

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);  
Ariz.R.Crim.P. 31.24



DIVISION ONE  
FILED: 11/17/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**

STATE OF ARIZONA,

Appellee,

v.

ESNELL DIAZ BORROTO,

Appellant.

1 CA-CR 09-0020

DEPARTMENT A

**MEMORANDUM DECISION**

(Not for Publication -  
Rule 111, Rules of the  
Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 1999-017628

The Honorable Steven D. Sheldon, Judge  
The Honorable Joseph C. Welty, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General  
by Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Division  
and Aaron J. Moskowitz, Assistant Attorney General  
Attorneys for Appellee Phoenix

Maricopa County Public Defender  
by Christopher V. Johns  
Attorneys for Appellant Phoenix

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**I R V I N E**, Judge

¶1 Esnell Diaz Borroto appeals the denial of his motion for mistrial for prosecutorial misconduct based on statements made during closing argument. Because the statements did not deprive Borroto of a fair trial, we affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 In December 1999, Borroto was charged with aggravated assault for pointing a loaded gun at an employee (the "victim") of a cabaret club who refused him entry because he appeared intoxicated. Borroto denied carrying the gun and testified he left it in his car when he parked. The victim claimed Borroto pulled the gun from his waistband, and another witness saw a gun tucked in Borroto's waistband as he left the club.

¶3 In closing, the prosecutor argued that because defendant cannot claim the State has "the wrong guy" or that "he didn't have a gun,"

*They have to craft the defense to the facts that are indisputable.* The defendant was pulled over. The weapon was in his vehicle. He had the weapon that evening.

Okay. That's the case. Can't say, "Wrong guy." Can't say, "Never had a gun."

What do you say at that point? Well, I may have a gun, but I never pointed it at anyone. I never brought it out of my car.

Well, what do you do in that case when we have people outside of the car that know he has that weapon? . . .

You ask the jury to examine everything but the defendant's actions. . . .

You turn the case into something else. So attack the witnesses.

(Emphasis added.)

¶14 Defense counsel did not immediately object. At a sidebar held before Borroto's closing argument, his counsel moved for a mistrial based on the prosecutor's statement. After the motion was denied, Borroto proceeded with closing and argued that if the jury starts with the necessary premise that Borroto is presumed innocent, it will see the inconsistencies in the State's case. These inconsistencies, he argued, showed that the State failed to meet its burden of proof. Defense counsel accused the victim of "trying to cover up lies" and "fabricating the truth." He urged the jury, "[W]hen there are inconsistencies, you will see why they're significant, not that they have been crafted."

¶15 At the end of trial, defense counsel asked the trial court to note for the record that he had moved for a mistrial earlier at the sidebar. The prosecutor asked if the trial court wanted to hear argument, but defense counsel responded, "I'm just preserving the record." The court replied:

I'm not sure it is really subject to argument. It's on the record. Whatever you said is on the record. And [defense counsel] is simply reserving the opportunity to make a more full record at the end. I think what

you said is reasonably subject to an interpretation by the jurors, which I clearly think it was, because I made a note on it before Mr. Garcia ever approached, that you were essentially accusing these people of fabricating a defense based on the evidence as they discovered what it was.

I thought it was blatant. The only question now is whether Mr. Garcia waived it by not objecting, because he certainly showed a willingness to object during your final argument and whether or not it deserves consideration as a mistrial.

I'm happy to look at the case law and, as I say, if we get to it later, you can both make your arguments and I will expect some briefing on it and make a decision.

Defense counsel argued that he did raise the alleged misconduct "prior to beginning [his] closing." The court responded,

You adequately preserved at every opportune moment the right to make the objection. You did after it was over, not during it. As I say, that's going to factor into my consideration, because you didn't show any hesitancy of objecting several times during [the prosecutor]'s final closing argument.

And based on your argument, I'm going to have to consider it may have been a tactical decision, because I think you used it very effectively to your own advantage. So I'll have to factor that in too.

¶16 The jury returned a guilty verdict and found the offense to be dangerous. Defense counsel again moved for mistrial, arguing that in making the statement, the prosecutor "claimed that we crafted evidence and manufactured a defense. It

was a direct attack on the defendant's choice of counsel and the defendant's counsel." Defense counsel explained that he did not object because he did not want to "draw attention to the statement."

¶17 The trial court noted its concern, but denied the motion for mistrial "without prejudice to allowing [defense counsel] to reurge it in a motion for new trial supported by the transcript." It allowed the parties an opportunity to provide additional briefing. No post-conviction motion was filed, however, because Borroto waived his presence for the verdict and absconded before sentencing.

¶18 More than eight years later, Borotto was sentenced to a presumptive prison term of 7.5 years. He timely appeals.

#### **DISCUSSION**

¶19 Borroto argues he is entitled to a new trial because the trial court erred in denying his motion for mistrial based on the prosecutor's statements insinuating the defense was fabricated. Because Borroto failed to timely object when the statements were made, we review only for fundamental error. *State v. Morris*, 215 Ariz. 324, 335, ¶ 47, 160 P.3d 203, 214 (2007).

¶10 Fundamental error (1) goes to the foundation of the case, (2) takes from the defendant a right essential to his defense, and (3) is of such magnitude that the defendant could

not have received a fair trial. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Defendant bears the burden of establishing each element of fundamental error. See *id.* at 568, ¶ 22, 115 P.3d at 608. In order to constitute fundamental error, a prosecutor's remarks "had to be so egregious as to deprive the defendant of a fair trial and render the resulting conviction a denial of due process." *State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991).

¶11 We begin by noting that "[t]he prosecutor has an obligation to seek justice, not merely a conviction, and must refrain from using improper methods to obtain a conviction." *State v. Hughes*, 193 Ariz. 72, 80, ¶ 33, 969 P.2d 1184, 1192 (1998). Accordingly, our supreme court has recognized the impropriety of "argument that impugns the integrity or honesty of opposing counsel." *Id.* at 86, ¶ 59, 969 P.2d at 1198; accord *State v. Gonzales*, 105 Ariz. 434, 436, 466 P.2d 388, 390 (1970).

¶12 Although we share the trial court's concern that the prosecutor made improper remarks, our analysis does not end there. To find fundamental error, we must also determine whether Borroto was denied his right to a fair trial. See *State v. Denny*, 119 Ariz. 131, 134, 579 P.2d 1101, 1104 (1978) (noting concern about statements impugning the integrity of defense counsel, but finding no denial of fair trial). Where the transcript is silent, we keep in mind that the "trial court is

in the best position to determine the effect of a prosecutor's comments on a jury." See *State v. Newell*, 212 Ariz. 389, 402, ¶ 61, 132 P.3d 833, 846 (2006).

¶13 We agree with the trial court that Borroto received a fair trial. Although the transcript shows that the prosecutor accused Borroto of "making up a motive" and that he had a "motive for fabricating everything," the prosecutor made only one reference to defense counsel. That comment stated, "They have to craft the defense to the facts that are indisputable." (Emphasis added.) Although this may have been improper, the prosecutor insisted that the statement was meant to attack the defense itself, not defense counsel "in any way whatsoever." In context, the prosecutor was not singling out defense counsel.

¶14 As to the statements referring only to Borroto, the State correctly points out that they were fair rebuttal. A prosecutor's comments that fairly rebut the remarks of defense counsel are not objectionable. *State v. Gillies*, 135 Ariz. 500, 510, 662 P.2d 1007, 1017 (1983). Borroto argued in opening that the jury must determine who, between him and the victim, "was telling the truth." He then accused the victim of manipulating and tampering with evidence. By so framing the case, Borroto invited the prosecutor to respond that it was defendant who was not truthful. Although the prosecutor's phrasing of that response left room for improvement, the statements referring

only to defendant were arguably "fair rebuttal." The comment that suggested defense counsel had helped fabricate the defense, however, was not.

¶15 Nevertheless, in support of the argument, the prosecutor did not draw the jury's attention to any matter it was not already entitled to consider. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (citation omitted). Instead, the prosecutor only pointed to inconsistencies between the testimony of the witnesses.

¶16 Furthermore, any influence the prosecutor's remarks may have had on the jury was mitigated by the jury instructions. See *State v. Robinson*, 127 Ariz. 324, 329, 620 P.2d 703, 708 (App. 1980). The jury was instructed that opening and closing arguments were not evidence. See *Newell*, 212 Ariz. at 403, ¶ 68, 132 P.3d at 847 (we presume jurors follow the jury instructions). The prosecutor himself began his closing argument by reminding the jury,

[W]hat is said on the witness stand is what is the evidence. What I'm doing right now is just arguing about the evidence.

. . . I'm trying to convince you to see things a certain way, sort of in this political season like a spin master after the convention when their candidate has given his speech.

¶17 More importantly, the trial court believed that Borroto's closing argument "fairly convincingly . . .



deflect[ed] any harm that came out of the prosecutor's comments." It noted that, by arguing that the inconsistencies showed the State had failed to meet its burden of proof, the defense counsel turned the prosecutor's remarks "rather effectively" into Borroto's advantage. The trial court even commended defense counsel for delivering an "excellent closing argument" that was "as persuasive a closing argument as any defendant could have hoped to have had in this kind of case." As noted above, the trial court was in the best position to determine this. *Newell*, 212 Ariz. at 402, ¶ 61, 132 P.3d at 846. Because we agree with the trial court that Borroto received a fair trial, we find no fundamental error.

¶18 We therefore reject Borroto's reliance on *State v. Lockhart*, 947 P.2d 461 (Kan. App. 1997). In *Lockhart*, the prosecutor repeatedly insinuated that defense counsel helped the defendant lie, even after the court had sustained his objection. *Id.* at 464. The Kansas Court of Appeals held that the prosecutor undermined the defendant's right to a fair trial, noting that such conduct "reveals nothing but ill will on the part of the prosecutor." *Id.* at 465.

¶19 In contrast, Borroto made no objection when the statement was made and cited only one instance in which the prosecutor referred to Borroto's counsel. In addition, Borroto does not argue ill will on the part of the prosecutor. The

prosecutor explained that he had no intent to discredit defense counsel when he made the statement, and Borroto has not shown any.

**CONCLUSION**

¶20 For these reasons, we affirm Borroto's conviction and sentence.

/s/  
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PATRICK IRVINE, Judge

CONCURRING:

/s/  
\_\_\_\_\_  
ANN A. SCOTT TIMMER, Presiding Judge

/s/  
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DANIEL A. BARKER, Judge