DIVISION ONE
FILED: 12/11/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0746
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	
SABIN LEE BURRELL,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-135297-001

The Honorable Jeanne M. Garcia, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Angela C. Kebric, Assistant Attorney General
Attorneys for Appellee

Law Office of David Michael Cantor, PC — Phoenix
By Eric S. Rothblum
Attorneys for Appellant

H A L L, Judge

¶1 Sabin Lee Burrell (Defendant) appeals from his conviction and sentence of probation on one count of theft, a

class three felony. Defendant argues prosecutorial misconduct deprived him of a fair trial and that the superior court erred in denying his motion for judgment of acquittal and in ordering juror one to serve as an alternate juror. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 On or about October 13, 2006, victim KC gave Defendant a $20,000 check for part of a down payment Defendant and others were going to make on a real estate development in Florida. Pursuant to a promissory note signed by KC and Defendant, KC would receive a 20% return on his $20,000 "investment." Defendant cashed the check; did not use the proceeds for the down payment, and refused KC's request to return the $20,000. Although KC initiated civil proceedings that resulted in a judgment against Defendant, Defendant never paid that judgment.

¶3 KC subsequently contacted the Maricopa County Sheriff's Office and, after an investigation by Detective Travis Pierce, the State filed a criminal charge, alleging Defendant committed theft in violation of Arizona Revised Statutes (A.R.S)

[1] We view the evidence in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Defendant. *State v. Manzanedo,* 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

section 13-1802(A)(2) (Supp. 2012).[2] At trial, Defendant moved for a mistrial based on the prosecutor's reference to Defendant as a "con man" during the previous day's opening statements. The court denied the motion as untimely. After the State rested, Defendant unsuccessfully moved for judgment of acquittal under Rule 20, Arizona Rules of Criminal Procedure.

¶4 The case lasted longer than anticipated, creating a scheduling issue for juror one. After speaking in open court with juror one, over Defendant's objection, the court designated juror one as an alternate. The jury found Defendant guilty as charged, and the court imposed three years of supervised probation. Defendant filed a timely appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 and -4033(A) (Supp. 2010).

DISCUSSION

I. Motion for Mistrial: Prosecutorial Misconduct

¶5 Defendant argues the prosecutor engaged in misconduct by referring to Defendant as a "con man."[3] Thus, Defendant contends the court erred in denying his motion for mistrial.

---

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

[3] Defendant also asserts that Detective Pierce added to the prejudicial effect of the prosecutor's comments by improperly

¶6 We review a trial court's decision whether to grant or deny a mistrial because of prosecutorial misconduct for a clear abuse of discretion. *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997). "We will affirm the trial court when it reaches the correct result even though it does so for the wrong reasons." *State v. Oakley*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994).

¶7 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 conduct be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Atwood,* 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992) (internal quotation omitted),

---

nodding his head in apparent agreement. Defendant did not timely object to this conduct; instead, he waited until the following day to bring it to the court's attention. To the extent Defendant has preserved this issue for fundamental error review, we reject it. Nothing in the record reflects the jury was affected by, or even noticed, the detective's displays of agreement. *See State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 20-22, 115 P.3d 601, 607-08 (defendant's burden to establish prejudice). We will not presume prejudice when none appears affirmatively in the record. *See State v. Trostle*, 191 Ariz. 4, 13-14, 951 P.2d 869, 878-79 (1997).

disapproved of on other grounds by State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717 (2001).

¶8 The references by the State to Defendant as a "con man" during opening statements did not amount to misconduct warranting reversal. On this record, "there was justification for believing [the] evidence . . . would be presented" to support a determination that Defendant knowingly used KC's $20,000 for purposes other than for KC's intended investment. *State v. Bowie*, 119 Ariz. 336, 339-40, 580 P.2d 1190, 1193-94 (1978); *cf. State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993) (holding prosecutor's comment during opening statement that the victim was "perhaps tortured" was improper because "the record does not indicate that any evidence [of torture] was anticipated").

¶9 Any challenge made by Defendant to the prosecutor's "con man" references during closing arguments is likewise without merit. 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). Based on the evidence received at trial, the prosecutor's references during closing

arguments to Defendant as a "con man" did not amount to misconduct.

¶10 Additionally, the court's instructions to the jury – that they were to consider only the evidence presented to them and that the statements of the attorneys were not evidence – cured any potential prejudice. *See Bowie*, 119 Ariz. at 340, 580 P.2d at 1194. Therefore, the court did not abuse its discretion in denying Defendant's motion for mistrial.

II. Rule 20

¶11 We review de novo a trial court's denial of a Rule 20 motion. *Bible*, 175 Ariz. at 595, 858 P.2d at 1198. We will not reverse the superior court's denial of a motion for a judgment of acquittal unless there is a complete absence of probative facts supporting a conviction. *State v. Johnson*, 215 Ariz. 28, 29, ¶ 2, 156 P.3d 445, 446 (App. 2007); *State v. Miles*, 211 Ariz. 475, 481, ¶ 23, 123 P.3d 669, 675 (App. 2005). If reasonable minds could differ on the inferences to be drawn from the evidence, whether direct or circumstantial, the case must be submitted to the jury. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993).

¶12 As charged in this case, "[a] person commits theft if, without lawful authority, the person knowingly . . . [c]onverts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's

possession for a limited, authorized term or use." A.R.S. § 13-1802(A)(2).[4] Given this charge, the trial court did not err when it denied Defendant's Rule 20 motion because the evidence required the court to submit the case to the jury.

¶13 The State presented substantial evidence from which the jury could conclude that Defendant knowingly used KC's $20,000 for purposes other than the funds' specifically authorized use, namely the Florida real estate investment. At Defendant's request, KC made the $20,000 check out to Defendant personally, not to the LLC that was named in the promissory note. Detective Pierce testified this request was one of numerous indicia of "fraud" his investigation revealed. The trial evidence also showed the LLC did not exist. The trial evidence further showed that KC and Defendant agreed that the money would be used for making a down payment on a condominium in the Florida development. After Defendant cashed the check, and the planned investment did not go forward, Defendant did not

[4] Defendant's reliance on *State v. Abbey*, 13 Ariz.App. 55, 57, 474 P.2d 62, 64 (1970), is misplaced. Unlike the offense of grand theft at issue in *Abbey*, the crime of conversion does not require an intent to permanently deprive. A.R.S. § 13-1802(A)(2). Rather, conversion is complete when property entrusted to another is knowingly converted from its "authorized term or use." *Id*. *See also State v. Scofield*, 7 Ariz.App. 307, 312, 438 P.2d 776, 781 (1968) (explaining "it is no defense to a charge of embezzlement that the trustee who has converted property to his own use intends sometime in the future to return it").

return the funds to KC. Indeed, Defendant admitted that he never invested KC's $20,000.

¶14 Defendant contends that the $20,000 given to him by KC was an "extension of credit . . . that was not revocable at [KC's] whim[,]" and therefore, Defendant was not obligated to return the money. To the extent the trial evidence supports such an inference, Defendant was entitled to make this argument to the jury. However, the existence of an innocent explanation that can be gleaned from the evidence does not require a trial court to grant a Rule 20 motion. *See, e.g., Landrigan*, 176 Ariz. at 4, 859 P.2d at 114. Therefore, the court did not err when it denied Defendant's Rule 20 motion.

III. Alternate Juror

¶15 After the close of evidence and before closing arguments commenced, the court learned in the late afternoon that juror one, due to a previously scheduled "personal situation[,]" possibly would be unable to return the following morning to participate in deliberations. Over Defendant's objection, the court ordered the juror designated as an alternate "mainly because we told them we'd be done on Thursday and we're not able to deliver."

¶16 Defendant argues the court abused its discretion in designating juror one as an alternate. We disagree.

¶17 As Defendant correctly notes, although he was entitled to a fair and impartial jury, he was not entitled "to be tried by any particular jury." *State v. Arnett*, 119 Ariz. 38, 50, 579 P.2d 542, 554 (1978). Defendant points to nothing in the record that the absence of juror one in deliberations resulted in an unfair or partial jury. His complaint of "conceivabl[e]" prejudice is insufficient. Further, his reliance on Rule 18.5(h), Arizona Rules of Criminal Procedure, is misplaced. That Rule applies to instances when the court excuses a "*deliberating* juror" and requires the court to instruct the jury to begin deliberations anew with an alternate juror. Ariz. R. Crim. P. 18.5(h).

¶18 Based on the possible scheduling conflict as a result of the trial lasting longer than anticipated and juror one's previously planned personal matter, the court did not abuse its discretion in designating juror one as an alternate. *See State v. Armstrong*, 208 Ariz. 345, 354, ¶ 40, 93 P.3d 1061, 1070 (2004) (noting an abuse of discretion occurs when "no reasonable judge would have reached the same result under the circumstances"); *State v. Cowles*, 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004) (abuse of discretion occurs when "[t]he record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision.").

CONCLUSION

¶19 Defendant's conviction and sentence are affirmed.

_/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_/s/_____
PETER B. SWANN, Judge

_/s/_____
SAMUEL A. THUMMA, Judge