DIVISION ONE
FILED: 06-29-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0528
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
ADRIAN RENE LONGORIA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR2008-180235-001 DT

The Honorable Julie P. Newell, Judge Pro Tem

AFFIRMED

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

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

Adrian Rene Longoria — Phoenix
Appellant

T H O M P S O N, Judge

¶1 This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297,

451 P.2d 878 (1969). Counsel for Adrian Rene Longoria (defendant) has advised us that, after searching the entire record, he has been unable to discover any arguable questions of law and has filed a brief requesting this court to conduct an *Anders* review and search the record for fundamental error. This court granted counsel's motion to allow defendant to file a supplemental brief *in propria persona*, and he has done so.

¶2 In his supplemental brief, defendant asks this court to search the record for error with regard to several issues: (1) sufficiency of the evidence; (2) whether an excused state's witness may be recalled as a case agent, subverting the rule of exclusion of witnesses, without prior notice of case agent designation; and (3) whether the prosecutor's comments during closing argument constitute prosecutorial misconduct. We reject the arguments raised in defendant's supplemental brief, and after reviewing the entire record, find no fundamental error. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶3 Defendant was charged by indictment with two counts of aggravated assault, class 3 dangerous felonies; one count of possession or use of marijuana, a class 6 felony; and one count of possession of drug paraphernalia, a class 6 felony. The following

evidence was presented at trial.[1]

¶4 On December 24, 2008, defendant nearly collided with victims L.I. and his passenger, D.F., on Thomas Road near 27th Avenue. L.I. testified that following the near collision he made eye contact with defendant via defendant's rear-view mirror and that defendant was acting in a confrontational manner. L.I., angered by the situation, sped up and moved to the right to pass defendant. Both victims testified that at this point, defendant moved down, picked up a black semiautomatic handgun, and pointed it at them. L.I. then sped up, but kept his eye on defendant's vehicle while he told a 9-1-1 operator what happened. Both cars stopped at Thomas and 59th Avenue where L.I. ran over to a police squad car, notified an officer that defendant had pointed a gun at them, and identified defendant at the intersection. One officer observed a black handgun in defendant's passenger seat area and detained defendant. The other officer secured the handgun and conducted a vehicle search. Both officers testified they smelled marijuana upon approaching the vehicle. The detaining officer found a small amount of marijuana and a glass pipe used for smoking marijuana on defendant's person.

¶5 At trial, both victims testified they believed the

[1] Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark,* 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against defendant. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

firearm was loaded when it was pointed at them. Defendant, who testified on his own behalf, explained that when L.I. drove up next to him, he moved his handgun from the dash to the passenger seat. Defendant further testified that at several intervals from the near collision to the stop at 59th Avenue, he was on the phone with either a family member or his girlfriend.

¶6 During its rebuttal, the state recalled a prior excused witness, Officer Kartchner. The court noted that the witness had been excused and had been present in the courtroom since being excused. The state argued that the prior release of Officer Kartchner was done in error and that he was actually a case agent. The state further argued that no prejudice resulted from prior excusal and subsequent recall of Officer Kartchner. The state had another witness, Officer Gantt, a designated case agent, and after his initial testimony the court did not excuse him, but reminded him that he was subject to recall. Officer Kartchner was released after cross and redirect examination. The court allowed the state to recall Officer Kartchner. Officer Kartchner's rebuttal testimony consisted primarily of impeaching defendant's testimony that the gun had been in the slide-lock back position, and thus unable to fire with a pull of the trigger, since defendant had purchased it.

¶7 During closing arguments, the state referred to defendant's actions and state of mind and then explained, "and

that's why this [sic] is charged with an aggravated assault, not an attempted murder, because clearly all he wanted to do was scare them and not kill them." Defendant objected and the court sustained the objection, striking the comments from the record. The court warned the prosecutor to stay away from vouching or referring to charging decisions.

¶8 A jury found defendant not guilty of aggravated assault on both counts but convicted defendant of two counts of the lesser-included offense, disorderly conduct, a nondangerous felony. The jury also convicted defendant of count 3, possession or use of marijuana, a class 6 felony; and count 4, possession of drug paraphernalia, a class 6 felony. At sentencing, the court designated counts 3 and 4 as class 1 misdemeanors. The court further noted defendant had complied with all his presentence release conditions. The court sentenced defendant to two years supervised probation on all four counts, beginning from the date of sentencing. Defendant timely appealed his conviction and sentence. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) (2003), 13-4031 and -4033(A)(1) (2010).

DISCUSSION

¶9 In *Anders* appeals, we review the entire record for reversible error. *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. Defendant raises three issues, which we consider in turn.

1. Sufficiency of the Evidence

¶10 Defendant claims insufficiency of the state's evidence. The "relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Montano*, 204 Ariz. 413, 423, ¶ 43, 65 P.3d 61, 71 (2003)(quoting *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981)). Here, defendant was convicted of two counts of disorderly conduct, a lesser-included offense of aggravated assault. The jury found, by its unanimous verdict, that defendant intended to disturb the peace of L.I. and D.F., and had the knowledge of doing so when he recklessly handled or displayed the semiautomatic handgun by moving it from his car dash to his passenger seat. *See* A.R.S. § 13-2904(A)(6)(2010).

¶11 It is well-established that the jury, as finder of fact, determines the credibility of witnesses and weighs the evidence. *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995). In general, we defer to the jury's assessment of a witness's credibility and the weight to be given evidence. *See id*. After reviewing the entire record, we find substantial evidence was presented to support defendant's convictions. Accordingly, this claim is without merit.

2. Recall of Officer Kartchner

¶12 Defendant argues it was improper for Officer Kartchner,

who remained present in the courtroom after being previously excused as a witness during the state's case-in-chief, to be recalled as the state's rebuttal witness. Arizona Rule of Evidence 615 provides, "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." Because the state invoked this rule of exclusion at the Trial Management Conference, the exclusion of witnesses during other witness testimony was mandatory. *See* Ariz. R. Evid. 615; *see also* Ariz. R. Crim. P. 9.3(a)("at the request of either party [the court] shall[] exclude prospective witnesses from the courtroom...").

¶13 However, if a witness is "a person whose presence is shown by a party to be essential to the presentation of the party's cause," that witness is exempt from exclusion. Ariz. R. Evid. 615(3). Here, the state argued that Officer Kartchner was its case agent in addition to Officer Gantt. Defendant argues that he was prejudiced by the court allowing Officer Kartchner to testify on rebuttal after hearing testimony from other witnesses, including defendant.

¶14 We find no error in allowing two case agents to testify and be present during defendant's trial. *See State v. Williams*, 183 Ariz. 368, 379-80, 904 P.2d 437, 448-49 (1995)(holding the trial court did not abuse its discretion in allowing two case agents to be present throughout trial under Rule 615 because the

state demonstrated both witnesses were essential to its case). However, on this record, we cannot conclude with certainty that the state demonstrated both officers were essential to the state's case. Our next inquiry, therefore, is whether violation of the rule of exclusion in allowing Officer Kartchner to testify was prejudicial to defendant. Reversible error may only be found where the court abused its discretion, which prejudiced the defendant. *State v. Schlaefli*, 117 Ariz. 1, 4, 570 P.2d 772, 775 (1977)("absent an abuse of that discretion and subsequent prejudice to the defendant, we will not reverse on appeal."); *State v. Perkins*, 141 Ariz. 278, 294, 686 P.2d 1248, 1264 (1984)("we will not interfere with the trial court's decision denying appellant's motions [to strike and preclude testimony] absent an abuse of discretion and evidence of prejudice to appellant's case."), *overruled on other grounds by State v. Noble*, 152 Ariz. 284, 287-88, 731 P.2d 1228, 1231-32 (1987).

¶15 "The violation of the order of exclusion does not in itself make the witness incompetent to testify." *State v. Sowards*, 99 Ariz. 22, 24, 406 P.2d 202, 204 (1965). A mere claim of prejudice by the defense is not enough to meet a showing of prejudice requiring reversal. *See, e.g., State v. Parker*, 22 Ariz. 111, 116, 524 P.2d 506, 511 (App. 1974)(holding no prejudice to the defendant where the defendant claimed that it was prejudicial to allow the officer to testify at the close of State's case).

Defendant has raised the claim of prejudice, but has failed to demonstrate how allowing Officer Kartchner to testify on rebuttal prejudiced his case. In any event, we note defendant cross-examined Officer Kartchner during rebuttal testimony, which suggests no prejudice to defendant occurred.[2] *See Schlaefli*, 117 Ariz. at 4, 570 P.2d at 775 (court holding that, among other things, defendant was not prejudiced because he had opportunity to cross-examine witness who was in violation of the rule).

¶16 We find no abuse of discretion by the trial court nor do we find prejudice to defendant when the court allowed Officer Kartchner to be recalled. Therefore, no reversible error occurred with respect to this issue.

3. State's Closing Argument

¶17 Defendant asks us to review, for error, the prosecutor's comments during closing argument. We interpret this request as a request to review the record for prosecutorial misconduct and improper vouching of the state's witnesses. *See State v. Lamar*, 205 Ariz. 431, 441, ¶ 54, 72 P.3d 831, 841 (2003)("A prosecutor must not convey his personal belief about the credibility of a witness.").

¶18 To secure reversal for prosecutorial misconduct, the

[2] We also note that Officer Kartchner's impeachment testimony was presented for purposes of proving the aggravated assault count, of which defendant was acquitted. Defendant was ultimately convicted of disorderly conduct. The impeachment testimony resulted in no prejudice to defendant.

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." *State v. Roque*, 213 Ariz. 193, 228, ¶ 152, 141 P.3d 368, 403 (2006)(quoting *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998)). We will reverse based on prosecutorial misconduct if two conditions are satisfied: (1) the state's action was improper; and (2) "a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *Montano*, 204 Ariz. at 427, ¶ 70, 65 P.3d at 75.

¶19 Defendant made four objections during the state's closing argument, two of which the court sustained and ordered the statements be stricken from the record. After one objection by the defendant, the court warned the prosecutor not to engage in vouching. Even if the prosecutor's comments were improper, defendant does not explain, and we do not discern, how the state's action prejudiced defendant and deprived him of a fair trial. The court instructed the jury that closing arguments are not evidence and that sustained objections and stricken testimony must not be considered. We presume that the jury follows the instructions of the trial court. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006)). We conclude the prosecutor's comments were not so prejudicial as to deprive defendant of his right to a fair trial.

CONCLUSION

¶20 We have read and considered counsel's brief and have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, defendant was adequately represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits. Pursuant to *State v. Shattuck,* 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), defendant's counsel's obligations in this appeal are at an end.

¶21 We affirm the conviction and sentence.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Presiding Judge

/s/
DIANE M. JOHNSEN, Judge