FILED BY CLERK
DEC -7 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RUBEN WARREN ZUNIGA, Appellant.	2 CA-CR 2012-0105 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR201001145

Honorable Delia R. Neal, Judge Pro Tempore

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Ruben Zuniga was convicted of aggravated assault and the trial court sentenced him to an enhanced, maximum three-year prison term. On appeal, Zuniga argues the court abused its discretion by denying his request for a mistrial because of prosecutorial misconduct and by imposing a maximum sentence based on improper aggravating factors. For the reasons set forth below, we affirm.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to upholding Zuniga's conviction. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On July 11, 2009, Arizona Department of Corrections (ADOC) Officer Ricky Spurgeon was on duty at the Special Management Unit (SMU) where Zuniga was an inmate. Spurgeon was responsible for escorting inmates to and from various activities, and, on that day, Zuniga informed Spurgeon that he wanted to go the recreation area. Before removing Zuniga from his cell, Spurgeon searched Zuniga's clothes and shoes for contraband and handcuffed his hands behind his back through a trap in the cell door. Once Zuniga was out of his cell, Spurgeon placed his left hand on Zuniga's right-upper forearm and began to lead him down a staircase. As they reached the bottom of the stairs and began to turn a corner, Zuniga broke free from Spurgeon's grasp, moved behind him, and kicked him in the back two times. Spurgeon then turned to face Zuniga and pushed him to the ground. After seeing the incident on a video monitor from the control room, ADOC Officer Nicholas Garcia activated the Incident Command System and a group of officers soon arrived and took control of Zuniga.

¶3 Zuniga was charged with aggravated assault, *see* A.R.S. § 13-1204(A)(10), convicted as charged, and sentenced as described above. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Discussion

Prosecutorial Misconduct

¶4 Zuniga first argues the cumulative effect of multiple instances of prosecutorial misconduct denied him his constitutional right to a fair trial such that a "mistrial was mandated." He maintains the "most pervasive aspect of misconduct" involved the prosecutor's comments about his gang affiliation and the dangerous nature of the SMU where he was housed. He also contends that a prosecution witness impermissibly commented on his decision to exercise his right to remain silent, which "in and of itself, mandates a reversal of [his] conviction." On appeal, our standard of review for each alleged instance of misconduct hinges on whether Zuniga objected at trial. *See State v. Roque*, 213 Ariz. 193, ¶ 154, 141 P.3d 368, 403 (2006). If he objected, the issue is preserved and we review for harmless error; if he failed to object, we review only for fundamental, prejudicial error. *Id*.; *State v. Bocharski*, 218 Ariz. 476, ¶ 74, 189 P.3d 403, 418 (2008).

¶5 "Prosecutorial misconduct '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, and which [s]he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App.

2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To prevail on a claim of prosecutorial misconduct, "[t]he defendant must show that the offending statements, in the context of the entire proceeding, 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d 833, 846 (2006), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). We review for an abuse of discretion a trial court's refusal to grant a mistrial based on alleged prosecutorial misconduct. *Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d at 846.

¶6 Zuniga contends the prosecutor committed misconduct in characterizing the SMU as housing only "extremely dangerous" inmates. The prosecutor described the SMU during her opening statement, elicited a description from Officer Garcia during his trial testimony, and again referred to it in her closing argument. Zuniga did not object to the prosecutor's opening statement or to her examination of Garcia. We therefore review these alleged acts of misconduct only for fundamental, prejudicial error. *See Roque*, 213 Ariz. 193, ¶ 154, 141 P.3d at 403.

¶7 During her opening statement, the prosecutor told the jury Zuniga was housed in the SMU, which she described as a high security "lock-down" unit that allowed only one inmate per cell. She explained the SMU has a central control room with several rows of cells like "spokes of a wheel," noting the purpose of its design is to prevent the possibility of "some sort of revolt." The prosecutor also elicited testimony about the layout and security protocols of the SMU from Garcia. On cross-examination, Garcia stated that Zuniga was housed in a protective custody wing for Zuniga's own protection.

¶8 Contrary to Zuniga's argument, neither of these alleged incidents of misconduct involved the prosecutor or Garcia describing the SMU as housing "extremely dangerous" inmates. Rather, the prosecutor's statement and Garcia's testimony regarding the SMU merely described the scene of the crime and, thus, were relevant. *See State v. Roscoe*, 184 Ariz. 484, 494, 910 P.2d 635, 645 (1996) (crime scene evidence relevant). And, although the evidence potentially was prejudicial because it demonstrated Zuniga was housed in a high-security facility, not all harmful or prejudicial evidence is "unfairly prejudicial" such that it must be excluded. *See State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993); *State v. Machado*, 224 Ariz. 343, ¶ 18, 230 P.3d 1158, 1168 (App. 2010) (evidence not unduly prejudicial because it portrays the defendant in a "bad light" or causes jurors to have adverse reaction). We find no error, let alone fundamental error, in the prosecutor's opening statement or in Garcia's testimony regarding the nature and layout of the SMU. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (first step in fundamental error review is determining if error occurred).

¶9 During closing argument, after stating that Zuniga was housed in the SMU, the prosecutor told the jurors that society should care about this case "if we want to have institutions like prisons, where we put people that we deem to be unfit for society or too dangerous to live in society with the rest of us." Zuniga objected to the remark on the basis it was "improper argument." Following a bench conference held off the record, the prosecutor continued her argument by noting correctional officers have a "tough, dangerous job," and they "go to work every day wearing a stab vest." Because Zuniga

objected to the prosecutor's closing argument, we review for harmless error. *See State v. Dann*, 220 Ariz. 351, ¶ 125, 207 P.3d 604, 626 (2009).

¶10 In determining whether closing arguments are improper, we consider whether the remarks called the jurors' attention to matters they would not be justified in considering. *State v. Gonzales*, 105 Ariz. 434, 437, 466 P.2d 388, 391 (1970) (citation omitted). "[E]xcessive and emotional language" is permissible, "limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury." *Id*. Attorneys are given wide latitude in making their closing arguments. *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). However, they may not make arguments that appeal to the passions, prejudices, and fears of the jury. *Id*.

¶11 Here, although the prosecutor's remarks arguably were intended to appeal to the jurors' emotions, we cannot say they were "so inflammatory, offensive and prejudicial as to require a reversal" under the circumstances. *Gonzales*, 105 Ariz. at 437, 466 P.2d at 391. The prosecutor commented improperly that we use prisons to house inmates deemed "unfit" or "too dangerous" for society, but she did not refer specifically to Zuniga as "dangerous" or suggest his release would pose a danger to society. *See, e.g.*, *State v. Moody*, 208 Ariz. 424, 459, 94 P.3d 1119, 1154 (2004) (improper for prosecutor to appeal to jurors' fears by arguing they should not "cut loose" brutal and vicious murderer). Moreover, the state had already introduced evidence, without objection, that corrections officers who work at the SMU wear stab vests, and, by implication, have very

dangerous jobs. Thus, we conclude the prosecutor's remarks, although inappropriate, did not rise to the level of reversible error.

¶12 Next, Zuniga argues the testimony and argument regarding his gang affiliation amounted to prosecutorial misconduct. Officer Spurgeon testified that during the assault Zuniga said Spurgeon had "disrespected his gang." He also testified that prisoners in nearby cells were shouting encouragement to Zuniga and that they belonged to the same gang. And on redirect examination, the prosecutor asked Spurgeon if he believed Zuniga's gang affiliation was the motive for the assault, but Spurgeon did not answer because the trial court had sustained Zuniga's objection to the question.

¶13 A bench conference was then held outside the presence of the jury regarding several issues, including Zuniga's gang affiliation. During the discussion, Zuniga moved for a mistrial based on "a combination of things," namely, the prosecutor's opening statements regarding the SMU and the testimony regarding Zuniga's gang affiliation. The trial court denied the motion. With respect to Zuniga's gang affiliation, the court ruled Zuniga's statement that Spurgeon had "disrespected his gang" was relevant and admissible but, because of the lack of additional evidence that Zuniga was in a gang and because there was no gang allegation, the state could not argue that Zuniga's motive for the assault was gang related.

¶14 On appeal, Zuniga points to two portions of the prosecutor's closing argument that he contends constituted improper comments on his gang affiliation. In the first statement, the prosecutor said, "Why did he do it? We have a statement that he made that somehow or another it was retaliation for . . . Spurgeon having disrespected

some gang affiliation or association or some friends." In the second statement, made during rebuttal, the prosecutor similarly suggested the motive for the assault was "retaliation for . . . Spurgeon supposedly disrespecting [Zuniga's] gang buddies or gang members or gang associations." Because Zuniga did not contemporaneously object to these statements during closing argument, we review for fundamental error. *See Bocharski*, 218 Ariz. 476, ¶ 74, 189 P.3d at 418.

¶15 As to those portions of the prosecutor's comments where she simply repeated what the evidence showed Zuniga had said, that argument was in full compliance with the trial court's ruling, and we are aware of no authority providing that such statements should or must be precluded from evidence or cannot be commented on during closing arguments. *See State v. Cruz*, 218 Ariz. 149, ¶¶ 50-51, 181 P.3d 196, 208 (2008) (no legal basis for suppressing pre-custody statements made by defendant); Ariz. R. Evid. 801(d)(2)(A) (party admissions not hearsay). However, we agree with Zuniga that the prosecutor violated the court's ruling by suggesting his gang affiliation was the motive for the assault.

¶16 However, we disagree with the trial court's order precluding the state from arguing gang affiliation was a possible motive for the assault because "'motive or lack of motive is a circumstance that may be considered in determining guilt or innocence.'" *State v. Milke*, 177 Ariz. 118, 122, 865 P.2d 779, 783 (1993), *quoting State v. Hunter*, 136 Ariz. 45, 50, 664 P.2d 195, 200 (1983). Here, the particular motive was supported by Zuniga's own words during the assault—that Spurgeon had "disrespected his gang." Accordingly, it was probative to explain what otherwise would appear to have been a

random and unprovoked attack. *See State v. Romero*, 178 Ariz. 45, 52, 870 P.2d 1141, 1148 (App. 1993) (state need not conclusively prove gang ties of defendant or victim for such evidence to be relevant and admissible to show motive). Although we do not condone the prosecutor's disregard of the court's ruling, intentional or otherwise, we find no misconduct related to these arguments because we cannot say they "called to the jury's attention matters it should not have considered in reaching its decision." *Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d at 846.

¶17 Finally, the third area of purported misconduct relates to what Zuniga characterizes as an "improper comment on [his] right to remain silent." The incident occurred when the prosecutor was questioning an ADOC investigator and the following exchange took place:

> Q. . . . . And did the defendant after you read him his Miranda warnings, did he make any statements to you relevant to anything that had taken place?
>
> A. He stated several things. One, first off, was I don't want to talk to you . . . .

During an off-the-record bench conference, Zuniga apparently moved for a mistrial. That motion was renewed and placed on the record the following day. In response to the motion, the prosecutor maintained that she had instructed the investigator, prior to taking the stand, that he should not refer to the "I don't want to talk to you" statement. She stated that she instead was trying to elicit from him two other statements Zuniga had made spontaneously after he was advised of his rights under *Miranda* that were not in

response to any question.[1] The prosecutor pointed out that the question she asked the investigator was pretty specific and clearly intended to elicit Zuniga's statements related to the incident, not his statement invoking his right to remain silent.

¶18 Zuniga does not cite, nor have we found, any authority supporting his apparent suggestion that an unexpected and inappropriate statement by a witness for the state should be attributed to the prosecutor and treated as prosecutorial misconduct. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall contain citations to authority). Zuniga does not allege that the prosecutor purposefully elicited the statement or that it was "calculated to direct the jury's attention to [his] exercise of his [F]ifth [A]mendment privilege." *State v. Gillies*, 135 Ariz. 500, 510, 662 P.2d 1007, 1017 (1983). Nor does Zuniga argue the state failed to adequately warn the witness not to give the testimony. *See State v. Brewer*, 110 Ariz. 12, 16, 514 P.2d 1008, 1012 (1973). In fact, during argument on the motion for a mistrial, Zuniga acknowledged the conduct was unintentional. Thus, we find no misconduct on the part of the prosecutor. *See Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27.

[1]Before Zuniga's first trial, which ended in a mistrial when the jury was unable to reach a verdict, the trial court apparently precluded from evidence Zuniga's statements to investigators both before and after he had been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Zuniga now contends the prosecutor blatantly violated that order by eliciting the above testimony, contending "[t]he state should not have even questioned [the investigator] about the *Miranda* warnings or [Zuniga's] statements." However, at the start of the second trial, as the state points out, contrary to Zuniga's suggestion, the court did not adopt all prior rulings. Rather, it precluded only Zuniga's pre-*Miranda* statements and allowed the state to introduce testimony of spontaneous post-*Miranda* statements Zuniga had made that had not been in response to a question. As we discuss, the state did not violate the court's ruling.

¶19 In sum, we find in reviewing the alleged incidents of misconduct separately, either that no error occurred or that no error amounting to prosecutorial misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d at 846, *quoting Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191. Likewise, the cumulative effect of the incidents does not demonstrate that the prosecutor acted "'with indifference, if not a specific intent, to prejudice the defendant.'" *Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d at 403, *quoting Hughes*, 193 Ariz. 72, ¶ 31, 969 P.2d at 1192.

Aggravating Factors

¶20 Zuniga next argues "the trial court imposed a maximum sentence based upon improper aggravating factors." He contends the five aggravating factors found by the court were afforded too much weight, improper, or not supported by the evidence. "A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003).

¶21 During sentencing, the trial court found the following aggravating factors: Zuniga's prior felony conviction; his violent past; he had committed the present offense while in prison; his actions were unprovoked and without reason; and he failed to benefit from past lenient treatment. The court found no mitigating circumstances and imposed the maximum, but not the aggravated, term pursuant to A.R.S. § 13-703(I).

¶22 Zuniga first maintains that two of the aggravators—Zuniga's prior felony conviction and his violent past—"should have been accorded little or no weight" because his prior felony conviction "form[ed] the basis" for the current charge of aggravated assault by a prisoner.[2] *See* A.R.S. § 13-1204(A)(10). Zuniga cites no authority, and we are aware of none, for the proposition that these are inappropriate aggravating factors. Indeed, Zuniga's prior felony conviction was a statutorily enumerated aggravating circumstance, A.R.S. § 13-701(D)(11), and, once found, the court had discretion to consider additional aggravating circumstances, § 13-701(F). *See also State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005). The weight to be accorded such factors was within the sound discretion of the trial court. *State v. Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d 451, 456 (App. 1998).

¶23 Zuniga also argues that two of the factors—that his actions were unprovoked and that he had not benefitted from past lenient treatment—were not supported by the evidence. As to provocation, Zuniga asserts the state's theory of the case—that he was retaliating against Spurgeon for disrespecting his gang—demonstrates that the assault was provoked. But regardless of Zuniga's motive for the assault, the court's finding that the assault was "unprovoked and without reason" was nonetheless supported by the evidence. *See State v. Manzanedo*, 210 Ariz. 292, ¶ 16, 110 P.3d 1026,

[2]Although Zuniga did not object during sentencing, in *State v. Vermuele*, 226 Ariz. 399, ¶ 6, 249 P.3d 1099, 1101 (App. 2011), this court held the defendant had not forfeited his sentencing error claims "[b]ecause a trial court's pronouncement of sentence is procedurally unique in its finality under our rules . . . and because a defendant has no appropriate opportunity to preserve any objection to errors arising during the court's imposition of sentence." Thus, this argument has not been forfeited.

1030 (App. 2005) (aggravating factor of "unprovoked and unreasoning nature" of crime permissible if supported by reasonable evidence). And as to his failure to benefit from past lenient treatment, the presentence report indicates that Zuniga accepted a plea agreement on his prior second-degree murder conviction, pursuant to which certain charges and allegations against him were dismissed. Thus, although he received a slightly aggravated sentence on that charge, he also received lenient treatment, and his failure to benefit from such treatment was a permissible factor to consider in aggravation. *See* § 13-701(D)(24).

¶24 Finally, citing *State v. Gillen*, 171 Ariz. 358, 830 P.2d 879 (App. 1992), Zuniga contends it was improper for the trial court to consider that the crime was committed in prison as an aggravating circumstance, because that was "an essential and irreducible element" of the offense with which he was charged. *See* § 13-1204(A)(10) (assault is aggravated if committed while the person is in custody and against person acting in official capacity). This court previously has held that an element of a crime can only be used as an aggravator when it is one of those aggravators specifically enumerated in § 13-701(D)(1) through (23). *See State v. Germain*, 150 Ariz. 287, 290, 723 P.2d 105, 108 (App. 1986); *State v. Alvarez*, 205 Ariz. 110, 113-14, 67 P.3d 706, 709-10 (App. 2003). Here, the aggravator in question is not specifically enumerated and therefore necessarily falls under the catchall provision of § 13-701(D)(24). Thus, we agree with Zuniga that the court improperly considered it.

¶25 In this case, however, we need not remand for resentencing because we conclude the trial court found "sufficient and appropriate aggravating factors to justify

imposition of [the] . . . sentence[],” and the sentence is within the statutory range. *State v. Gillies*, 142 Ariz. 564, 573, 691 P.2d 655, 664 (1984). We agree with the state that pursuant to § 13-701(F) an aggravated sentence was mandated. Moreover, because the court found four proper aggravating factors, and no mitigating factors, it would have been justified in imposing the aggravated maximum pursuant to § 13-703(K) but instead imposed a sentence on the lower end of the available range. *See* § 13-703(I). Thus, we find no abuse of discretion in the sentence imposed.

Disposition

¶26 For the reasons set forth above, Zuniga’s conviction and sentence are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge