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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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STATE OF ARIZONA, *Appellee*,

*v.*

PHILIP JOHN MARTIN, *Appellant*.

No. 1 CA-CR 16-0551  
FILED 6-19-2018

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Appeal from the Superior Court in Mohave County  
No. S8015CR201201326  
The Honorable Billy K. Sipe, Jr., Judge, *Pro Tempore*

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix  
By Linley Wilson  
*Counsel for Appellee*

Mohave County Legal Advocate, Kingman  
By Jill L. Evans  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Presiding Judge James P. Beene delivered the decision of the Court, in which Judge Randall M. Howe and Judge Kent E. Cattani joined.

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**B E E N E**, Judge:

¶1 Philip John Martin (“Martin”) appeals his conviction and sentence for first-degree murder. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 A grand jury indicted Martin in 2012 for first-degree, premeditated murder. The jury in the first trial was unable to agree on a verdict of first-degree murder but convicted Martin of the lesser-included offense of second-degree murder.

¶3 On appeal, we held that the superior court had erred in refusing to give a crime prevention instruction, reversed Martin’s conviction, and remanded for a new trial. *See State v. Martin*, 1 CA-CR 13-0839, 2014 WL 7277831, \* 1, ¶ 1 (Ariz. App. Dec. 23, 2014) (mem. decision). Before the second trial, the superior court granted the State’s motion to retry Martin for first-degree murder.

¶4 The evidence at trial, viewed in the light most favorable to supporting the conviction,<sup>1</sup> showed that Martin and the victim were neighbors on a dirt road in Golden Valley. Martin routinely placed railroad ties and other debris on the road in front of his driveway to cover ruts that developed after rainstorms. On the day of the incident, the victim and a friend came upon these impediments in the road. After removing a railroad tie, the victim told his friend he was “gonna go ask why he keeps throwing stuff across the road.” As the victim walked toward Martin’s house, the friend saw a muzzle blast from the front window of Martin’s house and saw the victim fall to the ground. The victim died of shotgun wounds to his abdomen from a single shotgun blast.

¶5 Martin admitted to the first deputy sheriff to arrive that he shot the victim. He told a detective and later testified that he did so because

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<sup>1</sup> *State v. Boozer*, 221 Ariz. 601, 601, ¶ 2 (App. 2009).

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the victim ignored his demands to get off his property and he believed the victim was armed and was coming toward him to harm him.

¶6 The jury convicted Martin of first-degree murder, and the court sentenced him to natural life. Martin filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes sections 12-120.21(A)(1), 13-4031, and -4033(A).

**DISCUSSION<sup>2</sup>**

**I. Purported Juror Taint**

¶7 Martin argues the superior court abused its discretion in refusing to strike the entire jury panel and grant a mistrial after jurors' answers in *voir dire* tainted the panel. He argues the panel was tainted by: (1) a prospective juror's remarks that she knew the prosecutor from church and boy scouts and "[knew] him to be an honest man"; (2) another's comment that she recognized Martin from the county jail, and could not be fair because of her interactions with him; (3) another's comment that he did not believe a shot from 40 feet away<sup>3</sup> was self-defense; (4) another's comment that she was "physically sick" just being in the same room with someone accused of shooting another person; and (5) another's comment that he could not be impartial because of his discussions about other homicide and assault cases with a friend who was a California police sergeant.

¶8 The court excused all of those who made the offending remarks, but denied Martin's motion to strike the entire panel, finding that nothing occurred during *voir dire* "that would taint the whole panel" and prevent Martin from receiving a fair and impartial trial.

¶9 We review the denial of a motion to strike a jury panel or grant a mistrial based on purported juror taint for an abuse of discretion.

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<sup>2</sup> In a separate opinion, *State v. Martin*, 1 CA-CR 16-0551 (Ariz. App. Jun. 19, 2018), filed simultaneously with this memorandum decision, we address Martin's challenge to his conviction and sentence on the grounds that the State was barred by double jeopardy from trying him for first-degree murder after he had been convicted in the first trial of second-degree murder.

<sup>3</sup> The prosecutor had cited 40 feet as the distance of the shot in his mini-opening statement.

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*See State v. Glassel*, 211 Ariz. 33, 45, ¶ 36 (2005); *State v. Blakley*, 204 Ariz. 429, 435, ¶¶ 21-22 (2003). The superior court has considerable discretion in evaluating claims that remarks tainted the panel because it is in the “best position to assess their impact on jurors.” *State v. Doerr*, 193 Ariz. 56, 62, ¶ 23 (1998).

¶10 As the party challenging the panel, Martin has the burden of showing “the jurors could not be fair and impartial.” *State v. Davis*, 137 Ariz. 551, 558 (App. 1983). In reviewing his claim, we will not presume the jury panel was tainted by the information some members shared during *voir dire*. *Doerr*, 193 Ariz. at 61-62, ¶ 18. Such prejudice must be apparent from the record. *Id.* at 61, ¶ 18 (“Defendant merely speculates that this contamination occurred. We will not, however, indulge in such guesswork.”); *see also State v. Tison*, 129 Ariz. 526, 535 (1981) (“Unless there are objective indications of jurors’ prejudice, we will not presume its existence.”).

¶11 The superior court did not abuse its discretion. The record fails to support Martin’s claim that other members of the panel were prejudiced by the remarks. Instead, he relies on sheer speculation, which is insufficient to show that he was denied a fair and impartial jury. *See Doerr*, 193 Ariz. at 61-62, ¶ 18. The record shows that the court repeatedly instructed the prospective jurors that Martin was presumed innocent, that no evidence had yet been presented, and that the remarks of the lawyers were not evidence. The court also confirmed that the prospective jurors understood these instructions.

¶12 On this record, Martin has failed to meet his burden to show that the remarks tainted the panel, or that the court abused its discretion in denying his motion to strike the panel.

## II. Admission of Dying Declaration

¶13 Martin argues the superior court violated his confrontation rights by admitting the victim’s dying declarations, and our decision in this case ruling that the declarations were admissible at trial was manifestly erroneous or unjust and should not have been applied as law of the case. In our memorandum decision on appeal of Martin’s conviction in the first trial, we held that the victim’s dying declarations were admissible over Martin’s Confrontation Clause objection, because “the primary purpose of the exchange between the officers and the victim was to enable the officers to react and respond to an ongoing emergency which included trying to keep the victim alive.” *See Martin*, 1 CA-CR 13-0839, \*\*3-4, ¶¶ 11-18.

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¶14 At the final pretrial management conference before the second trial, the court noted that the first trial court had ruled that the statements made by the victim as he was dying were admissible, and we had affirmed that ruling. The court asked counsel if there was “[a]ny disagreement” with the court’s assumption that “there’s no issue whatsoever that the statements the victim made to law enforcement will be admissible.” Defense counsel responded, “Judge, I would normally like to disagree, but obviously the court of appeals has affirmed itself. It’s essentially the law of the case at this point.”

¶15 Martin’s attempt to re-litigate this issue on appeal is barred by the law of the case doctrine. The “law of the case” doctrine describes the judicial policy of “refusing to reopen questions previously decided in the same case by the same court or a higher appellate court unless an error in the first decision renders it manifestly erroneous or unjust or when a substantial change occurs in essential facts or issues, in evidence, or in the applicable law.” *State v. Wilson*, 207 Ariz. 12, 15, ¶ 9 (App. 2004) (internal quotations and citation omitted); *see also State v. Waldrip*, 111 Ariz. 516, 518 (1975) (“Ordinarily, a decision of an appeals court in a prior appeal of the same case settles the law for an appellate court in a subsequent appeal.”) (citation omitted).

¶16 Martin argues that the doctrine does not apply because our decision was manifestly erroneous or unjust. He claims the facts showed that police “shifted to proving past events potentially relevant to later criminal prosecution” and therefore the primary purpose of the exchange was not to respond to an ongoing emergency. We disagree. Our analysis of the exchange was supported by the governing law and the record. *See Martin*, 1 CA-CR 13-0839 at \*\* 3-4, ¶¶ 11-18.

¶17 We conclude that the court did not err in failing to *sua sponte* reopen this issue at trial, and we decline to do so on appeal.

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**CONCLUSION**

¶18 For the foregoing reasons, we affirm Martin's conviction and sentence for first-degree murder.



AMY M. WOOD • Clerk of the Court  
FILED: AA