IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ROBERT R. SAPIEN, *Appellant*.

No. 1 CA-CR 18-0524
FILED 10-29-2019

Appeal from the Superior Court in Maricopa County
No. CR2016-160381-001
The Honorable Frank W. Moskowitz, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz, Ashley Fitzwilliams, Rule 38(d) certified student
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Mark E. Dwyer
Counsel for Appellant

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Diane M. Johnsen joined.

C A T T A N I, Judge:

¶1 Robert R. Sapien appeals his forgery convictions, asserting that pervasive prosecutorial misconduct resulted in an unfair trial. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In late December 2016, Sapien attempted to cash a business check at a Phoenix bank. The bank teller asked Sapien for identification and, after looking at the check, noted several discrepancies including incorrect alignment, lack of a serial number, and discolored, faded ink. Based on these discrepancies, the teller told Sapien that someone else would have to review the transaction, and she took the check to her manager. The teller and the manager called the business that purportedly issued the check and learned that Sapien was not the original payee. They then called the police.

¶3 Phoenix Police officers arrived just as Sapien was leaving the bank. Officer Rogne detained Sapien, who promptly told the officer that he knew he was wrong and he "never should have tried to cash the check." After being read *Miranda*[1] warnings, Sapien told officers that a friend, "Nick," had given him the check with the promise of a $100 reward if he cashed it. Sapien was arrested, and a search incident to arrest revealed another forged check in Sapien's pocket.

¶4 The State charged Sapien with two counts of forgery. A jury found him guilty as charged. Sapien acknowledged several prior felony convictions, and the court sentenced him to concurrent, mitigated terms of nine years' imprisonment.

¶5 Sapien timely appealed, and we have jurisdiction under A.R.S. § 13-4033(A).

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1 *Miranda v. Arizona*, 384 U.S. 436 (1966).

DISCUSSION

¶6 Sapien argues that the prosecutor engaged in misconduct that affected the verdicts, and that the superior court erred by not *sua sponte* giving a curative jury instruction. We review alleged acts of prosecutorial misconduct to which the defendant objected at trial under a harmless error standard. *State v. Dann*, 220 Ariz. 351, 373, ¶ 125 (2009). If the defendant did not object, we review only for fundamental, prejudicial error. *Id.*; *see also State v. Henderson*, 210 Ariz. 561, 567–68, ¶¶ 19–20 (2005).

¶7 To prevail on appeal on a claim of prosecutorial misconduct, a defendant must show 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 omitted). The misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* If prosecutorial misconduct has occurred, it requires reversal only if there is a reasonable likelihood that the misconduct affected the jury's verdict, thus denying the defendant a fair trial. *Id.* Alleged instances of prosecutorial misconduct are evaluated both individually and for their cumulative effect. *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26 (1998).

I. Specific Instances of Alleged Misconduct.

¶8 Although Sapien alleges pervasive misconduct, he focuses on several instances of purported misconduct during the State's case-in-chief. These allegations relate primarily to whether the prosecutor violated a pretrial ruling regarding how to address or characterize the bank teller's anticipated testimony.

¶9 Before the jury was impaneled, in discussing the parameters of the State's opening statement, defense counsel indicated that the teller "did not remember anything about this case or her involvement," while the prosecutor maintained that "[t]he State personally believes that the witness is feigning her lack of memory on this. The fact that she has zero memory about anything is slightly suspicious." The court cautioned the prosecutor not to put "words into [the teller's] mouth not really knowing what she is going to be able to say." Although the prosecutor expressed some confusion about what the court meant, he agreed not to say anything specific about the teller's anticipated testimony.

¶10 This led to three objections from defense counsel during the prosecutor's opening statement. The first objection (which was sustained) was to the mischaracterization of the elements of forgery. The second

objection (which was overruled) was to the prosecutor stating that the check "was recognized by the bank representatives that it could possibly be a forgery." The third objection was to the prosecutor stating, "the first person [Officer Rogne] contacted in the bank was a teller named []. [The teller] pointed --." This objection led to an extended heated discussion, outside the presence of the jury, regarding the pretrial discussion and ruling. During this discussion, the court told the prosecutor to "calm down," and told him that continued specific references to the teller's statements would violate the pretrial ruling. The prosecutor apologized for his comments, stating he had been frustrated about how to address the teller's testimony, but acknowledged that was "not an excuse" for the way he had addressed the court. There were no further issues or objections during the prosecutor's opening statement.

¶11 During the State's case-in-chief, the prosecutor struggled to comply with the court's directive regarding the teller. Sapien raises three specific instances in which he asserts that the prosecutor committed impermissible vouching. Because Sapien objected on this basis at trial, we apply harmless error review. *See Dann*, 220 Ariz. at 373, ¶ 125. "Vouching" occurs "(1) where the prosecutor places the prestige of the government behind its witness" or "(2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. Vincent*, 159 Ariz. 418, 423 (1989).

¶12 First, while the prosecutor was questioning Officer Rogne, the prosecutor referred to "something we're not supposed to talk about":

> Q: When you arrived at the bank, did you know who to arrest?
>
> A: Not –
>
> Q: *Let me ask that a different way before we get into something we're not supposed to talk about.*

(Emphasis added.) Defense counsel objected to the statement as vouching, and the court overruled the objection but instructed the prosecutor to rephrase his question.

¶13 Sapien argues the prosecutor's statement implied to the jury the existence of additional incriminating evidence that would not be presented at trial. But in context, the dialogue simply reflected a permissible attempt by the prosecutor to rephrase his question to avoid eliciting a reference to the teller. The initial question did not reference other

criminal or otherwise objectionable conduct by Sapien and was instead simply a preliminary question to explain the chain of events that followed. And the follow-up statement did little more than inform the jury that the prosecutor wanted to rephrase his question to avoid an objectionable topic, without any suggestion that the avoided topic included incriminating information that would not be admissible at trial. Under these circumstances, the prosecutor's statement was not vouching.

¶14 Although Sapien argues that the court should have given a curative jury instruction, he did not request such an instruction and instead accepted the court's remedy of directing the prosecutor to rephrase his question. *See State v. Nordstrom*, 200 Ariz. 229, 247, ¶ 51 (2001) ("[T]he trial court does not err in failing to give a limiting instruction if trial counsel does not properly request an instruction."), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 243, ¶ 20 (2012). The court thus did not err by failing to *sua sponte* give a curative instruction.

¶15 Second, the prosecutor referred to the police report when asking the bank teller whether the business checks Sapien had in his possession had been altered:

> Q: Would you doubt that it was the checks – one of the checks or both of the checks that I just showed you?
>
> A: No.
>
> Q: *Would you doubt that the portion of the report where you saw, or you said that you told Officer Rogne that you saw –*

(Emphasis added.) Defense counsel objected, and the court directed the prosecutor to rephrase his question. The prosecutor then asked whether anyone signed the check in front of the teller. Sapien urges that this, too, constituted vouching, and that the court erred by failing to sustain his objection and give a curative instruction.

¶16 This statement, however, was not vouching: the prosecutor neither placed the prestige of the government behind the teller's testimony nor implied that other inadmissible evidence supported the teller's statements. *See Vincent*, 159 Ariz. at 423. At most, the prosecutor's questioning appeared to be an attempt to ask the teller if she had told Officer Rogne what she had seen; such questioning did not result in any type of vouching.

¶17 Third, the prosecutor asked the bank teller about the police report she was provided to refresh her recollection of the event:

> Q: Do you doubt anything that you read in that report that I just gave you?
>
> THE DEFENSE: Objection. Vouching. Hearsay as to the report.
>
> THE COURT: If you could rephrase. Sustained.
>
> Q: *Did you read anything in the report that you think is untrue?*
>
> THE DEFENSE: Objection. Vouching.

(Emphasis added.) The court then held a side-bar conference regarding the mention of the police report, which was not in evidence, and the prosecutor ultimately chose to withdraw the question.

¶18 Although the prosecutor's initial question mentioned a document not in evidence, it was not impermissible vouching. The question did not place the authority of the State behind the document or suggest that other evidence supported the witness's testimony. *See Vincent*, 159 Ariz. at 423. Rather, the question asked the teller whether *she* believed the report (which presumably included information she had conveyed to the police) was accurate. Thus, because the prosecutor's question about what the witness personally believed or understood it did not vouch for the witness's credibility or for the strength of the State's case. Accordingly, no curative instruction was necessary.

II. Pervasive Unprofessionalism.

¶19 In addition to the specific instances of alleged misconduct detailed above, Sapien contends that pervasive unprofessionalism by the prosecutor requires reversal of his convictions and sentences. The record is replete with references to the prosecutor interrupting the court and defense counsel during side-bars and other conferences. The court admonished the prosecutor several times, including telling him to "calm down." And the court ultimately held the prosecutor in contempt of court due to "offensive and quite unprofessional" conduct, requiring the prosecutor's supervisor to appear in court before purging the contempt order. But because the conduct occurred outside the presence of the jury, it does not establish that Sapien was denied a fair trial. *See Morris*, 215 Ariz. at 335, ¶ 46; *see also State*

v. Armstrong, 208 Ariz. 345, 357–58, ¶¶ 60–62 (2004) (noting that jurors were not influenced by contentious arguments made outside of their presence).

¶20 Sapien further suggests that the prosecutor's alleged misconduct regarding the teller confused the jurors, specifically asserting that prejudice is apparent in questions from the jury about who initially called the police and how the police knew to respond to the bank. But these questions demonstrate only that there was a gap in the narrative given to the jury. And the gap resulted from the court's ruling requiring the prosecutor to limit references to the teller's involvement in dealing with Sapien at the bank, not from any asserted misconduct. The prosecutor's untoward response to that ruling notwithstanding, the fact that jurors were curious about what triggered police involvement in the case does not establish prosecutorial misconduct.

CONCLUSION

¶21 For the foregoing reasons, we affirm Sapien's convictions and sentences.