DIVISION ONE
FILED: 07-22-2010
PHILIP G. URRY, CLERK
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**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA, | ) | 1 CA-CR 09-0355 |
| | ) | |
| Appellee, | ) | DEPARTMENT B |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| RICARDO GARZA, | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |
| | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-128904-001 DT

The Honorable Michael D. Jones, Judge

**AFFIRMED**

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

Bruce Peterson, Maricopa County Legal Advocate — Phoenix
by Thomas J. Dennis, Deputy Legal Advocate
Attorneys for Appellant

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**P O R T L E Y**, Judge

**¶1** Ricardo Garza challenges his felony convictions for two counts of armed robbery, two counts of theft of means of

transportation, and one count of possession or use of dangerous drugs. He argues that the trial court erred when his request for a mistrial was denied. For the following reasons, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND[1]

**¶2** K.P.[2] was walking to his car on May 4, 2007, at approximately 5:00 p.m., when he noticed a Hispanic man and Hispanic woman parked in a black "[m]id-90's" Mercedes outside of the building where he worked. He retrieved his white 2000 Nissan Altima, and as he waited for his co-worker to close and lock the parking area gate, he was approached by the Hispanic man, later identified as Defendant. The man held "a big knife with a long blade that ha[d] jagged edges," and said, "I want your car." K.P. got out of his car, and Defendant got in, backed up to the Mercedes, and yelled at the Hispanic female to "get out" of the Mercedes. Once the female got into the Altima, Defendant drove off. Phoenix Police later searched the Mercedes and found a wallet with check stubs in Defendant's name, a photograph of Defendant, a manila envelope containing several letters addressed to Defendant, broken glass, and blood.

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[1] We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against Defendant. *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

[2] We use the initials of any victims throughout this decision to protect their privacy. *See State v. Maldonado*, 206 Ariz. 339, 341 n.1, ¶ 2, 78 P.3d 1060, 1062 n.1 (App. 2003).

**¶3** Later that evening, some two and one-half miles from where K.P.'s Altima had been taken, J.S. was in his 2004 Mercedes in a Dairy Queen parking lot. A man, later identified as Defendant, approached J.S. from behind while holding a "[v]ery large" knife, and told him, "Move. Move." J.S. attempted to get his wallet off of the passenger seat, but Defendant pushed his hand off of the wallet and again said, "Move. Move." A witness testified that she saw the incident and noticed a white Nissan Altima about two feet behind the Mercedes. A Hispanic female with blood on her face was in the passenger seat of the Altima. After J.S. got out of his car, Defendant got in and drove off. The female in the Altima moved to the driver's seat and also drove off.

**¶4** Phoenix Police broadcasted a description of J.S.'s 2004 Mercedes shortly after the incident. At approximately 3:00 a.m. the next morning, an officer on patrol spotted a car fitting the description. After he confirmed that the vehicle had been stolen, the officer requested an air unit and back-up. Defendant led the pursuing officers on a high-speed chase from Phoenix to Casa Grande, but eventually stopped at a gas station and was taken into custody.

**¶5** Defendant was transported back to Phoenix. After Defendant was released to a police detective, the transporting officer searched the back of the patrol car and found a small

bag of what was later identified as 540 milligrams of methamphetamine. During an interrogation, Defendant admitted that he dropped the bag of methamphetamine in the patrol car.

**¶6** Defendant was charged with two counts of armed robbery, class two dangerous felonies; two counts of theft of means of transportation, class three felonies; and one count of possession or use of dangerous drugs, a class four felony.

**¶7** At trial, Defendant testified that he knew K.P., and that a mutual friend of theirs named "Raul" had hired him to pick up some property for K.P. He testified that he was directed by Raul to meet K.P. and switch cars, that K.P. supplied the knife to him for his protection, and that after obtaining K.P.'s Altima, Raul directed him to go to a house near 16th Street and Indian School. According to Defendant, after arriving at the house, he was directed by Raul to take a black car that was parked on the street with keys inside. Defendant said that he then began "driving around the streets" waiting for Raul to call, and when he realized police were after him, he "got very scared because [he] didn't know if there was like stolen property in the car or illegal stuff."

**¶8** The prosecutor sought to impeach Defendant's story by demonstrating that Defendant had not told his story to the police. During cross-examination, Defendant testified that he

had not read the police report, and the following exchange occurred:

> Prosecutor: You have had somebody read [the police report] to you; haven't you?
>
> Defendant: No.
>
> Prosecutor: So no one told you what the police report says?
>
> Defendant: No.
>
> Prosecutor: In a year and a half no one discussed with you what's in the police report?

Before Defendant answered the question, defense counsel requested a sidebar, and after the jury was excused, moved for a mistrial. Counsel argued that the prosecutor had implicitly "comment[ed] on defendant's and defense counsel's communication and conversation." The prosecutor disagreed and argued that he was only trying to determine whether Defendant had general knowledge of what the police report stated.

**¶9** The court stated that the State was "entitled to question [Defendant] about whether [he was] aware of certain things within the police department reports," but that the court was not going to allow any similar further questioning. The court concluded that "the stage that [the issue was] caught ha[d] prevented any prejudicial error to the defendant . . . particularly because the very last question was not answered."

The court denied the request for a mistrial, but instructed the prosecutor not to question Defendant further about the subject.

**¶10** On rebuttal, the State called K.P. and one of the interrogating officers. K.P. testified that he did not know, and had never met either Defendant or "Raul," did not give Defendant a knife, and did not give Defendant permission to take his car. He testified that there was no "deal" to switch cars, and that after his car was taken, he "quickly called 911." The officer testified that during his interrogation, Defendant never mentioned "Raul," knowing K.P., or picking up the 2004 Mercedes or any other property for K.P. He also testified that Defendant admitted that he approached K.P. with a knife, told him to "get out of the car," and admitted that the methamphetamine found in the patrol car "was his."

**¶11** Defendant was convicted as charged. After finding that Defendant had two prior felony convictions, the court sentenced him to consecutive twenty-year prison terms for the two counts of armed robbery. The court also sentenced him to fifteen-year terms for each count of theft of means, and a ten-year term for possession or use of dangerous drugs, each to run concurrently with the armed-robbery terms.

**¶12** Defendant appeals, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A) (2010).

## DISCUSSION

**¶13** Defendant contends that the trial court erred in denying his motion for a mistrial. We review the ruling for an abuse of discretion, and recognize that the trial court's "discretion is broad . . . because [it] is in the best position to determine whether [] evidence will actually affect the outcome of the trial." *State v. Jones,* 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000) (citation omitted).

**¶14** Defendant argues that a mistrial should have been granted because the prosecutor improperly infringed upon the attorney-client privilege. He argues that the questions posed were "remarkably similar" to an exchange found improper in *State v. Holsinger*, 124 Ariz. 18, 601 P.2d 1054 (1979).[3]

**¶15** In *Holsinger*, a prosecutor asked a defendant whether she had "discussed the case that the State had against [her]" with her attorney. *Id.* at 22, 601 P.2d at 1058. After an objection by her counsel, the defendant was asked whether she

[3] Defendant also relies on two Maryland cases, *Blanks v. State*, 959 A.2d 1180 (Md. 2008), and *Haley v. State*, 919 A.2d 1200 (Md. 2007). Neither of these cases, however, presented the attorney-client privilege issue in the context of an appellate review of a denied request for a mistrial. *See Blanks*, 959 A.2d at 1184-85, 1187-89; *Haley*, 919 A.2d at 1209-14. Additionally, unlike the prudent response of the trial court in this case, the trial court in both Maryland cases, over defense counsels' objections, repeatedly permitted improper questioning that infringed on the attorney-client privilege. *See Blanks*, 959 A.2d at 1184-85; *Haley*, 919 A.2d at 1209-11. Therefore, we reject Defendant's argument that *Blanks* and *Haley* cannot be distinguished from this case.

wanted to invoke the attorney-client privilege. *Id.* On appeal, our supreme court found that the question placed the defendant "on the horns of a dilemma" because "the effect if not the intent of the question was to force the defendant either to waive the attorney-client privilege," possibly resulting in damaging testimony, "or to invoke the privilege before the jury" and risk leading the jury to believe that she was hiding something. *Id.* at 23, 601 P.2d at 1059. The court held that the question was prejudicial and constituted error. *Id.* After finding several other instances of improper questioning by the prosecutor, the court reversed the conviction and remanded the case for a new trial. *Id.* at 21-24, 601 P.2d at 1057-60.

**¶16** Defendant argues that, like in *Holsinger*, "the prosecutor asked a line of questions that required [him] to either waive his attorney client privilege or look like he was either trying to hide something or providing incredulous testimony." The State argues, however, that unlike *Holsinger*, the prosecutor's broad questions about whether anyone had read or discussed the police report with Defendant did not have the same effect as the pointed question did in *Holsinger*.

**¶17** We agree with the trial court that the broad questioning employed by the prosecutor had the potential of infringing on Defendant's attorney-client privilege. Even though the inquiries were not specifically focused on whether

*defense counsel* had read or discussed the police report with him, they could have infringed on the privilege because defense counsel was ostensibly included within the group of anyone who may have read or discussed the police report with Defendant. If counsel was the only person who had read and/or discussed the police report with Defendant, Defendant was faced with the choice of waiving the privilege and impeaching himself, perjuring himself to protect the privileged information, or invoking the privilege and risking that the jury might believe he had something to hide.

**¶18** Here, Defendant testified that no one had read the police report to him. His lawyer intervened and requested a sidebar before Defendant responded to whether anyone had "discussed" the report with him. The court instructed the prosecutor to avoid asking questions that could infringe on the attorney-client privilege.

**¶19** Even though the questions could have infringed on the attorney-client privilege, the trial court did not abuse its discretion in denying the request for a mistrial. In *State v. Adamson*, 136 Ariz. 250, 262-63, 665 P.2d 972, 984-85 (1983), our supreme court reviewed the denial of a request for a mistrial in the context of infringement of the attorney-client privilege. There, the defendant was charged in a bombing murder. *Id.* at 253, 665 P.2d at 975. During cross-examination of an attorney

who spoke with the defendant on the night of the bombing, the prosecutor asked the attorney whether he had "any conversation with [defendant] concerning the bombing." *Id.* at 262, 665 P.2d at 984. Although the trial court sustained objections to both questions, the defense moved for a mistrial because the questions "were designed to probe into areas that were not of legitimate inquiry and were asked for the purpose of forcing [the] defendant to invoke the attorney-client privilege." *Id.* at 263-64, 665 P.2d at 984-85.

**¶20** The Supreme Court held that the question between the defendant and the attorney about the bombing "went to the substance of [the attorney's] telephone conversation with the defendant and therefore was within the protection of the attorney-client privilege." *Id.* at 263, 665 P.2d at 985. The court distinguished *Holsinger*, and stated that "[Holsinger's] conviction was reversed due to several instances of improper questioning . . . by the prosecutor of which forcing the defendant to invoke the attorney-client privilege was only one." *Id.* Because only one improper question was asked in *Adamson*, and no answer was given, the court found no abuse of discretion in denying the motion for a mistrial. *Id.* The court stated that the trial court "necessarily weighed the effect of the asking of [the] one unanswered question on the entire

proceeding," and that the court "could very well have felt . . . that the effect was little or none." *Id.*

**¶21** Here, like in *Adamson*, the trial court weighed the effect of the prosecutor's questions on the entire proceedings and could very well have felt, as we do, that there was little, if any, prejudicial effect.[4] Defense counsel timely intervened and the court prudently addressed the situation outside of the presence of the jury. The jury, as a result, was never alerted to the nature of the objection or the ramifications of the question. The trial court was in the best position to assess the impact of the questions and it was not error to find that their influence was minimal. *See State v. Bailey*, 160 Ariz. 277, 279, 772 P.2d 1130, 1132 (1989) (citing *State v. Hallman,* 137 Ariz. 31, 37, 668 P.2d 874, 880 (1983)).

[4] During closing argument, the prosecutor argued that Defendant had changed his story for trial. He stated, "Then [Defendant] completely changes what he says here. He has an explanation for everything. Every single point that's brought up he had an explanation for. But he's never prepared. He had no idea about preparation in this case." Defendant argues that the prosecutor's statements about trial preparation were in reference to the improper questions asked by the prosecutor, and served to increase the prejudice to him. We disagree. During cross-examination, Defendant also testified that he had not prepared for his testimony. Based on Defendant's testimony, the prosecutor's comments were not improper, nor do they amount to fundamental error.

## CONCLUSION

**¶22** Based on the foregoing, we affirm Defendant's convictions.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Presiding Judge

/s/
_____
PATRICIA K. NORRIS, Judge