IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BERHAN ADHANA HIABU,
Appellant.

No. 2 CA-CR 2023-0195
Filed November 21, 2024

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NOT FOR PUBLICATION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 Pima County
No. CR20185158001
The Honorable Javier Chon-Lopez, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Vice Chief Judge Eppich authored the decision of the Court, in which Presiding Judge Sklar and Judge Brearcliffe concurred.

E P P I C H, Vice Chief Judge:

¶1 Berhan Hiabu appeals from his convictions and sentences for kidnapping, sexual abuse, and sexual assault. He argues the trial court erred by denying his motion for a mistrial due to the prosecutor's use of the phrase "in this case" and questions related to his prior employment with Uber. Hiabu asserts these instances highlighted his other pending charges to the jury in violation of a prior court order. For the following reasons, we affirm Hiabu's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Hiabu. *See State v. Fierro*, 254 Ariz. 35, ¶ 2 (2022). Early one morning in January 2017, D.B. and her friend were outside of a bar discussing plans to get home. D.B. had consumed "a lot" of alcohol, and while she was outside, Hiabu offered her a ride in his car. Thinking it was an Uber, D.B. got into the front seat of Hiabu's car, afraid that she might throw up if she sat in the back. Hiabu drove through a dark residential area, stopped the car, grabbed D.B.'s hand, and used it to masturbate himself. D.B. was "scared" and she "froze" because she did not want to get hurt. Hiabu then "shoved himself" onto her, and D.B. resisted as he straddled her, reached under her dress, and touched her breasts. D.B. was eventually able to exit the car and contact police.

¶3 After a jury trial, Hiabu was convicted as described above and sentenced to concurrent prison terms, the longest of which is seven years. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Prosecutorial Error

¶4 On appeal, Hiabu argues the trial court erred by denying his request for a mistrial based on prosecutorial error.[1] Specifically, he asserts the prosecutor violated the court's order to exclude references to other bad acts by (1) repeatedly using the phrase "in this case" during the state's case-in-chief, and (2) eliciting testimony related to his employment with Uber. We review the court's denial of a motion for mistrial due to prosecutorial error for an abuse of discretion. *State v. Burns*, 237 Ariz. 1, ¶ 146 (2015); *see also State v. Jones*, 197 Ariz. 290, ¶ 32 (2000) (trial court has broad discretion in determining mistrial motion because it is "in the best position to determine whether the evidence will actually affect the outcome of the trial").

¶5 A mistrial is an extraordinary remedy that "should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Payne*, 233 Ariz. 484, ¶ 61 (2013) (quoting *State v. Speer*, 221 Ariz. 449, ¶ 72 (2009)); *see also State v. Hughes*, 193 Ariz. 72, ¶ 26 (1998) (To warrant reversal, prosecutor's conduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." (quoting *State v. Atwood*, 171 Ariz. 576, 611 (1992))). If the prosecutor "knowingly engages in improper and prejudicial conduct indifferent to the fact that such conduct will likely result in a mistrial or dismissal," the trial court must order a mistrial. *State v. Rasch*, 188 Ariz. 309, 312 (App. 1996).[2]

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[1]Hiabu characterizes the prosecutor's allegedly improper actions as "prosecutorial misconduct." Our supreme court has directed that "courts should differentiate between 'error,' which may not necessarily imply a concurrent ethical rules violation, and 'misconduct,' which may suggest an ethical violation." *In re Martinez*, 248 Ariz. 458, ¶ 47 (2020). The prosecutor's challenged conduct here was not ethically improper.

[2]After the jury returned its verdicts, Hiabu also moved for new trial—making arguments similar to those in his mistrial motion. Hiabu does not challenge the denial of his motion for new trial on appeal, and, therefore, we do not address it. *See State v. Clark*, 249 Ariz. 528, ¶ 13 (App. 2020) (failure to include "contentions, citations to legal authority, and appropriate references to the record" may result in waiver); Ariz. R. Crim. P. 31.10(a)(7).

I. "[I]n this case"

¶6 To provide context to Hiabu's arguments, it is necessary to note that, in addition to the charges here, Hiabu was also charged with two attempted sexual assaults related to two other victims that occurred more than eighteen months after the crimes against D.B. The trial court denied the state's motion to consolidate that matter with this one. The court found that even if the other offenses were admissible as other acts under Rule 404(b), (c), Ariz. R. Evid., the probative value is substantially outweighed by the danger of unfair prejudice.

¶7 Before trial, Hiabu filed a "Motion to Suppress/Motion in *Limine*" to preclude his statement to a detective from being introduced into evidence. The trial court granted the motion in part. The court generally permitted the state to introduce Hiabu's statements but prohibited any mention of his previous contacts with police, previous representation by a public defender, previous police collection of DNA samples, or previous release on bond. The court further ordered the state to "instruct any witness to not refer to [Hiabu] having any past involvement with the police."

¶8 During trial, while the state examined the detective, the following occurred:

> [Prosecutor:] So we've been talking about some events that happened on January of 2017. You became involved in this case in September of 2018; is that correct?
>
> [Detective:] That's about correct.
>
> [Prosecutor:] Now, without getting into the particulars, in September of 2018, did Berhan Hiabu become a suspect in this case?
>
> [Detective:] Yes.
>
> [Prosecutor:] And were you able to collect his DNA as a result of that, collect—collect his buccal swabs?
>
> [Detective:] As a result of which.

> [Prosecutor:] So in this case, were you able to get a warrant to get buccal swabs for—[3]
>
> . . . .
>
> [Prosecutor:] So—so as I was saying, in this case, were you able to get a warrant to get the DNA buccals from Berhan Hiabu?
>
> [Detective:] In a case in two thousand—
>
> [Prosecutor:] So just in this. So in 2018, were you able to get a warrant to get the buccals from—for Berhan Hiabu?
>
> [Detective:] Yes.
>
> . . . .
>
> [Prosecutor:] Now, in this case, you had requested that some additional DNA be tested, is that correct?
>
> [Detective:] That is correct.
>
> [Prosecutor:] So we'll hear later from some DNA that was tested in 2019. Just this past year, did you request some additional DNA to be tested in this case?
>
> [Detective:] Yes.

¶9 Based on this line of questioning, Hiabu moved for a mistrial. He argued, in part, that the detective was "confused about whether [the DNA] was collected in this case or another case" and implied to the jury "that the buccal swabs were seized under a different case number" in violation of the trial court's prior order. The court denied the motion. On

[3]At this point, Hiabu objected arguing the state should not discuss a warrant because he was not challenging the legality of obtaining the buccal swabs. The state argued the questioning was necessary to establish the police followed the proper procedures. The trial court overruled Hiabu's objection.

redirect, the prosecutor again confirmed the detective had collected DNA from Hiabu by asking, "So, again, in this case, you were able to collect DNA that was placed into evidence?"

¶10 Hiabu subsequently submitted a "Memorandum in Support of Motion for Mistrial" in which he argued the prosecutor's use of the phrase "*in this case*" was prosecutorial misconduct and "a deliberate attempt to prejudice the jury against" him. He further asserted, "it is reasonable to believe that the Jurors were put on alert that another matter may be pending against" him. The court denied the motion for mistrial concluding the prosecutor's addition of "[in] this case" did not imply that Hiabu had other charges pending against him.

¶11 On appeal, Hiabu reasserts that the prosecutor's repeated use of the phrase "in this case" when questioning the detective signaled to the jury that there was at least one other case pending against him.[4] He argues this violated the trial court's orders prohibiting the introduction of other act evidence and precluding evidence of prior involvement with the police. The state counters that the phrase "in this case" did not suggest another case was pending against Hiabu and, to the extent the phrase or similar phrasing was used, it was to prevent inadvertent disclosure of Hiabu's other charges and "reorient[] [the detective] to the case at hand."

¶12 "The prosecutor has an obligation to seek justice, not merely a conviction, and must refrain from using improper methods to obtain a conviction." *Hughes*, 193 Ariz. 72, ¶ 33. Therefore, a prosecutor may not refer to evidence not in the record, suggest that the defendant committed other "bad acts" without a proper basis and proper analysis by the trial court, or refer to previously excluded evidence. *See State v. Leon*, 190 Ariz. 159, 161-63 (1997) (prosecutor's reference in closing argument to "prior transactions" and implication that unadmitted police reports contained other "bad acts" was reversible misconduct and "particularly egregious" because court had excluded statements related to a prior incident); *cf.* Ariz. R. Evid. 404(b) (generally precluding evidence of other crimes or acts to

[4]At trial, Hiabu also argued a crime scene specialist's reference, to other cases, generally, was impermissible as irrelevant. After the trial court denied the motion for mistrial, Hiabu moved to strike that witness's testimony. Although Hiabu mentions this testimony in his opening brief, he does not develop an argument as to why the testimony was improper or how it relates to the court's denial of his motion for mistrial. We therefore do not address it. *See Clark,* 249 Ariz. 528, ¶ 13.

show conformity therewith); *State v. Anthony*, 218 Ariz. 439, ¶ 33 (2008) (setting out findings court must make before admitting Rule 404(b) evidence).

¶13 The prosecutor's use of the phrase "in this case" here was not error. The prosecutor appears to have used the phrase to orient the witness, a detective who was actively working on "cold cases," to the matter at hand. Specifically, when asking the detective to introduce his involvement with Hiabu, the prosecutor asked him not to "get[] into the particulars," implicitly requesting the detective avoid details that may connect Hiabu to the other, unrelated charges.

¶14 The closest impermissible reference to the unrelated charges came from the detective, not the prosecutor. After being asked if he was able to obtain a warrant to get buccal swabs from Hiabu in this case, the detective stated "[i]n a case in two thousand—." The prosecutor said, "So just in this. So in 2018, were you able to get a warrant to get the buccals from—for Berhan Hiabu?"

¶15 The crimes against D.B. occurred in 2017, whereas the crimes alleged in the unrelated charges occurred in 2018. Although the detective did not specify a year before the prosecutor intervened, it appears the prosecutor was attempting to preemptively avoid an inadvertent disclosure of the other charges and ensure compliance with the trial court's prior order. Because no particular year was mentioned by the detective and the prosecutor's subsequent question was focused on the matter at issue, it was reasonable for the court to conclude this exchange did not imply Hiabu had other charges against him.

¶16 Even so, Hiabu analogizes the phrase "in this case" to a prosecutor's use of a "mug shot" photograph. Our supreme court has concluded that even if a "mug shot" is not shown to the jury, testimony about a "mug shot" can be reversible error as it may "imply[] a prior criminal conviction." *State v. Jacobs*, 94 Ariz. 211, 212-14 (1963). We disagree that "in this case" is inherently suggestive of any prior criminal activity in the same way a "mug shot" can be, and Hiabu cites no authority to support such an argument. As mentioned above, the detective here was actively working on "cold cases" when he testified. A reasonable explanation for the phrase is to orient the detective to the case at hand and not any of his other active cases. The prosecutor used this phrase, without objection, when questioning other witnesses including another detective and the crime scene specialist. Hiabu himself used the phrase a number of times on cross-examination.

¶17 We recognize that, in certain circumstances, the inflection and emphasis used in the phrase "in this case" could improperly lead a jury to conclude a defendant is subject to other proceedings. But the trial court is in the best position to evaluate the prosecutor's "tone of voice, facial expressions, and their effect on the jury, if any." *State v. Hansen*, 156 Ariz. 291, 297 (1988). Hiabu's other case was never mentioned, and the court concluded the prosecutor's use of the phrase "in this case" did not otherwise suggest there were other charges pending against Hiabu. Absent an abuse of discretion, we will not disturb this conclusion. *Id.* On this record, there was no prosecutorial error in the use of the phrase "in this case," and the court did not thereby err in denying a mistrial on this ground.

II. Employment with Uber

¶18 Hiabu also contends the prosecutor's questioning of the detective regarding Hiabu's prior employment with Uber was improper. He argues the prosecutor knew he was not an Uber driver in January 2017 and that by asking about Uber, the prosecutor improperly asked about evidence "only applicable to [his] other pending case."

¶19 At trial, the prosecutor asked the detective, if he was "able to confirm if Berhan Hiabu was an Uber driver." Hiabu objected on hearsay grounds, which the trial court overruled. The detective responded, "Yes."

¶20 Hiabu then moved for a mistrial arguing any facts related to him being an Uber driver "happened in a completely different case" and that "as a matter of fact, he wasn't an Uber driver when this happened." The trial court denied the motion reasoning that the detective had not mentioned a different case and that, as it related to this case, "some of these cars identify themselves as Ubers and others don't." The court further stated there had been "plenty of evidence presented to the jury that they can decide whether or not he was an Uber driver." On cross-examination, Hiabu elicited testimony from the detective that he had not contacted Uber to investigate whether Hiabu was an Uber driver in January 2017. In an argument to the court thereafter, Hiabu again asserted that the questioning was precluded by the court's prior order but that the prosecutor was "not intentionally trying to do something."

¶21 In his subsequent "Memorandum in Support of Motion for Mistrial," mentioned above, Hiabu additionally argued that this questioning constituted knowing prosecutorial misconduct as "no credible evidence" supported the assertion that he was an Uber driver in January 2017. The trial court stated it was "worried" about the mention of Uber but

concluded it could be remedied by clarifying that Hiabu only admitted to being an Uber driver in 2018 and that the detective "[did] not have any solid evidence to show that [Hiabu] was an Uber driver when this happened." The court denied the "motion for mistrial," and the detective was recalled to testify. Based on the state's questioning, the detective clarified that he did not know whether Hiabu was an Uber driver in January 2017. Hiabu again cross-examined the detective and asked if the state had "any evidence that [he] was an Uber driver" in January 2017. The detective responded, "No."

¶22 On appeal, Hiabu argues the state's questioning "insinuated he was being investigated in other cases" because although he may have been an Uber driver in 2018, when the other charged attempted sexual assaults allegedly occurred, the prosecutor knew he was not an Uber driver in January 2017. He further asserts this questioning left him "no room to cross-examine" the detective without referencing the other case.

¶23 As noted above, it is prosecutorial error for a prosecutor to make insinuations unsupported by evidence in the record, *see State v. Arias*, 248 Ariz. 546, ¶ 35 (App. 2020), or improperly refer to other "bad acts," *Leon*, 190 Ariz. at 162; *see also* Ariz. R. Evid. 404(b). But contrary to Hiabu's argument, the prosecutor did not make "unsupported insinuations" while questioning the detective here. *Arias*, 248 Ariz. 546, ¶¶ 35, 48 (unsupported insinuations are inquiries made without a reasonable basis). Hiabu had told police in November 2018 that he was an Uber driver and had been for "maybe a year" but was unsure. The questioning was relevant because D.B. had previously testified that Uber had been discussed before she got into Hiabu's car, either with her friend or with Hiabu. She further testified that although she did not "order an Uber," she thought Hiabu was an Uber driver and assumed her friend had ordered the Uber for her.

¶24 Even if we assume, without deciding, that this questioning was error, it was harmless beyond a reasonable doubt. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005) (A defendant's objection preserves an error for harmless error review which "places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence."). Whether Hiabu was actually an Uber driver or not in January 2017 was of little importance because his identity was established through DNA evidence. Hiabu did not contest that his DNA was found on D.B. and her phone. Moreover, any error was cured when Hiabu cross-examined the detective and clarified that the state did not have evidence that he was an Uber driver in January 2017. As such, we

are convinced beyond a reasonable doubt that this asserted error was harmless. *See id*.

¶25 Hiabu also argues the combination of the phrase "in this case" and reference to Uber resulted in cumulative prosecutorial error depriving him of a fair trial. Because we have assumed, at most, one error, we need not address this argument. *See State v. Thompson*, 252 Ariz. 279, ¶¶ 83, 85 (2022) (no need to address cumulative error when only one instance of prosecutorial error).

Disposition

¶26 For the foregoing reasons, we affirm Hiabu's convictions and sentences.