DIVISION ONE
FILED: 07-22-2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0580
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
	)	(Not for Publication –
AARON TYLER BENENTI,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-129850-001 DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

The Hopkins Law Office, P.C. — Tucson
by Cedric Martin Hopkins
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Aaron Tyler Benenti ("Defendant") appeals from his conviction for aggravated assault following a jury trial and from the sentence imposed. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the verdict. *See State v. Stroud,* 209 Ariz. 410, 412, ¶ 6, 103 P.3d 912, 914 (2005). Defendant was indicted for aggravated assault, a Class 3 dangerous felony. Defendant noticed several defenses, including self-defense and accident. After Defendant failed to appear at a pretrial hearing, the court issued a bench warrant for his arrest and subsequently granted the State's motion to proceed with trial in absentia. The following facts were presented at trial.

¶3 On May 10, 2008, the victim, J. and his friend pulled into a parking lot of a bar and restaurant in Peoria. J. saw three men standing beside a Trailblazer. As they walked past the vehicle, Defendant yelled, "Hey, faggots." J. turned around and said, "Hey, are you talking to me?" Defendant and J. then exchanged words, swore at each other and threatened to fight one another.

¶4 Defendant and his companions, Eric and Aidan, got into the Trailblazer. Defendant told J. and his friend to come over to the vehicle and as they did so, the verbal altercation continued between J. and Defendant. Defendant, who was in the

passenger seat, pulled out a gun and fired a shot. J. was hit in the leg and the penis. Eric, who was the driver, immediately exited the parking lot. Neither J. nor his friend had weapons and J. never threatened to kill Defendant or his companions.

¶5 An employee heard J. yell that he had been shot, called 9-1-1, and Peoria police officers arrived.[1] Officer Fernandez, who was dispatched to the scene, collected evidence, including a shell casing, bullet jacket and bullet.

¶6 Detective Balson obtained a vehicle description and license plate number from J.'s friend, located Eric, and arrested him. At first, Eric denied being at the bar. When the detective accused him of not telling the truth, he said, "I'll come clean." The detective created two photo lineups, one for Defendant and one for Eric. J. was unable to identify either suspect, but J.'s friend indentified Defendant as the shooter and said he was "99.999 percent sure" it was him.

¶7 Under a grant of limited immunity, Eric testified at trial that Defendant had been drinking, started the fight with J. and escalated it by calling him names. He said that he did not see J. with a weapon and that he was not in fear for his life. He testified that the gun belonged to Defendant and that he had never owned one. Eric further testified that after he heard the gunshot and the victim shrieking, he panicked and

[1]The jury heard the tape of the 9-1-1 call at trial.

drove away. He said Defendant told him in the car that "maybe he shouldn't have done that," but turned up the music and "was kind of laughing." Defendant later gave Eric the gun that he used to shoot J.

¶8 After Defendant was arrested, Detective Laing interviewed him. At first Defendant denied knowing anything about the shooting, but then admitted he fired the gun. He said he didn't mean to hurt anyone, didn't know that he hurt anyone and that he just wanted to scare J. He said that J. and his friend instigated the fight and that Eric engaged in the verbal altercation with them. He also said that the gun belonged to Eric, that Eric handed him the gun and that he fired toward the asphalt after Eric told him to "back him [J.] off."

¶9 Defendant admitted, however, that he never saw weapons on J. or his friend. He told the detective that he knew that what he did was wrong, that he wished he had not fired the gun, that it was not a smart thing to do and that it was illegal. He also said he did not feel threatened and did not believe his life was in danger.

¶10 Pursuant to a warrant, Detective Laing searched Defendant's house and found .45 caliber ammunition. The next day, Eric's father gave the detective the .45 caliber handgun used by Defendant.

¶11 Prior to the close of evidence, the judge told counsel he was giving the jury a self-defense instruction, although he didn't see any evidence to support it. He stated that "the only reason I [am] giving a self-defense instruction is because I think the jurors need to understand the law of self-defense." The State agreed.

¶12 The jury found Defendant guilty as charged. The court found three mitigating factors and sentenced Defendant to a mitigated term of imprisonment of five years with 75 days of presentence incarceration credit and ordered him to pay restitution in the amount of $1,896.42. Defendant filed a timely notice of appeal.

¶13 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033 (A) (2010).

DISCUSSION

¶14 On appeal, Defendant argues that both prosecutors engaged in misconduct during closing arguments by improperly appealing to the jurors' passions and fears, showing disrespect to Defendant and defense counsel, and expressing a personal opinion about Defendant's right to advance a defense at trial. Defendant also argues that the cumulative effect of these remarks was so prejudicial that he was denied a fair trial.

¶15 The following were comments made by the prosecutors to which no objections were made. Attorney Heath told the jury that Defendant "doesn't have a self-defense claim. It's ridiculous to even bring it up, because there is no evidence, period, at all, nada, that these people had a gun." During rebuttal argument, Attorney Prichard also told the jury that "the fact that self-defense is actually asserted in this case is an absolute joke. There is nothing to show that it was self-defense in this case, absolutely nothing."

¶16 Referring to the 9-1-1 call, Heath told the jury, "you heard the blood curdling screams in the background. And what was the defendant's reaction . . . [h]e turned up the radio and he laughed. Remember that blood curdling scream . . . and you remember this, he laughed." Heath continued, "send the defendant a message that it's not funny, and nobody is laughing. It's not funny, . . . Tell him a message that he needs to be held accountable for his actions, and he needs to be responsible for what he does, and that he can't evade his responsibility. The way you tell him that is to hold him accountable for what he did." Prichard echoed this theme by telling the jury, "You cannot point and fire a gun at a person and not be held accountable for where that bullet may go. And the state submits to you that the victim demands your justice . . . . The State submits to you that the defendant deserves justice. Do justice.

Hold the defendant accountable for his actions and find the appropriate verdict of aggravated assault, a dangerous offense."

¶17 Defendant objected to a portion of a Prichard's rebuttal closing. In explaining that Defendant had no excuse for his conduct, Prichard said,

> [W]ouldn't it be scary if what [defense counsel] says was the law, if anybody could pull a weapon to a person when they're five to 15 feet away, yelling at you. Wouldn't that be frightening? What kind of society would we live in? And traffic disputes—-you could just pull a gun because someone was yelling at you in the car next to you. Imagine a person fires shots, random shots, in response to an argument because they were angry and hit a three year old, and they could say--

¶18 The court told the jury, "I would remind you, ladies and gentlemen, this is certainly argument. There has been no evidence to that effect." Prichard responded that "[i]n no way am I implying that that happened in this case, ladies and gentlemen. I'm just using a hypothetical." She then continued,

> If you did that, but that person did not have the intent to hurt that child or that person who got injured, then that person could never be held accountable who [sic] fired that gun. And if the person was able to fire a gun in response to yelling, it would be very scary. And if that person wasn't held responsible for where that bullet went, that would be frightening.

¶19 "Wide latitude is given in closing argument, and counsel may comment on and argue all justifiable inferences

which can reasonably be drawn from the evidence adduced at trial." *State v. Dumaine,* 162 Ariz. 392, 402, 783 P.2d 1184, 1194 (1989). "The arguments must 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." *Id.* A prosecutor should not, however, express his or her personal opinion about a defendant's guilt or innocence or attack defense counsel's honesty or integrity during closing argument. *Id.* at 401-403, 783 P.2d at 1183-1185. *See also State v. Van Den Berg,* 164 Ariz. 192, 196, 791 P.2d 1075, 1079 (App. 1990) (improper for prosecutor during closing argument to express his personal opinion as to defendant's guilt or innocence); *State v. Smith,* 182 Ariz. 113, 116, 893 P.2d 764, 767 (App. 1995) (improper for prosecutor during closing argument to tell jury that "defense counsel is a liar"). Also, a prosecutor cannot make arguments that appeal to the fears or passions of the jury. *State v. Comer,* 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). Nonetheless, subject to those limitations, in presenting their closing arguments to the jury, "'excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal.'" *State v. Jones,* 197 Ariz. 290, 305, ¶37, 4 P.3d 345, 360 (2000)(quoting *State v. Gonzales,* 105 Ariz. 434, 436-37, 466 P.2d 388, 390-91 (1970)).

¶20 To warrant a new trial based upon a prosecutor's comments, the remarks must call to the attention of the jurors matters that they would not be justified in considering, and it must be probable that the remarks influenced the jury's verdict. *State v. Hanson,* 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1988) (disapproved on other grounds by *State v. Nordstrom*, 200 Ariz. 229, 241, ¶ 25, 25 P.3d 717, 729 (2009)). Prosecutorial misconduct alone, however does not mandate reversal; it is only required when the defendant has been denied a fair trial as a result of the misconduct. *See id. See also State v. Bolton,* 182 Ariz. 290, 308, 896 P.2d 830, 848 (1995) (reversal on the basis of prosecutorial misconduct must be so "egregious that it permeated the entire trial and probably affected the outcome").

¶21 As to the un-objected-to remarks by the prosecutors, we review solely for fundamental error. *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To establish fundamental error, Defendant must prove that error occurred, that the error "complained of goes to the foundation of his case or takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial," and that such error resulted in prejudice. *Id.* at 568, ¶¶ 23-26, 115 P.3d at 608. In this context, even if a prosecutor's comments are improper, if there is overwhelming independent evidence supporting those remarks, Defendant has not met his

burden of proving prejudice under *Henderson.* *See State v. Morris,* 215 Ariz. 324, 338, ¶ 59, 160 P.3d 203, 221 (2007) (during aggravation phase in death penalty case, although it was improper for prosecutor to single out individual jurors and ask them to volunteer to experience the vicious and inhuman acts committed by the defendant, because of the overwhelming evidence of cruelty, the defendant could not show prejudice).

¶22 Here, as to the comments that the defense of self-defense was “ridiculous” or an “absolute joke," the prosecutors were not expressing a personal opinion about Defendant’s guilt or innocence, nor were they impugning defense counsel’s honesty or integrity; rather they were telling the jury that there was absolutely no evidence presented that Defendant acted in self-defense, a view supported by the record and shared by the judge. Although their remarks were somewhat derisive, they did not rise to the level of fundamental error. As to Heath’s remark about the victim’s “blood curdling scream” and the fact that Defendant laughed afterward, this was a proper comment on the evidence presented at trial. Regarding the prosecutors’ comments about sending a message to Defendant, holding him accountable for his actions and telling the jury to do justice and find him guilty, such comments are not inflammatory or improper. *See State v. Herrera,* 174 Ariz. 387, 397, 850 P.2d 100, 110 (1993) (prosecutor may tell jurors that if they find the state has met

its burden of proof, they have a duty to protect our society and do justice by returning a guilty verdict); *State v. Sullivan,* 130 Ariz. 213, 218-19, 635 P.2d 501, 506-07 (1981)(holding that it was not improper to tell jury to send a message to drug pushers and find the defendant guilty).

¶23 Finally, as to the prosecutor's hypothetical story about a three-year old child being shot to which Defendant objected, the court took remedial action by reminding the jurors that there was no evidence to that effect. The prosecutor followed this up by emphasizing that in no way was she suggesting that this event occurred. The record reflects that the prosecutor was merely using the story to illustrate that even if Defendant did not intend to harm the victim, what he did was dangerous and frightening and that Defendant must held be responsible for the consequences of his acts, whether he specifically intended them or not. In any event, given the overwhelming evidence of Defendant's guilt, any error was harmless beyond a reasonable doubt. *Comer,* 165 Ariz. at 427, 790 P.2d at 347 (although prosecutor's comments exceeded bounds of appropriate closing argument, the error was harmless beyond a reasonable doubt in light of overwhelming evidence of guilt).

¶24 We reject Defendant's argument that the alleged misconduct was so egregious and pervasive, that the cumulative effect of the prosecutor's misconduct deprived Defendant of a

fair trial. *See State v. Hughes,* 193 Ariz. 72, 88, ¶ 74, 969 P.2d 1184, 1200 (1998). Here, the cumulative effect of the comments made by the prosecutors in no way "permeated the entire atmosphere of the trial with unfairness" so as to require reversal. *State v. Roque,* 213 Ariz. 193, 230, ¶ 165, 141 P.3d 368, 405 (2006) (citing *Hughes,* 193 Ariz. at 79, ¶ 25, 969 P.3d at 1191). There was no fundamental or reversible error.

CONCLUSION

¶25 For the forgoing reasons, we affirm Defendant's conviction and sentence.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
MICHAEL J. BROWN, Presiding Judge

/s/_____
JON W. THOMPSON, Judge