IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 02/10/11
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0696
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
ILLYA DURETTE HADNOT, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Navajo County

Cause No. S-0900-CR-0020070787

The Honorable John N. Lamb, Judge

AFFIRMED

Thomas Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Michael J. Mitchell, Assistant Attorney General
Attorneys for Appellee

Roser Law Office, PLLC — Snowflake
by Samuel J. Roser
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Illya D. Hadnot ("Defendant") appeals from his convictions for burglary, disorderly conduct, and attempted

armed robbery. He argues that the trial court erred by denying his motion to suppress evidence obtained through execution of a search warrant and his request for a *Willits*[1] instruction. For reasons that follow, we affirm.

BACKGROUND

¶2 In the early morning of July 16, 2009, Jason J. arrived for work at a truck stop in Winslow, Arizona. When he and a co-worker, James, reached the accounting office, Jason saw "two bodies dressed in dark clothing, with some kind of coverings over their heads" near the office safe. One person wore a gray sweater or sweatshirt, the other wore either a black or blue sweater, and both wore "dark pants." The man in the gray sweatshirt suddenly reached toward Jason and said, "Hey." Jason turned to leave but then looked back and saw the man carried a knife with a silver blade, black handle, and serrated edge. Fearing for his safety, Jason ran to the front of the building and told a cashier to call the police. He then saw the intruders running from the building and noticed that one was limping. James gave chase.

¶3 Jason returned to the accounting office and saw that the trash can had a "Glad" brand white liner bag with a red drawstring that was unlike the bag liners normally used. When

[1]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

James returned, he produced a knife that he had found, which Jason recognized as the one he had seen in the intruder's hand.

¶4 When the police arrived, one of the officers spotted a man walking with a limp and wearing dark trousers and a long-sleeved, green shirt in the vicinity. He took the man, later identified as Defendant, into custody. Another officer noticed that Defendant's boots left a distinctive impression in the dirt and recalled having seen similar prints near a gray sweatshirt found in the area. Jason identified the sweatshirt as that worn by the man who had carried the knife. Police took custody of the knife, trash can liner, and a latex glove found in the hallway outside the accounting office.

¶5 Later that day, police obtained a search warrant for Defendant's apartment. They found a bag of latex gloves, a box of white Glad trash bag liners with red drawstring closures, a building sketch, and a store receipt from the day before for the gloves. Police took a DNA sample that later linked Defendant and another individual to the knife and the latex gloves.

¶6 The State charged Defendant with burglary in the third degree, aggravated assault, and attempted armed robbery. After trial, a jury found him guilty of burglary and of the lesser offenses of disorderly conduct involving a weapon and attempted armed robbery. At sentencing, the court found that Defendant

had two historical felony priors and imposed presumptive, concurrent terms for each offense.[2]

¶7 Defendant timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A) (1) (2003), 13-4031 and 13-4033 (2001).

DISCUSSION

Motion to Suppress

¶8 Prior to trial, Defendant moved to suppress the evidence found in his apartment, arguing that the search warrant was constitutionally and statutorily invalid for lack of a command or authorization to search for anything and for failure to comply with A.R.S. § 13-3915 (2010). The court found that the poor wording of the warrant "crossed the line from inadvertent mistake . . . to incomprehensible" and rendered the warrant invalid. Relying on *United States v. Leon*, 468 U.S. 897 (1984), and A.R.S. § 13-3925 (2010),[3] the court nonetheless found that the officer had relied in good faith on the warrant and declined to exclude the seized evidence.

[2]The terms were 10, 3.75, and 11.25 years respectively.

[3]Section 13-3925(C) allows a court to deny suppression of otherwise admissible evidence "if the court determines that the evidence was seized by a peace officer as a result of a good faith mistake or technical violation."

¶9 Defendant now argues that because the warrant's language was so incomprehensible as to render it "invalid," the trial court erred in ruling that the good faith exception to the warrant requirement was met. We will not reverse a ruling on a motion to suppress absent an abuse of discretion. *State v. Prince*, 160 Ariz. 268, 272, 772 P.2d 1121, 1125 (1989). When reviewing the trial court's ruling, we consider "only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings." *State v. Zamora*, 220 Ariz. 63, 67, ¶ 7, 202 P.3d 528, 532 (App. 2009) (citation omitted). Although we defer to the trial court's factual findings, we review its legal conclusions *de novo*. *Id.* Finally, we will affirm the court's ruling if it was correct for any reason. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶10 At the suppression hearing, Detective Hayes, who had prepared the affidavit and search warrant using a "set template" in the police department's computer, testified. He stated that he had submitted the documents and personally saw the magistrate read the affidavit and review and sign the search warrant form. Once the magistrate had signed the form, he believed the warrant to be valid and proceeded to execute the search.

¶11 The warrant contained the phrase, "NOW THEREFORE YOU ARE COMMANCED." The officer testified that he had never noticed the word "commanced" in the template and did not know what it meant or what word had been intended.

¶12 Arizona law defines a search warrant as "an order in writing issued in the name of the State of Arizona, signed by a magistrate, directed to a peace officer, *commanding* him to search for personal property, persons, or items described . . ." A.R.S. § 13-3911 (2010) (emphasis added.) Although the trial court found that the "command" requirement was missing and that the warrant "made no sense" and could not fulfill its purpose, we conclude that the warrant contained an obvious typographical error. The letter "c" replaced the "d" in the word "commanded." As our courts have acknowledged, affidavits and search warrants "are normally drafted by non-lawyers in the midst and haste of a criminal investigation" and should not be viewed in a "hyper-technical" fashion. *State v. Carroll*, 111 Ariz. 216, 218, 526 P.2d 1238, 1240 (1974). Therefore, the court abused its discretion in finding that the warrant lacked a command. *See State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n. 18 (1983) (court abuses its discretion if its reasons "are clearly untenable, legally incorrect, or amount to a denial of justice").

¶13 Arizona law requires that no search warrant "be issued except on probable cause, supported by affidavit, naming or describing the person and the particular property to be seized and the place to be searched." A.R.S. § 13-3913 (2010). The trial court found that the warrant was entitled "search warrant"; was signed by a magistrate; correctly listed the Defendant's name; and described the property and items to be seized. The warrant additionally contained both a description of and the precise address of the premises to be searched; was addressed to "any Sheriff, Constable, Marshall, Policeman, or Peace Officer, in the County of Navajo, State of Arizona;" and stated that "[p]roof by affidavit" was made before the signing magistrate that day.

¶14 On appeal, Defendant argues that the search warrant nonetheless failed to comply with § 13-3915 because it did not state whose affidavit the magistrate considered and the command failed to authorize a peace officer to search for specifically identified items. Section 13-3915(C) requires that a valid search warrant "shall be in substantially the following form:"

> County of_____, state of Arizona.
>
> To any peace officer in the state of Arizona:
>
> Proof by affidavit having been this day made before me by (naming every person whose affidavit has been taken) there is probable

> cause for believing that (stating the grounds of the application) according to § 13-3912, you are therefore commanded in the daytime (or in the night, as the case may be, . . .) to make a search of the (naming persons, buildings, premises or vehicles, describing each with reasonable particularity) for the following property, persons or things: (describing such with reasonable particularity), and if you find such or any part thereof, to retain such in your custody subject to § 13-3920.

¶15 In reviewing Defendant's challenge, we need only determine "whether statutory procedure has been substantially followed and whether the court issuing the warrant had sufficient grounds upon which to base its decision." *State v. Hadd*, 127 Ariz. 270, 274, 619 P.2d 1047, 1051 (App. 1980). Furthermore, "[t]here is a presumption in favor of the validity of a search warrant," *id.*, and we will not invalidate a warrant merely because of technical violations or inadvertent mistakes. *See Yuma County Attorney v. McGuire*, 109 Ariz. 471, 473, 512 P.2d 14, 16 (1973) (judge's failure to sign was "mere technical oversight" that did not invalidate warrant); *State v. Sherrick,* 98 Ariz. 46, 56-58, 402 P.2d 1, 11-13 (1965) (minor violation in timely return of warrant did not invalidate it).

¶16 We conclude that this warrant substantially met the requirements of § 13-3915(C). It recited the Defendant's name, gave a full description of the property and items to be seized, designated itself as a "search warrant," and was duly signed and

authorized by a magistrate based on "proof by affidavit" made before her. It was addressed to "any peace officer" in the state who was "comman[d]ed" to execute it "in the day time only" and, if they found the property to be seized, to bring it forth "within five days." Section 13-3915 requires that a search warrant "substantially" comply with its dictates, and we conclude that the warrant did so.

¶17 Defendant argues, however, that the warrant failed to state whose affidavit the issuing judge considered. Detective Hayes testified that he personally had presented the affidavit to the magistrate and watched her review and sign the affidavit and warrant. The fact that the warrant referred to the detective's affidavit but did not identify Detective Hayes as its proponent was not fatal because the warrant still substantially complied with the statute.[4]

Denial of Willits Instruction

¶18 Defendant contends that the State's failure to preserve a pair of blue latex gloves found at the crime scene entitled him to a *Willits* jury instruction and that failure to

[4]Nor was the warrant constitutionally infirm. A search warrant is constitutional if it was based on probable cause and "particularly described the place to be searched and the persons or things to be seized." *Berger v. New York*, 388 U.S. 41, 58 (1967). Defendant never challenged the existence of probable cause, and the warrant described the place to be searched and items to be seized.

give it was error. The trial court denied Defendant's requested instruction because he had not shown that the gloves had any exculpatory value and thus had not shown any prejudice from their absence at trial.

¶19 To be entitled to a *Willits* instruction, an accused must prove that the state failed to preserve material and accessible evidence that might tend to exonerate the accused as well as resulting prejudice. *State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999). We review the trial court's ruling for an abuse of discretion, but the court does not abuse its discretion "if a defendant fails to establish that the lost evidence would have had a tendency to exonerate him." *Id*.

¶20 The blue latex gloves were found near the gray sweatshirt and were photographed but later discarded. Even if the gloves had been tested and Defendant's DNA or fingerprints had not been found, that evidence would not have "tended to exonerate" him of these crimes. The trial court correctly noted the evidence that two people had been involved in the crimes, and therefore the absence of Defendant's DNA or fingerprints would not be "exculpatory." Thus, Defendant failed to prove prejudice from failure to retain the gloves, and the court did not abuse its discretion by refusing the instruction.

CONCLUSION

¶21 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
DONN KESSLER, Presiding Judge

/s/_____
DIANE M. JOHNSEN, Judge