DIVISION ONE
FILED: 05/24/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. BILLY BURTON, Appellant.	)	1 CA-CR 09-0963 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication– Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR-2009-113204-001 SE

The Honorable F. Pendleton Gaines III, Judge (Deceased)

AFFIRMED

Thomas C. Horne, Arizona Attorney General by Kent E. Cattani, Chief Counsel, Criminal Appeals/Capital Litigation Section William Scott Simon, Assistant Attorney General Attorneys for Appellee	Phoenix
Michael S. Reeves Attorney for Appellant	Phoenix

D O W N I E, Judge

¶1 Defendant Billy Burton appeals his convictions for burglary, armed robbery, and kidnapping. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Defendant went to Matthew B.'s apartment to buy marijuana. Defendant and Matthew smoked marijuana together; while Matthew was preparing marijuana for defendant to take with him, defendant pointed a gun at Matthew's head and stated, "[g]ive [me everything] in your room." He cocked the gun so Matthew could see it was loaded. Matthew gave defendant more marijuana, but denied having any cash. Defendant told a female accompanying him to "go get the car." After the woman departed, defendant put the gun into Matthew's crotch and said, "[g]ive me the money or I'm going to blow your balls off."

¶3 Defendant told Matthew that, to save his life, he could give defendant his television. Defendant made Matthew carry the television to his waiting Suburban and ordered him into the vehicle. Defendant threatened to shoot Matthew if he did not "stop moving around and fidgeting." Matthew believed defendant was taking him to the desert to shoot him. He jumped over the seat and began struggling with defendant. When the vehicle slowed, Matthew escaped.

¶4 Matthew did not initially tell investigating officers the incident began as a drug sale. Instead, he said defendant

[1] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

approached him outside his apartment and forced Matthew to let him into his apartment. The week before trial, Matthew called Detective Kelly and told him about the drug deal because he was "worried about lying on the stand." The jury was told that Matthew initially withheld information about the drug sale.

¶5 Defendant was charged with burglary in the first degree, armed robbery, and kidnapping, all class 2 dangerous felonies. The jury found defendant guilty of all counts. The court sentenced defendant to presumptive, concurrent terms of 15.75 years on each count. Defendant timely appealed. 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), 13-4031 and -4033.

DISCUSSION

1. *Miranda*[2] Violation

¶6 During direct examination, the following exchange took place between the prosecutor and Detective Kelly:

> Q. Now, sir, after going through the preliminary questions with [defendant], would it be fair to say that you didn't receive any other information that would be useful in your investigation?
>
> A. That's correct.
>
> Q. Okay. What did [you do] at that time?

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

> A. I read him his *Miranda* warnings. He refused to answer any questions.

¶7 Defense counsel objected, and the trial court stated, "Ladies and gentlemen, disregard that answer, would you, please?" The prosecutor asked a few additional questions, and trial adjourned for the day shortly thereafter. After the jury was excused, defense counsel stated:

> Your Honor, I have problems with Detective Kelly's testimony. I mean, he clearly is an experienced officer. He knows the rules. He's thrown out information regarding the criminal history information. He's thrown out information about *Miranda*, my client invoking his rights.
>
> Clearly he knows not to comment on that stuff. Obviously, [sic] I don't want to request a mistrial and I don't even know if a curative instruction is going to work.

¶8 The trial court agreed it was appropriate not to request a mistrial, but said it would not preclude such a request if defense counsel deemed it appropriate. The court ascribed Detective Kelly's statement to the "broad, open-ended questions" posed by the prosecutor. The court noted it had already told the jury to disregard the response, but told defense counsel to "think about it overnight" and "come back in the morning and tell us what you'd like to do." The following day, the court asked defense counsel if she wanted another curative instruction. Counsel said she was not asking the court to reiterate its admonition to jurors, but wanted the issue

addressed in the final instructions. The court said it would entertain the request when settling final instructions and would leave it up to defense counsel to "request a curative instruction in connection with the finals," if desired.

¶9 Defense counsel did not move for a mistrial on this basis, and the final instructions did not specifically reference Detective Kelly's statement.[3] On appeal, defendant claims the officer's statement violated his due process rights because it was an improper comment on the exercise of his *Miranda* rights. The State responds that we need only review for fundamental error because defendant "did not object to the sufficiency of the trial court's curative measures, nor did he request a mistrial."

¶10 It is true that defendant did not seek a mistrial on this basis. However, although neither party refers to it, the record includes what appears to be a proposed final instruction by the defense that was not given.[4] Instead, with defense

---

[3] Jurors did, however, receive the following instruction:

> Stricken evidence: At times I may order some evidence to be stricken from the record. Then it is no longer evidence and you must not consider it for any purpose[.]

[4] The proposed instruction reads: "You were previously instructed to disregard Detective Kelly's testimony that stated Mr. Billy Burton 'refused' to talk to him. Mr. Billy Burton did not refuse to talk to Detective Kelly. Mr. Billy Burton did talk to Detective Kelly. However, Detective Kelly did not

counsel's acquiescence, the court incorporated a portion of the requested instruction into a response to a jury question that read: "Can we (the jury) hear or see the statement [defendant] gave to police?" The trial court noted that it considered defendant's agreement to its proposed response to be "without waiving your full objection," and it responded to the jury question as follows:

> You are required to rely on the testimony and the evidence admitted at trial. No other information will be provided. You should refer to Prelim instructions p.14.
>
> As I instructed you yesterday, you are ~~instructed~~ to disregard Detective Kelly's testimony that [defendant] refused to talk to him after the reading of the *Miranda* rights.

¶11 Based on this record, we consider the relevant question to be whether the court erred by denying defendant's requested instruction. We review the denial of a requested jury instruction for an abuse of discretion. *State v. Barraza*, 209 Ariz. 441, 444, ¶ 8, 104 P.3d 172, 175 (App. 2005). When the substance of a proposed instruction is adequately covered by other instructions, the court is not required to give the requested instruction. *State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000). We will not reverse the denial of a jury instruction absent an abuse of discretion. *State v.*

---

obtain any incriminating statements from Mr. Billy Burton."

Gilfillan, 196 Ariz. 396, 406, ¶ 39, 998 P.2d 1069, 1079 (App. 2000). We review due process claims *de novo*, but we review a trial court's choice of remedy for a violation of such rights for an abuse of discretion. *State v. Rosengren*, 199 Ariz. 112, 116, ¶ 9, 14 P.3d 303, 307 (App. 2000).

¶12 The reference to defendant's decision not to answer questions post-*Miranda* was short and fleeting. As the trial court noted, it appears the response was due to the prosecutor's open-ended questions rather than an attempt to improperly draw the jury's attention to the invocation of silence. The instruction to the jury, given immediately after the statement, was adequate under the circumstances, as was the court's decision to repeat its admonition in responding to the jury's question.[5] Absent evidence to the contrary, we assume the jury followed its instructions. *Newell*, 212 Ariz. at 403, ¶ 69, 132 P.3d at 847.

2. *Pre-Miranda* Statements

¶13 Over defense counsel's objection, Detective Kelly was allowed to testify that, before giving defendant *Miranda* warnings, he asked his "name, date of birth, telephone number, address, if he lived with anyone; those [sorts] of questions."

[5] The record also reflects that the court was concerned about unduly drawing the jury's attention to the statement. *See, e.g., State v. Newell*, 212 Ariz. 389, 402, ¶ 61, 132 P.3d 833, 846 (2006) (in context of prosecutorial misconduct, trial court is in best position to gauge effect of comments on jury).

The detective testified that the preliminary information defendant gave corroborated information given by Matthew.

¶14 Defendant acknowledges that "preliminary questions to ascertain the identity of a person in custody generally do not require that *Miranda* warnings have been read." *State v. Landrum*, 112 Ariz. 555, 559, 544 P.2d 664, 668 (1976). He argues though that the questions at issue were "interrogation" in violation of *Miranda* because they confirmed identification information that police already knew.

¶15 The decision to admit or exclude evidence is left to the sound discretion of the trial court. *State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App. 1989). We will not reverse evidentiary rulings absent a clear abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). Police officers may question an individual in custody without giving *Miranda* warnings when their questions are directed to a defendant's identity and are "clearly neutral, nonaccusatory in nature, and in furtherance of proper preliminary investigation." *Landrum*, 112 Ariz. at 559, 544 P.2d at 668 (citation omitted). Requesting general booking information does not constitute an "interrogation" for *Miranda* purposes, even if the information later proves incriminating. *State v. Jeney*, 163 Ariz. 293, 298, 787 P.2d 1089, 1094 (App. 1989). Here, it is clear Detective Kelly asked for the

information during the routine booking procedure. The fact that some of the background information was later used against defendant because it corroborated information received from the victim did not transform that routine procedure into a formal interrogation. The trial court did not err by admitting the challenged testimony.

3. Reference to Defendant's Criminal History

¶16 When describing procedures used to locate defendant, Detective Kelly testified he obtained "biographical information," such as defendant's height, weight, and age, by running his name "through our records bureau and coming up with driver's license information, as well as through the criminal history." Defendant argues the reference to "the criminal history" was improper evidence of prior bad acts and highly prejudicial. *See* Ariz. R. Evid. 404(b). Defendant maintains that after Detective Kelly made this comment, "the defense objected, and the Judge attempted to explain away the violation, asking the jury to not draw any adverse inference from the detective's comments about criminal history." However, the record shows that it was the prosecutor who asked to approach for a bench conference. Thereafter, the court instructed the jury as follows:

> Ladies and gentlemen, please do not draw any adverse inference from the detective's comments about criminal history. That's

> just a data base they run. You absolutely should not infer from that, that the defendant has any criminal history, so please disregard that; disregard that.
>
> I'm instructing you it has nothing to do with the trial. When the detective was talking about different criminal data bases, you should not infer anything from that. It has nothing to do with the proof of the defendant's guilt or innocence in this case, so please disregard it.

¶17 Defendant did not object to this curative instruction or request a mistrial. He has thus forfeited relief as to this issue unless he can prove both that fundamental error occurred and that the error caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005)*; see also State v. Holmes*, 110 Ariz. 494, 496, 520 P.2d 1118, 1120 (1974) (failure to ask court to order question or argument stricken or to order jury to disregard implication arising therefrom, or to ask for mistrial waives right to complain on appeal). We find no error.

¶18 The trial court properly and thoroughly instructed the jury not to draw any adverse inferences from the brief mention of the criminal history, stating it was just a "data base they run" and had nothing to do with defendant's guilt or innocence. There was no indication of what, if any, information Detective Kelly obtained when he ran defendant's name through the criminal history database. The trial court took prompt and appropriate

remedial action. Defendant does not argue, let alone prove, how he was prejudiced by this statement.

4. Failure to Preclude State's Witness

¶19 During police interviews on the date of the crime, Matthew said he had been planning to meet a friend, Brian S., who might have been outside his apartment when the incident occurred. When Matthew spoke with Detective Kelly the week before trial, he advised that Brian actually knocked on the door of his apartment while the drug sale was occurring.

¶20 The State initially filed a disclosure statement stating its intent to call as "Other Witnesses . . . [a]ny individual named or referred to in the preliminary hearing transcript, grand jury transcript, police report, or other State's disclosure." The week before trial, pursuant to Matthew's disclosure, the State filed a "Supplemental Notice of Disclosure," stating its intent to call Brian S. and Trevor M.[6]

¶21 Defense counsel objected to Trevor as a witness because he was not timely disclosed. Counsel later raised a similar concern about Brian. The prosecutor pointed out that Brian was disclosed in the original police report given to defense counsel. According to Detective Kelly, when Matthew revised his story, he also provided Brian's phone number. The detective tried to contact Brian and left several messages, but

[6] Trevor was with Brian at the apartment complex.

received no return call. The court ordered Detective Kelly to continue trying to contact Brian, and, assuming he was located, to produce him for a defense interview before trial began.

¶22 The following morning, the prosecutor informed the court that Brian had contacted the police and had already submitted to an interview with defense counsel. The court precluded Trevor as a witness, but ruled that Brian, whose name had been previously disclosed, could testify. Brian subsequently testified that he and a couple of friends stopped by Matthew's apartment the evening of the offense to "hang out." When he knocked on the door, Matthew said he was "really busy" and asked them to wait outside. Brian noticed a Suburban parked illegally in the parking lot, but paid little attention to it. After waiting for some time, he called Matthew's telephone, but got no answer. He and his friends then left.

¶23 Defendant argues the trial court abused its discretion by allowing Brian to testify. "The decision whether to impose sanctions and the choice of sanctions for a violation of disclosure is within the sound discretion of the trial court." *State v. Dumaine*, 162 Ariz. 392, 406, 783 P.2d 1184, 1198 (1989), *disapproved on other grounds by State v. King,* 225 Ariz. 87, 90, ¶ 12, 235 P.3d 240, 243 (2010). Absent a showing of abuse, we will not disturb the court's choice of sanction or its

decision not to impose a sanction. *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996).

¶24 Here, there was arguably no violation as to Brian, as the State disclosed its intent to call him as a witness as soon as it learned of his presence the night of the crime. However, even assuming the disclosure was tardy, the court conditioned admission of his testimony on the State making Brian available for a defense interview, which occurred. The record shows that defense counsel was able to effectively cross-examine Brian. We find no abuse of discretion in allowing Brian to testify.

5. Remand to Grand Jury

¶25 Defendant argues the State violated his constitutional rights by not remanding his case to the grand jury for a new determination of probable cause after the victim revised his rendition of events. As the State notes, this issue is not subject to review following a finding of guilt beyond a reasonable doubt. *See State v. Gonzalez*, 181 Ariz. 502, 507, 892 P.2d 838, 843 (1995). In any event, defendant's contention that the officer presented perjured testimony is without merit. When Detective Kelly testified before the grand jury, he accurately relayed information Matthew had given up to that point.

¶26 Furthermore, a defendant's due process rights are violated if the government bases an indictment on perjured

testimony that is "material." *State v. Moody*, 208 Ariz. 424, 440, ¶ 32, 94 P.3d 1119, 1135 (2004). Perjury is a false sworn statement regarding a "material issue" that a witness makes believing the statement to be false. *Id*. A statement is "material" if it can affect the course or outcome of a proceeding. A.R.S. § 13-2701(1). As noted above, Detective Kelly did not have reason to believe Matthew's statements were false when he recounted them to the grand jury. More importantly, the only thing that later changed was that Matthew admitted letting defendant into his apartment to sell him drugs. The fact that Matthew voluntarily let defendant into his apartment was not "material" to the charged offenses occurring *after* defendant was inside the apartment, when he beat Matthew, robbed him at gunpoint, and forced him into a vehicle.

CONCLUSION

¶27 For the foregoing reasons, we affirm defendant's convictions and sentences.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
JON W. THOMPSON, Judge