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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0644
	)	1 CA-CR 11-0650
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RUBEN DELAPAZ PEREZ,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2006-100527-002
CR2011-107266-001

The Honorable Dawn M. Bergin, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

G O U L D, Judge

¶1 Ruben Delapaz Perez appeals his convictions and sentences imposed after a jury found him guilty of aggravated assault, misconduct involving weapons, and disorderly conduct. Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 At the time of the subject incident, Perez was living with his girlfriend ("C.A."), his father, and his father's girlfriend ("E.R."). On the night of January 21, 2011, Perez and his father went to a bar, where they each consumed about a 12-pack of beer. Perez's father left the bar before Perez, returned home, and went to bed.

¶3 At trial, E.R. testified that later that night she was asleep in her bedroom when she heard Perez and C.A. arguing. E.R. got up and stepped into the hallway, where she saw C.A. in the bathroom washing blood from a cut on her wrist. Perez ordered C.A. to go into their bedroom, but she resisted and expressed fear of going into the room. E.R. tried to convince Perez to let C.A. stay in E.R.'s room instead. Initially, Perez refused because he didn't want C.A. to call the police, but he eventually relented.

[1] On review, we consider the evidence in the light most favorable to sustaining Perez's convictions and resolve all reasonable inferences in favor of sustaining the verdict. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

¶4 At this point, Perez's father had also awakened, and was trying to intervene between Perez and C.A. While arguing with his father, Perez took out a gun and was waving it around, threatening to kill his father. The police arrived outside in response to a call from a neighbor that someone had a gun, but Perez eluded the officers by escaping through the backyard.

¶5 C.A. was transported to the hospital, where she was interviewed by the police. She was treated for lacerations on her wrist, the outside of her left thigh, the left side of her head, and above her left ear. The jeans she had been wearing were saturated with blood.

¶6 Several days after the assault, a detective attempted to locate C.A. to interview her again, but he could not find her. C.A. did not testify or appear at trial because her whereabouts were unknown.

¶7 The State eventually charged Perez with Count One, aggravated assault against C.A.; Count Two, assault against C.A.; Count Three, attempt to commit aggravated assault against his father (with a gun); Count Four, attempt to commit aggravated assault against his father (with a knife); and Count Five, misconduct involving weapons.

¶8 During closing argument, Perez's counsel commented on C.A.'s absence at trial. Defense counsel stated, "[C.A.] is not here so she was unable to testify. So, the State has not been

able to provide any witnesses that actually saw this happen . . . more is needed to get beyond a reasonable doubt." In response to this comment, the prosecutor stated in her rebuttal closing that "the State bears the burden of proof . . . but the defense can subpoena witnesses . . . . You can, as the defendant, subpoena [the victim]."

¶9 At the end of the trial, the jury found Perez guilty on Count One, aggravated assault against C.A., and Count Five, misconduct involving weapons. Count Two was dismissed because the State conceded it had not presented any supporting evidence. As to Counts Three and Four, the jury found Perez guilty of the lesser included offenses of disorderly conduct on both counts. The court sentenced Perez to the presumptive prison sentences on each count. Perez timely filed this appeal.

DISCUSSION

¶10 Perez contends the prosecutor's comment regarding his failure to subpoena the victim amounted to prosecutorial misconduct, because it improperly shifted the burden of proof from the State to the defendant. Perez argues this alleged prosecutorial misconduct constituted reversible error. Because Perez failed to object on this ground at trial, our review on appeal is limited to a review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶11 Perez bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* 210 Ariz. at 568, ¶ 22, 115 P.3d at 608. To establish fundamental error, the defendant must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial. *State v. Hunter,* 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

¶12 When a prosecutor comments on a defendant's failure to present evidence to support his theory of the case, it is neither improper nor shifts the burden of proof to the defendant so long as such comments are not intended to direct the jury's attention to the defendant's failure to testify. *State v. Sarullo*, 219 Ariz. 431, 437, ¶ 24, 199 P.3d 686, 692 (App. 2008). It is well-settled that "the prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not constitute a comment on defendant's silence." *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987).

¶13 Perez contends that the rule set forth in *Sarullo* and *Corcoran* is limited to those cases where the defendant has suggested the state failed to call a witness because the witness' testimony was unfavorable to the state. In support of this argument, Perez cites *State v. Suarez*, 137 Ariz. 368, 670 P.2d

1192 (App. 1983) and *State v. Jerdee*, 154 Ariz. 414, 743 P.2d 10 (App. 1987). However, neither of those cases supports Perez's argument.

¶14 In *Suarez*, during closing argument defense counsel commented that because the prosecutor did not call certain witnesses, the state had failed to prove its case. *Suarez*, 137 Ariz. at 376-77, 670 P.2d at 1200-1201. In response, the prosecutor commented that defense counsel had failed to call the same witnesses because they were favorable to the state's case. *Id*. Under these circumstances, the court concluded the prosecutor's comments were error, albeit not prejudicial error. *Id*. In contrast, in *Jerdee* the court held it was not error for the prosecutor to comment on the defendant's failure to subpoena a police officer because defense counsel had implied the officer's testimony would have been favorable to the defense. 154 Ariz. at 416-17, 743 P.2d at 12-13.

¶15 Neither *Suarez* nor *Jerdee* undermine the rule set forth in *Sarullo* and *Corcoran* that a prosecutor may properly comment on a defendant's failure to subpoena a witness, so long as the prosecutor does not draw attention to the defendant's failure to testify. Rather, both *Suarez* and *Jerdee* focus on when it is permissible for a prosecutor to assert that an absent witness's testimony would have been favorable to the state. In *Suarez*, the court held it was prosecutorial misconduct for the state to raise

this inference because defense counsel never argued the absent witnesses were favorable to defendant's case, and therefore the state's argument constituted improper rebuttal. However, in *Jerdee* it was proper for the prosecutor to assert this inference because the argument was made in rebuttal to defendant's assertion the absent witness would have testified favorably for the defendant.

¶16 Here, the state never commented about whether C.A.'s testimony would be favorable to either side. Therefore, *Suarez* and *Jerdee* are not controlling.

¶17 The remaining cases cited by Perez are also distinguishable. In *U.S. v. Arendale*, 444 F.2d 1260, 1266-68 (5th Cir. 1971), the prosecutor commented that if the defense disbelieved the defendant's accuser, it could have called the accuser's wife as a witness. In reversing the conviction, the court noted that the prosecution could not seriously have contended the wife was an appropriate defense witness, since her husband was hoping for a lenient sentence by accusing the defendant. *Id.* More importantly, the reversal was based on a whole host of errors apart from the prosecutor's comment, including the prosecutor calling the jury's attention to hearsay statements of the defendant's wife that had been excluded by the court, making an unjustified suggestion to the jury that a defense witness had to be watched by law enforcement during the

trial to avoid jury tampering, and insufficiency of the evidence to sustain the conviction. *Id.*

¶18 Perez also cites to *People v. Murray*, 64 A.D.2d 916 (N.Y. App. Div. 1978). In *Murray*, the court found that the prosecutor made an improper comment by conveying to the jury the erroneous impression that defendant had an obligation to call witnesses in his behalf. *Id.* However, a new trial was only required because instead of giving the jury an admonition on this issue, the court compounded the error by then calling attention to the defendant's failure to testify. *Id.* 64 A.D.2d at 917.

¶19 Based on the record in this case, there was no error, much less fundamental error, with respect to the prosecutor's comments about Perez's failure to subpoena C.A. as a witness. The prosecutor's comments were not improper, because they did not shift the burden of proof to Perez or direct the jury's attention to Perez's failure to testify.[2] Rather, the prosecutor's comments served to rebut two inferences potentially raised by defense counsel's statements about C.A.: (1) the State failed to call C.A. as a witness because her testimony would be unfavorable to the State, and/or (2) the State could not prove its case without C.A.'s testimony because her testimony was so critical to the case (when in fact *neither* side called her as a witness).

[2] Because we find no error, we do not address whether the prosecutor's alleged misconduct resulted in prejudice.

¶20 Furthermore, the prosecutor's comments could not be interpreted as shifting the burden of proof to Perez because the prosecutor mentioned multiple times in her closing argument that the State bears the burden of proof. Before she mentioned Perez's failure to call C.A. as a witness, the prosecutor explicitly stated that "the State bears the burden of proof." Additionally, in her rebuttal, the prosecutor emphasized that the most important instruction in this case concerns the burden of proof, which "the State proudly bears in this country."

CONCLUSION

¶21 Perez's convictions and sentences are affirmed.

/S/_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/_____
MICHAEL J. BROWN, Presiding Judge

/S/_____
DONN KESSLER, Judge