IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CLAYTON ROBERT SOPELAND,
Appellant.

No. 2 CA-CR 2016-0159
Filed August 29, 2017

Appeal from the Superior Court in Gila County
No. S0400CR201400104
The Honorable Gary V. Scales, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Kelly[1] concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Clayton Sopeland was convicted of fraudulent schemes and artifices and sentenced to not more than two years' probation. On appeal, he argues the evidence was insufficient and the trial court erred in denying his motion for a new trial based on alleged prosecutorial misconduct. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the jury's verdict[]." *State v. Wright*, 239 Ariz. 284, ¶ 2, 370 P.3d 1122, 1123 (App. 2016). Advanced Tactical Armament Concepts, LLC, manufactures and sells ammunition under the name HPR. It classifies the ammunition it manufactures into four categories: (1) retail grade, which it sells in proprietary packaging with a quality assurance guarantee; (2) "blems," rounds with cosmetic blemishes, which it sells in plain, unmarked boxes of 500 rounds; (3) "shooters," which are rounds deemed unsuitable for sale but safe to shoot, and are given out to employees as rewards but never sold; and (4) "scrap," which are rounds deemed unsafe to shoot and are normally destroyed.

¶3 HPR hired Sopeland in 2011 as a machine operator, and later promoted him to ballistics lab technician. He had an additional duty of making weekly ammunition deliveries to an indoor gun

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

range, where he would also collect discarded HPR proprietary packaging for return to the factory and eventual reuse.

¶4 In 2013, HPR learned that Sopeland had sold an acquaintance several boxes of "scrap" ammunition, boxed in HPR proprietary packaging. Subsequent investigation revealed that Sopeland had taken approximately 15,000 rounds of ammunition from the scrap barrel at HPR and provided as many as 10,000 of these rounds to his friend and former co-worker, N.E., who sold the rounds to people in the Phoenix area and split the profits with Sopeland.

¶5 Sopeland was terminated from HPR and subsequently charged with a number of felonies based on the state's allegations that he took "scrap" ammunition from HPR to his home, deceptively repackaged it, and sold it under the false pretense that it was blemished ammunition ("blems"). He was convicted and sentenced as described above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A)(1).

Sufficiency of the Evidence

¶6 Sopeland first argues the trial court erred when it denied his motions for judgment of acquittal made under Rule 20(a) and (b), Ariz. R. Crim. P., because "the state offered no evidence that he had acted 'pursuant to a scheme or artifice to defraud.'" *See* A.R.S. § 13-2310(A). Rule 20(a) provides "that on a defendant's motion or its own initiative, a trial court 'shall enter a judgment of acquittal' before the verdict 'if there is no substantial evidence to warrant a conviction.'" *State v. West*, 226 Ariz. 559, ¶ 6, 250 P.3d 1188, 1190 (2011), *quoting* Ariz. R. Crim. P. 20(a).

¶7 "Th[e] question of sufficiency of the evidence is one of law, subject to de novo review." *Id.* ¶ 15. We must determine whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. ¶ 16, *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). Substantial evidence is "such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.*, *quoting Mathers*, 165 Ariz. at 67, 796 P.2d at 869. "Evidence may be direct or circumstantial, but if

reasonable minds can differ on inferences to be drawn therefrom . . . [a] trial judge has no discretion to enter a judgment of acquittal." *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citations omitted). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶8 A person is guilty of fraudulent schemes and artifices if, "pursuant to a scheme or artifice to defraud, [he] knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions." § 13-2310(A). A "'scheme or artifice' is some 'plan, device, or trick' to perpetrate a fraud." *State v. Haas*, 138 Ariz. 413, 423, 675 P.2d 673, 683 (1983), *quoting State v. Stewart*, 118 Ariz. 281, 283, 576 P.2d 140, 142 (App. 1978). "Something is fraudulent when it is 'reasonably calculated to *deceive* persons of ordinary prudence and comprehension.'" *Id.*, *quoting United States v. Netterville*, 553 F.2d 903, 909 (5th Cir. 1977) (emphasis added). The statute requires proof of the specific intent to defraud. *See id.* at 418-19, 675 P.2d at 678-79. Fraudulent pretenses "may be effected by deceitful statements or half-truths or even the concealment of material facts." *See id*. As such, the state must prove "not only (1) a scheme or artifice to defraud, but also that (2) defendant knowingly and intentionally participated in it and that (3) it was a scheme for obtaining money or property by means of 'false or fraudulent pretenses, representations or promises.'" *Id.* at 419, 675 P.2d at 679. Conviction, however, does not require "that the victim actually relied on the fraudulent pretense, representation, promise or omission." *State v. Proctor*, 196 Ariz. 557, ¶ 27, 2 P.3d 647, 654 (App. 1998).

¶9 Sopeland maintains he did not make any misrepresentations to N.S., because he had informed him the ammunition was "blems" he purchased at an employee discount, and not brand-new retail quality. But the evidence showed that the ammunition he had sold to N.S. was not "blems" purchased from HPR at a discount; rather, it consisted of "scrap" that Sopeland had taken from HPR. As already noted, Sopeland boxed this "scrap" in HPR's proprietary packaging, which includes a quality assurance guarantee stating: "whether new *or reprocessed*, our brass meets stringent factory specifications" (emphasis added). Although N.S.

testified Sopeland had told him the ammunition was "blems," he also testified he did not know what the term "blems" meant. N.S. further testified that Sopeland never used the word "scrap." Additionally, N.E., Sopeland's friend and former co-worker, testified that Sopeland had provided him with 10,000 rounds of "scrap" ammunition with the understanding N.E. would sell it and the two would split the profits.

¶10 After HPR discovered Sopeland's actions and terminated his employment, he apologized to company executives, saying, "I just want you to know I'm sorry and if I jeopardize[d] anything with the company, you know, put anything in danger, I'm sorry." A reasonable juror could conclude this showed consciousness of intentional wrongdoing. And on this evidence, a rational trier of fact could conclude Sopeland knowingly had taken "scrap" ammunition from HPR in order to repackage and sell it for profit, and had misrepresented its quality by boxing it in proprietary packaging with a quality assurance guarantee, knowing it lacked any such guarantee and was unsafe to shoot. The evidence was sufficient for a rational juror to find Sopeland guilty of fraudulent schemes and artifices.

Motion for a New Trial

¶11 Sopeland next argues the trial court erred by denying his motion for a new trial based on alleged prosecutorial misconduct. He contends the state committed misconduct at several points during the trial by eliciting testimony that the ammunition he had sold to N.S. was dangerous, and by arguing in closing that Sopeland had "endangered" others.

¶12 Post-verdict motions for new trial are "disfavored and should be granted with great caution." *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996), *quoting State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988). We will not disturb a trial court's denial of a motion for new trial based on prosecutorial misconduct absent an abuse of discretion. *State v. West*, 238 Ariz. 482, ¶ 50, 362 P.3d 1049, 1064 (App. 2015).

¶13 "To prevail on a claim of prosecutorial misconduct, 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.'" *Id.* ¶ 51, *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). Reversal on this basis "requires that the conduct be so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.*, *quoting Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191. While prosecutorial misconduct is harmless if we are satisfied "beyond a reasonable doubt that it did not contribute to or affect the verdict," "an incident may nonetheless contribute to a finding of persistent and pervasive misconduct if the cumulative effect of [multiple] incidents shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant." *Id.* ¶¶ 51-52, *quoting State v. Roque*, 213 Ariz. 193, ¶¶ 152, 155, 141 P.3d 368, 403 (2006). Thus, after reviewing individual incidents, "we must identify those constituting misconduct and evaluate their cumulative effect on the trial." *Id.* ¶ 52.

¶14 Sopeland argues the state committed misconduct by repeatedly eliciting testimony that "scrap" ammunition is not safe to shoot—a fact he argues was irrelevant. We disagree. Over a dozen witnesses testified that the rounds Sopeland had sold to N.S. were "scrap," that they were unsafe to shoot, and/or that they would not sell those rounds to anyone. This testimony was not irrelevant as Sopeland alleges, because his misrepresentation about the ammunition's quality was an element of his fraud.

¶15 When Sopeland told N.S. that the rounds were "blems" that he had purchased from HPR at a discount, he was making a claim about the quality of the rounds. As noted earlier, "blems," while cosmetically imperfect, are safe to shoot while "scrap" rounds are so designated because they are potentially dangerous and nonsalable. As the trial court stated in its denial of Sopeland's motion for a new trial, whether the rounds were safe to shoot was "central to the State's theory of the case." The testimony was relevant; therefore, none of the times the state elicited such testimony, individually or cumulatively, constituted reversible prosecutorial misconduct.

¶16 Sopeland's final argument is that the state committed reversible misconduct by using variations of the word "endanger" three times during closing argument although Sopeland was not charged with endangerment. Sopeland objected to the use of this

term, and the trial court sustained his objection. The court's decision, however, was not predicated on the fact the state was arguing the ammunition was dangerous, which it recognized was central to the state's theory of the case, but rather on the manner in which the state was making that point.[2] The court told the state to desist, and warned, "[Y]ou are dancing close to a mistrial if you keep it up." Following that admonition, the state made no further mention of endangerment, or the dangerous nature of the ammunition in question.

¶17 We find no error. Because the trial court was in the best position to evaluate what effect, if any, the state's remarks might have had on the jury, we do not find an abuse of discretion in the court's denial of a new trial on the basis of prosecutorial misconduct. *See State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006).

Disposition

¶18 For the foregoing reasons, Sopeland's conviction and term of probation are affirmed.

[2] The court took exception to the state's use of the word "endanger" as opposed to "dangerous," and admonished the state for posing hypothetical questions about how many dangerous rounds "are out there," and "[w]hat if law enforcement got them?"