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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
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,) No. 1 CA-CR 09-0499
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
DEVON HOLLAND,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
)
)
)

Appeal from the Superior Court in Navajo County

Cause No. S-0900-CR-0020080702, S-0900-CR-0020080735

The Honorable John N. Lamb, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Suzanne M. Nichols, Assistant Attorney General
Attorneys for Appellee

Roser Law Office PLLC Snowflake
By Samuel J. Roser
Attorney for Appellant

B R O W N, Judge

¶1 Appellant Devon Holland appeals from his convictions for aggravated assault, misconduct involving weapons, assisting a street gang, and escape in the second degree. He argues that the trial court abused its discretion in denying his request for a mistrial based on alleged prosecutorial misconduct. For the following reasons, we affirm.

BACKGROUND

¶2 In June 2006, victims John and Ricardo, who are brothers, were walking home when Holland approached them and asked "What are you doing on my block? This is my block." A fist fight ensued and Holland pulled a gun. Holland pistol-whipped John and then began to pistol-whip Ricardo. Both brothers were able to break away and attempted to flee the scene. Holland fired two shots at the brothers, hitting John in the leg. Ricardo ran home to get help while John sat on the street corner.

¶3 John was taken to the hospital where he was interviewed by Winslow police. John remembered that Holland was "talking some gang stuff" and used the term "Westside." Ricardo later positively identified Holland as the assailant by identifying him in a photo line-up. Ricardo also informed the police that he knew Holland from a prior interaction just days earlier.

¶14 Police were unable to locate Holland for some time after the shooting. An arrest warrant was obtained and after two failed attempts to bring Holland in voluntarily for questioning, Holland was arrested at his home. Following police questioning, Holland, who remained handcuffed, was escorted to a patrol car for transport. As police attempted to place Holland in the back of the patrol car, he fled on foot but was later apprehended. Holland was subsequently indicted for attempted first degree murder, a class 2 felony; two counts of aggravated assault, class 3 felonies; one count of misconduct involving weapons, a class 4 felony; assisting a street gang, a class 3 felony; and one count of escape in the second degree, a class 5 felony.

¶15 At trial, Holland testified in his own defense and denied being involved in the shooting. He conceded that he had attended a barbeque at his mother's house on the day of the shooting, but claimed he had left for Phoenix by the time of the incident. During cross-examination, the State asked about one of Holland's alibi witnesses—his mother. The State asked if Holland knew that his mother had been convicted of hindering prosecution; defense counsel objected prior to an answer being given and then moved for a mistrial. The trial court denied the motion for mistrial, but struck the question and instructed the jury to disregard it. Holland's mother did not testify. Other

witnesses, however, testified that Holland was present at the scene, had committed the offenses, and had a history of threatening witnesses in an attempt to convince them to change their stories.

¶16 Following a three-day trial, a jury found Holland not guilty of attempted first degree murder, the lesser-included offense of attempted second degree murder, and aggravated assault committed against Ricardo. The jury found Holland guilty, however, of aggravated assault committed against John, misconduct involving weapons, assisting a street gang, and escape in the second degree. Holland stipulated to a prior conviction and admitted he was on parole at the time of the incident. He was sentenced to 6.5 years for aggravated assault and assisting a street gang, and 4.5 years for misconduct involving weapons; all to be served concurrently. He was also sentenced to 2.25 years for escape in the second degree, to be served consecutively to the other sentences. Holland filed a timely notice of appeal.

DISCUSSION

¶17 Holland argues that the State committed prosecutorial misconduct when the prosecutor asked him about his mother's alleged prior conviction and thus the trial court erred when it failed to grant a mistrial on that basis. We disagree.

¶18 "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) (citation omitted). In *State v. Hughes*, our supreme court set forth the test for reversal based on prosecutorial misconduct:

[A] defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. 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. To determine whether prosecutorial misconduct permeates the entire atmosphere of the trial, the court necessarily has to recognize the cumulative effect of the misconduct.

193 Ariz. 72, 79, ¶ 26, 969 P.2d 1191 (1998) (citations and internal quotations omitted). The trial court is in the best position to determine the effect of a prosecutor's conduct on a jury; therefore, we will not disturb a trial court's denial of a mistrial for prosecutorial misconduct absent a clear abuse of discretion. *State v. Newell*, 212 Ariz. 389, 402, ¶ 61, 132 P.3d 833, 846 (2006).

In this case, the question at issue occurred during the following exchange between the prosecutor and Holland:

Q: All right . . . [W]ho is Martha Thomas?
A: That's my mother.
Q: Okay. And you told her you were leaving Winslow when you left?
A: Yeah, [] my cousin had let her know. She was on her way from Bingo when my cousin let her know.
Q: Okay. Is she willing to testify to that for you?
A: Pretty sure. She came.
Q: You know that she was convicted of hindering prosecution?

Holland did not answer the question because defense counsel immediately objected. At that point the following side-bar discussion took place:

Defense: Judge, I don't know where he's going or where that's coming from but it's certainly not proper, it's extremely prejudicial.

Prosecution: Well, the hearsay that she [. . .]

Defense: And what in the world does it have to do with this? We move for a mistrial based on his mention of some alleged prior conviction that he's never disclosed to us, even though we did list Martha as a witness.

Prosecution: Right, and her statement that she said that he was out of town came in before where [Holland] said to [his brother]: It looks like you make mom look like a liar because she said I was in Phoenix, trying to impeach that.

Defense: He's never disclosed a prior conviction.

Court: I agree with you . . . I'm not going to call a mistrial, but I'll admonish the jury to disregard[.]

Defense: Judge, we would move to strike that response.

Court: All right, we'll grant that and we'll strike the question that was asked. Do not consider that at all, we are striking that.

The trial continued and no further mention was made of Holland's mother's prior conviction, except that the court later clarified that if Holland's mother did testify, the State could inquire about her prior conviction.

¶10 As recognized by the trial court, the prosecutor's question about whether Holland's mother had been previously convicted of hindering prosecution was improper at that point because she had not yet testified and been examined about her conviction nor had it been established by public record; therefore, raising it for impeachment purposes at this juncture was premature. See Ariz. R. Evid. 609. Regardless of the timeliness of the inquiry, this isolated incident does not rise to the level of prosecutorial misconduct justifying reversal of Holland's convictions.

¶11 Holland does not contend, nor does the record support, a conclusion that the prosecutor intentionally made the inquiry into the witness' prior conviction for the purpose of improperly prejudicing Holland. Instead, the prosecutor explained that he

was attempting to discredit the anticipated corroborating evidence he expected Holland's mother to present.

¶12 In addition, the record does not support a finding that the State's improper question was so "pronounced and persistent that it permeate[d] the entire atmosphere of the trial." *Hughes*, 193 Ariz. at 79, ¶ 26, 969 P.2d at 1191. First, defense counsel objected immediately after the question was raised, Holland never offered an answer, and the subject was never again discussed during the proceedings. Second, the jury acquitted Holland of three of the seven charges against him, including two of the more serious charges and one lesser-included offense. See *State v. Anderson*, 199 Ariz. 187, 193, ¶ 33, 16 P.3d 214, 220 (App. 2000) (finding that a claim of prejudicial impact on the jury is undermined when a jury acquits defendant on some of the more serious charges). Finally, the trial court instructed the jury that it "must disregard [the question] and any answer given" further admonishing that "[a]ny testimony stricken from the court record must not be considered." See *State v. Stuard*, 176 Ariz. 589, 602, 863 P.2d 881, 894 (1993) (finding that potential prejudice of a fleeting mention of an inadmissible matter is mitigated by an instruction to strike testimony and not consider it in deliberations). We presume jurors follow the court's instructions. *State v. Kuhs*, 223 Ariz. 376, ___, ¶ 55, 224 P.3d 192, 203 (2010). The record

supports the conclusion that this was a minor and isolated reference that did not so infect the proceedings as to permeate the entire atmosphere of the trial. Thus, we cannot say the trial court abused its discretion in denying Holland's request for a mistrial.

¶13 Holland also asserts that the State's improper question was so prejudicial that his mother never took the stand and therefore the misconduct effectively precluded him from "collaboration of his alibi defense." The record does not reveal, however, why Holland's mother and at least one other alibi witness were not called to testify. And, even if Holland's mother had testified, consistent with the trial court's ruling, the State would have been able to question her about the prior conviction for hindering prosecution. We therefore reject Holland's assertion that he was precluded from presenting an alibi defense as a result of the improper question raised by the prosecutor.

CONCLUSION

¶14 For the foregoing reasons, we affirm Holland's convictions and sentences.

/s/

MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

JON W. THOMPSON, Judge

/s/

SHELDON H. WEISBERG, Judge