IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

KHEYLON TRISTAN CUNNINGHAM, *Appellant*.

No. 1 CA-CR 15-0831
FILED 6-29-2017

Appeal from the Superior Court in Maricopa County
No. CR2013-459537-001
The Honorable Erin Otis, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael Valenzuela
Counsel for Appellee

Maricopa County Office of the Legal Advocate, Phoenix
By Colin F. Stearns
Counsel for Appellant

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge Kenton D. Jones joined.

K E S S L E R, Judge:

¶1 Kheylon Tristan Cunningham appeals from his convictions and sentences for felony murder, burglary, aggravated assault, and misconduct involving weapons. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 On the morning of December 12, 2013, Cunningham barged into the apartment of his ex-girlfriend, KT, slammed her into a door frame, and, in front of her and her cousin, NM, shot the father of KT's infant daughter, killing him. KT had told Cunningham two weeks earlier that their relationship was over, and a week before the shooting, he had threatened to shoot the victim if he ever saw him at her apartment. After shooting the victim, Cunningham pointed the gun at KT and threatened to kill her if she called police. Cunningham hid in the apartment of a friend for more than twelve hours before he was taken into custody.

¶3 Cunningham testified that KT had invited him into the apartment because they had planned for him to take her son to school that morning. He testified he was attacked by NM and the victim, and while they were wrestling, he got possession of the victim's gun and shot the victim. He testified that when he shot the victim, he was in fear for his life. He testified he had had no previous problems with NM or the victim.

¶4 The jury convicted Cunningham of first degree murder, burglary in the first degree, aggravated assault, and misconduct involving weapons. The jury found that Cunningham was on felony probation at the time of the offenses and found numerous aggravating circumstances. The court sentenced Cunningham to concurrent terms of natural life for murder, fifteen years for burglary, and 4.5 years for misconduct involving weapons. Cunningham also received a consecutive term of twelve years on the aggravated assault conviction. The court revoked his probation and sentenced him to eight years' imprisonment, to be served consecutively to

the sentences in this matter.[1] Cunningham filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2017), 13-4031 (2017), and 13-4033(A) (2008).

DISCUSSION

I. Forfeiture by Wrongdoing

¶5 Cunningham argues that the superior court abused its discretion and violated his rights under the Confrontation Clause by allowing the prosecutor to introduce the out-of-court testimonial statements of NM, based on its finding that the witness was unavailable to testify, and Cunningham had procured his unavailability. Although we ordinarily review evidentiary rulings for abuse of discretion, we review evidentiary rulings that implicate the Confrontation Clause de novo. *State v. Ellison*, 213 Ariz. 116, 130, ¶ 42 (2006) (citations omitted).

¶6 The Confrontation Clause prohibits in a criminal case the use of a testimonial pretrial statement in lieu of testimony from a witness unless there was a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 51-54 (2004). The forfeiture-by-wrongdoing doctrine, however, provides an exception to this general rule. *See id.* at 62; *Giles v. California*, 554 U.S. 353, 359 (2008). The doctrine has been codified in Arizona Rule of Evidence ("Rule") 804. Ariz. R. Evid. 804(b)(6) (providing for exception to rule against hearsay for "statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.").

¶7 Before a trial court may admit out-of-court testimonial statements under the forfeiture-by-wrongdoing doctrine, the State must prove by a preponderance of the evidence that (1) the declarant is unavailable to testify at trial; (2) the declarant's unavailability is the result of wrongdoing; (3) the defendant engaged in or acquiesced in the wrongdoing; and (4) the defendant intended to procure, and actually did procure, the declarant's unavailability to testify as a witness. *See State v. Franklin*, 232 Ariz. 556, 559-61, ¶¶ 12-25 (App. 2013); *State v. Valencia*, 186 Ariz. 493, 498 (App. 1996); Ariz. R. Evid. 804(b)(6).

¶8 NM refused to testify because Cunningham, who was in an adjacent holding tank that morning, had called him a "snitch" in the

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[1] Cunningham filed a separate appeal of this sentence, and we affirmed the sentence as modified. *State v. Cunningham*, 1 CA-CR 16-0354, 2017 WL 1632411 (Ariz. App. May 2, 2017) (mem. decision).

presence of other inmates. He therefore felt threatened that if he testified, he risked being cut or stabbed. According to NM, after he told Cunningham he was not going to testify, Cunningham said, "[a]ll right then because I'm just protecting you from getting stabbed, from getting stuck. You know if you testify, you're going to get stuck, right?" The prosecutor avowed that earlier that morning, NM had been willing to testify. A Phoenix police detective testified that word of someone being a snitch travels among the inmates, and snitches are targets for threats, violence, and death.

¶9 The court found that the State had met its burden by showing (1) NM was unavailable as a witness because he refused to testify despite being advised by the court of the consequences of failing to do so; and (2) Cunningham had caused NM to be unavailable as a witness by broadcasting to other inmates that "[NM] was going to be snitching or testifying against him," followed by a threat from Cunningham "that because of him testifying he risked being cut or stabbed." The court accordingly found that the State could introduce NM's testimonial statement to police after the incident.

¶10 The court did not err in ruling that the out-of-court testimonial statement of NM was admissible under the forfeiture-by-wrongdoing doctrine. The court appropriately concluded that NM was "unavailable" because he refused to testify despite a court order to do so. *See* Ariz. R. Evid. 804(a)(2) ("A declarant is considered to be unavailable as a witness if the declarant . . . refuses to testify about the subject matter despite a court order to do so"). "A witness's refusal to testify makes him unavailable for Confrontation Clause purposes." *State v. Lehr*, 227 Ariz. 140, 148, ¶ 34 (2011) (citation and quotation omitted). The State served NM with a subpoena to compel him to attend trial and testify. The court warned him that he was required to testify and that if he refused to testify, "the [S]tate [could] move for sanctions such as incarcerating you, things of that nature, which I don't want to have to do. But we're going to need you to honor the subpoena." NM repeatedly told the court he was not willing to testify. The court found he was unavailable to testify under Rule 804(a)(2) based on his explicit refusal to testify, despite being warned of the consequences. The record provides ample support for this finding.

¶11 Cunningham suggests for the first time on appeal that the witness was not "unavailable" because he might have been willing to testify if Cunningham was not present in the courtroom. Cunningham, however, never indicated that he would consent to his absence from trial, which would have required a waiver of his right to be physically present at his trial. *See State v. Levato*, 186 Ariz. 441, 443 (1996) (citations omitted) (holding

that the accused's right to be present at trial is protected by the Sixth Amendment to the federal constitution and Article 2, Section 24 of the Arizona Constitution). Moreover, videotaped testimony like that ordered in *State ex rel. Montgomery v. Kemp*, 239 Ariz. 332, 335, ¶ 16 (App. 2016), on which Cunningham relies, might very well have exposed NM to the very danger he feared—the threat of violence from having testified against Cunningham—even if he were placed in protective custody.

¶12 We also reject Cunningham's argument, raised for the first time on appeal, that the evidence of unavailability "was brought to light only after coercive examination intended to find [NM] unavailable." The court has a duty to exercise reasonable control over the method of examining witnesses to "make those procedures effective for determining the truth." Ariz. R. Evid. 611(a)(1). In this case, the court stated that it would allow further questions in the interests of clarity. The court allowed defense counsel to re-cross several times following the court's and State's questions. Defense counsel did not object at the time, and our review fails to show that the examination was "coercive," or designed to show that the witness was "unavailable," as opposed to simply clarifying if NM would testify under any circumstances. This claim accordingly fails.

¶13 Nor did the court err in concluding that Cunningham had procured NM's unavailability by engaging in "wrongdoing." The evidence showed that Cunningham called NM a "snitch" in front of numerous inmates, and then asked him if he still intended to testify against him. When NM told Cunningham he would not testify, Cunningham told him he was "just protecting you from getting stabbed, from getting stuck," and "you know if you testify, you're going to get stuck, right?" Cunningham's conduct constituted witness tampering, "a classic form of wrongdoing that can lead to forfeiture." *Franklin*, 232 Ariz. at 559, ¶ 15; A.R.S. § 13-2804(A)(1) (2014) ("A person commits tampering with a witness if the person knowingly communicates, directly or indirectly, with a witness in any official proceeding . . . to . . . [u]nlawfully withhold any testimony."). Moreover, the evidence amply supported the court's finding that Cunningham's threats to NM were intended to, and did in fact, procure NM's unavailability. Notably, the court found that NM's fear was credible, based on his demeanor in court.

¶14 On this record, the court did not err in concluding that the doctrine of forfeiture by wrongdoing applied to allow admission of NM's prior testimonial statement at trial.

II. Evidence of Threats to NM

¶15 Cunningham argues that the court "abused its discretion when it admitted non-intrinsic, unduly prejudicial evidence based on a flawed Rule 403 analysis." The court found that the evidence—a redacted video of NM's testimony outside the jury's presence on the threats Cunningham had made, and testimony from a deputy sheriff about his observations of NM, and his knowledge of jail culture and "snitches"—was admissible both as intrinsic evidence and under Rule 404(b) as evidence of consciousness of guilt and was not unduly prejudicial. Cunningham argues that the evidence revealed his in-custody status, which was highly prejudicial, and the court's Rule 403 analysis was flawed because it relied on a pre-2015 memorandum decision of this Court, which "has no precedential value and cannot be cited as authority."

¶16 We review a trial court's evidentiary rulings for a clear abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167 (1990) (citation omitted). We may affirm the superior court "on any grounds which were within the issues." *State v. Dugan*, 113 Ariz. 354, 356 (1976) (citations omitted). Under Rule 404(b), evidence of other acts or crimes is admissible unless offered "to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). Evidence otherwise admissible under Rule 404(b) may be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice. Ariz. R. Evid. 403. "Evidence is unfairly prejudicial if it has an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Mills*, 196 Ariz. 269, 275, ¶ 28 (App. 1999) (citation and quotation omitted). The court must provide an appropriate limiting instruction if requested. *State v. Mott*, 187 Ariz. 536, 545 (1997) (citations omitted).

¶17 Cunningham does not dispute that the other act was proven by clear and convincing evidence; that it was offered for and relevant to a proper purpose under Rule 404(b) (consciousness of guilt); or that an appropriate limiting instruction was given.[2] He contends only that the trial court abused its discretion in finding that the probative value of the act was not substantially outweighed by the danger of unfair prejudice caused by revealing that he was in custody. *See Estelle v. Williams*, 425 U.S. 501, 504-

[2] In light of Cunningham's failure to dispute these predicates to a Rule 404(b) finding, and his concession that the testimony "was 404(b) evidence," it is not necessary for this Court to also analyze its admissibility as intrinsic evidence.

06 (1976) (holding that criminal defendants have a constitutional right not to be compelled to appear before a jury in jail attire).

¶18 The court did not abuse its discretion in concluding that the prejudice to Cunningham from the revelation that he was in custody did not substantially outweigh the probative value of his threat as to his consciousness of guilt. The court noted that the evidence had significant probative value on consciousness of guilt, and any undue prejudice from the revelation that Cunningham was in custody could be minimized by a limiting instruction on his in-custody status, along with the usual limiting instruction for Rule 404(b) evidence. The court ultimately instructed the jury that "threats do not by themselves prove guilt," but could be considered along with the other evidence; evidence of the threats could not be considered to determine that defendant acted in conformity therewith and therefore committed the charged offense; and "you must not let the fact that the defendant is in custody for this offense influence your decision in this matter." On this record, the court acted well within its discretion in finding that any prejudice from the revelation that Cunningham was in custody did not substantially outweigh the probative value of his threats to NM. *See State v. Spencer*, 176 Ariz. 36, 41 (1993).

¶19 To any extent that the court relied on an unpublished pre-2015 memorandum decision, this reliance does not require reversal. "Trial judges are presumed to know the law and to apply it in making their decisions." *State v. Williams*, 220 Ariz. 331, 334, ¶ 9 (App. 2008) (citations and quotation omitted). Cunningham has shown nothing to rebut that presumption. His argument for the first time on appeal that the court "was duped into considering illegal authority," which it might have believed it "was obligated to follow" is based on sheer speculation, unsupported by the record.

¶20 The court noted its independent basis for its finding with respect to its Rule 403 analysis both before and after mention of the unpublished decision cited by the State. The court announced its decision that the probative value of the evidence of the threats on "consciousness of guilt" outweighed the prejudice from the jury learning of Cunningham's in-custody status before noting that the State had provided an unpublished decision regarding jail calls and defendant's in-custody status. In the cited unpublished decision, this Court held simply that defendant had failed to prove prejudice from revelation of his in-custody status through admission of jail calls, in light of the presumption that jurors followed the instruction not to let the fact he was in custody influence their decision. *State v. Estell*, 1 CA–CR 11–0846, 2012 WL 6176790, at *6, ¶ 25 (Ariz. App. Dec. 11, 2012)

(mem. decision) (citations omitted). After referring to the unpublished decision, the court outlined its own experience with jail calls, noted that they are admissible if there is a legal basis, and reiterated that any prejudice associated with the jury learning that the defendant was in custody could be handled by a limiting instruction. To any extent that the court improperly relied on this unpublished decision, *see* Ariz. R. Sup. Ct. 111(c)(1)(C), it was cumulative to the court's own experience and legal knowledge, and accordingly did not prejudice Cunningham.

III. Comment on Cunningham's Silence

¶21 Cunningham argues that the court fundamentally erred in allowing the State to elicit testimony on his post-arrest, pre-*Miranda* silence and to comment on that testimony and his post-*Miranda* silence. On fundamental error review, the defendant has the burden of proving that the court erred, that the error was fundamental in nature, and that he was prejudiced thereby. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20 (2005) (citations omitted).

¶22 The use of a defendant's post-*Miranda* silence as evidence of guilt, even for impeachment purposes, violates a defendant's due process rights. *See Doyle v. Ohio,* 426 U.S. 610, 619 (1976). Our supreme court has also held that use of a defendant's pre-*Miranda* silence while in custody, even absent police interrogation, violates a defendant's Fifth Amendment rights. *State v. Van Winkle*, 229 Ariz. 233, 236-37, ¶ 15 (2012) (citations omitted). The Fifth Amendment, however, does not prohibit comment on a defendant's pre-arrest silence, absent state action compelling him to speak. *State v. Lopez*, 230 Ariz. 15, 20, ¶¶ 16-17 (App. 2012) (citations omitted). Whether testimony constitutes an improper comment on a defendant's constitutional right to remain silent is a question of law this Court reviews de novo. *State v. Newell*, 212 Ariz. 389, 397, ¶¶ 27-28 (2006) (holding that application of *Miranda* is reviewed de novo).

¶23 Cunningham first objects to a single question posed by the prosecutor to the arresting officer: "Detective, when you began the process of taking the defendant into custody, did he say anything, anything at all, about the investigation that Phoenix Police had been conducting or why Phoenix Police might have been there?" The detective responded simply, "No." Cunningham argues that this was a comment on his "post-arrest, pre-*Miranda*" silence. The question, however, referenced the time when the detective "*began* the process of taking the defendant into custody." (emphasis added). The question therefore was proper because it referred

to Cunningham's pre-arrest, pre-*Miranda* silence. *See Lopez*, 230 Ariz. at 20, ¶ 16.

¶24 Cunningham also objects, again for the first time on appeal, to the prosecutor's argument in closing that "[Defendant] fails to mention any of his self-defense claim to really anyone until he sat right here." Cunningham argues that these remarks commented on his right to remain silent post-*Miranda*. We disagree. In context, it is apparent that in making the first remark, the prosecutor was commenting on Cunningham's failure to assert self-defense immediately after the murder or to a friend, in whose apartment he hid for twelve hours. This remark was not improper.

¶25 Cunningham finally argues that the prosecutor improperly commented on his post-*Miranda* silence by arguing in rebuttal closing: "[H]e sits on this vital information for almost two years, doesn't tell a soul until his opportunity to meet you folks. Does that make sense? Is that reasonable?" This statement could be interpreted as a comment on Cunningham's silence after being given his *Miranda* warnings. However, we need not decide whether the remark was that expansive. Even assuming this remark amounted to error, Cunningham failed to meet his burden of showing that this single remark prejudiced him, as necessary for reversal on fundamental error review. *See Brecht v. Abrahamson*, 507 U.S. 619, 639 (1993) ("[I]n view of the State's extensive and permissible references to petitioner's pre-*Miranda* silence—*i.e.*, his failure to mention anything about the shooting being an accident to the officer who found him in the ditch, the man who gave him a ride to Winona, or the officers who eventually arrested him—its references to petitioner's post-*Miranda* silence were, in effect, cumulative.").

IV. Pervasive Prosecutorial Misconduct

¶26 Cunningham argues the prosecutor "engaged in persistent and pervasive misconduct that permeated the entire atmosphere of appellant's trial," depriving him of a fair trial and requiring reversal. Cunningham did not object at trial to any of these instances of alleged prosecutorial misconduct, limiting us to review for fundamental error only. *Henderson*, 210 Ariz. at 568, ¶ 22. Defendant has the burden of proving that the court erred, that the error was fundamental in nature, and that he was prejudiced thereby. *Id.* at 567, ¶ 20 (citations omitted).

¶27 To determine whether a prosecutor's remarks are improper, we consider "(1) whether the remarks call to the attention of the jurors matters that they would not be justified in considering in determining their

verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks." *State v. Jones*, 197 Ariz. 290, 305, ¶ 37 (2000) (citation and quotation omitted). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Morris*, 215 Ariz. 324, 335, ¶ 46 (2007) (citation and quotation omitted). In considering whether argument is misconduct, this Court "looks at the context in which the statements were made as well as the entire record and to the totality of the circumstances." *State v. Nelson*, 229 Ariz. 180, 189, ¶ 39 (2012) (citation and quotation omitted).

A. Citation to Pre-2015 Unpublished Decision

¶28 Cunningham argues that the prosecutor committed misconduct when he cited a pre-2015 memorandum decision in support of his legal argument on the other act evidence.

> Prosecutorial misconduct 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, 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 (App. 2007) (citation and quotation omitted). Here, the prosecutor's improper citation to the memorandum decision appeared to be simply a misunderstanding that Arizona Supreme Court Rule 111(c)(1) allowed citation to all memorandum decisions, not just those issued on or after January 1, 2015. *See* Ariz. R. Sup. Ct. 111(c)(1)(C). We find no misconduct and, for the reasons stated above, no prejudicial misconduct.

B. Comment on Right to Remain Silent

¶29 Cunningham argues the prosecution improperly commented on Cunningham's right to remain silent during its case-in-chief and during closing arguments. For the reasons outlined *supra*, we find no prejudicial misconduct.

C. Improper Vouching

¶30 Cunningham argues the prosecutor improperly engaged in vouching during closing arguments. There are "two forms of impermissible

prosecutorial vouching: (1) where the prosecutor places the prestige of the government behind its witness; [and] (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. King*, 180 Ariz. 268, 276-77 (1994) (citation and quotation omitted). Cunningham argues that the prosecutor placed the prestige of the government behind its own evidence and expressed his personal opinion of the facts when he argued: "So those are the pieces. Those are the facts. You decide what the facts are. The facts are he didn't act in self-defense and he sat there and lied to you. Those are the facts." He also argues that the prosecution improperly vouched for one of its own witnesses by arguing that her faulty memory and her tears while testifying supported her "believability . . . . It shows she's not lying," and vouched for another of its witnesses by arguing that his statements corroborated hers "because it's the truth," "[b]ecause he's not lying . . . [he] is telling the truth." In this case, before, during, and after making the remarks at issue, the prosecutor emphasized that it was the jury's job to determine credibility, and linked his characterization of the witnesses to the evidence presented at trial, including the witness's demeanor. The prosecutor's arguments, in context, were not improper. *See State v. Corona*, 188 Ariz. 85, 91 (App. 1997) (holding prosecutor's characterization of the witnesses as "truthful" did not constitute vouching "because the prosecutor made clear that it was for the jury to 'determine the credibility of' the witnesses and her characterization of the witnesses as truthful was sufficiently linked to the evidence.").

¶31 Cunningham also objects to the following argument, on grounds the prosecution was suggesting that "there was additional information that supported its case, but the State could not present it to the jury because of some purported misconduct by the appellant":

> That 15 hours that he hid in Isabelle's house, he denied you evidence. He denied what his hand may have looked like if there was gunshot residue. Maybe if there was some dirt on them, maybe there was blood on them. He denied you all that. The clothes he was wearing, how he was dressed, you heard different descriptions, he denied you exactly what he was wearing that day. He also denied you of the gun. All of the things he knows are things that can incriminate him and he does whatever he can to get rid of them.

¶32 By these remarks, the prosecutor did not suggest that evidence outside the record supported his claim. Rather, the prosecutor was arguing a reasonable inference from Cunningham's decision to flee after committing the offense—that evidence the prosecutor might otherwise be

able to present to the jury had been destroyed. Moreover, even if the remarks were improper, the jury was instructed that counsels' arguments were not evidence, and it should consider only the evidence admitted at trial in reaching its verdicts. Absent any indication in the record that the jury failed to heed this instruction, we presume the jury followed it. *See Newell*, 212 Ariz. at 403, ¶ 68 (citation omitted).

D. Misstating the Law

¶33 Cunningham further argues the prosecutor misstated the law by improperly shifting the burden of proof of self-defense to him. In support of this argument, Cunningham cites two passages from a thirteen-page argument outlining the State's position the defendant's testimony that he acted in self-defense was not credible, nor his claim supportable, because his testimony, his conduct, the physical evidence, and the testimony of the other witnesses refuted his claim. The passages that Cunningham argues shifted the burden of proof simply stated that the jury would have to believe Cunningham's version of events to find he shot the victim in self-defense, because no other evidence supported his claim. Even if this was improper, the court specifically instructed the jury that the State had the burden to disprove self-defense, a burden the prosecution argued in rebuttal that it had met. On this record, we conclude that the prosecutor's remarks did not constitute misconduct.

¶34 He also argues that the prosecutor misstated the law by improperly arguing that Cunningham's flight "could be considered as evidence of guilt." The prosecutor's argument that Cunningham's flight was "evidence of guilt," however unartfully, summarized in lay terms the principle that innocent people do not flee. For a more precise directive, the State referred the jury to the court's instruction:

> In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's running away, hiding, or concealing evidence together with all the other evidence in the case . . . . Running away, hiding, or concealing evidence after a crime has been committed does not by itself prove guilt.

The prosecutor's argument did not constitute misconduct.

E. Improper Appeal to Jurors' Prejudices

¶35 Cunningham argues the prosecutor "improperly appealed to the prejudices of the jury when [he] asked the jury not to belie[ve] appellant because he was a vacuum cleaner salesman who wore a suit, tie and glasses to court." Cunningham argues that the prosecutor's argument implied that "people employed in sales are skilled liars," an argument "designed to inflame the prejudices of the jury against people, like appellant, who make their living in sales." He argues that the prosecutor's reference to him wearing a suit, tie, and glasses was an improper comment on his in-custody status. We have reviewed the arguments at issue, and conclude that they were tied to the evidence and not improper, as well within the wide latitude accorded counsel in closing argument. *Jones*, 197 Ariz. at 305, ¶ 37 (citation omitted). Even if improper, they were harmless given the overwhelming evidence of guilt.

F. Cumulative Effect

¶36 Finally, Cunningham argues that the cumulative effect of this misconduct deprived him of a fair trial, requiring reversal. Cunningham has failed to demonstrate that the "prosecutor intentionally engaged in improper conduct and did so with indifference, if not specific intent, to prejudice the defendant," as is necessary to reverse on the basis of cumulative error. *See State v. Gallardo*, 225 Ariz. 560, 568, ¶ 35 (2010) (citation and quotation omitted).

CONCLUSION

¶37 For the foregoing reasons, we affirm Cunningham's convictions and sentences.

AMY M. WOOD • Clerk of the Court
FILED: AA