FILED BY CLERK
JUL -1 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. EDUARDO VASQUEZ CELAYA, Appellant.	2 CA-CR 2007-0307 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063527

Honorable John S. Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson — Tucson
Attorneys for Appellee

Emily Danies — Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 A jury found appellant Eduardo Celaya guilty of two counts of first-degree murder. He was sentenced to consecutive life terms of imprisonment with no possibility of parole until he had served twenty-five years on each count. He argues the trial court erred when it denied his motion for mistrial based on prosecutorial misconduct and when it allowed the state's rebuttal witness to remain in the courtroom while a firearms expert testified for the defense. For the following reasons, we affirm Celaya's convictions and sentences.

¶2 We view the evidence in the light most favorable to upholding the convictions. *State v. Slover*, 220 Ariz. 239, ¶ 2, 204 P.3d 1088, 1091 (App. 2009). In October 2005, a police officer dispatched to a city park found in a car the bodies of two men, each of whom had been shot once in the head. Officers arrested Celaya in September 2006 after his cousin, Manuel B., reported that Celaya had killed the men.

¶3 Manuel maintained at trial that, a few weeks before the homicides, Celaya had reported having accidentally shot a bullet from his .45-caliber gun in his work truck. A detective later found the bullet in the floorboard of the truck beneath the seat, and testing indicated the bullet had been fired from the same gun used to kill the victims. Celaya presented evidence at trial that, about two years before the homicides, he had purchased one gun, returned it approximately a week later, and another week later purchased a second gun of the same manufacture and model as the first. Based on this evidence, Celaya contended outside the jury's presence that the gun "that fired the shot through the seat had in fact been

returned . . . and replaced with a totally different weapon." However, the jury heard no direct evidence about the timing of Celaya's misfiring of the gun into the work truck. Nor did Celaya argue to the jury that, when the victims were shot, he no longer owned the gun that he had fired into the work truck. After Celaya was convicted and sentenced, this appeal followed.

PROSECUTORIAL MISCONDUCT

¶4 Celaya argues the trial court erred in denying his motion for a mistrial, urged on the ground of cumulative prosecutorial misconduct during closing argument.[1] "We review a trial court's denial of a motion for mistrial for an abuse of discretion, bearing in mind that a mistrial is a 'most dramatic' remedy that 'should be granted only when it appears that that is the only remedy to ensure justice is done.'" *State v. Blackman*, 201 Ariz. 527, ¶ 41, 38 P.3d 1192, 1203 (App. 2002), *quoting State v. Maximo*, 170 Ariz. 94, 98-99, 821 P.2d 1379, 1383-84 (App. 1991). In deciding whether to grant a mistrial based on prosecutorial misconduct, "[t]he trial court should consider (1) whether the prosecutor's statements called jurors' attention to matters the jury was not justified in considering in

[1]However, Celaya moved for a mistrial based only on the prosecutor's alleged comment on his failure to testify. He did not object when the prosecutor made a statement about the defense expert witness, nor did he object on that basis in his subsequently renewed motion for mistrial. Thus, we review his claim of cumulative prosecutorial misconduct for fundamental error and resulting prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005); *State v. Hughes*, 193 Ariz. 72, ¶ 62, 969 P.2d 1184, 1198 (1998); *State v. Wood*, 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994) ("In determining whether a prosecutor's conduct amounts to fundamental error, we focus on the probability it influenced the jury and whether the conduct denied the defendant a fair trial.").

determining its verdict, and (2) the probability that the jurors were in fact influenced by the remarks." *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997). Moreover, we will only reverse a conviction for prosecutorial misconduct when it was "'so pronounced and persistent that it permeate[d] the entire atmosphere of the trial.'" *Id.*, *quoting State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

¶5 Celaya argues the first instance of misconduct occurred when the prosecutor commented in closing argument on his failure to testify. The prosecutor stated:

> Did anyone sit in that chair, swear to tell the truth and look you all in the eye and tell you anything about when the bullet was fired into the work truck? Absolutely, positively not. Nobody did that except that Man[uel] said he heard about it a few weeks before the murders.

Then, in rebuttal, the prosecutor stated:

> [Y]ou're told by defense counsel . . . [the Bureau of Alcohol, Tobacco, and Firearms records] must mean that the bullet was accidentally discharged by the gun that was returned and, therefore, the two guns must be different.
>
> That's what you're being asked to believe; however, there was no testimony as to that, none. That is, again, just a lawyer talking to you . . . .

¶6 "In Arizona, a prosecutor is prohibited both by constitution and by statute from bringing to the jury's attention either directly or indirectly the fact a defendant did not testify." *State v. Schrock*, 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986); *see* Ariz. Const. art. II, § 10; A.R.S. § 13-117(B); *State v. Christensen*, 129 Ariz. 32, 38, 628 P.2d 580, 586

(1981) (federal and Arizona constitutional law prohibits reference to defendant's choice not to testify); *see, e.g.*, *State v. Decello*, 113 Ariz. 255, 258, 550 P.2d 633, 636 (1976) ("The comment 'no one, no one, no one got up on this stand and testified to you contrary to what was testified to you by the witnesses' was certainly calculated to point out to the jury that the defendant had not taken the stand and testified and was, we believe, fundamental error."). "To determine whether a particular argument is improper, the statements must be examined in context to determine whether the jury would naturally and necessarily perceive them to be a comment on the failure of the defendant to testify." *Schrock*, 149 Ariz. at 438, 719 P.2d at 1054.

¶7 Our courts have long held a prosecutor's general comments that the state's evidence is uncontroverted are not improper comments on a defendant's failure to testify. *See State v. Flynn*, 109 Ariz. 545, 548, 514 P.2d 466, 469 (1973) (prosecutor's statement defendant did not bring witnesses to rebut some of state's evidence not improper comment on failure to testify); *State v. Byrd*, 109 Ariz. 10, 11, 503 P.2d 958, 959 (1972) ("The prosecution has a right to argue to the jury that the State's case has not been contradicted, even though the defendant is one of the persons who might have done so."); *State v. Morgan*, 128 Ariz. 362, 369, 625 P.2d 951, 958 (App. 1981) (statement defense had put on no evidence when defendant was only one of two witnesses who could have testified not improper comment on failure to testify). Here, the prosecutor did not name Celaya and it was unclear Celaya was the only potential source of evidence about when the misfire may have

occurred.[2] Thus, the issue here is a close one that must necessarily turn on a fair assessment of how the comments would reasonably be understood in the context of the overall case. And, we do not believe the jury would have "naturally and necessarily perceive[d]" the prosecutor's statements to be a comment on Celaya's failure to testify. *Schrock*, 149 Ariz. at 438, 719 P.2d at 1054. We therefore find no misconduct in those remarks.

¶8 Celaya also contends the prosecutor engaged in misconduct in his summation when he challenged the credibility of the firearms expert who testified for the defense as follows:

> What is odd . . . is that after [Ronald Scott] stopped being a police officer and coming and testifying as part of the law enforcement community, after he stopped that, he's opened up his own business and now he works for hire, and now he uses a different scientific standard. So it depends on, I guess, who is paying the bill for Mr. Scott as to what science means.

"It is proper impeachment to inquire into the credentials and employment of an expert witness to show bias or motive." *State v. Bailey*, 132 Ariz. 472, 478, 647 P.2d 170, 176 (1982). "However, a prosecutor may not insinuate that an expert is unethical or incompetent without properly admitted evidence to support it." *Id.* at 479, 647 P.2d at 177.

¶9 Celaya relies on *State v. Hughes*, 193 Ariz. 72, ¶¶ 52-53, 969 P.2d 1184, 1196 (1998), in which the court found prosecutorial misconduct had occurred when the state argued the defense had paid an expert to fabricate a diagnosis. In *Hughes*, however, the

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[2]Indeed, the record suggests that other persons who worked with Celaya could conceivably have supplied such evidence.

prosecutor's statements about the expert witnesses were completely unsupported by the record and were part of a rebuttal argument our supreme court characterized as "a masterpiece of misconduct." *Id.* ¶ 50. Here, in contrast, the prosecutor's comment about Scott's scientific standard was based on Scott's own testimony that, although he had testified in previous cases that a particular bullet could be linked to a particular gun, he no longer believed such a conclusive connection was possible.

¶10 Moreover, "[c]ounsel ha[s] wide latitude in closing argument." *Id.* ¶ 69. This wide latitude includes the ability to comment on the evidence, a "valuable tool[] for the determination of truth." *Bailey*, 132 Ariz. at 479, 647 P.2d at 177. The statement that "it depends on . . . who is paying the bill for Mr. Scott as to what science means," was such a comment on the evidence. Finally, we presume the jurors followed the court's instruction that the lawyers' statements in closing argument are not evidence. *See State v. Tucker*, 215 Ariz. 298, ¶ 89, 160 P.3d 177, 198-99 (2007).

¶11 In short, not only has Celaya failed to show that any of the cited statements by the prosecutor "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974), he has failed to persuade us that they were misconduct at all.

FAILURE TO EXCLUDE REBUTTAL WITNESS

¶12 Celaya also argues the trial court erred when it allowed the state's rebuttal witness, Lucien Haag, to remain in the courtroom while Ronald Scott was testifying for the

defense. At the beginning of trial, Celaya had invoked Rule 9.3(a), Ariz. R. Crim. P., which provides that, when requested by either party, the court "shall . . . exclude prospective witnesses from the courtroom during opening statements and the testimony of other witnesses." *See State v. Sowards*, 99 Ariz. 22, 26, 406 P.2d 202, 204 (1965) (noting purpose of rule to encourage discovery of truth and expose falsehoods).

¶13 But "a mere violation of [Rule 9.3(a)] does not result in automatic reversal." *State v. Hadd*, 127 Ariz. 270, 277, 619 P.2d 1047, 1054 (App. 1980). Generally, the "admission of testimony after a rule violation is a matter of discretion with the trial judge, and absent an abuse of that discretion and subsequent prejudice to appellant, we will not interfere." *Id.*; *accord State v. Jones*, 185 Ariz. 471, 483, 917 P.2d 200, 212 (1996). Here, although Celaya had invoked the rule at the beginning of trial, he did not object when Haag remained in the courtroom during Scott's testimony. Thus, the trial court had no chance to cure the violation when it occurred. Even had Celaya objected, however, an appellant must show he has suffered prejudice from a rule violation to be entitled to relief. *See State v. Gulbrandson*, 184 Ariz. 46, 63, 906 P.2d 579, 596 (1995) (defendant must show prejudice resulted from violation of Rule 9.3).

¶14 Celaya relies on the following factors to support his general assertion that allowing Haag to remain in the courtroom during Scott's testimony was "clearly prejudicial": Haag's "ultimate testimony was biased"; Haag had prior access to a transcript of the state's interview with Scott and a report of Scott's research and conclusions; and "Scott has

criticized Mr. Haag's work on his website and thus, Haag could not really be fair and objective." But these factors do not explain how Haag's presence in the courtroom during Scott's testimony affected the outcome of the trial. Indeed, Celaya's assertions that Haag had preexisting disagreements with Scott and that Haag possessed materials related to Scott's conclusions in Celaya's case would have presumably affected Haag's subsequent rebuttal testimony regardless of whether he heard Scott's testimony. Thus, Celaya has failed to articulate how he was prejudiced by Haag's presence.

¶15 Celaya's convictions and sentences are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge