IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MATTHEW T. HURLEY, *Appellant*.

No. 1 CA-CR 12-0482
FILED 12-26-2013

Appeal from the Superior Court in Maricopa County
No. CR2012-103613-001
The Honorable Jerry Bernstein, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Adriana M. Zick

Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Mikel P. Steinfeld

Counsel for Appellant

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Maurice Portley and Judge John C. Gemmill joined.

C A T T A N I , Judge:

¶1 Matthew T. Hurley appeals from his convictions and sentences for aggravated assault and resisting arrest. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 The incident that gave rise to these charges began when Phoenix Police Officer Damian Baynes stopped Hurley at night after observing him bicycling the wrong way and failing to stop at a stop sign. After responding to preliminary questions, Hurley agreed to let Officer Baynes search his pockets. When Officer Baynes felt what he believed to be drugs in Hurley's shirt pocket, he asked what was in the pocket. Hurley responded, "Oh, shit," and struck the officer's arm. Hurley pulled his jacket over his shirt pocket, then pushed Officer Baynes in the chest twice and started moving away from him notwithstanding the officer's commands to stop.

¶3 Officer Baynes radioed for help and finally succeeded in getting Hurley face down on the ground. Hurley continued to struggle, however, ignoring commands to put his hands behind his back, and repeatedly pulling his arms away from the officer. During the struggle, Hurley appeared to be trying to remove something from his shirt pocket.

¶4 Officer Baynes finally placed Hurley in a headlock until two additional officers arrived to assist in handcuffing him and taking him into custody. Officers were unable to find anything in Hurley's pocket or in the surrounding area.

¶5 At trial, Hurley denied that he had consented to a search, that he possessed drugs, or that he hit or pushed the officer. Hurley testified that after he told Officer Baynes he did not have drugs in his pocket, the officer "threw a combination of about ten punches, kicks," hitting his eye, ear, and ribs, then forced him face down on the ground and placed him in choke hold. Hurley testified that he resisted only in an

attempt to breathe. He also testified that other officers similarly hit or kicked him after they arrived at the scene. Hurley sustained a black eye and a bloody nose, and he claimed to have lost a tooth. Hurley admitted having three prior felony convictions.

¶6 The jury convicted Hurley of the charged offenses, and the court sentenced him to 4.75 years in prison. 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.

DISCUSSION

I. Preclusion of Statement Offered to Prove "State of Mind."

¶7 Hurley argues that the superior court erred when it precluded as hearsay a statement he made to police officers shortly after he was arrested in response to an officer's inquiry as to why he did what he did. Hurley argues that the court should have admitted his response—"I was just standing there and you ripped my shirt"—under Arizona Rule of Evidence 803(3) as evidence of his state of mind at the time, *i.e.*, that he believed that Officer Baynes was the initial aggressor.

¶8 We review the court's ruling on the admissibility of evidence for an abuse of discretion. *See State v. Tucker*, 205 Ariz. 157, 165, ¶ 41, 68 P.3d 110, 118 (2003). Rule 803(3) provides an exception to the rules precluding hearsay for "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) . . . but not including a statement of memory or belief to prove the fact remembered or believed." To be admissible under this exception, "the statement must describe declarant's present feeling or future intention rather than look backward, describing declarant's past memory or belief about another's conduct." *State v. Fulminante*, 193 Ariz. 485, 495, ¶ 32, 975 P.2d 75, 85 (1999). Moreover, "that statement must be limited to a declaration showing the state of mind and not include a description of the factual occurrence that engendered that state of mind." *Id.*

¶9 The statement in this case was a "look backward, describing [the] declarant's past memory or belief" about the officer's conduct, not just Hurley's resulting state of mind, and thus was inadmissible under the Rule 803(3) exception. *See id.* Accordingly, the court did not abuse its discretion by precluding this statement.

II. Prosecutorial Misconduct.

¶10 Hurley urges this court to reverse his convictions for numerous alleged instances of prosecutorial misconduct during closing argument. He argues that even if no single instance of misconduct justifies reversal, the cumulative impact of the misconduct does. Because Hurley failed to object on grounds of misconduct to any of the prosecutor's closing argument, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶11 To prevail on a claim of prosecutorial misconduct, a defendant must show conduct that, "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 significant resulting danger of mistrial." *State v. Aguilar*, 217 Ariz. 235, 238–39, ¶ 11, 172 P.3d 423, 426–27 (App. 2007) (citation omitted). To constitute reversible error, the misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial, and "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) (citation omitted). Instances of prosecutorial misconduct may be viewed cumulatively in determining whether reversal is required. *State v. Roque*, 213 Ariz. 193, 230, ¶ 164, 141 P.3d 368, 405 (2006). We conclude that none of the arguments cited by Hurley constituted misconduct and thus there is no error, much less fundamental error.

¶12 Hurley first argues that the prosecutor engaged in misconduct when he invited the jurors to view the evidence through the lens of a typical police officer, and from the perspective of Officer Baynes, as the victim of the aggravated assault. Prosecutors are not permitted to "make arguments that appeal to the fears or passions of the jury" by "playing on their sympathy for the victims and fears of the defendant." *Morris*, 215 Ariz. at 337, ¶ 58, 160 P.3d at 216. But prosecutors "have wide latitude in presenting their closing arguments to the jury." *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000).

¶13 The prosecutor's argument that the jury should view the evidence through the lens of a typical police officer was not, in context, an appeal to fears or passions, but rather an effort to show that Officer Baynes's actions were appropriate under the circumstances he faced that

night, contrary to Hurley's testimony that he did not provoke the officer's conduct in any way.

¶14 Nor did the prosecutor engage in misconduct by his brief suggestion that "it would only be Officer Baynes's feelings as far as efforts of the Defendant to insult, injure or provoke him." We will not assume that the prosecutor intended an improper meaning of an ambiguous remark. *See State v. Dunlap*, 187 Ariz. 441, 462–63, 930 P.2d 518, 539–40 (App. 1996). In context, the remark was meant to convey only that Officer Baynes was the sole victim of the aggravated assault, and his perceptions of what took place were relevant to show Hurley's intent to injure, insult or provoke, an argument the prosecutor quickly explained.

¶15 Hurley argues that the prosecutor took unfair advantage of the court's preclusion of evidence favorable to Hurley, and improperly argued that evidence not before the jury supported a conviction. As an initial matter, as described above, we conclude the superior court did not abuse its discretion by precluding as hearsay Hurley's post-arrest statement that he had acted in the manner he did because the officer ripped his shirt. Nor did the superior court abuse its discretion by precluding—as irrelevant—testimony aimed at showing that police had never taken Hurley to the hospital (and thus, by inference, did not test his blood to prove that he had swallowed the drugs Officer Baynes felt in his pocket). In light of the trial evidence (including Hurley's own testimony), the prosecutor did not mislead the jury by arguing that Hurley's testimony that the officer attacked him for no reason made no sense, and that Hurley was too preoccupied swallowing the drugs to respond to the police commands. Both arguments represented reasonable inferences from the evidence. Finally, the prosecutor's brief reference to the jury having heard in rebuttal only "one snippet of the facts as to what the Defendant said and what the evidence actually says," was not, in context, a reference to evidence not before the jury but rather simply a reference to the many contradictions between the officers' and Hurley's testimony that were not addressed in the rebuttal case.

¶16 Hurley also argues that the prosecutor improperly vouched for the testifying officers by arguing that they would not have risked their careers and reputations to beat the suspect for no reason, and then lie about it at trial**.** It is impermissible for the prosecutor to place "the prestige of the government behind its witness." *State v. King*, 180 Ariz. 268, 276–77, 883 P.2d 1024, 1032–33 (1994*)* (citation omitted). But Hurley raised at trial the issue of the officers' credibility. In his opening statement, defense counsel suggested that the case was not about the

truth, but "about what Officer Baynes wants it to be." In closing, defense counsel again suggested that Officer Baynes and the other two officers had lied. Under these circumstances, the prosecutor's argument was not improper. *See United States v. Weatherly*, 525 F.3d 265, 271–72 (3d Cir. 2008) (holding that argument that officers would not risk their many years of experience by testifying falsely not improper vouching in part because it was a reasonable response to defense counsel's allegations of perjury); *State v. Tyrrell*, 152 Ariz. 580, 581–82, 733 P.2d 1163, 1164–65 (App. 1986) (holding that the prosecutor did not improperly vouch for a law enforcement officer when he asked why the officer would perjure himself and risk his fourteen-year career).

¶17 Hurley next argues the prosecutor impermissibly encouraged the jurors to disregard their instructions by suggesting that they "think back to before you met all of us on Monday, what was resisting arrest in your eyes?" and find that Hurley's conduct fit that picture. Although arguably improper standing alone, in context, the comment simply suggested that the legal definition of resisting arrest—on which the jurors were instructed—comported with a common-sense understanding of the term. The prosecutor acknowledged the definition contained in the jury instruction by reminding the jurors that "[w]e have to lay it out for you so it's clear, so that everybody in Arizona is on the same page," and the superior court explicitly instructed the jurors on the elements of resisting arrest under Arizona law. Under these circumstances, the prosecutor's comment did not constitute misconduct.

¶18 Nor did the prosecutor improperly shift the burden of proof or attack the integrity of defense counsel by arguing that Hurley's testimony failed to answer the fundamental question of why police reacted in the way he claimed they had. 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). In this case, the prosecutor could not have called attention to a failure to testify because Hurley in fact testified, and the prosecutor did not improperly shift the burden of proof. *See 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 by arguing that defendant had failed to call expert witnesses to support his theory). Nor did the prosecutor's arguments regarding what defense counsel wanted the jury to believe, and not to ask, cross the line into impropriety. Although it is improper for a prosecutor to attack the integrity of defense counsel, it is not improper to tell the jury that the defense's closing argument confuses the issues or is

misleading. *See State v. Hughes,* 193 Ariz. 72, 86, ¶ 59, 969 P.2d 1184, 1198 (1998) ("Jury argument that impugns the integrity or honesty of opposing counsel is [ ] improper."); *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997) ("Criticism of defense theories and tactics is a proper subject of closing argument."). The prosecutor's argument was proper in that it attacked the defense counsel's theory, not his integrity.

¶19 Finally, the prosecutor did not engage in misconduct by briefly referencing Hurley's version of events as "his story," or by suggesting that Hurley was trying to get rid of the contents of his pocket, "[b]ecause if these guys catch it, whoa, it's a little different, it's a little different than pushing and shoving." We construe the prosecutor's brief reference to Hurley's "story" as simply a shorthand way of referring to the defense theory of the case, and not improper, particularly in light of the prosecutor's reference to his own theory of the case as a "story." Nor are we persuaded that the prosecutor's comment about the difference between being caught with drugs and "pushing and shoving" constituted an improper reference to the comparative severity of a drug offense or the punishment such an offense might bring. The prosecutor did not suggest that the punishment would be more severe for a drug offense, but instead simply suggested that Hurley's motive for resisting arrest was to avoid being charged for possession of drugs, an argument supported by the evidence. We conclude that the prosecutor did not engage in misconduct by advancing these arguments.

CONCLUSION

¶20 For the foregoing reasons, we affirm Hurley's convictions and sentences.

Ruth A. Willingham · Clerk of the Court
FILED: gsh