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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

RAYVON COTTON, *Appellant*.

No. 1 CA-CR 15-0555
FILED 6-29-17
AMENDED PER ORDER FILED 6-30-17

Appeal from the Superior Court in Maricopa County
No. CR2014-001795-001
The Honorable Stephen A. Gerst, Judge, *Retired*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Adele G. Ponce
Counsel for Appellee

Ballecer & Segal LLP, Phoenix
By Natalee E. Segal
Counsel for Appellant

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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Donn Kessler joined.

H O W E, Judge:

¶1 Rayvon Cotton appeals his conviction and sentence for second-degree murder. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Late one evening in September 2013, K.H., N.B., and the victim walked from N.B.'s apartment to a nearby convenience store to buy drinks. K.H. walked approximately five to ten feet ahead of the other two. During their walk, a man on foot and one on a bike approached them heading the opposite direction. After they passed K.H., one man said, "what's up," and N.B. and the victim responded, "what's up," and continued walking. The same man then said in a menacing tone, "I said what's up." The victim turned, stared back at the man, and walked toward him.

¶3 K.H., who was still a few feet ahead of N.B. and the victim, turned around, saw the man on foot pull a pistol out of his waistband and point it at the victim's head. After a few seconds, the man then lowered the pistol and shot the victim in the chest. The victim immediately fell to the ground and the two men "scurried off." K.H. had never seen either man before and did not recognize the voice. The area was dimly lit and N.B. was intoxicated and not wearing her prescription glasses, but she saw that the shooter was a mid-20's light-skinned black man with braids. The victim later died from the gunshot wound.

¶4 Once other officers responded to the scene, N.B. was taken to a police station for an interview. When presented with a photo lineup, N.B. did not recognize the shooter. She was also unable to assist a sketch artist because she had not been attentive to the shooter's appearance, having been overcome with fear.

¶5 The next day, K.H. called N.B. Because N.B. was intoxicated the night before, K.H. gave her a description of the shooter, including that he had an "LA" facial tattoo. K.H. had also heard "rumors" from people in

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the neighborhood that Cotton may have been the shooter. Based on this information, and rumors that N.B. was also hearing, N.B. anonymously called "Silent Witness" and provided Cotton's name.

¶6 Nearly a week after the shooting, K.H. contacted his probation officer to report that he had witnessed the victim's murder. Upon hearing K.H.'s account, the probation officer drove K.H. to a police station to meet with a detective. K.H. again recounted the shooting and his description of the shooter, after which the detective showed him two photographic lineups. K.H. identified a person he believed looked like the shooter, but stated he could not be sure because the pictured individual did not have a facial tattoo.

¶7 When K.H. finished speaking with the detective, the probation officer dropped K.H. off at a fast-food restaurant. Shortly after, K.H. called the probation officer and told him that Cotton was inside the restaurant. The probation officer immediately contacted the detective, and officers soon arrived and arrested Cotton. The State charged Cotton with one count of first-degree murder. The State also alleged numerous aggravating factors and that Cotton had prior felony convictions and was on probation.

¶8 During N.B.'s testimony at the subsequent jury trial, a juror asked whether N.B. recognized the shooter in the courtroom. Defense counsel objected to the question, arguing that it was improper because the State had failed to elicit such testimony and "[i]t's part of their case. They have to have a witness identify who the person is." The court overruled the objection and asked the question. She responded that she "believe[d] so" and pointed to Cotton. The prosecutor followed-up, asking whether, despite her inability to identify the shooter in the pretrial photographic line-up, she could identify him in the courtroom and why. The prosecutor also showed N.B. a photographic line-up, asking if she could identify the shooter's photo. N.B. responded that she "maybe" could, and pointed to "photo three," which was Cotton's. The prosecutor asked if "he look[s] different here today than he does in [the photo]." Cotton again objected, arguing that the prosecutor improperly testified on the shooter's identity. The trial court sustained the objection, advising the prosecutor that "what [he] did was not the right thing to do." Cotton declined to ask any follow-up questions.

¶9 On the next day of trial, though, defense counsel moved for a mistrial based on the prosecutor's "vouching for the credibility of a witness." The prosecutor responded that he attempted only to elicit

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testimony regarding the physical differences between Cotton's photo and in-court appearance. The trial court, however, noted that the prosecutor had improperly introduced evidence that was not previously admitted, namely, identifying the photograph in position three as Cotton. The prosecutor stated that although the evidence had not previously been admitted, he planned to call the officer who prepared the photographic lineups who would testify that the third photo was the one of Cotton. Based on the prosecutor's avowal, the trial court denied Cotton's motion for mistrial. The court then instructed the jury to disregard the prosecutor's statement that Cotton was the person in the photo that N.B. identified the previous day because "what the lawyers say is not evidence." The following day, the preparing officer testified that he created the photographic lineup and placed Cotton's picture in the third spot.

¶10 During closing argument, Cotton argued against K.H.'s credibility, stating he simply "regurgitat[ed] what he hear[d] in the neighborhood." In rebuttal, the prosecutor indicated that K.H. would have no reason to merely "spout rumors" because he was on probation at the time, and doing so would jeopardize that. Cotton objected to the statement as not being in evidence, and the trial court sustained the objection. Upon Cotton's request, the court then struck the prosecutor's last comment.

¶11 After deliberating, the jury convicted Cotton of the lesser-included offense of second-degree murder. The jury also found that Cotton had previously been convicted of two or more violent or aggravated felonies. The trial court sentenced Cotton to life imprisonment, and Cotton timely appealed.

DISCUSSION

1. Admission of Identification Testimony

¶12 Cotton first contends that the trial court deprived him of his due process rights by asking the juror question that led to N.B.'s in-court identification testimony because the testimony was unreliable. A defendant's due process rights include the right to a fair identification procedure. *State v. Leyvas*, 221 Ariz. 181, 185 ¶ 10, 211 P.3d 1165, 1169 (App. 2009). We review the fairness and reliability of a challenged identification for an abuse of discretion. *State v. Lehr*, 201 Ariz. 509, 520 ¶ 46, 38 P.3d 1172, 1183 (2000). However, we review claims of due process violations de novo. *State v. Rosengren*, 199 Ariz. 112, 116 ¶ 9, 14 P.3d 303, 307 (App. 2000). Because N.B.'s in-court identification was reliable and the jury could

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ultimately determine her credibility, the court did not err by asking the juror's question and admitting the testimony.

¶13 An identification made for the first time in court is generally not deemed unreliable because the witness "is subject to thorough cross-examination about the witness's identification testimony." *Leyvas*, 221 Ariz. at 189 ¶ 28, 211 P.3d at 1173. A defendant's due process may be violated if the defendant's ability to challenge identification testimony that "falls below some minimal threshold of reliability" is restricted. *State v. Williams*, 166 Ariz. 132, 138, 800 P.2d 1240, 1246 (1987); *see also State v. Nordstrom*, 200 Ariz. 229, 241 ¶ 26, 25 P.3d 717, 729 (2001) (explaining that due process concerns arise "when evidence lacking in foundation reaches the jury under circumstances that do not afford a defendant an opportunity to point out its weaknesses"), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012).

¶14 Here, Cotton's due process was not violated because N.B. was subject to Cotton's thorough cross-examination challenging N.B.'s ability to identify the shooter. Additionally, nothing hindered Cotton's ability to challenge N.B.'s identification testimony. N.B.'s cross-examination testimony, together with the prosecutor's direct questioning, elicited admissions that: (1) the crime scene area was so dimly lit that N.B. could "barely" see on the night of the shooting, (2) N.B. was not wearing her prescription glasses at the time, (3) N.B. was intoxicated, (4) N.B. was unable to identify the shooter in a photographic lineup, (5) K.H. gave N.B. a description of the shooter the day after the incident, and (6) N.B. was overcome with fear and therefore did not pay attention to the shooter's appearance. The jury, as fact-finder, could assess any "weaknesses" in N.B.'s testimony and determine its weight and credibility. Additionally, Cotton declined to ask any follow-up questions after N.B. made the in-court identification. The trial court thus did not abuse its discretion by admitting N.B.'s identification testimony. *See Leyvas*, 221 Ariz. at 189 ¶ 29, 211 P.3d at 1173; *see also Perry v. New Hampshire*, 132 S. Ct. 716, 721 (2012) ("When no improper law enforcement activity is involved," reliability is sufficiently tested through "vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.>").

2. Prosecutorial Misconduct

¶15 Cotton next contends that the prosecutor engaged in misconduct by presenting N.B. with the photographic lineup that she had previously viewed, identifying which pictured individual was Cotton, and

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then asking N.B. to explain how Cotton's in-person presentation allowed for a positive identification when his picture did not. We will find reversible error only if misconduct has occurred and a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying the defendant a fair trial. *State v. Morris*, 215 Ariz. 324, 335 ¶ 46, 160 P.3d 203, 214 (2007). To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* This misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* Because no reasonable likelihood existed that the prosecutor's actions affected the jury's verdict, no prosecutorial misconduct occurred.

¶16 A prosecutor may properly ask an eyewitness to discuss differences between a defendant's in-court appearance and image in a photographic lineup, and elicit testimony explaining how any discrepancies in that appearance hindered the eyewitness's previous identification efforts. *See State v. Myers*, 117 Ariz. 79, 84, 570 P.2d 1252, 1257 (1977). A prosecutor may not, however, "refer to evidence which is not in the record or 'testify' regarding matters not in evidence." *State v. Bailey*, 132 Ariz. 472, 477-78, 647 P.2d 170, 175-76 (1982).

¶17 Here, the prosecutor made a comment referring to evidence not yet in the record by identifying Cotton as the individual in photograph number three. However, the State avowed to the court that although it had not yet been presented, it planned to call the officer that prepared the line-up who would testify that he placed Cotton's photo in the third slot. The trial court then struck the prosecutor's statement and instructed the jury not to consider it. Because we presume jurors follow instructions, and Cotton has not presented any evidence to overcome that presumption, the prosecutor's remark, though improper, likely did not affect the jury's verdict. *See State v. Goudeau*, 239 Ariz. 421, 469 ¶ 214, 372 P.3d 945, 993 (2016).

¶18 Cotton also argues that the prosecutor engaged in misconduct by improperly vouching for K.H.'s credibility. Specifically, Cotton challenges the portion of the prosecutor's closing argument indicating that K.H.'s status as a probationer provided incentive for him to tell the truth. Two types of prosecutorial vouching can occur: "(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. Duzan*, 176 Ariz. 463, 467, 862 P.2d 223, 227 (App. 1993). A prosecutor places the prestige of the government behind a

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witness by personally assuring the jury of the witness's veracity. *See 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).

¶19 No misconduct occurred here. A prosecutor's argument that a witness does not have a motive to lie generally does not rise to the level of misconduct. *See State v. Ramos*, 235 Ariz. 230, 238 ¶ 30, 330 P.3d 987, 995 (App. 2014). Even if the statement at issue were improper, however, the trial court sustained defense counsel's objection and struck that portion of the argument. We presume the jurors followed the trial court's instructions. *See Goudeau*, 239 Ariz. at 469 ¶ 214, 372 P.3d at 993. On this record, no reasonable likelihood exists that the prosecutor's statement affected the jury's verdict.

3. Sufficiency of the Evidence

¶20 Cotton argues finally that insufficient evidence supports his conviction because the "only evidence linking Cotton to the shooting was the identification made by two witnesses who were unable to positively identify him from a photo lineup." We review a claim of insufficient evidence de novo. *State v. West*, 226 Ariz. 559, 562 ¶ 15, 250 P.3d 1188, 1191 (2011). Sufficient evidence may be direct or circumstantial and "is such proof that reasonable persons could accept as adequate" to "support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Borquez*, 232 Ariz. 484, 487 ¶¶ 9, 11, 307 P.3d 51, 54 (App. 2013). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). In evaluating the sufficiency of the evidence, we test the evidence "against the statutorily required elements of the offense," *State v. Pena*, 209 Ariz. 503, 505 ¶ 8, 104 P.3d 873, 875 (App. 2005), and "do not reweigh the evidence to decide if [we] would reach the same conclusions as the trier of fact," *Borquez*, 232 Ariz. at 487 ¶ 9, 307 P.3d at 54.

¶21 The evidence was sufficient to support Cotton's conviction. A person commits second-degree murder if, without premeditation, the person intentionally causes the death of another person. A.R.S. § 13-1104(A)(1). Although no forensic evidence linked Cotton to the murder, the State had two eyewitnesses, N.B. and K.H., who identified Cotton as the shooter at trial. K.H. also identified Cotton as the shooter at the fast-food restaurant the following day. Cotton's counsel certainly questioned the reliability of their identifications on cross-examination, but the credibility of the witnesses was for the jury, as fact-finder, to assess. *See*

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State v. Buccheri-Bianca, 233 Ariz. 324, 334 ¶ 38, 312 P.3d 123, 133 (App. 2013).
This testimony provided substantial evidence that Cotton intentionally shot the victim, causing his death.

CONCLUSION

¶22 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
FILED: JT