IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOVON LUIS MANKEL,
Appellant.

No. 2 CA-CR 2014-0414
Filed May 17, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20123739001
The Honorable Javier Chon-Lopez, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By David A. Sullivan, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Frank P. Leto, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 After a jury trial, Jovon Mankel was convicted of first-degree murder, discharging a firearm at a non-residential structure, and aggravated assault with a deadly weapon or dangerous instrument, and sentenced to natural life. He argues (1) the trial court erred by precluding evidence that the victim's girlfriend was pregnant, (2) the court did not properly instruct the jury on the burden of proof for his defense of self-defense, and (3) the state's conduct during his testimony and its closing argument denied him a fair trial. We conclude the trial court did not err and affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Haverstick*, 234 Ariz. 161, ¶ 2, 318 P.3d 877, 880 (App. 2014). In September 2012, Mankel agreed to sell oxycodone pills to the victim, J.G. Nothing in the record indicates Mankel or the victim had a prescription for the oxycodone. They agreed to conduct the drug sale in a restaurant parking lot where Mankel was sitting with his girlfriend in her Chrysler. J.G. got into the back seat of the car on the driver's side and proceeded to rob Mankel and his girlfriend at gunpoint. J.G. quickly left the Chrysler, running back to the Oldsmobile he had arrived in.

¶3 Mankel grabbed a gun from the driver's side door and exited. He pointed his gun at J.G. and fired about five shots, three of which hit J.G. An autopsy revealed one bullet had hit J.G. in the back and exited through his abdomen, causing him to bleed to death. Mankel fled and was apprehended several days later.

¶4 Mankel testified that after J.G. had exited the Chrysler, he had turned back around and pointed his gun at Mankel, at which

point Mankel shot him in self-defense. A.K., an unrelated witness, testified he had been sitting in his own car waiting for someone in the restaurant when he saw J.G. running toward him after getting out of the Chrysler. He saw Mankel shoot J.G. in the back while J.G. was running away. He testified J.G. had not turned around. J.G.'s girlfriend S.A., who was in the Oldsmobile throughout the incident, also testified she had seen Mankel shoot J.G. in the back and never saw J.G. turn around. The jury rejected Mankel's self-defense justification and found him guilty on all counts. He was sentenced as described above and now appeals. Sections 13-4031 and 13-4033(A)(1), A.R.S., furnish jurisdiction.

Exclusion of Evidence

¶5 Mankel argues the trial court erred by granting the state's motion to preclude evidence that the victim's girlfriend was pregnant at the time of the incident, pursuant to Rules 401 and 403, Ariz. R. Evid. We will not disturb a court's evidentiary rulings absent a clear abuse of discretion. *State v. Bocharski*, 200 Ariz. 50, ¶ 21, 22 P.3d 43, 48 (2001).

¶6 Relevant evidence—evidence with any tendency to make a fact of consequence more or less probable than it would be otherwise—is admissible except as otherwise provided by law or rule. *See* Ariz. R. Evid. 401, 402. Yet the trial court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Ariz. R. Evid. 403. "'Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror.'" *State v. Ortiz*, 238 Ariz. 329, ¶ 9, 360 P.3d 125, 130 (App. 2015), *quoting State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997).

¶7 Mankel argued below that evidence of S.A.'s pregnancy was relevant to "tell the whole story" and to show "just how dangerous" the victim and his girlfriend were, as well as their desperation to obtain drugs. The state argued the evidence was irrelevant because Mankel's self-defense theory turned on what Mankel had known or believed at the time he shot the victim. Further, there was no indication that Mankel had known the

victim's girlfriend was even present in the Oldsmobile during the shooting, much less that he had known she was pregnant. The state also argued evidence of S.A.'s pregnancy was unfairly prejudicial because other evidence proffered to impeach her perception of the shooting would show S.A. was abusing prescription pain medication on the date of the incident. "[The pregnancy is] just there to paint her in a bad light and make the jury hate her," the state contended. The court concluded that evidence of S.A.'s pregnancy was irrelevant, or to the extent it had any relevance, its probative value was substantially outweighed by the danger of unfair prejudice.

¶8 Mankel contends the fact that S.A. was pregnant had some tendency to make it more probable that J.G. had turned around after getting out of the Chrysler, because he would have wanted to protect S.A.'s unborn child. Yet Mankel was free to argue that J.G. would have had an incentive to turn around in order to protect his own life as well as S.A.'s life. *Cf. State v. Walker*, 138 Ariz. 491, 495, 675 P.2d 1310, 1314 (1984) (no need to admit gruesome evidence to further prove unchallenged point). Whatever additional incentive J.G. might have had to turn around in order to protect S.A.'s unborn child, beyond his incentive to protect his own and S.A.'s lives, was arguably cumulative. *Cf. State v. Fernane*, 185 Ariz. 222, 227, 914 P.2d 1314, 1319 (App. 1995) (admitting prejudicial, inflammatory, duplicative evidence with only marginal relevance was error).

¶9 Assuming for the sake of argument that S.A.'s pregnancy had some tendency to make it more likely that J.G. turned around, nevertheless the trial court reasonably could have concluded the probative value was substantially outweighed by the risk of unfair prejudice. Rule 403; *see also State v. Cooperman*, 232 Ariz. 347, ¶ 17, 306 P.3d 4, 8 (2013) (trial court has "considerable discretion" in Rule 403 balancing). As the state predicted at the hearing on the motion in limine, the jury heard evidence that S.A. had been abusing prescription painkillers on the date of the shooting. The court reasonably could have concluded evidence that S.A. was pregnant while abusing drugs would unduly inflame the jury and improperly suggest decision on the basis of emotion or

horror. *Ortiz*, 238 Ariz. 329, ¶ 9, 360 P.3d at 130; *cf. State v. Davolt*, 207 Ariz. 191, ¶ 63, 84 P.3d 456, 474 (2004) (admitting minimally probative but highly prejudicial photographs of gruesome crime scene depicting victims' charred bodies was abuse of discretion). The court did not clearly abuse its discretion.

Jury Instructions

¶10 The written jury instructions in this case provided, in relevant part, "The state has the burden of proving beyond a reasonable doubt that the defendant did not act [in self-defense]. If the state fails to carry this burden, then you must find the defendant not guilty of the charges." When reading this instruction to the jury before deliberations, however, the court neglected to read aloud the phrase "beyond a reasonable doubt." Mankel argues for the first time on appeal that this omission was error. Because he did not object below, it is his burden to show an error both fundamental and prejudicial. *See generally State v. Henderson*, 210 Ariz. 561, ¶ 19-20, 115 P.3d 601, 607-08 (2005). We review de novo whether jury instructions accurately state the law. *State v. Juarez-Orci*, 236 Ariz. 520, ¶ 12, 342 P.3d 856, 860 (App. 2015). There is no requirement that instructions be "'faultless,'" so long as, when taken as a whole, they adequately reflect the law and are not misleading. *See State v. Rutledge*, 197 Ariz. 389, ¶ 15, 4 P.3d 444, 448 (App. 2000), *quoting State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996).

¶11 Mankel concedes that the written instructions provided to the jurors were legally correct. He nevertheless argues "[a] written instruction on burden of proof is not . . . sufficient to satisfy a defendant's right to fair trial when the oral instruction given to the jury omits the element of 'beyond a reasonable doubt.'" He relies on *State v. Johnson*, 173 Ariz. 274, 842 P.2d 1287 (1992) in support of his argument. In *Johnson*, our supreme court reversed because the trial court affirmatively gave a "clearly wrong" oral jury instruction that improperly shifted the burden of proof to the defendant. *See id.* at 276-77, 842 P.2d at 1289-90. In this case, the trial court omitted a few words in an accurate and appropriate written self-defense instruction, and the defendant did not object to the omission. *Cf. State v. Gallegos*, 178 Ariz. 1, 10-11, 870 P.2d 1097, 1106-07 (1994) (omission of "attempted" from oral instructions, although not from

written instructions, not reversible fundamental error). The jury took a copy of the correct written instruction with them to the deliberation room. *Cf. State v. Kinkade*, 140 Ariz. 91, 94-95, 680 P.2d 801, 804-05 (1984) (no fundamental error where, *inter alia*, jury took copy of correct reasonable doubt instruction to jury room). The attorneys correctly argued the burden of proof for self-defense as stated in the written instructions, and nothing suggests that the jury was actually confused about the burden of proof. *See Gallegos*, 178 Ariz. at 10-11, 870 P.2d at 1106-07 (mere speculation insufficient to establish actual jury confusion). Mankel has not met his burden of showing any error was both fundamental and prejudicial. *Kinkade*, 140 Ariz. at 94-95, 680 P.2d at 804-05; *accord State v. Bass*, 198 Ariz. 571, ¶¶ 15-18 & n.2, 12 P.3d 796, 801-02 & n.2 (2000).

Improper Vouching

¶12 Mankel contends he was denied a fair trial because the state improperly vouched for witnesses on two occasions: first, when the prosecutor and a detective allegedly rolled their eyes during his testimony, and second, when the prosecutor argued in closing that Mankel had lied on the stand and A.K. had told the truth. Because he neither objected nor moved for a mistrial on these grounds below, we review for fundamental prejudicial error. *State v. Forde*, 233 Ariz. 543, ¶ 69, 315 P.3d 1200, 1219 (2014); *State v. Robinson*, 127 Ariz. 324, 329, 620 P.2d 703, 708 (App. 1980).

Alleged Eye-Rolling

¶13 On the final day of trial, and outside of the presence of the jury, defense counsel told the court that three individuals from her office who had been present when Mankel testified had told her they saw the prosecutor and a detective roll their eyes during Mankel's testimony. Defense counsel argued the alleged eye-rolling was "a form of vouching," even if unintentional, and asked "that it not happen during closing arguments." Defense counsel did not make an offer of proof or attempt to call any of the three alleged eyewitnesses to the incident, but neither did the state deny that the eye-rolling had occurred. No party requested an inquiry into whether any juror had observed any unusual conduct by the prosecutor or detective, including eye-rolling. The judge said he

had not seen any eye-rolling, but added he was sure the prosecutor and detective would agree that such behavior would be inappropriate. No further discussion of the matter took place.

¶14 The state argues as a threshold matter that no evidence in the record establishes that the eye-rolling actually occurred because the three alleged eyewitnesses did not testify in an offer of proof. Yet even accepting, for the sake of argument, Mankel's position that the state's silence following the accusation that eye-rolling occurred is sufficient to establish that it did occur, we cannot accept his characterization of the eye-rolling as reversible prosecutorial vouching.

¶15 In *State v. Martinez*, the record unambiguously established that the prosecutor had rolled her eyes and made disapproving facial expressions at least twice during witness testimony. *See* 230 Ariz. 208, ¶¶ 26-28, 30, 282 P.3d 409, 415-16 (2012). Although our supreme court stressed that such behavior is "highly inappropriate" and contrary to a prosecutor's oath of admission to the bar, it nevertheless determined the conduct did not constitute vouching, nor did it improperly suggest that information outside the record supported the witnesses' testimony. *Id.* ¶¶ 29-30, 33. Even though at least one juror actually observed the improper eye-rolling and facial expressions in *Martinez*, the court ruled the defendant had not shown prejudice. *Id.* ¶ 30. In this case, the trial court did not confirm that eye-rolling occurred, and there is nothing in the record suggesting any juror observed it if it did. Even assuming the prosecutor or the detective did roll their eyes, Mankel has not met his burden of showing prejudice, like the defendant in *Martinez*. *See id.* ¶¶ 29-32.

Prosecutor's Closing Argument

¶16 Mankel also argues the prosecutor's repeated assertions during closing argument that Mankel had lied on the witness stand and that A.K. had testified truthfully, constituted improper vouching. "In order to reverse a conviction based on improper comments from the prosecutor, the comments must 'be so egregious as to deprive the defendant of a fair trial and render the resulting conviction a denial of due process.'" *Haverstick*, 234 Ariz. 161, ¶ 6,

318 P.3d at 880, *quoting State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991). Improper prosecutorial vouching occurs either when the state places the government's prestige behind its witness, or when the prosecutor suggests that information not in the record supports the testimony of its witness. *Id.*; *see, e.g.*, *Forde*, 233 Ariz. 543, ¶¶ 71-72, 315 P.3d at 1220, *citing State v. Lamar*, 205 Ariz. 431, ¶ 54, 72 P.3d 831, 841 (2003) (prosecutor conveying his personal belief that witness testified honestly constituted improper vouching). Yet when the prosecutor clarifies that it is for the jury to assess witness credibility, and her characterization of witnesses' testimony as truthful or untruthful is sufficiently linked to the evidence, no improper vouching occurs. *Haverstick*, 234 Ariz. 161, ¶ 6, 318 P.3d at 880-81; *see State v. Moore*, 112 Ariz. 271, 275, 540 P.2d 1252, 1256 (1975) (prosecutor's statement accusing defense witnesses of lying invited reasonable inference from evidence and did not call jury's attention to improper matters); *State v. Corona*, 188 Ariz. 85, 91, 932 P.2d 1356, 1362 (App. 1997) (prosecutor's assertion that state witnesses testified truthfully sufficiently linked to evidence).

¶17 The following excerpt typifies the broader theme of the state's closing argument and rebuttal in the present case:

> You're the people that decide credibility . . . . If you believe the things that [A.K.] told you he saw on the stand[,] the defendant is guilty.
>
> If you believe the defendant[,] he's innocent. But the problem is that there's so much physical evidence that shows the defendant has to be lying. He cannot be telling the truth. It is scientifically impossible for him to be telling the truth at this point.
>
> . . . .
>
> . . . He is lying and the reason he is lying is because he was not justified. He knows he was not justified in killing this guy.

¶18 Although the prosecutor was forceful in inviting skepticism of Mankel's testimony and repeatedly argued the evidence showed Mankel was lying, we must view these comments in the context of her entire argument. *See Haverstick*, 234 Ariz. 161, ¶ 7, 318 P.3d at 882. The prosecutor said at least three times in rebuttal that witness credibility was a matter for the jury to decide. *Cf. id.* ¶ 6.

¶19 We also cannot accept Mankel's contention that "there was no actual evidence [Mankel] was lying or [A.K.] was telling the truth other than the lack of consistency in their testimony." The state's argument that the jury should find Mankel was lying and A.K. was telling the truth was sufficiently linked to the evidence at trial. *Cf. Corona*, 188 Ariz. at 91, 932 P.2d at 1362. Although there was no direct evidence Mankel was lying and A.K. was not, there was considerable circumstantial evidence suggesting this was the case. *See State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993) ("Arizona law makes no distinction between circumstantial and direct evidence."). Mankel had a strong motive to testify that J.G. had turned around, because without that fact, his self-defense theory was severely weakened. A.K., who testified J.G. had never turned around, had no motive or interest in the outcome of the case, and thus, arguably no incentive to fabricate. Other eyewitnesses such as S.A. testified that they had never seen J.G. turn around. The autopsy established that J.G. had been shot in the back. The state also presented a detailed ballistics reconstruction based on the physical evidence at the scene that concluded J.G. must have been shot in the back after he had already fallen to the ground. This evidence was sufficient to permit an argument that the jury should conclude Mankel did not testify truthfully but A.K. did.

¶20 Mankel's reliance on *State v. Albino*, 97 A.3d 478 (Conn. 2014) for a contrary conclusion is misplaced. In *Albino*, the prosecutor said in closing argument that the state had not promised anything to its jailhouse informant, adding, "he made that clear to you [when he testified], and *we make it clear to the jury*." *Id.* at 490. The court held the italicized statement was improper because through it, "the prosecutor effectively testified to the state's lack of any promises" to the witness. *Id.*; *accord Haverstick*, 234 Ariz. 161,

¶ 6, 318 P.3d at 880 (impermissible prosecutorial vouching includes prosecutor's suggestion that information not presented to jury supports witness's testimony). In the present case, however, the prosecutor did not take the role of a witness and assert personal knowledge of facts in issue, but merely invited a reasonable inference from the facts in the record—namely, that Mankel was lying inasmuch as his testimony conflicted with that of other witnesses and the physical evidence. *Cf. Haverstick*, 234 Ariz. 161, ¶ 7, 318 P.3d at 882 (in context, prosecutor's argument that jury should find witness credible after examining evidence and reaching their own conclusions did not amount to impermissible vouching).

¶21 Finally, we note that the trial court instructed the jurors that the lawyers' comments were not evidence, and that they should consider witnesses' motives, biases, and prejudices in reaching their verdicts. Even if the closing argument could be categorized as improper prosecutorial vouching, these instructions obviate Mankel's claim of prejudicial, fundamental error. *See State v. Payne*, 233 Ariz. 484, ¶¶ 107-09, 113, 314 P.3d 1239, 1266-67 (2013); *State v. Lamar*, 205 Ariz. 431, ¶ 54, 72 P.3d 831, 841-42 (2003); *Robinson*, 127 Ariz. at 329, 620 P.2d at 708. Mankel has not met his burden of showing prejudice. *See Haverstick*, 234 Ariz. 161, ¶ 8, 318 P.3d at 882.

Disposition

¶22 We affirm Mankel's convictions and sentences.