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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 08/02/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0586
)
Appellee,)
) DEPARTMENT E
v.)
) **MEMORANDUM DECISION**
RYAN ALLAN WHEELER,)
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-151453-001

The Honorable Robert L. Gottsfield, Judge (Retired)

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
Matthew H. Binford, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

T I M M E R, Presiding Judge

¶1 Ryan Allan Wheeler appeals his conviction and resulting disposition after a jury convicted him on one count of aggravated assault for punching a man several times in the face at a party. Wheeler did not deny punching the victim but asserted he did so in self-defense. Wheeler argues the trial court erred by failing to grant a new trial because the prosecutor engaged in misconduct by impermissibly shifting the burden of proof when cross-examining Wheeler and again during closing argument. For the reasons that follow, we disagree and therefore affirm.

¶2 Because Wheeler failed to raise a claim of prosecutorial misconduct to the trial court,¹ we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). "Fundamental error" is error that goes to "the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)).

¹ Defense counsel did not object to the prosecutor's closing arguments. Defense counsel objected to only one of the questions he now claims constituted misconduct and only on the ground it shifted the burden. An objection on the ground of burden-shifting fails to preserve a claim of prosecutorial misconduct. *State v. Rutledge*, 205 Ariz. 7, 13, ¶¶ 29-30, 66 P.3d 50, 56 (2003).

¶13 To determine whether a prosecutor's remarks are improper, we consider whether they called attention to matters jurors should not consider and the probability the jurors were influenced by the remarks. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (citation omitted). To require reversal, prosecutorial misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (citation omitted). "Prosecutorial misconduct constitutes fundamental error only when it is so egregious as to deprive the defendant of a fair trial." *State v. Woody*, 173 Ariz. 561, 564, 845 P.2d 487, 490 (App. 1992) (internal quotation marks and citation omitted).

¶14 Wheeler argues the prosecutor engaged in misconduct by: (1) asking Wheeler on cross-examination (a) whether party-goers who reportedly could corroborate his version of events had appeared to testify at trial, and (b) whether he told his attorney he punched the victim two or three times; and (2) questioning during rebuttal closing argument Wheeler's assertion that other party-goers told him the victim had a tendency to start fights in light of party-goers' failure to testify. Wheeler argues the cumulative effect of this alleged misconduct was to improperly influence the jurors to decide the case by

weighing the number of witnesses testifying concerning each version of events rather than the credibility of the witnesses.

¶15 We reject Wheeler's argument because the prosecutor did not call the jurors' attention to matters they should not consider and therefore did not act improperly. *Jones*, 197 Ariz. at 305, ¶ 37, 4 P.3d at 360. It is well settled a "prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify." *State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (not improper for prosecutor to argue defendant failed to present any evidence in support of his theory that eyewitnesses were mistaken); *State v. Cozad*, 113 Ariz. 437, 439, 556 P.2d 312, 314 (1976) (not improper for prosecutor to ask defendant if his alibi witness was going to testify); *State v. Herrera*, 203 Ariz. 131, 137, ¶¶ 18-21, 51 P.3d 353, 359 (App. 2002) (not improper for prosecutor to argue that defendant's failure to introduce a videotape of his performance on field sobriety tests indicated the videotape would not have been favorable to the defendant). "Such comment is permitted by the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it." *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987) (not improper to

ask DUI defendant who attacked validity of breath test results if he had received his breath sample and to argue in closing that had the result of testing the sample been favorable, defendant would have offered it as evidence).

¶16 Because Wheeler testified, the prosecutor's statements could not have called attention to his failure to testify. The cross-examination and rebuttal argument were, rather, permissible references to Wheeler's failure to produce evidence in support of his claims his friends had told him about the victim's tendency to start fights and that one of them had asked him to be the party's "regulator." See *id.* Additionally, the prosecutor's remarks did not expressly or impliedly shift the burden of proof.² See *State v. Sarullo*, 219 Ariz. 431, 437, ¶ 24, 199 P.3d 686, 692 (App. 2008) (prosecutor did not shift the burden of proof to defendant by arguing he failed to call expert witnesses to support his theory of defense). For these reasons, we do not discern error, much less fundamental error.

¶17 For the foregoing reasons, the trial court did not commit fundamental error by failing to sua sponte grant a new

² Wheeler asserts the prosecutor's question about what Wheeler had told his counsel concerning the number of times the victim was punched shifted the burden and was particularly "egregious." We disagree. First, we fail to understand how the question arguably shifted the burden. Second, reading the contested question in context, it is clear the prosecutor referred to what Wheeler had told his attorney during direct examination and did not improperly ask about any confidential communications.

trial based on prosecutorial misconduct. We therefore affirm Wheeler's conviction and resulting disposition.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
Patricia A. Orozco, Judge

/s/
Diane M. Johnsen, Judge