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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



DIVISION ONE
FILED: 01/20/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

STATE OF ARIZONA,) 1 CA-CR 09-0681
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
GENARO EVENICIO PINA-AGUIRRE,) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-174549-001 DT

The Honorable Janet E. Barton, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Peg Green, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Genaro Pina-Aguirre ("Pina-Aguirre") challenges his convictions and sentences. For the following reasons, we affirm.

FACTUAL BACKGROUND¹

¶2 Late on December 4, 2006, the victim parked her car in her driveway. As she got out, Pina-Aguirre pointed a handgun at her and demanded the keys. After she relinquished her keys and purse, Pina-Aguirre got into her car and drove away. The victim called police and activated her "LoJack" GPS tracking device.

¶3 The car was quickly located in front of a house. As police approached, Pina-Aguirre fled out the back door. He was captured in a nearby backyard and was subsequently identified by the victim. He was charged with armed robbery, theft of means of transportation, and misconduct involving a weapon. A jury found him guilty as charged. He appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 and -4033(A)(4) (2010).²

¹ "We view the facts and all reasonable inferences therefore in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

² We cite the current version of a statute unless there has been a material revision.

DISCUSSION

¶4 Pina-Aguirre argues that the trial court erred when it did not *sua sponte* conduct a hearing to determine the voluntariness of his post-arrest statements to police. Because he did not request a voluntariness hearing and failed to raise any objection to the admission of his statements during trial, we review only for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is error that "goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* at 568, ¶ 24, 115 P.3d at 608.

¶5 We find no error, much less fundamental error, here. First, there is no requirement that the trial court must *sua sponte* determine that a defendant's statements were voluntary before they can be admitted. The defendant must raise any issue of voluntariness. *State v. Alvarado*, 121 Ariz. 485, 487, 591 P.2d 973, 975 (1979). Once raised, the court has to address the issue pursuant to A.R.S. § 13-3988(A) (2010). Absent a request, the United States Constitution does not require the trial court to conduct a voluntariness hearing. *Wainwright v. Sykes*, 433 U.S. 72, 86 (1977); *Alvarado*, 121 Ariz. at 487, 591 P.2d at 975. Consequently, because Pina-Aguirre failed to raise any issue as

to the voluntariness of his statements, the trial court did not err.

¶16 Moreover, Pina-Aguirre alleges his statements were involuntary because he was wet and cold during interrogation. Specifically, he testified that a police officer pushed him into a backyard swimming pool during the chase, even though the backyard where he was captured "was strictly dirt." He also testified that the air conditioner in the police station was on during the interrogation. Even assuming, *arguendo*, that he was cold and wet, there was no evidence that shows his will was overborne and his statements were involuntary. See *State v. Spears*, 184 Ariz. 277, 286, 908 P.2d 1062, 1071 (1996) (quoting *State v. Arnett*, 119 Ariz. 38, 43, 579 P.2d 542, 547 (1978)) (holding that free will is not overborne where there is evidence of nothing more than uncomfortable surroundings).

¶17 Moreover, there was no evidence of coercion during the interrogation. In *State v. Smith*, our supreme court held that coercive police activity is a necessary predicate before a trial court can find a confession was not voluntary. 193 Ariz. 452, 457, ¶ 14, 974 P.2d 431, 436 (1999) (quoting *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)). Here, Pina-Aguirre was read the *Miranda*³ warnings and agreed to answer questions. No threats or promises were made during the interrogation. See

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

State v. Boggs, 218 Ariz 325, 335, ¶ 44, 185 P.3d 111, 121 (2008) (quoting *State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979)) (finding the State meets its burden of proving a free and voluntary statement when the confession was obtained without threat, coercion, or promises). The detective testified that Pina-Aguirre never complained to him about his physical condition. In fact, Pina-Aguirre testified that he was not forced to make statements during the interrogation. Consequently, there was no voluntariness issue.

¶8 The trial court, however, instructed the jury to consider Pina-Aguirre's statements only if they found that he made the statements voluntarily.⁴ Because we presume that the jury followed the instruction, *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996), we find no fundamental error.

⁴ The jury was given the following instruction:

You must not consider any statements made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily. A defendant's statement was not voluntary if it resulted from the defendant's will being overcome by a law enforcement officer's use of any sort of violence, coercion or threats, or by any direct or implied promise, however slight. You must give such weight to the defendant's statement as you feel it deserves under all of the circumstances.

CONCLUSION

¶19 For the reasons stated above, we affirm his convictions and sentences.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

PATRICIA A. OROZCO, Judge