

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JASON DARRELL KUNK,
Appellant.

No. 2 CA-CR 2016-0190
Filed December 27, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County

No. CR20154027002

The Honorable Richard D. Nichols, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Nicole Farnum, Phoenix
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, appellant Jason Kunk was convicted of aggravated assault with a deadly weapon or dangerous instrument, a class three felony, a repetitive offense based on two historical prior felony convictions, and misdemeanor assault. On appeal, he contends the prosecutor committed misconduct by indirectly commenting on his failure to testify and suggesting he had a prior felony conviction, thereby depriving him of a fair trial. We affirm for the reasons stated below.

¶2 Viewed in the light most favorable to sustaining the verdicts, the evidence and reasonable inferences therefrom established the following. *See State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). Gabriel Ortiz, Kunk's codefendant, and B.G., became involved in a verbal altercation, which appeared to be resolved after B.G. showed Ortiz he had a pocket knife and the two men shook hands. Ortiz left the scene but returned with Kunk, and the three men began fighting; Kunk repeatedly hit B.G. in the head with a handgun, and Ortiz and B.G. wrestled. Kunk and Ortiz were charged with aggravated assault with a deadly weapon or dangerous instrument based on the blows to B.G.'s head, aggravated assault causing temporary but substantial disfigurement based on a laceration B.G. sustained when struck with the gun, aggravated assault with a deadly weapon based on the allegation that at one point Kunk had pulled the trigger of the gun but no shot was fired, attempted armed robbery, and aggravated robbery based on the allegation that Ortiz had taken a necklace from around B.G.'s neck. The trial court granted Kunk's motion for a judgment of acquittal as to the attempted armed robbery and aggravated robbery charges, pursuant to Rule 20, Ariz. R. Crim. P. The jury was unable to reach a

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verdict on the charge of aggravated assault based on Kunk having pulled the trigger of the gun, and the court declared a mistrial on that charge. The jury found Kunk and Ortiz guilty of simple assault, a lesser-included offense of aggravated assault based on the head laceration, and aggravated assault with a deadly weapon or dangerous instrument based on the blows to B.G.'s head with the handgun.

¶3 Neither defendant testified. B.G. testified, however, and, in an apparent attempt to draw the proverbial sting of his prior felony conviction, the prosecutor asked B.G. about it during direct examination. B.G. admitted he had been convicted of a felony in 2006, when he was sixteen years old. During cross-examination, B.G. repeatedly admitted he was "a convicted felon." In an apparent attempt to mitigate any impeaching effect of the repeated references to the conviction during cross-examination, the prosecutor noted those references on redirect examination, stating, "You understand because you're on the witness stand, we get to ask you that question." B.G. said he did understand and, through the prosecutor's questions, was able to emphasize B.G. had been sixteen years old at the time.

¶4 During closing argument, the prosecutor reviewed the evidence and, in the context of addressing whether the defendants could have acted in self-defense, the prosecutor turned to the issue of B.G.'s credibility based on the felony conviction and his appearance. The prosecutor argued that B.G. was entitled to protection under the law even if the jury thought he was "a piece of crap." He stated: "So you might see him and you might see tattoos in the photographs. [B.G.], when he's 16 years old, was convicted of a felony. He took the stand, so we were able to ask him about that. And he admitted to it." Noting defense counsel had referred to this felony "six or seven times," the prosecutor commented, "He wasn't trying to hide from that. You get to weigh credibility. And he was completely open and straightforward with every aspect of it."

¶5 On appeal, Kunk contends for the first time that the prosecutor's statement during closing argument suggested to the jury that Kunk "had a criminal record that they did not get to hear about because [he] did not 'take the stand.'" He argues the state

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deliberately “drew the jury’s attention to the fact that [he] did not testify” and insinuated Kunk chose not to testify “because he was a convicted felon,” asserting “[t]here was no other arguable reason for making the comment.” Conceding he did not object below, Kunk asserts that this was a comment on his constitutional right not to testify and resulted in fundamental error that was prejudicial because it denied him his constitutional right to a fair trial.

¶6 A defendant who fails to assert an objection in the trial court forfeits the right to relief for all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Error may be characterized as fundamental if it goes “to the foundation of the case” and is “of such magnitude that defendant could not possibly have received a fair trial.” *State v. Rutledge*, 205 Ariz. 7, ¶ 32, 66 P.3d 50, 56 (2003), quoting *State v. Hughes*, 193 Ariz. 72, ¶ 62, 969 P.2d 1184, 1198 (1998).

¶7 To obtain reversal of a conviction based on prosecutorial misconduct, a defendant must show the challenged behavior amounted to misconduct and there is a reasonable likelihood that it “could have affected the jury’s verdict, thereby denying defendant a fair trial.” *State v. Morris*, 215 Ariz. 324, ¶ 46, 160 P.3d 203, 214 (2007), quoting *State v. Anderson*, 210 Ariz. 327, ¶ 45, 111 P.3d 369, 382 (2005). “The prosecutor who comments on defendant’s failure to testify violates both constitutional and statutory law.” *Hughes*, 193 Ariz. 72, ¶ 63, 969 P.2d at 1198; see also U.S. Const. amend. V; Ariz. Const. art. II, § 10; A.R.S. § 13-117(B). A prosecutor’s improper comment on the defendant’s failure to testify can be harmless error in some cases and fundamental error in other cases. *Hughes*, 193 Ariz. 72, ¶ 63, 969 P.2d at 1198. “To be improper, ‘the prosecutor’s comments must be calculated to direct the jurors’ attention to the defendant’s exercise of his fifth amendment privilege.’” *Id.* ¶ 64, quoting *State v. McCutcheon*, 159 Ariz. 44, 45, 764 P.2d 1103, 1104 (1988). The comments “must be examined in context to determine whether the jury would naturally and necessarily perceive them to be a comment on the failure of the defendant to testify.” *Id.*, quoting *State v. Schrock*, 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986). “To be constitutionally proscribed, a comment must be adverse; that is, it must support an unfavorable inference against the

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defendant and, therefore, operate as a penalty imposed for exercising a constitutional privilege.” *State v. Mata*, 125 Ariz. 233, 238, 609 P.2d 48, 53 (1980).

¶8 Viewed in the context in which the prosecutor made it, the comment during closing argument related solely to B.G. and his criminal record and did not appear to be “intended to direct the jury’s attention to the defendant’s failure to testify.” *State v. Sarullo*, 219 Ariz. 431, ¶ 24, 199 P.3d 686, 692 (App. 2008). Again, the prosecutor appears to have been attempting to mitigate any negative effect the prior conviction would have had on the jury’s assessment of the victim’s credibility. The prosecutor explained to the jury that because B.G. testified, the state had the chance to ask him about his prior conviction; the prosecutor made the point that, through this line of questioning, the state had been able to show B.G. was forthcoming about that conviction, had admitted it openly, and was young when he committed the offense. As we noted above, the prosecutor had already made the statement directly to B.G. while questioning him, explaining to B.G., and therefore, the jury, that it was appropriate for the attorneys to ask him about the prior conviction. Neither below nor on appeal did Kunk object to this first comment. Kunk has failed to establish the prosecutor was guilty of misconduct; therefore, we see no error, much less error that could be characterized as fundamental and prejudicial.

¶9 For the reasons stated, we affirm the convictions and the sentences imposed.