IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

EASTON COURTNEY MURRAY,
Appellant.

No. 2 CA-CR 2018-0313
Filed October 4, 2019

Appeal from the Superior Court in Pima County
No. CR20170096001
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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OPINION

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa concurred and Judge Eckerstrom concurred in part and dissented in part.

E P P I C H, Presiding Judge:

¶1 Easton Murray appeals from his conviction for aggravated assault with a deadly weapon. He contends he was denied a fair trial by numerous instances of alleged prosecutorial misconduct, improperly admitted evidence, and evidence and argument suggesting conviction for an uncharged offense. Finding few errors, and none warranting reversal, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *See State v. Allen*, 235 Ariz. 72, ¶ 2 (App. 2014). On December 16, 2016, Murray and his brother, who had a rifle in his hand, approached the victim at his apartment and asked that he hold some marijuana for them. The victim refused and asked Murray and his brother to leave. An argument ensued, which quickly escalated into a fight outside the front door. During the altercation, Murray shocked the victim with a taser and Murray's brother shot him in the leg.

¶3 After a three-day trial in which Murray and his brother were tried jointly, a jury convicted Murray of aggravated assault with a deadly weapon. The trial court sentenced Murray to five years' imprisonment. We have jurisdiction over Murray's timely appeal pursuant to A.R.S. §§ 13-4031 and 13-4033(A)(1).

Victim's Translation of Murray's Foreign-Language Statements

¶4 We first address Murray's claim that the trial court erred by permitting the victim to testify that during the confrontation, Murray said to his brother in Jamaican Patois, "[S]hoot him, shoot the boy." Murray contends that allowing the victim to translate the words he heard was improper because the victim was not "a trained interpreter, and certainly not neutral."

¶5 Because Murray did not object at trial, we review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). "A defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, or (3) the error was so egregious that he could not possibly have received a fair trial." *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). The victim, who stated that Jamaican Patois is his "native language," testified as a witness to a conversation he personally perceived.

Murray cites no case, and we are aware of none, holding that a witness cannot testify in English to the meaning of what he or she personally heard and understood in another language. Indeed, substantial authority holds such testimony admissible. *See, e.g.*, *United States v. Villalta*, 662 F.2d 1205, 1207 (5th Cir. 1981) (witness with personal knowledge of conversation competent to testify to content of conversation in foreign language); *People v. Munoz-Casteneda*, 300 P.3d 944, 948-49 (Colo. App. 2012) (same); *Commonwealth v. Shooshanian*, 96 N.E. 70 (Mass. 1911) ("There was no error in permitting the witness . . . to state in English the substance of the conversation between him and the defendant held in a foreign language."). The case Murray cites to argue otherwise, *People v. Allen*, 317 N.E.2d 633, 633-35 (Ill. App. Ct. 1974), involved a much different situation where the trial court, over the defendant's objection, allowed the state to use an interested party as an interpreter for a testifying witness.

¶6 Nor does Murray cite any authority for the proposition that only a "trained interpreter" can testify in English to the meaning of words he heard in another language. Again, substantial authority holds otherwise. *See, e.g.*, *Munoz-Casteneda*, 300 P.3d at 949 (witness with "personal knowledge of the relevant conversation" who "is capable of testifying to a translation of its contents without misleading the jury[] and is subject to cross-examination . . . may testify without first being certified as an interpreter"); *State v. Roldan*, 855 A.2d 445, 449 (N.H. 2004) (rules governing court interpreters inapplicable to witnesses testifying to meaning of foreign-language evidence). We conclude that the victim's testimony in English to the meaning of what he heard in Jamaican Patois was proper, and no error occurred, fundamental or otherwise.

Indictment

¶7 Murray contends that while the indictment alleges he committed aggravated assault with a firearm, the state improperly presented additional evidence and argument that Murray used a taser in the assault, qualifying as use of a "deadly weapon or dangerous instrument" under the aggravated assault statute. A.R.S. § 13-1204(A)(2). Murray argues that because the alleged taser use constituted an entirely different crime from that alleged, the indictment was automatically amended to conform to the evidence of an assault by taser. *See* Ariz. R. Crim. P. 13.5(b) ("[An indictment] is deemed amended to conform to the evidence admitted during [trial]."). Murray concludes that because he had no notice of the alleged assault by taser, and there is no way "to know whether the jury rested its verdict on the (proper) firearm allegation or the (improper) taser allegation," the verdict against him must be set aside.

¶8 Because this is another issue Murray did not timely raise at trial,[1] we review it for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19. An indictment "limits the trial to the specific charge or charges stated in the . . . indictment," and unless the defendant consents, an indictment "may be amended only to correct mistakes of fact or remedy formal or technical defects." Ariz. R. Crim. P. 13.5(b). An amendment to an indictment that instead changes the nature of the offense violates Rule 13.5(b), *see State v. Freeney*, 223 Ariz. 110, ¶ 20 (2009), and a defendant's rights under the Sixth Amendment may be violated—and fundamental error may thereby occur—if he does not receive adequate notice of such an amendment. *See State v. Montes Flores*, 245 Ariz. 303, ¶¶ 16-17 (App. 2018) (citing *Freeney*, 223 Ariz. 110, ¶¶ 16-17, 24-29).

¶9 No error of any kind occurred here, however. In the trial court's opening instructions to the jury, it read the allegation in the indictment—that "Murray assaulted [the victim] with a deadly weapon or dangerous instrument, to wit, a firearm." Each juror received a copy of the indictment. We presume that the jury followed its instruction and considered the charged offense as alleged, *see State v. Jeffrey*, 203 Ariz. 111, ¶ 18 (App. 2002) (juries presumed to follow instructions), and nothing that occurred at trial overcomes this presumption. The defendants' use of a taser was part and parcel of the overall altercation, and therefore was admissible to put the events in context independent of showing that they used a deadly weapon or dangerous instrument. Moreover, in closing arguments, the prosecutor stressed that the defendants used a firearm—a gun—which qualified as a deadly weapon and made the assault an aggravated assault. The prosecutor never argued that the taser was a deadly weapon or dangerous instrument. In these circumstances, there is no reason to believe Murray was convicted for anything other than the offense alleged in the indictment—aggravated assault using a firearm.

[1] Murray maintains he preserved the issue by referring to the unexpected taser evidence in his Rule 20 motion and his motion for new trial. On neither occasion, however, did he object to the taser evidence for the reasons he now raises on appeal. In any event, any issue first raised in his motion for new trial would not have been preserved for appeal. *See State v. Larin*, 233 Ariz. 202, ¶ 14 (App. 2013) (issues raised for first time in motion for new trial reviewed for fundamental error only).

Personal Knowledge

¶10 At trial, the prosecutor asked the victim if he recognized what was depicted in a photograph that appears to show a dark-colored bale wrapped in clear plastic. The victim said no. The prosecutor then asked if the victim thought he knew what the photograph depicted. The trial court overruled Murray's objection that the question had been asked and answered, and the state restated the question, asking the victim if he "[knew] what [the photograph] might be." The court again overruled Murray's objection that the question had been asked and answered, and the victim said, "No. I don't know what was in the black bag." The prosecutor then asked, "Do you think you know what [the photograph is] even though it doesn't look familiar to you?" The victim then answered, "I think I know what it is. It was in the house." When asked what he thought it was, the victim replied that it was marijuana.

¶11 Murray contends the trial court erred by allowing the prosecutor to continue to question the victim after he "repeatedly denied any knowledge of what was in the photo," contending this violated Rule 602, Ariz. R. Evid., which requires that a witness have "personal knowledge" of a matter to which he testifies. Murray asserts that this testimony was the only evidence establishing the state's proposed motive for the assault—the victim's refusal to assist Murray and his brother in their marijuana business—and therefore the testimony prejudiced him.

¶12 Because Murray objected at trial,[2] we review the trial court's rulings for abuse of discretion. *See State v. Pandeli*, 215 Ariz. 514, ¶ 41 (2007). Here, the court had discretion to allow the prosecutor to continue to probe the victim about the contents of the photograph even after he initially expressed unfamiliarity with it. *Cf. State v. Lynch*, 238 Ariz. 84, ¶¶ 11-12 (2015) (no abuse of discretion where court overruled objections to prosecutor's aggressive, combative questioning), *rev'd on other grounds*, 136 S. Ct. 1818 (2016). And even were we to take the witness's ultimate answer as speculation rather than an admissible inference from personal knowledge and experience, *see* Ariz. R. Evid. 701; *State v. Peltz*, 242 Ariz. 23, ¶ 17 (App. 2017), the answer was merely cumulative of other evidence that Murray and his brother had brought marijuana to the apartment for the

[2]Murray's second objection was, "I still object. Asked and answered. He said he doesn't know what it is." We take this as an objection that the witness lacked personal knowledge to answer the question.

victim to hold for them. Any error here was therefore harmless. *See State v. Granados*, 235 Ariz. 321, ¶ 35 (App. 2014).

Expert Witness

¶13 After testifying to his experience and knowledge of the local marijuana trade, a detective testified, without objection, that evidence he saw in this case was consistent with the shipping practices common to that trade. During cross-examination, Murray asked the detective whether the evidence could have indicated that marijuana was being received in addition to being shipped, and the detective testified that it did. Murray also asked about the significance of finding multiple cell phones at the scene, and the detective replied it indicated involvement in narcotics trafficking. Murray argues that this testimony was presented as lay witness testimony under Rule 701, but was actually expert testimony the state did not properly disclose under Rule 15.1, Ariz. R. Crim. P., or establish as appropriate expert testimony. *See* Ariz. R. Evid. 702 (imposing several requirements on opinion testimony based on "scientific, technical, or other specialized knowledge").

¶14 Murray again raised no objection, so we review for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19. We detect none here. Murray cites *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997), for its proposition that law-enforcement testimony that the defendant's conduct was consistent with that of a drug trafficker is expert testimony and must be disclosed as such. *But see United States v. Novaton*, 271 F.3d 968, 1007-09 (11th Cir. 2001) (declining to follow *Figueroa-Lopez* and admitting similar testimony as lay witness testimony). Murray does not attempt to explain, however, how *Figueroa-Lopez* supports reversal here, in light of the fact that the court did not reverse the defendant's convictions there—even though that defendant had objected at trial and thus was afforded the more stringent harmless-error standard of review. 125 F.3d at 1244, 1247; *see also Henderson*, 210 Ariz. 561, ¶ 18 (under harmless error review, state has burden to prove beyond reasonable doubt that error did not affect verdict). Moreover, in *Figueroa-Lopez*, the state "relied extensively" on the contested testimony in its closing arguments but the court found the testimony to be harmless because the witness testified to knowledge and experience that would have qualified him as an expert. 125 F.3d at 1247. Here, the detective similarly testified to extensive experience that would have qualified him as an expert, including participation in several hundred drug-trafficking investigations, and Murray cites no instance where the state relied on the contested evidence.

¶15 Finally, the bulk of the detective's opinions were elicited by Murray himself during cross-examination. Indeed, Murray not only prompted the detective to repeat his opinion that the evidence was consistent with drug shipping, Murray further elicited that the evidence was consistent with receiving drugs, and that the multiple cell phones found were also consistent with drug trafficking. Most if not all prejudice from the testimony can therefore be attributed to Murray's own questioning, which cannot be a basis for reversal. *See State v. Logan*, 200 Ariz. 564, ¶¶ 8-9 (2001) ("[W]e will not find reversible error when the party complaining of it invited the error."). Murray offers no explanation of how fundamental error exists despite this undisputed fact.

¶16 Murray additionally claims prejudice from the lack of disclosure, asserting he was deprived of the opportunity to challenge admission of the testimony, prepare to rebut it, or obtain his own expert. But he does not adequately explain how this alleged deprivation prejudiced him. *See Escalante*, 245 Ariz. 135, ¶ 21 (defendant claiming fundamental error based on deprivation of right essential to defense must make separate showing of prejudice). Indeed, Murray's only specific assertion of prejudice is that the evidence was irrelevant and "the only possible use of this testimony was to prompt jurors to continue to engage with stereotypes about Jamaicans and marijuana." But the evidence was relevant because it helped show a motive for the assault—to force the victim to assist in drug trafficking, or punish him if he did not. Murray does not identify, and we do not find, any instance where the detective suggested a link between Murray's nationality and the drug-trafficking evidence. In sum, even assuming that the contested testimony was expert testimony that should have been disclosed, we conclude that Murray has not shown fundamental, prejudicial error.

Prosecutorial Misconduct

¶17 Because Murray did not object at trial to any of the alleged instances of prosecutorial misconduct he raises here, we review them for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19. Fundamental error review is restrictive because it is designed to "encourage defendants to present their objections in a timely fashion at trial, when the alleged error may still be corrected, and to discourage defendants from reserving a curable trial error as a 'hole card' to be played in the event they are dissatisfied with the results of their proceedings." *State v. Davis*, 226 Ariz. 97, ¶ 12 (App. 2010) (quoting *Henderson*, 210 Ariz. 561, ¶ 19).

¶18 Where, as here, a defendant claims that prosecutorial misconduct was so egregious it deprived him of a fair trial, "a 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, ¶ 26 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). We therefore reverse for prosecutorial misconduct only when "(1) misconduct exists and (2) 'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Morris*, 215 Ariz. 324, ¶ 46 (2007) (quoting *State v. Anderson*, 210 Ariz. 327, ¶ 45 (2005)). We view a prosecutor's conduct within the context of the entire trial, and will not lightly overturn a conviction solely on the basis of a prosecutor's misconduct. *State v. Hernandez*, 170 Ariz. 301, 308 (App. 1991) (citing *United States v. Young*, 470 U.S. 1, 11 (1985)). We will, however, consider the cumulative effect of multiple instances of misconduct where the prosecutor engaged in "persistent and pervasive misconduct" and "did so with indifference, if not a specific intent, to prejudice the defendant." *Morris*, 215 Ariz. 324, ¶ 47 (quoting *State v. Roque*, 213 Ariz. 193, ¶ 155 (2006)).

Evidentiary Misrepresentations

¶19 First, Murray argues that the prosecutor misrepresented the evidence when, on two occasions in closing arguments, he stated that the defendants had called the victim an offensive name. Murray acknowledges that the victim testified Murray told him to "stop acting like a bitch," but contends this does not count as "anyone calling [the victim] an offensive name." We decline Murray's invitation to split hairs; the prosecutor's characterizations of the evidence accurately convey that the defendant applied an offensive name to the victim. No error, much less fundamental error, occurred here.

¶20 Next, Murray contends the prosecutor misrepresented the evidence by arguing in closing that a neighbor "generally described what [Murray and his brother] looked like," because the neighbor had testified he had not seen the men's faces. But the neighbor testified the men were "African-American," "weren't short" and were "taller than" the witness, and wore dark clothing with some red trim. The prosecutor's characterization of this testimony as a general description falls within the "wide latitude . . . to be given in closing arguments." *State v. Hill*, 174 Ariz. 313, 322 (1993). Again, there was no error.

¶21 Murray further contends the prosecutor "lied to the jury" in stating that the neighbor "[told] the same story [the victim] told down to the argument, scuffle, shots, arguments, scuffle, shots." In support of his contention that the neighbor and the victim had not told the same story, Murray points to various discrepancies between the two accounts as to the order, timing, and details of events. In particular, Murray takes issue with the prosecutor's use of the word "shots," because although the neighbor testified he heard multiple shots, the victim testified there was only one shot.

¶22 Again, no error, much less fundamental error, occurred here. Murray materially misquotes the prosecutor, who said that the neighbor told "*about* the same story [the victim] told." (Emphasis added.) The prosecutor's actual statement thus concedes that the two accounts differed in some respects. And as Murray acknowledges, both accounts described an argument, a scuffle, and at least one shot. We thus take the prosecutor's statement to be a legitimate effort to highlight these similarities between the accounts. To the extent that the prosecutor's use of the word "shots" imprecisely characterized the victim's testimony, we presume that jurors followed their instruction that closing arguments are not evidence. *See State v. Goudeau*, 239 Ariz. 421, ¶ 214 (2016).

Legal Misrepresentations

¶23 Murray next contends the prosecutor misrepresented the legal significance of whether the shooting was accidental by making the following statements:

> It was [the victim] that had every right to defend himself in that situation. It's clear beyond all doubt that [the victim] did not shoot himself. But even if he did accidentally pull the trigger and shoot himself, that is on [Murray and his brother]. 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 the charged offense, the prosecutor misstated the law by arguing that the defendants were guilty even if the victim accidentally fired the gun.

¶24 We view these statements within the context of the trial, including the prosecutor's closing arguments as a whole. *See Hernandez*, 170 Ariz. at 308. The prosecutor had previously argued that Murray and

his brother had gone to the victim's home and gotten into a physical altercation with the victim, during which Murray's brother, at Murray's direction, pointed the gun at the victim. It is implied, therefore, that if the victim were to have accidentally pulled the trigger, it would have occurred in a struggle over the gun in which the victim was rightfully defending himself.

¶25 Viewed in this context, the prosecutor's argument is not improper. Even if the victim accidentally pulled the trigger in 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).[3] For the first theory, the jury could conclude that by pointing the gun at the victim and then struggling with him over it, Murray and his brother had recklessly caused the discharge, and therefore had recklessly caused the victim's injury. Murray concedes that "[s]ituations may exist where a defendant *could* be guilty of aggravated assault for causing physical injury even when the victim himself pulled the trigger"; the prosecutor's statements were appropriate argument that this was such a situation. For the second theory, the jury could find that Murray and his brother had intentionally put the victim in reasonable apprehension of imminent physical injury by pointing the gun at him, completing the offense before the accidental discharge even occurred.

¶26 We also find no fundamental error in the prosecutor'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 that this is an incorrect statement of law that a shooting during an argument or scuffle cannot be accidental, it appears to be argument that the altercation preceding the shooting was evidence that the shooting was intentional. It was not improper for the prosecutor to argue that the evidence demonstrated intent; we see no fundamental error here. To the extent that any of the prosecutor's arguments about intent were imprecise, it was up to Murray to timely object. *See State v. Smith*, 126 Ariz. 534, 535 (App. 1980) (absent fundamental error, defendant must timely object to erroneous or improper argument or objection is waived).

[3]Assault becomes aggravated if the assailant "uses a deadly weapon or dangerous instrument." A.R.S. § 13-1204(A)(2).

¶27 Murray also contends the prosecutor deliberately misrepresented the elements of self-defense by arguing that the lack of evidence that either defendant was injured "cancels out the self-defense argument that might be raised by either defendant in this case." To be sure, a lack of injury to a person claiming self-defense does not "cancel out" that defense: generally, a defendant claiming self-defense need only show that his use of force was "immediately necessary to protect . . . against [another's] use or attempted use of unlawful physical force." A.R.S. § 13-404(A). We are not persuaded by Murray's contention that the prosecutor deliberately misstated the law, however. It appears the prosecutor's remark was an ill-phrased attempt to refer back to earlier (and proper) argument in which the prosecutor mentioned the defendants' lack of injuries as one fact among several showing that the defendants did not act in self-defense. Given that Murray did not object, the remark was fleeting and isolated, the prosecutor's other arguments about the issue were proper, and the trial court properly instructed the jury on self-defense, reversible error did not occur here. *See Morris*, 215 Ariz. 324, ¶ 46; *Hernandez*, 170 Ariz. at 308 (prosecutor's improper remark not reversible error where defendant did not object); *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").

¶28 In any event, Murray does not point to any evidence creating a reasonable likelihood that he could have prevailed on his self-defense claim. Instead, he suggests that because the trial court agreed with him that a self-defense jury instruction was warranted, it shows his defense had merit and he therefore suffered the prejudice required for reversal of his conviction. But "[a] defendant is entitled to a self-defense instruction if the record contains the 'slightest evidence' that he acted in self defense." *State v. King*, 225 Ariz. 87, ¶ 14 (2010) (quoting *State v. Lujan*, 136 Ariz. 102, 104 (1983)). Satisfying this minimal standard does not establish a reasonable likelihood that Murray's self-defense argument would have succeeded; he therefore has failed to show sufficient prejudice for reversal. *See Morris*, 215 Ariz. 324, ¶ 46.

¶29 Murray next contends the prosecutor misrepresented the law by saying that "[i]f the victim had had a gun, the victim 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," arguing that simply trying to get someone to do something illegal does not justify self-defense. But immediately preceding this remark, the prosecutor had stated: "So [the victim] was outnumbered. He was attacked. He was in reasonable fear.

Once he sees the gun that [Murray's brother] has, once he sees the taser that [Murray] has, it is the victim that would have had the right to self-defense in that situation." It is evident that the prosecutor was arguing that trying to get the victim to do something illegal by attacking him and pointing weapons at him would justify the victim's self-defense. This was not error.

Evidence of Nationality

¶30 Murray contends the prosecutor improperly injected the defendants' nationality into the trial by mentioning in his opening statement and twice eliciting from the victim the fact that the defendants were from Jamaica. He argues this was an improper attempt to "play[] into preconceived notions jurors may have had about Jamaicans and marijuana—the alleged motive for the shooting." As Murray acknowledges, however, the neighbor who witnessed the assault heard conversation in an unfamiliar language. Because of this, evidence that Murray and his brother were from Jamaica (and spoke in Jamaican Patois) was relevant, as it tended to show that the people the neighbor had heard were Murray and his brother.

¶31 The federal cases Murray cites where courts have reversed convictions for improperly admitted nationality evidence involve distinguishing circumstances, including nationality evidence lacking a proper purpose, repeated references to the defendant's nationality making it the focus of the trial, and overt suggestion that persons of the defendant's nationality were more likely to commit the charged offense. *See United States v. Cabrera*, 222 F.3d 590, 596-97 (9th Cir. 2000) (testifying officer's "repeated references to Cuban drug dealers had the cumulative effect of putting the . . . Cuban community on trial, rather than sticking to the facts of [the defendants'] drug offenses"); *United States v. Cruz*, 981 F.2d 659, 663-64 (2d Cir. 1992) (expert testimony area where defendant allegedly committed drug offense had "a very high Hispanic population" and was "inundated with drug dealing"); *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 "very close"); *United States v. Doe*, 903 F.2d 16, 20, 27-29 (D.C. Cir. 1990) (testimony Jamaicans taking over drug trade "had no bearing upon any claimed defense or other issue at trial, and was openly allusive in linking the drug charges to appellants solely on the basis of the ancestry of two of them"). The brief references to Murray's Jamaican nationality here, which had a proper purpose and did not allude to participation by Jamaicans in the marijuana trade, did not constitute fundamental error.

Reasonable-Doubt Standard

¶32 Murray also contends the prosecutor misrepresented the reasonable-doubt standard, constituting fundamental error. The prosecutor argued in his rebuttal closing:

> 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.

These remarks may have been an attempt to invite jurors to reexamine any doubts they might have had about the defendants' guilt. But when these words are boiled down to their essentials, what remains is an argument that a belief a defendant "might be guilty" constitutes belief in guilt beyond a reasonable doubt. This misrepresents the reasonable-doubt standard, under which a juror must be "firmly convinced of the defendant's guilt" to find the defendant guilty. *State v. Portillo*, 182 Ariz. 592, 596 (1995). And while the state, quoting *Donnelly*, 416 U.S. at 647, urges that we "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," it offers no less damaging interpretation.

¶33 We do not believe, however, that these erroneous remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Hughes*, 193 Ariz. 72, ¶ 26 (quoting *Donnelly*, 416 U.S. at 643). The prosecutor made other, proper arguments explaining

the reasonable-doubt standard, and more importantly, the court properly instructed the jury on the reasonable-doubt standard. The cases Murray cites do not present similar circumstances ruled to be fundamental error. In *State v. Corona*, 188 Ariz. 85, 89, 91 (App. 1997), the court noted the prosecutor's improper remark about the burden of proof to provide guidance for a possible retrial, not to support the reversal of the defendant's conviction, which was reversed on another ground. In *State v. Malone*, 245 Ariz. 103, ¶¶ 28-29 (App. 2018), *vacated*, 247 Ariz. 29 (2019), the court did not find fundamental error where the prosecutor grossly misstated the law about a central issue in the case; the court ruled the misstatement "cured" because the prosecutor later corrected it and the court issued a proper jury instruction on the issue. And in *State v. Johnson*, 173 Ariz. 274, 274-77 (1992), the trial court itself failed to instruct the jury on the reasonable-doubt standard after the close of evidence, save for an erroneous, off-the-cuff instruction.

¶34 In *State v. Acuna Valenzuela*, our supreme court concluded that the prosecutor's single, potentially burden-shifting statement, also offered in rebuttal argument, was insufficient to warrant reversal given that the court, the prosecutor and defense counsel had made multiple references to the State's burden and the jury had been properly instructed. 245 Ariz. 197, ¶ 91 (2018);[4] *cf. Jeffrey*, 203 Ariz. 111, ¶ 18 (juries presumed to follow instructions). Given that the single improper burden-of-proof argument here occurred alongside other, proper instruction and argument, we do not find a reasonable likelihood the argument could have affected the verdict in this case or otherwise deprived Murray of a fair trial.[5] We therefore do not find fundamental error.

¶35 Our dissenting colleague, however, contends we do not sufficiently address the foundational nature of this error, focusing only on insufficient prejudice. But prejudice is a crucial factor in any fundamental error analysis, *see Escalante*, 245 Ariz. 135, ¶ 21 ("If the defendant establishes fundamental error under prongs one or two, he must make a separate showing of prejudice . . . ."), and our colleague's concerns are overstated. For example, he asserts that "the evidence was far from overwhelming"

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[4]We note *Acuna Valunzuela* was decided eleven days after *Escalante*, upon which our dissenting colleague relies.

[5] In reaching this conclusion, we do not suggest that a proper reasonable-doubt instruction will always suffice to cure improper argument regarding the burden of proof.

because "the case against Murray turned largely on the credibility of [the victim's] testimony." But that only distracts from the true issues in the case, and ignores the substantial weight of the evidence having nothing to do with the victim's credibility, and the fact that every salient point he testified to, going to the elements of the offense, was well corroborated by other evidence. That corroboration included the neighbor's testimony about the raised voices and a fight at the victim's front door involving two men and the occupant of the apartment, the neighbor within a few minutes hearing a weapon's "chamber locking" and the sound of gunfire, the serious gunshot wound suffered by the victim, Murray and his codefendant fleeing the scene, the spent bullet casing being found immediately outside the victim's front door by police, and the gun used in the attack being surrendered by the codefendant.

¶36 The mere fact that the victim could be challenged on his immigration status, immunity agreement with the state, and his less than law-abiding history, had little impact on any of the essential elements upon which Murray was convicted; specifically, whether he "intentionally, knowingly, or recklessly" caused physical injury to the victim with a deadly weapon, or whether he intentionally placed him in "reasonable apprehension of imminent physical injury with a deadly weapon." *See* A.R.S. §§ 13-1203, 13-1204(A)(2). And it is notable that the victim substantially admitted his deficits and was not meaningfully impeached as being untruthful about any of the operative events surrounding the attack at his front door. Thus, we cannot agree with the dissent's assertion that the prosecutor's comment, which as the dissent concedes, only subtly departed from the court's instruction "struck at the core of the defense case" when that "core" relied on irrelevant misdirection.

¶37 Finally, while the dissent makes much of the fact that the prosecutor's misstatement occurred at the close of his rebuttal argument, contrary to our colleague's portrayal, it was not "the last word" the jury heard. In fact, immediately following closing arguments, the trial court admonished the jury to rely on the instructions previously given, and to review their written copies of those instructions during their deliberations. The proper reasonable-doubt instruction, not only given by the court but reiterated several times by both the prosecutor and defense counsel during their arguments, did rebut the misleading, but isolated, misstatement of the prosecutor at later points in time than its first reading, and very likely in the jury deliberation room, as expressly directed by the court. *See State v. Bush*, 244 Ariz. 575, ¶ 16 (2018) (there is a "well-established presumption

that the jurors followed the trial court's instructions").[6] Given all of these safeguards and the strength of the pertinent evidence, there is no reasonable probability the prosecutor's error could have affected the verdict. *See Escalante*, 245 Ariz. 135, ¶ 34.

¶38 Murray lastly argues that even if none of these alleged instances of misconduct individually amount to fundamental error, taken together they do. The few instances of impropriety here, however, involve imprecise statements that could have been easily remedied by a timely objection, not persistent and pervasive misconduct with indifference or intent to prejudice. Therefore, the conduct here, considered cumulatively, does not constitute fundamental error. *See Morris*, 215 Ariz. 324, ¶ 47.

Disposition

¶39 For all of the foregoing reasons, Murray's conviction and sentence are affirmed.

E C K E R S T R O M, Judge, concurring in part, dissenting in part:

¶40 In the last moments of his rebuttal summation, the prosecutor exhorted the jurors to convict Murray if they believed he "might be guilty." Worse, the prosecutor explained why, in the State of Arizona's view, this was a logical application of the reasonable-doubt standard: "You are a fair and impartial juror. If you are thinking that [he might be guilty] . . . , is it not proof that you have been persuaded by the evidence in the case beyond a reasonable doubt?"

¶41 My colleagues correctly conclude that this plainly misrepresented the law. However, I do not share the majority's confidence that this improper argument—offered by a prosecutor who marshals the

[6] The dissent effectively ignores this presumption, expressing skepticism jurors would trust their own deductions about the proper legal standard over the "solemn assertions of the state's legally trained representative." However, the jurors were given no such choice. Rather, they were instructed as to the proper standard by the court both orally and in writing, and that arguments of counsel are not evidence. Whatever the popular view of the prosecutor's role may have been eighty-four years ago, when *Berger*, upon which our dissenting colleague relies, was decided, nothing in the record here suggests that the jury ignored the court's instructions, notwithstanding "the stature of the prosecutor as explicator of the law."

presumed integrity of the state in describing the law—had no effect on the jury's deliberations.

¶42 Murray's trial counsel failed to object. We therefore must ask whether the prosecutor's uncorrected comments constituted fundamental error. We characterize error as fundamental only if it "goes to the foundation of the defendant's case, takes away a right essential to the defense, or is of such magnitude that it denied the defendant a fair trial." *Escalante*, 245 Ariz. 135, ¶ 1. If we conclude this first condition has been met, the defendant is entitled to relief if, in the absence of that error, "a reasonable jury . . . *could have* reached a different [verdict]." *Id.* ¶ 29 (omission, emphasis, and alteration in *Escalante*) (quoting *Henderson,* 210 Ariz. 561, ¶ 27).

¶43 An error "goes to the foundation of a case" if it (1) "relieves the prosecution of its burden to prove a crime's elements," (2) "directly impacts" the resolution of a core factual question, or (3) "deprives the defendant of constitutionally guaranteed procedures." *Id.* ¶ 18. Although we may find foundational error under any one of those circumstances, the improper argument here accomplished all three.

¶44 By exhorting the jurors to convict if they believed the defendant "might be guilty," the prosecutor sought to relieve the state of its elevated burden of proof as to all elements of the offenses charged. That argument directly clouded the jury's assessment of the core factual question posed by the case: how much confidence need the jury have in the credibility of the lone percipient witness to the altercation? Finally, the prosecutor undermined the defendant's elemental right to a constitutionally guaranteed procedure—a trial in compliance with the Sixth Amendment to the United States Constitution. *Sullivan v. Louisiana*, 508 U.S. 275, 278-82 (1993) (describing the standard of proof beyond a reasonable doubt as foundational to a defendant's Sixth Amendment right to a jury trial). Because the reasonable-doubt standard is the lens through which the jury must consider each item of evidence presented, a distortion of that standard can pervasively infect the fairness of a criminal trial.

¶45 The majority neither addresses nor disputes the foundational nature of the error. Rather, it holds that the error was not sufficiently prejudicial to entitle Murray to relief. It reasons that the "improper burden-of-proof argument here occurred alongside other, proper instruction and argument"—and therefore there was no "reasonable likelihood" that the error could have affected the verdict. That conclusory analysis fails to consider the impact of the error on the parties' respective

theories of the case, the timing of the improper argument, and the stature of a prosecutor as explicator of the law. It even fails to specifically consider how effectively the proper instruction would have remedied the state's later improper argument in light of the specific features of that argument. Given these oversights, I fear my colleagues have incompletely—and therefore incorrectly—evaluated the potential impact of the error on the jury's deliberations.

¶46 Our supreme court has recently clarified the appropriate prejudice analysis to be applied when, as here, the underlying error is foundational. *Escalante*, 245 Ariz. 135, ¶ 1 (identifying purpose of opinion to clarify "conflicting decisions" about what fundamental-error showing entails). That analysis does not require that the defendant show a "likelihood" that the error affected the case.[7] Rather, the defendant need only demonstrate that, but for the foundational error, the jury "could have reached a different result." *Id.* ¶¶ 29-30, 32 (expressly rejecting state's argument that defendant must show jury "*would have* reached a different result").

¶47 *Escalante* also clarified the factors to be considered when determining whether foundational error is sufficiently prejudicial to entitle a defendant to relief. It instructs that "an appellate court should examine *the entire record,* including the parties' theories and arguments as well as the trial evidence." *Id.* ¶ 31 (emphasis added). I submit that if we guide our analysis by that standard, we must conclude a reasonable jury could have "plausibly and intelligently" reached a different result. *Id.*

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[7]Citing *State v. Hughes*, the majority has imported the "reasonable likelihood" standard used to determine whether a defendant has a claim of prosecutorial misconduct in the first instance. 193 Ariz. 72, ¶¶ 26, 32 (defining prosecutorial misconduct as behavior likely depriving defendant of "due process" and a "fair trial" but ultimately evaluating prejudice under traditional harmless-error standard for preserved error); *see also Acuna Valenzuela*, 245 Ariz. 197, ¶ 66 (same). Although *Hughes* and its progeny suggest, without analysis, that we apply a uniquely elevated prejudice standard for evaluating prosecutorial misconduct claims generally, few prosecutorial misconduct errors are foundational. At the same time, the supreme court has exhaustively articulated a more specific prejudice standard for foundational errors raised for the first time on appeal. *See Escalante*, 245 Ariz. 135, ¶ 29. That more specific standard remains the correct one here, where the misconduct is not routine but foundational.

¶48 A review of the trial record and arguments of counsel demonstrate that the evidence of guilt—while sufficient to survive a judgement of acquittal—was far from overwhelming. The undisputed evidence demonstrates that the alleged victim, O.C., suffered a non-lethal gunshot wound to his thigh; that the injury occurred while the appellant Easton Murray and his brother, Claudius, were present either within or outside O.C.'s apartment; and that Claudius departed with the .22-caliber rifle that had discharged the gunshot.[8] It was also undisputed that, before the incident, O.C. and the Murray brothers had been friends and that Claudius had previously allowed O.C. to lodge with him for several months. Finally, law enforcement officers who responded to the shooting found, hidden in O.C.'s apartment, an eight-pound bale of marijuana with a potential street value of $4,000 together with paraphernalia associated with drug trafficking, including scales and shipping materials.

¶49 O.C. was the lone trial witness to the details of the altercation. Only O.C. could identify who was the aggressor, whether the shooting was accidental, whether it occurred in self-defense, and what role, if any, the appellant played in causing O.C.'s wound as distinguished from his brother. Thus, the case against Murray turned largely on the credibility of O.C.'s testimony that Claudius had intentionally shot O.C., with Murray's encouragement, in the leg.

¶50 The state provided O.C. immunity from prosecution on the potential drug-trafficking charges in return for his testimony against the Murray brothers. O.C.'s resulting status as a "victim" also allowed him to defer any immigration consequences for a year. Although one might be skeptical of any person's self-exonerating claims, when incentivized by immunity on a drug-trafficking charge that carried up to twelve years in prison, some specific features of O.C.'s testimony might also have given a reasonable juror pause. Under oath, O.C. maintained that, notwithstanding the presence of a bale of marijuana and trafficking paraphernalia found hidden in his home, he had no involvement in drug trafficking at the time

[8] The majority correctly identifies these undisputed evidentiary features of the case and suggests that they are dispositive of guilt. It also places emphasis on the fact that the Murray brothers left the scene before police arrived. But, absent O.C.'s testimony, these facts fall far short of demonstrating that Easton Murray was the aggressor or that he had any intention to discharge the firearm—facts crucial to find him guilty of aggravated assault. Indeed, the evidence suggests that Murray never touched the rifle, a fact that O.C. conceded.

of the incident. The state's lead detective conceded that O.C.'s claim to innocence on the drug charges, anchored in an effort to deflect blame onto the Murrays, defied "common sense." And, in contradiction of his prior statement to the police, O.C. claimed for the first time at trial that Murray had shocked him with a taser during the encounter—a unique and painful occurrence no truthful witness would omit when offering pretrial descriptions of the event.

¶51 Some of O.C.'s testimony also suggested that the circumstances of the shooting could have been accidental. Defense counsel elicited that O.C. had initially told the police he had been shot without motive. And, O.C. conceded that, during the confusion of the struggle, he may have been holding the rifle when it discharged.

¶52 Murray presented no testimony or evidence of his own. Rather, he focused exclusively on challenging O.C.'s credibility. As the trial record shows, that challenge found concrete support both in the identity of O.C. as a highly motivated, self-serving witness and in the sometimes improbable contents of his testimony. In short, Murray's entire theory of the case rested on the premise that O.C. could not be believed beyond a reasonable doubt.

¶53 In this context, the prosecutor's improper argument, which equated "might be guilty" with proof beyond a reasonable doubt, struck directly at the jugular of the defense case. That the prosecutor's improper remarks were protracted—and that he made them as his last substantive comment before submitting the case to the jury—belies the state's current claim that the argument had no effect on the jury. Rather, he delivered it, and timed it, to have maximum impact. That this experienced prosecutor misled the jury on the burden of proof is itself instructive. It suggests that he feared the jury might acquit if he did not cloud the appropriate legal standard.

¶54 Although the credibility of the state's primary witness was tenuous and the prosecutor's improper argument appears calculated, my colleagues nonetheless conclude that any adverse impact was cured because the jury had been previously instructed on the correct reasonable-doubt standard before closing arguments. The presence of proper instruction, while an important factor in evaluating the impact of improper argument, *see, e.g.*, *Jeffrey*, 203 Ariz. 111, ¶ 18 (jurors presumed to follow instructions), cannot be the lone consideration. As discussed above, the supreme court has instructed us to consider the practical effect of the error in the context of the entire record. *Escalante*, 245 Ariz. 135, ¶ 31. In

that context, I cannot agree that the instruction would have reliably immunized the improper remarks from having an impact on the jury's deliberations.

¶55 First, the prosecutor distorted the burden of proof during his rebuttal summation—long after the correct instruction had been given and when defense counsel had no opportunity to answer that argument during his own summation. And, because defense counsel failed to object, the jury received neither contemporaneous nor subsequent instruction that the prosecutor's argument was legally flawed. As a practical matter, then, the jurors' thought processes were exposed to the remarks immediately before deliberation without any contemporaneous or subsequent alert that, if they accepted the prosecutor's reasoning, they would violate the defendant's right to a fair trial.

¶56 Further, the contents of the prosecutor's argument reduced the likelihood that previous instruction would remedy the error. Indeed, the prosecutor misleadingly anchored his argument in some of the language found therein.[9] After the court properly instructed the jurors that

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[9]That instruction, mandated by our supreme court in *State v. Portillo*, 182 Ariz. 592 (1995), reads:

> The state has the burden of proving the defendant guilty beyond a reasonable doubt. This means the state must prove each element of each charge beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the state's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> 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 crime charged, you must find him

they could convict only if they were "firmly convinced of the defendant's guilt," the prosecutor argued, in a rhetorical slight of hand, that the jurors could convict if they were "firmly convinced" that Murray "might be guilty." Of course, an especially alert juror could have deduced that the state's "might be" standard would logically conflict with the first paragraph of the *Portillo* instruction. But I am skeptical most jurors would trust their own deductions about a legal standard above the solemn assertions of the state's legally trained representative in the courtroom—assertions that only subtly departed from the language of the instruction.

¶57 As the United States Supreme Court has observed, a criminal prosecutor is perceived by jurors as a neutral "servant of the law" who has a "duty to refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States,* 295 U.S. 78, 88 (1935). For this reason,

> [i]t is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest on the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions [and] insinuations . . . are apt to carry much weight against the accused when they should properly carry none.

Id. In placing such confidence in the curative effects of proper instruction, my colleagues have overlooked both the elevated stature of the prosecutor on questions of law and the prosecutor's misleading use of language found in the proper instruction.

¶58 When a prosecutor's summation has improperly described the reasonable-doubt standard, courts have not analyzed prejudice with such exclusive focus on the remedial effects of a non-contemporaneous instruction. Neither party has cited, nor have we found, any published Arizona case squarely addressing prejudice in the context of a prosecutor's improper distortion of the reasonable-doubt standard.[10] However, several

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> 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.

[10] The majority cites a case addressing the analytically distinct question of burden shifting. *See Acuna Valenzuela,* 245 Ariz. 197, ¶¶ 87-91

other jurisdictions have concluded such error requires reversal when the evidence of guilt is not overwhelming and the error is not spontaneously corrected.

¶59 Under circumstances indistinguishable from those here, the California Supreme Court held that the prosecutor's improper description of the reasonable-doubt standard, given as "the last word" during rebuttal, required reversal when the defendant failed to object, and the evidence presented against the defendant "was far from definitive" and "depended almost entirely" on the victim's credibility. *People v. Centeno,* 338 P.3d 938, 947-52 (Cal. 2014); *see also State v. Schnabel,* 279 P.3d 1237, 1244, 1258 (Haw. 2012) (reversible error when no contemporaneous correction occurred and evidence against defendant "not so overwhelming as to 'outweigh' the effect of the misconduct"); *Rheubottom v. State*, 637 A.2d 501, 505-06 (Md. App. 1994) (same). And, in *State v. Johnson*, 243 P.3d 936, 940-41 (Wash. App. 2010), the court found reversible error notwithstanding a contemporaneous corrective instruction when, as here, the prosecutor's mischaracterization was "flagrant and ill-intentioned" and the evidence of guilt was "conflicting." Although that court acknowledged the general salutary effect of a curative instruction, it nonetheless found prejudice because the improper argument "reduced the State's burden," which undermined the "bedrock upon which [our] criminal justice system stands." *Id*. (final alteration in *Bennett*) (quoting *State v. Bennett*, 165 P.3d 1241, 1248 (2007)).

¶60 Our supreme court's reasoning in *Acuna Valenzuela* is readily distinguishable. 245 Ariz. 197, ¶¶ 87-91. There, the defendant alleged that a segment of the prosecutor's summation had suggested that the defendant bore some burden of proof. *Id.* ¶ 87. Recognizing that portions of the argument were proper, the court stopped short of finding error, much less foundational error, concluding only that the prosecutor's argument came "close to attempting to shift the burden of proof." *Id.* ¶ 90. Thus, the court held only that subtle, marginal errors in burden shifting do not require reversal when the jury receives other proper arguments and instruction. *Id.* ¶¶ 87-91. The court did not address the circumstance we encounter here—a prosecutor's protracted and unambiguous distortion of the very standard

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(addressing competing considerations in evaluating burden-shifting claim). Determining when a prosecutor's challenge to a defendant's factual case rises to the level of burden shifting is a more commonplace and nuanced legal problem than the rare situation we address here—a plain distortion of the reasonable-doubt standard.

by which the jury must assess each fact in a close case.[11] Nor does that case purport to address whether proper instruction is an effective remedy when the prosecutor misleadingly anchors his improper argument in the language of the instruction itself. Given that the supreme court has instructed us to consider "the entire record" in evaluating prejudice arising from foundational error, these markedly differing facts render *Acuna Valenzuela* a poor benchmark for resolving the case before us.

¶61 In conclusion, the Arizona Supreme Court has recently clarified the legal standards relevant to evaluating whether foundational error entitles a defendant to relief. In so doing, it held that sufficient prejudice has been shown if such error "could have" affected the verdict. It also held that "the entire record" should be evaluated to consider that question. Here, such an evaluation demonstrates that: (1) the state had a strong case that Murray "might have" committed aggravated assault but a more tenuous case when evaluated by the standard of proof beyond a reasonable doubt; (2) the prosecutor's improper argument undermining that standard was protracted and timed to have maximum impact on the jury; (3) the argument struck at the core of the defense case; (4) the argument misleadingly seized on language found in the proper reasonable-doubt instruction; and (5) the argument was neither contemporaneously nor subsequently corrected by objection or re-instruction. For these reasons, I must respectfully dissent from the majority's conclusion that the prosecutor's remarks could have had no effect on the jury's deliberations.[12]

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[11] The majority opinion notes that proper instruction would not always cure prejudice arising from error of this variety. But I fear its reasoning suggests otherwise. Here, the argument struck at the foundation of a defendant's right to a fair trial, it misleadingly purported to conform to the proper standard, and it pivotally attacked the core of the defense case—all when the state's case relied on a witness of debatable credibility. If even this quantum of prejudicial impact is deemed cured by proper instruction, I cannot conjure what circumstances would, in the majority's view, entitle a defendant to relief. Given that all Arizona trial juries are instructed on the proper reasonable-doubt standard, I fear the majority opinion unwittingly lifts all jurisprudential constraints on the uniquely malignant species of improper argument displayed here.

[12] Even if analyzed by the prejudice standard chosen by the majority, these factors demonstrate that there was a reasonable likelihood that the improper exhortation "could have affected" the jury's deliberations. *Escalante*, 245 Ariz. 135, ¶ 30.

I would remand for a new trial free of that error. I join with the majority opinion on all remaining issues.