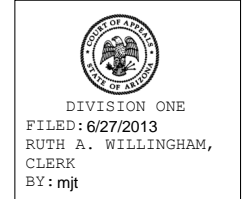


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 12-0323
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
FERNANDO ALFREDO TORRES-AGUIRRE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-006493-015

The Honorable Janet E. Barton, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Joseph T. Maziarz, Chief Counsel, Criminal Appeals
And Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

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By Janelle A. McEachern
Attorney for Appellant

N O R R I S, Judge

¶1 Fernando Torres-Aguirre appeals his convictions and sentences for conspiracy to commit drug offenses, illegally conducting an enterprise, and use of a wire or electronic

communication in a drug-related transaction. The key evidence at trial consisted of several telephone calls taped as part of a wiretap investigation and interpreted by a detective, and the testimony of cooperating witness Julian Gerardo Palacios-Trillo, the target of the wiretap and a key member of the Mexico-based Quintero Drug Trafficking Organization ("Quintero").

¶12 On appeal, Torres-Aguirre challenges various evidentiary and other rulings of the superior court, arguing the court: first, should have suppressed evidence from the State's wiretap investigation; second, should have declared a mistrial and granted a new trial based on the State's late disclosure of the immigration status of Palacios-Trillo and his son; third, violated his confrontation rights by admitting statements involving non-testifying witnesses; fourth, should have granted a new trial because a detective testified at trial that Torres-Aguirre was a drug dealer; and fifth, should have granted his motion for a judgment of acquittal because insufficient evidence supported the guilty verdicts. Additionally, Torres-Aguirre argues the evidence failed to support the jury's guilty verdicts. For the reasons discussed below, we disagree with these arguments and affirm Torres-Aguirre's convictions and sentences.

I. Wiretap Evidence

¶13 Relying on Arizona Revised Statute ("A.R.S.") section

13-3010 (2010), Torres-Aguirre argues¹ the superior court should have suppressed the wiretap evidence because the affidavit submitted by law enforcement officers in support of the wiretap did not show the requisite necessity ("necessity requirement").² Specifically, Torres-Aguirre argues the officers failed to show they could not have utilized other investigative techniques, such as, installing a pole camera or using Palacios-Trillo as a confidential informant to investigate Quintero. We disagree. The affidavit submitted by the officers in support of their request for the wiretap set forth sufficient facts to meet the necessity requirement and, therefore, the superior court did not abuse its discretion in admitting the wiretap evidence. *State v. Peterson*, 228 Ariz. 405, 407, ¶ 6, 267 P.3d 1197, 1199 (App. 2011) (appellate court reviews denial of motion to suppress for abuse of discretion).

¹The caption for this argument in the opening brief actually references a different argument that Torres-Aguirre does not develop. Thus, we will not address it.

²Section 13-3010 requires the State, in applying for a wiretap, to provide detailed information, including "[a] full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." A.R.S. § 13-3010(B)(3). It also requires the judge authorizing the wiretap to find, among other things, that "[n]ormal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." A.R.S. § 13-3010(C)(3). Together, these two provisions constitute the "necessity requirement." *State v. Hale*, 131 Ariz. 444, 447, 641 P.2d 1288, 1291 (1982).

¶14 First, the affidavit explained in detail that law enforcement had used numerous traditional investigative techniques, including, an analysis of phone numbers called, surveillance, Global Positioning System ("GPS") tracking, informants, an undercover investigation, and search warrants. Law enforcement, nevertheless, had been unable to obtain sufficient information that could be used to dismantle Quintero, such as what the co-conspirators had discussed, the location of the drugs, the distribution networks, and the extent of the conspiracy.

¶15 Second, the affidavit explained many of the methods law enforcement had employed or might be available were too dangerous to use to investigate Quintero -- an organization known for its sophistication and "extreme violence." For instance, the phone records had only documented calls, had not identified people, and were often inaccurate because Quintero members frequently changed phones and telephone numbers. Further, Quintero had frustrated surveillance and GPS tracking efforts through counter-surveillance, causing Quintero members to discard drug proceeds. Also, Quintero had killed key informants or they had stopped cooperating and no source had been willing to testify against Quintero or introduce undercover agents into it. Moreover, police execution of search warrants could expose the investigation and had a limited value in

identifying Quintero members, many of whom lived and operated in Mexico.

¶16 The affidavit also specifically rejected the two alternative procedures Torres-Aguirre argues law enforcement should have pursued: a pole camera directed at Palacios-Trillo's residence and accepting Palacios-Trillo's repeated offers to act as a confidential informant. The affidavit explained a pole camera would not be effective because Palacios-Trillo lived in "a large apartment complex," which made it "virtually impossible to differentiate co-conspirators from residents," "[n]one of the surveillance conducted on Palacios-Trillo up to this point [had] suggested that he [was] meeting any co-conspirators at this location," and pole cameras could not record conversations or provide necessary evidence for prosecution.

¶17 The affidavit further explained that although Palacios-Trillo had been a confidential source for the federal Drug Enforcement Agency ("DEA") in the past, DEA had "deactivated" him as an informant and rebuffed his attempts to resume this role because he: had admitted "his allegiance to [] Quintero [] was stronger than his desire to cooperate with law enforcement"; become unwilling to provide additional information on Quintero; discussed the government's investigation with the head of Quintero; and "severely compromised the investigation."

¶18 In light of the foregoing, Torres-Aguirre's reliance

on *United States v. Gonzalez, Inc.*, 412 F.3d 1102 (9th Cir. 2005) is misplaced. Unlike *Gonzales*, where police had conducted only a limited investigation before applying for a wiretap, here, the affidavit detailed the extensive efforts by law enforcement to investigate Quintero. Therefore, on this record, the superior court did not abuse its discretion in finding law enforcement had shown the requisite necessity to obtain a wiretap, and accordingly, in denying Torres-Aguirre's motion to suppress.³

II. Disclosure of Key Witness's Immigration Status

¶19 Torres-Aguirre next argues the superior court should have granted his motions for a mistrial and a new trial because the State did not disclose to him before trial that the immigration status of Palacios-Trillo and his son had changed. He also argues the court should have granted these motions because, only after he had finished cross-examining Palacios-Trillo, did the State give him a copy of the application a detective had submitted to the federal government to change Palacios-Trillo and his son's immigration status ("application"). Based on our review of the record, the superior court did not abuse its discretion in finding the

³For the same reason, the superior court did not abuse its discretion in denying Torres-Aguirre's motion for mistrial based on the admission of the wiretap evidence.

State's discovery delay had not prejudiced Torres-Aguirre and, therefore, denying his motions. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000) (appellate court reviews denial of motion for mistrial for abuse of discretion); *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984) (same standard of review for denial of motion for new trial).

¶10 As the superior court found, and as the record reflects, Torres-Aguirre was aware, before trial, that the State had agreed to use "best efforts" in its plea agreement with Palacios-Trillo to obtain legal residency status in the United States for him and his son. Indeed, in his pretrial motions, Torres-Aguirre repeatedly expressed concerns that Palacios-Trillo had long sought and expected to receive "substantial immigration benefits" for testifying. Although the State did not reveal until the second day of trial the change in immigration status,⁴ Torres-Aguirre nevertheless emphasized in his opening statement the benefits Palacios-Trillo could receive by testifying against him, stating that "should [Palacios-Trillo] testify . . . he could also receive immigration

⁴After Torres-Aguirre told the jury in his opening statement Palacios-Trillo was in the United States illegally, the State requested a side-bar discussion with the court and defense counsel. During this discussion, the State disclosed it had obtained a change in immigration status for Palacios-Trillo that allowed him to remain legally in the United States so he could testify at trial.

benefits.⁵ And the government had agreed to make efforts to see that [Palacios-Trillo] remains in the United States and that his family comes to the United States."

¶11 Further, the record does not support Torres-Aguirre's argument the State's late disclosures deprived him of "the opportunity to effectively cross-examine [] Palacios-Trillo and to call an expert to explain the huge benefit to the jury" he had received through the change in immigration status. During cross-examination, Torres-Aguirre elicited testimony from Palacios-Trillo that he and his son had received "huge" immigration benefits as a result of the plea agreement and had already received legal status to stay for another year. And, although Torres-Aguirre did not receive a copy of the application before he had finished cross-examining Palacios-Trillo, he nevertheless received it during the trial, and had he wished to question Palacios-Trillo about the application, he could have asked the court to allow him to recall Palacios-Trillo for this purpose, but he did not do so. Moreover, as the superior court pointed out, even though Torres-Aguirre had not known about the change of status before the start of trial, based on the State's pretrial disclosure that it had agreed to

⁵The State also secured an immigration benefit for Palacios-Trillo's son, but we cannot ascertain the extent of that benefit from this record.

use "best efforts" to obtain immigration benefits for Palacios-Trillo and his son, he could still have called an expert witness to testify about the significance of the State's agreement and the "huge immigration benefits" Palacios-Trillo could or would receive with the State's help.

¶12 Based on our review of this record, we agree with the superior court that despite the State's late disclosure of the "precise immigration benefit" Palacios-Trillo had received, Torres-Aguirre was nonetheless aware Palacios-Trillo could obtain substantial immigration benefits long before trial, and was not, therefore, prejudiced. *State v. Martinez-Villareal*, 145 Ariz. 441, 448, 702 P.2d 670, 677 (1985) ("for a reviewing court to find an abuse of discretion, appellant must demonstrate that he suffered prejudice by nondisclosure"). The superior court, thus, acted within its discretion in denying Torres-Aguirre's motions for mistrial and new trial.

III. Wiretap Calls Involving Non-testifying Witnesses

¶13 Torres-Aguirre next argues the superior court should have granted his motions for a mistrial and a new trial because its admission of wiretap calls involving people who did not testify at trial violated his Sixth Amendment right to confront witnesses. U.S. Const. Amend. VI. We disagree; as the superior court correctly found, the statements of the non-testifying witnesses were admissible under the co-conspirator exception to

the hearsay rule, and were non-testimonial under *Crawford v. Washington*, 541 U.S. 36, 51, 68, 124 S. Ct. 1354, 1364, 1374, 158 L. Ed. 2d 177 (2004).

¶14 In *Crawford*, the United States Supreme Court held that while the Confrontation Clause prohibits admission of "testimonial hearsay" from a witness who does not appear at trial, "statements in furtherance of a conspiracy" are "statements that by their nature [are] not testimonial," and thus admissible. *Id.* at 56, 124 S. Ct. at 1367; *State v. Tucker*, 231 Ariz. 125, 144, ¶ 49, 290 P.3d 1248, 1267 (App. 2012) ("there is no requirement that a coconspirator's statement satisfy the Confrontation Clause to be admissible"); see also Ariz. R. Evid. 801(d)(2)(E) (co-conspirator statements are non-hearsay, and thus admissible, when made during and in furtherance of conspiracy).

¶15 At issue here were two telephone calls between Palacios-Trillo and other Quintero members in Chicago and Mexico, regarding payment for a marijuana sample furnished by Torres-Aguirre and the possibility of doing more business with him. After the second call, Palacios-Trillo called Torres-Aguirre multiple times to make payment arrangements and negotiate further business with him. Because the non-testifying witnesses' statements in these phone calls were statements of co-conspirators during and in furtherance of the conspiracy to

distribute illegal drugs, which they had no reason to anticipate would be used as evidence at a later trial, the statements were therefore non-testimonial under *Crawford* and their admission did not violate Torres-Aguirre's confrontation rights. Accordingly, the superior court did not abuse its discretion in denying his motions for mistrial and new trial.

IV. Detective's Testimony

¶16 Torres-Aguirre argues the court should have granted his motion for new trial because the detective testified he believed Torres-Aguirre was a drug dealer. We disagree.

¶17 During cross-examination, Torres-Aguirre repeatedly asked the detective about his investigation into his source of income, including whether he knew how Torres-Aguirre made a living, and what kind of job he had. On redirect, the State asked the detective what he thought Torres-Aguirre did for a living, and the detective responded, "He is a drug dealer." The court immediately sustained Torres-Aguirre's objection, ordered the detective's answer stricken from the record, and subsequently instructed the jury to ignore all testimony to which it had sustained an objection and not to consider any testimony stricken from the record. As our supreme court has instructed, we presume the jury followed the court's instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Based on our review of the record, the

detective's testimony, although improper, did not rise to the level of prejudice warranting a new trial, and the superior court did not abuse its discretion in denying the motion for new trial.

V. Judgment of Acquittal and Sufficiency of the Evidence

¶18 Torres-Aguirre argues the superior court abused its discretion in denying his motion for judgment of acquittal because the State failed to present substantial evidence of his guilt. And, he further argues the evidence did not support the jury's guilty verdicts. Although Torres-Aguirre makes these arguments separately, our analysis of the evidence under each argument is the same. Ariz. R. Crim. P. 20(a); *State v. West*, 226 Ariz. 559, 562, ¶¶ 15-16, 250 P.3d 1188, 1191 (appellate court reviews the superior court's decision on Rule 20 motion de novo; inquiry is whether State presented "substantial evidence," that is, "such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt'" (citation omitted); *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999) (judgment of acquittal is only appropriate if there is "no substantial evidence to warrant a conviction") (citation omitted); *State v. Sharma*, 216 Ariz. 292, 294, ¶ 7, 165 P.3d 693, 695 (App. 2007) (determination of sufficiency of evidence is limited to "whether substantial evidence supports the

verdict"). Therefore, we address these two arguments together, and will not reverse the superior court's denial of a motion for a judgment of acquittal or a jury's guilty verdict unless there are no probative facts supporting the defendant's conviction. *State v. Johnson*, 215 Ariz. 28, 29, ¶ 2, 156 P.3d 445, 446 (App. 2007); *State v. Miles*, 211 Ariz. 475, 481, ¶ 23, 123 P.3d 669, 675 (App. 2005).

¶19 Here, substantial evidence demonstrated a conspiracy to sell drugs. The recorded phone calls, as interpreted by the detective, revealed Torres-Aguirre had provided a Quintero member in Chicago with 22 pounds of marijuana as a sample of what he could supply in greater quantities. The calls also showed Palacios-Trillo and Torres-Aguirre had discussed arrangements for payment for that sample, delivery of another, and the potential for more deliveries of marijuana.

¶20 Further, Torres-Aguirre flew to Phoenix and met with Palacios-Trillo in what Palacios-Trillo testified was standard practice "to get to know the person" before participating in drug transactions. Palacios-Trillo also testified he talked to Torres-Aguirre about obtaining cocaine, and Torres-Aguirre put him in touch with a person who met him in Georgia and supplied him with a sample of one kilogram of cocaine. Palacios-Trillo testified he anticipated paying about \$27,000 for the cocaine sample, but was arrested before he could do so.

¶121 The circumstantial evidence was sufficient to show Torres-Aguirre agreed to supply Palacios-Trillo with marijuana and cocaine for distribution, came to Arizona and met with Palacios-Trillo in furtherance of that agreement, and accordingly, conspired to possess and transport the drugs for sale. A.R.S. § 13-1003 (2010) (conspiracy exists when person "agrees with one or more persons that at least one of them or another person will engage in conduct constituting . . . [a felony] offense" "with the intent to promote or aid the commission of [the] offense," and "one of the parties commits an overt act in furtherance of the offense"); *State v. Avila*, 147 Ariz. 330, 336, 710 P.2d 440, 446 (1985) (criminal conspiracy rarely can be proved by direct evidence; the agreement may be inferred from circumstantial evidence, including parties' overt conduct).

¶122 The same evidence was also more than sufficient to establish Torres-Aguirre participated in the conduct of an enterprise, knowing the enterprise was being conducted through racketeering (i.e., distributing illegal drugs), and twice used a wire (i.e., a cell phone), in a drug-related transaction. See A.R.S. §§ 13-2301(D)(2) (2010), -2301(D)(4), -2312(B) (Supp. 2012) (person commits offense of illegally conducting enterprise by participating directly or indirectly in the conduct of an enterprise, knowing that such enterprise is being conducted

