

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 09/04/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0516  
)  
Appellee, ) DEPARTMENT B (AUGUST)  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
TRAIIVON KARLTON WHITE, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)

---

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-102115-002

The Honorable Barbara L. Spencer, Judge Pro Tempore

**AFFIRMED**

---

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

James J. Haas, Maricopa County Public Defender Phoenix  
By Terry J. Reid, Deputy Public Defender  
Attorneys for Appellant

---

**S W A N N**, Judge

¶1 Defendant Traivon Karlton White appeals his conviction and sentence for misconduct involving weapons. Defendant contends that his conviction and sentence should be vacated

because of prosecutorial misconduct. We conclude that there was no prosecutorial misconduct, and therefore affirm.

*FACTS AND PROCEDURAL HISTORY*

¶2 Defendant was indicted for misconduct involving weapons, and the matter proceeded to a jury trial.

¶3 At trial, Defendant stipulated that he was a prohibited possessor. The state presented evidence that on the date of the offense, two Phoenix police officers found Defendant and another man sleeping in a stolen car, with Defendant in the front passenger seat and his companion in the driver's seat. Because it was dark outside, the officers illuminated the stolen car's interior using their patrol car's headlights, overhead lights, and spotlights. Officer Francis Perreira then approached the front passenger's side window while his partner approached the driver's side window. The officers woke the sleeping men and commanded them to put their hands on top of their heads. Through the passenger's side window, Officer Perreira saw Defendant remove a holstered handgun from his waistband and place it in the glove box before complying with the officers' orders. A search of Defendant's person revealed a .38 caliber round in his pants pocket, and a search of the stolen car revealed a second .38 caliber round in the backseat and a loaded .38 caliber revolver and holster in the glove box.

Officer Perreira testified that he was "positive" Defendant had transferred the handgun from his waistband to the glove box.

¶14 Defendant did not present any evidence. In closing argument, the prosecutor argued that Officer Perreira had no motive to lie about what he saw. Defense counsel then argued that "there are a million different reasons why people can be dishonest" and "a million different reasons a person can be mistaken." Counsel argued that Officer Perreira could have lied for "any of the million reasons," such as wanting to "increase his stats" or simply "picking on somebody" because of a bad day. Counsel warned that the jury members could not know whether Officer Perreira was "the most corrupt officer there is out there" and would not want to find out later that they relied entirely on the testimony of an officer who was found to have "acted dishonestly" in many cases.

¶15 In rebuttal, the prosecutor began by stating: "[I]n order for you to find the defendant not guilty you have to believe that Officer Perreira is a bald faced liar, there's no way around it." Defense counsel objected on the grounds of "burden shifting" and "misstat[ing] the law." The court overruled the objection without comment, and the prosecutor continued:

There's no middle ground here. It's not a question of whether Officer Perreira thought the gun was black or silver, it's not some inconsequential

detail, he told you flat out what he saw that night. He told you flat out that he saw the defendant pull the gun from his waistband and put it in the glove box. . . .

The defense spent a lot of time talking about credibility and it's for that reason. You have to decide that Officer Perreira is a bald faced liar in order to find the defendant not guilty.

Defense counsel again objected, citing "improper argument," and the court again overruled the objection without comment. The prosecutor then stated:

You have to believe that [Officer Perreira]'s willing to put his entire career on the line to lie about someone that he doesn't even know.

Now, you were told in jury selection that it's not proper to give an officer's testimony more weight than another person's testimony simply because he's an officer, but you are not told to check your common sense at the door. We all bring our experiences to jury service. You know how to evaluate someone's testimony and to know whether or not they're lying based on what it is they're saying, the circumstances that they're describing, their body language and other surrounding facts, like what I said about putting his career on the line.

¶16 At the conclusion of the prosecutor's rebuttal argument, the court gave the jury its final instructions, including an instruction to "use the tests for accuracy and truthfulness that people use in determining matters of importance in everyday life" to evaluate testimony, and an instruction to "consider the testimony of a police officer just as you would the testimony of any other witness" because "[t]he testimony of a law enforcement officer is not entitled to any

greater or lesser importance or believability merely because of the fact that the witness is a law enforcement officer." The jury was also instructed that lawyers' opening statements and closing arguments are not evidence. With the exception of the instruction about police officers' testimony, these final instructions repeated portions of the preliminary instructions given at the start of trial.

¶17 While the jury was deliberating, defense counsel requested an additional jury instruction. Counsel argued that the prosecutor inaccurately stated the law in the rebuttal argument because the issue was not necessarily whether Officer Perreira was a liar, but whether his testimony was reliable. Counsel contended that by overruling the defense objections to those statements without comment, the court implicitly approved the statements, and therefore a corrective instruction was needed. The court declined to give an additional instruction, explaining that the jury had already been instructed that lawyers' arguments are not evidence and commenting that "probably a more appropriate objection might have been vouching, but that wasn't the objection that was made."

¶18 The jury found Defendant guilty, and the court entered judgment on the jury's verdict and imposed a nine-year prison sentence. Defendant timely appeals. We have jurisdiction

pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033.

*STANDARD OF REVIEW*

¶9 Defendant contends that his conviction and sentence should be vacated because the prosecutor engaged in prosecutorial misconduct during the rebuttal argument. Defendant did not raise a claim of prosecutorial misconduct in the superior court, and his objections on other grounds did not preserve the issue. *State v. Lopez*, 217 Ariz. 433, 434, ¶ 4, 175 P.3d 682, 683 (App. 2008). We therefore review for fundamental error. *State v. Speer*, 221 Ariz. 449, 458, ¶ 42, 212 P.3d 787, 796 (2009).

*DISCUSSION*

¶10 Defendant contends that the prosecutor engaged in misconduct by stating that the jury would have to find that Officer Perreira was a "bald faced liar" in order to find Defendant not guilty, and by stating that Officer Perreira would risk his career by lying.

¶11 Prosecutorial misconduct means misconduct that "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 (State)*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984) (footnote omitted). If prosecutorial misconduct exists, it will warrant reversal only where it denied the defendant a fair trial. *State v. Moore*, 108 Ariz. 215, 222, 495 P.2d 445, 452 (1972). That is, reversal is warranted only where the misconduct, viewed cumulatively, "so infected the trial with unfairness as to make the resulting conviction a denial of due process" and was "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial." *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (citations omitted). On fundamental error review, "we examine, under the circumstances, whether the jurors were probably influenced and whether the [improper] statement[s] probably denied Defendant a fair trial." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993).

¶12 We conclude that the prosecutor's statements violated no restriction on proper closing argument and did not constitute misconduct. Therefore, Defendant was not denied a fair trial.

*I. THE PROSECUTOR'S STATEMENTS DID NOT CONSTITUTE MISCONDUCT.*

A. The "Bald Faced Liar" Statements Did Not Constitute Misconduct.

¶13 We first consider the prosecutor's statements that the jury would have to find that Officer Perreira was a "bald faced liar" in order to find Defendant not guilty. Defendant

characterizes those statements as misleading misstatements of the law and impermissible vouching.

¶14 We agree that the statements did not present a complete summary of all conceivable bases on which the jury could reject Officer Perreira's testimony and find Defendant not guilty -- the jury could reach that conclusion either by finding that Officer Perreira lied or by finding that he was mistaken. But the statements must be viewed in the context of Defendant's arguments. *State v. Kerekes*, 138 Ariz. 235, 239, 673 P.2d 979, 983 (App. 1983). "[P]rosecutorial comments which are fair rebuttal to comments made initially by the defense are acceptable." *State v. Duzan*, 176 Ariz. 463, 468, 862 P.2d 223, 228 (App. 1993). Here, Officer Perreira testified that he was "positive" about what he saw, and Defendant's closing argument made clear that his theory of defense was not that Officer Perreira was possibly mistaken, but that he was possibly dishonest. The prosecutor's statements in rebuttal were a fair response to Defendant's arguments, directed to the deciding issue as Defendant framed it. In these circumstances, the statements were not misleading.

¶15 Further, the statements did not constitute impermissible vouching. Vouching is a form of misconduct that may occur where the prosecutor places the prestige of the government behind its witness. *State v. Vincent*, 159 Ariz. 418,



423, 768 P.2d 150, 155 (1989). Defendant argues that by using the phrase "bald faced liar," the prosecutor "impl[ie]d that it would be unthinkable for the jury to label an officer of the law, a representative of the state, as a liar." To be sure, the prosecutor chose a colorful phrase. But it did not clearly place the prestige of the government behind the witness. Moreover, immediately after invoking the phrase, the prosecutor foreclosed any possible impermissible implication by reminding the jury that "it's not proper to give an officer's testimony more weight simply because he's an officer."

B. The Statements About Officer Perreira's Career Did Not Constitute Misconduct.

¶16 We next consider the prosecutor's statements that Officer Perreira would risk his career by lying. Defendant characterizes those statements as improper argument of facts not in evidence and an appeal to the sympathy of the jury.

¶17 Prosecutors may not suggest that evidence not presented to the jury supports a witness's testimony -- that is a different form of vouching. *Vincent*, 159 Ariz. at 423, 768 P.2d at 155 (1989). But "[p]rosecutors have 'wide latitude' in presenting their arguments to the jury" and may argue "all reasonable inferences from the evidence." *State v. Morris*, 215 Ariz. 324, 336, ¶ 51, 160 P.3d 203, 215 (2007) (citation omitted). Prosecutors may also remind jurors of facts that are

common knowledge. *State v. Jones*, 197 Ariz. 290, 306, ¶ 41, 4 P.3d 345, 361 (2000). The state presented no evidence concerning whether Officer Perreira would face repercussions were he found to be lying. But Officer Perreira testified that he was employed by a police department, and the fact that his career would be adversely affected if he were found to have fabricated facts was a reasonable inference and common knowledge.

*II. DEFENDANT WAS NOT DENIED A FAIR TRIAL.*

¶18 None of the prosecutor's statements constituted misconduct. Further, we presume that the jurors followed the instructions to not consider lawyers' arguments as evidence and to assess all witnesses' testimony based on the same criteria. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006).

¶19 Whether viewed separately or cumulatively, the prosecutor's statements did not deprive Defendant of a fair trial.

CONCLUSION

¶20 For the foregoing reasons, we affirm Defendant's conviction and sentence.

/s/

---

PETER B. SWANN, Judge

CONCURRING:

/s/

---

JON W. THOMPSON, Presiding Judge

/s/

---

ANN A. SCOTT TIMMER, Judge