NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

DIVISION ONE
FILED: 6/11/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	1 CA-CR 10-0754
v.	DEPARTMENT B
COREY DEMAR SHIVERS, Appellant.	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-134188-001

The Honorable Robert L. Gottsfield, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Joseph T. Maziarz, Acting Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Cory Engle, Deputy Public Defender
Attorneys for Appellant

T H U M M A, Judge

¶1 Defendant Corey Demar Shivers appeals from his conviction for threatening and intimidating, a Class 6 felony.

Shivers argues that: (1) the superior court erred in denying his motion to dismiss with prejudice after a mistrial and (2) Arizona Revised Statutes (A.R.S.) section 13-1202(B)(2),[1] which designates threatening and intimidating a Class 6 felony when committed by a person who is a "criminal street gang member," violates his First Amendment right of freedom of association. Finding no error, the conviction and sentence are affirmed.

FACTS AND PROCEDURAL HISTORY[2]

¶2 The State charged Shivers with two counts: (1) threatening and intimidating to cause physical injury to M.P.[3] "in order to promote, further or assist in the interests of . . . a criminal street gang," a Class 3 felony and (2) assisting a criminal street gang, also a Class 3 felony. The State alleged that Shivers, a self-avowed member of the Lindo Park Crips, threatened M.P., the mother of his daughter, in March 2009 after their relationship ended.

¶3 Shivers' first trial ended when the superior court granted his motion for a mistrial. After the court denied

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[1] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

[2] On appeal, the evidence is viewed in the light most favorable to sustaining the conviction and all inferences are resolved against defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

[3] The initials of the victim are used to protect her privacy. *State v. Maldonado*, 206 Ariz. 339, 341 n.1, ¶ 2, 78 P.3d 1060, 1062 n.1 (App. 2003).

Shivers' motion to dismiss with prejudice, and after a lengthy second trial, the jury found Shivers not guilty of Count 2 and, for Count 1, found him guilty of the lesser included offense of threatening and intimidating to cause physical injury to M.P. and that Shivers was a member of a criminal street gang, making the offense a Class 6 felony.

¶4 At sentencing, the superior court placed Shivers on supervised probation for three years. From that conviction and sentence, Shivers filed a timely appeal. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033.

DISCUSSION

I. Failure To Dismiss With Prejudice.

¶5 At the first trial, during cross-examination of Phoenix Police Detective Hurt, Shivers' counsel asked: "[p]rior to May of this year, [Shivers] has never been arrested for any type of gang activity; isn't that correct, Sir?" Hurt stated that he did not believe that was correct and, upon further questioning by Shivers' counsel, added "[i]f we're discussing your client right here, and you're asking me if this individual has been arrested for a gang-related crime, it's my belief that he has." Hurt went on to testify that Shivers had been arrested for a gang-related crime while using a different name. When

Shivers' counsel asked Hurt if he had brought anything "to corroborate [his] belief," Hurt replied that he had.

¶6 At a hearing outside of the presence of the jury, the prosecutor presented Shivers' counsel with a police report for Corey Roper who was a suspect in a 2001 "gang-motivated" incident. According to Hurt and the prosecutor, Shivers was a juvenile in 2001 and the reason they believed he was the same individual was because Shivers and "Roper" had the same date of birth and the incident occurred at Shivers' mother's address.

¶7 Shivers' counsel then moved for a mistrial, arguing the State had not disclosed the incident, which is why he had asked each testifying officer the same question and "every officer said no" until Hurt's testimony. The prosecutor informed the court that she had received the information concerning the arrest from Hurt the previous week; that she had no intention of using the information in the State's case-in-chief and that she therefore had no disclosure obligation and that Shivers' counsel had learned about the incident from his own client.

¶8 Noting Shivers' position throughout the trial was that he was never arrested for any prior gang-related activity, the superior court agreed with Shivers' counsel that, once the State had learned of this possible arrest, that material should have been disclosed and granted a mistrial on that basis. At a hearing on the State's motion to reconsider, the court affirmed

the grant of a mistrial, but rejected any suggestion of prosecutorial misconduct, stating:

> I find no reason to find that this constituted prosecutorial misconduct in any way. The state was under the view it was not going to use this new information. The state, I believe, had actually thought that it did not have to disclose that.
>
> I don't feel there was an intentional act here, so the defense continued to ask the questions about a prior arrest and prior gang activity, and that really did prejudice the case.

¶9 The superior court later heard argument on Shivers' motion to dismiss the charges with prejudice, contending that prosecutorial misconduct had created a double jeopardy bar to retrial. Shivers argued, among other things, that *Brady v. Maryland*, 373 U.S. 83 (1963) and Ariz. R. Crim. P. 15.1 required the State's disclosure of the information; that the prosecutor's withholding of the information was a deliberate tactic intended to precipitate a mistrial once she realized the State had "a bad case" and that, as the police report only showed that "Roper" was a "suspect," the prosecutor and Hurt had deliberately misrepresented that Shivers had been "arrested." The prosecutor responded that *Brady* applied only to exculpatory evidence, which this evidence was not; that Rule 15 imposed a duty to disclose convictions, not arrests and that she and Hurt had not misled anyone because they believed an arrest had to have occurred when

"Roper" was transferred to adult criminal court. The prosecutor further avowed that she had not disclosed the police report because the State never planned to use the information unless Shivers took "the stand and lied."

¶10 The superior court denied Shivers' motion to dismiss with prejudice and restated at length why the State had not committed prosecutorial misconduct. On appeal, Shivers argues that the ruling was error, that double jeopardy barred his retrial and that his conviction and sentence must be vacated.

¶11 In general, when a defendant successfully moves for a mistrial, double jeopardy does not bar a retrial. *State v. Minnitt*, 203 Ariz. 431, 437, ¶ 28, 55 P.3d 774, 780 (2002). However, "[w]hen a prosecutor intentionally commits misconduct so as to deliberately or indifferently mistry a case for an improper purpose, double jeopardy principles can preclude a retrial." *State v. Korovkin*, 202 Ariz. 493, 495, ¶ 5, 47 P.3d 1131, 1133 (App. 2002) (citing *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984)). In deciding when double jeopardy bars retrial, the superior court must distinguish between "simple prosecutorial error, such as an isolated misstatement or loss of temper, and misconduct that is so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself." *Minnitt*, 203 Ariz. at 438, ¶ 30, 55 P.3d at 781 (citation omitted). Retrial is precluded

> when the prosecutor engages in improper conduct that is not merely the result of legal error or negligence, but constitutes intentional conduct that the prosecutor "knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal [] and the conduct causes prejudice to the defendant that cannot be cured by means short of a mistrial."

Id. at ¶ 29, 55 P.3d at 781 (quoting *Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72). A superior court's determination regarding whether prosecutorial misconduct bars retrial is reviewed for an abuse of discretion. *State v. Trani*, 200 Ariz. 383, 384, ¶ 5, 26 P.3d 1154, 1155 (App. 2001).

¶12 Double jeopardy did not bar retrial in this case, and the superior court did not abuse its discretion in denying Shivers' motion to dismiss with prejudice. The record demonstrates, and the court found, that no prosecutorial misconduct occurred, let alone intentional and egregious prosecutorial misconduct implicating double jeopardy concerns.

¶13 Although claiming the prosecutor violated disclosure rules by not providing the police report, Shivers cites no authority for this proposition. The information was not exculpatory or "favorable to the accused." *Brady*, 373 U.S. at 87. Rule 15.1 (b)(6) requires a prosecutor to disclose a list of "all prior felony convictions" the prosecutor intends to use at trial, but does not require disclosure of arrests.

¶14 Other disclosure rules that might apply are limited to information or evidence the prosecutor "intends to use at trial." Ariz. R. Crim. P. 15.1 (b)(5), (b)(7) and (h). The prosecutor did not use the police report in her case-in-chief and avowed that she did not intend to use it for any purpose unless Shivers took "the stand and lied." Although finding the State had a duty to disclose the report, the superior court also found that the State's position was not prompted by any intentional misconduct but, instead, "the state . . . actually thought that it did not have to disclose" the information under these circumstances. The court found that this "legal error was not . . . pursued for an improper purpose" and that the prosecutor's conduct did not "amount to the intentional [mis]conduct alluded to in *Pool*."[4]

¶15 Nothing in the record undercuts this finding that the prosecutor's conduct did not rise to the level of intentional and egregious misconduct that would bar a retrial for double jeopardy purposes. *Korovkin*, 202 Ariz. at 495, ¶ 5, 47 P.3d at 1133. Instead, the record fully supports the superior court's finding that double jeopardy did not bar Shivers' retrial.

[4] Unlike *Pool*, the issue here was created by questions asked by defense counsel (not the prosecutor). Perhaps even more significantly, Shivers' counsel admitted that he had spoken to his client and knew about "the Corey Roper name" and his client's past arrest history *before he had asked Hurt about the issue during trial*.

II. Alleged First Amendment Violation.

¶16 Shivers argues A.R.S. § 13-1202(B)(2), directing that threatening or intimidating is a Class 6 felony when committed by a "criminal street gang member," is "an unconstitutional infringement on the First Amendment freedom of association." On appeal, a statute's constitutionality is reviewed de novo. *State v. Casey*, 205 Ariz. 359, 362, ¶ 8, 71 P.3d 351, 354 (2003). "Statutes are presumed constitutional and the burden of proof is on the opponent of the statute to show it infringes upon a constitutional guarantee or violates a constitutional principle." *Id.* at 362, ¶ 11, 71 P.3d at 354 (citation omitted).

¶17 Shivers argues that, by elevating threatening and intimidating from a misdemeanor to a felony on the showing that the defendant is a "criminal street gang member," A.R.S. § 13-1202(B)(2) is "unnecessary" to the State's otherwise legitimate interests in ending crimes that are committed to "further, promote or assist" a criminal street gang and, therefore, is an impermissible "infringement on his freedom of association." Accordingly, Shivers claims his conviction should be reduced from a Class 6 felony to a Class 1 misdemeanor.

¶18 The United States Supreme Court has long recognized that two types of association are protected from undue government intrusion as a "peripheral First Amendment right:" (1) relationships involving "an individual's choice to enter

into or maintain certain *intimate or private relationships*" and (2) the "freedom of individuals to associate for the purpose of engaging in *protected speech or religious activities*." *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). For the first category, the Supreme Court has extended First Amendment protections to marriage, child-rearing and "cohabitation with relatives," relationships that "presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Rotary Int'l*, 481 U.S. at 545 (quoting *Roberts*, 468 U.S. at 619-20). For the second category, the Supreme Court has extended First Amendment protections to associations affecting "those activities protected by the First Amendment," such as "speech, assembly, petition for the redress of grievances, and the exercise of religion," *Roberts*, 468 U.S. at 618, or dedicated to the "pursuit of a wide range of political, social, economic, educational, religious, and cultural ends," *Rotary Int'l*, 481 U.S. at 546.

¶19 Apart from these two categories is "a broad range" of relationships" entitled to lesser protection depending upon where the particular "relationship's objective characteristics

locate it on the spectrum from the most intimate to the most attenuated of personal attachments." *Roberts*, 468 U.S. at 620. "[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Id.* at 628; *see also 3613 Ltd. v. Dep't of Liquor Licenses & Control*, 194 Ariz. 178, 186, 978 P.2d 1282, 1290 (App. 1999) (noting association right "may be curtailed if necessary to further a significant governmental interest like eliminating . . . crime, corruption and racketeering").

¶20 Shivers has failed to establish that the activities of a "criminal street gang" such as the "Lindo Park Crips," of which he is a member, fall within either of the two categories of protected associations delineated by the Supreme Court. A "'[c]riminal street gang' means an ongoing formal or informal association of persons in which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act." A.R.S. § 13-105(8). Shivers does not challenge the fact that the Lindo Park Crips is a criminal street gang. Moreover, the activities of a "criminal street gang" that "produce special harms distinct from their communicative impact" are not entitled to First Amendment protections. *See* Roberts, 468 U.S. at 628.

¶21 In addition, A.R.S. § 13-1202(B)(2) serves a compelling state interest unrelated to the suppression of ideas, which is to deter the threatening and intimidation of the general public by members of organized criminal street gangs who may employ their gang affiliation to amplify threats and intimidation. Contrary to Shivers' claims, as applied, A.R.S. § 13-1202(B)(2) does not penalize "mere membership" in a criminal street gang; it penalizes the additional menace inflicted on the general public when criminal conduct is engaged in by an avowed member of a criminal street gang. That, of course, is precisely what occurred in the present case.

¶22 Moreover, the evidence at trial shows Shivers invoked his Lindo Park Crips affiliation when texting M.P. to augment his threats. M.P. testified that Shivers threatened to kill her in various telephone text messages and telephone calls, telling her "he was putting it on his hood," which to M.P. signified Shivers' gang. Shivers also threatened to hurt M.P. if she ever put their daughter "around another weak side" person, which M.P. testified meant someone who was not a member of the Lindo Park Crips. As another example, M.P. testified that Shivers had stated he had "the 411 on you," meaning he had people watching her and she believed those people were gang members.

¶23 Although Shivers' argument with M.P. may not have been undertaken to "promote, further or assist" the interests of a

criminal street gang, by couching his threats in these ways, Shivers was clearly invoking his gang affiliation and employing it to increase the menace to M.P. and her family. This conduct is precisely the type of behavior that the statute is meant to curtail and that the State has a "compelling state interest" in preventing and punishing. Because the statute does not affect any recognized protected category of association or speech, Shivers has failed to establish any First Amendment violation. *Casey*, 205 Ariz. at 362, ¶ 11, 71 P.3d at 354.

CONCLUSION

¶24 Shivers' conviction and sentence are affirmed.

/S/________________________________
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/________________________________
MAURICE PORTLEY, Presiding Judge

/S/________________________________
DONN KESSLER, Judge