IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GERALD RODRIGUEZ DURAN,
Appellant.

No. 2 CA-CR 2016-0318
Filed December 11, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20143084001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Robert A. Kerry, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

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

¶1 Gerald Duran appeals from his convictions and sentences for aggravated assault, armed robbery, kidnapping, and two counts of sexual assault.[1] On appeal, he raises multiple issues of trial error. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In April 2014, M.C. was working a night shift at her job as a custodian. While she was outside the building, getting her access card to go inside, she felt a gun at her head and saw the reflection of a person in the glass door. Her assailant grabbed her and told her to walk, holding the gun pointed at her head. He took her cell phone. She walked across the street, into a dark area near some bushes, and as she was walking, the man said that he was going to kill her. He forced her to perform oral sex on him, then put his penis into her vagina. M.C. ran away, found a security guard, and asked for help. Tucson police officers arrived and took M.C. for a medical examination.

¶3 Around the time of M.C.'s attack, law enforcement was also investigating an attack on a woman named R.K. R.K. had met her attacker previously and had given him her cell phone number. He called her and arranged to meet. When they met, the man held her at knifepoint and touched her breasts and vagina over her clothing. Officers obtained the phone records for the number used to call R.K. and connected that number with Duran. They obtained a search warrant for Duran's DNA.[2] That DNA was later connected to DNA collected from M.C. after she was attacked.

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[1] Duran was also convicted in this case number of attempted aggravated assault and attempted sexual assault. Those convictions were entered pursuant to a plea agreement and are not at issue in this appeal.

[2] Deoxyribonucleic acid.

¶4 Duran was convicted as described above and sentenced to a combination of concurrent and consecutive enhanced, maximum, prison terms totaling sixty-three years. This appeal followed.

Suppression

¶5 Duran raises multiple issues related to his motion to suppress evidence. We review a trial court's ruling on a motion to suppress for an abuse of discretion, but we review the court's legal conclusions de novo. *See State v. Peterson*, 228 Ariz. 405, ¶ 6 (App. 2011). In our review, we look only to the evidence introduced at the suppression hearing, which we view in the light most favorable to upholding the trial court's ruling. *State v. Gay*, 214 Ariz. 214, ¶ 4 (App. 2007).

Search Warrant Issues

¶6 Duran challenges the warrant that authorized the search of his home on several grounds. We address each of his arguments below.

Warrant Affidavit

¶7 Duran first claims the warrant was obtained pursuant to a defective affidavit. If a warrant is obtained through the knowing, intentional, or reckless assertion of false statements, and the false statements are necessary to the finding of probable cause, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *State v. Buccini*, 167 Ariz. 550, 554 (1991), *quoting Franks v. Delaware*, 458 U.S. 154, 156 (1978). We will uphold the trial court's determination on whether "the affiant deliberately . . . excluded material facts" unless it is clearly erroneous. *Id.*

¶8 Duran claims the police detective omitted certain facts from the affidavit that supported the requested warrant. "The evidence seized by reason of a warrant will be deemed inadmissible if the defendant can show by a preponderance of the evidence that . . . the affiant made a false statement which was knowingly or intentionally false or which was made in reckless disregard for the truth." *State v. Carter*, 145 Ariz. 101, 108 (1985). Omissions or misstatements that occur due to mere negligence will not invalidate a search warrant. *Id.* at 109. An omission is not material unless the omitted fact would change a reasonable magistrate's determination that probable cause exists. *Buccini*, 167 Ariz. at 557-58.

¶9 In the affidavit, the detective included a report from a witness, R.K., who claimed a man matching Duran's description had held her at knifepoint and groped her over her clothing. Duran asserts the detective omitted the fact "that police reports contained notations that R[.]K[.] was not reliable and that she was 'continuously changing her story.'" However, in support of this assertion, Duran cites to a single statement by one witness concerning R.K.'s reliability. And, although Duran included an excerpt from the police report containing that statement in his motion to suppress below, he did not actually attach that police report to his motion. Nor has this court found the report cited by Duran at any other place within the record on the motion to suppress. The lack of the report provides no context for this statement—whether the witness who claimed R.K. was changing her story was found credible, what relationship this witness had to R.K., or any details about how R.K. might have changed her story. We therefore conclude Duran has not met his burden of showing the omission was material or that the detective acted with reckless disregard for the truth.

¶10 Duran next claims the affidavit left out his own statement that "he interacted with R[.]K[.] but asserted i[t] was a failed sex-for-pay encounter." The affidavit, however, does include Duran's statement, and this claim has no factual support in the record. Likewise, Duran's claim that "[t]he application for search warrant . . . impl[ied] that his alleged contact with R[.]K[.] left DNA to be examined" is unsupported by the record. In fact, the affidavit did not rely solely on the incident with R.K., but noted that there were several victims of sexual assault in the area where Duran lived, some of whom had undergone forensic medical examination.

¶11 Lastly, Duran claims the detective misled the trial court by stating several sexual assaults that had occurred in Duran's neighborhood were committed by a suspect "with similar physical suspect description" as the description R.K. had provided of her assailant. Although the descriptions given by all four victims were not precisely the same, there were some common characteristics. The victims all gave an estimation of their attacker's height that was fairly short, ranging from five feet, two inches to five feet, seven inches tall. Those victims who described their assailant's weight or body type all said he was thin. Three out of the four victims stated the perpetrator was a Mexican or Hispanic man. Three of the victims said the man was wearing a hat; two victims stated the hat was red, and two of them said he was wearing a baseball cap. Although there were dissimilarities among the descriptions provided by the victims, the term "similar" does not mean "exactly the same." Because there were sufficient similarities between the descriptions given by the victims to justify the use of the term "similar," we do not believe Duran has met his burden of

showing the detective omitted information intentionally or with reckless disregard for the truth. *See Carter*, 145 Ariz. at 108.

¶12 Duran also claims he was entitled to a hearing under *Franks*, 438 U.S. 154, to determine whether the officer who applied for the warrant deliberately or recklessly omitted information from the affidavit. "[A] defendant is entitled to a hearing to challenge a search warrant affidavit when he makes a substantial preliminary showing . . . that the affiant knowingly, intentionally, or with reckless disregard for the truth included a false statement in the supporting affidavit." *Frimmel v. Sanders*, 236 Ariz. 232, ¶ 27 (App. 2014). For the reasons discussed above, Duran has not made such a showing. We accordingly conclude the trial court did not err in denying his request for a *Franks* hearing.

Cell Phone Data

¶13 Duran next claims the warrant was invalid because its issuance was based, in part, on illegally obtained data from his cell phone. He also separately asserts the trial court erred in denying his motion to suppress evidence obtained from his cell phone records.

¶14 Duran argues the evidence was obtained in violation of A.R.S. § 13-4071 and the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, A.R.S. §§ 13-4091 to 13-4096, as well as the Fourth Amendment. As to his statutory challenges, neither § 13-4071 nor the Act prescribes suppression or exclusion of evidence as a remedy for a violation. *See United States v. Forrester*, 512 F.3d 500, 512 (9th Cir. 2008) ("[S]uppression is a disfavored remedy, imposed only . . . (outside the constitutional context) where it is clearly contemplated by the relevant statute."); *cf. State v. Foncette*, 238 Ariz. 42, ¶ 25 (App. 2015) (suppression not required for violation of nighttime search statute). Duran cites to A.R.S. § 44-1376.01, which states that "[a] person shall not . . . knowingly procure . . . a telephone record or communication service record . . . by fraudulent, deceptive or false means" and provides that "personal information that is contained in a telephone record . . . that is obtained in violation of this article is inadmissible as evidence in any judicial . . . proceeding," claiming this statute provides for a remedy of suppression. A.R.S. § 44-1376.02, however, specifically exempts "action[s] by a law enforcement agency or any officer . . . in connection with the performance of the official duties of the agency" from the reach of the article. The exclusionary provision of § 44-1376.01, therefore, does not apply. Because there is no statutory suppression remedy for violations, even assuming arguendo that the state committed

any violation in securing the telephone records, suppression was not required.

¶15 As to Duran's Fourth Amendment claim, the United States Supreme Court has concluded that a person has no legitimate expectation of privacy in the telephone numbers that person dials. *See Smith v. Maryland*, 442 U.S. 735, 742 (1979). Duran cites *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473 (2014), in support of his position that a warrant was required to obtain his cell phone records, but in that case, law enforcement officers physically searched the defendant's actual cell phone. *Id.* at ___, 134 S. Ct. at 2480. Here, officers simply obtained the call records of Duran's phone,[3] for which there is no expectation of privacy and therefore no Fourth Amendment protection.

Breadth of Warrant

¶16 Duran's final claim regarding the search warrant is that it was overly broad. He claims the provision allowing officers to search for clothing was overbroad because it did not describe the "size [or] color" of clothing sought, and contends the warrant description "all hats" was not sufficiently particular. His claim is factually inaccurate. The warrant actually allowed the seizure of "[c]lothing—black pants, Nike tennis shoes, grey or white sweater or hoodie, all baseball caps," which clearly described the color of the pants and sweater that were being sought, and the brand of tennis shoes. Even assuming arguendo that "all hats" would have been too broad a description, the warrant actually specified "all baseball caps." The description of the clothing sought was clearly "of sufficient particularity to enable a searching officer to ascertain the . . . property to be seized." *State v. Ault*, 150 Ariz. 459, 466 (1986).

¶17 Duran also challenges the categories "[i]ndicia of occupancy," "[k]nives, firearms or simulated firearms," and a category allowing officers to search his cell phone for images, videos, audio recordings, messages, and call history. Even assuming arguendo that these categories were impermissibly broad, "'invalid portions of a warrant may be stricken and the remaining portions held valid' so that 'seizures pursuant to the valid

[3]The subscriber on the cell phone in question was actually Duran's neighbor, W.M. W.M. gave the phone to Duran and his girlfriend. We assume arguendo that this was sufficient for Duran to assert a privacy interest in the phone.

portions will be sustained.'" *State v. Roark*, 198 Ariz. 550, ¶ 9 (App. 2000), *quoting United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1986).

¶18 The state asserts that no evidence obtained pursuant to these categories was actually admitted at trial. In his reply brief, Duran does not dispute this assertion, but suggests this court must remand this matter to the trial court to determine if the purportedly improper categories of the warrant are severable. Duran, however, has not pointed to any additional fact-finding that would be necessary for the trial court, nor has he provided any basis for finding that these parts of the warrant were not severable. *See id.* ¶¶ 10-13. We therefore determine that even if these parts of the warrant were invalid, no error resulted because the only evidence actually admitted at trial was obtained pursuant to a valid part of the warrant.

Warrantless Arrest

¶19 In his final issue concerning suppression, Duran claims the trial court erred when it denied his motion to suppress based on his arrest inside his home without a warrant. But even if he was subject to an illegal arrest, no fruits of that arrest were actually introduced at trial. Duran cites his statements, his DNA, and his clothing as fruits of this arrest, but his statements were not introduced at trial, and his DNA and clothing were obtained pursuant to a warrant, which, as discussed above, was valid at least as to those items.

Hearsay

¶20 Duran argues that certain statements made by M.C. should have been excluded as hearsay because they were not made for the purpose of medical diagnosis and treatment. The statements Duran takes issue with include her statement to the nurse performing her forensic examination that her assailant "had a gun," that "[h]e told her not to scream or that he would kill her," that "the gun was pointed" at her forehead, and "[s]he said she told him she had a daughter and to leave her alone and then he told her to run." This court has noted that "health care providers examining one claiming to be the victim of a sexual assault must [also] diagnose whether or not the alleged victim has suffered psychological trauma and, if so, its nature and extent, and treat that as well." *State v. Lopez*, 217 Ariz. 433, ¶ 10 (App. 2008), *quoting State v. Janda*, 397 N.W.2d 59, 63 (N.D. 1986) (alteration in *Lopez*). The statements cited by Duran were clearly related to assessing M.C.'s psychological trauma, and the trial court therefore did not err in ruling these statements were admissible under this hearsay exception.

Evidence of Victim's Motive

¶21 Duran argues the trial court erred in excluding evidence of M.C.'s "victim's compensation."[4] Duran also claims he was denied his right to cross-examine M.C. because he was not permitted to ask her about payment she had received from the victims' compensation fund. M.C. received money from the fund, essentially conditioned on her cooperation with law enforcement officers, prosecutors, or criminal justice agencies. She was informed that if she was later found not to be eligible, she could be required to repay the victims' compensation fund. Duran suggests that M.C. might have chosen to "stick closely to the story she first told police" in order to avoid the potential consequence of forfeiting funds she had received. He claims M.C. might have changed her description of her assailant were she not afraid of losing the money.

¶22 Duran argues the evidence could have cast doubt on M.C.'s description of the perpetrator as looking similar to Duran. But given the strength of the DNA evidence identifying Duran as the perpetrator, any error that occurred in the exclusion of the evidence was harmless. *See State v. Dixon*, 226 Ariz. 545, ¶ 32 (2011).

DNA Evidence

¶23 Finally, Duran claims the trial court erred in denying his motion to preclude testimony about "random match probability" with respect to DNA testing, and in denying his motion for mistrial based on the prosecutor's reference to that evidence in her opening statement.

¶24 Duran challenges the court's denial of his motion to preclude expert testimony regarding the frequency that a DNA profile will occur within a given population, noting that that frequency is assessed based on a "theoretical," rather than a "real world" population. The state's expert testified that "[t]he frequency of occurrence for this DNA profile among unrelated individuals in the US population is estimated to be one in 430 quintillion Caucasians, one i[n] 1.7 sextillion African Americans, and one in 200 quintillion Southwestern Hispanics." This type of calculation is known

[4] In his opening brief, Duran also complains that the trial court excluded evidence of M.C.'s application for a U-Visa, but in his reply brief, he concedes that evidence was properly excluded. Likewise, although he initially asserted it was error for evidence that M.C. had received workers' compensation benefits to have been excluded, he concedes in his reply brief that the issue is waived.

as random match probability, and the United States Supreme Court has noted that "[t]he prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample," but did not conclude that such testimony was inadmissible. *McDaniel v. Brown*, 558 U.S. 120, 128, 132 (2010). We likewise conclude that any flaws present in the testimony here went to the weight, rather than the admissibility, of this evidence. *Cf. State ex rel. Montgomery v. Miller*, 234 Ariz. 289, ¶ 33 (App. 2014) ("[F]laws in a methodology 'uncovered by peer review do not necessarily equate to a lack of scientific validity,' and may be relevant to 'the weight, not the admissibility, of the evidence.'"), *quoting United States v. Bonds*, 12 F.3d 540, 559 (6th Cir. 1993).[5] The trial court did not err in denying Duran's motion to preclude this testimony.

¶25 As to Duran's motion for mistrial based on the prosecutor's comments in her opening statement, "[a] declaration of a mistrial . . . is 'the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.'" *State v. Dann*, 205 Ariz. 557, ¶ 43 (2003), *quoting State v. Adamson*, 136 Ariz. 250, 262 (1983). Duran argues that the prosecutor's comments in her opening statement "impl[ied] that because the odds of the DNA being someone else's were tiny then the chances of the defendant being innocent were likewise tiny." As we have explained above, the testimony about the frequency of a DNA profile was admissible, and the prosecutor could properly comment on it in her opening statement. Moreover, the prosecutor did not refer to the statistical likelihood that the DNA in question came from Duran. She stated that the "DNA . . . matched or was consistent with Gerald Duran's DNA," and that the jury would hear "how [Duran's] DNA was found multiple places on [M.C.'s] body." The prosecutor's statement about the DNA matching was a layperson's description of what could be concluded from the DNA testing, and, as such, was "a fair statement of the evidence." *State v. Burruell*, 98 Ariz. 37, 40 (1965). Accordingly, it was not improper and the court did not err in denying Duran's motion for mistrial.

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[5]Duran has also argued that, pursuant to Rule 901, Ariz. R. Evid., "[t]he state did not provide foundation for the statistical data bases used as applied to the specific community in which [Duran] lived." The databases, however, were not admitted as substantive evidence, but were used as the basis for the expert's opinion.

Disposition

¶26 For the foregoing reasons, Duran's convictions and sentences are affirmed.