FILED BY CLERK
SEP -9 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS ARIEL ZACARIAS, Appellant.	2 CA-CR 2008-0187 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054212

Honorable Howard Hantman, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Appellant Jesus Zacarias appeals his convictions for armed robbery and aggravated robbery. He asserts there was insufficient evidence to support his convictions and that the trial court erred by permitting the victim to identify him at trial. He also contends the court erred by denying his motion to suppress evidence, contending a search warrant affidavit contained material misrepresentations and his motion to suppress the admission of an assault rifle into evidence arguing the rifle was irrelevant and unfairly prejudicial. Last, Zacarias asserts the court erred by precluding testimony from an expert on the reliability of eyewitness identifications. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Zacarias's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On September 22, 2005, A. was home with her three children when she heard a "crash" and went to investigate. At least four men, some wearing masks, came through her front door and yelled for her to get down. Two of the men did not have masks on, including Francisco Salomon, Zacarias's half-brother. Salomon pointed a black "machine gun" at A. The men repeatedly asked A. where "the safe" was, but A. did not have a safe. One of the men threatened to kill A.'s son. The men searched the house, and took a console game system and a shotgun before leaving.

¶3 As A. called police, she looked out her bedroom window and saw Zacarias sitting in the passenger seat of a car as it pulled out of her driveway and drove away. A. had

not seen Zacarias in her house. Police later found the car abandoned near the Santa Cruz river. They found and arrested five men who were running from the area, including Salomon and Zacarias. In the car, officers found a game console system of the same type as the one stolen from A.'s home as well as gloves and a mask. Another mask was found nearby.

¶4 A grand jury charged Zacarias with armed robbery, aggravated robbery, first-degree burglary, three counts of aggravated assault, and three counts of kidnapping. After a nine-day trial, the jury found Zacarias guilty of both robbery charges, but acquitted him of the burglary, kidnapping, and aggravated assault charges. The trial court sentenced Zacarias to concurrent, presumptive terms of imprisonment, the longer of which was 10.5 years. This appeal followed.

Discussion

Sufficiency of the Evidence

¶5 Zacarias first contends the trial court erred in denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. We will not disturb a trial court's ruling on a Rule 20 motion absent an abuse of discretion. *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). A motion for judgment of acquittal should only be granted when there is no substantial evidence proving the elements of the offense. Ariz. R. Crim. P. 20(a). Only if there is a complete absence of probative facts to support a conviction will we reverse a trial court's denial of a motion for judgment of acquittal. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). In determining whether

there was sufficient evidence to withstand a Rule 20 motion, "we view the evidence in the light most favorable to sustaining the verdict." *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984). "[I]f reasonable minds can differ on inferences to be drawn [from the evidence], the case must be submitted to the jury . . . [and the] trial judge has no discretion to enter a judgment of acquittal." *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citation omitted).

¶6 Zacarias argues there was no evidence he "participated or acted as an accomplice to the crime[s]," only that "he was merely present in the vehicle used by others that committed th[ese] crime[s]." We agree with Zacarias there was no evidence he actually entered A.'s house. A person is liable for a crime as an accomplice if he or she "[a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense." A.R.S. §§ 13-301(2), 13-303(A)(3). There is ample evidence Zacarias was an accomplice to the robbery. First, although Zacarias's presence at the scene is, standing alone, insufficient to support a conviction, it is some circumstantial evidence he was an accomplice. *See State v. Beard*, 107 Ariz. 388, 391, 489 P.2d 25, 28 (1971). Additionally, "'companionship[] and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred.'" *Id.*, *quoting State v. Villegas*, 101 Ariz. 465, 468, 420 P.2d 940, 943 (1966).

¶7 Zacarias left A.'s house with Salomon and the others and abandoned the car, fleeing with Salomon—his half-brother. *See Villegas*, 101 Ariz. at 467, 420 P.2d at 942

(relationship with companions relevant to accomplice liability). "It is difficult to believe" four individuals "would plan a robbery and take along with them a[n additional person] who, being ignorant of their plans, might decide that he would oppose their criminal action or later inform against them." *Id*. at 468, 520 P.2d at 943. Finally, a pair of gloves and the game console system were found in the front passenger seat where A. had seen Zacarias. *See State v. Rivera*, 124 Ariz. 123, 124, 602 P.2d 504, 505 (App. 1979) (stolen money found underneath rear seat of automobile where defendant had been sitting evidence of accomplice liability).

¶8 Zacarias also suggests the jury "belie[ved] that he was merely present" due to a question it asked during its deliberations concerning whether robbery "require[d] that the individual charged had physical contact with the property taken . . . or be present when the property [was] removed." But the trial court correctly instructed the jury that Zacarias's mere presence at the scene was insufficient evidence of his guilt, and we presume the jury followed that instruction.[1] *See State v. Tucker*, 215 Ariz. 298, ¶ 89, 160 P.3d 177, 198

[1]In response to the jury's question, the trial court told it to rely on the instructions it had been provided. To the extent Zacarias suggests on appeal that this response was error, Zacarias agreed with that approach at trial. *See State v. Moody*, 208 Ariz. 424, ¶ 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.'"), *quoting State v. Endreson*, 109 Ariz. 117, 122, 506 P.2d 248, 253 (1973). Moreover, Zacarias does not develop this argument or cite any relevant authority. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief must contain legal arguments with supporting authority). Accordingly, Zacarias has waived this issue and we do not address it. *See State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (failure to develop argument results in waiver).

(2007). The jury's question does not suggest it believed Zacarias was merely present. At most, the question suggests the jury may have believed there was insufficient evidence Zacarias had entered the house. And we agree with the state that the jury's question does not necessarily refer to Zacarias. Accordingly, for the reasons stated, we conclude the court did not abuse its discretion in denying Zacarias's Rule 20 motion.

Identification Testimony

¶9 Before trial, Zacarias filed a "Motion to Preclude [A.'s] In Court Identification" of him, arguing any identification would be based on a suggestive pretrial identification and, therefore, would be unreliable. After a hearing held pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), the trial court denied Zacarias's motion. Zacarias contends the court erred in denying his motion. We review the court's decision for an abuse of discretion. *See State v. Moore*, ___ Ariz. ___, ¶ 17, 213 P.3d 150, 156 (2009). In reviewing the court's ruling, we consider only the evidence presented at the *Dessureault* hearing. *See Dessureault*, 104 Ariz. at 384, 453 P.2d at 955; *Moore*, ___ Ariz. ___, ¶¶ 17, 22, 213 P.3d at 156, 157.

¶10 At the *Dessureault* hearing, A. testified that on the afternoon of September 22, 2005, at least four men "burst into [her] house" with machine guns, yelled, told her to lie down on the floor, "ask[ed] questions on where the safe was and everything," and told her to "pass on a message." As the intruders were leaving the house, A. went to her bedroom window, from which she could see the intruders' car parked in her driveway, and called law

enforcement. A. testified that, while looking at the intruders' vehicle, she saw a man in the front passenger seat and "remember[ed] seeing his nose" and that "he had a big nose." Nonetheless, A. admitted she had not told law enforcement that "the passenger [she] had seen in the vehicle had a big nose." A. testified, however, that while she was on the telephone with law enforcement, "there was a whole lot of commotion going on," "there was a[ ]lot of chaos," and she "was scared" for herself and her children.

¶11 On the day of the robbery, A. went to the police station where officers showed her several suspects. Although Zacarias was among the suspects shown to A., she did not recognize him. Several months later, however, she attended a pretrial hearing at which Zacarias was present. When Zacarias came into the courtroom and spoke with his attorney, A. "kn[e]w he[was] involved in the case." She testified that, upon seeing Zacarias, it "came into [her] mind" during "a flashback of the incident" that he had been the passenger in the intruders' vehicle. At that moment, she "fe[lt] like [she] remember[ed] things more clearly . . . than [she] did right after the incident happened." She then told a county attorney she recognized Zacarias because she "remember[ed] his nose." A. again identified Zacarias at the *Dessurealt* hearing. After considering A.'s hearing testimony, the trial court denied Zacarias's motion to preclude her from identifying him at trial, finding her identification of him was reliable and not the result of a suggestive procedure.

¶12 When an in-court identification is challenged based on suggestive pretrial identification procedures, the trial court must conduct an evidentiary hearing to determine

whether the circumstances under which the identification was made were, in fact, unduly suggestive. *See Dessureault*, 104 Ariz. at 384, 453 P.2d at 955. Even when "a pretrial identification procedure is overly suggestive, however, [that] does not bar the admission of an identification." *State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002). Rather, an in-court identification is nonetheless admissible if it has not been tainted by the pretrial identification; that is, "if, in view of the totality of the circumstances, the in-court identification is reliable." *State v. Schilleman*, 125 Ariz. 294, 297, 609 P.2d 564, 567 (1980); *see Dessureault*, 104 Ariz. at 384, 453 P.2d at 955; *Moore*, ___ Ariz. ___, ¶ 16, 213 P.3d at 156. In determining whether an identification is reliable, we consider the following factors: (1) the witness's opportunity to see the criminal at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's description of the criminal; (4) the witness's level of certainty upon identifying the defendant; and (5) the time between the crime and the identification. *Moore*,___ Ariz. ___, ¶ 16, 213 P.3d at 156; *see also Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

¶13 Assuming, without deciding, that A.'s identification of Zacarias at the pretrial hearing was unduly suggestive, we cannot say the trial court erred in finding her identification nonetheless reliable. A. testified at the *Dessureault* hearing that she had seen the passenger of the intruders' vehicle at the time of the incident and looked at him while she was on the telephone with law enforcement as the intruders backed out of her driveway. Although A. admitted she had not described the passenger to law enforcement at that time,

she distinctly "remember[ed] seeing his [big] nose," a description Zacarias does not contend is inaccurate. The record is unclear regarding the date of the pretrial hearing at which A. first identified Zacarias, but it was less than a year after the home invasion and A. expressed no uncertainty in her identification.

¶14 Despite this testimony, Zacarias argues A.'s identification of him was unreliable because "[s]he [had] failed to identify [him] during a one-person show-up just after the incident." But a witness's "failure to identify [the defendant immediately following a crime] affect[s] the weight, rather than the admissibility, of her [subsequent] identification and [would be] appropriately the subject of cross-examination." *Moore*, ___ Ariz. ___, ¶ 29, 150 P.3d at 158; *see also State v. McCall*, 139 Ariz. 147, 155, 677 P.2d 920, 928 (1983) ("[A] witness'[s] previous inability to identify a defendant goes to the credibility of the witness, not the admissibility of subsequent identifications."); *State v. Myers*, 117 Ariz. 79, 84-85, 570 P.2d 1252, 1257-58 (1977) ("'[W]henever possible, the fact that witnesses were previously unable to identify a defendant should properly go to the credibility and not to the admissibility of subsequent positive in-court identifications.'"), *quoting People v. Belenor*, 246 N.W.2d 355, 357 (Mich. Ct. App. 1976). For the foregoing reasons, we cannot say the trial court abused its discretion in denying Zacarias's motion.

Search Warrant Affidavit

¶15 Zacarias next argues the trial court erred in denying his motion to suppress evidence seized in searches of two residences associated with him. He had asserted the

affidavit by Tucson Police Department detective Daniel Spencer and Marana Police Department detective Joshua Corn made in support of the search warrant contained false statements. After an evidentiary hearing held pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), the court concluded the detectives had not knowingly, intentionally, or recklessly made any false statements in the affidavit and, in any event, the affidavit was sufficient to support a finding of probable cause even when the purportedly false statements were not considered.

¶16 "We review the denial of a motion to suppress evidence for a clear abuse of discretion, viewing the evidence presented at the suppression hearing in the light most favorable to upholding the trial court's factual findings and reviewing its legal conclusions de novo." *State v. Esser*, 205 Ariz. 320, ¶ 3, 70 P.3d 449, 451 (App. 2003). Challenges to warrant affidavits generally involve a two-step process. *Franks*, 438 U.S. at 171-72; *see also State v. Buccini*, 167 Ariz. 550, 554, 810 P.2d 178, 182 (1991). First, the defendant must establish by a preponderance of the evidence "that the affiant knowingly, intentionally, or with reckless disregard for the truth included a false [material] statement in the affidavit." *Buccini*, 167 Ariz. at 554, 810 P.2d at 182. Then, if the court finds that the affiant made a false statement, the court may omit that statement and determine whether sufficient probable cause remains. *Id.* If the warrant application lacks probable cause after the improper statements are removed from consideration, all evidence seized under the warrant is excluded. *Id.*

¶17 "A trial court's finding on whether the affiant deliberately included misstatements of law or excluded material facts is a factual determination, upheld unless 'clearly erroneous.'" *Id.*, *quoting United States v. Fawole*, 785 F.2d 1141, 1145 (4th Cir. 1986). However, we review de novo a trial court's decision that a warrant affidavit is sufficient to find probable cause. *Buccini*, 167 Ariz. at 555, 810 P.2d at 183.

¶18 Zacarias asserts the detectives were aware that three statements in the warrant affidavit were false: (1) that two suspects had admitted guns were hidden near where Zacarias had been arrested; (2) that a suspect had admitted to stealing a shotgun from the victim's home; (3) and that Zacarias "was in possession of weapons" although he "was in fact in jail." At the suppression hearing, the detectives admitted that only one, not two, suspects had given statements and that the suspect had stated the guns had been "tossed," not "hidden," as the affidavit stated. Spencer testified he did not know why he had told the judge who issued the search warrant that two suspects had made statements, and that he could not recall whether anyone had told him two suspects had made statements.

¶19 Nothing in Spencer's or Corn's testimony suggests the assertion in the affidavit that two suspects instead of one had provided information about the weapons was anything other than an inadvertent misstatement. *See Franks*, 438 U.S. at 171 (allegations of negligence or innocent mistake insufficient). Nor does Zacarias explain how the inaccuracy was material to the determination of probable cause. The gravamen of that portion of Spencer's affidavit—that the suspects had abandoned weapons before being

arrested—remains unchanged regardless of whether one or two suspects had made the statement. *See Buccini*, 167 Ariz. at 554, 810 P.2d at 182; *see also United States v. Coleman*, 349 F.3d 1077, 1084 (8th Cir. 2003) ("A 'minor discrepancy' in the wording of an officer's statement is not sufficient under *Franks* to establish that the officer acted deliberately or recklessly in making the statement."), *quoting United States v. Frazier*, 280 F.3d 835, 846 (8th Cir. 2002). Nor is there any material difference between the statement in the warrant affidavit that the weapons had been "hidden" and the suspect's statement to police that the weapons had been "tossed in the desert near where they were arrested." Accordingly, we find no clear error in the trial court's finding these statements were not intentional, knowing, or reckless misrepresentations.

¶20 Regarding the second statement—that one of the suspects admitted to stealing a shotgun from the victim's house—the trial court did not err in finding that statement was not a material falsehood. Corn testified a suspect had informed police a gun had been taken from the house during the invasion and the victim had told them a shotgun had been stolen. Plainly, then, Corn could, and did, infer the gun to which the suspect had referred was that shotgun.[2] Thus, the statement was not materially false.

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[2]Admittedly, Spencer's and Corn's testimony regarding this statement was confusing. Contrary to the warrant affidavit, Spencer stated an informant, not a suspect, had given police that information. Corn initially stated the suspect had not said he had stolen the shotgun and that statement in the affidavit was a "mistake." But Corn later testified a suspect had told them that some of his accomplices had entered the victim's residence without guns and later

¶21 Nor did the court err in finding that Spencer's statement in the affidavit that Zacarias was in possession of items sought under the warrant was not a knowing, intentional, or reckless material falsehood. Spencer admitted Zacarias was in custody when he applied for the search warrant. But, read in context, the thrust of Spencer's statement was not that Zacarias was currently in physical possession of the items, but instead that Zacarias—along with several others—had previously "conceal[ed]" the items or "prevent[ed them] from being discovered." Accordingly, for the reasons stated, the court did not abuse its discretion in denying Zacarias's motion to suppress. *See Esser*, 205 Ariz. 320, ¶ 3, 70 P.3d at 451.

Admission of AK-47 Assault Rifle into Evidence

¶22 Zacarias contends the trial court erred in admitting evidence, over his objection, that investigating officers had found an AK-47 assault rifle during a search of a car on his parents' property. We review the court's decision for an abuse of discretion. *See State v. Chapple*, 135 Ariz. 281, 290, 660 P.2d 1208, 1217 (1983).

¶23 Zacarias first argues the trial court should not have admitted the gun into evidence because it was irrelevant. *See* Ariz. R. Evid. 401, 402. Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401; *see also* Ariz. R. Evid. 402 (irrelevant evidence inadmissible).

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emerged with a gun. In any event, whether an informant or a suspect had told police a shotgun had been stolen is of little consequence in determining whether there was sufficient probable cause to issue the search warrant.

Zacarias contends the gun evidence was not relevant because "the state had no evidence linking [it] to the crime." But Zacarias ignores the facts that the gun was found in a car associated with him and that A.'s son had testified before trial that the intruders were carrying guns, one of which looked like "a gun like the Army guys carry." Evidence of an AK-47 found on property associated with Zacarias makes it more probable Zacarias was involved in the home invasion and not merely present; therefore, the evidence was relevant. *See* Ariz. R. Evid. 401.

¶24 Nonetheless, Zacarias points out that neither A. nor her son had specified what type of gun the intruders had until A.'s son testified at trial they had an AK-47. Zacarias also asserts that although the state argued at trial that the AK-47 had mud on it, the state never "had the mud analyzed to determine if it was in fact mud from [the location at which Zacarias and several others were apprehended]." But Zacarias's concerns go to the weight of the evidence, not its admissibility. *See State v. Lacy*, 187 Ariz. 340, 349, 929 P.2d 1288, 1297 (1996) (lack of definite identification of footprint found at crime scene goes to weight of evidence, not admissibility).

¶25 Zacarias next contends the evidence was inadmissible because it was unduly prejudicial. *See* Ariz. R. Evid. 403. Relevant evidence is inadmissible if its probative value is substantially outweighed by its prejudicial effect. *See id.* Zacarias argues the gun evidence improperly allowed the jury to "associate [his] mere ownership of a firearm with

a disposition to [use] it." But, this assertion is premised on his previous argument that no evidence linked the gun to the charged offense, an argument we have already rejected.[3]

¶26 Zacarias further asserts that, because an AK-47 "is a military assault weapon that has a negative and scary connotation," its admission "allowed the jury to infer he was a bad person" and had committed the charged crimes. But, as we have noted, the evidence also allowed the jury to draw the permissible inference that the gun was the one the victims had identified as having been used during the home invasion. Therefore, it had substantial probative value on the issue of whether Zacarias was involved in the home invasion. And, although evidence of the AK-47 was certainly detrimental to Zacarias's defense, it did not "suggest [a] decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997); *cf. Onujiogu v. United States*, 817 F.2d 3, 6 (1st Cir. 1987) (all evidence against defendant meant to be prejudicial; Federal Rule of Evidence 403 designed to prevent only unfair prejudice). We will not disturb the trial court's weighing of the evidence's probative value against its prejudicial effect absent an abuse of discretion, and we find none here. *See State v. Fernane*, 185 Ariz. 222, 225, 914 P.2d 1314, 1317 (App. 1995).

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[3]In passing, Zacarias further contends that admission of evidence of his "mere ownership" of a firearm, "without a satisfactory evidentiary link" to the charged offense, "violates [his] and his family's right under the Arizona Constitution to bear arms." But, again, we have rejected Zacarias's contention that no evidence connected the gun to the charged offenses. We, therefore, do not address this argument further.

Preclusion of Expert Witness Testimony

¶27 Before trial, Zacarias's codefendant Salomon apparently disclosed, pursuant to Rule 15.2(b), (c), Ariz. R. Crim. P., his intent to call Dr. Linda Demaine to testify on his behalf regarding his pretrial identification by A. Salomon also filed an offer of proof detailing the content of Demaine's proposed testimony. *See* Ariz. R. Evid. 103(a)(2). According to Demaine's "Preliminary Report," she intended to testify A.'s pretrial identification of Salomon was unreliable because, inter alia, she was "hysterical" after the home invasion and "provid[ed] [law enforcement] no details regarding Mr. Salomon's face . . . that might have caused her to identify him at the show-up." As the state notes, and as the record shows, Zacarias never filed a disclosure stating his intent to call Demaine as a witness for his defense, filed an offer of proof showing the content of her proposed testimony on his behalf, or joined in Salomon's disclosure or offer of proof.

¶28 The state moved to preclude Demaine from testifying on Salomon's behalf, and Salomon alone replied to that motion. Several days later, Zacarias filed a "witness list" in which he listed the witnesses he intended to call at trial—the list did not include Demaine. Zacarias neither joined Salomon's response to the state's motion to preclude Demaine's testimony nor participated in arguments during a pretrial hearing on the state's motion. On the fourth and seventh days of trial, however, when the trial court again addressed the state's motion to preclude Demaine from testifying on Salomon's behalf and heard preliminary testimony by Demaine, Zacarias asked Demaine two general questions regarding the

"concepts" about which she planned to testify and asked the court to deny the state's motion, arguing the relevance of expert testimony regarding the reliability of eyewitness identification in general. The court granted the state's motion.

¶29 Zacarias contends the trial court erred in precluding Demaine from testifying on his behalf regarding the reliability of A.'s identification of him. But, as we have explained, despite making statements mid-trial regarding the admissibility of identification expert testimony in general, Zacarias never joined in Salomon's disclosure or otherwise clearly or timely informed the trial court or the state of his intent to call Demaine on his own behalf. Because Demaine's testimony was only offered and precluded with respect to Salomon, there is no evidentiary ruling relevant to Zacarias for us to review.

Disposition

¶30 We affirm Zacarias's convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge