

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: 8/6/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0766
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
BRIAN JOSEPH BRUBAKER,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-155927-001

The Honorable Karen L. O'Connor, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Joseph T. Maziarz, Section Chief Counsel,
Criminal Appeals
and Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

Debus, Kazan & Westerhausen Phoenix
By Tracey Westerhausen
Attorneys for Appellant

H O W E, Judge

¶1 Brubaker appeals his convictions and sentences for manslaughter, endangerment and leaving the scene of a fatal accident. He contends his trial was unfair due to prosecutorial

misconduct. He also argues the trial court erred in its determination that witness testimony was inadmissible hearsay. For the reasons that follow, we find no error and affirm.

BACKGROUND¹

¶12 After spending the day with friends at a bar and drinking "six or seven" beers, Brubaker drove westbound on the Santan Freeway and drove "right through" a white pickup truck that was also proceeding westbound at approximately 7:14 p.m. The pickup flipped, "hurl[ed]" along the road and eventually came to a stop upside down on the right shoulder. The truck's driver, G.G., was injured but survived; his girlfriend, however, did not.

¶13 After Brubaker's car came to a stop in the median, he got out and ran away. He made a number of telephone calls to his wife and to a friend, J.C., who was a Michigan police officer. His wife picked him up, and he turned himself in to the police. Brubaker submitted to a blood draw at 10:00 p.m. to test for alcohol intoxication. Although Brubaker told officers he had nothing to drink after the collision, his blood sample had an alcohol concentration of .142 percent.

¹ "We view the facts in the light most favorable to sustaining the convictions." *State v. Musgrove*, 223 Ariz. 164, 166 ¶ 2, 221 P.3d 43, 45 (App. 2009).

¶14 Brubaker was indicted for manslaughter, a class two felony; endangerment, a class six felony; and leaving the scene of a fatal accident, a class two felony.² The case proceeded to a jury trial. During the testimony of the surviving victim, the State asked whether he had settled with Brubaker's insurance company. Before the witness could answer, the court sustained Brubaker's objection on relevance grounds. Brubaker then unsuccessfully moved for a mistrial arguing evidence of a settlement improperly infers guilt. Later, during direct examination of J.C., Brubaker's counsel asked questions related to comments Brubaker made to J.C. when he called after the collision. The court sustained the State's hearsay objections.

¶15 The jury found Brubaker guilty of the three charges. Brubaker moved for a new trial, arguing that the court's evidentiary rulings relating to G.G.'s and J.C.'s testimony resulted in an unfair trial. The court denied the motion, imposed presumptive terms of imprisonment, and Brubaker appealed. We have jurisdiction pursuant to Arizona Revised

² Brubaker was also charged with three additional counts of endangerment relating to alleged victims in another vehicle that was nearby when the accident occurred. He was acquitted of those charges.

Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, -4033(A) (West 2013).³

DISCUSSION

I. G.G.'s Testimony

¶16 Brubaker contends that he was entitled to a mistrial because the State's question about settlement with Brubaker's insurance company amounted to misconduct. We review for an abuse of discretion. *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997).

¶17 When considering a motion for a mistrial based on prosecutorial misconduct, a trial court should first consider whether the prosecutor's statements call jurors' attention to matters the jury is not justified in considering when determining a verdict, and then the court considers the effect those statements had on the jury. *Id.* To prevail on a claim of prosecutorial misconduct on appeal, 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).

¶18 We fail to see how the single question regarding settlement—to which the court sustained an objection and the witness never answered—constituted misconduct or how it

³ We cite the current version of the applicable statute because no revisions material to this decision have occurred.

prejudiced Brubaker, especially in light of the court's instructions to the jury to not consider questions as evidence and to "not try to guess what the answer might have been" when the court sustains an objection. See *State v. Newell*, 212 Ariz. 389, 403 ¶ 68, 132 P.3d 833, 847 (2006) (stating jurors are presumed to follow instructions); *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995) (summarily noting defendant suffered no demonstrable prejudice from a witness's comment to which an objection was sustained). Even assuming the question was improper, it clearly was not "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial." *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992) (quoting *United States v. Weinstein*, 762 F.2d 1522, 1542 (11th Cir. 1985) (quoting *United States v. Blevins*, 555 F.2d 1236, 1240 (5th Cir. 1977))); see also *Lee*, 189 Ariz. at 616, 944 P.2d at 1230. The prosecutor did not mention any insurance settlement during closing argument. Further, Brubaker's assertion that, because of the question itself, "the jury got the unshakable idea that [Brubaker's] insurance company thought he was at fault for the accident[,] is pure speculation. Consequently, the court's denial of Brubaker's mistrial motion was not an abuse of discretion.

II. Brubaker's Post-Accident Statement to J.C.

¶9 Through J.C.'s testimony, defense counsel sought to introduce Brubaker's explanation that another driver had cut him off and caused the accident. As he did at trial, Brubaker argues that his explanation was admissible under the excited utterance exception to the hearsay rule. See Ariz. R. Evid. 802, 803(2). We review the ruling for an abuse of discretion. *State v. Fischer*, 219 Ariz. 408, 416 ¶ 24, 199 P.3d 663, 671 (App. 2008); *State v. Beasley*, 205 Ariz. 334, 340 ¶ 29, 70 P.3d 463, 469 (App. 2003).

¶10 "'Hearsay' [is] a statement[] . . . offer[ed] in evidence to prove the truth of the matter asserted[,]" and generally is not admissible as evidence. Ariz. R. Evid. 801(c), 802. As an exception to the general prohibition against admitting hearsay evidence, Rule 803(2) permits the admissibility of statements "relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." "The exception requires proof of three elements: (1) a startling event, (2) a statement made soon after the event to ensure the declarant has no time to fabricate, and (3) a statement which relates to the startling event." *State v. Bass*, 198 Ariz. 571, 577, 12 P.3d 796, 802 (2000); see also *State v. Cruz*, 218 Ariz. 149, 161 ¶ 54, 181

P.3d 196, 208 (2008); *State v. Anaya*, 165 Ariz. 535, 538, 799 P.2d 876, 879 (App. 1990).

¶11 Here, Brubaker called J.C. at 7:45 p.m., more than thirty minutes after the accident. During that time, he walked away from the collision and twice spoke on the phone with his wife. Under these circumstances, he was no longer under the stress of the excitement of the event, but had sufficient time to provide an exculpatory explanation for the cause of the deadly collision. As a result, he failed to prove that his call to J.C. was made soon after the event to ensure that he had no time to fabricate. Accordingly, the court did not abuse its discretion in sustaining the State's hearsay objections. The court's denial of Brubaker's motion for mistrial on this basis was likewise not an abuse of discretion.

CONCLUSION

¶12 Brubaker's convictions and sentences are affirmed.

_____/s/_____
RANDALL M. HOWE, Presiding Judge

CONCURRING:

_____/s/_____
MAURICE PORTLEY, Judge

_____/s/_____
PATRICIA A. OROZCO, Judge