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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THE STATE OF ARIZONA, Appellee, v. VLADIMIR GARCIA SOZA, Appellant.	2 CA-CR 2009-0394 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20063636

Honorable Stephen C. Villarreal, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, Vladimir Soza was convicted of the first-degree murder of L. and sentenced to natural life in prison. On appeal, Soza argues the trial court erred by admitting a poem into evidence, refusing to grant his motion for a mistrial, ordering the production of his defense investigator's notes, and sustaining an objection to state-of-mind evidence. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). In 1998, L. received a favorable plea agreement in exchange for his testimony against two co-defendants, one of whom was Raul Maldonado. On September 17, 2006, L., who recently had been released from prison, and two companions left a Tucson nightclub around 3:00 a.m. and started walking toward their vehicle. Soza, who was wearing a white tank top, left the same club with a companion less than a minute later. A video camera outside the club recorded a man wearing a shirt similar to Soza's following L. into the parking lot. The man pulled out a gun, called out L.'s nickname, said, "[T]his is for Raul," shot L., and fled. L. died from the gunshot wound. An employee of the club identified Soza, who was a regular customer, as the shooter in the parking lot video. In addition, both of L.'s companions testified they had seen the gunman inside the club, and one of them saw L. shake hands with the gunman as they were leaving the club.

¶3 After Soza was convicted of first-degree murder following a jury trial, this court reversed his conviction and remanded the matter for a new trial due to the improper admission of evidence of Soza's previous incarceration. *See State v. Soza*, No. 2 CA-CR 2007-0383, ¶ 1 (memorandum decision filed Oct. 3, 2008). Soza was subsequently again convicted of first-degree murder and sentenced as set forth above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

"Snitch" Poem

¶4 Soza first argues the trial court abused its discretion when it allowed the admission into evidence of a poem found in Soza's room. The poem, which was discovered in a folder of Soza's papers and drawings, expressed disdain for "snitches" and the opinion that "the only good snitch is six feet under dirt."[1] The court ruled the

[1]The full text of the poem is as follows:

> a snitch is a snitch and a rat is a rat
> they give three to go free or some shit like that
> They'd rather tell on their friends than go to the joint so they talk to the cops and in court they will point
> They're weak and they're scary[;] I guess that's why they squeal
> I hope all of the snitches will some day feel steel
> They cry like a bitch, "I can't do no time[,]"
> but if that is the case, then why do the crime[?]
> ["]no one will know,["] I'm sure they must think
> but we always find out if some one's [sic] a fink
> it's gotten so bad[,] you never know who you can trust
> I love to see rats gettin[']stomped in the dust.

poem was admissible because its probative value outweighed its prejudicial effect. *See* Ariz. R. Evid. 403. We will not disturb a court's decision on the admissibility of evidence under Rule 403 absent an abuse of discretion. *State v. Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d 564, 584 (2002).

¶5 Soza initially claims the admission of the poem contravened this court's memorandum decision reversing his conviction after the first trial. He argues the decision "made it clear that evidence of contact between [Soza] and Raul Maldonado would have increased the likelihood that [Soza] knew [L.] had been a cooperating witness for the State" and that such evidence was needed in order for the poem to be admissible. We disagree

¶6 In our prior decision, we focused on the admission of evidence of Soza's imprisonment and explained, "it is difficult to assign any probative value to the fact of Soza's prior incarceration" due to the lack of any testimony that Soza and Maldonado "had been housed in the same prison, let alone the same cell block," or otherwise knew each other. *Soza*, No. 2 CA-CR 2007-0383, ¶ 9. In a footnote, we stated that "evidence of contact between Soza and Maldonado would have increased the likelihood that Soza knew [L.] had been a cooperating witness for the state and thus the probative value of the derogatory poem about snitches also objected to by Soza." *Id*. n.5. But, we went on to

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> it almost always turns out to be a so-called friend
> I guess time will tell all and we'll see who is what in the end
> In my mind it's crazy and I don't understand why
> how can they look in a mirror or hold their head high[?]
> ["]I'm sorry![”] they yell when they are about to get hurt
> but the only good snitch is six feet under dirt.

explain that, "because we cannot predict how the 'facts and circumstances' of this case will be presented on retrial, and we find the erroneous admission of Soza's prison record dispositive, we do not reach this issue." *Id.* Because we expressly found it unnecessary to decide this issue, and the facts and circumstances presented in the new trial differed from those in the first trial, we reject Soza's argument that the trial court failed to follow our prior memorandum decision. *See State v. Fulminante*, 193 Ariz. 485, ¶ 13, 975 P.2d 75, 81 (1999) ("The law of the case will not be applied if 'the issue was not actually decided in the first decision or the decision is ambiguous.'"), *quoting Dancing Sunshines Lounge v. Indus. Comm'n*, 149 Ariz. 480, 483, 720 P.2d 81, 84 (1986).

¶7 In a related argument, Soza contends the poem should have been excluded because apart from the sentence, "This is for Raul," there was no evidence Soza knew or had any contact with Raul Maldonado. The record demonstrates, however, that in addition to the gunman's statement immediately before shooting L., additional evidence was presented that L. previously had testified against Maldonado in exchange for a favorable plea deal and that L. recently had been released from prison. Thus, we agree with the state that "[e]vidence demonstrating that [Soza] harbored animosity toward 'snitches,' introduced at his trial for killing a 'snitch,' [wa]s properly admissible as evidence of motive." *See State v. Hargrave*, 225 Ariz. 1, ¶ 14, 234 P.3d 569, 576 (2010) ("[M]otive is relevant in a murder prosecution."), *cert. denied*, ___ U.S. __, 131 S. Ct. 317 (2010); *see also State v. Greene*, 192 Ariz. 431, ¶¶ 20-23, 967 P.2d 106, 112-13 (1998) (letters written by defendant relevant evidence tying defendant to murder).

Consequently, the trial court did not abuse its discretion in allowing the admission of the poem, regardless of whether any evidence directly linked Soza and Maldonado.

Motion for Mistrial

¶8 Soza next contends the trial court erred when it denied his motion for a mistrial. Declaring a mistrial "is the most drastic remedy for trial error" and should be granted "only when justice will be thwarted if the current jury is allowed to consider the case." *State v. Nordstrom*, 200 Ariz. 229, ¶ 68, 25 P.3d 717, 738 (2001). Because the "trial judge is in the best position to determine whether a particular incident calls for a mistrial," *State v. Williams*, 209 Ariz. 228, ¶ 47, 99 P.3d 43, 54 (App. 2004), we will not reverse absent a clear abuse of discretion, *State v. Slover*, 220 Ariz. 239, ¶ 19, 204 P.3d 1088, 1094 (App. 2009).

¶9 At trial, the prosecutor asked a detective whether photographs of Soza's tattoos had been taken contemporaneously with his arrest. The detective responded the photographs "were taken, I believe, shortly after the interview." Soza thereafter unsuccessfully moved for a mistrial, arguing the reference to an "interview" was an indirect comment on his right to remain silent.

¶10 Generally, "a defendant's [right to] due process is violated when a witness introduces a statement at trial that the defendant asserted his right to remain silent." *State v. Gilfillan*, 196 Ariz. 396, ¶ 36, 998 P.2d 1069, 1079 (App. 2000). However, "testimony that falls short of disclosing a defendant's invocation of the right to remain silent does not run afoul of the Due Process Clause." *State v. Siddle*, 202 Ariz. 512, ¶ 5, 47 P.3d 1150,

1153 (App. 2002). Here, the detective made a brief off-hand reference to an interview with Soza and did not say that Soza had invoked his right to remain silent or otherwise suggest that Soza had refused to speak with him. Because his statement did not constitute a comment on Soza's right to remain silent, the trial court did not abuse its discretion in denying Soza's motion for a mistrial. *See id.* (no error when officer "did not state or imply that [defendant] had invoked his right to remain silent").

¶11 Moreover, even assuming the statement could be construed as an inferential reference to Soza's right to remain silent, we nevertheless would conclude the trial court did not abuse its discretion. "A comment does not constitute reversible error unless the prosecution draws the jury's attention to the defendant's exercise of the right to remain silent and uses it to infer guilt." *State v. Guerrero*, 173 Ariz. 169, 172, 840 P.2d 1034, 1037 (App. 1992). Because the detective's comment was made only in passing, the prosecutor did not expressly ask about Soza's interview, and the prosecutor did not make any reference to it, any error resulting from the comment was not reversible error. *See id.*; *see also Gilfillan*, 196 Ariz. 396, ¶ 38, 998 P.2d at 1079 (no reversible error when "testimony consisted of no more than a brief reference to the defendant's request for counsel" and there was "no suggestion that it was elicited as the result of willful conduct by the prosecutor").

Defense Investigator's Timeline

¶12 Soza next contends the trial court erroneously required the defense to disclose a defense investigator's notes, written in the form of a timeline, because they

were privileged "work product." The timeline contained the investigator's observations of the club's videos from the night of the murder, including the times at which various incidents had occurred. Soza argues the court's ruling "hamstrung the defense in its presentation of the relevant video evidence" because the investigator could not provide commentary to accompany the portions of video that were played for the jury without risking "impeach[ment] . . . with his own work-product opinions" included on the timeline.[2]

¶13 Even assuming the notes were privileged, however, Soza has failed to demonstrate their disclosure would warrant a new trial. At the outset, the record belies Soza's argument that the court's ruling prejudiced his presentation of evidence. After the prosecutor stated he would not cross-examine the investigator about the timeline if the investigator only operated the video equipment and presented segments of the video to the jury, defense counsel responded, "as long as that's the parameters, we can certainly work with that because that's, frankly, what we were going to do anyway." Soza's counsel then added that "all [the investigator is] doing is playing the times on [the video] and that's all that was ever meant to be done" and later said this arrangement "doesn't

[2]Although the state argues Soza has forfeited this claim because he did not ensure the challenged document would be contained in the record on appeal, the timeline was, in fact, among the trial exhibits provided to this court. The state also argues Soza has waived the issue because he failed to present any testimony about the timeline at trial. However, because Soza raised an arguable claim that the timeline was work product, both below and on appeal, in our discretion, we address the issue. *See* Ariz. R. Crim. P. 15.4(b)(1) (records, reports and memoranda created by defense counsel's legal or investigative staff considered work product and not subject to disclosure).

change anything" and was "what we planned to do in the beginning." The investigator then played chosen segments of the videos to the jury. Although those segments were not presented with any commentary from the investigator, as the trial court pointed out, defense counsel could have played any of these segments and provided commentary and arguments during his closing argument. Despite having had this opportunity, Soza did not take advantage of it. Accordingly, we reject his argument that the investigator's inability to provide commentary as the videos were played for the jury was "a disastrous problem" warranting a new trial. *See State v. Wallen*, 114 Ariz. 355, 358, 560 P.2d 1262, 1265 (App. 1977) (error precluding evidence harmless when review of record demonstrated defendant's presentation of defense not affected materially by ruling); *see also State v. Hall*, 204 Ariz. 442, ¶ 25, 65 P.3d 90, 97 (2003) (defendant "not entitled to a perfect trial, only a fair one").

Character Evidence

¶14 At trial, Soza's counsel elicited testimony from the manager of the night club that, during the several months before the murder, Soza never had given him any trouble or caused problems in the club, always was polite, never was a "smart-aleck," and once had assisted the staff in removing others who had been causing problems. The state objected to this testimony as impermissible character evidence and the trial court sustained the state's objection; no further evidence or argument concerning Soza's prior behavior at the night club was presented.

¶15 Soza contends this testimony was not character evidence but instead was "evidence of [his] state of mind on the date of the incident." And, he maintains, the trial court's ruling "denied [him] the opportunity to present additional evidence as to his conduct at the [night club], and comment on that conduct in closing." As noted previously, we review a court's decision on the admissibility of evidence for an abuse of discretion. *State v. Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d 456, 473 (2004).

¶16 Defense counsel's questions concerned the manager's perception of Soza's behavior and demeanor on previous visits to the night club, and his answers portrayed Soza as a polite, helpful person. Contrary to Soza's argument, offered without any supporting authority, such evidence does not demonstrate his mental state on the night of the murder, but instead was properly precluded character evidence irrelevant to the charged offense. *See* Ariz. R. Evid. 404(a)(1) (character evidence inadmissible except when accused offers evidence of pertinent character trait); *State v. Rhodes*, 219 Ariz. 476, ¶ 10, 200 P.3d 973, 976 (App. 2008) (character evidence admissible "as long as it pertains to a trait involved in the charge"). Accordingly, the trial court did not abuse its discretion in sustaining the state's objection to this evidence.[3]

[3]Because we have concluded the trial court did not abuse its discretion in precluding this evidence, we need not reach Soza's arguments that the state improperly threatened to impeach him with specific instances of conduct and had failed to disclose evidence of prior misconduct concerning his possession of a gun at the night club.

Disposition

¶17 For the foregoing reasons, Soza's conviction and sentence are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge