DIVISION ONE
FILED: 08/09/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0377
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CARLOS ALBERTO GUZMAN,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Yavapai County

Cause No. V1300CR201080318

The Honorable Tina R. Ainley, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Division Chief Counsel
Joseph T. Maziarz, Section Chief Counsel
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Criminal Appeals Section
Attorneys for Appellee

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W I N T H R O P, Chief Judge

¶1 Carlos Alberto Guzman appeals his convictions and the resulting sentences for robbery, a class four felony, and assault, a class one misdemeanor. Guzman argues the trial court

erred by failing to submit the issue of jurisdiction to the jury and by denying his motions for mistrial. For the reasons that follow, we affirm.

BACKGROUND[1]

¶2 Guzman's convictions stem from an incident in which he confronted the victim shortly after midnight as the victim was walking along State Route 260 in Camp Verde. The victim testified that Guzman had a knife in his left hand, approached the victim, and demanded money. As Guzman came toward the victim, the victim grabbed Guzman's left wrist with both hands to prevent being stabbed and pulled Guzman toward a nearby gas station in an effort to move into the light where someone might see them and summon help. Guzman punched the victim numerous times with his right hand until the victim blacked out. Before he lost consciousness, the victim observed a car pull into the gas station, and he heard a female voice yell, "Carlos, get in the car. Carlos, get in the car."

¶3 When the victim regained consciousness, he had been badly beaten and his wallet, the car, and Guzman were gone. The victim was eventually transported by ambulance to a hospital, and his wallet was subsequently discovered several miles away

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[1] We review the facts in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against Guzman. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

along the side of the road, but his driver's license was missing from the wallet. After the victim identified Guzman from a photographic lineup, the police searched Guzman's residence and found the victim's driver's license in Guzman's bedroom.

¶4 At trial, Guzman denied possessing a knife, demanding money, or taking the victim's wallet, and he insinuated that the victim had assaulted him first after he inquired why the victim was walking in the general vicinity of his parents' house at such a late hour.

¶5 The jury declined to convict on the charged offenses of armed robbery and aggravated assault and instead found Guzman guilty of the lesser-included offenses of robbery and assault. Guzman admitted the prior felony convictions alleged by the State for sentence enhancement purposes, and the court sentenced him as a repetitive offender with at least two historical prior felony convictions to a slightly aggravated eleven-year prison term on the robbery conviction and a concurrent 180-day jail term on the assault conviction.

¶6 Guzman filed a timely notice of appeal. We have appellate jurisdiction pursuant to the Arizona Constitution,

Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012),[2] 13-4031, and 13-4033(A).

ANALYSIS

A. Jurisdiction

¶7 Before trial, Guzman moved to dismiss the charges, claiming the Yavapai County Superior Court lacked jurisdiction because he is a member of the Yavapai-Apache Nation and the alleged offenses occurred on the Yavapai-Apache Reservation. The State conceded Guzman is a member of the Yavapai-Apache Nation, but maintained the superior court had concurrent jurisdiction over the charged offenses because the offenses initiated off the reservation. Following an evidentiary hearing, the trial court ruled that although there was evidence indicating the encounter ended in the gas station parking lot, which was on the reservation, there was no evidence contradicting the victim's account that the confrontation commenced off the reservation. Accordingly, the court denied the motion.

¶8 During the second day of the four-day trial, Guzman again raised the issue of jurisdiction, arguing it was an issue for the jury to decide. The trial court stated it still had not heard any evidence contradicting its preliminary finding that

[2] We cite the current Westlaw version of the applicable statutes because no revisions material to this decision have since occurred.

the encounter commenced off the reservation, but if Guzman had controverting facts that would allow the issue to go to the jury, the court would not forestall him from presenting them. During settlement of jury instructions after the close of evidence, Guzman did not argue there was evidence to support the jury deciding jurisdiction, and he did not object to the lack of instructions on the issue of jurisdiction.

¶9 On appeal, Guzman contends the trial court erred by failing to have the jury decide the issue of jurisdiction. Because Guzman failed to object to the instructions submitted to the jury, our review is limited to fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Under this standard of review, Guzman bears the burden of showing both that fundamental error occurred and that the error caused him prejudice. *See id.* at ¶ 20. When reviewing for fundamental error, we first determine whether the trial court committed some error, and only if we find error will we consider "the prejudicial nature of the unobjected-to error . . . in light of the entire record." *State v. Thomas*, 130 Ariz. 432, 436, 636 P.2d 1214, 1218 (1981) (citation omitted).

¶10 The jurisdictional issue arises from the fact that the confrontation between Guzman and the victim occurred in an area where Camp Verde borders the Yavapai-Apache Reservation. As a general rule, Arizona has subject matter jurisdiction to

prosecute crimes committed within its territorial borders. *State v. Verdugo*, 183 Ariz. 135, 137, 901 P.2d 1165, 1167 (App. 1995); *see also* A.R.S. § 13-108(A)(1) (providing jurisdiction over an offense in which "[c]onduct constituting any element of the offense . . . occurs within this state"). However, federal law preempts state court jurisdiction over a criminal prosecution when an offense involving an Indian occurs on Indian land. *See* 18 U.S.C. §§ 1152, 1153. "If [the] defendant or the victim is an Indian and the crime was committed within Indian country, as defined by federal statute, then the state superior court has no subject matter jurisdiction to try [the] defendant for the offense." *Verdugo*, 183 Ariz. at 137, 901 P.2d at 1167 (citing 18 U.S.C. §§ 1152, 1153).

¶11 Guzman does not dispute that the Yavapai County Superior Court has concurrent jurisdiction to try him for the offenses if they began off the reservation regardless of whether they ultimately concluded on the reservation. *See State v. Robles*, 183 Ariz. 170, 174, 901 P.2d 1200, 1204 (App. 1995) ("In our opinion, 18 U.S.C. sections 1152 and 1153 were intended to bestow exclusive preemptive jurisdiction on the federal courts only when the crime occurs on a federal enclave and when no elements of the crime occur outside that enclave."). His sole argument on the issue of jurisdiction is that the jury, and not

the trial court, should have decided whether the offenses began off the reservation.

¶12 In the rare case in which jurisdiction is legitimately at issue because of contradicting jurisdictional facts, the issue of jurisdiction is for the jury. *State v. Willoughby*, 181 Ariz. 530, 538, 892 P.2d 1319, 1327 (1995). "If the jurisdiction facts are undisputed, as in almost all cases, the court may decide the issue. In the absence of evidence contradicting jurisdiction, then, only the issues pertaining to criminality must go to the jury." *Id.* at 538-39, 892 P.2d at 1327-28 (citations omitted).

¶13 In this case, the record is insufficient for Guzman to meet his burden of showing there is an actual conflict in the evidence regarding where the offenses commenced that would require submitting the issue of jurisdiction to the jury. The victim testified Guzman approached him with a knife and demanded money while he was next to the "pump house," which the parties agree and the evidence indicates is situated off the reservation. According to the victim, he pulled Guzman back toward the parking lot of the gas station, which is on the reservation. In contrast, Guzman's testimony regarding the confrontation failed to create a clear factual dispute as to whether the confrontation commenced on or off the reservation. In testifying about where he contacted the victim and where he

first punched him, Guzman pointed to locations on Exhibit 14, which was an aerial photograph of the area with the boundary lines for property parcels and the tribal trust lands superimposed on it. No markings are included on Exhibit 14 to indicate where Guzman was pointing during his testimony, and his testimony is entirely consistent with him indicating that the confrontation with the victim began off the reservation.

¶14 To justify reversal, error cannot be based on speculation but must appear affirmatively in the record. *State v. Diaz*, 223 Ariz. 358, 361, ¶ 13, 224 P.3d 174, 177 (2010); *see also State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991) (holding that to qualify as "fundamental error," the error must be "clear"); *Thomas*, 130 Ariz. at 436, 636 P.2d at 1218 ("Before a finding of fundamental error can be made, it must be apparent that error was committed by the trial court in some aspect of the proceedings."). In this case, we cannot say a genuine dispute exists in the evidence regarding whether the confrontation commenced on the reservation. Both the trial court and counsel had the opportunity at trial to observe precisely where Guzman pointed on Exhibit 14 while testifying about the confrontation, but those locations are not reflected with any specificity in the record on appeal.[3] In light of the

[3] Of course, a possible explanation for why Guzman failed to raise the issue of jurisdiction during settlement of

indefinite nature of Guzman's testimony contained in the record on appeal regarding where the initial confrontation occurred, it is not possible to conclude that the trial court clearly erred in not submitting the issue of jurisdiction to the jury.

¶15 We further find no merit to Guzman's argument that a statement by the victim to the police in reporting the robbery, or testimony by Guzman's friend ("K.C."), who drove up to the gas station sometime after the initial encounter between Guzman and the victim, create a factual dispute as to jurisdiction. The police officer's testimony that the victim stated the incident happened at the gas station is not inconsistent with, and does not contradict, the victim's additional statements to that same officer or the victim's trial testimony that the encounter started by the pump house and ended in the gas station parking lot. With respect to K.C., she testified that while she was turning into the gas station, she observed Guzman and the victim together in the parking lot of the gas station and saw the victim throw two punches before she observed Guzman hit the victim. She further admitted, however, that she did not know what occurred before her arrival at the gas station. In the absence of a showing of clear error by the trial court in not

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instructions is that his trial testimony, which included pointing to locations on Exhibit 14, clarified that his confrontation with the victim began off the reservation.

submitting the issue of jurisdiction to the jury, Guzman's claim of fundamental error necessarily fails.

B. Motions for Mistrial

¶16 Guzman also argues the trial court erred by denying two motions for mistrial based on prejudicial comments by the prosecutor. We will not reverse for prosecutorial misconduct unless "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying the defendant a fair trial." *State v. Martinez*, 218 Ariz. 421, 426, ¶ 15, 189 P.3d 348, 353 (2008) (citations omitted). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). In short, our "focus is on the fairness of the trial, not the culpability of the prosecutor." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993) (citations omitted).

¶17 It is well established that "[a] declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983)

(citation omitted). Deciding whether a prosecutor's improper comments require a mistrial falls within the broad discretion of the trial court, and we will not disturb its decision absent a clear abuse of discretion. *State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988). We grant the trial court broad discretion in such matters "[b]ecause the trial court is in the best position to determine the effect of a prosecutor's comments on a jury." *State v. Newell*, 212 Ariz. 389, 402, ¶ 61, 132 P.3d 833, 846 (2006) (citations omitted). We will reverse a trial court's decision only if that decision "is palpably improper and clearly injurious." *State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989) (citation omitted).

¶18 The first motion for mistrial was based on a remark by the prosecutor in regard to a question by defense counsel asking K.C. on redirect examination whether she told the prosecutor that she was "not going to lie for anybody." After K.C. answered affirmatively, the prosecutor said, "Objection. I know she's lying."[4] Guzman objected to the prosecutor's comment, and

[4] Defense counsel's question was in response to an extended series of questions posed to K.C. by the prosecutor on cross-examination. Throughout cross-examination, the prosecutor sought to impeach K.C. with her prior inconsistent statements, and K.C. acknowledged that much of her testimony at trial was inconsistent with or directly contradicted her previous statements to a police detective and her sworn testimony at the September 14, 2010 evidentiary hearing on the motion to dismiss for lack of jurisdiction. Specifically, in response to multiple questions, K.C. conceded that her prior statements were

the trial court immediately ordered the comment struck. Later, outside the presence of the jury, Guzman moved for a mistrial. The trial court denied the motion, stating that "while I find that it was improper, at this point I'm not finding, with the general level of evidence on both sides, that it would materially taint any verdict from the jury or create that level of unfairness as to violate due process." The trial court did agree, however, that a curative instruction directing the jury not to consider the prosecutor's comment "would be appropriate," and the court included such an instruction in the final jury instructions.

¶19 It is undisputed that the prosecutor's statement was improper as an expression of personal opinion on the credibility of a witness. *See State v. Salcido*, 140 Ariz. 342, 344, 681 P.2d 925, 927 (App. 1984) (holding that lawyers are prohibited from expressing personal knowledge of facts unless testifying as a witness). We nevertheless hold that the trial court did not abuse its discretion in denying a mistrial. When the improper comment was made, the trial court immediately ordered it struck.

"different from what you've testified to today," "inconsistent with what you're telling us today," and "completely different from what your story is today." Contradictions and changes in a witness's testimony, however, do not necessarily constitute perjury. *Tapia v. Tansy*, 926 F.2d 1554, 1563 (10th Cir. 1991). Although K.C. changed her story in multiple ways, she was thoroughly impeached with the changes, and it was for the jury to decide which version to believe. *See id*.

Further, in the final instructions, jurors were told not to consider any matters struck by the trial court and specifically directed not to consider "[a]ny personal opinion expressed by any of the attorneys as to a witness'[s] veracity." We presume jurors follow their instructions. *State v. Prince*, 226 Ariz. 516, 537, ¶ 80, 250 P.3d 1145, 1166 (2011). Under these circumstances, the trial court did not err in denying the motion for mistrial. *See Newell*, 212 Ariz. at 403, ¶ 69, 132 P.3d at 847 (holding that a prosecutor's improper comment did not affect the verdict and deny the defendant a fair trial because the objection thereto was sustained, the comment was stricken, and the jury was properly instructed).

¶20 The second motion for mistrial was made after a remark by the prosecutor during rebuttal closing argument. In addressing K.C.'s lack of credibility, the prosecutor stated, "It's interesting that [defense counsel] didn't address [K.C.]'s testimony at all during his 35-plus minutes of closing argument, because even he doesn't believe her." Guzman objected, but the trial court overruled the objection and later denied a motion for mistrial, ruling that the remark did not rise to the level of misconduct. Guzman argues the remark was improper because the prosecutor was arguing his personal belief about what

defense counsel thought and insinuating that defense counsel had knowingly presented false testimony.[5]

¶21 "The prosecutor has an obligation to seek justice, not merely a conviction, and must refrain from using improper methods to obtain a conviction." *Hughes*, 193 Ariz. at 80, ¶ 33, 969 P.2d at 1192 (citations omitted). Our supreme court has recognized the impropriety of "argument that impugns the integrity or honesty of opposing counsel." *Id.* at 86, ¶ 59, 969 P.2d at 1198 (citations omitted); *accord State v. Gonzales*, 105 Ariz. 434, 436, 466 P.2d 388, 390 (1970).

¶22 We find nothing improper about the first part of the prosecutor's statement, in which the prosecutor noted, "It's interesting that [defense counsel] didn't address [K.C.]'s testimony at all during his 35-plus minutes of closing argument . . . ." *See generally Bible*, 175 Ariz. at 602, 858 P.2d at 1205 ("[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions." (citations omitted)); *see also State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) ("[P]rosecutors have wide latitude in presenting their closing arguments to the

[5] Attorneys have a duty not to knowingly encourage or present false testimony. *See* Ariz. R. Sup. Ct. 42, ER 3.3(a)(3). An attorney generally may, however, call witnesses whose reliability and veracity is suspect. *See State v. Ferrari*, 112 Ariz. 324, 334, 541 P.2d 921, 931 (1975).

jury."); *accord State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). It was entirely appropriate for the prosecutor to attack K.C.'s credibility and urge the jury not to believe her testimony, and the above-referenced statement by the prosecutor merely addressed and highlighted what had (or more precisely, had not) occurred during defense counsel's argument – that counsel had failed to discuss the testimony of one of his witnesses.

¶23 We do, however, find improper the second part of the statement, in which the prosecutor concluded "because even he doesn't believe her." In support of his motion for a mistrial, defense counsel argued that, given the "interplay" of this remark with the prosecutor's previous statement "as to his personal beliefs," the motion should be granted. The trial court rejected defense counsel's argument, indicating that in its view the remark constituted an acknowledgement that even defense counsel had ultimately recognized K.C.'s testimony, when considered in the context of all the evidence presented at trial, lacked credibility.[6] We agree with defense counsel, however, that given the prosecutor's previous statement that he knew K.C. was lying, this remark appeared to impugn the

[6] The court specifically noted that even Guzman in his trial testimony "acknowledged that some of the things said by that witness were inconsistent with what he was saying and were not what occurred."

integrity or honesty of defense counsel, *see Hughes*, 193 Ariz. at 86, ¶ 59, 969 P.2d at 1198, because the jury may reasonably have interpreted the remark as suggesting, if not directly stating, that defense counsel knowingly presented false testimony through K.C. Nevertheless, after viewing the entire record, we conclude that the trial court did not abuse its discretion in denying a mistrial for this remark.

¶24 A prosecutor's improper comments will not require reversal unless a reasonable likelihood exists that the misconduct could have affected the jury's verdict. *Newell*, 212 Ariz. at 403, ¶ 67, 132 P.3d at 847 (citation omitted). Further, "improper comments must be so serious that they affected the defendant's right to a fair trial." *Id*. (citation omitted). In this case, although Guzman's objection was overruled, the trial court instructed the jury as part of the standard jury instructions that it must not be influenced by sympathy or prejudice, it must determine the facts only from the evidence produced in court, and anything said in closing arguments was not evidence. As we have recognized, jurors are presumed to follow their instructions. *Prince*, 226 Ariz. at 537, ¶ 80, 250 P.3d at 1166. Moreover, K.C.'s testimony was likely of minimal, if any, benefit to Guzman because it largely contradicted Guzman's own testimony. In fact, while testifying, Guzman attempted in several instances to distance himself from

K.C.'s statements, which if believed might have established Guzman's liability for robbery as an accomplice. Finally, the evidence as a whole overwhelmingly established Guzman's guilt, and despite the fact that the prosecutor's remark was improper, when viewed in context of the entire trial, it was not so prejudicial as to deprive Guzman of his right to a fair trial. *See Newell*, 212 Ariz. at 403-04, ¶ 70, 132 P.3d at 847-48.

¶25 In light of the testimony presented, and given that the trial court was in the best position to gauge how the prosecutor's remark might be construed by the jury, we find no abuse of discretion in the court's ruling that the remark did not warrant a mistrial. *See State v. Ferguson*, 149 Ariz. 200, 212, 717 P.2d 879, 891 (1986). Accordingly, we hold that there was no error in the denial of the motion for mistrial.

CONCLUSION

¶26 Guzman's convictions and sentences are affirmed.

/S/
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

/S/
MAURICE PORTLEY, Presiding Judge

/S/
PATRICIA K. NORRIS, Judge