IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

HECTOR GONZALES, *Appellant*.

No. 1 CA-CR 15-0575
FILED 8-23-2016
AMENDED PER ORDER FILED 8-23-16

Appeal from the Superior Court in Maricopa County
No. CR2014-146950-001
The Honorable Daniel J. Kiley, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Arizona Attorney General's Office, Phoenix
By Colby Mills, Alice Jones
Counsel for Appellee

Michael J. Dew, Attorney at Law, Phoenix
By Michael J. Dew
Counsel for Appellant

MEMORANDUM DECISION

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge Maurice Portley joined.

N O R R I S, Judge:

¶1 Hector Gonzales appeals his convictions and sentences for one count of shoplifting with two or more predicate offenses involving shoplifting, and one count of shoplifting with two or more predicate convictions involving shoplifting, both Class 4 felonies under Arizona Revised Statutes ("A.R.S.") section 13-1805(I) (2010). On appeal, Gonzales first argues that during the State's rebuttal closing argument, the prosecutor commented on his right not to testify at trial, and accordingly, he is entitled to a new trial because the prosecutor's comment was "prejudicial per se." Although we agree with the superior court that the prosecutor's comment was improper, we disagree that such a comment is prejudicial per se. Further, based on our review of the record, we are convinced the comment constituted harmless error.

¶2 At trial, the State introduced into evidence a recording of a nonemergency call made to police by a convenience store clerk. The clerk told the police operator a man had stolen a gallon or quart of ice cream and was pumping gas at "pump five." The clerk described the man to the police operator. Police arrived at the convenience store, and the clerk told the police operator that they were with the "right guy." Another officer, Officer K.O., spoke to Gonzales, who was standing next to a car at the gas pump, and read him his *Miranda* rights. Gonzales admitted to stealing the ice cream. Officer K.O. found the ice cream in the car—which was occupied by one person in the front passenger seat and one person in the rear passenger seat—on the rear passenger seat floorboard. On cross-examination, Officer K.O. stated he had attempted to obtain surveillance video of the incident from the convenience store, but acknowledged he had not documented his request for the video in a supplemental police report.

¶3 In her initial closing argument, the prosecutor argued the State had met its burden of proof, relying principally on the call, the confession, and the ice cream. In response, defense counsel argued the State had failed to prove Gonzales's guilt beyond a reasonable doubt because it had inadequately investigated the incident, pointing out the State had not

provided the jury with any surveillance video or photographic evidence that showed Gonzales taking the ice cream without paying for it.

¶4 In her rebuttal closing argument, the prosecutor emphasized the jury needed to decide the case on the evidence presented, not by speculating as to facts and theories absent from the evidentiary record. She then argued:

> The people who are allowed to testify [sic] is anybody who is called to that stand who takes an oath to tell you the truth, and the defendant has an absolute right not to testify. Absolute right. But he didn't get up here and tell you . . . .

Defense counsel objected, and the court sustained the objection, subsequently explaining to the prosecutor that calling attention to a defendant's decision not to testify is improper.

¶5 When a defendant elects not to testify at trial, as did Gonzales, the State is barred from commenting on the defendant's decision. *See* U.S. Const. amend. V; Ariz. Const. art. 2, § 10; A.R.S. § 13-117(B) (2010); *see also State v. Goudeau*, 239 Ariz. 421, ___, ¶ 208, 372 P.3d 945, 992 (2016). Thus, as Gonzales argues, and as the superior court found, the prosecutor's comment, even as interrupted by defense counsel's objection, was improper. Our supreme court has recognized, however, that such a comment can be harmless error. *State v. Rutledge*, 205 Ariz. 7, 13, ¶ 32, 66 P.3d 50, 56 (2003); *see also State v. Trostle*, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997) (because evidence against defendant was overwhelming, prosecutor's comment on defendant's failure to testify at trial was harmless beyond a reasonable doubt). Further, in *State v. Ramos*, 235 Ariz. 230, 236, ¶ 17, 330 P.3d 987, 993 (App. 2014), we explicitly stated "a prosecutor's comment on a defendant's failure to testify does not necessarily require reversal of the defendant's conviction." Thus, "if overwhelming evidence of guilt exists in the record, we may conclude that a defendant has failed to meet his burden of establishing prejudice from the impermissible comment." *Id.* at 236, ¶ 18, 330 P.3d at 993.

¶6 Here, we are confident the prosecutor's comment did not contribute to or affect the jury's verdict and thus amounted to harmless error. The State presented overwhelming evidence of Gonzales's guilt. *See id.* at 236, ¶ 17, 330 P.3d at 993. As summarized above, the jury heard the clerk tell the police operator the police were with the "right guy" who had

taken the ice cream, Gonzales told Officer K.O. he had stolen the ice cream, and Officer K.O. found the ice cream in the car. *See supra* ¶ 2.

¶7 Pursuant to supplemental briefing authorized by the court, Gonzales also argues his convictions and sentences for shoplifting with two or more predicate offenses involving shoplifting and shoplifting with two or more predicate convictions involving shoplifting present a double jeopardy violation. Although Gonzales did not raise this argument in the superior court, the State correctly recognizes that a double jeopardy violation constitutes fundamental error. *State v. Jurden*, 239 Ariz. 526, ___, ¶ 7, 373 P.3d 543, 545 (2016). The State also properly concedes that under A.R.S. § 13-1805(I), a defendant is guilty of only one Class 4 felony arising out of a single act of shoplifting if he or she has either committed or been convicted of two or more prior shoplifting offenses.

¶8 Accordingly, we vacate Gonzales's conviction and sentence for shoplifting with two or more predicate convictions involving shoplifting. We affirm, however, his conviction and sentence for shoplifting with two or more predicate offenses involving shoplifting.[1]

Amy M. Wood • Clerk of the court
FILED: JT

[1]Gonzales argues we should, at a minimum, remand to the superior court for resentencing. Given that the superior court imposed presumptive, concurrent sentences, we need not remand for resentencing and may vacate his conviction and sentence for shoplifting with two or more predicate convictions involving shoplifting. *See State v. Powers*, 200 Ariz. 123, 127, ¶ 16, 23 P.3d 668, 672 (App. 2001); *see also* A.R.S. §§ 13–4036 (2010), -4037 (2010).