IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 8/15/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 12-0286
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
TIGER FLOWERS, JR., Appellant.	)	Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-007901-002

The Honorable Edward W. Bassett, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

The Hopkins Law Office, P.C. — Tucson
By Cedric Martin Hopkins
Attorneys for Appellant

Tiger Flowers, Jr. — San Luis
Appellant

J O H N S E N, Chief Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following the conviction of Tiger Flowers, Jr. of second-degree murder, a Class 1 felony. Ariz. Rev. Stat. ("A.R.S.") § 13-1104 (West 2004). Flowers's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. *See Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel now asks this court to search the record for fundamental error. Flowers filed a supplemental brief raising several issues, which we address below. After reviewing the entire record, we affirm Flowers's conviction and sentence.

FACTS AND PROCEDURAL BACKGROUND

¶2 In November 2011, Flowers and Termaine Lee, Flowers's nephew, were charged by indictment with first-degree murder, A.R.S. section 13-1105 (West 2004), and assisting a criminal street gang, A.R.S. § 13-2308 (West 2004).[1] The facts giving rise to the indictment occurred in May 2005.[2]

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[1] Lee is not a party to this appeal. *See State v. Lee*, No. 1 CA-CR 12-0202, 2013 WL 509973 (Ariz. App. Feb. 12, 2013) (mem. decision).

[2] Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Flowers. *See State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

¶3 Flowers grew up in an area of South Phoenix where the Lindo Park Crips gang is found. In May 2005, Flowers did not live in that area, but his sister, Carolyn Colter, resided in Flowers's childhood home there. The victim was in a relationship with Carolyn Colter and living with her around the time he was killed and conducted Lindo Park Crips' activities out of the home.

¶4 In the early morning of May 3, 2005, the victim's body was discovered beside the sidewalk at the intersection of 65th Avenue and Grant Street. The victim had been stabbed multiple times with more than one weapon, but there was very little blood at the scene, indicating to one of the investigators, Detective Clifton Jewell, that the victim was not killed at the location where his body was found. Jewell also observed what appeared to be a bite mark on the victim's arm; he swabbed the area for DNA.

¶5 In September 2009, Detective Marianne Ramirez received a notification from the Phoenix Crime Laboratory that Lee was a possible suspect in the homicide. Ramirez and Detective Tyler Kamp interviewed Sarah Dagle, Lee's girlfriend at the time of the murder.[3] Dagle said that around May 2, 2005, Lee asked her if he could borrow her car because he and Flowers "were going to go handle business, take care of – take care of somebody, have

[3] Dagle had married and changed her last name to Pata by the time of Flowers's trial. Because the witnesses and record refer to her as Dagle, we maintain that form here as well.

somebody killed." Dagle was awoken later that night when the garage door opened and Lee came into her bedroom with blood on his hands, wearing someone else's clothes.

¶6 According to Dagle, a few minutes later, after Lee washed his hands, Dagle heard noises in the garage and saw Lee and Flowers and Flowers's Ford Thunderbird. The next day, she saw Lee removing the interior lining of the car and putting it in plastic bags. Dagle also saw spots of blood on the driver's side panel. She also saw local news coverage of a helicopter circling the scene of a dead body in the street.

¶7 Dagle told Pamela Colter, Flowers's sister and Lee's mother, what she saw. Colter confronted Flowers about what she had heard, and he confirmed that he went to Dagle's house while bloody one night. Shortly after the victim's murder, Colter saw Flowers driving in his Thunderbird with all the interior lining torn out, "[i]t was like a shell."

¶8 Ramirez and Kamp also brought Flowers's wife, Natosha Smith, into the police station for questioning. Smith told the detectives that Flowers and Lee returned home one night while bloody, rushed up the stairs, washed their hands and changed their clothes. She recounted that the Thunderbird was not at Smith's house the next morning.[4] About one week later, she

[4] Police ultimately traced the Thunderbird to an owner in Mexico; the detectives never examined the car.

learned the victim had been killed. The State called Smith to testify at trial, and she recanted all the statements she had made in her police interview. After extensive impeachment with the transcript of her interview, she testified that she lied to the detectives because they were "mean" and "rude" and she wanted to return to her children.

¶9 Police re-submitted evidence from the case to the crime laboratory to be tested against the DNA profiles of Flowers and Lee. An analysis of the swabs Jewell took from the possible bite mark on the victim's arm matched Flowers's DNA, and scrapings of the victim's fingernails matched Lee's DNA.

¶10 After a ten-day trial, a jury acquitted Flowers of the charged offenses but found him guilty of the lesser-included offense of second-degree murder, a dangerous offense. *See State v. Kamai*, 184 Ariz. 620, 623, 911 P.2d 626, 629 (App. 1995). The jury also found two aggravating factors. The court sentenced Flowers to an aggravated sentence of 22 years with 645 days' presentence incarceration credit.

¶11 Flowers timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (West 2013), 13-4031 (West 2013) and -4033(A)(1) (West 2013).[5]

[5] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

DISCUSSION

A. Issues Raised in Flowers's Supplemental Brief.

1. Denial of pro per motions.

¶12 After the guilty verdict, while the jury was deliberating about the charged aggravating circumstances, Flowers informed the court that he wished to represent himself. The court conducted a colloquy to ensure the waiver of counsel was knowing, intelligent and voluntary. *See* Ariz. R. Crim. P. 6.1(c).[6] The record clearly reflects that Flowers was informed of the risks of self-representation and his duty to comply with the Arizona Rules of Criminal Procedure. *See State v. Raseley*, 148 Ariz. 458, 461, 715 P.2d 314, 317 (App. 1986).

¶13 In his supplemental brief, Flowers asserts the court abused its discretion in denying on timeliness grounds numerous post-trial motions he made while representing himself. Flowers argues he neither received advisory counsel nor the case file until after the deadline to file the motions. The record is clear, however, that the superior court carefully advised Flowers he would face time pressures imposed by court deadlines if he persisted in his desire to represent himself. Specifically, the court advised Flowers,

[6] Flowers was represented by counsel at all other stages of the proceedings against him. His advisory counsel was present at sentencing.

> if you determine that you needed to file a motion for new trial, you would have to do so within ten days and you would be subject to the ten days from the date of the verdict, so you would be subject to all the rules that govern motions.
>
> * * *
>
> And if you represent yourself, you will be held to the same standards as an attorney . . . includ[ing] . . . the Arizona Rules of Criminal Procedure.

Flowers responded he understood. The court did not err in denying Flowers's untimely motions.

2. Admission of co-conspirator statement.

¶14 Flowers argues the superior court erred in admitting a statement Lee made to Dagle as a statement of a co-conspirator pursuant to Arizona Rule of Evidence ("Rule") 801(d)(2)(E).

¶15 That rule provides that a statement is not hearsay if it is offered against a party and was "made by the party's coconspirator during and in furtherance of the conspiracy." Ariz. R. Evid. 801(d)(2)(E). "The statement must be considered but does not by itself establish . . . the existence of the conspiracy or participation in it." Ariz. R. Evid. 801(d)(2). For purposes of the rule, the existence of the conspiracy and the defendant's involvement need only be established by a preponderance of the evidence, *Bourjaily v. United States*, 483 U.S. 171, 176 (1987), which may consist only of circumstantial evidence, *State v. Arredondo*, 155 Ariz. 314, 317, 746 P.2d 484,

487 (1987); *see also United States v. Mason*, 658 F.2d 1263, 1269 (9th Cir. 1981). We review for an abuse of discretion the superior court's decision to admit statements of an alleged co-conspirator pursuant to Rule 801(d)(2)(E). *State v. Dunlap*, 187 Ariz. 441, 458, 930 P.2d 518, 535 (App. 1996). "An abuse of discretion is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (quotation omitted).

¶16 During an interview with detectives in 2010, Dagle stated that the day before the victim's body was found, Lee asked her if he could use her car because "we need to go handle that . . . we're gonna go kill the guy." Flowers argues there was insufficient evidence other than this statement that either connected him to a conspiracy with Lee or indicated that he knew and participated in the conspiracy. Based on all the evidence in the record, however, the superior court properly could conclude that, more probably than not, Flowers was involved in a conspiracy with Lee to kill the victim.

¶17 For instance, Dagle also testified that the same night Lee made the statement, he came home with blood on his hands and tore out the interior lining of Flowers's car in her garage. Additionally, Smith's recanted testimony that Flowers and Lee came home bloody and changed their clothes corroborated Dagle's testimony. Finally, both Flowers's and Lee's DNA was present on

the victim's body. The evidence in the record is sufficient to sustain the superior court's determination that proof of a conspiracy to kill the victim existed.

¶18 Flowers further contends that the court violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution by admitting Lee's statement. We review *de novo* evidentiary rulings that implicate the Confrontation Clause. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42, 140 P.3d 899, 912 (2006).

¶19 The Confrontation Clause prohibits the admission of "testimonial hearsay" from a declarant who does not testify at trial. *Crawford v. Washington*, 541 U.S. 3, 51, 68 (2004). A statement may be testimonial under *Crawford* if the declarant "would reasonably expect it to be used prosecutorially or if it was made under circumstances that would lead an objective witness reasonably to believe the statement would be available for use at a later trial." *State v. Parks*, 211 Ariz. 19, 27, ¶ 36, 116 P.3d 631, 639 (App. 2005). The Court in *Crawford* specifically noted that statements made in furtherance of a conspiracy are "statements that by their nature [are] not testimonial." 541 U.S. at 56; *see also Giles v. California*, 554 U.S. 353, 374, n.6 (2008) ("[A]n incriminating statement in furtherance of the conspiracy would probably never be . . . testimonial."). Because Lee had no reason to anticipate that

his statement to Dagle would be used as evidence at a later trial, that statement was not testimonial under *Crawford* and its admission therefore did not violate Flowers's confrontation rights.

3. Sufficiency of the evidence.

¶20 Flowers next argues that the evidence in support of his conviction was insufficient. In reviewing a claim of insufficient evidence, we examine whether substantial evidence supports the jury's verdict. *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005). "Evidence is not insubstantial simply because testimony is conflicting or reasonable persons may draw different conclusions from the evidence." *State v. Toney*, 113 Ariz. 404, 408, 555 P.2d 650, 654 (1976). Rather, "[s]ubstantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt," *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996), and it "may be either circumstantial or direct," *State v. Henry*, 205 Ariz. 229, 232, ¶ 11, 68 P.3d 455, 458 (App. 2003). We will reverse a defendant's conviction only if there is a complete absence of probative facts to support the jury's verdict. *State v. Lopez*, 230 Ariz. 15, 17, ¶ 3, 279 P.3d 640, 642 (App. 2012).

¶21 Flowers first contends Dagle never identified "the guy" he and Lee purportedly were going to kill. While Dagle did

not testify that Lee stated they were going to kill the specific victim in this case, there was substantial evidence supporting the jury's verdict that "the guy" was the victim Flowers was charged with killing. Dagle testified that the morning after her middle-of-the-night encounters with Lee and Flowers, she watched local news coverage of the scene of the victim's dead body. Smith also confirmed while testifying that when Ramirez and Kamp questioned her, she knew they were investigating this victim's death. Finally, Flowers's and Lee's DNA were present on the victim's body.

¶22 Flowers also argues that only DNA evidence links him to the crime and that it is insufficient. Jewell testified there was a possible bite mark near the victim's elbow that he swabbed for DNA. Analysis of the swabs resulted in a "mixed DNA profile" of the victim and Flowers's DNA. In arguing this evidence is insufficient, Flowers points to testimony of the State's witness, Kelley Merwin, the DNA supervisor of the forensic biology section of the crime laboratory, that there is a "possibility of secondary transfer" of DNA.

¶23 In explaining "secondary transfer," Merwin testified that one can shake another's hand and leave DNA on that other person's hand. Merwin also opined that environmental factors such as perspiration may cause more DNA to be deposited in such a situation. Relying on this testimony, Flowers argues the mere

presence of his DNA on the mark on the victim's arm was insufficient to prove he killed the victim.

¶24 Although Flowers argues that his DNA could have been deposited on the victim days or weeks prior to the murder, the jury saw a videotape in which he told police that he had no recollection of the last time he saw the victim prior to the murder. "Evidence is not insufficient simply because testimony is conflicting." *State v. Donahoe*, 118 Ariz. 37, 42, 574 P.2d 830, 835 (App. 1977). Moreover, "[n]o rule is better established than that the . . . weight and value to be given to [witness] testimony are questions exclusively for the jury." *State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974). Here, a reasonable jury could have found from the evidence presented that Flowers's DNA was present on the victim because he participated in the killing.

¶25 Next, Flowers argues the State failed to prove he committed a voluntary act because "[t]here was no evidence" he inflicted any injury, possessed a murder weapon, or was with the victim when the injuries were inflicted. *See* A.R.S. § 13-201 (West 2013). Flowers's argument again goes to the weight the jury assigned to the evidence, especially circumstantial evidence. While no witness testified to seeing Flowers stab the victim or dispose of a weapon, we cannot say there is a complete absence of probative facts supporting the jury's verdict. As

discussed, Lee told Dagle he and Flowers were "gonna go kill" someone, Flowers came home bloody and changed his clothes and Flowers's DNA was present at the site of a possible bite mark on the victim's body. Moreover, the victim died from multiple stab wounds, circumstances from which an intent to do the act may be inferred. *See State v. Ontiveros*, 206 Ariz. 539, 543, ¶ 18, n.2, 81 P.3d 330, 334 (App. 2003).

¶26 Flowers also contends the State presented evidence supporting only premeditated, first-degree murder. Flowers notes that Lee's statement that they were "gonna go kill the guy," that the victim was stabbed numerous times and that his body was disposed of in a different location are circumstances evidencing premeditation and deliberation. We understand Flowers to argue that he was either guilty of the greater offense of first-degree murder, or not at all. *See State v. Morgan*, 204 Ariz. 166, 170, ¶ 13, 61 P.3d 460, 464 (App. 2002). We are not persuaded. The record is replete with evidence from which the jury could, on the one hand, conclude Flowers acted knowing his conduct would cause death or serious physical injury to the victim, A.R.S. § 13-1104(A), for purposes of second-degree murder, and on the other hand, leave the jury unconvinced that he committed first-degree murder.

¶27 Flowers argues that a question the jury asked during deliberations supports his contention that his conviction was

erroneous. At the close of trial, the court instructed the jury on both the "intentional" and "knowingly" forms of second-degree murder. During deliberations, the jury submitted a question asking whether it could "choose both 'intentional' and 'knowingly' or do we have to choose only one." Flowers's counsel and the State agreed with the superior court's explanation to the jury that if the State must prove Flowers acted knowingly, then that requirement is satisfied if it proved Flowers acted intentionally. The jury found Flowers not guilty as to "intentionally" but guilty as to "knowingly," which Flowers asserts must be erroneous because if "the State did not prove [he] acted intentionally, [] the requirement to prove knowingly was not satisfied."

¶28 Flowers is incorrect. "Knowing is a less culpable mental state than intent but is included within it so that whenever a jury determines that a defendant has acted intentionally, it has necessarily concluded that he acted knowingly." *State v. Schurz*, 176 Ariz. 46, 55, 859 P.2d 156, 165 (1993); *see also* A.R.S. § 13-202(C) (West 2013). Conversely, the lesser "knowingly" does not include the greater "intentionally." Thus, the jury properly could find the State proved beyond a reasonable doubt that Flowers committed second-degree murder "knowingly" but not "intentionally."

4. Marital privilege.

¶29 Flowers asserts the State violated his marital privilege rights, A.R.S. § 13-4062 (West 2013), when it subpoenaed Smith to testify "against her will and without [his] consent."[7] Pursuant to A.R.S. § 13-4062(A)(1),

> A person shall not be examined as a witness in the following cases:
>
> 1. . . . a wife for or against her husband without his consent, as to events occurring during the marriage, nor can either, during the marriage or afterwards, without consent of the other, be examined as to any communication made by one to the other during the marriage. . . . Either spouse may be examined as a witness for or against the other in a prosecution for [first degree murder, second degree murder or manslaughter] if . . .
>
> (a) Before testifying, the testifying spouse makes a voluntary statement to a law enforcement officer during an investigation of the offense or offenses about the events that gave rise to the prosecution or about any statements made to the spouse by the other spouse about those events.

A.R.S. §§ 13-4062(A)(1), -706(F)(1)(a)-(c) (West 2013).

¶30 Flowers failed to object when the State called Smith to testify; in fact, Flowers's counsel cross-examined her. Because Flowers did not object to her testimony, we are limited to fundamental review of the asserted error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

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[7] Although the offense was committed in 2005, we apply the version of a privilege statute in effect at the time of trial. *State v. Carver*, 227 Ariz. 438, 441, ¶ 10, 258 P.3d 256, 259 (App. 2011).

¶31 The court did not err, much less commit prejudicial fundamental error, by permitting Smith to testify. The exception quoted above allowed the State to call Smith to testify because she had made a "voluntary statement" to police about the matters at hand.

5. Alleged prosecutorial misconduct.

¶32 Flowers contends his due-process rights were violated by multiple acts of prosecutorial misconduct. A conviction will be reversed for prosecutorial misconduct only if misconduct occurred and a reasonable likelihood exists that the misconduct affected the verdict, thereby depriving the defendant of a fair trial. *State v. Anderson*, 210 Ariz. 327, 340, ¶ 45, 111 P.3d 369, 382 (2005). When the defendant fails to object to the claimed misconduct, our review is limited to fundamental error. *Id.*

a. Detectives' testimony regarding Smith's interview.

¶33 Flowers argues Ramirez and Kamp committed perjury when they testified regarding the circumstances under which they questioned Smith. Specifically, Flowers argues his rights were violated when the State solicited false testimony from the detectives that Smith had agreed to go to the police station to be interviewed. Flowers contends that the transcript of the interview shows that Smith felt the detectives "made" her go.

He argues that had the prosecutor corrected the allegedly false testimony, the jury would have concluded that Smith's statements inculpating Flowers were not given voluntarily and therefore were untrue. To establish prosecutorial misconduct, Flowers must show that the witnesses' material statements were false, the prosecution knew they were false and the statements affected the jury's judgment. *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989).

¶34 Smith testified that she voluntarily went with the detectives to the station. Her testimony bolsters Kamp's testimony that she agreed to be interviewed at the station. To the extent Smith testified otherwise, it is not proper for this court to weigh conflicting testimony. *State v. Pike*, 113 Ariz. 511, 514, 557 P.2d 1068, 1071 (1976). More importantly, we fail to see how the circumstances under which Smith went in to be interviewed might affect the statements she gave to police that inculpated Flowers, or how Ramirez and Kamp's testimony about how they questioned Smith might have tainted the jury's verdict. As we have recognized, there was other evidence of Flowers's guilt. We therefore reject Flowers's argument.

b. Inconsistent testimony regarding the possible bite mark on the victim's arm.

¶35 Flowers challenges the evidence of his DNA profile found on the swabbed area of the possible bite mark on the

victim's arm. He notes that the State's exhibit 22 pictured the mark on the victim's left arm. When Kim Kobojek, the forensic scientist who tested the swabs for the presence of blood, testified, however, she read the impound officer's description of the swabs as from "a possible bite mark on victim's right upper arm."

¶36 Flowers did not object at trial, but argues on appeal that the prosecutor knew or should have known that her witness provided false information about the presence of his DNA near the bite mark on the victim, which enabled the jury to conclude that he must have participated in the murder.

¶37 We reject Flowers's argument. Our review of the record shows that the supplement to Jewell's police report states that he swabbed both "the victim's left upper arm where there appears to be a hand print" and "the victim's right upper arm where there appears to be a bite mark." Even assuming that, as Flowers seems to argue, Kobojek tested the swab from a hand print and not a bite mark, that would mean that Flowers's DNA was discovered in a bloody hand print on the victim presumably left during the commission of the homicide. Under these circumstances, we cannot say the inconsistency regarding the location from which the swab was taken constituted fundamental error denying Flowers a fair trial.

c. Prosecutor's opening statement and closing argument.

¶38 Finally, Flowers argues his conviction must be reversed because the prosecutor's comments during opening statement and closing argument amounted to misconduct.

¶39 In determining whether a prosecutor's actions were improper, the court should take into account "(1) whether the remarks call to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks." *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (quotation omitted). Because Flowers failed to object to any of the comments at trial, we review for fundamental error only. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶40 Flowers first cites two comments made by the prosecutor during opening statement. Flowers notes the prosecutor alerted the jury to pay close attention to Smith's testimony about what "she heard at the time of the murder." Second, Flowers notes the prosecutor's comment that Dagle "talked to the police about a Thunderbird she saw in her garage the night of [the victim's] murder." Flowers argues these statements constituted "false evidence" that deprived him of a

fair trial because the State never established that the two witnesses were referring to the same night or that it was the night when the victim was killed.

¶41 The prosecutor's forecast of the evidence the jury was going to hear was not improper. The trial was conducted nearly seven years after the offense and although the witnesses did not pinpoint the same specific date, they did testify that Flowers's and Lee's activities occurred around the time the victim was killed. Additionally, the superior court's instructions to the jury that they were to consider only the evidence presented to them and that the attorneys' statements were not evidence cured any potential prejudice. *See State v. Bowie*, 119 Ariz. 336, 339-40, 580 P.2d 1190, 1193-94 (1978).

¶42 Flowers also identifies two comments the prosecutor made during closing argument. Specifically, Flowers notes that the prosecutor described Smith's testimony as "like watching paint dry" and "painful to listen to" and told the jury that Smith had a motive to lie to cover for Flowers. Flowers also challenges the prosecutor's statements regarding his police interview, in which the prosecutor accused Flowers of lying: "[o]f course the defendant is lying. . . . What else do you expect him to do but lie about everything there is, lie about where he was, lie about his activities, lie about being a gang member?"

¶43 Trial counsel is afforded great latitude in presenting closing arguments to the jury and is free to comment on the evidence. *State v. Lucas*, 146 Ariz. 597, 606, 708 P.2d 81, 90 (1985), *overruled in part on other grounds by State v. Ives*, 187 Ariz. 102, 108, 927 P.2d 762, 768 (1996). The prosecutor's arguments about the credibility of a witness are not improper when they are based on facts in evidence. *State v. Williams*, 113 Ariz. 442, 444, 556 P.2d 317, 319 (1976). From our review of the record, we conclude the prosecutor's remarks were within the permissible range of proper argument.

¶44 The prosecutor's explanation that Smith was motivated during her testimony to cover for Flowers was supported by her thorough impeachment and her testimony that she was untruthful with detectives simply because they were "rude" and "mean." *See State v. Mincey*, 130 Ariz. 389, 409-10, 636 P.2d 637, 657-58 (1981) (permissible to allege perjury in challenging credibility of defense witnesses or to inform jury it had been deceived).

¶45 As for the prosecutor's argument concerning Flowers's interview, Flowers contends that the prosecutor "engaged in impermissible vouching during closing argument by calling defendant 'a liar.'" There are two forms of prosecutorial vouching: "(1) where the prosecutor places the prestige of the government behind its [evidence] [and] (2) where the prosecutor suggests that information not presented to the jury supports the

[evidence]." *State v. Newell*, 212 Ariz. 389, 402, ¶ 62, 132 P.3d 833, 846 (2006) (alterations in original) (quoting *State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989)). Clearly, the prosecutor's argument here does not fit either category.

¶46 Moreover, the videotaped interview was admitted into evidence and the prosecutor's characterization of it was proper. *See State v. Blackman*, 201 Ariz. 527, 544, ¶ 71, 38 P.3d 1192, 1209 (App. 2002); *see also State v. Schrock*, 149 Ariz. 433, 438-39, 819 P.2d 1049, 1054-55 (1986) (prosecutor warranted in arguing defendant lied as a means of highlighting that defendant's statement was not believable). For these reasons, we reject Flowers's argument.

B. Other Issues.

¶47 The record reflects Flowers received a fair trial. He was present at all critical stages. The superior court held appropriate pretrial hearings. It did not conduct a voluntariness hearing; however, the record did not suggest a question about the voluntariness of Flowers's statements to police. *See State v. Smith*, 114 Ariz. 415, 419, 561 P.2d 739, 743 (1977); *State v. Finn*, 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974).

¶48 Pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), the court held a hearing concerning Dagle's

pre-trial identification of Flowers. During Dagle's interview, police showed her a single photograph of Flowers after stating, "I'm gonna . . . show Sarah Dagle, a photograph of an individual to see if she recognizes this person to be [Flowers], right? . . . [I]t's going to be Mr. Tiger Flowers, Jr. Sarah, is this who you recognize?" Dagle responded, "Yes."

¶49 The court ruled Dagle's out-of-court identification admissible, reasoning that the identification procedures were not unduly suggestive because she had prior contact with Flowers given he was her boyfriend's uncle. Alternatively, even if the procedures were suggestive, the court found any in-court identification by Dagle would not be tainted because Flowers was her acquaintance and she knew him regardless of the photo identification. The court did not err. *See State v. LaBarre*, 114 Ariz. 440, 447, 561 P.2d 764, 771 (App. 1977) (given witness's prior relationship with defendant, any in-court identification would be independent of any pre-trial identification procedures).

¶50 The jury was properly comprised of 12 jurors with two alternates. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned a unanimous verdict, which was confirmed by juror polling. The court received and considered a presentence report, addressed its

contents during the sentencing hearing and imposed a legal sentence for the crime of which Flowers was convicted. *See* A.R.S. § 13-710(A) (West 2004).

CONCLUSION

¶51 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. After the filing of this decision, defense counsel's obligations pertaining to Flowers's representation in this appeal have ended. Defense counsel need do no more than inform Flowers of the outcome of this appeal and his future options, unless, upon review, counsel finds "an issue appropriate for submission" to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Flowers has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Flowers has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

_____/s/_____
DIANE M. JOHNSEN, Chief Judge

CONCURRING:

_____/s/_____
SAMUEL A. THUMMA, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge