IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LANCE SHORTMAN, *Appellant*.

No. 1 CA-CR 21-0354
FILED 12-29-2022

Appeal from the Superior Court in Maricopa County
No. CR2018-148008-001
The Honorable Laura Johnson Giaquinto, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Andrew Reilly
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Aaron J. Moskowitz
Counsel for Appellant

OPINION

Vice Chief Judge David B. Gass delivered the opinion of the court, in which Presiding Judge Samuel A. Thumma and Judge Cynthia J. Bailey joined.

G A S S, Vice Chief Judge:

¶1 Lance Shortman appeals his convictions and sentences for two counts of aggravated driving under the influence of alcohol (DUI) and one count of failing to remain at the scene of a crash resulting in vehicle damage. Because we find no reversible error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 This court recounts the facts in the light most favorable to sustaining the verdicts and resolves all reasonable inferences against Shortman. *See State v. Stroud*, 209 Ariz. 410, 412, ¶ 6 (2005).

¶3 One early evening in September 2018, the victim stopped his car in a left-turn lane at a busy intersection in Maricopa County. After the left-turn arrow turned green, the victim started turning left. Shortman was driving his van in the opposite direction, ran the red light, and crashed into the victim's car. The victim did not sustain serious injuries, but the crash disabled his car. Shortman fled the scene.

¶4 Another driver saw the crash and followed Shortman while calling the police. Shortman eventually stopped at an apartment complex about 2.5 miles from the crash. A police officer arrived and found Shortman inspecting the damage to his van. Shortman told the officer he "ran into" a stop sign. Shortman also told the officer he was driving on a "somewhat" suspended license. Shortman later admitted he was involved in a car crash and left the scene, but he said the other car "cut him off" and caused the crash.

¶5 Shortman showed signs of impairment and also admitted drinking a few beers that day. The officer arrested Shortman and secured a warrant to draw his blood. Testing and retrograde analysis revealed Shortman had a blood alcohol concentration between .163 and .179 within two hours of the crash.

¶6 The State charged Shortman with two counts of aggravated DUI, both class 4 felonies, and one count of failing to remain at the scene of a crash resulting in vehicle damage, a class 2 misdemeanor. The State also alleged Shortman was on felony probation when he committed the offenses.

¶7 In June 2021, the superior court conducted a six-day jury trial. Over Shortman's objection, the superior court seated some jurors in the gallery behind the State to allow for social distancing during the COVID-19 pandemic.

¶8 The jury convicted Shortman on all counts. The jury also found Shortman committed the offenses while on felony probation. *See* A.R.S. §§ 13-708.C, -604.B.4. The superior court imposed presumptive concurrent 2.5-year prison terms for the felony DUI convictions, and a concurrent two-month jail term for the misdemeanor failing to remain at the scene of a crash resulting in vehicle damage. *See* A.R.S. §§ 13-702.D, -707, -708.C, -604.B.4.

¶9 Shortman timely appealed. This court has jurisdiction under article VI, section 9, of the Arizona Constitution, and A.R.S. §§ 13-4031 and -4033.A.1.

ANALYSIS

I. Seating of Jurors

¶10 Shortman argues the superior court abused its discretion when it seated some jurors in the jury box and others in the gallery behind the State, an argument he timely pressed with the superior court. Because no jurors sat behind the defense, Shortman argues "the courtroom atmospherics tilted in favor of the State, risking an unfair trial that served no essential state interest." Shortman points to no specific trial event to show the seating arrangement caused prejudice. Instead, he argues the seating arrangement was "inherently prejudicial."

¶11 This court generally reviews the superior court's decisions regarding jury issues for abuse of discretion. *See State v. Glassel*, 211 Ariz. 33, 47, ¶ 46 (2005) (reviewing a motion to strike a jury panel for abuse of discretion); *State v. Hurley*, 197 Ariz. 400, 402, ¶ 9 (App. 2000) (reviewing a jury instruction decision for abuse of discretion); *Hedlund v. Sheldon*, 173 Ariz. 143, 143 (1992) (reviewing a superior court judge's decision to employ dual juries for abuse of discretion). An "abuse of discretion" is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Tilley v. Delci*, 220 Ariz. 233, 238, ¶ 16 (App. 2009). Additionally, superior courts generally have "broad discretion over the management of a trial." *Gamboa v. Metzler*, 223 Ariz. 399, 402, ¶ 13 (App. 2010); *see also* Ariz. R. Evid. 611(a). The superior court did not abuse its broad discretion in Shortman's case.

¶12 In 2020, the Maricopa County Superior Court's Criminal Division issued and then revised trial practices and procedures to ensure the safety of all individuals participating in criminal trials during the COVID-19 pandemic (COVID Trial Practices). *See* The Judicial Branch of Arizona—Maricopa County—Criminal Department Socially-Distanced Trial Practices and Procedures (2020). The COVID Trial Practices in place at the time of Shortman's trial required the superior court to ensure jurors were socially distanced and masked in the jury box and in the "gallery (prosecution side)[.]" *Id.* at 7.

¶13 To analyze the risk of an erroneous decision, this court considers the specific circumstances and procedural safeguards implemented in each case. *Tracy D. v. Dep't of Child Safety*, 252 Ariz. 425, 434, ¶ 35 (App. 2021). Trial courts, however, are in the best position to assess safeguards. *Id.* at 435, ¶ 39; *see also Commonwealth v. Delmonico*, 251 A.3d 829, 842 (Pa. Super. Ct. 2021) (holding trial court did not abuse its discretion by requiring jurors to wear masks and practice social distancing because the decision was based on the "essential demands of fairness" and adhered to the state supreme court's orders).

¶14 The pandemic forced superior courts hearing criminal trials to balance public safety against the need for a speedy trial, the preference for in-person testimony, and the reliability of evidence. *Cf. Tracy D.*, 252 Ariz. at 432–35, ¶¶ 27–40 (discussing the tension between timely in-person hearings and due process in the context of terminating parental rights); *see also* Christopher Robertson & Michael Shammas, *The Jury Trial Reinvented*, 9 TEX. A&M L. REV. 109, 123 (2021) (suggesting the pandemic put the need for speedy trials in tension with the need for in-person trials). *Tracy D.* explained, "as to the risk that the procedures used will lead to erroneous decisions, we look to the specific circumstances of the case, including any procedural safeguards provided." 252 Ariz. at 434, ¶ 35. To do so here, the superior court implemented the safeguards prescribed by the COVID Trial Practices by separating the jury into two groups: one in the jury box and one in the gallery behind the State. Shortman has not shown the superior court erred or deprived him of any right when it followed the COVID Trial Practices.

¶15 Shortman cites no controlling authority, or facts in the record, to suggest the seating arrangement "conveye[d] alignment with the prosecutor" or was otherwise inherently prejudicial. Instead, Shortman relies on a dissent discussing "inherently prejudicial" trial procedures in *Coy v. Iowa*, 487 U.S. 1012, 1034 (1988) (Blackmun, J. dissenting). Because the United States Supreme Court did not adopt the standards laid out in the

dissent, the dissent does not bind this court here. *See State v. Bush*, 244 Ariz. 575, 597, ¶ 101 (2018).

¶16 Shortman then offers only vague references to "courtroom atmospherics tilted in favor of the State" and "convey[ing] alignment with the prosecutor." Those vague references do not negatively implicate Shortman's presumed innocence. The superior court repeatedly instructed the jury it had to presume Shortman innocent and the State bore the burden to prove Shortman's guilt beyond a reasonable doubt. We presume the jury followed those instructions. *See State v. Newell,* 212 Ariz. 389, 403, ¶ 68 (2006).

¶17 Though Arizona's appellate courts have not faced this precise issue in the criminal context, other courts have. *See Commonwealth v. Davis*, 273 A.3d 1228 (Pa. Super. Ct. 2022); *People v. Bogan*, No. 355649, 2022 WL 815371 (Mich. Ct. App. March 17, 2022) (unpublished per curiam opinion); *United States v. Holder*, No. 18-cr-00381-CMA-GPG-01, 2021 WL 4427254 (D. Colo. Sept. 27, 2021) (unpublished order). In each case, the trial court followed the applicable COVID-19 pandemic-based protocols involving jury seating in the gallery among other social-distancing procedures. And in each case, the relevant court found the protocols did not violate the defendant's right to a fair trial because each defendant—like Shortman here—could not establish the protocols compromised the trial's fairness, or the juror deliberations or verdicts.

¶18 *Davis* is particularly instructive. 273 A.3d 1228. In *Davis* and this case, jurors sat in the gallery and the defendant sat at the counsel table. *Id.* at 1241–42. This setup placed the parties in their typical positions—with the State closest to the jury and the defendant further away. *See id.* As *Davis* recognized, the layout was not ideal, but it "presented the most practical and effective accommodations for the jury and witnesses." *Id.* at 1242. And jurors could see and hear the witnesses. *Id.* In *Davis*, as here, the trial court "reflected careful consideration of governing safety and health measures." *See id.* Additionally, like the defendant in *Davis*, Shortman "has failed to demonstrate any prejudice, including that the jury was not fair and impartial as a result of the social distancing protocols." *See id.*

¶19 Because the record does not show the seating arrangement was inherently prejudicial, this court need not address whether it lacked an essential state interest. And because the superior court followed the COVID Trial Practices, the superior court did not act arbitrarily or capriciously. *See id.* Though the protocols may not have allowed for a perfect layout, Shortman received a fair trial "in a solemn, disciplined courtroom where

the search for truth and justice is unhampered by any feelings of fear, intimidation or revenge." *State v. Bush*, 148 Ariz. 325, 330 (1986).

II. Prosecutorial Error

¶20 Shortman contends the State denied him a fair trial when it cumulatively engaged in multiple instances of "prosecutorial misconduct" related to video evidence, vouching, and the admission of a blood kit. Shortman, however, does not argue the State acted unethically. The Arizona Supreme Court recently clarified the difference between "prosecutorial misconduct" and "prosecutorial error." *State v. Murray*, 250 Ariz. 543, 548, ¶ 12 (2021). Both broadly encompass "*any conduct* that infringes a defendant's *constitutional rights*." *Id.* Prosecutorial misconduct goes one step further because it may "imply a concurrent ethical rules violation." *Id.*

¶21 Prosecutorial error or misconduct is not merely legal error or mistake. *State v. Aguilar*, 217 Ariz. 235, 238–39, ¶ 11 (App. 2007). Instead, both require the prosecutor to err intentionally knowing it is improper and prejudicial. *Id.* To prevail under each, a defendant must show the error occurred, and it is reasonably likely the error "could have affected the jury's verdict, thereby denying defendant a fair trial." *Matter of Martinez*, 248 Ariz. 458, 469, ¶ 43 (2020) (citing *State v. Hulsey*, 243 Ariz. 367, 388, ¶ 89 (2018) (quoting *State v. Anderson*, 210 Ariz. 327, 340, ¶ 45 (2005))). This court reviews errors cumulatively to determine whether the conduct resulted in an unfair trial. *State v. Acuna Valenzuela*, 245 Ariz. 197, 216, ¶ 66 (2018) (citing *Hulsey*, 243 Ariz. at 388, ¶ 88).

¶22 As discussed below, the prosecutor did err in some respects, but Shortman has not shown—and the record does not support—finding the errors individually or cumulatively amounted to prosecutorial error warranting a new trial.

A. Unredacted Video

¶23 During trial, the State presented an unredacted video for the jury including a brief statement regarding marijuana found in Shortman's van. The State had previously agreed to redact that statement. Shortman promptly objected and moved for a mistrial, which the superior court denied. The superior court, however, replaced the unredacted CD with a redacted one for the jury to consider during deliberations and instructed the jury:

> There is no allegation that this defendant was impaired by any other substance other than alcohol. There is no allegation in this matter that this defendant possessed or used marijuana. I am striking any reference to any other substance you may have heard. You must disregard any statements related to any other substances in this matter.

¶24 Though the prosecutor erred by not redacting the video, the mistake did not result in an unfair trial. First, the superior court took proper corrective measures by striking the reference, giving the jury a curative instruction, and providing the jurors the redacted CD during deliberations. Second, during direct examination and without objection, a defense witness testified about marijuana and paraphernalia found in Shortman's van after the crash. The jury, therefore, would have heard testimony about the marijuana even if the State had redacted the statement from the video. The record, thus, does not show the error affected the jury's verdicts.

B. Vouching

¶25 Shortman next claims the prosecutor improperly vouched for three trial witnesses: a driver, a forensic scientist, and a police officer. A prosecutor impermissibly vouches for a witness by suggesting "information not presented to the jury supports the witness's testimony." *Acuna Valenzuela*, 245 Ariz. at 217, ¶ 75 (quoting *State v. Vincent*, 159 Ariz. 418, 423 (1989)).

¶26 First, Shortman argues the prosecutor vouched for the driver who witnessed the crash, followed Shortman, and called the police. On direct examination, the witness testified about his decision to follow Shortman, saying:

> I worked as an assistant manager at the time, so I took note of the driver's license plate because we did that a lot for apprehension at my store. And I kept driving on the street until I saw the van turning left onto Mill, and that's when I called nonemergency because I had caught up with the vehicle and let them know I was in pursuit of a hit-and-run.

The following exchange then occurred between the prosecutor and the witness:

> Q. Okay. Just backing up again. You said you work asset management?

> A. I was actually operations manager, but we didn't have a loss prevention manager at the time, so I did a lot of camera work and that sort of thing.
>
> Q. So you understood what it was you needed to do, to be the best witness possible.
>
> A. Correct.

¶27 According to Shortman, the prosecutor's "best witness possible" comment implied information outside the record—in other words, the witness was "more credible and believable[] than any other witness." But taken in context, the prosecutor did not suggest the witness was the "best" witness relative to other witnesses. Instead, the colloquy established the witness took certain actions based on his experience in "loss prevention." The prosecutor did not err.

¶28 Second, Shortman argues the prosecutor vouched for the forensic scientist who tested Shortman's blood. As the witness described the general process for analyzing blood samples, he referred to an instrument that measures alcohol content as a "GC." The prosecutor then said: "you're one of the smartest people I know, but please don't use acronyms. You said GC?"

¶29 Shortman argues the prosecutor introduced information not admitted as evidence: the relative intelligence of the prosecutor's acquaintances. The prosecutor's comment was improper because a lawyer may not assert personal knowledge of facts unless the lawyer testifies as a witness. *See State v. Bible*, 175 Ariz. 549, 601 (1993). But taken in context, the prosecutor simply was asking the expert to use plain English so the jury could follow the testimony, rather than use potentially technical terms. Because Shortman offered no conflicting expert evidence, the prosecutor's comment to the state's expert who offered uncontested opinions did not result in an unfair trial. *See Acuna Valenzuela*, 245 Ariz. at 216, ¶ 66.

¶30 Third, Shortman argues the prosecutor vouched for a police officer witness during closing argument. The prosecutor said: "I can tell you that [the officer] told me this is the first time he's ever testified in this court. Okay? So he's a novice at this too." The prosecutor made the comment in response to defense counsel's closing. Defense counsel said, "All of the witnesses that you were presented with in our trial except [the eyewitness] are specifically trained to testify and have likely done so at least once if not a number of different times."

¶31 In making the comment, the prosecutor improperly vouched for the officer. *See id.* Even so, the prosecutor was responding directly to defense counsel's comments about the officer's experience. The jury could reasonably conclude the prosecutor did nothing more than correct a misimpression created by Shortman's apparently incorrect statement inferring the officer had testified before this trial. The prosecutor's comment, thus, did not reflect an intentional attempt to unfairly secure a conviction.

¶32 In summary, the errors were harmless given the overwhelming evidence supporting Shortman's convictions.

C. The Blood Kit

¶33 At trial, Shortman questioned whether the blood kit used to obtain and store his blood sample was expired. Shortman contends the State "ambushed" him at trial when it introduced the blood kit itself to address that trial issue. To that end, the officer said he retrieved the blood kit and partially peeled back an exterior sticker to reveal a January 31, 2020 expiration date. Defense counsel objected numerous times, arguing primarily she was unable to inspect what she considered an "altered" blood kit because the State failed to disclose it.

¶34 The prosecutor, however, did not err by introducing the blood kit with the exposed expiration date. The State disclosed the box two years before trial. And the record shows the prosecutor would have instructed the officer to peel back the label covering the expiration date in defense counsel's presence if she had made an earlier request.

¶35 Shortman also argues the prosecutor erred during closing arguments. An attorney may not impugn "the integrity or honesty of opposing counsel" in front of the jury. *State v. Ramos*, 235 Ariz. 230, 238, ¶ 25 (App. 2014). "The criteria for determining whether such statements require reversal are whether the prosecutor's actions called the attention of the jury to matters it could not consider, and whether the jurors were influenced by the remarks." *Acuna Valenzuela*, 245 Ariz. at 220, ¶ 94. The superior court, further, can correct such an action "by instructing the jury not to consider the attorneys' arguments as evidence." *State v. Payne*, 233 Ariz. 484, 512, ¶ 109 (2013).

¶36 Here, during closing arguments, the State said, "when the State tried to introduce [the blood kit], you saw the fight that Defense put up to keep you from seeing it." Shortman timely objected and the superior court said, "Stop. Stop. This is argument. This is his argument. It is not

evidence. Evidence is what you heard from the witnesses on the witness stand and the exhibits I have admitted." Though the State's comment improperly imputed a bad-faith basis to defense counsel's objections, the isolated nature of the State's improper argument, the immediate corrective instruction, and the evidence of Shortman's guilt prevented the comment from affecting the verdict. *See Acuna Valenzuela*, 245 Ariz. at 220, ¶ 94.

D. Cumulative Error

¶37 Considering all the errors described above, Shortman fails to demonstrate they cumulatively "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Newell*, 212 Ariz. at 402, ¶ 60 (citing *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26 (1998)). His claim of cumulative prosecutorial error fails. *See id.*

III. Sentencing

¶38 Shortman argues the superior court erred because it did not recognize its discretion to impose sentences less than the presumptive 2.5-year prison terms for the class 2 aggravated DUI convictions. *See* A.R.S. § 13-702.D. The superior court, however, must impose a sentence no less than the presumptive sentence authorized for a person convicted of a non-dangerous felony "that is committed while the person is on probation for conviction of a felony offense." A.R.S. § 13-708.C.

¶39 Shortman acknowledges he was on probation for endangerment, a class 6 undesignated felony, when he committed the present offenses. Still, Shortman argues he was not on felony probation for sentencing purposes because a different superior court designated the earlier offense a misdemeanor before sentencing in this case. Of consequence here, however, is the time Shortman committed the present offense, not the time of sentencing. *See id.* Further, though a superior court may delay designating a class 6 offense, "until the court actually enters an order designating an offense a misdemeanor," the offense "shall" be treated as a felony conviction for use "as a historical prior felony conviction." A.R.S. § 13-604.B.4.

¶40 At the time of the vehicle crash on September 29, 2018, Shortman was on probation for a class 6 undesignated felony. Another superior court designated the earlier felony a misdemeanor in January 2020—*after* the vehicle crash in this case. Thus, A.R.S. §§ 13-708.C and -604.B.4 required the superior court to treat the prior offense as a felony and impose a sentence no less than the presumptive sentence for the DUI convictions. And the superior court did.

CONCLUSION

¶41 We affirm.