

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



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FILED: 03/16/2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA,) 1 CA-CR 08-0643
)
) DEPARTMENT D
Appellee,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)
JACK ELLIOT GONZALEZ,)
)
Appellant.)
)

Appeal from the Superior Court of Maricopa County

Cause No. CR2007-167483-001 SE

The Honorable Connie Contes, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel, Criminal Appeals and
Capital Litigation Section
and Julie A. Done, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Terry J. Reid, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Jack Elliot Gonzalez (defendant) appeals his conviction and sentence for child abuse, a class five felony and domestic violence offense. For the reasons that follow, we find no error and affirm.

¶2 The evidence at trial showed that defendant spanked his ten-year-old daughter (the victim) with a belt because she lost her house key. The victim told her teacher and her school's assistant principal about the spanking. Pursuant to school policy, the principal called the police and Child Protective Services (CPS). Photographs were taken of bruises on the side of the victim's buttocks and police interviewed defendant and the victim. At trial, defendant admitted that he spanked the victim with a belt because she lost her house key, but denied that the spanking left the bruises on the side of the victim's buttocks. The investigating officer testified that when asked what caused the bruises on the victim, the defendant told him that he spanked her with a belt up to eight times. The evidence also showed that CPS conducted a separate investigation, but did not remove the victim from defendant's home. The jury found defendant guilty of reckless child abuse, which was also classified as a domestic violence offense. At sentencing, the judge placed defendant on probation for eighteen months. Defendant timely appealed.

¶3 On appeal, defendant claims that he was denied the

right to due process and a fair trial because the prosecutor engaged in misconduct when he allegedly 1) referred to the consequences of the charged offense; 2) argued facts not in evidence; and 3) engaged in vouching. "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, 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) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984)). In determining whether a prosecutor's remarks were improper, we consider whether the remarks called matters to the attention of jurors that they would not be justified in considering and, under the circumstances, the probability that the jurors were influenced by the remarks. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000). To require reversal, the misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Newell*, 212 Ariz. 389, 402, ¶ 61, 132 P.3d 833, 846 (2006) (quoting *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997)).

¶14 Because defendant did not object to the prosecutor's

statements at trial, we review for fundamental error. See *State v. Speer*, 221 Ariz. 449, 458, ¶ 42, 212 P.3d 787, 796 (2009) (citation omitted). Prosecutorial misconduct constitutes fundamental error only when it is "so egregious as to deprive the defendant of a fair trial." *State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991). Defendant bears the burden of demonstrating that fundamental error occurred and that it caused defendant prejudice. See *State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). We have reviewed the entirety of the record cited by defendant in support of his claims of prosecutorial misconduct, and we find none.

¶15 Nonetheless, to the extent that defendant has cited to the record in support of these allegations, we will address each of them.

Opening Statement

¶16 Defendant first argues that the prosecutor engaged in misconduct in his opening statement because he improperly referred to the consequences of the charged offense. Defendant contends that the prosecutor referred to the consequences of the charged offense when he referred to other cases of child abuse as the "most serious offenses" and "top charges," and when he stated that the child abuse at issue here was a "lower" or "lesser" offense. We find nothing

improper in the prosecutor's references to varying levels of child abuse. At the opening of trial, the judge read the jurors the following charge: "[i]n this case, the State has alleged that Jack Elliot Gonzalez . . . under circumstances *other than those likely to produce death or serious physical injury*, recklessly caused [the victim] to suffer physical injury or abuse in violation of Arizona law." The prosecutor's characterizations of the charge, in context, did not refer to consequences of the charge, but rather provided a framework of the state's claim to the jury. Moreover, the judge told the jury that they were not to consider penalties of the charge and instructed, "[y]ou must decide whether the defendant is guilty or not guilty by determining what the facts in the case are and applying these jury instructions. You must not consider the possible punishment when deciding on guilt. Punishment is left to the judge." We presume the jurors followed the judge's instructions. See *State v. McCurdy*, 216 Ariz. 567, 574, ¶ 17, 169 P.3d 931, 938 (App. 2007). Accordingly, even if the remarks were improper, defendant has not shown that the jurors were influenced by them so that he was prejudiced.

Closing Argument

¶7 Defendant argues that the prosecutor engaged in misconduct in his rebuttal closing argument when he stated

that CPS is a civil agency and that "[t]hey handle their matters. They are separate. Therefore, CPS is not going to arrest somebody because they do not have the arresting powers. That is a division. They do their job. They're separate." While there was no information introduced at trial as to the extent of CPS's powers, the record shows that the prosecutor made the foregoing statement in response to remarks defense counsel made in his closing statement that CPS is "[t]he most entrusted government agency who protects our children's welfare" and defense counsel's question to the jury, that if CPS "didn't have a problem . . . [w]hy should you find abuse?" Comments by the prosecutor on rebuttal are not improper where they are fairly in response to areas opened by the defense. *Hernandez*, 170 Ariz. at 307-308, 823 P.2d at 1315-16 (citations omitted). Neither defense counsel's arguments nor the prosecutor's arguments were based on evidence produced at trial. The prosecutor's description of CPS constituted a fair response to defense counsel's remarks. Accordingly, the prosecutor's remarks regarding CPS were not improper.

¶18 Defendant next argues that the prosecutor engaged in misconduct in his rebuttal to the closing statement by "vouching" for CPS when he told the jury that CPS did not have arresting powers. Two types of improper prosecutorial vouching exist: when the prosecutor "plac[es] the prestige of

the government behind a witness" and when the prosecutor "suggests that additional unrevealed evidence supports a guilty verdict." *State v. Palmer*, 219 Ariz. 451, 453, ¶ 6, 199 P.3d 706, 708 (App. 2008) (citation omitted). As discussed above, the prosecutor's remarks regarding CPS properly rebutted remarks made in defense counsel's closing statement regarding CPS. The prosecutor's remark about CPS's lack of arresting power neither placed the prestige of the government behind a witness nor suggested that unrevealed evidence supported a guilty verdict. Accordingly, we conclude that the prosecutor's comment regarding CPS's arresting powers did not amount to vouching.

¶19 Lastly, defendant contends that the prosecutor engaged in misconduct by commenting on facts not in evidence, when in his rebuttal to the closing statement, he remarked that the victim's bruise was getting smaller over time. Since a prosecutor may not comment on facts not introduced into evidence, it was arguably improper for the prosecutor to comment on the change in the size of the bruise. See *State v. Zaragoza*, 135 Ariz. 63, 68, 659 P.2d 22, 27 (1983) (citation omitted). It may be a matter of common sense that a bruise will fade with time. Cf. *State v. Hughes*, 193 Ariz. 72, 85, ¶

59, 969 P.2d 1184, 1197 (1998) ("Counsel can argue all reasonable inferences from the evidence."). In any event, this isolated statement was not so egregious as to result in a denial of due process. Moreover, both at the beginning of the trial and before jury deliberations, the trial court instructed the jury that the attorneys' statements were not evidence. We presume that the jurors followed these instructions. See *McCurdy*, 216 Ariz. at 574, ¶ 17, 169 P.3d at 938. Accordingly, defendant has not shown that fundamental error resulted from the prosecutor's statement.

¶10 For the foregoing reasons, we affirm defendant's conviction and sentence.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

PATRICK IRVINE, Judge