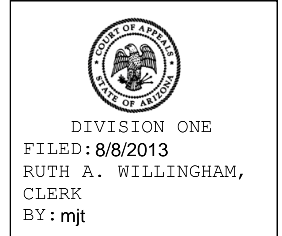
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24


DIVISION ONE
FILED: 8/8/2013
RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	No. 1 CA-CR 12-0158
v.	DEPARTMENT C
CHRISTOPHER MICHAEL BARRON, Appellant.	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-005534-001

The Honorable Bruce R. Cohen, Judge

AFFIRMED AS CORRECTED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Joseph T. Maziarz, Chief Counsel, Criminal Appeals Section
and Matthew H. Binford, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
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Attorneys for Appellant

G E M M I L L, Judge

¶1 Christopher Michael Barron appeals his convictions and sentences on three counts of armed robbery, two counts of attempted armed robbery, one count of aggravated assault, and

one count of misconduct involving weapons. For the reasons that follow, we affirm the convictions but correct an error in classification to reflect that the attempted armed robbery convictions on Counts Four and Six are class three dangerous felonies rather than class two dangerous felonies.

BACKGROUND

¶2 The convictions arose from the armed robbery of three customers of a Filiberto's restaurant in Tempe, the aggravated assault of one of the employees, and the attempted armed robbery of that employee and another employee. The evidence at trial showed that a dark-skinned man, wearing dark clothes, a hooded sweatshirt, and a bandana covering most of his face, robbed the customers at gunpoint. At the same time, a white-skinned man with blue eyes, similarly dressed and also wielding a gun, demanded that two of the employees open the cash registers, and struggled with and then shot one of the employees in the arm. None of the witnesses was able to provide a detailed description of the suspects.

¶3 Police swabbed the hand of the employee who had fought with one of the suspects and subsequently matched the DNA on the hand to Barron. Barron did not testify at trial but called an expert witness who testified that Barron's DNA could have been transferred to the victim's hand in any number of secondary or tertiary ways other than in the fight. The jury convicted

Barron of the charged offenses and found aggravating factors on Counts One through Six. The judge sentenced him to aggravated sentences on Counts One through Six and the presumptive sentence on Count Seven, to be served concurrently, the longest term of which was seventeen years in prison. Barron timely appealed and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).[1]

ANALYSIS

Prosecutorial Misconduct

¶4 Barron argues that the trial court committed fundamental error by allowing the prosecutor to engage in misconduct (1) by demeaning the defense expert witness in cross-examination and in closing arguments, (2) by shifting the burden of proof and commenting on Barron's failure to testify in closing arguments, and (3) by misstating the law regarding circumstantial evidence. Barron argues that the cumulative impact of the prosecutor's misconduct warrants a new trial.

¶5 "Prosecutorial misconduct 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 any improper purpose with indifference to a

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

significant resulting danger of mistrial." *State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (internal quotations and citation omitted).

¶6 "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. Morris*, 215 Ariz. 324, 335, ¶ 46, 160 P.3d 203, 214 (2007) (internal quotations and citation omitted). "The misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (internal quotations and citation omitted). "Prosecutorial misconduct constitutes reversible error only if (1) misconduct exists and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *Id.* (internal quotations and citations omitted).

¶7 Because Barron failed to object to any of the alleged incidents of prosecutorial misconduct at trial, he bears the burden of establishing on appeal that the prosecutor engaged in misconduct, that the misconduct constituted fundamental error, and that the error caused him prejudice. *See State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). Error is fundamental when it goes to the foundation of the defendant's case, takes from him a right essential to his

defense, and is error of such magnitude that he could not possibly have received a fair trial. *Id.* at 567, ¶ 19, 115 P.3d at 607.

¶8 As an initial matter, we conclude that the prosecutor's cross-examination of Barron's expert was not improper. The prosecutor was cross-examining the defense expert on whether he informed clients, who came to him with issues regarding marital infidelity, about the possibility that the suspect's DNA ended up on the spouse from secondary or tertiary transfer, as he suggested might have occurred in this case. This was an acceptable line of questioning of the expert's actual practice in the field, as contrasted with his testimony at trial. *Cf. Smethers v. Campion*, 210 Ariz. 167, 177, ¶¶ 33-34, 108 P.3d 946, 956 (App. 2005) (holding that it was error for the trial court to limit cross-examination of an expert witness on his personal approach to a medical issue). The prosecutor's subsequent rhetorical question, "Isn't there always [a qualifier]?", and her explanatory comment that the expert had "qualified essentially everything you told us today" by going "from secondary transfer to third transfer to fourth transfer" may have been argumentative but did not rise to the level of misconduct or reversible error. *Cf. Aguilar*, 217 Ariz. at 238-39, ¶ 11, 172 P.3d at 426-27.

¶9 We also do not find that the prosecutor engaged in

misconduct by her isolated reference in her rebuttal argument to the defense expert by the name of one of his websites, as "Dr. CaughtHimCheating.com," and her arguments in closing that no evidence supported Barron's theory of the case, and that the jury should give circumstantial evidence and direct evidence "equal weight." We will address each of these issues in turn.

¶10 Prosecutors have "wide latitude in their closing arguments to the jury." *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). To determine whether a prosecutor's remarks are improper, we consider whether the remarks called to the attention of the jurors matters they would not be justified in considering, and the probability, under the circumstances, that the jurors were influenced by the remarks. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000).

¶11 Barron argues that the prosecutor engaged in misconduct by referring to the defense expert in her closing argument as "Dr. CaughtHimCheating.com," with the purpose of "play[ing] on prejudices associated with infidelity testing." The expert had acknowledged that the company of which he was vice president, Chromosomal Laboratories in Phoenix, runs two web sites: "CaughtHimCheating.com" and "CaughtHerCheating.com," both related to the company's business of using DNA analysis to confirm marital infidelity. The prosecutor's reference to the expert witness in rebuttal argument as "Dr.

CaughtHimCheating.com" was inappropriate if its purpose was to appeal to improper prejudices of the jurors rather than to simply persuade them not to give the expert's testimony any weight. We conclude, however, that this isolated remark was not so egregious and did not so pervade the atmosphere of the trial that it denied Barron a fair trial, as required for reversal. *See Morris*, 215 Ariz. at 335, ¶ 46, 160 P.3d at 214.

¶12 Barron next argues that the prosecutor improperly shifted the burden of proof and commented on his failure to testify when she argued that the jury had not heard any evidence to support the defense expert's theory that Barron's DNA could have been transferred to the back of the assault victim's hand by some form of innocent transfer, such as by eating at the restaurant or handling a broom there. We disagree.

¶13 It is well settled that 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) (holding it was not improper for prosecutor to argue that defendant failed to present any evidence in support of his theory that eyewitnesses were mistaken); *see also State v. Sarullo*, 219 Ariz. 431, 437, ¶ 24, 199 P.3d 686, 692 (App. 2008) (holding that prosecutor did not shift the burden of proof to defendant

by arguing that he had failed to call expert witnesses to support his theory of defense); *State v. Herrera*, 203 Ariz. 131, 137, ¶¶ 19-20, 51 P.3d 353, 359 (App. 2002) (holding that it was not improper for prosecutor to argue that had a videotape of defendant's performance on field sobriety tests been favorable, defendant would have introduced it).

¶14 "Even where the defendant does not take the stand, the prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not constitute a comment on defendant's silence." *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987) (holding that it was not improper to ask DUI defendant if he had received a breath sample and to argue in closing that had the results been favorable, defendant would have offered it as evidence). "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." *Id.* The decision on whether the prosecutor's remarks were impermissible comments on the defendant's failure to testify turns on whether they were of such character that "the jury would naturally and necessarily perceive them to be a comment on the failure of the defendant to testify." *State v. Cook*, 170 Ariz. 40, 51, 821 P.2d 731, 742 (1991) (holding that

prosecutor's comments on the failure of defendant to offer an alibi in conversations before trial did not improperly call attention to his failure to testify).

¶15 We find nothing improper in the prosecutor's argument on the absence of any evidence supporting Barron's theory of the case, that is, that his DNA ended up on the outside of the victim's hand, not during the fight, but from some other contact, such as might arise from visiting the restaurant as a customer. The evidence that Barron had some contact with the victim or an article touched by the victim other than during the fight could have been offered by a witness other than Barron, such as a friend who could attest that Barron had visited the restaurant as a customer, or was an acquaintance of the victim. Under these circumstances, we do not construe the prosecutor's argument as one that the jury would necessarily perceive as a comment on Barron's failure to testify, as required to find it improper. *See id.* Accordingly, we discern no prosecutorial misconduct on this ground.

¶16 Finally, Barron argues that the prosecutor misstated the law in closing argument when she informed the jury it should give direct and circumstantial evidence "equal weight when . . . discussing the facts and evidence in this case." Although the prosecutor may have slightly misstated the law in making what appears to be a summary statement, we do not perceive any

prosecutorial misconduct on this point. The judge had previously instructed the jury that "the law makes no distinction between direct and circumstantial evidence," but added that it was up to the jury "to determine the importance to be given to the evidence, regardless of whether it is direct or circumstantial." The prosecutor's summary statement that the jurors should give direct and circumstantial evidence "equal weight" is consistent with the legal standard that the law does not distinguish between direct and circumstantial evidence, *see State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993), but omits the point that the jury must decide how much weight to give each item of evidence. We decline to find that the prosecutor engaged in misconduct by failing to also emphasize the latter point. Additionally, our supreme court has repeatedly held that the jury is presumed to follow the judge's instructions in the absence of evidence to conclude otherwise. *See, e.g.*, *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996); *State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994). On this record, we conclude that the prosecutor did not engage in misconduct by arguing that the jury should give equal weight to direct and circumstantial evidence.

¶17 Finally, we have also considered the potential cumulative effect of all of Barron's claims of prosecutorial misconduct. For all of the reasons set forth above, we decline

to reverse on grounds of prosecutorial misconduct.

Classification of Attempted Robbery

¶18 Barron also argues that the attempted armed robbery charges of which he was convicted in Counts Four and Six were improperly designated in both the indictment and the sentencing minute entry as class two dangerous felonies, when they are class three dangerous felonies. The State concedes error, and we agree. Armed robbery is a class two felony. A.R.S. § 13-1904(B) (2010). An attempt to commit a class two felony is a class three felony. A.R.S. § 13-1001(C)(2) (2010). Attempted armed robbery thus is a class three felony. *See* A.R.S. § 13-1904(B); A.R.S. § 13-1001(C)(2). The judge imposed sentences on the attempted armed robbery offenses that were within the statutory range for class three dangerous felonies under former A.R.S. § 13-604(I). *See* 2005 Ariz. Sess. Laws, ch. 188, § 1. We accordingly modify the sentencing minute entry to correctly reflect that the convictions for attempted armed robbery in Counts Four and Six were for class three dangerous felonies. *See State v. Dowthard*, 92 Ariz. 44, 49, 373 P.2d 357, 362 (1962) (modifying the written judgment to correct the designation of the offense of conviction).

CONCLUSION

¶19 For the foregoing reasons, we affirm Barron's convictions and sentences, but correct the classification of the

attempted armed robbery convictions in Counts Four and Six in the sentencing minute entry to reflect that they are class three dangerous felonies.

/s/

JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Judge

/s/

PATRICIA A. OROZCO, Judge