



1 victim representative, Joan Shattuck (Shattuck), about the substance of his testimony at  
2 trial. The rule of exclusion had been invoked by the Court at the start of trial.

3 On Monday March 9<sup>th</sup>, Paul Chastain (Chastain) called Detective McDormett  
4 (McDormett) to inform him that he had received a call from Comstock, during which call  
5 Chastain learned about the conversation between Shattuck and Comstock. The State was  
6 informed by McDormett about this conversation. The State investigated the incident by  
7 speaking with Chastain and Comstock. McDormett was instructed to take photos of  
8 Comstock's phone to preserve evidence.

9 On Wednesday March 11<sup>th</sup>, the State informed defense counsel and the Court what  
10 had occurred between Comstock and Shattuck. Defense moved for a mistrial and the  
11 Court granted the motion.

## 12 LAW

### 13 **A. Dismissal is not the proper remedy for a violation of the rule of exclusion**

14 Defendant is arguing that the case be dismissed or in the alternative that the  
15 Court preclude witnesses Shattuck, Chastain, Comstock and McDormett from testifying  
16 at the retrial. Even though the Court has determined that there was a violation of the rule  
17 of exclusion, dismissal is not the proper remedy. This is particularly clear under the  
18 circumstances of this case in which much of what defense objects to in his motion  
19 occurred in the pretrial proceedings before the Rule was even invoked.

20 In order to warrant a dismissal of the case, Defendant must show that he was  
21 prejudiced by the violation of the rule of exclusion. *Spring v Bradford*, 243 Ariz. 167,  
22 403 P.3d 579 (2017). Here, the violation of the rule occurred after the witness testified.  
23 Thus, any conversation taking place could not have affected the witnesses direct  
24 testimony. Defense can cross-examine the witness and the jury can determine the

1 credibility of the witness and weight the credibility against the witnesses testimony on  
2 direct examination. Thus, there is no prejudice to the defendant. Dismissal of the case is  
3 unwarranted.

4 Nor is preclusion of witnesses warranted in this case. First, McDormett is the case  
5 agent. Case agents are in court every day of trial, and exempted from the Rule of  
6 Exclusion. This Court gave McDormett permission, as the case agent, to speak with the  
7 witnesses about the conversation between Shattuck and Comstock. There is no prejudice  
8 in allowing the case agent to do his job. Defendant can offer no logical reason for the  
9 witness to be barred from testifying.

10 Similarly, Defendant can offer no explanation for why Paul Chastain should be  
11 prohibiting from testifying during a re-trial. Chastain had yet to testify at the initial trial.  
12 When contacted by Comstock, Chastain told Comstock that they could not speak with  
13 each other. Chastain never spoke to Comstock about the substance of his testimony after  
14 the Rule had been invoked. After speaking with Comstock, Chastain immediately  
15 contacted McDormett and informed him of the call from Comstock. Defendant has  
16 failed to show how a non-testifying witness is prejudicial.

17 As the violation related to Comstock, he remains a witness that can be cross-  
18 examined at length about his conversation with Shattuck in violation of the rule. A  
19 violation of the Rule does not make the witness incompetent to testify. *State v Sowards*,  
20 99Ariz. 22 406 P.2d 22 (1965). “[p]otential remedies for violating an exclusion order  
21 include contempt, allowing cross-examination regarding the violation, instructing the jury  
22 regarding the violation, or under the right circumstances, precluding the testimony.” *State*  
23 *v Spring*, 241 Ariz. at 461; cf. *Allison*, 4 Ariz. App. At 500-01. It will be up to the jury  
24 to decide if Comstock is believable or if he was influenced by others. It is well-

1 established that the jury, as finder of fact, determines the credibility of witnesses and  
2 weighs the evidence. *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App.1995).

3 Finally, as it relates to witness Shattuck, she is a victim representative in this case  
4 and is entitled to be present during Court proceedings. Her testimony, by way of  
5 deposition, is complete. In fact, it was completed over a year in advance of trial. She  
6 cannot change her testimony. Therefore her violation of the Rule could not have an  
7 influence over her testimony- the very purpose the rule is designed to serve. As a result,  
8 preclusion of her testimony serves no logical end either.

9 Regarding the weekend after Comstock testified, Shattuck said in her deposition:  
10

11 **Q:** ....Did you, during those conversations, correct him or influence his  
12 recollection of events?

13 **A:** No.No. No. I was just – and I think it was only the one as far as after he  
14 got subpoenaed. And what I remember from it was that he was like, “eh, I got to  
15 do this thing.” I was like – I just remember feeling like oh, my gosh. All this  
16 time and now he’s like, eh, I really don’t want to do it. That was – that was it.  
17 I’m just going.

18 *Transcript 8-14-20 60:14-22*  
19

20 Shattuck was questioned about the events that took place before and after  
21 Comstock testified.  
22

23 **Q.** Do you recall ever telling him how to testify?

24 **A.** No. Never.

1 Q. Did you ever tell him or correct him on facts that he anticipated testifying to?

2 And by that, let me give you an example, although not a specific one. Let's say,  
3 for instance, he was going to say, "I recall that the defendant said this on this  
4 date," and you said, "No, that occurred on this date." That's more of what I'm  
5 looking for. Do you recall ever correcting his proposed testimony?

6 A. No. No. Oh, no.

7 Q. And do you recall him ever asking you how to testify?

8 A. No. He never did.

9 Q. So nothing of that nature occurred during the deposition or during your  
10 conversations prior to his testimony?

11 A. No

12 *R.T. 8-14-20, 61:15-25, 62:1-8.*

13  
14 There is simply no prejudice to defendant to allow Shattuck's deposition to  
15 continue to serve as her testimony at trial.

16  
17 **B. There was no prosecutorial misconduct**

18  
19 Prosecutorial misconduct is "conduct that 'is not merely the result of legal error,  
20 negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to  
21 intentional conduct which the prosecutor knows to be improper and prejudicial.'" *State v.*  
22 *Martinez*, 221 Ariz. 383, 392, ¶ 36, 212 P.3d 75, 85 (App. 2009) (emphasis added)  
23 (citing *Pool*, 139 Ariz. at 108–09, 677 P.2d at 271–72; *State v. Aguilar*, 217 Ariz. 235,  
24 238–39 ¶ 11, 172 P.3d 423, 426–27 (App. 2007)).

1 Similarly, prosecutorial misconduct constitutes reversible error only if “a  
2 reasonable likelihood exists that the misconduct could have affected the jury’s verdict,  
3 thereby denying defendant a fair trial.” *Morris*, 215 Ariz. at 335, ¶ 46, 160 P.3d at 214  
4 (emphasis added) (quoting *State v. Anderson*, 210 Ariz. 327, 340 ¶ 45, 111 P.3d 369, 382  
5 (2005)). Further, “[t]he harmless error rule is applicable” to all the grounds for a new trial  
6 in Ariz. R. Crim. P. 24.1(c), including prosecutorial misconduct. *Id.* cmt. (citing Ariz.  
7 Const. Art. 6, § 27).

8 Defendant has accused the State of prosecutorial misconduct based on the  
9 allegation that the State asked leading questions of witness Comstock. Defendant is  
10 misinformed. Leading questions suggest an answer. *State v. Payne*, 233 Ariz. 484, 513, ¶  
11 119, 314 P.3d 1239, 1268 (2013). The courts have gone so far as to give examples of  
12 what leading questions are and are not:

13 “Had you known the trust was not insured would you have invested?” or, “Had you  
14 known you were going to be paid principal rather than interest ...?” or “Had you  
15 known the trust was insolvent ...?” These are not leading questions. A leading  
16 question is one that suggests the answer, such as, the cat was black, wasn't it? A  
17 question is not leading just because the answer is obvious.  
18 *State v. Agnew*, 132 Ariz. 567, 577, 647 P.2d 1165, 1175 (App. 1982).

19  
20 Even if leading questions are asked during direct examination, it is the rule in this  
21 state that “evidence elicited by leading questions is legal and competent though its  
22 probative force might not be as strong as voluntary testimony.” *State v. Godsoe*, 107  
23 Ariz. 367, 370, 489 P.2d 4, 7 (1971). Furthermore, it is within the sound discretion of the  
24 trial court to determine whether to permit the asking of leading questions of one's  
25 witness. *State v. King*, 66 Ariz. 42, 182 P.2d 915 (1947); *State v. Godsoe*, 107 Ariz. 367,

1 489 P.2d 4 (1971); *Wackerman v. Wackerman*, 16 Ariz.App. 382, 493 P.2d 928 (1972).  
2 Asking leading questions is often appropriate when doing so will serve “the ends of  
3 justice.” *State v. Payne*, 233 Ariz. 484, 513, ¶ 119, 314 P.3d 1239, 1268 (2013).

4 In this case, Comstock testified that he had several telephone conversations with  
5 the defendant shortly after the murder. Those conversations were recorded and later  
6 transcribed. During those conversations the defendant made several incriminating and  
7 contradictory statements. Although Comstock had reviewed the voluminous transcripts of  
8 those recordings, the conversations had occurred nearly 10 years prior, and Comstock  
9 testified that he could not recall the defendant’s word-for-word statements.

10 During this testimony, the Court sustained a leading objection and instructed the  
11 State to ask Comstock what he remembered before asking him about the specific  
12 statements in the recording. The State finished its questioning of Comstock with only one  
13 more objection by defense.

14 **Court:** I’ll sustain the objection for now. Open-ended questions. And then  
15 if there is specifics that he forgot, I have no problem with you refreshing  
16 his recollection in the fashion that you’re doing it. But until we’ve had a  
17 chance for him to say it’s not refreshing recollection.

18  
19 We let Mr. Williams refresh recollection the same way because  
20 sometimes looking at the transcripts and digging through is time  
21 consuming. I get that. But I think you got to ask him what he remembers  
22 first and then you can ask him if he remembers this or that.

23  
24 *Transcript 3-06-20 20:2-13*

25  
26 On direct examination, the State then asked Comstock about specific statements  
27 that had been transcribed from the recordings. In each question, the State asked whether  
28 the defendant had made such statement. The form of questioning did not suggest an

1 appropriate answer, and Mr. Comstock was free to answer “yes,” “no,” or that he “did not  
2 recall.” Therefore, while the questions did contain the defendant’s previously recorded  
3 statements, the form of the questions were not leading and this court properly allowed the  
4 State to question Comstock in such a manner.

5 Finally, Defendant has failed to demonstrate how he was prejudiced. The  
6 statements that had been elicited during Comstock’s direct examination are verifiable  
7 through the recordings previously disclosed to Defendant and such statements were made  
8 by the defendant himself. Proper foundation had been laid for admission of the  
9 recordings, and had the trial continued, those recordings would have been admitted.  
10 Therefore, the avenue for presenting these statements to the jury would not have resulted  
11 in any prejudice.

12 **Conclusion**

13 Defendant has not proven that he was prejudiced by the witnesses violation of  
14 the rule of exclusion. Neither McDormett nor Chastain had testified in the trial.  
15 McDormett remains exempt from the Rule as the designated case agent. Shattuck’s  
16 testimony was completed by way of deposition over a year prior. Comstock’s direct  
17 testimony occurred prior to the rule violation, and he can adequately be cross examined  
18 as to how any violation may or may not have impacted his future testimony. Further,  
19 recordings of the conversations that served as the substance of Comstock’s testimony  
20 exist and can show definitively whether his testimony is accurate or improperly  
21 influenced by witness Shattuck.

22 There is no prosecutorial misconduct for asking leading questions. Any potential




1 | issues were suitably cured with a directive from the Court and the testimony concluded.  
2 | Certainly, given a retrial is already mandated, there is no possible prejudice to the  
3 | defendant in any event from the asking of leading questions in a prior trial.

4 | Defendant's motion to dismiss or in the alternative preclude witnesses should be  
5 | denied.

6 |

**RESPECTFULLY SUBMITTED** this 2<sup>nd</sup> day of December, 2020.

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By:   
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COPY of the foregoing  
 mailed  emailed  hand-delivered

This 2<sup>nd</sup> day of December, 2020 to:

Hon. Tina R. Ainley  
Yavapai County Superior Court Division 3

Craig Williams  
Attorney for Defendant

By: \_\_\_\_\_