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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 06/14/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
) No. 1 CA-CR 10-1013
)
 Appellee,) DEPARTMENT E
)
 v.) **MEMORANDUM DECISION**
) (Not for Publication -
 ANGELA SUE PERKINS,) Rule 111, Rules of the
) Arizona Supreme Court)
)
 Appellant.)
)
)
)

Appeal from the Superior Court in Mohave County

Cause Nos. CR2009-00871

The Honorable Rick A. Williams, Judge

AFFIRMED

Thomas Horne, Arizona Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

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Attorneys for Appellant

G E M M I L L, Judge

¶1 Defendant Angela Sue Perkins ("Perkins") appeals her

conviction on one count of child abuse by domestic violence, a Class 5 felony. Her sole argument on appeal is that the trial court abused its discretion when it denied her motion for a mistrial based on prosecutorial misconduct. For reasons set forth more fully below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vendeever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

¶13 The victim is Perkins' youngest son, Triston, who was born in 1995. Triston lived with Perkins in a house in Golden Valley, Arizona, and attended Black Mountain Elementary School.

¶14 When Triston was in fourth grade, his older brother moved and conditions at the house began to deteriorate. There were periods when there was no electricity or running water, and Triston would have to get a bucket of water in order to bathe himself or wash his clothing. The house was "filthy" and full of "trash."

¶15 Triston relied on the help of friends and acquaintances who gave him shirts, pants, and socks to wear to school because his mother rarely took him to buy clothing. At times, Triston also had no food to eat because the food in the cupboards was "rotten" or had mold on it and Perkins kept any

food that she bought with food stamps in a mini-fridge that was in her locked bedroom. Triston would occasionally break into Perkins' room in order to get the food in the mini-fridge "because [he] was starving." Black Mountain helped him get food through a "free lunch account," and one of the teachers sometimes gave him food.

¶16 During this period, Triston slept in a closet in his bedroom because he was afraid of Perkins. That was because once, when Triston was in 7th grade, Perkins had "pulled a knife on [him]" and threatened to kill "both of them." Beginning when Triston was about ten years old, Perkins would sometimes tell him to "get out of the house and stay out" and would then lock him out of the house for hours at a time. The longest he had been locked out was two days. Triston was also afraid of Perkins' friends because some of them "threatened to beat [him]" and some "did hurt [him]."

¶17 Triston's 6th grade teacher noticed that Triston smelled when he came into the classroom, and some students in the class complained that "they didn't want to sit near him." The teacher would "Febreze around the classroom and try to be nice about it and not hurt [Triston's] feelings." He and some other school officials then arranged for Triston to use the shower room at the gym before school and also brought Triston clean clothing to wear while they laundered his dirty garments.

If they offered snacks in the classroom, Triston was "one of those students" who was "so hungry" he always accepted them.

¶18 When Triston was in 7th grade, he went to see a guidance counselor and complained that he was "having trouble in school and he was failing and he needed some help." The counselor got him some "assistance and resources that he needed" for school, but as Triston began to feel "more comfortable" with the counselor, he would go to see her to talk "about what was happening in his home." Triston was "visibly upset" about what was going on at his home and described conditions that "concerned" the counselor "about where he was living." The counselor arranged for Triston to obtain a food box every weekend and also made a call to Child Protective Services ("CPS"). At one point, when Triston was "so emotionally distraught" about his home situation, the counselor also gave him her son's telephone number and advised Triston that he should call "if things are going bad" and her son would let him know where she could be reached.

¶19 On March 9, 2009, Triston became "tired of everything that was going on . . . tired of the abuse," so he went to the home of a woman who lived nearby and who also worked at the school and asked for her assistance. She called the police, and Mohave County Sheriff's Deputy P. came to her home and spoke with Triston. As he was speaking with Triston, Deputy P.

received a call from his dispatcher, who informed Deputy P. that he needed to contact Perkins because she had reported Triston as a "runaway." Deputy P. left Triston and drove to Perkins' home.

¶10 As Deputy P. approached the front of the house, he noticed "a substantial amount of trash on the front porch," including "animal feces." After Deputy P. knocked on the door several times, Perkins finally answered but "shut the door behind her." She complained that she was having trouble with Triston and his "not wanting to stay home." When Deputy P. asked Perkins if he could see the inside of the house; she consented, but said that it was "a little messy" and that "she tried her best to clean up but she got no help from Triston." She also stated that "Triston [made] all the mess around here."

¶11 Immediately upon entering the house, Deputy P. noted "a smell of animal feces and just dirt in the air." Deputy P. entered many homes in the course of his daily duties, including "some homes that do smell," but Perkins' house was "by far probably the worst" in which he had been. Among other things, Deputy P. observed trash and clutter on the floor, including trash bags that had been ripped open. In fact, there was so much clutter and trash on the floor that "there wasn't a clear path to walk through." Deputy P. also spotted dog and cat feces throughout certain areas of the house. Perkins informed Deputy P. that she had not had running water in the house "for over a

year."

¶12 When Deputy P. walked into the bathroom in Triston's bedroom, he observed that the toilet was filled with "[b]oth solid and liquid feces . . . that appeared to have been there for some time [because] [t]here was mold built up on the feces." Right next to the toilet was a litter box and next to that pots and pans. It appeared to Deputy P. that "dishes were being done in the actual bathroom tub," however "there were no clean dishes in the actual bathroom at the time." In the closet in Triston's bedroom, which is where Triston had said he had been sleeping, Deputy P. observed "two blankets and a pillow."

¶13 The kitchen was "full of . . . debris . . . [:] [t]he countertop was almost completely full of trash, empty cans, empty bottles[,] [f]ood that had been molded[;] [and there were] . . . [p]ots and pans around the kitchen sink and stove area [that] had mold growing in them." Although there was "a large refrigerator," it was "wide open" and "had no food in it." A "smaller brown mini-fridge" had food in it that was "molding and no good to eat" because it had no power to it.

¶14 Deputy P. did not view Perkins' bedroom that day because the door was locked, and Perkins did not grant him entrance to it. She told Deputy P. that Triston did not have access to her bedroom, and Deputy P. observed that it was "obviously dead-bolted." Perkins also informed Deputy P. that

she "[kept] food in her bedroom[,] behind the dead bolt" in a refrigerator similar to one that was in the kitchen.

¶15 Deputy P. asked Perkins if he could take photographs of the house, but she refused to allow him to do so. Deputy P. returned to the house on March 16 with a CPS worker, and Perkins allowed him to take photographs on that date. At that time, Deputy P. noted some improvement in the interior conditions since his visit on March 9, "but not much." For example, the Perkins' toilet was "full of feces" and appeared to have been "used multiple times without being flushed and had been there for some time."

¶16 The CPS worker who accompanied Deputy P. to the house on March 16 confirmed the conditions inside the house. At trial, she testified that she had seen many "disarrayed houses," but that, compared to the houses she had seen, "[this] was really bad; this was worse."

¶17 The State charged Perkins with one count of child abuse by domestic violence, a Class 4 felony, alleging that Perkins "intentionally or knowingly caus[ed her son Triston] to be placed in a situation where his person or health was endangered." Perkins testified at trial, and blamed the conditions in the home on Triston and his misbehavior, her financial situation, her physical limitations, and various other problems.

¶18 At the conclusion of trial, the jury convicted Perkins of child abuse by domestic violence, a Class 5 felony, finding that Perkins' conduct was "reckless" rather than knowing or intentional as charged. After a separate trial, the jury also found that the State had proven three aggravating factors: (1) Perkins was the victim's mother; (2) Perkins violated a position of trust; and (3) the victim was thirteen years-old at the time of the offense.

¶19 On December 14, 2010, the trial court suspended imposition of the sentence and placed Perkins on probation for a period of three years. It also ordered that Perkins serve 90 days in jail. Perkins timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1)(2003), 13-4031 (2010) and 13-4033 (2010).¹

DISCUSSION

Failure to Grant Mistrial

¶20 Prior to trial, defense counsel filed a motion *in limine* requesting, among other things, that the trial court preclude the State from introducing "any mention of drug use by defendant." The motion noted that "[o]n page 2 of the DRs the alleged victim makes a statement that his mom uses drugs" and

¹ We cite to the current versions of statutes when no revisions material to this decision have occurred since the date of the alleged offenses.

also that "one or both of the CPS caseworkers who may testify in this case have alluded at times to their belief the defendant may have used drugs on occasion." According to defense counsel, however, Perkins never admitted to using drugs and thus "any mention of drug use by the defendant is not rooted in any hard evidence and would simply be a form of improper character assassination."

¶21 During argument on the motion, defense counsel reiterated his argument that evidence of drug use by Perkins "would clearly be inadmissible uncharged misconduct," of which he did not "think there [was] really any factual evidence" to support. The prosecutor agreed that testimony from witnesses who had not seen Perkins use drugs was speculation and not admissible. She also stated that she believed Deputy P. and the CPS worker understood that. However, the prosecutor also argued that "if Triston were to come forward and say that his mom was using drugs out in front of him, leaving drugs out in front of him, or any of those types of allegations, that would be part of this dangerous situation she [was] allowing him to live in" and therefore "relevant."

¶22 The prosecutor explained that, because Triston was represented by counsel, she had not had the opportunity to speak with him at that point, and she did not yet know precisely what Triston was going to say. However, she argued that, if his

testimony was not "mere speculation," it would be admissible at trial. The prosecutor also affirmed that she did not intend to elicit drug testimony from any other State witnesses.

¶23 The trial court asked the prosecutor whether any state agent had interviewed the victim prior to today and whether Triston had, in fact, made any allegations of Perkins' drug use. The prosecutor informed the court that "a patrol officer" had, but the officer had not asked the victim any specific questions on this particular issue that would provide a "legal foundation." Defense counsel did not take issue with the prosecutor's position at the hearing.

¶24 Thereafter, the trial court ruled:

With regard to issue No. 1 regarding any sort of CPS case workers or other witnesses, witnesses other than the alleged victim, it's ordered granting the motion in limine.

It doesn't seem like there's going to be an issue with other possible witnesses testifying about alleged drug use. And whether or not the victim should be allowed to testify or even the victim would testify about that is unknown at this time.

But, again, as far as any other witnesses, that motion is granted.

¶25 During defense counsel's cross-examination of Triston, he asked a series of questions that suggested that the conditions in the home could be attributable to Perkins' mental state at the time. These included asking the victim: (1) if he

remembered telling CPS workers that he thought his mother "was going insane or . . . suicidal"; (2) if his mother appeared to him to be "depressed"; (3) if he knew if his mother took any medication for her depression; (4) if the conditions in the home got worse when his mother was suicidal or depressed; and (5) whether he remembered admitting thinking that his mother "was pretty severely depressed." Counsel also asked a series of questions that suggested that Triston had contributed to the situation by acting out and by not doing his chores as his mother asked.

¶126 During redirect examination, the following exchange occurred between the prosecutor and the victim:

Q. Going back over, you discussed with [defense counsel] that your mom sometimes acted berserk or she was going insane . . .

A. Insane.

Q. - correct? Was there anything that your mom did that caused her to act weird in front of you?

A. Drugs. That was one.

Perkins objected to the line of questioning, noting that the parties had previously discussed the issue and that the trial court had "indicated this is probably an inadmissible area." The trial court dismissed the jury, and the parties discussed the objection further.

¶127 Defense counsel argued that it was his understanding

of the court's ruling on the motion *in limine* that the evidence "would not be elicited at trial," but that "if Triston . . . opened the door[,] . . . brought it up, then he would be allowed to testify to it." As Triston had not mentioned it during cross-examination, Perkins argued the door was not opened and the testimony was inadmissible on redirect. The prosecutor's recollection was that, when they argued the motion, she had not interviewed Triston yet, the court had ruled only that persons who had no knowledge of Perkins' drug use could not testify about it, but that, if Triston had actually seen his mother using drugs, his testimony would be admissible. After speaking with Triston, the prosecutor had learned that Triston had seen Perkins use both marijuana and "methamphetamine . . . a white powder being smoked out of a pipe." She also pointed out that Deputy P. had told her that, when [he] went through the home, there were rolling papers as well as regular cigarette butts, but that "over the stench of the house, he could not determine the smell of the rolled cigarettes."

¶128 The prosecutor also contended that the defense counsel had indeed opened the door when counsel asked Triston about Perkins' mental state during the period in question, going so far as to ask Triston to describe "how she was depressed, how she would act, and how she couldn't keep up with the housework, and that she was threatening of him." The prosecutor argued that

the evidence was relevant and admissible to explain what Triston saw that his mother was doing that caused her to act weird.

¶129 The trial court noted that the State's case was based on allegations of "neglect, living in filth, not having basic amenities." The trial court consequently found that, while the fact that Triston "observed the defendant occasionally use drugs" had "some probative value," that value was outweighed by the "clear prejudice" to Perkins. In so ruling, the trial court noted that the possibility of prejudice in this case was compounded by the fact that Perkins did not have the benefit of a pretrial interview with the victim. It also agreed with defense counsel that the drug evidence was outside the area of direct and cross examinations. The trial court left open the possibility that the evidence might be admissible if Perkins were to take the stand "and talk[] about issues of depression and reasons why perhaps she didn't keep up on the house," but precluded it in the State's case-in-chief.

¶130 Defense counsel did not ask the trial court to strike the testimony or give a curative instruction. The following morning, defense counsel requested a mistrial, arguing that the prosecutor had committed misconduct by knowingly eliciting Triston's drug testimony despite the fact that the trial court had granted the motion *in limine* and precluded the evidence "unless the child brought it up."

¶131 The prosecutor reminded the court that, at the hearing on the motion, the court had precluded testimony by other witnesses but left the question "open" as to Triston's testimony. She also reminded the court that, although the police report indicated that "Triston had seen his mother using drugs," she had not interviewed Triston at the time, which is why the court had left it open. She reminded the court that her question was directly related to Triston's answers to the defense attorney's questions about his mother's depression and erratic behaviors and was therefore relevant to clarifying "things that the defendant was doing to create her mental state."

¶132 The trial court specifically rejected defense counsel's claim of prosecutorial misconduct, stating, "just because I agreed with the defense yesterday and I precluded the State from getting into this area with the victim does not translate [that] it was prosecutorial misconduct for her to attempt to get into this area." The trial court acknowledged that its own pretrial ruling had "[left] the door open to a certain extent" because the court was unsure at the time what the victim's testimony would be. The court also reiterated its earlier reflection that the defense might yet "conceivably open the door" to the testimony should Perkins take the stand and argue that the conditions in the home were just the result "of

some sort of mental or emotional infirmities." In that case, the court reasoned, the testimony would "provide rebuttal evidence" to show that there "may have been some conscious choices on the defendant's part to consume substances" that may have affected her ability to care for her son. Ultimately, the court ruled that "there has not been an instance of prosecutorial misconduct" and denied the motion for mistrial.

¶33 Following the jury's guilty verdict, Perkins moved for a new trial, arguing, among other things, that the prosecutor committed misconduct when she elicited improper evidence in defiance of an order precluding the evidence and also deliberately defied the court's order and elicited the evidence without first obtaining a ruling. At a hearing on the motion, the prosecutor reiterated her previous arguments and her contention that the trial court had ruled that, if Triston saw his mother using drugs, his testimony would be admissible.

¶34 The trial court denied the motion for new trial. The court specifically found that the prosecutor had not been "intentionally trying to circumvent the Court's rulings" by her question and that the question was "proper or was understandable" in light of defense counsel's questions concerning Perkins' "stress" or "mental state" that might explain the conditions of the home.

¶35 On appeal, Perkins argues that the trial court abused

its discretion in denying her motion for mistrial based on the prosecutor's misconduct in intentionally eliciting Triston's testimony about Perkins' drug use in defiance of the trial court's orders. We disagree.

¶136 Prosecutorial "[m]isconduct 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) (citation omitted). Furthermore, "[t]o prevail on a claim of 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.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). To warrant reversal based on prosecutorial misconduct, the misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (citation omitted).

¶137 It is well established that "a declaration of a mistrial is the most dramatic remedy for trial error" that "should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983).

"The trial court is in the best position to determine whether an attorney's remarks require a mistrial, and its decision will not be disturbed absent a plain abuse of discretion." *State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1998). We grant the trial judge broad discretion in such matters "because he is in the best position to determine whether the evidence will actually affect the outcome of the trial." *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). We will reverse a trial court's decision not to grant a mistrial only if that decision is "palpably improper and clearly injurious." *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995) (citation omitted).

¶38 We have reviewed the circumstances surrounding the eliciting of Triston's comment and agree with the trial court that the prosecutor in this case did not commit misconduct. Consequently, we conclude that the trial court did not abuse its discretion in denying Perkins' motion for mistrial and new trial.

¶39 Perkins further contends that the prosecutor "intentionally" elicited the testimony knowing full well that the trial court had ruled it inadmissible, thereby engaging in bad faith misconduct by circumventing the court's order. However, the record plainly does not support this argument. And we note that the trial court appropriately did not credit this

argument.

¶140 The trial court's pretrial ruling specifically granted the motion *in limine* only as to witnesses "other than the alleged victim." In rejecting Perkins' motion for a mistrial, the trial court itself acknowledged that its open ended ruling had "left the door open" as to whether the victim would be allowed to testify to drug use, and, that, in its view, "there [had] not been an instance of prosecutorial misconduct" on the part of the State. Given the trial court's interpretation of its own ruling and of the circumstances surrounding the prosecutor's action, the court did not abuse its discretion in finding no prosecutorial misconduct. See *Hansen*, 156 Ariz. at 297, 751 P.2d at 957 (trial court in best position to determine whether attorney's remarks require mistrial). While, in retrospect, it might have been prudent for the prosecutor to have reviewed Triston's testimony with the trial court once the prosecutor had actually interviewed Triston, clearly the court did not in any fashion view the prosecutor's conduct as a flagrant and improper end run around its prior ruling. Contrary to defendant's contention, we find nothing in this record that supports the claim that the prosecutor engaged in "bad faith intentional misconduct[]" justifying a mistrial and dismissal with prejudice."

¶141 Perkins also asserts that the jury "could have relied"

on evidence of her drug use when it found that she acted with "the greater mental state of recklessness" rather than with the lesser still mental state of negligence. This argument is based on sheer speculation. Perkins points to no support for this argument in the record and we find none.

¶42 Perkins also argues that the testimony was inadmissible character evidence prohibited by Rule 404(b) of the Arizona Rules of Evidence. The trial court specifically rejected this argument when it considered and denied Perkins' subsequent motion for new trial,² finding that Perkins had made no "argument with regard to 404(b) for the instructions" and that, consequently, no limiting instruction was given to the jury. In denying the motion for new trial, the trial court also noted that, in its view, if the question and answer between the prosecutor and the victim was error, it "seem[ed] harmless to the Court."

¶43 We defer to the trial court's findings if they are supported by the record because the trial court is in the best position to assess the atmosphere of the trial and determine whether a particular incident calls for a mistrial. *State v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983). This applies equally where a trial court's ruling is based on the court's

² As with a motion for mistrial, we review the denial of a motion for new trial for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, 10, ¶ 15, 66 P.3d 50, 53 (2003).

assessment of evidence that violates Rule 404(b). *Id.* at 102, 673 P.2d at 300; *State v. Hoskins*, 199 Ariz. 127, 142-43, ¶¶ 55-57, 14 P.3d 997, 1012-13 (2000).

¶44 In the instant case, the trial court's rulings imply that it did not view the evidence as implicating 404(b). We agree. We find it improbable that the jury would have viewed the victim's passing comment as associating Perkins with other criminal activities or bad acts that rendered her guilty of the charged offense because she was essentially an "evil person," as Perkins argues. Certainly the prosecutor never used the statement for that purpose or to suggest that it established a propensity on the part of Perkins to abuse her son.

¶45 Instead, the trial court stated that it "believ[ed] the [prosecutor's] question was proper or understandable" insofar as there had been "questioning ongoing" during cross-examination about Perkins' mental state in order "to try and explain why the home was in the state it was." Under those circumstances, the court reasoned that "the State was allowed to at least attempt to ask the question it did" and, therefore, no prosecutorial misconduct was involved on the part of the State. The trial court repeated its earlier finding that it did "not believe that the State was intentionally trying to circumvent the Court's rulings." The trial court did not abuse its discretion in so ruling.

¶146 It is clear from the record that the prosecutor's question was aimed at responding to defense counsel's suggestion, by his questioning of Triston, that the conditions in the home might be attributable to mental factors outside Perkins' control and not aimed at gratuitously implying that Perkins was "evil." The trial court found the question justifiable for this reason and also not an intentional violation of its orders, which certainly the trial court is in the best position to discern.

¶147 Furthermore, our conclusions are supported by the fact that Perkins did not request either that the trial court strike Triston's answer to the prosecutor's question or that it issue a curative instruction. A mistrial is warranted only where the testimony might have materially influenced the jury's verdict. *State v. Roscoe*, 145 Ariz. 212, 223, 700 P.2d 1312, 1323 (1984). We cannot say that the trial court abused its discretion by failing to grant the mistrial, particularly where, as here, Perkins failed to request some curative measure. *Id.* See also, e.g., *State v. Christensen*, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981) (finding no error in failure to grant mistrial "particularly in the light of the fact that [Perkins] did not move to strike the testimony or request a curative instruction").

CONCLUSION

¶48 For the foregoing reasons, we affirm Perkins' conviction and sentence.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
PHILIP HALL, Judge