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

STATE OF ARIZONA, Appellee, v. TRAYON DESHAWN WILLIAMS, Appellant.	)	1 CA-CR 09-0326 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Maricopa County

Cause No. CR2008-006027-001 DT

The Honorable Pendleton Gaines, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
And Joseph T. Maziarz
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Theresa M. Armendarez, P.L.C. — Phoenix
By Theresa M. Armendarez
Attorney for Appellant

T H O M P S O N, Judge

¶1 Trayon Williams (defendant) appeals his conviction for attempted second degree murder, arguing the trial court erred in denying his motion for a mistrial after the prosecutor asked

defendant "how many times" he had used the words "self-defense" during a police detective's interview of defendant. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Defendant was charged by indictment with one count of attempted first degree murder, a class 2 dangerous felony, or, in the alternative, one count of aggravated assault, a class 3 dangerous felony. The following evidence was presented at trial.[1]

¶3 Defendant and his brother went to a friend's apartment. They accepted a ride home from the victim, M.T. During the drive, an altercation ensued. Once they arrived at the apartment complex, defendant fired multiple shots at M.T. M.T. was hit at least four times in his stomach and his leg. Defendant ran from the scene.

¶4 At trial, defendant testified on his own behalf. Defendant admitted to firing six shots at M.T., but testified that he was shooting in self-defense. The following exchange took place during cross-examination:

> [Prosecutor]: Now, you spoke to Detective Enriquez at the police station?
>
> [Defendant]: Yeah, I did.
>
> [Prosecutor]: Okay. Did you tell her it was self-defense?
>
> [Defendant]: No, I thought it would be best to tell a lawyer.

[1] We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against defendant. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

> [Prosecutor] Okay. How many times did you use the words self-defense when you talked to Detective Enriquez?
>
> [Defendant] I didn't tell her it was self-defense.

¶5 Defense counsel then objected and stated, "I'm going to move for a mistrial." The parties had a bench conference with the court that was not transcribed and out of the hearing of the jurors. Cross-examination resumed and the prosecutor did not question defendant further about his conversation with Detective Enriquez. During redirect, defendant testified as follows:

> [Defense Counsel]: Mr. Williams, when you spoke with Detective Enriquez, he [sic] asked you a lot of questions and you started telling her about the car, right? Correct?
>
> [Defendant]: Yes.
>
> [Defense Counsel]: And you told her about how you guys were at the party, and you left the party because of the way [M.T.] was acting, correct?
>
> [Defendant]: That's right.
>
> [Defense Counsel]: And you told her about the car ride and how he was speeding and driving fast, right?
>
> [Defendant]: Yes.
>
> [Defense Counsel]: Okay. And when she – when she – she read you your Miranda warnings, right?
>
> [Defendant]: Yeah, she did.
>
> [Defense Counsel]: And when she started asking you about what happened in the parking lot, you said that you wanted to tell her but you

> thought you should talk to a lawyer first, right?
>
> [Defendant]: My exact words –
>
> [Defense Counsel]: And she didn't – she didn't question you any more after that, correct?
>
> [Defendant]: Right. Yeah.

¶6 After defendant finished testifying, the jury was excused for their lunch break and a hearing was held regarding the motion for mistrial. The court denied the motion for mistrial, reasoning as follows:

> I remain in the posture of a trial judge in trying to cut with a very fine edge here at what point is it not proper to ask a question: Well, the question is, you never told that to the police. That's the kind of thing we're talking about. I don't think – whatever the resolution is, I don't think it warrants a mistrial.

The court requested defendant's counsel to propose a curative instruction to disregard. However, defendant's counsel withdrew the request for a limiting or disregard instruction.

¶7 A jury convicted defendant of attempted second degree murder, a class 2 felony, finding it a dangerous offense. The jurors also found two aggravators. Count 2 was dismissed. The court sentenced defendant to 12.5 years imprisonment with 616 days of presentence incarceration credit. Defendant timely appealed his conviction and sentence. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) (2003), 13-4031, and -

4033(A)(1) (2010).

DISCUSSION

¶8 We review a trial court's ruling on a motion for mistrial for "a clear abuse of discretion." *State v. Stuard*, 176 Ariz. 589, 601, 863 P.2d 881, 893 (1993); *see also State v. Dann*, 220 Ariz. 351, 363, ¶ 48, 207 P.3d 604, 616 (2009) ("We will not overturn a trial [court's] decision to deny a motion for mistrial unless we find an abuse of discretion."). In deciding whether to grant a motion for mistrial after inadmissible testimony is 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." *Stuard,* 176 Ariz. at 601, 863 P.2d at 893 (citation omitted). Because a mistrial is the most extreme remedy available to a trial court, it should be granted only when necessary to "ensure justice is done." *State v. Blackman,* 201 Ariz. 527, 538, ¶ 41, 38 P.3d 1192, 1203 (App. 2002) (quoting *State v. Maximo,* 170 Ariz. 94, 98-99, 821 P.2d 1379, 1383-84 (App. 1991).

¶9 Defendant argues the court should have granted his motion for mistrial because the prosecutor's questions improperly commented on his right to remain silent. "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. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Prosecutorial misconduct constitutes reversible error only if (1) misconduct exists and (2) "'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Morris,* 215 Ariz. 324, 335, ¶ 46, 160 P.3d 203, 214 (2007) (quoting *State v. Anderson*, 210 Ariz. 327, 340, ¶ 45, 111 P.3d 369, 3825 (2005)). We give great deference to the trial court's decision because "the trial court is in the best position to determine the effect of a prosecutor's comments on a jury." *State v. Newell,* 212 Ariz. 389, 402, ¶ 61, 132 P.3d 833, 846 (2006).

¶10 Defendant claims that the interview "never got to the point where defendant would have had reason to say he had acted in self-defense." The prosecutor, however, avowed to the court that the defendant initially waived his *Miranda* rights and subsequently made statements about the incident to Detective Enriquez. Specifically, defendant said he probably made a wrong decision, that he wasn't cold-blooded, that he saw the TV coverage and disagreed with the media's portrayal of the incident, that the victim was the one "tripping out," and that the victim said he was going to kill defendant and his brother because they got in an

argument. Our review of the record supports the prosecutor's avowals.

¶11 A defendant's silence, at the time of arrest and after *Miranda* warnings, cannot be used for impeachment purposes. *Doyle v. Ohio*, 426 U.S. 610, 619-20 (1976). However, "[w]hen one who has voluntarily made statements to police officers after his arrest makes new exculpatory statements at trial, the fact that he failed to make these statements earlier may be used for impeachment." *State v. Tuzon,* 118 Ariz. 205, 207, 575 P.2d 1231, 1233 (1978) (noting that unlike the *Doyle* defendant, the defendant engaged in an extensive discussion of the details of his version of the events, and thus no reversible error occurred); *see also State v. Guerra*, 161 Ariz. 289, 296, 778 P.2d 1185, 1192 (1989) ("[i]f a defendant tells different stories during post-arrest questioning and at trial, the prosecution may properly inquire into the prior inconsistent statements, even though the prior statements involve 'silence' insofar as they omit facts contained in the later story.").

¶12 In this case, the prosecutor sought to impeach defendant by showing his testimony in court differed from his statement to Detective Enriquez. The prosecutor did not comment on or ask any questions relating to defendant's invocation of his *Miranda* rights. Furthermore, the prosecutor did not mention the interview in her closing argument. We find the prosecutor's questioning about why

defendant had not told the detective he acted in self-defense was not a comment upon his silence but proper impeachment.[2] *See Tuzon,* 118 Ariz. at 207, 575 P.2d at 1233. Accordingly, the court did not abuse its discretion in denying defendant's motion for mistrial.

CONCLUSION

¶13 We affirm the conviction and sentence.

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge

[2] Even if the prosecutor's questions were improper, we would find the error and the court's denial of defendant's motion for mistrial to be harmless under the facts of this case. The jury had substantial evidence to reject defendant's theory of self-defense. We can say beyond a reasonable doubt that any alleged error did not contribute to the verdict. *See Guerra*, 161 Ariz. at 296-97, 778 P.2d 1185, 1192-93 (finding the prosecutor improperly commented on the defendant's silence, but holding the comments were harmless).