DIVISION ONE
FILED: 07/26/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. CHARLES ALAN GALLINO, Appellant.	)	1 CA-CR 09-0434 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-006468-001 DT

The Honorable Raymond P. Lee, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

Charles Alan Gallino — Florence
Appellant

P O R T L E Y, Judge

¶1 Defendant Charles Alan Gallino challenges his conviction for first-degree murder and the resulting sentence

under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Defendant has advised us that, after searching the entire record, she has been unable to discover any arguable questions of law, and has filed a brief requesting us to conduct an *Anders* review of the record. Defendant has taken the opportunity to file a supplemental brief.

FACTS[1]

¶2 The police conducted a welfare check and found Eric Evans dead inside of his Phoenix apartment on June 8, 2007. A few nights before the discovery, Eric was visiting Paul Hansberger, his neighbor. Eric had been drinking because Savana Whipple, his girlfriend, had moved out of his apartment.

¶3 Ms. Whipple and Defendant, however, stopped by Hansberger's apartment later that evening to buy some pills. When Eric saw her, he punched Defendant in the face, which drew blood, and then left the apartment.

¶4 Later, Defendant drove Ms. Whipple to the place he was living. He left her there, and when he returned, she noticed that he had a gun. The pair then drove back to the apartment complex and Ms. Whipple waited in the car while Defendant left with the gun. When he returned, Defendant made a cell phone

[1] We review the facts in the light most favorable to sustaining the verdict. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

call to his uncle, Gary Lape, and stated that he thought he "might have killed somebody."

¶5 After driving around for awhile, Defendant and Ms. Whipple went back to the apartment complex. Defendant told her to get out and look for a shell casing. She did, found the shell casing, and gave it to Defendant. They left, and spent the night together.

¶6 The next day, Defendant told Jason Leger that after he had been hit in the mouth, he went back with a gun and fired a shot through the door. He also told Leger that he had Ms. Whipple retrieve the shell casing. Leger subsequently called silent witness.

¶7 Defendant was indicted for first-degree murder. The State alleged that he had four prior convictions and alleged other aggravating factors for sentencing. The matter proceeded to trial, and after the presentation of testimony and evidence, the jury convicted Defendant of the first-degree murder.

¶8 Defendant's motion for judgment of acquittal or, in the alternative, motion for a new trial was denied. Defendant was subsequently sentenced to life imprisonment with the possibility of parole after 25 years, with credit for 668 days of presentence incarceration.

¶9 We have jurisdiction over this appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona

Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2010).

DISCUSSION

¶10 We have read and considered counsel's brief, Defendant's supplemental brief, and have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶11 The opening brief notes that Defendant wants to raise several issues: insufficiency of the evidence, actual innocence; failure to give a *Willets* instruction; failure to grant mistrials; denial of a motion for new trial; prosecutorial misconduct; and failure to sua sponte give the second degree murder instruction. In his supplemental brief, Defendant only comments about matters discussed in the opening brief. We address the issues for reversible error. *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

¶12 Defendant first challenges the sufficiency of the evidence used for his conviction. Specifically, he argues that Terri Frost, Ms. Whipple, Mr. Hansberger and Eric Stell should not have been allowed to testify. He argues that they, and others, were not credible witnesses because of drug addiction or drug use. He also claims that there were no credible witnesses to prove that he did anything, and the witnesses should not have been allowed to give hearsay testimony.

¶13 Defendant filed motions in limine to preclude Teresa Frost, Chelsea Nichol, Eric Stell, and Gary Lape from testifying. The motions were denied because the witnesses had relevant information about statements Defendant made to them after the shooting which implicated him, and his statements were not inadmissible hearsay. Ariz. R. Evid. 801(d)(2). Alternatively, the testimony of one or more of the challenged witnesses could be used to impeach another witness with a prior inconsistent statement pursuant to Arizona Rule of Evidence 806. Accordingly, the trial court did not abuse its discretion by its pretrial evidentiary rulings. *See State v. Roscoe,* 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996).

¶14 Defendant also asserts that the witnesses should not have been allowed to testify because of their addictions or drug use. The standard, however, is not whether they may use or abuse illegal drugs, but whether the witness has relevant testimony that will "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, 402. If the witness has relevant testimony that is material to the case, the witness should testify. During the cross-examination of a witness, his or her observations, perceptions and credibility can be challenged or impeached in a myriad of ways. Ariz. R. Evid. 607. The jury, as fact finder,

then has to determine the credibility of each witness, determine the testimony to believe, and decide the facts. *See State v. Fimbres,* 222 Ariz. 293, 297, ¶ 4, 213 P.3d 1020, 1024 (App. 2009). We will not independently determine the credibility of the witnesses or the facts but defer to the jury's assessment of a witness's credibility and the weight to be given evidence. *See id.* at 300, ¶ 21, 213 P.3d at 1027.

¶15 The trial record here demonstrates that the challenged witnesses were cross-examined, and their credibility was challenged. For example, although Mr. Stell was given immunity to testify, he initially refused to testify, was found in contempt of court, and jailed until he reconsidered. Once he decided to testify, the jury heard about the contempt and the fact that he was jailed until he decided to testify. During his cross-examination, the jury heard about his grant of immunity; that he had stopped taking Xanax while he was detained for contempt; that he had used a myriad of other drugs; that he seemed to be confused and did not have any solid memory about the facts; that the police had been aggressive towards him during their interview; and other relevant matters. Consequently, the jury had to decide whether Mr. Stell was credible and whether to accept or reject his testimony. We will not second-guess or disturb the jury's determination.

¶16 The second issue raised in the brief is the claim that the trial court erred by failing to give a *Willits*[2] instruction. Specifically, Defendant argued below that: the State failed to preserve a receipt that would have demonstrated the day and time that Ms. Sara Mitchell saw Ms. Whipple in a store; that the State failed to collect or preserve the victim's DNA; and that the State failed to preserve the blood that was smeared and transferred on the victim's lower leg.

¶17 A *Willits* instruction allows the jury to draw an inference from the destruction of material evidence that the lost or destroyed evidence would be unfavorable to the party that lost or destroyed the evidence. *State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999). A defendant is entitled to a *Willits* instruction when (1) the state fails to preserve accessible, material evidence that "might tend to exonerate him" and (2) there is resulting prejudice. *Id.* The exculpatory potential of the evidence, however, must have been apparent at the time it was lost or destroyed. *State v. Davis,* 205 Ariz. 174, 180, ¶ 37, 68 P.3d 127, 133 (App. 2002). A defendant is not entitled to a *Willits* instruction "merely because a more exhaustive investigation could have been made." *State v. Murray,* 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). Moreover, "a *Willits* instruction is not appropriate if the

[2] *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964)

defendant fails to demonstrate that the absent evidence would have exonerated him." *State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988).

¶18 Although Defendant argues that he was harmed by the trial court's failure to give the instruction, there is nothing in the record to demonstrate that any ungathered evidence would have exonerated him, or that any evidence that had been collected or lost was unfavorable to the State. Accordingly, we find that the denial of the *Willits* instruction was not an abuse of discretion or fundamental error.

¶19 The third issue raised is Defendant's claim that the trial court erred by failing to grant any of the requested motions for mistrials. We review the court's rulings for a clear abuse of discretion. *Murray,* 184 Ariz. at 35, 906 P.2d at 568. A mistrial is the "'most dramatic remedy for trial error'" and should be ordered "'only when justice will be thwarted if the current jury is allowed to consider the case.'" *State v. Lamar,* 205 Ariz. 431, 439, ¶ 40, 72 P.3d 831, 839 (2003) (quoting *State v. Nordstrom,* 200 Ariz. 229, 250, ¶ 68, 25 P.3d 717, 738 (2001)). When determining whether to grant a motion for a mistrial based on a witness's testimony, courts must consider: "(1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability

under the circumstances of the case that the testimony influenced the jurors." *Id.*

¶20 Defendant first requested a mistrial during Mr. Stell's testimony. The trial court determined that neither the questions asked nor Mr. Stell's answers created prejudice or violated any of the court's earlier rulings.

¶21 Defendant later filed a written motion and requested a mistrial because Mr. Stell was allowed to testify even though he seemed, as the defense contends, incompetent to testify and disconnected from reality, especially because he testified that he received money to be a "good witness." The motion also argued that Ms. Frost had violated the court's ruling that there be no discussion about Defendant's time in jail when she briefly discussed a party after he was "getting out." Defendant also argued that Ms. Frost had improper contact with Mr. Lape and any attempted recording she had made of his statements had not been produced to the defense. Finally, he argued that Ms. Frost had improper contact with the case agent during trial.

¶22 The trial court denied the motion. The court watched the witnesses, listened to the testimony and was in the best position to determine whether the testimony violated any rules, rulings or otherwise brought matters to the jurors' attention that they were not supposed to consider in reaching their verdict, as well as the probability that the testimony

influenced the jurors. We find no fault with the court's analysis or the denial of the motion for mistrial.

¶23 Moreover, Defendant also sought a mistrial after the State's closing argument. He alleged that the State made statements that were unduly prejudicial; namely, that Ms. Whipple was not granted immunity to testify; that Defendant was a "killer"; and that he was a gangster. The jurors had been properly instructed that they had to determine the facts and that comments by the lawyers are not evidence. Consequently, because we presume that the jurors followed the instructions, *State v. McCurdy,* 216 Ariz. 567, 574, ¶ 17, 169 P.3d 931, 938 (App. 2007), no error was committed when the motion was denied.

¶24 The fourth issue on appeal argues that the trial court erred by failing to sua sponte give the lesser-included instruction on second-degree murder.

¶25 Generally a defendant is "entitled to an instruction on any theory of the case reasonably supported by the evidence." *State v. Shumway,* 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983). Although the trial court in a capital case must sua sponte instruct the jury on any lesser-included offenses even absent a defense request, *State v. Whittle,* 156 Ariz. 405, 407, 752 P.2d 494, 496 (1988), that requirement does not apply in a noncapital murder case unless the failure to give an instruction would amount to fundamental error. *Id*.

¶26 In this case, there was no request for a second-degree murder instruction as a lesser-included offense. Moreover, Defendant only claimed alibi and misidentification as his defenses. As a result, absent a request for the lesser-included instruction, the failure to give the lesser-included instruction was not fundamental error.

¶27 The fifth issue listed is the argument that the trial court erred by denying his motions for new trial.

¶28 Motions for new trial are not favored. *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996). The motion should only be granted to promote justice and protect the innocent. *State v. Chase*, 78 Ariz. 240, 241, 278 P.2d 423, 424 (1954). The trial court has to review the evidence, and if there is substantial evidence[3] supporting the conviction, the court cannot substitute its judgment for that of the jury. *State v. Gulbrandson*, 184 Ariz. 46, 65, 906 P.2d 579, 598 (1995). Consequently, and as our supreme court noted more than fifty years ago, the grant of a new trial would be an abuse of discretion if there is evidence to support the verdict. *Chase*, 78 Ariz. at 241, 278 P.2d at 424.

[3] Substantial evidence exists when reasonable people "[c]ould differ on the inferences to be drawn from the evidence . . . ." *State v. Sullivan,* 205 Ariz. 285, 287, ¶ 6, 69 P.3d 1006, 1008 (App. 2003).

¶29 Here, because the trial court was familiar with the facts presented during trial, the court was in the best position to determine whether there was substantial evidence to support the verdict. Thus, although Defendant claims "actual innocence," we find no error in the court's determination that there was substantial evidence to support the verdict that Defendant was guilty of murder in the first degree.

¶30 Finally,[4] Defendant argues that there was prosecutorial misconduct that amounts to fundamental error which requires a new trial. When reviewing claims of prosecutorial misconduct, our "focus is on the fairness of the trial, not the culpability of the prosecutor." *State v. Bible,* 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993). "[Prosecutorial] [m]isconduct alone will not cause a reversal, but only where the defendant has been denied a fair trial as a result of the actions of counsel." *State v. Hallman,* 137 Ariz. 31, 37, 668 P.2d 874, 880 (1983). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the 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

[4] Defendant also argues that his trial lawyer was ineffective because the lawyer was unable to present character evidence; an issue the trial court resolved at a pretrial conference. If Defendant wants to pursue the ineffectiveness claim, he will have to file a petition pursuant to Arizona Rule of Criminal Procedure 32. *See State v. Spreitz*, 202 Ariz. 1, 2, ¶ 6, 39 P.3d 525, 526 (2002).

1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)).

¶31 Based on the supplemental brief and the motion to the trial court, Defendant claims that the following statements made by the State during closing arguments were unduly prejudicial: that Defendant had a "lack of remorse"; that Ms. Whipple was not granted immunity; that a slide was shown to the jurors with the word "killer";[5] that Defendant was twice called a gangster; and that the State argued that "you are not even safe behind your door and now a person can shoot you."

¶32 We find no error. The jury heard the testimony. The jury was properly instructed on the law and told that the arguments of counsel are not facts. Consequently, because our supreme court has directed us to focus on the fairness of the trial, the complained of statements made by the prosecutor during the closing argument did not prevent Defendant from having a fair trial. Thus, there is no basis to warrant a new trial because of prosecutorial misconduct.

¶33 Having addressed the arguments, and having searched the entire record for reversible error, we find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal

[5] After Defendant told his uncle that he might have shot somebody, Mr. Lape started calling him "killer."

Procedure. The record, as presented, reveals that Defendant was represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits.

CONCLUSION

¶34 After this decision has been filed, counsel's obligation to represent Defendant in this appeal has ended. Counsel need do no more than inform Defendant of the status of the appeal and Defendant's future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 585, 684 P.2d 154, 157 (1984). Defendant can, if desired, file a motion for reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure.

¶35 Accordingly, we affirm Defendant's conviction and sentence.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge