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,	)	1 CA-CR 09-0798
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JAMES KELLEY GODINEZ,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-113978-001 DT

The Honorable Joseph C. Welty, Judge

AFFIRMED

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

Richard D. Coffinger — Glendale
Attorney for Appellant

D O W N I E, Judge

¶1 James Kelley Godinez appeals his conviction for aggravated assault. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). We do not weigh the evidence; that is the function of the jury. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶3 Police officers arrested Godinez after responding to a report of domestic violence. As Godinez was being transported to the police station with his hands cuffed behind him, the officer driving stopped quickly for a traffic light. Godinez, who was not wearing a seatbelt, fell forward, striking the partition between the front and rear seats of the vehicle and falling to the floor. Upon arrival at the police station, Godinez was uncooperative and had to be physically removed from the vehicle so medical personnel could examine him. Once it was determined that Godinez had not been injured, several officers carried him to the booking area. While at the station, Godinez allegedly tried to kick one officer in the groin and bite another officer.

¶4 Godinez was charged with two counts of aggravated assault. The State alleged that Godinez intentionally placed the two officers in reasonable apprehension of imminent physical injury and did so knowing or having reason to know they were

peace officers engaged in the execution of official duties. *See* Arizona Revised Statutes ("A.R.S.") sections 13-1203(A)(2), -1204(A)(8)(a).

¶5 A jury found Godinez guilty of aggravated assault based on his attempt to kick the first officer, but acquitted him of the second count. Godinez was placed on eighteen months' probation. We have jurisdiction over his timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033.

I. Refusal to Answer Police Questions

¶6 We first consider whether the court erred by admitting evidence that Godinez refused to answer questions posed by police officers and by denying his motion for mistrial based on that evidence. We review a trial court's evidentiary rulings for a clear abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). Likewise, we review the denial of a motion for mistrial for an abuse of discretion. *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995). A trial court's ruling on a mistrial request will be reversed only if it is "palpably improper and clearly injurious." *Id.* (citing *State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989)).

¶7 The evidentiary issue arose during the defense's case-in-chief. Godinez recalled the arresting officer to the

stand and asked questions inferring that he had been cooperative with officers when they initially contacted him at his home. On cross-examination, the officer stated that Godinez was not cooperative when initially contacted. The prosecutor then asked: "Describe how he was being uncooperative." The officer provided a narrative response that described events occurring at Godinez's home before his arrest. She concluded by stating: "But when I asked why he thought police were called, or what we were doing there, he refused to talk to me." Godinez objected. The court ruled that the testimony was admissible because it related to areas Godinez had explored during his direct examination.[1]

¶8 Godinez moved for a mistrial. He argued that the officer improperly commented on his invocation of the right to remain silent. The trial court denied the motion. It ruled there was no evidence Godinez had invoked his Fifth Amendment rights and that the officer's testimony was not a comment on the invocation of any right. The court further ruled that Godinez had opened the door to the testimony during direct examination

[1] The transcript indicates that the court "sustained" Godinez's objection. Immediately thereafter, though, the court explained why the evidence was admissible. In ruling on the subsequent motion for mistrial and motion for new trial, the court again explained why the evidence was admissible. Thus, either the court misspoke, or this is a transcription error. Nothing in the record indicates the State sought this response from the officer.

by introducing evidence about his level of cooperation with officers. Further, the record reflects that Godinez was not under arrest when he refused to talk to officers and had not yet been given *Miranda* warnings. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

¶9 We find no error. Although evidence that a defendant remained silent after being arrested and receiving *Miranda* warnings is generally inadmissible, evidence that a defendant remained silent *prior* to being arrested and given *Miranda* warnings is typically admissible. *State v. Ramirez*, 178 Ariz. 116, 125, 871 P.2d 237, 246 (1994). Godinez does not claim that he was under arrest or that he had received *Miranda* warnings before refusing to speak to the officer. Moreover, Godinez introduced evidence that he was cooperative with officers when initially contacted. It was permissible for the State to then introduce evidence that Godinez was not in fact cooperative when he was initially contacted and before his arrest.

II. Closing Argument

¶10 Godinez next argues the trial court improperly restricted his closing argument. "The trial court is vested with great discretion in the conduct and control of closing argument and will not be overturned on appeal absent an abuse of discretion." *State v. Tims*, 143 Ariz. 196, 199, 693 P.2d 333, 336 (1985).

¶11 Godinez identifies three instances of allegedly improper restrictions. The first occurred when defense counsel argued: "I told you in my opening statement I thought that the defendant should not have been charged at all, probably, but . . . they wanted to charge him with something [.]" The State objected, and the court instructed counsel not to argue his opinion about what charges were appropriate. The second instance occurred when counsel argued that the State could not charge Godinez with aggravated assault because neither victim was injured. Although the court overruled the State's objection, it cautioned defense counsel to limit his arguments to the law upon which the jury had been instructed.

¶12 The final instance occurred when defense counsel addressed the State's contention that Godinez had placed the victims in reasonable apprehension of imminent physical injury. Counsel argued: "[t]hat whole statute is about when someone's frightened normally with a deadly weapon [.]" When the State objected, the court advised counsel: "Please do not try to instruct this jury as to what statutes are about or are not about. I have instructed them with respect to the law in the State of Arizona. They will make a determination as to whether that law applies to the facts as they find it, and not your opinion about what it does and does not apply to." Defense counsel later argued several times that the case was

"overcharged," which the court allowed. The defense also argued the evidence was insufficient to convict Godinez of the charged offenses.

¶13 "[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury, 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). Godinez has cited no authority requiring a court to permit the defense to argue whether and how a case should have been charged, and we are aware of none. Whether to file charges and what charges are to be filed are matters of prosecutorial discretion. *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992). A defendant may argue there is insufficient evidence to convict on a charged offense, but a defendant's opinion about what the charges should have been is irrelevant and inadmissible. Its irrelevance is heightened where, as here, the defendant is convicted of the charged offense and does not challenge the sufficiency of the evidence to support that conviction on appeal. The trial court could also limit Godinez's argument to the law relevant to the charged offense and on which the jury had been instructed. We find no improper limitation of the defense's closing argument.

III. Motion for New Trial

¶14 Finally, Godinez assigns error to the denial of his motion for new trial based on prosecutorial misconduct. "Motions for new trial are disfavored and should be granted with great caution." *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996). We review the denial of a motion for new trial for an abuse of discretion. *Id.*

¶15 According to Godinez, the misconduct occurred in the context of the issues addressed above. He further argues the prosecutor engaged in misconduct by failing to instruct another officer not to mention that the initial police contact arose from a report of domestic violence. That officer made the reference despite a pretrial order precluding such evidence.[2] Godinez argued that even if these incidents were individually insufficient to warrant a mistrial, their cumulative effect required one.[3]

¶16 We find no error. Prosecutorial misconduct is not merely "legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional

---

[2] Godinez initially raised a separate issue regarding denial of a mistrial based on the officer's reference to domestic violence, but withdrew that issue in his reply brief.

[3] Although Arizona typically does not recognize cumulative error in criminal cases, we do consider cumulative error in the context of prosecutorial misconduct. *State v. Hughes*, 193 Ariz. 72, 78-79, ¶¶ 25-27, 969 P.2d 1184, 1190-91 (1998).

conduct which the prosecutor knows to be improper and prejudicial." *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To justify reversal, the misconduct "must be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (citations omitted). Even then, reversal is not required unless the defendant was denied a fair trial. *Bible*, 175 Ariz. at 600, 858 P.2d at 1203.

¶17 In the case at bar, no act or omission by the prosecutor amounted to even "legal error, negligence, mistake, or insignificant impropriety," let alone "intentional conduct which the prosecutor [knew] to be improper and prejudicial." Regarding the reference to the domestic violence call, the witness's answer was non-responsive to the question posed; moreover, the prosecutor avowed that she had in fact instructed the witness before trial not to mention that matter. Regarding the failure to instruct the arresting officer not to mention that Godinez remained silent during his initial contact with police, we have already held that such evidence was admissible, so there can be no prosecutorial misconduct on that basis. Finally, the State's objections to the defense closing argument were sustained and/or resulted in instructions to Godinez to limit his argument; no prosecutorial misconduct can arise from those objections.

CONCLUSION

¶18 For the foregoing reasons, we affirm.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
DANIEL A. BARKER, Presiding Judge

/s/
MICHAEL J. BROWN, Judge