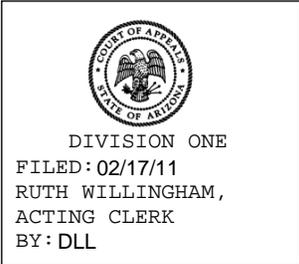


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**



STATE OF ARIZONA,) 1 CA-CR 09-0359
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
MARK ANTHONY ESCARCEGA,) - Rule 111, Rules of
) the Arizona Supreme
Appellant.) Court)
)
)

Appeal from the Superior Court of Maricopa County

Cause No. CR2008-141427-002 DT

The Honorable Kristin Hoffman, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Mark Anthony Escarcega (defendant) appeals from his conviction and sentence on one count of third degree burglary, a class 4 felony. For the following reasons, we affirm.

¶2 Defendant raises one issue on appeal: whether his due process rights were violated during the trial due to prosecutorial misconduct. Because defendant failed to object below, we review for fundamental error. See *State v. Harrod*, 218 Ariz. 268, 278, ¶ 35, 183 P.3d 519, 529 (2008). Fundamental error exists only in the rare case where there is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense . . . error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

¶3 On appeal, defendant asserts for the first time that the prosecutor undermined his credibility and "eliminate[d his] theories of innocence" by deliberately asserting that an individual named Pookey Braxton did not exist when he in fact did exist and the state was aware that he was involved in the crime. Defendant also complains that the prosecutor committed additional improper conduct which would require reversal, including asking him about drinking alcohol and implying that his story had changed during the state's cross-examination of defendant, by making improper arguments during closing argument, and by "deliberately l[ying] to the jury."

State's Cross-Examination of Defendant

¶4 At trial on direct examination, defendant testified as follows: On the day in question, he arrived on foot at the home of his co-defendant, Charles Coleman, and Coleman's girlfriend, Angila. A friend named Pookey Braxton, whom defendant had known for approximately twelve years, was also at the residence. Defendant noticed a black Chevy truck in the backyard. He asked Pookey to give him a ride to the liquor store, and the two men got into the Chevy and Pookey started driving. According to defendant, Pookey had keys to the truck. Instead of driving to the liquor store, Pookey started speeding and making turns while someone followed the truck. Pookey jumped a median with the Chevy truck and was almost hit by a dump truck. The men arrived at another friend's home, E.C., and defendant went inside. Pookey jumped out of the truck and took off in another direction; defendant never saw him again. Police arrived at E.C.'s residence and asked defendant to come outside but he did not immediately do so because he had outstanding warrants and was on probation. Subsequently, defendant went out and told police that he had never been in the black Chevy. Defendant was unaware that he had been riding in a stolen vehicle, and had not seen any stolen tools.

¶5 On cross-examination, the prosecutor asked defendant about his probation status, asked defendant whether he had actually been driving the truck,¹ and questioned him about the high-speed chase. She asked him whether one of the conditions of his probation was not drinking and whether he had reported his behavior to his probation officer; defendant's attorney objected and the trial court sustained the objection to the question about reporting to his probation officer. The prosecutor questioned defendant about his interactions with the police and the statement he made to Officer Lewis. In particular, she asked him whether he had ever mentioned Pookey to police; he admitted that he had never done so.

¶6 Our review of the record indicates that the prosecutor's cross-examination of defendant was appropriate and we find no error, fundamental or otherwise.

State's Closing Argument

¶7 Defendant also argues that the state committed fundamental error by improperly bringing up defendant's prior felonies and probation status during the state's closing argument and by calling him a liar. "[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury,

¹ Defendant denied driving the truck. The victim testified that defendant was the passenger, but could not be positive that he was in fact the passenger rather than the driver.

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) (citations omitted).

¶8 We find no error. Defendant testified at trial. Accordingly, it was proper for the prosecutor to attack defendant's credibility during closing argument. The state's closing argument summarized the evidence, commented on the evidence, and urged the jury not to believe the defendant's trial testimony, which was at odds with his pretrial statement to police. Furthermore, we find no indication that the prosecutor "deliberately lied" during closing argument. Although a police report listed "Charles Braxton, possible street name Pooky," as an "investigative lead," there is nothing in the record indicating that police ever suspected that Pookey was guilty of stealing the truck or tools. Finally, the state did not improperly comment of defendant's prior convictions. Pursuant to Arizona Rule of Evidence 609, evidence that a witness has been convicted of a crime is admissible for purposes of attacking the witness's credibility if the probative value of the evidence outweighs its prejudicial effect. Here, the state did not improperly suggest that defendant's probation status and prior convictions made it more likely that he had committed this crime; instead, the prosecutor argued that defendant's prior

convictions and probation status were enough to allow the jury to question defendant's credibility.

¶9 For the foregoing reasons, we affirm defendant's conviction and sentence.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

DONN KESSLER, Presiding Judge

/s/

DANIEL A. BARKER, Judge