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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
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BY: DN

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 08-1074  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
JESUS LOPEZ-ARREDONDO, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-006369-004 DT

The Honorable Rosa Mroz, Judge

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals Section/Capital Litigation Section  
And Julie A. Done, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Stephen R. Collins, Deputy Public Defender  
Attorneys for Appellant

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O R O Z C O, Judge

¶1 Jesus Lopez-Arredondo (Defendant) appeals the trial court's denial of his motion for mistrial. For the reasons set forth below, we affirm Defendant's convictions and sentences.

#### FACTUAL AND PROCEDURAL BACKGROUND

¶2 Defendant was indicted on two counts of kidnapping, class two dangerous felonies; two counts of aggravated assault, class three dangerous felonies; two counts of theft by extortion, class two dangerous felonies; and one count of misconduct involving weapons, a class four felony.<sup>1</sup>

¶3 During the State's closing argument at trial, the prosecutor said: "The State understands its burden is beyond a reasonable doubt. . . . [T]he State has proven to you these crimes beyond a reasonable doubt. *The defense has done nothing to overcome that and to rebut that.*" (Emphasis added.) Defendant immediately objected and moved for a mistrial. Defendant argued the comments were "about the defendant's right not to testify," and that they were so prejudicial that Defendant was entitled to a new trial.

¶4 In response, the prosecutor claimed he did not comment on Defendant's failure to testify. The trial court sustained Defendant's objection because it concluded the comments shifted the burden, but it denied his motion for mistrial. Immediately

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<sup>1</sup> During trial, the trial court granted the State's motion to dismiss the count of misconduct involving weapons without prejudice.

after the ruling, the trial court instructed the jury to disregard the prosecutor's statement.

¶15 The court also instructed the jury that: "The State must prove guilt beyond a reasonable doubt;" and "[The jury] must not conclude that the defendant is likely to be guilty because the defendant did not testify." The trial court further instructed the jury that Defendant was not required to prove his innocence, and "[i]f the [c]ourt sustained an objection to a lawyer's question, [the jury] must disregard it and any answer given."

¶16 Defendant timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes sections 12-120.21.A.1 (2003), 13-4031 (2001), and -4033.A (Supp. 2009).

#### DISCUSSION

¶17 A trial court's ruling on a motion for mistrial will not be disturbed absent an abuse of discretion. See *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). "Generally, a prosecutorial comment on defendant's failure to testify is objectionable if such reference is calculated or intended to direct the jury's attention to the fact that a defendant has chosen to exercise his [F]ifth [A]mendment privilege." *State v. Martinez*, 130 Ariz. 80, 82, 634 P.2d 7, 9 (App. 1981). In other words, comments regarding a defendant's decision not to testify are impermissible when the "language used

was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." *State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (citation omitted). Furthermore, a prosecutor is only allowed to "comment on the defendant's failure to present exculpatory evidence" that would substantiate the defendant's story if the prosecutor's statement does not constitute a comment on defendant's silence. *Id.* Therefore, if the prosecutor's comments were not intended to and did not direct the jury's attention to the defendant's failure to testify, they do not shift the burden of proof to the defendant. See *State v. Sarullo*, 219 Ariz. 431, 437, ¶ 24, 199 P.3d 686, 692 (App. 2008).

¶18 In *Fuller*, the prosecutor stated the defense "[has] presented no evidence, nothing positive. Their entire effort is to tear apart the State's case, to tell you that these eyewitnesses don't know what they saw." 143 Ariz. at 574, 694 P.2d at 1188. Because the comments did not specifically refer to the defendant's failure to take the stand, our supreme court held the prosecutor did not violate the defendant's Fifth Amendment rights. *Id.* at 575, 694 P.2d at 1189. It reasoned that the comments only "reflected the prosecutor's opinion that the defense failed to present any positive or exculpatory evidence." *Id.*

¶9 Even if comments by a prosecutor are improper, they do not necessarily require reversal of a defendant's conviction. A prosecutor's improper comments will require reversal if it is shown that there is both "a reasonable likelihood that the misconduct could have affected the jury's verdict" and the comments were "so serious that they affected the defendant's right to a fair trial." *State v. Newell*, 212 Ariz. 389, 403, ¶ 67, 132 P.3d 833, 847 (2006) (citation and quotations omitted).

¶10 In *Newell*, our supreme court declined for several reasons to overturn a conviction based on a prosecutor's improper comments. *Id.* First, the court explained the trial court had instructed the jury that "anything said in closing arguments was not evidence." *Id.* at ¶ 68. Because it is presumed that jurors follow a trial court's instructions, the court concluded that the comments did not affect the jury's verdict. *Id.* Second, while the trial court did not immediately instruct the jury to disregard the prosecutor's comments, it promptly sustained the defense counsel's objection to the comments. *Id.* at ¶ 69. At the end of trial, the trial court instructed the jury that "any sustained objection meant that the information must be disregarded." *Id.* The court again reasoned that because it is presumed that jurors follow a trial court's instructions, the comments did not affect the verdict. *Id.* Finally, the court agreed with the trial court's determination that the prosecutor's

comments were not so prejudicial that they required a mistrial. *Id.* at ¶ 70. In the context of the entire trial, the court held the jury did not base its guilty verdict on the prosecutor's comments; rather, the jury convicted the defendant based on the overwhelming evidence of guilt. *Id.*

¶11 Similar to the prosecutor's comments in *Fuller*, the prosecutor's comments in this case did not specifically refer to Defendant's failure to testify. When viewed in context, the prosecutor's comments neither called attention to nor were they intended to call the jury's attention to Defendant's failure to testify; rather, they illustrated the "prosecutor's opinion that the defense failed to present any positive or exculpatory evidence." *Fuller*, 143 Ariz. at 575, 694 P.2d at 1189. Because the prosecutor's statements were not comments on Defendant's failure to testify, Defendant's Fifth Amendment rights were not violated.

¶12 Furthermore, even if the prosecutor's comments implied that Defendant had the burden of proof, the trial court's cautionary instruction to the jury was sufficient to cure any harm. See *State ex rel. McDougal v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987). Here, Defendant's objection to the statement was sustained and the trial court immediately instructed the jury to disregard the prosecutor's statement. Moreover, the final jury instructions instructed the jury that

Defendant was not required to prove his innocence and that “[i]f the [c]ourt sustained an objection to a lawyer’s question, [the jury] must disregard it and any answer given.” Accordingly, we find if there was error, the jury instruction cured any potential harm to Defendant.

¶13 Finally, there is no reason to conclude that the jury was so affected by the prosecutor’s isolated comments that Defendant was denied a fair trial. When determining whether the jury based its verdict on the prosecutor’s comments, we must consider the statement in the context of the entire trial. See *Newell*, 212 Ariz. at 403, ¶ 70, 132 P.2d at 847. The record contains sufficient evidence for the jury to find Defendant guilty beyond a reasonable doubt. Various witnesses testified that Defendant drove the car that kidnapped the victims; he was apprehended near the home where the victims were being held; and he had the wallet of one of the victims on his person.

**CONCLUSION**

¶14 For the above mentioned reasons, we affirm Defendant's convictions and sentences.

/s/

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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/s/

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DIANE M. JOHNSEN, Judge

/s/

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JON W. THOMPSON, Judge