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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. RONNIE GENE SARTIN, JR., Appellant.	2 CA-CR 2008-0025 2 CA-CR 2008-0235-PR (Consolidated) DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL AND PETITION FOR REVIEW
FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-61619

Honorable Howard Hantman, Judge

AFFIRMED
REVIEW GRANTED; RELIEF DENIED

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E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant Ronnie Sartin was convicted of first-degree murder. The trial court sentenced him to a natural life term of imprisonment. Sartin raises numerous claims of error on appeal. He argues the trial court erred when it denied his pretrial motions to remand the case to the grand jury and to dismiss the case based on prosecutorial misconduct in the first trial. He contends the state presented insufficient evidence that he committed felony murder and that juror misconduct after trial and prosecutorial misconduct during closing argument caused reversible error. Sartin further maintains the court should have granted his requests for a *Willits*[1] instruction and a lesser-included offense instruction; his constitutional rights were violated by the state's failure to charge him with the predicate felonies of burglary and robbery; the state was barred by the statute of limitations from presenting evidence on those predicate felonies; and the state improperly used impeachment evidence as substantive evidence of guilt. Finally, in his consolidated petition for review of the trial court's denial of post-conviction relief, Sartin argues he presented a colorable claim for relief based on newly discovered evidence and is therefore entitled to an evidentiary hearing. For the following reasons, Sartin's conviction and sentence are affirmed, and although we grant review of his petition, relief is denied.

BACKGROUND

¶2 We view the evidence in the light most favorable to sustaining the convictions. *State v. McCurdy*, 216 Ariz. 567, ¶ 2, 169 P.3d 931, 934 (App. 2007). In May 1998, while

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

in Marc T.'s apartment, Sartin stabbed Marc to death and stole his television and videocassette recorder (VCR). Sartin immediately exchanged the television and VCR for cocaine.

¶3 That same day, Sartin told members of his family he had hurt someone. They arranged for Sartin to fly the next day to California to temporarily reside with his brother, Chad R. While in California, Sartin told Chad he had been in a man's apartment and became angry when the man had undressed and made sexual advances toward him. Sartin then admitted to Chad that he had decided to rob the man and Sartin stabbed him during the struggle and had then taken the man's television and VCR. Chad reported Sartin's admissions to the police and Sartin was arrested.

¶4 After a jury trial, Sartin was convicted of premeditated first-degree murder and this court upheld his conviction and sentence on appeal. *See State v. Sartin*, No. 2 CA-CR 99-0543 (memorandum decision filed Feb. 8, 2001). A few years later, after the Arizona Supreme Court disapproved of language in the premeditation instruction given at Sartin's trial, Sartin sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court denied the petition and this court granted relief on review. *See State v. Sartin*, No. 2 CA-CR 2005-0135-PR (memorandum decision filed Mar. 30, 2006). His conviction and sentence were later vacated.

¶5 Before his new trial began, Sartin successfully moved to remand the case to the grand jury for a redetermination of probable cause. The state presented both a premeditated

murder theory and a felony murder theory, and the grand jury returned a true bill for first-degree murder. Sartin then moved to dismiss the case with prejudice or remand it again to the grand jury, and the trial court denied the motion. At trial, Sartin testified he had stabbed Marc, stolen his television and VCR, and exchanged the items for cocaine. He contended, however, that he had killed Marc as a result of post-traumatic stress disorder he suffered from having been previously shot. The jury found Sartin guilty of first-degree murder and he was sentenced to life in prison without the possibility of parole. This appeal followed.

FAILURE TO REMAND TO GRAND JURY

¶6 Sartin argues the trial court erred when it denied his motion to dismiss the case or remand it to the grand jury.[2] "To obtain review of a denial of redetermination of probable cause, a defendant must seek relief before trial by special action." *State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995); *accord State v. Gortarez*, 141 Ariz. 254, 258, 686 P.2d 1224, 1228 (1984); *State v. Verive*, 128 Ariz. 570, 575, 627 P.2d 721, 726 (App. 1981). Absent an indictment that the state knew was partially based on perjured, material testimony, a defendant may not challenge matters relevant only to the grand jury proceedings by appeal from conviction. *Gortarez*, 141 Ariz. at 258, 686 P.2d at 1228.

¶7 In his reply brief, Sartin contends the "[s]tate's solicitation of testimony as to the lack of any mental disability . . . was a presentation of knowingly false testimony," and

[2]Sartin does not claim the court erred in refusing to dismiss his case with prejudice. We therefore do not address this issue.

thus, the *Gortarez* exception applies.[3] But the testimony in question elicited by the prosecutor did not falsely suggest that no evidence existed of Sartin's mental disability at all. Rather, when considered in context, the prosecutor more narrowly sought the detective's observations of Sartin when the detective met Sartin in California. The prosecutor asked, "And was there any evidence that Mr. Sartin had any physical or mental disabilities?" The detective replied, "No. None." Sartin does not contend, nor does the record show, any evidence that symptoms of the mental deficiency he later urged as a defense—post-traumatic stress disorder—would necessarily be apparent during an interview or encounter with him. Thus, Sartin has not shown the testimony was incorrect, let alone "knowingly false." *Gortarez*, 141 Ariz. at 258, 686 P.2d at 1228. And because Sartin was thereafter found guilty beyond a reasonable doubt, we do not address further his challenge to the earlier finding of probable cause made by the grand jury. *See id.*; *accord State v. Charo*, 156 Ariz. 561, 566, 754 P.2d 288, 293 (1988) ("[T]he issue of probable cause is a closed question after the jury determines a defendant's guilt beyond a reasonable doubt.").

[3]Although Sartin raised several issues related to the trial court's denial of his motion to remand the case to the grand jury in his opening brief, we construe the failure to mention those other grounds in the reply as an implicit concession none of the other grounds fits the *Gortarez* exception. *See* 141 Ariz. at 258, 686 P.2d at 1228. We also note arguments made for the first time in a reply brief are generally waived. *See State v. Guytan*, 192 Ariz. 514, ¶ 15, 968 P.2d 587, 593 (App. 1998).

FELONY MURDER

Failure to Charge Burglary or Robbery as Separate Crimes

¶8 Sartin argues that he was "deprived . . . of his basic constitutional rights" when the jury considered, as predicate crimes for felony murder, offenses for which he had never been separately indicted. As we understand Sartin's claim, he contends the state should have charged him separately with burglary and/or robbery in order to use evidence of those crimes to prove felony murder.[4] But, it is well settled "A.R.S. § 13-1105 does not require that the defendant be charged [with] and convicted of the underlying felony." *State v. Lacy*, 187 Ariz. 340, 350, 929 P.2d 1288, 1298 (1996); *accord State v. Eastlack*, 180 Ariz. 243, 258, 883 P.2d 999, 1014 (1994); *State v. Johnson*, 215 Ariz. 28, ¶ 14, 156 P.3d 445, 448 (App. 2007). "Even if the statute of limitations has expired on the predicate offense, a defendant may still be prosecuted for felony murder." *Lacy*, 187 Ariz. at 350, 929 P.2d at 1298. We therefore reject Sartin's argument.

Lack of Notice of Predicate Felonies in Indictment

¶9 In a related argument, Sartin contends the state deprived him of his right to proper notice when it failed to specify in the indictment which predicate offenses were the bases of the felony murder charge. Our supreme court has indeed recommended that the state provide such notice in the indictment when pursuing a felony murder conviction. *See State*

[4]The state contends it "present[ed] the felony-murder theory and supporting predicate-offense theories to the grand jury," and the record supports this contention.

v. Blakley, 204 Ariz. 429, ¶ 56, 65 P.3d 77, 88 (2003) ("In order to avoid injustice and to ensure that proper notice has been given in a felony murder case, we believe the state should include the predicate felony in the original or an amended indictment."). But, this court has not read *Blakley* as requiring notice of the pertinent felony murder theory in the indictment "so long as the defendant receives sufficient notice to reasonably rebut the allegation." *State v. Rivera*, 207 Ariz. 69, ¶ 12, 83 P.3d 69, 73 (App. 2004); *see also State v. Arnett*, 158 Ariz. 15, 19, 760 P.2d 1064, 1068 (1988) (when defendant had notice on first day of trial that state might present evidence of robbery to support felony murder theory and defendant showed no prejudice, "not error to refuse to require the State to elect which theory of first degree murder was being relied on"). Here, the record shows that several weeks before trial, the state provided Sartin notice it would pursue the murder charge on the theory that Sartin had caused the victim's death in furtherance of his commission of burglary or robbery. Sartin does not contend he was surprised by the state's presentation of those theories. Under these circumstances, we conclude the state provided sufficient notice to Sartin of the predicate felonies it would rely upon at trial to comply with the requirements of due process.

Presentation of Felony Murder Theory to Jury

¶10 Sartin also contends it was unlawful for the state to present a felony murder theory in his retrial when it had only proceeded based on premeditation in the first trial. As the state correctly notes, in *State v. Moody*, 208 Ariz. 424, ¶¶ 28-29, 94 P.3d 1119, 1134 (2004), our supreme court has expressly held to the contrary, concluding the trial court did

not abuse its discretion in allowing the state to proceed on theories of both premeditation and felony murder in a retrial when it had only proceeded on a premeditation theory in the first trial.

¶11 Sartin has offered no meaningful distinction between this case and the situation in *Moody*, other than to assert that Moody was convicted of both premeditation and felony murder unanimously. Here, the jurors were not unanimous on which theory applied: only six found him guilty under both theories.[5] However, the court in *Moody* simply noted that because of the unanimity of verdicts Moody had suffered minimal prejudice. *See id*. n.2. The court did not purport to overrule or create an exception to the longstanding principle that the jury need not be unanimous on which first-degree murder theory was the basis for its verdict. *See State v. Gomez*, 211 Ariz. 494, n.3, 123 P.3d 1131, 1135 n.3 (2005); *State v. Lopez*, 163 Ariz. 108, 111-12, 786 P.2d 959, 962-63 (1990). Accordingly, we find no error in the state's presentation of the felony murder theory to the jury at Sartin's retrial. *See Moody*, 208 Ariz. 424, ¶ 26, 94 P.3d at 1134 (when conviction reversed for any reason other than insufficient evidence, state may retry defendant, including using evidence not presented at first trial).

[5]Of the remaining six jurors, two found Sartin guilty of premeditated murder only and four found him guilty of felony murder only.

SUFFICIENCY OF EVIDENCE

¶12 Sartin argues there was insufficient evidence to support the conviction for felony murder. Specifically, he contends "there is no evidence [he] entered the victim's apartment unlawfully," and "absolutely no proof that [his] actions in killing the victim were the result of any desire or motive to rob him." "When reviewing the sufficiency of the evidence, an appellate court does not reweigh the evidence to decide if it would reach the same conclusions as the trier of fact." *State v. Barger*, 167 Ariz. 563, 568, 810 P.2d 191, 196 (App. 1990); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (in determining whether evidence sufficient to support conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

¶13 At trial, Sartin conceded that while he was in Marc's apartment, he killed Marc, stole his TV and VCR, and immediately exchanged the items for cocaine. He argues, however, that the state failed to prove one of the elements of burglary: that he had entered Marc's apartment unlawfully. But, the crime of residential burglary requires proof a person entered or remained unlawfully, and Sartin has not argued the state failed to prove he remained unlawfully in Marc's apartment after he had formed the intent to steal his television and VCR. *See* A.R.S. § 13-1507(A) (burglary committed when person "enter[s] or remain[s] unlawfully in or on a residential structure with the intent to commit any theft or any felony

therein"); *State v. Lacy*, 187 Ariz. 340, 349, 929 P.2d 1288, 1297 (1996) (person need not form intent to commit felony before entering residence under burglary statute).

¶14 In a similar vein, Sartin argues the state did not prove Marc was killed in furtherance of a burglary or robbery. But, the state presented evidence at trial—Sartin's statements to his brother—that Sartin decided to rob Marc before he stabbed him in retaliation for Marc's sexual advances. Even without this evidence of Sartin's intent, the jury reasonably could have inferred from the circumstantial evidence of Sartin's drug use that he had formed the intent to rob Marc in order to obtain cocaine and that Marc was killed in furtherance of that act. *See Jackson*, 443 U.S. at 319.

IMPROPER ARGUMENT ON PREMEDITATION

¶15 Sartin contends the prosecutor committed misconduct when he misstated the law on premeditation by relying too much on the simple passage of time and not pointing out that actual reflection is necessary. Because Sartin did not object to the prosecutor's statements at trial, we review this issue for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶16 Sartin focuses on the portion of the state's closing argument in which the prosecutor stated:

> You get to decide when you go back into the jury room that if someone is stabbing another person and inflicting that many wounds on them, do they have time to reflect upon what they're doing? Do they have time to make a decision to either go forward or to stop? Do they have time to realize what they are doing is taking . . . another human life? Do they have time after

> stab wound number one, two, three, on down, ten, 11, 12, 19, 20, 21[?] Do they have the time to think about the fact they are taking a human life, they are killing this person as they repeatedly time after time stab them with that knife? Evidence of premeditation. Evidence of reflection.

Sartin suggests this argument was misconduct in light of our supreme court's admonition in *State v. Thompson*, 204 Ariz. 471, ¶ 33, 65 P.3d 420, 429 (2003), that "the state may not use the passage of time as a proxy for premeditation." But as the court clarified, "The state may argue that the passage of time *suggests* premeditation, but it may not argue that the passage of time *is* premeditation." *Id.*

¶17 Here, the prosecutor appropriately explained that premeditation requires actual reflection and how the evidence proved Sartin had reflected. And, although the prosecutor emphasized the passage of time between Sartin's actions as circumstantial evidence of premeditation—as the state was entitled to do—that argument never suggested that the mere passage of time was, standing alone, enough to show Sartin had premeditated the killing. Rather, the prosecutor immediately followed his time-focused argument with the statements, "Evidence of premeditation. Evidence of reflection." Moreover, we presume the jurors followed the trial court's instructions that premeditation requires the defendant to have "reflected on the decision [to kill another human being] before killing," and that "[r]eflection is a thought, idea or opinion formed as a result of deliberation or serious consideration." *See State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007) (presuming jurors follow court's instructions). Accordingly, Sartin has not shown the prosecutor committed

misconduct, and in turn, has not met his burden to show fundamental error or prejudice. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607-08.

JUROR MISCONDUCT

¶18 Sartin argues the trial court erred by denying his motion for mistrial based on juror misconduct. We review the court's denial of a mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000); *see also State v. Brewer*, 26 Ariz. App. 408, 417, 549 P.2d 188, 197 (1976). At the end of trial, the court discovered one of the jurors had taken the morning's newspaper into the jury room with him and had looked at some sections of the paper. The newspaper contained an article about the trial on an inside page. When questioned, the juror denied reading the article about the trial; nonetheless, the court dismissed him from the jury panel. The other jurors were questioned if they had also read the newspaper or otherwise learned about the article. None indicated that he or she had, and the court ordered them to proceed with deliberations anew. While the jury was still deliberating, Sartin moved for a mistrial based on the misconduct of the excused juror, and the court denied his motion.

¶19 Sartin contends the excused juror's actions tainted the rest of the jury panel and that excusing the juror did not "cure[] the malady." But he offers neither argument nor evidence to support this contention. Thus, Sartin has not sustained his burden of showing the excused juror's actions tainted the rest of the panel. *See State v. Doerr*, 193 Ariz. 56, ¶ 18, 969 P.2d 1168, 1173-74 (1998) (appellate court will not presume prejudice, defendant

must show it). Sartin therefore has failed to demonstrate that the trial court abused its discretion when it denied his motion for a mistrial on that ground.

LESSER-INCLUDED OFFENSE INSTRUCTION

¶20 Sartin next contends the trial court erred when it refused to instruct the jury that theft is a lesser-included offense of felony murder. "We review a trial court's denial of a requested jury instruction for an abuse of discretion." *State v. Johnson*, 212 Ariz. 425, ¶ 15, 133 P.3d 735, 741 (2006). But it is well-established in Arizona that felony murder has no lesser-included offense. *See State v. LaGrand*, 153 Ariz. 21, 30, 734 P.2d 563, 572 (1987). Thus, an instruction on theft as a lesser-included offense would have been an incorrect statement of the law, and the court did not abuse its discretion by denying Sartin's request for such an instruction. *See State v. Cox*, 217 Ariz. 353, ¶ 17, 174 P.3d 265, 268 (2007) ("Courts do not err by refusing to give instructions that misstate the law.").[6]

DOUBLE JEOPARDY

¶21 Sartin argues the trial court erred in denying his pretrial motion to dismiss, contending prosecutorial misconduct in the first trial should have precluded a second trial. "Whether double jeopardy bars retrial is a question of law, which we review de novo." *State v. Moody*, 208 Ariz. 424, ¶ 18, 94 P.3d 1119, 1132 (2004).

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[6]Sartin also summarily contends "an instruction relating to the nature of the use of the theft instruction was also necessary" pursuant to *State v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996). But because we have determined Sartin was not entitled to a lesser-included offense instruction, we need not address this contention.

¶22 In deciding an identical question—whether "double jeopardy should have barred retrial because the prosecutor committed egregious misconduct in the first trial," *Moody*, 208 Ariz. 424, ¶ 17, 94 P.3d at 1132—our supreme court noted that double jeopardy protection based on prosecutorial misconduct traditionally had been afforded only to defendants who move for a mistrial on that ground during trial. *Id.* ¶ 20. The only exception arises when the "prosecutor 'engages in egregious conduct . . . sufficient to require a mistrial but manages to conceal his conduct until after trial.'" *Id.* ¶ 21, *quoting State v. Minnitt*, 203 Ariz. 431, ¶ 35, 55 P.3d 774, 782 (2002). Sartin did not move for a mistrial on the basis of prosecutorial misconduct during the first trial, nor did he receive a new trial on that basis. And Sartin does not contend that the misconduct in the first trial was concealed so as to fall under the exception set forth in *Minnitt*. Under such circumstances, any alleged prosecutorial misconduct in the first trial provides no basis for precluding a second trial. *See Moody*, 208 Ariz. 424, ¶ 21, 94 P.3d at 1133.

WILLITS **INSTRUCTION**

¶23 Sartin argues the trial court erred when it denied his request for a jury instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). "A trial court's denial of a requested *Willits* instruction is reviewed for an abuse of discretion." *State v. Wooten*, 193 Ariz. 357, ¶ 62, 972 P.2d 993, 1004-05 (App. 1998). Sartin contends the state failed to preserve a critical piece of evidence—an audio tape of an interview of Sartin by a police detective in California.

¶24 A *Willits* instruction allows the jury to draw an inference in favor of the defendant when the state permits certain evidence within its control to be lost or destroyed. *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). To be entitled to a *Willits* instruction, the defendant must show the state failed to preserve material evidence that had a tendency to exonerate him, and he suffered prejudice as a result. *State v. Speer*, 221 Ariz. 449, ¶ 40, 212 P.3d 787, 795 (2009).

¶25 The state emphasizes the audio recording of an interview is generally not the type of evidence covered by *Willits*. *See State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988) (*Willits* instructions ordinarily concern physical evidence used in perpetration of crime, not tape recordings). *But see State v. Atwood*, 171 Ariz. 576, 627-28, 832 P.2d 593, 644-45 (1992) (discussing *Willits* in context of interview with news reporter), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001). We need not decide this question, however, because, in any event, Sartin has not shown the recording would have tended to exculpate him. Sartin's sole defense was that he stabbed Marc as a consequence of post-traumatic stress disorder. He does not contend anything on the recording tended to prove his defense. Rather, he essentially contends the recording would have shown his statements were involuntary, and its loss meant his motion to suppress was "doomed to fail."[7] Under such circumstances, the trial court did not abuse

[7]We note Sartin's statements were not used as evidence against him in the state's case-in-chief, but only to impeach him during the state's cross-examination of him at trial.

its discretion in denying Sartin's request for a *Willits* instruction. *See State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999).

PROSECUTORIAL MISCONDUCT

¶26 Sartin argues the prosecutor committed misconduct that denied him a fair trial. "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. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). In other words, 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, ¶ 25, 25 P.3d 717, 729 (2001). In determining whether the misconduct permeates the trial, we assess its cumulative effect. *Id.*

¶27 Sartin refers to a series of incidents throughout the trial to support his argument. First, he contends the prosecutor mischaracterized the trip he took to California immediately after Marc's death as "fleeing." Second, the prosecutor mischaracterized Marc's reaction to the stabbing as a "blood curdling scream" when Sartin himself had never used those words. Third, Sartin contends the prosecutor's statement to his brother during direct examination, "I'm not trying to attack you Mr. R[.] What you came down here for and took an oath for was to testify to the truth," was prejudicial and "effectively vouched for the

State's case." Fourth, Sartin argues the prosecutor improperly used impeachment evidence as substantive evidence of his guilt.

¶28 Preliminarily, we disagree with Sartin that the first three events were misconduct at all. The prosecutor's description of Sartin's departure to California the day after he killed Marc as "fleeing" was a reasonable inference that could be drawn from the evidence. *See State v. Moody*, 208 Ariz. 424, ¶ 180, 94 P.3d 1119, 1159 (2004). Moreover, the court properly instructed the jury that the attorneys' opening and closing statements are not themselves evidence. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) (presuming jurors followed court's standard instruction that closing arguments not evidence). The record shows that the state's reference to Marc's alleged "blood curdling scream" was an accurate recounting of Chad's description to police of what Sartin had told him. And, Sartin himself testified Marc emitted an "outrageous scream" when Sartin stabbed him in the neck. Sartin has not explained how the state's use of the term "blood curdling scream" was particularly prejudicial in the context of the case, and we fail to see how it materially differs from Sartin's own description of the events.

¶29 Sartin also contends the prosecutor "effectively vouched for the State's case" by reminding Sartin's brother he was supposed to tell the truth on the witness stand. But prosecutorial vouching occurs only when the prosecutor either "places the prestige of the government behind its witness" or "suggests that information not presented to the jury supports the witness's testimony." *State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184,

1193 (1989). Here, as in *Dumaine*, "the prosecutor did not vouch for the credibility or the truthfulness of the . . . witness[]." *Id.* Rather, his attempts to emphasize inconsistencies between Chad's testimony and his statements to police were more likely to have the effect of impeaching Chad's credibility on the witness stand. And the trial court instructed the jury to judge the credibility of the witnesses; we presume they followed this instruction. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

¶30 Finally, to support his argument the prosecutor improperly used impeachment evidence as substantive evidence of guilt, Sartin relies on *State v. Allred*, 134 Ariz. 274, 655 P.2d 1326 (1982). There, our supreme court set forth some indicia of unfair prejudice when impeachment testimony is used for substantive purposes:

> 1) the witness being impeached denies making the impeaching statement, and
>
> 2) the witness presenting the impeaching statement has an interest in the proceeding and there is no other corroboration that the statement was made, or
>
> 3) there are other factors affecting the reliability of the impeaching witness, such as age or mental capacity, []
>
> 4) the true purpose of the offer is substantive use of the statement rather than impeachment of the witness,
>
> 5) the impeachment testimony is the only evidence of guilt.

Id. at 277, 655 P.2d at 1329. By these standards, Sartin has not shown he suffered unfair prejudice even assuming the impeachment evidence was used improperly. Other than Chad having a personal interest in the proceeding because Sartin is his brother, none of the other

indicia of prejudice is applicable. *See id.* at 278, 655 P.2d at 1330 (impeaching testimony more probative than prejudicial when impeached witnesses admitted having made statements, had no personal interest in proceeding, and there was other compelling evidence crime was committed). Because Sartin's own testimony corroborates most of the impeachment material of which Sartin complains, because he has not pointed to any of Chad's statements in particular that caused him to suffer prejudice, and because Sartin has not articulated how the impeachment material was used as substantive evidence of guilt, we find no error in the prosecutor's use of impeachment evidence in questioning Chad. In sum, Sartin has utterly failed to show the foregoing instances of alleged misconduct so infected the trial with unfairness as to result in a denial of due process. *See Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191.

PETITION FOR REVIEW

¶31 In the sole issue Sartin raises in his petition for review of the trial court's denial of post-conviction relief, he argues the trial court abused its discretion when it found he was not entitled to an evidentiary hearing on his claim under Rule 32, Ariz. R. Crim. P., and summarily denied relief. We review a court's decision to deny an evidentiary hearing on a claim for post-conviction relief for an abuse of discretion. *State v. Sanchez*, 200 Ariz. 163, ¶ 10, 24 P.3d 610, 613 (App. 2001). To be entitled to an evidentiary hearing, the defendant must present a colorable claim for relief, "one that, if the allegations are true, might have

changed the outcome" of the case. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶32 Sartin filed a "Limited Rule 32, Petition for Post Conviction Relief,"[8] pursuant to Rule 32.1(e), contending he had newly discovered evidence about the fingerprint examiner's qualifications. Rule 32.1(e) provides that newly discovered evidence may provide a ground for post-conviction relief if, *inter alia*, "[t]he newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence."

¶33 Sartin's second trial took place in October and November 2007. In 2008, the state discovered that, two years earlier, one of its fingerprint examiners had stolen drugs that he used while on and off duty. Preliminarily, we note there is no evidence the fingerprint examiner was using drugs either during his involvement in the initial investigation of Sartin's case or when he testified at Sartin's trial. And, even had the examiner been using drugs either when he testified or at the time he tested the fingerprints left in Marc's apartment, Sartin has not explained how the fingerprint examiner's testimony was "of critical

[8]*See* Ariz. R. Crim. P. 32.5 (requiring petitioner to "include every ground known to him . . . for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him"); *see also* Ariz. R. Crim. P. 32.2(a) (precluding claims that could have been raised on appeal or in previous Rule 32 proceeding).

significance at trial such that . . . evidence [of the examiner's drug use] probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e)(3).

¶34 Sartin summarily contends that "the question of whether [he] had blood on his hand when the print was left . . . is a crucial question because blood on [his] hand implicates him in the murder for the purpose of taking the victim's property." We are not persuaded by this argument. Sartin testified he stabbed Marc and then took his television and VCR. The evidence of a bloody print being left near the entertainment center is merely cumulative to Sartin's own testimony, and thus, was not "of critical significance at trial." Ariz. R. Crim. P. 32.1(e)(3). Accordingly, because the evidence clearly falls outside the parameters of Rule 32.1(e), we find no abuse of discretion in the trial court's denial of an evidentiary hearing.

DISPOSITION

¶35 We grant review of Sartin's petition but deny relief, and we affirm his conviction and sentence.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

_____
GARYE L. VÁSQUEZ, Judge