IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAVID DWAYNE WATSON,
Appellant.

No. 2 CA-CR 2017-0171
Filed January 22, 2021

Appeal from the Superior Court in Pima County
No. CR20151542001
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
By Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals, Phoenix
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E S P I N O S A, Presiding Judge:

¶1 David Watson previously appealed from his convictions for two counts of first-degree murder and one count of second-degree murder. In a memorandum decision, we affirmed those convictions and sentences, having, as relevant to this matter, considered and rejected Watson's numerous claims of prosecutorial misconduct except for several relating to the state's opening statement. *State v. Watson*, 2 CA-CR 2017-0171, ¶¶ 39-46, 55 (Ariz. App. Oct. 31, 2019) (mem. decision). We instead found those claims waived by Watson's failure to argue that the remarks constituted fundamental error. *Id.* ¶ 43. After granting Watson's petition for review, our supreme court vacated that portion of our decision and remanded it to this court "to reconsider the prosecutorial misconduct issue" in light of its recent decision in *State v. Vargas*, 249 Ariz. 186 (2020). We do so now.

Prosecutorial Error

¶2 In *Vargas*, our supreme court held that a defendant claiming fundamental error due to cumulative prosecutorial misconduct is not required to assert fundamental error for every allegation in order to preserve for review the argument that misconduct occurred. 249 Ariz. 186, ¶ 1. In his supplemental brief, in which Watson refers to the arguments originally raised in his opening brief, he again makes the same allegations of prosecutorial misconduct and argues their cumulative effect deprived him of his rights to due process and a fair trial.

¶3 Our supreme court recently distinguished between prosecutorial misconduct and prosecutorial error, adopting the American Bar Association's approach which recognizes that "prosecutorial misconduct" is a term of art "used to describe conduct by the government that violates a defendant's rights whether or not that conduct was or should have been known by the prosecutor to be improper and whether or not the prosecutor intended to violate the Constitution or any other legal or ethical

requirement." *In re Martinez*, 248 Ariz. 458, ¶¶ 46-47 (2020) (quoting ABA Recommendation 100B (2010)). It is conduct that ranges "from inadvertent error or innocent mistake to intentional misconduct." *Id.* ¶ 45. When referring to a prosecutor's conduct, the word "error" does not necessarily imply a concurrent ethical rules violation, while the use of "misconduct" may suggest such a violation. *Id.* ¶¶ 42, 47. Thus, although we have previously used the term "prosecutorial misconduct," we now refer to those claims as claims of "prosecutorial error." *See id.* ¶ 47; *State v. Smith*, 250 Ariz. 69, ¶ 138 (2020). To prevail on such a claim, the defendant must demonstrate that error or misconduct occurred and "a reasonable likelihood exists that the [prosecutorial error] could have affected the jury's verdict." *State v. Anderson*, 210 Ariz. 327, ¶ 45 (2005); *see also Martinez*, 248 Ariz. 458, ¶ 43.

¶4 In reviewing a claim of cumulative error based on prosecutorial error, we generally evaluate each instance of alleged error separately, *see State v. Morris*, 215 Ariz. 324, ¶ 47, and then consider the cumulative effect on the fairness of the trial, *see State v. Hughes*, 193 Ariz. 72, ¶ 26 (1998). Because Watson did not object at trial to the alleged errors, however, he must demonstrate fundamental error occurred. *See State v. Martinez*, 230 Ariz. 208, ¶ 25 (2012). Fundamental error analysis first requires him to establish that error exists, then that either "(1) the error went to the foundation of the case, (2) the error took from him a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial." *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). Regarding the third prong of *Escalante*, Watson need not demonstrate fundamental error for each alleged instance because "a successful claim [of cumulative error] necessarily establishes the unfairness of a trial." *Vargas*, 249 Ariz. 186, ¶ 13. Accordingly, Watson must "(1) assert cumulative error exists; (2) cite to the record where the alleged instances of misconduct occurred; (3) cite to legal authority establishing that the alleged instances constitute prosecutorial misconduct; and (4) set forth the reasons why the cumulative misconduct denied [him] a fair trial." *Id.* ¶ 14.

Opening Statement

¶5 On remand, Watson again alleges the prosecutor "improperly argued inferences and conclusions, discussed multiple pieces of inadmissible evidence to support the arguments he was making, and vouched for the [s]tate's witnesses" in his opening statement. Opening statements are opportunities for counsel "to tell the jury what evidence they intend to introduce. Opening statement is not a time to argue the inferences and conclusions that may be drawn from evidence not yet admitted." *State*

v. Acuna Valencia, 245 Ariz. 197, ¶ 68 (2018) (quoting *State v. Lynch*, 238 Ariz. 84, ¶ 9 (2015)). And a prosecutor may not refer to inadmissible evidence, *see State v. Dann*, 220 Ariz. 351, ¶ 50 (2009), but specific evidence may be referenced so long as the proponent has a good faith basis to believe that it exists and will be admissible, *see State v. Pedroza-Perez*, 240 Ariz. 114, ¶ 12 (2016).

¶6 Watson contends the prosecutor's statement that "there's, of course, talk and rumors and gossip and speculation. It doesn't come in at a trial and it's not admissible and it's not relevant," improperly "referred the jury to the existence of inadmissible evidence." He also takes issue with the prosecutor's statement that saying something "over and over . . . doesn't mean it's evidence" and that the jury should "keep a careful eye on the evidence, not the questions the lawyers are asking or what tone we're asking them in." We cannot, however, say those comments were improper, essentially only reiterating to the jury not to engage in speculation or base its decision on the lawyers' arguments, but rather decide the facts based on the evidence, consistent with the standard preliminary jury instructions given. *See* Revised Arizona Jury Instructions Preliminary Criminal 6 (evidence, statements of lawyers and rulings) (4th ed. 2016).

¶7 Watson also claims the prosecutor improperly vouched and "promised" evidence "never proffered and unlikely to be proffered" when he discussed the thoroughness of the police investigations, stressed the importance or unimportance of DNA evidence, referred to a state's witness as "one of the leading experts in this country" on identifying remains of desert border crossers, and preemptively attacked or rehabilitated the credibility of witnesses. Impermissible prosecutorial vouching occurs when the prosecutor "places the prestige of the government behind its witness" or "suggests that information not presented to the jury supports the witness's testimony." *State v. Vincent*, 159 Ariz. 418, 423 (1989). Neither occurred here, where the prosecutor's statements simply introduced witnesses from his perspective and highlighted for the jury their anticipated testimony during the trial. *See Pedroza-Perez*, 240 Ariz. 114, ¶ 12 ("Opening statements are predictions about what the evidence will show."). And the jury subsequently heard evidence about the forensic anthropologist's significant work history and credentials, supporting the prosecutor's introductory comment. We disagree that the prosecutor's foreshadowing the evidence regarding the police investigation "relieved the prosecution of its burden of proof." Moreover, if anything, promising evidence ultimately not introduced generally would disadvantage the state's case. *Cf. id.* ¶ 13 (party "who fails to produce evidence at trial to support claims made during the opening statement generally hurts only [it]self" because it "loses

credibility with the jury, cannot refer to the evidence available in closing argument, and will not be entitled to a jury instruction based on the evidence"). But that did not happen here.

¶8 The prosecutor previewed the lead detective's investigation, understandably in some detail given the anticipated volume of evidence to be presented by the detective, stating he "interviewed over 75 witnesses, recorded on tape. There's transcripts of those interviews. They're recorded. He interviewed over 50 witnesses just between 2000 and 2003. He's the one who ensured all these photographs were taken, checked items of evidence in, ensured they were analyzed by forensics." He went on: the detective "did all this work to make sure that you've got the photographs you have, the evidence that we will be admitting, the recordings of 75 interviews by the time he's done working on the case. And he actually takes 90 pages of notes . . . detailing his work on the case." The detective's testimony, over the course of two days, describing the extent of the police investigation confirmed those statements were accurate. A lawyer has considerable latitude in opening statement, so long as a good faith basis for believing specific evidence referred to exists and will be admissible. *See id.* ¶¶ 10, 12; *see also State v. Burruell*, 98 Ariz. 37, 40 (1965) ("Counsel should outline generally what he intends to prove, and should be allowed considerable latitude." (quoting *State v. Erwin*, 101 Utah 365 (1941))). Thus, we find no prosecutorial error in these complained-of statements.

¶9 Watson further contends the prosecutor improperly "engaged in pure theatrics," during his opening statement, by his manner of "justifying the lack of DNA evidence" connecting Watson to Linda's house and discounting DNA of another potential suspect in her disappearance. While a prosecutor may not make arguments that "appeal to the fears or passions of the jury," *see Morris*, 215 Ariz. 324, ¶ 58, Watson has not provided any authority, nor are we aware of any, that a prosecutor commits error by describing evidence or the lack thereof with fervor during an opening statement. In any event, the jury was specifically and properly instructed that what the lawyers say in opening statements is not evidence. In light of that instruction, we cannot say these alleged errors in the prosecutor's opening statement affected the jury's verdict. *See Acuna Valencia*, 245 Ariz. 197, ¶ 69; *see also Pedroza-Perez*, 240 Ariz. 114, ¶ 13 (presuming jurors follow instruction that opening statements are not evidence and noting "such an instruction typically cures any potential prejudice"); *State v. Haverstick*, 234 Ariz. 161, ¶ 8 (App. 2014) (instruction that lawyer's arguments are not evidence "can be sufficient to 'cure' improper vouching").

Eliciting Precluded Evidence

¶10 Watson also contends the prosecutor's comment that the murders of Marilyn and Renee were not the result of a robbery, carjacking, or gang violence improperly referred to evidence that had been disallowed. He argues the state sought to preclude the defense "from mentioning the fact that Curtis Road was a known high-crime neighborhood and that there was a possibility that Marilyn and Renee were killed in a botched robbery," then "proceeded to argue the absence of such evidence in opening statements and through leading questions presented to the [s]tate's witnesses." Assuming, without deciding, that the prosecutor's reference, which was only a passing one, was improper, it did not call the jury's attention to matters it would not be justified in considering when determining its verdict.[1] *See State v. Jones*, 197 Ariz. 290, ¶ 37 (2000). Accordingly, Watson has not shown the prosecutor's brief statement would amount to error that could have affected the fairness of his trial. *See Anderson*, 210 Ariz. 327, ¶ 45 (requiring a showing that a "reasonable likelihood exists that the misconduct could have affected the jury's verdict"); *Martinez*, 248 Ariz. 458, ¶ 43.

[1] As noted in our previous decision, the trial court ultimately permitted the defense to introduce evidence of, and argue, its high-crime area, third-party culpability defense. *Watson*, 2 CA-CR 2017-0171, ¶¶ 28, 30-31. In his supplemental brief, Watson contends in particular that the prosecutor introduced the absence of evidence regarding the previously precluded defense theory that several mechanics at an area auto shop had seen "a Hispanic man in a Cadillac loitering on Curtis Road and speeding away when shots were fired." He argues that theory was not allowed by the trial court's revised ruling permitting some previously precluded third-party culpability theories and therefore the prosecutor's reference to it was error. But that overstates the prosecutor's comment. The prosecutor only generally referred to a lack of evidence that someone else could have committed the murders, stating, "You may hear talk about a bad neighborhood. This was not a robbery. This was not a carjacking. This was not gang violence. This was an assassination." That statement did not implicate the precluded "suspicious Cadillac" theory. Moreover, the court's subsequent order permitting the defense to argue the possibility of a robbery or carjacking corrected any possible error in the prosecutor's statements, and, as noted in our previous decision, the departing-Cadillac third-party culpability theory was properly precluded as speculative.

Leading Questions

¶11 Watson further complains the state committed prosecutorial error by asking leading questions on direct examination. He provides several examples, but claims "it would require reprinting significant portions of each transcript to identify each one." Watson has waived any contentions not expressly identified in his briefs. Ariz. R. Crim. P. 31.10(a)(7), (c); *State v. Carver*, 160 Ariz. 167, 175 (1989). We agree that the prosecutor asked certain witnesses leading questions on direct examination. *See State v. Payne*, 233 Ariz. 484, ¶ 119 (2013); *see also* Ariz. R. Evid. 611(c) ("Leading questions should not be used on direct examination except as necessary to develop the witness's testimony."). We disagree, however, that those questions "injected the prosecutor's opinion into evidence." Moreover, the questions were unobjected to, save for one, suggesting that in the course of the trial, they were not deemed particularly prejudicial by Watson's two defense attorneys. *Cf. Trice v. Ward*, 196 F.3d 1151, 1167 (10th Cir. 1999) (counsel's failure to object to prosecutor's comments "while not dispositive, is relevant to [the] assessment of fundamental unfairness"); *Nichols v. Scott*, 69 F.3d 1255, 1278 (5th Cir. 1995) (failure to object to prosecutor's argument "is an indication that it was not perceived as having a substantial adverse effect [and] would not naturally and necessarily be understood as advancing improper considerations" (internal citation omitted)). Lastly, it was within the trial court's discretion to allow leading questions, particularly when not objected to. *See State v. Duffy*, 124 Ariz. 267, 273-74 (App. 1979); Ariz. R. Evid. 611(c). Accordingly, we do not find the complained-of questioning amounted to prosecutorial error. *See Duffy*, 124 Ariz. at 273-74.

Impugning Integrity of Defense Counsel

¶12 Watson argues the prosecutor committed error by raising "a constant stream of speaking objections" during cross-examination of his former spouse, Rosemary, which he alleges was "designed to discredit the attorneys and accuse the attorneys of improper conduct, while vouching for the [s]tate's star witness." The record reflects the prosecutor repeatedly made a "Rule 106" objection during Watson's questioning of Rosemary, asserting the defense was "[m]ischaracteriz[ing]" her previous statement to investigators.[2] The trial court overruled the objections, instructing, "I'm

[2]Rule 106, Ariz. R. Evid., provides that when a party introduces part of a written or recorded statement, the adverse party may require the

going to let him ask these questions. If you think he's misstated something or mischaracterized something under Rule 106 when he's done we're immediately going to let you read or have her read the entire paragraph verbatim." Watson also claims the prosecutor repeatedly and improperly objected during the defense opening statement. Although the prosecutor's continued objections may have been argumentative and disruptive of the defendant's cross-examination and opening statement, and we disapprove of them to the extent the prosecutor had already made his record and had been overruled, Watson has not demonstrated they impugned the integrity or honesty of opposing counsel, or vouched for Rosemary as he contends, and as such, we do not agree that the objections amounted to error contributing to any denial of a fair trial. *See generally State v. Thomas*, 110 Ariz. 120, 134 (1973) (frequent objections hindered defense, but no reversible error where defendant was not "effectively prevented from presenting his case"); *State v. Shook*, 1 Ariz. App. 458, 461 (1965) (prosecutor's conduct was "[a]nnoying" but defendant was not prejudiced).[3]

Misrepresenting the Evidence

¶13 Watson also claims the prosecutor "misrepresented the evidence" by his references to certain trial exhibits. In our previous decision, we rejected the argument that those references were a cause for a mistrial. The trial court expressly found that the jury did not see certain precluded information inadvertently included in a "horseback ride timeline" and we therefore continue to conclude there was no error that violated Watson's rights. *See State v. Armstrong*, 208 Ariz. 345, ¶ 60 (2004) (rejecting misconduct claim based on actions occurring outside the presence of the jury); *see also Martinez*, 248 Ariz. 458, ¶¶ 46-47 (2020) (prosecutorial error is conduct "that violates a defendant's rights"). Moreover, we disagree that the prosecutor's other statements and questions regarding the permitted horse trailer and horse tracks evidence misrepresented the evidence or otherwise constituted "an error going to the foundation of the

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introduction of any other part "that in fairness ought to be considered at the same time."

[3]We nevertheless caution that while objections should be raised to preserve the record, we do not condone their repeated use, even if not rising to the level of prosecutorial error, when they have little continuing justification and may serve only to impede the opposing side.

case."[4] Similarly, the prosecutor's creation of the "misleading" chart listing grandparent visitations was not error. As we previously noted, the only inaccuracy was a "comment that was made at the end," but we cannot speculate about the contents of something not entered into evidence and not in the appellate record. *See State v. Rivera*, 168 Ariz. 102, 103 (App. 1990). We therefore cannot find that the reference to that exhibit constituted prosecutorial error.

Cumulative Error

¶14 As our supreme court has instructed in *Vargas*, "[a] defendant presenting an appellate claim of fundamental error due to prosecutorial misconduct may base his claim on a single alleged instance of misconduct or he may allege that multiple instances occurred, which cumulatively amount to fundamental error. In either case, the defendant must establish that misconduct occurred." 249 Ariz. 186, ¶ 1; *see also State v. Bocharski*, 218 Ariz. 476, ¶ 75 (2008) ("Absent any finding of misconduct, there can be no cumulative effect of misconduct sufficient to permeate the entire atmosphere of the trial with unfairness."). In light of our above conclusions that only two instances of the prosecutor's conduct could be considered error, and neither could have affected the jury's verdict, *see Martinez*, 248 Ariz. 458, ¶ 45, Watson has not established cumulative fundamental error. It may be worth noting at this point, that after the culmination of the month-long trial, at a hearing on Watson's motion for new trial, the judge who had presided over the case expressly found "there was no prosecutorial misconduct throughout the trial." Although we do not go that far, indeed, as we have recognized, this trial was not flawless, it was nevertheless a fair one. *See State v. Leslie,* 147 Ariz. 38, 45 (1985) (defendant entitled to fair trial, not perfect one).

[4]The trial court had disallowed testimony that horse tracks had been observed in the area where Linda's skull was found in January 2008 as lacking foundation, but permitted testimony that Watson was seen pulling a horse trailer and had parked it near the area on a previous date. The state then referred to the permitted testimony in closing argument as circumstantial evidence that "when the heat was on defendant went right out there by . . . where Linda's skull was found."

Disposition

¶15 Having reconsidered Watson's cumulative prosecutorial error claim under the *Vargas* standard as our supreme court has directed, Watson's convictions and sentences are again affirmed.