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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-0724
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
JAMES LAWRENCE SHIPMAN,) - Rule 111, Rules of
) the Arizona Supreme
Appellant.) Court)
)

Appeal from the Superior Court in Mohave County

Cause No. CR-2007-0192

The Honorable Steven F. Conn, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

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N O R R I S, Judge

¶1 James L. Shipman timely appeals from his convictions and sentences. As explained below, we affirm.

¶2 Shipman's charges stem from events that occurred

between 2002 and 2006 while the victims, A.P. and her younger sister,¹ lived with their mother and her boyfriend, Shipman, in his home.²

¶13 A grand jury indicted Shipman on one count of sexual abuse of a minor under the age of fifteen (the younger sister), a class three felony and dangerous crime against children; sexual conduct with a minor under the age of fifteen (occurring in January 2002, against A.P.), a class two felony and dangerous crime against children; and sexual assault (occurring in November 2006 against A.P.), a class two felony. A jury convicted Shipman of all three offenses.

I. Insufficient Evidence of Sexual Assault Against A.P.

¶14 Shipman argues the State presented insufficient evidence the sexual intercourse with A.P. in November 2006 occurred "without consent" because it failed to show he beat, used physical force against, or threatened to use physical force against A.P. to have sexual intercourse with her.³ We disagree.

¹Two other siblings of the victims also lived in the home during that period.

²We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Shipman. *State v. Vendeveer*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

³Shipman first had sexual intercourse with A.P. in 2002, shortly after her family moved in with him, when she was 13 years old and her mother was in jail. This event is the

¶15 First, as an initial matter, Arizona Revised Statutes ("A.R.S.") section 13-1401(5) (2010) "includes" several ways in which "[w]ithout consent" may be established, but does not explicitly limit the proof of that element to *only* those ways. ("Without consent" includes" whether a "victim is coerced by the immediate use or threatened use of force against a person or property"; whether a "victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition"; whether a "victim is intentionally deceived as to the nature of the act"; or whether a "victim is intentionally deceived to erroneously believe that a person is the victim's spouse."). Therefore, as the superior court here properly instructed the jury, "[w]ithout consent includes *but is not limited to* the victim being coerced by the immediate use or threatened use of force against the victim."⁴ (Emphasis added.)

basis for the sexual conduct with a minor under 15 years of age charge involving A.P. Thereafter, Shipman repeatedly raped A.P. over the course of the next five to six years, "even over a hundred [times]." A.P. turned 18 on August 29, 2006. The last time Shipman had sexual intercourse with A.P., and the basis of the sexual assault charge involving A.P., was in November 2006, while her mother was out of town. Shipman conceded he had sex with A.P. in 2006, but maintained it was after she had turned 18 and it was consensual.

⁴Shipman did not object to the superior court's instruction, nor does he claim that it was error on appeal.

¶16 Second, the State presented ample evidence A.P. had not consented to sexual intercourse with Shipman during the November 2006 assault. A.P. testified that during that assault, around midnight, Shipman came to get her in her room as he "normally" did and told her to "go to his room." She testified, once there, she "told him no" and also stated, "I don't want this anymore. I don't want to do this." At that point Shipman "got all like antsy . . . like aggravated" and told her she "could lose everything [she] ha[d]." When asked why she had not tried to push Shipman away or attempted to get out of the room, A.P. replied she knew "you never argued with [Shipman] . . . he would not allow that . . . [he] just didn't want you to ever argue with him." Despite telling Shipman she did not want to have sex with him that night, he just "[s]tarted kissing [her]" and "[p]utting his hands on [her]," so she "just stopped." Because of her previous years of sexual abuse by Shipman, she did not argue or fight but simply submitted "because [she] knew it wasn't going to do any good."

¶17 Based on this evidence, the jurors could have found A.P. had not consented to sexual intercourse with Shipman even if he had not beat, used physical force against, or threatened her with physical injury. See *supra* note 2.

II. Prosecutorial Misconduct

¶8 Shipman next contends the prosecutor committed prosecutorial misconduct by (1) vouching for the State's case, and (2) drawing attention to Shipman's exercise of his Fifth Amendment right not to testify at trial. We disagree.

¶9 Shipman concedes he did not raise these claims before the superior court and he has therefore forfeited appellate relief absent a showing of fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). In order to prevail, Shipman must establish fundamental error occurred and this error caused him prejudice.⁵ *Id.* at ¶ 20, 115 P.3d at 607. The record demonstrates no error occurred.

A. Vouching

¶10 Shipman argues vouching occurred when the prosecutor argued "he was the real lawyer, a good guy who did not misdirect the jury and presented trustworthy, believable witnesses." In support of this vouching argument, Shipman cites the prosecutor's comments about "not having money to buy tie clips," and about defense counsel allegedly yelling at the victims when cross-examining them. According to Shipman, these comments

⁵Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)).

portrayed defense counsel as "a rich jerk who was completely unlike the good people of Mohave County," and impugned his professionalism and integrity, thereby depriving Shipman of a fair trial. We disagree with Shipman's interpretation of these arguments.

¶11 Prosecutorial misconduct occurs in two forms: when the prosecutor places the prestige of the government behind its evidence; and when the prosecutor suggests information not presented to the jury supports the evidence. *State v. Newell*, 212 Ariz. 389, 402, ¶ 62, 132 P.3d 833, 846 (2006).

¶12 First, we note the comments to which Shipman objects occurred during the prosecutor's rebuttal closing argument. They were made in direct response to defense counsel's closing arguments the prosecutor represented the "State of Arizona and not the people of Mohave County," as defense counsel and the jury did. Thus the "tie clip" comment was made essentially to counter defense counsel's implication the prosecutor was not also an average "citizen" of Mohave County also representing its people. Similarly, the "misdirection" comments were made in response to defense counsel's suggestion the prosecutor was contriving with the victims to elicit testimony favorable to the State's case -- i.e., only "whatever it was [the prosecutor] wanted to hear" -- every time defense counsel pointed out a

possible contradiction. The prosecutor's comments were not "vouching" or placing the prestige of the State behind the victims, but simply responding to defense counsel's own arguments.

¶13 A prosecutor has wide latitude in presenting closing arguments to the jury. *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). When one party raises an argument that may be improper or irrelevant, the other side *may* have a right to respond with comments on the subject. *Pool v. Superior Court*, 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984). Even if one party "opens the door," this does not entitle the opposing party "to engage in abusive, argumentative and harassing conduct." *Id.* In this case, the prosecutor's comments were neither improper vouching nor improper conduct. They therefore do not constitute error, let alone fundamental error.

¶14 Whether defense counsel "yelled" at the victims when he cross-examined them is not discernible from the transcripts. Shipman did not object to this characterization at trial and does not claim it was inaccurate on appeal. These statements merely commented on behavior that would have been readily apparent to the jurors, and were in direct response to defense counsel's closing argument attacking A.P.'s credibility, stating, "[f]or the first five minutes [she] never looked up

when [he] asked her questions" during cross-examination. Under these circumstances, these statements also do not constitute error, and would hardly be prejudicial.

B. Comment on Failure to Testify

¶15 Shipman further argues the State, in its rebuttal closing, commented on his exercise of his Fifth Amendment right, thus depriving him of a fair trial. We disagree.

¶16 A prosecutor's comments may be "improper" if they are calculated to direct the juror's attention to a defendant's exercise of his Fifth Amendment right. *State v. Hughes*, 193 Ariz. 72, 87, 969 P.2d 1184, 1199 (1998).

¶17 During his opening statement, defense counsel claimed the evidence would show Shipman "lived in Mohave County for twelve years," "fought in Vietnam," "spent twenty-three years in the Air Force," "has discipline in his life and is disciplined in all things he did," "has never been in trouble with the law," and "instilled discipline in these children." At trial, defense counsel attempted to establish through his questions the victims objected to the discipline and rules Shipman imposed and this is why they alleged abuse. However, the younger sister denied Shipman had ever punished her for breaking rules about boyfriends; and A.P. only agreed Shipman "had a background in the Air Force," he "liked to have things Air Force tight," and

"the regular regiment [sic] at the Shipman house had to do with discipline."

¶118 In his closing argument, when defense counsel stated Shipman had lived in Mohave County for 12 years and had "no criminal record," the prosecutor objected. The superior court sustained the objection, explaining there had been no evidence presented regarding Shipman's "prior record or lack thereof."

¶119 In his rebuttal closing, the prosecutor noted defense counsel presented a "lot of things" during his opening statement that were not subsequently proven at trial. Shipman objected, asserting the prosecutor was "shifting the burden," and the superior court overruled the objection but advised the prosecutor to "proceed with caution." The prosecutor then stated defense counsel had "talked about . . . [w]hat kind of man" Shipman was, how he "was in Vietnam" and a "great guy," but had presented no such evidence at trial.

¶120 Viewed in context, the prosecutor's statements simply responded to defense counsel's characterizations of Shipman made during opening statement to which he had not produced any evidence. The prosecutor's comments did not direct the jury's attention to the fact Shipman chose not to testify. As the State points out, while Shipman might have been one logical witness who could have testified about those matters, he was not

the sole witness who could have done so. By taking "the calculated risk" of mentioning these matters in his opening statement and then not presenting evidence about them at trial, defense counsel left the door open to the prosecutor's comments because an opening statement *may* be subject to attack. *State v. Rosas-Hernandez*, 202 Ariz. 212, 219, ¶ 24, 42 P.3d 1177, 1184 (App. 2002).

¶21 The prosecutor's statements were not an improper comment on Shipman exercising his right not to testify. The record does not reflect error, let alone fundamental error.

C. Cumulative Error

¶22 Finally, Shipman argues the cumulative effect of the State's improper arguments involving vouching and commenting on his failure to testify "so infected his trial with unfairness that his resulting convictions violate due process." Because the record demonstrates no error, *see supra* Part II.A and B, we reject this argument.

CONCLUSION

¶23 For the foregoing reasons, we affirm Shipman's convictions and sentences.

/s/

PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

MAURICE PORTLEY, Judge