IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

CLINT MICHAEL CUMMINGS, *Appellant*.

No. 1 CA-CR 16-0334
FILED 9-12-2017

Appeal from the Superior Court in Maricopa County
No. CR2015-120076-001
The Honorable Christopher A. Coury, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eric Knobloch
Counsel for Appellee

Law Office of David Michael Cantor PC, Phoenix
By Daniel Ian Hutto, David M. Cantor
Counsel for Appellant

MEMORANDUM DECISION

Acting Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Patricia A. Orozco and Judge John C. Gemmill joined. [1]

S W A N N, Judge:

¶1 Clint Michael Cummings appeals his convictions and sentences for two counts of aggravated assault, and one count each of resisting arrest and disorderly conduct. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Shortly after midnight on May 3, 2015, Cummings was ejected from the Bottled Blonde Bar, and fell in front of a Scottsdale police officer on bike patrol.[2] When the officer identified himself and tried to block Cummings's return to the bar, Cummings spun toward the officer, put him in a headlock and squeezed "extremely hard." The officer was unable to breathe; his vision was "splotchy" and blurry; he lost hearing; and he started to black out. Fearing for his colleague's life, a fellow officer punched Cummings in the face and head four times (two of which hit the other officer's hand) and yelled to him to stop resisting, to no effect. He then administered a Taser twice before the other officer was able to break free. Cummings exhibited signs and symptoms of intoxication.

¶3 When he was interrogated about four hours after he was arrested, Cummings told the officer he did not remember what happened, and he did not know why he was under arrest.

¶4 The jury convicted Cummings of the charged offenses of two counts of aggravated assault and one count each of resisting arrest and disorderly conduct. The court imposed concurrent terms of three years'

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[1] The Honorable Patricia A. Orozco and the Honorable John C. Gemmill, Retired Judges of the Court of Appeals, Division One, have been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

[2] We view the evidence in the light most favorable to sustaining the conviction. *State v. Boozer*, 221 Ariz. 601, 601, ¶ 2 (App. 2009).

supervised probation for the two counts of aggravated assault, and two years' supervised probation for resisting arrest and disorderly conduct, with 90 days in jail as a condition of probation on Count 1. Cummings filed a timely notice of appeal.

DISCUSSION

I. THERE WAS NO FUNDAMENTAL ERROR IN THE ADMISSION OF LAY TESTIMONY ABOUT "REAR NAKED CHOKE HOLDS."

¶5 Cummings argues it was error for the superior court to allow the head of the Bottled Blonde Bar security staff ("Mr. J.") to testify about the "rear naked choke hold," which this witness described as "an MMA move," because it was not the proper subject of lay opinion under Arizona Evidence Rule 701, and the witness had failed to show the necessary expertise to opine on the subject.

¶6 We ordinarily review evidentiary rulings for abuse of discretion. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42 (2006). But because Cummings did not object at trial, we review only for fundamental error. *State v. Lopez*, 217 Ariz. 433, 434–35, ¶ 4 (App. 2008).

¶7 The testimony at issue arose after defense counsel, while cross-examining Mr. J., introduced a videotaped interview in which Mr. J. stated that Cummings had attempted a "rear naked choke hold" on the officer. On redirect, the prosecutor asked Mr. J. to describe a "rear naked choke hold." Without objection, the witness testified, "It's an MMA move. When you have an individual facing the opposite way, you grab them in a triangular hold, and you press down on the windpipe, basically to knock them out. But it's dangerous. You can't really do that anymore, because if you crush this, you can kill someone."

¶8 The witness testified that a rear naked choke hold is a specific type of choke hold, and it appeared to him that defendant was trying to put the officer in the rear naked choke hold:

> Because if you have somebody in any other choke hold, you are just holding someone. Basically, your end result is to try to get them in that rear naked, so you can pass them out, not keep wrestling around with them. That is the whole starting point, is to put them in a hold to eventually go into the naked choke hold.

Defense counsel objected following this explanation, citing "Foundation as to the witness' speculation." The court overruled the objection, reasoning that "[t]he witness [wa]s explaining what he meant by rear naked choke hold." The witness subsequently testified that Cummings was successful in putting the officer in a choke hold, but was not successful in putting the officer in a rear naked choke hold.

¶9 Defense counsel also objected on lack of foundation to the prosecutor's question, "[i]f the second officer had not shown up, is it your belief that Officer S[.] would have been injured?" Asked to rephrase, the prosecutor asked how long it took for the second officer to show up, and whether he was worried during that time. Mr. J. responded without objection that it took several seconds for the second officer to show up, and "[i]n reality, if you put someone in a rear naked choke, if you look at time and time again, it only takes two to five seconds max to knock somebody out in that position."

¶10 The court did not fundamentally err in allowing the witness to explain to the jury what a "rear naked choke hold" is, or that it appeared to him that this was the choke hold that Cummings was attempting. Defense counsel opened the door to an explanation of the term by introducing the videotape on which Mr. J. had used this term to describe Cummings's action, and accordingly cannot complain about this result. *See State v. Kemp*, 185 Ariz. 52, 60–61 (1996) ("[T]he open door or invited error doctrine means that a party cannot complain about a result he caused.") (internal quotation, modification, and citation omitted); *State v. Leyvas*, 221 Ariz. 181, 189, ¶ 25 (App. 2009) ("When a party opens the door to later, otherwise objectionable testimony, there is no error.") (internal quotation, modification, and citation omitted). The prosecutor's questions were "specifically responsive to the invitation" — the use of the term "rear naked choke hold" without explanation on the videotape introduced by defense counsel. *Leyvas*, 221 Ariz. at 189, ¶ 26.

¶11 Moreover, Mr. J.'s description of the specific choke hold, and his reference to it as "an MMA move" was well within his role as a lay witness explaining what he had observed, in terms that fit his frame of reference. *See* Ariz. R. Evid. 701. Finally, this testimony was cumulative to the victim's unobjected-to testimony, that he had seen this type of chokehold before in "Mixed Martial Arts fights and when someone is trying to black someone out or trying to put them out; meaning make them go unconscious." The court did not err, much less fundamentally err, in allowing the testimony on a "rear naked choke hold."

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING TESTIMONY ABOUT STRANGULATION.

¶12 Cummings argues the superior court abused its discretion in overruling his relevance objection to an officer's testimony about strangulation in domestic violence cases. We review the court's admission of this evidence for abuse of discretion. *Ellison*, 213 Ariz. at 120, ¶ 42. In reviewing the ruling, "we must look at the evidence in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Kiper*, 181 Ariz. 62, 66 (App. 1994).

¶13 The court did not abuse its discretion. The prosecutor elicited the officer's background in domestic violence cases to demonstrate his specialized training in the symptoms of strangulation. After describing multiple symptoms of strangulation, the officer was asked to look at a photo of the victim's eyes taken that night, and the officer identified petechiae, consistent with strangulation. Cummings's argument that the reference to domestic violence "ultimately accused and unfairly insinuated that Mr. Cummings commits domestic violence" is not supported by the record. The court's admission of this testimony was well within its discretion.

III. THERE WAS NO PROSECUTORIAL MISCONDUCT.

¶14 Cummings argues that the prosecutor engaged in misconduct, depriving him of a fair trial, by eliciting improper and irrelevant testimony on the "rear naked choke hold" and referring to it in closing argument. Because Cummings did not object at trial on this ground, we review for fundamental error only. *State v. Dann*, 220 Ariz. 351, 373, ¶ 125 (2009).

¶15 "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 internal 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 internal quotation omitted).

¶16 For the reasons outlined in paragraphs 5–11, we conclude that the prosecutor did not engage in any misconduct by eliciting the testimony on the "rear naked choke hold." Nor, for the same reasons, do we find the prosecutor's use of this testimony in closing argument improper.

¶17 We also reject the claim that the prosecutor engaged in improper vouching "by arguing that there was no evidence presented to suggest [Mr. J.] saw anything different than what he testified to." At the cited lines, the prosecutor argued only: "There's no dispute at any point in Mr. J[.]'s testimony that the defendant had the officer's head and neck in between his arms, and that's parsing words and misstating what he testified to, to say that he or to argue that Mr. J[.] never actually saw what he said he saw." Cummings argues that this constituted improper vouching, whereby 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 omitted).

¶18 The prosecutor made the relevant statement during his rebuttal closing argument. During Cummings's closing argument, defense counsel had attacked Mr. J.'s testimony, arguing, "[t]his was not a scenario where Mr. Cummings was somehow struggling with him in some sort of MMA ring where he had him in some deadly choke hold. It was not what happened." Defense counsel also argued that the contradiction between Mr. J.'s testimony that Cummings had the officer in a choke hold and "wouldn't give up his arms" defeated the state's theory of the case. The prosecutor argued in rebuttal that Mr. J. indisputably testified that Cummings put the officer in a choke hold, and it was misleading for defense counsel to argue that Mr. J. "never actually saw what he said he saw." This argument did not improperly suggest that information not presented to the jury supported Mr. J.'s testimony. Rather, it simply criticized defense counsel's theory of the case, which is not 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."). The prosecutor did not engage in any misconduct, much less misconduct that so infected the trial with unfairness that it deprived Cummings of a fair trial.

IV. THERE WAS NO FUNDAMENTAL SENTENCING ERROR.

¶19 Cummings argues that the superior court fundamentally erred in allowing the jury to find that Count 1 "caused physical, emotional or financial harm to the victim," without requiring unanimity on each of the alternate prongs of this aggravating circumstance. A jury must unanimously find the existence of any aggravating circumstance. *State v. Coulter*, 236 Ariz. 270, 275, ¶ 15 (App. 2014). There is no error, however, in failing to specify which prong of several the jury relied upon, if the evidence is sufficient to satisfy each alternate prong. *Id.*

¶20 Even assuming *arguendo* that the evidence in this case was not sufficient to satisfy each of the prongs separately,[3] Cummings is unable to show that the error was either fundamental or prejudicial. "Simply considering an improper aggravating factor is not reversible error." *State v. Munninger*, 213 Ariz. 393, 397, ¶ 15 (App. 2006). Instead, a defendant must show a "reasonable likelihood" that had the court not considered the improper factor, it could have given him a more favorable sentence. *See State v. Trujillo*, 227 Ariz. 314, 319, ¶ 21 (App. 2011).

¶21 Here, any error in the aggravator was neither fundamental nor prejudicial. The court suspended Cummings's sentence and placed him on supervised probation on all counts. A court does not fundamentally err when it uses an improper aggravator, but does not impose an aggravated sentence. *See State v. Johnson*, 210 Ariz. 438, 440–42, ¶¶ 8–13 (App. 2005). Because the court suspended sentence, it did not fundamentally err in allowing the jury to find an improper aggravator. *See id.* Nor has Cummings demonstrated that the court considered this aggravator in imposing a 90-day jail term as a condition of his probation on Count 1. His argument that the aggravator influenced this condition of probation relies on speculation, an insufficient basis for prejudice on fundamental error review. *See Munninger*, 213 Ariz. at 397–98, ¶¶ 14–15. The court did not fundamentally err in allowing the jury to find this aggravator.

CONCLUSION

¶22 For the foregoing reasons, we affirm Cummings's convictions and sentences.

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

[3] The victim testified he suffered physical and emotional injury, but did not offer any specific evidence of financial injury.