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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RONDRIC D. DAVIS, Appellant.	2 CA-CR 2011-0360 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000614

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph L. Parkhurst,
and Amy M. Thorson
Tucson
Attorneys for Appellee

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M I L L E R, Judge.

¶1 Rondric Davis was convicted by a jury of armed robbery, aggravated robbery, aggravated assault, and two counts of disorderly conduct. He was sentenced to

minimum, concurrent terms of imprisonment, the longest of which was seven years. On appeal, Davis argues the evidence was insufficient to sustain the guilty verdicts; the trial court erred in denying his post-trial motion for the production of a witness's mental health treatment records; the trial court erred in denying Davis's motion for a new trial; the state committed a *Brady*[1] violation; and, the trial court erred in refusing to give Davis's proposed jury instruction. We affirm for the reasons stated below.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Davis's convictions. *See State v. Rivera*, 226 Ariz. 325, ¶ 2, 247 P.3d 560, 562 (App. 2011). The manager (R.D.) of an athletic shoe store located in the Sierra Vista Mall, was robbed in the mall parking lot while en route to make the nightly cash deposit at a nearby bank. Three men wearing hoods, black clothing, and bandanas over their faces approached R.D. The man in the lead was armed with an AK-47 assault rifle. He pointed the weapon at R.D.'s abdominal region, demanding he "[e]mpty [his] pockets." R.D. handed over the deposit bag, which contained approximately $1,100 in cash and a check for about $100. The three men then fled the scene.

¶3 Davis lived with his uncle and two older brothers in Sierra Vista. A witness testified that, before the date of the robbery, she had seen the Davis brothers handling an AK-47 and overheard co-defendants planning a robbery. Michael McKoy testified that he, Davis, and Davis's brother Darrick were the three men who robbed R.D.

[1]*Brady v. Maryland*, 373 U.S. 83 (1963).

and that co-defendant Wesley Hollis had driven them to and from the mall. McKoy said Darrick held an AK-47 during the robbery, while he and Davis carried BB guns.

¶4 Davis was charged with armed robbery, aggravated robbery, two counts of aggravated assault, and two counts of disorderly conduct. He was convicted as charged for all but one aggravated assault count. Davis filed a motion for a new trial. The court then sentenced Davis as described above. This timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A) and 13-4033(A).

Discussion

Sufficiency of the Evidence

¶5 Davis first argues the evidence was insufficient to sustain guilty verdicts because the state's primary witnesses were inconsistent and not credible. Whether evidence is sufficient to sustain a verdict is a question of law, which we review de novo. *See State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). "In reviewing sufficiency of the evidence, we examine the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997).

¶6 There must be substantial evidence to support the jury verdict. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913 (2005). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). Substantial evidence "may be either circumstantial or direct." *State v.*

Henry, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). We will reverse a conviction "only if 'there is a complete absence of probative facts to support [the jury's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988). If "'reasonable minds may differ on inferences drawn from the facts,'" the conviction must be upheld. *See West*, 226 Ariz. 559, ¶ 18, 250 P.3d at 1192, *quoting State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶7 Davis argues the state's primary witnesses were not credible, and their testimony did not constitute substantial evidence. M.K. testified that she heard two of the co-defendants discussing the robbery; she saw Davis and the three other participants leave together from the Charles Drive residence on the evening of the robbery; she later saw Davis and the two co-defendants return to the residence, take out a lot of money, and divide the cash among them. M.K. had seen Davis handling an AK-47 before the date of the robbery and one of the co-defendants carrying an AK-47 when Davis and the co-defendants returned to the house. McKoy testified that he was present during the robbery; that Davis, with a BB gun, and two other co-defendants participated in the robbery; that he, Davis, and a co-defendant approached a man and demanded money from him; and, that he, Davis, and the co-defendants returned to the residence, emptied a bag of cash, and divided it up.

¶8 Davis contends that M.K. gave conflicting testimony and that McKoy's testimony, standing alone, was insufficient. Credibility of witnesses is a matter for the

jury. *State v. Cañez*, 202 Ariz. 133, ¶ 39, 42 P.3d 564, 580 (2002); *State v. Roberts*, 139 Ariz. 117, 121, 677 P.2d 280, 284 (App. 1983). The jury, as demonstrated by the verdict, believed the bulk of the witnesses' testimony despite any inconsistencies or memory lapses while testifying. Davis essentially asks us to reweigh the evidence, which we will not do. *See State v. Gulbrandson*, 184 Ariz. 46, 65, 906 P.2d 579, 598 (1995) (reviewing court does not reweigh the evidence, but rather views it in light most favorable to sustaining the conviction).

¶9 In addition, other evidence corroborated the testimony of M.K. and McKoy. Another witness identified an AK-47 recovered by police as similar to an AK-47 carried by a man leaving the scene of the robbery. R.D. also testified that a check was in the deposit bag along with the cash. M.K. and McKoy both testified that a check was in the cash divided among the participants. Furthermore, another witness testified he had heard McKoy and the co-defendants refer to the athletic shoe store while they were discussing the robbery. Co-defendant Hollis testified at trial that he was previously employed by the athletic shoe store. Hollis indicated he was familiar with the store's deposit procedure and that he had performed it with R.D. "plenty of times."

¶10 The jury was properly instructed regarding the credibility of witnesses and material portions of M.K.'s and McKoy's testimony were corroborated by independent evidence. Thus, the jury heard sufficient evidence to conclude Davis was guilty beyond a reasonable doubt.

Post-trial Motion for Disclosure of Mental Health Records

¶11 Davis argues the trial court abused its discretion in denying his post-trial motion for production of M.K.'s mental health records. "[W]hether a criminal defendant is entitled to discover certain evidence is a matter within the trial court's discretion." *State v. Roberts*, 139 Ariz. 117, 120, 677 P.2d 280, 283 (App. 1983). We find no abuse of discretion here.

¶12 During cross-examination of M.K., defense counsel elicited testimony that M.K. was bipolar and had Attention Deficit Disorder (ADD) and Attention Deficit Hyperactivity Disorder (ADHD). M.K. said she controlled these conditions with medication. She also admitted that she had used alcohol and drugs, including marijuana and cocaine.

¶13 After the trial concluded, Davis filed a motion for production of M.K's mental health treatment records arguing he had recently obtained information suggesting M.K.'s mental health problems were "likely much more serious than she admitted to during her court testimony." Attached to the motion was an affidavit from Davis's brother, M.K.'s former boyfriend. The affidavit stated that he had observed and had been told about M.K.'s mental health issues such as ADHD, bipolar disorder, panic attacks, insomnia, and mood swings. The trial court denied the motion, finding the affidavit did "not present facts sufficient to overcome [M.K.'s] privacy interests." Davis filed a motion for reconsideration, which was also denied.

¶14 The state argues Davis's "post-trial motion for disclosure of [M.K.'s] mental health treatment records was untimely." We agree. Any motion, defense, or request not raised twenty days prior to trial is precluded. *See* Ariz. R. Crim. P. 16.1(c). Davis waived discovery of M.K.'s mental health records by failing to make his discovery motion within these time limits. *See State v. Piper*, 113 Ariz. 390, 392, 555 P.2d 636, 638 (1976). Moreover, there was no suggestion that Davis could not have obtained before trial the information on which he now relies. Davis's "failure to so move prior to trial precludes him from raising this issue on appeal." *Id.*

¶15 Davis's argument also fails on its merits. Davis has offered no authority or particular facts suggesting M.K.'s mental health records would have been subject to pretrial disclosure. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); Ariz. R. Crim. P. 15.1(b); Ariz. R. Crim. P. 15.6(c). Discovery rules are subject to broad interpretation, but there should also be a demonstration of "substantial need" for materials not otherwise covered by Rule 15.1, which includes health records of a witness. *See State v. Kevil*, 111 Ariz. 240, 243, 527 P.2d 285, 288 (1974); *see also* Rule 15.1(g). Moreover, when determining whether additional disclosure should be made, the trial court takes into account whether the defendant has sufficient information without the requested materials to conduct a thorough cross-examination. *Id.* at 243-44, 527 P.2d at 288-89. This includes information voluntarily provided by the witness. *Id.*

¶16 Here, as in *Kevil*, Davis was permitted to cross-examine M.K. extensively regarding her mental health issues and medical history, as well as how her medications

might affect her. She answered those questions, including some that might touch on personal information. Further, as the trial court noted in its ruling, M.K. had grounds to prevent the disclosure of her mental health records. *See e.g.*, A.R.S. §§ 32-2085 (psychologist privilege) and 13-4062(4) (physician privilege). Finally, M.K.'s problems referenced in the affidavit are largely the same medical issues elicited during M.K.'s cross-examination.

¶17 We conclude that Davis has not shown "substantial need" for M.K.'s medical health records, nor has he demonstrated any prejudice caused thereby. *See* Ariz. R. Crim. P. 15.1(g) (requiring a showing of substantial need prior to the trial court, in its discretion, ordering disclosure for material or information not otherwise covered by Rule 15.1); *Kevil*, 111 Ariz. at 243, 527 P.2d at 288 (finding appellant failed to demonstrate "compelling 'substantial need'" such that denial of his motion contributed to an abuse of discretion). Whether the request for M.K.'s mental health records was made before or after trial, on the record before us the trial court would not have abused its discretion in denying Davis's request.

Amended Motion for a New Trial

¶18 Next, Davis argues the trial court abused its discretion when it denied his amended motion for a new trial on the grounds that it was untimely. Motions for a new trial "are not looked upon with favor and should be granted with great caution." *State v. Schantz*, 102 Ariz. 212, 214, 427 P.2d 530, 532 (1967); *see also State v. Neal*, 143 Ariz. 93, 97, 692 P.2d 272, 276 (1984). We review a trial court's denial of a motion for a new

trial for an abuse of discretion. *Neal*, 143 Ariz. at 97, 692 P.2d at 276. We find the trial court did not abuse its discretion.

¶19 Davis's verdicts were rendered on March 23, 2011. On March 28, 2011, Davis timely filed a motion for a new trial pursuant to Rule 24.1, Ariz. R. Crim. P., on the following grounds:

> a. the verdict is contrary to law and to the weight of the evidence;
> b. the court erred in deciding matters of law; and
> c. the court erred in failing to instruct the jury in accordance with the Ninth Circuit model criminal jury instruction on the testimony of witnesses involving special circumstances, as requested by defendant.

Davis also requested "[thirty] days in which to prepare a brief in support of this motion." Nearly six months later, on September 23, 2011, Davis filed an amended motion for a new trial and supporting brief. The trial court issued its decision and order, declining to consider any new grounds set forth in the amended motion for a new trial due to a lack of jurisdiction.

¶20 A motion for a new trial must be filed not later than ten days after a verdict has been rendered. Ariz. R. Crim. P. 24.1(b). A trial court lacks jurisdiction to grant a motion for a new trial if the motion is filed after this ten-day limit. *State v. Wagstaff*, 161 Ariz. 66, 70, 775 P.2d 1130, 1134 (App. 1988); *see also State v. Vasquez*, 98 Ariz. 157, 159, 402 P.2d 574, 576 (1965). "Labeling untimely motions as supplemental does not enable a party to avoid the time restrictions imposed by procedural rules—especially those rules, such as Ariz. R. Crim. P. 24.1(b), that confer jurisdiction on the trial court."

State v. Ring, 200 Ariz. 267, n.4, 25 P.3d 1139, 1149 n.4 (2001), *rev'd on other grounds by Ring v. Arizona*, 536 U.S. 584, 609 (2002).

¶21 Here, Davis's amended motion alleged additional, specific grounds for a new trial that were not raised in Davis's original motion. As explained in *Ring*, merely labeling a motion "supplemental" or, in this case, "amended" does not relieve a party from jurisdictional time limits. *Id*. Davis filed his amended motion six months after a verdict was rendered, well outside the ten-day limit. The trial judge did not have jurisdiction to consider Davis's claims because they were raised in an untimely new trial motion. Thus, the trial court did not abuse its discretion in finding that Davis's amended motion and supplemental brief were untimely.

¶22 With respect to the original motion for a new trial, the trial court found two of the three grounds to be too vague to consider, citing Rule 35.1, Ariz. R. Crim. P. Pursuant to that rule, all motions must be accompanied by a brief memorandum stating the specific factual grounds, and specify "the precise legal points, statutes, and authorities relied upon." Ariz. R. Crim. P. 35.1(a). The comment to Rule 35.1 states that a motion which does not detail its factual support is insufficient. "Defective motions can operate to waive even constitutional issues." *State v. Wilson*, 164 Ariz. 406, 407, 793 P.2d 559, 560 (App. 1990). Both parties are expected to go beyond mere conclusory allegations. Ariz. R. Crim. P. 35.1, cmt.

¶23 The trial court did not abuse its discretion in denying Davis's amended motion for a new trial, nor did it abuse its discretion in denying Davis's original motion

for a new trial. As previously discussed, the amended motion for a new trial was untimely. The original motion for a new trial was defective. The motion did not detail any factual support and listed merely conclusory allegations. Thus, the trial court did not abuse its discretion in finding two of the three grounds too vague to consider. The third ground, failing to give the Ninth Circuit model jury instruction was also raised as an independent claim of error, and is discussed in detail in that section.

Alleged *Brady* Violation

¶24 Next, Davis contends the state failed to provide him with pretrial disclosure regarding M.K.'s police records, thereby violating *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (establishing a defendant's Fifth Amendment right of access to any evidence favorable to his defense and material to the issue of guilt). Davis first raised the *Brady* violation issue in his amended motion for a new trial. As previously discussed, Davis's amended motion was untimely filed and the trial court lacked jurisdiction to consider it pursuant to Rule 24.1(b), Ariz. R. Crim. P.

¶25 To preserve an argument for review, the defendant must make sufficient argument to allow the trial court to rule on the issue. *State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("An objection is sufficiently made if it provides the judge with an opportunity to provide a remedy"). "[A]n untimely objection first raised in a motion for a new trial does not preserve an issue for appeal." *State v. Davis*, 226 Ariz. 97, ¶ 12, 244 P.3d 101, 104 (App. 2010). Therefore, Davis has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561,

¶¶ 19-20, 115 P.3d 601, 607 (2005). Fundamental error requires the defendant to establish that: (1) an error occurred; (2) the error was fundamental; and (3) the error resulted in prejudice. *Id.* Furthermore, because he does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

¶26 Even assuming this argument had not been waived, Davis's claim of a *Brady* violation also lacks merit. "'The test for a *Brady* violation is whether the undisclosed material would have created a reasonable doubt had it been presented to the jury.'" *State v. Montaño*, 204 Ariz. 413, ¶ 52, 65 P.3d 61, 72 (2003), *quoting State v. Dumaine*, 162 Ariz. 392, 405, 783 P.2d 1184, 1197 (1989), *disapproved of on other grounds by State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010). "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith v. Cain*, ___ U.S. ___, ___, 132 S. Ct. 627, 630 (2012), *quoting Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

¶27 M.K.'s undisclosed police records are not material within the meaning of *Brady*. The police records largely contain irrelevant material, collateral to the issues at trial. *See State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982) ("The court may prevent cross-examination into collateral matters of a personal nature having minor probative value . . . ."). To the extent that the police reports would have opened new avenues of impeachment at trial, this additional information would not create a great enough likelihood of a different result to undermine confidence in the trial's outcome. M.K was not the only witness for the state. As discussed, her testimony was largely corroborated by other evidence and defense counsel was permitted to extensively challenge the reliability of her testimony based on her mental health issues. Accordingly, the state's failure to disclose the police records does not rise to the level of a *Brady* violation.

Requested Jury Instruction

¶28 Defendant argues the trial court erred in refusing to give his proposed jury instruction on how to consider the testimony of a witness who was an accomplice and had received a benefit for his testimony. We review a trial court's refusal to give a jury instruction for abuse of discretion. *State v. Martinez*, 218 Ariz. 421, ¶ 49, 189 P.3d 348, 359 (2008).

¶29 The trial court did not abuse its discretion when it refused to give Davis's requested instruction. We review the "legal adequacy" of an instruction de novo. *Id.* Legal adequacy is assessed by viewing the instructions in their entirety to determine

whether they accurately reflect the law. *State v. Garcia*, 224 Ariz. 1, ¶ 75, 226 P.3d 370, 387 (2010). In addition, "'when the substance of a proposed instruction is adequately covered by other instructions, the trial court is not required to give it.'" *Id.*, *quoting State v. Hoskins*, 199 Ariz. 127, ¶ 75, 14 P.3d 997, 1015 (2000).

¶30 Davis's requested instruction focused on two aspects of Michael McKoy's testimony: (1) that he admitted being an accomplice; and, (2) that he received prosecutorial immunity. The proposed instruction then directed the jury to examine McKoy's testimony "with greater caution than that of other witnesses."

¶31 As the trial court correctly pointed out, the second aspect of Davis's proposed jury instruction is factually incorrect. Contrary to the proposed instruction, McKoy understood that he could be prosecuted for this robbery and to instruct the jury otherwise would be factually inaccurate. It is not an abuse of discretion for a court to refuse to give an instruction that is factually inaccurate. *See State v. Rainey*, 137 Ariz. 523, 526, 672 P.2d 188, 191 (App. 1983) ("Since the instruction was incorrect because of its inapplicability to the factual posture of the case, the trial court did not err in refusing to give it.").

¶32 Furthermore, instructing a jury that an accomplice's testimony should be viewed with "distrust" or "great caution" is an impermissible comment on the evidence. *See State v. Bussdieker*, 127 Ariz. 339, 342, 621 P.2d 26, 29 (1980). Thus, the trial court properly refused to instruct the jury that McKoy's testimony should be examined "with

greater caution than that of other witnesses." *See id.*; *see also State v. Gretzler*, 126 Ariz. 60, 89, 612 P.2d 1023, 1052 (1980).

¶33 Finally, the trial court properly instructed the jury as to witness credibility. The jury was instructed that when evaluating testimony, it should consider "whether the witness had any motive, bias, or prejudice." Davis also had the opportunity to cross-examine McKoy about his possible motives, biases, or prejudices and to argue during closing about how those might have affected his credibility. For the foregoing reasons, the trial court did not err in refusing Davis's requested instruction.

Disposition

¶34 For the reasons stated above, Davis's convictions and sentences are affirmed.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge