IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

NICHOLAS HERNANDEZ,
Appellant.

No. 2 CA-CR 2019-0138
Filed August 21, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR201801702
The Honorable Jason R. Holmberg, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Diane Leigh Hunt, Assistant Attorney General, and
Jocelyn Tellez-Amado, a student certified pursuant to Rule 38(d),
Ariz. R. Sup. Ct., Tucson
Counsel for Appellee

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Counsel for Appellant

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Nicholas Hernandez appeals from his convictions after a jury trial for prisoner participation in a riot and aggravated assault. The trial court sentenced him to concurrent terms of imprisonment, the longest of which is eighteen years. On appeal, Hernandez contends the prosecutor committed fundamental error in his opening statement and closing argument by averring to facts not supported by the evidence. We affirm.

Factual and Procedural Background

¶2 We review the facts in the light most favorable to upholding Hernandez's convictions. *State v. Robles*, 213 Ariz. 268, ¶ 2 (App. 2006). In April 2015, Hernandez was an inmate at the Arizona Department of Corrections. On April 9, there was a fight in the "chow hall." Correctional Officer Ian MacFie saw "a flood of inmates [come] running out of the chow hall." MacFie and another correctional officer got those inmates under control—"on the ground and all cuffed up"—and then another group of inmates, including Hernandez, came around from the other side of the chow hall. MacFie then saw Correctional Officer David Jacobs come around a corner, about to walk into a "huge crowd of inmates." MacFie attempted to warn Jacobs, to get him to turn around, but when Jacobs turned to walk away, Hernandez "right-hooked him, cold-cocked him from the back," knocking Jacobs to the ground. Hernandez and about thirty other inmates began "beating the hell out of [Jacobs]." When MacFie tried to get the inmates off Jacobs, Hernandez looked at him and then looked at another inmate and said "[g]et that mother fucker too" and then the inmate threw a flashlight at MacFie.

¶3 Hernandez was charged with prisoner participation in a riot and aggravated assault. His first trial resulted in a mistrial. Officer Jacobs testified at the retrial and confirmed that Hernandez had hit him. Officer MacFie testified to the events described above and Correctional Officer Dusty Chandler testified that he had seen several inmates, including Hernandez, standing over Jacobs and kicking him. A surveillance video

captures images of Hernandez hitting and kicking Jacobs. The video was played multiple times at trial and witnesses identified both Hernandez and Jacobs in the recording.

¶4 The jury found Hernandez guilty of both charges. Hernandez was sentenced as described above. This appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Analysis

¶5 On appeal, Hernandez claims that the prosecutor committed prosecutorial misconduct in referring, in his opening statement and closing argument, to an oath that inmates take to assault correctional officers. Because Hernandez did not object to the prosecutor's remarks below, we review solely for fundamental error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). To prevail, Hernandez must show that fundamental error—in this instance prosecutorial misconduct—actually occurred and that the error prejudiced him. *See id.* ¶ 21. "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." *Id.* If the defendant is able to establish fundamental error under prongs one or two, he must make a separate showing of prejudice. *Id.* Here, although we conclude that the prosecutor's remarks were improper, Hernandez has failed to show that the error was fundamental given the lack of prejudice in light of the overwhelming evidence against him.

¶6 "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 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "Prosecutorial misconduct constitutes reversible error only if (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 the prosecutor's misconduct." *State v. Murray*, 247 Ariz. 447, ¶ 18 (App. 2019).

¶7 In his opening statement, the prosecutor stated:

> On that day, Officer Jacobs had taken an oath. That oath was when ICS was activated

> and when that emergency system was activated and his other correctional officers were in trouble, he didn't just sit there and let them fend for themselves. He went running. Unfortunately, he ran into an inmate that had taken an oath as well. That wasn't an oath based on courage and honor, but based on cowardice, opportunity, and violence. He was attacked by this defendant right here. He was attacked by this defendant and the other inmates.
>
> At the end of this trial, the State is going to ask you to find this defendant guilty for the choice that he made and the oath that he took and the attack that he and the other inmates did on Officer Jacobs. We're going to ask you to find him guilty.

And in his closing argument the prosecutor again referred to this oath:

> Over the past three days you have heard about two separate oaths at the Department of Corrections. You have seen those oaths. Not only have you heard about them, but you have seen them lived out. You saw the oath that Officer Jacobs and those other correctional officers took. You saw that oath that he took when he wasn't concerned about his safety but [went] into the fight. When he didn't wait for other officers, but went to help the people that he had made that oath to. You see it on the video. He lived that oath and he lived that out. When he told the other officers, that if the [worst] case happens I'm going to be there, that's exactly what he did.
>
> Because he took that oath that would put aside maybe his own personal feelings and put aside thinking about what's the best thing for him, because he had that oath and had that commitment to the other officers, this defendant saw the opportunity to live the oath that you have also seen and heard about over the past three days. It's an oath that's not built

> on courage and honor, but cowardice. It's an oath that looks for opportunity like the one that he saw on April 9th, 2015, an opportunity to hit an officer and to hurt an officer.
>
> Because of that and because of the witnesses that came in here and told you what he did, the only just verdict in this case is for you to find the defendant guilty of both counts.

¶8 Hernandez argues that the "prosecutor's bold and unsubstantiated inference that the riot in the Chow Hall and the assault on Officer Jacobs each occurred because of the oath sworn to by the Defendant and by fellow inmates constitutes fundamental error." Although advocates are given wide latitude in closing arguments and "excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal," *State v. Gonzales*, 105 Ariz. 434, 436 (1970), their arguments must still be "based on facts the jury is entitled to find from the evidence and not on extraneous matters that were not or could not be received in evidence." *State v. Leon*, 190 Ariz. 159, 162 (1997) (quoting *State v. Dumaine*, 162 Ariz. 392, 402 (1989)). Additionally, an "opening statement should not contain any facts which the prosecutor cannot prove at trial." *State v. Bowie*, 119 Ariz. 336, 339 (1978).

¶9 Here, there was no evidence of any oath taken by inmates admitted at trial and there is no indication that such evidence was ever anticipated. Nonetheless, the state argues that the use of the oath in its opening statement and closing argument was "clearly rhetorical in nature and not meant to be taken literally" since "no rational person would do so based in no small measure on the fact that not a scintilla of evidence was presented at trial of any oaths." We do not agree. Instead of using the oath as a rhetorical device, the prosecutor here stated, repeatedly, that Hernandez specifically had taken this oath and this oath caused or bound him to commit the acts for which he was being tried. This goes beyond the use of the oath as a rhetorical device and was an improper use of "facts" that were not in the record.

¶10 Notwithstanding, Hernandez is unable to prove that these remarks, however improper, prejudiced him. To show prejudice, Hernandez must demonstrate that "a reasonable jury, applying the appropriate standard of proof, could have reached a different [verdict]." *State v. Henderson*, 210 Ariz. 561, ¶ 27 (2005). The trial court instructed the jury that the statements or arguments made by the lawyers were not evidence. "We presume that the jurors followed the court's instructions."

State v. Newell, 212 Ariz. 389, ¶ 68 (2006). Moreover, evidence of Hernandez's guilt was overwhelming. *See id.* ¶ 70 ("When considered in the context of the entire trial, we agree that the overwhelming evidence of guilt influenced the jury to convict," rather than the prosecutor's misconduct); *State v. Trostle*, 191 Ariz. 4, 16 (1997) (prosecutor's improper comment harmless given "overwhelming evidence of guilt"). Specifically, there were numerous eyewitnesses to the assault and participation in a prison riot, and the events were caught on camera. Hernandez did not present or point to any testimony or evidence to the contrary. No reasonable fact-finder could have reached a different result, and we thus conclude Hernandez has failed to show that the prosecutor's remarks prejudiced him in any way.

Disposition

¶11 For the foregoing reasons, we affirm Hernandez's convictions and sentences.