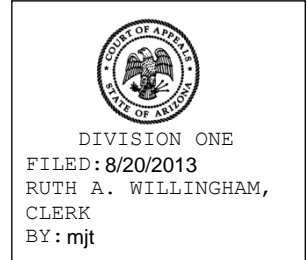


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 12-0450
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MARCOS ANTONIO LOPEZ,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-005336-001

The Honorable Joseph C. Welty, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
Jana Zinman, Assistant Attorney General
Attorney for Appellee

Bruce F. Peterson, Maricopa County Legal Advocate Phoenix
By Colin F. Stearns, Assistant Legal Advocate
Attorney for Appellant

C A T T A N I, Judge

¶1 Marcos Antonio Lopez appeals his convictions of
second-degree murder and misconduct involving weapons and the

resulting sentences. Lopez argues prosecutorial misconduct in closing arguments warrants reversal. We disagree and therefore affirm.

FACTS AND PROCEDURAL BACKGROUND¹

¶12 Late one autumn morning in 2008, Lopez and a few other men, including the victim, were drinking beer in the victim's front yard in Phoenix. At the time, Lopez was on felony probation and accordingly was prohibited from possessing firearms.

¶13 Lopez and the victim began to argue, then Lopez pushed the victim, pulled out a handgun, and shot the victim in the back as the victim was moving away. Lopez drove away in a white S.U.V. The victim died from the gunshot wound before police arrived.

¶14 One week later, a Border Patrol agent in Indio, California pulled Lopez over in a traffic stop. Lopez was driving a blue S.U.V. with no license plates. A consent search of the vehicle revealed several cell phones, brand new clothes, and approximately \$2,000 in cash. When asked for identification, Lopez gave the agent a driver's license with a

¹ We view the evidence in the light most favorable to upholding the jury's verdicts. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

false name. Lopez's fingerprints, however, linked him to an outstanding arrest warrant related to the Arizona homicide.

¶15 The State charged Lopez with one count of second-degree murder and one count of misconduct involving weapons. After a seven-day trial, a jury found Lopez guilty on both counts and found the murder to be a dangerous offense. The court sentenced Lopez to concurrent presumptive terms of imprisonment, the longest of which is 16 years.

¶16 Lopez timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033.²

DISCUSSION

¶17 Lopez argues the prosecutor engaged in a variety of misconduct during closing argument, including vouching, referring to facts not in evidence, expressing a personal opinion of Lopez's guilt, and misstating both the evidence and the law. Because Lopez failed to raise these claims of error to the superior court, we review only for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Error is fundamental if it "goes to the foundation of [the defendant's] case, takes away a right that is essential to

² Absent material revisions after the relevant date, statutes cited refer to the current version unless otherwise indicated.

[the defendant's] defense, and is of such magnitude that [the defendant] could not have received a fair trial." *Id.* at 568, ¶ 24, 115 P.3d at 608. To prevail on a claim of fundamental error, Lopez bears the burden of establishing error that is both fundamental and prejudicial. See *id.* at 567, ¶ 20, 115 P.3d at 607.

¶18 We will reverse a conviction for prosecutorial misconduct only if "(1) misconduct is indeed present[,] and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Moody*, 208 Ariz. 424, 459, ¶ 145, 94 P.3d 1119, 1154 (2004) (citation omitted). Only misconduct that is "so pronounced and persistent that it permeates the entire atmosphere of the trial" is subject to reversal. *State v. Rosas-Hernandez*, 202 Ariz. 212, 218-19, ¶ 23, 42 P.3d 1177, 1183-84 (App. 2002) (quoting *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997)). Our analysis looks to, "under the circumstances, whether the jurors were probably influenced and whether the [improper] statement probably denied Defendant a fair trial." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993).

A. Vouching

¶19 There are two forms of prosecutorial vouching: "(1) where the prosecutor places the prestige of the government

behind its [evidence] [and] (2) where the prosecutor suggests that information not presented to the jury supports the [evidence]." *State v. Newell*, 212 Ariz. 389, 402, ¶ 62, 132 P.3d 833, 846 (2006) (alterations in original) (citation omitted).

¶10 Lopez alleges three instances of prosecutorial vouching in the State's closing argument. He first contends the prosecutor vouched for the credibility of the State's witnesses by highlighting evidence corroborating the witnesses' testimony and by stating that "Corroboration equals truthfulness, equals accuracy." As the court properly instructed the jury, however, one factor for evaluating witnesses' credibility is "other evidence, and the reasonableness of the witness'[s] testimony when considered in the light of the other evidence." See also Rev. Ariz. Jury Instr. ("RAJI") Stand. Crim. 18 (credibility of witnesses). The prosecutor's argument that the jury should consider corroboration by other evidence in assessing the witnesses' credibility was not improper.

¶11 Lopez next argues the prosecutor impermissibly vouched for a witness's credibility by personally opining that the testimony was truthful. An eyewitness to the shooting testified that he had been either 30 feet or 75 feet from the scene. The prosecutor argued in closing that "[the witness] didn't know the exact distance. Well, ladies and gentlemen, I submit to you

that that is why it's accurate." The prosecutor suggested that in contrast, had the witness stated the distance down to the inch, the testimony would be suspect. The prosecutor's comments expressed no personal opinion as to the witness's truthfulness, instead simply positing reasons why the jury should consider the testimony credible. The statements neither placed the government's prestige behind the witness nor suggested external information supported the testimony and, as such, did not constitute vouching. See *Newell*, 212 Ariz. at 402, ¶ 62, 132 P.3d at 846.

¶12 Lopez also contends the prosecutor vouched for the State's evidence by suggesting Lopez's aunt, who did not testify at trial, would have provided evidence supporting the State's case. During trial, the case agent testified that the aunt, who at the time of the murder lived in the same house as the victim, had assisted the police early in the investigation by providing information on Lopez's name, date of birth, and vehicle, but that she later failed to appear for court and could not be located for trial despite a bench warrant. In closing, the prosecutor recounted the case agent's testimony regarding the aunt, including her assistance in the investigation and her failure to appear as a witness.

¶13 Lopez characterizes this argument as vouching by reference to the aunt's theoretical testimony. The prosecutor's

comment, however, relied entirely on the case agent's testimony -- actually presented at trial -- regarding the aunt's role in developing Lopez as an investigative lead. Similarly, the statements regarding the aunt's failure to testify did not bolster the State's case, but instead simply explained why a particular potential witness had not appeared. See *id.* at ¶ 63. This argument was not improper.

B. Referring to facts not in evidence

¶14 Lopez next argues the prosecutor referred to matters not in evidence when arguing that three witnesses displayed fear of Lopez. Despite the wide latitude afforded counsel in closing arguments, counsel may not describe or comment on evidence that has not previously been presented to the jury. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000). Here, however, one witness testified that he was afraid of Lopez, justifying the prosecutor's comments to that effect in closing.

¶15 The prosecutor also argued that two other witnesses' demeanor on the stand -- their failure to look at Lopez while testifying -- suggested fear of Lopez. Although, as Lopez points out, the witnesses' physical demeanor while testifying does not become part of the record on appeal, "the witness'[s] manner while testifying" is one factor the jury is directed to consider when evaluating credibility. See also RAJI Stand.

Crim. 18. Accordingly, the prosecutor's argument highlighting the witnesses' demeanor was not improper.

C. Expressing a personal opinion regarding guilt

¶16 Lopez argues the prosecutor improperly expressed a personal belief in Lopez's guilt by stating during rebuttal closing that "The defendant is guilty." Statements of personal opinion as to the defendant's guilt are improper. See, e.g., *State v. Williams*, 113 Ariz. 442, 444, 556 P.2d 317, 319 (1976). Counsel may, however, "suggest ultimate conclusions" during closing argument as long as the argument is based on evidence presented and reasonable inferences therefrom. See *Bible*, 175 Ariz. at 602, 858 P.2d at 1205.

¶17 The prosecutor in this case argued that "It's not a conspiracy [among the witnesses to "pin the murder on [Lopez]"]. It's evidence of guilt. The defendant is guilty." Although in isolation the statement that Lopez "is guilty" could be read as an expression of personal belief, in context it is instead a suggestion that the witnesses' testimony supports a finding of guilt. Thus, the statement was not improper.

D. Misstating evidence

¶18 Lopez contends the prosecutor misstated the evidence presented at trial by stating there were "[n]umerous witnesses that identified [Lopez] as the murderer." One witness at trial explicitly identified Lopez as the man who shot and killed the

victim, and further testified that Lopez then left the scene in a white S.U.V. The State presented evidence that a second witness heard the gunshot, saw a man with a gun walking toward the white S.U.V., identified the man with the gun as the nephew of Lopez's aunt, and positively identified Lopez in a photographic lineup. A third witness saw a man walk to and leave in the white S.U.V. immediately after the gunshot; although he did not positively identify Lopez, this witness picked a photo of Lopez as one of two photos in a photographic lineup when asked to identify the person in the white S.U.V. A fourth witness, although not certain of the identification, indicated that the photo of Lopez was "the best one that I could say was -- looked like the -- gentleman" with the gun. In light of this evidence, the prosecutor's statement that several witnesses identified Lopez is a reasonable inference from the evidence presented. See *Bible*, 175 Ariz. at 602, 858 P.2d at 1205 (counsel may "urge the jury to draw reasonable inferences from the evidence" during closing argument).

E. Misstating the law

¶19 Lopez last argues the prosecutor mischaracterized the law regarding evidence of flight or concealment. The prosecutor argued in closing that Lopez's actions in "concealing your I.D., fleeing the City and the State, going to California, lying about who you are, all of that is evidence of guilt. All of that is a

consciousness of guilt. Guilt for the murder." Lopez claims this argument was improper because "flight in itself is not evidence of guilt."

¶20 Lopez misconstrues the law. Flight or concealment is not enough, *by itself*, to prove guilt; the jury may, however, consider flight or concealment as some evidence of guilt. See *State v. Cota*, 229 Ariz. 136, 142, ¶ 11, 272 P.3d 1027, 1033 (2012) (citation omitted) ("Evidence of flight is admissible to show consciousness of guilt when the defendant flees 'in a manner which obviously invites suspicion or announces guilt.'"); see also RAJI Stand. Crim. 9 ("In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's running away, hiding, or concealing evidence, together with all the other evidence in the case. Running away, hiding, or concealing evidence after a crime has been committed does not by itself prove guilt."). The court properly instructed the jury on the use of flight evidence. Moreover, the prosecutor argued that Lopez's actions in leaving Arizona and attempting to conceal his identity when detained by law enforcement was "evidence of guilt," not that flight alone established guilt. This was an accurate statement of the law and accordingly does not constitute misconduct.

¶21 Because Lopez has not established any instances of prosecutorial misconduct, we need not address his arguments relating to the cumulative effect of alleged misconduct or resulting prejudice. See *Moody*, 208 Ariz. at 459, ¶ 145, 94 P.3d at 1154.

CONCLUSION

¶22 For the foregoing reasons, we affirm Lopez's convictions and sentences.

/S/

KENT E. CATTANI, Judge

CONCURRING:

/S/

PETER B. SWANN, Presiding Judge

/S/

JOHN C. GEMMILL, Judge