IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ANDREW MARQUEZ SUAREZ, *Appellant*.

No. 1 CA-CR 15-0369
FILED 5-31-2016

Appeal from the Superior Court in Mohave County
No. S8015CR201401160
The Honorable Steven F. Conn, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Craig W. Soland
Counsel for Appellee

Mohave County Legal Advocate's Office, Kingman
By Jill L. Evans
Counsel for Appellant

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Andrew W. Gould joined.

H OW E, Judge:

¶1 Andrew Suarez appeals his convictions and sentences for drugs and weapons charges. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 One August day in 2014, police executed a search warrant at an apartment in Bullhead City in Mohave County. In the search warrant, the affiant officer described his extensive training in drug investigations and stated that he had made more than 100 arrests for illegal drug violations. The officer stated that within the previous day or two, a "confidential and reliable informant" had contacted him and said that an "unknown Hispanic male," who introduced himself as "Andrew," had recently moved into an apartment in Bullhead City and was selling heroin out of the apartment. The officer avowed that the informant told him that the informant was inside this apartment within the previous day or two and "observed 'Andrew' in possession of three golf ball size baggies of a black tar substance that the informant identified as black tar heroin." The informant also told the officer that an "elderly female" had moved into the apartment recently and that "Andrew" was probably her grandson.

¶3 The officer also avowed that the informant led the police to the apartment, and the property manager confirmed that an elderly female recently had begun renting the apartment. The officer further avowed that he considered the information from the informant true because the informant had purchased a quantity of illegal drugs under his or a fellow officer's direction and control on no fewer than ten separate occasions. The officer also provided that within the past six months, the informant had provided independently verified information about illegal drugs in Mohave County. A magistrate granted the request.

¶4 On that August day, the police went to the apartment, knocked on the door, and announced their presence. No one answered; the police opened the door with a key the property manager supplied. Inside the apartment, the police saw an elderly woman and two men. Upon seeing

the police, the men retreated to a bedroom and closed the door; the police forced their way into the room and detained the men.

¶5 The police learned that one of the men was the elderly woman's grandson and the other man, later identified as Suarez, lived in the bedroom into which the men had retreated. Inside the bedroom, the police found methamphetamine, black tar heroin, a bong, a marijuana water pipe, digital scales, a razor blade, a vacuum packing machine, plastic bags, international airline tickets, and a semiautomatic pistol. The police also found "lots of cash" and Suarez's identification card, social security card, passport, and other forms of identification.

¶6 While the police were inside the apartment, Suarez's phone rang and an officer—the same officer who wrote the search warrant—answered it, pretending to be Suarez. The caller wanted to come over and "pick up," and the officer told him to do so. The caller soon called back and said that police cars were at the apartment complex; the officer told the caller to come anyway because the police were at another apartment. The caller appeared at the apartment, and the police detained and later interviewed him at the police station. There, the caller told police that he was at the apartment to buy "heroin from AJ" and described AJ. The investigating officer thought the description sounded like Suarez and pulled out a picture of Suarez for the caller; the caller confirmed that Suarez was the person he knew as "AJ."

¶7 The police arrested and took Suarez to the police station. There, the officer who wrote the search warrant interviewed Suarez. The officer gave Suarez his *Miranda*[1] rights, and Suarez, leaning back against the wall with his arms crossed, stated that he understood his rights. The officer asked Suarez whether the officer could ask him a few questions. Suarez mumbled, "Can I have an attorney present?" The officer responded, "You can, do you want to call one? Do you know one that you can call? Because I can't just get one down here for you." He then offered Suarez a phone and a phone book. Suarez took the phone book and casually looked through the pages. The officer noted that it was after 6 p.m., "[s]o I'm guessing none of the office numbers are going to be open. But you certainly have the right to an attorney if you don't want to answer any questions without an attorney present. But I do have a few questions I wanted to ask you." Suarez pushed the phone book away and mumbled, "Yeah, I'll do some." The officer clarified, "You're ok with answering questions without an attorney?" Suarez mumbled again, "Yeah, I'll do some." The officer confirmed, "OK.

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1 *Miranda v. Arizona*, 384 U.S. 436 (1966).

If I get to a question you don't want to answer, just say, 'I'd rather not answer that question.'" Suarez confirmed that he would answer questions.

¶8 During the interview, the officers tried to get Suarez to admit that he knew about the heroin in his bedroom. In doing so, the officer stated that after Suarez was arrested, his phone rang and the officer picked it up, pretending to be Suarez. The officer told Suarez that after the caller came by the apartment, the caller admitted that he was coming to "buy heroin from Andrew." Suarez ultimately acknowledged that he was holding the methamphetamine for a "friend" and admitted possessing the pistol and a small amount of heroin for personal use. Suarez also stated that federal agencies, including the FBI, had been looking for him and that the agencies had him down as an "international drug importer" because he was "internationally flying everywhere on the weekends."

¶9 The State charged Suarez with possession of dangerous drugs for sale, possession of narcotic drugs for sale, possession of drug paraphernalia, two counts of misconduct involving weapons, and transportation of dangerous drugs for sale. Before trial, Suarez moved to suppress all evidence seized from the apartment on the ground that the search was the result of an invalid search warrant. Suarez argued that the affidavit did not provide sufficient detail to allow the magistrate to conclude that the informant was reliable. After briefing and oral argument, the court denied the motion. The court reasoned that, although the search warrant was not perfect, "sufficient evidence [existed] in the affidavit to allow the magistrate to find probable cause and to issue the warrant."

¶10 Suarez also moved to suppress statements he made during his police interview, arguing that the interviewing officers violated his constitutional rights by continuing questioning after Suarez invoked his right to counsel. After briefing, oral argument, and watching the videotaped interview, the court concluded that Suarez's statement, "Can I have an attorney present?" was not an unequivocal invocation of his right to counsel. The court denied Suarez's motion to suppress because the police did not violate his *Miranda* rights.

¶11 At trial, the parties stipulated that Suarez was a prohibited possessor of firearms because he had two prior felony convictions and had not had his right to possess a firearm restored. The parties also stipulated to admission of Suarez's videotaped interview. The officer who interviewed Suarez testified about the incident leading to Suarez's arrest, leaving out the part when he picked up Suarez's phone and pretended to be Suarez. But on cross-examination, defense counsel asked the officer about that phone call and about the caller identifying Suarez in a subsequent police

interview. The officer responded that he had not talked about that during his direct examination, but confirmed that it did happen. At the close of its case, the State played Suarez's videotaped interview, including the part when the officer told Suarez about picking up his phone and pretending to be him. Suarez did not object.

¶12 The trial court instructed the jurors that they could not consider any statements the officers made during Suarez's police interview, unless the statements had been independently proved at trial, and that the jurors should otherwise consider those statements lawful "interrogation techniques":

> If statements were made by officers during the interview with the Defendant asserting facts which were not independently proven at trial or are even inconsistent with evidence presented at trial, you should not consider those facts as having been proven. You should consider that as an interrogation technique, which is not unlawful, used by the police in order to get the Defendant to discuss the allegations against him.

¶13 The jury convicted Suarez of possession of dangerous drugs and narcotics for sale, possession of drug paraphernalia, and misconduct involving weapons. After the court sentenced Suarez, he timely appealed.

DISCUSSION

1. Motion to Suppress Evidence

¶14 Suarez first argues that the trial court erred in denying his motion to suppress evidence found in his bedroom on the grounds that the affidavit supporting the search warrant failed to establish the informant's reliability and the informant's tip failed to support probable cause. We review a ruling on a motion to suppress for an abuse of discretion, considering the facts presented at the suppression hearing in the light most favorable to sustaining the ruling. *State v. Wilson*, 237 Ariz. 296, 298 ¶ 7, 350 P.3d 800, 802 (2015). Because probable cause supports the search warrant, the trial court did not err in denying Suarez's motion.

¶15 Under both the United States and Arizona Constitutions, a search warrant may be issued only when supported by probable cause. U.S. Const. amend. IV; Ariz. Const. art. 2, § 8. In determining whether probable cause exists to issue a search warrant, "[t]he task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the

circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Id.* at 238–39. "Doubtful or marginal affidavits should be considered in light of the presumption of validity accorded search warrants." *State v. Edwards*, 154 Ariz. 8, 12, 739 P.2d 1325, 1329 (App. 1986). When a search has been conducted pursuant to a search warrant, the search is presumed lawful and the burden is on the defendant to invalidate it. Ariz. R. Crim. P. 16.2(b); *Search Warrants C-419847 & C-419848 v. State*, 136 Ariz. 175, 176, 665 P.2d 57, 58 (1983).

¶16 Here, the totality of the circumstances demonstrates that probable cause supports the search warrant. The record shows that the information about the proven reliability of the informant, the informant's personal observation of a man at the apartment in possession of a large quantity of heroin, and the informant's report that this person, "Andrew," was selling heroin from the apartment, was sufficient on which to conclude that the informant was reliable and credible. Further, the investigating officer avowed that the informant had worked previously under the direction and control of police on no fewer than ten separate occasions and that within the past six months, the informant had provided independently verified information about illegal drugs in Mohave County. The absence of precise dates or more detail about when the confidential informant participated in controlled buys of illegal drugs and provided information about illegal drugs does not invalidate the warrant. *See In re One 1970 Ford Van*, 111 Ariz. 522, 523, 533 P.2d 1157, 1158 (1975) ("An affidavit for a search warrant must be tested in a common-sense and realistic fashion; if a magistrate has found probable cause, a warrant should not be invalidated by a hypertechnical interpretation."). Thus, the trial court could reasonably conclude that the informant's history of providing tips that were "verified as true and correct" was sufficient to establish the informant's reliability. *See State v. McCall,* 139 Ariz. 147, 156–57, 677 P.2d 920, 929–30 (1983) (allowing the court to draw reasonable conclusions from facts given, even when those conclusions were not expressly stated by the warrant affidavit).

¶17 Moreover, the informant was not an anonymous, unknown informant. The confidential informant was known to the police and had a history of purchasing illegal drugs under police direction and control. The informant also led the police to the apartment complex in question, where the property manager verified some of the information the informant provided about the apartment's residents. Consequently, the trial court did

not abuse its discretion in denying the motion to suppress because the affidavit and circumstances were sufficient to establish the reliability of the confidential informant. *See Edwards*, 154 Ariz. at 12, 739 P.2d at 1329 (upholding determination of probable cause despite questions surrounding an informant's reliability).

2. Motion to Suppress Statements

¶18 Suarez next argues that the trial court erred in denying his motion to suppress his post-*Miranda* statements on the ground that he had unambiguously invoked his right to counsel before answering any questions. We review the court's ruling for an abuse of discretion, based on the evidence presented at the hearing, viewed in the light most favorable to upholding the ruling. *State v. Ellison,* 213 Ariz. 116, 126 ¶ 25, 140 P.3d 899, 909 (2006). Because Suarez did not make an unequivocal request for an attorney, the court did not err in denying his motion to suppress statements.

¶19 The Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination requires that custodial interrogations be preceded by advice to the defendant that he has the rights to remain silent and to have counsel present. *Miranda*, 384 U.S. at 474. If a suspect invokes his right to have counsel present, all questioning must cease until counsel is present. *Edwards v. Arizona,* 451 U.S. 477, 484–85 (1981). Police, however, need not cease a custodial interrogation unless the suspect "articulate[s] his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States,* 512 U.S. 452, 459 (1994); *see also State v. Eastlack,* 180 Ariz. 243, 249–51, 883 P.2d 999, 1005–07 (1994). "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, . . . precedents do not require the cessation of questioning." *Davis*, 512 U.S. at 459.

¶20 In view of the circumstances, a reasonable officer could have construed Suarez's question, "Can I have an attorney present?" as the officer did, as a question about whether he had that right; or as the trial court did, as a question "on the logistics of how an attorney would be provided." Similar statements have been held to be ambiguous requests for an attorney, and under the circumstances here, a reasonable police officer would not have understood that Suarez was invoking his right to consult with an attorney before answering any more questions. *See Davis*, 512 U.S. at 462 (affirming the trial court's ruling that remark "[m]aybe I should talk to a lawyer" was not a request for counsel); *Ellison*, 213 Ariz. at 127 ¶ 29, 140 P.3d at 910 (holding that statement, "I think I might want an attorney"

was an "equivocal request for counsel," which did not require police to cease interrogation); *Eastlack*, 180 Ariz. at 250–51, 883 P.2d at 1006–07 (providing that defendant's comment, "I think I better talk to a lawyer first," not an unequivocal request for counsel but a request that the officer could appropriately clarify). Consequently, the trial court did not err in denying Suarez's motion to suppress statements because Suarez did not make an unequivocal request for an attorney.

3. Confrontation Clause Rights

¶21 Suarez argues that the trial court violated his confrontation rights by admitting a hearsay statement from a nontestifying witness that the witness was at the apartment to buy heroin from Suarez. But defense counsel elicited the testimony from the investigating officer that the nontestifying witness identified Suarez as the person from whom he was going to purchase heroin. Suarez's claim of error accordingly is precluded by the invited error doctrine, which prevents a party who causes an error from profiting from it on appeal. *See State v. Lucero*, 223 Ariz. 129, 135–36 ¶¶ 17, 20, 220 P.3d 249, 255–56 (App. 2009); *State v. Fish*, 109 Ariz. 219, 220, 508 P.2d 49, 50 (1973) ("The defense cannot complain when the objectionable material was actually introduced by the defense.").

¶22 To the extent that Suarez is also arguing that the trial court erred in failing to *sua sponte* redact police statements to the same effect from his videotaped interview played later at trial, we review this claim only for fundamental error because Suarez did not object at trial. *See State v. Henderson,* 210 Ariz. 561, 567 ¶ 19, 115 P.3d 601, 607 (2005). On fundamental error review, the defendant bears the burden of establishing that the court erred, that the error was fundamental in nature, and that he was prejudiced thereby. *Id.* at 568 ¶ 22, 115 P.3d at 608. Suarez has failed to demonstrate error, much less fundamental, prejudicial error.

¶23 Statements used as a police technique to elicit a confession do not violate a defendant's confrontation rights. *State v. Roque,* 213 Ariz. 193, 214 ¶ 70, 141 P.3d 368, 389 (2006) (holding that third party's statements in interrogation video were not hearsay but simply a police technique to elicit a confession and accordingly did not violate defendant's confrontation rights). Here, the entirety of Suarez's videotaped interview, especially the part about the nontestifying witness, shows that the officers were trying to get Suarez to admit that he possessed everything that the police found at the apartment and specifically the methamphetamine and heroin. The video shows that the purpose of the line of questioning about the nontestifying witness was to elicit a confession from Suarez that he knew the heroin was in the bedroom.

¶24 Moreover, the court instructed the jury to disregard any such statements police made during the interview unless they were independently proved at trial and to otherwise consider such statements as "interrogation techniques" that were not unlawful to get Suarez to discuss the allegations against him. Had defense counsel not elicited the testimony from the interviewing officer that a nontestifying witness had identified Suarez as the person from whom he was going to buy drugs, the jury would not have had independent evidence supporting these accusations in the videotaped interview. Under these circumstances, the court did not err in failing to *sua sponte* redact remarks from a nontestifying witness from the videotaped interview.

4. Statement about International Drug Dealing

¶25 Suarez argues finally that the trial court erred under Arizona Rule of Evidence 404(b) in failing to *sua sponte* redact from his videotaped interview his statement that federal agencies suspected him of international drug dealing. Because Suarez did not object at trial, we review this issue only for fundamental error. *See Henderson,* 210 Ariz. at 568 ¶ 22, 115 P.3d at 608. Suarez has not shown fundamental error. Suarez's brief reference to his suspected status as an international drug dealer had such little relevance to any issue at trial, bearing no mention in closing arguments, and the evidence of his guilt so overwhelming that no reasonable jury could have reached a different verdict without hearing this statement. *See id*. at 569 ¶ 28, 115 P.3d at 609. Consequently, the court did not err in admitting this statement at trial.

CONCLUSION

¶26 For the foregoing reasons, we affirm.