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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 6/4/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0241
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
DL THOMAS, JR.,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-135905-002DT

The Honorable Roger E. Brodman, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
by Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
and Angela Kebric, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Louise Stark, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Defendant DL Thomas, Jr., appeals his convictions for burglary in the second degree, a class 3 felony; theft of means of transportation, a class 3 felony; two counts of unlawful flight from law enforcement vehicle, each a class 5 felony; four counts of aggravated assault, each a class 2 felony and dangerous offense; and endangerment, a class 6 felony. Thomas argues that the trial court erred in denying his motions for mistrial. He also claims that he was denied a fair trial due to prosecutorial misconduct. For reasons that follow, we affirm.

DISCUSSION

I. MOTIONS FOR MISTRIAL

¶2 Thomas contends that the trial court erred in denying his two motions for a mistrial. The first motion came after testimony from an alleged coparticipant in the burglary that he knew the name "DL" from hearing it from "people that was [sic] in prison with him or something." The second was a reaction to the prosecutor's reference during closing argument to a picture of Thomas in a photographic lineup as a booking photo. The trial court denied both motions based on findings that neither incident was so unduly prejudicial as to deprive Thomas of a fair trial.

¶3 A declaration of mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new

trial granted." *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (citation omitted). A trial court has broad discretion in deciding whether to grant a mistrial, and we will reverse a trial court's decision only if it is "palpably improper and clearly injurious." *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995) (citation omitted).

¶14 In deciding whether to grant a motion for mistrial on the basis of a witness's testimony, a trial court must examine "whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and[, if so,] . . . the probability under the circumstances of the case that the testimony influenced the jurors." *State v. Lamar*, 205 Ariz. 431, 439, ¶ 40, 72 P.3d 831, 839 (2003). We give great deference to a trial court's decision because it "is in the best position to determine whether the [testimony] will actually affect the outcome of the trial." *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000).

¶15 The trial court did not abuse its discretion when it denied the motion for mistrial based on testimony from a witness that he heard the name DL from a person who had been in prison with him. During his testimony, this witness further indicated that Thomas did not appear to be the same DL to whom he was referring. In these circumstances, the trial court could

reasonably have found that the witness's testimony connecting the name DL with someone who had been in prison would not so influence the jury as to deny Thomas a fair trial.

¶16 The trial court likewise did not abuse its discretion by concluding that the prosecutor's remark about a booking photo did not merit a mistrial. Even before an objection could be raised, the prosecutor immediately corrected herself, informed the jury that she had misspoken, and stated that she meant photo lineup. She further made clear that there was no booking photo of Thomas in evidence. In light of the quick action taken by the prosecutor to correct her error, we find no reasonable probability that the jury would consider the prosecutor's misstatement in deciding the issue of Thomas's guilt.

II. CLAIMS OF PROSECUTORIAL MISCONDUCT

¶17 Thomas also argues that he is entitled to a new trial on the ground of prosecutorial misconduct. Because he failed to raise this issue at trial, our review is limited to fundamental error. *State v. Speer*, 221 Ariz. 449, 458, ¶ 42, 212 P.3d 787, 796 (2009). To prevail under this standard of review, Thomas must establish both that fundamental error occurred and that the error caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). Prosecutorial misconduct constitutes fundamental error only when it is "so egregious as

to deprive the defendant of a fair trial" *State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991).

¶18 Thomas's claims of prosecutorial misconduct derive from the same facts that gave rise to his motions for mistrial. In short, Thomas argues that the prosecutor necessitated the two motions for mistrial by failing to comply with the trial court's pretrial directives to warn all the government witnesses not to mention Thomas's criminal history and to avoid referring to pictures in the photographic lineups as "mug shots."

¶19 "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'" *State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (citation omitted). In reviewing claims of prosecutorial misconduct, our "focus is on the fairness of the trial, not the culpability of the prosecutor." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993). Accordingly, even if we were to assume that the prosecutor's actions rose to the level of prosecutorial misconduct, we would hold that the trial was fair, and Thomas is not entitled to a new trial due to prosecutorial misconduct.

CONCLUSION

¶10 For the foregoing reasons, we affirm the convictions and sentences.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

LAWRENCE F. WINTHROP, Chief Judge