DIVISION ONE
FILED: 01/25/2011
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0692
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
ALONZO DEAN PATTERSON, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-111596-001 DT

The Honorable Thomas Dunevant, III, Retired Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and W. Scott Simon, Assistant Attorney General
Attorneys for Appellee

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

N O R R I S, Judge

¶1 Alonzo Dean Patterson appeals from his convictions and sentences for one count of burglary in the third degree, a class four felony in violation of Arizona Revised Statutes ("A.R.S.")

section 13-1506(A)(1) (2010),[1] and one count of possession of burglary tools, a class six felony in violation of A.R.S. § 13-1505(A)(1) (2010). He argues the superior court should have excluded testimony regarding the substance of a 9-1-1 call because the testimony constituted inadmissible hearsay and its admission violated Patterson's Sixth Amendment right to confrontation. Patterson also argues the State engaged in reversible prosecutorial misconduct by asking him to comment on police officers' credibility and by using that line of questioning in rebuttal closing argument. We disagree on both grounds and affirm his convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND[2]

¶2 Before noon on February 13, 2009, two Phoenix police officers responded to an anonymous 9-1-1 call reporting a burglary in progress at a Phoenix home -- someone attempting to steal a water heater. Officer E.O. found Patterson crouching behind the dismantled and slightly ajar door of the detached utility room. After a pat-down, he found vise grips (locking pliers) in Patterson's pocket and handcuffed him for further

[1]Although certain statutes cited in this decision were amended after the date of Patterson's offenses, the revisions are immaterial. Thus, we cite to the current version of these statutes.

[2]We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Patterson. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

investigation. Officer E.O. observed the lower pipes leading to the washer/dryer in the room had been cut and hedge loppers were crimping the water heater's copper piping. He also found a duffel bag full of cut copper pipes.

¶3 At trial, Officer E.O. testified to the substance of the 9-1-1 call -- dispatch directed the officers to the home after an anonymous caller reported "someone" was stealing a hot water heater. Officer M.N. testified the 9-1-1 caller identified the person as a "male." Contrary to Patterson's argument on appeal, at trial neither officer testified the caller identified the race of the person stealing the water heater. Officer M.N. testified Patterson told him he saw the utility room door ajar as he was riding his bicycle through the neighborhood and went home to pick up tools to take the water heater and copper piping. He further testified Patterson told him he needed a water heater because although water heaters only cost $100, "it was a hundred dollars he didn't have" (collectively, "admissions").

¶4 Directly contradicting Officer M.N.'s trial testimony, Patterson denied making any of these admissions.[3] Specifically, Patterson testified he "got concerned" when he saw the door ajar with water on the ground, tried to inform the residents, and

[3]Patterson did not, however, comment on the veracity of the officers on direct examination.

then went into the utility room to see the damage. Patterson further testified he was not trying to steal the water heater, did not touch the hedge loppers or own the duffel bag found in the room, and was carrying the vise grips only to keep his bicycle in working order.

¶5 During her cross-examination of Patterson, the prosecutor focused on the glaring inconsistencies between the testimony of the officers and Patterson. Going beyond that, she also, through a series of questions, tried to have Patterson acknowledge he was accusing the officers of lying.[4] Although Patterson objected to the form of these questions at trial and, consequently, only answered one of the questions,[5] nevertheless

---

[4]For example, the prosecutor asked Patterson questions such as, "[Y]ou want us to believe that what the cops said isn't true even though you were found in the utility room hiding?"

[5]The prosecutor cross-examined Patterson as follows:

> Q. So you really want us to believe that the cops made all of this up and that they just wanted to pin it on you for no, no reason whatsoever, even though they don't know you, they've never seen you before?
>
> [DEFENSE COUNSEL]: Your Honor, I'm going to object to form and ask for clarification.
>
> THE COURT: Objection as to form is sustained.
>
> Q. [PROSECUTOR]: You want us to believe --

the prosecutor achieved her objective through her questions. The prosecutor returned to her point in her rebuttal closing

---

> THE COURT: No. Strike that, strike that, strike that. I will let you finish your question and then you make your objection.
>
> Q. [PROSECUTOR]: You want us to believe that the cops made it all up even though they don't know you and they've never seen you before?
>
> A. [PATTERSON]: No, I --
>
> [DEFENSE COUNSEL]: Your Honor, I will object to form and speculation as to what the cops thought.
>
> THE COURT: Overruled. You can answer.
>
> . . . .
>
> MR. PATTERSON: I'm sorry. I'm not calling the police a liar. I just said I didn't say what they said I said.
>
> Q. [PROSECUTOR]: And you want us to believe that what the cops said isn't true even though you were found in the utility room hiding?
>
> A. I was not hiding, ma'am.
>
> Q. [PROSECUTOR]: And you want us to believe that the cops aren't telling the truth even though you had a pair of vise grips, a known burglary tool, in your pocket?
>
> A. When I was --
>
> [DEFENSE COUNSEL]: Objection; form.
>
> [THE COURT]: Sustained.

argument, asserting Patterson "wants you to believe that [the officers] are lying to you."

DISCUSSION

I. 9-1-1 Call

¶6 Both before and during trial and now on appeal, Patterson argues the officers' testimony regarding the substance of the 9-1-1 call was inadmissible hearsay. We review a trial court's ruling on the admissibility of evidence over hearsay objections for an abuse of discretion. *State v. Fischer*, 219 Ariz. 408, 415-16, ¶ 24, 199 P.3d 663, 671-72 (App. 2008). As we explain, we disagree because the State properly offered and used the statements for a valid nonhearsay purpose.

¶7 "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and generally is not admissible. Ariz. R. Evid. 801, 802. Here, the officers' testimony regarding the 9-1-1 call would constitute hearsay if offered to prove the truth of the matter asserted. The State, however, did not offer these statements to prove the truth of the matter asserted; rather, it offered them to explain the officers' conduct and presence at the scene. As

such, the court properly admitted the statements for that limited purpose.[6]

¶8 Although *offered* for a nonhearsay purpose, Patterson further argues the State in fact *used* the statements in its rebuttal closing argument to prove the truth of the matter asserted -- "to counter [Patterson's] claim that he came upon the scene after someone else broke in" and "to convince the jury that [Patterson] was the person who the anonymous caller saw." We disagree. In its rebuttal closing argument, the State noted the 9-1-1 call was placed "minutes before the officers arrived at that location" and reported "someone was currently in the process of stealing the water heater and committing a burglary of the utility room." The State used these statements to provide a context for the officers' presence and did not use these statements to prove that either the 9-1-1 call was placed at that time or the caller saw someone stealing the water

[6]Although not separately briefed, Patterson argues the testimony regarding the 9-1-1 call was irrelevant and prejudicial. We disagree on both grounds. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. The testimony was relevant to explain the officers' conduct in investigating the utility room. Further, "the danger of unfair prejudice" did not "substantially outweigh[]" the probative value because the testimony was probative to explain the officers' conduct and not specific enough to prejudice Patterson or identify him as the burglar. Ariz. R. Evid. 403.

heater.[7] Thus, the court did not abuse its discretion by admitting the statements.

II. Commenting on Credibility

¶9 Patterson next argues the State engaged in reversible prosecutorial misconduct by "forcing him to defend against accusations that he was calling the police officers liars or otherwise speculating on the reason the police officers testified as they did." On this record, we see no reversible prosecutorial misconduct.

¶10 "To prevail on a claim of prosecutorial misconduct, a defendant 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. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871, 40 L. Ed. 2d 431 (1974)), and was "so pronounced and persistent that

[7]Because we conclude the statements constituted nonhearsay testimony, we need not address whether these statements qualify under the "excited utterance" or "present sense impression" hearsay exceptions. Additionally, we need not address Patterson's Sixth Amendment Confrontation Clause argument because we have held the statements were both offered and used for a valid nonhearsay purpose. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9, 124 S. Ct. 1354, 1369 n.9, 158 L. Ed. 2d 177 (2004) (Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"); *Tennessee v. Street*, 471 U.S. 409, 414, 105 S. Ct. 2078, 2081-82, 85 L. Ed. 2d 425 (1985) (using nonhearsay aspect of statement "raises no Confrontation Clause concerns").

it permeate[d] the entire atmosphere of the trial." *State v. Rosas-Hernandez*, 202 Ariz. 212, 218-19, ¶ 23, 42 P.3d 1177, 1183-84 (App. 2002) (quoting *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997)). Prosecutorial misconduct constitutes reversible error only if (1) misconduct exists and (2) "a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Anderson*, 210 Ariz. 327, 340, ¶ 45, 111 P.3d 369, 382 (2005) (citation omitted).

¶11 Patterson argues the prosecutor's questions on cross-examination, beginning with "you want us to believe," improperly required him to comment on the officers' credibility. *See supra* notes 4-5 and accompanying text. Courts usually find error when a State's cross-examination compels a defendant to state that law enforcement witnesses are lying. *See, e.g.*, *United States v. Sanchez*, 176 F.3d 1214, 1219-20 (9th Cir. 1999). "Were they lying" questions, however, are not always improper -- "such questions may be appropriate when the only possible explanation for the inconsistent testimony is deceit or lying or when a defendant has opened the door by testifying about the veracity of other witnesses on direct examination." *State v. Morales*, 198 Ariz. 372, 375, ¶ 13, 10 P.3d 630, 633 (App. 2000).

¶12 Although using "were they lying" questions is a risky tactic and fraught with problems, here, because of the stark inconsistencies between the testimony of Patterson and the officers, the questioning was not improper under *Morales*. Thus, in this case, we cannot say the use of these questions deprived Patterson of a fair trial.

¶13 Patterson further argues the prosecutor "exploited the improper line of questioning" in her rebuttal closing argument by recounting the "were they lying" questions to bolster the credibility of the officers. We disagree. Because Patterson failed to object at trial to the prosecutor's rebuttal closing argument, we review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prevail, Patterson must show fundamental error existed and such error caused him prejudice. *Id.* at ¶ 20.

¶14 The court affords counsel "wide latitude" in closing arguments, and "counsel are permitted to comment on the evidence" and "argue reasonable inferences therefrom." *State v. Gonzales*, 105 Ariz. 434, 436-37, 466 P.2d 388, 390-91 (1970). "[A]ny improper comments must be 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). Here, although the prosecutor's comments during rebuttal closing argument were potentially problematic, because these statements were directed

at the inconsistencies in testimony, they did not amount to prejudicial error and thus did not deprive Patterson of his right to a fair trial.

CONCLUSION

¶15 For the foregoing reasons, we affirm Patterson's convictions and sentences.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Judge

/s/
PATRICIA A. OROZCO, Judge