IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JERMAINE PLEDGER, *Appellant*.

No. 1 CA-CR 12-0604
FILED 12-10-2013

Appeal from the Superior Court in Maricopa County
No. CR2011-005417-001
The Honorable Robert E. Miles, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz

Counsel for Appellee

Maricopa County Public Defender, Phoenix
By Peg Green

Counsel for Appellant

MEMORANDUM DECISION

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

G E M M I L L, Judge:

¶1 Jermaine Pledger appeals his convictions and sentences for conspiracy to commit possession of marijuana for sale, possession of marijuana for sale, armed robbery, kidnapping, misconduct involving weapons, misconduct involving body armor, and two counts of aggravated assault. Pledger argues the prosecutor engaged in misconduct when she vouched for a witness during closing argument and that the second count of aggravated assault could not be a class 2 felony because the State failed to prove Pledger knew the victim was a peace officer engaged in the execution of official duties. We have jurisdiction pursuant to Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A) (2003), 13-4031 (2010) and 13-4033 (2010). For the reasons explained below, we affirm Pledger's convictions and sentences.

BACKGROUND

¶2 Pledger sought to purchase approximately 170 pounds of marijuana from "Ruiz." Ruiz eventually drove a vehicle containing 170 pounds of marijuana to a residence Pledger led him to and parked the vehicle in the garage, after which Pledger closed the garage door. As Ruiz walked into the residence from the garage, another person struck Ruiz in the chest with a handgun and told him it was "a rip," meaning they were going to steal the marijuana. Pledger and two other armed men then held Ruiz in the residence at gunpoint. Pledger and his accomplices were unaware that Ruiz was a paid informant working with an undercover police officer who was observing the residence from an unmarked car parked up the street.

¶3 Believing they would kill him, Ruiz fled through the back door of the residence when the opportunity arose. Pledger and his two accomplices then fled the house. Pledger and one accomplice fled in Pledger's vehicle, while the third accomplice fled in Ruiz's vehicle with the marijuana.

¶4 Ruiz ran to the undercover officer and informed him it was a "drug rip." The officer and Ruiz pursued Pledger's vehicle and eventually found it stopped in an industrial cul-de-sac. The officer stopped his vehicle up the street from the cul-de-sac, retrieved a bullet-proof-vest from the trunk and put it on in a manner that he hoped would allow Pledger and his accomplice to see the word "POLICE" emblazoned in yellow letters on the vest. Because he was in plain clothes, the officer hoped this would prevent Pledger and his accomplice from taking any action against them. When the officer got back in his vehicle, however, Pledger drove straight at him. As he approached the officer's vehicle, Pledger lowered the driver's window, held a gun out the window and aimed it at the officer. The officer feared Pledger would shoot him. Pledger, however, drove past the officer's vehicle and did not fire. After a short pursuit, other officers eventually stopped and apprehended Pledger and his accomplice. The officers eventually found Ruiz's vehicle and the marijuana at another location.

DISCUSSION

I. Prosecutorial Misconduct

¶5 Pledger contends the prosecutor engaged in misconduct during her rebuttal argument when she allegedly vouched for the credibility of Ruiz.

¶6 In his closing argument, Pledger's counsel argued, "Well, we know before [Ruiz] ever was brought into this that he lied to police twice. So we have a liar to start. So we have a liar coming into this courtroom when another man is on trial, and you're just supposed to accept what he says because he's in the courtroom? Think about that." Pledger's counsel continued, "Basically, what I'm saying is that you need to disregard everything that he said, because that's justice. Think about that person that testified. Think about the inconsistencies he talked about, okay, and let me talk about those." After counsel discussed alleged inconsistencies in Ruiz's testimony, he argued, "Do we, as a society, as a criminal justice system, use that to convict somebody? Is that what we do?"

¶7 After he discussed more alleged inconsistencies in Ruiz's testimony, Pledger's counsel further argued:

> Let's talk about the ridiculous things that [Ruiz] says that trump everything else that he says, where you cannot derive or find a fact from him.

> He goes on a monologue about how the police get no credit. They risk their lives every day. He talks about he's found the love of his life and this is why he's snitching out Jermaine Pledger, because he found the love of his life.
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> And then he tries to cry. I didn't see any tears. I saw him trying to cry. That's ridiculous. Does that trump everything else that he talks about? This is serious. This is a serious situation, a man is on trial. Are we going to accept that? Can you accept that?
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> Can you accept his credibility, period? You can't. He's working for cash. He's working for straight cash. He keeps working after this happens. He gets pulled over. He's facing potential charges. And there's motive, bias – you look at the credibility of witnesses instruction – all over the place.
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> What I submit to you is certain ridiculous things that he said in this trial that, using your common sense, you could almost laugh at. That trumps the rest of his testimony to the extent you need to reject it, because it's not fair to try to derive facts from it otherwise. That's not justice.

¶8 In rebuttal, the prosecutor argued:

> [Ruiz] stood in this courtroom, right where I'm standing, held his hand up and swore to tell the truth. He was honest with you when he told you that he lied to the police when he was stopped with $30,000 in his car. He was honest with you in telling you that the lied to the police when he had 80 pounds of marijuana in his car. He was honest with you when he told you that at that point in his life he was working for a drug trafficking organization, and he was honest with you when he relayed the events that happened between January 26th, 2011 and February 16th, 2011.[1]

¶9 Pledger argues this portion of the prosecutor's rebuttal vouched for the credibility of Ruiz. "Two forms of impermissible prosecutorial vouching exist: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor

[1] This is the only portion of the prosecutor's argument Pledger identified as improper in his opening brief.

suggests that information not presented to the jury supports the witness's testimony. In addition, a lawyer is prohibited from asserting personal knowledge of acts in issue before the tribunal unless he testifies as a witness." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993). Pledger argues the prosecutor's rebuttal placed the prestige of the government behind Ruiz and constituted an expression of the prosecutor's personal opinion that Ruiz was truthful.

¶10 Pledger concedes, however, that he raised no objection below. A failure to object to alleged prosecutorial misconduct at the time of trial waives the issue absent fundamental error. *State v. Wood*, 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994). "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Even when a defendant has established fundamental error, the defendant must still demonstrate the error was prejudicial. *Id*. at ¶ 26. In the context of whether a prosecutor's conduct amounts to fundamental error, we focus our inquiry on the probability the conduct influenced the jury and whether the conduct denied the defendant a fair trial. *Wood*, 180 Ariz. at 66, 881 P.2d at 1171. "The focus is on the fairness of the trial, not the culpability of the prosecutor." *Bible*, 175 Ariz. at 601, 858 P.2d at 1204.

¶11 We find no error, fundamental or otherwise. Prosecutors have wide latitude in presenting closing arguments. *State v. Jones*, 197 Ariz. 290, 305, ¶37, 4 P.3d 345, 360 (2000). A prosecutor may characterize a witness as truthful when the argument is sufficiently linked to the evidence and the prosecutor does not place the prestige of the government behind the witness or suggest that information not before the jury supports the testimony. *See State v. Corona*, 188 Ariz. 85, 91, 932 P.2d 1356, 1362 (App. 1997). Further, "Prosecutorial comments which are fair rebuttal to comments made initially by the defense are acceptable." *State v. Duzan*, 176 Ariz. 463, 468, 862 P.2d 223, 228 (App. 1993).

¶12 Here, the prosecutor's argument was a fair rebuttal to Pledger's counsel's attack on Ruiz's credibility. The prosecutor's argument addressed evidence introduced at trial that counsel referenced directly and indirectly in his attack on Ruiz: how Ruiz admitted he lied to police when stopped with $30,000 in his car, how Ruiz admitted he lied to police when he was later stopped with a large quantity of marijuana in his car, and how Ruiz admitted he had worked for a drug organization. It was fair rebuttal for the prosecutor to argue that Ruiz's honesty regarding

this unfavorable evidence showed he was also honest when he testified about the events that led to the charges against Pledger. Further, the prosecutor did so in a manner that did not place the prestige of the government behind Ruiz, did not suggest that information not before the jury supported Ruiz's testimony, and did not express the prosecutor's personal opinion.

II. Aggravated Assault as a Class 2 Felony

¶13 The jury found Pledger guilty of aggravated assault of the undercover police officer as charged in count 6 of the indictment. As charged in count 6, a person commits aggravated assault if the person intentionally places another person in reasonable apprehension of immediate physical injury and does so through the use of a deadly weapon. *See* A.R.S. § 13-1204(A)(2) (2011). Aggravated assault committed pursuant to A.R.S. § 13-1204(A)(2) is ordinarily a class 3 felony. A.R.S. § 13-1204(D) (2011). The jury, however, also found the undercover officer was a peace officer engaged in the execution of official duties. This finding rendered the offense a class 2 felony. A.R.S. § 13-1204(E) (2011).

¶14 Pledger argues the jury could not convict him of aggravated assault as a class 2 felony because the State failed to prove and the jury failed to find that Pledger *knew* the undercover officer was a peace officer engaged in the execution of official duties. Relying on A.R.S. § 13-202(A), Pledger argues a defendant's knowledge that the victim was a peace officer engaged in the execution of official duties is an element of the offense of aggravated assault of a peace officer as a class 2 felony.[2]

¶15 Interpretation of a statute is a question of law we review *de novo*. *See Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). When interpreting a statute, we attempt to fulfill the intent of the drafters, and we look to the plain language of the statute as the best indicator of that intent. *Id.* We give the words and phrases of the statute their commonly accepted meaning unless the drafters provide special definitions or a special meaning is apparent from the text. *State v. Barr*, 183 Ariz. 434, 438, 904 P.2d 1258, 1262 (App. 1995). If the language is clear

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[2] "If a statute defining an offense prescribes a culpable mental state that is sufficient for commission of the offense without distinguishing among the elements of such offense, the prescribed mental state shall apply to each such element unless a contrary legislative purpose plainly appears." A.R.S. § 13-202(A)(2011).

and unambiguous, we give effect to that language and do not employ other methods of statutory construction. *State v. Riggs*, 189 Ariz. 327, 333, 942 P.2d 1159, 1165 (1997). Finally, "[i]n construing a legislative enactment, we apply a practical and commonsensical construction." *State v. Alawy*, 198 Ariz. 363, 365, ¶ 8, 9 P.3d 1102, 1104 (App. 2000).

¶16 We find no error. The language of the applicable statutes is clear and unambiguous. To convict Pledger of aggravated assault as charged, the State was only required to prove that Pledger intentionally placed the victim in reasonable apprehension of immediate physical injury and that he did so with the use of a deadly weapon. A.R.S. § 13-1204(A)(2). To enhance that offense from a class 3 felony to a class 2 felony, the State also had to prove the victim was a peace officer engaged in the execution of official duties. A.R.S. § 13-1204(E). Therefore, while the victim's *status* as a peace officer was an element of the enhanced offense, Pledger's *knowledge* of the victim's status as a peace officer was not. *See State v. Gamez*, 227 Ariz. 445, 450, ¶ 29, 258 P.3d 263, 268 (App. 2011) ("There is nothing in the plain language of the statute that requires proof that the perpetrator engaged in the sexual act while also knowing that the person was under 18"). "Due process requires only that the state prove every *element* of a crime beyond a reasonable doubt." *Gamez*, 227 Ariz. at 451, ¶ 37, 258 P.3d at 269 (emphasis in original).

¶17 A.R.S. § 13-202(A) merely provides that when a statute defining an offense identifies the culpable mental state without distinguishing among the elements of the offense, that mental state applies to each element unless a contrary legislative purpose plainly appears. A.R.S. § 13-202(A). Pledger would have us interpret A.R.S. § 13-202(A) to add a wholly new element to an offense even though the legislature chose not to include that element in its definition of the offense. We decline to do so. "When the legislature intends that the mens rea apply to the status of the victim, it says so explicitly." *Gamez*, 227 Ariz. at 450, ¶ 30, 258 P.3d at 268. More specifically, when our legislature intends that the mens rea apply to the status of the victim as a peace officer engaged in the execution of any official duties, it says so explicitly. Our legislature has in fact done so in the context of a class 5 felony aggravated assault of a peace officer, in which the assault does not involve the use of a deadly weapon or result in a serious injury. For that type of aggravated assault, the State must prove the defendant knew or had reason to know the victim was a peace officer engaged in the execution of official duties. A.R.S. § 13-1204(A)(8)(a), (E) (2011). Through A.R.S. § 13-1204(E), our legislature has expressed its determination that aggravated assault committed with a deadly weapon against a peace officer is such a serious

offense that it is a class 2 felony regardless whether the defendant knew the victim's status as a peace officer. The legislature was free to do so, and application of the statute does not violate principles of due process. *See United States v. Feola*, 420 U.S. 671, 676-77, 685 (1975) (noting that "responsibility for assault upon a federal [undercover] officer does not depend on whether the assailant was aware of his victim at the time he acted. . . . Although the perpetrator of a narcotics 'rip-off,' such as the one involved here, may be surprised to find that his intended victim is a federal officer in civilian apparel, he nonetheless knows from the very outset that his planned course of conduct is wrongful.").

CONCLUSION

¶18 Because we find no error, we affirm Pledger's convictions and sentences.

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