IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DEMONE WILSON, *Appellant*.

Nos. 1 CA-CR 17-0250
1 CA-CR 17-0261
(Consolidated)
FILED 7-31-2018

Appeal from the Superior Court in Maricopa County
Nos. CR2011-153765-001, CR2015-139270-001
The Honorable Joseph P. Mikitish, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Gracynthia Claw
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Tennie B. Martin
Counsel for Appellant

MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Chief Judge Samuel A. Thumma and Judge James P. Beene joined.

M O R S E, Judge:

¶1 Appellant Demone Wilson appeals his convictions of and sentences for resisting arrest, possession or use of marijuana, and possession or use of a dangerous drug. Wilson maintains that the cumulative effect of alleged prosecutorial misconduct warrants a new trial. For the following reasons, we affirm Wilson's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 During an August 2015 traffic stop, Phoenix police found a bag of marijuana and several vials of phencyclidine ("PCP") in Wilson's possession. Wilson was charged with possession of dangerous drugs for sale, possession or use of marijuana, and resisting arrest. At trial, Wilson made several objections and moved for a mistrial based on claims of prosecutorial misconduct. The superior court overruled the objections and denied the motion for a mistrial. The jury convicted Wilson of all counts.

¶3 Following the verdict, Wilson moved for a new trial based upon nine alleged instances of prosecutorial misconduct, which he argued cumulatively deprived him of a fair trial. The superior court denied Wilson's motion for a new trial, and Wilson was sentenced to prison.

¶4 Wilson timely appealed his convictions and sentences, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A).

DISCUSSION

I. STANDARD OF REVIEW

¶5 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Harm*, 236 Ariz. 402, 404 n.2 (App. 2015). "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. Hughes*, 193 Ariz. 72, 79, ¶ 26 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "Because the trial court is in the best position to determine the effect of a prosecutor's comments on a jury, we will not disturb a trial court's denial of a mistrial for prosecutorial misconduct in the absence of a clear abuse of discretion." *State v. Newell*, 212 Ariz. 389, 402, ¶ 61 (2006).

¶6 We "separately review [] each instance of alleged misconduct, and the standard of review depends upon whether the defendant objected." *State v. Martinez*, 230 Ariz. 208, 214, ¶ 25 (2012) (internal quotation marks and citation omitted). If the defendant objected, we review for harmless error; if the defendant did not object, we review for fundamental error. *Id*. "We will reverse a conviction because of prosecutorial misconduct if the cumulative effect of the alleged acts of misconduct shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant." *State v. Bocharski*, 218 Ariz. 476, 492, ¶ 74 (2008) (internal quotation marks and citation omitted).

II. PROSECUTORIAL MISCONDUCT

¶7 Wilson argues that the State engaged in nine acts of prosecutorial misconduct during opening statements, witness examinations, and closing arguments. The State contends that none of the alleged acts constitute misconduct and thus, Wilson was not prejudiced or deprived of a fair trial.

A. Opening Statements

¶8 Wilson alleges two instances of prosecutorial misconduct during the parties' opening statements. Because Wilson did not object to either instance on the ground of prosecutorial misconduct, we review these acts for fundamental error. *See State v. Lopez*, 217 Ariz. 433, 434-35, ¶ 4 (App. 2008) ("[A] general objection is insufficient to preserve an issue for appeal. And an objection on one ground does not preserve the issue on another ground."). Under this standard, Wilson must establish that fundamental

error exists and that the error caused prejudice. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 20 (2005).

¶9 First, Wilson cites the State's comments during opening statements in which the State told the jurors that they would "hear from our drug detective, Detective Lamberto, and from Detective Snow [] that . . . California is the source destination for PCP." Wilson claims that this statement was improper vouching because it exposed the jury to "the theory that two detectives would provide expert testimony about PCP" in violation of the superior court's order limiting the State to one expert witness. Wilson objected on the basis of the court's limiting order and, following a bench conference, the prosecutor corrected himself: "Apparently I misspoke. Only one of our detectives will be testifying that California is a location where PCP is being imported, where dealers get their PCP to sell in the streets."

¶10 To the extent that the prosecutor erred in mentioning both witnesses, that error was quickly corrected. Moreover, in its preliminary and final instructions, the superior court properly instructed the jurors that the lawyers' statements were not evidence and we presume that the jurors followed the court's instruction. *See State v. Morris*, 215 Ariz. 324, 336-37, ¶ 55 (2007) (finding the effect of improper arguments negated by the judge's instructions). Based upon this record, Wilson has failed to establish fundamental error or resulting prejudice.[1]

¶11 Second, Wilson cites the State's substitution of its expert witness as another example of prosecutorial misconduct. Wilson concedes that he did not object to the State's request to change its expert witness. The superior court allowed the substitution only after Wilson did not object and acknowledged that the change was made "early enough" in the proceedings. On this record, Wilson has shown no fundamental error. *See Henderson*, 210 Ariz. at 567, ¶ 19 (noting that fundamental error goes to the foundation of the case, deprives a defendant a right essential to his or her defense, and is of such magnitude that the defendant could not have received a fair trial).

---

[1] Moreover, the State was limited to one expert based on the cumulative, and not prejudicial, nature of the testimony. In this circumstance, the brief reference to the second witness cannot have prejudiced Wilson. *See State v. Dann*, 220 Ariz. 351, 363, ¶ 50 (2009) (finding no reasonable likelihood that the jury's verdict was affected by photographs excluded because they were cumulative).

B. Witness Examinations

¶12 Wilson argues that "[t]he prosecutor continued to tell the jury that there was evidence they would not have the chance to hear" during witness examinations. Wilson first claims that the State improperly commented on inadmissible evidence when the State asked its initial witness to "briefly describe [his] background, training, and experience without mentioning what we talked about[.]" Wilson contends that this alleged misconduct "heavily implied" to the jury that the State had evidence that the jury would not hear and constituted misconduct under *Pool v. Superior Court*, 139 Ariz. 98, 103 (1984).

¶13 "Suggestion by question or innuendo of unfavorable matter which is not in evidence and which would be irrelevant . . . is improper and can constitute misconduct." *Id*. Rather than commenting on inadmissible evidence, however, the record shows that the prosecutor was carefully complying with the superior court's order to preclude any reference to the witness's gang-related law enforcement experience. When Wilson objected, the State explained—out of the presence of the jury—that the comment was a precautionary reminder not to testify about his inadmissible work experience and the superior court overruled Wilson's objection.

¶14 The record reveals no basis to find that the State's remark was misconduct. *See State v. Martinez*, 221 Ariz. 383, 393, ¶ 36 (App. 2009) (noting that misconduct is intentional conduct known by the prosecutor to be improper and prejudicial). The challenged comment was clearly linked to the witness's training and experience and does not imply undisclosed factual evidence of guilt. Nor is there any basis on which to find that the remark improperly bolstered the witness's credibility or supported any forthcoming testimony. *See State v. Dunlap*, 187 Ariz. 441, 462 (App. 1996) ("Prosecutorial vouching occurs either (1) where the prosecutor places the prestige of the government behind its witness; (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony.") (internal quotation marks and citation omitted); *see also State v. Dumaine*, 162 Ariz. 392, 402 (1989) (finding no misconduct nor prejudice where the prosecutor alluded to the existence of additional incriminating evidence but did not comment on it or suggest that it bolstered any testimony and the trial court properly instructed jurors regarding evidence).

¶15 As we have noted, jurors are presumed to follow instructions and the jury was properly instructed that counsel's statements and questions were not evidence. On this record, Wilson has shown neither

misconduct nor reversible error. *See Hughes*, 193 Ariz. at 80, ¶ 32 (finding harmless error where "we can find beyond a reasonable doubt that it did not contribute to or affect the verdict"). Even assuming that the State's comment was intentional, Wilson has failed to establish that the remark contributed significantly to the verdict.

¶16 Next, Wilson argues that the State "improperly comment[ed] on the evidence" during redirect examination of Snow when it asked Snow, "[a]nd that conversation was not with the police?" and Snow answered that it was not.

¶17 The record shows that the parties had stipulated to the use of Wilson's recorded jail-call conversation in which he denied using PCP, provided there was no reference to the fact that the recording was of a jail-call. Initially, and without objection, the State elicited trial testimony from Snow that the police were not party to the recorded conversation. Eventually, Wilson objected to this examination of Snow and asserted a prosecutorial misconduct motion. Wilson argued that the State's conduct defeated the purpose underlying the stipulation, which Wilson said was intended to eliminate the prejudicial jail-call context of the recording. We consider Wilson's objection timely because the superior court had an opportunity to rectify any error and the State had a chance to address the objection. *See Lopez*, 217 Ariz. at 434, ¶ 4. Further, Wilson had made the court aware of his concern regarding the stipulation. *See Hughes*, 193 Ariz. at 85, ¶ 58 (finding an issue fully preserved where counsel failed to object every time but did object frequently on the subject at trial and in pre-trial proceedings).

¶18 In overruling Wilson's misconduct objection and motion, the superior court found no prejudice because the testimony was consistent with other testimony already in evidence. On cross-examination, Wilson had elicited testimony from Snow directly on point—confirming that there were no recordings of Wilson's conversations with police in evidence before the jury. The State's questioning on redirect, thus, did not contribute anything new on point and was not improper. *See State v. Kemp*, 185 Ariz. 52, 60-61 (1996) (noting that a defendant cannot claim error after opening the door on cross-examination to the result of which he or she complains).

¶19 Accordingly, the superior court was within its discretion to deny the misconduct motion and we find no misconduct nor error, reversible or otherwise. *See State v. Gonzales*, 105 Ariz. 434, 437 (1970) (noting that whether the verdict was influenced by improper argument must be left to the sound discretion of the trial court); s*ee also State v. Garcia*,

141 Ariz. 97, 101 (1984) (finding no error when the answer suggested by leading questions "had already been received as the result of proper questioning").

¶20 Finally, Wilson argues that the State improperly vouched during a question to Snow on redirect: "Would it surprise you if there was no cellphone data found[.]" Wilson asserted a prosecutorial misconduct motion and moved for a mistrial. The superior court denied Wilson's requests and rejected Wilson's claims that the State engaged in a "pattern of improper prosecutorial questions . . ." and attempted to insert evidence into the record for which Snow lacked foundation to testify.

¶21 To determine whether a mistrial is warranted, a trial court should consider whether the prosecutor's statements called to the jury's attention matters it should not have considered in reaching its decision, and the likelihood that the jurors were actually influenced by the statements. *State v. Atwood*, 171 Ariz. 576, 611 (1992).

¶22 Under these facts, Wilson has not shown any abuse of discretion by the superior court. The superior court was in the best position to determine the effect of the question on the jury, if any. *See id*. at 609. Although hypothetical questions often signal expert testimony, *State ex rel. Montgomery v. Whitten*, 228 Ariz. 17, 21-22, ¶ 17 (App. 2011), we need not determine the propriety of the State's question. The record shows that the State voluntarily withdrew the question, and the parties agreed to strike the question from the record. In its limiting instruction, the superior court admonished the jury to "not [] consider what is stricken or [the State's] questions regarding the contents of the phones . . . ." Additionally, the jurors were instructed that questions posed to witnesses were not evidence and the reasons for any objections or the possible answers that may have followed were not to be considered.

¶23 In light of this record, Wilson has not established misconduct or error, reversible or otherwise. *See State v. Ramirez*, 178 Ariz. 116, 127 (1994) (noting that, absent evidence to the contrary, the jury is presumed to have followed the relevant instruction); *see also Garcia*, 141 Ariz. at 101 (finding that even if the prosecutor's leading questions were improper, the questions were not prejudicial because other evidence on point had been received).

C. Closing Arguments

¶24 Wilson argues that the State engaged in four acts of misconduct during its closing arguments. First, Wilson again claims that

the State improperly referenced the jail-call context of the stipulated recording when the State argued that the jury should consider the "casual environment" of the recorded conversation and the "informal language" with which Wilson denied using PCP.

¶25 Over Wilson's objection and prosecutorial misconduct motion, the superior court clarified that the stipulation "limited the fact [that] it was a jail call" and found that the characterization of Wilson's statement was fair as the context could be inferred from the manner of speech and the words used. As we previously stated, Wilson elicited testimony from Snow on cross-examination about the fact that no recordings of Wilson's conversations with police were in evidence. Thus, the jury could reasonably infer the contextual statements at issue. *See Hughes*, 193 Ariz. at 85, ¶ 59 (noting that counsel may argue all reasonable inferences from the evidence). On this record, the superior court properly denied the misconduct motion and we find no misconduct or error.

¶26 Wilson next argues that the State improperly referred to defense counsel as "doing his job," and impugned the integrity or honesty of defense counsel. In its rebuttal closing argument, the State argued to the jury that the "[d]efense got up here and talked about what we're missing, what shows that the Defendant's not guilty. But that's his job." Citing *State v. Denny*, 119 Ariz. 131, 134 (1978), Wilson claims that the State's comments were "an attack on opposing counsel" and that "[w]ith this one expression the prosecutor attacked both the defense attorney and all of the things he did and said over the course of the trial."

¶27 At trial, Wilson claimed under *Hughes*, 193 Ariz. 72, that the State impermissibly undermined defense counsel's "belief in [its] own case" and "suppl[ied] some sort of break in the relationship between [defense counsel] and [] [Wilson]." After Wilson's misconduct objection, the State responded that it was appropriately commenting on Wilson's arguments regarding the State's pursuit of "something more [] than [] the truth." The superior court overruled Wilson's objection with the caveat that "[i]f either party thinks that it's worthy of a post-trial motion, [it would then be] consider[ed] [] in more detail with all the citations."

¶28 While "an attorney should not imply to the jury that opposing counsel may not believe in the defense presented," *State v. Hallman*, 137 Ariz. 31, 37 (1983), nor "impugn the integrity or honesty of opposing counsel," *Newell*, 212 Ariz. at 403, ¶ 66, "criticism of defense theories and tactics is a proper subject of closing argument," *State v. Ramos*, 235 Ariz. 230, 238, ¶ 25 (App. 2014) (citation omitted).

¶29 The challenged argument is essentially identical to the arguments addressed in *State v. Smith*, 138 Ariz. 79 (1983). There, defense counsel argued that the prosecutor's "job is to make things easy for the government, to grease the wheels . . . ." *Id*. at 83. In rebuttal the prosecutor argued that defense counsel's "job was to get his client off. That's it." *Id*. The supreme court found that the prosecutor's statement was "invited by defendant," "not of a highly prejudicial nature," unlikely to have "influenced the jury's verdict," and not reversible error. *Id*. at 83-84.

¶30 Here, Wilson argued that the State's case was not supported by the evidence and that the State was "pushing . . . this case just beyond possession and into that sales scenario to try to get [a] conviction . . . ." In this light, the prosecutor's response that it is defense counsel's "job" to point out what evidence is "missing" in a case or "what shows that the Defendant's not guilty," is invited, not overly prejudicial, and not reversible error. *Id.*; *see also State v. Moody*, 208 Ariz. 424, 460, ¶¶ 151-52 (2004) (noting that "the mere fact that a prosecutor makes improper remarks does not require reversal unless, under the circumstances of the case, the jury was probably influenced by those remarks") (internal quotation marks and citation omitted).

¶31 Wilson argues also that the State improperly infringed upon Wilson's right to remain silent during rebuttal when the State referred to its sole burden of proof and remarked that "they don't have to produce any type of evidence. But they can produce evidence if they have it." Wilson objected on the ground of "classic burden shifting" within an "ongoing pattern of prosecutorial misconduct . . . deserving a mistrial" and claimed that he did not open the door to the State's adverse inference.

¶32 It is well settled that a prosecutor may properly comment on a defendant's failure to present exculpatory evidence which would substantiate defendant's story, provided the remark is not a comment on defendant's silence. *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160 (1987). Likewise, argument about the nonproduction of evidence is proper where the nonproduction gives rise to the inference that it would have been adverse to the party who could have produced it. *Id*.

¶33 It is apparent from the record that the State's rebuttal remarks followed Wilson's attack on the credibility of the State's evidence and theory of the case. Wilson had argued that the State could "bring in any cop" to say that the evidence demonstrated that Wilson possessed the drugs for sale. Wilson invited the jury to consider whether the State was really "pushing for the truth or . . . for a conviction[.]"

¶34 Taken in context, the State's arguments to the contrary did not expressly or impliedly direct the jury's attention to Wilson's failure to testify but maintained that Wilson was free to produce evidence and witness testimony favorable to his defense. *See State v. Sarullo*, 219 Ariz. 431, 437, ¶ 24 (App. 2008) (finding that the prosecutor did not shift the burden to defendant by arguing that defendant failed to call witnesses to support his theory of defense); *State v. Herrera*, 203 Ariz. 131, 137, ¶¶ 18-21 (App. 2002) (finding no misconduct or burden shifting where the prosecutor's statement to the jury that the defendant would have produced the evidence at issue had it been favorable to the defendant).

¶35 Under these facts, the record does not show that the jury would have "naturally and necessarily" viewed the State's argument to be a comment on Wilson's right to remain silent. *See State v. Blackman*, 201 Ariz. 527, 544-45, ¶ 74 (App. 2002). The superior court was within its discretion to deny the mistrial motion and find that the State's argument was reasonable and could be inferred from the evidence and arguments before the jury. Additionally, the superior court's final instructions advised the jurors regarding the State's burden of proof and that Wilson need not testify in his defense. For these reasons, Wilson has not shown misconduct or error.

¶36 Wilson argues further that the State then "resumed [its] rebuttal argument making the same objectionable remark, only this time broadening [its] argument to encompass all defense attorneys." Specifically, the State remarked, "they [talk] a lot . . . about how they never have to produce any type of evidence." In overruling Wilson's misconduct objection and finding that the State's conduct did not rise to the level of misconduct, Wilson claims that the superior court failed to properly instruct the jury that it should not consider Wilson's failure to testify or present evidence.

¶37 It is improper for counsel to comment on evidence not presented to the jury, *Gonzales*, 105 Ariz. at 436-37; *Dunlap*, 187 Ariz. at 463, or for a prosecutor to attack defense counsel or comment on defense tactics without proof, *State v. Cornell*, 179 Ariz. 314, 331 (1994). It is unclear from the record if the State's remark referred to Wilson's defense arguments or to defense attorneys' arguments generally; however, in the State's response to Wilson's post-conviction motion for a new trial, the State conceded that it was error for the State to refer to defense attorneys' defense arguments generally.

¶38 By referring to defense attorneys' arguments generally, the State made an improper argument to the jury. Wilson has not, however, established a reasonable likelihood that the improper comment could have affected the jury's verdict. *See State v. Robles*, 135 Ariz. 92, 96 (1983) ("Where any error on counsel's part did not result in prejudice to defendant, there is no reversible error.").

¶39 The record shows that the State reminded the jurors that "the lawyers' comments are not evidence" and the State also had previously admonished the jury that "[n]othing [the State] say[s] . . . is evidence." Although no jury instruction immediately followed the State's remark, as previously noted, the jurors were properly instructed regarding the burden of proof and that the lawyers' arguments were not to be considered as evidence. These instructions were sufficient to dispel any taint that may have occurred. *See State v. Payne*, 233 Ariz. 484, 512, ¶ 113 (2013) (finding vouching error harmless where the trial court instructed jurors that the lawyers' arguments were not evidence).

¶40 Given this record and presuming that the jury followed the superior court's instructions, *State v. Gallardo*, 225 Ariz. 560, 569, ¶ 44 (2010), we find no misconduct or reversible error.

III. CUMULATIVE MISCONDUCT

¶41 Wilson contends that the State's misconduct had the cumulative effect of denying Wilson a fair trial such that a new trial is warranted.

¶42 Following Wilson's convictions, Wilson moved the superior court for a new trial. The superior court again rejected Wilson's motion and found that Wilson received a fair trial. We agree and find no abuse. As we have stated, a trial court properly measures a prosecutor's conduct throughout trial, *Pool*, 139 Ariz. at 108 n.9, and is in the best position to determine any effects an error, if any, may have had on the jury, *Hallman*, 137 Ariz. at 37.

¶43 "After determining which claims constitute error, [we] review[] the cumulative misconduct to determine whether the total effect rendered defendant's trial unfair." *State v. Hulsey*, 243 Ariz. 367, ___, ¶ 88 (2018). To prevail, a defendant must show that the prosecutor's actions were misconduct and that there is a reasonable likelihood that the misconduct could have affected the jury's verdict. *Id*. at ¶ 89.

¶44 Even when individual acts of misconduct are harmless, the cumulative effect of the incidents may demonstrate "that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant[.]" *State v. Roque*, 213 Ariz. 193, 228, ¶ 155 (2006) (internal quotation marks and citation omitted), *overruled on other grounds by State v. Escalante-Orozco*, 241 Ariz. 254, 267, ¶¶ 11-15 (2017). However, "[a]bsent any finding of misconduct, there can be no cumulative effect of misconduct sufficient to permeate the entire atmosphere of the trial with unfairness." *Bocharski*, 218 Ariz. at 492, ¶ 75.

¶45 Based upon our review, Wilson's cited allegations do not merit extended discussion. *See State v. Anderson*, 210 Ariz. 327, 341, ¶¶ 46-48 (2005) (finding statements neither improper nor misconduct where the statements were substantially accurate or fair argument). Although the State did engage in an isolated instance of improper conduct, the State did not engage in intentional misconduct with indifference to the prejudice caused, nor do we find that Wilson was convicted on any unfair, prejudicial basis. *See Gallardo*, 225 Ariz. at 568, ¶ 35; *Newell*, 212 Ariz. at 403, ¶ 67. We find nothing approaching pervasive unfairness in this case. *See Atwood*, 171 Ariz. at 611 (noting that misconduct alone is insufficient to award a new trial where the record reveals no reasonable likelihood that the misconduct could have affected the jury's verdict); *State v. Lynch*, 225 Ariz. 27, 39, ¶ 65 (2010) (finding no unfairness to defendant, even considering an alleged act improper).

¶46 On this record, the alleged instances of misconduct, considered cumulatively, did not constitute reversible error.

CONCLUSION

¶47 For the foregoing reasons, we affirm Wilson's convictions and resulting sentences.

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