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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THE STATE OF ARIZONA, Appellee, v. JOSE DE JESUS ORTIZ, Appellant.	2 CA-CR 2009-0260 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20020995

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Jose Ortiz was convicted of one count of attempted armed robbery, one count of conspiracy to commit armed robbery, and one count of first-degree felony murder. The trial court sentenced him to life in prison with

no possibility of release for at least twenty-five years for the murder conviction and to lesser, concurrent terms for the other two offenses. On appeal, Ortiz contends that insufficient evidence was presented to support his conviction for first-degree murder. He also claims the trial court erred in denying his motion for a new trial based on allegations of prosecutorial misconduct. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Jose Ortiz, Jeffrey Roberts, and Justin Samsoon went to a house where the victim, G.A., lived. Earlier in the day, Roberts and Ortiz had talked about robbing G.A. When they arrived at the house, Roberts entered first, carrying a gun that Ortiz had given him. Ortiz and Samsoon were waiting in a truck outside, but they later went inside as well. During an ensuing altercation, Ortiz shot G.A., who subsequently died.

¶3 Ortiz was charged with first-degree murder, conspiracy to commit armed robbery, and armed robbery, later amended to attempted armed robbery. Roberts and Samsoon also were charged as a result of their participation, and both entered into plea agreements in exchange for their testimony against Ortiz. A jury found Ortiz guilty on all three counts. He then filed a motion for new trial, which the trial court denied. This appeal followed.

Insufficient Evidence

¶4 Ortiz first argues that the trial court erred in denying his motion for judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., because the state

failed to present sufficient evidence to support the felony underpinning his conviction for felony murder. Although we have stated that "we review the [trial] court's denial of a Rule 20 motion for an abuse of discretion," *State v. Leyvas*, 221 Ariz. 181, ¶ 33, 211 P.3d 1165, 1175 (App. 2009); *see also State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007), Ortiz has asserted, relying on *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993), that our review is de novo. In *Bible*, our supreme court stated that "[w]e conduct a de novo review of the trial court's decision [on a Rule 20 motion]." 175 Ariz. at 595, 858 P.2d at 1198. "[W]e are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them." *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993). Thus, our review is de novo. But we view the facts in the light most favorable to sustaining the verdict. *See Bible*, 175 Ariz. at 595, 858 P.2d at 1198.

¶5 A motion for judgment of acquittal should only be granted "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20. "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). Substantial evidence "may be either circumstantial or direct." *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). We will reverse a conviction "only if 'there is a complete absence of probative facts to support [the jury's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶6 A defendant commits felony murder if, "in the course of and in furtherance of . . . or immediately [in] flight from" the commission or attempted commission of an enumerated offense, including robbery, "the [defendant] or another person causes the death of any person." A.R.S. § 13-1105(A)(2); *see also* A.R.S. §§ 13-1902 (robbery); 13-1904 (armed robbery); 13-1001 (attempt). Ortiz does not dispute testimony that he was the person who shot G.A. Thus, if there is substantial evidence to prove that Ortiz killed G.A. during the course of or in flight from an attempted armed robbery, the predicate felony for Ortiz's felony murder conviction, the elements necessary to prove felony murder would have been established.

¶7 A defendant commits armed robbery if, "in the course of taking any property of another from his person or immediate presence and against his will," A.R.S. § 13-1902, the defendant uses or is armed with, inter alia, a deadly weapon. A.R.S. § 13-1904(A). Attempt includes "[i]ntentionally do[ing] or omit[ting] to do anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of an offense." A.R.S. § 13-1001.

¶8 Testimony was presented that, prior to the shooting, Ortiz and Roberts had planned to rob the victim, whom they suspected had money from dealing drugs. And just before Roberts entered the victim's home, Ortiz gave him a gun. Though Roberts stated that he entered the house not thinking about the planned robbery, no evidence indicates that Ortiz had changed his mind about the purpose of this visit. Therefore, substantial evidence was presented to show that G.A. was killed during the commission of what Ortiz intended to be an armed robbery.

¶9 Ortiz argues, however, that G.A. was not killed during an attempted armed robbery because Ortiz had "entered the home[] at the behest of Roberts and his sister to get [Roberts] out of the situation." But Ortiz did not present any evidence that this had been his intent, and he provides no citation to the record that supports this assertion. And, even had he produced such evidence, it would be, at best, conflicting evidence that was for the jury to resolve. *See State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). Finally, even if Ortiz was attempting to extricate Roberts from the failed armed robbery, a death resulting during the flight from an attempted armed robbery would still support the felony murder conviction. A.R.S. § 13-1105(A)(2). Consequently, we conclude that sufficient evidence supports the attempted armed robbery conviction and, therefore, Ortiz's felony murder conviction predicated thereon.

Prosecutorial Misconduct

¶10 Ortiz next challenges the trial court's denial of his motion for a new trial, which was based, in part, on four alleged instances of prosecutorial misconduct during closing arguments. Specifically, Ortiz contends the prosecutor committed misconduct by (1) improperly stating that a witness feared testifying against Ortiz; (2) improperly arguing that the crime of armed robbery had a lower standard of proof than required by law; (3) improperly vouching for the credibility of two witnesses; and (4) offering improper argument that a "plan" is not a necessary element of the crime of conspiracy to commit armed robbery.

¶11 Generally, we review the court's denial of a motion for a new trial for an abuse of discretion. *State v. Hoskins*, 199 Ariz. 127, ¶ 52, 14 P.3d 997, 1012 (2000).

Ortiz failed to object to any of the four instances of alleged misconduct during trial, however, only raising them for the first time in his motion for new trial.[1] And when an issue of prosecutorial misconduct is first raised in a motion for new trial, any review of that issue is forfeited absent fundamental error. *See State v. Mills*, 196 Ariz. 269, ¶ 15, 995 P.2d 705, 709 (App. 1999) (defendant forfeited argument by not raising it until motion for new trial). To prevail under the fundamental error standard of review, Ortiz bears the burden of showing "both that fundamental error exists and that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). To do so, he "must first prove error." *Id.* ¶ 23.

¶12 Misconduct is defined as conduct that "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to

[1]Although the state asserts Ortiz did indeed object to the prosecutor's allegedly improper statement that a witness feared testifying against Ortiz, we disagree. During closing arguments, the prosecutor noted that a witness had stated he did not want to "come to court and testify against [Ortiz]" because he was scared of him. Ortiz's attorney objected, claiming that he did not "recall having heard that testimony from [the witness] at all [during trial.]" Ortiz's objection was not based upon prosecutorial misconduct; rather, Ortiz's attorney was claiming that the prosecutor had been arguing facts outside of the evidence. "And an objection on one ground does not preserve the issue [for appeal] on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008); *see also State v. Rutledge*, 205 Ariz. 7, ¶¶ 26-30, 66 P.3d 50, 55-56 (2003) (defendant's objection that statement in prosecutor's closing argument "shifted the burden of proof" from state to defendant did not specify prosecutorial misconduct and therefore was insufficient to preserve issue of prosecutorial misconduct on appeal). Moreover, even if Ortiz's objection had been sufficiently based upon prosecutorial misconduct, his attorney apparently agreed that the prosecutor had indeed introduced the testimony during trial, which constituted a withdrawal of any objection. *See State v. Cruz*, 218 Ariz. 149, ¶ 105, 181 P.3d 196, 213 (2008) (withdrawn objection waived and reviewed only for fundamental error). And finally, even if Ortiz's attorney had not withdrawn the objection, Ortiz has not shown that the prosecutor's statements constituted misconduct in any event.

intentional conduct which the prosecutor knows to be improper and prejudicial." *Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Accordingly, "[p]rosecutorial misconduct constitutes reversible error only if (1) misconduct exists and (2) 'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Morris*, 215 Ariz. 324, ¶ 46, 160 P.3d 203, 214 (2007), *quoting State v. Anderson*, 210 Ariz. 327, ¶ 45, 111 P.3d 369, 382 (2005).

¶13 Here, Ortiz does not explain why the prosecutor's statements constituted misconduct, much less fundamental, prejudicial error. Instead, without argument, he simply states that the alleged misconduct "infected the entire tenor of the proceedings and deprived [him] of a fair trial." Accordingly, because Ortiz has failed to articulate why the prosecutor's statements were intentional misconduct or why they constituted fundamental, prejudicial error, he has failed to meet his burden under our standard for fundamental error review. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

Disposition

¶14 Based on the foregoing, we affirm Ortiz's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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

E S P I N O S A, Judge, specially concurring.

¶15 I concur in the disposition and the supporting analysis above in all respects save one. I disagree with the majority's statement that "Ortiz failed to object to any of the four instances of alleged misconduct during trial" and would find he made a sufficient objection to the prosecutor's reference to a matter allegedly outside the record to raise the issue of prosecutorial misconduct at trial and preserve it for appeal. *See State v. Leon*, 190 Ariz. 159, 161-62, 945 P.2d 1290, 1292-93 (1997) (prosecutor's references to extraneous matters not in evidence "egregious" misconduct warranting reversal); *cf. State v. Newell*, 212 Ariz. 389, ¶¶ 64-65, 67, 132 P.3d 833, 847 (2006) (prosecutor's comment regarding reliability of "DNA" improper when such evidence not introduced, although not sufficiently prejudicial to require mistrial); *State v. Smith*, 114 Ariz. 415, 418-19, 561 P.2d 739, 742-43 (1977) ("It is, of course, improper for an attorney to argue matters which were not or could not have been introduced in evidence."). Nonetheless, because Ortiz has not demonstrated the trial court abused its discretion in denying Ortiz's related motion for mistrial, I concur in affirming his convictions and sentences.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge