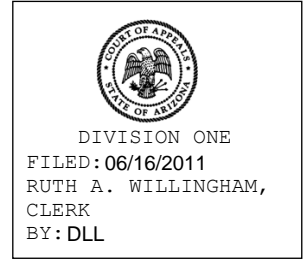


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0375
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JOSEPH HENRY TRELLA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-119685-001 DT

The Honorable Stephen P. Lynch, Judge *Pro Tempore*
The Honorable Carolyn K. Passamonte, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Adriana M. Rosenblum, Assistant Attorney General
Attorneys for Appellee

James Haas, Maricopa County Public Defender Phoenix
By Paul J. Prato, Deputy Public Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Joseph Henry Trella appeals from his convictions and sentences for two counts of aggravated driving under the influence. Trella asserts that the trial court's admission of out-of-state motor vehicle records violated his Confrontation Clause rights under the Sixth Amendment. For the following reasons, we affirm.

BACKGROUND

¶2 Trella was involved in an automobile accident in Phoenix when his vehicle collided with the vehicle ahead of him. Officers investigating the scene observed that Trella had bloodshot, watery eyes, smelled strongly of alcohol, was slurring his speech, and had trouble with his balance. After officers conducted a field sobriety test, they observed several more cues indicating impairment due to alcohol consumption and placed Trella under arrest.

¶3 At the police precinct, Trella admitted to drinking earlier that day and, when officers requested Trella's license, he produced a Colorado identification card. Trella informed police that his license was not suspended, revoked, or cancelled. However, when asked what state his license might be suspended in, he responded, "Massachusetts." After officers administered a breath test, results indicated that Trella had a blood alcohol concentration of approximately .24. The State later charged Trella with two counts of aggravated driving under

the influence of alcohol pursuant to Arizona Revised Statutes ("A.R.S.") sections 28-1381(A)(1)-(A)(2) (Supp. 2010), and - 1383(A)(1) (Supp. 2010).

¶4 Prior to trial, Trella filed a motion to preclude testimony, arguing that his Colorado and Massachusetts motor vehicle division ("MVD") records were inadmissible hearsay. In addition, he asserted the records were testimonial and therefore violated the Sixth Amendment's Confrontation Clause. In response, the State argued that the MVD records were admissible as public records and nontestimonial because they were not created for use in a criminal prosecution.

¶5 At the evidentiary hearing on Trella's motion to preclude, Trella introduced testimony from an Arizona MVD custodian of records to explain the nature and substance of the out-of-state MVD records. After both parties discussed the admissibility of the records, the trial court found that both the Colorado and Massachusetts records were admissible, at a minimum, as public records. But, Trella declined to address the Confrontation Clause argument, stating, "It's not really a confrontation issue any more because it's not testimonial."

¶6 However, at trial, outside the presence of the jury, Trella argued that certain documents, attached to the MVD records, were testimonial because they were "generated in anticipation of litigation." More specifically, Trella objected

to the following documents: (1) an affidavit attached to the Massachusetts record, signed by the Massachusetts MVD registrar; and (2) a printout confirming that Trella was mailed a suspension notice from the Colorado MVD. With respect to the Colorado verification of mailing, the State asserted that it was nontestimonial because the MVD has an interest in maintaining records of license suspensions. The State similarly argued that the Massachusetts affidavit was "non-testimonial and . . . properly part of [a] public record." The court ruled that neither document was testimonial and the State subsequently relied on these records to prove that Trella had a suspended license at the time of the offense, and that he knew, or should have known, that he had a suspended license.

¶17 Trella voluntarily absented himself from trial and was tried *in absentia*. After a three-day trial, a jury found Trella guilty of both counts. The trial court sentenced Trella to two concurrent eight-month terms, with 209 days of presentence incarceration credit. Trella timely appealed.

DISCUSSION

¶18 Trella asserts that the trial court violated his Sixth Amendment right to confront witnesses by admitting into evidence the Colorado and Massachusetts MVD records showing that his license was suspended in those states. Trella argues that the MVD records are testimonial hearsay that violated his

Confrontation Clause rights because he had no prior opportunity to cross-examine the author of the MVD records.¹ Although we generally review a trial court's ruling on the admissibility of evidence for an abuse of discretion, "we conduct a *de novo* review of challenges to admissibility under the Confrontation Clause." *State v. King*, 213 Ariz. 632, 636, ¶ 15, 146 P.3d 1274, 1278 (App. 2006) (citation omitted).

¶19 Under the doctrine of invited error, however, Trella is precluded from arguing on appeal that the trial court erred by allowing the State to offer the MVD records from Colorado and Massachusetts. See *State v. Moody*, 208 Ariz. 424, 453, ¶ 111, 94 P.3d 1119, 1148 (2004) ("This court has long held that 'a defendant who invited error at trial may not then assign the same as error on appeal.'" (citation omitted). If an alleged error is invited, we do not consider whether the error is fundamental, "for doing so would run counter to the purposes of the invited error doctrine[,]'" which is "to prevent a party from inject(ing) error in the record and then profit(ing) from it on appeal." *State v. Logan*, 200 Ariz. 564, 565-66, ¶¶ 9, 11, 30 P.3d 631, 632-33 (2001) (quotations and citations omitted).

¹ Even though an Arizona MVD custodian of records testified, Trella asserts that his Confrontation Clause rights were violated because he did not have the ability to cross-examine the persons who actually prepared the out-of-state MVD records.

¶10 Here, Trella conceded at the evidentiary hearing that the MVD records were “not testimonial.” When the trial court inquired as to whether Trella wished to address his Confrontation Clause argument, Trella responded, “Since it’s coming under the hearsay exception, I believe that it eviscerates the [Confrontation C]lause issue.” Moreover, at trial, although Trella objected to the affidavit and verification of mailing attached to the MVD records, he did not object to the records themselves. When the trial court clarified whether Trella was objecting to “the last page of the Colorado [MVD record] and . . . the first page of the Massachusetts document[,]” Trella responded, “Correct[.]” Accordingly, we address only whether admission of the affidavit and the verification of mailing violated the Confrontation Clause.

A. Colorado Verification of Mailing

¶11 The Sixth Amendment to the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2551 (2009) (quoting U.S. Const. amend. VI). In *Crawford v. Washington*, the Supreme Court found that the Sixth Amendment guarantees a defendant’s right to confront those who provide “testimonial” statements against a defendant. 541 U.S. 36, 59

(2004). Thus, the Confrontation Clause prohibits the admission of testimonial evidence from a declarant who does not appear at trial unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Id.*

¶12 The *Crawford* court defined “testimonial” as a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.* at 51 (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)). Although the court declined to provide a comprehensive definition of testimonial, the court stated that it “applies at a minimum to prior testimony at a prior hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.* at 68. However, the court made clear that nontestimonial hearsay did not violate the Confrontation Clause, noting that “[M]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.” *Id.* at 56.

¶13 In *State v. King*, this court addressed whether Arizona MVD records are testimonial under *Crawford*. 213 Ariz. at 634, ¶ 2, 146 P.3d at 1276. We found that such records are “required to be kept by statute and exist independently of any criminal prosecution.” *Id.* at 638, ¶ 25, 146 P.3d at 1280; see A.R.S. § 41-1346(A)(2) (2011) (requiring the director of the department of transportation to “[m]ake and maintain records containing

adequate and proper documentation of the . . . essential transactions of the agency designed to furnish information to protect the rights of the state and of persons directly affected by the agency's activities"); see also A.R.S. § 28-3004 (Supp. 2010) (department required to keep records pertaining to driver's licenses). Moreover, we found that MVD records are "prepared in the regular course of business by individuals who are not proxies of police investigators." *King*, 213 Ariz. at 638, ¶ 25, 146 P.3d at 1280 (quotation and citation omitted). As a result, we concluded that Arizona MVD records are not testimonial and therefore do not implicate the Sixth Amendment's Confrontation Clause. *Id.* at ¶ 26.

¶14 Here, the verification of mailing, which confirmed that Trella was informed by mail of his suspended license, was attached to Trella's Colorado MVD records. Colorado MVD records, like Arizona MVD records, are required to be kept by statute and exist independently of any criminal prosecution. See Colo. Rev. Stat. Ann. ("C.R.S.") § 42-2-121 (West 2011) (department required to keep records pertaining to driver's licenses, including records of suspension); see also C.R.S. § 42-2-119(2) (West 2011) (requiring notices of suspension to be mailed to licensees and providing that such notices "create[] a presumption for administrative purposes that such notice or order was received if the department maintains a copy of the

notice or order and maintains a certification that the notice or order was deposited in the United States mail by an employee of the department.") Moreover, the verification of mailing was created well before the instant case was initiated and therefore was not produced for the purpose of prosecuting Trella. Accordingly, introduction of these records at trial did not violate Trella's Confrontation Clause rights.

¶15 Trella argues, however, that the verification was "prepared and maintained for use in court." In support of this proposition, Trella cites C.R.S. § 42-2-121(2)(c)(II), which states that official MVD records are "admissible in all . . . courts within the state of Colorado without further foundation" if the records specify the number of pages, bear the official seal of the department and are signed by the director of the department. Although it is clear from this statute that MVD records are available for use at trial, this does not override the primary purpose of the motor vehicle statutes—to provide records for identification and licensing purposes. See C.R.S. § 42-2-121. Therefore, the fact that these records may subsequently be used in criminal prosecutions does not preclude them from qualifying as nontestimonial public records. See *King*, 213 Ariz. at 637, ¶ 22, 146 P.3d at 1279. Furthermore, Arizona's motor vehicle statutes similarly provide that motor vehicle records are "admissible in evidence without further

foundation in all courts or administrative agencies" if certified. A.R.S. § 28-442 (2004). Accordingly, the verification is not testimonial, and thus does not violate the Confrontation Clause.²

B. Massachusetts Affidavit

¶16 Relying on *Melendez-Diaz*, Trella also argues that any affidavits attached to the MVD records are testimonial because "[t]he Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits[.]" See 129 S. Ct. at 2542. Here, an affidavit was attached to the Massachusetts MVD records. It was signed by the motor vehicle registrar and stated that the notice of suspensions were "MAILED ON THE DATE(S) APPEARING ON THE NOTICE TO THE LAST ADDRESS ON FILE AS APPEARING IN THE REGISTRAR'S RECORDS[.]" and that "THERE HAS SINCE BEEN NO REINSTATEMENT OF [TRELLA'S] LICENSE OR RIGHT TO OPERATE MOTOR VEHICLES IN THE COMMONWEALTH OF MASSACHUSETTS."

¶17 However, we need not resolve whether this affidavit violated Trella's confrontation rights because "Confrontation Clause and hearsay rule violations are subject to harmless error

² Trella also asserts that the Colorado verification of mailing is testimonial because it was not "vetted through the judicial process," as required by *King*. Although *King* found that statements contained in public records were not testimonial in part because "the records merely document facts already established through the judicial process," the court there was referring to records of prior convictions, which are not at issue here. *King*, 213 Ariz. at 638, ¶ 24, 146 P.3d at 1280.

analysis." *State v. Bocharski*, 218 Ariz. 476, 486, ¶ 38, 189 P.3d 403, 413 (2008). "Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Anthony*, 218 Ariz. 439, 446, ¶ 39, 189 P.3d 366, 373 (2008) (citation omitted). "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* (citation omitted).

¶18 Here, the affidavit merely summarized the contents of the MVD records. The Massachusetts MVD records supporting the registrar's affidavit indicate that in 2002, Trella was notified that within ninety days of the date of the letter, his "license/right to operate a motor vehicle [would] be suspended for an indefinite period." Moreover, the records reveal that Trella had numerous other suspensions and revocations of his record that occurred prior to the indefinite suspension in 2002. Because the affidavit contained information that was contained in the MVD records, which were admissible and nontestimonial, we find the registrar's affidavit to be harmless error.³

³ Trella does not argue on appeal that these records were inadmissible, and has waived any argument that the MVD records themselves were testimonial. See *supra* ¶¶ 9-10. We also note that, notwithstanding the Massachusetts records, the Colorado

Accordingly, the trial court did not violate Trella's Sixth Amendment right to confront the witnesses against him.⁴

CONCLUSION

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

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

DONN KESSLER, Judge

MVD records showed that Trella's license was suspended in Colorado at the time of the accident and that he was informed by letter of that fact.

⁴ Because we decide the case on this basis, we do not address Trella's argument that, assuming the MVD records violate the Confrontation Clause, the verdicts are against the weight of the evidence.