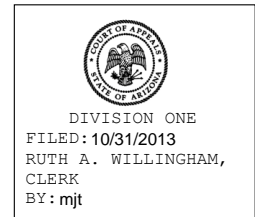


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 12-0472
)
Appellee,) Department E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
ADALBERTO RIVAS,) Rule 111, Rules of
) the Arizona Supreme
Appellant.) Court)
)
_____)

Appeal from the Superior Court of Maricopa County

Cause No. CR2011-164772-001

The Honorable William L. Brotherton, Jr., Judge

AFFIRMED

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

Terry J. Adams, Maricopa County Public Defender Phoenix
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Adalberto Rivas (defendant) appeals his convictions and sentences on two counts of aggravated assault on police officers, class five felonies, and one count of criminal trespass, a class six felony. Defendant

asserts that the trial court erred in failing to grant him a new trial after the prosecutor improperly commented on his right to remain silent during closing arguments. Finding no error, we affirm.

¶12 On Christmas morning 2011, police were called to the residence of S.M. She reported that her former boyfriend, defendant, had forced his way into her home. Police found defendant hiding under her bed, handcuffed him, and put him in a police vehicle while conducting the initial investigation. Defendant made multiple statements to police prior to receiving *Miranda* warnings including “[t]respassing maybe, but I wasn’t burglarizing nothing” and that he’d now learned his lesson and he would “leave her alone.” Defendant got increasingly agitated, apparently highly concerned that he might be charged with burglary; he attempted to exit the vehicle, eventually assaulting two officers at the scene. Defendant was taken to the police station by a third officer, Officer Stokes, who had reported to the officers needing assistance call. Officer Stokes took defendant to the station and administered *Miranda* warnings.

¶13 During trial, both the state and defense raised defendant’s pre-*Miranda* statements and his attempts to engage the officers at the scene. Officer Stokes testified

that *Miranda* warnings were administered at the police station, and defendant was angry and swore at the officer, leaving the officer unable to complete the interview due to defendant's lack of cooperation. During the defense's closing argument, defendant's counsel made assertions that defendant:

wanted to talk to the officers [about the charges], and they didn't listen to that. He attempted over and over . . . this is a citizen who is being charged with something, and he is saying to the officers, well, wait a second. Let's talk. . . . They weren't having any of it. They were pushing him, cramming him back into the police car, and he was standing back up against it. Not the smartest move, resisting arrest. Not assault.

Defense counsel pointed to Officer Stokes' testimony and the defendant's attempts to talk to officers, and argued that he may have been resisting arrest but it was not aggravated assault. On rebuttal, the prosecutor stated Officer Stokes:

tried to talk to the defendant, and again, that's very important because the defendant just wanted to tell his side of the story. He was trying to tell these officers, hey, man, it is not a burglary. But these officers were not listening. Okay. He is at the station. The officer is giving him *Miranda*. Does he at that point say, you got it all wrong. I wasn't burglarizing this house. I had permission to be there. We were boyfriend/girlfriend. She let me in the house, he didn't say any of that.

Defendant objected, stating it was an improper comment on

defendant's right to remain silent, and he moved for a mistrial. The prosecutor explained that he had been about to re-iterate Officer Stokes' testimony about defendant swearing at Officer Stokes during the *Miranda* rights to show defendant's anger at the arrest. The trial judge warned the prosecutor that he was getting close to the edge but stated:

you can say that what he told the officers was "fuck you" but just state that. But again he was voluntarily speaking to the officers, so I don't think it's inappropriate to comment on the fact that all this was going on. He could have said the other things, so I'm going to deny the motion for mistrial.

The trial judge addressed the attorneys again after the jury panel began deliberations, ruling:

With regard to the objection and the motion for mistrial, again, I am denying that. I just looked back at the record at what was said. I don't think it is appropriate that the defense comments on the defendant's desire to tell his side or to talk to the police without the State being able to respond. And he did have an opportunity to do that. And when I looked at the record on this, as far as what the State did comment on only went to the actual charge of the Trespass and the issue of whether or not he had permission to be there. So I don't think that comments of the State actually infringed on his right to invoke. And the fact the record's clear, he did not actually invoke except for maybe I would assume the term "fuck you" would be considered an invocation of your rights But again, it was only mentioned with regard to the Criminal Trespass charge anyways.

¶14 Defendant was convicted on all three counts and

sentenced to 7 years for each aggravated assault charge and to 5.75 years on the criminal trespass charge, with the sentences to be served concurrently. Defendant timely appealed.

¶15 On appeal, defendant asserts that the trial court erred in failing to grant a mistrial after the prosecutor commented on defendant's right to remain silent. Defendant states this is so:

even if it is not actually clear at what point the prosecutor in the instant case was referring to, it is clear that he was in custody and whether Miranda warnings were given or not, *Van Winkle* holds unequivocally that the prosecutor's comment on his right to remain silent is a violation of the Fifth and Fourteenth Amendments of the United States Constitution.

We review the grant or denial of a mistrial under an abuse of discretion standard. *State v. Adamson*, 136 Ariz. 250, 263, 665 P.2d 972, 985 (1983). We give the trial court deference because it is in the best position to determine whether the alleged error actually affected the trial. *State v. Lamar*, 205 Ariz. 431, 439, ¶ 40, 72 P.3d 831, 839 (2003).

¶16 Defendant cites the recent Arizona Supreme Court ruling in *State v. VanWinkle*, for the proposition that the prosecutor wrongfully commented on defendant's silence while he was in custody, whether or not defendant had been

Mirandized yet, and that such comment violates his constitutional right to remain silent. 229 Ariz. 233, 273 P.3d 1148 (2012) (expanding on *Doyle v. Ohio*, 426 U.S. 610, 619 (1976)). Defendant argues that such prosecutorial misconduct constitutes reversible error and the convictions and sentences in this matter must be set aside.

¶17 The state makes two assertions: first, defendant has not shown, or even taken a position, that he either unambiguously invoked or did not otherwise waive his *Miranda* rights by his conduct; and second, that a prosecutor may fairly point out to the jury that the evidence does not support the defense's asserted theory or story. See *State v. Henry*, 176 Ariz. 569, 580, 863 P.2d 861, 872 (1993) (no constitutional violation when state argued in closing that defendant's silence as to the murder was relevant when he spoke freely regarding other matters to officers); *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987) ("Even where the defendant does not take the stand, the prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not constitute a comment on defendant's silence.") (citations omitted). The trial court found both that defendant was voluntarily speaking to

the officers and that the prosecutor was entitled to respond to defense counsel's argument that defendant was just trying to talk to officers who wouldn't listen. Additionally, the trial court correctly pointed out that the prosecutor's comment went only to the lesser charge of criminal trespass and not to the aggravated assault charges. The trial court did not err.

¶8 For the trial court to have abused its discretion in denying a mistrial there must be clear error. *Lamar*, 205 Ariz. at 439, ¶ 40, 72 P.3d at 839 ("A declaration of a mistrial is the most dramatic remedy for trial error and is appropriate only when justice will be thwarted if the current jury is allowed to consider the case.") (citation omitted). On an allegation of prosecutorial misconduct, therefore, the defendant must have been denied a fair trial. See *State v. Hallman*, 137 Ariz. 31, 37, 668 P.2d 874, 880 (1983) ("Misconduct alone will not cause a reversal, but only where the defendant has been denied a fair trial as a result of the actions of counsel.") Thus, even if we were persuaded that defendant had shown misconduct here, the prosecutor's comments would be subject to a harmless error analysis. See *VanWinkle*, 229 Ariz. at 237, ¶¶ 16-17, 273 P.3d at 1152 (holding prosecutor's improper comment that VanWinkle's silence was a tacit

admission of guilt was, nevertheless, harmless error). Given the evidence, including defendant's own properly admitted incriminating statements that he was trespassing at his prior girlfriend's house, we cannot find the trial court abused its discretion.

¶19 For the above stated reasons, defendant's convictions and sentences are affirmed.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Presiding Judge

/s/

MARGARET H. DOWNIE, Judge