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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/09/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0883
)
Appellee,) DEPARTMENT B
)
v.) MEMORANDUM DECISION
)
HARVEY DEON KENDRICK,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR-2008-122709-001 DT

The Honorable Joseph Welty, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
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Attorneys for Appellant

J O H N S E N, Judge

¶1 Harvey Deon Kendrick appeals his convictions of burglary in the second degree, a Class 3 felony; possession of burglary tools, a Class 6 felony; and escape in the second degree, a Class 5 felony. He argues the State committed prosecutorial misconduct, resulting in fundamental error and the denial of a fair trial.

FACTS AND PROCEDURAL HISTORY

¶2 Kendrick was apprehended while exiting a ransacked condominium belonging to a stranger. Shortly after being taken into custody, he escaped and was recaptured. During the State's closing argument at trial, the prosecutor attempted to explain the standard of proof for criminal convictions as follows:

Looking at your standard of proof, [the defense attorney] is correct, it is a very high standard. But it's not an impossible standard. It's a standard that our country has used for over 200 years, and rightly so. . . .

In order to find someone guilty of an offense is beyond a reasonable doubt. Now there is no percentage if you look at your instructions that tell you if you are 80 percent convinced or this much presented. What we do know is for civil cases, it has to do with what they call preponderance of the evidence. That is 51 percent. We know that. This is a much more higher standard. It doesn't have to be 100 percent. Not every single piece of the puzzle has to be there, but it can still be beyond a reasonable doubt. It does not need to be beyond all possible doubt. There may still be a few holes in the story. But that wouldn't stop from convicting him.

Kendrick did not object to the prosecutor's statement; nor did he ask for a curative instruction.

¶3 The jury convicted Kendrick. He now appeals his convictions and sentences. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-120.21(A)(1) (2003).

DISCUSSION

A. Standard of Review.

¶4 When a defendant fails to object to an alleged trial error, as in this case, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). It is the defendant's burden to prove both that fundamental error exists and that the error caused him prejudice. *Id.* at ¶ 20.

B. No Error Occurred.

¶5 Kendrick argues the prosecutor's reference to "80 percent convinced" during closing was prosecutorial misconduct and "could have influenced the jury, thereby denying Kendrick a fair trial." He argues the jury "could reasonably have believed

that 80 percent was the amount of conviction needed to find [him] guilty beyond a reasonable doubt."

¶16 Contrary to Kendrick's argument, read in context, the prosecutor's reference to "80 percent convinced" plainly was an attempt to explain that the standard of proof for a criminal conviction is high and does not require any specific percentage of certainty on the part of the jury. The prosecutor appropriately observed that "there is no percentage if you look at your instructions that tell you if you are 80 percent convinced or this much presented." By way of comparison, the prosecutor then described the standard of preponderance of the evidence as requiring 51 percent certainty in civil cases, stating, "We know that." She continued to distinguish the criminal standard from the civil standard by saying, "This is a much more higher standard [sic]. It doesn't have to be 100 percent. Not every single piece of the puzzle has to be there, but it can still be beyond a reasonable doubt."

¶17 Taken in context, therefore, the prosecutor's reference to "80 percent convinced" was offered to negate the notion that any set percentage of certainty is required to convict. She further cited the "80 percent" figure to differentiate the burden of proof in a criminal trial from the burden in civil cases. Accordingly, contrary to Kendrick's assertion, the prosecutor's argument did not misstate the law.

¶18 Kendrick argues that *State v. Kerekes*, 138 Ariz. 235, 673 P.2d 979 (App. 1983), supports the proposition that the prosecutor's reference to "80 percent" constitutes misconduct. In that case, the prosecutor referred to percentages in describing the State's burden of proof. *Id.* at 238, 673 P.2d at 982. The prosecutor in that case stated, "[Reasonable doubt is] more than 51%. How much more, nobody knows. The Judge will not give you a number figure. Nobody can It might be 70%; it might be 80%. It even could be . . . 99%." *Id.* This court concluded no fundamental error had occurred because taking the prosecutor's arguments in context, "the prosecutor did not postulate his argument so as to instruct the jury that if they were convinced by 70% or 80%, they could convict the appellant." *Id.* at 239, 673 P.2d at 983. The same is true here.

¶19 Even if the prosecutor in this case had misstated the law, which she did not, the superior court's clear instructions to the jury would have cured any misunderstanding. Both before and after the jury heard testimony, the court explained:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty and in criminal cases, the law does not require proof that overcomes every doubt. If based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find him guilty. If on the other hand you think

there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

This explanation by the court negated any inference from the prosecutor's closing that guilt beyond a reasonable doubt may be denominated by any particular percentage of certainty.

¶10 Moreover, the superior court further instructed the jury prior to closing arguments:

It's your duty as a juror to decide this case by applying these instructions to the facts as you determine them. You must follow these jury instructions. They are the rules you should use to decide this case.

* * *

Lawyers' [c]omments [a]re [n]ot [e]vidence. In their opening and closing statements the lawyers talk to you about the law and the evidence. What the lawyers say is not evidence, but it may help you understand the law and evidence.

These instructions support our conclusion that the prosecutor's remarks did not improperly influence the jury. See *State v. Anderson*, 210 Ariz. 327, 342, ¶ 50, 111 P.3d 369, 384 (2005) (no fundamental error occurred when prosecutor misstated the elements required for two aggravating circumstances).

¶11 In sum, the prosecutor's remarks did not amount to prosecutorial misconduct, nor did they deprive Kendrick of a fair trial. Because we conclude no error occurred, let alone

fundamental error, we need not reach the question of whether Kendrick has proven prejudice.

CONCLUSION

¶12 For the foregoing reasons, we affirm Kendrick's convictions and sentences.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
JOHN C. GEMMILL, Judge