IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JOSE L. RUIZ, *Appellant*.

No. 1 CA-CR 20-0177
FILED 7-29-2021

Appeal from the Superior Court in Maricopa County
No. CR2019-113323-001
The Honorable Jennifer C. Ryan-Touhill, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jennifer L. Holder
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Kevin D. Heade
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Kent E. Cattani delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Brian Y. Furuya joined.

C A T T A N I, Chief Judge:

¶1 Jose L. Ruiz appeals his convictions and sentences for aggravated assault, endangerment, and unlawful discharge of a firearm. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Miesha L. (who was eight months pregnant at the time) was driving home from work with her daughter in the car. Miesha's husband, Kevin H., was driving behind her with two other children in his car. The lanes in which they were driving merged from two lanes to one. As Miesha approached the merge point, a red car (in which Ruiz was a passenger) did not yield, forcing Miesha out of the lane, where she almost struck a parked vehicle.

¶3 Kevin followed the red car and, while driving on the shoulder, pulled up along its passenger side. Kevin yelled a profanity and exclaimed, "you ran my wife off the road." As Kevin began to slow down, Ruiz fired a handgun at Kevin's vehicle three times. One bullet struck the front bumper area, causing a flat tire. Kevin then stopped his vehicle.

¶4 Meanwhile, Miesha continued driving until she reached Kevin. Kevin then pursued the red car in Miesha's vehicle. During the pursuit, Kevin called the police to report the incident and the red car's location.

¶5 Eventually, the red car stopped at a community college where Ruiz was attending classes. Ruiz got out of the car and proceeded to the campus carrying two bags. The school's surveillance video system showed Ruiz go into a locker room near the gym and then leave carrying only one bag. A police officer then searched the locker room and, in a locker with mesh-like sides, saw a bag that looked like one Ruiz had been carrying. The officer opened the locker, opened the bag, and found the gun used in the shooting.

¶6 The State charged Ruiz with aggravated assault, unlawful discharge of a firearm, discharge of a firearm at a structure, and two counts of endangerment. Before trial, Ruiz moved to suppress evidence found in the locker, arguing the warrantless search of the locker violated his rights under the Fourth Amendment. After conducting a suppression hearing, the superior court denied the motion. At trial, Ruiz testified and presented a justification defense. Specifically, Ruiz argued that he was defending himself, his mother (the driver), and his young daughter (a passenger), and that he was preventing Kevin from committing a criminal offense.

¶7 The jury convicted Ruiz as charged. The superior court imposed a combination of concurrent and consecutive sentences totaling 12 years' imprisonment. Ruiz timely appealed, and we have jurisdiction under A.R.S. § 13-4033(A)(1).

DISCUSSION

¶8 Ruiz asserts that the superior court erred by denying his motion to suppress evidence, by allowing testimony about Miesha's pregnancy, and by instructing the jury on defensive display of firearms. Ruiz also challenges the prosecutor's closing argument as improper.

I. Motion to Suppress.

¶9 Ruiz argues that in denying his suppression motion, the superior court erred by relying on the school special needs exception to the Fourth Amendment's warrant requirement to permit the search of the locker. We review the superior court's denial of a motion to suppress for an abuse of discretion but review de novo its ultimate legal conclusion that the search was constitutionally permissible, considering only the evidence presented at the suppression hearing. *See State v. Jean*, 243 Ariz. 331, 333–34, ¶¶ 2, 9 (2018).

¶10 "The Fourth Amendment of the United States Constitution and Article 2, Section 8, of the Arizona Constitution protect against unreasonable searches and seizures."[1] *State v. Allen*, 216 Ariz. 320, 323, ¶ 9 (App. 2007). Subject to a few well-delineated exceptions, searches

[1] Because Ruiz does not argue that Article 2, Section 8, of the Arizona Constitution provides greater protections than the Fourth Amendment in this context, we rely only on Fourth Amendment jurisprudence in reviewing the superior court's suppression ruling. *See State v. Mixton*, 250 Ariz. 282, 290, ¶¶ 31–32 (2021); *State v. Teagle*, 217 Ariz. 17, 22, ¶ 19 n.3 (App. 2007).

conducted without a warrant are per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception—the school special needs exception—permits school officials to conduct reasonable searches when they believe the search will reveal evidence that a student has violated the law or a school rule. *State v. Serna*, 176 Ariz. 267, 271 (App. 1993) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985)).

¶11 Ruiz argues that the court improperly relied on the school special needs exception in validating the search. But we need not address the exception, because Ruiz did not have a legitimate expectation of privacy in the locker. *See Rakas v. Illinois*, 439 U.S. 128, 148 (1978).

¶12 The protections of the Fourth Amendment only attach when the defendant has a legitimate expectation of privacy in the item searched. *Allen*, 216 Ariz. at 323, ¶ 13. To have a legitimate expectation of privacy, the person must show both an "actual (subjective) expectation of privacy" and that the expectation is "one that society is prepared to recognize as reasonable." *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (quotation omitted). Generally, persons have a reasonable expectation of privacy in public lockers used for storing items. *See State v. Miller*, 110 Ariz. 491, 492–93 (1974). But here, the locker's sides were mesh-like, making its contents clearly visible to those passing by. *See Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). And the locker—and the room in which it was located—was authorized for use by visiting athletes. It was readily known that non-athletes used the lockers and had access to the room in which the locker's contents were visible. Finally, campus police had ongoing authority from college administrators to remove any locks and empty the lockers, which the officers regularly did. *Compare Miller*, 110 Ariz. at 492–93 (finding an expectation of privacy in a locker over which the defendant had control and which was not open to the public). A person who knowingly exposes the contents of a locker to those passing by and who enjoys no exclusive control over the locker does not have a reasonable expectation of privacy in that locker. *Cf. Rakas*, 439 U.S. at 148.

II. Evidence of Miesha's Pregnancy.

¶13 Ruiz argues that evidence of complications with Miesha's pregnancy at the time of the offenses was improperly admitted at trial. We review evidentiary rulings for an abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 208, ¶ 60 (2004).

¶14 Evidence is admissible only if it is relevant. *See* Ariz. R. Evid. 402. And evidence is relevant if it "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Ariz. R. Evid. 401. Relevant evidence may be excluded however, if its probative value is substantially outweighed by the danger of unfair prejudice, including if the evidence has an "undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." Ariz. R. Evid. 403; *State v. Mott*, 187 Ariz. 536, 545 (1997).

¶15 Noting that he did not know Miesha was pregnant, Ruiz contends that evidence of her pregnancy was not relevant to his state of mind at the time of the shooting. But the evidence was relevant for another reason: it explained why Kevin and his wife were not in the same vehicle, and the fact that Miesha was experiencing complications associated with her advanced pregnancy corroborated Kevin's testimony that, immediately after yelling at the red car's occupants, he slowed down so he could stop and return to "check on [Miesha]." Given that the victim testified Ruiz shot at him while he was slowing down, the evidence was relevant in evaluating Ruiz's self-defense claim.

¶16 Ruiz also asserts that the evidence aroused undue sympathy in the jury and was therefore inadmissible under Arizona Rule of Evidence 403. But even assuming the testimony was only marginally relevant, it was only marginally prejudicial, particularly given the absence of any evidence Ruiz was aware of the pregnancy. And the court instructed the jury not to be influenced by sympathy when determining the facts. We presume the jury followed this instruction. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68 (2006). Based on the limited use of the evidence and the absence of any reference to it in the prosecutor's opening statements or closing arguments, the record does not reflect unfair prejudice.

III. Defensive-Display Jury Instruction.

¶17 Ruiz next contends that the superior court erred by granting the State's request to instruct the jury on the defensive display of a firearm. Ruiz objected to the instruction at trial, and on appeal, the State concedes error but argues the error was harmless. We review to determine whether the instruction was erroneous and, if so, whether any such error affected the verdict. *See State v. Dann*, 205 Ariz. 557, 565, ¶ 18 (2003).

¶18 A jury instruction may be given if it is reasonably supported by the evidence. *State v. Bolton*, 182 Ariz. 290, 309 (1995). A defensive

display of firearm instruction describes a separate justification defense that allows a defendant to display a firearm to protect against bodily harm. The instruction also indicated that Ruiz "was not required to defensively display a firearm before using physical force or threatening physical force that was *otherwise justified*." (Emphasis added.) But at trial, there was no testimony about the display of a firearm (or lack thereof). The only reference to display of a firearm was following a jury question regarding Ruiz's military training and if he was trained to first show his firearm. Thus, the instruction was arguably improper.

¶19 But Ruiz has not established reversible error because the erroneous instruction benefited him. The jury asked about his prior military experience and if he was trained to display a firearm, and the instruction ameliorated any potential juror concern by noting that he was not required to display a firearm before using it. Accordingly, the error was harmless. *See State v. Bible*, 175 Ariz. 549, 588 (1993) ("Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict.").

IV. Prosecutorial Misconduct.

¶20 Finally, Ruiz argues the prosecutor committed misconduct during closing arguments by intentionally misstating the evidence and inappropriately appealing to the jurors' fears. Ruiz claims the prosecutor's improper comments individually and cumulatively denied him a fair trial. *See State v. Hughes*, 193 Ariz. 72, 79, ¶ 25 (1998). Because Ruiz did not object to the arguments at trial, we review for fundamental error. *See State v. Escalante*, 245 Ariz. 135, 138, ¶ 1 (2018).

¶21 "[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions." *State v. Goudeau*, 239 Ariz. 421, 466, ¶ 196 (2016) (citation omitted). But a prosecutor cannot call matters to the jurors' attention that they should not consider. *State v. Roque*, 213 Ariz. 193, 224, ¶ 128 (2006), *abrogated in part on other grounds by State v. Escalante-Orozco*, 241 Ariz. 254, 267, ¶¶ 13–14 (2017). To qualify as misconduct, a closing argument must fall outside the "wide latitude" afforded counsel. *Goudeau*, 239 Ariz. at 466, ¶ 196 (citation omitted).

¶22 During closing arguments, the prosecutor argued that Ruiz's fear alone was not enough to justify his action. The prosecutor called out Ruiz's defense and argued that: "He didn't say that [Kevin] had a gun. He

didn't say that one of the threats that came out of his mouth was: Hey . . . I have a gun. He just said, I thought we were gonna die." Ruiz argues this misstates the evidence because there was evidence to suggest that Ruiz was in fear. But the argument acknowledged Ruiz's fear and was simply proper rebuttal attacking the reasonableness of Ruiz's explanation for firing his gun. The State had the burden of proving beyond a reasonable doubt that Ruiz was not justified in shooting at the victim's vehicle—namely that Ruiz was unreasonable in firing his gun. *See* A.R.S. §§ 13-205(A), -404, -405, -406, -411. And here, the prosecutor acknowledged that Ruiz was afraid but argued that fear alone was not enough to support a justification defense. Considered in that context, the prosecutor's comments did not misstate the evidence and instead properly confronted Ruiz's theory of justification. *Cf. State v. Martinez*, 130 Ariz. 80, 82–83 (App. 1981).

¶23 Ruiz also argues that the prosecutor impermissibly appealed to the jurors' fears by stating, "Imagine someone cutting you off in traffic, and you catch up to them on the side in the next lane, right? And you're yelling, and you're cussing, and you're honking. If that person could just shoot you, . . . we would have shootings like that every[ ]day." In context, however, the argument was not improper. Just before the complained-of statements, the prosecutor outlined that verbal provocation alone was not enough to justify use of deadly physical force. *See* A.R.S. § 13-404(B)(1) ("The threat or use of physical force against another is not justified . . . [i]n response to verbal provocation alone[.]"). The prosecutor's comments merely explained the public policy rationale for the statutory prohibition against justifying physical force in response to verbal provocation. And by using a common road-rage scenario like what occurred in this case, the prosecutor simply highlighted the State's argument that Ruiz's decision to fire his gun was unreasonable. *See* A.R.S. § 13-205 (noting the State's burden to disprove justification). Thus, Ruiz has not established prosecutorial misconduct, much less pervasive misconduct resulting in an unfair trial. *See State v. Bocharski*, 218 Ariz. 476, 492, ¶ 75 (2008).

CONCLUSION

¶24 Ruiz's convictions and sentences are affirmed.