IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

CURTIS RAY SMITH, JR., *Appellant.*

No. 1 CA-CR 13-0044
FILED 12-26-2013

Appeal from the Superior Court in Coconino County
No. CR S0300CR201100805
The Honorable Jacqueline Hatch, Judge

AFFIRMED

COUNSEL

Attorney General's Office, Phoenix
By Myles A. Braccio

Counsel for Appellee

Coconino County Public Defender's Office, Flagstaff
By Brad Bransky

Counsel for Appellant

MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Pro Tempore Sally S. Duncan joined.

J O N E S, Judge:

¶1 Curtis Ray Smith Jr. (Defendant) appeals his convictions and sentences for aggravated assault, attempted armed robbery and criminal damage. He challenges the admissibility of two witnesses' trial testimony, and he asserts his trial was unfair due to prosecutorial misconduct. Defendant also argues the trial court improperly used a foreign prior felony conviction for sentencing purposes. We affirm.

PROCEDURAL HISTORY AND BACKGROUND

¶2 The trial evidence reveals the following.[1] In the late evening of November 2, 2011, AB was waiting in her car in the parking lot of a rest area on eastbound I-40 when she observed a "young guy" wearing a black and red jacket follow another man from the restroom and attack him with an "eight to ten inches long . . . cylinder-type [flashlight]." AB could not see the assailant's face. The victim testified that the man following him demanded his wallet and then proceeded to hit him in the head and body with a "pipe," knocking him to the ground. When AB turned on her headlights to illuminate the altercation, she observed the assailant hide nearby and eventually leave the scene in a dark vehicle bearing a gray-colored hood. AB called 9-1-1 to report the crime. The victim of the assault sustained multiple internal injuries as well as cuts and bruises to his face and head. During the assault, the victim grabbed and squeezed the attacker's jacket to "mark" him with the blood that was "all over [the victim's] hands [and] face and everything."

¶3 Approximately twenty minutes later, DPS Officer Gould arrived at the scene. He could not initially locate the described vehicle,

---

[1] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Defendant. *See State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

but he soon found it parked "backwards" in a parking spot at the westbound rest area. The car's hood was warm to the touch. Officer Gould woke Defendant and a female who appeared to be sleeping under a blanket in the front passenger side of the vehicle. YM, the woman in the car, explained she and Defendant were driving her car home to Alabama from Las Vegas when they stopped at the rest area earlier in the day to ask travelers for gas money. She said she had fallen asleep in the car's passenger seat in the evening, and she woke up when Defendant returned to the vehicle and proceeded to "speed[] off" to the rest area on the other side of the freeway because, he explained, "there wasn't a whole lot of people" at the present location.

¶4 Officer Gould noticed Defendant was not wearing a jacket. Officer Gould found a blood-stained black and red jacket in a trash can located behind the vehicle. According to YM, Defendant was wearing a red, black and gray jacket that was not stained when they arrived at the eastbound rest area. YM further explained that, after she and Defendant changed location to the westbound rest stop, Defendant exited the car for three to four minutes and returned without his jacket. Subsequent forensic testing revealed that DNA and blood taken from the jacket Officer Gould located were "perfect match[es]" for Defendant and the victim, respectively.

¶5 Officer O'Farrell transported AB to the westbound rest area, and AB recognized the jacket that Officer Gould found in the trash can; she stated it "look[ed] like the same" one the attacker was wearing. AB also identified the car in which YM and Defendant were found sleeping as the one the attacker used to flee the crime scene. Officer O'Farrell observed what appeared to be blood on Defendant's pants and shoes.

¶6 Meanwhile, as Officer Gould talked to YM and described the weapon used in the assault as "club style," YM disclosed that she kept a "tire checker" under the driver's seat.[2] YM offered to retrieve the tire checker for Officer Gould, and she located it under the passenger seat. YM explained to Gould that "as [Defendant] came in the vehicle, it felt like

[2] Trial testimony revealed that a tire checker is a "large bar, typically of a fairly good weight to it, that [commercial truck drivers use to] smack the tire and depending on the sound or the feeling in their hand they can tell whether a tire is low or full." YM testified that she kept the tire checker in her car for protection.

he was doing something underneath [the passenger] seat." Subsequent DNA testing revealed Defendant was a major contributor to DNA found on the tire checker's handle.

¶7 The evidence further revealed that while in pre-trial custody Defendant contacted YM multiple times requesting she not testify at trial. In a recorded telephone call from jail, Defendant told his mother:

> [YM] is testifying on me. . . . They're using her as a witness against me. . . . You need to talk to her and tell her that she does not need to show up if she knows what's good for her. . . . Tell her she can't get in no trouble if she don't show up. . . . But she's a main factor in this case. They can get a lot of information out of her.

¶8 The State charged Defendant with one count each of aggravated assault and attempted armed robbery, both class three dangerous felonies, and one count of criminal damage, a class one misdemeanor.[3] Defendant allegedly attempted to escape pre-trial custody, which resulted in an additional charge of second degree escape, a class five felony. The trial court granted Defendant's motion to sever the escape count from the other counts for purposes of trial.

¶9 At trial, Defendant raised a misidentification defense arguing YM was the assailant. The jury returned guilty verdicts on all three charges and found the aggravated assault and attempted armed robbery counts were dangerous offenses. The jury additionally found the following three aggravating circumstances, as charged by the State, applicable to the assault and robbery counts: (1) The victim suffered physical harm; (2) Defendant ambushed the victim during the commission of a felony; and (3) Defendant committed the offense as consideration for the receipt or in the expectation of the receipt of anything of pecuniary value.

¶10 Before sentencing, Defendant plead guilty to the escape charge pursuant to an agreement with the State. The trial court subsequently found Defendant had one historical prior felony conviction from Alabama, Defendant was on felony probation during the

---

[3] The criminal damage count was based on the victim's $400 glasses that were broken beyond repair during the assault.

commission of the offenses, and the offenses were dangerous. Based on these findings and the aggravating circumstances found by the jury, the trial court sentenced Defendant to concurrent terms of imprisonment on all counts, the longest of which is twenty years for the assault and robbery convictions. Defendant 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) (West 2013), 13-4031 (West 2013) and -4033(A)(3) (West 2013).[4]

DISCUSSION

I. Officer Gould's Testimony

¶11 Defendant argues the trial court improperly admitted, over his hearsay objections, testimony from Officer Gould regarding AB's description of the assailant that he acquired before searching for the suspect. Specifically, Defendant refers to descriptions of the suspect's height, weight, gender, dress, and the description of the weapon used in the assault.

¶12 Assuming, without deciding, that Officer Gould's testimony regarding the suspect's physical characteristics was inadmissible hearsay, we conclude the trial court's admission of the evidence was harmless. *See, e.g.*, *State v. Romanosky*, 162 Ariz. 217, 221-23, 782 P.2d 693, 697-99 (1989) (determining police officer's trial testimony regarding eyewitness identification of suspect was inadmissible hearsay when there was no issue pertaining to how police "got these people"); *State v. Koch*, 138 Ariz. 99, 103-04, 673 P.2d 297, 301-02 (1983) (finding trial court properly precluded as hearsay third person's description of suspect contained in police report); *see also State v. Doerr*, 193 Ariz. 56, 64, ¶ 33, 969 P.2d 1168, 1176 (1998) ("[T]his court will not reverse a conviction if an error is clearly harmless."). Error is harmless only "if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.* (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

---

[4] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

¶13 Of all the physical characteristic testimony by Officer Gould that Defendant argues was improperly admitted, the dispositive characteristic at trial was the suspect's gender; Defendant admitted to the jury that either he or YM committed the alleged offenses. Officer Gould, however, was not the sole conduit of trial evidence describing the suspect as a man. Significantly, the victim testified the person who followed and attacked him "[d]efinitely was a man." AB herself testified that she observed one man attacking another, and her recorded 9-1-1 call confirms this description. Further, the remaining trial evidence, recounted *supra* ¶¶ 2-7, otherwise overwhelmingly establishes Defendant's guilt in this case. Accordingly, we conclude beyond a reasonable doubt that Officer Gould's testimony regarding the suspect's physical description did not affect the verdicts. *See State v. Shearer*, 164 Ariz. 329, 340, 793 P.2d 86, 97 (App. 1989) (holding that the introduction of inadmissible evidence was harmless error when said evidence was cumulative to and consistent with other trial testimony); *State v. Calhoun*, 115 Ariz. 115, 117-18, 563 P.2d 914, 916-17 (App. 1977) (evidentiary error deemed harmless in light of remaining overwhelming evidence of guilt).

II. YM's Testimony

¶14 In response to the State's apparent attempt to "draw the sting" during direct examination, YM testified she had a prior conviction for a "bad check." Defendant contends the trial court abused its discretion in allowing this testimony. Defendant asserts that YM's prior conviction was for negotiating a worthless instrument, and he argues the description her prior conviction as for "bad check" denied him a fair trial because it "improperly . . . mitigate[d] and explain[ed] her impeachment" in violation of a "black letter rule."

¶15 Defendant's argument is without merit. First, Defendant's reference to the discretionary standard of review incorrectly reflects what transpired at trial. The record indicates that Defendant did not object to YM testifying that she was convicted in 2005 for a "bad check;" instead, he objected to further questions regarding the circumstances of that offense. The trial court sustained Defendant's objection and YM limited her subsequent testimony, as Defendant agreed she could, to stating she was convicted of a misdemeanor "five years ago" in Alabama. Consequently, we review the trial court's decision to not *sua sponte* strike the "bad check" testimony for fundamental error, which requires Defendant to establish error that "goes to the foundation of his case" and results in prejudice. *State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 20-24, 115 P.3d 601, 607-08 (2005); *see State v. Velazquez*, 216 Ariz. 300, 309, ¶ 37, 166 P.3d 91, 100

(2007); *State v. Lopez*, 217 Ariz. 433, 434-35, ¶ 4, 175 P.3d 682, 683-84 (App. 2008).

¶16 Defendant does not specify the rule that prohibits "explanations" of prior convictions used for impeachment purposes. Instead, he cites *State v. Britson*, 130 Ariz. 380, 383, 636 P.2d 628, 631 (1981) and *State v. Pavao*, 23 Ariz. App. 65, 530 P.2d 911 (1975). To the extent the statement "we are of the opinion that the better view is to disallow . . . explanations [of prior felony convictions]" in *Pavao*, 23 Ariz. App. at 67, 530 P.2d at 913, constitutes "black letter law," the "explanations" disallowed by that statement refer to explanations of innocence with respect to the declarant's prior conviction. *See State v. Weis*, 92 Ariz. 254, 261-62, 375 P.2d 735, 740 (1962) (cited in *Pavao*, 23 Ariz. App. at 67, 530 P.2d at 913); *see also Britson*, 130 Ariz. at 383, 636 P.2d at 631 (referring to *Pavao*'s "clear[] hold[ing] that [mitigating] explanations [regarding prior felony convictions] are disallowed"). YM's "bad check" testimony was not an explanation of her innocence. Accordingly, the trial court's failure to *sua sponte* strike the challenged testimony on this basis did not amount to error, fundamental or otherwise. *See State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991) ("Before we may engage in a fundamental error analysis, however, we must first find that the trial court committed some error.").

¶17 Moreover, we fail to discern prejudice. Defendant speculates that the jury perceived YM's "bad check" testimony as "lessen[ing] the value of the impeachment." Speculation is insufficient to establish prejudice. *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006). Indeed, during cross-examination YM affirmatively responded to counsel's question, "And as the State mentioned, you were convicted for negotiating a worthless instrument in 2005 in Morgan County, Alabama, is that correct?" Thus, the jury had before it the ostensibly correct name of YM's prior conviction. Based on this later testimony, and considering the overwhelming evidence of Defendant's guilt, Defendant fails to demonstrate the requisite prejudice for reversal. *See Henderson*, 210 Ariz. at 569, ¶ 27, 115 P.3d at 609 (noting a defendant "must show that a reasonable jury, applying the appropriate standard of proof, could have reached a different result").

III. Prosecutorial Misconduct

¶18 Defendant contends the prosecutor engaged in improper vouching during his direct examination of YM and in closing arguments.

As Defendant concedes, his failure to object at trial limits us to fundamental error review.

¶19 To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that "(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) (citations omitted). In addition, reversal is only required if misconduct is "so pronounced and persistent that it permeates the entire atmosphere of the trial." *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)).

¶20 "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 suggests that information not presented to the jury supports the witness's testimony." *State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989), *disapproved on other grounds by State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010). "The first type of vouching consists of personal assurances of a witness'[s] truthfulness. The second type involves prosecutorial remarks that bolster a witness'[s] credibility by reference to material outside the record." *State v. Dunlap*, 187 Ariz. 441, 462, 930 P.2d 518, 539 (App. 1996).

¶21 Defendant argues the first instance of vouching occurred at the end of the State's direct examination of YM when the following took place:

> Q. And have I ever told you what to say?
> A. No, sir.
> Q. Have I always asked you to tell the truth?
> A. Yes, sir.
> Q. And have you done your best today to tell the truth about what happened?
> A. Yes, sir.

¶22 This exchange does not reflect vouching. The prosecutor did not place the prestige of the government behind YM; he did not suggest YM was credible because the State called her to testify. *Dumaine*, 162 Ariz. at 401, 783 P.2d at 1193. And the prosecutor did not actually inform the jury that YM's testimony was true, which would have been improper. *See State v. White*, 115 Ariz. 199, 204, 564 P.2d 888, 893 (1977). Nor did the prosecutor refer to information not presented to the jury. He merely

attempted to bolster YM's credibility by eliciting an avowal regarding her truthful testimony and showing he had not coached her in preparation for trial.

¶23 Defendant next points to the prosecutor's following statements during rebuttal closing arguments: (1) "Here's the problem I have – the big problem I have with the [D]efendant's theory;" (2) "So if [D]efendant's – and I believe [D]efendant's premise is correct, that it was either [YM] or the [D]efendant. Obviously, it was the [D]efendant in the State's mind;" and (3) in response to defense counsel's statement during closing argument that the State's witnesses gave conflicting testimony, "They are not, I think, huge contradictions."

¶24 These statements also are not vouching. We do not interpret these statements as improper personal assurances by the prosecutor of witnesses' truthfulness or of Defendant's guilt. Rather, the prosecutor was addressing arguments of defense counsel. *See White*, 115 Ariz. at 204, 564 P.2d at 893 (noting "use of the word 'we' . . . is an unfortunate word choice rather than a personal opinion as to the defendant's guilt and was undoubtedly understood as such by the jury"); *see also People v. Cummings*, 850 P.2d 1, 46 n.48 (Cal. 1993) (holding prosecutor's statements that "I believe," "I think," and "I am willing to bet" do not amount to misconduct). Thus no misconduct occurred, and even assuming it did, it was not so pronounced and persistent as to require reversal. *Rosas–Hernandez*, 202 Ariz. at 218–19, ¶ 23, 42 P.3d at 1183–84. Further, the trial court properly instructed the jury that closing arguments were not evidence. *See State v. Morris*, 215 Ariz. 324, 336–37, ¶ 55, 160 P.3d 203, 215–16 (2007) ("[T]he judge instructed the jury that the lawyers' arguments were not evidence to be considered in reaching its conclusions. . . . Jurors are presumed to follow the judge's instructions."). Therefore, we cannot conclude that Defendant's alleged instances of prosecutorial misconduct possibly affected the verdicts. No fundamental error occurred.

IV. Sentencing: Alabama Conviction

¶25 Defendant argues the trial court fundamentally erred in imposing a sentence based on his Alabama conviction for "Assault in the Second Degree." Specifically, Defendant contends the Alabama conviction is not a historical prior conviction for sentencing purposes because the Alabama crime of assault in the second degree does not necessarily constitute a felony if committed in Arizona. *See State v. Heath*, 198 Ariz. 83, 84, ¶ 3, 7 P.3d 92, 93 (2000) (noting a defendant convicted of a

foreign felony is "subject to enhanced penalties" if the crime is punishable as a felony under Arizona law). We disagree.

¶26 As an initial matter, we find no error, fundamentally or otherwise, in imposing an enhanced sentence based on Defendant's 2010 Alabama felony conviction for assault in the second degree because that crime would be a felony if committed in Arizona. According to the indictment that led to Defendant's Alabama conviction, he was convicted of assault in the second degree under Ala. Code § 13A-6-21(a)(2) (2010), which provides: "A person commits the crime of assault in the second degree if . . . [w]ith intent to cause physical injury to another person, he or she causes physical injury to any person by means of a deadly weapon or a dangerous instrument." *State v. Crawford*, 214 Ariz. 129, 132, ¶ 11, 149 P.3d 753, 756 (2007) (stating use of a charging document is permissible "'to narrow the foreign conviction to a particular subsection of the statute that served as the basis of the foreign conviction' and not to establish 'the factual nature of the prior conviction'") (quoting *State v. Roque*, 213 Ariz. 193, 217, ¶ 88, 141 P.3d 368, 392 (2006)). Using a deadly weapon or dangerous instrument to intentionally cause physical injury to another clearly satisfies the elements necessary for the conviction of aggravated assault in Arizona, a class three felony. *See* A.R.S. §§ 13-1203(A)(1) (West 2013), -1204(A)(2), (D) (West 2013).

¶27 Furthermore, even if the Alabama conviction would not constitute a felony in Arizona, we find no reversible error because Defendant invited whatever sentencing error occurred on this basis. *See State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001) ("If an error is invited, we do not consider whether the alleged error is fundamental, for doing so would run counter to the purposes of the invited error doctrine. Instead, as we repeatedly have held, we will not find reversible error when the party complaining of it invited the error.").

¶28 The record reflects the trial court relied upon Defendant's Alabama assault conviction to impose an enhanced and aggravated sentence under A.R.S. § 13-704(D) (West 2013) (enhanced sentence for class three dangerous offense conviction when defendant "has one historical prior felony conviction that is a class 1, 2 or 3 felony involving a dangerous offense"). Pursuant to § 13-704(D), a person convicted of a class three dangerous felony, and who has one historical prior felony conviction that is a class two or three felony involving a dangerous offense, is subject to the presumptive term of 11.25 years imprisonment to the maximum term of 20 years. At sentencing, Defendant specifically requested the trial court "impose the presumptive term . . . of 11.25 years."

Before Defendant made this request, he expressly agreed with the trial court that his prior convictions will be used to enhance his sentence. Because Defendant requested an enhanced presumptive term under § 13-704(D), he has invited any possible error committed by the trial court in sentencing him pursuant to that statute.

CONCLUSION

¶29 Defendant's convictions and sentences are affirmed.

The Honorable Sally Schneider Duncan, Judge Pro Tempore of the Court of Appeals, Division One, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to Article 6, Section 3, of the Arizona Constitution and A.R.S. §§ 12-145 to -147.