

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: 04/02/2013
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0883
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
FRUTOSO GALLEGOS,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-152838-001

The Honorable Karen L. O'Connor, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Thomas K. Baird, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Defendant Frutoso Gallegos appeals his convictions and sentences,¹ contending that the prosecutor impermissibly shifted the burden of proof to him and violated his Fifth Amendment rights by commenting on his decision not to testify at trial. We conclude that the prosecution neither commented improperly on Gallegos's failure to testify at trial, nor did it shift the burden of proof. We therefore affirm.

*FACTS AND PROCEDURAL HISTORY*²

¶2 On September 22, 2010, Gallegos purchased a small quantity of gas from a QuikTrip at 7th Street and Las Palmaritas in Phoenix, Arizona. Gallegos next went to an occupied house on El Caminito, used the gasoline in an improvised explosive device to set the house on fire, and left the scene. Police found Gallegos walking on the south side of 7th Street close to a canal and conducted a one-on-one identification with a neighbor who witnessed Gallegos at the house. Because the witness failed to identify Gallegos, the police did not detain him at that time.

¹ Gallegos was convicted and sentenced for arson of an occupied structure (Count 1), aggravated assault (Count 2), endangerment (Count 3), and misconduct involving weapons (Count 4).

² We view the evidence in the light most favorable to sustaining the convictions and resulting sentences. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶13 Police eventually detained Gallegos after reviewing the surveillance video at QuikTrip and identifying him as the purchaser of the gas. The four-count indictment followed.

¶14 At trial, the court instructed the jury that the "[s]tatements or arguments made by the lawyers in the case are not evidence. Their purpose is to help you understand the evidence and law." It also instructed the jury that "[t]he law does not require a defendant to prove innocence."

¶15 During the state's closing argument, counsel argued:

[State's Counsel]: Ladies and gentlemen, there is no burden on the defense to produce any evidence in this case. It's the State's burden and we accept that, but what that means is all the evidence you've had is the State's evidence. What that means is no one has gotten up here in the chair and sat down and testified --

[Defense Counsel]: Objection, to burden shifting, Your Honor.

The Court: Mr. Rapp.

[State's Counsel]: It's not burden shifting.

The court called counsel to the bench, and the following colloquy took place:

[State's Counsel]: I'm going to say no one has testified that I know Frutoso Gallegos, I asked him to come over to my house that day and work on my lawn mower and on the way over to my house, I asked him to buy a dollar's worth of gas so he could prime the carburetor. That's not evidence and I'm allowed to comment on what the evidence is not.

[Defense Counsel]: And that's classic burden shifting, Judge. He's saying nobody got on the stand to talk on the defendant's behalf.

The Court: My concern is that you went from the statement that the defendant doesn't have the burden here, you do, but then you got -- you went from that to saying that no one has gotten up here and then if you make the statements that you just put on the record, then you're walking a very thin line here.

[State's Counsel]: Yeah, I know --

The Court: So I would just stay away from it.

[State's Counsel]: Oh, okay, wait, so I can't say what there's not evidence of? I'm not saying they have to produce any evidence of, I'm saying what the evidence is and what it is not.

The Court: I would start over with your argument.

[State's Counsel]: Okay.

Once the bench conference concluded, the state presented closing argument as follows:

[State's Counsel]: Just to be very clear, the defendant has no burden, none, [he] is not required to produce any evidence, so -- just so everybody is clear on that, but what there hasn't been evidence of, there hasn't been evidence of a reasonable explanation for the defendant's behavior. No one got up on that stand and said, yeah, my name is Bill Smith --

[Defense Counsel]: Object to burden shifting, Judge.

The Court: Overruled.

[State's Counsel]: No one has gotten up on this stand, sat down, swore to you to take an oath to tell the truth and said, my name is George Smith, I know Frutoso Gallegos, we were working on my

lawn mower that day, I asked him to come over to my house --

[Defense Counsel]: Objection to burden shifting, Judge.

The Court: Overruled.

[State's Counsel]: -- at 6:30 in the morning and I asked him to bring a dollar's worth of gas with me and I live two blocks south of the canal. You haven't had any evidence of that. So any sort of explanation you might get for why he is buying that gas or why he's there or why he's lying, is just guessing, and that's the very thing you are not allowed to do.

¶16 The jury found Gallegos guilty on all counts.³ Gallegos timely appeals.

¶17 We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A), 13-4031 and 13-4033.

STANDARD OF REVIEW

¶18 During closing argument, counsel has "considerable latitude." *State v. Sarullo*, 219 Ariz. 431, 437, ¶ 23, 199 P.3d 686, 692 (App. 2008). A closing argument is unduly prejudicial if it "calls to the attention of the jurors matters which they would not be justified in considering in determining their verdict." *Id.* (citation omitted). We will not reverse the trial court's ruling on grounds of prosecutorial misconduct

³ He received a 15-year prison sentence with 429 days of presentence incarceration for Count 1 and a 10-year prison sentence for Count 2 to be served consecutive to Count 1. The sentences for Counts 3 and 4 were imposed concurrently with Count 1.

unless the misconduct "affect[s] the jury's ability to fairly assess the evidence" and is "so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (citation omitted).

DISCUSSION

I. THE PROSECUTION'S CLOSING ARGUMENT DID NOT VIOLATE GALLEGOS'S RIGHT NOT TO TESTIFY.

¶19 Gallegos contends that the prosecutor infringed his Fifth Amendment right not to testify by commenting on the absence of exculpatory evidence. Under the controlling legal standard, we disagree.

¶10 A comment during argument is impermissible if it is "calculated to direct the jurors' attention to the defendant's exercise of his fifth amendment privilege." *State v. McCutcheon*, 159 Ariz. 44, 45, 764 P.2d 1103, 1104 (1988). But comments regarding a defendant's failure to testify at trial are objectionable only if they comment "on the failure of the defendant to testify personally." *State v. Still*, 119 Ariz. 549, 551, 582 P.2d 639, 641 (1978). Therefore, "[t]he prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify[,]" unless the defendant is the only one who could

contradict or explain the state's evidence. *State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985).

¶11 "When a prosecutor comments on a defendant's failure to present evidence to support his or her 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." *Sarullo*, 219 Ariz. at 437, ¶ 24, 199 P.3d at 692. Here, the prosecutor commented on the absence of exculpatory evidence, but directed those remarks away from Gallegos's decision not to testify. The prosecutor never referred specifically to Gallegos's failure to testify, and Gallegos was not the only potential source of the exculpatory evidence that the state contended was missing. On this record, we conclude that the prosecutor's statements were properly confined to matters other than Gallegos's decision not to testify. In view of the settled case law concerning such statements, we discern no burden shifting. We therefore conclude that the court did not err in overruling defense counsel's objections.

CONCLUSION

¶12 For the foregoing reasons, we affirm.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

THOMAS C. KLEINSCHMIDT, Judge*

*The Honorable Thomas C. Kleinschmidt, Judge (Retired) of the Court of Appeals, Division One, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147 (2003).