

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
MAR 31 2008
COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)
)
Appellee,)
)
v.)
)
BRADLEY ALAN SCHWARTZ,)
)
Appellant.)
_____)

2 CA-CR 2006-0213
DEPARTMENT B
MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20043995

Honorable Nanette M. Warner, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Joseph L. Parkhurst

Tucson
Attorneys for Appellee

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By Brick P. Storts, III

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E S P I N O S A, Judge.

¶1 Appellant Bradley Schwartz was convicted after a jury trial of conspiracy to commit first-degree murder. The trial court sentenced him to prison for life without the

possibility of release for twenty-five years.¹ On appeal, Schwartz raises numerous issues that he contends require the reversal of his conviction and sentence. For the reasons below, we affirm.

Factual and Procedural Background

¶2 This case arises from the murder of David Stidham on October 5, 2004. At trial, the state’s theory was that Schwartz had hired a third party, Ronald Bigger, to kill Stidham. The evidence at trial, viewed in the light most favorable to sustaining Schwartz’s conviction and sentence, established the following facts.² See *State v. Andriano*, 215 Ariz. 497, n.1, 161 P.3d 540, 543 n.1 (2007).

¶3 Both Stidham and Schwartz were pediatric ophthalmologists. From 2001 to 2002, Stidham worked for Schwartz, who owned a successful pediatric ophthalmology practice in Tucson. In October 2002, after the State Medical Board learned Schwartz had been abusing prescription pain medication, it suspended his medical license and required him to seek drug abuse treatment. The Drug Enforcement Agency (DEA) also withdrew Schwartz’s license to prescribe controlled substances. In November, while Schwartz was in

¹Although the trial court sentenced Schwartz to life imprisonment without possibility of “parole,” the terms of the applicable statute, A.R.S. § 13-1003, are “without possibility of release on any basis.”

²Because the guilty verdict is based primarily upon circumstantial evidence, we provide a detailed account of the facts.

a residential treatment facility in Tucson, Stidham left Schwartz's practice and opened his own medical office.

¶4 In February 2003, Schwartz was released from treatment. His medical license was reinstated in October, and he thereafter reopened his medical office. Although Schwartz's practice grew throughout 2004, it was considerably less successful than it had been before his leave of absence: his income was greatly reduced, the DEA had not reinstated his license to prescribe drugs, and several hospitals and health care organizations had revoked his privileges. Moreover, several of Schwartz's patients and employees had left his practice and followed Stidham to his new office.

¶5 Schwartz blamed Stidham for his misfortune and believed Stidham had "left [him] when [he] needed him the most." He became "obsessed with revenge" and wanted to humiliate Stidham and destroy his practice. Schwartz considered planting child pornography or illegal drugs in Stidham's office; he asked a friend to claim Stidham had sexually assaulted her during treatment; and he asked a woman he had met at the treatment center to claim Stidham had fondled her child. He repeatedly told friends that Stidham was "going to die," and he asked several people to "take care of" Stidham or to "poke[] out" his eyes, "crush his hands," or "throw acid in his face." In February 2004, he reportedly paid a man \$5,000 to kill Stidham, but the plan was foiled when the hired killer was himself murdered in March. Schwartz told his girlfriend that he was going to hire someone to kill Stidham outside Stidham's medical office and that it would look like a carjacking.

¶6 On the night of the murder, Stidham conducted an ophthalmology seminar for medical students in his office at 6:00 p.m. The seminar concluded at 7:00, and the attendees had all left by 7:15. At 7:26, the alarm to Stidham's office was activated, indicating the time he left for the evening. At 10:30 p.m., an employee in the complex where Stidham's office was located returned with her fiance to retrieve an item she had left there. They found Stidham's body on the ground in the parking lot and called 911. An autopsy revealed that Stidham had died from several stab wounds to the chest. His wallet, containing his credit cards and some cash, was found inside his pants pocket. His vehicle registration was found on the ground near his body, but his vehicle was gone.

¶7 Before the seminar, at approximately 5:45 p.m., several people had seen a man in blue medical "scrubs" sitting on a curb in the parking lot outside Stidham's office. Neither of two men who routinely wore scrubs to work at the complex had been there at that time. At 6:00 p.m., a man wearing blue scrubs, later identified as Ronald Bigger, entered a convenience store near the office complex. He placed several calls from the store phone and left the store at approximately 6:45. About ten minutes later, a man called the store from Schwartz's cell phone, told the store clerk that a man had just called him from that number, and asked whether the caller was still in the store. The clerk informed him the man had left a few minutes earlier. When Bigger left the store, he had been seen walking in the direction of Stidham's office.

¶8 Later that evening, Bigger entered a midtown restaurant located about a fifteen-minute drive from Stidham's office. Stidham's vehicle was later found in a parking lot a short walk from the restaurant. At 7:46 p.m., Bigger called Schwartz from a pay phone at the restaurant. Bigger then hailed a taxicab to drive him to another restaurant where Schwartz was having dinner with a companion, Lisa Goldberg. En route, Bigger borrowed the taxi driver's telephone and, at 8:19 p.m., placed another call to Schwartz.

¶9 When the taxicab arrived at the restaurant, Schwartz came out and paid the fare. Bigger, who was now wearing casual clothes, joined the two inside for dinner. Goldberg recognized Bigger from Schwartz's office, where she had been introduced to him earlier that day. She noted that he now appeared extremely agitated. Schwartz asked Bigger how the scrubs had "worked out." Significantly, in July, Schwartz had attempted to solicit a prospective "hit man" and said he could provide scrubs to be worn while assaulting Stidham.

¶10 After dinner, Schwartz, Goldberg, and Bigger left in Schwartz's car to find a hotel room for Bigger. Several hotels were full, but they eventually secured a room. After Schwartz paid for the room, he and Goldberg left Bigger there and returned to Schwartz's apartment. The next day, Schwartz withdrew \$10,000 from his bank account. Bigger was seen that day carrying a large amount of cash in a white envelope. The month before Stidham was murdered, Schwartz had mentioned to Goldberg that he knew a man who was willing to kill someone for \$10,000. Upon learning Stidham had been murdered, Goldberg

believed Schwartz was responsible. When she asked him about it, he replied that he had not been involved but added that she was “his alibi.”

¶11 On October 25, 2004, Schwartz and Bigger were each indicted on one count of first-degree murder and one count of conspiracy to commit first-degree murder. Their cases were severed for trial. The jury could not reach a decision on the first-degree murder charge, which the trial court dismissed without prejudice. As noted earlier, the jury found Schwartz guilty of conspiracy to commit first-degree murder, and he was sentenced to life in prison. This appeal followed.

Discussion

¶12 On appeal, Schwartz raises numerous claims, arguing the trial court erred when it limited his ability to present a defense of third-party culpability, admitted hearsay evidence, precluded him from offering witnesses to impeach the testimony of one of the state’s witnesses, precluded him from offering character evidence, and denied his request to have the jury determine his Rule 20 motion. He also alleges multiple acts of prosecutorial misconduct and contends the trial court mishandled several issues concerning the publicity surrounding the trial.

a. Third-Party Culpability Evidence

¶13 In March 2005, Schwartz advised the trial court he intended to present evidence that a third party, Dennis Walsh, had murdered Stidham. He claimed his investigator had located several inmates at the Pima County jail who had information

connecting Walsh to Stidham's murder, including one who had been at a party with Walsh and had heard him confess to the murder. Schwartz also sought to introduce evidence that Walsh had pled guilty to committing two carjackings and sixteen robberies that had occurred in the area of Stidham's medical office in the weeks surrounding the murder. The state moved to preclude this evidence.

¶14 After a hearing on the state's motion, the trial court ruled that Schwartz could present evidence of the two carjackings as well as testimony connecting Walsh to the murder. But the court found that the evidence of the robberies was irrelevant, that its sole purpose would be to show Walsh was a "bad guy," and that its probative value would be substantially outweighed by the danger of confusing the jurors. Schwartz now contends the court erred in precluding the evidence, a decision we review for an abuse of the trial court's discretion. *See State v. Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d 189, 193 (2002).

¶15 Generally, a defendant is entitled to present evidence that the crime with which he is charged was committed by another person. *See State v. Dann*, 205 Ariz. 557, ¶ 30, 74 P.3d 231, 242 (2003). The trial court must first determine, however, whether the proffered evidence is relevant, *i.e.*, whether it tends to create a reasonable doubt as to the defendant's guilt. *See State v. Gibson*, 202 Ariz. 321, ¶¶ 13, 16, 44 P.3d 1001, 1003-04 (2002). If so, the evidence is admissible unless "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.” *Id.* ¶ 13, *quoting* Ariz. R. Evid. 403. The greater the probative value of the evidence, the less probable that factors of prejudice or confusion will substantially outweigh its value. *Id.* ¶ 17. Because this weighing of factors is not easily quantified, we accord the trial court substantial deference. *Id.*

¶16 Schwartz maintains evidence of the robberies was relevant because all of them occurred in the vicinity of Stidham’s medical office and in the weeks surrounding the murder. And he notes, during at least one of the robberies, Walsh displayed a knife.³ The robberies Walsh committed, however, bear little resemblance to the crime with which Schwartz and Bigger were charged. In each instance, Walsh had approached the clerk of a store during regular business hours and demanded money. During none of the robberies was any person injured. And, although Walsh indeed displayed a knife during one robbery, he did not attempt to use it. By contrast, the murder of Brian Stidham involved a violent attack in a parking lot after hours, and the victim’s wallet, containing cash and credit cards, was left in his pants pocket. Evidence of the robberies would have shown that Walsh had a penchant for committing crimes—in the trial court’s words, “that Mr. Walsh is a bad guy”—but evidence is not admissible when offered solely for such purpose. *See* Ariz. R. Evid. 404(b);

³Schwartz also contends “the court erred in precluding [his] third-party defense in its entirety.” This assertion is not supported by the record because the trial court precluded only part of the evidence that Schwartz sought to admit. During trial, however, Schwartz did not present any evidence of third-party culpability.

see also State v. Lacy, 187 Ariz. 340, 348, 929 P.2d 1288, 1296 (1996) (evidence of other crimes inadmissible “because the crimes were dissimilar” to those with which defendant charged). Accordingly, we cannot say the trial court abused its discretion in finding the mere proximity of the robberies to the murder scene and Walsh’s use of a knife insufficiently probative on the question whether Schwartz committed the offense and in precluding this evidence. *See Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d at 193.

b. Prosecutorial Misconduct

¶17 Schwartz next contends the prosecutor committed multiple acts of misconduct during trial that require the reversal of Schwartz’s conviction. He claims the prosecutor’s actions throughout the trial demonstrate both reckless indifference and intentional misconduct that denied him a fair trial. We examine the alleged instances of misconduct individually as well as for their cumulative effect on the trial. *See State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998) (courts must evaluate the cumulative effect of misconduct). Schwartz made several motions for mistrial, which the trial court denied. We review the trial court’s rulings for an abuse of discretion. *See State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006).

¶18 Prosecutorial misconduct “‘is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.’” *State v.*

Aguilar, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate the misconduct so infected the trial with unfairness that it denied him a fair trial and made the resulting conviction a denial of due process. See *Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191.

i. The “Mug Shot”

¶19 On the ninth day of trial, the state called as a witness Dr. Jason Lee, who had attended Stidham’s seminar the night of the murder. Lee testified that, before the seminar, he had seen a man in blue scrubs in the parking lot outside Stidham’s office. On cross-examination, Lee stated he had subsequently seen photographs of both Schwartz and Bigger in the media and the person he had seen in the parking lot had not resembled either of them. On redirect, the prosecutor asked Lee whether the media photographs of Schwartz and Bigger had depicted the full length of their bodies, and Lee answered that they had. The prosecutor then asked: “As to Mr. Bigger, it was not just a mug shot[?]” Defense counsel objected to the prosecutor’s use of the term “mug shot,” and the trial court sustained the objection.

¶20 Schwartz now claims the prosecutor improperly implied that Bigger had a criminal history by referring to a “mug shot” and the implication was beneficial to the state’s case. We disagree for several reasons. First, we cannot say the prosecutor necessarily intended to imply that Bigger had a criminal history. When the prosecutor’s question is

viewed in context, it could have been intended to merely differentiate between a photograph of the entire body and a photograph of a person's face. Moreover, the jury was likely aware that Bigger had been arrested, given that there had been widespread media coverage of the case. Therefore, the prosecutor could have been referring to Bigger's booking photo. This equivocal reference does not rise to the level of intentional misconduct requiring the reversal of a conviction. *See Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27. In any event, Schwartz's objection to the prosecutor's use of the term was sustained, and we presume the jurors followed the court's previous instruction to disregard such statements. *See State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007). Schwartz concedes in his opening brief that this incident alone does not establish prosecutorial misconduct but must be viewed in light of other instances, which we now examine.

ii. Federal Charges

¶21 In 2001, the DEA began to investigate the purchase of controlled substances with prescriptions Schwartz had written for his then girlfriend and one of his employees. In 2002, Schwartz was indicted in federal court for prescription-drug fraud and, in 2003, he entered into a plea agreement that required his participation in a federal diversion program. Before this trial began, the court prohibited the state from introducing evidence of the federal investigation, indictment, or plea agreement.

¶22 On the twelfth day of trial, the state called Stephanie Nagel as a witness. Nagel testified she had met Schwartz at the federal courthouse in late 2003 or early 2004 and

subsequently saw him there weekly. The prosecutor then asked Nagel why she had been at the courthouse; defense counsel interjected, “Judge—,” and the trial court ordered a bench conference. At sidebar, the prosecutor assured the court she would not ask Nagel to testify about Schwartz’s legal problems in federal court. The prosecutor then asked the following questions:

Q: Were you dropping a urine sample for drug testing at the federal building?

A: Yes, ma’am.

Q: Was that part of your pretrial release conditions?

A: Yes.

Q: Because you had some legal problems?

A: Yes.

Q: Did the defendant tell you that he too was at the federal building to drop urine samples for drug testing?

A: Yes.

Throughout Nagel’s testimony, the prosecutor referred several more times to Nagel’s indictment in federal court and to her having met Schwartz at the federal courthouse while she was there to provide urine samples. Following Nagel’s testimony, defense counsel moved for a mistrial, which the trial court denied.

¶23 Schwartz contends the prosecutor acted improperly by eliciting testimony that he had been at the federal court. He claims the jury “clearly understood that [he], like Ms.

Nagel, was at the federal building to provide urine samples because he, like Ms. Nagel, had ‘some legal problems.’”⁴ First, we note that Schwartz never objected to the prosecutor’s questioning during Nagel’s testimony. After the bench conference held at the beginning of the testimony, at which the prosecutor assured the court she would “lead [the witness] through it,” Schwartz did not object to the prosecutor’s line of questioning until Nagel had completed her testimony and left the witness stand, at which time he moved for a mistrial. The trial court denied his motion on the ground he had not objected earlier.

¶24 One purpose of an objection is to give a trial court the opportunity to cure any possible error. *See State v. Rutledge*, 205 Ariz. 7, ¶ 30, 66 P.3d 50, 56 (2003). The court was not afforded that opportunity here, however, because Schwartz did not raise any objection during Nagel’s testimony. Although a defendant need not object to every instance of prosecutorial misconduct in order to preserve the issue for appeal, *see Hughes*, 193 Ariz. 72, ¶ 58, 969 P.2d at 1197, he should object at least once. *See Rutledge*, 205 Ariz. 7, ¶¶ 29-30, 66 P.3d at 56. Schwartz failed to do so, and the trial court expressly denied the motion for mistrial for that reason.

⁴In his opening brief, Schwartz claims that, after Nagel testified, she signed an affidavit stating the prosecutors “had never talked with her about the court’s ruling and had never instructed her not to mention that [Schwartz] had been indicted on federal charges or was at the federal building as the result of the federal charges.” That affidavit is not part of the record on appeal, and we therefore do not consider it. *See State v. Griswold*, 8 Ariz. App. 361, 363, 446 P.2d 467, 469 (1968). But, even if admitted, such an affidavit would not affect our analysis.

¶25 Schwartz did, however, file a motion in limine to preclude evidence of the federal proceedings; thus, we find the issue was preserved for appeal. *See State v. Burton*, 144 Ariz. 248, 250, 697 P.2d 331, 333 (1985) (“[W]here a motion in limine is made and ruled upon, the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial.”). Generally, a prosecutor is “not entitled to refer, by innuendo or otherwise,” to evidence the trial court has precluded. *See State v. Leon*, 190 Ariz. 159, 163, 945 P.2d 1290, 1294 (1997). Here, it appears the prosecutor used innuendo in questioning Nagel to indirectly allude to the federal charges against Schwartz, in violation of the trial court’s order.⁵ But the trial court was in the best position to gauge the effect of the testimony on the jury, *see Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d at 846, and we cannot say it erred in implicitly concluding any prejudice to Schwartz was insufficient to warrant a mistrial. We note that other, properly admitted evidence showed Schwartz’s medical license had been suspended and his license to prescribe controlled substances revoked.

⁵Although we cannot discern the relevance of Nagel’s testimony that Schwartz, too, had been at the federal building submitting urine samples for drug testing, we cannot say the prosecutor’s actions necessarily constituted misconduct. The testimony in question occurred immediately following a bench conference on the scope of the prosecutor’s questioning. But neither the trial court nor defense counsel stopped, or apparently even reacted to, the questioning, and, as the state points out, the prosecutor did not refer to Schwartz’s federal indictment, plea agreement, or diversion. Thus, although it appears the prosecutor indirectly elicited matters the trial court had precluded, the lack of any contemporaneous reaction by defense counsel or the court tends to suggest the testimony was innocuous if not within the limits imposed by the court.

Testimony implying that Schwartz had additional legal problems was therefore highly unlikely to affect the jury's verdict. *See Leon*, 190 Ariz. at 162, 945 P.2d at 1293.

iii. Harm to Second Doctor

¶26 The day after Nagel's testimony, the state called Carmen Fernandez as a witness. She testified Schwartz had once asked her if she knew anyone who could "take care of" Stidham. The prosecutor then asked Fernandez if Schwartz had ever mentioned "another doctor that he wanted to be taken care of," and Fernandez replied he had. Defense counsel immediately objected and moved for a mistrial. At the ensuing bench conference, defense counsel claimed it was "extremely inappropriate to point out the fact that [Schwartz] may have been bringing threats against other doctors." The prosecutor explained she wanted to "elicit a difference in what [Schwartz] wanted done between the two doctors. One he wanted killed, one he wanted harmed." The trial court denied a mistrial but sustained the objection and ordered the jurors to disregard the testimony.

¶27 Schwartz contends the prosecutor intentionally and improperly elicited testimony about other crimes, wrongs, or acts in violation of Rule 404(a) and (b), Ariz. R. Evid., and further claims the prosecutor's explanation for eliciting the testimony is "absurd." We need not determine the prosecutor's intentions or the plausibility of her explanation, however, because we defer to the trial court's judgment on such matters. *See United Metro Materials, Inc. v. Pena Blanca Props., L.L.C.*, 197 Ariz. 479, ¶ 22, 4 P.3d 1022, 1026 (App. 2000) (whether to accept avowal of counsel within trial court's discretion). More

importantly, we can say beyond any reasonable doubt that Fernandez’s testimony did not affect the jury’s verdict. *See Leon*, 190 Ariz. at 162, 945 P.2d at 1293 (prosecutorial misconduct does not require reversal if “it can be said beyond a reasonable doubt that counsel’s statements did not affect the verdict”). Including Fernandez, the state called four witnesses who each testified that Stidham had asked them personally to find someone to “injure” Stidham. And three additional witnesses testified Schwartz had told them he intended to find someone to injure Stidham. In light of this overwhelming and uncontested evidence that Schwartz had been looking for someone he could hire to harm Stidham, the fact that Schwartz may also have wished to harm another doctor would have had no effect on the jury’s verdict. *See id.* Moreover, the trial court ordered the jurors to disregard the statement, and we assume they followed that instruction. *See McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d at 938.

iv. Schwartz’s Palm Pilot

¶28 Prior to trial, the state sent to defense counsel a compact disc (CD) containing information the state had retrieved from a computer seized from Schwartz’s home. The CD contained the equivalent of several hundred pages of information. Defense counsel inquired what information on the CD the state intended to offer as evidence at trial and, specifically, whether the state intended to use any information that had been transferred to the computer from Schwartz’s personal “Palm Pilot” device. The state responded in an electronic mail (e-

mail) message that it intended to use a certain memorandum it had recovered, but it did not mention the Palm Pilot.

¶29 Jeff Englander, formerly a Pima County Sheriff's Department investigator, had retrieved the data from Schwartz's computer. At trial, Englander testified the computer had also contained information downloaded from Schwartz's Palm Pilot. The state then offered into evidence an exhibit detailing information obtained from the Palm Pilot, which the trial court admitted over defense counsel's objection. Englander testified that the only entry in the Palm Pilot address listings that contained information about a vehicle model and license plate number was the entry for Stidham. Schwartz requested a mistrial or, alternatively, that Englander's testimony about the Palm Pilot be stricken from the record. The trial court denied a mistrial but, after a subsequent hearing, found the state had failed to properly disclose the Palm Pilot information. The court instructed the jurors to disregard the exhibit and any testimony about it.

¶30 Schwartz contends the state's nondisclosure was an "egregious act[] of prosecutorial misconduct." But we cannot say the trial court erred in finding otherwise. As discussed above, the state before trial had provided defense counsel a CD containing all the information retrieved from Schwartz's computer, including the information from the Palm Pilot. The state had also included instructions about how to open and read the information on the CD. Thus, defense counsel was in possession of the evidence in question several weeks before trial. The state responded to defense counsel's inquiry about what information

from the CD the state intended to offer in evidence with an informal e-mail message that failed to mention the Palm Pilot. The totality of the circumstances suggests, as the trial court apparently found in denying a mistrial, that the prosecutor's actions were the result of negligence or mistake rather than intentional conduct, and we defer to its determination. *See Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d at 846. And, again, the trial court ordered the testimony and exhibit stricken and admonished the jury to disregard it, an admonition we assume the jurors followed. *See McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d at 938.

¶31 Moreover, the Palm Pilot evidence in question showed that Schwartz had noted the model and license plate number of Stidham's vehicle. The introduction of this evidence was harmless because the jurors later learned that Schwartz had known Stidham's vehicle model and license plate number when another witness testified to that fact without objection. *See State v. Torres*, 127 Ariz. 309, 311, 620 P.2d 224, 226 (App. 1980) (improperly admitted evidence harmless when cumulative of properly admitted evidence). We can therefore say beyond a reasonable doubt that the stricken Palm Pilot evidence did not affect the outcome of the trial. *See Leon*, 190 Ariz. at 162, 945 P.2d at 1293.

v. Reference to Indictment

¶32 On the fourteenth day of trial, the state called as a witness Lourdes Salomon-Lopez, who had been engaged to Schwartz from January to May 2004. Lopez, along with Schwartz, had been indicted in federal court for prescription-drug fraud. In 2002, her then-employer, the Pima County Attorney's Office, learned of the pending indictment and gave

her the option of resigning or being terminated from her position as a deputy county attorney. Lopez chose to resign.

¶33 On direct examination, the prosecutor asked Lopez: “Was there a reason why you left the Pima County Attorney’s Office in 2002?” Lopez replied: “Because I knew that I was going to be indicted.” Defense counsel objected and requested a mistrial, asserting the jury now knew that Schwartz and Lopez had been indicted, in violation of the court’s order precluding evidence of the federal prosecution or plea agreement. The court implicitly overruled Schwartz’s objection by denying the motion for mistrial. After Lopez finished testifying, she told the trial court the state had not informed her of the order precluding evidence of the federal proceedings.

¶34 Schwartz contends the prosecutor’s failure to inform Lopez of the court’s order constitutes prosecutorial misconduct. Whether the omission was an oversight or something more, we note that the prosecutor informed the court that Lopez’s counsel had not permitted him to contact Lopez before that day. As observed earlier, prosecutorial misconduct “is not merely the result of legal error, negligence, mistake, or insignificant impropriety,” *Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426, *quoting Pool*, 139 Ariz. at 108, 677 P.2d at 271, and we cannot say the trial court erred in not finding the prosecutor’s failure to inform Lopez to be more than negligence or mistake. Her testimony did not violate the court’s order; she testified that she believed *she*, not Schwartz, would be indicted. We fail to see how her testimony necessarily implied that Schwartz had been indicted, and we defer to the trial

court's observation that "the response of Ms. Lopez was not one that the State sought to elicit, but was the result of non-leading questions."

vi. DNA Testimony

¶35 Before trial, Curtis Reinbold, a criminalist for the Department of Public Safety (DPS), examined deoxyribonucleic acid (DNA) that had been swabbed from the radio knob of Stidham's vehicle. Using short tandem repeat (STR) testing, Reinbold determined the radio knob contained DNA from a major contributor, Stidham, and from an unknown minor contributor. Reinbold was unable to exclude Bigger as that minor contributor of DNA. A second DPS criminalist, Lorraine Heath, examined the DNA using Y-STR testing, which is similar to STR testing but analyzes only the Y chromosome. She also determined the radio knob contained DNA from a major contributor, Stidham, and from a minor contributor, whose DNA corresponded to Bigger's profile at fourteen out of sixteen loci. Heath could not state to a reasonable degree of scientific certainty, however, that the DNA belonged to Bigger.

¶36 Before Reinbold and Heath testified as witnesses for the state, the trial court held a *Frye*⁶ hearing to determine whether Heath would be permitted to testify about a third type of DNA testing that combined the results of the STR and Y-STR analyses to compute the random statistical probability of the DNA profile appearing in the general population. The state apparently anticipated the results would show it was highly statistically probable

⁶*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

that Bigger was the minor contributor. The court ruled the combined statistical analysis was not generally accepted in the scientific community, and it precluded Heath “from testifying as to the combined probabilities of the results of the autosomal STR and Y-STR analysis.”

¶37 During Heath’s testimony, the prosecutor asked: “So what opinion can you give about the likelihood that the DNA . . . belonged to Ronald Bigger?” Heath replied: “Having looked at both my own data and Mr. Reinbold’s data, I feel that there is very strong evidence that—.” Defense counsel objected and moved for a mistrial, claiming the prosecutor had improperly introduced evidence about the combined probabilities of the STR and Y-STR analyses in violation of the court’s ruling. The trial court sustained Schwartz’s objection but denied a mistrial.

¶38 Schwartz now contends the prosecutor “back doored” the trial court’s ruling because, although Heath did not testify about the combined statistical probabilities, she did give testimony based on the combined results of her own and Reinbold’s testing. We disagree with Schwartz that the prosecutor acted improperly here. Heath was asked only about the results of the Y-STR testing she had performed, and there is nothing to suggest the prosecutor intended to elicit testimony about the combined results. Based on the prosecutor’s question, it was not foreseeable that Heath would answer as she did. Moreover, Heath did not state a statistical probability that Bigger was the minor contributor. Heath had earlier testified that, based on fourteen out of sixteen loci, she had been “able to identify [Bigger as the] minor contributor,” though not to a scientific certainty. In light of that testimony, we

cannot fault the court for implicitly concluding that Heath's interrupted testimony about the combined test results was harmless.

¶39 Schwartz also contends the trial court erred when it denied his motion for a mistrial. We review the denial of a motion for a mistrial for an abuse of the trial court's discretion. *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995). A mistrial is the "most dramatic remedy for trial error" and should be ordered "only when justice will be thwarted if the current jury is allowed to consider the case." *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003), quoting *State v. Nordstrom*, 200 Ariz. 299, ¶ 68, 25 P.3d 717, 738 (2001). When determining whether to grant a motion for a mistrial based on a witness's testimony, courts must consider: "(1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors." *Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d at 839.

¶40 We cannot say the court abused its discretion here. As discussed above, Heath's testimony did not call the jurors' attention to precluded evidence in a way that unfairly prejudiced Schwartz. Moreover, the trial court sustained defense counsel's objection and, based on instructions given at the start of and at several other points during the trial, the jurors were aware they should disregard the statement. *See id.* ¶ 43 (trial court did not abuse discretion in denying motion for mistrial when it had instructed jurors to disregard improper statement).

vii. Winston's Testimony

¶41 On the tenth day of trial, the state called as a witness Dr. David Winston, a forensic pathologist for Pima County. Winston testified that, at about 4:00 a.m. on the night Stidham was murdered, he had arrived at the scene and examined Stidham's body. At 8:30 a.m., after the body had been transferred to the Forensic Science Center, he performed an autopsy. On direct examination, the prosecutor asked Winston about the phenomenon of livor mortis. Winston testified that livor mortis is the settling of the blood in the body after death and that livor mortis "fixes" approximately twelve hours after the time of death.

¶42 On cross-examination, defense counsel showed Winston one of Winston's autopsy notes that stated livor mortis had not yet fixed and asked whether this note indicated that livor mortis had not fixed at 8:30 a.m. Schwartz notes in his opening brief that, had Winston answered affirmatively, his testimony would suggest that Stidham had been murdered sometime after 8:30 p.m., a fact that would have undermined the state's theory of the case. Instead, Winston testified he had written the note to remind himself that livor mortis had not fixed when he examined the body at the scene at 4:00 a.m. and it did not refer to the time of autopsy.

¶43 Several weeks later, Schwartz called as a witness Dr. Phillip Keen, the chief medical examiner for Maricopa and Yavapai counties. Keen testified that, based on his review of Winston's autopsy report and notes, he believed Winston's note indicated that livor mortis had not fixed at the time of the autopsy. Later that day, Schwartz recalled Winston

as a witness for the defense. Winston testified that his previous testimony had been erroneous, that the autopsy note in question had indeed indicated that livor mortis had not fixed at the time of the autopsy, but that this did not change his earlier conclusion that Stidham had died sometime after 4:00 p.m. Winston testified he had not told anyone of his mistake until just prior to being called as a witness that day, when he had told the prosecutor, because he had known he would be recalled as a witness by Schwartz and could correct his mistake at that time. Schwartz moved for a mistrial, arguing the state had improperly failed to disclose that a witness had given false testimony. The prosecutor stated that when she learned about it that day she had believed defense counsel was aware of Winston's mistake and his intention to change his prior testimony. The trial court accepted this explanation, found that Schwartz had not been prejudiced, and denied his motion for a mistrial.

¶44 On appeal, Schwartz contends the prosecutor was dishonest when she stated she believed defense counsel had known about Winston's mistake, and he reasserts the prosecutor improperly failed to disclose that a witness had given false testimony. We agree that the prosecutor should have immediately informed defense counsel of Winston's error. However, the prosecutor avowed to the trial court she had learned of Winston's misstatement and intention to correct it just before he took the stand as a witness for Schwartz, an explanation confirmed by Winston, and it was up to the court whether to credit that explanation. *See Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d at 846 ("we will not disturb a trial court's denial of a mistrial for prosecutorial misconduct in the absence of a clear abuse of

discretion”); *see also United Metro Materials*, 197 Ariz. 479, ¶ 22, 4 P.3d at 1026 (whether to accept avowal of counsel within trial court’s discretion). In light of the fact that Schwartz had called Keen as a witness earlier that day to contradict Winston’s previous testimony, the trial court could have reasonably concluded the prosecutor assumed Schwartz had recalled Winston to impeach his previous testimony.

¶45 Moreover, we fail to see how Schwartz suffered prejudice. Winston, a key witness for the state, was recalled as a witness for Schwartz on the premise that Winston had given false testimony. As the prosecutor put it: “Dr. Winston now looks like a boob and one who is perhaps not candid with the court.” When the trial court asked Schwartz how he had been prejudiced, he was unable to offer an answer. Schwartz continues to offer no plausible theory of how he was prejudiced, and we can think of none. Accordingly, even if prosecutorial misconduct had occurred, it would not require reversal of his conviction. *See Leon*, 190 Ariz. at 162, 945 P.2d at 1293.

viii. The Cumulative Effect

¶46 Arizona courts have consistently held that, in determining whether prosecutorial misconduct has permeated the entire atmosphere of a trial, courts must look at the cumulative effect of the misconduct rather than at individual incidents. *See Hughes*, 193 Ariz. 72, ¶¶ 26-27, 969 P.2d at 1191 (compiling cases). Although any one incident of alleged misconduct might not warrant reversal, the prosecutor’s conduct throughout the trial must be considered as a whole. *See id.* ¶ 27. As discussed above, however, we have found only

one instance of colorable misconduct, and we have no reason to set aside the trial court's implicit findings of no undue prejudice to Schwartz. Thus, "we cannot conclude that the prosecutor engaged in 'persistent and pervasive' misconduct" that deprived Schwartz of a fair trial and that requires the reversal of his conviction. *State v. Morris*, 215 Ariz. 324, ¶ 67, 160 P.3d 203, 218 (2007).

c. Hearsay Testimony and Confrontation Clause

¶47 On the tenth day of trial, Jennifer Dainty testified she had been working on the night of the murder at a convenience store located near Stidham's medical office. Around 6:00 p.m., a man in blue medical scrubs had entered the store and told her he had just come from a meeting where they were serving pizza but he did not like pizza so he was looking for something else to eat. Dainty later identified this man as Bigger. During the trial, several other witnesses for the state testified they had seen a man in blue scrubs in the parking lot outside Stidham's medical office on the day Stidham was murdered, although none of them had identified the man. One of the witnesses, however, Dr. Jason Lee, testified the man in blue scrubs had given him directions to Stidham's office and had mentioned that pizza had recently been delivered there.

¶48 Schwartz sought to preclude Dainty and Lee from testifying about anything the man in blue scrubs had said to them about pizza on the ground it was inadmissible hearsay. The trial court found the statements were not offered to prove the truth of the matter asserted, and it permitted the testimony. On appeal, Schwartz contends the court violated the hearsay

rule for the same reasons he argued below. We review the court’s rulings for an abuse of discretion. *State v. King*, 212 Ariz. 372, ¶ 16, 132 P.3d 311, 314 (App. 2006).

¶49 Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Ariz. R. Evid. 801(c). Hearsay is generally inadmissible as evidence at trial because it cannot be subjected to cross-examination, which “assesses the perception, memory, motivation, and sincerity of the declarant and ‘may reveal ambiguities in the declarant’s use of language and errors in the report of the out-of-court statement.’” *State v. Allen*, 157 Ariz. 165, 172, 755 P.2d 1153, 1160 (1988), quoting M. Udall & J. Livermore, *Law of Evidence* § 121, at 234 (2d ed. 1982). In this case, the trial court correctly concluded the out-of-court statements were not hearsay because they were not offered to prove their truth. Whether pizza had in fact been delivered to Stidham’s medical office and whether Bigger actually disliked pizza were irrelevant to any issue at trial, and Schwartz would not have benefitted from cross-examining the man in blue scrubs about his statements.

¶50 Schwartz cites *State v. Romanosky*, 162 Ariz. 217, 218, 782 P.2d 693, 694 (1989), in which police officers had arrested the defendant based on a composite description created by combining a description given by the wife of the victim and a description given by the victim of an unrelated crime the defendant had allegedly committed later that day. *Id.* at 219-20, 782 P.2d at 695-96. Our supreme court found it error to have permitted the arresting officer to testify about the composite description because his testimony was based

on hearsay evidence and was used to prove the defendant's identity. *Id.* at 222-23, 782 P.2d at 698-99. Schwartz contends that, as in *Romanosky*, the state "created a 'composite' conversation about pizza and relied upon independent comments made to Ms. Dainty and Dr. Lee to make it appear the same person made each of the comments, in order to prove that Mr. Bigger was in and around the complex parking lot at or near the time of the murder."

¶51 *Romanosky* is inapposite to this case. There, out-of-court statements were used to create a composite description that "provided a very specific, detailed description of a male and female perpetrator. Those descriptions matched the defendant and the state's star witness," and their "truth" was therefore at issue. *Id.* at 223, 782 P.2d at 699. By contrast, the state's witnesses in this case did not testify about a description of Bigger provided by an out-of-court declarant. Rather, the out-of-court statements in question functioned more like an eyewitness's first-hand physical description of the man wearing scrubs; Lee's and Dainty's testimony that the man in blue scrubs had mentioned pizza is no more hearsay than their testimony that he had worn blue scrubs. Arizona courts have repeatedly held that the rule against hearsay is not violated when evidence is admitted solely for the purpose of proving that certain words were spoken, regardless of their truth. *See, e.g., State v. Nightwine*, 137 Ariz. 499, 503, 671 P.2d 1289, 1293 (App. 1983). Such was the case here, and the trial court did not abuse its discretion in admitting the statements. *See King*, 212 Ariz. 372, ¶ 16, 132 P.3d at 314.

¶52 Schwartz also claims the court’s ruling violated his rights under the Confrontation Clause. However, the Sixth Amendment’s protections in this regard are directed primarily to “testimonial hearsay statements.” *King*, 212 Ariz. 372, ¶ 19, 132 P.3d at 315. As discussed above, the statements here did not constitute hearsay because they were not admitted for their truth, *see* Ariz. R. Evid. 801(c), and the Confrontation Clause therefore was not implicated. *See King*, 212 Ariz. 372, ¶ 19, 132 P.3d at 315. Moreover, statements are “testimonial” only if the declarant could reasonably expect that they will later be used at trial. *See id.* ¶¶ 19-20. Courts must therefore distinguish testimonial statements from those that constitute casual or offhand remarks. *See id.* ¶ 20. The out-of-court statements about pizza here clearly fall into the latter category. They were not testimonial, and their admission did not violate Schwartz’s confrontation rights.

d. Impeachment Testimony

i. Paul Skitzki

¶53 Schwartz’s former fiancée, Lopez, provided testimony during two days of the trial. On the second of those days, she testified Schwartz had once told her he was planning to hire someone to kill Stidham, but she had not taken his threats seriously. On cross-examination, defense counsel asked Lopez if she had told anyone about Schwartz’s threats. She stated she had told Paul Skitzki, who had also previously been a deputy Pima County Attorney.

¶54 A week later, anticipating that Schwartz might call Skitzki as a witness to impeach Lopez’s testimony, the state sought to preclude Skitzki from testifying. Schwartz argued Skitzki’s impeachment testimony was necessary because Lopez’s false testimony had undermined his defense that no one had taken his threats against Stidham seriously enough to report them. After a hearing, the trial court found that Skitzki’s testimony would constitute impeachment evidence on a collateral issue and was therefore inadmissible under Rule 608(b), Ariz. R. Evid. Schwartz contends the court erred by preventing Skitzki from testifying and argues Rule 608(b) cannot be used “to assert preclusion of a witness.”

¶55 Under Rule 608(b), a party cannot introduce extrinsic evidence to impeach a witness regarding an inconsistent fact that is collateral to the trial issues, but is “bound by the witness’[s] answer.” *State v. Hill*, 174 Ariz. 313, 325, 848 P.2d 1375, 1387 (1993). Evidence is collateral if “it could not properly be offered for any purpose independent of the contradiction,” *id.*; that is, if it is irrelevant “to the guilt or innocence of the prisoner.” *State v. Mangrum*, 98 Ariz. 279, 286, 403 P.2d 925, 929 (1965), quoting 1 Underhill, *Criminal Evidence* § 239 (5th ed. 1956). Rule 608(b), however, “should not stand as a bar to the admission of evidence introduced to contradict, and which the jury might find disproves, a witness’s testimony as to a material issue of the case.” *United States v. Blake*, 941 F.2d 334, 338-39 (5th Cir. 1991), quoting *United States v. Opager*, 589 F.2d 799, 803 (5th Cir. 1979); see generally *State v. Swafford*, 21 Ariz. App. 474, 486, 520 P.2d 1151, 1163 (1974) (no

error in permitting rebuttal witness to contradict defense witness when testimony concerned material trial issues).

¶56 Schwartz contends “[t]he very basis” of his defense was that “no one took [his threats against Stidham] seriously” and impliedly argues that Lopez’s testimony related to a material issue in the case. Lopez, however, had testified on direct examination that she had believed Schwartz was a “big blowhard [who] made a lot of big talk” and that she had not taken his threats against Stidham seriously. Although she testified she had told Skitzki about the threats, she did not say whether she had done so because she had taken them seriously or for some other reason. Therefore, Lopez’s testimony that she had told Skitzki about the threats did not necessarily undermine Schwartz’s defense, and Skitzki’s testimony would have constituted impeachment evidence on a collateral issue.⁷ *See Hill*, 174 Ariz. at 325-26, 848 P.2d at 1387-88.

¶57 Moreover, it was Schwartz who elicited the testimony in questioning during cross-examination. Generally, “extrinsic evidence may not be admitted to impeach testimony invited by questions posed during cross-examination.” *United States v. Castillo*, 181 F.3d 1129, 1133 (9th Cir. 1999). By contrast, “[c]ourts are more willing to permit, and commentators more willing to endorse, impeachment by contradiction where . . . testimony

⁷Schwartz somewhat obliquely contends the court “should have viewed the State’s motion as a two-fold issue, dealing with the prove-up of prior inconsistent statements and/or non-statements, not offered for the truth of the matter asserted but for the fact that the witness made prior inconsistent statements.” But regardless of how the trial court viewed the issue, the evidence was properly excluded pursuant to Rule 608(b).

is volunteered on direct examination. The distinction between direct and cross-examination recognizes that opposing counsel may manipulate questions to trap an unwary witness into ‘volunteering’ statements on cross-examination.” *Id.*

¶58 Schwartz concedes in his reply brief that defense counsel had known before cross-examining Lopez that she would testify she had told Skitzki about Schwartz’s threats. In light of Lopez’s previous testimony that she had not taken Schwartz’s threats seriously, which wholly supported Schwartz’s defense, it seems that Schwartz hoped to elicit testimony about Skitzki for the sole purpose of later challenging Lopez’s general credibility by introducing extrinsic evidence to impeach her on that point. Extrinsic evidence about collateral facts is not admissible for such a purpose, *see* Ariz. R. Evid. 608(b), and we cannot say the court erred by precluding the testimony. *See Castillo*, 181 F.3d at 1133-34.

¶59 Schwartz also asserts that the state’s motion to preclude was brought in bad faith because it was untimely filed and “subverted the truth-seeking function and violated [his] substantive due process rights.” But Arizona evidence law, as discussed above, rendered Skitzki’s testimony inadmissible. *See Hill*, 174 Ariz. at 325-26, 848 P.2d at 1387-88. We therefore cannot say the state’s motion subverted any legitimate truth-seeking function or violated Schwartz’s substantive rights. As to the untimeliness of the state’s motion, Rule 16.1, Ariz. R. Crim. P., provides that “[a]ll motions shall be made no later than 20 days prior to trial, or at such other time as the court may direct.” Although the state did not file its motion until the nineteenth day of trial, Rule 16.1 provides that motions may be

untimely raised if “the basis therefor was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it.” Lopez did not refer to Skitzki until the fifteenth day of trial.⁸ The state filed its motion within a reasonable time after learning of the situation, and we find no violation of Rule 16.1.

¶60 Schwartz further contends the state acted in bad faith because its motion was not filed until after it had allowed him to elicit an answer from Lopez that the state knew was false. But neither the trial court nor this court could say Lopez’s testimony was in fact false, only that Skitzki was apparently prepared to testify that it was. Nothing in the record suggests the state was aware that defense counsel would ask Lopez about Skitzki or that Skitzki was prepared to offer testimony contradicting Lopez. Accordingly, Schwartz’s claims of bad faith by the state are unsupported.

ii. Dave Wickey

¶61 Three weeks after Lopez testified, Schwartz informed the trial court that he intended to call DEA agent Dave Wickey as a witness. Wickey was reportedly prepared to testify that Lopez had made numerous false statements to the jury about her reasons for leaving the Pima County Attorney’s Office and about her knowledge of the DEA investigation concerning her. The state moved to preclude Wickey as a witness, arguing that his testimony, like Skitzki’s, would constitute impeachment evidence on a collateral issue in

⁸Although Schwartz filed a pretrial witness list that named Skitzki generally as a “potential impeachment witness,” the state could not have known then what Schwartz would ask Lopez on cross-examination or whether Schwartz would in fact call Skitzki as a witness.

violation of Rule 608(b), Ariz. R. Evid. The court granted the state’s motion, and we review its decision for an abuse of discretion. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 59, 25 P.3d 717, 736 (2001).

¶62 As discussed above, a party may not introduce extrinsic evidence to impeach a witness on a collateral issue. *See Hill*, 174 Ariz. at 325-26, 848 P.2d at 1387-88. Wickey’s testimony about Lopez’s reasons for leaving the Pima County Attorney’s Office and about her knowledge of the DEA investigation clearly would not have been relevant or admissible apart from their impeachment purpose. Accordingly, we cannot say the trial court erred by precluding the collateral testimony. *See id.*

e. Daphne Stidham

¶63 At midnight on the night of the murder, several Pima County Sheriff’s deputies went to the Stidham residence to conduct a welfare check. The deputies let themselves into the home through an unlocked door in the garage after no one responded at the front door. They found Daphne Stidham, the victim’s widow, asleep in bed and woke her. Without looking to see if her husband was in bed beside her, she asked: “Is my husband okay?” She then asked: “Was he shot?” Because the deputies had not mentioned that her husband had been harmed, one of them asked her why she would ask that question. She replied: “Because he’s missing. He didn’t come home yet.” The deputies told Daphne that her husband was dead, and she began to cry. Several of the deputies saw a legal document, lying

on a couch in the bedroom. They noted it had both of the Stidhams' names on it and believed it to be a will.

¶64 Schwartz informed the state before trial that he considered Daphne's behavior on the night of the murder to be "bizarre" and that she was a "potential suspect" in the murder. Although Schwartz did not assert an intention to present a third-party-culpability defense accusing Daphne of the murder, the state filed a motion in limine to preclude such a defense. After a hearing, the trial court granted the state's motion, finding that evidence about Daphne's behavior on the night of the murder would be irrelevant and that any possible relevancy would be outweighed by potential confusion of the issues. Schwartz now contends the court erred in granting the state's motion. We review the court's decision for an abuse of discretion. *See Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d at 193.

¶65 As we have noted, a defendant is generally entitled to present evidence that the crime with which he is charged was committed by another person. *See Dann*, 205 Ariz. 557, ¶ 30, 74 P.3d at 242. The court must first determine whether the proffered evidence is relevant, *i.e.*, whether it tends to create a reasonable doubt as to the defendant's guilt. *See Gibson*, 202 Ariz. 321, ¶¶ 13, 16, 44 P.3d at 1003-04. If the evidence is relevant, it is admissible unless "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." *Id.* ¶ 13, *quoting* Ariz. R. Evid. 403.

¶66 Here, Schwartz did not meet the threshold relevancy requirement of *Gibson*. At the hearing on the state’s pretrial motion to preclude the evidence, Schwartz’s counsel conceded that he did not intend to raise a third-party defense accusing Daphne Stidham of murdering her husband. He therefore, implicitly acknowledged that evidence of Daphne’s reaction on the night of the murder would not have created a reasonable doubt about Schwartz’s guilt. Indeed, we agree the evidence would have raised, at most, “a possible ground of suspicion.” *Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d at 193. Accordingly, we defer to the trial court’s determination that any relevance the evidence might conceivably have had was outweighed by the danger of confusion of the issues at trial, *see* Ariz. R. Evid. 403, and we cannot say the court abused its discretion in precluding it. *See Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d at 193.

¶67 Schwartz also contends the court’s order impinged on his right to effectively cross-examine the deputies about Daphne’s behavior on the night of the murder. Because Schwartz failed to raise this issue below, we review it for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). As discussed above, Daphne’s reaction when awakened by the deputies did not tend to create a reasonable doubt about Schwartz’s guilt, and evidence of her behavior was therefore irrelevant. *See Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d at 193. While the right of cross-examination is guaranteed by the United States and Arizona Constitutions, “that right does not confer a license to run at large into irrelevant matters,” and a trial court has broad discretion to determine what is relevant in

cross-examination. *State v. Riley*, 141 Ariz. 15, 20, 684 P.2d 896, 901 (App. 1984). We find no error, much less fundamental error, in the court's ruling precluding Schwartz from cross-examining the deputies about Daphne's reaction when she awoke to find them in her bedroom. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608.

f. Character Evidence

¶68 Before trial, Schwartz filed a notice pursuant to Rule 15.2(b), Ariz. R. Crim. P., disclosing his intent to call ten character witnesses. He gave the following reasons for calling the witnesses:

These witnesses will be testifying regarding the contact they had with the Defendant in his capacity as a medical doctor. This testimony will be used, in part, as character evidence, however, will principally be offered to refute the theory of the State that the Defendant caused the murder, of the victim, Dr. Brian Stidham, as the result of his inability to acquire patients and have an on-going successful medical practice, for which he blamed Dr. Stidham. These witnesses will testify that the Defendant was an excellent doctor and the fact that he materially affected their lives and their children's predicated on his excellent medical services. This will be the thrust of the testimony of these witnesses.

¶69 The state moved to preclude this testimony on the grounds it would be irrelevant and cumulative, and it offered to stipulate that Schwartz was a competent medical doctor with the skills necessary to attract and maintain clients and earn money practicing medicine. After a hearing, the court granted the state's motion and precluded "any witnesses that are going to be testifying solely about the defendant's skill as an ophthalmologist surgeon and his ability to treat patients." Schwartz now contends the court erred because

those witnesses were necessary to show his business had been doing well and he had no motive to murder Stidham. We review the court's ruling for an abuse of discretion. *See State v. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d 127, 131 (App. 2002).

¶70 It is axiomatic that evidence is admissible 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* Ariz. R. Evid. 402. Generally, evidence that tends to prove or disprove a defendant's motive to commit the offense charged is relevant, admissible evidence. *See State v. Andriano*, 215 Ariz. 497, ¶ 26, 161 P.3d 540, 546 (2007). Even when otherwise admissible, however, evidence may be excluded if it contributes to the “needless presentation of cumulative evidence.” Ariz. R. Evid. 403.

¶71 We fail to see how evidence that Schwartz was a good doctor and had provided valuable medical services to his patients was relevant to whether he had a motive to murder Stidham. The state alleged at trial that Schwartz had blamed Stidham for destroying his medical practice, but the proffered testimony would have had no direct bearing on this issue. Patients' opinions that Schwartz “was an excellent doctor and . . . materially affected [their] lives and their children's [lives]” might tend to create sympathy and respect for Schwartz, but evidence is not admissible when offered for those purposes alone. *See State v. Adams*, 145 Ariz. 566, 570, 703 P.2d 510, 514 (App. 1985).

¶72 Moreover, evidence at trial showed that Schwartz’s new practice, while not as successful as his former practice had been before he left it to undergo substance abuse treatment, was growing and earning money. Several witnesses testified to his skills as a doctor, and a former patient testified that Schwartz had removed a tumor from her son’s eye and saved his life. There was ample evidence at trial about Schwartz’s skills as a doctor and the success of his business. Thus, the proposed witnesses’ testimony was not only of questionable relevance but would also have been cumulative of other evidence presented. *See* Ariz. R. Evid. 403 (“evidence may be excluded if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence”). The trial court did not abuse its discretion in precluding the evidence. *See Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d at 131.

g. Polling Expert

¶73 This case generated considerable publicity in Pima County. In July 2005, about eight months before trial, Schwartz filed a motion asking the trial court to authorize \$8,500 for hiring a litigation research expert, O’Neil & Associates, to conduct a telephone poll in support of Schwartz’s pending motion for a change of venue.⁹ He proposed having the expert telephone 200 potential jurors in Pima County in an attempt to measure the extent of the pretrial publicity the case had received in the area “and its impact on the potential jury

⁹The Office of Court-Appointed Counsel had previously denied Schwartz’s request.

pool.” Schwartz claimed the poll would be conducted in a scientific manner and would demonstrate he could not obtain a fair and impartial jury trial in Pima County.

¶74 The trial court denied Schwartz’s request, stating it had concerns with “the relevance of the survey results” to Schwartz’s pending motion for a change of venue. Specifically, the court was concerned that (1) the survey would be conducted by calling land-line telephones and would therefore not reach a large segment of the jury pool; (2) the fact that the proposed survey questions were not open-ended would likely dictate the answers; and (3) the survey would not address the central issue relevant to the determination of Schwartz’s motion—whether potential jurors could lay aside their preexisting opinions, rely on the evidence presented at trial, and follow the court’s instructions.

¶75 Schwartz moved to reconsider, submitting a letter from the research expert that attempted to meet each of the trial court’s objections to the proposed survey. The expert asserted in that letter that (1) using land-line telephones would not affect the results of the survey; (2) closed-ended questions were best suited to this type of survey; and (3) the survey would not ask potential jurors whether they could set aside their opinions and rely on the evidence at trial because potential jurors would feel pressure to answer that question affirmatively. The trial court affirmed its previous ruling and again denied Schwartz’s request for funding. Schwartz contends the court erred in denying his request because a research expert would have greatly assisted the court in ruling on his motion for a change of venue.

¶76 Section 13-4013(B), A.R.S., provides that, for indigent defendants, a trial court shall “appoint investigators and expert witnesses as are reasonably necessary to adequately present a defense at trial.” Rule 15.9(a), Ariz. R. Crim. P., implements § 13-4013(B), providing essentially the same right. Whether an expert witness is “reasonably necessary” for the presentation of a defense depends upon the particular facts of the case. *See Calderon-Palomino v. Nichols*, 201 Ariz. 419, ¶ 5, 36 P.3d 767, 770 (App. 2001). We review for a clear abuse of discretion a trial court’s denial of a defendant’s request to appoint an expert, and we will not overturn it absent a showing of substantial prejudice. *See State v. Peeler*, 126 Ariz. 254, 257, 614 P.2d 335, 338 (App. 1980).

¶77 We cannot say the trial court abused its discretion in denying Schwartz funds for the research in question. In determining whether a defendant can receive a fair trial despite publicity, a court looks not to whether potential jurors have heard of or have an opinion about the case but whether they would be able to set aside their beliefs about the case, rely on the evidence presented at trial, and follow the court’s instructions. *See State v. LaGrand*, 153 Ariz. 21, 34, 734 P.2d 563, 576 (1987). As the trial court noted, Schwartz’s proposed survey did not ask potential jurors whether they would be able to do that. Thus, the survey would have offered the trial court limited assistance, if any, in determining Schwartz’s motion for a change of venue. We note other jurisdictions have reached similar conclusions. *See, e.g., Samra v. State*, 771 So. 2d 1108, 1115 (Ala. Crim. App. 1999) (questioning relevance of pretrial phone survey that “did not ask the respondents whether

they could set aside what they had heard about the case and decide it based solely on the evidence presented in court”); *State v. Wallace*, 528 S.E.2d 326, 346 (N.C. 2000) (finding two pretrial phone surveys insufficient to support defendant’s motion for change of venue when surveys did not ask potential jurors if they could follow instructions on presumption of innocence and confine judgments to evidence presented at trial); *State v. Richardson*, 302 S.E.2d 799, 805 (N.C. 1983) (same); *State v. Bishop*, 753 P.2d 439, 459 (Utah 1988) (finding pretrial phone survey insufficient to support defendant’s motion for change of venue when “survey did not ask whether the respondents could set their opinions aside”), *overruled on other grounds by State v. Carter*, 888 P.2d 629, 649 (Utah 1995).

¶78 Moreover, Schwartz has not demonstrated that he was prejudiced by the court’s refusal to provide funds for a research expert, a prerequisite for this court to reverse the trial court’s decision. *See Peeler*, 126 Ariz. at 257, 614 P.2d at 338. We address this issue more fully below.

h. Change of Venue

¶79 As noted above, Schwartz filed a pretrial motion for change of venue based upon the publicity the case had received and was continuing to generate in the local media. He claimed the coverage had misinformed the Pima County jury pool about the facts of the case in a way that was biased against him. He included with his motion several exhibits detailing each instance of media coverage the case had received, starting from the date of the murder through the filing of the motion to change venue in May 2005. By then, the case had

been the subject of 892 televised reports, 108 print articles, and seven internet reports. Schwartz periodically supplemented the motion with updates about additional reporting on the case, and he included viewership estimates of each television program and circulation figures for the newspapers. In December 2005, the trial court denied his motion for change of venue.¹⁰ Schwartz contends the court erred in so doing. We review that decision for an abuse of discretion and resulting prejudice. *See State v. Davolt*, 207 Ariz. 191, ¶ 44, 84 P.3d 456, 470-71 (2004).

¶80 Rule 10.3(b), Ariz. R. Crim. P., requires a defendant seeking a change of venue based on pretrial publicity “to prove that the dissemination of the prejudicial material will probably result in the party being deprived of a fair trial.” In reviewing the denial of a request for change of venue, we look to the totality of the circumstances to determine whether the publicity surrounding the trial was “so pervasive that it caused the proceedings to be fundamentally unfair.” *Davolt*, 207 Ariz. 191, ¶ 45, 84 P.3d at 471, *quoting State v. Atwood*, 171 Ariz. 576, 630, 832 P.2d 593, 647 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001). Prejudice to a defendant may be presumed or actual. *Davolt*, 207 Ariz. 191, ¶ 45, 84 P.3d at 471. Schwartz has presented no evidence of actual prejudice, *i.e.*, that the jurors had formed preconceived notions about his guilt that they were unable to put aside, *see Nordstrom*, 200 Ariz. 229, ¶ 18, 25 P.3d at

¹⁰Schwartz renewed his motion for change of venue one week before the start of the trial, and he supplemented it the day before trial and again on the twenty-sixth day of trial. The trial court also denied his renewed motion.

728, and we have found none. We therefore look to his assertion that we should presume prejudice.

¶81 Prejudice may be presumed if the publicity surrounding the trial was so extensive and outrageous that it affected the entire proceeding or created a “carnival-like” atmosphere. *Davolt*, 207 Ariz. 191, ¶ 46, 84 P.3d at 471. The defendant must be able to show that the trial was a mockery of justice or a mere formality. *State v. George*, 206 Ariz. 436, ¶ 23, 79 P.3d 1050, 1059 (App. 2003). The adverse publicity must be so pervasive and prejudicial that the trial court could not reasonably believe potential jurors’ claims that they would be able to put aside their opinions, disregard what they have heard, and decide the case fairly. *See Davolt*, 207 Ariz. 191, ¶ 46, 84 P.3d at 471. “This is a high standard and it is rarely met.” *Id.* In making this determination, “the reviewing court examines the entire record, without regard to the panelists’ avowals of impartiality.” *State v. Carlson*, 202 Ariz. 570, ¶ 21, 48 P.3d 1180, 1187 (2002).

¶82 In support of his claim, Schwartz argues that his case received relentless media attention from the time of the murder in 2004 through the trial in 2006; that the coverage portrayed him in a negative light, and much of it assumed he was guilty; and that the coverage often delved into facts that were inadmissible at trial, such as his personal life, the federal drug charges against him, his problems with former employers, and his problems with the State Medical Board. He offers several news stories as examples of the allegedly biased coverage he received. In one story, several fellow doctors referred to him as a “loose

cannon”; another reported that members of the local medical community had immediately suspected he had been involved in the murder. One article focused on a lawsuit filed against him by a former employer, another on his federal charges, and still another reported that Bigger’s attorney believed Schwartz was guilty. He claims that the media coverage increased in the time leading up to trial and that 92% of potential jurors were aware of facts about the case. He also cites the presence of cameras in the courtroom as evidence of a “carnival-like” atmosphere during the trial.

¶83 Indisputably, Schwartz’s case received much attention in the media. However, a large amount of media coverage does not in itself establish a presumption of prejudice. *See State v. Jones*, 197 Ariz. 290, ¶ 44, 4 P.3d 345, 362 (2000). Rather, the salient factor is the *effect* of the publicity. *See id.* In *Jones*, our supreme court found the trial court had not erred in denying the defendant’s motion for a change of venue when the majority of the more than 850 newspaper and television articles about the defendant’s case had been factual in nature. *Id.* ¶¶ 44-46. Similarly, in *State v. Bible*, 175 Ariz. 549, 564, 858 P.2d 1152, 1167 (1993), the defendant had been the subject of several pretrial stories in the media that were factually inaccurate or inflammatory or discussed matters that were inadmissible at trial. Our supreme court nevertheless determined the trial court had not erred in denying the defendant’s motion for a change of venue, noting that, “[f]or the most part,” the media reports were factual in nature. *Id.* at 564, 858 P.2d at 1167. Here, the trial court found that the overwhelming majority, 84.3%, of the media coverage had been factual and not inflammatory. It also found

that many of the stories were repetitive and that the majority of those stories that expressed an opinion about Schwartz had been published in a free newspaper with low circulation. When, as here, the majority of the publicity surrounding a case was not inflammatory, we generally will not presume prejudice. *See Nordstrom*, 200 Ariz. 229, ¶ 15, 25 P.3d at 727. We also note the trial court went to great lengths to ensure that a fair and unbiased jury was eventually seated, and Schwartz has not claimed otherwise. *See Jones*, 197 Ariz. 290, ¶ 45, 4 P.3d at 362 (no presumption of prejudice when trial court “took the precautionary steps necessary to choose an impartial jury”). We therefore have no basis on which to say the court abused its discretion in denying Schwartz’s motion for a change of venue.

i. Motion to Sequester Jury

¶84 Schwartz filed a pretrial motion to sequester the jury, citing the extensive publicity surrounding the case and incorporating his previously filed motion for a change of venue. The trial court denied the motion after a hearing, but it attempted to limit the effect of the pretrial publicity by asking potential jurors if they and their families would be able to restrict their exposure to the media throughout the trial. Schwartz now contends the court erred in refusing to sequester the jury, a decision we review for an abuse of discretion and resulting prejudice. *See State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995); Ariz. R. Crim. P. 19.4.

¶85 Rule 19.4, Ariz. R. Crim. P., entrusts to the trial court’s discretion whether to sequester jurors during trial. The main factor in determining whether a jury should be

sequestered is the nature of the publicity surrounding the trial. *See State v. Gretzler*, 126 Ariz. 60, 78, 612 P.2d 1023, 1041 (1980). When the publicity has not been sensational or inflammatory, there is no need to sequester a jury, especially when the trial court has cautioned the jurors against exposing themselves to media coverage of the case and there is nothing to suggest the court's instructions were violated. *Id.* at 79, 612 P.2d at 1042.

¶186 As we have noted, most of the publicity in this case was not sensational or inflammatory. Rather, the trial court found the great majority of the reporting was factual in nature. Moreover, the trial court took several steps to ensure that jurors would not be exposed to media coverage. On the first day of jury selection, the court instructed the pool of prospective jurors not to read or listen to any media accounts of the case or to discuss the case with family or friends. Then, at the beginning of trial, the court gave the following admonition to the selected jury panel:

Avoid media coverage. There will be news media coverage of this trial. Do not read, watch or listen to any newspapers, Internet, television or radio accounts. If you inadvertently see, hear or read something about the case end your exposure to it immediately and please let me know as soon as possible. If anyone attempts to talk to you about the case, please let me know as soon as possible.

The trial court then promised to give the jurors this same instruction, or a shortened version of it, each time they left the courtroom during the trial. And, indeed, the record reveals such an admonition was given every day of the twenty-eight day trial the jurors were present in

the courtroom. Sometimes the court explicitly told the jurors to “[a]void any contact with the media”; other times it simply told them to “remember the admonition.”

¶87 Schwartz contends there is evidence the court’s warnings were violated because “[o]ne of the jurors was actually excused because she had brought a newspaper with coverage of the trial, to the jury room.” But Schwartz has mischaracterized the facts. On the nineteenth day of trial, a juror informed the bailiff that he had found on the table in the jury room a newspaper, which appeared not to have been opened. Later that day, juror forty-nine informed the court she had brought the paper. She stated she had inadvertently picked it up at a restaurant as part of her morning breakfast routine because the newspaper was free there but said she had not looked at it nor read any newspaper since the trial began. She also said she was unaware of any other jurors’ having been exposed to publicity about the trial since the trial began. Two days later, juror forty-nine asked to be dismissed as a juror because she had not understood the evidence presented about DNA and “the financial aspect of the case.” The trial court specifically asked whether her request was related to the earlier incident with the newspaper, to which she replied: “No, that has nothing to do with it.” Noting that the evidence had indeed been “very technical,” the trial court dismissed her from the jury.

¶88 We find nothing that suggests any jurors were exposed to or influenced by the trial publicity in this case. In light of the trial court’s thorough and persistent warnings to the jury to avoid any media coverage of the case and the absence of evidence that any jurors ignored the court’s warnings, we cannot say the court abused its discretion in denying

Schwartz's request to sequester the jury or that Schwartz was prejudiced as a result. *See Gretzler*, 126 Ariz. at 79, 612 P.2d at 1042.

j. Rule 20 Motion

¶89 Schwartz filed a motion before trial asking to have the jury determine his anticipated motion pursuant to Rule 20, Ariz. R. Crim. P. He now contends the trial court erred in denying his request, claiming, without citation to any relevant authority, that a “defendant is entitled to have a jury, not a trial court, decide this all important question of whether or not the State’s proof is adequate.”¹¹

¶90 Rule 20 requires the trial court, either on the defendant’s motion or on its own initiative, to “enter a judgment of acquittal of one or more offenses charged in an indictment, information or complaint after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction.” Our supreme court has held that whether there is substantial evidence to warrant a conviction is a question of law for the trial court. *See State v. King*, 66 Ariz. 42, 45, 182 P.2d 915, 917 (1947); *see also State v. Miller*, 112 Ariz. 95, 97-98, 537 P.2d 965, 967-68 (1975) (questions of law determined by trial court, not jury); *accord* 75A Am. Jur. 2d *Trial* §§ 731, 840 (whether to grant judgment of acquittal is question of law solely for trial court’s determination); 23A C.J.S. *Criminal Law* § 1733 (same). We

¹¹Schwartz does cite *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in support of this claim, but we fail to see how these cases, addressing a defendant’s constitutional right to have a jury determine facts that may increase the defendant’s sentence, apply here.

have no authority to overrule a decision of our supreme court. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003). Accordingly, we find the trial court did not err in denying Schwartz's request.¹²

Disposition

¶91 For all of the foregoing reasons, Schwartz's conviction and sentence are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge

¹²We also note that requiring the jury to determine a Rule 20 motion would violate the general rule, and the instruction routinely given at the start of trial, that jurors not reach any conclusions before hearing all the evidence, closing arguments, and final instructions. Additionally, one purpose underlying Rule 20 is to protect defendants from unwarranted jury verdicts. *See generally Jackson v. Virginia*, 443 U.S. 307, 318 n.10 (1979); Richard Sauber & Michael Waldman, *Unlimited Power: Rule 29(A) and the Unreviewability of Directed Judgments of Acquittal*, 44 Am. U. L. Rev. 433, 441 (1994). That purpose would obviously be thwarted if juries were required to determine Rule 20 motions.