IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LOIS KAY CLOUD, *Appellant*.

No. 1 CA-CR 10-0840
FILED 02/18/2014

Appeal from the Superior Court in Yuma County
No. S1400CR200300438
The Honorable Lawrence C. Kenworthy, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Myles A. Braccio
Counsel for Appellee

Sharmila Roy, Laveen
Counsel for Appellant

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the Court, in which Presiding Judge Donn Kessler and Judge Maurice Portley joined.

S W A N N, Judge:

¶1 Lois Kay Cloud appeals her convictions and sentences for first-degree murder, conspiracy to commit first-degree murder, solicitation to commit first-degree murder, and facilitation to commit first-degree murder. The evidence at trial demonstrated that Cloud and Vincent Accardo conspired to murder Cloud's husband; Accardo shot and killed Cloud's husband at close range as the Clouds left a Yuma restaurant in December 1997; and Cloud thereafter engaged in a secret relationship with Accardo and gave him thousands of dollars in cash and property. Cloud raises several issues on appeal, which we address in turn below. We discern no reversible error, and affirm.

I. CLOUD WAS NOT DEPRIVED OF HER RIGHT TO A SPEEDY TRIAL.

¶2 Cloud first contends that she was deprived of her right to a speedy trial under Ariz. R. Crim. P. 8 and the Sixth Amendment of the United States Constitution because she was not brought to trial until more than six years after she was indicted.

A. The Superior Court Did Not Abuse Its Discretion by Denying Cloud's Motion to Dismiss Under Rule 8.

¶3 Cloud was indicted in May 2003. In November 2006, she moved to dismiss, arguing that her speedy trial rights under Rule 8 had been violated. The court denied the motion in July 2007 and Cloud unsuccessfully moved for reconsideration. The court explained that (1) by virtue of the consolidation of Cloud's and Accardo's cases in May 2005, Cloud was bound by the supreme court's "extraordinary" designation in Accardo's case suspending Rule 8 limits; (2) Cloud waived her Rule 8 argument by failing to timely request a trial date; and (3) the delay in bringing Cloud to trial had not prejudiced her. We must affirm the superior court's ruling absent an abuse of discretion and resulting prejudice. *State v. Spreitz*, 190 Ariz. 129, 136, 945 P.2d 1260, 1267 (1997).

¶4 We find no abuse of discretion here. Cloud agreed in 2006 that the time limits had been suspended in her case by the Arizona Supreme Court's designation of it as an "extraordinary case." And though it was later determined that the Supreme Court had actually designated only Accardo's case as "extraordinary," once the two cases were consolidated in May 2005, the suspension of time limits for purposes of Rule 8 in Accardo's case also applied to Cloud's case. *See* Ariz. R. Crim. P. 8.4(f) (providing that time shall be excluded for "[d]elays resulting from joinder for trial with another defendant as to whom the time limits have not run where there is good cause for denying severance"); *State v. Hankins*, 141 Ariz. 217, 222, 686 P.2d 740, 745 (1984) (requiring Rule 8 calculation for multiple defendants consolidated for trial from the case with the longest time available); *State v. Farmer*, 126 Ariz. 569, 571, 617 P.2d 521, 523 (1980) ("Although appellant did not join in the motion to declare the case extraordinary, the appellant is bound by the suspension of the Rule 8 time limits. The delay occasioned by or on the behalf of any defendant is attributable to his codefendants in determining whether speedy trial time limits have been violated.").

¶5 We further note that Cloud waived her Rule 8 argument by failing to object to the delay in bringing her to trial until long after the time limit set by Rule 8 had expired. A defendant may waive her speedy trial rights by failing to object in a timely manner. *Spreitz*, 190 Ariz. at 138, 945 P.2d at 1269. A defendant may not "wait until after the [Rule 8.2 time limit] has expired and then claim a Rule 8 violation after it is too late for the trial court to prevent the violation." *Id.* (citation omitted). The Rule 8 right to a speedy trial "is not fundamental, but a procedural right, not a shield by which the accused may avoid trial and possible punishment by taking advantage of loopholes in the law or arithmetic errors." *Id.* at 139, 945 P.2d at 1270 (citation omitted) (internal quotation marks omitted).

¶6 Cloud was arraigned in mid-2003, at which time defense counsel acknowledged that the state intended to seek the death penalty. Under the version of Rule 8.2(a)(4) then in effect, the initial last day for Cloud's trial was in late 2004, subject to allowable exclusions. Other events extended the last trial date to early 2005. In the time leading up to that date, defense counsel did nothing to fulfill his duty under Rule 8.1(d) to alert the court of the impending expiration of the time limit. In fact, defense counsel indicated throughout 2003, 2004, 2005, and most of 2006 that he was not ready for trial (though he repeatedly declined to waive time). Counsel did not argue that Cloud's Rule 8 speedy trial rights had been violated until November 2006, more than three years after she was arraigned, and long after the last day for trial had expired.

B. The Superior Court Did Not Abuse Its Discretion by Denying Cloud's Motion to Dismiss Under the Sixth Amendment.

¶7 In December 2007, Cloud orally joined in Accardo's motion to dismiss on the grounds that the state had violated her right to a speedy trial under the Sixth Amendment. The court never heard argument on the purported Sixth Amendment violation, and did not expressly rule on her motion. The motion was therefore deemed denied as a matter of law. *See State v. Hill*, 174 Ariz. 313, 323, 848 P.2d 1375, 1385 (1993).

¶8 The Sixth Amendment provides the right to a "speedy and public trial," but "do[es] not provide a specific time limit within which trial must be held." *State v. Henry*, 176 Ariz. 569, 578, 863 P.2d 861, 870 (1993). We consider four factors to determine whether a delay requires reversal under the federal constitution: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right; and (4) resulting prejudice. *Id.* at 578-79, 863 P.2d at 870-71 (citing *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972)). In weighing these factors, we give the least weight to the length of the delay and the most weight to the prejudice to the defendant. *Id.* at 579, 863 P.2d at 871. A lengthy delay does not alone require reversal, but must be considered in concert with the remaining factors. *Spreitz*, 190 Ariz. at 140, 945 P.2d at 1271.

¶9 With respect to the first factor, the length of the delay, it took six years to bring Cloud to trial. But while Cloud blames the long interval on the state's intransigence in copying voluminous disclosure, changes in judges, changes in the prosecuting agency, and delays in ruling on motions, our review of the record persuades us that the state was not primarily to blame for the time it took to bring Cloud to trial.

¶10 First, with respect to the disclosure, the state promptly invited defense counsel to review the voluminous records at the police station and designate which documents he wanted copied. By this invitation, the state made the documents "available," which is all that is required by the disclosure obligations prescribed by Ariz. R. Crim. P. 15.1. Defense counsel also did not object to the procedure at the time. Second, delays attributable to changes in judges and the prosecuting agency were minimal. Our review of the record convinces us that Cloud caused, or at the least acquiesced to, the more significant delays in the case both before and after her December 2007 joinder in Accardo's motion to dismiss under the Sixth Amendment.

¶11 Defense counsel repeatedly indicated that he was not prepared for trial, failed to file any substantive motions until more than three years after the indictment, and repeatedly objected to setting a firm trial date. Then, after a January 2007 trial date was vacated as a result of the assigned judge's electoral defeat, Cloud immediately moved for a change of judge. After the court resolved this motion and the earlier-filed Rule 8 motion, Cloud agreed to sever her trial from Accardo's trial and to proceed with Accardo's trial first (which at that time was set for April 2008), and the court set her trial for January 2009. In December 2008, however, defense counsel requested a continuance of the January 2009 trial date based on the withdrawal of his co-counsel. At Cloud's request, the court therefore set a new trial date in October 2009. After jury selection resulted in a mistrial, trial began anew in January 2010.

¶12 It is apparent from the foregoing that Cloud played a significant role in her trial's delay. Moreover, she claims no actual prejudice from the trial's delay -- and in fact admitted in the proceedings below that she expected to benefit from the delay because it allowed her to observe Accardo's trial and preview the evidence that would be used against her. On this record, the superior court did not abuse its discretion by denying Cloud's motion to dismiss under the Sixth Amendment.

II. THE RECORD DOES NOT SUPPORT A FINDING OF PROSECUTORIAL MISCONDUCT.

¶13 Cloud next contends that the prosecutor engaged in misconduct that denied her a fair trial when he advised the jury in opening remarks about facts he "knew were incorrect and later, smirked and made gestures towards the spectators during Cloud's testimony."

¶14 "[P]rosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which 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.'" *State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (citation omitted). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Morris*, 215 Ariz. 324, 335, ¶ 46, 160 P.3d 203, 214 (2007) (citation omitted) (internal quotation marks omitted). "The misconduct must be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *Id.* (citation omitted).

¶15 Cloud argues that the prosecutor engaged in misconduct by knowingly misstating in the opening statement that the evidence would show that: (1) the gun with which Accardo shot the victim was fired at such close range that gunshot residue was left on the victim's car window; (2) a detective checked with shuttle companies and found that Accardo had not used a shuttle to leave Yuma before the shooting; (3) a gun that Accardo had borrowed from a third party was the murder weapon; and (4) within a week of the murder, Accardo received a package from Cloud that contained cash. Because Cloud did not object to any of these statements at trial, we review for fundamental error only. *State v. Martinez*, 230 Ariz. 208, 215, ¶ 31, 282 P.3d 409, 416 (2012). Cloud bears the burden of establishing that there was error, that the error was fundamental, and that the error caused her prejudice. *State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005).

¶16 We conclude that the prosecutor's remarks did not constitute misconduct. "The object of an opening statement is to apprise the jury of what the party expects to prove and prepare the jurors' minds for the evidence which is to be heard." *State v. King*, 180 Ariz. 268, 276, 883 P.2d 1024, 1032 (1994) (citation omitted). Although an attorney "should not make a statement of any facts which he cannot legally prove upon the trial," he is permitted "considerable latitude" in opening statements. *State v. Burruell*, 98 Ariz. 37, 40, 401 P.2d 733, 736 (1965) (citation omitted). Here, the jury reasonably could have inferred from the evidence at trial each of the statements to which Cloud now objects.

¶17 With respect to the prosecutor's statement about gunshot residue, a former detective testified that he saw "some kind of a blackened type of soot" on the victim's car window and that a later test that showed no gunshot residue in swabs from the window did not change his opinion. Moreover, several witnesses testified that the gun was fired at close range. On this record, we are not persuaded that the prosecutor knowingly misstated that the evidence would show that the gun was fired at such close range that gunshot residue was left on the car window.

¶18 With respect to the prosecutor's statement about Accardo's failure to leave Yuma by shuttle before the shooting, a detective and a police sergeant both testified that they had checked with a local shuttle company to determine whether Accardo had taken a shuttle out of Yuma before the shooting. Cloud objected on hearsay grounds to the detective testifying about the results of the inquiry, and the court sustained the objection. On this record, again, we are not persuaded that the prosecutor knowingly misstated this evidence. Moreover, any error in failing to

prove that Accardo had not left Yuma by shuttle before the murder was harmless because the state produced substantial other evidence to show that Accardo remained in Yuma until the murder.

¶19 With respect to the prosecutor's statement about Accardo borrowing the murder weapon from a third party, J.H. testified that he lent Accardo a Smith & Wesson .357 Magnum and that Accardo refused to return the firearm and threatened to harm J.H.'s family if he told police about it. In addition, a witness to the murder testified that she heard a shot and saw Accardo holding a gun in outstretched arms, and a ballistics expert testified that the bullet jacket fragment left at the scene was most likely fired from a Smith & Wesson .357 Magnum or similar firearm. In view of this evidence, the prosecutor's statement did not constitute misconduct.

¶20 With respect to the prosecutor's statement about Accardo's receipt of cash from Cloud after the murder, a witness testified that shortly after the murder she delivered to Accardo a FedEx envelope, sent from Yuma, that he had told her he was expecting, and he took the envelope to the bathroom, came out with cash, and gave her one thousand dollars. Also, Cloud admitted that she had given Accardo substantial amounts of money and had mailed FedEx envelopes to him in Texas. The prosecutor's statement that Cloud sent Accardo a FedEx envelope containing cash within a week of the murder did not constitute misconduct.

¶21 In conclusion, none of the statements that Cloud now objects to rose to the level of prosecutorial misconduct. We further note that the judge instructed the jury that the lawyers' statements were not evidence. The jury is presumed to have followed these instructions. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

¶22 Cloud also argues that during her testimony, one of the prosecutors engaged in misconduct by rolling her eyes while looking at the victims and spectators. Defense counsel's investigator testified outside the presence of the jury that she saw the prosecutor twice turn toward the victims' area of the courtroom and though she could not see the prosecutor's face at the time, her "impression" was that the prosecutor was "making eyes or making facial expressions at the jury . . . about the things [the defendant] was testifying about." The prosecutor explained that she had first turned around to give a note to her paralegal and "if there was any exasperation it was because the paralegal was not there," and had later turned around to find the source of a noise that she had

heard "coming from the Defendant's side of the courtroom." The court ruled that it could not find any prejudice from the alleged improper conduct because it had not "heard that the jury would have been influenced by anything that occurred," but warned against any "rolling of eyes" and suggested that if the prosecutor wanted to get someone's attention, she should pass a note to her co-counsel. The judge did not find, nor did the record support, defense counsel's claim that the prosecutor rolled her eyes during Cloud's testimony. We therefore find no misconduct on this ground.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING CLOUD'S REQUESTS FOR CONTINUANCES.

¶23 Cloud next contends that the superior court abused its discretion by denying her several requests for continuances in the early days of trial to resolve problems with her hearing and vision. We review the court's rulings for abuse of discretion and will not reverse absent a showing of prejudice to the defendant. *State v. Garcia-Contreras*, 191 Ariz. 144, 149, ¶ 21, 953 P.2d 536, 541 (1998).

¶24 Defense counsel first complained that Cloud was having hearing and vision problems the day before opening statements were scheduled. The court ordered hearing and eye examinations and provided headphones to Cloud, which she reported were helpful. The court however denied Cloud's request for a continuance, noting that Cloud's alleged problems did not appear to interfere with her ability to hear her counsel and would not interfere with her ability to hear the opening statements.

¶25 The following day, defense counsel informed the court that a doctor had examined Cloud and diagnosed eye fatigue and resultant blurriness, but Cloud had yet to be examined for the hearing issues. The court again denied a continuance, finding that Cloud could fully participate in the proceedings. Several days later, counsel argued that an eye patch on Cloud's right eye, which the eye doctor had recommended to assist with strain on her left eye, was hurting instead of helping. Counsel asked that the proceedings be continued until she could be reexamined. The prosecutor responded that Cloud had been "writing on a pad of paper and passing that to [defense counsel]," and "doesn't appear to be writing in a large font or anything like that . . . it's in a straight line, it's in normal sized writing, so apparently her sight is well enough to do that." The judge denied the continuance, again finding that Cloud "can effectively participate at this time."

¶26 Defense counsel raised the issue again several days later, arguing that a surgeon had examined Cloud, had diagnosed eye fatigue in her left eye, and had recommended that she wear sunglasses. Counsel argued that the sunglasses recommendation was unacceptable, and requested that the court "set a time where this surgeon can be available and we can try and resolve something for my client so that there is not fatigue. . . . so she can fully participate in this trial and see without constraint, see without limitation." The prosecutor responded that Cloud was still wearing the eye patch that she had earlier complained of, and argued that it was inappropriate for the court "to be asked to provide, you know ad hoc recommendations as to how to care for this defendant throughout the trial." The court cut off further discussion, explaining that it "underst[ood] the issue plenty," and called the jury in so that the trial could continue.

¶27 We perceive no abuse of discretion. The court had the opportunity to observe Cloud during the proceedings before each request for continuance. We give substantial deference to the trial court's observations that Cloud was able to fully participate despite her vision and hearing problems. *Cf. State v. Moody*, 208 Ariz. 424, 443, ¶ 48, 94 P.3d 1119, 1138 (2004) ("In determining whether reasonable grounds exist [for a competency examination], a judge may rely, among other factors, on his own observations of the defendant's demeanor and ability to answer questions."). This case is therefore distinguishable from the out-of-state authorities on which Cloud relies.[1]

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[1] *See United States v. Knohl*, 379 F.2d 427, 437 (2d Cir. 1967) (affirming denial of motion to preclude trial of defendant over concerns that "the strain and stress of a trial would be likely to bring about another stroke and thus endanger the life of the accused"); *United States v. Gambino*, 809 F. Supp. 1061, 1077 (S.D.N.Y. 1992) (affirming denial of severance, rejecting claims that defendant's serious heart ailment, problems with depression, and mental difficulties precluded his trial with codefendants); *United States v. Doran*, 328 F. Supp. 1261, 1263 (S.D.N.Y. 1971) (finding defendant unfit to stand trial because he was "gravely ill," and there was "substantial" chance the trial could kill him); *Adams v. State*, 257 So. 2d 366, 367 (Ala. Crim. App. 1971) (affirming denial of continuance, reasoning that the degree to which defendant suffered from his liver ailment was self-induced and not apparent in court); *State v. Meredith*, 400 So. 2d 580, 583-85 (La. 1981) (affirming denial of continuance for defendant who had been admitted to inpatient alcohol treatment

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING CONVERSATIONS BETWEEN CLOUD AND ACCARDO THAT WERE RECORDED DURING A WIRETAP INVESTIGATION.

A. Accardo's Recorded Statements Were Admissible Under Ariz. R. Evid. 801.

¶28 Cloud next contends that the superior court abused its discretion by admitting, over her objection, nine telephone conversations between Accardo and herself that were recorded during a wiretap investigation in April 2003. Cloud contends that the admission of Accardo's statements made during those conversations constitutes reversible error because: (1) there was no proof independent of the recorded statements that there was a conspiracy; (2) the statements were not made during the existence of the conspiracy or in furtherance of its objectives, but afterward, and only to conceal it; and (3) the admission of the statements effectively amended the indictment, thereby depriving her of notice and due process, because the evidence added "obtaining the victim's assets and money" as an objective of the charged conspiracy of murder.

¶29 Under Ariz. R. Evid. 801(d)(2)(E), statements "made by the party's coconspirator during and in furtherance of the conspiracy" are not hearsay. A co-conspirator's statements are admissible "when it has been shown that a conspiracy exists and the defendant and the declarant are parties to the conspiracy." *State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980). A defendant's involvement in a conspiracy may be established by circumstantial evidence. *See United States v. Cota*, 953 F.2d 753, 758 (2d Cir. 1992). For purposes of Rule 801(d)(2)(E), the existence of a conspiracy and a defendant's involvement need only be established by a

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facility); *State v. Karno*, 342 So. 2d 219, 223 (La. 1977) (providing guidance for courts to address requests for continuance due to claims that standing trial would seriously endanger health or prevent defendant from effectively participating in own defense); *Eastland v. State*, 78 So. 2d 127, 128-30 (Miss. 1955) (reversing conviction based on trial court's denial of continuance despite evidence of defendant's series of heart attacks, including one during trial, and other serious health issues); *Compton v. State*, 500 S.W.2d 131, 133 (Tex. Crim. App. 1973) (affirming denial of continuance despite defendant's claims of "stomach and gall bladder trouble").

preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171, 176 (1987) (construing analogous federal rule). We review determinations regarding the admissibility of co-conspirators' statements for abuse of discretion. *State v. Dunlap*, 187 Ariz. 441, 458, 930 P.2d 518, 535 (App. 1996).

¶30 We find no abuse of discretion here. As an initial matter, Cloud's contention that there was no independent proof of a conspiracy is meritless. The evidence at trial demonstrated that Cloud and Accardo spoke by phone multiple times before the murder, that shortly before the murder Cloud rented a car for Accardo and met with him several times at his hotel, and that on the night of the murder Cloud arranged to be at a nearby restaurant with the victim where Accardo shot him. The evidence also demonstrated that Cloud gave money and gifts to Accardo and kept her relationship with him a secret from her friends and the police. Ample circumstantial evidence independent of the wiretapped conversations showed that Cloud and Accardo conspired to murder Cloud's husband and profit from his death.

¶31 Nor do we find any merit in Cloud's argument that any conspiracy was long over by the time of the wiretapped conversations. It is well-settled that a conspiracy that involves profiting from a victim's death continues after the death and while the transfer of property is pending. *State v. White*, 168 Ariz. 500, 506-07, 815 P.2d 869, 875-76 (1991) (holding that conspiracy continued beyond the death of the victim and included attempts to divert attention and conceal crime because any link between defendant, his lover, and the victim's death would have precluded collection of insurance proceeds), *abrogated on other grounds by State v. Salazar*, 173 Ariz. 399, 844 P.2d 566 (1992); *State v. Cruz*, 137 Ariz. 541, 548, 672 P.2d 470, 477 (1983) (holding that conspiracy that involved transfer of money in exchange for killing the victim continued until transfer of money was accomplished). Moreover, "[w]hen inquiring whether a statement of a coconspirator was made in furtherance of the conspiracy, courts focus on the intent of the coconspirator in advancing the goals of the conspiracy, not on whether the statement has the actual effect of advancing those goals." *Dunlap*, 187 Ariz. at 458, 930 P.2d at 535. "So long as some reasonable basis exists for concluding the statement furthered the conspiracy, the 'in furtherance' requirement is satisfied." *Id.*

¶32 Here, the evidence showed that the recorded conversations occurred while Cloud was continuing to fight to obtain money from the victim's estate to transfer to Accardo. In these conversations, Cloud and Accardo discussed Cloud's attempts to obtain money from the estate for

Accardo as promised, the couple's need to prevent others from discovering their relationship, and their plans to leave the country together. The court did not abuse its discretion in admitting these statements as ones made during the course of and in furtherance of the conspiracy.

¶33 Finally, we find no merit in Cloud's argument, raised for the first time on appeal, that the admission of the recorded conversations deprived her of notice and due process by amending the indictment. "It is not necessary that a conspiracy be charged, as long as the record reveals sufficient reliable evidence of a conspiracy to support the admission of the statements of the coconspirator." *Baumann*, 125 Ariz. at 411, 610 P.2d at 45 (citation omitted). It therefore was not a necessary predicate for the admission of Accardo's statements that the indictment specify that the conspiracy had another object beyond murdering the victim, and the admission of Accardo's statements did not amend the indictment. Moreover, the state was not required to notify Cloud of the manner in which it intended to prove that she conspired with Accardo to murder her husband, *see State v. Arnett*, 158 Ariz. 15, 18, 760 P.2d 1064, 1067 (1988), and the state gave Cloud notice before trial that it would introduce evidence both that she had paid Accardo for the murder and that she was trying at the time of their arrest to obtain more money from the victim's estate for additional payment to Accardo.

B. The Superior Court Did Not Abuse Its Discretion by Denying Cloud's Motions to Suppress the Recorded Conversations.

¶34 Cloud next contends that the superior court abused its discretion by admitting the recorded conversations because "they were not necessary to the police investigation, and thus the admission of the wiretaps violated [her] rights under the Fourth Amendment." We construe this argument as an argument that the police failed to demonstrate necessity for the wiretap under A.R.S. § 13-3010 because they failed to show that other investigative procedures could not have been used. Cloud joined in Accardo's motion to suppress the conversations on this ground, and also moved to suppress on the ground that the orders authorizing the wiretap were tainted by false and illegally obtained information. We review the court's denial of Cloud's motions to suppress for abuse of discretion. *State v. Ring*, 200 Ariz. 267, 273, ¶ 14, 25 P.3d 1139, 1145 (2001), *rev'd on other grounds*, 536 U.S. 584 (2002). We limit our review to the evidence submitted in the suppression proceedings. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996).

¶35 As an initial matter, we note that the record contradicts Cloud's claim on appeal that the original affidavit in support of the wiretap application was not part of the record before the court when it ruled on the motion to suppress. The application for wiretap and supporting affidavit were ordered unsealed in January 2008 at the state's request, and the affidavit was submitted to the court in the suppression proceedings.

¶36 The application and affidavit were sufficient to support the court's denial of Cloud's motions to suppress. Applications for wiretap warrants must include "[a] full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," A.R.S. § 13-3010(B)(3), and a judge may approve the application if he finds it shows that "[n]ormal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," A.R.S. § 13-3010(C)(3). Our supreme court has explained that this "necessity" requirement

> is to be interpreted in a commonsense fashion with an eye toward the practicalities of investigative work. Thus, a wiretap need not be used only as a last resort. The statute does not mandate the indiscriminate pursuit to the bitter end of every nonelectronic device . . . to a point where the investigation becomes redundant or impractical.

State v. Hale, 131 Ariz. 444, 447, 641 P.2d 1288, 1291 (1982) (citations omitted) (internal quotation marks omitted); *see also Ring*, 200 Ariz. at 273, ¶ 15, 25 P.3d at 1145; *State v. Politte*, 136 Ariz. 117, 129, 664 P.2d 661, 673 (App. 1982).

¶37 Here, a detective of the Yuma Police Department stated in a 37-page affidavit in support of the wiretap application that he believed wiretap was "the only available investigative technique which has a reasonable likelihood of attaining the objectives of the investigation, including capturing admissions of the criminal act by the participants and the unveiling of the conspiratory efforts used by the participant[s] to conceal the crime." He avowed that the investigation had already employed the use of "grand jury subpoenas, physical surveillance, mail covers, police interviews, laboratory analysis, financial data analysis, consent searches, confidential sources of information, and pen register and trap and trace devices," and these methods had proved "replete with problems and deemed unlikely to succeed." He explained that physical

surveillance had shed little light on whether Cloud, Accardo, and Accardo's wife were involved in a conspiracy, and if so, in what capacity. He also stated that the semi-rural and gated-community locations of the suspects' respective residences made surveillance impracticable; it was apparent that the suspects were "extremely cautious and alert for law enforcement activity"; they and their associates would likely invoke the Fifth Amendment or lie in a grand jury investigation; consensual recordings would be of no avail because law enforcement had no access to confidential sources with close personal relationships with the subjects; interviews of Accardo's wife and mother-in-law had not yielded any useful information; and further interviews would likely not be useful and would alert Cloud to the existence of an investigation. The detective further avowed that he did not believe search warrants would provide sufficient evidence "to determine the full scope of the crime committed" because years had passed since the murder was planned and committed. On this record, we conclude that the court reasonably denied Cloud's motions to suppress the recorded conversations.

V. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING CLOUD'S REQUEST FOR A MISTRIAL BASED ON LATE-DISCLOSED EVIDENCE.

¶38 Cloud next contends that the superior court abused its discretion "when it refused to grant a mistrial or a continuance longer than 30 days after the prosecution disclosed hundreds of pages of witness interviews and other material in the middle of trial." Cloud contends that the prosecutor violated Ariz. R. Crim. P. 15.1 and the holding of *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to timely disclose material that (1) undermined the state's theory that Accardo's sole source of money for murdering the victim was Cloud, and (2) bolstered Cloud's credibility by showing that Accardo had a history of duping women.

¶39 The superior court held an evidentiary hearing regarding the late-disclosed material, at which the prosecutor argued that the newly disclosed evidence was merely cumulative and the state's failure to disclose it before trial was inadvertent. The court denied Cloud's requests for dismissal with prejudice, a mistrial, or a 90-day continuance. Instead, it granted a one-month continuance and required the state to pay all expenses incurred in reinterviewing and recalling witnesses. In support of its ruling, the court found: (1) the failure to disclose was not intentional but was caused by the prosecuting agencies' inadequate case transfer procedures; (2) the state would be substantially prejudiced by dismissal but Cloud would not be substantially harmed by a one-month

continuance to allow her to investigate and reinterview witnesses; (3) the newly disclosed evidence did not generally "create[] a new issue or strategy that was not previously known to the defendant"; and (4) ninety percent of the newly disclosed evidence was cumulative regarding issues of Accardo's past scams, his access to funds, and his method of using threats.

A. The Late Disclosure Did Not Constitute a *Brady* Violation.

¶40 Contrary to Cloud's contention, *Brady* did not require the superior court to declare a mistrial or grant a longer continuance. Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Evidence is considered "material" for purposes of *Brady* "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-10 (1976). Rather, the nondisclosed favorable evidence must be such that it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

¶41 Further, our supreme court has held that *Brady* is not violated when previously undisclosed exculpatory information is revealed at trial and defense counsel has the opportunity to present it to the jury. *See State v. Jessen*, 130 Ariz. 1, 4, 633 P.2d 410, 413 (1981). "This is true even though the pretrial non-disclosure may have affected appellant's trial preparation and strategy." *Id.; see also Agurs*, 427 U.S. at 112 n.20 (1976) (rejecting argument that *Brady* claim should focus on the impact of undisclosed evidence on defendant's ability to prepare for trial). "As long as ultimate disclosure is made before it is too late for the defendant[] to make any use of any benefits of the evidence, Due Process is satisfied." *United States v. Warhop*, 732 F.2d 775, 777 (10th Cir. 1984) (citation omitted).

¶42 Here, the record supports the superior court's finding that the late-disclosed evidence was simply cumulative of other evidence that Cloud already had, and Cloud has failed to demonstrate a reasonable

probability that the outcome of the trial would have been any different had this material been disclosed to her before trial. Moreover, the court allowed Cloud a reasonable opportunity to review the evidence and conduct further investigation before resuming trial. On this record, the superior court's ruling in response to the late-disclosed evidence was not error under *Brady*.

B. The Imposition of a One-month Continuance to Allow Further Investigation at the State's Expense Was an Appropriate Remedy for the Late Disclosure.

¶43 Though the record does not support a finding of a *Brady* violation, the state's untimely disclosure unquestionably violated Ariz. R. Crim. P. 15.1. But contrary to Cloud's contention, this violation did not require the superior court to declare a mistrial or grant a longer continuance.

¶44 In general, a court may impose any remedy or sanction for nondisclosure that it finds just under the circumstances. Ariz. R. Crim. P. 15.7(a). In selecting the appropriate sanction, the trial court "should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible since the Rules of Criminal Procedure are designed to implement, not to impede, the fair and speedy determination of cases." *State v. Fisher*, 141 Ariz. 227, 246, 686 P.2d 750, 769 (1984). A declaration of 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, 570, ¶ 43, 74 P.3d 231, 244 (2003) (citation omitted). "The trial judge's discretion is broad, because he is in the best position to determine whether the evidence will actually affect the outcome of the trial." *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000) (citation omitted). In determining the appropriate sanction, the court should consider "(1) the importance of the evidence to the prosecutor's case, (2) surprise or prejudice to the defendant, (3) prosecutorial bad faith, and (4) other relevant circumstances." *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996). We review the imposition of sanctions, and the denial of a request for mistrial, for abuse of discretion. *State v. Armstrong*, 208 Ariz. 345, 353-54, ¶ 40, 93 P.3d 1061, 1069-70 (2004); *Jones*, 197 Ariz. at 304, ¶ 32, 4 P.3d at 359.

¶45 We discern no abuse of discretion here. The quantity of late-disclosed documents was minimal in comparison with the quantity of documents that were timely disclosed. And again, the importance of the

late-disclosed evidence was minimal because it was largely cumulative of earlier-disclosed evidence. Cloud's investigator could not identify any specific inconsistencies, significant new information, or exculpatory information in the newly disclosed material. Moreover, there was no evidence that the late disclosure was the product of prosecutorial bad faith -- by contrast, the evidence showed that the failure to previously disclose the evidence was inadvertently caused by inadequate case transfer procedures. Finally, any potential prejudice to Cloud was minimized by the fact that her counsel possessed transcripts from Accardo's trial that referenced some of the late-disclosed evidence, *see State v. Bracy*, 145 Ariz. 520, 530, 703 P.2d 464, 474 (1985), and by the fact that she was given a reasonable and cost-free opportunity to conduct further investigation before trial resumed.

VI. SUFFICIENT EVIDENCE SUPPORTS CLOUD'S CONVICTIONS FOR CONSPIRACY AND MURDER.

¶46 Cloud next contends that the evidence was insufficient to support her convictions for conspiracy to commit murder and accomplice liability for first-degree murder. She does not contend that the evidence was insufficient to support her other convictions.

¶47 First-degree murder, a class 1 felony, is committed when a person intentionally or knowingly causes another's death with premeditation. A.R.S. § 13-1105(A)(1). A person is liable as an accomplice to first-degree murder if, "with the intent to promote or facilitate the commission of [first-degree murder]," she "[s]olicits or commands another person to commit [first-degree murder]," "[a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing [first-degree murder]," or "[p]rovides means or opportunity to another person to commit [first-degree murder]." A.R.S. § 13-301. Conspiracy to commit murder requires an "agree[ment] with one or more persons that at least one of them or another person will engage in conduct constituting [murder]" with "the intent to promote or aid the commission of [murder]." A.R.S. § 13-1003(A). Conspiracy rarely can be proved by direct evidence; the agreement may be inferred from circumstantial evidence, including the parties' overt conduct. *State v. Avila*, 147 Ariz. 330, 336, 710 P.2d 440, 446 (1985).

¶48 We review the sufficiency of the evidence to support Cloud's convictions de novo, *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011), viewing the facts in the light most favorable to upholding the verdicts and resolving all conflicts in the evidence against Cloud, *State v.*

Girdler, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). We defer to the jury regarding the credibility of witnesses and the weight given to their testimony. *See State v. Just*, 138 Ariz. 534, 545, 675 P.2d 1353, 1364 (App. 1983). We do not distinguish between direct and circumstantial evidence. *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993).

¶49 The evidence at trial showed that Cloud had problems in her marriage to the victim and had engaged in a serious argument with him the weekend before he was murdered. She and Accardo had called each other frequently before the murder, and she met with him and rented him a car a few days before the murder. On the day of the murder, she arranged to be with the victim at a restaurant and Accardo shot and killed him there at close range. When questioned by police, Cloud denied seeing the shooter and failed to mention Accardo when police described a person with his appearance leaving the scene of the crime. Cloud instead repeatedly suggested to police that the shooter was one of her husband's renters, and suggested to friends that the shooting was a case of mistaken identity. Cloud withdrew substantial sums of money immediately before and after her husband's death and gave them to Accardo, gave substantial amounts of property to Accardo in the days and years following the murder, kept her relationship with Accardo a secret from her friends and the police, and used elaborate codes and circumventions when she contacted him in the years following the murder. She attempted to obtain money from the victim's estate to give to Accardo, and she communicated with him regarding plans to evade police and flee the country.

¶50 This evidence was more than sufficient to support Cloud's convictions for conspiracy to commit murder and accomplice liability for first-degree murder.

VII. EVIDENCE THAT CLOUD PURCHASED FIREARMS AFTER THE MURDER WAS PROPERLY ADMISSIBLE.

¶51 Cloud next contends that the superior court abused its discretion by allowing the state to introduce "two firearms that were purchased [after the murder] by Cloud but had no bearing on the case." She argues that these firearms were unfairly prejudicial because they had "a visceral impact" upon the jury and were cumulative of evidence of other items that Cloud purchased for Accardo after the murder, including a car and a motorcycle. At trial, however, Cloud did not raise these objections. We therefore review her arguments of prejudice and cumulativeness for fundamental error only. *Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608. We view the challenged evidence in the "light most

favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21, 985 P.2d 513, 518 (App. 1998) (citation omitted).

¶52 We conclude that the superior court did not abuse its discretion, much less commit fundamental error, by allowing the state to present the evidence that Cloud purchased firearms. The evidence showed that Cloud had purchased the firearms in early 2001, and told one of the sellers that the purchase was for her "husband." The evidence also showed that the firearms were seized during a search of Accardo's home in 2003. The firearms and paperwork regarding their purchase therefore had probative value to show that Cloud had an ongoing relationship with Accardo, contrary to her later denial of this fact, and to show that she gave the firearms to Accardo as additional payment for his murder of her husband. Cloud has failed to persuade us, as is her burden on fundamental error review, that any unfair prejudice or cumulative effect from introduction of this evidence substantially outweighed its probative value and denied her a fair trial. *See* Ariz. R. Evid. 403.

VIII. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING CLOUD'S MOTION FOR MISTRIAL BASED ON IMPROPER TESTIMONY.

¶53 Cloud next contends that the superior court abused its discretion by denying a mistrial after the state's forensic accounting expert "blurted out that he would only work for the defense in cases where the defendant was innocent."

¶54 We find no abuse of discretion here. On cross-examination of the state's forensic expert, the following exchange occurred:

> Q. You testified at the beginning of your direct examination that you had testified for primarily plaintiffs but sometimes for defense. How many times have you testified on behalf of criminal defendants?
>
> A. Very few, two or three.
>
> Q. In your entire course of your professional experience?
>
> A. That's the only ones that I've ever found that were innocent that would –

¶55 The court granted Cloud's motion to strike this testimony, and instructed the jury not to consider it, but denied Cloud's motion for mistrial.[2] The court gave Cloud the opportunity to propose a more detailed jury instruction to address the issue but Cloud did not do so.

¶56 The court was in the best position to determine whether the improper comment would actually affect the outcome of trial, and we cannot say that the court abused its discretion by finding that striking the testimony and instructing the jury to ignore it provided a sufficient remedy. We presume that the jury followed the instruction. *See LeBlanc*, 186 Ariz. at 439, 924 P.2d at 443.

IX. THE SUPERIOR COURT DID NOT ERR BY PRECLUDING EVIDENCE OF POLICE FAILURE TO FOLLOW UP ON A REPORT OF ACCARDO'S FAMILY'S ILLEGAL ENTERPRISES.

¶57 Cloud finally contends that the superior court "did not set forth the correct standard" when it precluded evidence that the police did not follow up on Accardo's wife's "get-rich-quick schemes or her mother's trips to Colombia, possibly for drug-running," "despite being informed about the possibility by [Accardo's stepdaughter]." Cloud contends that the preclusion of this evidence deprived her of her constitutional right to present a complete defense by "suggest[ing] to the jury that the State's theory, namely, that all the money that Accardo had came from Cloud because she had hired him to kill [the victim], was wrong."

¶58 At trial, the court allowed Accardo's stepdaughter to testify "about get-rich schemes that she knows the specifics of that her mother engaged in," but precluded her from testifying that she had told police in 1998 that her family's trucking company was involved in drug smuggling and her maternal grandmother had traveled to Colombia. The court found that the risk of unfair prejudice and the cumulative nature of such testimony substantially outweighed its limited probative value. Later, the court found that this evidence also was unfairly prejudicial under the law governing admissibility of third-party culpability evidence, which the court reasoned was applicable because Cloud was offering the evidence in part to cast doubt on her guilt by showing that Accardo had "another source" of money other than her.

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[2] Later, the court found the expert in contempt of court and fined him $200.

¶59 The constitutional rights to due process, compulsory process, and confrontation guarantee a criminal defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citation omitted). A defendant's right to present evidence is subject to restriction, however, by application of reasonable evidentiary rules. *See United States v. Scheffer*, 523 U.S. 303, 308 (1998). Although we ordinarily review evidentiary rulings for abuse of discretion, we review evidentiary rulings that implicate a defendant's constitutional rights de novo. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42, 140 P.3d 899, 912 (2006).

¶60 We find neither evidentiary error nor constitutional error here. The precluded testimony's minimal probative value, to show a lack of police follow-up and Accardo's alternative sources of money, was substantially outweighed by the danger of unfair prejudice from the likelihood that the jury would view the testimony as evidence that Accardo's mother-in-law, a witness to the murder, was in fact involved in drug-smuggling. *See* Ariz. R. Evid. 403. Further, the testimony was cumulative of other evidence of police failure to follow up on evidence suggesting that Accardo and his relatives obtained money from other illegal activity. *See id.* The court applied reasonable evidentiary rules to preclude the evidence and allowed Cloud to introduce substantial other evidence supporting her theories. Her constitutional right to present a complete defense was not violated.

CONCLUSION

¶61 We reject each of Cloud's assignments of error. We affirm her convictions and sentences.