IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ANTHONY CARROLL ARZAGA,
Appellant.

No. 2 CA-CR 2016-0399
Filed November 6, 2017

Appeal from the Superior Court in Pinal County
No. S1100CR201401562
The Honorable Kevin D. White, Judge

AFFIRMED

COUNSEL

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

DuMond Law, PLLC, Phoenix
By Samantha K. DuMond
Counsel for Appellant

MEMORANDUM DECISION

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

E P P I C H, Judge:

¶1 Anthony Arzaga seeks review of his conviction and sentence for leaving the scene of an accident resulting in death. On appeal, he raises several issues associated with the prosecutor's closing argument and the sufficiency of the evidence presented at trial. Finding no error, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the jury's verdicts." *State v. Wright*, 239 Ariz. 284, ¶ 2, 370 P.3d 1122, 1123 (App. 2016). In September 2013, Arzaga pulled out in front of a motorcycle carrying two riders. The motorcycle collided with Arzaga's car, throwing both riders off and causing the motorcycle to catch fire.

¶3 Arzaga and his passenger got out of the car and checked on the victims, moving one away from the fire. But they did not call 9-1-1 or provide further assistance to the victims of the crash. They ran away from the collision before first responders arrived without providing their names or any identifying information. Both victims died as a result of the crash.

¶4 A few days after the fatal collision, Arzaga contacted police personnel and later admitted to driving the car. He was charged with two counts of causing death by use of a vehicle and one count of leaving the scene of an accident resulting in death.

¶5 After a jury trial, he was convicted of leaving the scene of an accident resulting in death and two counts of the lesser offense of driving on a revoked license. This appeal followed. We have

jurisdiction pursuant to Ariz. Const. art. VI, § 9, A.R.S. §§ 12-120.21(A)(1), 13-4031, and Ariz. R. Crim. P. 31.2.

Prosecutor's Closing Argument

¶6 Before closing arguments, the state asked for a jury instruction pursuant to A.R.S. § 28-666. The state argued that the statute clarified the extent of Arzaga's duty under A.R.S. § 28-663, requiring him to contact law enforcement in order to avoid criminal liability under A.R.S. § 28-661. The trial court found that an instruction under § 28-666 would confuse the jury, as it was not an element of the charged offense, and denied the state's request.

¶7 During closing arguments, the prosecutor nonetheless argued that Arizona law required Arzaga to contact the police. He included a slide making this assertion in his PowerPoint presentation. Arzaga objected and requested a curative jury instruction. The trial court invited Arzaga's attorney to submit a supplemental instruction. After a brief recess, Arzaga renewed his objection and asked for a mistrial. The court denied Arzaga's request for a mistrial, but proposed a supplemental instruction. Arzaga reiterated his request for a mistrial, but indicated that he had no objection to the instruction as proposed. At Arzaga's request, the court gave the following instruction after the state's closing argument but before Arzaga's:

> In reaching a verdict in this case, you must follow the jury instructions that I have given to you. What the attorneys say in their closing arguments may help you to understand the jury instruction I have provided to you. However, nothing counsel says or displays in closing arguments may be considered by you as additional rules of law that you should follow in reaching your verdict. You are guided only by the instructions that I have given to you.

¶8 Arzaga raises three related issues associated with the prosecutor's closing argument. First, he argues that the prosecutor's comments constituted prosecutorial misconduct, resulting in a denial of his right to due process. Second, he argues that the trial court abused its discretion by not granting his request for a mistrial. Third, he argues that the supplemental instruction given by the court was insufficient.

Prosecutorial Misconduct

¶9 In cases of prosecutorial misconduct, we must determine whether "(1) the prosecutor committed misconduct and (2) a reasonable likelihood exists that the prosecutor's misconduct could have affected the verdict." *State v. Benson*, 232 Ariz. 452, ¶ 40, 307 P.3d 19, 30 (2013). "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.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). "Reversal on the basis of prosecutorial misconduct requires that the conduct be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *Id.*, *quoting State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992). Because Arzaga objected to the argument below, we review for harmless error. *State v. Gallardo*, 225 Ariz. 560, ¶ 35, 242 P.3d 159, 167 (2010).

¶10 The prosecutor's closing argument in this case was improper, *State v. Daymus*, 90 Ariz. 294, 303, 367 P.2d 647, 653 (1961) (misstatement of the law in argument is improper), and we agree with Arzaga that it rose to the level of prosecutorial misconduct. *See State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (prosecutorial misconduct is more than just a mistake or significant impropriety—it is improper and prejudicial conduct intentionally pursued with indifference to the danger of a mistrial). Here, the prosecutor argued § 28-666 applied even though the trial court had expressly precluded the statute from being mentioned. We therefore disagree with the state's contention that the prosecutor's reference was unintentional.

¶11 However, Arzaga fails to show he was prejudiced by this single instance of misconduct because the trial court corrected any prejudice through its curative instruction. *See State v. Dann*, 205 Ariz. 557, ¶ 48, 74 P.3d 231, 245 (2003) (jury is presumed to have followed a court's curative instruction); *cf. State v. Manuel*, 229 Ariz. 1, ¶¶ 23-24, 270 P.3d 828, 833 (2011) (instruction that attorney arguments are not evidence cured prejudice from state's argumentative comments); *State v. Lamar*, 205 Ariz. 431, ¶ 54, 72 P.3d 831, 841 (2003) (prosecutorial vouching "ameliorated" by instruction that attorney arguments are not evidence). Further, he points to no other instances that indicate the type of consistent and pervasive misconduct that would require reversal. Accordingly, we cannot say that the prosecutor's misconduct violated Arzaga's right to due process.

Motion for Mistrial

¶12 "A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial is granted." *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). Absent an abuse of discretion, we will not disturb a trial court's denial of a motion for mistrial on appeal. *Id.* A court abuses its discretion by committing an error of law. *State v. Bernstein*, 237 Ariz. 226, ¶ 9, 349 P.3d 200, 202 (2015).

¶13 The trial court did not abuse its discretion when it denied Arzaga's motion for a mistrial. Other than the improper statement of law by the prosecutor, which the court corrected with a supplemental instruction, Arzaga fails to identify any misconduct that would have warranted a mistrial.

Jury Instruction

¶14 Arzaga argues for the first time on appeal that the supplemental instruction was insufficient because it did not expressly clarify the misstatement of law by the prosecutor. Not only did Arzaga fail to object to the wording of the instruction, he affirmatively requested that it be given. Therefore, any resulting

error was invited and provides no basis for reversal. *State v. Logan*, 200 Ariz. 564, ¶ 8, 30 P.3d 631, 632 (2001).

Sufficiency of the Evidence

¶15 Arzaga argues the trial court abused its discretion by not granting a Rule 20 motion for judgment of acquittal.[1] *See* Ariz. R. Crim. P. 20. We review the court's denial of a motion for judgment of acquittal de novo. *State v. Harm*, 236 Ariz. 402, ¶ 11, 340 P.3d 1110, 1114 (App. 2015). We examine the facts in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 24, 312 P.3d 123, 129-30 (App. 2013). A directed verdict of acquittal is appropriate "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a).

¶16 Section 28-663, A.R.S., requires the driver of a vehicle involved in an accident resulting in injury or death to (1) provide his name, address and vehicle registration number, (2) on request, exhibit his driver license to the person struck or driver or occupants of the vehicle collided with, and (3) render aid to a person injured, to include making arrangements for carrying of the person to a hospital or medical professional for treatment.

¶17 Arzaga argues that performing any one of the three duties enumerated in § 28-663 relieved him of liability under § 28-661. Because Arzaga moved a victim of his accident away from a fire, he argues, he satisfied his requirement of rendering "reasonable assistance," to an injured party under § 28-663(A)(3).

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[1]Arzaga also argues the evidence was insufficient to sustain his conviction. But he does not develop any distinct argument to support his insufficiency of the evidence claim. We review this claim in the context of the court's denial of his motion for judgment of acquittal, but consider any other argument waived. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi).

¶18 Even were we to read § 28-663 as Arzaga asks, there was sufficient evidence for a jury to find beyond a reasonable doubt that Arzaga's assistance was not reasonable under § 28-663(A)(3), bringing him within the scope of criminal liability under § 28-661. Arzaga did not call 9-1-1 or otherwise make arrangements for the victims to be transported for medical treatment. Aside from pulling a victim away from the fire, he did not render any other aid. Any reasonable trier of fact could find his actions were not reasonable.

¶19 Moreover, we reject Arzaga's argument that complying with any one of the three requirements set forth in § 28-663 absolved him of any obligation to comply with the other two requirements. To construe that statute in such a manner would result in absurdity, wherein, for example, the displaying of a driver license would, at the accused's discretion, substitute for administering life-saving medical assistance. *See Lake Havasu City v. Mohave County*, 138 Ariz. 552, 557, 675 P.2d 1371, 1376 (App. 1983) ("Statutes must be given a sensible construction which will avoid absurd results."). In this case, the evidence was not only sufficient to allow the jury to conclude that Arzaga had failed to render reasonable aid, but that he had failed to identify himself at the scene as required by § 28-663(A)(1). Thus, the trial court did not abuse its discretion in denying Arzaga's Rule 20 motion.

Disposition

¶20 For the foregoing reasons, we affirm Arzaga's convictions and sentences.