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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 08-0470  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
DIONICIO ABUNDIS, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-007359-001 DT

The Honorable Michael W. Kemp, Judge

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
and Melissa M. Swearingen, Assistant Attorney General  
Attorneys for Appellee

Theresa M. Armendarez PLC Phoenix  
By Theresa M. Armendarez  
Attorney for Appellant

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**S W A N N**, Judge

¶1 Dionicio Abundis ("Defendant") was convicted by a jury of discharging a firearm at a residential structure, a violation of A.R.S. § 13-1211(A) (2001) and a class two dangerous felony; assisting a criminal street gang, then a violation of A.R.S. § 13-2308<sup>1</sup> and a class three dangerous felony; and threatening or intimidating, then a violation of A.R.S. § 13-1202(A)(3) (Supp. 2005) and a class four felony.<sup>2</sup> The charges stemmed from a 2005 incident in which Defendant, his brother, and a friend tried to call occupants out of a house for a fight and, after the occupants refused to exit, the friend fired a handgun at the house. The trial court sentenced Defendant to concurrent, slightly mitigated prison terms, the longest being twelve years. On appeal, Defendant contends that the trial court erred in denying his motion for mistrial based on the playing of a recorded interview that included references to his prior criminal record. For the reasons that follow, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 At trial, the State presented testimony from a police detective regarding his interview of Defendant. During the detective's testimony, a recording of the interview was admitted

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<sup>1</sup> Assisting a criminal street gang is now a violation of A.R.S. § 13-2321 (Supp. 2009).

<sup>2</sup> Threatening or intimidating pursuant to A.R.S. § 13-1202(A)(3) is now a class three felony. A.R.S. § 13-1202(C) (Supp. 2009).

into evidence and played for the jury without objection. The quality of the recording was poor, and portions of Defendant's responses were unclear or inaudible. When defense counsel objected to testimony by the detective that filled in some of the inaudible portions, the trial court permitted the testimony but instructed the jurors that what was said on the tape was ultimately for them to decide. The detective made no mention of Defendant's criminal record in his testimony.

¶13 At the conclusion of that day's testimony, the trial court *sua sponte* raised an issue regarding the tape. The court noted that in addition to the interview of Defendant, the recording contained interviews of Defendant's brother and the friend, which were not in evidence. The court directed that those interviews should not be available to the jury. Defense counsel remarked that the exhibit marked into evidence also contained a second audiotape of a recording with one of the victims, which likewise was not in evidence. The trial court agreed that the second tape should not be part of the exhibit and directed the State to provide a recording for submission to the jury that contained only Defendant's interview. There was no discussion concerning the contents of Defendant's interview.

¶14 The next day, the trial court addressed a new objection from defense counsel about the recording:

Second issue is the tape. The recording of the defendant's statement. I'm going to order that any reference to the defendant being a convicted felon or being in the Department of Corrections will be redacted before that tape goes back to the jury. Those portions should have been redacted before, although, the defense did not object.

If there is reference to the Department of Corrections and to the defendant having a prior felony conviction -- and it's difficult for the Court to determine that because the audio is not a very good quality. I'm not sure that is what the defendant said. The tape has already been played for the jury. The bell has been rung -- but, I do want those parts excised from the tape, if this goes back to the jury. And I'm leaving it up to counsel as to how to do that. That tape will not go back to the jury without those portions being excised.

Again, the references to the defendant referring to himself as having a felony conviction or that he had been to the Department of Corrections -- hopefully that part is not audible and the jury didn't hear that -- the State did not elicit any testimony regarding those areas through [the detective] when he was called, but I think that those should be excised.

¶15 Defendant moved for dismissal with prejudice based on prosecutorial misconduct, or in the alternative for a mistrial, because the recording played at trial included his comments about his felony conviction and his time in prison. The trial court denied the motions, concluding that it was unlikely that the jury had heard the offending references. Defendant

unsuccessfully re-urged his motion for mistrial while the jury was deliberating.

¶16 Defendant timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031, and 13-4033(A) (Supp. 2009).

#### DISCUSSION

¶17 A 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. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). In deciding whether to declare a mistrial after inadmissible evidence has been unexpectedly interjected, the trial court should consider "(1) whether the remarks called 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. Stuard*, 176 Ariz. 589, 601, 863 P.2d 881, 893 (1993) (citation omitted). The trial court has broad discretion in deciding whether to grant a motion for mistrial because it "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); accord *State v. Koch*, 138

Ariz. 99, 101, 673 P.2d 297, 299 (1983) ("The trial judge is able to sense the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial."). The trial court's decision should only be reversed for an abuse of discretion that is "palpably improper and clearly injurious." *State v. Murray*, 184 Ariz. 9, 35, 96 P.2d 542, 568 (1995) (citation omitted).

¶8 We cannot say that the trial court abused its discretion when it concluded that the unredacted recording likely did not affect the jury's decision. Given the poor quality of the recording, the trial court could reasonably find that the jury did not hear the comments regarding Defendant's prior felony and imprisonment when the recording was played in court. Indeed, in the motion to dismiss or in the alternative for mistrial, defense counsel acknowledged that the reason she did not immediately object was because she was uncertain whether she accurately heard the relevant comments. In these circumstances, the court did not err in denying Defendant's motion for mistrial.

**CONCLUSION**

¶19 We affirm the convictions and sentences.

/S/

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PETER B. SWANN, Judge

CONCURRING:

/S/

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PATRICIA K. NORRIS, Presiding Judge

/S/

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DANIEL A. BARKER, Judge