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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. WALTER THOMAS WARD, Appellant.	2 CA-CR 2007-0376 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20055080

Honorable Richard S. Fields, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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H O W A R D, Presiding Judge.

¶1 After a jury trial, Walter Thomas Ward was convicted of multiple felony offenses including aggravated assault, kidnapping, armed robbery, and sexual assault of a minor under fifteen. On appeal, Ward claims the trial court erred in denying a motion to dismiss based on his claim the state failed to preserve evidence and a motion to preclude evidence as a sanction for the state's alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He also claims the trial court erred in granting the state's motion in limine to preclude him from eliciting certain testimony from a state's witness during cross-examination. Finally, Ward claims the court erred in denying his motion for mistrial based on a claim of prosecutorial misconduct. Because the trial court did not err or abuse its discretion, we affirm.

Facts

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). E.G. and her fourteen-year-old daughter, E.V., had stopped at a convenience store early in the morning to put gas in their car and buy something to eat. Ward and his codefendant, Stephen Calaway, approached the car, pointed guns at the two victims, and demanded money. After E.G. gave Ward some cash, her credit cards, and the personal identification number for one of the cards, Ward took E.V. into the store to use an automated teller machine (ATM) to withdraw cash from E.G.'s account. When they left the store, Ward took E.V. behind a shed and sexually

assaulted her. He then took her to a neighboring parking lot where Calaway had driven E.G.'s vehicle with E.G. inside. Ward and Calaway then left the area in their own vehicle.

¶3 Public circulation of a still photograph from a recording made by the convenience store's digital surveillance system led to Ward's arrest. At trial, a jury found Ward guilty of ten felony offenses in connection with the incident. The trial court sentenced him to a combination of consecutive and concurrent sentences totaling ninety-six years.

Motion to Dismiss: Failure to Preserve Evidence

¶4 Ward first claims the trial court erred in denying his motion to dismiss based on his claim that the state had failed to preserve exculpatory evidence. He argues the police officers failed to obtain a usable copy of the digital surveillance recording that had captured images of Ward and E.V. when they went inside the store to use the ATM. We review a court's denial of a motion to dismiss for an abuse of discretion. *State v. Pecard*, 196 Ariz. 371, ¶ 24, 998 P.2d 453, 458 (App. 1999).

¶5 The convenience store company provided police officers with a copy of the recording on a disc, but part of that disc was corrupted and some of the data could not be retrieved. Before another copy was made, the original recording was erased as part of the store's normal surveillance-system protocol. Ward moved to dismiss the prosecution on this basis. The trial court noted the existence of other available evidence concerning the events, found that the reason for the loss of some of the video-recording on the disc was unclear and that no bad faith had been shown, and denied the motion.

¶6 To prevail on a claim that the trial court erred in denying a motion to dismiss based on the state's failure to preserve potentially exculpatory evidence, the defendant must show that this failure was either a result of bad faith or that it caused substantial prejudice to the defendant's case. *State v. Gerhardt*, 161 Ariz. 410, 412, 778 P.2d 1306, 1308 (App. 1989). The presence of bad faith turns on the police officer's "'knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.'" *State v. Dunlap*, 187 Ariz. 441, 452, 930 P.2d 518, 529 (App. 1996), *quoting Arizona v. Youngblood*, 488 U.S. 51, 56 (1988). "The mere possibility that destroyed evidence could have exculpated a defendant is insufficient to establish a due process violation." *State v. O'Dell*, 202 Ariz. 453, ¶ 13, 46 P.3d 1074, 1079 (App. 2002). Absent a showing of bad faith or "prejudice-in-fact," the failure to preserve material evidence that might have assisted the defense is adequately cured with an instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). *See State v. Youngblood*, 173 Ariz. 502, 506-07, 844 P.2d 1152, 1156-57 (1993) (trial courts shall "instruct juries that if they find the state has lost, destroyed or failed to preserve material evidence that *might* aid the defendant and they find the explanation for the loss inadequate, they may draw an inference that that evidence would have been unfavorable to the state").

¶7 On the question of bad faith, Ward argues the officers did not follow customary protocols for collecting evidence. At an evidentiary hearing, the detective who had been assigned to obtain a copy of the recording admitted he had left the unreadable disc with an employee of the convenience store and had not followed customary procedures. The

detective also testified that he did not know what was on the disc and that "there could have been nothing on the CD." Ward argues this testimony shows bad faith because it reveals the detective had an "interested motive" in failing to preserve exculpatory evidence; that is, his only motive was to preserve evidence beneficial to the state.

¶8 But, as we have observed above, the question of bad faith turns on whether the detective knew of the evidence's exculpatory value at the time he failed to preserve it or allowed it to be destroyed. *See Dunlap*, 187 Ariz. at 452, 930 P.2d at 529. His testimony that he did not know what was on the disc and believed there might be nothing on it supports the conclusion that he had no knowledge the disc contained potentially exculpatory evidence. In light of this testimony and in the absence of any other evidence that the detective was aware the disc contained exculpatory evidence, the trial court could properly conclude Ward failed to show the detective acted in bad faith.

¶9 As to the question of prejudice, Ward contends the corrupted portion of the recording had exculpatory value because it would have shown he had not been physically aggressive towards E.V. in the store, that he had not displayed a gun, and that E.V. had appeared to be accompanying Ward willingly. Ward argues the recording would have therefore corroborated his own testimony that he went into the store with E.V. because Calaway told him to and that he had not known he was participating in a robbery.

¶10 First, as the trial court noted, other evidence existed concerning the events. Given the evidence that Ward had threatened E.V. outside with a gun, that she believed he

was holding the gun beneath his shirt while inside the store, and that she was aware Ward's codefendant was holding her mother hostage at gunpoint somewhere outside the store, the trial court could properly conclude the evidence of Ward's and E.V.'s outwardly calm behavior inside the store would not have exculpated Ward. *Cf. Gerhardt*, 161 Ariz. at 413, 778 P.2d at 1309 (no prejudice where contents of missing video would not completely exculpate defendant and limited potential exculpatory value was based on speculation).

¶11 Second, the store's assistant manager, who had watched the recording on the day of the incident, testified at trial and recounted what she had seen, including the fact that she did not see Ward carrying a gun on the video. And a clerk who had been in the store when Ward and E.V. entered testified that he had not seen a gun, that E.V. had not appeared to be upset, and that he had thought Ward and E.V. were father and daughter. Thus, the evidence Ward claims was exculpatory—namely, that he was not violent inside the store and that E.V. did not appear to be in distress—was actually presented at trial. Ward has therefore not shown prejudice as a result of the state's failure to obtain a usable copy of the recording. *See id*.

¶12 Because Ward failed to show either bad faith or prejudice, the trial court did not abuse its discretion in denying his motion to dismiss. Moreover, to the extent the jury could have found the state's explanation for its failure to obtain a usable copy of the recording was less than satisfactory, and to the extent the recording might yet have had some

useful value to the defense, the trial court properly gave the jury a *Willits* instruction. *See Youngblood*, 173 Ariz. at 506-07, 844 P.2d at 1156-57.

Motion to Preclude Evidence as Sanction for *Brady* Violation

¶13 Ward also argues the trial court erred when it permitted the state to present DNA evidence after denying his motion to dismiss or, in the alternative, to preclude evidence,[1] based on his claim that the state failed to disclose past incidents of contamination in the Tucson Police Department Crime Laboratory where the DNA had been tested. We review a court's decisions regarding the admissibility of evidence for an abuse of discretion. *State v. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d 127, 131 (App. 2002). We defer to the court's factual findings, but we review legal conclusions de novo. *State v. Storholm*, 210 Ariz. 199, ¶ 7, 109 P.3d 94, 95 (App. 2005).

¶14 Before trial, the state disclosed its intent to present DNA evidence that had been collected from E.V.'s body. Ward moved to dismiss after he learned from independent sources of previous incidents in which DNA samples had been contaminated at the crime lab. He claims the criminalist who tested the DNA evidence in his case, Nora Rankin, failed to disclose this information during a defense interview. Ward argues that, in withholding the information about past contamination incidents, the state violated its disclosure obligations under Rule 15, Ariz. R. Crim. P., and under *Brady v. Maryland*, 373 U.S. 83 (1963).

[1]Ward filed a written motion to dismiss but, at a hearing on this issue, asked the court for sanctions in the form of precluding the DNA evidence.

Although he does not challenge the trial court's denial of his motion to dismiss, he does contend the court erred in refusing to preclude the DNA evidence as a sanction.

¶15 The rule established in *Brady* is that "the state is required to disclose all plainly exculpatory evidence within its possession and violates due process if it fails to do so, irrespective of its good or bad faith." *State v. O'Dell*, 202 Ariz. 453, ¶ 10, 46 P.3d 1074, 1078 (App. 2002); *see also State v. Youngblood*, 173 Ariz. at 505-06, 844 P.2d at 1555-56. Similarly, Rule 15.1(b)(8) requires the state to disclose all "existing material or information which tends to mitigate or negate the defendant's guilt." The disclosure of evidence favorable to the defendant is required whether or not the defendant requests it.[2] *State v. Jones*, 120 Ariz. 556, 560, 587 P.2d 742, 746 (1978).

¶16 At a hearing, Rankin testified about six incidents over a span of seven years in which a DNA sample had been contaminated in cases in which she had been the analyst. She testified there had been no contamination of the DNA evidence in Ward's case. The Tucson Police Department DNA supervisor, Robert Blackett, testified that, for all of the lab's DNA analysts, a cumulative total of twenty-five incidents of contamination had occurred over the previous seven years. Blackett testified he had reviewed Rankin's analysis of the DNA in Ward's case and had confirmed there was no indication of contamination.

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[2]We note with disapproval that, in support of this proposition in his opening brief, Ward cites an appellate decision that has been vacated by our supreme court.

¶17 After the hearing, the trial court found that Ward's concerns about "[l]ab procedures, protocol and discipline were certainly overstated [and] . . . the evidence adduced disclosed an accredited lab with evolving protocols commensurate with the evolution of DNA analysis." The court also found Rankin's remarks during the defense interview had not been "purposefully incomplete." The court further determined that no DNA in Ward's case had been contaminated. The court concluded no *Brady* violation had occurred and no sanctions were warranted. The trial court's factual findings are supported by the record, and its legal conclusions are correct. *See Storholm*, 210 Ariz. 199, ¶ 7, 109 P.3d at 95. Therefore, the court did not abuse its discretion in denying the motion to dismiss and admitting the DNA evidence.

Motion in Limine: Preclusion of Testimony

¶18 Ward further claims the trial court erred in granting the state's motion in limine to preclude him from cross-examining Rankin about the incidents of contamination in which she was not the analyst involved.[3] Ward contends he should have been allowed to question her about all twenty-five incidents, arguing this evidence was "relevant to the determination of whether or not the jury should trust the results of the DNA analysis."[4]

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[3]Ward mentions that this claim was one of his arguments supporting a motion for new trial. But on appeal, he does not challenge the trial court's denial of his new trial motion. Rather, he challenges only the court's earlier decision precluding him from eliciting evidence of the past contamination. We therefore address only that argument.

[4]The state argues Ward failed to state the grounds of his objection to the motion in limine and thus forfeited his claim of error below absent fundamental error. But a review of the transcript of the hearing on this motion evinces that both parties and the trial court were

¶19 We review a trial court's decision regarding the admissibility of evidence and whether to grant a motion in limine for an abuse of discretion. *Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d at 131; *State v. Kiper*, 181 Ariz. 62, 64-65, 887 P.2d 592, 594-95 (App. 1994). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401; *see also State v. Fulminante*, 193 Ariz. 485, ¶ 57, 975 P.2d 75, 92 (1999). Relevant evidence is generally admissible, *see* Ariz. R. Evid. 402, but may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ariz. R. Evid. 403; *see also State v. Gibson*, 202 Ariz. 321, ¶¶ 13, 17, 44 P.3d 1001, 1003, 1004 (2002).

¶20 The trial court permitted Ward to cross-examine Rankin on the six incidents of contamination in which she was involved. Because she was not the analyst in the other incidents, the court could properly conclude evidence regarding those unrelated incidents,

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discussing whether this evidence was relevant. We therefore address Ward's argument that the evidence was in fact relevant. However, in addition to his relevancy argument, Ward suggests on appeal that preclusion of the testimony violated his rights to due process and to confrontation. While it is apparent that some discussion of this motion took place off the record, Ward did not make these arguments below in the portion of the discussion that was recorded and has thus forfeited them absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982) (appellant's duty to ensure "record before us contains the material to which [he] take[s] exception"). Because he does not argue fundamental error occurred, he has waived the arguments on appeal, and we do not consider them further. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

involving other analysts, was not relevant to whether the results of the DNA analysis in this case were reliable. *See* Ariz. R. Evid. 401. Even if such evidence did have some slight probative value, it was well within the trial court's discretion to conclude that minimal value was outweighed by the risk of confusion of issues. *See* Ariz. R. Evid. 403; *Gibson*, 202 Ariz. 321, ¶¶ 13, 17, 44 P.3d at 1003, 1004.

¶21 Ward also points out that Rankin testified at trial that the lab was accredited, and he argues that precluding him from informing the jury of the "problems experienced at the lab" interfered with his right to a fair presentation of the evidence. When the prosecutor asked Rankin if the crime lab was accredited, Ward did not object. Later, when reviewing a proposed jury question regarding the lab's accreditation, Ward did object on the basis of hearsay and lack of foundation. But he did not argue that the question affected his "right to a fair presentation of the evidence." Therefore, absent fundamental error, Ward forfeited the argument he now seeks to make. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). And because he does not argue fundamental error occurred, he has waived the argument on appeal, and we do not consider it further. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

Motion for Mistrial: Prosecutorial Misconduct

¶22 Last, Ward argues the trial court erred in denying his motion for mistrial based on alleged prosecutorial misconduct during rebuttal closing argument. We review a trial court's decision to deny a mistrial for an abuse of discretion. *State v. Moody*, 208 Ariz. 424,

¶ 124, 94 P.3d 1119, 1151 (2004). "'To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Morris*, 215 Ariz. 324, ¶ 46, 160 P.3d 203, 214 (2007), *cert. denied*, __ U.S. __, 128 S. Ct. 887 (2008), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). The alleged misconduct must be "'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *Id.* Furthermore, we will only find reversible error if "'a reasonable likelihood exists that the misconduct could have affected the jury's verdict.'" *State v Anderson*, 210 Ariz. 327, ¶ 45, 111 P.3d 369, 382 (2005), *quoting State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992).

¶23 Ward contends two comments by the prosecutor during rebuttal closing argument constituted misconduct. First, after asserting the state had presented "powerful evidence" of guilt, the prosecutor stated: "And in a situation like that, many times the defendant wants to distract, to throw out issues that are non-issues in order to distract you from looking at the evidence." Second, when discussing Ward's credibility, the prosecutor stated: "And the fact this defendant has prior felony convictions, you heard him testify, is that the type of person whose testimony you want to believe?"

¶24 We first observe that Ward failed to object to either of the comments he asserts constituted misconduct until the day after closing arguments, which is when he moved for a mistrial. *See Moody*, 208 Ariz. 424, ¶ 124, 94 P.3d at 1151 (failure "to lodge a specific,

contemporaneous objection" deprived court of opportunity to correct error with "immediate curative instruction"). But even if his objection and request for mistrial had been timely, and even if he has correctly characterized those comments as improper, they simply do not rise to the level of misconduct that would warrant either the granting of a mistrial or appellate reversal of his conviction; that is, they did not permeate the entire trial, and we see no reasonable likelihood that they could have affected the jury's verdict. *See Morris*, 215 Ariz. 324, ¶ 46, 160 P.3d at 214. Accordingly, the trial court did not abuse its discretion in denying Ward's motion for mistrial.

Conclusion

¶25 In light of the foregoing, the trial court did not err or abuse its discretion in denying Ward's motion to dismiss, motion to preclude evidence, or motion for mistrial, nor did it abuse its discretion in granting the state's motion in limine. Accordingly, we affirm his convictions and sentences.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge