DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ERIK WAYNE BROOKS, Appellant.	)	1 CA-CR 09-0837 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-171338-001 DT

The Honorable Maria Del Mar Verdin, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General By Kent E. Cattani, Chief Counsel Criminal Appeals/Capital Litigation Section Attorneys for Appellee	Phoenix
James J. Haas, Maricopa County Public Defender By Terry J. Reid, Deputy Public Defender Attorneys for Appellant	Phoenix

K E S S L E R, Judge

¶1 Appellant Erik Wayne Brooks ("Brooks") was tried and convicted of robbery and aggravated assault. Counsel for Brooks filed a brief in accordance with *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878

(1969). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Brooks was given the opportunity to, but did not file, a supplemental brief *in propria persona*. For the reasons that follow, we affirm Brooks's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶2 Brooks was charged with robbery and aggravated assault in connection with events that took place in November of 2008. Brooks pled not guilty to the charges.

¶3 On November 16, 2008, the victim ("J.V.") checked into a hotel in the Phoenix metropolitan area. That evening, J.V.'s friend S. asked him to jump start her husband E.'s car, which had broken down close to the hotel. J.V. drove his recreational vehicle ("RV") to E.'s location and assisted him in charging the car's battery. E. and his wife then drove back to the hotel, and J.V. followed soon after.

¶4 J.V. pulled into the hotel's parking lot and shut off the engine. As he did so, he heard a noise from inside his RV. J.V. was still seated in the driver's seat when someone came up behind him, placed him in a choke hold, and began punching him in the face. Trapped by his seatbelt and unable to free himself, J.V. laid on his horn to try to get someone's attention. The assailant then released him and J.V. exited the RV.

¶5 Once outside of the RV, the assailant began to charge

at J.V., who stepped back and tripped on the curb behind him. When J.V. fell to the ground, the suspect came towards him and began punching him again. J.V. testified the suspect did not use a weapon during the attack. When the beating stopped, J.V. got up to find his attacker holding his taser; however, it appeared the suspect did not understand what it was or how to use it. J.V. was not able to identify the suspect as his eyes were swollen and it was relatively dark in the parking lot. He did not realize his wallet was stolen until the police later returned it to him at the hospital. J.V.'s taser was never recovered. As a result of the incident, J.V. sustained multiple injuries, including a broken nose, black eyes, and stitches in three difference places.

¶6 Following the attack, E. called the police. At trial, E. testified that the suspect was wearing jeans, a dark sleeve shirt, and a hat; however, after later watching the surveillance video of the incident, E. agreed that he was mistaken as to the color of the suspect's shirt. E. also testified that he believed the suspect to be Hispanic, but after listening to a recording of his 9-1-1 call he acknowledged that he had stated he did not know the race of J.V.'s attacker.

¶7 Officer K. was the first to respond to the scene. After speaking with a witness, Officer K. accompanied Officer A. and his dog Reno on a K-9 track. The K-9 led the officers north to a

black shirt and black hat discarded in the bushes at the side of a residence. The officers notified dispatch of the find and continued north on the track. They soon came across Brooks, who was on his cell phone walking towards them. Officer K. testified that Brooks was wearing a gray shirt and dark pants and had blood on the right side of his face. Officer A. and Reno stayed behind as Officer K. identified himself and asked to speak with Brooks. Brooks ran away from the officers, heading down an alley to the east where he attempted to jump a fence. In response, Officer A. released Reno, who bit Brooks in the hip and pulled him to the ground. The officers then handcuffed Brooks and took him into custody. When they searched him they found brass knuckles, rubber gloves, and J.V.'s wallet (containing $837) in his left rear pocket.

¶8 In June of 2009, a jury convicted Brooks of both robbery and aggravated assault. At the priors trial, the court found the defendant to have two prior historical felony convictions and one aggravator. In addition, the court found that Brooks was on community supervision at the time of the offense. Defense counsel moved for a new trial based on jury misconduct, prosecutorial misconduct, court error, and insufficient evidence. The motion was denied. Brooks was sentenced to the presumptive terms of 10 years for Count 1 and 3.75 years for Count 2 (to run concurrently), with 333 days of

presentence incarceration credit.

¶9 Brooks filed a timely appeal. *See* Ariz. R. Crim. P. 31.3. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(1) (Supp. 2009), 13-4031, -4033(A)(1) (2010).

DISCUSSION

¶10 This court has reviewed the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial. *See State v. Gendron,* 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). In order to obtain a reversal, the defendant must also demonstrate that the error caused prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). On review, we examine the facts in a light most favorable to sustaining the judgment and resolve inferences against the defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

I. SUFFICIENCY OF THE EVIDENCE

¶11 Robbery requires proof that the accused: 1) took the property of another person; 2) the taking was from the victim's person or immediate presence; 3) the taking was against the victim's will; and 4) the accused threatened or used force against the victim with intent to either coerce surrender of

property or to prevent resistance to taking or retaining property. A.R.S. § 13-1902 (2010).

¶12 Here, there is sufficient evidence in the record to support the jury's conviction of Brooks for the crime of robbery. J.V. testified that he was in possession of his wallet when he checked into the hotel, and he did not realize it was missing until it was later returned to him at the hospital. In addition, Officer K. testified that after Brooks was arrested, a subsequent search revealed that he was in possession of J.V.'s stolen wallet. Finally, evidence of J.V. being beaten is found in J.V.'s testimony, E.'s testimony, testimony by each officer who saw J.V. after the event, and photographs taken of the scene.

¶13 Aggravated assault requires proof that the accused: 1) intentionally, knowingly, or recklessly caused a physical injury to another person; and 2) the assaulted person's ability to resist was substantially impaired. A.R.S. § 13-1204 (2010).

¶14 J.V.'s testimony, E.'s testimony, the hotel's surveillance video, and the photographs taken of J.V. and the crime scene, all provided evidence that the suspect punched J.V. both inside of his vehicle, and again outside of it. In listening to the testimony, watching the video, and looking at the photographs, it would be reasonable for the jury to conclude that the act was an intentional one. As a result of the

incident, J.V. testified that he sustained multiple injuries, including a broken nose and two black eyes. In addition, J.V.'s testimony provided evidence that while being beaten in the RV, he was trapped by his seatbelt and unable to move.

¶15 Although there was no direct evidence that Brooks was the suspect who committed both crimes, circumstantial evidence was introduced. The evidence includes testimony that Brooks was found on the K-9 track near the area where the suspect had discarded clothing, testimony that Brooks ran when confronted by the police, testimony that Brooks had blood on the side of his face, and testimony that Brooks was in possession of J.V.'s wallet at the time of his arrest.

¶16 In comparing the evidence in the record to the elements in the statutes, we find there was sufficient evidence to support the jury's conviction of Brooks for both robbery and aggravated assault.

II. PROSECUTORIAL MISCONDUCT

¶17 During the State's closing argument, the prosecutor made statements comparing the color of the suspect's shirt to that of Brooks's shirt at the time of his arrest:

> And you can see plain as day in that video that that person who attacked [J.V.] is not wearing a long, dark-sleeve shirt. He's wearing a long gray shirt.
>
> [Brooks] is wearing exactly what the robber appears to be wearing in the video.

Defense counsel objected, and a bench conference was held. The defense claimed that the State was testifying, and argued that it was impossible to determine the color of the suspect's shirt in the grayscale video. Defense counsel further argued that the statements presented facts not in evidence as none of the witnesses testified that the suspect was wearing a gray shirt. The prosecutor claimed the statements to be argument and not testimony. Following the discussion, the trial court made the following statement to the jury: "...[Y]ou need to rely on what you heard and what you saw in determining what the facts are in this case. This is argument to you, and you are to rely on your own memory of what you saw and what you see."

¶18 Following the jury's guilty verdict, defense counsel moved for a new trial based in part on prosecutorial misconduct. Counsel argued that the statements violated Brooks's right to due process and influenced the jury's verdict. In its response, the State claimed that the prosecutor made arguments based on reasonable inferences from the evidence:

> The surveillance video in question was admitted during trial and showed a male subject who, jurors could reasonably conclude, was wearing a gray shirt. The robber in the video wore a very dark short-sleeved T-shirt over a much lighter colored long-sleeved shirt. The color of that long-sleeved shirt could then be contrasted against the color of the victim's RV, which color photographs showed was white. It was perfectly reasonable for the prosecutor to argue, based on

> the evidence, that the long-sleeved shirt was gray. Defense counsel was free to present his own interpretation of the evidence during his closing argument and argue that the color of the shirt on the tape could not be positively identified because it was in black and white.

The State also argued that even if the statements were improper, there was no evidence that they tainted the entire trial in such a way as to deny the defendant his right to due process. The State further argued that following the bench conference both the prosecutor and the court told the jury they should look at the evidence and decide the color of the suspect's shirt for themselves. Finally, the State listed the additional evidence addressed in the closing statement, and argued that the surveillance video was only "one piece among many that pointed to the Defendant's guilt."

¶19 "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. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (citations omitted). "Misconduct is defined as conduct that '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.'" *State v. Martinez*, 221 Ariz. 383, 393, ¶ 36, 212 P.3d 75, 85 (App. 2009) (quoting *Pool v. Superior Court*, 139

Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984)). Counsel is permitted extensive freedom when presenting closing arguments, but is restricted from commenting on topics that were not introduced into evidence. *State v. Prince*, 204 Ariz. 156, 161, ¶ 23, 61 P.3d 450, 455 (2003). Statements by counsel require reversal when they invite the jury to consider matters that should not be taken into account during deliberation. *State v. Garcia*, 165 Ariz. 547, 553-54, 799 P.2d 888, 894-95 (App. 1990). In other words, "[c]ounsel may not argue to the jury extraneous matters that were not or could not be received in evidence." *Id*. at 554, 799 P.2d at 895 (citing *State v. Neil*, 102 Ariz. 299, 300, 428 P.2d 676, 677 (1967)).

¶20 In this case the State did not present improper arguments to the jury and the statements did not prevent the jury from remaining impartial and fair in considering the evidence. To ensure the jury's ability to judge was not affected, the court addressed them, emphasizing that counsel's statements were argument, and they were to rely on their own memory during deliberation. It is assumed that juries follow instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996); *See also State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006) (Finding that jurors follow instructions, including instructions that closing arguments are not evidence). In addition, the State's case was also

corroborated by other evidence. *See Garcia*, 165 Ariz. at 554, 799 P.2d at 895.

III. JUROR MISCONDUCT

¶21 A hearing was held in September 2009 to evaluate Juror 4 after it was brought to the court's attention that she had met Officer A., one of the witnesses, prior to trial. As a member of the American Legion in Glendale, Juror 4 had helped to raise money to buy vests for two dogs in the K-9 unit. Officer A. and his dog Reno visited the organization to thank them. Juror 4 stated she never spoke with Officer A. personally and did not realize that she had met him until he came to testify.

¶22 The court found that Juror 4: 1) had answered truthfully during voir dire; 2) had not been instructed to notify the court if she later recognized anyone during trial; and 3) would not have been removed had she come forward with the information sooner. Furthermore, Juror 4 testified she did not share the information with other jurors and she remained impartial during deliberations. Based on these findings, the court denied defendant's motion for a new trial.

¶23 In determining whether the empanelment of a juror has denied the defendant a fair trial, "the burden is on the party who claims he was tried by a biased jury to establish that a juror gave improper answers on voir dire or that the selection procedure was somehow discriminatory." *State v. Stolze*, 112

Ariz. 124, 126-27, 539 P.2d 881, 883-84 (1975). In addition, "[a]lthough a juror's failure to disclose knowledge of a witness is a serious matter, it does not automatically require disqualification." *State v. Bible*, 175 Ariz. 549, 574, 858 P.2d 1152, 1177 (1993). After a review of the record, we find the court did not err in its finding against juror misconduct.

CONCLUSION

¶24 After careful review of the record, we find no meritorious grounds for reversal of Brooks's conviction or modification of the sentence imposed. The evidence supports the verdict, the sentence imposed was within the sentencing limits, and Brooks was represented at all stages of the proceedings below. Accordingly, we affirm Brooks's conviction and sentence. Upon the filing of this decision, counsel shall inform Brooks of the status of the appeal and his options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion,

Brooks shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/S/

DONN KESSLER, Judge

CONCURRING:

/S/

MARGARET H. DOWNIE, Presiding Judge

/S/

PETER B. SWANN, Judge