IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0457
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	
GILBERT MARTINEZ, SR.	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-007790-001 DT

The Honorable Rosa Mroz, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
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O R O Z C O, Judge

¶1 A grand jury indicted Gilbert Martinez, Sr. (Defendant), and others on twenty-three counts arising from a

series of seven burglaries and home invasions between December 2005 and March 2006. Defendant appeals his convictions and sentences imposed following trial on four of the burglaries and home invasions. For the reasons that follow, we find no error and affirm.

¶2 The court severed the trials on charges against Defendant as to the different victims as follows: 1) the first trial as to victims Stanley and Patricia P. for counts six through eleven of the indictment: one count each on the charges of theft and burglary in the first degree, two counts of armed robbery and two counts of kidnapping, all six counts are dangerous offenses; 2) the second trial on count two of the indictment, burglary in the first degree, a dangerous offense, relating to victim Howard M.; 3) the third trial as to counts three and four of the indictment, one each for armed robbery and burglary in the first degree, both dangerous offenses as to victim Merton T.; and 4) the fourth trial as to count twelve of the indictment, burglary in the second degree as to victim John H.[1]

[1] Defendant was acquitted on count one of the indictment. The State dismissed count five. The trial court ordered counts thirteen through twenty-three to be tried together as part of a capital case that proceeded to trial following sentencing in the cases at issue in this appeal. Defendant was subsequently convicted on counts thirteen through twenty-three, including the first-degree murder charge alleged in count twenty-two, for which he was sentenced to death.

¶3 In each of the four trials a jury convicted Defendant as charged, with the exception of count two in the second trial where the jury did not find that charge against Defendant to be a dangerous offense.[2]

¶4 The trial court sentenced Defendant to aggravated terms totaling ninety-nine years in prison: fifty years on the offenses involving Stanley and Patricia P., thirteen years on the offense involving Howard M., eighteen years for the offenses involving victim John H., and eighteen years as to the convictions for charges relating to victim Merton T. Defendant timely appealed his convictions and the sentences imposed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 13-4031 and -4033 (2010).

STANLEY AND PATRICIA P. (COUNTS SIX THROUGH ELEVEN)

¶5 On appeal, Defendant raises five issues with respect to the first trial on counts six through eleven. He argues (1) the court erred when it denied his motion to preclude testimony by the State's cooperating witness, Manuel Stevens (Stevens); (2) the State engaged in misconduct in eliciting Stevens' testimony, in light of Stevens' alleged feigned memory loss, in an earlier trial of a co-defendant, in violation of his

[2] In the first trial instead of the jury finding the aggravating factor, Defendant admitted to the one aggravating factor relating to the victims' age.

testimonial agreement; (3) the trial court violated his confrontation rights by allowing Stevens to testify about a statement that an unidentified co-conspirator made after the offense was complete; (4) the court abused its discretion in admitting a photograph of an Arizona criminal statute book in Defendant's truck; (5) the trial court abused its discretion in denying Defendant's motion to sever his trial from that of his co-defendant and son, Gilbert Martinez, Jr. (Martinez Junior); and (5) the trial court erred in instructing on the inference arising from the possession of recently stolen property. For the reasons that follow, we find no reversible error.

¶6 The facts, viewed in the light most favorable to upholding the jury's verdict,[3] were as follows. Three men dressed in black, wearing stocking cap masks and knit gloves, surprised Stanley and Patricia P., who were seventy-four and seventy-three, respectively, in their home while they were watching television on the evening of February 6, 2006. According to the victims, two of the men, approximately six feet tall and of husky build, pointed black nine millimeter pistols at the victims' heads, and one masked-man began giving them commands. The burglars carried walkie-talkies.

¶7 The person giving commands took Stanley P.'s money

[3] *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996).

clip containing approximately $400, Patricia P.'s wallet containing credit cards, her driver's license, approximately $300, an ATM card, and other personal items, including Patricia P.'s wedding band. He demanded Patricia P.'s PIN number for the ATM card and threatened to shoot her if she gave him an incorrect PIN. In the meantime, the third man, considerably shorter than the other two, ransacked the victims' home, dumping the contents of a jewelry case into a pillow case. The burglars also stole a Kodak digital camera, a Dell computer and a football-shaped bank. The person giving commands ordered the victims into a closet and told them to remain there for twenty minutes and not call the police or they would be shot.

¶8 Stevens, the State's cooperating witness, testified that he served as a look-out outside the victims' home during this burglary and home invasion. Stevens testified that Defendant, Martinez Junior, and another accomplice, Robert Arbolida, invaded the house, and that Defendant was armed with a nine-millimeter Beretta. He further testified that Arbolida was approximately 5'5" tall, and Defendant and Martinez Junior were approximately 6'2" or 6'3" tall. Stevens also testified that Defendant gave him Patricia P.'s ATM card and PIN. He proceeded to withdraw $300 from Patricia P.'s bank account and split the cash with the four men.

¶9 During the execution of a search of Defendant's home,

officers found the victims' camera and Patricia P.'s diamond wedding band. They also found receipts for two ski masks and walkie-talkies. In addition, officers found the victims' football-shaped bank inside Defendant's vehicle. The walkie-talkies and gloves were discovered inside Martinez Junior's vehicle.

¶10 A jury convicted Defendant on the six charges stemming from the burglary and invasion of Stanley and Patricia P.'s home. The trial court sentenced Defendant to a total of fifty years on these convictions.

Testimony of State's Cooperating Witness

¶11 Prior to trial, Defendant filed a motion to preclude Stevens from testifying, alleging that in a prior trial on charges against Martinez Junior, Stevens feigned memory loss in violation of the testimonial agreement, and that it was questionable that Stevens would testify truthfully in this trial. Defendant argues the court erred by denying his motion to preclude testimony by Stevens[4] Defendant also argues the State engaged in misconduct in eliciting Stevens' alleged false testimony because it violated the terms of his testimonial

[4] The prior trial was in Maricopa County Superior Court cause number, CR2006-048077 and the record of that trial was not included with this record on appeal. We rely on the portions of the record of the prior trial, as quoted in Defendant's motion filed in these proceedings.

agreement. We disagree.

¶12 The testimonial agreement between the State and Stevens provided in pertinent part that Stevens was required to testify truthfully at trial and not attempt to protect any person by omission or through false information and that the Maricopa County Attorney's Office would be the sole judge of whether Stevens had breached the testimonial agreement.

¶13 In support of his argument, Defendant cites the *sua sponte* observation of the trial court during the previous trial, that when Stevens "was claiming he didn't remember anything, his personal posture, the way he said he didn't remember, suggests to me that he was feigning his memory loss."[5] In the ensuing discussion regarding the previous trial court's *sua sponte* observations, however, the State's attorney commented only that as her voice got louder, Stevens' memory appeared to improve.[6]

¶14 The court denied Defendant's motion to preclude Stevens' testimony, noting as an initial matter that it did not know if Defendant even had standing to object, and because only the State could determine whether Stevens had breached the testimonial agreement. The court also noted that it did not

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[5] The same judge and State's attorney participated in both trials.

[6] The defense attorney for Martinez Junior told the court that he believed Stevens' failure to remember was genuine, the result of mental health issues and a prior brain injury.

believe that the State had offered false testimony in the other case: "It was simply a matter of [the State's attorney] reminding [Stevens] of what he has previously testified to." The court ruled that objections to the use of Stevens' *prior* statements, to which Defendant had also objected, went to the weight of the evidence, not the admissibility.

¶15 During trial, Defendant again objected to Stevens' testimony and asked the trial court to preclude the testimony because the testimonial agreement provided that Stevens "tell the truth about all things at all times." Defendant said that he interpreted the State's same remark in the previous trial, that Stevens' "memory seemed to get better as she got louder," as a statement that he was "feigning memory loss," and accordingly, "my impression is [the State] doesn't believe [Stevens] is being completely truthful." The State clarified that her comment in the prior trial was in reference to the fact that Stevens was "clearly intimidated" by the conduct of Defendant's family members in the courtroom. She further stated "so the louder I got, the more [Stevens] focused on me and answered the questions."

¶16 Defendant has failed to cite to any testimony by Stevens in his trial that was false. Nor has he cited any finding by the State that Stevens breached his testimonial agreement. Defendant relies solely on the court's brief comment

in a prior trial that it appeared that Stevens was "feigning memory loss." The only testimony which Defendant specifically cites in support of this argument are Stevens' initial denials that the burglars wore anything covering their faces, carried guns, or communicated with him by mechanical means, which were followed by his immediate concession after the State asked him to refresh his memory with the transcript from prior testimony. Stevens then testified that the burglars did in fact wear ski masks; Defendant had a nine-millimeter Beretta; and Defendant and he had walkie-talkies. This testimony fails to support the proposition for which Defendant cites it, that is, that the State "deliberately misled jurors." *See State v. Morrow*, 111 Ariz. 268, 271, 528 P.2d 612, 615 (1974); *Tapia v. Tansy*, 926 F.2d 1554, 1563 (10th Cir. 1991). The record instead demonstrates that the prosecutor corrected Stevens' testimony by asking him to refresh his memory with a transcript of his prior testimony. The trial court, moreover, noted that in *this* trial, she did not observe any indications that Stevens was feigning memory loss. Additionally, Defendant cross-examined Stevens vigorously on issues related to his credibility, and specifically, his motive to implicate other persons in this offense, the prescription narcotic drugs he was taking the day of the incident, and the brain damage that Stevens suffered in a 2003 industrial accident resulting in memory problems. On this

record, in the absence of any evidence that Stevens testified falsely in *this* trial, Defendant's claim fails.

¶17 Furthermore, Defendant's argument that the prosecutor knowingly presented false testimony at this trial is not supported by the record. The knowing use of perjury or false testimony to convict a defendant constitutes a denial of due process and is reversible error without a showing of prejudice. *State v. Ferrari*, 112 Ariz. 324, 334, 541 P.2d 921, 931 (1975) (citing *Mooney v. Holohan*, 294 U.S. 103 (1935)). "Contradictions and changes in a witness's testimony alone do not constitute perjury and do not create an inference, let alone prove, that the prosecution knowingly presented perjured testimony." *Tapia*, 926 F.2d at 1563; *see Morrow*, 111 Ariz. at 271, 528 P.2d at 615 (holding that a new trial was not required because court was not convinced inconsistencies in witness's testimony were of such a nature that witness was committing or had committed perjury). A prosecutor may accordingly call witnesses who have made prior inconsistent statements: "The prosecution is under an obligation to present the witness as he was," *Ferrari*, 112 Ariz. at 334, 541 P.2d at 931, "warts and all." *State v. Rivera*, 210 Ariz. 188, 194, ¶ 28, 109 P.3d 83, 89 (2005).

¶18 Although prosecutors have a duty not to knowingly encourage or present false testimony, "[a]bsent a showing that

the prosecution was aware of any false testimony, the credibility of witnesses is for the jury to determine." *Rivera*, 210 Ariz. at 194, ¶ 28, 109 P.3d at 89. Finally, "[p]rosecutorial 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) (internal punctuation and citations omitted).

¶19 The record fails to support Defendant's claim that the trial court erred in refusing to preclude Stevens' testimony on the cited grounds, or that the prosecutor knowingly elicited perjury from him at trial.

Admission of Co-Conspirator's Statement

¶20 The record fails to support Defendant's claim that the trial court erred in refusing to preclude Stevens' testimony on the cited grounds, or that the prosecutor knowingly elicited perjury from him at trial.

¶21 Defendant next argues that the trial court violated his confrontation rights in allowing Stevens to testify on a statement made by an unidentified co-conspirator not in furtherance of the conspiracy, because it was made after the

offense was complete. Specifically, Defendant argues that the trial court erred in admitting Stevens' testimony that, after the burglars exited the victims' house, one of the men laughed as he "made a comment . . . that the homeowners were inside the closet praying." The trial court ruled that the comment was made "in the course [of] and in furtherance of the conspiracy," reasoning that "[t]he whole entire event is to further the crime of the home invasion, all the way through to the end of the ATM." We review a trial court's ruling on the admissibility of evidence over hearsay objections for abuse of discretion. *State v. Tucker*, 205 Ariz. 157, 165, ¶ 41, 68 P.3d 110, 118 (2003).

¶22 A co-conspirator's statement "of a party during the course and in furtherance of the conspiracy" is viewed as an admission of a party-opponent, and not considered hearsay. Ariz. R. Evid. 801(d)(2)(E). For hearsay statements of co-conspirators to be admitted, the state must establish: "(1) the existence of a conspiracy; (2) the defendant's connection to the conspiracy; (3) that the statements were made in the course of the conspiracy by a co-conspirator; [and] (4) that the statements were made in furtherance of the conspiracy . . . ." *State v. Stanley*, 156 Ariz. 492, 495, 753 P.2d 182, 185 (App. 1988). "When inquiring whether a statement of a coconspirator was made in furtherance of the conspiracy, courts focus on the intent of the coconspirator in advancing the goals of the

conspiracy, not on whether the statement has the actual effect of advancing those goals." *State v. Dunlap*, 187 Ariz. 441, 458-59, 930 P.2d 518, 535-36 (App. 1996) (holding that trial court did not abuse its discretion in admitting Robison's diary entries because they may have helped him to "understand how trial maneuvers fit into a master plan and understand the relationship of the maneuvers to the conspiracy"). "So long as some reasonable basis exists for concluding the statement furthered the conspiracy, the 'in furtherance' requirement is satisfied." *Id*.

¶23 We find no err in admitting the challenged statement. Contrary to Defendant's claim, at the time the statement was made, the crimes against this couple had not yet ended. The crimes ended only after the co-conspirators fled the scene of the home invasion and withdrew money using Patricia P.'s PIN and ATM card. The statement that the homeowners were in the closet praying served to assure the other co-conspirators that the homeowners were not likely to be calling police immediately, and accordingly that the co-conspirators had time to escape and withdraw money from the victims' bank account at the ATM. The court did not err by finding that the statement was made by a co-conspirator in the course of and in furtherance of the conspiracy.

¶24 To the extent Defendant also argues that admitting the statement violated his confrontation rights, we reject that argument. Statements made by a co-conspirator in furtherance of a conspiracy are not testimonial and thus, not within the protection of the Confrontation Clause. *See Crawford v. Washington*, 541 U.S. 36, 56 (2004).

¶25 We do not separately address reliability as the credibility of this witness was for the jury, not us, to decide.[7] We find no reversible error.

Admission of Photograph Showing Criminal Statute Manual

¶26 Defendant next argues that the trial court abused its discretion in admitting a photograph of a 2002-03 edition of the Arizona Criminal and Traffic law Manual (Manual) in the trunk of his vehicle. Defendant argues the book's probative value, if any, was limited but its prejudicial value was great. The State argued that the Manual was relevant to show that "we had someone

[7] *See State v. Martin*, 139 Ariz. 466, 478-79, 679 P.2d 489, 501-02 (1984) (addressing reliability of hearsay for purposes of Confrontation Clause under test of *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36; *State v. Canaday,* 141 Ariz. 31, 34-36, 684 P.2d 912, 915-17 (App. 1984) (addressing trustworthiness of statement for purposes of Arizona Evidence Rule 804(b)(3), the hearsay exception for statements against interest, as well as the reliability of statement for purposes of Confrontation Clause under test of *Roberts*, 448 U.S. 56); *United States v. Bibbero*, 749 F.2d 581, 584 (9th Cir. 1984) (holding that because statement was inadmissible under the co-conspirator exception, it was "conclusively unreliable" for purposes of the Confrontation Clause); *United States v. Alvarez*, 584 F.2d 694, 699 (5th Cir. 1978) (addressing trustworthiness of statement for purposes of Federal Evidence Rule 804(b)(3)).

who was so concerned about the crimes that they could be charged with at a later point in time that they actually carried around a [Manual] in the trunk," and it was not unfairly prejudicial. The court found the photograph to be relevant, and its probative value was not substantially outweighed by the danger of unfair prejudice and allowed the photograph to be admitted into evidence. The court noted that the arguments defense counsel made to preclude, went to the weight of the evidence, not its admissibility. We review rulings on the admissibility of evidence for an abuse of discretion. *State v. Ellison,* 213 Ariz. 116, 129, ¶ 42, 140 P.3d 899, 912 (2006).

¶27 The presence of the Manual in the trunk of Defendant's vehicle had some probative value on Defendant's consciousness of guilt, that is, his awareness that he was doing something that was against the law. *See State v. Greene*, 192 Ariz. 431, 438, ¶ 21, 967 P.2d 106, 113 (1998). Although this inference might be prejudicial to Defendant, we cannot say that the prejudice would be unfair. We decline to find that Defendant's possession of the Manual "necessarily connotes a criminal mind," or that such a broad, improper inference would substantially outweigh its relevance on consciousness of guilt. We defer to the trial court's balancing of any unfair prejudice against its probative value, and decline to find that the court abused its discretion in admitting the photograph.

Denial of Severance

¶28 Defendant next argues that the trial court abused its discretion in denying his motion to sever his trial from that of his co-defendant and son, Martinez Junior, "given that each had antagonistic defenses, there was inappropriate rub-off effect, and the admission of evidence against Appellant was inadmissible as to the other." Defendant did not seek to sever his trial from that of his son in his pre-trial motion to sever, or at trial. We accordingly review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Defendant bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608.

¶29 The issue of severance of trial of these two defendants first arose during the State's examination of Maricopa County Sheriff's Detective Stephen G. The detective testified that he initially met with Stevens to discuss a different matter and not the burglary and home invasion of Stanley and Patricia P. Martinez Junior's counsel immediately requested that the trial court sever his trial from Defendant's, on the ground he could not elicit testimony from the detective in this joint trial that the detective had approached Stevens to

discuss a separate crime, a murder in which Defendant was suspected. Defendant did not join in the motion to sever, but instead asked the court for a mistrial. The court denied both motions, reasoning that the detective's testimony did not suggest that either of the two defendants was being investigated for another crime at the time.[8]

¶30 Defendants may be joined for trial in pertinent part "when each defendant is charged with each offense." Ariz. R. Crim. P. 13.3.b. The trial court must sever the trial of co-defendants only when it "is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense." Ariz. R. Crim. P. 13.4.a. The trial court should grant severance when it detects features of the case that might prejudice the defendant, such as:

> [W]hen (1) evidence admitted against one defendant is facially incriminating to the other defendant; (2) evidence admitted against one defendant has a harmful rub-off effect on the other defendant; (3) there is significant disparity in the amount of evidence introduced against the defendants, or (4) co-defendants present antagonistic, mutually exclusive defenses or a defense that is harmful to the co-defendant.

State v. Murray, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). We review a trial court's decision regarding severance for a clear

[8] The State's attorney argued she asked the question to rebut Defendant's claim during opening argument that Stevens identified Defendant as a person involved in this home invasion only because the detective suggested it and fed Stevens details.

abuse of discretion. *Id*. "A clear abuse of discretion is established only when a defendant shows that, at the time he made his motion to sever, he had proved that his defense would be prejudiced absent severance." *Id*.

¶31 Defendant has failed to establish error, much less fundamental, prejudicial error in the failure to sever his trial from the trial of his son. Defendant has failed to argue, much less demonstrate with citations to the record, that he suffered any prejudice from the joinder, as required, for reversal on this basis. Specifically, he has failed to show that evidence admitted against his son was not admissible against him, that the evidence against his son was significantly greater than the evidence against him, that he suffered a harmful rub-off effect from his son's trial with his, or that he and his son had antagonistic defenses. *See Murray*, 184 Ariz. at 25, 906 P.2d at 558. We find no reversible error on this ground.

Jury Instruction on Permissive Inference

¶32 Finally, Defendant argues that the trial court erred in instructing that the possession of recently stolen property "gives rise to an inference" that he was aware of the risk that the property had been recently stolen, on the ground the instruction impermissibly shifted the burden of proof to the defendant. Contrary to Defendant's claim, the instruction directed the jury that the possession of recently stolen

property "may give rise" to such an inference, and the jury, as trier of fact, was free to accept or reject any inference.

¶33 The instruction read in pertinent part:

> Proof of possession of property recently stolen, unless satisfactorily explained, may give rise to an inference that the defendant was aware of the risk that such property had been stolen or in some way participated in its theft. You are free to accept or reject this inference as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any inference that the law permits you to make.[9]

The trial court overruled Defendant's objection to the instruction, noting that the appellate court had previously approved the language of the instruction, citing *State v. Mohr*, 150 Ariz. 564, 568-69, 724 P.2d 1233, 1237-38 (App. 1986). We review the adequacy of an instruction *de novo*. *State v. Martinez*, 218 Ariz. 421, 432, ¶ 49, 189 P.3d 348, 359 (2008), *cert. denied*, 129 S.Ct. 494 (2008). This instruction allowed

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[9] The instruction went on to say: "Even with the inference, the State has the burden of proving each and every element of the offense of theft beyond a reasonable doubt before you can find the defendant guilty.

In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights, a defendant need not testify.

Possession may be satisfactorily explained through other circumstances and other evidence independent of any testimony by a defendant."

the jury to infer from the possession of recently stolen property that Defendant was aware of the risk that it was stolen or participated in its theft, but advised the jury that it could also reject any inference, and that even if it did accept the inference, the State still retained the burden of proof. This instruction on the inference that may arise from possession of recently stolen property comported with due process. *See Mohr*, 150 Ariz. at 567-68 n.2, 724 P.2d at 1235-36 n.2 (App. 1986) (reasoning that such instruction did not impermissibly shift burden and accordingly would be constitutional).

HOWARD M. (COUNT TWO)

¶34 On appeal, Defendant raises one issue with respect to his conviction in this trial on a burglary charge. He argues, as he did in the trial of the offenses arising from the invasion of Patricia and Stanley P.'s home, that the trial court erred in refusing to preclude Stevens' testimony.

¶35 The facts, viewed in the light most favorable to upholding the jury's verdict, were as follows. Police were called to the home of Howard and Anna M. on February 4, 2006. They found the home ransacked and the duty belt, baton, handcuffs, keys and nine-millimeter Sig Sauer handgun that Howard M. used as a volunteer sheriff's posse member had been stolen. Police executing a search warrant at Defendant's home and on Stevens' vehicle, which was parked in front of

Defendant's home, discovered property identified as stolen from Howard M.'s residence.

¶36 Stevens testified that on the night of the offense, after he, Defendant, and Martinez Junior observed the victims leave their home, they entered the house through the patio door. Stevens testified that while he and Defendant were inside the residence, Defendant took a nine-millimeter Sig Sauer handgun, and Stevens filled a pillowcase with jewelry, cash, the duty belt, handcuffs and two magazines for the gun. The jury convicted Defendant of the burglary, and the trial court sentenced him to thirteen years in prison.

¶37 We again find no merit to Defendant's argument that the State knowingly presented false testimony from Stevens, thus violating Defendant's due process rights. Defendant filed a pre-trial motion to preclude Stevens' testimony in this trial, largely on the same basis as he did in the Patricia and Stanley P. home invasion trial. The State argued in pertinent part that 1) it had taken pains to verify Stevens' statements before offering him a testimonial agreement; 2) it never touted Stevens' veracity to the jury, but conversely had advised the jury, in each opening statement, that Stevens was not a law-abiding citizen; 3) Stevens obviously fought the prosecutor's questions every step of the way and would have preferred to say he did not remember, but the prosecutor pressed Stevens for

answers by asking him to refresh his memory and/or impeached him with his prior statements; and 4) the defense exploited Stevens' memory problems for the jury, defending in large part on that basis, but the prosecutor corrected any memory problems by Stevens as they arose. The trial court denied the motion to preclude, reasoning in pertinent part:

> I specifically note that I did not observe any perjured testimony during the trials that I've already sat through. There may be some memory loss, as the defense has always suggested, or feigned memory loss from the first trial, which I noted, but I did not at any time say that I believe Mr. Stevens was lying. I do believe that he was intimidated by the number of people that were in the courtroom at the time, and that's the reason why I put down my observations when I said that I thought he was feigning memory loss. Feigning memory loss does not automatically suggest that someone is lying.
>
> Furthermore, I don't believe that the State has put on any perjured testimony of . . . Stevens . . . . When [he] testified inconsistently with whatever it was that [he] previously stated in the many, many transcripts that are involved in this case, [the State] has impeached her own witness with whatever was stated in the previous transcript. So I've not observed any proffering of perjured testimony by [the State].

¶38 Defendant again fails to identify any perjured testimony. He cites only to several pages of transcript testimony that he contends illustrate "several misstatements made by Stevens" that Defendant's counsel highlighted in

Stevens' cross-examination.

¶39 The record fails to demonstrate that the State knowingly presented false testimony to the jury; it indicates only that before trial, Stevens told police and defense counsel something different than what he was telling the jury, an inconsistency ably exploited by defense counsel. *See Tapia,* 926 F.2d at 1563. Defendant again relies primarily on the court's brief comment in a *prior* trial that it appeared Stevens was "feigning memory loss," a comment that the court noted in this trial did not mean that she believed he had presented false testimony in that trial. This record, in short, fails to support Defendant's claim the trial court erred in refusing to preclude Stevens' testimony on the cited grounds, or that the State knowingly elicited perjury from him at this trial.

MERTON T. (COUNTS THREE AND FOUR)

¶40 Defendant raises only one issue with respect to his conviction in this trial on burglary and armed robbery charges: that the judge made inappropriate remarks during *voir dire*, discrediting his counsel, deterring jurors from being candid, and depriving Defendant of his right to due process. Because the facts supporting the convictions are not necessary to resolution of this issue on appeal, we do not recite them.

¶41 During *voir dire* when the trial court asked whether any potential juror believed that his or her absence from work

would impose undue hardship, twenty two of the fifty-five persons in the jury pool asked to be excused. Of those, the trial court excused ten. In follow-up questioning by the State, nine persons, many of whom had previously claimed jury duty would present undue hardship, responded affirmatively to the question whether anyone "just [didn't] want to sit on this jury?" After each explained his reason, all confirmed that they would not hold it against either side if they were selected to sit.

¶42 In follow-up questioning, Defendant's counsel asked the jury a slightly different question: "[H]ow many people feel like they're not going to be at their best because they're already annoyed that they have to be here?" Eight persons answered affirmatively, six of whom had previously explained to the prosecutor that while they did not want to sit on the jury, they believed they could be impartial. Defense counsel further explored the circumstances of each in turn. The first few to be asked agreed that in light of the distraction presented by their hardship, they could not be fair. Defense counsel then commented, "And there's kind of, like, this universal funk going on with the state of the economy and people losing their jobs, and it just seems to be like a very depressing place to--."

¶43 The court interrupted defense counsel's comment at that point to call for a recess, which lasted three minutes.

When proceedings resumed, the court stated it would allow defense counsel to continue her questioning but expressed "dismay at everybody's--what I consider to be lack of civic responsibility."

¶44 Defense counsel subsequently expressed to the jury her sense that it was awkward to proceed in the same vein of asking them about hardships, but, after the court instructed her to continue with this line of questioning, she did so. Two of those she subsequently questioned said they would be so distracted it would deprive them of focus or affect their ability to be fair. The court repeatedly encouraged prospective jurors not to be intimidated by its comments but to be open and honest in their responses. The court subsequently struck all of the prospective jurors who told defense counsel they could not focus or be fair because of their respective distractions.[10] Defense counsel refused to pass the panel for cause, however, explaining:

> Because in the middle of my voir dire, the Court got very upset, demanded we leave the courtroom, came back and chastised the entire panel about their conduct. I looked like-– when I tried to move on, I was

[10] In this context, outside the presence of the jury, the court noted that she objected to the question on whether the jurors might be distracted, and was dismayed that defense counsel had not followed up and asked the prospective jurors whether they could set aside the distraction and focus on the trial. She said she would print out the question, and work on rewording it for future trials.

> reprimanded and told, continue on this line of questioning. It's embarrassing. It makes it look like I've done something wrong, which I've not done anything wrong. I think this jury pool has been tainted, and I think we need to start all over again.

The court denied her motion to strike the venire. The court subsequently apologized to the panel selected to serve on the jury for her earlier "loss of temper," and noted that although it had occurred during questioning by Defendant's counsel, it had nothing to do with counsel, and that jurors should not hold the court's comments against Defendant's attorney, in any way. The court further instructed, "if you're going to be mad at anybody about what I said, it's all on me, and I will try to make restitution by making you cookies on Monday."

¶45 We find no merit in Defendant's argument that the court's interpretation of his counsel's *voir dire* and subsequent lecture to the juror pool on civic responsibility deprived him of his due process rights. Due process requires "a fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955). A trial court, however, has a duty to see that the trial is conducted in an orderly manner. *Gaston v. Hunter*, 121 Ariz. 33, 59, 588 P.2d 326, 352 (App. 1978). We evaluate a claim of improper judicial remarks "according to the particular circumstances of each case." *Id*. "Within reason, a judge does not display bias or cause prejudice when acting sua sponte to

control the courtroom and the trial." *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993); *see also Liteky v. United States*, 510 U.S. 540, 556 (1994) (noting that "A judge's ordinary efforts at courtroom administration-even a stern and short-tempered judge's ordinary efforts at courtroom administration" do not establish bias or prejudice for purposes of federal recusal statute).

> "A trial judge's intervention in the conduct of a criminal trial would have to reach a significant extent and be adverse to the defendant to a substantial degree before the risk of either impaired functioning of the jury or lack of the appearance of a neutral judge conducting a fair trial exceeded constitutional limits."

Daye v. Attorney General, 712 F.2d 1566, 1572 (2d Cir. 1983).

¶46 Moreover, a trial judge is presumed to be free from bias and prejudice, and a defendant has the burden to establish bias and prejudice by a preponderance of the evidence. *See State v. Ellison*, 213 Ariz. 116, 128, ¶ 37, 140 P.3d 899, 911 (2006); *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (to succeed on a judicial bias claim arising from the combination of investigative and adjudicative functions, the party must "overcome a presumption of honesty and integrity in those serving as adjudicators").

¶47 Defendant has failed to meet his burden to establish that the trial court's comments evidenced bias or prejudice or

intimidated the jurors, or that its comments were so improper that they deprived Defendant of a fair trial. The court's comments in context simply expressed dismay at what she considered to be a lack of civic responsibility within the juror pool. By their terms, the court's comments were not directed at Defendant or his counsel, but rather to those jurors who were claiming they would be too distracted because of their respective worries to serve. The court later told the jurors as much, and directed them not to hold her remarks against any of the attorneys, and specifically not Defendant's attorney. Moreover, the court's remarks were not so intemperate that they discouraged prospective jurors from making their case to be excused, as was evidenced by the two prospective jurors who subsequently explained at length why they did not believe they should serve. In short, the court's comments did not evidence any bias against Defendant, and were instead nothing more than an expression of its frustration over the unwillingness of many to serve, and an attempt to explain the importance of juror service. The court's lecture was neither inappropriate nor significantly adverse to Defendant such that it deprived him of due process. *See Daye*, 712 F.2d at 1572. We decline to reverse on this basis.

JOHN H. (COUNT TWELVE)

¶48 Defendant raises two issues with respect to his conviction in this trial on a burglary charge, both of which arose during the State's opening statement. It is not necessary for resolution of these issues to recite the evidence that supports this conviction, except to note that Stevens testified that he, Defendant and two others burglarized the home, and he subsequently directed police to the residence of Defendant's sister, a co-conspirator, where police seized a boom box taken in the burglary of John H.'s home.

Motion for Mistrial on Vouching

¶49 Defendant argues first, the trial court erred when it denied his motion for mistrial based on his claim that the prosecutor improperly vouched for Stevens' veracity in her opening statement when she stated that "had [Stevens] not spoken, [Defendant] would have gotten away with it. It wasn't until [Stevens] spoke to the police on April 22 and they received the tip about the burglary in Sun City that they were able to follow up on it, and solve the crime, and get the corroborating evidence that you will have." He also argues that the State's reference to the terms of Stevens' plea agreement, and the consequences if he failed to testify truthfully, constituted improper vouching. The court denied the motion for mistrial, but offered to reinstruct the jury that lawyer's

arguments were not evidence, and did so as soon as the jury returned.

¶50 A declaration of mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (citation omitted). We review a trial court's denial of a motion for mistrial for abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). "The trial judge's discretion is broad, because [s]he is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Id.* (citations omitted).

¶51 There are "two forms of impermissible prosecutorial vouching: (1) where the prosecutor places the prestige of the government behind its witness; [and] (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. King*, 180 Ariz. 268, 276-77, 883 P.2d 1024, 1032-33 (1994) (citation omitted). In this case, the prosecutor neither placed the prestige of the government behind Stevens by personally assuring the jury of his veracity, nor suggested that evidence not presented to the jury supported his testimony, one of which is necessary to support a claim of impermissible prosecutorial vouching. *Cf. State v. Vincent,* 159

Ariz. 418, 423, 768 P.2d 150, 155 (1989) (holding that prosecutor engaged in impermissible vouching when he argued "the State wouldn't have put Mr. Calaway on the witness stand if [it] didn't believe every word out of his mouth"). The State's argument that police would never have solved the crime had Stevens not talked, did not constitute improper vouching, but rather placed his testimony in its context. Nor did the State improperly vouch for Stevens by reciting the requirement in his plea agreement that he testify truthfully. *Cf. State v. McCall*, 139 Ariz. 147, 159, 677 P.2d 920, 932 (1983) (holding that testimony to the same effect "does not amount to improper vouching but simply demonstrates that the witness had no motive to testify falsely").

¶52 Moreover, contrary to Defendant's claim on appeal the trial court not only gave the jury in preliminary instructions that lawyer's arguments were not evidence, but also issued an immediate curative instruction reminding the jurors that the lawyer's arguments were not evidence and again instructed the jury during final instructions to the same effect. Thus, to any extent that the State's remarks were improper, the court's instructions minimized any resulting prejudice. *See State v. Lamar*, 205 Ariz. 431, 441, ¶ 54, 72 P.3d 831, 841 (2003). The jury is presumed to have followed these instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). On this

record, we find that the State did not improperly vouch for Stevens, the court issued a curative instruction, and did not abuse its discretion in denying a mistrial on this basis.

Prosecutor's Reference to Other Burglaries

¶53 Defendant argues that the court "abused its discretion when it admitted evidence concerning victims unrelated to the [John H.] burglary in violation of Rule 403, 404(b), Arizona Rules of Evidence and Rule 13.5, Severance." In support of this argument, however, Defendant cites only to the prosecutor's opening statement, in which the prosecutor briefly referred to the discovery at the residence of Defendant's sister, a co-conspirator, of someone having "attempted to burn and destroy identifying items such as a cell phone and personal identification" in a wheelbarrow in the back yard, and at Defendant's residence, "an empty gun case."

¶54 Following the State's opening statement, Defendant moved for a mistrial in pertinent part on the ground that prosecutor had improperly referenced items taken from other burglaries, "in direct contravention of the order granting the severance of the various incidents in this count." The court ruled that "the wheelbarrow with the cell phone and IDs . . . since it has nothing to do with this case that I can tell" was not admissible at trial. It also ruled that the gun holster stolen from Howard M. was not admissible as evidence at this trial, because although relevant in that it ostensibly belonged to the gun used in this robbery, it was needlessly cumulative to the other gun cases, gun bags, bullets and "things of that

nature" that would be introduced as evidence. The court denied the motion for mistrial, however, "because of the fact that statements and arguments made by the attorneys in the case are not evidence." When the jury returned, moreover, the court instructed members that attorney's statements were not evidence, as she had instructed them in preliminary instructions, and again, in final instructions. The court was in the best position to determine if these brief references in the State's opening statement would actually affect the outcome of the trial, and we cannot say it abused its discretion in denying the motion for mistrial and instead providing a curative instruction. We decline to reverse on this basis.

CONCLUSION

¶55 For the foregoing reasons, we find no error and affirm Defendant's convictions and sentences.

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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
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MAURICE PORTLEY, Presiding Judge

/S/
_____
MARGARET H. DOWNIE, Judge