

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



DIVISION ONE
FILED: 07-29-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0524
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
JONATHAN HERNANDEZ-URQUIZA,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-111281-001 DT

The Honorable Arthur T. Anderson, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Katia Méhu, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 Jonathan Hernandez-Urquiza appeals from his convictions and sentences for aggravated assault, a Class 3 dangerous felony, and two counts of forgery, both Class 4 felonies. For the following reasons, we affirm the convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 Hernandez and several other people were together at an apartment late one night; everyone was drinking large quantities of beer. A fight broke out. M.G. pushed Hernandez to the ground, then walked into another room. When M.G. returned several minutes later, Hernandez was waiting for him with a knife and stabbed him two or three times.

¶3 Hernandez was arrested and interviewed by two detectives. During the interview, Hernandez was questioned about a Mexican driver's license, an Arizona identification card and a Social Security card that were found in his wallet.¹ During the exchange, Hernandez stated he was born in Morelos, Mexico. Prior to trial, the State filed a motion *in limine* to

¹ These documents constituted the basis of the forgery charges brought against Hernandez. Although his notice of appeal identified each of the charges on which he was convicted, the only issues Hernandez raises in his brief go to his aggravated assault conviction; he raises no argument concerning his forgery convictions. See *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim.") (citations omitted).

preclude evidence of the immigration status of M.G. or Hernandez. Hernandez did not object to the motion.²

¶4 At trial, the State played portions of the videotaped interview for the jury. While setting up the video player in the courtroom, the prosecutor inadvertently played the segment in which Hernandez stated he was born in Mexico. Defense counsel requested a sidebar conference, which was not put on the record. After the sidebar conference, the following occurred:

THE COURT: I heard a couple of sounds emanating from the computer as counsel was trying to get it set up.

Did anybody hear anything in particular, recognize any words from that computer?

Okay. You did, sir.

Okay. I'm going to instruct you to disregard anything that you heard during the setup. I understand that as he's going through various files and things, that what you may have heard may have nothing to do with this case. And so you should disregard it in its entirety as he's loading up the appropriate items in evidence, because what you heard was not.

JUROR: Okay. Very good.

THE COURT: And please don't share with anyone what it is you did hear. Thank you.

² The record does not reflect that the court granted the motion, but the parties agree it did.

¶15 The rest of the interview was played without incident. At the close of the detective's testimony, the court held another sidebar conference at which the following occurred:

THE COURT: During the -- during the last break, there was a -- a concern mentioned by the defense that a portion of the videotape asked the defendant to identify where he was born, and he mentioned a state of -- in Mexico. There was a motion in limine that dealt with the immigration status of the defendant or any other witnesses. My initial reaction to that was, the question didn't go to immigration status, just where he was born.

I would offer -- and the defense has requested a -- an instruction. This is what I would offer, if you were still wanting me to instruct something.

You have heard the defendant state his place of birth. You are instructed that that information is not relevant to the issues in this case. You should not speculate about the defendant's immigration status -- what the defendant's immigration status might have been.

[DEFENSE COUNSEL]: I was thinking now more in the line of putting -- dumping it in at the end of instructions, just when you read the instructions.

THE COURT: The final instructions?

[DEFENSE COUNSEL]: Just that the immigration status of any witness or the defendant is irrelevant for the purposes of --

THE COURT: Okay.

[DEFENSE COUNSEL]: I don't want to point it out now.

THE COURT: Okay. Because his -- I did not find it in violation of the motion in limine because it just dealt with place of birth. But I could see it kind of leaves that issue open ended. So you don't want to give an instruction now, just leave it for the finals?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: Okay. I'll deal with it that way.

[DEFENSE COUNSEL]: Thank you, sir.

¶16 The final jury instruction concerning the matter stated, "Immigration status is irrelevant to your deliberations and cannot be considered by the jury. You are also instructed not to speculate about the immigration status of anyone in this case." Defense counsel did not object to the instruction as it was given.

¶17 After the jury convicted Hernandez of one count of aggravated assault, the three forgery counts were tried to the court, which convicted Hernandez of two counts. Hernandez was sentenced to a slightly mitigated term of 6.5 years' imprisonment on the aggravated assault charge and a presumptive 2.5 years' term of imprisonment on each of the forgery counts. The sentences were ordered to run concurrently.

¶18 Hernandez timely appealed.³ 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 (2010) and -4033(A)(1) (2010).⁴

DISCUSSION

¶19 On appeal, Hernandez raises several arguments concerning the playing of the interview segment in which he said he was born in Mexico.

¶10 Hernandez first argues the segment of the videotape concerning his place of birth violated the court's ruling on the motion *in limine*. The superior court found, however, and we agree, that the accidental playing of the segment did not violate the ruling on the motion *in limine*. The motion requested the court to preclude "any mention" of "[t]he immigration status of the Defendant, the victim, or any other witness or party to this case." The statement at issue only concerned Hernandez's birthplace; there was no mention of his immigration status.

¶11 Hernandez argues, however, that he was prejudiced because Maricopa County jurors who hear that a defendant was born in Mexico will presume he is in the United States without

³ Hernandez was allowed to file a delayed appeal.

⁴ Absent material revisions after the date of an alleged offense, we cite a statute's current version.

documentation unless they are told otherwise. Even accepting Hernandez's proposition only for purposes of argument, the jury was instructed, in accordance with Hernandez's request, that immigration status was irrelevant to the case and was directed not to speculate about the immigration status of any party. "We presume that the jurors follow instructions." *State v. Kuhs*, 223 Ariz. 376, 387, ¶ 55, 224 P.3d 192, 203 (2010) (citation omitted).

¶12 Hernandez next argues the prosecutor committed prosecutorial misconduct by allowing the jury to hear the statement. Hernandez did not object to the statement at trial on this basis, so on appeal we apply a fundamental error standard of review. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (citations omitted); see *State v. Bible*, 175 Ariz. 549, 572, 600-01, 858 P.2d 1152, 1175, 1203-04 (1993). Fundamental 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." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984) (citation omitted). It is the defendant's burden to show both error and prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607 (citations omitted).

¶13 In reviewing an allegation of prosecutorial misconduct, we consider whether the prosecutor brought information before the jury it should not have heard and whether it is probable the jury was influenced by that information. *State v. Newell*, 212 Ariz. 389, 402, ¶ 60, 132 P.3d 833, 846 (2006) (citation omitted). To require reversal, the prosecutor's conduct must "infect[] 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." *State v. Harrod*, 218 Ariz. 268, 278, ¶ 35, 183 P.3d 519, 529 (2008) (internal quotation and citation omitted).

¶14 Although evidence of Hernandez's birthplace should not have been admitted because it was not relevant to any issue at trial, see Ariz. R. Evid. 402, we conclude the jury could not have been improperly influenced by what it heard, if anything. See *Newell*, 212 Ariz. at 402, ¶ 60, 132 P.3d at 846.

¶15 In the first place, from the record we infer that only one juror heard the statement, and that the statement was nothing more than that Hernandez was born in Mexico.⁵ In short

⁵ During the interview the detective also read Hernandez his rights as a non-citizen of the United States, but there is no indication that this was the segment accidentally played for the jury.

order after the statement was played, the court instructed the juror to disregard what he had heard and not to tell the other jurors about it. The superior court further instructed the jury at the close of evidence that immigration status is irrelevant and not to speculate about immigration status.

¶16 Second, the jury heard a wealth of evidence supporting Hernandez's conviction. M.G. testified that in the initial skirmish, he hit Hernandez but helped him back up before retiring to another room for several minutes to allow everyone to calm down. He further testified that Hernandez said before stabbing him, "No one does something to me and gets away with it." Although Hernandez testified that when the stabbing occurred, M.G. was coming at him angrily and threatening to kill him, the jury heard Hernandez say during his interview that M.G. had started to walk away before Hernandez stabbed him. Hernandez also testified M.G. was threatening him with a broken bottle and had cut Hernandez's finger with it. The prosecutor pointed out that Hernandez did not mention the death threat during the videotaped interview. In addition, during the interview, Hernandez said that M.G. no longer had the broken bottle in his hand when the stabbing occurred.

¶17 For these reasons, and on this record, we conclude that the evidence about Hernandez's place of birth was not so prejudicial that it deprived Hernandez of a fair trial.

CONCLUSION

¶18 For the reasons stated above, we find no error and affirm Hernandez's convictions and sentences.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Presiding Judge

/s/
MAURICE PORTLEY, Judge