IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2005-0371
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
AMBER LYNN TRUDELL,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20033836

Honorable Richard S. Fields, Judge

AFFIRMED

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

Robert J. Hooker, Pima County Public Defender
By Scott A. Martin
Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 After a second jury trial, appellant Amber Lynn Trudell was convicted of second-degree murder. The trial court sentenced her to a thirteen-year prison term. On appeal, Trudell argues that her conviction should be vacated and charges against her dismissed with prejudice because the prosecutor's misconduct had caused a mistrial. In the alternative, Trudell contends her conviction should be reversed and her case remanded for a new trial because of the trial court's erroneous evidentiary rulings and failure to instruct the jury on the lesser-included offense of negligent homicide. For the reasons set forth below, we affirm Trudell's conviction and sentence.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the verdict." *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). Trudell had an extramarital relationship with Michael D., her yoga instructor. On September 24, 2003, the two of them returned to his Tucson home after they had been drinking alcohol. Tucson police officers later found Michael dead on his front porch with a bullet wound in his forehead. Trudell did not contact law enforcement officials about the incident but rather fled to the White Mountains in Arizona and then relocated to New York. During that time, she stated to her mother-in-law that she had done "something bad." Tucson police officers found the weapon used to shoot Michael buried in the back yard of Trudell's relatives in the White Mountains. There were no witnesses to the events at Michael's home other than Trudell.

¶3 A Pima County Grand Jury indicted Trudell with first-degree murder. Before trial, Trudell moved to preclude evidence that she had, before the murder, previously quarreled with her husband after drinking alcohol and had pointed a loaded gun at him before he disarmed her. Her husband had made an audio recording of this incident and preserved the tape. The trial court granted Trudell's motion.

¶4 During trial, Trudell testified that she and Michael had both been drinking heavily and had argued. Trudell claimed Michael became physically violent and ultimately sodomized her without her consent. She further alleged that, as she was leaving his house, Michael's demeanor seemed to change; he told her she did not deserve what had happened, and he asked, "[W]hy don't you just shoot me?" According to Trudell, Michael then took the pistol she was carrying, covered her hands with his own, and put it to his forehead. Trudell claimed that the gun then discharged. After two trials, Trudell was convicted of second-degree murder.

¶5 At both trials, the jury was instructed on first-degree murder, second-degree murder, and manslaughter. And, in both trials, the court denied Trudell's request to instruct the jury on negligent homicide. When the first jury was unable to reach a verdict after deliberations, the court declared a mistrial.

¶6 Before the second trial, Trudell moved to dismiss the charges with prejudice, alleging, *inter alia*, that prosecutorial misconduct had caused the jury to reach a deadlock

in the first trial. The court denied the motion after a hearing. After a second trial, she was convicted of second-degree murder. This appeal followed.

Discussion

Double Jeopardy

¶7 Trudell argues that the prosecutor in the first trial engaged in misconduct that was calculated and intended to cause a mistrial so that the state could "retry the case in a more advantageous evidentiary posture." She contends the trial court therefore abused its discretion in failing to dismiss the prosecution on double jeopardy grounds.

¶8 Trudell made several motions for mistrial during her first trial based on prosecutorial misconduct. She made the first motion during the prosecutor's opening statement, when the prosecutor referred to a recorded statement Trudell had made to police in which Trudell essentially denied that she had been involved in Michael's death. Finding the statements were not an invocation of her constitutional rights, the court denied the motion for mistrial.

¶9 Later, during the state's case-in-chief, the prosecutor asked an arresting officer if he had advised Trudell of anything when she was taken into custody. The officer replied that he had informed her of her constitutional rights and that Trudell had responded that she did not want to talk to him. Trudell objected on the ground that it was improper to elicit that she had exercised her constitutional rights. She then moved for a mistrial based on the cumulative prejudicial effect of that alleged misconduct and a similar reference by the state

to a taped statement wherein Trudell had arguably asserted her constitutional rights. The trial court, appearing to accept the prosecutor's explanation that the answer was unexpected, advised the state to phrase its questions more carefully, and denied the motion.

¶10 Then, in a conference outside the hearing of the jury before closing arguments began, Trudell requested that the court prohibit the state from suggesting that expert witnesses and defense counsel had colluded with Trudell to invent a defense, which could constitute prosecutorial misconduct under *State v. Hughes*, 193 Ariz. 72, ¶ 59, 969 P.2d 1184, 1198-99 (1998). The prosecutor clarified what she intended to present in her closing argument in the following colloquy:

> [THE PROSECUTOR]: I'm not saying they paid somebody to come in and say exactly wh[at] they wanted to. I'm not—I'm not going to say that.
>
> [DEFENSE COUNSEL]: All right.
>
> THE COURT: I think that's all right.
>
> [THE PROSECUTOR]: What I am going to suggest is that [Trudell] had—a story was made up. She had all the disclosure and she knew what things she needed to make up.
>
> THE COURT: Obviously you can argue that, and you can argue the fact she got to hear all the testimony.
>
> [THE PROSECUTOR]: And I plan to.
>
> [DEFENSE COUNSEL]: All right.

Trudell objected thereafter when the prosecutor appeared to suggest defense counsel and expert witnesses had manufactured testimony, and the court warned the prosecutor to "be cautious." A short time later, the prosecutor observed:

> [W]hen . . . Trudell got on the stand . . . after listening to [the defense firearms expert witness]'s testimony, we now have Michael picking up the gun by the barrel, carefully placing it against his forehead, and then moving his hands back in a manner in which, I guess he could have pulled the hammer himself. And then, moving them further down around her hands and squeezing.
>
> They had to have him in, that gun into position on Michael D[.]'s head.

Defense counsel objected based on its earlier argument and moved for a mistrial. The trial court denied the motion. During rebuttal argument, the prosecutor revisited the issue:

> [L]et's get a couple of things real, real clear. [Defense counsel] says, oh, it's not important what theories [the defense's firearms expert witness] may have been presented. Well, it is, folks, because it has changed continually. And I submit to you it has changed because once they saw [from his testimony that] startled responses or jerking responses or involuntary jerking movement couldn't work under the circumstances, they had to change it . . . .

When defense counsel began to renew the objection, the prosecutor corrected herself, saying, "She had to change it." The court warned the prosecutor to avoid using the word "they." The prosecutor went on to observe that Trudell was "really good, she got to sit and listen to the evidence. We have her testifying [Michael] collapses down on himself. Why

do we have to have him collapse down on himself [?]" Defense counsel again objected and moved for a mistrial, and the court overruled this objection as well.

¶11 In sum, Trudell moved twice for a mistrial during closing arguments: once after the prosecutor suggested that the defense team had contrived a story to match the physical evidence and again during rebuttal, when the prosecutor emphasized her argument that Trudell had modified her testimony after listening to the expert testimony.

¶12 We review a trial court's decision whether to dismiss an indictment on the ground of double jeopardy because of prosecutorial misconduct for an abuse of discretion. *State v. Trani*, 200 Ariz. 383, ¶ 5, 26 P.3d 1154, 1155 (App. 2001). As our supreme court stated in *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984):

> [J]eopardy attaches under art. 2, § 10 of the Arizona Constitution when a mistrial is granted on motion of defendant or declared by the court under the following conditions:
>
> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
>
> 2. such conduct 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 an improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
>
> 3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

When a motion for a mistrial is erroneously denied, the Double Jeopardy Clause nonetheless prevents retrial if "the prosecutor's deliberate conduct . . . should have triggered a mistrial"

and it "deprived Defendant of his right to have the case fairly tried to a conclusion with the jury selected." *State v. Jorgenson*, 198 Ariz. 390, ¶¶ 3, 4, 10 P.3d 1177, 1178 (2000). Thus, to prevail on this claim, Trudell must demonstrate both that the trial court erred in failing to grant a mistrial and that the prosecutor's behavior amounted to "intentional conduct which the prosecutor knows to be improper and prejudicial, and which [s]he pursue[d] for an improper purpose with indifference to a significant resulting danger of mistrial."[1] *Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72.

¶13 We cannot find the trial court abused its discretion here. First, a prosecutor does not violate a defendant's constitutional rights by observing, during closing arguments, that the defendant had an opportunity to conform her testimony to what she had already heard at trial. *Portuondo v. Agard*, 529 U.S. 61, 63, 68 (2000). Indeed, the trial court in this case had expressly allowed the state to "argue the fact [Trudell] got to hear all the testimony." Therefore, the prosecutor's reference to Trudell's presence at trial and Trudell's ability to tailor her defense thereby was neither legal error nor intentional misconduct. And,

---

[1]And, to properly preserve the double jeopardy issue for appeal, Trudell was required to move for a mistrial based on prosecutorial misconduct during her first trial. *See State v. Moody*, 208 Ariz. 424, ¶ 23, 94 P.3d 1119, 1133 (2004) (appellate court reviews double jeopardy claim only concerning grounds raised in motion for mistrial). Therefore, we do not reach Trudell's allegations of misconduct based upon (1) the prosecutor's remarks to the jury regarding the possible consequences of failing to reach a verdict or (2) her comments to the jury regarding the consideration of lesser-included offenses. These were not raised as grounds for a mistrial in the trial court. Furthermore, we do not address Trudell's argument regarding the propriety of statements made by the prosecutor and a detective to the media following the declaration of a mistrial. Such comments could not have affected the first jury and therefore cannot serve as grounds for a double jeopardy claim.

although the prosecutor had also insinuated that the defense team had colluded in fabricating a defense and persisted in that improper argument notwithstanding a warning by the trial court, we have no basis for disturbing the trial court's conclusion that such argument was not sufficiently prejudicial to Trudell to justify a mistrial. *See State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003) (trial court in best position to assess impact of improper statements in evaluating whether to declare mistrial).

¶14 Essentially conceding this point, Trudell argues the prosecutor's arguments, when coupled with the state's "successful but improper admission" of earlier evidence, "demonstrate a pattern of repeatedly using [Trudell]'s invocation of her constitutional rights affirmatively as evidence of her guilt." A court must consider "the cumulative effect of any alleged misconduct" when determining whether a mistrial is required. *Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191. But the challenged prosecutorial behavior must still be objected to as misconduct and, in fact, constitute misconduct to be considered in a double jeopardy claim. *See Moody*, 208 Ariz. 424, ¶ 21, 94 P.3d at 1133. A prosecutor's reasonable reliance on a trial court's evidentiary rulings—even if those rulings are arguably erroneous—does not transform an ordinary trial error, which does not bar retrial, into misconduct triggering jeopardy. *See State v. May*, 210 Ariz. 452, ¶ 26, 112 P.3d 39, 46 (App. 2005) (double jeopardy does not bar retrial when conviction reversed due to trial error). Thus, we can find no misconduct in the prosecutor's arguments regarding Trudell's taped statement—wherein Trudell states, "I'm not going to implicate myself"—because the

trial court had ruled those portions of the statement admissible. And although the prosecutor later elicited less ambiguous testimony about Trudell's invocation of her right to remain silent, the trial court implicitly found that this had been an accident, accepting the prosecutor's explanation that she was trying to elicit information concerning the impoundment of Trudell's vehicle. Good faith mistakes do not warrant a mistrial under *Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72, and this court must defer to the trial court's assessment of the prosecutor's avowal that she had no intent to elicit improper testimony. *Cf. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d at 244.

¶15 Accordingly, we find no error in the trial court's refusal to dismiss the indictment on the ground that the prosecutor engaged in intentional misconduct sufficiently egregious to justify a mistrial during the first trial. Having so concluded, we necessarily reject Trudell's contention that the state violated Trudell's double jeopardy rights when it tried her a second time after the first trial ended in a mistrial because the jury could not reach a verdict.

Jury Instruction

¶16 Trudell next argues that the court erred by denying her request for a jury instruction on the lesser-included offense of negligent homicide. The trial court instructed the jury on first- and second-degree murder as well as manslaughter but refused Trudell's request for an instruction on negligent homicide. A defendant is entitled to an instruction "on all grades of homicide that are reasonably supported by the evidence." *State v. Ruelas*,

165 Ariz. 326, 328, 798 P.2d 1335, 1337 (App. 1990). We review a trial court's refusal to give a proposed jury instruction for an abuse of discretion. *State v. Anderson*, 210 Ariz. 327, ¶ 60, 111 P.3d 369, 385 (2005).

¶17 Negligent homicide is defined as causing the death of another person with criminal negligence. A.R.S. § 13-1102(A). "Criminal negligence" is a culpable mental state whereby:

> with respect to a result or to a circumstance described by a statute defining an offense, . . . a person *fails to perceive a substantial and unjustifiable risk* that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

A.R.S. § 13-105(9)(d) (emphasis added). Negligent homicide is generally a lesser-included offense of manslaughter, because the sole difference between the offenses is the accused's mental state. *State v. Nieto*, 186 Ariz. 449, 456, 924 P.2d 453, 460 (App. 1996). Manslaughter is defined as "recklessly" causing the death of another, A.R.S. § 13-1103(A)(1), meaning "a person is aware of and consciously disregards a substantial and unjustifiable risk" of death. A.R.S. § 13-105(9)(c).

¶18 Here, the trial court gave two reasons for not providing a negligent homicide instruction. First, the court reasoned that "once the gun was lifted or pointed, anyone that has any familiarity with a firearm knows . . . that you have to disengage from the trigger or death or serious injury could result." Second, the court found Trudell's case to be

analogous to *State v. Fisher*, 141 Ariz. 227, 248, 686 P.2d 750, 771 (1984), in which our supreme court held that "negligent homicide is not a lesser included offense of manslaughter where the defendant's sole defense is voluntary intoxication."

¶19 But the trial court overlooked that Trudell in essence testified she had neither lifted nor pointed the gun at Michael. And, although Trudell also testified both she and Michael had been drinking that evening, a fact corroborated by other witnesses, she did not seek acquittal because she was intoxicated but rather because she claimed the shooting had been accidental.

¶20 Specifically, Trudell testified that she had brought the gun into and out of Michael's house as a matter of routine, and she had carried the gun in her hand because it could not fit in the small pocketbook she had with her that evening. She further testified Michael had raised her arm, put the gun to his own head, and placed his hands over hers on the gun. And, "[w]hen the weapon was discharged [she] was unaware that [her] finger was on the trigger." An expert witness testified that handguns are ergonomically designed so the person holding it instinctively rests his or her finger against the trigger. As a result, a phenomenon called "involuntary trigger pull" can often occur, particularly when people are startled, off-balance, or struggling with someone else.

¶21 In sum, Trudell presented evidence which, if believed, reasonably could have supported a negligent homicide instruction. The jury could have concluded that Trudell's culpable act had been failing to perceive the risk created when she attempted to depart from

an emotionally volatile situation with a firearm in her possession. *See* § 13-105(9)(d) (criminal negligence occurs on failure to perceive substantial and unjustifiable risk). And the jury could have concluded that it was not her intoxication, but rather her routine of carrying a firearm, or her emotional state, that had caused her to fail to perceive the risk created by the firearm.

¶22 Although we acknowledge that the trial court's characterization of the events might be more plausible, it is for the jury, rather than the court, to find the facts of the case based on the evidence provided. If the jury had credited Trudell's testimony, it reasonably could have concluded that she had been criminally negligent, rather than reckless, and returned a verdict of guilt on the criminal negligence count. Because the trial court was required to provide any lesser-included instruction reasonably supported by the evidence, *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006), it erred when it denied Trudell's request for an instruction on negligent homicide.

¶23 Our supreme court has held, however, that a trial court's erroneous failure to give a jury instruction on a lesser-included offense is harmless when a defendant is found guilty of a greater offense. *State v. White*, 144 Ariz. 245, 247, 697 P.2d 328, 330 (1985). Under such circumstances, the jury has "necessarily rejected all other lesser-included offenses." *Id.* Here, the jury found Trudell guilty of second-degree murder, the greater offense, rather than the lesser-included offense of manslaughter.

¶24 Trudell acknowledges our supreme court's holding in *White*, but contends that subsequent supreme court cases have undermined its continuing vitality. Specifically, Trudell observes, the supreme court now allows the jury to consider lesser offenses after making "reasonable efforts" to reach a verdict on the greater charges. *State v. LeBlanc*, 186 Ariz. 437, 442, 924 P.2d 441, 448 (1996). In contrast, at the time the court released its opinion in *White*, a jury could not deliberate on the lesser offense until it had first acquitted the defendant on the greater charge. *See State v. Wussler*, 139 Ariz. 428, 430, 679 P.2d 74,76 (1984) (approving instruction requiring acquittal on greater offense before consideration of lesser-included offenses). But in *White*, the court did not refer to the *Wussler* requirement in concluding that a conviction of a greater offense rendered harmless the erroneous failure to instruct the jury on a lesser-included offense. *White*, 144 Ariz. at 247, 697 P.2d at 330. To the contrary, it reasoned—in seeming contradiction of *Wussler*—that conviction on the greater offense demonstrated that the jury implicitly had rejected the lesser offense. *Id.*

¶25 That reasoning can be applied here. By finding beyond a reasonable doubt that Trudell had either intentionally or knowingly caused Michael's death or, "[u]nder circumstances manifesting extreme indifference to human life, had recklessly created a grave risk of death," *see* A.R.S. § 13-1104(A) (defining mental states for second-degree murder), the jury necessarily rejected any argument that she had simply *failed to perceive* a substantial and unjustifiable risk that an accident resulting in death could occur, the

gravamen of negligent homicide. Rather, the jury found, at minimum, she had *consciously disregarded* a risk of death to Michael. *See* § 13-105(9)(c) (defining criminal recklessness as consciously disregarding risk that result will occur).

¶26 Thus, although the trial court erred when it declined to instruct the jury on negligent homicide, we find that error to be harmless in light of the jury's ultimate verdict.

Evidence of Invocation of Rights

¶27 Trudell next contends the trial court erred in admitting evidence that she had invoked her constitutional rights. During the second trial, over Trudell's objection, the state introduced an audio recording between Trudell and a police detective in which she twice said, "I'm not going to implicate myself,"[2] and later, on a separate recording, stated, "[L]isten, I have to have a lawyer." Trudell claims the admission of this evidence constituted "an impermissible use of [her] invocation of her constitutional rights to counsel and to not incriminate herself." The state concedes the court erred in admitting Trudell's request for counsel but argues the error was harmless in the context of the overall case. The trial court ruled that the statements in the audio recording were admissible after finding them to be merely exculpatory, not an invocation of the right to remain silent.

[2]In her appellate brief, Trudell contends she used the word "inculpate," not "implicate." The trial court interpreted Trudell as saying "implicate," and, having reviewed the evidence, we find the trial court to be correct.

a. Self-Incrimination

¶28 We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Rodriguez*, 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996). Absent an invocation of the right to remain silent, a defendant's own statements may be admitted as evidence of guilt. *See* Ariz. R. Evid. 801(d)(2) (admission by party-opponent excluded from definition of hearsay); *State v. Lawson*, 144 Ariz. 547, 555, 698 P.2d 1266, 1273 (1985) (where right to remain silent not asserted, privilege against self-incrimination not violated by admission of defendant's exculpatory statement to police). Here, we evaluate whether Trudell's statement, "I'm not going to implicate myself," should be understood as an assertion of her right not to incriminate herself or merely a description of her motivation in talking to the officer.

¶29 Trudell relies principally on *State v. Lang*, 176 Ariz. 475, 484, 862 P.2d 235, 244 (App. 1993), for the proposition that "the state could not refer to the defendant's words used to invoke his right to remain silent." There, the defendant had "told the detectives that he did not want to answer any more questions," the trial court found this to be an inadmissible invocation by the defendant of his rights, and the court of appeals agreed. *Id.*

¶30 Here, however, the trial court did not find Trudell's words to be an effective invocation of any constitutional rights. Although we can conjure scenarios within which the phrase, "I'm not going to implicate myself," could potentially function as an invocation of the right to remain silent, the trial court noted that Trudell's statements were made in

conjunction with comments denying involvement in Michael's death. Before she made both comments, Trudell had stated she would cooperate with police. In such a context, the court did not abuse its discretion in ruling the statements were the equivalent of, "I didn't do it"—not an invocation of any Fifth Amendment rights. *See Lawson*, 144 Ariz. at 555, 698 P.2d at 1274 (finding defendant's statement, "I've got nothing to say," no more than a response to police questions); *State v. Stabler*, 162 Ariz. 370, 375, 783 P.2d 816, 821 (App. 1989) (finding defendant did not invoke right to remain silent during police interrogation when he said, "it's time for me to shut up," then denied killing anyone); *see also State v. Finn*, 111 Ariz. 271, 275-76, 528 P.2d 615, 619-20 (1974) (no error in admitting defendant's response to interrogating officer, "I wouldn't be crazy enough to tell you that").

b. Right to Counsel

¶31 The state concedes the trial court erred in admitting evidence of Trudell's desire to speak with an attorney. *See State v. Palenkas*, 188 Ariz. 201, 210, 212, 933 P.2d 1269, 1278, 1280 (App. 1996) (finding reversible error in admitting evidence of defendant's contact with attorney during preliminary police investigation). We agree. We must therefore determine whether the error can be characterized as harmless or whether we must reverse the conviction. *State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004). "Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858

P.2d 1152, 1191 (1993). In making this case-by-case factual inquiry, "we consider the error in light of all the evidence." *Id.*

¶32 In *Palenkas*, the court summarized two alternative tests for determining whether error in this context may be viewed as harmless. Some courts employ a categorical test: an error is *not* harmless if the improper reference to the defendant's exercise of rights "strikes at the jugular" of his or her version of events. 188 Ariz. at 213, 933 P.2d at 1281. Courts may also assess the prejudicial impact of the improper reference by examining the following factors: (1) whether the defendant was forced to defend the statements in his or her own testimony, and when the statements were made in the case; (2) the tone and import of the comments, and their significance given the overall evidence; (3) the degree to which the comments may have misled the jury and prejudiced the defendant; (4) whether "the comments were 'deliberately or accidentally placed before the jury'"; and (5) whether there was overwhelming proof of defendant's guilt, or rather was the state's case built on circumstantial evidence making the defendant's credibility a factor. *Id.*, *quoting Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990).

¶33 In the overall context of this case, the statement, "I have to have a lawyer," did not "strike at the jugular" of Trudell's defense, which was that Michael had been shot accidentally in her presence with her gun. *See Palenkas*, 188 Ariz. at 213, 933 P.2d at 1281 (implicitly approving holding from federal circuit court case that reference to request for attorney harmless when core of defense is accidental, rather than deliberate shooting).

Trudell did not dispute she had been present when Michael was shot, that the gun belonged to her, and that she had been holding it when it discharged. A jury would likely conclude that, under such circumstances, an innocent person might reasonably seek advice of counsel when questioned by police. Thus, any improper inculpatory inference from that invocation was mitigated here.

¶34 Trudell contends however that if we apply the five-factor test set forth in *Palenkas*, we cannot find the error harmless. We disagree. First, evidence of Trudell's invocation of her right to counsel was admitted under circumstances that did not draw any special attention to it—as part of a tape of Trudell's more extensive statements to the officers. Trudell was not forced to explain them on cross-examination, nor did the prosecutor call attention to this specific remark during her opening argument. Although the prosecutor made some general remarks about Trudell's statements being more "consistent with someone who knows she's guilty of a crime" in summation, she never focused specifically on Trudell's invocation of her right to counsel in the context of those remarks. Thus, the jury heard the improperly admitted statement only once during a three-week trial.

¶35 Nor could the comment have had a significant prejudicial impact given the other, properly admitted evidence. Although the jury might have improperly considered Trudell's request for a lawyer as evidence of her consciousness of guilt, the state presented extensive, far more powerful, evidence supporting the same inference. Testimony showed Trudell had called her employer after Michael was shot, told her she would not be coming

in for work because "something had happened," and left town shortly thereafter to stay with her in-laws who lived in the White Mountains, hours away. There, she confessed she had done "something bad," and she buried the gun used to shoot Michael. Moreover, after police informed her she was a suspect and advised her not to leave Tucson, Trudell left the state, exchanged vehicles in Connecticut, and was apprehended in New York near the Canadian border. Given this extensive evidence showing Trudell's consciousness of guilt, any prejudicial effect of the evidence that she had requested a lawyer was, at most, cumulative and trivial. Thus, the improperly admitted evidence of Trudell's invocation could not have misled the jury nor did it stand out as a surprising or particularly noteworthy fact. For those reasons, we conclude that the admission of the comment was harmless error, even as we acknowledge that Trudell's credibility was an issue and the state's evidence of guilt was wholly circumstantial.[3]

Preclusion of Evidence

¶36 Finally, Trudell argues the trial court abused its discretion when it precluded her from introducing Michael's bank records. On retrial, Trudell's counsel had observed during opening statement that Michael had stopped by a liquor store and returned to his house with "a bottle of booze" on the night he died. This statement was consistent with

[3]We need not address whether the statement was admitted "'deliberately or accidentally,'" a relevant factor under *State v. Palenkas*, where, as here, the court had previously ruled the evidence admissible. 188 Ariz. 201, 213, 933 P.2d 1269, 1281 (App. 1996), *quoting Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990).

Trudell's testimony at her first trial. Several days into the retrial, a juror queried whether a bottle of hard alcohol had been found in Michael's house. The detective replied none was found.

¶37 To corroborate Trudell's version of the events, Trudell's counsel then subpoenaed Michael's bank records. She obtained a facsimile of his checking account statement showing his debit card had been used to make a $10.15 purchase at a liquor store in Tucson, apparently on the day Michael died. The same day she received this document, Trudell disclosed it to the state, sought its admission, and testified Michael had purchased a bottle of liquor on his way home. The trial court denied leave to admit the bank statement finding, *inter alia*, that the evidence had been obtained through an improper procedure—a criminal subpoena rather than a court order—and the document had not been disclosed in a timely manner. On appeal, Trudell argues there was no discovery violation, and, even if there had been, preclusion of the evidence was not warranted.

¶38 Rule 15.2, Ariz. R. Crim. P., requires a defendant to disclose all papers and documents he or she intends to introduce at trial forty days after arraignment or within ten days of the prosecutor's disclosure. *See* Ariz. R. Crim. P. 15.2(c)(3), (d)(1). The duty to disclose such information is ongoing and continues until the deadline for disclosure, which is seven days before trial. Ariz. R. Crim. P. 15.6(a), (c). Thereafter, the nondisclosure of evidence could result in sanctions unless it is excused. *See* Ariz. R. Crim. P. 15.6(d). Sanctions may be avoided if the nondisclosing party demonstrates that earlier discovery and

disclosure could not have been achieved, even with due diligence. *Id.* Otherwise, the trial court "shall impose any sanction it finds appropriate." Ariz. R. Crim. P. 15.7. We review a trial court's choice of sanction for an abuse of discretion. *State v. Tucker*, 157 Ariz. 433, 439, 759 P.2d 579, 585 (1988).

¶39 Here, defense counsel violated the rules of discovery by seeking to admit evidence that had not been disclosed before trial. Rule 15.6(d), Ariz. R. Crim. P., insulates the proponent of untimely disclosed evidence from sanctions only "[i]f the court finds that the material or information could not have been discovered or disclosed earlier even with due diligence." Here, the jury question undoubtedly underscored the relevance of the bank statement in corroborating Trudell's version of the events. But any evidence shedding light on the events of that evening was patently relevant long before trial, and nothing prevented Trudell from seeking and disclosing the bank statement in a more timely fashion. Trudell does not assert the records were unavailable or that she could not have discovered them earlier. The record suggests that, had Trudell wished to discover and disclose the information earlier, she could have done so. Nor does any provision of Rule 15 excuse a party from complying with the time limits for discovery and disclosure merely because that party has inaccurately predicted what evidence might be most relevant as the trial unfolds.

¶40 Although a trial court may preclude evidence that is untimely disclosed, *see* Rule 15.7(a)(1), Ariz. R. Crim. P., it is a sanction of last resort. *State v. Delgado*, 174 Ariz. 252, 257, 848 P.2d 337, 342 (App. 1993). Whether preclusion is an appropriate sanction

depends upon: (1) how vital the evidence is to the proponent's case, (2) whether the late disclosed evidence causes surprise to the opposing party, (3) "whether the discovery violation was motivated by bad faith," and (4) any other circumstances that are relevant. *State v. Smith*, 140 Ariz. 355, 359, 681 P.2d 1374, 1378 (1984).

¶41 The trial court did not abuse its discretion in precluding Michael's bank records. First, the evidence was not vital to Trudell's case. Her defense was that the shooting had been an accident caused at least in part by the victim. Although Michael's alcohol consumption on the night he died was relevant to this defense, the state presented substantial eyewitness evidence that he had consumed alcohol before going to his house, and his blood alcohol concentration, which was determined during an autopsy, further corroborated that fact. Michael's bank statement, therefore, was cumulative evidence of his alcohol consumption. Insofar as this evidence also tended to corroborate Trudell's testimony, thereby enhancing her credibility, it did so only with respect to a collateral issue that was not directly contradicted by the detective who testified.

¶42 Second, while Trudell's defense and anticipated testimony were known before her retrial, the state was surprised by defense counsel seeking to introduce the bank statement at such a late stage in the retrial. *See State v. Killean*, 185 Ariz. 270, 270-71, 915 P.2d 1225, 1225-26 (1996) (affirming preclusion of corroborative documentary evidence not disclosed by defendant until trial). Trudell sought to admit the evidence at the close of her case while Trudell herself testified. The state therefore had little opportunity to conduct an

independent investigation of the evidence or otherwise rebut it. The surprise was exacerbated by defense counsel's arguably improper use of a criminal subpoena rather than a court order to obtain the bank statements. *See* Ariz. R. Crim. P. 15.1(g) (upon proper showing, court may order "any person" to provide material or information necessary to defendant's case); *see also Carpenter v. Superior Court*, 176 Ariz. 486, 491, 862 P.2d 246, 251 (App. 1993) (criminal defendant cannot use subpoena power of court to conduct investigation without notice to state or consent of trial court).

¶43 We reiterate that preclusion of evidence disclosed in an untimely manner should be a sanction of last resort in part because preclusion risks penalizing a party for his or her counsel's mistakes. *See Killean*, 185 Ariz. at 272, 915 P.2d at 1227 (Zlaket, V.C.J., dissenting) (suggesting counsel rather than parties should "bear the brunt" of sanctions). But, here, where the late disclosure arose not from necessity but erroneous trial strategy, where the evidence sought to be presented was cumulative of other undisputed evidence in the case and where the opponent of the evidence did not have a reasonable opportunity to conduct an independent investigation of it, the trial court did not abuse its discretion in precluding it.

¶44 Affirmed.

_____

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

_____
PHILIP G. ESPINOSA, Judge

_____
GARYE L. VÁSQUEZ, Judge