DIVISION ONE
FILED: 5/30/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0219
	)	1 CA-CR 11-0222
Appellee,	)	1 CA-CR 11-0223
	)	(Consolidated)
v.	)	
	)	DEPARTMENT B
NICHOLAS ALEXANDER RENNER,	)	
	)	**MEMORANDUM DECISION**
Appellant.	)	
	)	(Not for Publication –
	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2007-108740-001 DT; CR2009-159870-001 SE;
CR2006-119164-001 SE

The Honorable Michael D. Jones, Judge (Retired)

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Acting Chief Counsel
Criminal Appeals/Capital Litigation Section
and Michael O'Toole, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 In this consolidated appeal, Nicholas Alexander Renner appeals his convictions and sentences in CR2009-159870 for second degree murder, kidnapping and aggravated assault. Renner argues the prosecutor's misconduct during closing arguments denied him a fair trial. Renner also contends the second degree murder conviction should be reversed because the superior court erred by ruling evidence of the victim's handgun's inoperability was admissible. For the reasons that follow, we affirm.[1]

FACTUAL AND PROCEDURAL HISTORY

¶2 During the early morning of September 12, 2009, Renner was at Marissa's apartment. He was in her bedroom talking with Pete, her cousin. AG, the victim, came into the bedroom and confronted Renner. Renner fatally shot AG twice in the chest with a .38-caliber handgun. Renner and Pete immediately ran from the apartment in separate directions.

¶3 Meanwhile, in the apartment complex parking lot, Wilton, Marissa's roommate (aka "Bill" or "Shorty"), and his girlfriend, Heather, were walking toward his car. Pete told the couple that Renner shot AG. Shortly thereafter, as Heather began driving the car, Renner jumped into the backseat.

[1] On October 5, 2011, we consolidated the appeal from the convictions and sentences in CR2009-159870 with Renner's pending appeals from the revocation of his probation in two other criminal matters, CR2006-1119164 and CR2007-108740. Because Renner raises no independent challenges to his revocation proceedings, the dispositions of those proceedings are affirmed.

Renner pointed his gun at Heather and ordered her to drive away. As Shorty observed what was transpiring, he ran to his car and tried to pull Renner out of the car. Shorty stopped, however, when Renner pointed the gun at him. Following Renner's commands, Heather drove away, but was able to bail from the car when Renner became distracted.

¶4 Renner drove to the house where his mother and step-father lived. Renner broke into the home and cleaned himself up. A neighbor drove Renner to the hospital because Renner claimed he was shot, but before they got there, Renner changed his mind and asked to be driven to his apartment.

¶5 Later that day, when Renner was arrested at his apartment, he stated the incident at Marissa's apartment involved a "drug rip"[2] and that AG had shot at him. While investigating the murder scene, police discovered a .25-caliber handgun in AG's back pocket. A forensic exam of the weapon revealed that it was inoperable due to a malfunctioning firing pin.

¶6 The State charged Renner with second degree murder, a class one dangerous felony; kidnapping, a class two dangerous felony; and aggravated assault, a class three dangerous felony. Renner testified at trial that he shot AG out of self-defense

[2] The county medical examiner testified the autopsy revealed the presence of methamphetamine in AG's blood and urine.

because he feared for his life after AG reached for a handgun in his back pocket after making threatening comments and getsures. Pete, however, testified that AG was not reaching for a weapon nor was he trying to grab or touch Renner when the shooting occurred. Renner was found guilty as charged. The jury also found the aggravating circumstances alleged by the State, with the exception of one allegation regarding the kidnapping charge. The superior court subsequently imposed aggravated consecutive prison terms totaling forty-nine years' incarceration.

¶7 Renner timely appealed and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(1) (2010).

DISCUSSION

I. Prosecutorial Misconduct

¶8 Renner argues his trial was unfair because the State committed prosecutorial misconduct during its closing arguments.[3] Renner points to statements that he characterizes as "personal attacks" on defense counsel and improper accusations that the defense was "trying to distract the jury." *See* Appendix A at Section I. Renner also contends the prosecutor made misstatements of law. *See* Appendix A at Section II. In

[3] With one exception that we address in more detail below, an appendix ("Appendix A") attached to this decision sets forth the specific statements at issue.

addition, Renner claims the prosecutor improperly shifted the burden of proof to Renner. *See* Appendix A at Section III. Finally, Renner argues that the prosecutor made statements that amount to improper remarks regarding the jury's duty to assess witness credibility, *see* Appendix A at Section IV, and reflect the prosecutor's "dislike of" Renner, *see* Appendix A at Section V.

¶9 With three exceptions, one noted below and two in Appendix A, Renner did not object to the statements at trial, thus we review the superior court's responses to those statements for fundamental error. *See State v. Blackman*, 201 Ariz. 527, 543, ¶ 70, 38 P.3d 1192, 1208 (App. 2002). Renner cites to no authority, nor could we locate any, for the proposition that a court commits fundamental error by not *sua sponte* addressing possible instances of prosecutorial misconduct committed during closing arguments. However, even if such authority existed, we conclude the prosecutor's statements in this case did not constitute misconduct, and thus no error occurred.

¶10 Prosecutors have wide latitude in presenting closing arguments. "[E]xcessive and emotional language is the bread and butter weapon of counsel's forensic arsenal, 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." *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (internal quotation marks and citation omitted); *see also State v. Morris*, 215 Ariz. 324, 336, ¶ 51, 160 P.3d 203, 215 (2007) ("Prosecutors have wide latitude in presenting their arguments to the jury. . . . [and are] permitted to argue all reasonable inferences from the evidence, but cannot make insinuations that are not supported by the evidence." (internal quotation marks and citations omitted)). To 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." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). "Reversal on the basis of prosecutorial misconduct requires that the misconduct be so pronounced and persistent that it permeates the entire atmosphere of the trial." *United States v. Weinstein*, 762 F.2d 1522, 1542 (11th Cir. 1985) (internal quotation marks and citation omitted)); *accord State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997).

¶11 Viewing the challenged statements in the context of the entire record—specifically, the parties' closing arguments as a whole—the prosecutor's statements do not amount to misconduct. Instead, the alleged improper statements fall within the wide latitude afforded prosecutors in closing remarks. *See*

State v. Trostle, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997) ("Comments that are invited and prompted by opposing counsel's arguments are not improper if they are reasonable and pertinent to the issues raised."); *State v. West*, 176 Ariz. 432, 446, 862 P.2d 192, 206 (1993) (commenting on defense counsel's questioning as being "a defense ploy," "improper" and "outrageous" "was well within the wide latitude afforded both parties in closing argument"), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 64 n.7, ¶ 30, 961 P.2d 1006, 1012 (1998)); *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987) (stating that "[w]hen a defendant takes the stand he is subject to cross-examination to the same extent and subject to the same rules as any other witness"; noting that a prosecutor may comment on defendant's failure to produce evidence so long as the comment is not regarding defendant's silence); *State v. McDaniel*, 136 Ariz. 188, 197, 665 P.2d 70, 79 (1983) ("Where the accused has testified, the prosecutor may properly comment upon his demeanor in the courtroom."), *abrogated on other grounds by State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989). And Renner does not argue that the prosecutor improperly referred to evidence that was not admitted at trial. *See State v. Garza*, 216 Ariz. 56, 64, ¶ 23, 163 P.3d 1006, 1014 (2007) (noting improper prosecutorial vouching occurs "when the prosecutor places the

prestige of the government behind its witness, or where the prosecutor suggests that information not presented to the jury supports the witness's testimony" (internal quotation marks and citation omitted)); *State v. Roscoe*, 184 Ariz. 484, 497, 910 P.2d 635, 648 (1996) (noting argument is clearly improper when it refers to matters not in evidence).

¶12 In any event, the statements were not unduly prejudicial and did not contribute to the jury's verdict because the superior court advised the jury before the closing arguments that the lawyers' comments were not evidence, and the court instructed the jury to evaluate Renner's testimony "the same as any other witness's testimony." *See State v. Bowie*, 119 Ariz. 336, 340, 580 P.2d 1190, 1194 (1978) ("Any possible prejudice from the opening statement was overcome by the court's cautionary instructions that evidence did not come from the attorneys and that the verdict must be determined only by reference to the evidence . . . ."). We presume that jurors follow the judge's instructions. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006) (stating that the judge properly instructed the jury that statements during closing arguments were not evidence and presuming that jury followed the instruction).

¶13 Without citing to the record, Renner argues the following closing argument by the prosecutor violated the trial

court's "prior ruling that use of force in crime prevention can be used as a defense by an individual to prevent an assault against them":

> And you know where that came from or you know a situation. You come home and somebody's hurting your child or your spouse or your loved one. Somebody's raping your daughter, and you shoot and kill that person. That's where crime prevention. It's not, "I was afraid he was going to shoot or manslaughter me or aggravate assault me." It doesn't happen. Read the statute again.

¶14 Assuming, without deciding, this argument amounts to error[4] because its substance violated a prior court order, it did not "permeate the trial" or otherwise "probably affect the outcome" in this case. *See Blackman*, 201 Ariz. at 541, ¶ 59, 38 P.3d at 1206 ("Prosecutorial misconduct requiring reversal must have so permeated the trial that it probably affected the outcome and denied defendant his due process right to a fair trial."). Further, the record reflects the superior court sustained Renner's objection to this argument, and Renner did not request any additional curative instruction, nor did he move for a mistrial on the basis of this argument. Based on the

[4] We note that 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 he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal." *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984).

court's instructions to the jurors, specifically that they are not to consider statements subject to a sustained objection, in addition to the ample evidence supporting Renner's convictions, we cannot conclude on this record that the improper argument amounted to prosecutorial misconduct warranting reversal.[5]

¶15 In sum, we find no prosecutorial misconduct that constitutes a denial of due process. Consequently, we also reject Renner's suggestion that the cumulative effect of the alleged misconduct so infected the proceedings that he was denied a fair trial. *See State v. Hughes*, 193 Ariz. 72, 79, ¶ 25, 969 P.2d 1184, 1191 (1998) (stating doctrine of cumulative error applies to claims of prosecutorial misconduct).

---

[5] Renner further contends that the prosecutor "continued along the same line of arguments making statements such as '[Renner] is again claiming that he is saving his own bacon that morning and he is justified in preventing the victim from committing a crime.' And 'so in addition to a not guilty for homicide, he wants a gold medal for crime prevention. The bottom line is: That ain't right. That ain't the law.'" Read in context, no misconduct occurred in making these statements; they fall within the wide scope of permissible argument.

We also summarily reject Renner's contention that portions of the prosecutor's slide presentation during closing arguments constituted misconduct because she used "red ink" to highlight statements made by Renner, and she added commentary in capital letters that challenged the veracity of Renner's testimony.

II. Inoperability of AG's Handgun

¶16 Arguing that he did not know whether AG's handgun was functioning at the time of the murder, Renner moved *in limine* to preclude as irrelevant evidence that the gun was inoperable. The superior court denied the motion, finding that the operability of the gun was relevant based on the State's offer of proof that Renner made statements after fleeing the murder scene that AG was shooting at him.

¶17 Renner contends his second degree murder conviction should be reversed because the court abused its discretion in ruling the inoperability of AG's handgun was relevant and therefore admissible. We disagree. The evidence at trial established Renner made statements to police and others that AG shot at him, and Renner feigned injuries therefrom. The operability of the gun found in AG's pocket was clearly relevant to rebut Renner's post-crime statements and faked injuries. Consequently, the court did not abuse its discretion in denying Renner's motion *in limine*.[6] *See State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990) ("The trial court has considerable discretion in determining the relevance and admissibility of evidence, and we will not disturb its ruling absent a clear abuse of that discretion."); Ariz. R. Evid. 401

[6] Upon denying his motion the superior court stated that it would consider a limiting instruction, however, Renner did not request a limiting instruction.

(defining relevant evidence as evidence having "any tendency to make a fact more or less probable than it would be without the evidence" when "the fact is of consequence in determining the action").

CONCLUSION

¶18 Renner's convictions and sentences are affirmed, as well as the revocation of his probation in the two consolidated cases.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
MAURICE PORTLEY, Presiding Judge

/S/
SAMUEL A. THUMMA, Judge

APPENDIX A

I. Statements by the prosecutor that Renner alleges attacked the character of defense counsel.

▪ “Ladies and Gentlemen, it’s not what was promised to you in opening statements . . . . Bottom line, that is a distraction that is to paint [AG] in a bad picture, and the simple truth is that’s not what happened.”

▪ “Please, during the course of closings and in deliberations, keep your eye on the ball. This case is about the facts –- murder and what actually happened -- not urban legions [sic] and spooks of what methamphetamine is.”

Renner’s objection was overruled.

▪ “We know methamphetamine is bad. But you know what? So is murder. And that’s what this case is about. Not drug use, not the distractions and the lies, not something that pulls focus away from what the defendant unjustifiably did, but now attempts to paint the victim in a negative light.”

▪ “Bill gives a report and gives a description about having the gun pointed at him, and it’s Bill’s fault another jurisdiction got involved? A distraction. It’s a red herring and has nothing to do with what defendant put Bill and Heather through that morning.”

▪ “Again, Ladies and Gentlemen, all of this issue, in talking about crisis entry, is another distraction . . . Don’t be distracted, don’t be persuaded that it was a bad entry.”

▪ “I’d like to start by turning your attention, please, back to the trial you attended and sat through for the past 3 weeks and not the story and made up versions you just heard.”

▪ Defense counsel was trying “to shove [a] quote down [a witness’s] throat when he was on the stand,” was “[parading] [witnesses] up in front of [the jury],” and was calling witnesses who were a “[w]aste of time.”

▪ Accusing defense counsel of telling the jury to guess on the facts, and stating that this was “absolutely unfair and inappropriate,” and urging the jury to not “let the defense attorney get up here and on the final day . . . . tell you to guess or ask you to guess.”

Renner’s objection was overruled.

▪ “And I apologize if I’m going to talk to you this morning in my smug and arrogant manner. And I apologize in advance for not pandering to you and thanking you, if I belittle your intelligence, because guess what? What I say, and I’ve said a lot –- oh, and my lengthy way as well –- is not evidence. Everything [defense counsel] just talked to you about for 55 minutes is not evidence.”

▪ Accusing defense counsel of “bombard[ing] [the jury] with adjectives and accusations and lines and catchy little spooky details, all meant to spook you and to scare you and make you believe that [AG] was a bad guy.”

▪ “Ladies and Gentlemen, the only time you heard [that AG was a loose cannon] was 10 minutes ago, from the defense attorney defending the defendant.”

▪ “So don’t sit there and argue to me it never happened, defense attorney, and then say ‘[b]ut if it did,’ because the defendant testified he pointed the gun. I’m sure that wasn’t a happy moment for the defense, but I had to do it.”

II. Statements by the prosecutor that Renner alleges are misstatements of law.

▪ Addressing Renner’s self-defense theory and stating, “Bottom line: No matter what your story is, it’s not okay. The law doesn’t protect the defendant’s action.”

▪ Implying Renner had a duty to retreat, *see* A.R.S. § 13-411(B) (Supp. 2012),[1] before shooting AG by stating: "If he wants you to believe everything is true and what a reasonable person with common sense would do, it means the defendant walks out the door."

▪ When discussing the law of crime prevention, *see* A.R.S. § 13-411(C), the prosecutor purportedly undermined the subjective intent requirement by stating: "It's no longer a reasonable person objective standard, but there is still the clear ringing bell of reasonableness."

III. Statements by the prosecutor that Renner alleges improperly shifted the burden of proof.

▪ "[T]he defense attorney had [Pete] on cross- examination. He could have said, 'Isn't it true that the victim sprang up with a gun?' Those questions were never asked, and you know why? Because that event never happened."

IV. Statements by the prosecutor that Renner alleges are improper remarks regarding evaluations of witness credibility.

▪ After correctly stating that "regardless of who puts a witness on the stand, you are to judge their credibility," the prosecutor stated "this holds especially true to the defendant, when testifying in this case," thereby improperly suggesting, according to Defendant, that his testimony should be judged by a different standard.

▪ "[F]ollow the law, even if from [sic] you don't like hearing what Heather and Bill had to say, you don't like what Pete had to say, about the drugs . . . because credibility of the witnesses does not require a likability component, does not

---

[1] We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

require a drug-free component." I.e. improper remarks about Renner's demeanor on the stand.

V. Statements by the prosecutor that Renner alleges demonstrate the prosecutor's "dislike of" Renner.

▪ "[Renner is] flippant, he's aggressive on cross-examination. He was cocky."

▪ "[Renner] was able to recall and answer his lawyer's questions, 'Yes, sir;' 'No, sir.' When I got up there, he's so used to agreeing with what the defendant agrees, he said, 'Yes, sir;' 'No, sir.' It's a 'ma'am' over here. His demeanor during cross, why did it change if he did nothing wrong? Why am I the bad guy? . . . He was cocky, confrontational, and smug when answering the State's questions."

▪ "So when you go back in the jury room and look at the forms of verdict, you will never be asked to check a form whether you like [AG] or whether you liked what his lifestyle was like, or liked Heather or Bill or agreed with them not calling the police, that's not what this case is about. This case is about the defendant picking the witnesses in this case. So sure, attack the State's evidence. But you know what? The defendant put them all in play. The State doesn't get the luxury or the liberty or the ability to go to central casting and pick out peachy-keen, sharp-witted, good-dressed individuals that makes you like them. That's not what this is about. This defendant knows his friends, knows their lifestyle, was right there with them shoulder-to-shoulder, and he knows these people, in general, stay under the rocks. And that's what he was counting on, thinking he could commit these crimes; he could do that to Heather and Bill, because they're all the same. And he's counting on them not testifying; and when they do, what do you get? 'You're a convicted felon, aren't you?' 'Oh, well, you've got me there.'"