

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
FEB 06 2008
COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)
)
Appellee,) 2 CA-CR 2007-0166
) DEPARTMENT A
)
v.) MEMORANDUM DECISION
) Not for Publication
) Rule 111, Rules of
LANCE CHRISTIAN HAMBLIN,) the Supreme Court
)
Appellant.)
_____)

APPEAL FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. CR2006-123

Honorable D. Corey Sanders, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Julie A. Done

Phoenix
Attorneys for Appellee

Law Offices of Perry Hicks, P.C.
By Adam Ambrose

Sierra Vista
Attorneys for Appellant

B R A M M E R, Judge.

¶1 A jury found appellant Lance Hamblin guilty of third-degree burglary and theft. Hamblin argues on appeal that the trial court should have granted the motion for mistrial he made following testimony he asserts was improper and erred by denying his motion for new

trial asserting the state had failed to disclose exculpatory evidence. He also argues the evidence was insufficient to support his convictions. In a separate opinion filed simultaneously with this decision, we address Hamblin's argument that his actions did not constitute burglary under A.R.S. § 13-1506. *See* Ariz. R. Sup. Ct. 111(h); Ariz. R. Crim. P. 31.26. We address all other claims in this decision. Finding no error, we affirm.

Factual and Procedural Background

¶2 On appeal, “[w]e view the facts in the light most favorable to sustaining the verdict[s].” *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). At approximately 6:30 p.m. on January 3, 2006, W. saw a truck belonging to his friend, S., parked in a Wal-Mart parking lot. He pulled into the parking lot and parked next to S.'s truck, intending to go into the store and talk to S. As he was walking toward the store, he saw a Ford Bronco pull into the parking lot next to S.'s truck. A man got out of the Bronco and “started urinating right there in the parking lot.” W. continued to watch “because something didn't seem right.” W. saw the man walk between W.'s vehicle and S.'s truck. He then saw the dome light in S.'s truck go on and off. The man then got back in the Bronco and drove away, “squealing tires as he took off” and running a stop sign. W. wrote down the Bronco's license plate number.

¶3 After W. found S. in the store, he told S. what he had seen and gave him the license plate number. S. went to his truck and looked inside but initially did not notice anything missing. Later, as S. got in his truck to drive home, he then noticed his radar

detector was missing. He called the police and reported the incident, giving them the license plate number W. had recorded.

¶4 Police determined the license plate number matched that of a Ford Bronco registered to Hamblin. An officer went to Hamblin's address, but neither Hamblin nor the Bronco was there. The officer returned later that night and saw the Bronco at the house. He then spoke with Hamblin, who told the officer that he had been at a meeting and had not been in the Wal-Mart parking lot earlier that evening.

¶5 Three days later, Thatcher Police Department Detective Kendall Curtis went to Hamblin's house to speak with Hamblin and arrange an interview. Hamblin then admitted he had taken a radar detector out of a truck at Wal-Mart but claimed "he wanted to meet with the victim and make it right with the victim rather than [have] criminal charges [filed]." Hamblin told Curtis that he could recover the radar detector, so Curtis "gave him until Monday morning to bring [the radar detector] to our office." Hamblin did not bring Curtis the radar detector. Curtis tried to reach him several times the following week without success.

¶6 Hamblin was charged with third-degree burglary and theft. His first trial ended in a mistrial when the jury was unable to reach a verdict. At a second trial, the jury found Hamblin guilty of both counts.¹ The trial court suspended imposition of sentence on both and

¹Hamblin was charged with theft of property having a value of \$1,000 or more but less than \$2,000, a class six felony. *See* A.R.S. § 13-1802(E). The verdict form for theft in Hamblin's second trial, however, did not ask the jury to determine the value of the stolen property. Although S. testified at trial that a laptop computer was missing from his truck, the trial court declined to aggravate Hamblin's sentence or order restitution based on the value

placed Hamblin on concurrent terms of supervised probation, the longer for four years. This appeal followed.

Discussion

Motion for Mistrial: Improper Testimony

¶7 Before trial, Hamblin moved to preclude any testimony by a witness, A., that Hamblin had used methamphetamine. The trial court granted that motion and instructed A. before she testified that she was not to discuss “any drug use or any allegations of drug involvement by Mr. Hamblin.” A. testified that Hamblin had given her a radar detector in early January 2006, but she had thrown it away because it “looked like a piece of junk.” During her testimony, A. stated she had pled guilty to a criminal offense that had led to her being placed on probation. When the prosecutor asked A. why she was testifying, she responded that she was testifying because Hamblin had not “stopp[ed] all this and [had] made [her] come,” and that “if he would have handled his stuff, [she] wouldn’t be here.” During cross-examination, A. stated that, during her pretrial interview with Hamblin’s attorney, she had said that Hamblin “needed to do his civil duties for himself.” Hamblin moved for a mistrial, arguing A.’s comments were prejudicial because they had effectively shifted the burden of proof from the state. The court denied the motion but stated it would be willing to strike the testimony and give a curative jury instruction.

of that laptop computer, “finding that there is doubt as to the causation of the loss to [S.] for that amount.”

¶8 On appeal, Hamblin asserts the trial court erred by denying a mistrial, arguing A.’s comments improperly referred to Hamblin’s prior drug use and suggested he was guilty. He also argues A.’s statements “amounted . . . to an allegation that [Hamblin] was guilty of other bad acts for which he was not on trial,” violating Rule 404, Ariz. R. Evid. We review for an abuse of discretion a trial court’s decision on a mistrial motion based on improper testimony and give “great deference to a trial court’s decision because the trial court ‘is in the best position to determine whether the evidence will actually affect the outcome of the trial.’” *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003), quoting *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). “A declaration of mistrial is the most dramatic remedy for trial error and is appropriate only when justice will be thwarted if the current jury is allowed to consider the case.” *Id.*, quoting *State v. Nordstrom*, 200 Ariz. 229, ¶ 68, 25 P.3d 717, 738 (2001). When a motion for mistrial is based on a witness’s testimony, a trial court must consider two factors: “(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.” *Id.*

¶9 In support of his argument that A.’s comments improperly referred to prior criminal activity and thus warranted a mistrial, Hamblin relies primarily on *State v. Leon*, 190 Ariz. 159, 945 P.2d 1290 (1997). There, a prosecutor made a series of improper statements, including referring to prior criminal transactions that had not been admitted in evidence. *Id.* at 162, 945 P.2d at 1293. Noting that improper references to prior criminal acts are

particularly harmful to defendants, our supreme court determined the trial court had erred by denying the defendant's request for a mistrial. *Id.*

¶10 We initially note that *Leon* is inapposite, as it turned on improper statements by a prosecutor, not a witness. *See id.* at 163, 945 P.2d at 1294 (improper vouching by prosecutor harmful because “the prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence”), quoting *United States v. Young*, 470 U.S. 1, 18-19 (1985). As the trial court correctly noted, however, there is no question A.’s comments were improper. *See* Ariz. R. Evid. 402. But we do not agree that they can fairly be interpreted as suggesting Hamblin had previously used drugs or committed other criminal acts in violation of Rule 404(b), Ariz. R. Evid. *See, e.g., State v. Smith*, 123 Ariz. 243, 250, 599 P.2d 199, 206 (1979) (officer’s volunteered testimony that defendant’s vehicle had been impounded did not violate Rule 404(b) because it did not suggest defendant had been involved in serious prior act). Indeed, while arguing his mistrial motion below Hamblin admitted A. “didn’t talk about” Hamblin’s drug use.

¶11 The trial court stated it would, and did, instruct the jury concerning the state’s burden of proof and “that the burden always remains with the State.”² “Jurors are presumed to follow the court’s instructions.” *State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 25, 42 P.3d 1177, 1184 (App. 2002). Thus, to the extent A.’s comments arguably “shift[ed] the burden

²The final jury instructions were not transcribed and are not contained in the record on appeal. Hamblin, however, does not assert the trial court failed to give that instruction and admits the court gave an “instruction at the end of trial concerning the burden of proof.”

of proof” or suggested Hamblin should have pled guilty, the court’s instructions neutralized any risk that those comments could have influenced the jury. *See Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d at 839. Moreover, Hamblin declined the court’s invitation to move to strike the testimony or request an additional curative instruction. *See State v. Poehnel*, 150 Ariz. 136, 149, 722 P.2d 304, 317 (App. 1985) (no abuse of discretion for trial court to deny mistrial motion when curative instruction given after improper testimony).

¶12 As noted, Hamblin’s first trial on these charges resulted in a mistrial after the jury failed to reach a verdict. A. did not testify at that trial. This, Hamblin reasons, demonstrates the “particular force” of her improper testimony. We agree that it suggests A.’s testimony was helpful to the state’s case. We do not agree, however, that the difference in verdicts conclusively shows A.’s testimony improperly influenced the jury. As we have explained, A.’s comments cannot fairly be interpreted as suggesting Hamblin had engaged in some prior criminal conduct. And the trial court’s jury instructions cured any improper allusion to Hamblin’s guilt and confirmed the state’s burden of proof. Accordingly, for the reasons stated, the court did not err in denying Hamblin’s mistrial motion.

Motion for New Trial: Failure to Disclose Exculpatory Evidence

¶13 After the jury returned its verdicts, the trial court denied Hamblin’s motion for a new trial, made pursuant to Rule 24.1(c)(2), Ariz. R. Crim. P.³ In the motion, Hamblin asserted the state was required but had failed to disclose that A. had a prior felony conviction

³The trial court also denied Hamblin’s later motion to vacate the judgment, made pursuant to Rule 24.2(a)(2), Ariz. R. Crim. P. Hamblin does not challenge that ruling on appeal.

and that she had admitted using methamphetamine while she was on probation. “A denial of a motion for new trial will be reversed only when there is an affirmative showing that the trial court abused its discretion and acted arbitrarily.” *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984).

¶14 The state has an obligation to disclose any material evidence within its possession or control that tends to mitigate or negate a defendant’s guilt. *State v. O’Dell*, 202 Ariz. 453, ¶ 10, 46 P.3d 1074, 1078 (App. 2002); *see also Brady v. Maryland*, 373 U.S. 83, 87 (1963); Ariz. R. Crim. P. 15.1(b)(8). Evidence is material if it “might lead the jury to entertain a reasonable doubt about the defendant’s guilt or [if] nondisclosure of [the] evidence . . . may prejudice the defense.” *State v. Dumaine*, 162 Ariz. 392, 406, 783 P.2d 1184, 1198 (1989). The state’s disclosure obligation includes impeachment evidence. *See State v. Holsinger*, 115 Ariz. 271, 274, 564 P.2d 1238, 1241 (1977). The scope of disclosure required by *Brady* and Rule 15.1 is a legal question we review de novo. *See State v. Roque*, 213 Ariz. 193, ¶ 21, 141 P.3d 368, 380 (2006).

¶15 The state admitted it had failed to disclose A.’s prior conviction. As the state correctly points out, however, A. admitted her prior conviction and her probation status during her testimony. “When previously undisclosed exculpatory information is revealed at the trial and is presented to the jury, there is no *Brady* violation.” *State v. Jessen*, 130 Ariz. 1, 4, 633 P.2d 410, 413 (1981). And “[t]his is true even though the pretrial non-disclosure may have affected appellant’s trial preparation and strategy.” *Id.* Indeed, Hamblin admits he discovered A.’s prior conviction before trial.

¶16 In arguing his motion for a new trial below, Hamblin asserted he had contacted a Graham County probation officer before trial, asked whether a petition to revoke A.'s probation had been filed, and been told one had not. When Hamblin inquired again after trial, the probation officer provided him with a "Request for Drug Test" contained in A.'s probation file indicating she had admitted using methamphetamine and had tested positive for methamphetamine in December 2006, while she was on probation. We agree with Hamblin that this information would have been valuable impeachment evidence, as A. testified that she had not used drugs since her March 2006 arrest for drug dealing. But we do not agree that the state was obligated to obtain or disclose the information under the circumstances presented here.

¶17 Rule 15.1(b) and *Brady* require the state to disclose only that information within its possession or control. *See O'Dell*, 202 Ariz. 453, ¶ 10, 46 P.3d at 1078. That obligation extends to any information "within the possession or control 'of any other persons who have participated in the investigation or evaluation of the case.'" *State v. Meza*, 203 Ariz. 50, ¶ 21, 50 P.3d 407, 412 (App. 2002), *quoting* Ariz. R. Civ. P. 15.1(d) (1993); *see also* Ariz. R. Crim. P. 15.1(f). This includes law enforcement agencies and crime laboratories. *See Meza*, 203 Ariz. 50, ¶21, 50 P.3d at 412. Hamblin asserts that "it is no excuse that information concerning [A.'s] positive drug test was in the hands of the county probation department as opposed to the county prosecutor." He cites no authority, however, and we find none, that suggests a probation officer "operates as an arm of the prosecutor for purposes of obtaining information that falls within the required disclosure provisions." *Id.*,

quoting *Carpenter v. Superior Court*, 176 Ariz. 486, 490, 862 P.2d 246, 250 (App. 1993). The probation department is part of the judicial branch. See *State v. Lyons*, 167 Ariz. 15, 16, 804 P.2d 744, 745 (1990) (“The adult probation officers who supervise and observe probationers are members of the judicial branch.”); A.R.S. § 12-253(2) (adult probation officers shall “[e]xercise general supervision and observation over persons under suspended sentence, *subject to control and direction by the court*”) (emphasis added). The county attorney, in contrast, is a member of the executive branch. *State v. Superior Court*, 180 Ariz. 384, 387, 884 P.2d 270, 273 (App. 1994). Consequently, information in the probation department’s possession cannot be imputed to the county attorney. See, e.g., *United States v. Zavala*, 839 F.2d 523, 528 (9th Cir. 1988) (disclosure of probation reports not mandated by *Brady* “if the reports are in the hands of the court or the probation office”).

¶18 Hamblin argues that the probation department must have informed the county attorney of A.’s positive drug test because it would have been a violation of the terms of her probation. He cites nothing to support this claim, however, and we decline to find a *Brady* violation based on speculation that the probation department necessarily gave the information to the county prosecutor. See *State v. Acinelli*, 191 Ariz. 66, 71, 952 P.2d 304, 309 (App. 1997) (“Mere speculation that a government file may contain *Brady* material is not sufficient to require a remand for *in camera* inspection, much less reversal for a new trial.”).

¶19 Hamblin additionally contends it was “necessary . . . for the prosecutor to . . . check on the status of [A.’s] probation.” As we have explained, the state’s disclosure obligation extends only to evidence in its possession and control. *O’Dell*, 202 Ariz. 453,

¶ 10, 46 P.3d at 1073. The state is not required to search for potentially exculpatory information it does not possess. *See State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987) (“Generally, the State does not have an affirmative duty to seek out and gain possession of potentially exculpatory evidence.”); *see also United States v. Graham*, 484 F.3d 413, 418 (6th Cir. 2007) (“*Brady* clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess.”), *quoting United States v. Beaver*, 524 F.2d 963, 966 (5th Cir.1975); *United States v. Hall*, 171 F.3d 1133, 1145 (8th Cir. 1999) (“[T]he government has no obligation to obtain for a defendant records that it does not already have in its possession or control.”); *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 824 (9th Cir. 1985) (prosecution “has no duty to volunteer information that it does not possess or of which it is unaware”).

Motion for Judgment of Acquittal

¶20 Hamblin next asserts the trial court erred by denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P.⁴ We review the denial of a motion for a judgment of acquittal for an abuse of discretion, “and will reverse only if there is a complete absence of substantial evidence to support the charges.” *State v. Carlos*, 199 Ariz. 273, ¶ 7, 17 P.3d 118, 121 (App. 2001). “[A] trial court must submit a case to the jury if reasonable minds can differ on the inferences to be drawn from the evidence.” *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003).

⁴In his opening and reply briefs, Hamblin incorrectly characterizes his motion as a “Motion for New Trial.” The substance of his argument, as well as the record make clear that he is in fact challenging the denial of his motion for judgment of acquittal.

¶21 The evidence here was clearly sufficient. Curtis testified that Hamblin had admitted to him that he had taken a radar detector out of a truck at Wal-Mart and had told Curtis “he wanted to meet with the victim and make it right.” Although Hamblin testified that Curtis’s testimony misrepresented what Hamblin had said, assessing Curtis’s credibility was for the jury. *See State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004) (“Although the record contains some conflicting evidence, it was for the jury to weigh the evidence and determine the credibility of the witnesses.”). Additionally, the license plate number of the Bronco W. saw in the parking lot matched that of Hamblin’s Bronco, and A. testified that Hamblin had given her a radar detector.

¶22 Hamblin asserts that the evidence apart from his confession was insufficient to satisfy the corpus delicti doctrine, which provides “that a defendant cannot be convicted of a crime based solely upon an uncorroborated confession or admission.” *State v. Hall*, 204 Ariz. 442, ¶ 43, 65 P.3d 90, 101 (2003). All the state must present to satisfy corpus delicti, however, is “proof of a crime and that someone is responsible for that crime.” *State v. Jones ex rel. County of Maricopa*, 198 Ariz. 18, ¶ 12, 6 P.3d 323, 327 (App. 2000). It is not necessary for the state to produce evidence “tend[ing] to show that the defendant was the guilty party.” *Id.* at n.6, 6 P.3d at 327 n.6. Here, W. testified that he saw a man near S.’s truck and saw S.’s dome light come on—suggesting the person he saw had opened the door of the truck. S. testified that he then discovered a radar detector was missing from the truck. Nothing else was necessary to demonstrate that the crimes of burglary and theft—the crimes to which Hamblin confessed—had occurred. *See* A.R.S. §§ 13-1506(A)(1), 13-1802(A)(1).

Thus, the trial court did not err in denying Hamblin's motion for a judgment of acquittal and submitting the case to the jury.

Disposition

¶23 We affirm Hamblin's convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge