IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

HUMBERTO LUIS PEREZ, *Appellant*.

No. 1 CA-CR 24-0207

FILED 03-06-2025

Appeal from the Superior Court in Mohave County
No. S8015CR202200929
The Honorable Lee Frank Jantzen, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Deborah Celeste Kinney
Counsel for Appellee

Janelle McEachern Attorney at Law, Chandler
By Janelle McEachern
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Anni Hill Foster delivered the decision of the Court, in which Judge Michael J. Brown and Judge Paul J. McMurdie joined.

F O S T E R, Judge:

¶1 Defendant Humberto Perez appeals the superior court's denial of his motions for mistrial and new trial based on comments the prosecutor made during opening statements. For the following reasons, this Court affirms his convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 The facts of the case are viewed "in the light most favorable to sustaining the conviction." *State v. Huante*, 252 Ariz. 191, 192, ¶ 2 (App. 2021) (citation omitted). Perez was married to Cathy[1] , with whom he had several children in common, including William. In 2022, Cathy filed for divorce. Perez left the marital residence and moved into a recreational vehicle ("RV") park. After Perez moved out, Cathy's mother moved in.

¶3 While living at the RV park, Perez met Matthew and Jacob, who also lived there. Perez told them that Cathy had a new boyfriend who was abusing William and Cathy. Even though no such boyfriend existed, Perez sought help from Matthew and Jacob to get his child out of the situation. In the early morning hours, the three men met up to rescue William from the alleged abusive boyfriend. Their plan involved impersonating law enforcement, so Jacob provided camouflage clothing, masks and gloves for disguises and unloaded firearms. Jacob did not provide Perez with a weapon, but Perez acquired a metal bat from the vehicle once the men arrived at his former residence.

¶4 The three men knocked on the door and called out "U.S. Marshalls," and when no one opened the door, they broke it down. Perez entered the house and said: "How dare you take my house." He struck Cathy's leg with the bat, causing her to fall to the ground, and proceeded

[1] This Court uses pseudonyms to protect the identity of victims and witnesses. *See, e.g.*, *State v. Agueda*, 253 Ariz. 388, 389, ¶ 2 n.1 (2022); Ariz. R. Sup. Ct. 111(i).

to repeatedly hit her with the bat, causing bruises and lacerations "all over [her] body" and a concussion. He grabbed William by the hair and dragged him to a back room of the house. Perez then repeatedly struck Cathy's mother, breaking her leg, hand and elbow. Eventually, Matthew and Jacob pulled Perez away, and the three men left.

¶5 Deputies spoke with the three victims at the hospital. Cathy and William identified Perez as the bat-wielding assailant. Cathy also identified the RV park where Perez lived, and there, the deputies made contact with Jacob and Matthew, who identified Perez as the third man involved.

¶6 A grand jury indicted Perez on eight counts: one count of burglary in the first degree, a class 2 felony; four counts of aggravated assault with domestic violence designations, class 3 felonies; two counts of aggravated assault, class 6 felonies and one count of aggravated domestic violence, a class 5 felony. The day before the trial, the State moved to dismiss the aggravated domestic violence charge, which the court granted.

¶7 During opening statements, the prosecutor mentioned Perez was the subject of an order of protection obtained by Cathy; Perez objected to the prosecutor's statement. The court overruled the objection, noting that the remark was made during the prosecutor's opening statement and was not evidence. The prosecutor continued her opening statement and mentioned that the Department of Child Safety ("DCS") had removed Perez and Cathy's children, not including William, from their custody. Perez did not object to this comment. Over the afternoon break, Perez again objected to the remark about the protective order. The parties discussed the issue, and the court declined to dismiss the case or grant a mistrial. Neither the protective order nor the DCS case was mentioned again during the trial in the jury's presence. As the court discussed final jury instructions, it inquired about including an instruction on other-acts evidence because of the prosecutor mentioned the protective order. The court included the instruction. Jurors were also instructed that anything said during opening statements was not evidence and should not be considered as such. While deliberating, the jury submitted a question to the court regarding whether a protective order existed, to which the court instructed the jury to "only consider the evidence presented during the evidentiary portion of the trial."

¶8 The jury found Perez guilty of the seven remaining counts against him. It further found each was a dangerous offense and found six aggravating factors applicable to each: (1) "[i]nfliction or threatened infliction of serious physical injury"; (2) "[u]se, threatened use or

possession of a deadly weapon or dangerous instrument during the commission of the crime"; (3) "[p]resence of an accomplice"; (4) "[t]he victim, or the victim's immediate family, suffered physical, emotional, or financial harm"; (5) "[t]he defendant was impersonating a peace officer" and (6) "[d]uring or immediately following the commission of the offense, the defendant used a mask or other disguise to obscure the defendant's face to avoid identification." Perez moved for a new trial, which the court denied. The court sentenced Perez to a total aggravated sentence of 40 years with 597 days of presentence incarceration credit.

¶9 Perez timely appealed. This Court has jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A).

DISCUSSION

¶10 Perez argues the court erred by denying his motion for mistrial made during the first day of trial and by denying his motion for a new trial following his convictions. Although similar, "[a]n order declaring a *mistrial* . . . is not equivalent to an order granting a *new trial*." *State v. Hansen*, 237 Ariz. 61, 64, ¶ 6 (App. 2015). A mistrial "entails no judgment or sentence having been rendered by [the] court," and "the declaration of a mistrial does not automatically result in a new trial." *Id.* at 65, ¶¶ 7–8 (citations and quotations omitted).

¶11 This Court reviews the denial of both a motion for mistrial and a motion for a new trial for an abuse of discretion, which "occurs when the reasons given by the court for its actions are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Arvallo*, 232 Ariz. 200, 201, ¶¶ 6–7 (App. 2013) (quotation omitted); *accord State v. Jones*, 197 Ariz. 290, 301, ¶ 20 (2000). Declaring "a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 220 Ariz. 351, 363, ¶ 50 (2009) (quotation omitted). But "[t]he court may grant a new trial" under several circumstances, including when "the State is guilty of misconduct." Ariz. R. Crim. P. 24.1(c)(2). Perez argues the prosecutor's remarks regarding the protective order and the DCS case during the opening statement were prosecutorial misconduct and deprived him of a fair trial. But to succeed, he "must show that the prosecutor's error so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Thompson*, 252 Ariz. 279, 298, ¶ 75 (2022) (cleaned up).

I. The Order of Protection and the Motion for Mistrial

¶12 Perez primarily focuses on the prosecutor's reference to the protective order. Perez mentions two theories for why the protective order remark amounts to prosecutorial error: prosecutorial vouching and improper statement. First, Perez indicates the prosecutor's reference to the protective order was impermissible vouching, but he fails to develop this argument. "Failure to argue a claim on appeal constitutes waiver of that claim." *State v. Bolton*, 182 Ariz. 290, 298 (1995) (citation omitted); *see also* Ariz. R. Crim. P. 31.10(a)(7) (appellant's brief shall include an argument containing the party's contentions, reasons therefore and necessary supporting citations). Because Perez failed to develop this argument, he has waived this theory of error.

¶13 Second, Perez argues the prosecutor's reference to the order of protection during opening statements was improper. Perez objected at trial, so he "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. Murray*, 250 Ariz. 543, 548, ¶ 13 (2021) (quotations omitted). To do so, Perez must show "(1) misconduct exists and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *Id.* (cleaned up). "A prosecutor's statements are improper if (1) they call attention to matters that jurors should not consider in reaching their verdict, and (2) [they] create a high probability that the jurors are, in fact, influenced by those statements." *Thompson*, 252 Ariz. at 299–300, ¶ 81 (citation omitted). "'[P]rosecutorial misconduct' broadly encompasses *any conduct* that infringes a defendant's *constitutional rights*," including "inadvertent error," "innocent mistake" or "intentional misconduct." *Murray*, 250 Ariz. at 548, ¶ 12 (quotation omitted). Opening statements are intended to prepare the jury for the evidence that will be presented and the elements of the offense that must be proved. *State v. King*, 180 Ariz. 268, 276 (1994). Though "[s]pecific evidence may be referenced in the opening statement as long as the proponent has a good faith basis for believing the proposed evidence exists and will be admissible," *State v. Pedroza-Perez*, 240 Ariz. 114, 116, ¶ 12 (2016), prosecutors are not allowed to refer to inadmissible evidence during their opening statements, *Dann*, 220 Ariz. at 363, ¶ 50.

¶14 Here, the court did not rule on the protective order's admissibility as evidence, but it "underst[ood] that the evidence isn't coming in" and advised the prosecutor to "not mention the [order] again." Neither the prosecutor nor Perez presented testimony regarding the protective order or mentioned it during the remainder of the trial, so it was

information that would have been improper for the jury to consider when reaching its verdicts. *See State v. Hall*, 204 Ariz. 442, 448, ¶ 18 (2003) ("extrinsic evidence" is "improper evidence").

¶15 But even assuming error, this Court reviews whether "a reasonable likelihood exists that the misconduct could have affected the jury's verdict." *Murray*, 250 Ariz. at 548, ¶ 13. The preliminary jury instructions stated "[a]n opening statement is neither evidence nor argument," and the final jury instructions reemphasized "[w]hat the lawyers say [in opening statements] is not evidence." At Perez's request, the court added an instruction regarding other-acts evidence that prohibited the jury from considering such acts "to determine the defendant's character or character trait, or to determine that the defendant acted in conformity with the defendant's character or character trait and therefore committed the charged offense." And although during deliberations a juror asked about the existence of a protective order, the court responded: "The jury is to rely on its collective memories regarding the evidence presented and apply the jury instructions to the evidence present[ed]. You must only consider the evidence presented during the evidentiary portion of the trial." Courts presume jurors follow instructions. *Dann*, 220 Ariz. at 366, ¶ 75. Thus, the court's efforts to cure any prejudice against Perez rendered any error from the prosecutor's statement harmless. *See State v. Acuna Valenzuela*, 245 Ariz. 197, 216, ¶ 69 (2018); *see also State v. Vargas*, 251 Ariz. 157, 165, ¶ 17 (App. 2021). The court did not abuse its discretion by denying Perez's motion for mistrial.

II. The DCS Case, Cumulative Error and the Motion for New Trial

¶16 Perez further contends the prosecutor's subsequent reference to the DCS case, wherein DCS removed his children from the home, resulted in cumulative error when coupled with the reference to the protective order.

¶17 When a defendant fails to object to a single act of prosecutorial misconduct, the claimed error is subject to fundamental review as set forth in *State v. Escalante*, 245 Ariz. 135 (2018); *Murray*, 250 Ariz. at 548–49, ¶¶ 14, 16–17. A defendant can establish fundamental error by showing one of three prongs: (1) "the error went to the foundation of the case," meaning "it relieve[d] the prosecution of its burden to prove a crime's elements, directly impact[ed] a key factual dispute, or deprive[d] the defendant of constitutionally guaranteed procedures"; (2) "the error took from the defendant a right essential to his defense," meaning "it deprive[d] the defendant of a constitutional or statutory right necessary to establish a

viable defense or rebut the prosecution's case"; or (3) "the error was so egregious that [the defendant] could not possibly have received a fair trial," meaning the error "so profoundly distort[ed] the trial that injustice is obvious." *Escalante*, 245 Ariz. at 141–42, ¶¶ 18–21. "If the defendant establishes fundamental error under prongs one or two, he must make a separate showing of prejudice." *Id.* at 142, ¶ 21 (citation omitted).

¶18 However, to show cumulative error based on multiple acts of prosecutorial misconduct,

> the defendant must: 1) assert cumulative error exists; 2) cite to the record where the alleged instances of misconduct occurred; 3) cite to legal authority establishing that the alleged instances constitute prosecutorial misconduct; and 4) set forth the reasons why the cumulative misconduct denied the defendant a fair trial with citation to applicable legal authority.

State v. Vargas, 249 Ariz. 186, 190, ¶ 14 (2020). Determining whether the cumulative misconduct denied the defendant a fair trial incorporates *Escalante*'s three prongs. *See id.* at 189–90, ¶¶ 12–14 (cumulative error review "consistent with" *Escalante*); *see also Escalante*, 245 Ariz. 141, ¶ 20 ("Prong three: An error so egregious that a defendant could not possibly have received a fair trial encompasses either or both prongs one and two."). However, defendants need not show the individual acts of prosecutorial misconduct amounted to fundamental error that deprived them of a fair trial. *Vargas*, 249 Ariz. at 190–91, ¶¶ 14–15, 17; *see also State v. Morris*, 215 Ariz. 324, 335, ¶ 47 (2007) (harmless or non-erroneous incidents may contribute to cumulative error).

¶19 Here, the prosecutor recounted the following narrative during the opening statements:

> And also around that time a DCS case had commenced. DCS, Department of Child Safety. What that meant was that at the end of July and the beginning of August of 2022, the only people living at the house was [Cathy] and her adult son [William]. Humberto had taken the RV to the [RV park]. And the five minor children were within the custody of DCS in another location.

Perez contends these remarks, along with the protective order reference, "thoroughly trashed [Perez's] reputation" by portraying him "as a wife-beater who was unable to protect or provide for his family and, thus, likely

committed the acts alleged." But Perez failed to cite any legal authority to support his claim or any evidence admitted at trial that supports his position. *Vargas*, 249 Ariz. at 190, ¶ 14.

¶20 However, even assuming the reference to the DCS case was misconduct, the court properly instructed the jury numerous times regarding opening statements and what they were to consider during deliberations, and courts presume the jury followed the instructions. *Dann*, 220 Ariz. at 366, ¶ 75; *see also Acuna Valenzuela*, 245 Ariz. at 216, ¶ 69. The record does not reflect the cumulative impact "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Vargas*, 249 Ariz. at 190, ¶ 13 (quotation omitted). And these combined acts do not compare with the egregiousness of other errors that courts have determined denied a defendant a fair trial. *See, e.g.*, *Escalante*, 245 Ariz. at 141–42, ¶¶ 18–20 (providing examples); *id.* at 143, 146, ¶¶ 26, 40 (admission of drug-courier profile evidence); *Murray*, 250 Ariz. at 554, ¶ 40 (misstatement of the reasonable-doubt standard). Because Perez failed to establish fundamental, prejudicial error, the superior court did not err by denying Perez's motion for a new trial after the jury returned its verdicts.

CONCLUSION

¶21 For the reasons above, Perez's convictions and sentences are affirmed.

MATTHEW J. MARTIN • Clerk of the Court
FILED: JR