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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS MARIA DURAZO, Appellant.	2 CA-CR 2008-0305 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CR06-161

Honorable Kimberly A. Corsaro, Judge Pro Tempore

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Jesus Durazo was convicted of two counts each of attempted first-degree murder and endangerment and a single count of drive-by shooting, all dangerous nature offenses. The trial court sentenced him to aggravated, concurrent prison terms of twenty-one years for the drive-by shooting and three years for each of the endangerment counts, to be served consecutively to aggravated, consecutive terms of twenty-one years for each of the attempted murder counts. On appeal, Durazo argues the court erred by denying his motions to preclude photographic and physical evidence, denying his motion for a mistrial based on impermissible lay opinion testimony the court had ordered stricken from the record, denying his motion to dismiss two of the counts as multiplicitous, and imposing a sentence for drive-by shooting that is consecutive to the attempted murder counts. He also alleges multiple instances of prosecutorial misconduct. For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). Durazo and M. were divorced in 2002 but briefly renewed their relationship during the second half of 2005. In March or April of 2006, M. ended the relationship, telling Durazo she was seeing someone else. Durazo attempted to change her mind by offering M. money and telling her that if she "wasn't for him, [she] couldn't be for anyone else." M. had begun dating another man, T., and refused Durazo's advances.

¶3 On July 2, M. and T. were sitting in T.'s vehicle in the driveway in front of M.'s home in Nogales when Durazo drove his black Mercedes past the house, turned around, and blocked the driveway with his car. Durazo pointed a handgun out of his car window and fired several shots, wounding both M. and T. T. started his vehicle and rammed the Mercedes, pushing it out of the way. T. and M. had driven about half a mile when Durazo caught up with them on Grand Avenue and began shooting at them again. When T. realized he could not outrun the Mercedes, he slammed on the brakes and deliberately collided with it, causing it to spin around. He then drove to the hospital, where he and M. were treated at the emergency room.

¶4 Durazo was charged by information with: count one, attempted first-degree murder of M.; count two, attempted first-degree murder of T.; count three, attempted first-degree murder of M.; count four, attempted first-degree murder of T.; and count five, drive-by shooting. Counts one and two related to the shooting in the driveway of M.'s home, and counts three and four were for the shooting on Grand Avenue. At trial, Durazo did not dispute he had fired his gun at the victims. Instead, he introduced evidence of his proficiency with firearms to support his defense that he did not intend to kill them. He maintained that, if he had intended to kill the victims, they would be dead. The jury convicted him of the two attempted murder counts relating to the driveway shooting, two counts of the lesser-included offense of endangerment with respect to the Grand Avenue shooting, and drive-by shooting. This appeal followed.

Discussion

Admission of photographs and jury view

¶5 Durazo argues the trial court erred in denying his motion to preclude the introduction of photographs taken at the hospital showing M.'s and T.'s injuries. He also contends the court erred in permitting the jury to view T.'s car. We review the court's decisions for an abuse of discretion. *See State v. Spreitz*, 190 Ariz. 129, 141, 945 P.2d 1260, 1272 (1997).

¶6 "The admissibility of a potentially inflammatory photograph is determined by examining (1) the relevance of the photograph, (2) its 'tendency to incite or inflame the jury,' and (3) the 'probative value versus potential to cause unfair prejudice.'" *State v. Cruz*, 218 Ariz. 149, ¶ 125, 181 P.3d 196, 215-16 (2008), *quoting Spreitz*, 190 Ariz. at 141, 945 P.2d at 1272. The photographs here were relevant to corroborate the victims' descriptions of the attack and to illustrate the medical testimony as to the nature and extent of their injuries. *See State v. Maximo*, 170 Ariz. 94, 97, 821 P.2d 1379, 1382 (App. 1991). Durazo asserts the photographs were "graphic, bloody, and intended to inflame the passions of the jury." But he has identified nothing specific about any of the photographs that is particularly inflammatory. Nor are we persuaded by his contention that the injuries could have been described adequately without the photographs. *See State v. Castaneda*, 150 Ariz. 382, 391, 724 P.2d 1, 10 (1986) (test of admissibility not whether subject-matter of photograph can be described adequately with words). The court therefore did not abuse its discretion in finding

the probative value of the photographs was not substantially outweighed by any potential for prejudice. *See Cruz*, 218 Ariz. 149, ¶ 125, 181 P.3d at 215-16.

¶7 Durazo contends the trial court erred in permitting the jury to view the victim's vehicle "because the prejudicial effect outweighed [the] probative value" pursuant to Rule 403, Ariz. R. Evid. The only support he offers for this contention, however, is his assertion that "the State had not presented any evidence concerning a forensic trajectory investigation involving the firing of the weapon" but nonetheless expected the jury to draw conclusions about the trajectory of the bullets. Durazo neither explains nor supports his conclusion that he was prejudiced by the viewing or, for that matter, that any prejudicial effect substantially outweighed the probative value of the evidence. We therefore do not consider this claim.[1] *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument constitutes waiver of claim); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall include concise argument containing contentions, reasons therefor, and supporting citations of authority). Nor was Durazo prejudiced by the viewing simply because it was cumulative to numerous photographs of the vehicle previously admitted in evidence.[2] Although a court

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[1]Nor need we decide whether the viewing was merely the result of the introduction of physical evidence or akin to a view of the crime scene, as Durazo urges, although we note the standard of review would be the same in either case. *See State v. Mauro*, 159 Ariz. 186, 204, 766 P.2d 59, 77 (1988) (whether to grant jury view of crime scene matter for trial court's discretion). We therefore do not reach this question.

[2]Durazo provides no authority to support his apparent contention that if the evidence was cumulative its admission was reversible error. Arguably, he therefore has also waived this argument. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

may exclude relevant evidence that is needlessly cumulative, here the court found there was "definitely a benefit to seeing the three-dimensional [vehicle] as opposed to the parts in the photographs." We find no abuse of discretion in the trial court's ruling.

Motion for Mistrial

¶8 Durazo next argues the trial court erred in denying his motion for a mistrial after T. testified Durazo had tried to kill him. A mistrial is "the most dramatic remedy for trial error," and we will not disturb a trial court's decision to deny a mistrial absent an abuse of discretion. *Maximo*, 170 Ariz. at 98-99, 821 P.2d at 1383-84. Similarly, "whether a lay witness is qualified to testify as to any matter of opinion is a preliminary determination within the sound discretion of the trial court whose decision must be upheld unless shown to be clearly erroneous or an abuse of discretion." *Groener v. Briehl*, 135 Ariz. 395, 398, 661 P.2d 659, 662 (App. 1983).

¶9 "Lay witnesses may give opinion testimony, even as to the ultimate issue, when it is 'rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.'" *State v. Doerr*, 193 Ariz. 56, ¶ 26, 969 P.2d 1168, 1175 (1998), *quoting* Ariz. R. Evid. 701. Thus, admissibility of lay opinion testimony depends on whether the witness is competent to make the statement pursuant to Rule 602, Ariz. R. Evid., and whether it is relevant. *State v. Ayala*, 178 Ariz. 385, 387-88, 873 P.2d 1307, 1309-10 (App. 1994); *see* Ariz. R. Evid. 602 (witness may not testify to matter absent evidence of personal knowledge). In *Ayala*, this court concluded a

rape victim was competent to testify that her two assailants had known she was trying to get away because her testimony they had "held her down while she was struggling with them and kicking at them" provided a rational basis for her opinion. 178 Ariz. at 388, 873 P.2d at 1310. The court distinguished this situation from a prior case in which a witness had testified, based only on his "limited perceptions while in a holding cell," that he was "'quite sure'" his cell mate had killed the victim. *Id.*, *quoting State v. Koch*, 138 Ariz. 99, 102, 673 P.2d 297, 300 (1983).

¶10 Here, the trial court previously sustained Durazo's objection when the state had asked M.: "Do you believe that . . . Durazo tried to kill you?" But, at a bench conference before T.'s testimony, the prosecutor argued she should be allowed to pose that question to T. pursuant to Rule 701. The court did not rule on the issue, and in response to one of the state's first questions, "Why are you here today?" T. responded, "Because that man tried to kill me." The court denied Durazo's motion for a mistrial, but struck the testimony, finding "no foundation [had been] laid to suggest that [T.] had any rational basis for this comment." Durazo argues T.'s testimony was "inappropriate, inadmissible opinion testimony" and the court erred in denying a mistrial. However, the court instructed the jury not to consider the stricken testimony, and we presume the jury followed this instruction. *See State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847 (2006). There was thus no error in the court's denial of a mistrial.

¶11 In any event, T. later provided the missing foundation for his comment. He subsequently testified he had seen a "black Mercedes with somebody in it pointing a gun at me shooting. . . . There was a lot[] . . . [of] shots . . . so close it was hurting my ears," and that he had been wounded in the arm. T. stated Durazo pursued his vehicle as he drove to the hospital, and M. alerted him Durazo was still shooting at them. He thus had "a rational basis" for his opinion that Durazo was trying to kill him. *See Ayala*, 178 Ariz. at 388, 873 P.2d at 1310. And at the close of direct examination the state elicited, over Durazo's objection, T.'s "opinion . . . that [Durazo] was trying to kill both of us." In light of this statement, which Durazo does not challenge on appeal, it is difficult to conceive how Durazo could have been prejudiced by the first statement.

Multiplicitous charges

¶12 Durazo argues the trial court erred in denying his motion to dismiss counts three and four charging him with attempted first-degree murder of M. and T. respectively, relating to the shooting on Grand Avenue. He contends these charges were multiplicitous because they were based on acts constituting a continuation of the first shooting. The question here is whether Durazo committed one criminal act charged in multiple counts or the same criminal act multiple times. *See State v. Williams*, 182 Ariz. 548, 562, 898 P.2d 497, 511 (App. 1995). Because this is a mixed question of fact and law, our review is de novo. *See State v. Barnes*, 215 Ariz. 279, ¶ 5, 159 P.3d 589, 590 (App. 2007).

¶13 As mentioned above, Durazo was charged with two counts of attempted murder as to each victim, one relating to the shooting in M.'s driveway and the other to the shooting along Grand Avenue as the victims drove to the hospital.[3] Durazo argues that his shooting "at the victims at two locations on the same day within minutes of each incident" was a "continuous act" and thus the information "charge[d] a single offense in multiple counts." But he "'confuses the repetition of the same crime with "multiplicity."'" *See State v. Bruni*, 129 Ariz. 312, 319, 630 P.2d 1044, 1051 (App. 1981), *quoting State v. Dorsey*, 578 P.2d 261, 266 (Kan. 1978) (McFarland, J., dissenting).

¶14 In determining whether acts may be charged separately from one another "the time span [between them] . . . is not material[,] so long as there is proof that each act was composed of the necessary criminal elements." *See State v. Tinghitella*, 108 Ariz. 1, 3-4, 491 P.2d 834, 836-37 (1971). "[I]t is against public policy to allow a person to repeat [a] crime . . . as many times as he likes on the same victim with no additional criminal liability." *Id.* "[S]o long as the evidence supports the commission of each of the separate charges, they are separate acts and not multiplicitous." *Williams*, 182 Ariz. at 563, 898 P.2d at 512.

¶15 We recognize that "every crime is a series of interrelated events and movements—a total transaction with indefinite spatial and temporal boundaries." *State v. Gordon*, 161 Ariz. 308, 313, 778 P.2d 1204, 1209 (1989). Here, however, we are not

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[3]Although the original information did not differentiate between the charges, it subsequently was amended so that with respect to each of the victims one count was alleged to have taken place at M.'s address and the other at "N. Grand Avenue."

persuaded that the shooting outside M.'s home was part of a single act including the shooting on Grand Avenue. As Durazo concedes, the events took place at two distinct locations, and Durazo ceased shooting between the two attacks. The jury therefore reasonably could characterize the events as a completed, albeit failed, attempt to kill M. and T. in the driveway, followed by a second attempt as they fled.

¶16 Furthermore, each attack included at least one separate step that the jury could infer was intended to culminate in M. and T.'s murder. In addition to the shootings themselves, Durazo's driving to M.'s residence and his pursuit of T.'s car could have been construed as separate "step[s] in a course of conduct planned to culminate in commission of [the] offense" of first-degree murder. A.R.S. § 13-1001(A)(3) (defining attempt). Each incident therefore comprised all the necessary criminal elements to constitute a separate act. *See Tinghitella*, 108 Ariz. at 3-4, 491 P.2d at 836-37. Thus, counts three and four of the information were not multiplicitous, *see Williams*, 182 Ariz. at 562, 898 P.2d at 511, and the trial court did not err in denying Durazo's motion to dismiss.

¶17 Durazo also argues, pursuant to A.R.S. § 13-116, that the trial court erred in imposing the drive-by shooting sentence consecutively to the sentences for attempted murder. Section 13-116 mandates concurrent sentences for offenses based on the same act or omission. At sentencing, the court stated it viewed Durazo's convictions for endangerment and drive-by shooting as arising from "one course of conduct, one incident that occurred on

Grand Avenue."[4] It therefore ordered the sentences for those convictions to be served concurrently pursuant to § 13-116. However, the court ordered them to be served consecutively with the sentences for the attempted murder convictions arising from the driveway shooting. Durazo again maintains the driveway shooting formed part of a "continuous act" with the Grand Avenue shooting. For the same reasons stated above, we reject this contention.[5]

Prosecutorial misconduct

¶18 Finally, Durazo argues "the prosecution's misconduct . . . , while individually insufficient to deny [him] a fair trial, in cumulative form was sufficient" to do so. We will reverse a conviction for prosecutorial misconduct if "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict,

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[4]Durazo apparently believes, on the contrary, that the drive-by shooting charge related to the driveway shooting. Unlike the other charges, this charge was not amended to specify a location. Although it was thus potentially ambiguous, Durazo did not object below and does not raise this issue on appeal. We therefore do not consider possible defects in the information with respect to the drive-by shooting charge. *See State v. Anderson*, 210 Ariz. 327, ¶¶ 17-18, 111 P.3d 369, 378 (2005) (objection to indictment forfeited absent fundamental error if not raised before trial); *State v. Moreno-Medrano,* 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (forfeited argument waived on appeal if fundamental error not asserted and argued).

[5]Durazo asks us to apply the test set forth in *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. But *Gordon* is inapposite. "The question here is different from the question which gives rise to a *Gordon* analysis because it does not involve whether the Defendant was convicted for the same act under different provisions of the law . . . ." *Williams*, 182 Ariz. at 562, 898 P.2d at 511. Nor does the present case involve whether Durazo's offenses were committed on the "same occasion" for sentence enhancement purposes. Durazo's reliance on *State v. Henry*, 152 Ariz. 608, 612, 734 P.2d 93, 97 (1987), is thus equally misplaced.

thereby denying [the] defendant a fair trial." *State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992), *overruled in part on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001). If the cumulative effect of prosecutorial misconduct "'so permeate[s] the entire atmosphere of the trial with unfairness that it denie[s the defendant] due process,' it can warrant reversal even if the individual instances would not do so by themselves." *State v. Velazquez*, 216 Ariz. 300, ¶ 57, 166 P.3d 91, 103-04 (2007), *quoting State v. Roque*, 213 Ariz. 193, ¶ 165, 141 P.3d 368, 405 (2006).

¶19 However, Durazo fails to identify with citation to the record any specific instance of prosecutorial misconduct. Instead he generally asserts

> numerous speaking responses to [his] counsel['s] evidentiary objections in front of the jury, citing of improper or irrelevant case law as authority for particular evidentiary ruling by the trial court, failing to properly instruct witnesses concerning matter precluded from evidence by in limine ruling of the trial court and eliciting a patently improper and inadmissible response from a witness.

He therefore has waived this argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's argument "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the . . . parts of the record relied on"); *see also Bolton*, 182 Ariz. at 298, 896 P.2d at 838 (insufficient argument on appeal constitutes waiver of claim); *Collins v. Collins*, 46 Ariz. 485, 494, 52 P.2d 1169, 1173 (1935) (declining to consider argument requiring court to "examine the entire reporter's transcript . . . and then guess to which part . . . the plaintiff refers").

¶20 In any event, we do not find the few instances of the prosecutor's speaking responses to Durazo's objections and alleged misciting of cases as catalogued in Durazo's statement of facts so permeated the trial with unfairness as to deny Durazo due process. *See Velazquez*, 216 Ariz. 300, ¶ 57, 166 P.3d at 103-04. And to the extent Durazo's other allegations of prosecutorial misconduct allude to the circumstances surrounding T.'s stricken opinion testimony, we find no misconduct. As noted above, the trial court made no ruling in limine precluding the testimony, and T.'s statement that Durazo had tried to kill him was arguably spontaneous and not deliberately elicited by the state.

Disposition

¶21 For the reasons stated above, we affirm Durazo's convictions and sentences.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge