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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2005-0335
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
LUIS NOE MIRAMON,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20043568

Honorable Richard S. Fields, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and David A. Sullivan — Tucson
Attorneys for Appellee

R. Lamar Couser — Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 A jury found appellant Luis Noe Miramon guilty of first-degree murder, two counts of aggravated assault with a deadly weapon or dangerous instrument, and two counts of endangerment.[1] All of these charges arose from a series of events that occurred on the evening of August 22, 2004. On appeal, Miramon argues the court should have granted his motion for a new trial or declared a mistrial because of alleged acts of prosecutorial misconduct, and that the court should not have admitted the testimony of one of three witnesses who made in-court identifications of him as the perpetrator. For the reasons discussed below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408, *supp. op.*, 206 Ariz. 153, 76 P.3d 424 (2003). On the evening of August 22, 2004, Miramon and two other men left a party at a Famous Sam's bar and were crossing Irvington Road on foot as Bright B. and his family drove past them. Bright made eye contact with Miramon, who pointed a gun at Bright's van. Bright continued to drive past the men who had crossed the street to the nearby AM/PM convenience store. At the convenience store, Reginald W. exited his car that was parked at a gas pump. One of his two passengers, Batin D., was sitting in the front passenger seat, and Batin's brother, Muhammed, was sitting in the back. Miramon walked

[1]The state initially also filed charges of discharge of a firearm at an occupied structure and possession of a deadly weapon by a prohibited possessor but these charges were severed on Miramon's motion.

in front of the car and said something just before he pulled a gun from his waistband and fired a single shot through the windshield, hitting Batin in the head. Muhammed got out of the back seat and exchanged several shots with Miramon, who ran off with the other two men. Reginald and Muhammed then drove Batin to a hospital where he was later pronounced dead. A subsequent medical examination found Batin had been killed by a single gunshot to the head.

¶3 On August 23, 2004, an anonymous caller to 911 reported that someone with the nickname "Pee Wee" had committed the shooting. The police reviewed a video recording taken at Famous Sam's on the night of the shooting and cross-referenced it with a list of men they knew to be nicknamed Pee Wee. As a result, they included Miramon in photographic lineups presented to Reginald, Muhammed, and Bright. Both Reginald and Muhammed identified Miramon from the lineups. Bright failed to identify Miramon from the lineups, but sometime later recognized him in a television newscast about the shooting.

¶4 Throughout the trial, Miramon's primary defense was mistaken identity; the defense's theory was that another man, Miguel C., who had also been present at Famous Sam's and shared some of Miramon's physical characteristics, could have been the shooter. Reginald and Muhammed both identified Miramon at trial as the person who had fired the gun and Bright identified him as the person who had pointed the gun.

¶5 The jury found Miramon guilty of all five charges. The trial court imposed a sentence of life imprisonment without the possibility of release for twenty-five years on the

first-degree murder conviction. For each of the two counts of aggravated assault, Miramon received a presumptive sentence of 7.5 years, with one of the sentences to be served consecutively to the first-degree murder sentence. He received a presumptive sentence of 2.25 years for each of the two counts of endangerment, with one of the sentences to be served consecutively to the consecutive aggravated assault sentence. The court denied Miramon's motion for a new trial pursuant to Rule 24.1(c), Ariz. R. Crim. P., and this appeal followed. We have jurisdiction under A.R.S. § 13-4033(A).

Discussion

Motion for a new trial

¶6 Miramon first argues the trial court erred when it denied his motion for a new trial pursuant to Rule 24.1(c). He contends the state "committed repeated acts of prosecutorial misconduct that so infected the trial with unfairness as to make [his] conviction a denial of due process." Although Miramon cited to subsections (1), (2), (4), and (5) of Rule 24 in both his motion and his opening brief on appeal, he only provides arguments for subsection (2) on appeal. We therefore only consider his claim for a new trial on the ground of prosecutorial misconduct, under Rule 24.1(c)(2). *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

¶7 We review a trial court's ruling on a motion for a new trial for an abuse of discretion. *State v. Hoskins*, 199 Ariz. 127, ¶ 52, 14 P.3d 997, 1012 (2000), *supp. op.*, 204 Ariz. 572, 65 P.3d 953 (2003). Miramon's motion was based, in part, on the trial court's refusal to grant a mistrial. The decision to grant or deny a motion for mistrial is also a matter for the trial court to decide in the exercise of its discretion, and we will not disturb the court's ruling absent a clear abuse of that discretion. *Id.* ¶ 57.

¶8 Miramon bases his argument on three incidents during the trial that he alleges constitute intentional prosecutorial misconduct. Our supreme court has held that a conviction should be reversed on the ground of prosecutorial misconduct if "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001); *accord, State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). Further, "[i]f the cumulative effect of the conduct 'so permeate[s] the entire atmosphere of the trial with unfairness that it denie[s the defendant] due process,' it can warrant reversal even if the individual instances would not do so by themselves." *State v. Velazquez*, No. CR-04-0361, ¶ 57, 2007 WL 2264542 (Ariz. Aug. 9, 2007), *quoting State v. Roque*, 213 Ariz. 193, ¶ 165, 141 P.3d 368, 405 (2006) (first alteration added).

¶9 In the present case, however, none of the incidents rises to the level of misconduct and we therefore need go no further than step one. In the first incident, a prosecutor met privately with Bright during the lunch break on the second day of trial and viewed newcasts concerning the crime. The purpose of the meeting was for Bright to identify the newscast from which he had recognized Miramon. Miramon alleges this meeting was in violation of a court order that any examination of such newscasts must be conducted in the presence of counsel and on the record. The state responds that "the record does not reflect that the trial court ordered the parties to review the newscasts with [Bright] only in court."

¶10 When Miramon's counsel objected to the meeting, the trial court conceded that its ruling on this issue was less than clear: "I probably could have been a little more forthright . . . I think I ruled by saying I can understand that, and perhaps that didn't come across as strong as it needed to."[2] The court denied Miramon's motion for a mistrial but permitted him to cross-examine Bright about his meeting with the prosecutor. The record does not establish that the meeting constituted prosecutorial misconduct.

¶11 Second, Miramon alleges the state elicited testimony from Muhammed that the shooter was affiliated with a gang. However, the record shows that Muhammed's testimony was an unexpected, voluntary response:

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[2]The actual text of the court's order is not found in the record.

> Q. [by prosecutor] So [Miramon] started saying: Yeah? What? What? The tall, skinny one does?
>
> A. Yes.
>
> Q. Okay. And what do they do after they say: Yeah? What? What?
>
> A. The other two were pretty much focused on just continuing their route through the AM/PM, but he was more aiming this direction towards us, saying, What? Saying his gang affiliation, and—pretty much just, he was mouth—just saying everything.

¶12 Contrary to Miramon's contention, the prosecutor's questions were not aimed at eliciting this response. Indeed, at several points the prosecutor attempted to refocus the witness on the defendant's actions rather than his words: "What I'm asking you is, what did he do, not what did he say?" Furthermore, in response to Miramon's motion for a mistrial, the trial court instructed the state to elicit testimony from Detective Bracamonte that there was "no information that Luis Miramon was a known or affiliated gang member." "When a witness unexpectedly volunteers an inadmissible statement, the remedy rests largely within the discretion of the trial court." *State v. Marshall*, 197 Ariz. 496, ¶ 10, 4 P.3d 1039, 1043 (App. 2000); *see also State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983).

¶13 Third, Miramon alleges the state violated a court order by eliciting testimony from Detective Bracamonte that she had used video from the convenience store to help her choose the photographs she had used in the lineup. The court had granted Miramon's pretrial motion to preclude Bracamonte from testifying that she had identified him from the

convenience store surveillance video. However, Bracamonte's testimony was not elicited by the prosecution and appears to have been a slip of the tongue by the detective. She stated she had intended to refer to the video from Famous Sam's rather than the one from the AM/PM, because she had, in fact, used the video from Famous Sam's to select the photographs. The court decided to remedy the error by allowing Bracamonte to unequivocally correct her prior statement, and admit to misspeaking when she had referred to the AM/PM rather than the Famous Sam's video. In response to Miramon's second motion for a mistrial, the court further sought to redress any damage resulting from the reference to the AM/PM video by allowing defense counsel to question the detective about out-of-court statements she had made concerning similarities between Miguel and the defendant.

¶14 "Determination of whether a particular action is misconduct depends to some extent on the circumstances of the particular case." *Pool v. Superior Court*, 139 Ariz. 98, 102, 677 P.2d 261, 265 (1984). In this case, the state did not commit misconduct by its alleged "violation" of a verbal ruling that the court admitted was unclear. *See State v. Zuck*, 134 Ariz. 509, 511, 658 P.2d 162, 164 (1982) (appellant bears burden of assuring record on appeal sufficient to enable review of challenged ruling). Neither did the state's questioning of two witnesses resulting in unsolicited, potentially prejudicial testimony,

constitute prosecutorial misconduct.[3] The trial court did not abuse its discretion by refusing to declare a mistrial and denying Miramon's motion for a new trial.

In-court identification of defendant

¶15 We next address Miramon's claim that the trial court abused its discretion in allowing Bright to make an in-court identification of him.[4] Miramon also contends the court should have barred Bright's testimony on grounds of unreliability, late disclosure, and prosecutorial misconduct. However, since he cites no authority for these claims, we only consider them to the extent they overlap with the first claim. *See Carver*, 160 Ariz. at 175, 771 P.2d at 1390.

¶16 In Arizona, the "'fairness and reliability of a challenged identification are preliminary matters for the trial court whose findings will not be overturned on appeal absent a showing of clear and manifest error.'" *State v. Day*, 148 Ariz. 490, 495, 715 P.2d 743, 748 (1986), *quoting State v. Hooper*, 145 Ariz. 538, 544, 703 P.2d 482, 488 (1985). Miramon argues Bright's in-court identification at trial had been tainted by his viewing of a newscast showing the defendant's "mug shot" photograph. He claims that since the photograph was disseminated to the media outlets by the police, the broadcast constitutes

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[3]Our conclusion would be the same had the state's actions constituted prosecutorial misconduct. Given the court's prompt action to cure any prejudice that might have resulted from the two pieces of unelicited testimony, there is no reasonable probability that the verdict was affected.

[4]In his opening brief, Miramon frames this issue in terms of the court's denial of his *Dessureault* motion. *See State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1960).

state action. Generally, in order to trigger an analysis of whether a defendant has been denied due process of law because of suggestive pretrial identification procedures, the identification must have been the result of state action. *State v. Prion*, 203 Ariz. 157, ¶ 14, 52 P.3d 189, 192 (2002). When "the state action requirement of the Fourteenth Amendment . . . cannot be established, due process analysis is inapposite." *State v. Nordstrom*, 200 Ariz. 229, ¶ 24, 25 P.3d 717, 729 (2001). In *Nordstrom*, a witness who had failed to identify a defendant in a photographic lineup was able to identify him after watching a newscast showing his arraignment. *Id.* ¶ 22. Our supreme court found that because "the media, rather than the State" had allegedly tainted the identification, no state action had occurred and a "due process analysis [was] inapposite." *Id.* ¶ 24. Bright similarly failed to identify Miramon in a photographic lineup, but was able to identify him after viewing a television news bulletin that showed his photograph. Thus, any shortcomings in Bright's pretrial identification were not the result of state action.

¶17 Our supreme court has suggested that in rare instances due process concerns might also be implicated in the absence of state action, "when evidence lacking in foundation reaches the jury under circumstances that do not afford a defendant an opportunity to point out its weaknesses." *Id.* ¶ 26. However, in this case Miramon's counsel thoroughly cross-examined Bright and elicited inconsistencies between his failure to identify the defendant at the photographic lineup and the *Dessureault* hearing and his in-court identification in which he stated he was only eighty percent sure Miramon was the man

who had pointed the gun at him. We therefore find the trial court did not err in admitting Bright's in-court identification.

Photographic lineup

¶18 In a related argument, Miramon contends the state committed prosecutorial misconduct by not putting Miguel in the photographic lineups viewed by Bright and the other two witnesses prior to their in-court identifications. Because Miramon did not make this argument below, he forfeited all but a review for fundamental error. *State v. Martinez*, 210 Ariz. 578, n.2, 115 P.3d 618, 620 n.2 (2005). Fundamental error is error that goes to the foundation of a case such that the defendant could not have received a fair trial. *See State v. Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d 601, 608 (2005). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶19 Miramon argues the omission of Miguel from the photographic lineups constituted prosecutorial misconduct and interfered with Miramon's right to present a defense of misidentification. However, there is no evidence the prosecution played any role in excluding Miguel from the lineups, which took place about a year before trial. Rather, the record shows that the police selected the photographs for the lineups based on an anonymous tip suggesting the shooter was someone nicknamed Pee Wee. Since Miramon was nicknamed Pee Wee, the police included his photograph in the lineups.[5] Miramon cites

[5]Miguel's nickname was Angel, and he was therefore not included in the lineups.

no authority to support his contention that the independent actions of law enforcement in focusing its investigation on one suspect rather than another can constitute prosecutorial misconduct. On the contrary, our supreme court has refused to "speculate on appeal about 'what might have been' or 'what could have happened[]'" had the police investigated alternative theories, when "ample evidence existed to support the convictions."[6] *Atwood*, 171 Ariz. at 606, 832 P.2d at 623. Because "[l]ineups need not and usually cannot be ideally constituted . . . the law only requires that they depict individuals who basically resemble one another such that the suspect's photograph does not stand out." *State v. Alvarez*, 145 Ariz. 370, 373, 701 P.2d 1178, 1181 (1985) (citation omitted). Miramon does not otherwise challenge the sufficiency of the photo lineups. We find no merit to his argument and thus no error.

Motion to dismiss

¶20 Miramon argues the trial court should have granted his motion to dismiss on the ground the state committed prosecutorial misconduct by failing to ascertain the identity of the anonymous caller who had told police that "Pee Wee" had committed the shooting. We review a trial court's ruling on a motion to dismiss criminal charges for an abuse of discretion. *State v. Medina*, 190 Ariz. 418, 420, 949 P.2d 507, 509 (App. 1997).

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[6]We are also unpersuaded by Miramon's allegation of prosecutorial misconduct with regard to the police decision not to pursue the identity of the anonymous 911 caller, which similarly relies on speculation about the outcome of the case had the police investigated alternate theories.

¶21 Citing *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333 (1988), Miramon claims Detective Bracamonte had failed to preserve evidence of the identity of the 911 caller who had identified the shooter as Pee Wee and that this evidence could have formed a basis for exonerating him. In *Youngblood*, a sexual assault case, police failed to preserve physical evidence and carry out forensic tests which might have exonerated the defendant. *Id.* at 58, 109 S. Ct. at 337-38. However, "[n]one of this information was concealed from [the defendant] at trial, and the evidence—such as it was—was made available to [defendant's] expert who declined to perform any tests on the samples." *Id.* at 58, 109 S. Ct. at 337. Finding that the actions of the police had, at worst, been negligent, the United States Supreme Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.*

¶22 Miramon alleges that the police acted in bad faith. However, he fails to support this claim with any evidence, provide relevant authority,[7] or distinguish the current case from *Youngblood*. The evidence at issue in this case is a purported list—which may never have even existed—showing calls routed to a cellular telephone tower on the same day as the 911 call and containing as many as a million telephone numbers. If the list did exist it was routinely destroyed 180 days after the call was made. As in *Youngblood*, the state

[7]In fact, he concedes that he is unable to find a relevant criminal case defining bad faith.

disclosed information about the evidence to Miramon, including a recording of the 911 call. The exculpatory potential of any missing list is arguably more tenuous than the evidence at issue in *Youngblood*. However, Miramon does not show, if such a list did exist, that its routine destruction was carried out in bad faith. We therefore find the trial court did not abuse its discretion in denying Miramon's motion to dismiss.

Confrontation Clause

¶23 In a related argument, Miramon claims the admission of testimony that an anonymous 911 caller identified the shooter as Pee Wee violated his rights under the Sixth Amendment Confrontation Clause. Miramon did not raise this argument at trial. "A defendant generally waives his objection to testimony if he fails either to ask that it be stricken, with limiting instructions given, or to request a mistrial." *State v. Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d 899, 916 (2006). We therefore review for fundamental error. *See Martinez*, 210 Ariz. 578, n.2, 115 P.3d at 620 n.2.

¶24 "[T]he admission of testimonial statements of a witness who did not appear at trial" is generally prohibited under the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 54, 124 S. Ct. 1354, 1365 (2004). 911 calls can be considered testimonial when they describe past events and there is no "imminent danger" to the caller. *Davis v. Washington*, __ U.S. __, __, 126 S. Ct. 2266, 2276 (2006). "If proposed out-of-court statements will probably be considered by the jury for the truth of the matters stated therein,

the evidence should be considered the functional equivalent of hearsay for Confrontation Clause purposes." *State v. Moss*, 215 Ariz. 385, ¶ 18, 160 P.3d 1143, 1148 (App. 2007).

¶25 Here, Bracamonte confirmed at trial that she had acted upon an anonymous 911 tip identifying the shooter as Pee Wee. The context of her testimony suggests the trial court intended to admit her testimony to explain the course of the police investigation, and in particular why the police included Miramon in their photographic lineups. However, the court failed to give an instruction limiting the jury's use of the testimony to this purpose and excluding its use in determining Miramon's guilt or innocence. Thus, the testimony was effectively admitted for the truth of the matter asserted,[8] *see State v. Fulminante*, 193 Ariz. 485, ¶ 50, 975 P.2d 75, 90 (1999), triggering both a potential hearsay objection that Miramon failed to raise either at trial or on appeal, *see State v. Ramirez Enriquez*, 153 Ariz. 431, 432, 737 P.2d 407, 408 (App. 1987), and a violation of Miramon's Confrontation Clause rights under *Crawford*. "We review de novo evidentiary rulings that implicate the Confrontation Clause." *State v. Tucker*, 215 Ariz. 298, ¶ 61, 160 P.3d 177, 194 (2007).

¶26 We find that the trial court erred in failing to provide an appropriate limiting instruction for testimony about the anonymous tip.[9] However, Bracamonte's references to

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[8]This is particularly the case as the jury had heard from another witness that Miramon was nicknamed Pee Wee.

[9]Some courts outside our jurisdiction have gone further, suggesting that in certain Confrontation Clause situations where a jury is highly likely to ignore a limiting instruction, such evidence should be excluded entirely. However, such decisions "are inconsistent with pre-*Crawford* statements of the Arizona Supreme Court." *State v. Moss*, 215 Ariz. 385, n.8,

the tip were brief and the state did not refer to either it or to Miramon's nickname in closing. *See Ellison*, 213 Ariz. 116, ¶ 62, 140 P.3d at 916 (fundamental error absent where testimony brief and not referred to in closing statement). Miramon has the burden of showing how the admission of Bracamonte's testimony prejudiced him, and he has not attempted to do so. *See Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608-09. Reginald and Muhammed, two eyewitnesses, identified Miramon as the shooter from photographic lineups and again in court. Miramon has not challenged either of these identifications. We cannot conceive how fleeting testimony about the anonymous tip could have caused him sufficient prejudice to have affected the outcome of the case. We therefore find no fundamental error.

Motion for mistrial

¶27 Finally, Miramon argues the trial court erred in denying his motion for a mistrial, which was prompted by an emotional outburst by the victim's mother.[10] Because the trial court is best able to sense the possible effect an objectionable statement may have had on the jury, it is granted broad discretion in ruling on a motion for mistrial. *State v. Bailey*, 160 Ariz. 277, 279, 772 P.2d 1130, 1132 (1989). We do not reverse that determination unless there is a clear abuse of discretion. *Id*.

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160 P.3d 1143, 1148 n.8 (App. 2007).

[10]Miramon also makes a claim of prosecutorial misconduct concerning this incident. Applying our earlier analysis of his similar claims regarding the two pieces of unsolicited testimony, we find that the state played no part in eliciting this outburst and thus there was no prosecutorial misconduct.

¶28 During the trial, the mother of the victim burst into tears and repeated the phrase, "Brains on the seat," when a witness recounted the facts of her son's death. Miramon moved for a mistrial. The court denied the motion and questioned each juror individually about whether he or she could remain fair and impartial in the light of this outburst. Each of the jurors affirmed that they could do so.

¶29 "A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). In this case, the trial court, by receiving confirmation from each of the jurors that the outburst would not affect their impartiality, satisfied itself that justice could still be done with the existing jury. We therefore find no abuse of discretion by the court in denying Miramon's motion for mistrial.

Conclusion

¶30 We affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge