DIVISION ONE
FILED: 7/18/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0270
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ROBERT CARLOS PERALTA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-117219-001

The Honorable Carolyn K. Passamonte, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Joseph T. Maziarz, Chief Counsel,
Criminal Appeals Section
Linley Wilson, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Louise Stark, Deputy Public Defender
Attorneys for Appellant

T H U M M A, Judge

¶1 Robert Carlos Peralta timely appeals his convictions and sentences for discharge of a firearm at a structure, a dangerous offense, and aggravated assault, a domestic violence

and dangerous offense. This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031, and -4033(A).[1] Finding no reversible error, Peralta's convictions and sentences are affirmed.

FACTS AND PROCEDURAL HISTORY[2]

¶2 The evidence at trial showed that Peralta fired two shots through the door of M.C.'s (his girlfriend's) home while she was in a nearby hallway. After being arrested, Peralta admitted reporting a false carjacking to 9-1-1 immediately after the shooting to "divert [the officers] out of the area." Peralta told the police a friend nicknamed "Chavo" (sometimes appearing in the transcript as "Chabo") fired the gun, apparently because Chavo recognized M.C. as "someone who may have robbed him in the past." Peralta admitted to having the nickname "Chavo," although he told the police he had not been called that name in a long time. Peralta did not testify and did not call any witnesses at trial.

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[1] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

[2] The evidence is viewed in the light most favorable to sustaining the conviction and all inferences are resolved against defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

DISCUSSION

I. Impeachment Of M.C.'s Trial Testimony.

¶3 Peralta first argues the superior court abused its discretion in precluding impeachment of M.C. through testimony from police officers about M.C.'s purported prior inconsistent statements that she did not recall making.[3] Applying an abuse of discretion standard, *State v. Robinson*, 165 Ariz. 51, 58, 796 P.2d 853, 860 (1990), the superior court's ruling is affirmed if correct for any reason, *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶4 At trial, M.C. testified that she: (1) saw Peralta pull out what she thought was a gun immediately before the shots were fired (and she recalled telling one police officer that the gun was in his waistband, but did not recall telling another officer the gun was in his pocket); (2) did not recall what she and Peralta had been arguing about and (3) recalled hearing two gunshots, but she might have told a police officer she heard three or four shots because of echoes she heard.

¶5 Peralta sought to impeach M.C.'s testimony with testimony from police officers regarding whether M.C. previously had said Peralta pulled the gun out of his pants' waistband or

[3] Although prior statements may be used as evidence in a variety of ways, Peralta's argument on appeal is that he was improperly restricted from impeaching M.C.'s trial testimony with her prior inconsistent statements.

pocket; what Peralta and M.C. had been arguing about prior to the incident and whether M.C. heard two or four gunshots. The State moved to preclude Peralta from impeaching M.C. on these details that she could not remember during her trial testimony. In granting the State's motion, the superior court stated it was

> not satisfied that any of the . . . statements that [M.C.] made were so crystal-clear denials of what she had said in the previous interviews with police officers. I think they were either she agreed that yes, she said that at the time, or she doesn't recall what she said at the time and therefore, not proper subject of impeachment by extrinsic evidence.

¶6 In challenging that ruling, Peralta fails to show how M.C.'s trial testimony was inconsistent with statements she made to the police officers, a necessary predicate to the admissibility of such extrinsic evidence for impeachment purposes. *See State v. Navallez*, 131 Ariz. 172, 174, 639 P.2d 362, 364 (App. 1981) (noting "long established rule that in order for a prior statement to be admitted for impeachment it must directly, substantially, and materially contradict testimony in issue"); Ariz. R. Crim. P. 19.3(b) ("No prior statement of a witness may be admitted for the purpose of impeachment unless it varies materially from the witness' testimony at trial."); *see also* Ariz. R. Evid. 613(b) (providing for admission of extrinsic evidence of prior inconsistent statement); Ariz. R. Evid. 801(d)(1)(A) (providing witness's

"prior statement" that "is inconsistent with the declarant's testimony" is not hearsay).[4] Accordingly, given M.C.'s lack of recollection at trial, there was no prior inconsistent statement on the points, meaning Peralta's argument fails.[5]

¶7 As the State suggests, "[a] claimed inability to recall, when disbelieved by the trial judge, may be viewed as inconsistent with previous statements." *State v. King*, 180 Ariz. 268, 275, 883 P.2d 1024, 1031 (1994). A superior court has considerable discretion in determining whether evasive answers or lack of recollection by a witness at trial may be considered inconsistent with that witness's prior out-of-court statements. *See State v. Hausner*, 230 Ariz. 60, 76, ¶ 60, 280 P.3d 604, 620 (2012). Peralta, however, never claimed that M.C. was feigning memory loss, and the evidence in the record fails to support any such claim.

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[4] Contrary to Peralta's argument, *State v. Ortega*, 220 Ariz. 320, 206 P.3d 769 (App. 2008), did not "specif[y] that lack of memory of the prior statement makes admission of the prior statement proper." Instead, *Ortega* -- the only case Peralta cites applying the Arizona Rules of Evidence -- addressed how a prior statement may be used to refresh the recollection of a witness or to impeach a witness who expressly "denies making the prior statement," neither of which occurred here. *See id*. at 330, ¶ 33, 206 P.3d at 779 (citing Ariz. R. Evid. 612, 613(b) and 801(d)(1)).

[5] The superior court was well within its discretion in finding the police officers could not testify as to the inconsistent statements that M.C. admitted at trial that she had made previously. *See State v. Hines*, 130 Ariz. 68, 71, 633 P.2d 1384, 1387 (1981) (where an inconsistency was admitted, "[n]o further proof was necessary").

¶8 Because they were not inconsistent and because the record does not suggest M.C. was feigning memory loss, the superior court did not abuse its discretion in granting the State's motion to prevent Peralta from offering extrinsic evidence of prior statements by M.C. on these details that she could not remember during her trial testimony.

II. Prosecutorial Misconduct.

¶9 Peralta argues prosecutorial misconduct, alleging the prosecutor improperly: (1) "tampered with a witness's testimony to gain an advantage at trial;" (2) in closing "urg[ed] the jury to consider [defendant's] alleged failure to present evidence as evidence of guilt," and that Peralta's attorney was using "smoke and mirrors;" and (3) argued in closing that "Chavo" was an uncommon nickname. Because no timely objection was made, Peralta must show fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, 568, ¶¶ 23, 26, 115 P.3d 601, 608 (2005).

¶10 Prosecutorial misconduct is not the result of legal error, mistake, negligence or insignificant impropriety but, rather, constitutes "intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial." *State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72

(1984)). Prosecutorial misconduct constitutes fundamental error only when it is "so egregious as to deprive the defendant of a fair trial," *State v. Woody*, 173 Ariz. 561, 564, 845 P.2d 487, 490 (App. 1992), or "so pronounced and persistent that it permeates the entire atmosphere of the trial," *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (citation omitted).

¶11 Peralta's witness tampering allegation arises out of whether a detective could have obtained a warrant to obtain Peralta's cell phone records. During an interview, Peralta apparently told a detective that the phone number for "Chavo" was on Peralta's cell phone. At trial, Peralta asked that detective whether he had obtained Peralta's cell phone records to find "Chavo's" phone number. The detective responded that "[you] can't write a warrant unless it's part of the evidence of the crime itself." In discussing the State's objection to another question clarifying that the detective could not obtain a warrant for exculpatory evidence, the prosecutor stated he had instructed the detective to sanitize his response "because his answer would have been, 'I can't do it because I can't get probable cause by a judge who's going to issue probable cause that there is potentially this [exculpatory] evidence. I don't have evidence of a crime actually occurring in that phone.'"

¶12 Instead of knowingly inducing the detective to testify falsely, A.R.S. § 13-2804(A)(2), the record shows the prosecutor

discussed with the detective responding truthfully in a way that sanitized from the response legal conclusions. As to Peralta's argument the detective's testimony that he had no basis for claiming the phone contained evidence of a crime "was a blatant lie," Peralta made no showing that the testimony was false, particularly given the nature of this case (discharge of a firearm at a structure and aggravated assault). Moreover, Peralta vigorously cross-examined the detective on the point. Peralta has shown no prosecutorial misconduct regarding the detective's testimony.

¶13 Peralta also fails to show that the prosecutor impermissibly urged the jury to consider Peralta's failure to present evidence when questioning this detective and in closing. The superior court sustained Peralta's objections to two questions on whether anyone had provided the detective with the phone records. The court later denied Peralta's motion for mistrial on grounds of burden-shifting, correctly finding the State's question about whether the detective had received any information about "Chavo's" phone number after Peralta's arrest did not shift the burden of proof.[6] The record is consistent with

[6] Peralta's summary argument that the prosecutor engaged in misconduct by suggesting that "defendant had not produced any phone records when the prosecutor had them" is not supported by the record. This issue arose after the detective testified he had not received any information about Chavo's phone number following Peralta's arrest. In moving for a mistrial on burden-

these rulings and does not support Peralta's prosecutorial misconduct claim.

¶14 Peralta also claims burden shifting by the prosecutor referring, in closing argument, to the absence of any evidence on Chavo's whereabouts; by suggesting that Peralta could have called Chavo to testify (if he existed) and by arguing that Peralta had "subpoena power" to compel Chavo's testimony. Contrary to these arguments, a "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." *State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985); *State v. Sarullo*, 219 Ariz. 431, 437, ¶ 24, 199 P.3d 686, 692 (App. 2008). Under this standard, the prosecutor did not engage in misconduct in addressing the lack of evidence regarding Chavo.

¶15 Similarly, Peralta has not shown prosecutorial misconduct in the State's closing argument that Peralta was using "smoke and mirrors" to distract the jury. Parties have wide latitude in presenting closing arguments. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000). Although it is

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shifting grounds, Peralta told the superior court that he had disclosed to the State phone records showing text messages between Peralta and M.C. Peralta, however, did not suggest that Chavo's phone number -- the sole issue on appeal with respect to the phone records -- was highlighted in the text messages he produced, or that phone records (other than text messages) had been produced to the State.

improper to attack the integrity of counsel, it is not improper to tell the jury that an adversary's closing argument is attempting to confuse the issues or is misleading. *See State v. Hughes*, 193 Ariz. 72, 85, ¶ 59, 969 P.2d 1185, 1198 (1998) ("Jury argument that impugns the integrity or honesty of opposing counsel is . . . improper."); *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997) ("Criticism of defense theories and tactics is a proper subject of closing argument.").

¶16 For the most part, the prosecutor's argument disputed the defense theory, not defense counsel's integrity. In rebuttal, however, the prosecutor did make a statement that may be read to question defense counsel's integrity: the prosecutor argued to the jury that Peralta's counsel focused on insignificant inconsistencies "because that's what he's supposed to do. He's got to represent his client. He can't point the finger at his client because he knows the physical evidence doesn't corroborate what his client said." On this record, although improper, this isolated statement did not constitute prosecutorial misconduct as defined in *Aguilar*. 217 Ariz. at 238-39, ¶ 11, 172 P.3d at 426-27.

¶17 Finally, Peralta argues the prosecutor improperly argued that Chavo was an unusual nickname. The prosecutor argued the nickname was unusual in urging the jury to draw a reasonable

inference -- that Peralta's story about Chavo was an attempt to deflect blame from himself, not realizing that the police officer was aware that Peralta's nickname was Chavo. Even in the absence of the prosecutor's argument, a reasonable jury could find it unlikely that two friends would use the same nickname. Finally, and in any event, the court instructed the jury that the lawyers' arguments were not evidence. Peralta has not shown the prosecutor's argument that Chavo was an unusual nickname was error.

CONCLUSION

¶18 Peralta's convictions and sentences are affirmed.

/S/_____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/_____
MAURICE PORTLEY, Presiding Judge

/S/_____
DONN KESSLER, Judge