DIVISION ONE
FILED: 05/08/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0867
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
BENJAMIN HALE HAMILTON,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Coconino County

Cause No. CR2008-0596

The Honorable Mark R. Moran, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
And Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

H. Allen Gerhardt, Coconino County Public Defender Flagstaff
Attorney for Appellant

T H O M P S O N, Judge

¶1 Benjamin Hale Hamilton appeals his convictions and sentences for first-degree felony murder, armed robbery, kidnapping, aggravated robbery, and possession of marijuana for

sale. He argues that because he was acquitted of first-degree premeditated murder, his conviction for first-degree felony murder cannot stand, and that prosecutorial misconduct requires a new trial. For the reasons that follow, we find no reversible error and affirm.

¶2 The evidence at trial, viewed in the light most favorable to supporting the convictions,[1] was in summary as follows. Police found the victim dead from a single gunshot wound to the head, at about 10 p.m. on July 10, 2008, in a clearing off Woody Mountain Road in Flagstaff. The night before the murder, the victim had assaulted and robbed Micah N., a seventeen-year-old runner for Jesse C. and Hamilton's marijuana business. Jesse testified that the victim had called him late in the afternoon the day of the murder to purchase marijuana, and, after Jesse recognized the name, he and Hamilton decided to arrange a meeting in a secluded area ostensibly to sell the victim marijuana, but in reality to beat and rob him as payback for what he had done to Micah.

¶3 When they picked up Micah, Jesse told him to bring along a realistic-looking airsoft gun that Jesse had given him for protection, and a blanket, and to hide under the blanket in the cargo area. Once they had picked up the victim and reached

[1] *State v. Moody*, 208 Ariz. 424, 435 n.1, ¶ 2, 94 P.3d 1119, 1130 n.1 (2004).

their destination, Hamilton took out a .45 caliber handgun, pointed it at the victim, and said, "[H]ere's the deal, you jumped our runner, so you're f***ed." At the same time, Micah came out from under the blanket with the airsoft gun and held it to the victim's head.

¶4 The three ordered the victim out of the vehicle and took his wallet and cell phone. Jesse ordered the victim down on the ground at knifepoint. Neither Micah nor Jesse were looking at Hamilton when they heard a gunshot; both looked up and saw Hamilton with his arm extended holding the .45 caliber firearm pointed at the victim's head, and blood starting to pool around the victim's head.

¶5 A friend of Hamilton's testified that Hamilton told him later that night that he had shot the victim in the head. Several friends of Micah testified that Micah had told them shortly afterward that Hamilton had shot and killed the victim. Micah turned himself in to police the next day after friends of the victim, armed with shotguns, confronted him; police brought Jesse in for questioning that night and subsequently arrested him. Hamilton turned himself into police the following day after learning that police had obtained a warrant for his arrest.

¶6 The jury convicted Hamilton of first-degree felony murder, second-degree murder as a lesser-included offense of

first-degree premeditated murder, armed robbery, aggravated robbery, kidnapping, and possession of marijuana for sale. On Hamilton's motion, the judge vacated the second-degree murder conviction as duplicitous. The judge imposed a life sentence with possibility of parole after twenty-five years on the first-degree murder conviction, and presumptive terms in prison on the remaining convictions. The judge ordered all sentences to be served concurrently, except for the two and one-half year sentence for possession of marijuana for sale, which he ordered to be served consecutively to the sentence for murder. Hamilton filed a timely notice of appeal.

First-Degree Murder Conviction

¶7 Hamilton asks this court to vacate his conviction for first-degree felony murder on the ground that, because murder is only one offense under Arizona law, the jury's acquittal of him on the charge of first-degree premeditated murder of the same victim disposed of both murder charges. Alternatively, he urges us to adopt the reasoning of the dissent in *State v. Canion*, 199 Ariz. 227, 239, ¶ 54, 16 P.3d 788, 800 (App. 2000), and conclude that the legal impossibility of two murder convictions for the death of one person, one for first-degree felony murder and the other for second-degree murder as a lesser-included offense of first-degree premeditated murder, casts doubt on the integrity

of the verdict and requires a new trial. We find no merit in either argument.

¶8 The grand jury had indicted Hamilton, in Count One, for first-degree felony murder, and, in Count Two, for first-degree premeditated murder, both arising from the murder of one person. The indictment did not charge the murder offenses in the alternative, and neither Hamilton nor the state asked the judge to instruct the jury that it should consider them in the alternative. Without objection, the judge accordingly provided the jury with two verdict forms, one for each count. The verdict form for first-degree premeditated murder provided that the jury could convict Hamilton of the lesser-included offenses of second-degree murder, manslaughter, or negligent homicide if it found him not guilty, or was unable to decide his guilt of any of the greater offenses. The jury found Hamilton guilty of first-degree felony murder, not guilty of first-degree premeditated murder, and guilty of second-degree murder, a dangerous offense. For the first time in a motion for new trial, Hamilton objected that the return of two murder convictions for the murder of one person was improper, and argued, pursuant to the dissent in *Canion*, that the two murder convictions cast doubt on the integrity of the verdict, requiring a new trial. Hamilton subsequently filed a motion to vacate the conviction for second-degree murder pursuant to the

majority opinion in *Canion*. The trial court denied the motion for new trial, but granted Hamilton's motion to vacate the second-degree murder conviction in Count Two, reasoning, "It is duplicitous pursuant to law and, as a matter of law, I must vacate that conviction."

¶9 On appeal, Hamilton asks that the first-degree felony murder conviction be vacated as well on the basis that his acquittal on first-degree premeditated murder disposed of all first-degree murder charges. We find no merit in this argument. It is well-settled that the murder of one victim is one crime regardless of the theory underlying the guilty verdict, and felony murder and premeditated murder are simply alternate theories of first-degree murder. *See State v. Tucker*, 205 Ariz. 157, 167, ¶ 50, 68 P.3d 110, 120 (2003) ("That felony murder and premeditated murder contain different elements does not make them different crimes, rather they are simply two forms of first degree murder."); *see also State v. Schad*, 163 Ariz. 411, 417, 788 P.2d 1162, 1168 (1989) ("[F]irst degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder."). The appropriate remedy when a jury convicts a defendant of two murders for murder of the same victim, however, is to vacate the lesser conviction. *See Canion*, 199 Ariz. at 231, ¶ 13, 16 P.3d at 792. Although in this case, the state did not charge the different theories of first-degree murder in the

alternative, as was the case in *Canion*, the result is the same. Because Hamilton was charged with committing the single offense of murder of a single victim, albeit under different theories, he could not be convicted of two murder offenses. *See id.* The trial court accordingly appropriately vacated the second-degree murder conviction. *See id.*

¶10 Hamilton's acquittal on the charge of first-degree premeditated murder, however, does not also require us to vacate his conviction for first-degree felony murder. Because premeditated murder and felony murder are alternate theories of murder, an acquittal on one theory of murder does not dictate an acquittal on the other. *See State v. Smith*, 160 Ariz. 507, 513, 774 P.2d 811, 817 (1989) (holding that a verdict of "not guilty" on a charge of first-degree premeditated murder is not inconsistent with a verdict of "guilty" on a charge of first-degree felony murder); *see also Canion*, 199 Ariz. at 230, ¶ 11, 16 P.3d at 791 (holding that implicit acquittal on first-degree premeditated murder charge "neither nullifies the felony murder guilty verdict nor implies that the jury actually found him innocent of that offense"). Nor do we find that the conviction of two homicides for the murder of one person requires a new trial, as suggested in the dissent in *Canion*. *See Canion*, 199 Ariz. at 239 n.7, ¶¶ 53-54, 16 P.3d at 800 n.7 (Ehrlich, J., dissenting). Although two murder convictions for the death of

one person are legally impossible, we are not persuaded that the verdicts in this case lacked integrity. *See Canion*, 199 Ariz. at 231-32, ¶¶ 15-20, 16 P.3d at 792-93. In this case, the jury followed its instructions to the letter, and simply found that the state had proved beyond a reasonable doubt the elements of first-degree felony murder and second-degree murder. For the foregoing reasons, we affirm Hamilton's conviction for first-degree felony murder.

Prosecutorial Misconduct

¶11 Hamilton also argues that prosecutorial misconduct requires a new trial on all counts. He argues for the first time on appeal that the prosecutor engaged in misconduct by eliciting testimony from Hamilton's sister on Hamilton's "decision to invoke the right to remain silent after consulting with an attorney." He argues that the prosecutor also improperly commented on his right to remain silent and not to testify at trial by stating in rebuttal closing that Hamilton had told his sister that he could not talk to her about whether he was guilty or not, and by also stating in rebuttal closing that the state would "be more than happy to hear from anybody who wants to tell us about" what happened at the murder scene.

¶12 A prosecutor violates a defendant's due process rights by commenting on his silence "at the time of arrest and after receiving *Miranda* warnings." *Doyle v. Ohio*, 426 U.S. 610, 619

(1976). "*Doyle* rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *State v. Ramirez*, 178 Ariz. 116, 125, 871 P.2d 237, 246 (1994) (citations and internal punctuation omitted). A prosecutor accordingly may impeach a defendant with his pre-*Miranda* silence. *Id.* The United States Supreme Court has not resolved, however, whether and under what circumstances a prosecutor may use a defendant's pre-*Miranda* silence as direct evidence. *State v. Stevens*, 228 Ariz. 411, 415 n.4, ¶ 10, 267 P.3d 1203, 1207 n. 4 (App. 2012).

¶13 "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984)). Moreover, "prosecutors 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)).

¶14 To determine 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, prosecutorial 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).

¶15 Appellant failed to object to the prosecutor's cross-examination of Hamilton's sister, or, on the ground he now raises on appeal, to the prosecutor's rebuttal argument that Hamilton could not talk with her about "whether he's guilty or not," thus limiting our review of these claims to one for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). "Prosecutorial misconduct constitutes fundamental error only when it is 'so egregious as to deprive the defendant of a fair trial.'" *State v. Woody*, 173 Ariz. 561, 564, 845 P.2d 487, 490 (App. 1992) (citation

omitted). Defendant bears the burden of establishing error, that the error was fundamental, and that the error caused defendant prejudice. *Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608.

¶16 We find no prosecutorial misconduct, much less prosecutorial misconduct "so pronounced and persistent" that it requires reversal because it "permeate[d] the entire atmosphere of the trial" and denied Hamilton a fair trial. As an initial matter, we find no intentional misconduct in the prosecutor's cross-examination of Hamilton's sister on what she had said before trial about Hamilton's demeanor and conduct after he learned a warrant had been issued for his arrest for murder. The parties had stipulated before Hamilton's sister testified that they would not elicit testimony on specific discussions between Hamilton and his attorney, but they would be allowed to examine her on "the fact that he had [an] opportunity to talk to his lawyer, talk to his mom and to his sister, and then decided to turn himself in." In fact, defense counsel first elicited testimony on this issue by asking the sister whether Hamilton had talked to an attorney before turning himself into police. The court also allowed defense counsel, over the prosecutor's objection, to ask Hamilton's sister to describe his demeanor upon learning that a warrant had been issued for his arrest on murder charges. She testified that Hamilton "was definitely

surprised by it. He kind of did like a shoulders back surprised reaction. It definitely had kind of a shock reaction to it."

¶17 On cross-examination, without objection, the prosecutor impeached Hamilton's sister with her prior inconsistent statements, in which she had described her brother as "worried," and "definitely a little agitated," and "quieter," rather than "shocked" and "surprised." Prior inconsistent statements are admissible for the purposes of impeaching witness credibility. Ariz. R. Evid. 613 (providing that a party need not show a witness a prior inconsistent statement when examining her about it, but extrinsic evidence of a prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny it). The prosecutor accordingly appropriately impeached this witness with her prior inconsistent statements regarding Hamilton's demeanor on learning a warrant had been issued for his arrest for murder.

¶18 In attempting to impeach the witness with her prior inconsistent statements, however, the prosecutor improperly read aloud an initial portion of one of these prior statements, not inconsistent with her testimony at trial, in which she said that Hamilton's attorney had instructed him not to say anything at all about the case until he met with him, and specifically "not to say guilty, not to say anything about it at all." Although it was improper for the prosecutor to confront the witness with

this initial portion of the statement, in the absence of any contemporaneous objection and in the context of these peculiar facts, we decline to find that the prosecutor engaged in prosecutorial misconduct or violated Hamilton's exercise of a right to remain silent, much less deprived him of a fair trial. *See Ramirez,* 178 Ariz. at 125, 871 P.2d at 246; *Aguilar*, 217 Ariz. at 238-39, ¶ 11, 172 P.3d at 426-27; *Woody*, 173 Ariz. at 564, 845 P.2d at 490.

¶19 Nor do we find that the prosecutor engaged in misconduct by referring again in rebuttal argument to Hamilton's statement to his sister after he had consulted an attorney that he "can't talk to her about whether he's guilty or not." This comment was part of a larger argument rebutting Hamilton's argument that no physical evidence connected him to the murder:

> [THE PROSECUTOR:] Defense counsel says, there's no blood on Ben's shoes. But you wouldn't expect there to be blood on Ben's shoes. That's what [the state's crime scene reconstructionist] tells you. And, by the way, how do we know what shoes Ben wore back up to Tucson? Now, remember, what Sarah testifies is that Ben is in Tucson at her place on Saturday and he finds out there's a warrant for his arrest and he says, I need to talk to a lawyer, and then he gets Sarah to drive him up to Flagstaff. During the conversation he says, he can't talk to her about whether he's guilty or not.
>
> MR. GLAZER: Actually, I object. That is not what was said.
>
> THE COURT: Overruled.

> [THE PROSECUTOR:] And he chooses what clothes to wear when he turns himself in. He makes that choice. The clothes are tested. There's no blood, just like there would be expected to be no blood. The hat limited back spatter. Most of the blood went out the exit wound of the cheek. You can look at the exhibit and see the blood, where it flowed from the cheek. There wasn't blood four to five feet away. And [the reconstructionist] said, you wouldn't expect to see it there.

In context, the reference to Hamilton saying he couldn't talk to his sister "about whether he's guilty or not," was offered as detail demonstrating that Hamilton chose the circumstances of his self-surrender, although gratuitous detail. The argument was consistent with his sister's testimony that he had followed his attorney's instructions not to say anything to anyone about the case, much less discuss his guilt or innocence, until he had met with the attorney, an instruction she had said she respected. Although we view this reference in the prosecutor's argument as improper, we decline to find that it rose to the level of prosecutorial misconduct, much less that it was so egregious in context that it deprived Hamilton of a fair trial, as necessary for reversal on fundamental error review. *See Ramirez,* 178 Ariz. at 125, 871 P.2d at 246; *Aguilar*, 217 Ariz. at 238-39, ¶ 11, 172 P.3d at 426-27; *Woody*, 173 Ariz. at 564, 845 P.2d at 490.

¶20 Finally, the prosecutor's comments in rebuttal closing that the state would "be more than happy to hear from

anybody who wants to tell us about" what happened at the murder scene, was not directed at Hamilton's silence, either after his arrest or at trial. Rather, the comment was specifically directed at Hamilton's argument that "it would have been of no value" for Jesse to tell the state during his free talk that Micah committed the murder. The state rebutted Hamilton's argument that the state had rushed to judgment after hearing from Micah before "Jesse's free talk," explaining, "what we're trying to do is find out what happened on Woody Mountain Road. We'd be more than happy to hear from anybody who wants to tell us about it, and that includes Jesse []." The judge overruled Hamilton's objection that this constituted a comment on his right to remain silent, reasoning, "I don't find it crosses the line with enough specificity to cast any type of comment upon the defendant's right to remain silent." We agree with the trial judge and find that the argument, taken in context, was not an improper comment on Hamilton's exercise of his right to remain silent, and accordingly find no prosecutorial misconduct on this ground either.

Conclusion

¶21 For the foregoing reasons, we affirm Hamilton's convictions and sentences.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
PETER B. SWANN, Presiding Judge

/s/
MICHAEL J. BROWN, Judge