DIVISION ONE
FILED: 11/03/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0057
	)	1 CA-CR 10-0059
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT D
	)	
MARJORIE ANN ORBIN,	)	**MEMORANDUM DECISION**
	)	
Appellant.	)	(Not for Publication –
	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2004-135842-001 DT and CR2006-007050-001 DT

The Honorable Arthur T. Anderson, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
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Criminal Appeals/Capital Litigation Section
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By Tyrone Mitchell
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T H O M P S O N, Judge

¶1 Marjorie Ann Orbin (Defendant) appeals her convictions for first degree murder, two counts of theft and two counts of

fraudulent schemes and artifices. Defendant argues the trial court erred when it failed to instruct the jury on third-party culpability; denied her motion for severance; failed to exclude the testimony of the State's computer expert and denied her motions for mistrial, motions to dismiss and motion for new trial. For the reasons that follow, we affirm Defendant's convictions and sentences.

I. Procedural Background

¶2 Defendant does not contest the sufficiency of the evidence to support her convictions. Therefore, it will suffice to note that Defendant and the victim divorced in 1998. They continued to live together, however, and presented themselves as husband and wife until the victim's murder approximately six years later in September 2004.

¶3 On September 22, 2004, Defendant informed police the victim was missing. On October 23, 2004, police found a portion of the victim's torso in a fifty-gallon container on state trust land in north Phoenix. The victim's body was frozen after death and at some point was cut up with a saw. Because no other portion of the victim's body was ever found, police identified the victim through DNA testing. The medical examiner identified the cause of death as "undetermined homicide."

¶4 The State charged Defendant with first degree murder, two counts of theft and two counts of fraudulent schemes and

artifices. After a seventy-one day jury trial that took place over the course of nearly ten months, a jury found Defendant guilty of first degree premeditated murder, two counts of theft of $100,000 or more and two counts of fraudulent schemes and artifices. The trial court sentenced Defendant to natural life for murder and concurrent, presumptive terms of five years' imprisonment for each remaining count. Defendant now appeals. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A) (2003), 13-4031 (2010), and 13-4033 (2010).

II. The Third-Party Culpability Instruction

¶5 As the first issue on appeal, Defendant contends the trial court erred when it refused to give her proposed instruction on third-party culpability. The proposed instruction read, "If you find the defendant has presented evidence sufficient to raise the issue of Third-party culpability with respect to the crime of First Degree Murder you must find the defendant not guilty of First Degree Murder. Evidence of Third-party culpability need only tend to create reasonable doubt that the defendant committed the offense of First Degree Murder."

¶6 Defendant argues the instruction was necessary "so that the jury would not mistakenly believe that the defense

would be required to prove that [Defendant's former boyfriend] committed the crime." Defendant further argues the failure to give the instruction caused the jury to shift the burden to Defendant to prove her former boyfriend committed the murder.[1] The trial court declined to give the instruction, but held Defendant could argue other persons "shared culpability" for the offenses.[2]

¶7 We review the decision to refuse a jury instruction for clear abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). The purpose of jury instructions is to inform the jury of the applicable law. *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996). A set of instructions need not be faultless. *Id.* The instructions, however, must not mislead the jury and must give the jury an understanding of the issues. *See id.* We will reverse only when the instructions, taken as a whole, are such that it is reasonable to suppose the jury was misled. *State v. Schrock*,

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[1] In support of her argument, Defendant claims an unidentified juror stated the jury expected Defendant to call her former boyfriend during the defense case. Defendant cites nothing in the record to support this allegation.

[2] We do not have the benefit of the trial court's full analysis of this issue because Defendant failed to make the transcript of the conference regarding the jury instructions part of the record on appeal. "When matters are not included in the record on appeal, the missing portion of the record is presumed to support the decision of the trial court." *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995).

149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986). Further, the omission of an instruction is not reversible error where the instructions, read as a whole, sufficiently set forth the applicable law. *State v. Barr*, 183 Ariz. 434, 442, 904 P.2d 1258, 1266 (App. 1995). "Where the law is adequately covered by instructions as a whole, no reversible error has occurred." *State v. Doerr*, 193 Ariz. 56, 65, ¶ 35, 969 P.2d 1168, 1177 (1998).

¶8 We find no error. First, Defendant's proposed instruction was an incorrect statement of the law and would have misled the jury. The instruction placed the burden on Defendant to introduce evidence of third-party culpability even though a defendant has no burden to introduce evidence. Further, the first sentence of the instruction provided the jury "must" acquit Defendant of first degree murder if they find nothing more than the issue of third-party culpability had been "raise[d]." This is not a correct statement of the law. Arguably, the first sentence of the instruction would also require acquittal simply because the jury believed someone else may have been "culpable" (whatever this may mean) in some unknown capacity and to an unknown degree. This is not a correct statement of the law and is also misleading. Finally, while the second sentence of the proposed instruction is a more

correct statement of the law, it does not alleviate or otherwise diminish the deficiencies of the first sentence.

¶9 We also find no error because the instruction was unnecessary. We recognize "[a] party is entitled to an instruction on any theory reasonably supported by the evidence." *State v. Rodriguez*, 192 Ariz. 58, 61, ¶ 16, 961 P.2d 1006, 1009 (1998). A party is not entitled to an instruction, however, when the applicable law is adequately covered in other instructions. *State v. Martinez*, 196 Ariz. 451, 460, ¶ 36, 999 P.2d 795, 804 (2000). The trial court instructed the jury regarding reasonable doubt; that Defendant was not required to prove her innocence; that Defendant was not required to introduce any evidence whatsoever, and that the State bore the burden of proof on every issue. These instructions were more than sufficient to inform the jury that Defendant had no burden to prove someone else committed the murder and ensure the jury did not shift any burden to Defendant. "[W]hen a jury is properly instructed on the applicable law, the trial court is not required to provide additional instructions that do nothing more than reiterate or enlarge the instructions in defendant's language." *Bolton*, 182 Ariz. at 309, 896 P.2d at 849. Further, "[j]uries are presumed to follow their instructions." *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996).

III. The Denial of Severance

¶10 As the second issue on appeal, Defendant argues the trial court erred when it denied her motion to sever the murder count from the other counts. The trial court held the counts of murder, theft, and fraudulent schemes were all part of a common scheme or plan in which Defendant murdered the victim to obtain the proceeds from several life insurance policies, gain control of the victim's business assets, and gain control of his estate. The court further held evidence of the property offenses would be admissible in a separate trial for murder because those offenses established that Defendant's motive for the murder was financial gain. Finally, the court held evidence of each offense was otherwise admissible in separate trials.[3] The court later denied Defendant's renewed motion. Defendant argues the jury could not separate her conduct regarding the property offenses from the murder and she was, therefore, denied a fair trial.

¶11 Arizona Rule of Criminal Procedure 13.3 provides in relevant part that offenses may be joined if they are part of a common scheme or plan. Ariz. R. Crim. P. 13.3(a)(3). A "common scheme or plan" is a "particular plan of which the charged crime is a part." *State v. Lee*, 189 Ariz. 590, 598, 944 P.2d 1204,

[3] We do not have the trial court's full analysis of this issue because Defendant failed to make the transcript of the conference part of the record on appeal.

1212 (1997) (quoting *State v. Ives*, 187 Ariz. 102, 108, 927 P.2d 762, 768 (1996)). The determination of whether offenses are part of a common scheme or plan focuses "on whether the acts are part of an over-arching criminal plan, and not on whether the acts are merely similar." *Id*. (quoting *Ives*, 187 Ariz. at 109, 927 P.2d at 769). Rule 13.4, however, provides that even when offenses have been properly joined, the offenses may be severed when "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense." Ariz. R. Crim. P. 13.4(a). "[I]n the interest of judicial economy, [however,] joint trials are the rule rather than the exception." *State v. Van Winkle,* 186 Ariz. 336, 339, 922 P.2d 301, 305 (1996).

¶12 "We review denial of [a motion for] severance for an abuse of discretion." *State v. Garland*, 191 Ariz. 213, 216, ¶ 9, 953 P.2d 1266, 1269 (App. 1998). We review the issue in the context of the evidence that was before the court at the time the motion was made. *State v. Blackman*, 201 Ariz. 527, 537, ¶ 39, 38 P.3d 1192, 1202 (App. 2002). "A clear abuse of discretion is established only when a defendant shows that, at the time he made [the] motion to sever, he had proved that his defense would be prejudiced absent severance." *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). To be entitled to reversal, however, a defendant must also demonstrate the trial court was unable to protect against any prejudice. *Id.* "A

defendant is not prejudiced by a denial of severance where the jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt." *State v. Johnson*, 212 Ariz. 425, 430, ¶ 13, 133 P.3d 735, 740 (2006) (quoting *State v. Prince*, 204 Ariz. 156, 160, ¶ 17, 61 P.3d 450, 454 (2003)).

¶13 We find no error. The trial court did not abuse its discretion when it determined the offenses were part of a common scheme or plan in which Defendant murdered the victim for considerable financial gain, much of which could be obtained only after the murder by gaining control of the victim's separate personal and business assets through theft and/or fraud. Further, evidence of the property offenses was admissible to establish the identity of the murderer as well as the motive for the murder. While motive is not an element of the offense, evidence of a motive is relevant in a murder prosecution. *State v. Hunter*, 136 Ariz. 45, 50, 664 P.2d 195, 200 (1983). Finally, severance of the offenses was not necessary for a fair determination of guilt or innocence on any one of the five charges.

¶14 Defendant has also failed to show the trial court did not adequately protect against any prejudice. The court instructed the jurors that the State must prove each element of each offense beyond a reasonable doubt; that each count was a

separate and distinct offense the jury must consider separately from any other count; that they must consider each count in the context of the evidence and law that applied to that particular count, and that their decision on any one count must not be influenced by their decision on any other count. Again, "[a] defendant is not prejudiced by a denial of severance where the jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt." *Johnson*, 212 Ariz. at 430, ¶ 13, 133 P.3d at 740. Further, juries are presumed to follow their instructions. *Dunlap*, 187 Ariz. at 461, 930 P.2d at 538.

IV. The Failure to Preclude Expert Testimony

¶15 Defendant next argues the trial court erred when it refused to preclude the testimony of a detective/computer expert who analyzed data found on computers seized from Defendant's home. Defendant argues the court should have precluded the expert's testimony as a sanction for the State's failure to disclose the expert's final supplemental report in a timely manner. We review the decision of whether to exclude evidence as a sanction for untimely disclosure for abuse of discretion. *State v. Rienhardt*, 190 Ariz. 579, 586, 951 P.2d 454, 461 (1997).

¶16 Due process requires that the State disclose material evidence in a timely manner. *State v. Gulbrandson*, 184 Ariz.

46, 63, 906 P.2d 579, 596 (1995). One of the purposes of timely disclosure is to avoid undue delay and surprise. *State v. Stewart*, 139 Ariz. 50, 59, 676 P.2d 1108, 1117 (1984). If a court determines a disclosure violation merits sanctions, however, the court must consider whether less stringent sanctions would suffice before it restricts the introduction of evidence. *State v. Meza*, 203 Ariz. 50, 58, ¶ 37, 50 P.3d 407, 425 (App. 2002).

¶17 A simple review of the procedural history of this issue shows Defendant suffered no prejudice from the late disclosure. Therefore, the trial court did not abuse its discretion when it declined to preclude the testimony of the expert. In April 2005, more than three years before trial began, the State provided Defendant the State's expert's initial report regarding his analysis of computers seized from Defendant's residence, as well as five compact discs (CDs) of data copied from those computers. In January 2006, the State provided Defendant an additional report from the expert as well as three more CDs. Twice at the prosecutor's request over a year later, the expert reviewed the data again to determine specifically whether anyone used the computers to conduct specific internet searches between September 8, 2004 and September 10, 2004, ostensibly to show whether the victim was still alive at that time.

¶18 Voir dire began on December 15, 2008 and continued for several weeks. On December 22, 2008, the State provided Defendant the results of the computer expert's most recent work regarding the internet searches. These materials consisted of a three page report, another CD and 172 pages of "related material." The additional materials included what the trial court described as a "narrative and grid" of the expert's additional findings.

¶19 On January 8, 2009, Defendant filed a motion for sanctions. Defendant argued the disclosure of these latest materials was untimely, interfered with her ability to put on a defense, interfered with her right to confrontation, and was otherwise highly prejudicial.[4] As a sanction, Defendant sought to preclude the State's computer expert's testimony in its entirety. Because trial was expected to continue for several months and the State's expert would not testify for several months, the trial court delayed ruling on the motion. In the interim, the court ordered the parties' computer experts to meet and make sure Defendant's expert had everything he needed to conduct his own analysis and address the reports and opinions of the State's expert.

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[4] Within her argument on this issue, Defendant claims she could not make her opening statement at the beginning of trial because she was not prepared to address the late disclosure. There is nothing in the record to support this allegation.

¶20 The trial court ruled on the motion for sanctions six months later in June 2009. The court held that because the jury was not empanelled until January 29, 2009, the State "technically" disclosed the expert's supplemental materials in a timely fashion. The court further held, however, that the State violated the "spirit" of disclosure when it failed to disclose the additional materials earlier when it had the opportunity to do so. Even so, the trial court refused to impose the ultimate sanction of preclusion.

¶21 The court first held the new material in the additional disclosure "consisted of a limited and focused analysis" which summarized the work requested and the results found. The court also noted the State's expert found only a small number of "hits" which showed someone used the computer to access certain websites during the time frame at issue. The court further held Defendant suffered no prejudice from the late disclosure. Defendant interviewed the State's expert regarding his analysis and opinions on February 5, 2009. Near that same time, the computer experts for both parties met to create an agreed upon "mirror image" of the hard drives at issue for Defendant's expert. At that time, Defendant informed the court her expert would need one to two months to conduct his own analysis, and Defendant's expert ultimately had far more time than this to complete his work. The trial court ultimately held

that because Defendant had sufficient opportunity to conduct all additional discovery she believed necessary, her expert had more than sufficient time to conduct his own analysis, and Defendant failed to demonstrate she was prejudiced in any way, no further sanctions were warranted.

¶22 Under these circumstances, the trial court did not abuse its discretion when it refused to preclude the testimony of the State's expert as a sanction for untimely disclosure. This is especially true in light of events that occurred after the court's ruling. The State's computer expert did not begin his testimony until June 9, 2009, more than six months after the late disclosure and approximately four months after Defendant's own computer expert was provided all the materials he needed to conduct all the work he believed necessary. Again, Defendant informed the court in February that her expert needed only one to two more months to conduct his analysis. Further, Defendant's expert began his testimony on August 3, 2009 – nearly two months after the State's expert testified. Defendant has never claimed her expert did not have sufficient time or materials to conduct his own analysis of the data or the work conducted by the State's expert, or that she did not have enough time to prepare for the cross-examination of the State's expert. The passage of such a significant amount of time after the disclosure and the steps taken by the court to ensure Defendant

and her expert had sufficient time and materials to address the State's expert's anticipated testimony were more than sufficient to eliminate any potential prejudice from the late disclosure. Therefore, the trial court did not abuse its discretion when it declined to preclude the admission of the testimony of the State's computer expert.

V. Denial of the Motions for Mistrial and Motions to Dismiss

¶23 Defendant next argues the trial court erred when it denied her motions for mistrial and motions to dismiss, all of which were based on alleged prosecutorial misconduct. The trial court has broad discretion on motions for mistrial. The failure to grant a motion for mistrial is error only if it was a clear abuse of discretion. *Murray*, 184 Ariz. at 35, 906 P.2d at 568. We will reverse only if the court's decision was "palpably improper and clearly injurious." *Id.* (citing *State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989)). The trial judge is in the best position to determine whether a particular incident calls for a mistrial because the trial judge is aware of the atmosphere of the trial, the circumstances surrounding the incident, the manner in which any objectionable conduct occurred, and its possible effect on the jury and the trial. *See State v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983). Likewise, we review the decision of whether to grant a motion to

dismiss for an abuse of discretion. *State v. Pecard*, 196 Ariz. 371, 376, ¶ 24, 998 P.2d 453, 458 (App. 1999).

¶24 Regarding prosecutorial misconduct, prosecutorial misconduct is not merely "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." *Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984). In reviewing allegations of prosecutorial misconduct, we generally consider whether the remarks directed the jurors' attention to matters they should not have considered in reaching their verdict, as well as the probability that the jurors were actually influenced by the remarks. *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997). As with motions for mistrial, the trial court is in the best position to judge the effect of a prosecutor's comments on a jury. *State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988). "Prosecutorial misconduct does not require reversal 'unless the defendant has been denied a fair trial as a result of the actions of counsel.'" *State v. Bible*, 175 Ariz. 549, 600, 858 P.2d 1152, 1203 (1993) (quoting *State v. Dumaine*, 162 Ariz. 392, 400, 783 P.2d 1184, 1192 (1989)). In our determination of whether reversal is required, "[t]he focus is on the fairness of the trial, not the culpability of the prosecutor." *Bible*, 175 Ariz. at 601, 858 P.2d at 1204.

A. Witness Hill

¶25 Defendant argues the first instance of prosecutorial misconduct came during the testimony of witness "Hill." Hill met Defendant in jail where they were both prisoners. Hill entered into a plea bargain in which she agreed to testify against Defendant. After she entered the plea, Hill told investigators Defendant told her she acted alone when she murdered the victim then cut up and disposed of his body. At trial, however, Hill testified the majority of what she told the investigators was a lie, that she never heard Defendant make any admissions or otherwise say anything about her case, and that she lied simply to get a better plea deal. The prosecutor thoroughly and aggressively impeached Hill with her prior statements almost from the very beginning of her direct examination.[5]

¶26 Defendant argues the alleged prosecutorial misconduct occurred not during the prosecutor's examination of Hill, but during a break in Hill's testimony. Defendant argues that during the break, the prosecutor threatened Hill with perjury in an effort to intimidate her and make her change her testimony.

[5] At another interview prior to her testimony at trial, Hill told counsel for both parties she lied about Defendant to get a better plea deal. Therefore, the State knew she would contradict her prior statements. The State moved for permission to treat Hill as a hostile witness shortly after her direct examination began, but the court denied the motion as well as the renewed motion.

The prosecutor argued to the court that he was merely "kibitzing" with Hill's counsel and not speaking to Hill. After a discussion of what did or did not occur, the trial court held the incident went to the weight to be attributed to Hill's testimony and, therefore, the jury should be informed of what happened. Hill then testified before the jury about the incident. Hill overheard the prosecutor's comments about perjury and discussed the issue with her attorney. Her attorney told her not to worry and explained why, in her opinion, she had not committed perjury. Hill further testified that the prosecutor's comments increased her tension, that she was intimidated by the comments and that she took them as a threat.

¶27 This was not, however, the first time the subject of perjury charges had been broached. Hill acknowledged that in a prior interview with both counsel in which she first claimed her statements to investigators were lies, the prosecutor made frequent reference to perjury. Further, Hill acknowledged that at the time of the prior interview, she understood she could be charged with perjury depending upon the circumstances. Even Hill's counsel acknowledged that the threat of perjury charges had "been over [Hill's] head" since her recantations, that the prosecutor had "talked to [Hill] about possible perjury charges from the very beginning," and that Hill knew even before trial she might eventually be charged with perjury. Further, Hill

stated at the interview that she was not bothered by any threat of perjury because "it's time for me to start being honest."

¶28 Defendant later moved for a mistrial and argued the prosecutor's threat of perjury against his own witness constituted misconduct.[6] The trial court denied the motion. The court held that while the prosecutor was aggressive, nothing the prosecutor did was improper and there was no misconduct.

¶29 We find no abuse of discretion. First, there was no misconduct. It is not per se improper for a judge or prosecutor to warn a witness about the possible consequences if the witness commits perjury. *Dumaine*, 162 Ariz. at 400, 783 P.2d at 1192. A problem arises only when a witness is so intimidated by such a warning that the defendant "was completely deprived of the . . . witness's testimony." *Id*. at 399, 783 P.2d at 1191. That did not occur here. Hill was consistent throughout her trial testimony, even after the "threat" of perjury. Despite her claim of intimidation, Hill acknowledged repeatedly she had told investigators Defendant admitted she committed the murder, but maintained her position that this was simply a series of lies she told to obtain a more favorable plea bargain. Hill never waivered from her testimony that she lied to the investigators to get a better deal and that she was now telling the truth at

[6] The motion raised other arguments regarding the examination of Hill that are not presented on appeal.

trial, even after the discussion of the perjury threat. She did not, as claimed by Defendant, suddenly testify more favorably for the State. Therefore, the trial court did not abuse its discretion when it denied the motion for mistrial based on prosecutorial misconduct.

B. The Reference to Attorney Retainer Agreements

¶30 Defendant next argues the prosecutor engaged in misconduct "by commenting on [Defendant's] efforts at retaining attorneys for her defense" in his opening statement. Defendant argues the prosecutor should not have referenced a retainer agreement in which she retained attorneys to assist her with the pre-indictment investigation of the victim's disappearance, nor a later retainer with the same firm to handle the victim's estate. Defendant filed motions for mistrial and to dismiss in part as a result of the reference to the retainers in opening, both of which were denied by the trial court. Defendant argues the reference to the retainers violated her right to counsel and deprived her of a fair trial "as the jury inevitably inferred guilty [sic] through this evidence."

¶31 We find no abuse of discretion. The prosecutor referenced the retainers only after the trial court overruled Defendant's objection and expressly held the prosecutor could reference both retainers in his opening statement. There can be

no prosecutorial misconduct when the prosecutor has done nothing more than what the trial court expressly permitted.

C. Disclosure of Benefits to Witness Johnson

¶32 Defendant next argues the prosecutor engaged in misconduct when he failed to disclose benefits witness "Johnson" received in exchange for her testimony against Defendant. Johnson was another former jail inmate who testified that Defendant admitted she murdered the victim, froze his body and cut it up. Johnson also testified that Defendant admitted she committed the murder for financial gain. Johnson, however, did not accept a plea offer in exchange for her testimony. Johnson went to trial in her own case, was convicted of two felony counts and sentenced to imprisonment.

¶33 Even though the State had not disclosed any benefit Johnson may have received in exchange for her testimony, Defendant explored whether Johnson cooperated with the State in exchange for any benefit during cross-examination. Defendant already knew the prosecutor and one of the investigating detectives had appeared at various hearings in the Johnson matter, including her sentencing. During a bench conference on this issue, however, the prosecutor repeatedly stated Johnson "got no deal" or any other benefit in exchange for her testimony. The prosecutor admitted, however, that he and the detective appeared at various hearings and the sentencing in the

Johnson matter, and that they informed the presiding judge she was cooperating in Defendant's case.

¶34 Through additional discovery and several hearings conducted during trial, the parties eventually established, among other things, that the prosecutor and the detective appeared at various hearings in Johnson's case; they spoke to the court at a hearing to modify Johnson's release conditions, following which, she was released from jail; they spoke to the court about their concerns for her safety; they spoke at Johnson's sentencing and asked for leniency; the State provided Johnson with approximately sixty days of housing to ensure her safety and her appearance at Defendant's trial; and that the State provided Johnson food during that same time period as well as transportation to and from the court during Defendant's trial. Defendant moved for both a mistrial and dismissal for prosecutorial misconduct based on the failure to disclose this information.

¶35 The trial court found Defendant "feign[ed] ignorance" of some of these matters. Based on the transcript of Defendant's interview of Johnson prior to trial, the court found Defendant already knew the prosecutor and the detective spoke to the trial court in the Johnson matter; that Defendant knew they informed the court that Johnson was cooperating in Defendant's case and that they had "good things to say about her;" and that

Defendant knew they not only appeared at Johnson's sentencing, but that they addressed the sentencing court and asked that the court be lenient. Even so, the trial court held the prosecutor should have disclosed all of this information prior to trial.

¶36 The trial court, however, further held Defendant suffered no prejudice. The court noted Johnson was still under subpoena to testify and subject to recall, and that because "an extensive evidentiary hearing has been conducted to ferret out the specifics of anything that could be considered a 'benefit' to Johnson," Defendant had the benefit of "extensive testimony" with which to impeach Johnson on recall. The court found that under these circumstances, neither sanctions nor dismissal were warranted. Defendant ultimately recalled Johnson during the defense case. During her direct examination of Johnson, Defendant had the opportunity to fully explore all of the "benefits" Johnson received from the State and whether those benefits had any effect on the substance of her testimony or otherwise played any role in her decision to testify against Defendant.

¶37 Assuming without deciding that the State should have disclosed all of the additional "benefits" the State provided to Johnson, Defendant suffered no prejudice. The court gave Defendant more than enough time and opportunity to discover the existence of these benefits, discuss them at length with Johnson

prior to her recall, determine their effect, if any, on Johnson's testimony and then utilize them to impeach Johnson once she was recalled during the defense case. Under these circumstances, the trial court did not abuse its discretion when it denied the motions for mistrial and to dismiss based on the prosecutor's failure to disclose the benefits provided to Johnson.

D. The Investigation of Detective Barnes

¶38 Within her argument on the court's failure to grant the motions for mistrial and dismissal based on prosecutorial misconduct, Defendant argues the State failed to disclose that the lead detective, "Barnes", had himself come under criminal investigation for unrelated matters during this case. It will suffice to note that upon receiving Defendant's motion for discovery, the State obtained the materials regarding the Barnes investigation and submitted them to the court for an in camera inspection. Further, Defendant eventually deposed Barnes and the court held a series of hearings in which Barnes was questioned by the court and counsel. During these proceedings, the trial court ultimately allowed Barnes to assert his Fifth Amendment privilege against self-incrimination regarding any discussion that occurred on or before December 14, 2007 regarding any alleged "benefits" Johnson might receive. The State never called Barnes to testify at trial. Defendant,

however, called Barnes during the defense case. Prior to his testimony, the trial court held Defendant could not question Barnes about any discussion of benefits for Johnson that occurred on or before December 14, 2007. Barnes did testify, however, about benefits allegedly afforded Johnson after that date.

¶39 Despite her inclusion of this issue in this section of her opening brief, Defendant never moved for a mistrial nor dismissal based on any prosecutorial misconduct related to the Barnes investigation. Further, Defendant does not argue on appeal the trial court should have declared a mistrial nor dismissed the case sua sponte. Defendant's entire argument on this issue consists of, "[t]his strict limitation [to the discussion of benefits for Johnson that occurred after December 14, 2007] violated Appellant's Fifth Amendment [sic], Sixth Amendment right of confrontation, and due process right to a fair trial, as Appellant could not confront the lead investigator regarding pertinent issues in this case concerning the murder investigation of [the victim]."

¶40 Because Defendant did not raise this issue below, we review for fundamental error. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to

his defense, and is of such magnitude that he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Even once fundamental error has been established, a defendant must still demonstrate the error was prejudicial to be entitled to reversal. *Id*. at ¶ 26.

¶41 We find no error, fundamental or otherwise. While Defendant complains about the court's limitation of her examination of Barnes, Defendant does not claim Barnes' invocation of his Fifth Amendment privilege against self-incrimination was invalid, and our review of the record reveals nothing to raise any question about the validity of Barnes' invocation. A defendant has no Sixth Amendment right to compel the testimony of a witness who has made a valid assertion of the Fifth Amendment privilege against self-incrimination. *State v. Rosas-Hernandez*, 202 Ariz. 212, 216, ¶ 10, 42 P.3d 1177, 1181 (App. 2002).

VI. The Failure to Disclose Videotapes

¶42 As the final issue on appeal, Defendant argues the trial court erred when it denied her motion for new trial based on the State's failure to disclose numerous videotapes which depicted Defendant and the victim as a couple at family gatherings. "Motions for new trial are disfavored and should be granted with great caution." *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996) (quoting *State v. Rankovich*, 159

Ariz. 116, 121, 765 P.2d 518, 523 (1988)). We review denial of a motion for new trial for abuse of discretion. *Spears*, 184 Ariz. at 287, 908 P.2d at 1072.

¶43 The victim's brother possessed the tapes in question. Because he was the deceased victim's brother, and because he was the executor of the victim's estate, the victim's brother was a "victim" of the offenses under Arizona law. A.R.S. § 13-4401(19) (2007); Ariz. R. Crim. P. 39(a)(1). Defendant argues the tapes were relevant to show that she and the victim were a happy couple and that Defendant did not hate the victim as alleged. Defendant further argues the tapes showed the victim was a large man and Defendant was a small woman and, therefore, Defendant did not have the physical capacity to murder the victim, freeze his body, cut it up and dispose of it.

¶44 The trial court denied the motion for new trial. First, the court held the State had no duty to disclose the tapes because the tapes were never in the possession of the State or any agent of the State. Second, the court held other evidence was admitted at trial regarding the nature of Defendant and the victim's relationship, their relative sizes and Defendant's strength. Third, the court found Defendant had

personal knowledge of the existence of the tapes yet never requested them until after the verdicts.[7]

¶45 The trial court did not abuse its discretion when it denied the motion for new trial based on the failure to disclose the videotapes. The State was not required to disclose the videotapes because neither the State nor any agent of the State ever possessed the tapes. The State only has a duty to obtain and disclose information in the possession or control of members of the prosecutor's staff and persons who have participated in the investigation or evaluation of the case who are under the prosecutor's control. Ariz. R. Crim. P. 15.1(f); *See also Rienhardt*, 190 Ariz. at 585, 951 P.2d at 460. A victim does not become an agent of the state simply because the victim cooperates with the State. *State v. Piper*, 113 Ariz. 390, 392, 555 P.2d 636, 638 (1976); *Rienhardt*, 190 Ariz. at 585, 951 P.2d at 460. Further, the State generally does not "have an affirmative duty to seek out and gain possession of potentially exculpatory evidence," nor does the State have a duty to gather evidence for a defendant to use in establishing a defense. *State v. Rivera*, 152 Ariz. 507, 511-512, 733 P.2d 1090, 1094-1095 (1987).

[7] Defendant failed to make the transcript of the hearing regarding the motion for new trial part of the record on appeal.

VII. Conclusion

¶46 Because we find no error, we affirm Defendant's convictions and sentences.

/s/
JON W. THOMPSON,
Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
JOHN C. GEMMILL, Judge