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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THE STATE OF ARIZONA, Appellee, v. ARMANDO ESTRADA, III, Appellant.	2 CA-CR 2009-0246 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20074036

Honorable John S. Leonardo, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, Armando Estrada was convicted of first-degree murder, conspiracy, armed robbery, kidnapping, theft of a means of transportation, and theft by

control. He was sentenced to multiple terms of imprisonment, including two concurrent life sentences. On appeal, he raises a number of issues, none of which warrants reversal. We therefore affirm his convictions and sentences.

Factual and Procedural History

¶2 We view the facts in the light most favorable to upholding Estrada's convictions, drawing all reasonable inferences permitted by the evidence in favor of supporting the jury's verdicts.[1] *See State v. Pierce*, 223 Ariz. 570, n.2, 225 P.3d 1146, 1146 n.2. (App. 2010). In the spring of 2007, M. hired Estrada and his brother-in-law, Rosendo Valenzuela, to clean a property she owned outside Tucson. The two were dissatisfied with their pay and planned to kill her. In late May, they carried out this plan, beating M. in the face and chest with a concrete paving brick and placing her, still alive, in her own pickup truck. They drove her to a remote section of another property she owned and left her to die in the bathtub of an abandoned trailer. They then used her debit card to withdraw approximately $300 from her bank account. About two weeks later, Pima County Sheriff's deputies responded to a "check welfare" request to search for M. and found her decomposing body in the trailer. After several months, detectives interviewed Estrada, who confessed his involvement in M.'s death. He was arrested, tried, convicted, and sentenced as set forth above.

[1]Estrada's statement of facts skews the evidence in his favor and lacks a single citation to the record, in violation of Rule 31.13(c)(1)(iv), Ariz. R. Crim. P.. We caution counsel against taking such liberties in the future. *See* Ariz. R. Crim. P. 31.13(e) (court of appeals may strike briefs that do not conform to rules).

Discussion

Estrada's Confession

¶3 Estrada first contends the trial court erred when it denied his motion to suppress his confession as "not voluntarily and intelligently obtained" because he was unable to understand "issues related to" *Miranda*[2] and, therefore, could not legitimately have waived the rights *Miranda* was designed to protect.[3] We review the court's denial of a motion to suppress for an abuse of discretion. *See State v. Gay*, 214 Ariz. 214, ¶ 30, 150 P.3d 787, 796 (App. 2007). In doing so, we consider only evidence presented at the suppression hearing and view it in the light most favorable to upholding the ruling, but review the court's legal conclusions de novo. *See id*.

¶4 In his motion to suppress, Estrada sought to preclude the state from introducing at trial incriminating statements he made to police officers after they had read him the *Miranda* warnings. He asserted that although the officers had "asked [Estrada] whether he understood his rights . . . [they] never asked [him] whether, in fact, understanding those rights, he was willing to answer questions." "To satisfy *Miranda*, the State must show that [the defendant] understood his rights and intelligently and knowingly relinquished those rights before custodial interrogation began." *State v.*

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[3]Estrada appears to conflate the validity of his waiver of his rights under *Miranda* principles and the question of whether his confession was voluntary, relying on authority relevant to each interchangeably. To the extent possible, we have attempted to separate his arguments on these discrete legal issues. *See State v. Montes*, 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983) ("Voluntariness and *Miranda* are two separate inquiries.").

Tapia, 159 Ariz. 284, 286-87, 767 P.2d 5, 7-8 (1988). A defendant need not expressly communicate his waiver, *State v. Stabler*, 162 Ariz. 370, 376, 783 P.2d 816, 822 (App. 1989), and to determine the validity of the waiver, the trial court examines the individual facts of the case as well as the defendant's background, behavior, and prior experiences, *State v. Rivera*, 152 Ariz. 507, 513, 733 P.2d 1090, 1096 (1987). The validity of a defendant's waiver depends on his objective manifestations of comprehension and assent. *State v. Carrillo*, 156 Ariz. 125, 134-35, 750 P.2d 883, 892-93 (1988).

¶5 Dr. James Sullivan, a forensic neuropsychologist testified at the suppression hearing that he had evaluated Estrada and concluded he has a "severe level of brain dysfunction." Sullivan noted Estrada's low intelligence quotient (IQ) and low level of educational achievement. Sullivan also testified about several *Miranda*-specific evaluations he had performed on Estrada. Although he conceded Estrada was capable of understanding the *Miranda* warning, he concluded that in light of Estrada's performance on several evaluations, Estrada "would have had difficulty making a knowing and intelligent waiver of his rights." Sullivan was particularly concerned that Estrada's answers evinced a lack of comprehension of the right to remain silent, and a belief that a judge could force him to make a statement.

¶6 The court denied Estrada's motion, pointing out that his IQ "tested at 84 which is significantly above the level thought to be evidence of mental retardation." The court noted the video recording of Estrada's confession reflected that his answers to police officers' questions were "appropriate and reasoned," and he "did not give any

objective signs of unusual mental distress or incomprehension." The court was not required to accept Sullivan's opinion that Estrada did not make a knowing and intelligent waiver of his rights. *See State v. Estrada*, 209 Ariz. 287, ¶ 22, 100 P.3d 452, 457 (App. 2004); *cf. Bishop v. Superior Court*, 150 Ariz. 404, 409, 724 P.2d 23, 28 (1986) (trial court not bound by opinions of mental health expert and may rely on own observations at competency hearing). Moreover, during its cross-examination of Sullivan, the state elicited testimony that could have called into question Sullivan's conclusions. For example, some of his testimony suggested several of Estrada's *Miranda*-comprehension test scores were artificially low and he acknowledged Estrada's previous experience with the criminal justice system, which included the entry of guilty pleas to felony charges. The court had before it and properly considered Estrada's manifestations of understanding as well as his background. Based on the record before us, we cannot say it abused its discretion in determining Estrada could and did waive his rights knowingly and intelligently after receiving and understanding the *Miranda* warning.

Voluntariness of Confession

¶7 Estrada also contends the trial court applied the wrong standard for determining whether his confession was voluntary, relying on its belief "that the police did not do anything wrong," rather than considering the totality of the circumstances. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (voluntariness of confession determined by assessing totality of circumstances). But this assertion is belied by the court's ruling, which reflects that it considered both the conduct of the police officers and

Estrada's manifestations of comprehension and assent.[4] Nonetheless, he contends the interrogation was coercive, "replete with instances of promises" that induced his confession by causing him to believe "he would not be arrested" and "was doing the right thing by speaking with the police." But Estrada has not identified any promise, implicit or explicit, that he would not be arrested.[5] And, contrary to his unsupported assumption, a confession is not rendered involuntary simply because an interrogating law enforcement officer appeals to a suspect's moral convictions to persuade him to tell the truth. *See Oregon v. Elstad*, 470 U.S. 298, 304-05 (1985) (evaluation of voluntariness of statement not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion"). Accordingly, we cannot say the court abused its

[4]Estrada emphasizes that his confession could not have been voluntary because he did not understand he had the right not to speak. But as discussed above, the trial court found he understood the *Miranda* warnings, which included the right to remain silent. Accordingly, we do not further address his argument that he did not, in fact, understand his rights.

[5]Estrada points to the following statements: "Don't let me find out later that you're lying to me and that you had any involvement . . . '[c]ause if you tell me now it's a whole lot better than if I find out later"; "it sounds to me like you may have got yourself caught in a bad situation"; and "I want this to be your opportunity to clear it up for me." These words do not convey a promise of any kind. And even assuming the officers misrepresented the degree to which they suspected Estrada had been involved in the murder, law enforcement officers are not required to be wholly forthright with suspects and may even mislead them without necessarily rendering involuntary any statements the suspect might make. *See State v. Winters*, 27 Ariz. App. 508, 511, 556 P.2d 809, 812 (1976); *see also State v. Walton*, 159 Ariz. 571, 578, 769 P.2d 1017, 1025 (1989) (confession voluntary despite interrogator's urging suspect to "[g]ive yourself a chance" and assuring him "[i]t's nothing that can't be worked out").

discretion when it denied Estrada's motion to suppress his statements on this ground either.

Extrinsic Evidence

¶8 Estrada next contends the trial court erred in denying his motion for a new trial after Dr. Sullivan's report was inadvertently provided to the jury, which it then considered during its deliberations. When jurors receive extrinsic evidence, a defendant is entitled to a new trial if "'it cannot be concluded beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict.'" *State v. Hall*, 204 Ariz. 442, ¶ 16, 65 P.3d 90, 95 (2003), *quoting State v. Poland*, 132 Ariz. 269, 283, 645 P.2d 784, 798 (1982). To warrant a new trial, the defense must show actual prejudice or facts that give rise to a presumption of prejudice. *Id*. Upon this showing, it is then incumbent upon the prosecutor to "prove[] beyond a reasonable doubt that the extrinsic evidence did not taint the verdict." *Id*. We review a trial court's ruling on a motion for new trial for an abuse of discretion. *Id*.

¶9 On the fifth day of trial, the court conducted a hearing outside the presence of the jury, during which Sullivan's report was introduced as an exhibit for the purposes of that hearing. When the case was submitted to the jury, the report was inadvertently included as a trial exhibit. After the jury rendered the verdicts, Estrada moved for a new trial pursuant to Rule 24.1(c)(3)(i), Ariz. R. Crim P., on grounds the jurors had "receive[d] evidence . . . not properly admitted" and that he presumptively had been prejudiced as a result. He also argued the jury's receipt of the report without testimony

by Sullivan interpreting its contents, was prejudicial because of the "likelihood that the[] jury would consider portions of the report out of context and unduly emphasize th[em]."

¶10 In denying Estrada's motion, the trial court stated it had considered the factors our supreme court identified in *Hall*. 204 Ariz. 442, ¶ 19, 65 P.3d at 96 (considering ambiguity of prejudicial material, whether evidence was otherwise admissible or cumulative, any curative instruction, trial context, and whether information "insufficiently prejudicial" in light of other issues and evidence); *see also State v. Aguilar*, 224 Ariz. 299, ¶¶ 17-25, 230 P.3d 358, 362-64 (App. 2010) (considering extent to which extraneous materials provided jury deviated from properly admitted evidence and instructions submitted at trial). The court noted Estrada had sought to permit Sullivan to testify about the contents of the report in order to support his primary defense that the inculpatory statements he had made to police were "not voluntary and thus not reliable . . . because of [Estrada]'s limited ability to fully comprehend his rights and the full implications of the interrogation situation." The court found that, although it had precluded Sullivan from testifying, the report provided to the jury "served to support this defense just as if its author had been permitted to testify as urged by the defense." The court expressly concluded beyond a reasonable doubt that Estrada had not been prejudiced and that the extrinsic evidence had not contributed to the verdict.

¶11 Estrada filed a "Renewed Motion for New Trial" to which he attached the affidavits of both an investigator who had spoken with several jurors and defense counsel's paralegal. He argued these affidavits demonstrated that the exhibit had affected

the verdict because some jurors had relied on Sullivan's statement in the report that Estrada was easily persuadable by law enforcement to conclude that Valenzuela would have been able to convince him to participate in M.'s murder. He further argued the trial court could consider the affidavits under Rule 24.1(d), Ariz. R. Crim. P., because they did "not deal[] with the mental process of the jury."

¶12 In denying this renewed motion, the trial court correctly noted that Rule 24.1(d) allows the court to receive testimony or an affidavit only regarding the "conduct" of a juror. The rule prohibits courts from accepting evidence that relates to the "subjective motives or mental processes" of the jurors. Rejecting Estrada's contentions to the contrary, the court concluded the affidavits "directly address[ed] the [jurors'] subjective motives and mental processes."

¶13 On appeal, Estrada reiterates his argument that allowing the jurors to view Sullivan's report without his testimony led them to conclude he was easily persuaded to participate in Valenzuela's plan to kill M. As the trial court pointed out, however, Estrada's suggestibility was the crux of his defense. In fact, Estrada's own counsel referred to him as "suggestible" in opening statements. Moreover, to the extent Estrada contends the affidavits establish he was prejudiced, we agree with the court's application of Rule 24.1 here. As noted above, this rule categorically prohibits inquiry into the jury's "subjective motives and mental processes." *Cf. Aguilar*, 224 Ariz. 299, ¶¶ 26-29, 230 P.3d at 364-65 (trial court questioned jury after juror misconduct resulted in extrinsic evidence reaching panel). Estrada argues the proffered affidavits do not relate to these

prohibited matters. We disagree and, like the trial court, do not consider the affidavits. Because the court properly could find that the jury's consideration of Sullivan's report could not have prejudiced Estrada, we cannot say it abused its discretion in denying his motions for a new trial.

Preclusion of Dr. Sullivan's Testimony

¶14 In a related argument, Estrada contends the trial court abused its discretion in precluding Sullivan from testifying. He argues the state "sandbagged [his] defense" by not moving to preclude this testimony until after his counsel referred to Sullivan's testimony during opening statements.[6] Relying on *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997), he further contends the jury was entitled to hear the testimony because it related to the voluntariness of Estrada's statement.

¶15 We need not determine whether the trial court erred when it refused to permit Sullivan to testify because, as discussed above, the jury received his report, albeit inadvertently. Thus, even assuming arguendo the court erred, the error was harmless. *See State v. Valencia*, 186 Ariz. 493, 502, 924 P.2d 497, 506 (App. 1996) (trial court's preclusion of defense witness reviewed for harmless error). The report provided the jury with Sullivan's unchallenged opinion relating to the voluntariness of Estrada's statements. Although Estrada contends Sullivan might have been able to "provide the

[6]The preclusion of testimony following an untimely motion is a matter clearly left to the discretion of the trial court and we do not entertain Estrada's complaints regarding the timing of the state's motion to preclude. *See State v. Zimmerman*, 166 Ariz. 325, 328, 802 P.2d 1024, 1027 (App. 1990) (trial court has discretion to hear untimely motions).

jury information regarding [his] ability to understand the proceedings and to respond to the various police tactics employed," this argument is undercut by the record. In seeking to admit Sullivan's testimony, defense counsel argued that it would "track almost word for word the testimony of the voluntariness hearing" and counsel was "not intending to . . . have [Sullivan] say anything that he didn't say at the voluntariness hearing." At that hearing, Sullivan addressed matters expressly contained in his written report. And because the jury received that report, Sullivan's testimony was not vital to Estrada's defense; as we previously stated, any error in precluding the testimony was harmless. *See id.* (preclusion of defense witness not "vital" to case harmless error).

Third-Party Culpability

¶16 Estrada next contends the trial court should have allowed him to introduce hearsay statements that would have supported the theory that R., an acquaintance of M.'s who lived in a trailer on one of her properties, had conspired with Valenzuela to murder M. But Estrada has neither identified an adverse ruling by the trial court nor specified the evidence he sought to present. Consequently, we could consider this argument abandoned for lack of sufficient argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief must include argument containing "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (defendant waives claim insufficiently argued absent fundamental error). In any event, even assuming Estrada was entitled to present such

evidence, any error in precluding it would be harmless. Estrada confessed his involvement in M.'s murder and, as the state points out, even assuming R. too had participated in the murder, this would not exculpate Estrada.[7] *See* Ariz. R. Evid. 401 (evidence relevant only when it has tendency to "make the existence of any fact that is of consequence" more or less probable); *State v. Prion*, 203 Ariz. 157, ¶ 24, 52 P.3d 189, 193 (2002) (relevance of third-party culpability evidence dependent on effect evidence has on defendant's culpability). Moreover, because R.'s culpability would not diminish Estrada's, this evidence would also present a substantial risk of confusing the jury and distracting from the issues. *See* Ariz. R. Evid. 403. Accordingly, Estrada has failed to show any reversible error.

Hearsay Statement of Codefendant

¶17 Estrada argues the trial court abused its discretion when it precluded his wife, S., from testifying that Valenzuela, who is both her brother and Estrada's

[7]In his reply brief, Estrada maintains that our recent decision in *State v. Machado*, 224 Ariz. 343, 230 P.3d 1158 (App. 2010), mandates reversal on this issue because, like in *Machado*, he intended to present evidence of third-party culpability, which he baldly asserts was neither prejudicial to the state nor distracting. But *Machado* clearly reaffirmed that third-party culpability evidence must be relevant and its probative value "must not be substantially outweighed by the risk that it will cause . . . confusion of the issues." *Id*. ¶ 14. In *Machado*, the alleged confession of a third party that he and not the defendant had killed the victim would have tended to exonerate the defendant. *Id.* ¶¶ 22, 38-39. Here, the precluded evidence would suggest, at most, that R. was culpable, but would not exonerate Estrada.

codefendant, admitted to her that Estrada had not been involved in M.'s murder.[8] When Estrada's counsel attempted to elicit this statement from S., the state objected on the basis of hearsay. The court sustained the objection, precluding the statement as not sufficiently reliable to qualify as an admission against Valenzuela's penal interest. *See* Ariz. R. Evid. 804(b)(3) (exculpatory statement against interest admissible if sufficiently reliable).

¶18 Citing *State v. Lopez*, 159 Ariz. 52, 764 P.2d 1111 (1988), Estrada maintains Valenzuela's alleged prior comment was reliable, and therefore an admissible statement against penal interest.[9] As the state correctly points out, however, we need not consider whether the statement was reliable because Valenzuela's alleged claim that Estrada had not been involved was not against Valenzuela's own interest. Valenzuela was ultimately charged with conspiracy to commit first-degree murder and first-degree murder and his own culpability would not have been affected by his alleged statement that Estrada had not participated.[10] Thus, we need not address this issue further because

[8]The record reflects S. had not made this statement in any prior recorded interview available to the state and had stated it only privately to Estrada's counsel. Accordingly, it is not entirely clear S. actually would have testified about this alleged second statement.

[9]Notably, Estrada does not explain how this case supports his argument and, indeed, it does not. There, a third party claimed to have been driving a vehicle at the time of a collision that resulted in charges against the defendant of which he was subsequently convicted. *See Lopez*, 159 Ariz. at 54-55, 764 P.2d at 1113-14. Notwithstanding that additional, corroborating evidence established the reliability of this statement, it both clearly exonerated the defendant and established the culpability of the speaker. *Id.*

[10]Estrada's alleged non-participation actually could have benefitted Valenzuela by eliminating the viability of a conspiracy charge as well as reducing the risk of an aggravated sentence by eliminating one of the potential aggravating circumstances:

the statement did not qualify as a hearsay exception under Rule 804(b)(3). *See State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002) (trial court's ruling upheld "if legally correct for any reason").

Sufficiency of the Evidence

¶19 Estrada also contends the state presented insufficient evidence he had committed either armed robbery, kidnapping, or first-degree murder. Without elaborating, Estrada contends, "[t]here was no evidence presented by the [s]tate in order for the jury to have credibly found that [he] committed either armed robbery or kidnapping" because Valenzuela was the only one with a weapon, and there was no evidence Estrada acted as an accomplice to the murder. Not only does this bald argument fly in the face of the evidence, both direct and circumstantial, it is waived for failure to develop it sufficiently and we do not address it further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

Inconsistent Legal Theories

¶20 Finally, in a supplemental brief, Estrada contends the state presented inconsistent legal theories at his and Valenzuela's trials by eliciting from S. testimony establishing Valenzuela had said Estrada was not involved in M.'s murder.[11] He contends that, in doing so, the prosecutor "presented evidence, which he himself believed

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commission of the offense with an accomplice. *See* A.R.S. §§ 13-1003(A), 13-701(D)(4).

[11]Although he has not specifically requested any particular relief, we infer Estrada believes this claim entitles him to a reversal of one or more of his convictions.

to be false." As the state points out, however, this claim is not presented properly on appeal. The transcript Estrada attaches to his supplemental brief to support the argument is not part of the record on appeal. *See* Ariz. R. Crim. P. 31.8(a)(1) (record on appeal consists of items introduced into evidence at trial). And in any event, even were the transcript properly before us, this contention appears meritless because the state did not actually elicit the testimony to which it had objected at Estrada's trial. There, Estrada attempted to elicit testimony from his wife that Valenzuela had said Estrada had "nothing to do with" M.'s death. At Valenzuela's trial, the state asked Estrada's wife if Valenzuela had said anything indicating that he and Estrada had done something wrong. She answered this question in the negative. A denial that Valenzuela had made any statements generally inculpating Estrada is not the same as testimony indicating Valenzuela had made statements expressly exculpating him. Therefore, were we to consider this argument, it would fail on its merits.

Disposition

¶21 Estrada's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

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