IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 05/26/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	1 CA-CR 09-0761
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JOSE GUADALUPE CALVILLO,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-158425-001 DT

The Honorable Rosa Mroz, 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

Bruce F. Peterson, Legal Advocate — Phoenix
By Consuelo M. Ohanesian
Attorneys for Appellant

G E M M I L L, Judge

¶1 Jose Guadalupe Calvillo ("Defendant") appeals from his convictions and sentences for two counts of first degree murder. He argues the trial court abused its discretion in admitting

hearsay evidence, and he contends his case should have been dismissed because of prosecutorial misconduct. For the reasons that follow, we affirm.

BACKGROUND

¶2 We must view the facts in the light most favorable to sustaining the verdicts and resolve all inferences against Defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

¶3 In the early morning of September 9, 2006, D. and J. met and talked with an acquaintance and others at a gas station parking lot. The discussion turned heated, and the acquaintance shot and killed D. and J. The shooter then approached J.P. -- D.'s brother and J.'s cousin who had arrived at the station with the victims and others -- and attempted to shoot him, too, but the gun did not fire.[1]

¶4 Numerous people witnessed the incident and testified at trial. Over Defendant's pre-trial objection on hearsay grounds, the trial court permitted J.P. to testify that, immediately after the failed attempt to shoot J.P., he overheard an unidentified person say "Let's go, Scrappy, let's go. F___

[1] Based on the attempt to shoot J.P., the State charged Defendant with aggravated assault. The jury found him not guilty of this charge.

them." (the "Scrappy Comment").[2] Based on evidence presented at an evidentiary hearing, the court determined the Scrappy Comment qualified as an excited utterance and therefore was admissible hearsay pursuant to Arizona Rule of Evidence 803(2). Also finding the Scrappy Comment was not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), the trial court similarly rejected Defendant's argument that admission of the statement would violate his Sixth Amendment right to confrontation.

¶5 During the State's closing arguments, Defendant objected to statements made by the prosecutor in reference to certain witnesses' testimony and statements made by the prosecutor about Defendant's demeanor during trial during a witness' testimony. Defendant argued the prosecutor's statements amounted to misconduct, and he moved for a mistrial. Although the court agreed that some of the statements were improper, it took curative measures and also concluded that the prosecutor did not intentionally make improper statements. Accordingly, the court denied the mistrial motion.

¶6 We discuss additional details in the context of our

[2] J.P. further stated, "And that's when Scrappy just ran to the car." J.P. testified that he had met Defendant in 2003, and Defendant's nickname was Scrappy. J.P. also testified that he saw Scrappy pull a gun from his waistband and fire at the victims a number of times. J.P. identified the Defendant at trial as the shooter.

analysis *infra*.

¶7 The jury returned guilty verdicts on two counts of first degree murder. The court sentenced Defendant to consecutive life sentences, and Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010) and 13-4033(A)(1) (2010).

DISCUSSION

I. Hearsay and Confrontation Clause

¶8 Defendant first argues the trial court abused its discretion in admitting the Scrappy Comment under the excited utterance exception to the hearsay rule. Similarly, Defendant claims admission of the statement violated his confrontation rights. The State counters that the Scrappy Comment was admissible because it is not hearsay or testimonial.

¶9 We review a trial court's ruling on the admissibility of evidence over a hearsay objection for an abuse of discretion. *State v. Fischer*, 219 Ariz. 408, 416, ¶ 24, 199 P.3d 663, 672 (App. 2008). We review *de novo* challenges to admissibility based on the Confrontation Clause. *State v. King*, 213 Ariz. 632, 636, ¶ 15, 146 P.3d 1274, 1278 (App. 2006).

¶10 Hearsay is "a statement[] . . . offered in evidence to prove the truth of the matter asserted[,]" and generally is not

admissible as evidence. Ariz. R. Evid. 801(c), 802. The excited utterance exception to the rule against admission of hearsay statements requires proof of three elements: "(1) a startling event, (2) a statement made soon after the event to ensure the declarant has no time to fabricate, and (3) a statement which relates to the startling event." *State v. Bass*, 198 Ariz. 571, 577, ¶ 20, 12 P.3d 796, 802 (2000); *see also State v. Whitney*, 159 Ariz. 476, 482, 768 P.2d 638, 644 (1989). The court considers the totality of the statement's circumstances to determine whether a hearsay statement is admissible under the excited utterance exception. *State v. Barnes*, 124 Ariz. 586, 589-90, 606 P.2d 802, 805-06 (1980). Among the elements usually considered are the time between the event and the challenged statement, the emotional and physical condition of the declarant, and the type of offense. *State v. Anaya*, 165 Ariz. 535, 539, 799 P.2d 876, 880 (App. 1990).

¶11 Here, the court heard J.P.'s testimony at the evidentiary hearing that the declarant had "seen everything . . . [that] was going on[,]" and he made the statement while looking at Defendant. J.P. also testified that the declarant made the Scrappy Comment immediately after the shooter attempted to shoot J.P. Finally, J.P. described the declarant's voice as "loud . . . [and] like in shock . . . [,]" and the declarant appeared "tripped out" when he made the comment, a reaction that J.P.

apparently demonstrated for the court. We conclude that the trial court did not abuse its discretion in determining that the statement was admissible as an excited utterance.

¶12 Additionally, the admission of the Scrappy Comment into evidence did not violate Defendant's right to confrontation. The Confrontation Clause states, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford*, the United States Supreme Court held testimonial evidence from a declarant who does not appear at trial may only be admitted when the declarant is unavailable and there has been a prior opportunity for the defendant to cross-examine the declarant. *Crawford v. Washington,* 541 U.S. at 68 (2004); *see also King,* 213 Ariz. at 637, ¶ 17, 146 P.3d at 1279.

¶13 Whether or not an excited utterance is testimonial is dependent on the circumstances existing at the time the statement was made. *State v. Parks*, 211 Ariz. 19, 27, ¶ 40, 116 P.3d 631, 639 (App. 2005). An excited utterance may not be subject to *Crawford* if the declarant had no reason to expect the statement would be used for prosecutorial purposes, or the statement was not made in response to police questioning or to prove or establish a fact. *State v. Aguilar*, 210 Ariz. 51, 53, ¶ 11, 107 P.3d 377, 379 (App. 2005); *see also Parks*, 211 Ariz. at 27-28, ¶ 40, 116 P.3d at 639-40. Here, we conclude that the

Scrappy Comment was not testimonial because the statement was not intended to be used in a prosecutorial manner. Instead, it appears declarant intended to encourage Scrappy to leave the scene. Therefore, the statement was properly admitted over the Confrontation Clause objection.

II. Prosecutorial Misconduct

¶14 Defendant contends the trial court should have granted his mistrial motion because, during closing arguments, the prosecutor made the following improper statements that cumulatively amounted to prosecutorial misconduct.

¶15 When referring to the testimony of an eye witness, the prosecutor stated:

> Now, if you remember [C.], he wasn't remembering a whole lot, . . . we had to go through this transcript to try to help him with his memory.
>
> Now, I don't know if you caught this, I certainly did, but the defendant was looking at him and giving him, like, a "mad dog" stare while he testified. So perhaps that was why [C.] was "forgetting" things.
>
> After that, after one of you all wanted us to move the podium, I started asking questions from counsel table, so that you could see him if you wanted to see him, and it wasn't shortly after that, if you were watching during the trial, that he stopped doing that. Let me suggest to you why he stopped. Perhaps his attorneys had a conversation with him about --

¶16 Defense counsel immediately requested a side bar and moved for a mistrial. The court denied the motion, but, finding

the comments improper, ordered them stricken and admonished the jury as follows:

> Okay, ladies and gentlemen, I would like you to disregard what [the prosecutor] had just stated as to what he observed and what he thinks happened. That is not in evidence before you. You are to consider only the evidence of the facts introduced into evidence, and so I want you to disregard that. You cannot consider it for any purpose.
>
> . . .
>
> [T]he State's comment about what he thinks or speculated as to what the defendant's lawyers may or may not have done is also stricken, as well, and you are not to consider that, either. Again, there is no evidence that the defendant's attorneys did anything wrong or did anything regarding that issue, so I do not want you to consider that for any purpose.

¶17 Defendant also objected to the prosecutor's reference to testimony other than J.P.'s that identified Defendant as the shooter, when those witnesses only testified as to the shooter's physical description but could not affirmatively identify Defendant. The court agreed that the statements were not based on the evidence, and it reminded the jury of the instruction that the lawyers' comments are not evidence. The court further ordered the prosecutor to correct the mistake, which he subsequently did:

> [T]he only person who specifically identified the defendant as the shooter is [J.P.] So if I say anything other than –- I know, and you've heard the evidence, that everybody else identified the shooter.

Okay?

> So [J.P.]'s the only one who identified the defendant as the shooter. So if I misspoke, I apologize.

The court also ordered the prosecutor to amend PowerPoint slides by replacing references to "defendant" with "shooter."

¶18 "Motions for new trial are disfavored and should be granted with great caution." *State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988). "Because the trial court is in the best position to determine whether an attorney's remarks require a mistrial, we will not disturb its judgment absent an abuse of discretion." *State v. Tucker*, 215 Ariz. 298, 319, ¶ 88, 160 P.3d 177, 198 (2007) (citations omitted). Lawyers have wide latitude in presenting closing arguments. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000). Thus, "[w]e will not usually review the exercise of the trial court's discretion in such cases unless there is 'invective so palpably improper that it is clearly injurious.'" *State v. Scott*, 24 Ariz. App. 203, 206, 537 P.2d 40, 43 (1975) (quoting *State v. Adams*, 1 Ariz. App. 153, 155, 400 P.2d 360, 362 (1965)).

¶19 When considering a motion for a mistrial based on prosecutorial misconduct, a trial court should first consider whether the prosecutor's statements called jurors' attention to matters the jury was not justified in considering in determining its verdict, and then the court should consider the impact those

statements had on the jury. *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997). To prevail on a claim of prosecutorial misconduct, 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 (1974)). "Reversal on the basis of prosecutorial misconduct requires that the conduct be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *Id.* (citations omitted). We look to the cumulative effect that incidents of purported misconduct had on the trial. *Id.*

¶20 While we note that the prosecutor's comments, especially regarding the "mad dog" stare, were improper, when applying the aforementioned standards to the circumstances here, we discern no abuse of discretion by the trial court in deciding that the statements did not rise to the level of invectiveness necessary to require a mistrial on misconduct grounds. Further, in light of our supreme court's repeated directive that juries are presumed to follow their instructions, *see, e.g., State v. Newell*, 212 Ariz. 389, 403, ¶¶ 68-69, 132 P.3d 833, 847 (2006), we are satisfied that the trial court's corrective measures sufficiently tempered any improper influence that the statements, independently and collectively, may have had on the

jury. *See State v. Roque*, 213 Ariz. 193, 230, ¶¶ 164-65, 141 P.3d 368, 405 (2006) (cumulative effect of prosecutor's misconduct -- including improperly injecting prosecutor's opinion regarding a psychiatric test, intentional disparaging remarks to an expert witness during trial, and intentional failure to properly disclose expert testimony -- did not amount to reversible error); *Newell*, 212 Ariz. at 403, ¶ 69, 132 P.3d at 847 (improper comment impugning opposing counsel's integrity did not affect jury's verdict because objection thereto was sustained, comment was stricken, and jury was properly instructed); *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987) (holding that to the extent prosecutor's statement in closing argument may have implied that defendant had the burden of proof, the trial court's cautionary instruction to the jury was sufficient to cure any harm); *State v. Bowie*, 119 Ariz. 336, 340, 580 P.2d 1190, 1194 (1978) ("Any possible prejudice from the opening statement was overcome by the court's cautionary instructions that evidence did not come from the attorneys and that the verdict must be determined only by reference to the evidence . . . ."); *Scott*, 24 Ariz. App. at 206, 537 P.2d at 43 (trial court's timely corrective measures sufficient to prevent "unquestionabl[y]" improper comments from

influencing jury). Accordingly, we conclude the court acted within its discretion in denying Defendant's mistrial motion.[3]

CONCLUSION

¶21 Defendant's convictions and sentences are affirmed.

___/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

___/s/_____
PATRICIA K. NORRIS, Presiding Judge

___/s/_____
PATRICIA A. OROZCO, Judge

[3] Defendant also objected to the prosecutor's argument that Defendant had confessed to his roommates. The court found this argument to be a reasonable inference based on the trial evidence. Although Defendant mentions this issue in his brief, he does not challenge the court's conclusion that the argument was proper.