DIVISION ONE
FILED: 03/01/11
RUTH WILLINGHAM, ACTING CLERK
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**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>JOSEPH JAMES WOODARD,<br><br>Appellant. | ) | 1 CA-CR 09-0855<br><br>DEPARTMENT B<br><br>**MEMORANDUM DECISION**<br><br>(Not for Publication – Rule 111, Rules of the Arizona Supreme Court) |

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-160573-001 SE

The Honorable Connie Contes, Judge

**AFFIRMED**

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

The Law Office of Tyrone Mitchell — Phoenix
by Tyrone Mitchell
Attorneys for Appellant

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W E I S B E R G, Judge

**¶1** Joseph James Woodard appeals his conviction and sentence for first-degree felony murder. He argues that the

trial court erred in failing to suppress evidence obtained in violation of his right to counsel and due process rights and that prosecutorial misconduct in obtaining and using the evidence deprived him of a fair trial. For reasons that follow, we find no reversible error and affirm.

**BACKGROUND**

**¶2** The evidence at trial, viewed in the light most favorable to the jury's verdict,[1] revealed that Woodard shot and killed the victim, B., while breaking into B.'s home to commit a burglary. Woodard and two accomplices, Sergio A. and Juan A., recently had attended a party at B.'s home and noticed large amounts of marijuana. Sergio drove the getaway car, a red Cadillac, and later pled guilty to second-degree murder. He testified that B. was shot during the break in. A neighbor also noticed the red Cadillac and called police to report suspicious activity. B.'s roommate told police that he saw a red Cadillac drive by the house after the shooting.

**¶3** In addition, two of Woodard's friends testified that on the day of the murder Woodard had confessed to the shooting. Also, Woodard's girlfriend testified that Woodard had said that

[1] *State v. Moody*, 208 Ariz. 424, 435 n.1, 94 P.3d 1119, 1130 n.1 (2004).

he "and Juan messed up." Police later seized a pair of tennis shoes from Woodard's bedroom and blood found on the shoes was identified as that of B.

**¶4** J.F., who had met Woodard through J.F.'s younger brother, testified that after Woodard was arrested, he and Woodard fortuitously were housed in the same jail pod and that Woodard admitted the shooting and said that he had buried the gun in the desert. Using maps Woodard gave to J.F., police found the gun, confirmed that it had been stolen from a friend of Woodard's family, and that a bullet casing at the murder scene came from the gun. The bullet from B.'s body was consistent with having been fired from this gun.

**¶5** The jury convicted Woodard of first degree murder, a dangerous offense. Following imposition of a life sentence, Woodard timely appealed.

## DISCUSSION

### Denial of Motion to Suppress

**¶6** Woodard argues that the trial court erred in failing to suppress certain statements he made to J.F. and the murder weapon, all of which were obtained in violation of his Sixth Amendment right to counsel and his right to due process. He asserts that J.F. was a state agent and engaged in outrageous conduct that interfered with Woodard's relationship with his counsel when J.F. sent Woodard a phony letter purportedly from

J.F.'s attorney, which prompted Woodard to reveal the location of the murder weapon.

**¶7** J.F. testified at the suppression hearing that Woodard had approached him in the jail and said that he had shot the victim and buried the gun in the desert. Woodard drew a map of the gun's location and asked J.F. to pass it to a cousin, who was supposed to retrieve the gun and use it to shoot two witnesses to Woodard's confession. At J.F.'s next court date, he told authorities that he had information about a homicide.

**¶8** A Chandler police officer met with J.F. a few days later, obtained the map, but could not find the gun. The officer also told J.F. that because J.F. had already been sentenced, the officer could not be of much help with that case but gave J.F. his phone number. He also told J.F. not to ask Woodard any questions but only to listen to anything Woodard volunteered. J.F. testified that Woodard later asked if "Everything was all right?" and J.F. said that the gun could not be found, at which time Woodard drew a second, more detailed map. The officer testified that he asked J.F. to describe how Woodard came to draw the second map and confirmed that J.F. had not asked Woodard any questions. With the second map, police found the murder weapon.

**¶9** Nearly five months later, the Chandler officer and J.F. signed an informant agreement. J.F. was released from

prison in order to aid police in obtaining information about Woodard's accomplices. Soon after, J.F. gave the officer two letters from Woodard, to which J.F. responded by sending a form letter on letterhead purportedly from J.F.'s attorney. The letter merely stated that the attorney would be happy to assist Woodard. J.F. testified that he had told Woodard that the jail guards would not scrutinize "legal mail," and that he and Woodard could use this ruse to communicate. Along with the legal letter, J.F. enclosed a note telling Woodard that if the guards opened the letter in front of him, their ruse had worked. Woodard responded to J.F. on February 15, 2007, marked the envelope "LEGAL MAIL," and sent it to the address J.F. had provided as that of his attorney.

**¶10** On February 21, 2007, police arranged for J.F. to meet with Woodard in jail. J.F. told Woodard that he had gotten into the jail by pretending to be a paralegal for Woodard's lawyer. J.F. testified that he was to obtain information only about the plan to kill the witnesses and the whereabouts of the accomplice, Juan. The Chandler detective testified that J.F. also was to ask about the roles of Juan and Sergio in the murder. He supplied J.F. with a false lab report that said no fingerprints tied Juan to the murder in hopes that Juan could be found and arrested.

**¶11** J.F. reiterated to Woodard in this taped conversation that the phony legal letter was a means to prevent scrutiny of the mail and that he was only pretending to be a paralegal. Woodard several times mentioned that he had communicated with his own lawyer, and he also talked to J.F. about arranging to murder the witnesses to Woodard's confession. Soon after, however, Woodard called J.F. to tell him not to murder one of the witnesses, who was a suspect in the murder, because his death might compromise Woodard's defense. After Woodard was arrested for conspiracy to murder the witnesses, he told police that he and J.F. had communicated through letters designated as legal mail.[2]

**¶12** The court denied Woodard's motion to suppress. It noted the prior "casual relationship" between Woodard and J.F. before their first meeting in the jail and that, contrary to his attorney's advice, Woodard spoke to J.F. and supplied the first map that J.F. later gave to police. Thus, no Sixth Amendment violation had occurred before J.F. met with Chandler police, and none occurred after J.F. met with the officer and signed the confidential informant agreement. The court concluded that the

[2]Woodard's mother testified at the suppression hearing that he repeatedly had asked her to contact J.F.'s attorney but that she never did so. Woodard testified only that J.F. had asked him many questions but did not mention use of the phony legal letter.

police conduct was not so "coercive or outrageous . . . so as to constitute a violation of defendant's constitutional rights."

**¶13** We review claimed violations of the Sixth Amendment right to counsel *de novo*. *State v. Glassel,* 211 Ariz. 33, 50, ¶ 59, 116 P.3d 1193, 1210 (2005). In reviewing a ruling on a motion to suppress, we consider only the facts available at the suppression hearing. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996). We regard those "facts in the light most favorable to sustaining the trial court's ruling." *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (App. 1996). We will not overturn a ruling absent "clear and manifest error." *Id*.

**¶14** The government may not introduce at trial statements elicited by an informant from a defendant after the defendant has been indicted and his right to counsel has attached with respect to those charges. *See United States v. Henry*, 447 U.S. 264, 270-72 (1980)(government violated defendant's right to counsel by intentionally creating situation likely to induce him, after he had been charged and had counsel appointed, to make incriminating statements about that offense to informant); *Massiah v. United States*, 377 U.S. 201, 202-07 (1964) (government violated right to counsel by using incriminating statements made after indictment to cooperating codefendant and

heard by government agent via radio transmitter).[3] The "primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986). Thus, the right to counsel also "includes protection from improper intrusions" into or interference with the defendant's relationship with his attorney. *State v. Pecard*, 196 Ariz. 371, 377, ¶ 27, 998 P.2d 453, 459 (App. 1999).

**¶15** We find no error in the admission of Woodard's confession to J.F. or of the first map showing where he had buried the murder weapon. The State violates a defendant's right to counsel only when the informant acts as a "state agent" in deliberately eliciting incriminating remarks from a defendant represented by counsel. *State v. Smith*, 107 Ariz. 100, 103, 482 P.2d 863, 866 (1971). One does not become a "state agent" merely because he "may harbor expressed or unexpressed motives

[3]The government, however, may use evidence obtained by an informant regarding activity for which no charges have been filed at a later trial for that activity, even if the right to counsel may have attached on other charges. *See Illinois v. Perkins*, 496 U.S. 292, 299 (1990)(use of undercover agent to interrogate suspect on matter for which no charges had been brought did not violate Sixth Amendment right); *Maine v. Moulton,* 474 U.S. 159, 180 n. 16 (1985) ("Incriminating statements pertaining to other crimes as to which the Sixth Amendment has not attached, are, of course, admissible at a trial of those offenses."); *Moran v. Burbine*, 475 U.S. 412, 431 (1986) ("[T]he Sixth Amendment right to counsel does not attach until after the initiation of formal charges.").

of expectation of lenient treatment in exchange for such information." *Id*. "O]nly when the state actively enters into the picture to obtain the desired information in contravention of constitutionally protected rights that the sanction of inadmissibility becomes pertinent." *Id*.

**¶16** The evidence at the hearing showed that only after Woodard confessed his role in the murder to J.F. and gave him the first map did J.F. contact authorities to inform them of the confession. Thus, J.F. was not a government agent when Woodard confessed and made the map, and the court properly declined to suppress evidence of the confession and map.

**¶17** Similarly, we find no error in the court's refusal to suppress the gun, which was discovered with the second map given to J.F. after J.F. had met with Chandler police. To preclude such evidence, a court must find "that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *State v. Martinez*, 221 Ariz. 383, 387, ¶ 12, 212 P.3d 75, 79 (App. 2009) (quoting *Kuhlmann*, 477 U.S. at 459).[4] Even assuming that J.F. became an informant when the detective gave him his phone number rather than when J.F. signed the cooperation agreement,

[4]The fruit of the poisonous tree doctrine precludes use of the fruits of a violation of a defendant's Sixth Amendment right to counsel. *See United States v. Wade*, 388 U.S. 218, 239-42 (1967).

the trial court was in the best position to gauge from J.F.'s demeanor and intonation whether he had deliberately tried to elicit incriminating statements. In finding no violation of Woodard's rights, the court implicitly concluded that J.F.'s conduct was not improper.

**¶18** However, evidence from the tape-recorded meeting between J.F. and Woodard when J.F. pretended to be a paralegal for Woodard's counsel did infringe Woodard's Sixth Amendment right. At trial, the State introduced two statements from that meeting: that Woodard was worried about blood found on his shoes and that he was planning to blame Juan for the murder. J.F. elicited the remark about the blood in part by asking whether "anything had changed since last time we met." J.F. also elicited Woodard's plan to blame Juan by saying that the police had not charged Juan, that Sergio would not say where Juan was, and that Sergio had said that he thought Woodard was responsible for B.'s murder. The detective testified that he had instructed J.F. to ask about Sergio's and Juan's roles in the murder, but J.F.'s questions also were aimed at obtaining information on B.'s murder as well as the plot to murder the witnesses. From the entire conversation, we conclude that these statements elicited from Woodard violated his Sixth Amendment right. *Martinez*, 221 Ariz. at 387, ¶ 12, 212 P.3d at 79.

**¶19** We also conclude, however, that any error in introducing this evidence was harmless. To demonstrate that an objected-to error was harmless, the State must prove beyond a reasonable doubt that the error "did not contribute to or affect the verdict or sentence." *State v. Henderson,* 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005). J.F. testified that in his first conversation with Woodard, before J.F. met with police, Woodard had said he was worried about blood on his tennis shoes. Evidence that Woodard reiterated this concern in a later taped conversation was cumulative and harmless. *Id*. Evidence that Woodard planned to blame Juan for B.'s murder was also harmless in light of the extensive evidence that Woodard participated in the burglary, shot B., and that B.'s blood was on Woodard's shoes. Given this record, the admission of Woodard's statements was harmless error.

**¶20** The only evidence from the later tape-recorded telephone call between Woodard and J.F., in which Woodard told J.F. not to murder a witness, was volunteered by Woodard without prompting by J.F. and accordingly did not infringe Woodard's right to counsel. Woodard had initiated the call to J.F. and had said, "[D]on't do the other thing," i.e. murder the witnesses, because it might compromise Woodard's defense. J.F. then asked, "[W]hat do you mean?," and Woodard explained that he wanted this witness alive because he was the only other suspect

in B.'s murder. Because J.F. did not deliberately elicit incriminating statements from Woodard about the pending charges, admission of this statement did not violate Woodard's right to counsel. *See Martinez*, 221 Ariz. at 387, ¶ 12, 212 P.3d at 79.

**¶21** Likewise, the police participation in the "legal mail" ruse, including sending the phony representation letter to Woodard and arranging for Woodard and J.F. to have a purported legal meeting, did not interfere with Woodard's relationship with his counsel and was not so outrageous that it constituted a due process violation. Unlike cases Woodard cites, the police did not record defense attorney's calls, seize attorney-client mail,[5] or suggest that Woodard ignore the advice of counsel and work directly with them.[6] To the contrary, evidence at the suppression hearing showed that Woodard knew that the legal representation letter was phony and was a means to prevent the guards from scrutinizing his correspondence with J.F. There was no evidence that Woodard thought that J.F.'s attorney also was representing Woodard. Woodard's mother testified that although her son wanted her to hire J.F.'s attorney as co-counsel, she told him that she would not do so. Furthermore, Woodard

[5]*See State v. Pecard,* 196 Ariz. at 374-76, 998 P.2d at 456-58; *State v. Warner*, 150 Ariz. 123, 127-28, 722 P.2d 291, 295-96 (1986).

[6]*See United States v. Irwin*, 612 F.2d 1182 (9th Cir. 1980) and *United States v. Morrison*, 449 U.S. 361 (1981).

repeatedly referred to his own attorney's advice in recorded conversations with J.F., including the conversation in which J.F. had pretended to be a paralegal and in the telephone call Woodard made to call off the murder of one of the witnesses. In short, there is no support for Woodard's contention that the legal mail ruse or J.F.'s pretending to be a paralegal interfered with Woodard's relationship with his own counsel or was so outrageous as to shock the conscience, violating his due process rights.

**Prosecutorial Misconduct**

**¶22** Woodard next argues that the prosecutor's use of the evidence obtained in violation of the attorney-client privilege constituted prosecutorial misconduct requiring reversal of his conviction. Because Woodard does not specifically identify what evidence or conduct is the basis for his claim, we presume that he is relying on the evidence discussed above. Woodard did not raise this issue below, and thus we review solely for fundamental error. *See Henderson,* 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. He must show not only error of a fundamental nature but resulting prejudice. *Id*. at 568, ¶ 22, 115 P.3d at 607.

**¶23** "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the

prosecutor knows to be improper and prejudicial and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984)). To require reversal, the misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee,* 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997)(citation omitted).

**¶24** As we have noted, the evidentiary hearing established that Woodard knew that J.F. was not acting on behalf of any lawyer when he sent letters labeled "legal mail." The evidence also established that Woodard understood that no other attorney was representing him; that his mother would not hire co-counsel; and that J.F. was not a paralegal but pretended to be one so that he and Woodard could meet privately. The court allowed the State to introduce evidence obtained as a result of the legal mail ruse and found that the conduct of the police and J.F. was not outrageous. Thus, the prosecutor did not deliberately violate any "attorney-client privilege" or commit misconduct.

## CONCLUSION

**¶25** For the reasons stated, we affirm Woodard's conviction and sentence.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
DONN KESSLER, Presiding Judge

/s/_____
DIANE M. JOHNSEN, Judge