IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MARISSA SUZANNE DEVAULT, *Appellant*.

No. 1 CA-CR 14-0427
FILED 8-4-2016

Appeal from the Superior Court in Maricopa County
No. CR2009-030306-001
The Honorable Roland J. Steinle, III, Judge *Retired*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Adele Ponce
Counsel for Appellee

The Hopkins Law Offices, PC, Tucson
By Cedric Martin Hopkins
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Randall M. Howe joined.

C A T T A N I, Judge:

¶1 Marissa Suzanne Devault appeals her conviction of first degree murder. She raises several claims of error regarding the superior court's evidentiary and suppression rulings, and further asserts that prosecutorial misconduct and judicial bias require reversal. For reasons that follow, we affirm.

PROCEDURAL BACKGROUND

¶2 The State charged Devault with first degree murder, seeking the death penalty, alleging that she killed her husband with a claw hammer. A jury found Devault guilty of first degree murder, but also found that, although she committed the murder in an especially cruel manner, she should receive a sentence of life imprisonment rather than death. The superior court sentenced Devault to life in prison without the possibility of release, and she now appeals. We have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 13-4033.

DISCUSSION

I. Motion to Suppress.

¶3 Devault argues the superior court erred by denying her motion to suppress her admission to police that she struck her husband with a hammer, arguing that the incriminating statement was elicited in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The court denied Devault's motion on the basis that she was not in custody—and thus not entitled to *Miranda* warnings—before her admission.

¶4 We review the court's suppression ruling for an abuse of discretion, considering only those facts presented at the suppression hearing and deferring to the superior court's factual findings. *See State v. Newell*, 212 Ariz. 389, 396 & n.6, ¶¶ 21–22 (2006); *State v. Adams*, 197 Ariz. 569, 572, ¶ 16 (App. 2000). We review de novo, however, the ultimate legal

question of whether a defendant's constitutional rights were violated. *Adams*, 197 Ariz. at 572, ¶ 16.

¶5 The right to *Miranda* warnings is triggered upon custodial interrogation. *Stansbury v. California*, 511 U.S. 318, 322 (1994). As relevant here, an individual is in custody if subjected to a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010) (citation and internal quotation marks omitted). The *Miranda* warnings are targeted to address the "danger of coercion [that] results from the interaction of custody and official interrogation." *Illinois v. Perkins*, 496 U.S. 292, 297 (1990); *see also Howes v. Fields*, 132 S.Ct. 1181, 1189 (2012).

¶6 In assessing whether an individual was in custody for purposes of *Miranda*, we consider the objective circumstances surrounding the interrogation to determine whether a reasonable person would have felt free to stop the questioning and leave. *Howes*, 132 S.Ct. at 1189. Relevant considerations include the location and duration of the questioning, statements made during the questioning, the presence or absence of physical restraints, and whether the person was released at the end of questioning. *Id.* Interrogation at a police station does not necessarily render the interrogation custodial. *State v. Carrillo*, 156 Ariz. 125, 133 (1988). "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

¶7 Here, Devault was not in custody until after her admission. Before speaking with Devault, the detective considered her to be a victim of an assault by her husband and had identified a third-party (S.C.) suspected of attacking Devault's husband. Accordingly, Devault was not initially arrested, and she was not subject to restrictions on her freedom of movement to a degree associated with an arrest. After speaking with the detective at the hospital, Devault voluntarily went to the police station (driven by her family members) to continue discussing her allegations of abuse by her husband. The detective informed her that she was free to leave whenever she wished, and she was not handcuffed or physically restrained in any way. Investigators made no promises or threats and did not deprive her of food or water. Devault took multiple breaks over the course of the five-hour interview, including trips outside with a detective. Although she was always accompanied by an escort when moving to and from the interview room (which was located in a secure area of the police station), a reasonable person in Devault's position would have understood that she was not under arrest and was free to stop the questioning and leave the

police station whenever she wished. Accordingly, there was evidence from which the superior court could reasonably conclude that Devault was not in custody for purposes of *Miranda*, and the court did not abuse its discretion by denying her motion to suppress.

II. Evidentiary Issues.

A. Admission of Evidence that A.F. Documented Conversations with Devault.

¶8 Devault argues the superior court erred by admitting evidence that a witness—A.F.—documented conversations he had with her before the murder in which she discussed having someone kill her husband (or doing so herself).

¶9 Before trial, Devault moved to preclude all evidence contained on A.F.'s computer hard drives (as well as expert reports analyzing data on the drives) on the basis that the State did not timely disclose the evidence. The hearing on that motion evolved into a discussion about hard drive documents in which A.F. described his pre-murder conversations with Devault about killing her husband. The State agreed that it would not introduce the documents themselves, but rather would use them to refresh A.F.'s memory if necessary. The superior court thereafter ruled that, although A.F. could testify directly regarding the pre-murder conversations, the State could not refer to the written documentation of the conversations (which the court considered essentially prior consistent statements) unless Devault attacked A.F.'s credibility by alleging recent fabrication. *See* Ariz. R. Evid. 801(d)(1)(B).[1]

¶10 At trial, A.F. testified about the content of the conversations, but also gratuitously stated, "I documented it." The prosecutor then asked

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[1] The language of this rule was modified effective January 1, 2015, after Devault's trial, to expand the admissibility of prior consistent statements beyond rebutting allegations of recent fabrication to also include rehabilitating the declarant witness's credibility against other types of attacks. *See* Ariz. R. Evid. 801(d)(1)(B) & cmt to 2015 amendment to Rule 801(d)(1)(B). The applicable pre-amendment version of the rule only allowed a witness's prior consistent statement to be admitted as non-hearsay "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying," but not to rebut other attacks on credibility. Ariz. R. Evid. 801(d)(1)(B) (2014).

A.F. a series of questions regarding how he had documented the conversations, whether he had done so when the conversations were fresh in his mind, whether he had revised the documents, and whether the documents accurately reflected the conversations. Devault did not object to this line of inquiry, but the superior court *sua sponte* stopped the questioning, struck the testimony, and instructed the jury to disregard it.

¶11 Devault now argues that the superior court erred by admitting evidence that A.F. documented the conversations. But the superior court never ruled that the evidence was admissible. Instead, the court precluded reference to the documents absent a claim of recent fabrication, and when it became apparent Devault was not objecting to the precluded testimony, the court took action *sua sponte*, stopping the line of questioning, striking the evidence, and instructing the jury to disregard it. We presume the jury followed this instruction. *See State v. Dunlap*, 187 Ariz. 441, 461 (App. 1996). Accordingly, Devault has not shown that the superior court erred in addressing this evidence. Moreover, the jury later heard a recording of a telephone conversation in which Devault admitted that A.F. wrote down everything they talked about, including Devault's efforts to have someone kill her husband. A.F.'s references to documenting his conversations with Devault were thus cumulative, and any error regarding this evidence was harmless.

B. Admission of Facts Underlying the State's Expert's Opinion.

¶12 Devault argues that the superior court erred by allowing the State's expert to testify to unfairly prejudicial facts underlying the expert's opinion. Devault objected to two instances of factual testimony, which we review for an abuse of discretion. *State v. Hyde*, 186 Ariz. 252, 276 (1996). We review the instances to which Devault did not object for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19–20 (2005).

¶13 During the mitigation portion of the penalty phase of trial, Devault presented expert testimony from a sociologist/criminologist that her actions were "consistent with someone that has experienced long-term domestic violence and childhood physical and sexual abuse," that an attack like Devault's was usually "a preemptive strike" of self-defense against an abuser, and that Devault likely acted in "an explosion of humiliated fury." In response, the State presented expert testimony from a clinical psychologist who opined that Devault suffered from antisocial personality disorder. The psychologist testified to the facts underlying the diagnosis, including Devault's prior run-ins with police, multiple instances of lying or

deceitful behavior, and multiple examples of manipulative behavior. Devault argues that admission of these facts was improper and requires reversal.

¶14 Devault acknowledges that the factual underpinnings of an expert's opinion may be presented to the jury in certain circumstances (even if not otherwise admissible), but argues that the court should have precluded the facts in this case because their unfair prejudice eclipsed any possible probative value. *See* Ariz. R. Evid. 703; *see also State v. Lundstrom*, 161 Ariz. 141, 148 (1989); *cf.* Ariz. R. Evid. 403. But by placing her mental health at issue, Devault opened the door to rebuttal mental health evidence, including conduct underlying the State's expert's diagnosis of antisocial personality disorder. *See State v. Johnson*, 212 Ariz. 425, 435–36, ¶¶ 36–40 (2006); *Phillips v. Araneta*, 208 Ariz. 280, 282, ¶ 8 (2004); *see also* A.R.S. § 13-751(D) ("The prosecution and the defendant shall be permitted to rebut any information received at the aggravation or penalty phase of the sentencing proceeding[.]").

¶15 Moreover, any conceivable error in allowing this rebuttal evidence was harmless and non-prejudicial. The facts underlying the psychologist's opinion were not presented until the mitigation portion of the penalty phase of trial, at which point the only issue that remained for the jury to decide was whether Devault should be sentenced to death or to life imprisonment. *See* A.R.S. § 13-752(F)–(H). The jury returned a unanimous verdict of life imprisonment (instead of the death penalty), which resolved the mitigation phase in Devault's favor. Accordingly, any error in allowing the State's expert to disclose the bases of her opinion was harmless and non-prejudicial beyond any doubt.

III. Prosecutorial Misconduct.

¶16 Devault argues the prosecutor engaged in misconduct during both initial and rebuttal closing arguments by vouching for A.F.'s credibility and arguing Devault was a liar. Devault claims these comments effectively placed the prestige of the government behind A.F.'s testimony. We review the one instance of alleged vouching to which Devault objected for an abuse of discretion. *See State v. Lee*, 189 Ariz. 608, 616 (1997). We review for fundamental, prejudicial error the other five instances of alleged vouching to which Devault did not object. *See Henderson*, 210 Ariz. at 567, ¶¶ 19–20 (2005); *State v. Wood*, 180 Ariz. 53, 66 (1994).

¶17 Prosecutorial misconduct warrants reversal only if "(1) misconduct is indeed present[,] and (2) a reasonable likelihood exists that

the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Moody*, 208 Ariz. 424, 459, ¶ 145 (2004). We consider the cumulative effect of all instances of misconduct to assess whether the misconduct was "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial," rendering "the resulting conviction a denial of due process." *State v. Morris*, 215 Ariz. 324, 335, ¶ 46 (2007) (citations omitted); *State v. Roque*, 213 Ariz. 193, 230, ¶ 164 (2006).

¶18 Prosecutorial vouching is a form of misconduct in which, as relevant here, "the prosecutor places the prestige of the government behind its [evidence]." *Newell*, 212 Ariz. at 402, ¶ 62 (alteration in original) (citation omitted).[2] Prosecutors have wide latitude in closing argument, however, to suggest reasonable inferences from the evidence presented, including ultimate conclusions for the jury's consideration. *State v. Bible*, 175 Ariz. 549, 602 (1993). A prosecutor thus may characterize a witness as truthful as long as the argument is grounded in the evidence presented at trial. *See State v. Corona*, 188 Ariz. 85, 91 (App. 1997).

¶19 During initial closing and while discussing the recorded telephone conversation in which Devault acknowledged A.F. had written down her comments about hiring someone to kill her husband, the prosecutor noted that Devault did not claim A.F. was lying, but rather told the other person to find out what A.F. had written down "so she [could] figure out a different way to spin it." Devault claims the prosecutor improperly vouched for A.F.'s credibility by arguing that Devault's response showed "The truth about [the victim's] murder is finally revealed. What [A.F.] told you about his conversations with the defendant, about her plans to kill her husband, are true."

¶20 This statement did not vouch for A.F.'s credibility, however, but rather argued a reasonable inference based on Devault's reaction. *See Bible*, 175 Ariz. at 602; *Corona*, 188 Ariz. at 91. Moreover, Devault objected to this argument, and the superior court sustained her objection and struck the prosecutor's statement, ordering the jury to disregard it. Thus, even assuming the prosecutor's statement constituted vouching, Devault received the only remedy she sought, and as the jury was instructed to disregard the comment, Devault has not shown that the comment so

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[2] Vouching also includes instances in which "the prosecutor suggests that information not presented to the jury supports the [evidence]," *Newell*, 212 Ariz. at 402, ¶ 62 (alteration in original), but Devault does not allege this type of vouching.

infected the proceedings as to deny her a fair trial. *See Morris*, 215 Ariz. at 335, ¶ 46; *Dunlap*, 187 Ariz. at 461.

¶21 The next instance of alleged vouching—to which Devault did not object—involved the prosecutor's argument about how, when Devault's initial story that S.C. committed the murder did not match the physical evidence at the scene, she changed her story to claim that her husband was abusive and she hit him when he was raping her. Devault argues the prosecutor engaged in misconduct when he then argued, "The cold, hard truth is this, ladies and gentlemen: The defendant planned to kill [the victim] and then she did it." But this argument did not place the prestige of the government behind any witness. *See Newell*, 212 Ariz. at 402, ¶ 62. Nor did the prosecutor's use of the word "truth" convert the statement into vouching. Rather, the argument simply urged the jury to draw a reasonable inference from the evidence presented at trial, and thus did not constitute vouching. *See Bible*, 175 Ariz. at 602.

¶22 Devault argues the prosecutor further bolstered A.F.'s credibility by repeatedly calling Devault a liar during rebuttal closing argument. These three instances of alleged vouching—to which Devault did not object—arose in response to Devault's argument in closing that the State's theory that she murdered her husband for insurance proceeds did not make sense because, as the perpetrator, she could not collect the proceeds. In rebuttal, the prosecutor argued (1) "that's why the lie about [S.C.] doing it is created. That lie allows for her to collect on that insurance policy because she didn't do it"; (2) that Devault reverted to her first version (S.C. attacked her husband) even after telling the police she did it because "[t]hat lie allows her to get paid"; and (3) that inconsistencies in Devault's versions of events arose because "[t]he problem with a lie is trying to keep it all consistent."

¶23 These three statements did not place the prestige of the government behind any witness. Instead, the statements simply urged the jurors to draw reasonable inferences grounded in the trial evidence. *See Newell*, 212 Ariz. at 402, ¶ 62. Moreover, the arguments were relevant to show premeditation based on Devault's purchase of the insurance policy, and further constituted fair rebuttal to Devault's closing argument minimizing the likelihood that Devault expected to collect the insurance proceeds. *See State v. Duzan*, 176 Ariz. 463, 468 (App. 1993) (noting that the prosecutor may rebut comments initially made by the defense).

¶24 The final instance of alleged vouching—to which Devault did not object—concerned the State's immunity agreement with A.F. Devault

argued in closing that A.F. had "every reason to be untruthful" because he received immunity from prosecution in exchange for testifying, and Devault further questioned why immunity was necessary if A.F. had done nothing wrong. In rebuttal, the prosecutor referred the jury to A.F.'s immunity agreement, which had been admitted as an exhibit, and pointed out that although the agreement generally prevented use of A.F.'s trial testimony as evidence against him, it expressly provided that A.F. could be prosecuted if he gave perjured testimony in this case. Devault argues the prosecutor vouched for A.F.'s credibility by then arguing that, "In other words, ladies and gentlemen, the only way [A.F.] can get in trouble for coming in here and testifying is if [he gives] you false information."

¶25 The State is allowed to introduce evidence that its agreement with a witness requires truthful testimony. *State v. McCall*, 139 Ariz. 147, 158–59 (1983). Moreover, in context, the prosecutor's comment was fair rebuttal to Devault's argument that A.F. had a motive to lie. *See Duzan*, 176 Ariz. at 468. In fact, the prosecutor's next statement explicitly rebutted Devault's argument: "The defense looks at that immunity agreement as a reason for him to lie. It can just as easily be looked at as his incentive to tell the truth."

¶26 Accordingly, Devault has not shown prosecutorial misconduct, much less pervasive misconduct warranting reversal.

IV. Alleged Judicial Bias.

¶27 Finally, Devault argues that the trial judge was biased against her counsel and, by not holding the prosecutor to the same standard, deprived her of a fair trial. Because Devault did not raise her claim of judicial bias before the superior court, we review for fundamental, prejudicial error. *Henderson*, 210 Ariz. at 567, ¶¶ 19–20; *State v. Curry*, 187 Ariz. 623, 631 (App. 1996).

¶28 We generally presume that trial judges are free of bias and prejudice. *See State v. Cropper*, 205 Ariz. 181, 185, ¶ 22 (2003). A party may rebut this presumption by showing, based on specific facts, "a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants." *Id.* Judicial rulings are generally insufficient to establish bias or prejudice absent an extrajudicial source of bias or a clear and deep-seated favoritism or antagonism that would make fair judgment impossible. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 40 (2006); *State v. Ramsey*, 211 Ariz. 529, 541, ¶ 38 (App. 2005). Additionally, alleged antagonism between the judge and an attorney (as opposed to between the judge and

the defendant) is generally insufficient to establish judicial bias. *See Curry*, 187 Ariz. at 631.

¶29 The first incident Devault argues establishes bias arose from an alleged violation of victim's rights. Early in the trial, the court learned that Devault's counsel contacted Devault's daughter after trial had begun; the daughter, who was also the decedent's daughter, had previously been designated a victim in this case, and the court had previously precluded any contact absent a court order. When the court, revisiting the matter at a later date, allowed the victim time to confer with her appointed counsel, Devault's counsel asked to be heard "on that issue." As the court responded, "No. [The victim's counsel] has been appointed by the Court to represent –," Devault's counsel interrupted the court to argue that the victim's counsel's appointment had ended. The court found Devault's counsel in contempt and imposed a $250 sanction (later withdrawn) for interrupting, being disrespectful, and raising his voice (at which time Devault's counsel again interrupted the court). The court then clarified that the sanction had nothing to do with counsel's representation of Devault, but rather only with counsel's disruptive behavior in the courtroom. The court also noted that it had "chewed out the prosecutor for crossing the line on a motion in limine" several days before, so it was "doing it fairly both ways."

¶30 The second incident involved the court's derogatory statements to defense counsel. While discussing a pattern of witnesses taking far longer than estimated, the court told defense counsel "you're never going to out-top me in the courtroom, so if you're going to get cute, I'm going to get cute right back." The record does not reveal what triggered the court's comment, which was made outside the presence of the jury. The court noted prior experiences with jurors becoming frustrated with "boring repetition," noted that "I've called [the prosecutor] on it a couple times," and asked the parties to keep the trial moving.

¶31 Neither of these incidents show judicial bias against Devault. First, Devault alleges judicial bias against counsel, not against herself. More importantly, the court has authority to exercise reasonable control over trial proceedings, *see* Ariz. R. Evid. 611(a), and the comments of which Devault complains were directly related to the court's efforts to ensure order and decorum in the courtroom during a lengthy and contentious trial. *See State v. Granados*, 235 Ariz. 321, 326, ¶ 17 (App. 2014).

¶32 Moreover, the record shows that the court treated both parties similarly throughout the proceedings. The court warned both the

prosecutor and defense counsel about getting "cute" with the court. The court was at times distinctly critical of the prosecutor's trial management, slow pace, and repetitiveness in examining witnesses, and even chided the prosecutor for playing "games" and threatened to hold the prosecutor in contempt for interrupting. The court lectured all counsel on professionalism and on counsels' failure to comply with the rules. The record shows that the court expressed its concerns with counsel representing Devault as well as counsel representing the State, and nothing suggests a deep-seated antagonism or favoritism. Accordingly, Devault has not shown judicial bias.

CONCLUSION

¶33 We affirm Devault's conviction.