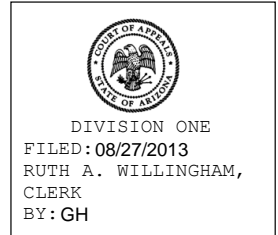


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 12-0549  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
MARIO WILLIAM FRAGASSI, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Mohave County

Cause No. S8015CR201100558

The Honorable Steven F. Conn, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
By Adele Ponce, Assistant Attorney General  
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender Kingman  
By Jill L. Evans  
Attorney for Appellant

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**B R O W N**, Judge

¶1 Mario Fragassi appeals from his convictions and sentences for theft and trafficking in stolen property. For the following reasons, we affirm.

## BACKGROUND

¶12 The victim owns and operates a cattle ranch in Mohave County. Because of the scarcity of water in the area, he uses a truck to haul water to various locations on the ranch and transfers the water to storage tanks. Water from the storage tank is then released through a pipe to a smaller tank, known as a "trough," that is accessible to the cattle. One of the storage tanks, which has a capacity of 4,000 gallons, was reported missing on May 5, 2011. The ensuing investigation revealed that a pipe connecting the storage tank to the nearby cattle trough had been broken and the tank had at least some water in it when it was stolen.

¶13 Earlier that day, Mark Underhill, an employee of Mohave County and former employee of the victim, observed two men in a Suburban pulling an empty trailer in the vicinity of the victim's ranch. Several hours later, Underhill saw the same vehicle emerge from an area where he knew one of the victim's water tanks was located, with a large water tank loaded on the trailer. Underhill promptly informed his supervisor, who also had cattle on the victim's property. The supervisor then advised the victim that one of his water tanks had been removed. John Grady, the owner of a local convenience store, subsequently saw two men in a Suburban hauling a trailer with a large metal tank. Grady noticed the tank because it looked like it was

"haphazardly" placed on the trailer, it was not properly secured, and it "looked dangerous." Douglas Gabler, the manager of a scrap yard, was working when Fragassi and another man brought the water tank into the yard using a trailer hauled by a Suburban. Fragassi sold the water tank for \$230.40. According to the victim, the water tank is worth at least \$4000.

¶14 The victim recovered his tank from the scrap yard and returned it to his ranch. Fragassi later returned to the scrap yard, claiming he was in trouble over the sale of the tank. Fragassi asked Gabler to talk to the victim on Fragassi's behalf, and Fragassi offered to return the money he had received for the tank to "lessen the severity of what was happening."

¶15 On May 14, Deputy Randall Apfel observed Fragassi driving the same Suburban that was used to haul the water tank. After he was placed under arrest, Fragassi told the officer that an individual named Shawn Ramey asked Fragassi to help haul a water tank, already loaded on a trailer, to the scrap yard. Fragassi explained that Ramey did not have any identification with him, and therefore Fragassi had to act as the seller for the transaction because the scrap yard requires identification for all sales.

¶16 The State charged Fragassi with one count of theft of property with a value of \$4000 or more, a class 3 felony, and one count of trafficking in stolen property in the second

degree, a class 3 felony. Ramey, however, was not charged with any crime relating to theft of the water tank. Instead, he entered a plea agreement that resolved several other charges in exchange for the State's agreement not to file charges against him for this matter. Neither Ramey nor Fragassi testified at trial; rather, defense counsel asserted that Fragassi was misled by Ramey and had no knowledge that they did not have permission to remove the water tank.

¶17 A jury convicted Fragassi of theft of property with a value of \$1000 or more but less than \$2000 and trafficking in stolen property in the second degree. The trial court found that Fragassi had two historical prior felony convictions. At sentencing, the court found no aggravating factors and determined that Fragassi's significant mental health history and the minor nature of the trafficking offense were mitigating factors. The court sentenced Fragassi to minimum terms of three years' imprisonment on the theft charge and ten years' imprisonment on the trafficking charge, with both sentences to be served concurrently. Fragassi timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21, 13-4031 and -4033.

## DISCUSSION

¶8 Prior to trial, Fragassi filed a motion to compel disclosure, requesting that the State disclose “[a]ny history of Shawn Ramey acting as an informant or otherwise cooperating with any government entity for the purpose of investigating or prosecuting illegal activity.” The State opposed the motion and argued that (1) whether or not Ramey was an informant in the instant case was not relevant; (2) the State had made no agreements with Ramey about testifying; and (3) Ramey was still under investigation for his involvement in the water tank matter. After oral argument, the court denied the motion. Fragassi’s motion to reconsider was also denied but the court noted that Fragassi was free to subpoena Ramey or anyone else who might have information as to whether Ramey worked as an informant.

¶9 On appeal, Fragassi argues that the court abused its discretion by denying his motion to compel the State to disclose whether Ramey previously worked as an informant. Fragassi asserts that disclosure was required because it was relevant as to whether Ramey, as an informant, was motivated to “set [Fragassi] up and then turn him in to curry favor with the police.”

¶10 Generally, we uphold a trial court’s ruling on a motion to compel absent an abuse of discretion. *See State v.*

*Conner*, 215 Ariz. 553, 557, ¶ 6, 161 P.3d 596, 600 (App. 2007). To the extent the court's evidentiary rulings encroach on the defendant's constitutional right to present a defense, however, our review is de novo. *Id.*

¶11 As set forth in Arizona Rules of Criminal Procedure (Rule) 15.1(b)(11), the State must disclose "[w]hether the case has involved an informant, and, if so, the informant's identity, if the defendant is entitled to know either or both of these facts under Rule 15.4(b)(2)." Rule 15.4(b)(2) provides that:

[d]isclosure of the existence of an informant or of the identity of an informant who will not be called to testify shall not be required where disclosure would result in substantial risk to the informant or to the informant's operational effectiveness, provided the failure to disclose will not infringe the constitutional rights of the accused.

Ariz. R. Crim. P. 15.4. Here, it is undisputed that neither party sought to call Ramey as a witness at trial. Thus, because the State indicated that Ramey would not be called as a witness, the State was not required to disclose whether Ramey had served as an informant in prior cases unless the failure to do so infringed on Fragassi's constitutional right to present his defense.

¶12 Fragassi argues that disclosure was required under *Brady v. Maryland*, 373 U.S. 83 (1963). To succeed on a *Brady* claim, the defendant must show that the undisclosed evidence (1)

is favorable, either because it is exculpatory or because it is impeaching; (2) was suppressed by the State, either willfully or inadvertently; and (3) resulted in prejudice. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). A defendant's "mere speculation" that evidence contains exculpatory or impeaching material does not impose a disclosure duty on the State. *State v. Acinelli*, 191 Ariz. 66, 71, 952 P.2d 304, 309 (App. 1997) (quoting *United States v. Navarro*, 737 F.2d 625, 631 (7th Cir. 1984)).

¶13 Fragassi based his theory that Ramey was an informant on (1) information he received from someone he encountered at the courthouse and (2) the State's refusal to disclose whether Ramey had a history as an informant. None of this rises above the level of speculation, and if the State's refusal to disclose whether Ramey was an informant could be considered tantamount to an admission that he was an informant, the rules that protect the identity of confidential informants would be rendered meaningless. At oral argument on Fragassi's motion to compel, the trial court expressly stated that its ruling was subject to reconsideration if additional facts were presented through Ramey's testimony at trial or some other means. Although Fragassi claimed that "everyone and his brother" knew that Ramey was an informant, Fragassi failed to provide any additional information to the court about Ramey's informant status. Nor

does the record reflect that Fragassi attempted to compel Ramey or any other potential witness to testify at trial. See *U.S. v. Green*, 178 F.3d 1099, 1109 (10th Cir. 1999) (concluding the defendant's constitutional rights were not violated when the defendant, "fully aware of the informant's identity," made a "tactical decision" not to call the informant as a witness). Because Fragassi's claim that the State failed to disclose *Brady* information is speculative, the trial court did not err by denying his motion to compel disclosure.

¶14 Fragassi also argues the trial court erred when it failed to find additional mitigating circumstances of minor participation and sentencing disparity. We will not, however, alter the trial court's sentencing determination absent an abuse of discretion. *State v. Mincey*, 141 Ariz. 425, 445, 687 P.2d 1180, 1200 (1984). "An abuse of discretion is characterized by capriciousness or arbitrariness or by a failure to conduct an adequate investigation into the facts necessary for an intelligent exercise of the court's sentencing power." *State v. Ethington*, 121 Ariz. 572, 574, 592 P.2d 768, 770 (1979). The trial court is only required to consider evidence offered in mitigation; it is not required to find the evidence mitigating. *State v. Long*, 207 Ariz. 140, 148, 83 P.3d 618, 626 (App. 2004).

¶15 At sentencing, Fragassi reasserted his claim that Ramey initiated the theft and misrepresented to Fragassi that



they had permission to remove the tank. The trial court discussed Ramey's possible involvement and his separate plea agreement and concluded that Fragassi's participation was not sufficiently minor to constitute a mitigating factor given that Ramey was never charged with these offenses and the court had no evidence from which to determine what role, if any, Ramey had in these crimes. The court acted within its discretion in declining to find that Fragassi's participation in the crime was minor.

¶16 Fragassi also argues that the court should have determined that the "extreme sentencing disparity" between Fragassi and Ramey was a mitigating factor. Specifically, Fragassi points out that he received a sentence of ten years for his involvement in this case and Ramey did not receive any punishment for his alleged participation in these crimes.

¶17 Disparity in sentencing is generally only considered between codefendants in a capital case, see *State v. Schurz*, 176 Ariz. 46, 57, 859 P.2d 156, 157 (1993), but even if such a rule were applicable to non-capital cases, a disparity in sentences between codefendants is significant only if it is unexplained. *State v. Ellison*, 213 Ariz. 116, 140, ¶ 105, 140 P.3d 899, 923 (2006) ("A disparity in sentences between codefendants and/or accomplices can be a mitigating circumstance if no reasonable explanation exists for the disparity. Only the unexplained

disparity is significant.") (internal quotations omitted); see also *Schurz*, 176 Ariz. at 57, 859 P.2d at 167 ("[I]t is not mere disparity between the two sentences that is significant, but, rather, unexplained disparity.").

¶18 Here, that Ramey was never charged with either of these crimes, and much less convicted, provides sufficient explanation as to the alleged disparity. See *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992) ("It is within the sound discretion of the prosecutor to determine whether to file criminal charges and which charges to file."). Furthermore, even if Fragassi maintains that the State only refused to charge Ramey as part of the plea agreement, appropriate plea bargaining that results in a difference in sentences may not be considered a mitigating factor. *State v. Stokley*, 182 Ariz. 505, 523, 898 P.2d 454, 472 (1995) ("[W]here the difference in sentences is a result of appropriate plea bargaining, it may not be considered in mitigation."). Therefore the trial court did not abuse its discretion by denying Fragassi's request to find disparity of sentencing as a mitigating factor.

**CONCLUSION**

¶19 For the foregoing reasons, we affirm Fragassi's convictions and sentences.

\_\_\_\_\_/s/\_\_\_\_\_  
MICHAEL J. BROWN, Presiding Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
JON W. THOMPSON, Judge

\_\_\_\_\_/s/\_\_\_\_\_  
MARGARET H. DOWNIE, Judge