DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0876
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JOE ANTHONY MARTINEZ,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-102953-001 DT

The Honorable Steven K. Holding, Judge Pro Tempore

REVERSED AND REMANDED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Joe Anthony Martinez was indicted on charges of aggravated assault of a police officer and resisting arrest. A

jury acquitted Martinez of aggravated assault but convicted him of resisting arrest. On appeal, Martinez argues his conviction must be reversed because of prosecutorial misconduct and an error by the superior court in precluding his investigator from testifying at trial.[1] Although we reject Martinez's prosecutorial misconduct argument we agree the superior court should not have excluded his investigator's testimony at trial. Because we cannot say beyond a reasonable doubt this error did not contribute to or affect the jury's verdict on the resisting arrest charge, we reverse and remand for a new trial on that charge.

DISCUSSION

I. Prosecutorial Misconduct

¶2 Martinez argues the superior court should have granted his motions for mistrial or a new trial because the prosecutor improperly made repeated references to absent witnesses with exculpating testimony and created an improper inference Martinez had a duty to present them. The superior court's decision whether to grant a mistrial or a new trial because of alleged prosecutorial misconduct will not be disturbed on appeal absent a clear abuse of discretion. *State v. Lee*, 189 Ariz. 608, 616,

[1]Martinez also contends the superior court should not have ordered him to pay partial reimbursement for indigent defense costs or imposed a probation surcharge and time payment fee. Because we are reversing Martinez's conviction, we need not address these issues.

944 P.2d 1222, 1230 (1997). "Prosecutorial misconduct sufficient to justify reversal must be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *Id*. (quoting *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992) (internal citation omitted)).

¶3 Further, the declaration of a mistrial, the most dramatic remedy for trial error, should only be granted when it appears "justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (quoting *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983)). The superior court must order a mistrial based upon prosecutorial misconduct if the misconduct permeates the entire trial and therefore deprives the defendant of a fair trial. *See State v. Ferguson*, 149 Ariz. 200, 212, 717 P.2d 879, 891 (1986). In reviewing allegations of prosecutorial misconduct, we consider whether the prosecutor's remarks directed the jurors' attention to matters they should not have considered in reaching their verdict, as well as the probability the jurors were actually influenced by the remarks. *Lee,* 189 Ariz. at 616, 944 P.2d at 1230. It is the judge, however, who is in the best position to determine whether a particular incident calls for a mistrial. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). The judge is aware of the atmosphere of the trial, the circumstances

surrounding the incident, the manner in which any objectionable statement was made, and its possible effect on the jury and the trial. *State v. Koch*, 138 Ariz. 99, 101-02, 673 P.2d 297, 299-300 (1983).

¶4 At trial, two police officers testified they observed Martinez with a beer as he was leaving the party and requested identification to determine if he was of legal age. Martinez removed his license from his pocket and abruptly placed it within inches of the face of one officer, causing her to step back. The second officer took the license from Martinez's hand to look at it. According to police testimony, Martinez pushed the second officer while grabbing his license back. Not sure of Martinez's intentions, the second officer responded by giving Martinez a two-handed "impact push" to create space between them. The first officer testified she informed Martinez he was under arrest for assaulting a police officer. Police testified Martinez ignored this officer and tackled the second officer who had pushed him. A struggle ensued; according to police, Martinez resisted the officers' efforts to handcuff him. Martinez was eventually taken into custody.

¶5 Defense counsel cross-examined both officers as well as a third officer who was present at the scene. The officers testified they had not spoken to or contacted any of the

individuals at the party who either may have or did see the altercation.

¶6 Martinez presented testimony from a friend who, along with three of her friends ("the three friends"), was with him at the party. His friend testified police started hitting Martinez for no reason and continued to beat him even after he was on the ground with his hands behind his back. She further stated Martinez did not push or tackle the officer and that he never resisted the officers in any manner. In addition, she testified there were numerous people watching the incident and the officers never attempted to interview her or any of the other witnesses.

¶7 During cross-examination, the prosecutor questioned the friend regarding the failure of the three friends and others at the party to testify at trial. The prosecutor asked, "[s]o there's almost a hundred people there at the party and a lot of them had cleared out, but there's nobody else that's coming forward?" The superior court sustained defense counsel's objection to "[b]urden shifting," and dismissed the jury after the prosecutor stated she wished to be heard on the matter.

¶8 The prosecutor argued the cross-examination was directed at the absence of corroboration for the friend's testimony, noting the defense had subpoena power and citing case law allowing the State to comment on the nonproduction of

evidence by a defendant. After hearing from defense counsel, who also moved for a mistrial, the superior court ruled the prosecutor's cross-examination was "burden shifting," but denied defense counsel's motion for a mistrial, stating:

> Your cases are clear that you can comment about a Defendant's case, that he is lacking certain elements to exculpate, being exculpatory to himself. And part of your statements are correct. I'm not going to go any further, because I don't want to prosecute the case for you. You are allowed to comment, but those comments are clearly to show whether he has or has not offered evidence in his theory of the case.
>
> This witness is an inappropriate witness to ask those questions of, so you shall cease asking those questions of [this witness] when she comes back on the stand. And I'm also going to not follow Defense's request that the State may make no further reference because the State is allowed by law to make reference. But be very careful you cannot burden shift. You can make limited statements that he offered one witness out of a potential -- but be very careful of how you do that, because that in and of itself could be burden shifting.

In compliance with the superior court's ruling, the prosecutor posed no further questions to the friend about other possible witnesses.

¶9 At closing, the prosecutor did not initially comment about absent witnesses or Martinez's failure to call other individuals who attended the party. During his closing argument, defense counsel emphasized the police had not

attempted to interview any of the individuals at the party, arguing "[t]hey are not interested in the truth. They are interested in their story and covering up their overreaction." Defense counsel then addressed "witness contact," arguing "[i]f we were trying to get a hold of you, the time to do it would be right now, while you're together. The best time they [the police] had to do it would have been while the crowd was there, when it happened. The police were the only ones who had the opportunity to investigate this and that opportunity was missed." Responding to defense counsel's argument, in rebuttal, the prosecutor argued:

> Defense also mentioned that we did not call any witnesses to verify the defendant's side of the story. You heard from the sergeant yourself that -- who spoke to the defendant that he was given an opportunity --
>
> [Appellant's Counsel]: Objection.
>
> THE COURT: Move on, State. Sustained.

Then, after pointing to the court's credibility instruction, the prosecutor argued:

> Now, the defendant himself agreed that there were other individuals with him when he went to that party. There were at least three other people; they did not testify.
>
> [Appellant's Counsel]: Objection.
>
> THE COURT: Overruled.

¶10 At the conclusion of closing argument, defense counsel moved to dismiss the charges against Martinez for prosecutorial misconduct, arguing the prosecutor had been warned "not to bring up the stuff about the witnesses." Defense counsel also moved for a mistrial and for a new trial on the same grounds after the jury returned its verdicts. The superior court denied the motions. Under the applicable legal standards governing prosecutorial misconduct, the court did not abuse its discretion in denying these motions.

¶11 The prosecutor's references to the absence of exculpatory testimony from other potential witnesses were not, improper under the circumstances presented here. In his cross-examination of the officers, defense counsel questioned them on their failure to interview others at the party. During closing argument, defense counsel used their failure to do so to suggest the officers had not told the truth about the incident and had covered up their "overreaction." The prosecutor's rebuttal argument regarding absent witnesses was not "burden shifting"; it "merely prevented [Martinez] from drawing a positive inference from evidence that he could have presented but did not." *State v. Herrera*, 203 Ariz. 131, 137, ¶ 21, 51 P.2d 353, 359 (App. 2002); *see also State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987) ("Such comment is permitted by the well recognized principle that the

nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it."); *State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) ("The prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify.").

¶12 The prosecutor also did not act improperly in commenting on Martinez's failure to produce absent witnesses. Contrary to Martinez's argument, the record does not reflect the prosecutor "knew" defense counsel had tried and been unsuccessful in locating the witnesses. Although Martinez had described the difficulties he was having in locating one of the three friends in a motion to continue filed a month before trial, and presumably the prosecutor knew what was stated in this motion, defense counsel's inability to locate this particular witness does not mean the prosecutor knew defense counsel had been unable to locate other witnesses.

¶13 Finally, the record does not reflect the prosecutor commented on Martinez's right to remain silent in her rebuttal argument. When the prosecutor started to argue that a police sergeant had given Martinez an opportunity to provide information concerning witnesses, defense counsel interrupted with an objection. The court sustained the objection. *See*

supra ¶ 9. Given the interruption, we cannot conclude the prosecutor actually commented on Martinez's invocation of his right to remain silent, and in any event, the jurors were instructed they were to determine the facts in the case based on the evidence produced in court and what the lawyers "say is not evidence." As our supreme court has instructed, "[j]uries are presumed to follow their instructions." *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996). Accordingly, the superior court could reasonably conclude this one interrupted remark failed to affect the jury's ability to fairly assess the evidence. *See State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995) ("Even where the prosecutor has erred, a reversal is not required unless the misconduct affected the jury's ability to judge the evidence fairly.").

¶14 The superior court, thus, did not abuse its discretion in denying Martinez's motions for mistrial and a new trial based on alleged prosecutorial misconduct.

II. Preclusion of Witness

¶15 Martinez next argues the superior court should not have precluded him from calling a defense investigator to rebut the prosecutor's arguments he had failed to present exculpatory evidence -- specifically, testimony from other individuals at the party. Defense counsel advised the court his investigator would testify about the efforts the defense had made to find

those witnesses which, he argued, would allow Martinez to rebut the State's argument he had failed to present exculpatory evidence in his "possession." The superior court refused to allow the investigator to testify reasoning Arizona Rule of Criminal Procedure 19.1 did not allow the defense to present a rebuttal witness in its case-in-chief.

¶16 We review the admission or exclusion of evidence for abuse of discretion. *State v. Tankersley*, 191 Ariz. 359, 369, ¶ 37, 956 P.2d 486, 496 (1998). "An abuse of discretion exists when the trial court commits an error of law in the process of exercising its discretion." *State ex rel. Thomas v. Blakey*, 211 Ariz. 124, 126, ¶ 10, 118 P.3d 639, 641 (App. 2005) (quoting *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004)).[2]

¶17 Rule 19.1, which governs the conduct of trial, states in pertinent part:

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[2]We reject the State's argument Martinez waived this argument by not asking the court to reconsider whether the investigator could testify either after the close of the defense's case-in-chief or after close of the State's rebuttal. Although the court clearly denied defense counsel's request to allow the investigator to testify in the defense's case-in-chief, the court also suggested the request was "not ripe yet" because the defense's case-in-chief had not closed, nor had the State put on its rebuttal. Contrary to the court's view, the investigator's testimony was ripe, that is, appropriate for the defense's case-in-chief, not later. Further, the court apparently believed the investigator's testimony was not "ripe" because Martinez had not yet decided whether to testify. But, the investigator's testimony was not contingent on Martinez's testimony.

> **Order of Proceedings.** The trial shall proceed in the following order unless otherwise directed by the court:
>
> (1) The indictment, information or complaint shall be read and the plea of the defendant stated.
>
> (2) The prosecutor may make an opening statement.
>
> (3) The defendant may then make an opening statement or may defer such opening statement until the close of the prosecution's evidence.
>
> (4) The prosecutor shall offer the evidence in support of the charge.
>
> (5) The defendant may then make an opening statement if it was deferred, and offer evidence in his or her defense.
>
> (6) Evidence in rebuttal shall then be offered unless the court upon a showing of good cause allows a case-in-chief to be reopened.
>
> (7) The parties may present arguments, the prosecutor having the opening and closing.
>
> (8) The judge shall then charge the jury.
>
> With the permission of court, the parties may agree to any other method of proceeding.

Ariz. R. Crim. P. 19.1(a).

¶18 Subsection 6 of this rule, which appears to be the basis of the superior court's ruling, provides for the introduction of rebuttal evidence not presented in a party's case-in-chief. "Rebuttal evidence" is "[e]vidence offered to

disprove or contradict evidence presented by an opposing party." Black's Law Dictionary 599 (8th ed. 2004). The offering of rebuttal evidence separate from a party's case-in-chief is generally limited to the prosecution. *See State v. Shepherd*, 27 Ariz. App. 448, 450, 555 P.2d 1136, 1138 (1976) ("The general rule of rebuttal evidence is that the State may offer any competent evidence which is a direct reply to or in contradiction of any material evidence introduced by the accused."). There is usually no need for separate rebuttal by the defense because the defense presents its rebuttal evidence in its case-in-chief. Indeed, the usual purpose of all the evidence presented in the defense's case-in-chief is to rebut the State's evidence. Rule 19.1 did not, as the superior court believed, bar Martinez from calling the investigator as a "rebuttal witness" in his case-in-chief. The court thus committed an error of law in exercising its discretion.

¶19 The issue then becomes whether this error entitles Martinez to a new trial. When, as here, an issue is properly presented to the superior court and erroneously ruled on, we review for harmless error. *State v. Bible,* 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). "Error . . . is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *Id.* Applying this standard, the error here was not harmless.

¶20 As discussed above, a prosecutor may properly comment on a defendant's failure to present exculpatory evidence as long as it does not constitute a comment on the defendant's silence. *See supra* ¶¶ 11, 13. As our supreme court has explained, it is "elemental fairness" to allow the State to comment on the defense's failure to present potentially exculpatory evidence which the defendant has access to when the defendant is attacking the accuracy of the State's evidence. *State ex rel. McDougall v. Corcoran,* 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987). This "elemental fairness" is grounded on the ability of the defendant to "access" this evidence. *Id.* But, when such evidence is unavailable to the defendant it would not be "elemental fairness" to allow the State to comment on a defendant's failure to produce that evidence.

¶21 Here, in the rebuttal closing argument, the prosecutor quite correctly described the case as being "about credibility." Addressing the credibility of the witnesses, the prosecutor pointed out "the defendant himself agreed that there were other individuals with him when he went to that party. There were at least three other people; they did not testify." In making this argument, the prosecutor was asking the jury to draw an adverse inference these witnesses were available to Martinez and his failure to present them was because they would corroborate neither his testimony nor the testimony of his friend. Martinez

was entitled, through his investigator's testimony, to present evidence that would have blunted or precluded the adverse inference the prosecutor sought to draw from Martinez's failure to present these witnesses and the prosecutor's attack on his credibility and the credibility of his friend. Under these circumstances, the court's erroneous exclusion of the investigator as a trial witness cannot be deemed harmless beyond a reasonable doubt.

CONCLUSION

¶22 For the foregoing reasons, we reverse Martinez's conviction for resisting arrest and remand for a new trial on that charge.

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Judge

B A R K E R, Judge, concurring in part, dissenting in part.

¶23 I agree with the section of the decision referring to asserted prosecutorial misconduct. I further agree that the court inexplicably erred in not permitting the defense

investigator to testify during the defense case-in-chief, which is exactly when that type of testimony should be presented. However, on the record before us, the error was harmless. Therefore, I would affirm.

¶24 What we know about the defense investigator's proposed testimony comes from the following two excerpts in the exchange between counsel and the court with regard to whether the defense investigator could testify:

> I believe I should be able to call, following Ms. [L.], my investigator, [R.], and he is here, so that he may testify about the efforts we have made to find those witnesses.
>
> . . . .
>
> I'm, once again, reiterating my request to call [R.] after Ms. [L.] has testified, to testify to our efforts to locate the witnesses, in this case, to rebut what you [the prosecutor] will be commenting on in your closing.

Treating this as an offer of proof, we know next to nothing about what the defense investigator would say.

¶25 Although the trial court clearly erred in precluding the witness based on its misconstruction of Rule 19.1, Martinez has forfeited any claim for relief by his failure to make an offer of proof providing any substance to the testimony to be presented. "Error may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the

evidence was made known to the court by offer or was apparent from the context . . . ." Ariz. R. Evid. 103(a)(2). An offer of proof is "simply a detailed description of what the proposed evidence is." *Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 129, 700 P.2d 819, 827 (1985) (quoting M. Udall & J. Livermore, Arizona Law of Evidence, § 13, at 20 (2d ed. 1982)). An offer of proof serves two purposes:

> First, the description puts the trial judge in a better position to determine whether his initial ruling was erroneous and to allow the evidence to be introduced if he decides it was. Second, *the appellate court will be able from the description to determine whether any error was harmful in the context of the case*.

Id. (quoting M. Udall & J. Livermore, *supra*, § 13, at 20-21) (emphasis added). From the record before us, we have no basis to conclude whether the information to which the investigator would have testified would or would not have any impact on this matter. As our supreme court stated in another matter, "In this case, we cannot know what the proffered testimony would have shown." *State v. Hill*, 174 Ariz. 313, 329, 848 P.2d 1375, 1391 (1993). In such circumstances, "[w]e cannot speculate from the record that such testimony would have been significant or favorable to Defendant and therefore cannot reverse the trial court's ruling." *Id*. Those same constraints apply here.

¶26 For the foregoing reasons, I would affirm as the error was harmless on this record.

/s/
_____
DANIEL A. BARKER, Judge