IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DEWEY RAY FREEMAN,
Appellant.

No. 2 CA-CR 2015-0217
Filed May 31, 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NOT FOR PUBLICATION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. CR20150087001
The Honorable Scott Rash, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Michael J. Miller, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 After a jury trial, appellant Dewey Ray Freeman was convicted of aggravated assault causing serious physical injury and aggravated assault with a deadly weapon. On appeal, he claims the state impermissibly shifted the burden of proof and committed prosecutorial misconduct when it argued the jury could consider his failure to present the testimony of his girlfriend to corroborate his justification defenses. For the reasons explained below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming Freeman's convictions and sentences. *See State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). In December 2014, several acquaintances gathered at a Tucson home where E.S. and the victim, S.M., lived. Freeman was present with C.C., his girlfriend of at least ten years. Everyone drank heavily at the gathering and was intoxicated.

¶3 There is no dispute Freeman stabbed S.M. in the left chest during the gathering, causing life-threatening injury, but the parties dispute the events leading up to the stabbing. According to S.M., Freeman stabbed him as he struggled to prevent Freeman from attacking T.G., who had been sitting between C.C.'s legs while she stroked his beard. While S.M. struggled with Freeman, C.C. came from behind and hit him in the back of the head just before Freeman stabbed him. Freeman attacked S.M. again while he was waiting for help to arrive, causing two lacerations on his wrists.

¶4 Freeman, however, claimed he had tried to defend C.C. after S.M. slammed C.C.'s hand on the concrete, and had defended himself with the knife after S.M. punched him in the head. During

closing argument, Freeman's counsel suggested that there had been no continuing confrontation and that the wounds on S.M.'s wrists occurred as the two men struggled for the knife.

¶5 Freeman was charged with aggravated assault and aggravated assault with a deadly weapon. At trial, he raised justification defenses, claiming self-defense and defense of a third party, C.C. *See* A.R.S. §§ 13-404 through 13-406. Although Freeman did not testify, a video of his in-custody interview was played and admitted into evidence. S.M. was the only testifying witness who personally saw the assault.

¶6 During rebuttal closing argument, the prosecutor suggested C.C.'s hand might not have been injured before the stabbing, and then said:

> Now, the State has the burden beyond a reasonable doubt here, not just to prove the elements of aggravated assault, but also beyond a reasonable doubt to disprove that it was self-defense. The State has the burden every time. It doesn't shift to the Defendant, but, you know, when the Defendant and his attorney -- through his attorney, they can just sit there and do absolutely nothing.
>
> They don't have to make an opening statement; they don't have to make a closing; don't have to question witnesses, cross-examine. They can do nothing, and the law says that's okay because it's all on the State.
>
> But maybe you're sitting there wondering, why didn't they bring [C.C.] in? You can consider that as well. Maybe [C.C.] -- and again they don't have to --

¶7 Freeman's attorney interrupted the prosecutor's argument and asked to approach the bench, which request the court denied. The court "noted" Freeman's objection and told the prosecutor to proceed. Freeman's counsel added, "[a]gainst the instructions" before the prosecutor reiterated the burden of proof and argued: "Maybe you wonder why didn't she come in and explain what happened. That's something you folks certainly can consider."

¶8 The jury found Freeman guilty on both counts, and found both offenses dangerous in nature. The court sentenced Freeman to concurrent 7.5-year prison terms, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶9 On appeal, Freeman contends the prosecutor's comments about C.C. not testifying improperly shifted the burden of proof in violation of his due process rights. He also claims the argument constituted prosecutorial misconduct because C.C.'s availability to testify had not been established in the trial record. We review Freeman's burden shifting argument for harmless error. *See State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005) (harmless error standard applies when defendant objects at trial preserving issue for appeal).[1] However, because, as he concedes, Freeman failed to allege prosecutorial misconduct at trial, we review that issue only for fundamental, prejudicial error. *See id.* ¶¶ 19-20.[2]

---

[1]Because the trial court cut off Freeman's objection, we treat the objection as adequately preserved. *But see State v. Rutledge*, 205 Ariz. 7, ¶¶ 27-30, 66 P.3d 50, 55-56 (2003) ("shifting the burden" not adequate to preserve claim of prosecutorial misconduct when state argued jury should consider defendant's unwillingness to provide names of alleged alibi witnesses).

[2]Fundamental error goes "'to the foundation of the case, [is] error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly

¶10 Ordinarily, "[w]hen an objection [has been] made, we review a trial court's ruling on the scope of closing argument for abuse of discretion." *State v. Pandeli*, 215 Ariz. 514, ¶ 30, 161 P.3d 557, 568 (2007). But we review "constitutional issues and purely legal issues de novo." *State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

¶11 Argument concerning a defendant's failure to produce evidence does not necessarily shift the burden of proof. *See State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987); *State v. Sarullo*, 219 Ariz. 431, ¶ 24, 199 P.3d 686, 692 (App. 2008). Argument based on the failure to produce potentially exculpatory evidence is permissible provided it does not "call attention to the defendant's own failure to testify." *State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985). In *Fuller*, our supreme court concluded that the prosecutor's rebuttal argument, including "[t]hey've presented no evidence, nothing positive[,]" did not "specifically refer" to the defendant's failure to testify and did not violate his Fifth Amendment rights. *Id.* at 574-75, 694 P.2d at 1188-89.

¶12 Likewise, the prosecutor's reference here did not refer to Freeman's failure to testify, but rather commented on his "nonproduction of evidence," which "give[s] rise to the inference that [the evidence] would have been adverse to the party who could have produced it." *McDougall*, 153 Ariz. at 160, 735 P.2d at 770. Evidence at trial suggested C.C. may have injured her hand after the stabbing rather than before as Freeman claimed. S.M. and Freeman both claimed C.C. had been present during the altercation. Thus, C.C.'s testimony, if presented, may have substantiated or refuted Freeman's claim he stabbed S.M. while trying to protect C.C., who had been injured by S.M. The prosecutor's comments suggesting the jury could "consider" C.C.'s absence therefore fall squarely in the category of argument drawing an inference from the failure to present evidence, and cannot be characterized as a shift in the

---

have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

burden of proof. *See Fuller*, 143 Ariz. at 575, 694 P.2d at 1189 ("The comment reflected the prosecutor's opinion that the defense failed to present any positive or exculpatory evidence."). The trial court did not commit error of any kind by allowing the prosecutor's comments during rebuttal closing argument.[3]

¶13 And, to the extent the prosecutor's comments could be construed as suggesting Freeman was obliged to present any evidence to prove his innocence, we presume any error was cured by the court's proper instructions on the burden of proof.[4] *See McDougall*, 153 Ariz. at 160, 735 P.2d at 770 ("cautionary instruction" cured effect of improper argument); *State v. White*, 115 Ariz. 199, 204, 564 P.2d 888, 893 (1977) (proper burden of proof instructions "cured" effect of "mistaken word choice" elsewhere in instructions). The final jury instructions not only explained the state's burden of proving Freeman's guilt beyond a reasonable doubt but also that "[t]he law does not require a defendant to prove innocence." The court further instructed the jury that "[t]he defendant is not required to produce evidence of any kind," closing arguments are not evidence, the non-production of evidence "is not evidence of guilt," and "[n]either side is required to call as witnesses all persons who may have been present" during the assault. *See State v. Herrera*, 174 Ariz. 387, 395, 850 P.2d 100, 108 (1993) (courts presume jurors follow the instructions they are given).

¶14 Furthermore, we disagree with Freeman's assertion that a burden shift occurred because C.C.'s availability had not been established in the record. We are aware of no authority stating that a prosecutor's referring to evidence not produced necessarily shifts

---

[3]In light of *Fuller*, and our conclusion that the trial court did not commit any error by allowing the rebuttal argument, we also reject Freeman's assertion of structural error. *See, e.g.*, *Sullivan v. Louisiana*, 508 U.S. 275, 279-82 (1993) (constitutionally deficient reasonable doubt instruction amounted to structural error requiring reversal without regard to harmless error analysis).

[4]Freeman has not argued on appeal that any of the instructions were improper or incorrect.

the burden of proof. In *State v. Corona*, for example, despite a burden shifting objection, we relied on "the general rule that closing arguments must be based on facts that the jury is entitled to find from the evidence" in concluding it was improper to comment on the defendant's failure to call a rebuttal gang expert when the trial included no indication he had retained or even consulted such an expert. 188 Ariz. 85, 89-90, 932 P.2d 1356, 1360-61 (App. 1997). Courts generally analyze such claims as being for prosecutorial misconduct and review them for harmless or fundamental error. *See, e.g., State v. Leon*, 190 Ariz. 159, 161-62, 945 P.2d 1290, 1292-93 (1997); *State v. Roscoe*, 184 Ariz. 484, 496-97, 910 P.2d 635, 647-48 (1996). We thus address Freeman's claim that the prosecutor's arguments improperly "drew the jury's attention to matters outside the record" in connection with his claim of prosecutorial misconduct.

¶15 Freeman argues the prosecutor committed misconduct when she "implied that [C.C.] was available to testify . . . when [her] availability was not supported by the record." As noted above, Freeman concedes he failed to object at trial on this basis. We therefore review this issue for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶16 Prosecutorial misconduct is "'intentional conduct which the prosecutor knows to be improper and prejudicial'" and which "'is not merely the result of legal error, negligence, mistake, or insignificant impropriety.'" *State v. Martinez*, 221 Ariz. 383, ¶ 36, 212 P.3d 75, 85 (App. 2009), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). Prosecutorial misconduct is fundamental error only when it is "so egregious as to deprive the defendant of a fair trial and render the resulting conviction a denial of due process." *State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991).

¶17 It is generally improper for counsel to refer to "matters not in evidence." *See State v. Bolton*, 182 Ariz. 290, 308, 896 P.2d 830, 848 (1995). Closing arguments must be based on properly admitted evidence and "inferences which can be reasonably drawn from" it. *State v. Woods*, 141 Ariz. 446, 454-55, 687 P.2d 1201, 1209-10 (1984).

Arguments may not rely "on extraneous matters that were not or could not be received in evidence." *State v. Neil*, 102 Ariz. 299, 300, 428 P.2d 676, 677 (1967) ("insinuations to a prior criminal record" of defendant without an offer of proof constitutes reversible error); *State v. Jordan*, 80 Ariz. 193, 196-98, 294 P.2d 677, 679-81 (1956) (improper to "inject[] in the mind of the jurors" opinions of victim's family, prosecutor's experience and "[o]pinions concerning insanity"); *see also Woods*, 141 Ariz. at 454-55, 687 P.2d at 1209-10 ("patently improper" for state to make argument inviting the jury to speculate about state's reasons for offering accomplice plea agreement in exchange for testimony). For this reason, it is improper to make an argument about an absent witness when no foundation is made at trial showing the witness is available to the defendant and could substantiate a claimed defense. *See State v. Condry*, 114 Ariz. 499, 500-01, 562 P.2d 379, 380-81 (1977); *State v. Filipov*, 118 Ariz. 319, 324, 576 P.2d 507, 512 (App. 1977).

¶18 Although Freeman asserts there was "no evidence that [C.C.] was available to testify or that the defense knew where she was," the record suggests otherwise. In his reply brief Freeman points out he and C.C. were homeless, and five months had passed between the incident and the trial. But evidence at trial indicated S.M. had known Freeman and C.C. for approximately ten years and that the five people at the gathering drank together often. Moreover, Freeman and C.C. had been together for over ten years, C.C. was with Freeman when he was arrested, and he entrusted her with his important belongings.

¶19 It was thus reasonable to infer Freeman did not present C.C.'s testimony because she would not have corroborated his claimed defenses. In light of the evidence that C.C. was available to Freeman, the prosecutor's argument cannot be characterized as misconduct, much less misconduct meeting the definition of prosecutorial misconduct. *See Martinez*, 221 Ariz. 383, ¶ 36, 212 P.3d at 85.

Disposition

¶20 We affirm Freeman's convictions and sentences.