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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. CIRILO PEDRO MACIAS, Appellant.	)	2 CA-CR 2009-0143 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082867

Honorable Edgar B. Acuña, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Cirilo Macias was convicted of aggravated assault causing serious physical injury, aggravated assault with a deadly weapon or dangerous instrument, and attempted second-degree murder, all dangerous nature offenses. The trial court sentenced him to enhanced, partially aggravated, concurrent terms of imprisonment totaling fourteen years. On appeal, Macias contends: (1) the court erred in denying his motion for a mistrial based upon cumulative prosecutorial misconduct; and (2) his "enhanced sentence for attempted second-degree murder was fundamental error and should be vacated, because the State did not allege a dangerous nature enhancement on that count." For the reasons that follow, we affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). Shortly after 2:00 a.m. on July 20, 2008, Macias and four acquaintances, Matt S., Desirea D., Richard M., and Francisco Q., were socializing in a parking lot. Desirea was waiting for F.J., whom she was dating, to finish his shift at a nearby restaurant. F.J. arrived in a truck with two other men, Luis L. and Arturo G. As Desirea walked toward the truck to go with F.J., Luis began shouting profanities at Matt and challenged Richard to a fight. F.J. and Arturo calmed Luis down and persuaded him to get back into the truck. Desirea left in the truck with F.J., Luis, and Arturo, and they drove to her house where she and F.J. were dropped off. While Desirea and F.J. were standing in the street talking, they noticed a car slowly drive past them. It then stopped nearby and Macias, Matt, and Richard got out.

¶3 Macias had followed Desirea and F.J. to Desirea's house because Macias wanted "to see what was going on." Macias approached Desirea and F.J., carrying a baseball bat. Macias called out to F.J., and as F.J. turned around, Macias "whack[ed]" him twice on the head. F.J. fell to the ground and Macias hit him with the bat two to three more times. Macias and the other men then ran back to their vehicle and drove away. Later that night, Macias disposed of the baseball bat in the desert. After Macias left Desirea's house, she telephoned 9-1-1. When the police and paramedics arrived, they found F.J. lying on the ground. His skull was "crushed so badly, [the number of fractures were] too numerous to count," and he was "bleeding in his brain."

¶4 Macias was indicted on two counts of aggravated assault and one count of attempted second-degree murder. A jury found him guilty of all charges and found all to be of a dangerous nature. The trial court sentenced him to enhanced, partially aggravated prison terms of ten years for each count of aggravated assault and an enhanced, partially aggravated term of fourteen years for attempted second-degree murder, ordering all of the sentences to be served concurrently. This appeal followed.

Discussion

I. Prosecutorial Misconduct

¶5 Macias asserts four incidents of prosecutorial misconduct occurred during trial that denied him a fair trial, and he contends the trial court erred in denying his motion for mistrial based on the cumulative effect of the misconduct. He claims the prosecutor accused him of "tailor[ing] his [trial] testimony 'to save his own ass,'" expressed his personal opinion regarding Macias's guilt, vouched for the state's

witnesses, and shifted the burden of proof to Macias. We address each of the alleged instances of misconduct below.

¶6 "The trial court is in the best position to determine whether an attorney's remarks require a mistrial, and its decision will not be disturbed absent a plain abuse of discretion." *State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988); *State v. Dumaine*, 162 Ariz. 392, 403, 783 P.2d 1184, 1195 (1989); *State v. Roscoe*, 184 Ariz. 484, 496, 910 P.2d 635, 647 (1996). "The first step in evaluating [Macias's] prosecutorial misconduct claim is to review each alleged incident to determine if error occurred." *See State v. Roque*, 213 Ariz. 193, ¶ 154, 141 P.3d 368, 403 (2006). And "[a]fter reviewing each incident for error, we must assess whether the incident should count toward [his] prosecutorial misconduct claim," and "evaluate the[] cumulative effect [of any incidents of misconduct] on the trial." *Id.* ¶ 155.

¶7 "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial . . . .'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To determine whether a prosecutor's remarks were improper, a trial court "'should consider: (1) whether the[y] . . . call[ed] to the jurors' attention matters that they would not be justified in considering in determining the verdict; and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks.'" *State v.*

Jones, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000), *quoting Hansen*, 156 Ariz. at 296-97, 751 P.2d at 956-57; *State v. Armstrong*, 208 Ariz. 345, ¶ 61, 93 P.3d 1061, 1073 (2004).

Discrepancies Between Trial Testimony and Statement to Police

¶8 Macias first argues the prosecutor improperly accused him of tailoring his trial testimony to concoct a theory of self-defense. Macias testified that he had struck F.J. because he thought F.J. might have been reaching for a weapon, possibly a gun. However, Macias made no mention of this in his earlier statement to the police. During cross-examination, the prosecutor asked Macias about this discrepancy:

> [PROSECUTOR]: That would be a moment you would want to remember very well, the moment you swing the bat; right?
>
> [MACIAS]: Yeah.
>
> [PROSECUTOR]: And, in fact, you are telling the jury you know exactly what [F.J.] was doing at that moment, right, because he was presenting to you a deadly threat; right?
>
> [MACIAS]: Yes.
>
> [PROSECUTOR]: That's your testimony. And, sir, you didn't say that to the police; right?
>
> [MACIAS]: No.
>
> [PROSECUTOR]: But now you know that the only way that you can hit him with the bat and nearly kill him is if he presents a deadly threat to you; right?

The trial court sustained Macias's objection to the prosecutor's last question, but denied his motion for a mistrial made on the ground "it was a clear inference to the jury his testimony has been tailored."[1]

¶9 First, "[a]n adverse witness may be impeached by a showing that he has previously made statements inconsistent with his present testimony." *State v. Caldwell*, 117 Ariz. 464, 473, 573 P.2d 864, 873 (1977). *See also* Ariz. R. Evid. 607. This includes a defendant who elects to testify in his own defense. *State v. Guerra*, 161 Ariz. 289, 296, 778 P.2d 1185, 1192 (1989). Second, to the extent the prosecutor intended for the jury to infer from the inconsistent statements that Macias was lying to support a defense, there was nothing improper about this. However, a trial court has discretion to limit the scope of cross-examination when appropriate. *State v. Fleming*, 117 Ariz. 122, 125, 571 P.2d 268, 271 (1977). The prosecutor's last question, "But now you know that the only way that you can hit him with the bat and nearly kill him is if he presents a deadly threat to you; right?" suggested not only that Macias was lying to avoid the consequences of his criminal act, a permissible inference, but also that he was lying in conformity with legal information provided him by counsel, an inflammatory suggestion for which the prosecutor had no factual basis or foundation. Thus, the trial court properly sustained Macias's objection to this question. But, even assuming the question was inappropriate,

[1]The trial court denied Macias's motion for a mistrial on the ground of prosecutorial misconduct based solely on this comment. Although Macias separately describes this comment as an instance of misconduct in his brief, he does not argue the court erred in denying his motion in connection with this comment alone. Any such argument is therefore waived. *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to argue claim on appeal constitutes waiver); Ariz. R. Crim. P. 31.13(c)(1)(vi).

the trial judge was in the best position to assess its apparent effect on the jury at the time the exchange occurred. And, because we presume the jury followed the trial court's instructions that it must not consider questions or responses that have been the subject of sustained objections, we agree with the court's implicit conclusion that the comments had no effect on the jury's deliberations. *Roque*, 213 Ariz. 193, ¶ 152, 141 P.3d at 403.

¶10 Macias also asserts that during his rebuttal closing argument, the prosecutor impermissibly expressed his personal opinion that Macias was guilty of the charged offenses and "appeal[ed] to the jurors' fears and emotions by using derogatory language and belittling terms." The prosecutor again referred to the discrepancy between Macias's trial testimony and his earlier statement to the police, stating to the jury:

> Lisa Miller [the primary detective on F.J.'s case] sits there and says to [Macias], okay, now is your chance to tell us. And think of his motive at that point to come up with whatever he can, and the lights are on in there but he can't come up with it. He can't say it. He says, no, no weapon, no weapon, there was no gun. He didn't say I thought of a gun. There was no word of a gun at Desirea's house, and there is no evidence to that effect except when he wanders into court here and tells you something, which you are allowed to conclude is an effort on his part to save his own ass.

Macias again objected, but the court overruled the objection.

¶11 "[I]t is not only improper but also unethical for an attorney, in his closing argument, to express his personal belief in the defendant's guilt or innocence." *State v. Byrd*, 109 Ariz. 10, 11, 503 P.2d 958, 959 (1972). "Argument containing personal opinion is improper because it is not based on the evidence or reasonable inferences that may be drawn from the evidence." *State v. Dunlap*, 187 Ariz. 441, 463, 930 P.2d 518,

540 (App. 1996) (prosecutor's comments approving witness's attempt to secure better plea bargain improper); *see Byrd*, 109 Ariz. at 11, 503 P.2d at 959 (prosecutor's comment, "This is probably one of the clearest cases I have ever taken to trial, and I think, at least in my own mind, there is not any question, any serious question that Mr. Byrd is guilty of the charge on this case" improper expression of personal opinion).

¶12 Here, however, the prosecutor did not express his personal opinion about Macias's guilt. Rather, he argued to the jury that based on the discrepancy between Macias's statement to the police and his trial testimony, it could conclude that he fabricated his trial testimony. This was proper argument, responding directly to Macias's testimony that he had acted in self-defense. *See State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993) ("[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions."). Clearly, the prosecutor should have chosen a more appropriate phrase than "save his own ass," but the trial court did not abuse its discretion by not declaring a mistrial on the basis of this comment. Although arguably inappropriate, this comment does not amount to misconduct that deprived Macias of a fair trial. "[P]rosecutors have wide latitude in presenting their closing arguments to the jury: 'excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal . . . .'" *Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d at 360, *quoting State v. Gonzales*, 105 Ariz. 434, 436-37, 466 P.2d 388, 390-91 (1970).

¶13 Macias argues that the prosecutor also "appeal[ed] to the jurors' fears and emotions by using derogatory language and belittling terms." The case upon which

Macias relies to support this argument is readily distinguishable. In *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990), the prosecutor referred to the defendant as a "monster," as "filth," and as the "reincarnation of the devil on earth." Here, there was no such name-calling or similar appeal to the jury's fears and emotions. The prosecutor's comment amounted to an "insignificant impropriety" and, viewed against the trial as a whole, did not prejudice Macias. *See Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27. It did not encourage the jury to decide the case on inappropriate grounds or bring improper matters to its attention. *Armstrong*, 208 Ariz. 345, ¶ 61, 93 P.3d at 1073. And any resulting harm was cured by the trial court's instruction to the jury that counsel's opening and closing arguments do not constitute evidence the jury should consider in reaching its verdict. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996) ("Jurors are presumed to follow instructions.").

Improper Vouching

¶14 Macias next argues "[t]he prosecutor impermissibly vouched for the State's witnesses" when he told the jury the witnesses would not have made up their testimony. "There are two types of prosecutorial vouching: '(1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony.'" *State v. Duzan*, 176 Ariz. 463, 467, 862 P.2d 223, 227 (App. 1993), *quoting Dumaine*, 162 Ariz. at 401, 783 P.2d at 1193. Macias contends the prosecutor's statements included both types.

¶15 During his rebuttal closing argument, the prosecutor stated:

> Why in the world would [Macias's] best friend make up that [Macias] got all over F[.]J[.] with that bat while he is on the ground? What motive—what does Matt S[.] stand to gain, going off to the army, testifying in front of his friend? He was there. He had to be in the room and have the guy looking at him. He comes in there subject to cross-examination, and why would Matt make that up that he was hitting him on the ground? Why would Desirea make it up, too? And why would [Francisco] make it up? Because they wouldn't. They would not.

As he did below, Macias argues the last two comments amounted to improper vouching for the witnesses because the prosecutor offered his "personal assurance that these [state] witnesses were telling the truth." But considering the statements in context, we disagree.

¶16 Macias relies on *United States v. Molina-Guevara*, 96 F.3d 698, 699 (3d Cir. 1996), in which the Third Circuit Court of Appeals reversed the defendant's conviction due to cumulative prosecutorial misconduct. During closing arguments, the prosecutor in that case had stated, with respect to two government witnesses, that: "He didn't say those things because he told you the truth. The truth is that this defendant was a participant," and, as to the other witness, "She has absolutely no reason to lie. In fact, it is insulting to think the United States would put on such a witness. Her memory of the events is unimpeachable." *Id*. at 701. She also stated that defense counsel "got up here during his opening and then just now and said or gave reason for you to believe that this agent lied. That is ridiculous. This agent did not lie to you." *Id.* at 702. The court concluded the prosecutor had vouched for the witness by "suggest[ing] that [she] knew

more than the jury had heard and that it should be willing to trust the government's judgment." *Id.* at 704-05.

¶17 In contrast, faced with Macias's conflicting testimony, the prosecutor here was pointing out that the state's witnesses lacked motives to lie about the incident. Pointing out a witness's lack of motive to lie does not generally constitute prosecutorial vouching. *See State v. McCall*, 139 Ariz. 147, 159, 677 P.2d 920, 932 (1983) (eliciting testimony that witness agreed to testify truthfully pursuant to plea agreement "does not amount to improper vouching but simply demonstrates that the witness had no motive to testify falsely"); *United States v. Wellington*, 754 F.2d 1457, 1468 (9th Cir. 1985) (holding prosecutor's question, "Why would [the witness] not tell you the truth?" not vouching); *United States v. Ricco*, 549 F.2d 264, 274 (2d Cir. 1977) (prosecutor's comments not improper vouching but permissible argument that "witnesses, whose veracity and credibility had been fiercely attacked by defense counsel, had no motive to testify falsely").

¶18 Furthermore, the evidence of Macias's guilt was overwhelming. All of the state's witnesses, including Macias's friends, testified that Macias had hit F.J. with a baseball bat numerous times without provocation; with the exception of Macias, no other witness stated that F.J. had possessed or reached for a weapon; and, Macias continued to beat F.J. after he was lying on the ground. Thus, even assuming the comment was improper, the trial court instructed the jury that counsel's opening and closing arguments are not evidence from which it should reach its verdict, and we presume the jury followed this instruction. *State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847 (2006).

Therefore, any error was harmless. *See Bible*, 175 Ariz. at 588, 858 P.2d at 1191 (error harmless if, beyond a reasonable doubt, it did not affect verdict).

¶19 Nor did the prosecutor's statement suggest "the state had some unrevealed basis to give [the witness] credence." *State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989). To support his argument that the witnesses had no reason to lie, the prosecutor specifically referred to information already before the jury, namely that Matt was Macias's good friend and that Matt, Desirea, and Francisco were present and had witnessed the assault.

Burden-Shifting

¶20 During closing argument, defense counsel reminded the jury the state had not proffered any evidence that there were pieces of gravel embedded in F.J.'s head after he was beaten. When the police and paramedics responded to the scene, they found F.J. lying on the ground, with his head resting on loose gravel. Defense counsel argued that had Macias hit F.J. after he was already down, "common sense will tell you . . . something is going to be transferred from the ground to the back of [F.J.'s] head." Defense counsel called this lack of evidence "the most telling piece of evidence," implying that the state would have pointed to the presence of gravel in F.J.'s head, had any been there. Accordingly, defense counsel concluded this was "very strongly suggestive of the fact that [F.J.] was hit twice [while standing] and not while he was on the ground." During rebuttal, the prosecutor responded that Macias had no obligation to present evidence and that the burden of proof rested solely on the state. He stated, however, that defense counsel should have adduced evidence to support his contention

that there was no gravel embedded in F.J.'s head and that its absence was significant as to the issue of how many times and when Macias had struck F.J. Defense counsel objected, apparently on the ground that the prosecutor's comment led the jury to believe the burden of proof was on Macias. The trial court reserved argument on the objection and later concluded any error that had occurred was not so egregious as to warrant a mistrial.

¶21 Macias maintains the prosecutor's comments shifted the burden of proof to him. Burden-shifting is improper, but "prosecutorial comments which are fair rebuttal to comments made initially by the defense are acceptable." *Duzan*, 176 Ariz. at 468, 862 P.2d at 228; *State v. Hernandez*, 170 Ariz. 301, 307-08, 823 P.2d 1309, 1315-16 (App. 1991); *State v. Alvarez*, 145 Ariz. 370, 373, 701 P.2d 1178, 1181 (1985); *State v. Gillies*, 135 Ariz. 500, 510, 662 P.2d 1007, 1017 (1983). Macias concedes a prosecutor may permissibly respond and comment on matters initiated by the defense, but denies defense counsel initiated the discussion in question. We disagree.

¶22 It is "elemental fairness to allow the State to comment upon the defense's failure to adduce potentially exculpatory evidence to which defendant had access when defendant is attacking the accuracy of the State's evidence." *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987); *see also State v. Edmisten*, 220 Ariz. 517, ¶ 26, 207 P.3d 770, 778 (App. 2009). And throughout his rebuttal, the prosecutor repeatedly told the jury the burden of proof was on the state and Macias had no burden whatsoever. We cannot say the prosecutor improperly shifted the burden of proof to Macias. *See Hernandez*, 170 Ariz. at 308-09, 823 P.2d at 1316-17 (court's

instruction on burden of proof and presumption of innocence and prosecutor's reference to court's instruction during closing arguments weigh against reversal).

Cumulative Error

¶23 Individual instances of prosecutorial misconduct may not warrant reversal standing alone. However, they "may nonetheless contribute to a finding of persistent and pervasive misconduct," *Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d at 403, which requires reversal of a conviction when cumulatively they "affected the proceedings in such a way as to deny the defendant a fair trial," *State v. Hughes*, 193 Ariz. 72, ¶ 32, 969 P.2d 1184, 1192 (1998). As noted above, we do not find that any of the alleged incidents raised on appeal constituted reversible prosecutorial misconduct, and we have found only one of the prosecutor's actions, his question insinuating that Macias had tailored his defense, improper at all. Because we have already concluded that the lone impropriety did not warrant reversal of Macias's conviction and that the trial court did not abuse its discretion in denying Macias's motion for mistrial on that basis, we need not further address the claim of cumulative misconduct. The trial court thus did not abuse its discretion in denying Macias's motions for a mistrial.

II. Improper Sentence

¶24 Macias contends the state did not provide notice of its intent to seek a dangerous nature enhancement of the sentence on the attempted second-degree murder charge before submitting the enhancement allegation to the jury. "[D]ue process and orderly procedure" mandate that a defendant "know the full extent of potential punishment he faces" before trial. *State v. Waggoner*, 144 Ariz. 237, 238-39, 697 P.2d

320, 321-22 (1985). *See also State v. Guytan*, 192 Ariz. 514, ¶ 32, 968 P.2d 587, 595 (App. 1998) ("[T]he requirement that sentence-enhancement allegations be filed prior to trial is intended to ensure that a defendant has sufficient notice of the full extent of potential punishment before his trial begins.").

¶25 Because Macias raises this argument for the first time on appeal, he has forfeited the right to relief for all but fundamental, prejudicial error. *State v. Smith*, 219 Ariz. 132, ¶¶ 19-20, 194 P.3d 399, 402-03 (2008); *State v. Rasul*, 216 Ariz. 491, ¶ 20, 167 P.3d 1286, 1291 (App. 2007). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). A defendant has the burden of showing both that the error was fundamental and that it caused him prejudice. *Id*. ¶ 20. However, the "'[i]mposition of an illegal sentence constitutes fundamental error.'" *State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007), *quoting State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002).

¶26 Macias notes the state's enhancement allegation filed with the indictment alleged the dangerous nature enhancement only "in the event the defendant . . . is convicted of any lesser offense [of attempted second-degree murder]"; it said nothing about applying the enhancement to the attempted second-degree murder charge itself. Macias argues the state therefore had no intent to seek enhancement of the sentence on that offense. As the state points out, however, the indictment itself cites the enhancement

statute, A.R.S. § 13-604(I) and (P),[2] under the charge of attempted second-degree murder. This is all that is required to provide a defendant with sufficient notice of the state's intent to treat a charge as a dangerous offense for enhancement purposes. *See State v. Hollenback*, 212 Ariz. 12, ¶ 11, 126 P.3d 159, 163 (App. 2005) ("Our supreme court has held that a 'reference in the indictment to the number of the statute providing for enhanced punishment . . . is adequate notice of the state's intent to enhance [the defendant's] sentence under that statute.'"), *quoting Waggoner*, 144 Ariz. at 239, 697 P.2d at 322; *State v. Burge*, 167 Ariz. 25, 28, 804 P.2d 754, 757 (1990) ("[A]n allegation of dangerousness in a grand jury indictment, such as [a] citation to § 13-604 in the indictment . . . , is sufficient to invoke § 13-604's sentence enhancement provisions."). Consequently, any discussion about the state's intent in not including the attempted second-degree murder charge in the separate enhancement allegation is pure speculation and not supported by the record.

Disposition

¶27 For the reasons stated above, we affirm Macias's convictions and sentences.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

[2]This was the enhancement statute in effect when the offenses were committed. Since that time, the dangerous nature enhancement statutes have been renumbered. Effective January 1, 2009, § 13-604 was repealed and its enhancement provisions were reenacted under § 13-704. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 15, 28, 119-20.

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge