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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: 8/15/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 12-0370
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
IRMA ANN TITTLE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-005789-001

The Honorable Dawn M. Bergin, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
William Scott Simon, Assistant Attorney General
Attorney for Appellee

James Haas, Maricopa County Public Defender Phoenix
By Terry Reid, Deputy Public Defender
Attorney for Appellant

C A T T A N I, Judge

¶1 Irma Ann Tittle appeals from her convictions of three counts of custodial interference and the resulting sentences of

probation. Tittle argues reversal is warranted because of prosecutorial misconduct in the form of arguing facts not in evidence and appealing to the sympathy of the jurors. We disagree and therefore affirm.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 Tittle and the victim (hereinafter "Father") were married to each other until 2003. The two had four children together -- an older son and three daughters -- when Father filed for dissolution of marriage. The May 2003 dissolution decree gave Tittle sole custody of the children, with Father to have parenting time each week.

¶3 Tittle moved to Texas approximately six months later, taking the children with her. Tittle did not inform Father of the move and listed a Phoenix post office box on the change-of-address form she filed with the family court.

¶4 Father lost contact with the children and Tittle for over five years. After Father eventually found the children in Texas, he petitioned the family court to modify custody. In a January 2010 custody order, the family court ordered Tittle and Father to share joint legal custody of the children, allowed the children's primary residence to remain with Tittle in Texas, and ordered reunification services and visitation for Father.

¹ We view the evidence in the light most favorable to upholding the jury's verdict. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

¶15 Over the following months, Father remained unsatisfied with Tittle's compliance with reunification services and with fostering contact between the children and Father. Father requested another modification of custody, prompting a September 2010 hearing that proceeded without Tittle present.² After this hearing, the family court issued a civil arrest warrant for Tittle for failure to appear with the children and issued an ex parte order awarding Father temporary sole custody of the children and ordering the children returned to Arizona. Tittle thereafter faxed the court a motion to quash the arrest warrant.

¶16 Meanwhile, Father returned to Texas to take custody of the children. Father collected the two youngest children and withdrew them from school in preparation for their move to Arizona, made contact with his oldest daughter and arranged to pick her up at the end of the week. When the end of the week arrived, Father temporarily returned the youngest children to Tittle to pack their belongings, with the understanding Tittle would pick up the oldest daughter and return with all three children to a neutral meeting place for the change of custody. Tittle did not return and instead fled with the children to a friend's house; the children did not return to school for one to

² Tittle claimed she was unable to attend the hearing due to surgery scheduled for her son during the same time period. Although Tittle faxed a motion to continue the September hearing to the family court, the court declined to consider the motion because it had not been filed.

two months. The children remained with Tittle until her arrest in May 2011.

¶17 The State charged Tittle with three counts of custodial interference in violation of Arizona Revised Statutes ("A.R.S.") section 13-1302(A)(1)³ "on or between the 1st day of October, 2003 and the 9th day of October, 2010," one count pertaining to each remaining minor child.⁴ Before trial, the superior court precluded Tittle's attempt to use alleged domestic violence by Father against Tittle as a statutory defense to the charges. See A.R.S. § 13-1302(C) (domestic violence threatening immediate danger to the children may be a defense to custodial interference under subsection (A)(2)). The court additionally restricted any testimony from Tittle regarding alleged domestic violence by Father against Tittle as irrelevant to the custodial interference charges. In recognition of this restriction, the court allowed only minimal trial testimony -- from Father as well as Tittle -- about the troubled relationship between Tittle and Father.

¶18 After a five-day trial, a jury found Tittle guilty of each count as charged. The court suspended sentence and imposed concurrent terms of four years' probation for each count.

³ Absent material revisions after the relevant date, we refer to a statute's current version.

⁴ By that time, the oldest son was no longer a minor.

¶9 Tittle timely appealed from the convictions and sentences. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033.

DISCUSSION

¶10 Tittle argues that prosecutors impermissibly referred to facts not in evidence and appealed to the sympathy of the jurors during the State's opening statement and closing argument, and that this misconduct warrants reversal. Because Tittle failed to raise this argument to the superior court, we review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Error is fundamental if it "goes to the foundation of [the defendant's] case, takes away a right that is essential to [the defendant's] defense, and is of such magnitude that [the defendant] could not have received a fair trial." *Id.* at 568, ¶ 24, 115 P.3d at 608. To prevail under this standard, Tittle must show both fundamental error and resulting prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607.

¶11 We will reverse a conviction for prosecutorial misconduct only if "(1) misconduct is indeed present[,] and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Moody*, 208 Ariz. 424, 459, ¶ 145, 94 P.3d

1119, 1154 (2004) (citation omitted). Only misconduct that is "so pronounced and persistent that it permeates the entire atmosphere of the trial" is subject to reversal. *State v. Rosas-Hernandez*, 202 Ariz. 212, 218-19, ¶ 23, 42 P.3d 1177, 1183-84 (App. 2002) (quoting *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997)). Our analysis looks to, "under the circumstances, whether the jurors were probably influenced and whether the [improper] statement probably denied Defendant a fair trial." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993).

¶12 Tittle claims the prosecutor's opening statement improperly appealed to the jurors' sympathy by characterizing Tittle's actions as selfish and by describing those actions as "high jack[ing] and robb[ing]" Father's opportunity to spend time with his children. Tittle additionally argues the prosecutor misled the jury by falsely stating Tittle "said, I don't care. I don't care what you Judge or anyone else has to say. I'm going to do what I want and I'm going to take my kids and I don't care." At most, these were simply figurative references to evidence of Tittle's actions reasonably expected to be introduced at trial, and thus were not improper. See *id.* at 602, 858 P.2d at 1205.

¶13 Tittle next argues the prosecutor's closing argument impermissibly relied on facts not in evidence. In closing, the

prosecutor argued Tittle's motive for fleeing with the children was to take revenge on Father for filing for divorce. As the court pointed out sua sponte after the State's initial closing, no evidence was presented at trial as to Tittle's motive because of the court's order precluding mention of domestic violence, which was Tittle's stated impetus for moving away from Father.

¶14 Despite the wide latitude afforded counsel in closing arguments, counsel may not describe or comment on evidence that has not previously been presented to the jury. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000). Here, after the court admonished prosecutors to refrain from arguing motive, the only reference to the reasons behind Tittle's actions was a statement that "why did she do this or that, or why did he do that. . . . are really irrelevant," which tended to mitigate the force of the earlier argument. Defense counsel also had an opportunity to address the issue in closing, which he did by pointing out the absence of evidence of motive and stating that the prosecutor's characterization was simply speculation. Under the circumstances of this case, we cannot conclude any allegedly improper remarks "probably influenced the jurors." *State v. Morris*, 215 Ariz. 324, 336, ¶ 51, 160 P.3d 203, 215 (2007) (citation omitted).

¶15 Tittle also contends prosecutors impermissibly appealed to the jurors' sympathy by mentioning Father's

financial troubles and asking the jurors to "show [Father] that someone does care, that someone has cared this entire time." Such statements could have encouraged the jury to decide the case based on emotion, rather than on the evidence as presented during trial and the law as instructed by the court. See *Bible*, 175 Ariz. at 603, 858 P.2d at 1206; *Morris*, 215 Ariz. at 337, ¶ 58, 160 P.3d at 216 (prosecutor's statements "playing on [the jurors'] sympathy for the victims and fears of the defendant. . . . constitute misconduct"). Ultimately, however, the two isolated statements invoking the jurors' sympathy and an abandoned revenge-as-motive theme are not "so pronounced and persistent [as to] permeate[] the entire atmosphere of the trial." See *Rosas-Hernandez*, 202 Ariz. at 218-19, ¶ 23, 42 P.3d at 1183-84 (citation omitted).

¶16 Nor has Tittle shown a significant likelihood that the jurors were influenced by any improper remarks so as to call into question the fairness of the proceeding. See *Bible*, 175 Ariz. at 601, 858 P.2d at 1204. This is particularly so in light of the substantial evidence presented that Tittle intentionally withheld and hid the children from Father even after the January 2010 order granting Father joint custody and the September 2010 order granting Father sole custody. Because Tittle has shown neither prejudice nor prosecutorial misconduct

of such degree as to deny her a fair trial, we reject her arguments.

CONCLUSION

¶17 For the foregoing reasons, we affirm Tittle's convictions and sentences.

/S/
KENT E. CATTANI, Judge

CONCURRING:

/S/
ANDREW W. GOULD, Presiding Judge

/S/
PATRICIA K. NORRIS, Judge