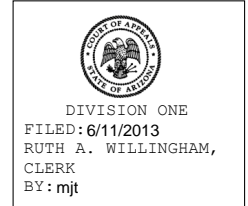


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**



STATE OF ARIZONA,) 1 CA-CR 11-0775
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
PEDRO RAMON GARZA,) -Rule 111, Rules of
) the Arizona Supreme
Appellant.) Court)
)
_____)

Appeal from the Superior Court of Maricopa County

Cause No. CR2010-152396-001 DT

The Honorable Lisa M. Roberts, Commissioner

AFFIRMED

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

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

T H O M P S O N, Presiding Judge

¶1 Pedro Ramon Garza (defendant) appeals from his convictions and sentences for one count of reckless endangerment, a class 6 dangerous felony, one count of

disorderly conduct, a class 6 dangerous felony, and misconduct involving weapons, a class 4 dangerous felony. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 On the evening of September 26, 2010, defendant fired a gun from inside his apartment. A neighbor called police after hearing a loud noise and finding a bullet hole in his apartment ceiling and a damaged piece of furniture. The neighbors were evacuated. The police instructed defendant to exit his apartment, but he did not do so. Awhile later, defendant fired five or six more gunshots inside the apartment.

¶3 Shortly thereafter, defendant emerged from his apartment. He appeared to be confused and angry and he yelled and threw some cardboard and a suitcase off of the balcony. The SWAT team entered the apartment while defendant was still on the balcony and arrested him. Police found a loaded handgun and ammunition, shell casings, and approximately twenty bullet holes in the apartment.

¶4 The state charged defendant with one count of reckless endangerment, a class 6 dangerous felony, one count of disorderly conduct, a class 6 dangerous felony, and misconduct involving weapons, a class 4 dangerous felony. The trial court held a competency hearing and found defendant competent to stand

trial. After a jury trial, defendant was convicted as charged.

¶5 The trial court sentenced defendant to mitigated sentences of two years in prison on each of the first two counts and a mitigated sentence of five years in prison on the third count, to be served concurrently. The court gave defendant credit for 257 days of presentence incarceration. 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) (2003), 13-4031 (2010) and 13-4033 (2010).

DISCUSSION

¶6 The sole issue on appeal is whether the prosecutor committed prosecutorial misconduct when he asked a police detective during direct examination whether defendant appeared to be sober. Defendant argues that the prosecutor's question denied him a fair trial because questions about his sobriety had been precluded by the trial court's ruling on his motion in limine. Because defendant did not raise the issue of prosecutorial misconduct below, we review for fundamental error. See *State v. Rutledge*, 205 Ariz. 7, 13, ¶ 30, 66 P.3d 50, 56 (2003) (citations omitted).

¶7 Prior to trial, defendant filed a motion in limine. In his motion, defendant stated that "purported marijuana, trace

amounts of a substance believed to be methamphetamine and purported performance enhancing drugs" had allegedly been found during the search of his apartment. He requested an order precluding the state from introducing in its case-in-chief photographs or testimony "regarding the alleged discovery of purported illicit drugs, drug paraphernalia and performance enhancing drugs" allegedly found in his apartment. The state agreed that it would not offer such evidence in its case-in-chief, but reserved its right to impeach the defendant with the evidence if he took the stand.

¶8 The state called Detective Douglas Hunt to the stand. Detective Hunt was called out to the scene the night of the shooting. He helped secure and search defendant's apartment. He did not see the defendant, however, until he returned to the police station. After Detective Hunt identified defendant in the courtroom, the prosecutor asked him how defendant was acting the night of the shooting. Hunt responded that defendant appeared fidgety. Then the prosecutor asked whether defendant appeared sober. Defense counsel objected to the question on evidentiary grounds:

MR. LOCKHART: Here's my concern, he's trying to do something that he can't do because of the motion without using the words to do it without the proper foundation to do that. Now if he wants to ask if he's antsy or something but anything that would

suggest that he's somehow on some type of substance that they have no proof of I have no objection to that.

. . .

[Prosecutor]: A person, a witness, can make a lay opinion on whether or not someone is intoxicated or not. I instructed my Detective not to mention anything about methamphetamine or marijuana but he can make the - he can make the observation whether or not the guy appeared intoxicated.

MR. LOCKHART: Here's the problem foundation as to that.

THE COURT: [W]hen you say intoxicated are you referring to alcohol intoxication or some other kind?

[Prosecutor]: Just general intoxication . . . I'm not going to go into what [Detective Hunt] believed [defendant] was on . . . but the jury has now heard the Defendant's demeanor and state of mind and he can make a lay opinion whether he was sober or intoxicated and there won't be any evidence of what intoxicating substance [it was].

Mr. Lockhart: Yes, I don't have any problem [with] him saying did he smell alcohol, something along those lines but anything other than that Judge I think you're going to tip the scale into speculation into the jurors mind to what else it could be.

THE COURT: Again, the concern I have is that I don't know if we're talking about alcohol intoxication or drug intoxication. So, was there an odor of alcohol on him?

[Prosecutor]: I don't think so. They appeared to think he was on a drug but I mean I won't go into that. But his state of

mind, how he was acting, the rationality of it is relevant.

THE COURT: Well I agree you can ask about if he was fidgeting and what, how he was behaving physically but I'm not going to allow you to go into observations that imply that he was under the influence when there's no proof that he was. Okay. (Bench conference ends).

[Prosecutor]: Describe his body movements.

[Detective Hunt]: Fidgety. My best recollection, you know, like this a lot of this. I believe that was prior to my interview with him.

Thus, Detective Hunt was ultimately not permitted to opine whether or not he thought defendant was sober, but instead only allowed to describe defendant's physical demeanor.

¶9 Prosecutorial misconduct is conduct 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." *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). Here, there is no evidence that the prosecutor intentionally tried to introduce the evidence of illegal drugs found in defendant's apartment excluded by the trial court pursuant to the motion in limine. The prosecutor's unanswered question about defendant's sobriety did not amount to

prosecutorial misconduct, let alone fundamental error depriving defendant of a fair trial.

¶10 For the foregoing reasons, we affirm defendant's convictions and sentences.

/s/

JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/

DONN KESSLER, Judge

/s/

LAWRENCE F. WINTHROP, Judge