IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MARK ANGEL MARRERO JR.,
Appellant.

No. 2 CA-CR 2015-0199
Filed April 19, 2017

Appeal from the Superior Court in Pima County
No. CR20141507001
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Vanessa C. Moss, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Howard and Judge Vásquez concurred.

E C K E R S T R O M, Chief Judge:

¶1 Mark Marrero appeals from his multiple convictions and sentences related to two residential robberies. On appeal, he asserts the trial court erred in not suppressing certain evidence, excluding third-party culpability evidence, denying his motion to vacate judgment, sentencing him to consecutive terms, and requiring him to register as a sex offender. For the following reasons, we affirm his convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the convictions. *State v. Boozer*, 221 Ariz. 601, ¶ 2, 212 P.3d 939, 939 (App. 2009). On the night of March 19, 2014, H.T. woke up to the sound of "the footsteps of many people running toward the house saying they were police officers." He looked out his window and saw a vehicle that had "police type lights" that flashed "red and blue." Four or five men entered his home through the window and forced him and his wife at gunpoint to lie down on a bed. The intruders threatened several members of the family at gunpoint while taking money and documents. They then forced H.T. and everyone else in the house into the bathroom and told them that if they left, they would be shot.

¶3 On March 26, 2014, M.A. was returning home after picking up his children from school. As he walked into his yard, he saw "an unmarked police car with flashing lights." The men who got out of the car claimed to be "D.E.A." and stated that "there were drugs in the house." M.A. asked if they had a search warrant, and M.A.'s son began yelling at the men. At that point, one of the men drew a gun, pointed it at M.A.'s son, took M.A.'s keys, and entered the house. The intruders forced M.A.'s children on their knees in a

bedroom and pointed guns at them. The men took about $2,200, some "historic bills" that M.A. collected, jewelry, and two guns. As they were leaving, one of the men took M.A.'s daughter at gunpoint, told M.A. not to follow them, and went outside. M.A. found his daughter outside shortly after they left.

¶4 On March 29, 2014, an officer with the Tucson Police Department stopped Marrero's vehicle for a window tint violation. Marrero initially provided a false name and claimed to not have identification. Because there was no record of a driver's license under the name and date of birth Marrero provided, and Marrero claimed he did not have a driver's license, the officer decided to impound the car. The officer searched the car and found two handguns, one of which matched the gun stolen from M.A. in brand, color, and serial number. In a later interview with a detective, Marrero claimed to have information about "red and blue lights."

¶5 After a jury trial, Marrero was convicted of sixteen counts of kidnapping, six counts of armed robbery, six counts of aggravated robbery, eight counts of aggravated assault, seven counts of aggravated assault of a minor under fifteen, two counts of burglary, and two counts of impersonating a peace officer. He was sentenced to a combination of concurrent and consecutive prison terms totaling 269.5 years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Suppression Issues

¶6 We review a trial court's decision on a motion to suppress evidence for an abuse of discretion, but review constitutional issues de novo. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). In our review, we consider only the evidence introduced at the suppression hearing, and we view that evidence in the light most favorable to upholding the trial court's ruling. *Id.*

Traffic Stop

¶7 Marrero claims there was no reasonable suspicion to conduct a traffic stop because the officer who conducted the stop did

not have sufficient knowledge to properly assess the level of window tint. He claims the officer who conducted the stop "admitted to a complete absence of training in window tint assessment and violations."

¶8 The record belies this assertion. The officer testified that, "in the course of [his] training, [he was] taught about Arizona laws regarding tinting on vehicles" and "[was] taught what kind of tinting is allowed and what kind is not allowed." He also testified that, in his experience, "[i]f you drive down the street and you look into a vehicle and you can't see who's driving, it's a cue that the tint's too dark." *See State v. Teagle*, 217 Ariz. 17, ¶ 26, 170 P.3d 266, 273 (App. 2007) (in assessing reasonable suspicion, court may consider officer's experience).

¶9 Marrero also questions the officer's methods for assessing the window tint, claiming he "used his own personal subjective standards." In *State v. Moreno*, this court noted that "[s]ubjectivity may often factor into establishing reasonable suspicion that a window is too dark." 236 Ariz. 347, ¶ 15, 340 P.3d 426, 432 (App. 2014). The fact that an officer used subjective methods for determining window tint does not render a stop based on illegal window tint unreasonable. *Id.*[1]

Vehicle Search

¶10 Marrero next claims the inventory search of his vehicle was improper because it failed to comport with police department procedures. After the officer pulled over Marrero's vehicle, he learned that Marrero did not have a valid driver's license. The officer decided to impound the vehicle and began an inventory search. However, as he began his search, he noticed "a small amount of what appeared to be loose marijuana" on the driver's

[1]To the extent Marrero is claiming the trial court erred in finding the officer to be a credible witness, that is a question for the trial court. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995) ("The finder-of-fact, not the appellate court . . . determines the credibility of witnesses.").

seat. At that point, the officer had probable cause to search the vehicle because evidence of a crime was in plain view. *See State v. Kelly*, 130 Ariz. 375, 378, 636 P.2d 153, 156 (App. 1981) ("A police officer is not required to close his eyes to evidence which is in plain view."); *see also State v. Reyna*, 205 Ariz. 374, ¶ 1, 71 P.3d 366, 366 (App. 2003) (police may search automobile "if probable cause exists to believe that the vehicle contains contraband").

¶11 Marrero asserts the search was nonetheless invalid because it was "the direct fruit of the illegal 'inventory search.'" Marrero's claim that the inventory search was invalid rests on the fact that the officer did not "fill out a specific vehicle inventory form." But Marrero has not pointed to anything in the record demonstrating that an officer is required to fill out this form before beginning an inventory search. Nor does the record demonstrate that, if the marijuana had not been found, the officer would not have filled out the form after completing his inventory search, thus making the inventory search valid. Accordingly, we cannot say that the search pursuant to probable cause was the fruit of an invalid search.

Warrant

¶12 Marrero claims the warrant that authorized seizure of his cell phone records was improper because the officer seeking the warrant "created his own form citing to a federal statute." As the state has noted, there is no authority for the proposition that a specific form must be used in seeking a warrant. We conclude the trial court did not err in denying Marrero's motion to suppress on this ground.[2]

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[2]In his reply brief, Marrero states for the first time that his claim is based on the fact that 18 U.S.C. § 2703, which the officer cited in the warrant form submitted for the court's signature, conflicts with Arizona law, as well as the United States Constitution. "We may disregard arguments raised for the first time in an appellant's reply brief." *State v. Shipman*, 208 Ariz. 474, n.2, 94 P.3d 1169, 1170 n.2 (App. 2004). Marrero also attempts to incorporate by reference the arguments he raised in his motion to the trial court,

Marrero's Statements

¶13 Marrero claims the trial court erred in denying his motion to suppress certain statements because those statements were obtained in violation of his right to counsel. He argues that, while he was interrogated, he made multiple requests for an attorney, but the detective conducting the interrogation ignored his requests and continued to question him.

¶14 "If a suspect requests counsel, 'the interrogation must cease until an attorney is present,' [h]owever, 'law enforcement officers may continue questioning until and unless the suspect *clearly* requests an attorney.'" *State v. Ellison*, 213 Ariz. 116, ¶ 26, 140 P.3d 899, 910 (2006), *quoting Miranda v. Arizona*, 384 U.S. 436, 474 (1966), *and Davis v. United States*, 512 U.S. 452, 461 (1994) (emphasis in *Ellison*).

¶15 Here, the detective informed Marrero that he would be seeking a warrant for Marrero's DNA.[3] Marrero responded that he "would have to ask [his] lawyer [a]bout that." As the detective further discussed the issue of a DNA test with Marrero, Marrero said, "I'm not because I don't have legal assistances to be able to be with me." Marrero then asserted, "I've had lawyers and I know that you guys ain't allowed to get a DNA test from me unless I have a lawyer present." None of these statements constituted an unequivocal request for counsel as a condition of further questioning. *See State v. Spears*, 184 Ariz. 277, 286, 908 P.2d 1062, 1071 (1996) ("You want to arrest me for stealing a car, then let me call a lawyer" did not constitute clear request for counsel).

¶16 Marrero later stated, "And I know that you get me a lawyer I'll tell you everything I know but I'm not gonna do that until I have a lawyer and my information is . . . red and blue lights." Even assuming that the first part of this statement was a clear request for counsel, *see State v. Finehout*, 136 Ariz. 226, 230, 665 P.2d 570, 574

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which is not permitted in this court. *See State v. West*, 238 Ariz. 482, n.10, 362 P.3d 1049, 1064 n.10 (App. 2015).

[3]Deoxyribonucleic acid.

(1983), the detective did not ask Marrero any questions in between the first part and the second part of the statement. The detective merely said "okay." Accordingly, the trial court did not err in ruling that Marrero's statement about red and blue lights was admissible. *Cf. State v. Jones*, 203 Ariz. 1, ¶ 9, 49 P.3d 273, 277 (2002) ("if the suspect reinitiates contact with the police, he waives his rights and questioning can continue").

Third-Party Culpability Evidence

¶17 Marrero next claims the trial court erred in refusing to admit photographs of C.D., a third party he claimed had actually committed the robberies. As Marrero acknowledges, the court's ruling was based on the fact that Marrero did not disclose the photographs until the first day of trial. A trial court has broad discretion in imposing disclosure sanctions, and we will not disturb its ruling absent an abuse of discretion. *State ex rel. Thomas v. Newell*, 221 Ariz. 112, ¶ 6, 210 P.3d 1283, 1285 (App. 2009). A court has not abused its discretion unless "no reasonable judge would have reached the same result under the circumstances." *State v. Naranjo*, 234 Ariz. 233, ¶ 29, 321 P.3d 398, 407 (2014), *quoting State v. Armstrong*, 208 Ariz. 345, ¶ 40, 93 P.3d 1061, 1070 (2004). In his opening brief, Marrero has not presented any meaningful argument that the court abused its discretion in excluding the photographs as a sanction for late disclosure, and he has therefore waived this argument. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) ("Merely mentioning an argument is not enough: 'In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised.'"), *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

¶18 Marrero also claims the trial court erred in allowing a detective to testify, over his hearsay objection, that he had learned from a telephone conversation with a jail staff member that C.D. was in custody on the date of one of the robberies. We review a trial court's ruling on a hearsay objection for an abuse of discretion. *State v. Chavez*, 225 Ariz. 442, ¶ 5, 239 P.3d 761, 762 (App. 2010).

¶19 Statements that are not offered to prove the truth of the matter asserted are not hearsay. *Id.* ¶ 7. Here, the trial court found the testimony was admissible to show its effect on the listener; it showed why the detective did not further investigate C.D. Our supreme court has stated that testimony to show why police officers acted in a given way is only admissible as non-hearsay if the officer's conduct is at issue. *See State v. Romanosky*, 162 Ariz. 217, 221-22, 782 P.2d 693, 697-98 (1989). Here, a detective testified that two of the witnesses to the robberies had said the perpetrator "looked like [C.D.]." The detective's conduct in not investigating C.D. was therefore placed at issue, and the testimony was not hearsay. *See State v. Rivers*, 190 Ariz. 56, 60, 945 P.2d 367, 371 (App. 1997).[4]

Statements by S.R.

¶20 Marrero next contends the trial court erred in excluding as hearsay certain statements made by S.R., a passenger in the car at the time Marrero was stopped. Even assuming arguendo the court erred in excluding these statements, any error was harmless because overwhelming evidence supported Marrero's convictions. *See State v. Leteve*, 237 Ariz. 516, ¶ 30, 354 P.3d 393, 403 (2015). Marrero possessed information about the home invasions that law enforcement officers had not given him, namely, that the robbers had used imitation police lights. Data from Marrero's cell phone suggested that he had been in the vicinity of the homes at the times of the robberies. Witnesses reported that one of the robbers had a diamond piercing on his cheek, and Marrero had such a piercing. Finally, officers found an item of property taken during one of the robberies in the car Marrero had been driving. Accordingly, we

[4] Marrero notes that he objected at trial based on his Confrontation Clause rights and refers to this statement as "unconfronted." Marrero also claims the trial court's denial of his request to admit documents showing that C.D. was on work furlough on the dates of the robberies was "damaging legal error." He has not made any substantive argument as to either of these claims, and we therefore deem them waived. *See Moody*, 208 Ariz. 424, n.9, 94 P.3d at 1147 n.9.

conclude any error in the exclusion of S.R.'s statements was harmless.

Consecutive Sentences

¶21 Marrero argues the trial court erred in sentencing him pursuant to A.R.S. § 13-705, the dangerous crimes against children (DCAC) statute, because his conduct did not "target" a minor under *State v. Sepahi*, 206 Ariz. 321, ¶¶ 15-19, 78 P.3d 732, 735 (2003). Marrero also claims the sentence was illegal because the jury was required to find that his conduct targeted a child under *Blakely v. Washington*, 542 U.S. 296 (2004).

¶22 In *Sepahi*, our supreme court stated that the DCAC statute applies if a person commits one of the statutorily enumerated crimes and "his conduct was 'focused on, directed against, aimed at, or target[ed] a victim under the age of fifteen.'" 206 Ariz. 321, ¶ 19, 78 P.3d at 735, *quoting State v. Williams*, 175 Ariz. 98, 103, 854 P.2d 131, 136 (1993) (alteration in *Sepahi*). A person whose conduct "create[s] a risk to everyone around him" and happens by unfortunate chance to harm a child is not subject to the DCAC sentence enhancement. *Williams*, 175 Ariz. at 100, 103, 854 P.2d at 133, 136. Unlike the defendant in *Williams*, who was convicted of aggravated assault with a reckless mindset, Marrero was convicted of kidnapping, which requires that a defendant "knowingly" acts against a victim, *see* A.R.S. § 13-1304(A), and aggravated assault with either an intentional or knowing mindset, *see* A.R.S. §§ 13-1203(A)(2), (3), 13-1204(A)(2).[5] Thus, Marrero's conduct in each of these aggravated assault counts was necessarily, specifically directed against a person who was a child under the age of fifteen, and the jury inherently made that determination in reaching guilty

[5] Although the indictment did not specify which predicate assaults were the bases for the aggravated assault charges, Marrero did not physically injure any of the child victims. Consequently, the guilty verdicts could only have been based on his having "[i]ntentionally plac[ed] another person in reasonable apprehension of imminent physical injury" or "[k]nowingly touch[ed] another person with the intent to injure, insult or provoke such person."

verdicts on these charges. *See Sepahi*, 206 Ariz. 321, ¶¶ 12-13, 78 P.3d at 734; *State v. Fernandez*, 216 Ariz. 545, ¶ 27, 169 P.3d 641, 649 (App. 2007) (jury finding that defendant targeted children was "inherent" in guilty verdict for "intentional" attempted murder).

Sex-Offender Registration

¶23 Marrero contends, as he did below, that the trial court erred in requiring him to register as a sex offender because "no sex offenses were charged or alleged." He claims that, although the plain language of the statute applies to him, requiring him to register violates the purpose of the law. We review issues of statutory interpretation de novo. *See State v. Skiba*, 199 Ariz. 539, ¶ 7, 19 P.3d 1255, 1256 (App. 2001).

¶24 Contrary to Marrero's position, in *State v. Coleman*, 241 Ariz. 190, ¶¶ 11, 18, 385 P.3d 420, 423, 425 (App. 2016), this court concluded that A.R.S. § 13-3821(A) requires registration for kidnapping a minor by a non-parent and does not require any showing of sexual motivation. The trial court did not err in ordering Marrero to register.

Motion to Vacate Judgment

¶25 Marrero asserts the trial court erred in denying his motion to vacate judgment pursuant to Rule 24.2, Ariz. R. Crim. P. "We review a trial court's denial of a motion to vacate judgment for abuse of discretion." *State v. Parker*, 231 Ariz. 391, ¶ 78, 296 P.3d 54, 71 (2013).

¶26 Marrero claims, as he did below, that, under Rule 24.2, Ariz. R. Crim. P., "newly discovered material facts exist" and that the state's failure to disclose this evidence constitutes a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Rule 24.2 applies the standards of Rule 32.1, Ariz. R. Crim. P., to define what constitutes newly discovered evidence. To establish a claim of newly discovered evidence, a defendant must demonstrate that the evidence is material, that it was discovered after trial, that the defendant exercised due diligence in discovering material facts, that the evidence is not merely impeachment, unless it would seriously

undermine critical testimony, and that the new evidence would probably change the verdict or sentence if introduced in a new trial. *State v. Orantez*, 183 Ariz. 218, 221, 902 P.2d 824, 827 (1995); *see also* Ariz. R. Crim. P. 32.1(e).

¶27 Marrero's first claim of newly discovered evidence concerns information about a detective who testified at trial about how he had tracked Marrero's movements through his cell phone. At trial, the detective testified that he had "over about 300 hours of training in the area of cell phones," including training "hosted by ATF . . . FBI . . . [and] Homeland Security." Marrero contends this testimony was false and that the falsity of the testimony was exculpatory information the state had a duty to disclose. Marrero's second claim is that the officer who conducted the traffic stop based on a window tint violation had an illegally high level of tint on his own windows, which would have affected the officer's ability to evaluate the level of window tint on Marrero's vehicle. As to both of these contentions, Marrero has failed to address the trial court's conclusion that these facts could have been discovered with due diligence, and he has therefore waived the issue.[6] *See Moody*, 208 Ariz. 424, n.9, 94 P.3d at 1147 n.9.

¶28 Marrero's third and final claim of newly discovered evidence concerns testimony offered in a grand jury proceeding of one of his codefendants. In the codefendant's case, the detective, who also testified in Marrero's case, inaccurately testified to the grand jury that a house where officers found stolen property belonged to the codefendant, when the house actually belonged to the codefendant's mother and the codefendant did not live there. The case was remanded to the grand jury. Marrero, citing to *Milke v. Ryan*, 711 F.3d 998, 1003 (9th Cir. 2013), argues that this was impeachment evidence that the state had an obligation to disclose. However, in that case, the officer in question was found to have "committed misconduct," "lied to a grand jury or a judge," and "violated suspects' *Miranda* and other constitutional rights during

[6]Marrero attempts to challenge this conclusion in his reply brief, but that is too late. *See Shipman*, 208 Ariz. 474, n.2, 94 P.3d at 1170 n.2.

interrogations, often egregiously." *Id.* at 1004. In contrast, here, while a court found that the detective's testimony was "inaccurate," there was no finding of deliberate falsehood or misconduct. Moreover, the inaccurate testimony was completely unrelated to Marrero himself. Accordingly, Marrero has not demonstrated that this information was material to his case. *See* Ariz. R. Crim. P. 24.2(a)(2), 32.1(e); *Orantez*, 183 Ariz. at 221, 902 P.2d at 827.

Disposition

¶29 For the foregoing reasons, Marrero's convictions and sentences are affirmed.