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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BRIAN CURTIS STEWART, Appellant.	)	2 CA-CR 2010-0281 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091212002

Honorable Clark W. Munger, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Appellant Brian Stewart was initially charged with first-degree murder. After the charge was amended at trial, he was convicted of second-degree murder. On appeal, Stewart contends the trial court erred when it denied his motion to suppress statements he had made to law enforcement officers. Stewart also challenges the court's denial of his motion for a new trial based on the following: the state improperly relied on a theory of culpability that was inconsistent with the theory it had presented in his codefendant's trial; the state violated his due process rights by not providing him notice until the day of trial of its intent to pursue a felony-murder theory on the first-degree murder charge; and, the prosecutor improperly commented on his decision not to testify at trial. For the following reasons, we affirm.

Background

¶2 We view the facts in the light most favorable to sustaining the verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In September 2006, Brian Peterson saw two men attack Q. Peterson photographed the two before they walked away and he called 9-1-1. Q. died from multiple stab wounds. Using Peterson's photographs, police officers located and arrested Stewart and his codefendant, Maxamillano Paredes. Blood on a knife found in Stewart's possession matched Q.'s DNA.[1]

¶3 Although Stewart was initially charged with first-degree murder, before closing arguments the parties stipulated to dismiss that charge and proceed on second-degree murder and its lesser-included offenses. The jury found Stewart guilty of second-

[1]Deoxyribonucleic acid.

degree murder and the trial court sentenced him to a sixteen-year term of imprisonment.[2] This appeal followed.

Discussion

I. Motion to suppress statements

¶4 Stewart asserts that certain statements he made to a police detective were involuntary, irrelevant, and unfairly prejudicial and the trial court therefore erred in denying his motion to suppress them.[3] We disagree. In reviewing and determining the propriety of a ruling on a motion to suppress, we review the trial court's factual findings for an abuse of discretion, but we review de novo the ultimate legal question whether the evidence was obtained in violation of the constitution. *State v. Davolt*, 207 Ariz. 191, ¶ 21, 84 P.3d 456, 467 (2004). We consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the court's ruling. *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). Statements a defendant makes to law enforcement officers are presumed involuntary and the state has the burden of demonstrating, by a preponderance of evidence, that they were voluntary when made. *State v. Tapia*, 159 Ariz. 284, 287, 767 P.2d 5, 8 (1988).

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[2]Paredes too was convicted of second-degree murder in a separate trial.

[3]Stewart also claims the trial court erred in failing to suppress "evidence of [his] post-arrest behavior." Stewart does not develop his argument beyond this one-sentence assertion and does not specify what evidence of his behavior should have been suppressed or why he believes the court erred in failing to do so. The argument is therefore waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief must include "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (failure to argue claim on appeal constitutes abandonment and waiver).

¶5 Tucson police detective Stephen Wilson testified at the suppression hearing that he had responded to a call regarding the stabbing and saw Stewart and Paredes walking near the area where it had occurred. Wilson ordered them to stop and asked whether they had any weapons. Stewart admitted he had a knife in his pocket, which Wilson secured as evidence as another officer placed handcuffs on Stewart. Wilson described Stewart as "highly agitated" and "going through mood swings." Stewart asked why he had been handcuffed, and Wilson informed him he was "investigating a fight" that had occurred nearby. Wilson did not ask Stewart any questions. While detained, Stewart said he was "off [his] medication" and that he was "homicidal, suicidal, and psychotic."[4]

¶6 Stewart claims his statements were involuntary, noting he had told Wilson "he was unstable when he was off his medication" and "it was apparent . . . that [he] was suffering from [a] mental disorder making him incapable of understanding his statements." But, "'[c]oercive police activity is a necessary predicate'" before a trial court can find a statement involuntary. *State v. Smith*, 193 Ariz. 452, ¶ 14, 974 P.2d 431, 436 (1999), *quoting Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Stewart does not point to any act of coercion by law enforcement, and we find none in the record. Contrary to his apparent contention, Stewart's mental state, although relevant to determining susceptibility to coercion, cannot alone render the statements involuntary. *Id.*; *see also Connelly*, 479 U.S. 157, 167.

[4]Stewart claims his statements were made following his arrest. Although Stewart had been placed in handcuffs and was in custody at the time, the record is unclear as to whether he had made the statements before or after he was actually placed under arrest.

¶7 At the hearing on his motion to suppress, Stewart also argued his statements were irrelevant and should be suppressed on this basis. The trial court rejected that claim and Stewart challenges this ruling on appeal. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. Our standard for concluding evidence is relevant under Rule 401 "is not particularly high." *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988). To convict Stewart of second-degree murder, the jury was required to find he had acted with a particular mental state. *See* A.R.S. § 13-1104(A) (requiring intent to cause death or knowledge conduct will cause death or serious physical injury); *State v. Walton*, 133 Ariz. 282, 289, 650 P.2d 1264, 1271 (App. 1982) (same). His statements, made shortly after the offense, were relevant to his state of mind and therefore "fact[s] . . . of consequence to the determination of the action." Ariz. R. Evid. 401.

¶8 Finally, Stewart argues the statements should have been suppressed as unfairly prejudicial. Rule 403, Ariz. R. Evid., provides that "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Relevant evidence generally will adversely affect the party against whom it is offered and Rule 403 is meant only to preclude evidence that "has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). Although Stewart argues the statements were prejudicial, he has not demonstrated they were unfairly so. *See State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) (finding mere prejudice not basis for

exclusion of evidence under Rule 403; acknowledging evidence can be harmful but not unfairly prejudicial).

II. Motion for a new trial

¶9 We next address Stewart's challenges to the trial court's denial of his motion for a new trial. We review the denial of a motion for a new trial for abuse of discretion. *State v. Mills*, 196 Ariz. 269, ¶ 6, 995 P.2d 705, 707 (App. 1999).

a. Inconsistent trial theories

¶10 Stewart claims, as he did in his motion for a new trial, that because the state was permitted to pursue inconsistent theories about which defendant had possessed the murder weapon, he was "denied . . . a fair trial and effective assistance of counsel"[5] At Stewart's trial, Jeffrey Gastelum testified he had been with Stewart, Paredes, and Q. at a bus station on the day of the stabbing. Stewart and Paredes had been drinking and were "acting drunk." Paredes and Q. had argued, Q. had struck Paredes in the face, and Gastelum had argued with Stewart. Gastelum testified he had offered to sharpen a hunting knife for Paredes,[6] and "[a]t some point [Paredes had taken] the knife out and . . . chas[ed Q.] around with it." Because Gastelum was "worried about" Q.'s safety, he had asked Q. to leave with him, but Q. had refused.

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[5]To the extent Stewart asserts a claim of ineffective assistance of counsel, we do not consider it on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (ineffective assistance claims not considered on direct appeal); *see also State ex rel. Thomas v. Rayes*, 214 Ariz. 411, ¶ 20, 153 P.3d 1040, 1044 (2007) (ineffective assistance of counsel may be raised only in post-conviction proceeding pursuant to Rule 32, Ariz. R. Crim. P.).

[6]As discussed below, Gastelum made inconsistent statements to law enforcement officers regarding whether he had sharpened the knife for Paredes or Stewart.

¶11 After Gastelum testified, Stewart asked the trial court to preclude the state from impeaching Gastelum with his statement to police officers that he had sharpened the knife for Stewart. Stewart asserted that because the state had argued the knife had been sharpened for Paredes in Paredes's trial, it should not be permitted to argue otherwise in his trial. Stewart maintained the state was "developing contradictory and irreconcilable positions" on "the issue of who was in possession of the . . . murder weapon." The court denied the motion and Tucson police officer Randy Lucero then testified that on the day of the stabbing, Gastelum had told him he "had sharpened a knife for . . . [Stewart]" rather than Paredes.

¶12 Stewart argues the state "selectively stressed testimony in each trial to point blame at each defendant." He asserts that during Paredes's trial, the state "'aggressively impeached' Gastelum to show . . . Paredes . . . owned the knife . . . [and] had it sharpened."[7] But, he claims the state used Lucero's testimony in Stewart's trial "in an attempt to show it was more likely that Stewart owned the knife."[8] He claims this "conflicting evidence . . . effectively made it impossible to assert . . . vital defenses . . . including the defense of mere presence."

¶13 The prohibition against inconsistent theories is based on the duty of prosecutors to present evidence that is accurate and truthful. *See Nguyen v. Lindsey*, 232

[7]In Paredes's first trial, Gastelum testified he had sharpened the knife for Paredes. The prosecutor asked who the knife belonged to and Gastelum responded that he was "not sure." The prosecutor then impeached Gastelum with his prior statement to detectives that "[i]t was [Paredes's] knife. [Stewart] never carries a knife."

[8]Stewart also claims the state "attempted to minimize Gastelum's testimony" about Paredes's involvement by showing that Stewart was drunk, threatening, and angry.

F.3d 1236, 1240 (9th Cir. 2000). Thus, "a prosecutor's pursuit of fundamentally inconsistent theories in separate trials against separate defendants charged with the same murder can violate due process if the prosecutor knowingly uses false evidence or acts in bad faith" by manipulating the evidence in a disingenuous manner or failing to correct the record with respect to admitted evidence the prosecutor learns is inaccurate. *Id*.; *State v. Moody*, 208 Ariz. 424, ¶ 28, 94 P.3d 1119, 1134 (2004); *see also Giles v. Maryland*, 386 U.S. 66, 74 (1967). But the prosecutor is not guilty of misconduct in this context when the nature of the crime is such that two defendants could have committed the offense. *See Nguyen*, 232 F.3d at 1240. Accordingly, the state violates a defendant's due process rights only when inconsistencies in the prosecutions of multiple defendants "exist at the core of the prosecutor's case against defendants for the same crime." *Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000).

¶14 Stewart relies primarily on *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997).[9] There, Thompson and his codefendant, Leitch, were tried separately for the rape and murder of the victim. 120 F.3d at 1055-56. The Ninth Circuit Court of Appeals found Thompson's due process rights had been violated based on the prosecutor's use of "fundamentally inconsistent theories" at the two trials. *Id*. at 1056. During Thompson's trial, the prosecutor had presented the testimony of two jail-inmate informants, who provided the only direct evidence that Thompson had killed the victim, that the victim had been raped, and that it was Thompson who had raped her. *Id*. These witnesses were

[9]The United States Supreme Court subsequently reversed the Ninth Circuit's decision in *Thompson* on other grounds. *Calderon v. Thompson*, 523 U.S. 538 (1998).

not called by the state at Leitch's trial, which was after Thompson's; instead, the prosecutor called defense witnesses whose testimony he had objected to at Thompson's trial and "relied heavily on their testimony to establish Leitch's motive for the murder." *Id*.

¶15 Gastelum's statement to Lucero was inconsistent with his testimony that he had sharpened the knife for Paredes. The prosecutor impeached Gastelum with this statement in Stewart's trial, but did not do so in Paredes's trial. But, in Stewart's trial the prosecutor conceded in his opening statement that "the exact circumstances" that preceded the attack were unclear, that Gastelum had made several conflicting statements about who had the knife, and that the jury would be able to evaluate Gastelum when he testified. The circumstances here differ markedly from those in *Thompson*, where the prosecutor "asserted as the truth before Thompson's jury the story he subsequently labeled absurd and incredible in Leitch's trial." *Id*. at 1057.

¶16 In addition, the prosecutor here made limited use of Gastelum's testimony in Stewart's trial, relying instead on DNA evidence, testimony of other witnesses, and Stewart's possession of the knife at the time of his arrest. In contrast, the witnesses who testified in Thompson's trial but not in Leitch's provided the only direct evidence that Thompson had committed the crime. *Id*. at 1056. The prosecutor's limited use of Gastelum's prior inconsistent statement is thus not comparable to the "glaring inconsistenc[ies]" noted by the court in *Thompson*. *Id*. at 1056-59. Stewart has not demonstrated that under these circumstances the prosecutor committed misconduct by

impeaching Gastelum with his prior inconsistent statement and that Stewart's due process rights were violated.[10] *See Nguyen*, 232 F.3d at 1240.

¶17 Finally, in Stewart's trial, the jury was instructed on accomplice liability. During closing argument the prosecutor stressed that "either . . . Stewart or . . . Paredes . . . [had] stabbed [Q.]" and "it doesn't matter which one it was, one did the stabbing and one is an accomplice." As the trial court recognized, because Stewart could have been convicted even had Paredes stabbed Q., this situation is fundamentally different from the one in *Thompson*. In that case, each defendant was prosecuted as a principal, rather than as an accomplice, and the prosecutor argued each possessed the only motive for committing the murder. *Thompson*, 120 F.3d at 1056-58. Here, both Paredes and Stewart could have been convicted of the charged offense without inconsistency. We therefore cannot say that inconsistencies "exist[ed] at the core of the prosecutor's case[]." *Groose*, 205 F.3d at 1052. Accordingly, we find no error.

b. Notice of felony-murder theory

¶18 Stewart also sought a new trial on the ground the state had "announced" on the first day of trial "it would proceed on the charge of first degree murder based on the felony-murder theory and that the predicate felony was robbery." He challenges the court's denial of a new trial on this ground, insisting his due process rights were violated

[10]Paredes's first trial resulted in a mistrial after the jury failed to reach a verdict. Paredes's second trial began after Stewart was convicted. Stewart has cited no authority, and we have found none, for the proposition that the state may not advance a different theory in a separate trial when, as here, a codefendant's earlier trial has resulted in mistrial.

by this late notice of both the fact that the state would base its case on the first-degree murder charge on felony murder instead of premeditated murder and use robbery as the predicate for felony murder.[11] The indictment did not specify whether the first-degree murder charge was based on felony murder or premeditation. In June 2009, a year before the trial, Stewart had filed a motion requesting, in part, that the state disclose whether it would "rely on felony murder as the basis for the charge of [first-degree murder] and if so what predicate felony [would] serve as the basis." The state did not respond to the request.

¶19 On the first day of trial, the state informed the court it intended to proceed on a felony-murder theory and the predicate felony was robbery.[12] Stewart protested, arguing he was prepared to defend against a charge of second-degree murder because in Paredes's trial the parties had stipulated to proceed on the charge of second-degree murder after Paredes moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. Stewart later conceded that although the parties had previously discussed the matter, they had not resolved whether the charge of first-degree murder would be dismissed. The court ruled that the state could proceed on the felony-murder theory for first-degree murder. On the third day of trial Stewart filed a motion to dismiss the charge

[11]Stewart alleges the state's failure to disclose its theory earlier "denied [him] effective assistance of counsel." As noted above, we will not address claims of ineffective assistance of counsel on direct appeal. *Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d at 527. But, Stewart essentially argues he was denied due process, and we consider his claim to this extent.

[12]The state based the robbery allegation on the fact that headphones with Q.'s DNA on them were found in Stewart's backpack.

of first-degree murder, stating he had "rel[ied] on the prosecutor's assertions during [an earlier] hearing and prepared to defend against a charge of second-degree murder." The parties thereafter stipulated to the dismissal of the first-degree murder charge and agreed to proceed on second-degree murder and its lesser-included offenses. After the jury found him guilty of that charge, Stewart filed his motion for a new trial. Relying in part on *State v. Blakely*, 204 Ariz. 429, 65 P.3d 77 (2003), he argued the state's refusal to disclose its theory until the first day of trial deprived him of due process.[13] We disagree.

¶20 Even assuming, without deciding, that the state had not provided Stewart sufficient notice of its theory of culpability on the first-degree murder charge, any error that may have resulted was clearly harmless. *See State v. Hickman*, 205 Ariz. 192, ¶ 28, 68 P.3d 418, 424 (2003) ("[M]ost trial error, and even most constitutional error, is reviewed for harmless error."); *State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998) (appellate court will not reverse conviction if error "clearly harmless"). "For an error to be harmless, the State must establish beyond a reasonable doubt that [it] did not contribute to or affect the verdict." *State v. Gunches*, 225 Ariz. 22, ¶ 24, 234 P.3d 590, 594 (2010). "'The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually

[13]Stewart contends that because the state did not disclose its theory until the day of trial, the court "should have at a minimum granted a continuance . . . to allow [him] to effectively prepare a defense." However, Stewart never requested a continuance. We find no support for the proposition that the court erred in failing sua sponte to continue the trial. *See State v. Longoria*, 123 Ariz. 7, 10, 596 P.2d 1179, 1182 (App. 1979) (finding no support for proposition and rejecting claim that court should have continued trial sua sponte when state disclosed on third day of trial knife that could have been weapon used in assault had been found on day of stabbing).

rendered in this trial was surely unattributable to the error.'" *Id*., *quoting State v. Anthony*, 218 Ariz. 439, ¶ 39, 189 P.3d 366, 373 (2008) (omission in *Anthony*).

¶21 Because the parties stipulated to the dismissal of the first-degree murder charge before the close of evidence, the jury never was instructed or asked to return a verdict on first-degree murder under either a premeditation or a felony-murder theory. Moreover, Stewart's objections to the felony-murder charge were premised on his assertion that he was "prepared to defend against a charge of second degree murder," indicating he was ready to defend against the second-degree murder charge submitted to the jury. Finally, Stewart does not explain what he would have done differently to defend against second-degree murder if the state had provided notice before the first day of trial that it intended to proceed on a felony-murder theory on the charge of first-degree murder. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief must contain "contentions of the appellant" with "reasons therefor"). Therefore, even assuming the state provided insufficient notice of its intent to proceed on a felony-murder theory, we conclude, beyond a reasonable doubt, that any error did not affect the verdict and was harmless. *See Gunches*, 225 Ariz. 22, ¶ 24, 234 P.3d at 594.

c. Prosecutorial misconduct

¶22 During closing argument, the state argued that abrasions on Stewart's hands, as well as blood on his person, were consistent with his participation in the death of Q. Stewart then argued:

> [I]f the jury is going to be asked to consider something, then you should be given some type of explanation, you should be given a photo of it, you should be given some type of

> interpretation, expert witness explaining the cut, how does this relate to the case? So you are left guessing with regards to exactly what the status of the hands were. And—and if there was blood on the hands, what does it mean?

The state then responded in rebuttal:

> [Y]ou do have to take into consideration why some of this evidence is not present. The only people [sic] who could have told you . . . how Mr. Stewart ended up with the cuts on his hand are [sic] Mr. Stewart. Now, he doesn't have to testify. He has a right not to. You have an instruction . . . on that fact. But [Q.'s] dead. He can't say anything about what happened. The only other two people left are in that scene right there. You have heard from Mr. Whitfield and Mr. Peterson, they didn't see things that closely. The only other people available are Mr. Stewart and Mr. Paredes.

¶23 Following rebuttal, Stewart moved for a mistrial based on the prosecutor's comment. The trial court denied the motion and Stewart challenged its ruling in his motion for a new trial, which was also denied. On appeal, Stewart claims the court erred "because the [s]tate's commentary on [his] decision not to testify adversely affected his right to a fair trial."[14]

¶24 "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, ¶ 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

[14]Although Stewart alleges that the state "commented on [his] failure to testify on multiple occasions," he cites only the above-quoted statement.

(1984). To prevail on a claim of prosecutorial misconduct, "[t]he defendant must show that the offending statements, in the context of the entire proceeding, 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d 833, 846 (2006), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998).

¶25 Generally "[a] comment by a prosecutor upon the failure of [a] defendant to testify violates the defendant's fifth amendment privilege against self-incrimination." *State v. Morgan*, 128 Ariz. 362, 369, 625 P.2d 951, 958 (App. 1981). Although not all such comments are improper, "comments which actually direct the jury's attention to the failure of the defendant to testify are impermissible." *Id.*; *see also Hughes*, 193 Ariz. 72, ¶ 64, 969 P.2d at 1199 (prosecutor's comments improper if calculated to direct jury's attention to defendant's exercise of his Fifth Amendment right).

¶26 Even assuming the prosecutor's comment here amounted to misconduct, rather than fair rebuttal, any error was harmless. "Prosecutorial misconduct is harmless error if we can find beyond a reasonable doubt that it did not contribute to or affect the verdict." *Hughes*, 193 Ariz. 72, ¶ 32, 969 P.2d at 1192. The prosecutor's comment did not suggest Stewart had chosen not to testify because he was guilty or had something to hide. Rather, the comment was made to rebut Stewart's earlier assertion that the state should have provided the jury further evidence about the cuts on Stewart's hands. *Cf. State v. Smith*, 101 Ariz. 407, 408-10, 420 P.2d 278, 279-81 (1966) (comment prejudicial when prosecutor suggested defendant chose not to testify to avoid answering questions about prior bad acts). Moreover, in his comment, the prosecutor stressed Stewart's right

not to testify and referred to the court's jury instruction to this effect. The court's final instructions to the jury indicated that "[t]he decision . . . whether to testify . . . is left to the defendant." "The defendant's decision not to testify . . . is not evidence of guilt." We presume the jury followed these instructions. *Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d at 847.

¶27 Furthermore, there was ample evidence from which the jury could conclude that Stewart committed the crime either as the principal or as an accomplice. *Cf. State v. Rhodes*, 110 Ariz. 237, 238, 517 P.2d 507, 508 (1973) (error prejudicial when "evidence hangs in delicate balance with any prejudicial comment likely to tip the scales in favor of the State"). Gastelum testified that on the day of the murder, both Paredes and Stewart had been drunk and arguing with Q. and as a result Gastelum had been "worried about" Q.'s safety. Peterson testified he had witnessed two men attacking Q. and had taken photographs, which were provided to the jury. Stewart was apprehended near the crime scene and, when confronted by the police, stated that he was "off his medications" and "psychotic[] and homicidal." Wilson testified that Stewart had abrasions and blood on his hand. Finally, the knife with Q.'s DNA on it was found in Stewart's pocket. We therefore conclude that any error as a result of the prosecutor's comment was harmless. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

Disposition

¶28 We affirm the conviction and sentence imposed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge