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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. VICTOR GARCIA DIAZ, Appellant.	)	2 CA-CR 2009-0401 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR63812

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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K E L L Y, Judge.

¶1 Appellant Victor Diaz appeals from his convictions for involving or using a minor under the age of fifteen in drug offenses and for sexual conduct with a minor under

the age of fifteen. He maintains that double jeopardy barred the second trial at which he was convicted and that the trial court abused its discretion in denying his motion for mistrial made on the basis of prosecutorial misconduct. Finding no error, we affirm.

Background

¶2 "We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdicts." *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). Diaz rented a home on the victims' grandparents' property. When D. was thirteen or fourteen years old, he began spending time with Diaz. Diaz provided D. with alcohol and marijuana and ultimately offered to give D. marijuana if he agreed to allow Diaz to perform oral sex on him. D. ultimately agreed and Diaz performed oral sex on D. at least fifteen times in the following month. Eventually, D. introduced his cousin A. to Diaz and Diaz propositioned him as well. A. rejected Diaz's sexual advances, but accepted marijuana from him. A. eventually reported Diaz's activities to his mother, who contacted police.

¶3 The state charged Diaz with sexual conduct with a minor under fifteen, sexual assault of a minor under fifteen, two counts of involving or using minors under fifteen in drug offenses, and one count of marijuana production. After a trial was held in his absence, the trial court rendered a judgment of acquittal on the sexual assault and production counts, and the jury found him guilty of the remaining counts. Diaz subsequently was arrested and the trial court imposed consecutive, presumptive, twenty-year prison terms on each count. Diaz appealed his convictions and sentences.

¶4 When it was discovered in the course of the appeal that the transcript for the third day of trial had not been filed, this court stayed the appeal and ordered the superior court either to produce the transcript or to notify the parties that it was unavailable. The trial court could not locate the transcript and Diaz moved for a new trial. The state apparently agreed that a new trial was appropriate, and the trial court ultimately vacated Diaz's convictions and sentences. Diaz's appeal was dismissed.

¶5 After a second trial, Diaz again was convicted of two counts of involving or using a minor under fifteen in drug offenses and one count of sexual conduct with a minor. The court imposed presumptive, twenty-year terms of imprisonment on each count, and ordered that the sentences for the drug-related offenses be served concurrent to one another and consecutive to the sentence on the sexual conduct count. This appeal followed.

Discussion

I. Double jeopardy

¶6 Diaz first contends his "convictions [were] barred by double jeopardy." He maintains that the trial court should have granted his motion for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., in the first trial, because the state had not presented sufficient evidence to show that he was "the same person as the man initially arrested for the crime." According to Diaz, "further proceedings should have been barred by double jeopardy" because there had been insufficient evidence to sustain his convictions. "We review de novo whether double jeopardy applies." *State v. Siddle*, 202 Ariz. 512, ¶ 7, 47 P.3d 1150, 1153 (App. 2002).

¶7 After the trial court ordered a new trial, Diaz moved to dismiss all counts of the indictment, arguing he would "be twice placed in jeopardy for the same offenses" at a second trial. The court pointed out that Diaz could not be retried on the two counts on which it had entered a judgment of acquittal in the first trial, after having granted Diaz's Rule 20 motion in the first trial. As to the remaining counts, it ruled that because Diaz had received a new trial based on missing transcripts, jeopardy had not "terminated[] and retrial [wa]s appropriate." We agree.

¶8 "The Double Jeopardy Clauses in the United States and Arizona Constitutions prohibit: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *Lemke v. Rayes*, 213 Ariz. 232, ¶ 10, 141 P.3d 407, 411 (App. 2006). Retrial after a successful appeal is not barred, however, unless the conviction was reversed on the ground of insufficient evidence. *State v. Porras*, 133 Ariz. 417, 419, 652 P.2d 156, 158 (App. 1982). Diaz's convictions on the three remaining counts were not reversed on the ground of insufficient evidence, however, but because a trial transcript could not be located. *See State v. Masters*, 108 Ariz. 189, 192, 494 P.2d 1319, 1322 (1972) (absence of portions of trial record does not automatically entitle criminal defendant to new trial, but new trial may be required when "showing of reversible error, or at least a credible and unmet allegation" thereof). Thus, because neither this court nor the trial court made a determination that there was insufficient evidence, this was not the basis for the grant of a new trial.

¶9 To the extent Diaz argues he should have received a new trial due to insufficient evidence, that argument was waived. As the trial court pointed out in its ruling, Diaz's motion for a new trial was filed too late to have been considered as a renewal of his original Rule 20 motion. *See* Ariz. R. Crim. P. 20(b). And, by seeking and receiving a new trial on the ground of the missing transcript, he implicitly waived any other arguments he might have made about the first trial. *Cf. State v. White*, 194 Ariz. 344, ¶ 43, 982 P.2d 819, 829 (1999) (If "party could have raised an issue in a prior appeal but did not, a court later hearing the same case need not consider the matter."), *quoting United States v. Nagra*, 147 F.3d 875 (9th Cir. 1998). In any event, "'[w]hen a new trial is granted, the effect is to set aside all proceedings in the old trial. Where a new trial has been granted, the case stands ready for trial as if there had been no trial.'" *Bankhead v. State*, 558 S.E.2d 407, 408 (Ga. Ct. App. 2001), *quoting Reagan v. Reagan*, 143 S.E.2d 736, 737 (Ga. 1965). Thus, the grant of a new trial negated any alleged errors in the first trial. In sum, the double jeopardy clauses did not bar Diaz's retrial.

II. Prosecutorial misconduct

¶10 Diaz also argues "[t]he prosecutor's numerous improper comments in closing [arguments] warranted a mistrial." He contends the prosecutor improperly vouched for the victims' testimony and inflamed the passions of the jury. We review for an abuse of discretion a trial court's refusal to grant a mistrial or new trial based on alleged prosecutorial misconduct. *State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006).

¶11 "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, which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *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 prevail on a claim of prosecutorial misconduct, "[t]he defendant must show that the offending statements, in the context of the entire proceeding, 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d at 846, *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998).

¶12 "The first step in evaluating [Diaz's] prosecutorial misconduct claim is to review each alleged incident to determine if error occurred." *State v. Roque*, 213 Ariz. 193, ¶ 154, 141 P.3d 368, 403 (2006). Even if an incident is not itself error, however, it "may nonetheless contribute to a finding of persistent and pervasive misconduct, if the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and 'did so with indifference, if not a specific intent, to prejudice the defendant.'" *Id.* ¶ 155, *quoting Hughes*, 193 Ariz. 72, ¶ 31, 969 P.2d at 1192 (citations omitted). We therefore review the alleged incidents for error and to determine if any of them "should count toward [Diaz's] prosecutorial misconduct claim." *Id.* We will then determine the cumulative effect on the fairness of Diaz's trial. *See id.*

¶13 Diaz contends "[t]he prosecutor twice argued in closing that the victims were both candid and honest" and thereby improperly vouched for their truthfulness. The prosecutor argued that the victims had been candid about their use of marijuana and that they had not "tr[ied] to whitewash any of their actions." She also argued in rebuttal:

> And, again, the witnesses' credibility. The defendant wants you to believe that, at age fourteen, these two boys master minded some plot to frame the defendant, and twelve years later, these young men, in their mid-twenties, are still honoring that pact. That doesn't make any sense.
>
> They also want you to believe that D[.] is making this up so that he wouldn't get . . . in trouble with his mom and dad at the time that they found marijuana in his room. Ladies and gentlemen, twelve years later, D[.] is telling you what this man did to him. And what could D[.'s] parents possibly do to him now, as an adult? There is no motive for D[.], twelve years later, to be . . . making something up about the defendant.

¶14 "It is black letter law that it is improper for a prosecutor to vouch for a witness." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993). "Two forms of impermissible prosecutorial vouching exist: (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." *Id.*, *quoting State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989).

¶15 Diaz maintains that by arguing in her rebuttal that the victims had no motive to lie, the prosecutor prevented him from presenting the jury with the fact that "they could potentially be charged with perjury for having lied" in the first trial and therefore somehow made an argument that "is a variation of arguing matters outside the

record." But, the prosecutor did not refer to the first trial directly or indirectly and thus nothing in the prosecutor's statements suggested the victims' testimony was supported by information not presented at the trial.

¶16 Furthermore, the prosecutor apparently made this argument in direct response to Diaz's closing argument in which defense counsel argued the victims had fabricated their story in an attempt to "pin the blame" on Diaz for their marijuana use when confronted by their parents. "Comments that are invited and prompted by opposing counsel's arguments are not improper if they are reasonable and pertinent to the issues raised." *State v. Trostle*, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997). The prosecutor's comments, which directly rebutted Diaz's argument about the victims' motives to lie, fall into that category.

¶17 The prosecutor's statements here also differ from the type Diaz relies on, in which the prosecutor's comments amount to a statement of personal belief in a particular aspect of a witness's testimony. *See State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989). Here the prosecutor did not vouch specifically for the victims' testimony, but rather argued, as was already implicit in the state's prosecution of Diaz, that Diaz had, in fact, provided the victims with drugs and had had sexual contact with them. Indeed, even the prosecutor's comments that the victims had been candid went to the fact that the victims had been truthful about their own involvement in criminal activity, not to their candidness about Diaz's activities. Thus, the prosecutor did not "place the prestige of the government behind its witness." *Bible*, 175 Ariz. at 601, 858 P.2d at 1204.

¶18 Next, Diaz maintains that the prosecutor improperly "appeal[ed] to the passions and fears of the jury" by referring to him as a "predator" in closing argument. In her closing argument, the prosecutor told the jury that Diaz had been "charged with violations of statutes that are designed to protect children" who "don't have good judgment . . . [or] know what is safe, what is dangerous, and who is a predator. These laws are designed to protect the children." Diaz states on appeal that the prosecutor "looked directly at Diaz when she made these comments."

¶19 We note first that "prosecutors have wide latitude in presenting their closing arguments to the jury." *State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000). "Within the latitude of closing argument counsel may comment on the vicious and inhuman nature of the defendant's acts. In so doing, however, counsel may not make arguments which appeal to the passions and fears of the jury." *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). Even accepting Diaz's assertion that the prosecutor made the comment at issue while looking at Diaz, the prosecutor's argument was not improper. Unlike the situation in *Comer*, the prosecutor here did not directly call Diaz inflammatory names or do more than suggest that his acts were consistent with those that the law was designed to prevent.

¶20 We turn then, to whether the cumulative effect of the alleged errors caused an unfair trial. *See Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d at 403. As detailed above, Diaz has failed to show that any of the prosecutor's statements to which he objects was error at all. Although incidents that themselves are not reversible error can contribute to reversible cumulative error, *id.*, we cannot say that cumulative error can exist where none

of the objectionable incidents has been shown to be error. As noted above, for cumulative error to exist the prosecutor's conduct must "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" *Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191, *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). In the absence of any specific incidents of error, we cannot say that Diaz's trial was so infected with unfairness that he was denied due process. *See id.*

Disposition

¶21 Diaz's convictions and sentences are affirmed.

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

CONCURRING:

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

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