IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CLAUDIUS C. MURRAY,
Appellant.

No. 2 CA-CR 2018-0312
Filed December 5, 2019

Appeal from the Superior Court in Pima County
No. CR20170096002
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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Counsel for Appellee

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By Joshua F. Hamilton and Carol Lamoureux
Counsel for Appellant

OPINION

Presiding Judge Staring authored the opinion of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Claudius Murray appeals from his conviction and sentence for aggravated assault with a deadly weapon or dangerous instrument. In this opinion, we address Murray's allegations of prosecutorial misconduct.[1] Because only this issue from Murray's appeal merits publication, we have addressed his other arguments in a separate, unpublished memorandum decision issued simultaneously. *See* Ariz. R. Sup. Ct. 111(h); Ariz. R. Crim. P. 31.19(f). For the following reasons, as well as the reasons discussed in the memorandum decision, we affirm Murray's conviction and sentence.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Murray. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). In December 2016, Murray and his brother Easton went to O.C.'s apartment. Murray was carrying a firearm and Easton was carrying a black bag. The brothers asked O.C. to store some marijuana for them, but O.C. refused and asked them to leave. An argument ensued, and then Easton and O.C. began fighting. During the fight, Easton shocked O.C. with a taser. Murray attempted to pull O.C. off of Easton but was unsuccessful. Easton then told Murray to shoot O.C. and Murray shot O.C. in the leg. O.C. managed to escape into his apartment, and Murray and Easton "ran off."

¶3 O.C.'s neighbor heard men arguing in a foreign language. He then saw two men trying to force their way into O.C.'s apartment and heard two or three gunshots followed by footsteps running away.

¶4 O.C. was treated for a bullet wound to his leg. Officers found a shell casing matching Murray's gun outside O.C.'s apartment. Police also found an eight-pound bale of marijuana, scales, cell phones, and packing and shipping materials inside O.C.'s apartment. O.C. claimed the marijuana was not his and the brothers had previously left the scales and shipping materials at his apartment.

¶5 Following a jury trial, Murray was convicted of aggravated assault with a deadly weapon or dangerous instrument committed by intentionally, knowingly, or recklessly causing physical injury in violation

[1]On appeal, the state is represented by different counsel.

of A.R.S. § 13-1204(A)(2).[2] The trial court denied Murray's motion for new trial and sentenced him to a mitigated five-year term of imprisonment.

¶6 This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶7 Murray contends the state committed prosecutorial misconduct by: (1) making inappropriate and irrelevant references to Murray's nationality; (2) misstating the evidence by claiming O.C.'s testimony was corroborated by "numerous" facts and witnesses and making unsupported and prejudicial remarks about Murray; and (3) misstating the law regarding intent, flight, self-defense, and the burden of proof.

¶8 Prosecutorial misconduct is "intentional conduct which the prosecutor knows to be improper and prejudicial" and that "is not merely the result of legal error, negligence, mistake, or insignificant impropriety." *State v. Martinez*, 221 Ariz. 383, ¶ 36 (App. 2009) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108 (1984)). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that '(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Moody*, 208 Ariz. 424, ¶ 145 (2004) (quoting *State v. Atwood*, 171 Ariz. 576, 606 (1992)). Reversal is warranted when prosecutorial misconduct "so permeated the trial that it probably affected the outcome and denied [the] defendant his due process right to a fair trial." *State v. Blackman*, 201 Ariz. 527, ¶ 59 (App. 2002).

¶9 "We evaluate each instance of alleged misconduct," *State v. Morris*, 215 Ariz. 324, ¶ 47 (2007), and then consider the cumulative effect on the fairness of Murray's trial, *see State v. Hughes*, 193 Ariz. 72, ¶ 26 (1998). "[T]he standard of review depends upon whether [Murray] objected." *Morris*, 215 Ariz. 324, ¶ 47. When a defendant has objected at trial, we review allegations of misconduct for harmless error; however, when a

[2]Murray and Easton were tried jointly, and Easton was also convicted of aggravated assault with a deadly weapon or dangerous instrument. On appeal, this court affirmed his conviction. *See State v. Murray*, No. 2 CA-CR 2018-0313, 2019 WL 4894121 (Ariz. Ct. App. Oct. 4, 2019).

defendant fails to object to any of the alleged instances of prosecutorial misconduct, we review only for fundamental error. *State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018);[3] *State v. Sanders*, 245 Ariz. 113, ¶ 91 (2018).

Murray's Nationality

¶10 Murray argues the state made "inappropriate and irrelevant" references throughout trial to the fact he is from Jamaica. In addition, he argues the references to his nationality were especially prejudicial in light of the state's presentation of marijuana-related evidence and such references "only served to invoke and inflame preexisting stereotypes that the jury might have about Jamaican involvement in marijuana shipping."

¶11 While references to nationality are generally improper and inherently prejudicial under certain circumstances, we do not find that to be the case here. *See generally State v. Filipov*, 118 Ariz. 319 (App. 1977); *see also United States v. Rodriguez Cortes*, 949 F.2d 532, 540-43 (1st Cir. 1991) (reversing conviction where nationality evidence of dubious relevance, prosecutor appealed to nationality-based prejudice in closing arguments, and case was otherwise a "very close case"). During trial, O.C.'s neighbor testified he heard an argument outside of his apartment, but could not understand what was being said because "it was off into [a] foreign language." In addition, O.C. testified that on the night he was shot, he, Murray, and Easton were speaking their native language, Jamaican Patois. As Murray acknowledges, evidence he could speak Jamaican Patois was relevant to explain O.C.'s neighbor's testimony about the argument he overheard. Thus, references to Murray's Jamaican nationality were neither irrelevant nor improper—they were intertwined with evidence of him speaking his native language.

[3]A defendant who fails to object at trial forfeits the right to appellate relief unless he can show that trial error exists, and that the error went to the foundation of the case, took from him a right essential to his defense, or was so egregious that he could not possibly have received a fair trial. *See Escalante*, 245 Ariz. 135, ¶ 21. If a defendant can show an error went to the foundation of the case or deprived him of a right essential to his defense, he must separately show prejudice resulted from the error. *Id.* If a defendant shows the error was so egregious he could not have received a fair trial, however, he has necessarily shown prejudice and must receive a new trial. *Id.*

¶12 And, contrary to Murray's claim, the state's comments and questions about his nationality did not serve to invoke and inflame jury prejudice; the state did not make any statements tying Jamaica to the drug trade or inviting the jury to draw improper conclusions based on nationality. *See United States v. Doe*, 903 F.2d 16, 20, 27-28 (D.C. Cir. 1990) (argument improper and prejudicial where state argued Jamaicans taking over drug trade strongly suggested Jamaican defendants were guilty). Thus, the state's references to Murray's nationality did not constitute misconduct.

Misrepresentation of Evidence

¶13 Murray next argues the state "repeatedly made inappropriate comments and arguments about the evidence that were not supported by the record" during closing argument. "Opposing counsel must timely object to any erroneous or improper statements made during closing argument or waive his right to the objection, except for fundamental error." *State v. Cook*, 170 Ariz. 40, 51 (1991) (quoting *State v. Smith*, 138 Ariz. 79, 83 (1983)).

¶14 "Counsel is given wide latitude in closing argument to comment on the evidence and argue all reasonable inferences from it." *Moody*, 208 Ariz. 424, ¶ 180 (internal citations omitted). "Unlike opening statements, during 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 (1993). And, courts should look to the context in which the statements were made, as well as the entire record and the totality of the circumstances. *State v. Goudeau*, 239 Ariz. 421, ¶ 196 (2016). Further, arguments made by counsel generally carry less weight than instructions from the court, which "are viewed as definitive and binding statements of the law," while arguments by counsel "are usually billed in advance to the jury as matters of argument, not evidence . . . and are likely viewed as the statements of advocates." *Boyde v. California*, 494 U.S. 370, 384 (1990).

Corroboration of O.C.'s Testimony

¶15 Murray argues the state mischaracterized and misstated the evidence during closing argument in an attempt to overcome O.C.'s "significant credibility issues." Specifically, he argues it was improper for the state to indicate O.C.'s story was credible because it was corroborated by "numerous facts, numerous witnesses" when "none of the witnesses

corroborated [O.C.] on the most contested issues, including what occurred during the scuffle." Murray also challenges the state's argument that drug-related evidence corroborates O.C.'s testimony and the state's comment that O.C. did not "have the best command of the English language."

¶16 Murray asserts the state should not have suggested the firearms examiner "confirmed" O.C.'s testimony implicating Murray as the shooter because the examiner confirmed only that the shell casing found outside O.C.'s apartment was from the same gun Murray surrendered to the police. As the state points out, however, its argument about the firearm analysis must be read in context. Immediately after the state asserted that O.C.'s testimony was corroborated by the firearms examiner, the state clarified, "The casing came from the gun as we heard," thus qualifying its statement by explaining that the shell casing came from the gun Murray later surrendered. Moreover, the trial court instructed the jury that attorneys' closing arguments were not evidence, and we presume the jurors followed the court's instructions. *See State v. Prince*, 204 Ariz. 156, ¶ 9 (2003). In any event, the state's argument that Murray was the shooter was a reasonable inference from the evidence presented: O.C. testified Murray shot him, Murray turned in a gun after the shooting, and that gun matched the shell casing found outside O.C.'s apartment. We find no misconduct.

¶17 Murray also contends the state improperly argued O.C.'s neighbor "completely confirmed [O.C.]'s story." Contrary to Murray's claim, the state argued only that O.C. and his neighbor told "*about* the same story . . . down to the argument, scuffle, [and] shots." (Emphasis added.) In support of his argument, Murray describes in detail the various differences between the two accounts, including the number of shots, timing, and sequence of events. Nonetheless, both O.C. and his neighbor testified about an argument in a foreign language, a physical altercation, and at least one gunshot. It was within the state's wide latitude to draw attention to the similarities between the accounts during closing argument. *See Moody*, 208 Ariz. 424, ¶ 180. And, to the extent the state's arguments imprecisely characterized the evidence adduced at trial, we presume the jurors followed their instruction that attorneys' arguments are not evidence. *See Prince*, 204 Ariz. 156, ¶ 9.

¶18 Next, Murray claims the state overstated O.C.'s neighbor's corroboration of O.C.'s story by arguing the neighbor was able to "generally describe" what the three men involved in the scuffle looked like. Although the neighbor testified he did not see anyone "face-to-face" and only saw "the back of people's heads," he was able to describe the three men as "African-American," "[not] short," and wearing dark clothing with red

trim. It was not improper for the state to characterize his testimony as a general description given the state's wide latitude in closing argument. *See Moody*, 208 Ariz. 424, ¶ 180.

¶19 Murray also argues the state misstated the evidence when it argued O.C.'s testimony was corroborated by the drugs and shipping materials found in his apartment because evidence also showed the items could have belonged to O.C. However, the state did not argue O.C. was not involved in illegal activity, but instead argued the evidence corroborated his testimony as to why Murray and Easton had come to his apartment that night. Again, we find no misconduct.

¶20 Murray alleges the state attempted to resolve O.C.'s credibility issues by arguing during closing that O.C. was "from another country" and did not "have the best command of the English language." However, O.C. testified he was from Jamaica and that Jamaican Patois was his native language. Murray also claims this argument was improper because O.C. is a "fluent English speaker," apparently relying on the fact that Jamaican Patois was described during trial as "English, broken English." Murray fails to provide any other support for this assertion. On the record before us, even assuming the state's argument was improper, any error does not rise to the level of fundamental error.

¶21 Murray also complains the state overemphasized the strength of its case during its closing argument by stating that "the evidence is very, very clear and it is proven beyond a reasonable doubt what happened on that night" and "[i]t is not a great mystery as to what happened in the case." However, it is well-established that in closing argument, "excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury." *State v. Gonzales*, 105 Ariz. 434, 437 (1970). Murray's argument on this point also fails.

Prejudicial Remarks

¶22 Murray also argues the state "made several inflammatory comments about [him] that were unsupported by the record and were directly aimed at establishing intent and lack of accident, which were the weakest aspects of the State's case." Specifically, he argues the state improperly speculated about Murray's intent in bringing the gun to O.C.'s apartment and "intentionally painted [Murray] as a drug dealer and

aggressive individual" when such arguments were not based on evidence presented at trial.

¶23 During its closing argument, the state asserted Murray "brought over the rifle to make a point, to back himself up, to give himself an advantage, an edge because he wanted [O.C.] to do something for him. That's why he brought the rifle over." The state also argued Murray and Easton "wanted to be bad. They wanted to intimidate [O.C.] and that's what they did." On rebuttal, the state argued:

> And for evidence of intent, you heard the evidence of intent. A man brings a gun to a house before the argument takes place. Why does he do that? That's what [Murray] did. That shows his intent to get [O.C.] to do what he wanted him to do, to intimidate him, to help him out with his marijuana[] business which he knew [O.C.] was involved in anyway. It's probably what made him so mad because [O.C.] didn't help him out. He knew [O.C.] does this kind of stuff and he didn't want to do it. He felt disrespected.

The state also told the jury it need not resolve "how big of a dope dealer [O.C.] is or whether the Murrays are bigger than [O.C.]."

¶24 Murray asserts the state improperly suggested he brought the firearm to O.C.'s apartment to intimidate him or to "be bad" because there was no supporting evidence for the state's suggestion and "[t]here are plenty of benign reasons [Murray] might have brought a firearm into [O.C.]'s residence, including that he may not have wanted to leave it in his car." Intent must generally be inferred from circumstantial evidence such as a person's actions and words, *State v. Routhier*, 137 Ariz. 90, 99 (1983), and, at the very least, the state's argument constituted a reasonable inference based on testimony about Murray's actions on the night of the shooting, including the fact he used the gun to shoot O.C. Moreover, that other explanations exist as to why Murray had a gun does not preclude the state from drawing its own reasonable inference from the evidence. *See State v. Anaya*, 165 Ariz. 535, 543 (App. 1990) (sufficient evidence may be either direct or circumstantial, and may support differing reasonable inferences). It is for the jury to consider whether that inference is appropriate.

¶25 Murray also argues the state's inference was unreasonable because there was no evidence he was "waving the firearm around" or "holding it in an intimidating manner." But, regardless of Murray's conduct while carrying the gun, the state was permitted to argue the inference, based on O.C.'s testimony, as well as the fact of the shooting, that Murray brought the firearm to intimidate O.C. into continuing to help him with his marijuana business. *See Bible*, 175 Ariz. at 602; *Moody*, 208 Ariz. 424, ¶ 180. Because the state's remarks about Murray's intent constituted a reasonable inference from the evidence, we find no misconduct.

¶26 Murray also contends the state's depiction of him as aggressive and angry was unsupported by the record because there was no evidence he was mad, "felt disrespected," or brought a firearm to O.C.'s apartment to intimidate him, and that such a depiction created a risk of inflaming the prejudices of the jury. However, O.C. testified that he, Murray, and Easton started to argue in raised voices after he refused to store the marijuana. And, O.C.'s neighbor testified he heard more than one voice arguing in "raised voices" and was "able to hear the anger and they weren't there to be on a friendly matter." Thus, there was sufficient evidence to support the state's argument. *See Anaya*, 165 Ariz. at 543. Further, the court instructed the jury not to be influenced by sympathy or prejudice and made clear that the attorneys' closing arguments were not evidence. Therefore, we conclude the state's argument was not improper.

¶27 Additionally, Murray claims the state's suggestion he was a drug dealer was "highly inflammatory, unduly suggestive, and unsupported by the record." He cites two out-of-state cases, *People v. Terry*, 728 N.E.2d 669 (Ill. App. Ct. 2000) and *State v. Cox*, 359 P.3d 257 (Or. Ct. App. 2015), each finding misconduct where the state referred to the defendant as a drug dealer when there was no evidence to support such an assertion. Murray's case is distinguishable. Specifically, he ignores O.C.'s testimony that Murray and Easton had previously left shipping and packing materials at his apartment and that the marijuana found in his apartment did not belong to him. This was sufficient evidence to support the state's reasonable inference and argument to the jury that Murray was a drug dealer. *See Anaya*, 165 Ariz. at 543 (circumstantial or direct evidence can support reasonable inference). Thus, we find no misconduct.

Misstatements of Law

¶28 We turn now to Murray's assertion that the state made "several blatant misstatements of law" as to intent, flight, self-defense, and the burden of proof during its closing argument. As generally noted,

prosecutors' comments during closing arguments must be viewed in context to determine if they exceed the wide latitude our precedents afford them. *See Goudeau*, 239 Ariz. 421, ¶ 196; *Moody*, 208 Ariz. 424, ¶ 180. However, while prosecutors may argue their version of the evidence to the jury, they may not misstate the law. *State v. Serna*, 163 Ariz. 260, 266 (1990). Further, a misstatement of law constitutes fundamental error when it goes to the foundation of the case, takes from the defendant a right essential to his defense, or is "so egregious that he could not possibly have received a fair trial." *Escalante*, 245 Ariz. 135, ¶ 21; *see also Serna*, 163 Ariz. at 267. To determine when prosecutors exceed those bounds, we look to (1) whether the prosecutor's statements called inappropriate matters to the jury's attention and (2) the probability that the jury was in fact influenced by those statements. *See Goudeau*, 239 Ariz. 421, ¶ 196.

Flight

¶29 Murray contends it was "improper for the State to argue [his] departure from the scene showed consciousness of guilt without requesting a jury instruction" because the evidence was insufficient to establish that he ran from the scene. In addition, he claims the state misstated the law by arguing: (1) "Both defendants ran off. . . . That shows that they were conscious of being in the wrong. It shows that they were conscious of being guilty." and (2) "They didn't stick around. They ran away. That shows consciousness of guilt in this case." Murray claims these statements indicated to the jury that "running away conclusively established" Murray's consciousness of guilt when instead the jury should have been instructed to consider evidence of flight together with all other evidence in the case.

¶30 Evidence of "[f]light or concealment after a crime is admissible because it bears on the issue of the defendant's consciousness of guilt." *State v. Weible*, 142 Ariz. 113, 116 (1984). And, although merely leaving the scene of a crime is not evidence of flight, "[r]unning from the scene of a crime, rather than walking away, may provide evidence of a guilty conscience . . . ." *State v. Lujan*, 124 Ariz. 365, 371 (1979). Even without pursuit, a defendant's manner of leaving the scene may indicate consciousness of guilt. *Id.*

¶31 During trial, O.C. testified Murray and Easton "ran off" after Murray shot him. Additionally, O.C.'s neighbor testified he "could hear the steps running away from what happened, from the area." Therefore, the state's arguments reasonably inferred from the evidence and the surrounding circumstances that Murray's flight indicated consciousness of

guilt. Murray was, of course, free to argue otherwise, and the jury was free to reject the state's contention. And, Murray cites no authority to support his claim that it was improper for the state to argue his flight from the scene showed consciousness of guilt without requesting a jury instruction about flight. However, even assuming without deciding that the state's arguments were improper absent a flight instruction, any such error is not fundamental given the other evidence of Murray's guilt and the trial court's instruction that the attorneys' arguments were not evidence. *See State v. Anderson*, 210 Ariz. 327, ¶¶ 49–52 (2005).

Intent

¶32 Murray claims it was improper for the state to argue he would still be guilty of aggravated assault even if O.C. had accidentally pulled the trigger or caused the firearm to go off. During closing, the state argued:

> It was [O.C.] that had every right to defend himself in that situation. It's clear beyond all doubt that [O.C.] did not shoot himself. But even if he did accidentally pull the trigger and shoot himself, that is on [Murray and Easton]. That's their fault and they're guilty for it. They are still guilty of aggravated assault on both theories, even if that's what happened.

Murray argues that because accident is a defense to aggravated assault, the prosecutor misstated the law by arguing that Murray and Easton were guilty even if the victim accidentally fired the gun.

¶33 We view these statements within the context of the trial, including the prosecutor's closing arguments as a whole. *See State v. Hernandez*, 170 Ariz. 301, 308 (App. 1991). The state presented evidence and argument that Murray and Easton, armed with a firearm and a taser, had gone to O.C.'s home in connection with the distribution of marijuana and had gotten into a fight with O.C., during which Murray, at Easton's direction, pointed the gun at O.C. Thus, it follows that if O.C. were to have accidentally pulled the trigger, it would have occurred in a struggle over the gun in which O.C. was rightfully defending himself.

¶34 Viewed in this context, the state's characterization of the law was not improper. Even if O.C. accidentally pulled the trigger during the struggle, evidence supports "both theories" of assault the prosecutor presented—"[i]ntentionally, knowingly or recklessly causing any physical

injury to another person" and "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury." A.R.S. § 13-1203(A)(1), (2).[4] As to the first theory, the jury could conclude that by pointing the gun at O.C. and then struggling with him over it, Murray and Easton had recklessly caused the discharge, and therefore had recklessly caused O.C.'s injury. Murray concedes "a defendant could be found guilty of aggravated assault under a theory of recklessness in situations where the victim accidentally discharged a weapon"; therefore, the state's arguments were appropriate. As to the second theory, the jury could have concluded that Murray and Easton had intentionally put O.C. in reasonable apprehension of imminent physical injury by pointing the gun at him, thus completing the offense before the discharge even occurred.

¶35 We also find no impropriety in the state's subsequent statement that "[w]hen arguments happen and physical scuffles happen and a shot is fired, that is not an accident at that point. That's what intent is called." While Murray contends this is an incorrect statement of law, in context, it appears to be argument that the altercation preceding the shooting in this case was evidence that the shooting was intentional, rather than a statement about intent in general. It was within the state's wide latitude to argue during closing that the evidence demonstrated intent; thus, no misconduct occurred. *See Moody*, 208 Ariz. 424, ¶ 180.

Self-Defense

¶36 Murray claims the state erred by arguing self-defense was unavailable because Murray did not sustain an injury, thus shifting the burden to Murray and creating a "new, imaginary element" of the defense. Specifically, Murray asserts the following was a gross misstatement of the law: "There is no evidence of any injury to either defendant. Again, that cancels out the self-defense argument that might be raised by either defendant in this case." Murray is correct to the extent that the lack of injury to a person claiming self-defense does not render such a defense unavailable. Generally, a defendant claiming self-defense need only show that his use of force was "immediately necessary to protect himself against [another's] use or attempted use of unlawful physical force." A.R.S. § 13-404(A).

[4]A person commits aggravated assault by "us[ing] a deadly weapon or dangerous instrument" to commit the assault. A.R.S. § 13-1204(A)(2).

¶37 Nonetheless, we view the state's remark as an attempt to refer to earlier argument in which the state mentioned the defendants' lack of injuries as one fact among several showing the defendants did not act in self-defense. Although the state's argument, in isolation, seems to indicate injury is required, Easton's counsel rebutted this argument during closing, stating, "you don't have to have a visible injury to protect yourself in self-defense." Given that Murray did not object, the state's other arguments about the issue were proper, the trial court properly instructed the jury on self-defense, and Murray had an opportunity to respond to this comment during his own closing argument, we find no error, much less fundamental error. *See Morris*, 215 Ariz. 324, ¶¶ 46-47; *Anderson*, 210 Ariz. 327, ¶¶ 49–52; *Hernandez*, 170 Ariz. at 308-09 (prosecutor's improper remark not fundamental error where jury properly instructed); *see also Orebo v. United States*, 293 F.2d 747, 749-50 (9th Cir. 1961) (finding no prejudice from the prosecutor's "occasional slip of the tongue," which would have been "easily correctible . . . upon seasonable objection").

¶38 Murray next contends the state misrepresented the law by saying, "If [O.C.] had had a gun, [he] would have been justified in getting the gun and defending himself from two men who came to his place trying to get him to do something illegal." Murray asserts that trying to get someone to do something illegal does not justify using lethal force in self-defense. But immediately preceding this remark, the state had argued: "So [O.C.] was outnumbered. He was attacked. He was in reasonable fear. Once he sees the gun that [Murray] has, once he sees the taser that Easton has, it is [O.C.] that would have had the right to self-defense in that situation." Thus, the state was arguing that because the two brothers were trying to get O.C. to do something illegal and attacking him and pointing weapons at him, O.C. would have been justified in defending himself with a gun. This was not misconduct. The prosecutor's comment was a fair statement of the law. *See* A.R.S. § 13-411(A), (C) (person justified in using deadly physical force against another if person reasonably believes it immediately necessary to protect himself against unlawful deadly force).

¶39 Murray also argues the state misstated its burden regarding self-defense and defense of others, thus impermissibly shifting the burden to Murray. He takes issue with the state's argument that it had the burden to prove "each element of the charge" beyond a reasonable doubt without mentioning it also had the burden of proving the absence of self-defense and defense of others beyond a reasonable doubt. Impermissible "burden shifting" occurs in the state's argument when it may lead a jury to believe the defendant bears some burden of proof on a question as to which the state bears the burden. *See, e.g., State v. Sarullo*, 219 Ariz. 431, ¶ 24

(App. 2008) (considering whether prosecutor's comments improperly shifted burden of proof to defendant, but finding no such misconduct).

¶40 We find no burden shifting here. The final jury instructions used the same phrase Murray now complains about to describe the burden of proof: "[T]he State must prove each element of each charge beyond a reasonable doubt." Further, the state correctly argued, and the final jury instructions provided, that self-defense has to be disproved by the state beyond a reasonable doubt. Murray's argument fails.

Burden of Proof

¶41 Murray argues the state's characterization of the reasonable-doubt standard during its rebuttal closing was improper and invited the jury to find Murray guilty under a lower standard than constitutionally required. Specifically, while the state argued that "beyond a reasonable doubt" is a "firmly convinced" standard and a "high burden of proof" in its first closing argument, on rebuttal it argued:

> So here is how to think when you might hear somebody say back there, well, I think one or both defendants might be guilty but I'm not sure it's beyond a reasonable doubt. Now, stop and ask yourself another question at that point. Why did I just say that? Why did I just say that I think the defendants might be guilty? You are a fair and impartial juror. If you are thinking that, if you are saying that, is it not proof that you have been persuaded by the evidence in the case beyond a reasonable doubt? Because why else would you say that were you not convinced by the State's evidence? So when you hear yourself say that, ask yourself the second question why, why do I think he is guilty? Because he is guilty because you have been convinced by the State's case beyond a reasonable doubt. That's why you think as you do being fair and impartial.

¶42 It is improper for a prosecutor to misstate the burden of proof. *State v. Schneider*, 148 Ariz. 441, 447 (App. 1985). And, under fundamental-error analysis, an improper argument goes to the "'foundation of a case' if it relieves the prosecution of its burden to prove a crime's elements, directly

impacts a key factual dispute, or deprives the defendant of constitutionally guaranteed procedures." *Escalante*, 245 Ariz. 135, ¶ 18.

¶43 Here, the state acknowledges potential problems arising from the prosecutor's argument on rebuttal about the burden of proof, characterizing it as "arguably confusing." But the state cites *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974), for the principle that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Notably, however, the state in this instance fails to put forth a less damaging meaning.

¶44 As our supreme court stated in *State v. Portillo*, citing the 1987 Federal Judicial Center, Pattern Criminal Jury Instructions, "[p]roof beyond a reasonable doubt is proof that leaves [jurors] firmly convinced of the defendant's guilt." 182 Ariz. 592, 596 (1995). Murray argues the state's mischaracterization in effect equated "beyond a reasonable doubt" with "I think" the defendant "might be guilty," thus diluting the state's burden to one "so weak that it is arguably even less demanding than a preponderance of the evidence standard." We agree, and conclude the state's characterization of the reasonable-doubt standard was a gross, improper misstatement of the law.

¶45 Nevertheless, even a clear misstatement of law during closing argument may be cured if the trial court correctly instructs the jury on the law and advises that lawyers' arguments are not evidence. *Anderson*, 210 Ariz. 327, ¶ 52 (trial court's correct instruction on law together with admonition that lawyers' arguments were not evidence negated error based on state's clear misstatements of law); *see also State v. Patterson*, 230 Ariz. 270, ¶ 25 (2012) (misstatement of law also cured if jury properly instructed and prosecutor corrects misstatement). Murray points out that although the trial court properly instructed the jury as to the reasonable-doubt standard, it did so "*before* the prosecutor made its erroneous argument and no curative instructions were provided thereafter." But Murray cites no authority,[5] and we find none, requiring the court to instruct the jury *after* a

[5]Murray cites *State v. Dansdill*, 246 Ariz. 593, ¶¶ 58-59 (App. 2019), for the proposition that prejudice from an improper argument is not "cured" by proper instructions where the trial court does not attempt to "dull the impact of the misconduct." However, *Dansdill* is factually distinguishable: there, Dansdill objected to the state's repeated misrepresentation; here, Murray did not object to the state's isolated

misstatement occurs for such instruction to negate error resulting from the misstatement.[6]

¶46 Here, the trial court correctly instructed the jury as to the reasonable-doubt standard immediately prior to closing arguments, provided the jury with a copy of the correct instruction to consult during deliberation, admonished the jury that "[w]hat the lawyers say is not evidence," and, following the arguments, reminded the jury to consult the written intructions and be guided by them. Although the state's mischaracterization of the reasonable-doubt standard was particularly egregious in light of the fact that it occurred during rebuttal almost immediately before the jury began deliberations, we are bound by the principles set forth in our supreme court's previous opinions. *See State v. Long*, 207 Ariz. 140, ¶ 23 (App. 2004) ("This court is bound by decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions."). And, pursuant to binding precedent, including the presumption that jurors follow their instructions, *Prince*, 204 Ariz. 156, ¶ 9, we cannot say the state's misstatement of law resulted in fundamental error requiring reversal.[7]

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misstatement. *Id.* ¶¶ 59-60. Thus, *Dansdill* addresses this issue in the context of harmless-error review rather than the fundamental-error review applicable in this case. *Id.* ¶¶ 52, 58.

[6]Trial judges are not required *sua sponte* to correct misstatements of law, however, it is within their discretion to do so. *See State v. Tims*, 143 Ariz. 196, 199 (1985) (trial court enjoys broad discretion in controlling closing argument). We encourage trial judges to speak up when confronted with misstatements as striking as the one here.

[7]This case may provide the Arizona Supreme Court with the opportunity to determine the circumstances, if any, in which a single act of prosecutorial misconduct—a gross misstatement of the burden of proof during rebuttal—is sufficient to warrant reversal under fundamental-error analysis. Notably, in *State v. Murray*, No. 2 CA-CR 2018-0313, ¶ 32, 2019 WL 4894121 (Ariz. Ct. App. Oct. 4, 2019), which was Easton's appeal, a divided panel of this court concluded the prosecutor's "erroneous remarks" during rebuttal amounted to "an argument that a belief a defendant 'might be guilty' constitutes belief in guilt beyond a reasonable doubt." But the majority concluded the remarks did not require reversal under fundamental-error analysis. *Id.* ¶ 33. The dissenting judge, however, noted: "Neither party has cited, nor have we found, any published Arizona

Cumulative Effect of the State's Conduct

¶47 Murray lastly maintains "[t]he prosecutor's pervasive misconduct constituted cumulative error and deprived [him] of a fair trial and due process." However, Murray has not met his burden of establishing the requisite prejudice for obtaining relief under fundamental-error review. "Cumulative error requires reversal only when misconduct is so pronounced and persistent that it permeate[d] the entire atmosphere of the trial, indicating that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant." *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 119 (2018) (alteration in original) (citation omitted).

¶48 Finding only one instance of prosecutorial misconduct—the state's gross misstatement of the reasonable-doubt standard—we conclude Murray's allegations, considered individually and cumulatively, did not rise to the level of the fundamental, prejudicial error necessary to reverse his conviction. *See Escalante*, 245 Ariz. 135, ¶ 21. Moreover, Murray fails to establish the state intentionally engaged in improper conduct in order to prejudice him as necessary to reverse based on cumulative error. *See Acuna Valenzuela*, 245 Ariz. 197, ¶ 119.

Disposition

¶49 For the foregoing reasons and those addressed in the accompanying unpublished memorandum decision, we affirm Murray's conviction and sentence.

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case squarely addressing prejudice in the context of a prosecutor's improper distortion of the reasonable-doubt standard." *Id.* ¶ 58.