DIVISION ONE
FILED: 10-07-2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0443
	)	
Appellee,	)	Department D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
JASON LE BRIESCH,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-144455-002 DT

The Honorable Pamela Hearn Svoboda, Pro Tempore

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Kathryn Petroff, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Presiding Judge

¶1 Jason Le Briesch ("Appellant") appeals his conviction for possession of burglary tools. Appellant argues that statements made by the prosecutor during closing arguments amounted to prosecutorial misconduct and were so prejudicial to the trial's outcome that his guilty verdict should be overturned.

FACTS AND PROCEDURAL HISTORY

¶2 On August 7, 2008, Appellant was indicted by a grand jury which charged him with three separate offenses: Count II[1] "unlawful use of means of use of transportation" ("the unlawful use of transportation charge"), a class six felony in violation of Arizona Revised Statutes ("A.R.S.") section 13-1803[2] (2010)[3]; Count III, "burglary in the third degree" ("the burglary charge"), a class four felony in violation of A.R.S. § 13-1506[4]

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[1] In a direct complaint, the State had alleged Count I, theft of means of transportation, against Appellant's girlfriend only.

[2] Under A.R.S. § 13-1803, "A person commits unlawful use of means of transportation if, without intent permanently to deprive, the person . . . . [k]nowingly is transported or physically located in a vehicle that the person knows or has reason to know is in the unlawful possession of another person . . . ."

[3] We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

[4] Under A.R.S. § 13-1506,

"A. A person commits burglary in the third degree by:

1. Entering or remaining unlawfully in or on a

(2010); and Count IV "possession of burglary tools" ("the burglary tools charge"), a class six felony in violation of A.R.S. § 13-1505[5] (2010).

¶3 Appellant's trial began on May 5, 2009, with the state calling three witnesses.[6] The facts introduced at trial included the following: On July 15, 2008, the victim observed Appellant and his girlfriend park behind his car. After parking, both Appellant and the girlfriend walked up to the victim's car, and the girlfriend reached in through the slightly open window of the victim's car and unlocked the door. The victim immediately called the police while Appellant and the girlfriend entered his car and began rummaging around. Before the police arrived, the

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> nonresidential structure or in a fenced commercial or residential yard with the intent to commit any theft or any felony therein.
>
> 2. Making entry into any part of a motor vehicle by means of a manipulation key or master key, with the intent to commit any theft or felony in the motor vehicle."

[5] Under A.R.S. § 13-1505, "A person commits possession of burglary tools by . . . . buying, selling, transferring, possessing, or using a motor vehicle manipulation key or master key . . . . transfers, possesses or uses no more than one manipulation key, unless the manipulation key is transferred, possessed or used with the intent to commit any theft or felony . . . ." Although the indictment did not specify which subsections of A.R.S. § 13-1505 Appellant had allegedly violated, the indictment's language tracked subsections (A)(2) and (B)(2).

[6] Appellant did not call any witnesses and he also waived his right to testify on his behalf.

girlfriend removed a folder from the trunk of the victim's car and placed it in the car in which she and Appellant had arrived.

¶4 A police officer arrived on the scene and ordered Appellant and his girlfriend to exit their vehicle and sit on the ground with their hands up. The officer handcuffed Appellant, and although he noticed that something was in Appellant's hand, he neither asked Appellant what he was holding nor ordered him to relinquish the object. While escorting Appellant to his squad car, the officer observed Appellant drop a cell phone and what appeared to be a "jiggle key" - a device commonly used to break into and start cars.

¶5 At the police station, Appellant was advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 346 (1966), and then questioned. Initially, Appellant claimed that he had found the victim's folder on the ground of the parking lot and had picked it up to return it to its owner. After further interrogation, however, Appellant stated that he had never touched the folder.

¶6 During the course of their investigation, the police determined that neither Appellant nor his girlfriend possessed any key to the car in which they had arrived. When questioned about that car, Appellant claimed that his friend had loaned him the car; however, Appellant was unable to give the police any

contact information for the alleged friend, and the police were unable to confirm the ownership or origin of the car.

¶7 On May 5, 2009, at the close of the State's case, the prosecutor renewed an earlier request to amend the burglary charge, and Appellant moved for dismissal of the burglary charge under Rule 20 of the Arizona Rules of Criminal Procedure.[7] The motion to amend the burglary charge was denied by the court, stating that amending the language would be "impermissible" because the amendment would "change the nature of the charge," and in so doing, violate Appellant's "Sixth Amendment notice requirement." As a result of the denial of the motion to amend, the court granted Appellant's motion to dismiss the burglary charge. After the Rule 20 motion was granted, the prosecutor notified the court and Appellant that he intended to use the evidence introduced in the case relating to the burglary charge to support his argument of Appellant's guilt of the burglary tools charge. Appellant then responded:

[7] The State sought to amend the burglary charge to reflect the language of A.R.S. § 13-1506(A)(1) rather than the language of (A)(2), which had been reflected in the original indictment. The State sought to amend the count so that burglary could be proven by showing under (A)(1) that Appellant had "enter[ed] or remain[ed] unlawfully in or on a nonresidential structure . . . with the intent to commit any theft or any felony therein," as opposed to (A)(2) in which the State had the burden of proving that Appellant had "ma[de] entry into any part of a motor vehicle by means of a manipulation key or master key, with the intent to commit any theft or felony in the motor vehicle."

> I thought [the state] argued, though, Judge, that the officer testified that based upon his training and experience, you know, that's what [the jiggle] key is used for, you know, without getting into [the evidence introduced regarding Appellant's entry into and presence inside the victim's car and the discovery of victim's folder in Appellant's car]. Because now if he goes there, then I guess we sit here and argue about [the burglary] charge that has been dismissed. I don't think they need [the evidence introduced regarding the appellant's entry into and presence inside the victim's car and the discovery of victim's folder in Appellant's car] in order to argue that jiggle key, according to the officer, [the jiggle key] would be for purpose of illegal purpose, if you will, if you believe what the officer testified to.

¶8 In response to Appellant's argument, the court made the following statement:

> I don't want [the state] to argue the burglary in the third degree, of course, because I've dismissed that count. But you certainly have the burden to show [the jiggle key] was intended to be used in the commission of a burglary [as part of the burglary tools charge]. And I think its permissible argument from the evidence that the officer said [jiggle keys] aren't used for lawful purposes; they're used to help commit burglaries. So I think you can make that inference.
>
> I think it's an element you have to prove [that the jiggle key was intended to be used as part of a felony or theft], but let's not focus too much on [the victim's] car. Just focus on the officer's testimony that [jiggle keys are] not possessed for lawful purposes, but for commission of burglaries. Is that clear?

¶9 No further discussion regarding the burglary charge occurred, nor was there any motion made by Appellant to strike the evidence related to the burglary charge. After further

discussion, the parties agreed to the following jury instruction regarding the burglary tools charge:

> [P]ossession of burglary tools, requires proof that the defendant: Number one, possessed a key, tool, instrument or other article adopted or commonly used for committing burglary . . . . or theft . . . . [a]nd two, intended to use or permit the use of such an item in the commission of a burglary or theft.

The court also informed the jury that the burglary charge was no longer pending for its consideration.

¶10 During closing arguments, the prosecutor made the following statements of which Appellant now complains:

> Now, how do you know that [Appellant] intended to use [the jiggle key] for a burglary? Well, you can look at the facts of this case . . . . The fact that the woman came up to the car and found out that the window was already down a little bit, so they didn't use the jiggle key didn't change the fact of what their intention was. And that's what this crime requires. [Appellant] possessed that key that at any point while he was possessing it, he intended to commit a theft or felony or burglary . . . .
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> . . . .
>
> . . . . [Appellant] was intending on using [the jiggle key] for a burglary or theft because you know what? The facts of this case show that he was doing that. He just didn't happen to need it [to break into the car], but his intention was still there.

During rebuttal, the prosecutor made the following statements of which Appellant also complains:

> [Appellant] possessed this burglary tool. He had the intent of committing a theft or burglary with it. Doesn't matter that he didn't need to [use it] in

> getting into the car. Got lucky. But it's clear what his intention was with this . . . .
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> . . . .
>
> . . . . [Appellant knew] that two witnesses or at least one saw this folder was in this car, but [Appellant is] going to deny that and say it's on the ground. And then [Appellant is] going to deny even [his] own statement and say [he] never touched it.

Appellant did not object to any of these statements at the time they were made.

¶11 On May 6, 2009, the jury found Appellant guilty of Count IV, the burglary tools charge, but found him not guilty of Count II, the unlawful use of transportation charge. The court sentenced Appellant to the presumptive term of 3.75 years' imprisonment.

¶12 Appellant timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).

ANALYSIS

¶13 Appellant argues that the prosecutor's statements during closing and rebuttal arguments constituted prosecutorial misconduct and denied Appellant a fair trial. Appellant also argues that his statement during the Rule 20 proceeding constituted a valid objection sufficient to preserve this issue for appeal.

¶14 A conviction may only be overturned for prosecutorial misconduct if a reasonable likelihood exists that the misconduct could have affected the jury's verdict. *See State v. Bocharski*, 218 Ariz. 476, 491-92, ¶ 74, 189 P.3d 403, 418-19 (2008) (quoting *State v. Anderson*, 210 Ariz. 327, 340, ¶ 45, 111 P.3d 369, 382 (2005)). Further, "when a defendant fails to object [to the prosecutor's behavior], the Court engages in fundamental error review." *Id*. (citing *State v. Velazquez*, 216 Ariz. 300, 311, ¶ 47, 166 P.3d 91, 102 (2007)); *accord State v. Hughes,* 193 Ariz. 72, 85, ¶ 58, 969 P.2d 1184, 1197 (1998).

¶15 Appellant's response during the Rule 20 proceeding, together with his failure to subsequently object to the prosecutor's closing and rebuttal arguments, was insufficient to preserve the issue for appeal; accordingly, we engage in a fundamental error review. "The purpose of an objection is to permit the trial court to rectify possible error, and to enable the opposition to obviate the objection if possible." *State v. Rutledge*, 205 Ariz. 7, 13, ¶ 30, 66 P.3d 50, 56 (2003) (quoting *State v. Hoffman*, 78 Ariz. 319, 325, 279 P.2d 898, 901 (1955)). *See also State v. Moody*, 208 Ariz. 424, 463, ¶ 167, 94 P.3d 1119, 1158 (2004) (finding that the defendant's failure to object to otherwise improper comments "deprived the court of the opportunity to cure any misuse of the reports by instructions or otherwise" and did not preserve the issue for appeal); *State v.*

Lichon, 163 Ariz. 186, 189, 786 P.2d 1037, 1040 (App. 1989) (finding that the defendant did not preserve the issue of prosecutorial misconduct for appeal despite the fact that the prosecutor's comments violated the terms of a motion in limine because "the defendant's failure to object to the closing argument deprived the court of a meaningful opportunity to consider the issue he now raises").

¶16 Appellant's statements supporting the Rule 20 motion were not sufficient to give the court the opportunity to rectify a possible error. Appellant's statement during the Rule 20 proceeding failed to put either the court or opposing counsel on notice of what evidence he believed to be prejudicial or what evidence should be precluded from closing argument as a result of the dismissal. Appellant also failed to move to strike any of the evidence or testimony that had been properly introduced. Furthermore, Appellant failed to object to any of the prosecutor's statements that he only now argues constitute prosecutorial misconduct. Since Appellant made no objection whatsoever during the prosecutor's closing or rebuttal arguments and no motion to strike or preclude was made or ruled on, the issue is not preserved. *See Lichon*, 163 Ariz. at 189, 786 P.2d at 1040 (noting that "[i]t is generally true that a [contemporaneous] objection is not required when a motion in limine has been made . . . [but] the defendant's failure to

object to the closing argument deprived the court of a meaningful opportunity to consider the issue" and thus the motion in limine did not preserve the issue on appeal); *see also State v. Lujan*, 136 Ariz. 326, 328, 666 P.2d 71, 73 (1983) (finding that an issue was not preserved despite a motion in limine because the ruling on the motion was not placed on the record and the Appellant made no objection to the prosecutor's actions at trial); *but see State v. Lindsey*, 149 Ariz. 472, 476, 720 P.2d 73, 77 (1986) (finding that an objection was preserved for appeal even without the appellant lodging a contemporaneous objection because the appellant had filed a written motion to preclude the subsequently referenced evidence and received a favorable ruling on the motion). Accordingly, Appellant did not preserve this issue for appeal, and the standard of review is for fundamental error.

¶17 In order to prevail on a claim of prosecutorial misconduct, Appellant must show that "(1) the state's actions were improper; and (2) 'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Montano*, 204 Ariz. 413, 427, ¶ 70, 65 P.3d 61, 75 (2003) (citation omitted). We do not find that the prosecutor's actions were improper in this case.

¶18 Prosecutorial actions are generally considered improper if they "call to the attention of the jurors matters they would not be justified in considering in determining their verdict, and [raise] the probability that the jurors . . . . were influenced by the remarks." *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (quoting *State v. Hansen*, 156 Ariz. 290, 296-97, 751 P.2d 951, 956-57 (1988)); *accord Rutledge*, 205 Ariz. at 13, 66 P.3d at 56. Furthermore, "counsel is given 'wide latitude' in closing argument to 'comment on the evidence and argue all reasonable inferences' from it." *Moody*, 208 Ariz. at 464, ¶ 180, 94 P.3d at 1159 (citation omitted). Finally, "prosecutors may 'argue all reasonable inferences from the evidence,' but cannot 'make insinuations that are not supported by the evidence.'" *State v. Harrod*, 218 Ariz. 268, 278, ¶ 35, 183 P.3d 519, 529 (2008) (quoting *Hughes*, 193 Ariz. at 79, ¶ 26, 969 P.2d at 1191); *see also State v. Leon*, 190 Ariz. 159, 163, 945 P.2d 1290, 1294 (1997) (finding that a prosecutor may not refer "by innuendo or otherwise, to evidence that has been ruled inadmissible").

¶19 In this case, the state had the burden of proving that Appellant possessed a burglary tool and "intended to use . . . such an item in the commission of a burglary or theft." The prosecutor was permitted to use relevant evidence admitted during trial to convince the jury that the jiggle key was

intended to be used as a part of a burglary or theft. The prosecutor's statements had direct bearing on the element of intent that he needed to prove as part of the burglary tools charge. All of the prosecutor's closing and rebuttal arguments were based on testimony that had been admitted throughout the proceedings. None of the evidence on which the prosecutor's arguments relied had been stricken from the record or otherwise precluded by the court. Finally, the court itself had not prohibited the prosecutor from referencing evidence related to the burglary charge.[8] The court instructed the prosecutor to "focus on the officer's testimony that [jiggle keys are] not possessed for lawful purposes, but for commission of burglaries," but never prohibited the prosecutor from using any other evidence at his disposal to satisfy his burden of proof. In fact, the prosecutor followed the court's instructions and focused on the officer's testimony - referencing the officer's statements at least three times throughout his closing argument and four more times during his rebuttal argument.

[8] The court acknowledged during the Rule 20 discussion that the State had the "burden to show [the jiggle key] was intended to be used in the commission of a burglary" and merely instructed the prosecutor to "not focus too much on [victim's] car." The court's statement did not forbid the prosecutor from discussing the events surrounding the dismissed burglary charge or preclude him from using any testimony that had been admitted at trial.

¶20 We conclude that the prosecutor did not act inappropriately when making statements concerning the events surrounding the robbery during his closing and rebuttal statements. Therefore, we do not find that prosecutorial misconduct occurred in this case.

CONCLUSION

¶21 For the aforementioned reasons, we affirm Appellant's conviction for possession of burglary tools.

_____/S/_____
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

_____/S/_____
PATRICK IRVINE, Judge

_____/S/_____
RANDALL H. WARNER, Judge*

*Pursuant to Article VI, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Randall H. Warner, Judge of the Arizona Superior Court, to sit in this matter.