DIVISION ONE
FILED: 08/12/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0307
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
GONZALO HERNANDEZ GUDINO, Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-123131-001 DT

The Honorable John R. Hannah, Jr., Judge

REVERSED AND REMANDED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

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Attorneys for Appellant

P O R T L E Y, Judge

¶1 Defendant Gonzalo Hernandez Gudino challenges his convictions and sentences. Specifically, he contends that he

should get a new trial because of prosecutorial misconduct. We agree.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 After having a little too much to drink at an April 2008 wedding reception, the victim, P.A.,[1] was going to call a taxi cab. The bride offered to have a family member take her home. She accepted, and got into Defendant's truck.

¶3 Instead of driving to the victim's house, Defendant stopped at his brother's house. The victim testified she tried to run away, but Defendant caught her and pulled her into the backyard. There, she explained, he sexually assaulted her; both vaginally and anally.

¶4 After the sexual assaults, P.A. grabbed her belongings, and his shirt, and ran. Because no one responded at the house across the street, she ran to a different house, was allowed to enter and the homeowner called 911.

¶5 Once the police arrived, P.A. pointed out the house where she had been raped. The police found Defendant asleep in a back bedroom. P.A. subsequently identified the Defendant as her assailant. Defendant was arrested and charged with: two counts of sexual abuse (Counts 1 and 3); kidnapping (Count 2);

[1] We use the initials of the victim throughout this decision to protect her privacy. *See State v. Maldonado*, 206 Ariz. 339, 341 n.1, ¶ 2, 78 P.3d 1060, 1062 n.1 (App. 2003).

three counts of sexual assault (Counts 4, 5, and 6); resisting arrest (Count 7) and aggravated assault (Count 8).

¶6 At trial, Defendant argued that P.A. had consented to the sex in return for cocaine.[2] The jury rejected the defense and found Defendant guilty of one count of sexual abuse (Count 1); kidnapping (Count 2); and three counts of sexual assault (Counts 4, 5 and 6). The jury acquitted him of sexual abuse (Count 3) and resisting arrest (Count 7).[3] Defendant was subsequently sentenced to prison and probation.

¶7 Defendant appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 and -4033 (2010).

DISCUSSION

¶8 We are asked to decide whether the remarks made during the State's closing rebuttal argument constitute prosecutorial misconduct which warrants a new trial.[4] Specifically, Defendant

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[2] P.A.'s urine was tested the day after the wedding and the drug screen was positive for cocaine.

[3] The trial court had dismissed the aggravated assault charge (Count 8) after the State rested.

[4] Defendant also claims, within the subsection "Statement of Facts," that an "English Test" which occurred when he was testifying in front of the jury was improper. Because Defendant fails to provide argument as to why the questioning was improper, we do not address it. *See Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) (stating that an issue was waived when it was not clearly raised and argued in the appellate brief). It is also

contends the prosecutor argued outside the record of evidence when she argued that Defendant manufactured his defense of sex in return for cocaine after reading or having the police report read to him.[5]

¶9 Mindful that a prosecutor has an obligation not only to prosecute with diligence but to avoid improper methods designed to obtain a conviction, we closely review claims of prosecutorial misconduct. *See State v. Minnitt*, 203 Ariz. 431, 440, ¶ 41, 55 P.3d 774, 783 (2002). To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the misconduct so infected the trial with unfairness that the resulting conviction amounts to a denial of due process. *See State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "Reversal on the basis of prosecutorial misconduct requires that the conduct be so pronounced and persistent that it permeates the entire atmosphere of the trial." *Hughes,* 193 Ariz. at 79, ¶ 26, 969 P.2d at 1191 (internal quotation marks

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unclear whether Defendant wanted to argue that there was insufficient evidence to support the convictions. Defendant's opening brief has a heading entitled "Reasonable Doubt Existed," and lists several facts without further argument. The next heading is entitled "Issue," but only refers to prosecutorial misconduct. Because Defendant failed to clearly raise the insufficiency of the evidence argument, we do not address it. *See id.*

[5] Defendant also argues the prosecutor made statements that were personal attacks on defense counsel. Because we reverse on other grounds, we will not address them.

omitted) (quoting *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992)). In fact, our supreme court has stated that to determine whether the misconduct permeates the whole trial, the court has to recognize the cumulative effect of the misconduct. *Hughes,* 193 Ariz. at 79, ¶ 26, 969 P.2d at 1191.

¶10 Here, the Defendant's defense was that he had consensual sex with the victim in return for cocaine. During the State's rebuttal closing argument, the prosecutor stated, "[t]his defendant had the police report read to him. And that is where he found the urinalysis. . . . He found a convenient defense." She also stated, "[t]hey never, ever had an agreement for sex for cocaine. He had the police report read to him, and that's where that came from," and "[s]aying that she squatted in the defendant's backyard to pee? Because the defendant read the police report . . . it's a manufactured explanation."

¶11 Defendant did not, however, object to the State's argument. Consequently, we look to see whether the argument constitutes fundamental error. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). To show fundamental error when, as argued here, the prosecutor engaged in misconduct during closing argument, we first review whether error, that is prosecutorial misconduct, occurred. *State v. Edmisten*, 220 Ariz. 517, 524, ¶ 23, 207 P.3d 770, 777 (App. 2009) (holding

that when the defendant is alleging prosecutorial misconduct "[t]o show fundamental error, the defendant must first prove error – that is, here, that misconduct actually occurred").

¶12 The State's argument introduced error into the trial because there was no evidence to support the argument.[6] *See State v. Roscoe*, 184 Ariz. 484, 497, 910 P.2d 635, 648 (1996) (holding that it is improper for the State to "refer[] to matters not in evidence"). The police report was not admitted into evidence. During cross-examination, Defendant testified that he could not read English well and no one had read the police report to him. He was then asked whether anyone had translated the police report for him. The defense objected on the basis that the question violated the attorney-client privilege, and the objection was sustained.

¶13 Consequently, there was no basis for the argument that Defendant created his defense from reading the police report or

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[6] The State argues that its statements were supported by the reasonable inference that Defendant had access to discovery of the lab report prior to trial. The forensic scientist testified that her analysis for the drug screen was reported on the police report. Because there was no evidence introduced at trial that Defendant read or had the police report read to him, the argument is not supported by any inference.

We agree with the State that the prosecutor misspoke when she claimed Defendant read from the police report about the victim urinating in Defendant's yard. The contested language about the victim urinating actually originated from the sexual assault examination report, which was admitted into evidence. Because, however, the prosecutor used the argument to bolster the theory that Defendant concocted his defense from the police report, it is still relevant to the prosecutorial misconduct analysis.

having anyone translate it for him. "Although advocates are ordinarily given wide latitude in closing argument, their comments must still be 'based on facts the jury is entitled to find from the evidence and not on extraneous matters that were not or could not be received in evidence.'" *State v. Leon*, 190 Ariz. 159, 162, 945 P.2d 1290, 1293 (1997) (quoting *State v. Dumaine*, 162 Ariz. 392, 402, 783 P.2d 1184, 1194 (1984)); *see also State v. Roscoe*, 184 Ariz. at 497, 910 P.2d at 648.

¶14 Moreover, in arguing that Defendant "had the police report read to him," the State was insinuating that defense counsel read the report to Defendant. The State "must not make prejudicial insinuations without being prepared to prove them." *State v. Cornell*, 179 Ariz. 314, 331, 878 P.2d 1352, 1369 (1994). In fact, we have found that it is improper for counsel to insinuate that defense counsel fabricated a defense or coached a defendant, in the absence of evidence to support such an inference. *See Hughes*, 193 Ariz. at 86, ¶¶ 59-61, 969 P.2d at 1198 (holding that it is improper to imply an expert witness or defense counsel fabricated an insanity defense); *see also Cornell*, 179 Ariz. at 330-31, 878 P.2d at 1368-69 (holding that it was improper to imply during cross-examination that defense counsel coached the defendant on how to fake epilepsy). Accordingly, the argument was improper and amounts to misconduct.

¶15 We next determine whether this error is fundamental error. *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005); *see also Edmisten*, 220 Ariz. at 524, ¶ 23, 207 P.3d at 777. "Error is considered to be fundamental when it goes to the foundation of the case, takes from a defendant a right essential to the defense, or is of such magnitude that it cannot be said it is possible for the defendant to have had a fair trial." *Cornell,* 179 Ariz. at 329, 878 P.2d at 1367.

¶16 Here, the remarks were made to attempt to convince the jury to disregard any evidence to support Defendant's defense that there might have been an agreement or understanding to have sex in exchange for cocaine. Instead of addressing the evidence and Defendant's closing argument professionally and asking the jury to reject the defense for any number of reasons, including the fact that even if there was an agreement, the victim was always free to change her mind and say "No," the State did what it was alleging Defendant did — concoct a theory without any factual support.

¶17 The lynchpin of the prosecutor's rebuttal closing argument was the theory that the defense was created from the police report. The idea was first suggested by the State during the victim's redirect examination. The prosecutor asked, without any objection, if the victim could explain the basis for Defendant's sex-for-cocaine defense. The victim freely

answered, “I think he read the police report and now the story has come out. That’s what I believe. He had to change direction. . . . It just, it’s a fabricated story.”

¶18 The prosecutor then emphasized the speculation in her rebuttal argument when she stated, “let’s call a spade a spade.” The prosecutor used the speculative fabrication testimony to obfuscate the fact that the victim tested positive for cocaine and other evidence that supported Defendant’s defense. The improper statements were “intended to undermine Defendant’s primary defense.” *Hughes*, 193 Ariz. at 86, ¶¶ 60-61, 969 P.2d at 1198 (holding that where there was evidence to support the defendant’s defense of mental illness and no evidence to support a fabrication of the defense, the misconduct undermined the defendant’s defense). Because the misconduct went to the foundation of the consent defense it denied Defendant the right to a fair trial, and the improper statements were fundamental error. *See State v. Lockhart*, 947 P.2d 461, 465 (Kan. Ct. App. 1997) (holding that because the defendant’s credibility was an issue in the trial the prosecutor’s comments calling the defendant and his counsel liars denied the defendant his constitutional right to a fair trial).

¶19 Once fundamental error is demonstrated, Defendant has to prove that the fundamental error caused him prejudice. *Henderson*, 210 Ariz. at 568, ¶ 26, 115 P.3d at 608. “[T]he

showing required to establish prejudice . . . differs from case to case." *Id.* (citing *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993)). A conviction will be reversed based on improper closing argument comments when there is a "reasonable likelihood that the misconduct *could have* affected the jury's verdict." *Edmisten*, 220 Ariz. at 524, ¶ 23, 207 P.3d at 777 (emphasis added) (internal quotation marks omitted) (quoting *State v. Newell*, 212 Ariz. 389, 403, ¶ 67, 132 P.3d 833, 847 (2006)).

¶20 Generally, we presume that jurors follow closing jury instructions that they have to determine the facts and that what the lawyers said is not evidence; thus, the instructions usually remedy any prejudice. *See generally Newell*, 212 Ariz. at 403, ¶¶ 69-70, 132 P.3d at 847 (holding that the jury instructions negated the prosecutor's improper comments that impugned the integrity of defense counsel); *State v. Anderson*, 210 Ariz. 327, 341-42, ¶¶ 49-50, 111 P.3d 369, 383-84 (2005) (holding that the jury instructions cured the prosecutor's misstatement of the law).

¶21 However, the rebuttal argument in this case is similar to an argument that our supreme court found so improper as to require a new trial. *See Leon*, 190 Ariz. at 162, 945 P.2d at 1293. In *Leon*, during closing argument, the State implied that the police report contained other charges or crimes. *Id.* at

161, 945 P.2d at 1292. Our supreme court found the statements referred to matters not in evidence and included statements the trial court had previously excluded. *Id.* at 162, 945 P.2d at 1293. In responding to the argument that the jury instruction alleviated the prejudice "[c]oncerning the prosecutor's reference to police reports," the court stated, "[u]nfortunately, we cannot be reasonably certain that this instruction was sufficient to eliminate any damage." *Id.* at 163, 945 P.2d at 1294.

¶22 Here, we agree with *Leon* that the general jury instructions were not enough to overcome the prejudice. Our analysis is also supported by cases from other jurisdictions. In *State v. Lockhart*, the Kansas court of appeals had to decide whether the prosecutor's argument that the defendant and defense counsel lied denied the defendant a fair trial, and was reversible error. 947 P.2d at 464-65. The court, after recounting the argument, found that the "statements can only be deemed an appeal to passion and prejudice." *Id.* at 465. The court continued and stated that "[w]e are not convinced that the statements made by the prosecutor would have little weight in the minds of the jury in trying to decide whether [the defendant] was guilty of possession of cocaine with the intent to sell the same. [He] denied possessing the cocaine as well as having any intent to sell any cocaine." *Id.* The court found

that "[the defendant's] credibility was an issue in this trial. The prosecutor's statements would likely have great weight in the minds of the jury in this case. We cannot conclude beyond a reasonable doubt that the prosecutor's comments, calling the defendant and his counsel liars, had no effect upon the jury's verdict." *Id.* The court subsequently ordered a new trial because the State's flagrant argument denied defendant a fair trial. *Id.*

¶23 Similarly, in a Connecticut kidnapping and sexual assault trial, the Connecticut Court of Appeals and Supreme Court found that the prosecution's conduct and argument went too far and reversed the defendant's convictions. *See State v. Beaulieu*, 848 A.2d 500 (Conn. App. Ct. 2004), *overruled on other grounds by* 876 A.2d 1155 (Conn. 2005). In *State v. Beaulieu*, the police officer testified that he thought the victim was credible. 848 A.2d at 510. During closing argument, the prosecutor "improperly bolstered the credibility of the victim" by "assuring the jury that she was there 'to tell the truth.'" *Id.*

¶24 The Connecticut Court of Appeals noted that credibility between the victim and defendant, who did not testify, was the central issue because the State's case was thin. *Id*. at 512. The court reasoned that because the conduct involved the victim's credibility, the pro se defendant's

failure to object and the general instruction "did not remove the deleterious effect of [the prosecutor's] thumb on the scale of credibility." *Id*. at 513. Because the appellate court found that there was other evidence to corroborate the kidnapping, but not the sexual assault, the court reversed only the sexual assault conviction and remanded it for a new trial. *Id*. at 512-14.

¶25 The defendant, but not the State, then appealed to the Connecticut Supreme Court. 876 A.2d at 1158. As a result, the court examined "whether there was a significant difference in the facts and circumstances of the kidnapping conviction to warrant a different result." *Id.* In concluding that the appellate court should have also reversed the kidnapping conviction, the court found that "[j]ust as with the sexual assault charge, the state would not have prevailed on the kidnapping charge if the jury did not believe the victim; her credibility was still the critical issue in the state's case." *Id.* at 1161.

¶26 Here, like *Lockhart* and *Beaulieu*, the critical issue for the jury was credibility. The ultimate issue for the jury was whether to believe the victim or Defendant because there were no witnesses to the assault and the forensic evidence did not disprove consensual sex. Did Defendant sexually assault the victim? Or, did the parties engage in consensual sex-for-drugs?

Because the State improperly depicted Defendant as having concocted a defense from the police report without any evidence that he had read the report, and that argument was ringing in the ears of the jurors as they began to deliberate, we find there is a "reasonable likelihood that the misconduct could have affected the jury's verdict." *Edmisten*, 220 Ariz. at 524, ¶ 23, 207 P.3d at 777 (internal quotation marks omitted) (quoting *Newell*, 212 Ariz. at 403, ¶ 67, 132 P.3d at 847).

¶27 Moreover, because a prosecutor has to seek justice and refrain from using improper methods to obtain a conviction, *see Minnitt*, 203 Ariz. at 440, ¶ 41, 55 P.3d at 783, we will follow supreme court guidance and "reverse a conviction because of prosecutorial misconduct if the cumulative effect of the alleged acts of misconduct 'shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant.'" *State v. Dann*, 220 Ariz. 351, 373, ¶ 125, 207 P.3d 604, 626 (2009) (quoting *State v. Roque*, 213 Ariz. 193, 228, ¶ 155, 141 P.3d 368, 403 (2006)).

¶28 Although the prosecutor may not have intended to unprofessionally prejudice Defendant, her rebuttal argument was improper and reflected indifference to the due process protections of Defendant. Based on the record, Defendant has established that he was prejudiced by the prosecutor's

statements. Therefore, the prosecutorial misconduct warrants reversal of Defendant's convictions and we remand the matter for a new trial.

CONCLUSION

¶29 Based on the foregoing, we reverse Defendant's convictions and remand the case for a new trial.

/s/
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MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Presiding Judge

/s/
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PATRICIA K. NORRIS, Judge