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



DIVISION ONE
FILED: 08/07/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0355
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
SAMUEL CRUZ,) Rule 111, Rules of
) the Arizona Supreme
Appellant.) Court)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-140327-001

The Honorable Randall H. Warner, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Joseph T. Maziarz, Section Chief
Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Peg Green, Deputy Public Defender
Attorney for Appellant

O R O Z C O, Judge

¶1 Samuel Cruz (Defendant) appeals his convictions and sentences for two counts of aggravated assault. He alleges the State committed prosecutorial misconduct, resulting in reversible error. For the following reasons, we affirm.

PROCEDURAL AND FACTUAL HISTORY

¶2 During an altercation, Defendant stabbed the victim in the head with a knife, causing fractures to the victim's skull. Defendant was thereafter indicted on two counts of aggravated assault.¹

¶3 A jury found Defendant guilty on both counts and the trial court sentenced him to concurrent terms of imprisonment. Defendant timely appealed. 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 13-4033.A.1 (2010).

DISCUSSION

¶4 Defendant argues the State committed prosecutorial misconduct during closing argument by: (1) referring to the victim's in-court drawing of the knife when the drawing was not admitted into evidence; (2) appealing to the sympathies of the

¹ Specifically, the State charged Defendant with one count of aggravated assault causing a fracture to a part of the body (count one), a class 4 dangerous felony, and one count of aggravated assault with a deadly weapon (count two), a class 3 dangerous felony.

jurors; (3) "grossly misstat[ing] the duty of the jury"; and (4) improperly arguing that "the jury should penalize [Defendant] for asserting his right to trial."²

¶15 Because Defendant did not raise a prosecutorial misconduct objection below, we review his claims for fundamental error.³ *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* (citation and internal quotation marks omitted). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* at ¶ 20.

¶16 Prosecutorial misconduct is "conduct that is not merely the result of legal error, negligence, mistake, or insignificant

² Defendant presents these arguments as two issues for review. We delineate and address his arguments under the single issue of prosecutorial misconduct, however, because he argues the prosecutor committed four separate acts of misconduct during closing argument.

³ Defendant claims he objected at trial to the State's reference to the victim's in-court drawing of the knife. Defendant did object to the State's use of the drawing during closing argument, but his objection was based on evidentiary grounds. Defendant did not object to the use of the drawing on the ground of prosecutorial misconduct. See *State v. Lopez*, 217 Ariz. 433, 434, ¶ 4, 175 P.3d 682, 683 (App. 2008) ("[A]n objection on one ground does not preserve the issue [for appeal] on another ground.").

impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial." *State v. Martinez*, 221 Ariz. 383, 393, ¶ 36, 212 P.3d 75, 85 (App. 2009) (citation and internal quotation marks omitted). In the context of closing argument, misconduct occurs when: (1) the prosecutor's remarks call the attention of jurors to matters they would not be justified in considering; and (2) there is a sufficient probability the remarks influenced the jury's verdict. *State v. Sullivan*, 130 Ariz. 213, 218, 635 P.2d 501, 506 (1981).

¶17 To warrant reversal, the defendant must demonstrate "the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); see also *State v. Hallman*, 137 Ariz. 31, 37, 668 P.2d 874, 880 (1983) ("Misconduct alone will not cause a reversal, but only where the defendant has been denied a fair trial as a result of the actions of counsel.").

The Victim's In-Court Drawing of the Knife

¶18 During his direct examination of the victim, the prosecutor asked the victim to sketch a drawing of the knife on an easel in the courtroom. The victim's drawing was not admitted into evidence, but the court allowed the use of the drawing for

demonstrative purposes and ordered that the drawing be marked as Exhibit 53.

¶9 During closing argument, the prosecutor asked the jurors to consider the victim's drawing during their deliberations. When Defendant objected that the drawing had not been admitted into evidence, the trial court ruled: "He can still use it. It was used in the trial." Defendant contends the prosecutor committed misconduct by asking the jury to consider the drawing and improperly referring to the drawing as "[S]tate's [E]xhibit 53" because, although the drawing was labeled as Exhibit 53, it was not admitted into evidence.

¶10 Wide latitude is given in closing argument, and counsel may comment on and argue all justifiable inferences which can reasonably be drawn from the evidence adduced at trial. *State v. Woods*, 141 Ariz. 446, 454, 687 P.2d 1201, 1209 (1984). However, "the arguments must be based on facts which the jury is entitled to find from the evidence and not on extraneous matters that were not or could not be received in evidence." *State v. Neil*, 102 Ariz. 299, 300, 428 P.2d 676, 677 (1967).

¶11 Here, the prosecutor did not call attention to matters not properly before the jury. The drawing was made in front of the jury during the victim's testimony and was therefore adduced at trial. The trial court permitted the use of the drawing for demonstrative purposes and directed that it be labeled Exhibit

53. Accordingly, the prosecutor could properly comment on and argue all justifiable inferences that could reasonably be drawn from the drawing. All of the prosecutor's remarks regarding the drawing were either directly supported by the record or could be reasonably inferred therefrom.

¶12 In addition, although the drawing was not admitted, it was admissible and could have been received in evidence. See *State v. LaGrand*, 153 Ariz. 21, 31, 734 P.2d 563, 573 (1987) (holding that demonstrative and illustrative exhibits "may be admitted for many reasons, including to illustrate and explain testimony"). Thus, by discussing the victim's drawing of the knife, the prosecutor did not refer to an exhibit that could not have been received in evidence. See *Neil*, 102 Ariz. at 300, 428 P.2d at 677.

¶13 Moreover, as part of the jury instructions, the trial court instructed the jurors:

It is your duty to determine what the facts are in the case by determining what actually happened. Determine the facts only from the evidence produced in court. When I say evidence I mean the testimony of witnesses and the exhibits introduced in court.

. . . .

Lawyers' comments are not evidence. In their opening statements and closing arguments the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence but it may help you to understand the law and the evidence.

The instructions fully informed the jurors that they were only to consider evidence adduced at trial and that the prosecutor's arguments during closing were not evidence. Jurors are presumed to follow the jury instructions, *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006), and "[i]n the absence of a request for a cautionary instruction, the instructions given must be deemed sufficient to advise the jury as to its duty." *Sullivan*, 130 Ariz. at 218, 635 P.2d at 506.

¶14 Accordingly, we find the prosecutor did not commit misconduct by referring to the victim's in-court drawing of the knife during his closing argument and we find no error.

Appealing to the Sympathies of the Jurors

¶15 Defendant next argues the prosecutor improperly appealed to the sympathies and passions of the jurors by arguing that the victim and his family "deserve[] justice." During closing, the prosecutor asserted: "[The victim] deserves justice, his family deserves justice and the only way you can give him justice is by holding defendant responsible by holding him guilty on every single count." He went on to claim during rebuttal: "[the victim] and his family are also asking [the jury to find Defendant guilty]. Only holding the [D]efendant responsible for all the charges against him can give [the victim] and his family the justice they deserve. . . . [The victim and his family] seek justice. That justice is in your hands." Defendant contends it

was improper for the prosecutor to suggest that the jury should find Defendant guilty based on sympathy for the victim and his family.

¶16 A prosecutor may not express his or her personal opinion about a defendant's guilt or innocence, *State v. Van Den Berg*, 164 Ariz. 192, 196, 791 P.2d 1075, 1079 (App. 1990), or make arguments that appeal to the fears or passions of the jury. *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). Subject to those limitations, however, "excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal" in presenting closing arguments to the jury. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (citation and internal quotation marks omitted).

¶17 Here, it was not improper for the prosecutor to ask the jury to send a message to Defendant by holding him accountable for his actions and to do justice by finding him guilty. See *State v. Herrera*, 174 Ariz. 387, 396-97, 850 P.2d 100, 109-10 (1993) (holding that the prosecutor may ask jurors to do justice by returning a guilty verdict). Furthermore, the court specifically instructed the jurors: "You must not be influenced by sympathy or prejudice." This instruction was sufficient to advise the jury of its duty to remain impartial. See *Newell*, 212 Ariz. at 403, ¶ 68, 132 P.3d at 847; *Sullivan*, 130 Ariz. at 218, 635 P.2d at 506. We thus find no misconduct or error.

Comments on the Duty of the Jury

¶18 During closing argument, the prosecutor told the jury: "By holding [D]efendant responsible for everything he is charged with, you are not only giving [the victim] and his family the justice they deserve, but you are sending [a] message to the community that this type of violence will not be tolerated by these dangerous people." Defendant contends: "Asking the jury to send a message to the community was improper because once again it overstated the duty of the jury. No jury is an arm of the county attorney's office. It is not up to the jury to send a message to anybody."

¶19 Defendant's argument is contrary to well-established case law. It is not improper for the prosecutor to advance arguments referring to the prevalence of crime or to ask the jury to send a message to the community or to enforce criminal laws. See, e.g., *Herrera*, 174 Ariz. at 396-97, 850 P.2d at 109-10 (holding the prosecutor may ask jurors to protect society by finding the defendant guilty); *Sullivan*, 130 Ariz. at 218-19, 635 P.2d at 506-07 (holding it is not improper to ask the jury to send a message to drug "pushers" by convicting the defendant); *State v. Jaramillo*, 110 Ariz. 481, 483-84, 520 P.2d 1105, 1107-08 (1974) ("the prosecuting attorney has a right to call attention to the prevalence of crime (crime rate), to urge the jury to do

its duty and uphold the law, and to draw inferences from conditions resulting from the failure to uphold the law”).

Asking the Jury to Punish Defendant

¶20 Finally, Defendant contends the prosecutor improperly asked the jury to punish Defendant for asserting his right to trial because doing so required the victim to testify and be subjected to cross-examination and thereby be victimized for a second time. Defendant claims: “The prosecutor’s shocking and inexcusable request of the jury was grossly improper because he asked the jury to punish Cruz for his choice to invoke his constitutional right to trial.”

¶21 We disagree with Defendant’s characterization of the prosecutor’s comments. In relevant part, the prosecutor argued: “[The victim] and his wife went on that stand being victimized again, going in front of a group of people they don’t know, sharing one of the most horrible moments in their lives and then having to be cross-examined by the defense and just putting themselves out there to tell you, to warn everybody how dangerous this person is.” Contrary to Defendant’s assertion, the prosecutor did not ask the jury to penalize or punish Defendant for asserting his right to trial. Instead, the prosecutor merely emphasized the importance of the case to the victim and his family and appropriately commented on their credibility and motivation for testifying. While it is not unreasonable for

Defendant to glean the implication he imputes to the prosecutor's comments, we will "not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly*, 416 U.S. at 647. We decline to make that inference in this case.

¶22 Moreover, we will reverse a conviction on the ground of prosecutorial misconduct only where "the cumulative effect of the alleged acts of misconduct shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not specific intent, to prejudice the defendant." *Martinez*, 221 Ariz. at 393, ¶ 36, 212 P.3d at 85 (citation and internal quotation marks omitted). We do not find such to be the case here.

¶23 Defendant relies on *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993) for the proposition that: "Victim's rights do not and cannot conflict with a defendant's right to a fair trial. Appeal to the jury's sense of fairness between the defendant and the victim cannot prevail. The jury is not expected to strike some sort of balance between the victim's and the defendant's rights."

¶24 The misconduct involved in *Bible*, however, is readily distinguishable from any of the prosecutor's comments in this case. There, the prosecutor explicitly told the jurors that

their goal was to do justice. *Id.* at 602, 858 P.2d at 1205. The prosecutor went on to opine that justice did not merely entail providing the defendant with a fair trial but also required the jurors to look at the rights of the victim. *Id.* Thus, the prosecutor in *Bible* presented a picture of conflicting rights between those of the defendant and those of the victim and “encouraged the jury to decide the case on emotion and ignore the court’s instructions.” *Id.* at 603, 858 P.2d at 1206. Here, in contrast, the prosecutor made no comparable remarks that either improperly referenced the victim’s rights or asked the jury to decide the case on an improper basis. In addition, as our supreme court also found in *Bible*, “the preliminary and final jury instructions focused the relevant inquiry and helped ensure that Defendant received a fair trial.” *Id.* Accordingly, we find no misconduct or error on this basis.

CONCLUSION

¶25 For the foregoing reasons, we affirm Defendant’s convictions and sentences.

_____/S/_____
PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

ANN A. SCOTT TIMMER, Presiding Judge

/S/

DIANE M. JOHNSEN, Judge