DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0982
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JAMES EARL YOUNG,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR 2000-018665

The Honorable Connie Contes, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
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T H O M P S O N, Judge

¶1 James Earl Young appeals his conviction and sentence for first degree murder. Young argues the trial court erred by denying his motion to dismiss or to remand to the grand jury and by denying his motion for new trial. For reasons that follow, we affirm.

¶2 Young was indicted for first degree murder for the death of S.C. S.C. was killed by a single gunshot to the forehead after answering the door to her apartment in the early morning hours of October 17, 2000. Although not married, Young and S.C. had lived together as husband and wife in another apartment in the same apartment complex until several months prior to her murder. S.C. moved out after being assaulted by Young.

¶3 Approximately four hours before the murder, Young went to the restaurant where S.C. worked, and upon seeing S.C. in the company of another man, M.A., Young pointed at them and stated, "You're both dead." After returning to her apartment later that evening, S.C. telephoned M.A. several times to report that she was receiving phone calls from Young. In her final phone call to M.A., S.C. told him that Young was outside her apartment, knocking on the door or window. Young went into hiding after the murder, and the police were unable to take him into custody on the murder charge until June 13, 2001.

¶4 Young was convicted of first degree murder following a trial and sentenced to natural life. This court affirmed the conviction, but vacated the sentence. *State v. Young*, 1 CA-CR 02-0273 (Ariz. App. Jan. 30, 2003 & Oct. 30, 2003) (mem. decisions). Young was resentenced to life in prison without the possibility of release for twenty-five years, and the sentence was affirmed on appeal. *State v. Young*, 1 CA-CR 05-0148 (Ariz. App. Oct. 20, 2005) (mem. decision).

¶5 On December 12, 2008, following an evidentiary hearing on his petition for post-conviction relief, Young was granted a new trial on the grounds of ineffective assistance of counsel and/or newly discovered material facts. At Young's trial in 2002, telephone company records evidencing the times of the telephone calls between S.C. and M.A. on the night of the murder had been presented to the jury as reflecting Mountain Standard Time. Based on evidence at the hearing on the petition for post-conviction relief, the trial court found the records actually showed the times of the phone calls in Eastern Standard Time and that this previously undiscovered discrepancy in the times of the phone calls had a reasonable probability of changing the jury's verdict.

¶6 Prior to his retrial, Young moved to dismiss or to remand to the grand jury because, among other grounds, the grand jury's consideration of false testimony regarding the timing of

the phone calls rendered the indictment defective and a denial of due process. The state opposed the motion, arguing that it was untimely and, alternatively, that there was no misconduct that would necessitate dismissal or remand. After hearing oral argument, the trial court denied the motion.

¶7 Upon trial to a second jury in 2010, Young was again found guilty of first degree murder. The trial court denied Young's motion for a new trial and sentenced him to life without the possibility of release for twenty-five years. Young filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A) (2010).

DISCUSSION

A. Denial of Motion to Dismiss or for Remand

¶8 Young argues that the trial court erred in denying his motions to dismiss or to remand to the grand jury based on the grand jury having considered false and misleading testimony with respect to the timing of phone calls and the existence of an order of protection. We generally review a ruling on a motion to dismiss for an abuse of discretion. *State v. Mangum*, 214 Ariz. 165, 167, ¶ 6, 150 P.3d 252, 254 (App. 2007).

¶9 Arizona Rule of Criminal Procedure 12.9 (Rule 12.9) is both "[t]he defendant's sole procedural vehicle for challenging

grand jury proceedings" and "the appropriate method to challenge prosecutorial misconduct before the grand jury." *State v. Young*, 149 Ariz. 580, 585-86, 720 P.2d 965, 970-71 (App. 1986). A motion made pursuant to this rule must be made "no later than 25 days after the certified transcript and minutes of the grand jury proceedings have been filed or 25 days after the arraignment is held, whichever is later." Ariz. R. Crim. P. 12.9(b). "A defendant waives his objections to the grand jury proceeding by failing to comply with the timeliness requirement." *State v. Mulligan*, 126 Ariz. 210, 213, 613 P.2d 1266, 1269 (1980) (quoting *State v. Smith*, 123 Ariz. 243, 248, 599 P.2d 199, 204 (1979)). Although the trial court may grant a motion for extension of time to file a Rule 12.9 motion, the motion for extension must be filed within the 25-day period. *Maule v. Superior Court*, 142 Ariz. 512, 515, 690 P.2d 813, 816 (App. 1984).

¶10 Here, the first of the three motions challenging the grand jury proceedings was filed by Young on March 24, 2009, and therefore was untimely, whether measured from the filing of the certified transcript and minutes of the grand jury proceedings, from Young's arraignment in 2003, or from the trial court's ruling granting the petition for post-conviction relief on December 12, 2008. Accordingly, not only was there no abuse of discretion by the trial court in denying the untimely motions,

the trial court lacked authority to take any other action on the motions. *See State v. Merolle*, 227 Ariz. 51, 54, ¶ 15, 251 P.3d 430, 433 (App. 2011).

¶11 Moreover, a defendant seeking to challenge an adverse trial court ruling concerning grand jury proceedings "generally must do so through special action rather than waiting to raise such issues on appeal." *State v. Snelling*, 225 Ariz. 182, 185, ¶ 11, 236 P.3d 409, 412 (2010). The sole exception is when a defendant has had to stand trial on an indictment which the government knew was based on perjured, material testimony. *State v. Moody*, 208 Ariz. 424, 440, ¶ 31, 94 P.3d 1119, 1135 (2004). "Perjury is a 'false sworn statement [a witness makes regarding] a material issue, believing [the statement] to be false.'" *Id.* at 440, ¶ 32, 94 P.3d at 1135 (quoting Ariz. Rev. Stat. (A.R.S.) § 13-2702(A)(1) (2010)).

¶12 In claiming that false testimony was presented to the grand jury, Young relies on the "same false and misleading statements that were testified to . . . by Detective [J.L.] regarding the timing of the phone calls" that were the basis for the trial court granting his petition for post conviction relief. No claim is made, however, that any of the detective's testimony to the grand jury was presented with a belief in its falsity. Indeed, the record is to the contrary. In granting the petition for post-conviction relief, the trial court found

expressly that "no person involved in Defendant's first trial, including Defendant, his attorney, the prosecutor, the judge, the jurors and the witnesses, [was] aware of the mistaken facts." Absent a showing of knowing use of perjured testimony in the grand jury proceedings, the challenge raised by Young to the grand jury proceedings is not reviewable on appeal. *Moody*, 208 Ariz. at 439-40, ¶ 31, 94 P.3d at 1134-35; *see also State v. Charo*, 156 Ariz. 561, 566, 754 P.2d 288, 293 (1988) (holding that the "issue of probable cause is a closed question after the jury determines a defendant's guilt beyond a reasonable doubt").

B. Denial of Motion for New Trial

¶13 Young argues that the trial court erred in denying his motion for new trial. "Motions for new trial are disfavored and should be granted with great caution." *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996) (quoting *State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988)). The decision of whether to grant a new trial is within the sound discretion of the trial judge, and we will not reverse that decision absent an affirmative showing of an abuse of that discretion. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). We accord the trial court "broad discretion" in ruling on a motion for new trial because it "sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the verdict which cannot

be recreated by a reviewing court from the printed record." *State v. Lukezic*, 143 Ariz. 60, 63, 691 P.2d 1088, 1091 (1984) (quoting *Reeves v. Markle*, 119 Ariz. 159, 163, 579 P.2d 1382, 1386 (1978)).

1. Weight of the Evidence

¶14 Young contends the trial court should have granted his motion for new trial because the jury's verdict was against the weight of the evidence. In considering such a claim, the trial judge acts as a "so-called thirteenth juror" and may grant the motion if the judge "simply disagrees with the jury's resolution of conflicting facts" and "believes the conviction is against the weight of the evidence". *Peak v. Acuna*, 203 Ariz. 83, 85, ¶ 9, 50 P.3d 833, 835 (2002). A new trial is required on this basis "only if the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime." *Landrigan*, 176 Ariz. at 4, 859 P.2d at 114.

¶15 Young makes no claim on appeal that the evidence was insufficient to withstand a motion for judgment of acquittal pursuant to Rule 20. The essence of his argument is simply that M.A's testimony, which placed Young at S.C.'s apartment shortly before the murder, is suspect when compared with the telephone company records and should not be credited. However, there was also testimony from the custodian of records for the telephone company that raised questions concerning the reliability and

completeness of the telephone records. Any conflict between M.A.'s testimony and the telephone records is a matter to be resolved by the finder of fact, whether it be the jury at trial or the trial judge in ruling on the motion for new trial, not by an appellate court. *See State v. Cox*, 217 Ariz. 353, 357, ¶ 27, 174 P.3d 265, 269 (2007) (noting credibility of witnesses and the weight and value of evidence are "questions exclusively" for the fact-finder).

¶16 Although there was no direct evidence that Young was the person who murdered S.C., a conviction "may rest solely on circumstantial proof." *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985). Our review of the evidence finds it more than sufficient to permit a finder of fact to conclude beyond a reasonable doubt that Young murdered S.C. Because the state presented evidence sufficient to support a verdict of guilt, the trial court did not abuse its discretion in concluding that the verdict was not against the weight of the evidence. *State v. Davis*, 226 Ariz. 97, 99, ¶ 7, 244 P.3d 101, 103 (App. 2010).

2. Prosecutorial Misconduct

¶17 Young also argues that his motion for new trial should have been granted because of "various acts of prosecutorial misconduct" both prior to and during the trial that "compounded in such a way as to result in the denial of his rights to a fair trial and due process." Young, however, argues only two

instances of alleged prosecutorial misconduct on appeal: a Rule 15 disclosure violation and a comment on his right to remain silent. The failure to argue any other instances of prosecutorial misconduct waives those claims on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (Appellate briefs "shall contain 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."); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

¶18 With respect to the alleged disclosure violation, Young complains the prosecutor presented testimony from a police detective about some additional investigation by him relating to phone numbers collected from the victim's pager that had not been disclosed in compliance with Rule 15.1. This rule requires the state to disclose certain information regarding evidence and witnesses to be used at trial in a timely manner. Ariz. R. Crim. P. 15.1(a)-(c). Issues regarding the scope of disclosure required by Rule 15 are reviewed *de novo*, while a trial court's rulings on the adequacy of disclosure and sanctions are reviewed for an abuse of discretion. *State v. Roque*, 213 Ariz. 193, 205, ¶ 21, 141 P.3d 368, 380 (2006).

¶19 The flaw in Young's argument is that the detective's testimony at issue does not fall within any of the categories of information or materials required to be disclosed pursuant to

Rule 15.1. The detective's further investigation of the pager numbers was performed the morning of his testimony in response to testimony elicited from another witness on cross-examination by defense counsel the previous day. The detective had been properly disclosed as a witness prior to trial and no report had been prepared concerning this further investigation that required disclosure. On this record, there was no abuse of discretion by the trial court in allowing the detective's testimony. Thus, there was likewise no abuse of discretion by the trial court in denying Young's motion for new trial.

¶20 Young also argues the prosecutor committed misconduct by commenting on his right to remain silent in closing argument. A prosecutor "may not comment on a defendant's post-arrest, post-*Miranda* warning silence as evidence of guilt." *State v. Ramirez*, 178 Ariz. 116, 125, 871 P.2d 237, 246 (1994); *see State v. Bowie*, 119 Ariz. 336, 341, 580 P.2d 1190, 1195 (1978) ("Generally, it is error for the prosecutor to draw a derogatory inference from the fact that the accused declined to speak to the police upon his arrest."). To do so "violate[s] the Due Process Clause of The Fourteenth Amendment." *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). However, there is nothing improper in a prosecutor commenting on silence that is not *Miranda*-induced:

> A prosecutor may, however, comment on a defendant's pre-*Miranda* warnings silence, either before or after arrest, because no

> governmental action induced [defendant] to remain silent, and thus, the fundamental unfairness present in *Doyle* is not present.

Ramirez, 178 Ariz. at 125, 871 P.2d at 246.

¶21 We find no merit to Young's claim that the prosecutor improperly commented on his constitutionally protected right to remain silent. The prosecutor never said anything about Young being silent after receiving *Miranda* warnings. Contrary to Young's contention, there was nothing improper in the prosecutor reminding the jury that Young made efforts to avoid the police following the murder and contrasting his conduct with that of M.A., who cooperated with the police, in arguing "consciousness of guilt." Because there was no comment by the prosecutor on any post-*Miranda* warning silence, there was no error by the trial court in refusing to grant a new trial on this claim.

3. Evidentiary Rulings

¶22 Finally, Young argues that the trial court abused its discretion in denying his motion for new trial based on three claimed evidentiary errors: (1) preclusion of evidence that a witness was intimidated by the state; (2) admission of evidence of prior threats against S.C.; and (3) preclusion of evidence that S.C. "had a history of involvement with drugs" and that M.A. had a "drinking problem." Young asserts these claims of evidentiary error in conclusory fashion, without citation to the record and in the complete absence of any authority to support

the claims. Given the failure to develop these issues as required by Rule 31.13(c)(1)(vi), we hold they are waived on appeal. *State v. Sanchez*, 200 Ariz. 163, 166, ¶ 8, 24 P.3d 610, 613 (App. 2001); *see State v. Jaeger*, 973 P.2d 404, 410, ¶ 31 (Utah 1999) ("[T]his court is not 'a depository in which the appealing party may dump the burden of argument and research.'") (quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)).

CONCLUSION

¶23 For the foregoing reasons, we affirm the conviction and sentence.

/s/

_____
JON W. THOMPSON, Judge

CONCURRING:

/s/

_____
PATRICIA A. OROZCO, Presiding Judge

/s/

_____
SAMUEL A. THUMMA, Judge