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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA,
Appellee,

v.

JOE ANGEL GOMEZ,
Appellant.

No. 1 CA-CR 15-0069
FILED 5-3-2016

Appeal from the Superior Court in Maricopa County
No. CR2013-003474-001
The Honorable Peter C. Reinstein, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eliza Ybarra
Counsel for Appellee

Maricopa County Office of the Legal Advocate, Phoenix
By Frances J. Gray
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Lawrence F. Winthrop and Judge Donn Kessler joined.

S W A N N, Judge:

¶1 Joe Angel Gomez ("Defendant") appeals his conviction for first-degree murder. First, he asserts the court made several discrete evidentiary rulings that individually or cumulatively constitute reversible error. Second, he contends that the court improperly allowed a witness to assert his Fifth Amendment rights or erred by allowing him to invoke those rights outside the presence of the jury, depriving Defendant of his right to present a complete defense. Third, he asserts that the admission of a photographic lineup identifying him as the perpetrator violated his right to confront witnesses because the witness no longer remembered participating in the lineup. He then contends that the prosecutor's remarks in closing argument were so egregious as to constitute prosecutorial misconduct. Finally, Defendant asserts that the statute requiring a natural life sentence for first-degree murder is unconstitutional. For the following reasons, we affirm Defendant's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶2 Veronica, Defendant's girlfriend, lived in South Phoenix with her family, including an older sister, Monica, and a younger sister. On June 5, 2013, some friends were at the house, including Michael Clark ("Mike") and "Pancho."[1] Veronica left with the men in Pancho's car, but later when it was getting dark, she walked home. When she arrived home, she discovered her younger sister's laptop was missing and suspected one of her visitors that afternoon had taken it. She set out to confront them at another acquaintance's house but did not find them. As she returned home, she saw Defendant driving toward her. She got in the car with him, and while they ran errands, she told him about her sister's stolen laptop.

¶3 While Veronica was out with Defendant, Mike and Pancho returned to her house to drink with Monica and another friend, Hoodini.[2]

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[1] Neither Veronica nor Monica had met Pancho before and did not use his given name.

[2] Monica believed that Hoodini was his given name.

After finishing the errands, Defendant drove Veronica back to the family's house to pick up some belongings, as she was staying at another house that evening. Pancho's car was parked in front of the house when they arrived, and Defendant parked in front of Pancho's car facing it. At that time, Mike and Pancho had decided to leave, and Monica was walking them out. Defendant and Pancho exchanged words, and Defendant seemed to become angry. Defendant then shot Pancho multiple times, continuing to shoot him after he fell to the ground. Pancho died shortly thereafter from multiple gunshot wounds. A neighbor's surveillance camera captured the event, but the video quality was low.

¶4 The other people present ran back into the house, but Veronica, after hesitating a moment, got in the car with Defendant, and they left. Veronica asked Defendant why he had shot Pancho, and he replied that it had to do with "respect." In the days after the shooting, Defendant sold his car to his sister, bought bus tickets under assumed names for himself and Veronica, and left for North Carolina. Veronica resumed using her real name in North Carolina and found a job. Defendant continued using his assumed name and also began working.

¶5 Police later discovered Defendant's connection to the crime and retrieved him from North Carolina. Defendant was charged with first-degree premeditated murder and misconduct involving weapons, though the misconduct charge was later severed.

¶6 Monica and Veronica both testified at the trial and identified Defendant as the shooter. A neighbor who had seen Defendant drive by after the incident also identified Defendant in a photographic lineup, though at trial the witness testified he did not remember making the pretrial identification. Defendant argued that the eyewitnesses were lying to cover up for the actual shooter. He tried to advance the theory that Hoodini had shot Pancho because Hoodini was angry that Pancho had been flirting with Monica, and Pancho was flirting with Monica because he was "drunk or buzzed." The court precluded several pieces of evidence and testimony that Defendant intended to introduce to support this theory. During closing arguments, the state characterized one of the defense's arguments as "stupid" and "hocus-pocus," and stated that defense counsel seemed to be making up the argument as she went along.

¶7 The jury found Defendant guilty of first-degree premeditated murder. The court sentenced him to natural life in prison pursuant to A.R.S. § 13-752(A).

DISCUSSION

I. THE COURT'S EVIDENTIARY RULINGS DID NOT AMOUNT TO REVERSIBLE ERROR.

¶8 Defendant asserts that several evidentiary rulings individually or cumulatively deprived him of the opportunity to present a complete defense, depriving him of his due process rights. We review the court's rulings on the admissibility of evidence for abuse of discretion. *State v. Newell*, 212 Ariz. 389, 404, ¶ 73 (2006). Even if the court's preclusion of evidence was error, we will not reverse unless "there was a reasonable probability . . . that a verdict might have been different had the error not been committed." *State v. Williams*, 133 Ariz. 220, 225 (1982) (citation omitted).

A. The Trial Court Properly Precluded Evidence About Drugs in the Victim's System at the Time of Death.

¶9 Defendant sought to introduce a blood sample and testimony from the medical examiner demonstrating that the victim had drugs in his system at his time of death. He claimed this evidence would show a "complete picture [of what] the doctor did" and support his third-party defense that Hoodini killed the victim because the victim had been "hitting on" Monica. The court granted the state's motion to preclude the evidence under Ariz. R. Evid. 403. It later supplemented the record by citing *State v. Dann*, 205 Ariz. 557 (2003), in support of its decision.

¶10 In *Dann*, the supreme court concluded that the trial court did not abuse its discretion by precluding evidence of a victim's drug use "whether the trial judge found the evidence irrelevant because it failed to create a reasonable doubt regarding [the defendant]'s guilt or because the tenuous and speculative nature of the evidence caused it to fail the Rule 403 test." 205 Ariz. at 569, ¶ 36. The situation is similar here. The fact that the victim had methamphetamine in his system did not make it more or less likely that Defendant killed him, and there were no allegations that drugs played any role in his death. *See id.* at 568, ¶ 33 (court examines the proffered evidence for the effect on the defendant's culpability). Whether the court viewed the evidence as completely irrelevant or simply not sufficiently probative to overcome the dangers of prejudice or confusion, the court did not abuse its discretion.

B. The Trial Court Did Not Err by Precluding Testimony from Defendant's Sister Concerning Her Reasons for Buying His Car.

¶11 Shortly after the murder, Defendant sold the car he drove on the night of the shooting. He sought to introduce testimony from his sister that she purchased his car because she had been in an accident and needed another car. He also produced an accident report and a photograph to support the testimony.[3] The defense claimed the sister's testimony supported the theory that Defendant sold the car not because he was trying to flee but because his sister needed a car. The court ruled that the sister could testify that she bought Defendant's car, but excluded testimony about the accident as collateral and likely to confuse the jury. The state later used Defendant's sale of the car to support its assertion that he had fled the scene.

¶12 "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Ariz. R. Evid. 602. Defendant's sister could testify that she purchased the car, but not why Defendant sold it. While Defendant himself could have testified to his motivation in selling the car, he elected not to testify. And Defendant's motives for selling the car do not change the fact that he sold it, and the jury could draw reasonable inferences from the fact. While the state did use the sale to support the flight allegation, there was also ample evidence that Defendant drove away from the scene, bought a bus ticket using false identification, and left for North Carolina. In these circumstances, the sister's reasons for buying the car were immaterial. The court did not abuse its discretion in precluding the accident report and related testimony.

C. The Trial Court Did Not Abuse Its Discretion in Precluding a Photo of Monica Holding a BB Gun.

¶13 Defendant also wanted to admit a picture of Monica holding a gun to impeach her testimony that she did not like guns and had never handled one. Based on a tip from one of the people observing the trial, the defense investigator discovered the picture in question on Monica's Facebook page during the trial, and defense counsel disclosed it to the state soon after. At the time Defendant wanted to introduce the photograph, Monica was no longer on the stand, and in fact, the state had already rested. The prosecutor sent Detective Orona to investigate the picture. He asked

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[3] Though the opening brief states that the court erred in precluding the accident report, the transcript indicates that the defense never attempted to admit the report into evidence.

Monica if she still had the gun depicted in the photograph, and she produced what he concluded was a BB gun. The state moved to prevent the picture from being introduced, asserting that it was untimely, "irrelevant, has no probative value, is misleading and confusing," and that it was lacking foundation. After the court heard testimony from Detective Orona, it granted the motion, with the comment "[b]ased upon relevance. The testimony of Detective Orona. The disclosure."

¶14 "[T]he trial court has broad discretion to decide what evidence is relevant in cross-examination, and reversal will occur only when the trial judge places unreasonable limitation on cross-examination." *State v. Riley*, 141 Ariz. 15, 20 (App. 1984). Extrinsic evidence is generally not admissible to prove specific instances of conduct to attack the witness's character for truthfulness; "the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of [ ] the witness." Ariz. R. Evid. 608(b)(1). However, "[i]t is well settled that when impeaching a witness regarding an inconsistent fact collateral to the trial issues, the impeaching party is bound by the witness' answer and cannot produce extrinsic evidence to contradict the witness." *State v. Hill*, 174 Ariz. 313, 325 (1993).

¶15 The photograph may have had a small tendency to impeach Monica, but on a collateral issue. Defendant was not suggesting that she was the shooter or that the gun in the photograph was the murder weapon, but that she was lying about having ever handled a gun. Whether she had handled a gun before had no relevance to whether Defendant committed murder, and the picture was properly excluded.

D. The Trial Court Did Not Err in Precluding the Question to the Case Agent About Contradictory Testimony.

¶16 Neither Hoodini nor Mike testified at trial. Defendant's counsel asked the case agent at trial "are you aware of the statements that [Hoodini] made to you were in direct conflict with Monica's?" She also planned to ask the case agent whether he was aware that Mike's statements differed from Monica's. The court precluded the testimony as hearsay because the question "essentially reveal[ed] what he said." Defendant contends that the testimony would not have been hearsay because it was offered to show the "effect on the witness," not to prove the truth of the matter asserted by the non-testifying witnesses.

¶17 Hearsay is an out-of-court statement presented for the truth of the matter asserted. Ariz. R. Evid. 801(c). If the statement is offered for a purpose other than to prove the truth of the matter, it may be admissible.

See Ariz. R. Evid. 803, 804. Because Hoodini's statement was presented as a "direct conflict" to Monica's statement, the implication was that one of the witnesses was lying, an implication that depended on the truth of the matter asserted. No hearsay exception applies to these statements, and the court did not err in sustaining the objection.

E. The Cumulative Effect of the Precluded Evidence Is Not Reversible Error.

¶18 Defendant also asserts that even if the above rulings were not individually reversible error, cumulatively they constitute reversible error. Arizona courts do not recognize the cumulative error doctrine, except in cases of prosecutorial misconduct. *State v. Hughes*, 193 Ariz. 72, 78-79, ¶ 25 (1998). "[S]everal non-errors and harmless errors cannot add up to one reversible error." *Id.* at 79, ¶ 25. Here, Defendant urges us to apply a cumulative error doctrine for evidence, citing *State v. Machado*, 224 Ariz. 343 (App. 2010), *abrogated on other grounds by Perry v. New Hampshire*, 132 S. Ct. 716 (2012). *Machado* does not recognize the cumulative error doctrine either -- the case examined the court's decision not to allow third-party culpability evidence under Ariz. R. Evid. 403 for being unduly prejudicial. *Id.* at 352, ¶ 15. The court there determined that the "erroneously precluded evidence . . . was potentially pivotal." *Id.* at 365, ¶ 67. Given the abundant eyewitness testimony and the surveillance video, it is unlikely that any of the evidence precluded over objection by Defendant, if admissible, would have been "pivotal" to changing the outcome of his trial. We find no error.

II. THE TRIAL COURT DID NOT ERR WHEN IT ALLOWED MIKE TO INVOKE HIS FIFTH AMENDMENT PRIVILEGE OUTSIDE THE PRESENCE OF THE JURY.

¶19 Defendant next contends that the court's decision to allow Mike to assert his Fifth Amendment privilege was a violation of Defendant's Sixth Amendment rights. Alternatively, he contends that allowing Mike to assert his privilege out of the presence of the jury was reversible error. Defendant wished to have Mike testify because his "version of events of that night differed from those of the persons who testified and [ ] he 'purposely misled the police.'" Mike's attorney explained that Mike was asserting his Fifth Amendment privilege because "there is a real possibility that he could be charged with false reporting and/or hindering prosecution" if he revealed that he had lied to the police. Defendant requested that Mike be made to assert his privilege in the presence of the jury, a request the court denied.

¶20 A defendant has a right to compel the attendance and testimony of witnesses at trial for his defense. *Washington v. Texas*, 388 U.S. 14, 19 (1967). That right is not absolute, however. *State v. McDaniel*, 136 Ariz. 188, 194 (1983). If the witness shows "a reasonable ground to apprehend danger to the witness from his being compelled to answer," he may validly assert his Fifth Amendment privilege. *State v. Mills*, 196 Ariz. 269, 276, ¶ 31 (App. 1999) (citation omitted). And if the witness could refuse to answer all relevant questions because of invoking his Fifth Amendment privilege, the court may excuse that witness without violating the defendant's Sixth Amendment rights. *State v. Harrod*, 218 Ariz. 268, 276, ¶¶ 20-21 (2008). "A trial court's decision whether to allow a party to call a witness before the jury who will assert his Fifth Amendment privilege is reviewed for an abuse of discretion." *Id.* at 275-76, ¶ 19.

¶21 Here, as Mike's attorney pointed out, there was a "real possibility" that Mike would be charged with a crime if he answered questions about the discrepancies in his account of the shooting. The questions that Defendant wanted to ask aligned with the questions Mike would refuse to answer as self-incriminating; the court was aware of this and properly excused him from testifying. Because Mike was questioned and asserted his privilege on the record, the court did not abuse its discretion in denying the request to have him do the same in front of the jury.

III. THE PROSECUTOR'S INAPPROPRIATE STATEMENTS IN CLOSING WERE NOT REVERSIBLE ERROR.

¶22 Defendant asserts that the prosecutor's statements in closing amounted to prosecutorial misconduct and require a new trial. The prosecutor argued in closing that "[defense counsel] didn't have a defense. She was coming up with a defense as the case [was] going along." Defense counsel objected to the statement as an improper argument, but the court overruled the objection. Later in closing, the prosecutor characterized one of the defense arguments as "stupid" and "hocus-pocus." He further instructed the jury "[d]on't buy [the defense's argument]. Don't be fooled. We didn't hide a thing from you. And I can honestly say when we look at the evidence we never misled, either."

¶23 Prosecutorial misconduct is reversible error when the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Hughes*, 193 Ariz. at 79, ¶ 26 (citation omitted). To evaluate an improper argument, the court considers whether "the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and

[whether] they, under the circumstances of the particular case, [were] probably influenced by those remarks." *State v. Gonzales*, 105 Ariz. 434, 437 (1970) (citation omitted). When a defendant objects at trial, misconduct is reviewed for harmless error. *State v. Martinez*, 230 Ariz. 208, 216, ¶ 39 (2012). When there was no objection, we review for fundamental error. *Id.* at 215, ¶ 31.

¶24 One could infer from the prosecutor's first remark, that defense counsel was making up the defense as she went along, that he felt that defense counsel was incompetent. We strongly disapprove of a prosecutor "unfairly cast[ing] aspersion on . . . counsel's integrity." *State v. Cornell*, 179 Ariz. 314, 331 (1994). The prosecutor in this case made an improper argument attacking the defense counsel personally, and the overruling of the objection was error. However, the prosecutor did not remark on any specific evidence or theory of the case in connection with the improper statement, and considering the record as a whole, we find no prejudice.

¶25 The prosecutor's second remark that the defense's argument was "stupid" and "hocus-pocus," and the assertion that the prosecution "didn't hide anything," was unprofessional at best. But Defendant did not object to these statements at trial, and we cannot say that these statements were likely to factor into the jury's verdict. Nor did these isolated remarks taken together infect the whole trial and deny Defendant his due process; it is not reversible error. And the court properly instructed the jury that lawyers' comments are not evidence, ensuring that any harm done was mitigated.

IV. THE ADMISSION OF THE PHOTO LINEUP DID NOT VIOLATE THE CONFRONTATION CLAUSE.

¶26 Defendant asserts that the court erred in admitting a photographic lineup identifying him and signed by a witness, because the witness did not authenticate or recall the lineup when testifying. The state instead called the officer who conducted the photographic lineup with the witness to authenticate it. Defendant contends this violated his right to confront an adverse witness.

¶27 An accused has the right to confront witnesses against him. U.S. Const. amend VI; Ariz. Const. art. II, § 24. The Confrontation Clause does not allow using testimonial pretrial statements in place of testimony from the witness unless a defendant had opportunity to cross-examine that witness. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). "Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective

cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). There is no guarantee that the testimony will not be "marred by forgetfulness, confusion, or evasion." *Id.* at 21-22. As long as "the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination," the Confrontation Clause is satisfied. *Id*. at 22.

¶28 In this case, the witness did not contradict his earlier identification of Defendant; he instead stated that he did not remember making it. That the witness did not remember making the identification does not cause any Confrontation Clause issues; it would, if anything, seem to assist the defense. Defendant had an opportunity to cross-examine the witness on the identification from the photo lineup but elected not to ask any questions.

V. THE STATUTE MANDATING A NATURAL LIFE SENTENCE FOR FIRST-DEGREE MURDER IS CONSTITUTIONAL.

¶29 Defendant finally asserts that the statute mandating a natural life sentence for defendants convicted of first-degree murder where the state did not seek the death penalty is unconstitutional because it is cruel and unusual punishment and does not allow for judicial discretion in sentencing.

¶30 The Eighth Amendment prohibits cruel and unusual punishments. U.S. Const. amend. VIII. Non-capital penalties, however, are only subject to a "narrow proportionality principle" which disallows sentences that are "grossly disproportionate" to the crime. *Ewing v. California*, 538 U.S. 11, 20, 21 (2003) (citations omitted). A court determines first if there is a "threshold showing of gross disproportionality by comparing 'the gravity of the offense [and] the harshness of the penalty.'" *State v. Berger*, 212 Ariz. 473, 476, ¶ 12 (2006) (citation omitted). In doing so, the court gives "substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences." *Id.* at ¶ 13.

¶31 There is no authority for the proposition that the Constitution forbids lifetime imprisonment for one who purposely ends the life of another. We have no reason or inclination to create that authority here.

CONCLUSION

¶32 For the foregoing reasons we affirm Defendant's conviction and sentence for first-degree murder.