NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 04-20-2010
PHILIP G. URRY,CLERK
BY: GH

STATE OF ARIZONA, Appellee, v. ROBERT ANTHONY WARD, Appellant.	1 CA-CR 08-0738 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-112160-001 DT

The Honorable Sally S. Duncan, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel, Criminal Appeals/Capital Litigation Section
and Sherri Tolar Rollison, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Defendant Robert Ward appeals his sentences. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 A jury found Defendant guilty of taking the identity of another and forgery, both class four felonies. A hearing on aggravating factors was held and the jury found Defendant had "committed the offense[s] . . . while on probation, parole, work furlough, community supervision, and/or any other release or escape from confinement for a conviction of a felony offense, specifically Maricopa County Superior Court matter numbers CR95000233 and CR9500921." The court sentenced Defendant to the presumptive term of ten years on each count, to be served concurrently. Defendant appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A) (Supp. 2008).

DISCUSSION

¶3 Defendant argues that the jury's finding that he committed the offense while he was an absconder from supervision, an aggravating factor, was in error because the prosecutor "'explained' the prison documents admitted into evidence without being sworn or subjected to cross-examination." Defendant contends the prosecutor violated his constitutional rights. Although we review constitutional issues de novo, *State v. McCann*, 200 Ariz. 27, 28, ¶ 5, 21 P.3d 845, 846 (2001), Defendant did not object to the process or the prosecutor's closing arguments, and therefore we review for fundamental error

only, *see State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶4 To prevail under the fundamental error standard of review, Defendant must establish: (1) an error; (2) that the error was fundamental; and (3) that the error resulted in prejudice. *State v. Smith*, 219 Ariz. 132, 136, ¶ 21, 194 P.3d 399, 403 (2008) (citing *Henderson,* 210 Ariz. at 567, ¶ 20, 115 P.3d at 607).

¶5 During the aggravation phase of the trial, the State offered into evidence certified copies of Defendant's conviction history and his arrest warrant. Defendant objected, and argued that, even though the documents were certified, the State needed a witness to present them to the court. The documents were admitted into evidence.[1] The prosecutor then stated, "I'm simply going to publish to the jury with the Court's permission and explain what the records are."

¶6 Defendant argues that the jury was not told that the "presentation" was "argument" and that the prosecutor's explanation was testimony from an unsworn witness that was not subject to cross-examination. Specifically, he argues the jurors were not told because "[t]he 'argument' had not followed witnesses and the other formalities that jurors observed during

[1] *See* Ariz. R. Evid. 902(2).

the guilt-innocence." We disagree that the trial court erred during the aggravation phase.

¶7 The court, at the onset of the aggravation phase, informed counsel that the instructions would be read at the beginning "with respect to what [the aggravation proceeding instructions are] so that they know and then save the part about the last page of the instructions . . . [as] my closing instruction." The court then confirmed with counsel that the process was acceptable.

¶8 When instructed, the jury was told to rely on the final jury instructions given earlier to determine the verdict and the instructions read during the aggravation phase. The final jury instructions on the merits informed the jury that "[w]hat the lawyers said or say is not evidence but it may help you to understand the law and the evidence." Similarly, the aggravation proceeding instructions stated that, "[t]he lawyer will again talk to you about the law and the evidence. What they say is not evidence, but it may help you to understand the law and evidence." The jurors had received written copies of the final jury instructions on the merits, and were provided with the written aggravation hearing instructions. We presume jurors follow the instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

¶9 Although the trial court did not specifically tell the jury that the prosecutor was about to give closing argument, the prosecutor discussed more than the two exhibits that had been published. The prosecutor also talked about relevant trial information that related to the aggravation phase. Defense counsel then spoke and, afterward, the court gave the final aggravation phase instruction. Accordingly, there is nothing to suggest the jury misunderstood the instructions and believed the prosecutor's explanation was testimony, thus there was no error.

¶10 Defendant also argues that the first statement from the prosecutor after the exhibits were published — when the prosecutor asked the court's permission to "explain what the records are" — was impermissible vouching. We disagree.

¶11 There are two forms of prosecutorial vouching: "(1) where the prosecutor places the prestige of the government behind its witness; and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. King*, 180 Ariz. 268, 276-77, 883 P.2d 1924, 1932-33 (1994) (quoting *State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989)). Neither is implicated in this case.

¶12 Although Defendant challenges on appeal the State's explanation of the significance of the prison records, an argument that was not made below, at the time of the

explanation, the presentation of evidence had been completed and closing arguments had begun.[2] Counsel can comment on properly admitted evidence and "urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions." *State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993). Counsel is given wide latitude in closing arguments, *State v. Amaya-Ruiz*, 166 Ariz. 152, 171, 800 P.2d 1260, 1279 (1990) (citing *State v. Zaragoza*, 135 Ariz. 63, 68, 659 P.2d 22, 27 (1983)), and it is not improper to help jurors understand the evidence. All of the closing remarks are directly supported by the record or can be reasonably inferred therefrom. Accordingly, we find no error, much less fundamental error.

CONCLUSION

¶13 Based on the foregoing, we affirm Defendant's sentences.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Judge

/s/

MARGARET H. DOWNIE, Judge

[2] Defendant has not challenged the admission of the documents.