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

STATE OF ARIZONA,	)	1 CA-CR 08-0986
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
BRAD J. ELWOOD,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Navajo County

Cause No. S-0900-CR-0020070735

The Honorable John N. Lamb, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

Law Office of Marsha Gregory PC — Springerville
By Marsha A. Gregory
Attorneys for Appellant

J O H N S E N, Judge

¶1 Brad J. Elwood appeals his convictions and sentences for second-degree murder and first-degree burglary, arguing that

the weight of the evidence failed to support his convictions and prosecutorial misconduct requires reversal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 At about 9:30 p.m. on Friday, July 13, 2007, an acquaintance discovered the victim lying face down on the floor of his home in Linden, dead, a dried pool of blood under his body. The medical examiner found the victim died of multiple gunshot wounds. An investigator concluded that the victim had died the previous day. A ballistics expert concluded that bullet jackets retrieved from the scene had been fired by a .44 magnum revolver that Elwood's employer testified he had sold to Elwood three years earlier. A DNA expert testified that Elwood was the major contributor to the DNA found on the .44 magnum revolver.

¶3 Two witnesses testified Elwood had told them on Thursday evening that he had killed the victim, for whom he had a longstanding animosity. Elwood's employer said Elwood left work at about 3:00 p.m. on Thursday and came over to the employer's house in Linden at about 5:30 p.m. that day. A person leaving a convenience store in Linden at about 5:50 p.m. testified that he called 9-1-1 after he saw a person driving erratically in Elwood's pickup truck, pounding the steering wheel with a large caliber revolver. An off-duty police officer who saw Elwood at a Show Low gas station in his pickup truck at

about 6:30 p.m. testified that Elwood was acting nervous and jumpy.

¶4 A friend, M.S., testified Elwood came by his house in the early evening on Thursday, drunk and "in a happy mood," and said that he had shot the victim. M.S. testified that at the time he did not believe Elwood. After he saw a pistol on the seat of Elwood's pickup truck, because Elwood was drunk, he took the revolver for safekeeping. M.S. called police after he learned that the victim was dead to report that he had Elwood's revolver. A detective who interviewed M.S. testified that M.S. said Elwood had told him on Thursday night, "Happiest day in my life, I killed him, I shot him twice." J.S. testified that she recalled overhearing Elwood say Thursday evening, "A bad person was gone," and "Boom, boom." M.S.'s mother testified that she overheard Elwood saying, "I did it." Another friend of Elwood's testified that Elwood visited him on Thursday night. According to that witness, Elwood was extremely drunk and said, "I finally did it . . . I shot [the victim] twice with a .44."

¶5 A highway patrolman arrested Elwood for driving under the influence at about 8:45 p.m. on Thursday in Heber. Elwood produced an identification card showing that he had been in prison, "kind of chuckled," and told the officer that he had been in for murder. When the officer stepped back, startled, Elwood said he was just kidding, that he had been in prison for

aggravated DUI. The officer saw a gun holster on the front seat of Elwood's pickup truck and a box for the Smith & Wesson .44 magnum revolver in the bed of the truck. A breathalyzer showed Elwood had an alcohol concentration of .146.

¶6 During an interview after the victim's body was found, Elwood initially repeatedly denied having been in Linden on Thursday and denied that he owned a gun. He eventually admitted that he purchased the Smith & Wesson .44 magnum revolver from his employer and that he had visited his employer in Linden the day before. Elwood denied shooting the victim but admitted that he was angry with him because the victim had rolled Elwood's truck 18 months before and then hit him in the head with a bottle.

¶7 Elwood called two witnesses who testified they recalled hearing two gunshots between 10:00 and 10:30 a.m. from the direction of the victim's house a day or two before the deputy sheriff interviewed them, which they both testified was on a Friday. The deputy sheriff who interviewed them, however, testified he interviewed them on the Saturday after the murder, and at that time, neither could recall what time of day nor how many days before they had heard the shots.

¶8 The jury convicted Elwood of second-degree murder, a lesser-included offense of the charged crime of first-degree murder, and of burglary in the first degree. After denying

Elwood's motion for new trial, the court sentenced Elwood to 17 years on the murder conviction and 10.5 years on the burglary conviction, the terms to be served concurrently. Elwood timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003).

DISCUSSION

A. Sufficiency of the Evidence.

¶9 Elwood argues the trial court erred when it denied his motion for new trial because his conviction was not supported by the weight of the evidence. He argues there were inconsistencies in the evidence regarding whether his pickup truck was "blue" or "green" or "solid color" or "two-toned" and the precise time he had arrived at various witnesses' homes and inconsistencies between some witnesses' statements to police and their testimony at trial with respect to what they overheard him say. He also contends there was an inconsistency between a pretrial statement and trial testimony by the witness who found the victim's body about whether he turned on the lights at the victim's house, and argues there was only a "weak at best" identification of Elwood's pickup truck by the witness who reported seeing the driver banging on the steering wheel with a gun in his hand. Elwood also argues that the witnesses who testified that they had heard two gunshots the day before a

deputy sheriff interviewed them indisputably placed the time of death as Friday at 10:30 a.m., when Elwood was already in jail.

¶10 We find no merit in Elwood's argument. "A new trial under Rule 24 is required only if 'the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime.'" *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996); *see also* Ariz. R. Crim. P. 24.1(c)(1). In determining the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all inferences against the defendant. *Spears*, 184 Ariz. at 290, 908 P.2d at 1075. We leave to the jury the determination of the credibility of witnesses and the weight to be given their testimony. *See State v. Neal*, 143 Ariz. 93, 97, 692 P.2d 272, 276 (1984). We will reverse a denial of a motion for new trial "only when there is an affirmative showing that the trial court abused its discretion and acted arbitrarily." *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984); *see also Neal*, 143 Ariz. at 97, 692 P.2d at 276.

¶11 As recounted above, the evidence was more than sufficient to support the guilty verdicts, and Elwood has given us no basis to conclude that the court abused its discretion when it denied his motion for a new trial. Specifically, the minor inconsistencies he identifies do not undermine the jury's

verdict. Defense counsel vigorously cross-examined the witnesses and argued at length in closing the version of events that Elwood argues should have resulted in a new trial. It was the jury's function to resolve any such inconsistencies in the evidence. *See State v. Parker,* 113 Ariz. 560, 561, 558 P.2d 905, 906 (1976).

B. Alleged Prosecutorial Misconduct.

¶12 Elwood argues that prosecutorial misconduct in closing argument deprived him of a fair trial. He argues the prosecutor (1) misrepresented the evidence, (2) willfully exceeded the scope of his rebuttal argument, and (3) improperly shifted the burden of proof.

¶13 "[P]rosecutors have wide latitude in presenting their closing arguments to the jury: 'excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury.'" *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (quoting *State v. Gonzales*, 105 Ariz. 434, 436-37, 466 P.2d 388, 390-91 (1970)). In determining whether a prosecutor's remarks are improper, we consider whether the remarks called to the attention of jurors matters they would not be justified in considering and the probability, under the circumstances, that the jurors were

influenced by the remarks. *Jones,* 197 Ariz. at 305, ¶ 37, 4 P.3d at 360 (citation omitted). To require reversal, the misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee,* 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (citation omitted).

¶14 First, we find no merit in Elwood's argument that the prosecutor engaged in misconduct by mistakenly attributing remarks made by M.S.'s sister to her mother. Elwood does not argue that the prosecutor's mistaken attribution was intentional, as necessary to establish misconduct. *See State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (citation omitted).

¶15 Second, we reject Elwood's argument that the prosecutor engaged in misconduct by allowing M.S.'s sister and mother to testify inconsistently with what they had said in an earlier interview and then relying on this inconsistent testimony in closing. The differences between the witnesses' statements were not significant. Elwood provides no legal support for the proposition that a prosecutor may not rely on sworn testimony simply because it is different from what the witness told police. Moreover, defense counsel impeached each witness and during closing, argued that the discrepancies undermined their credibility.

¶16 Nor do we find any merit in Elwood's argument that the prosecutor willfully exceeded the scope of his rebuttal argument by referring to Elwood's statement to police, in the absence of any discussion by defense counsel of this statement in his closing argument. Defense counsel argued at length in closing that police focused on Elwood as a suspect early in the case and then tried to obtain the evidence to convict him. Counsel argued that many of the State's witnesses who testified about conversations with Elwood the day of the killing were not to be believed because they had felony convictions and provided inconsistent statements. He argued those witnesses' failure to call police immediately made their testimony suspicious and that no forensic evidence connected him to the crime scene. Finally, counsel suggested that M.S. might have killed the victim on Friday with the revolver he had confiscated from Elwood on Thursday.

¶17 Elwood's argument that the prosecutor exceeded the scope of rebuttal by referring to his lies to police about his presence in Linden on Thursday fails. The fact that Elwood repeatedly lied to police about his presence in Linden on the day the victim was shot with his gun showed Elwood's consciousness of his own guilt and was a fair response to defense counsel's assertion that no evidence connected him to the crime scene and some other person had murdered the victim on

Friday while Elwood was in jail. *See State v. Trostle,* 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997).

¶18 Finally, we reject Elwood's argument that the prosecutor improperly attempted to shift the burden of proof by arguing that Elwood had not offered any evidence in support of his theory that M.S. killed the victim. It has long been settled that "the prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not constitute a comment on defendant's silence." *State ex rel. McDougall v. Corcoran,* 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987) (argument relating to defendant's failure to produce results of breath sample at trial was permissible); *State v. Fuller,* 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (references to defendant's failure to present any positive evidence were permissible when alibi witnesses were a possibility); *State v. Cozad,* 113 Ariz. 437, 439, 556 P.2d 312, 314 (1976) (not misconduct for prosecutor to comment about defendant's failure to produce a babysitter to provide an alibi for him in robbery case). "Such comment is permitted by the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it." *McDougall*, 153 Ariz. at 160, 735 P.2d at 770 (citations omitted).

¶19 The prosecutor's argument in this case that defense counsel had not offered any evidence to support his theory that M.S. had used Elwood's gun to commit the murder did not impermissibly shift the burden of proof to Elwood. On this record, we decline to find any prosecutorial misconduct, much less misconduct so pervasive that it requires reversal.

CONCLUSION

¶20 For the foregoing reasons, we affirm Elwood's convictions and sentences.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
DANIEL A. BARKER, Judge