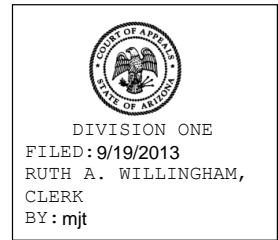


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) 1 CA-CR 12-0400  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
) Rule 111, Rules of the  
KENNETH WILLIAM PAUL, ) Arizona Supreme Court)  
)  
Appellant. )  
)  
)  
)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2011-144799-001

The Honorable Robert E. Miles, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General Phoenix  
by Joseph T. Maziarz, Acting Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
and Andrew Reilly, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
by Peg Green, Deputy Public Defender  
Attorneys for Appellant

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**P O R T L E Y**, Judge

¶1 Defendant Kenneth William Paul appeals his conviction for robbery. He contends the trial court erred by allowing the State to amend the indictment on the first day of trial to reflect the victim's correct name. He also contends that the State committed prosecutorial misconduct during closing argument by referring to his failure to call a witness. For the following reasons, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 Paul was hired by the victim through Craigslist to work on a roofing project. The victim alleged that Paul demanded payment before Paul had completed the project and physically assaulted him to obtain the payment. Paul was indicted for robbery. A jury found Paul guilty and he was subsequently sentenced to a mitigated prison term of three years and given credit for sixty-one days of presentence incarceration.

#### **DISCUSSION**

¶3 Paul raises two issues on appeal. He, however, failed to raise the issues at trial and our review is limited to fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). We note, however, that before engaging in fundamental error analysis, "we must first find that

the trial court committed some error." *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991).

### **I. Amending the Indictment**

¶4 Paul contends that the court erred when it allowed the State to amend the indictment to reflect the legal name of the victim on the first day of trial.<sup>1</sup> We disagree.

¶5 An indictment may only be amended to conform to the evidence without a defendant's consent "to correct mistakes of fact or remedy formal or technical defects." Ariz. R. Crim. P. 13.5(b). An amendment is "formal or technical" if it does not "change the nature of the offense charged or . . . prejudice the defendant in any way." *State v. Barber*, 133 Ariz. 572, 577, 653 P.2d 29, 34 (App. 1982) (holding that at the close of evidence, correcting a name in the indictment did not change the nature of the substantive charge), *aff'd*, 133 Ariz. 549, 653 P.2d 6 (1982). And, so long as the amendment does not change the nature of the offense or create prejudice it is permissible. *State v. Fimbres*, 222 Ariz. 293, 303, 213 P.3d 1020, 1030 (App. 2009).

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<sup>1</sup>The State contends that Paul cannot challenge the amendment because he failed to timely challenge the indictment pursuant to Arizona Rule of Criminal Procedure 16.1. We disagree with the State's position because it caused the issue by not ensuring that victim's name was properly in the indictment and then only discovering the error just before jury selection.

¶16 Here, we find no error. Paul clearly had notice of the charge. Although the victim's name was not correctly listed in the indictment, the victim was properly identified in the police reports and discovery by the State. Moreover, the record establishes that Paul had opportunity to prepare his defense; in fact, Paul used the victim's true name in his pretrial request for rule 608 hearing, and was prepared to attempt to impeach the victim on various topics under his true name, including his business dealings, driving record, and child support payments.<sup>2</sup>

¶17 Moreover, the amendment to the indictment did not preclude or limit any defense Paul could assert. The amendment did not create a double jeopardy problem because he cannot again be prosecuted for the facts giving rise to the indictment, prosecution and conviction. See *Barber*, 133 Ariz. at 577-78, 653 P.2d at 34-35 (holding that a "double jeopardy defense is not limited to the four corners of the indictment"). Consequently, because the amendment was a technical one that did not prevent Paul from preparing and presenting a defense, we find no error.

## **II. Prosecutorial Misconduct**

¶18 Paul next contends that he is entitled to a new trial because the State committed prosecutorial misconduct. He claims

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<sup>2</sup> While Paul was prepared to impeach the victim, the court precluded the impeachment because the topics did not tend to show the victim's character for untruthfulness.

the misconduct occurred during closing argument when the State referred to his failure to call a witness.

¶9 Generally, the State is given wide latitude during closing argument and may comment on the evidence and any reasonable inferences. *State v. Hughes*, 193 Ariz. 72, 85, ¶ 59, 969 P.2d 1184, 1197 (1998). Moreover, prosecutorial misconduct does not occur if the State comments on the defense's failure to call a witness who would substantiate his defense. *State v. Condry*, 114 Ariz. 499, 500, 562 P.2d 379, 380 (1977); see *State v. Herrera*, 203 Ariz. 131, 137, ¶ 19, 51 P.3d 353, 359 (App. 2002). In fact, so long as the comment is not "phrased to call attention to the defendant's own failure to testify" or if "it appears that the defendant is the only one who could explain or contradict the state's evidence" there is no misconduct. *State v. Bracy*, 145 Ariz. 520, 535, 703 P.2d 464, 479 (1985) (holding that the prosecution's reference to defendant's failure to produce exculpatory evidence did not violate defendant's Fifth Amendment rights).

¶10 Here, the State's comments during the closing argument were not improper. In its closing argument, after noting that Paul had testified, the prosecutor stated that "the defendant brought up the fact that this person Glenn was there, that this person Glenn saw everything, and could testify about what happened. And could confirm that [Paul] did not do any of this,

yet, where is Glenn[?]" The rhetorical "Where's Waldo" statement properly focused on the fact that Paul testified that Glenn would support his version of the events but he did not call Glenn to testify. See *Condry*, 114 Ariz. at 500, 562 P.2d at 380; *Herrera*, 203 Ariz. at 137, ¶ 19, 51 P.3d at 359. Consequently, we find no error, fundamental or otherwise.

**CONCLUSION**

¶11 Based on the foregoing, we affirm Paul's conviction and sentence.

/s/

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MAURICE PORTLEY, Judge

CONCURRING:

/s/

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DONN KESSLER, Presiding Judge

/s/

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PETER B. SWANN, Judge