DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA ex rel. ANDREW THOMAS, Maricopa County Attorney, Petitioner, v. THE HONORABLE ROLAND J. STEINLE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, HENRY WILLIAM HALL, Real Party in Interest.	No. 1 CA-SA 10-0001 1 CA-SA 10-0007 1 CA-CR 10-0017 (Consolidated) DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
HENRY WILLIAM HALL, Petitioner, v. THE HONORABLE ROLAND J. STEINLE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, STATE OF ARIZONA ex rel. ANDREW THOMAS, Maricopa County Attorney, Real Party in Interest.	

STATE OF ARIZONA,	)
	)
Appellant,	)
	)
v.	)
	)
HENRY WILLIAM HALL,	)
	)
Appellee.	)

Appeal from the Superior Court in Maricopa County

Cause No. CR 1997-011695

The Honorable Roland J. Steinle, Judge

JURISDICTION ACCEPTED; RELIEF DENIED; APPEAL DISMISSED AS MOOT

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S W A N N, Judge

¶1 In 1999, Henry William Hall was convicted of felony murder, armed robbery, kidnapping, and theft. He was sentenced to death for the murder charge. On direct appeal, the Arizona Supreme Court ruled that juror misconduct warranted reversal of all but the theft conviction, and remanded the case for a new trial. *State v. Hall*, 204 Ariz. 442, 65 P.3d 90 (2003). The background facts are set forth in that opinion, and we do not repeat them here. Pending retrial, Hall sought dismissal on grounds of alleged misconduct by the State. The court declined to dismiss the case, but entered orders precluding the State's use of several significant categories of evidence. The State and Hall each seek special action relief from that ruling.

¶2 For the reasons set forth below, we conclude that the court had the authority and discretion to impose the orders precluding introduction of evidence, and did not err by declining to dismiss the case. Accordingly, we deny both parties' requests for relief.

Procedural History

I. Motions to Dismiss

A. Double Jeopardy Triggered by Prosecutorial Misconduct in the 1999 Trial

¶3 From April to August 2009, Hall filed multiple motions to dismiss the case. Hall asserted that taken together, the motions showed that the cumulative effect of prosecutorial

misconduct in the 1999 trial had so permeated the proceedings that retrial was barred by double jeopardy. Hall identified three categories of prosecutorial misconduct.

¶4 First, Hall contended that the prosecutor had intentionally elicited or knowingly failed to correct crucial false testimony from four witnesses at the 1999 trial, and had referenced some of the false testimony in his closing argument.

¶5 Second, Hall contended that the State had failed to disclose several items of material evidence before the 1999 trial, in violation of his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Bagley*, 473 U.S. 667 (1985). Not disclosed until 2009 were motel check-in documents associated with an April 26, 1997 transaction on the decedent's credit card. Never disclosed was a historical disciplinary suspension report for the detective who in 1997 had visited the motel and had been responsible for gathering most of the transaction documents associated with the credit card. The disciplinary report pertained to the detective's failure in 1988 to properly impound and log all seized items in different cases, and his intentional falsification of at least one impound record. Finally, not disclosed until September 2007 were the results of a drug screening test performed on urine recovered from a water jug found in the decedent's car trunk.

¶6 Third, Hall contended that before the 1999 trial, the State had in bad faith failed to preserve potentially useful evidence, entitling him to relief pursuant to *Arizona v. Youngblood*, 488 U.S. 51 (1988). Hall alleged that in 1997, police crime lab processing procedures destroyed the signature strip on the decedent's credit card before the card was photographed.

B. Violations of *Arizona v. Youngblood* After the 1999 Trial

¶7 Hall also moved for dismissal on the separate ground that the State had committed two violations of *Arizona v. Youngblood* after the 1999 trial. Hall contended that the State was complicit in the disappearance of a manufacturer's label that had been affixed to the urine-containing water jug and that the State had released the decedent's remains, discovered in 2001, while Hall's direct appeal was still pending and well before he was ever notified that the remains had been recovered.

II. Superior Court's Ruling

¶8 The court held a four-day evidentiary hearing on Hall's motions. Hall called three witnesses to testify and the State called the 1999 trial prosecutor. The court ruled from the bench, and over the State's objection entered a written ruling along the lines proposed by the defense. The ruling was organized into four sections.

¶9 In Section I, titled "Alleged Prosecutorial Misconduct," the court addressed the 1999 trial testimony of a jailhouse informant, Cervantes, who had died since the trial. The court made the following findings:

> The testimony presented in previous proceedings in this case by State's witness Louis Cervantes was false and misleading. In order to grant dismissal, the Court would also have to find that [the prosecutor] knowingly and intentionally failed to correct the false or misleading testimony.
>
> The Court finds that [the prosecutor] did not offer false or misleading testimony. Although [the prosecutor] allowed Mr. Cervantes to testify as to a number of false and misleading facts, the Court finds that there is a significant difference between what happens during the midst of a trial and pretrial preparation and what can be determined after the fact while lawyers have years to go over the entire record of proceeding, including but not limited to police reports.
>
> Having viewed [the prosecutor's] testimony during the evidentiary hearing, and considered his explanations, the Court finds that he did not intentionally or knowingly offered [sic] the false or misleading testimony.

Accordingly, the court denied the motion to dismiss based on alleged prosecutorial misconduct in connection with the 1999 trial testimony. As an "intermediate sanction," the court barred introduction of Cervantes' 1999 trial testimony because it was "demonstrably false and misleading" and "patently incredible," and because preclusion was "particularly warranted under the circumstances in order to protect [Hall's] confrontation right granted by the Arizona and Federal Constitutions."

¶10 Section II, titled "Credit Card and Credit Card Transactions," pertained to the motel check-in documents, the detective's disciplinary report, and the destroyed signature strip on the decedent's credit card. The court again declined to dismiss the case and instead imposed as an "intermediate sanction" preclusion of "any and all evidence of [the decedent's] credit card and all credit card transactions, completed or attempted, between April 25, 1997, and May 5, 1997," including a convenience store videotape of someone attempting to use the card on May 5.

¶11 Section III, titled "Walgreen's [sic] Water Jug and its Contents," pertained to the jug, its missing label, and the urine test results. Again, the court declined to dismiss the case and imposed as an "intermediate sanction" preclusion of "the fact that the one gallon plastic Walgreen's [sic] water jug was found by police in the trunk of [the decedent's] vehicle" and "the plastic jug itself as well as any reference to its contents."

¶12 Section IV was titled "The Skeletal Remains." The court denied Hall's motion to dismiss the case based on the State's release of the decedent's remains but as an "intermediate sanction" announced that it would issue an instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), informing the jury of his late notification of the remains' recovery.

¶13 The ruling concluded: "In rending [sic] the aforementioned Orders, The Court has considered the cumulative effect of all of the claimed errors, and is of the opinion that the sanctions imposed are sufficient."

Jurisdiction

¶14 The State and Hall separately petitioned this court for special action relief.[1] The State challenges the court's orders precluding evidence and Hall challenges the court's failure to dismiss the case on double jeopardy grounds. Because both petitions arise from the same facts and challenge the same ruling, we consolidated the actions. We also consolidated an appeal filed by the State.

¶15 The appeal seeks the same relief as the special action and represents an understandable effort by the State to preserve its right to direct review in the event we declined special action review. The State candidly acknowledges uncertainty about whether an appeal of right is available pursuant to A.R.S. § 13-4032(6) (2010),[2] noting an apparent conflict between Division One

[1] Hall styled his petition a "Cross Petition." There is no provision in the Arizona Rules of Procedure for Special Actions allowing for a cross petition. In our discretion, we treat Hall's petition as a separate special action.

[2] We cite to the current version of the statute when no revisions material to this decision have since occurred.

and Division Two of this court.[3] But even if such a right of appeal existed, it would extend to the State only.

¶16 Special action jurisdiction is appropriate with regard to Hall's special action. *See Nalbandian v. Superior Court (Corbin)*, 163 Ariz. 126, 130, 786 P.2d 977, 981 (App. 1989) ("We hold that a petition for special action is the appropriate vehicle for a defendant to obtain judicial appellate review of an interlocutory double jeopardy claim."). It would be both wasteful and unfair to preclude the State from securing review of the same order in the same proceeding, and we conclude that special action jurisdiction is warranted over the State's petition. Because we accept special action jurisdiction, we need not address the issue of appellate jurisdiction under section 13-4032(6), and we dismiss the State's appeal as moot.

Discussion

I. The State's Special Action

¶17 The State argues that the superior court exceeded its authority and abused its discretion by granting the "intermediate sanctions" in Sections I, II, and III of the ruling because it found no misconduct to sanction.[4] But a finding of prosecutorial

[3] The Division One case is *State v. Rodriguez*, 160 Ariz. 381, 773 P.2d 486 (App. 1989). The Division Two case is *State v. Bejarano*, 219 Ariz. 518, 200 P.3d 1015 (App. 2008).

[4] The State does not challenge the sanction imposed in Section IV of the ruling.

misconduct was not a necessary predicate for the challenged rulings, and we therefore disagree that the court's preclusion of evidence constituted an abuse of discretion.

¶18 Regarding Section I of the ruling, the preclusion of Cervantes' previous testimony, which described a purported jailhouse confession by Hall, the court had the discretion to determine that the testimony was false and misleading.[5] Further, the court correctly recognized that an effective exercise of Hall's right to confront Cervantes is no longer possible. The State contends that Hall could use extrinsic evidence to demonstrate inaccuracies in Cervantes' testimony. But the essence of the right of confrontation is not the ability to use extrinsic evidence, but to conduct cross-examination -- and this Hall can no longer do because Cervantes is deceased. Based upon the information now available to the parties, the cross-examination to which Cervantes would be subjected would differ markedly from the cross-examination conducted in 1999. To permit the State to introduce highly incredible testimony concerning a purported confession without an effective opportunity to cross-examine would itself constitute fundamental error. On that ground alone, the court acted well within its discretion when it

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[5] Notably, the informant's description of the location and condition of the decedent's body is inconsistent with the location and condition of the remains recovered in 2001.

precluded the testimony without any finding of misconduct by the State. *See* Ariz. R. Evid. 403.

¶19 The sanctions imposed in Sections II and III of the ruling precluded the use of evidence on the grounds that information was undisclosed (the detective's disciplinary report), untimely disclosed (the motel check-in documents and the urine test results), and lost or destroyed (the credit card signature strip that was destroyed before the 1999 trial and the water jug label that was lost after the 1999 trial).

¶20 Pursuant to Ariz. R. Crim P. 15.7(a), when a party fails to properly make a disclosure, the trial court may impose "any sanction it finds appropriate," including "[p]recluding . . . [the] use of evidence." A Rule 15.7 sanction may be imposed for a failure to disclose that is attributable to any State actor involved in the investigation and prosecution. *See* Ariz. R. Crim. P. 15.1(f); *State v. Meza*, 203 Ariz. 50, 55, ¶ 21, 50 P.3d 407, 412 (App. 2002).

¶21 The court has considerable discretion in choosing the appropriate Rule 15.7 sanction, although a sanction that has more than a minimal impact on the merits of the case – such as preclusion of evidence – will rarely be appropriate. *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996). But "[a]bsent a showing of abuse by the trial court, we will not disturb the trial court's choice of sanction or its decision not

to impose a sanction." *Id*. (citation omitted). Under *Towery*, the court "should consider (1) the importance of the evidence to the prosecutor's case, (2) surprise or prejudice to the defendant, (3) prosecutorial bad faith, and (4) other relevant circumstances" before selecting a preclusive sanction. 186 Ariz. at 186, 920 P.2d at 308 (citation omitted); *accord* Ariz. R. Crim. P. 15.7(a). Though the court must weigh these factors, it is not required to state on the record its reasons for its choice of a particular sanction.[6] *State v. Williams*, 113 Ariz. 442, 444, 556 P.2d 317, 319 (1976).

¶22 Here, the court's ruling was based upon its consideration of evidence after an extensive hearing – it was entered neither hastily nor on a cursory understanding of the facts. We therefore conclude that the trial court had the authority and discretion under Rule 15.7(a) to impose the significant preclusive sanctions it chose without a specific

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[6] Of course, trial courts are strongly encouraged to state their reasoning and findings on the record. *See State v. Williams*, 113 Ariz. 442, 444, 556 P.2d 317, 319 (noting that "it would probably be better practice" for the trial court to state its reasons for imposing a disclosure sanction); *see also State v. Fisher*, 141 Ariz. 227, 236 n.1, 686 P.2d 750, 759 n.1 (1984) ("In failing to indicate the grounds on which it denied defendant's motion to suppress, the trial court has, intentionally or not, significantly added to this Court's appellate burden. We strongly urge trial courts to include in the record the reasons for their decisions so that appellate courts may review those decisions in a more directed and efficacious manner.")

finding of prosecutorial misconduct, and we deny relief in the State's special action.

II. Hall's Special Action

¶23 In his petition, Hall contends that the court erred by failing to find prosecutorial misconduct in connection with Cervantes' 1999 trial testimony. Hall also contends that the court erred by failing to dismiss the case on double jeopardy grounds because the court's severe "intermediate sanctions" implied that it found an atmosphere of prosecutorial misconduct in the 1999 trial. We reject Hall's arguments. We preface our analysis with a brief overview of the law of double jeopardy and prosecutorial misconduct.

A. Double Jeopardy and Prosecutorial Misconduct

¶24 The double jeopardy clause of the Fifth Amendment and Article 2, Section 10 of the Arizona Constitution generally protect criminal defendants from multiple prosecutions for the same offense. *State v. Minnitt*, 203 Ariz. 431, 437-38, ¶¶ 27-28, 55 P.3d 774, 780-81 (2002) (explaining that double jeopardy does not bar retrial when mistrial was granted upon the defendant's request or with his consent, unless mistrial was the only effective remedy for prosecutorial misconduct). But "even in the absence of a declared mistrial, double jeopardy bars retrial in situations where the trial became patently unfair and the conviction was obviously obtained by intentional prosecutorial

misconduct." *Id.* at 438, ¶ 32, 55 P.3d at 781 (citing *State v. Jorgenson*, 198 Ariz. 390, 10 P.3d 1177 (2000)).

¶25 "Prosecutorial misconduct" means improper and prejudicial conduct that 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 or reversal." *Pool v. Superior Court (State)*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To determine whether a prosecutor's actions were knowing and intentional, the court must consider objective factors, including "the situation in which the prosecutor found himself, the evidence of actual knowledge and intent and any other factors which may give rise to an appropriate inference or conclusion." *Id.* at 108 n.9, 677 P.2d at 271 n.9. The court may also consider the prosecutor's own explanation, "to the extent that such explanation can be given credence in light of the minimum requirements expected of all lawyers." *Id.*

¶26 Prosecutorial misconduct makes a trial patently unfair when it "so infect[s] 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 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). The

misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (quoting *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 241, ¶ 25, 25 P.3d 717, 729 (2001)). To determine whether that standard was satisfied, the court must consider the cumulative effect of all acts of misconduct. *Id.*

¶27 Acts of prosecutorial misconduct commonly take the form of the prosecutor intentionally eliciting false testimony from trial witnesses. *See, e.g.*, *Minnitt*, 203 Ariz. at 435, ¶ 15, 55 P.3d at 778. A due process violation likewise occurs when the prosecutor, though not soliciting false testimony, fails to correct it when it occurs and the prosecutor knowingly uses it to obtain a tainted conviction. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). This rule applies whenever the false testimony is in any way relevant to the case, even if it pertains only to the witness's credibility. *Id.* at 269-70.

¶28 But prosecutorial misconduct is neither limited to false testimony nor limited to actions taken by the prosecutor himself. Misconduct by other State actors involved in an investigation and prosecution may fairly be imputed to the prosecutor. *Cf.* Ariz. R. Crim. P. 15.1(f); *Meza*, 203 Ariz. at 55, ¶ 21, 50 P.3d at 412. Intentional *Brady* or *Bagley* violations may constitute prosecutorial misconduct. *See Jorgenson*, 198

Ariz. at 392-93, ¶ 11, 10 P.3d at 1179-80 (citing to *Commonwealth v. Smith*, 532 Pa. 177, 615 A.2d 321 (1992), a case involving *Brady*-based prosecutorial misconduct). And logically, *Youngblood* violations also may constitute prosecutorial misconduct because such violations require bad faith State action. *See Youngblood*, 488 U.S. at 38.

B. Cervantes' Testimony

¶29 The court specifically found that there was no prosecutorial misconduct in connection with Cervantes' testimony.[7] Hall contends that the court's findings were incomplete because no finding was made about whether the prosecutor allowed unsolicited false testimony to go uncorrected. We disagree.

¶30 The court found that the prosecutor "allowed Mr. Cervantes to testify as to a number of false and misleading facts," but expressly found that the prosecutor "did not offer false or misleading testimony." The court prefaced its findings by acknowledging that to grant dismissal, it would have to find that the prosecutor "knowingly and intentionally failed to correct the false and misleading testimony." The court did not

[7] Hall contended that other witnesses' testimony was part of a scheme to mask the crucial falsities in Cervantes' testimony. Though the court's finding expressly referred only to the elicitation of testimony from Cervantes, we infer that the finding implicitly extended to the testimony from the other relevant witnesses.

grant dismissal, and therefore implicitly found that the prosecutor neither knowingly and intentionally solicited false testimony nor knowingly and intentionally allowed unsolicited false testimony to go uncorrected.

¶31 The superior court had the opportunity to observe the prosecutor's demeanor as he testified at the evidentiary hearing, and was in the best position to assess the credibility of his explanations. *See State v. Estrada*, 209 Ariz. 287, 288, ¶ 2, 100 P.3d 452, 453 (App. 2004) (trial court, not appellate court, determines credibility of suppression-hearing witnesses). Hall's objection to the informant's testimony was primarily based on Cervantes' incorrect statement that until he spoke to a detective, law enforcement did not suspect that the case was a homicide.[8] The prosecutor explained at the evidentiary hearing that he did not solicit false testimony from Cervantes, and did not believe that he had to correct Cervantes' statements about his role in the investigation because they were statements of

[8] At trial, when the prosecutor asked "Did [the detective] appear to care about what you were talking about?", Cervantes responded "Yeah. He wasn't aware that there was a homicide. The only knowledge he had was that this person was missing. He didn't know he was dead. I verified that for him."

Later, when the prosecutor asked "[D]id you ever read anything in the newspaper concerning the information that you provided to Detective Daily on July 29th or 31st?", Cervantes responded "None of this information was available. Detective Daily didn't even know a homicide had occurred until I talked to him."

personal belief. And though the prosecutor referenced the testimony in closing argument, he did so only to demonstrate that Cervantes had not learned of the crime from media sources -- not to prove that the police had actually learned of the crime from Cervantes.[9]

¶32 Though Cervantes' testimony was deeply tainted with statements that the trial court found to be false, Hall does not contend that the prosecutor knew of these more substantial flaws. The prosecutor's testimony provided a sufficient basis for the court's findings that the prosecutor did not knowingly or intentionally engage in misconduct. We therefore do not disturb the findings. *See Estrada*, 209 at 288, ¶ 2, 100 P.3d at 453 (appellate court defers to trial court's post-suppression-hearing factual findings when the findings are supported by the record and not clearly erroneous).

C. Cumulative Effect of Misconduct

¶33 Hall contends that despite the court's express finding of no prosecutorial misconduct in connection with Cervantes' testimony, the severe sanctions that the court imposed in

[9] The prosecutor said: "There's a question about media, whether [Cervantes] read this thing in the newspaper or had any media coverage, and he said no, there was no media about this. He said Detective Daily didn't even know it was a homicide until he talked to him. Remember him telling us that on the witness stand? He said he saw no newspaper coverage, no TV coverage on this."

connection with the testimony and the other evidence imply that the court found an atmosphere of prosecutorial misconduct in the 1999 trial.

¶34 To be sure, the sanctions imposed in Sections I, II, and III of the ruling were severe.[10] The court not only precluded those items of evidence with disclosure problems, but also precluded related items of evidence that suffered from no independent disclosure problems. Moreover, the evidence that was precluded had been critical to the theories on which the State secured the convictions in the 1999 trial, *see Hall*, 204 Ariz. 442, 65 P.3d 90, and some of the violations were even more prejudicial before the 1999 trial than they are now because they involved complete nondisclosure that had not then been mitigated by untimely disclosure.[11]

¶35 But the court expressly found no prosecutorial misconduct in connection with Cervantes' 1999 trial testimony, which was the core of Hall's prosecutorial misconduct argument. And the court did not err by finding that even taken together, the conduct addressed in Sections II and III of the ruling did not rise to the level of misconduct requiring dismissal.

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[10] Like the State, Hall does not appear to challenge the sanction imposed in Section IV of the ruling.

[11] Specifically, the motel check-in documents and the urine test results were never disclosed before the 1999 trial but were disclosed before the retrial.

Conclusion

¶36 For the foregoing reasons, we accept jurisdiction of both special actions and deny relief in both. Because the State's appeal is wholly duplicative of its special action, we dismiss it as moot.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge