FILED BY CLERK
SEP 30 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DOMINIQUE MARTINEZ, Appellant.	2 CA-CR 2007-0355 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20062952

Honorable Richard S. Fields, Judge

AFFIRMED IN PART; VACATED IN PART

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

Cooper & Udall
By Dan H. Cooper and Laura E. Udall
Tucson
Attorneys for Appellant

B R A M M E R, Presiding Judge.

¶1 Dominique Martinez appeals from his convictions and sentences for illegally conducting an enterprise, seven counts of aggravated assault, three counts of

armed robbery, two counts of aggravated robbery, two counts of threatening and intimidating, two counts of kidnapping, two counts of attempted armed robbery, theft of a means of transportation, theft by control, and first-degree murder. He asserts: (1) prosecutorial misconduct denied him a fair trial; (2) the trial court erred in denying his motion to sever; (3) venue in Pima County was improper for several of the charged counts; (4) the court erred by admitting into evidence a ledger containing a record of drug transactions; (5) the court erred by admitting into evidence the out-of-court statements of four individuals who did not testify at trial; and (6) the "circumstances surrounding" a witness's identification of him at trial "created a substantial likelihood of misidentification." We vacate his convictions and sentences for two of the aggravated assault counts but affirm the remainder of his convictions and sentences.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining the jury's verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Martinez was indicted in August 2006 for illegally conducting an enterprise. The state alleged the enterprise had as its goals "[o]btaining money and property through various illegal methods including . . . transporting illegal drugs . . . for sale; kidnapping others believed to be drug dealers for purposes of robbery and/or extortion; auto thefts and burglaries." Martinez also was charged with twenty-seven other crimes related to the enterprise, arising from four events we describe below.

(1) *Crimes related to the murder of Tony Cornejo*

¶3 Tony Cornejo owned a tire store in Phoenix and supplied marijuana to Martinez's father. On the pretext of buying marijuana from him, Martinez and Roberto Solano drove to Phoenix, intending to kidnap Cornejo. Lucy Vera, who worked for Cornejo, saw Martinez, Cornejo, and others at Cornejo's tire shop on July 23, 2005.

¶4 The next day, Martinez and Solano again came to Cornejo's store and found Cornejo and Juan Ceniceros-Lopez there. After Cornejo, Solano, and Martinez talked for a few minutes, they got into an argument. Solano and Martinez pulled out guns, beat Cornejo and Ceniceros-Lopez, and threatened to kill them. Another person, Daniel Escajeda, arrived at the tire shop, and Solano attacked him as well. Solano and Martinez took from Ceniceros-Lopez two wallets, one belonging to him and the other to his brother. They told Ceniceros-Lopez they were going to kill Cornejo and leave the wallets near his body in order to implicate Ceniceros-Lopez. Martinez and Solano then left, taking Cornejo with them.

¶5 Vera then received several telephone calls from Cornejo and others, indicating Cornejo had been kidnapped and the kidnappers wanted a quantity of marijuana as a ransom. Vera, Escajeda, Manuel Chavez, and Juan Penuelas began gathering the marijuana needed for the ransom. Vera then drove to Tucson in Chavez's truck, carrying approximately five hundred pounds of marijuana. She took the truck to the hotel designated as the meeting spot, rented a room, and left the truck in the parking lot. She saw Martinez arrive in a truck she had seen the previous day at Cornejo's shop.

After a few minutes, both Martinez's truck and the truck Vera had taken to Tucson were driven away.

¶6 That night, Jesus Mendivil saw Solano arrive at Martinez's house in Tucson with a truck loaded with marijuana. Mendivil and Solano left in another vehicle to meet Martinez, taking with them an assault rifle and pistol. When they met Martinez, Cornejo was in his truck. Solano then shot Cornejo and left, leaving Martinez and Mendivil with Cornejo's body. Martinez told Mendivil to push the body out of the truck, and Mendivil did so. The two men then returned to Martinez's house. When police found Cornejo's body, they found next to it wallets belonging to Ceniceros-Lopez and his brother. Nearby they also found a black vinyl bag containing Martinez's identification.

¶7 Related to these events, a grand jury charged Martinez with aggravated assault with a deadly weapon, armed robbery, aggravated robbery, and threatening and intimidating, naming Ceniceros-Lopez and Escajeda as victims.[1] The grand jury also charged Martinez with the kidnapping, aggravated assault, armed and aggravated robbery, and first-degree murder of Cornejo. Martinez also was charged with threatening and intimidating Cornejo's wife, Yssenia, based on a telephone conversation she had with one of Cornejo's kidnappers, who instructed her not to call the police.[2]

[1]The jury acquitted Martinez of the two robbery counts naming Escajeda as a victim.

[2]The trial court entered a directed verdict dismissing this charge at the close of the state's case.

(2) *Assault and Attempted Robbery of Vincente Sandoval*

¶8 Vincente Sandoval worked with Martinez in the criminal enterprise from early 2002 through mid-2004. They stopped working together after having a disagreement concerning a load of marijuana for which Sandoval was unable to pay. On September 23, 2005, Martinez sent Armando Medrano and Solano to take Sandoval's Jaguar car as payment for the debt. Jacob Martinez, Martinez's cousin, drove Solano and Medrano to Sandoval's home. They attacked Sandoval, hitting him with their guns. During the struggle, however, the magazine fell out of Solano's gun, and Solano, Medrano, and Jacob Martinez then left empty-handed. For these offenses, the grand jury charged Martinez with attempted armed robbery, aggravated assault with a deadly weapon, and aggravated assault causing temporary but substantial disfigurement.

(3) *Crimes related to the kidnapping of Clive Cook-Tracey*

¶9 A few days after the incident with Sandoval, Martinez and Solano went to a house in Tucson after receiving information that money was hidden there. Clive Cook-Tracey and his cousin, Albert Walker, were staying at the house, and they arrived while Martinez and Solano were there. After Martinez and Solano found no money in the house, they beat both men and kidnapped Cook-Tracey in order to get ransom money from him. Walker escaped.

¶10 Martinez left in his truck with Cook-Tracey, while Solano drove Cook-Tracey's rental car. Martinez met Solano and Medrano at a convenience store, and the three men then took Cook-Tracey to his bank and forced him to withdraw money, which

he gave to Martinez. Solano took Cook-Tracey to his house and continued to hold him captive until Cook-Tracey escaped later that night.

¶11 Related to this incident, the grand jury charged Martinez with first-degree burglary,[3] aggravated assault with a deadly weapon of Walker and Cook-Tracey, theft of a means of transportation, kidnapping, armed robbery, and attempted armed robbery.

(4) *Attack on Mark Morlock*

¶12 Tucson police sergeant Mark Morlock responded to the call reporting Cook-Tracey's kidnapping. He was directed to a location where police had located a signal from Cook-Tracey's cellular telephone. While Morlock waited there, Solano approached Morlock, pointed a gun at him, and pulled the trigger, but the gun twice failed to fire. After the two men exchanged gunfire, Morlock fled, and Solano drove away in Morlock's police vehicle. Solano took the contents of Morlock's vehicle, including his gun and badge, to Martinez.

¶13 The grand jury charged Martinez with aggravated assault on a police officer with a deadly weapon, theft of a means of transportation, and trafficking in stolen property.[4] Martinez was arrested on September 30, 2005. Solano killed himself the next day, after being cornered by pursuing police officers. After a twenty-three-day trial, the jury found Martinez guilty of all remaining counts except the two robbery charges

[3]The trial court entered a directed verdict as to this count.

[4]The court entered a directed verdict on the aggravated assault and theft charges and amended the trafficking charge to possession of stolen property.

naming Escajeda as the victim. The trial court sentenced Martinez to life imprisonment without the possibility of parole for twenty-five years on the murder conviction. The court ordered the remaining prison sentences, totaling 19.25 years, be served concurrently with Martinez's life sentence. This appeal followed.

Discussion

Prosecutorial Misconduct

¶14 Martinez first argues the prosecutor committed misconduct, depriving him of a fair trial, and the trial court erred in denying his motions for mistrial and new trial. He asserts the prosecutor committed misconduct in three ways: (1) by making improper statements during his opening statement; (2) by violating repeatedly his disclosure obligations under Rule 15.1, Ariz. R. Crim. P., and *Brady v. Maryland*, 373 U.S. 83 (1963); and (3) by engaging in a "pattern of egregious misconduct" during trial and closing argument.

¶15 A prosecutor commits misconduct by "'call[ing] to the attention of the jurors matters that they would not be justified in considering in determining their verdict.'" *State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000), *quoting State v. Hansen*, 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1988). For a prosecutor's improper argument to warrant reversal, the defendant must demonstrate that it "'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); *see* U.S. Const. amend. XIV, § 1;

Ariz. Const. art. II, § 4. "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct [that] 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). "A trial court's ruling on a motion for new trial based upon prosecutorial misconduct will not be reversed absent abuse of discretion." *State v. Anaya*, 170 Ariz. 436, 441, 825 P.2d 961, 966 (App. 1991).

Opening Statement

¶16 We first address Martinez's claim that the prosecutor made improper remarks during his opening statement. "'The object of an opening statement is to apprise the jury of what the party expects to prove and prepare the jurors' minds for the evidence which is to be heard.'" *State v. King*, 180 Ariz. 268, 276, 883 P.2d 1024, 1032 (1994), *quoting State v. Lee*, 110 Ariz. 357, 360, 519 P.2d 56, 59 (1974). Although an attorney "'should make a fair statement of the evidence, . . . [h]e should not make a statement of any facts which he cannot legally prove upon the trial.'" *State v. Burruell*, 98 Ariz. 37, 40, 401 P.2d 733, 736 (1965), *quoting State v. Erwin*, 120 P.2d 285 (Utah 1941). An attorney is permitted considerable latitude in opening statements. *Id.*

¶17 Martinez asserts twelve statements the prosecutor made were improper. We address each in turn. First, Martinez contends the prosecutor improperly "emphasized that Mr. Martinez would testify" and "shift[ed] the burden of proof" to

Martinez by stating: "[T]he defendant stands in a position where he expects from the evidence to have you focus on the people he associated with, who did the worst acts, as if he is not responsible for it." We agree with the state that this statement was not improper and, in fact, correctly anticipated Martinez's defense. During his opening statement, Martinez painted Solano and others, instead of himself, as the perpetrators of various crimes. A prosecutor may "advise[] the jury of a possible defense in the case" during opening statements. *State v. Eisenlord*, 137 Ariz. 385, 390, 670 P.2d 1209, 1214 (App. 1983). Nothing about the prosecutor's statement suggested Martinez would testify or that he bore the burden of proof.

¶18 Next, Martinez claims the prosecutor's statement describing his taking of "trophy items" was inaccurate. The prosecutor stated that Martinez "insist[ed] on taking the trophy items himself, so he takes Sergeant Morlock's badge, . . . cell phone . . . or he takes a digital camera. He takes the collection of key papers and other documents about addresses and locations." As the state points out, there was ample evidence that Martinez took Morlock's badge, discarding it shortly before being arrested. And Martinez conceded in his opening statement that he had taken it.

¶19 Although the state does not identify, nor do we find, specific evidence that Martinez took other items, there was evidence he had ordered someone to destroy Morlock's telephone and had examined the papers Solano had brought. The gist of the prosecutor's statement—that Martinez took items Solano had taken from Morlock—was supported by the evidence. And the state's overarching theory of the case was that

Martinez was in charge of a criminal enterprise of which Solano—who Martinez claims took the items—was a member. In these circumstances, we cannot agree the prosecutor's statement was improper. *See Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27.

¶20 Third, Martinez contends the prosecutor falsely stated that "[t]he first thing [Martinez] does is[—]they need more weapons. He contacts . . . Chancellor Ward and says he needs weapons." The prosecutor's statement is supported by the record and therefore does not constitute misconduct. Chancellor Ward testified he had given a gun to Martinez, who also had called and asked for a knife.

¶21 Fourth, Martinez complains the prosecutor improperly suggested Martinez had made "half a dozen" telephone calls to Cornejo and argues "[t]here was no evidence that [he] made these phone calls." But the state presented evidence that Cornejo had received at least six telephone calls from numbers Martinez had left with an airline as points of contact for him. Thus, a jury could conclude, consistently with the prosecutor's statement, that Martinez had called Cornejo "half a dozen" times.

¶22 Next, Martinez asserts the prosecutor improperly suggested Cornejo had sold marijuana to Martinez's father. Again, the evidence supported this statement—Vera testified to drug transactions between Cornejo and Martinez's father.

¶23 The prosecutor stated during opening that Martinez and the others had agreed on a "plan" to "go and set up as if they were going to buy marijuana from Tony Cornejo, and then kidnap him and hold him for ransom." Martinez asserts "[t]here was no evidence of such a plan." We disagree. Mendivil testified that Solano and Martinez

had told him about a plan to kidnap Cornejo after "pretend[ing]" to buy marijuana from him. Martinez complains, however, that Mendivil did not use the word "plan" and that the term instead was "supplied by the prosecutor." Although Martinez is correct, the clear import of Mendivil's testimony was that Martinez and Solano had developed and implemented a scheme to kidnap Cornejo. It is immaterial whether the prosecutor or Mendivil used the word "plan."

¶24 Seventh, Martinez points to the prosecutor's statement that a man named Billy McDowell had told Vera not to "pay any ransom [for Cornejo because] they're going to kill him." He asserts the trial court precluded any evidence of this statement. But he identifies nothing in the record suggesting the prosecutor knew or should have known this evidence later would be precluded. Nor does he cite anything in the record supporting his contention the evidence never "existed." Although the court stated it did not recall Vera's making that statement in her deposition, it recalled her making a similar statement that McDowell had told her not to pay the ransom and "just come get guns." Neither party has cited the place in Vera's deposition testimony where this information could be found. In any event, even if the prosecutor's statement was not entirely supported by Vera's deposition, we find no indication the prosecutor's description of her testimony was a willful or knowing misstatement. It thus did not constitute misconduct. *See Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27.

¶25 Martinez next complains about the prosecutor's statement that "the evidence is going to be that it was Solano's intention to kidnap [Sandoval], which was

okay with the defendant." He asserts "[t]here was no such admissible evidence." A witness testified that Martinez had told Medrano and Solano to "[g]o pick up [Sandoval's] Jaguar." That witness, however, said Solano had not "ma[d]e any statements about anything else that [Martinez] wanted [them] to do in addition to bringing back the Jaguar." But, again, Martinez has not demonstrated this was a willful or knowing misstatement of the evidence. *See Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27. It is apparent from his questioning of that witness that the prosecutor believed the witness would testify that Martinez had told them to kidnap Sandoval. Nothing in the record suggests the prosecutor's belief was unfounded.

¶26 Martinez similarly contends the prosecutor's statement that Martinez and Mendivil had "kick[ed] Tony Cornejo's body out onto the street" was unsupported by the evidence. Mendivil testified that Martinez told him to do so and that he had complied. The jury therefore reasonably could conclude Martinez had participated. Thus, this statement did not constitute misconduct.

¶27 The tenth and eleventh remarks of which Martinez complains were comments made during the prosecutor's opening statement about the testimony of Medrano, who did not testify at trial. But the record does not support Martinez's contention that the prosecutor "knew prior to his opening statement whether or not Medrano would testify." Notably, in the state's response to Martinez's motion for new trial, the prosecutor stated he had made a tactical decision during trial not to call Medrano. We find no indication of misconduct. Moreover, the trial court instructed the

jury that the attorneys' statements were not evidence, and we presume the jury followed that instruction. *See State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847 (2006).

¶28 Last, Martinez asserts no evidence supported the prosecutor's statement that Martinez and Solano had a plan "to obtain marijuana and money . . . through kidnapping, ransoms, and rip offs, not regular marijuana sales." But there was ample evidence that Martinez and Solano had implemented such plans—as, for example, by kidnapping Cornejo to hold him for ransom and by going to Cook-Tracey's home in search of money. The prosecutor's statement therefore did not constitute misconduct.

Disclosure

¶29 Martinez next asserts the prosecutor's violations of the state's disclosure obligations under Rule 15.1 and *Brady* amounted to prosecutorial misconduct. Martinez identifies seven purported disclosure violations, which we address in turn.

¶30 Martinez first complains the prosecutor did not disclose before his opening statement that Sandoval "had lied to police about the ownership of marijuana found in his home." But the prosecutor stated, and Martinez does not dispute, that the prosecutor had learned only the day before trial that Sandoval had lied to the police.[5] And Sandoval did

[5]Martinez points out the prosecutor had stated during oral argument on Martinez's motion for new trial that it was "apparent" Sandoval initially had been lying about the marijuana's ownership but did not "confirm it verbally until right before my opening statement." Martinez asserts the prosecutor had an obligation to "immediately inform defense counsel of the lie." Nothing requires a prosecutor to disclose his or her subjective opinion of a potential witness's veracity. *See* Ariz. R. Crim. P. 15.1(b) (listing required disclosure), 15.4(b) (disclosure not required of materials containing "opinions, theories or conclusions of the prosecutor").

not testify until five days after opening statements. Assuming the prosecutor was required to disclose this information earlier, Martinez does not explain how the timing of the disclosure prejudiced him. As to his contention the prosecutor failed to disclose Sandoval's "written notes" on the subjects about which Sandoval had been dishonest, Martinez identifies nothing in the record suggesting the state ever possessed such notes. *See State v. Armstrong*, 208 Ariz. 345, ¶ 55, 93 P.3d 1061, 1072 (2004) ("Generally, '[t]he [S]tate cannot be held to disclose material that it does not possess."), *quoting State v. McDaniel*, 136 Ariz. 188, 195, 665 P.2d 70, 77 (1983) (alterations in *Armstrong*).

¶31 Second, Martinez complains Sandoval testified for the first time at trial about marijuana trafficking with Martinez "two years prior to the scope of the indictment."[6] The state pointed out, and the trial court agreed, however, that the bulk of that information was contained in materials that already had been disclosed. Although Martinez asserts his counsel described in detail "the critical information that was not disclosed," the court concluded the previously disclosed information was sufficient to prevent "unfair surprise." Because the relevant disclosure has not been included in the record on appeal, we have no basis to disturb that finding. *Cf. State v. Villalobos*, 114 Ariz. 392, 394, 561 P.2d 313, 315 (1977) ("When an incomplete record is presented to an appellate court, it must assume that any testimony or evidence not included in the record

[6]Martinez does not argue on appeal that the trial court erred in amending the indictment to conform to the evidence.

on appeal supported the action taken by the trial court."). Because there was no disclosure violation, there was no misconduct.

¶32 Contrary to his pretrial statements, Sandoval testified at trial, beneficially to Martinez, that he had not engaged in drug runs with Martinez or Martinez's father. Although Martinez asserts the state was aware before trial that Sandoval had been lying about those drug runs, he does not support this assertion with any citation to the record. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall contain citation to "parts of the record relied on"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claim waived on appeal by insufficient argument). In any event, Martinez has not identified in his opening brief any cognizable prejudice resulting from the prosecutor's purported failure to disclose this fact before trial. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 833; *State v. Lopez*, 217 Ariz. 433, n.4, 175 P.3d 682, 687 n.4 (App. 2008) (issues raised for first time in reply brief generally waived).

¶33 Martinez asserts the prosecutor failed to disclose before trial Sandoval's statement to Martinez that, "if you do come after me, you kill me. Because if you don't, I'm going to kill you." But the prosecutor stated he was surprised by this testimony, as he similarly was surprised by Ceniceros-Lopez's testimony—about which Martinez also complains—that his attackers had told him they would take his wallet and leave it with Cornejo's body. Although Martinez asserts the prosecutor's "claim[s] of surprise . . . lose[] veracity each time [they are] uttered," he identifies nothing in the record suggesting the prosecutor was aware either witness would so testify. And evaluating the credibility

of a prosecutor's claims of surprise is best left to the trial court.[7] *See State v. Gay*, 214 Ariz. 214, ¶ 19, 150 P.3d 787, 794 (App. 2007).

¶34 For the same reason, we reject Martinez's argument that the prosecutor committed misconduct by failing to disclose that Vera would testify the attack on Cornejo had occurred at "another office." Again, the prosecutor asserted he was not aware Vera would offer this testimony, and the trial court was in the best position to assess the credibility of that avowal. *See Gay*, 214 Ariz. 214, ¶ 19, 150 P.3d at 794.

¶35 Last, Martinez complains the prosecutor failed to disclose a witness's pretrial identification of two of Martinez's accomplices. The prosecutor sought to elicit this testimony in response to Martinez's suggestion the testifying police officer's investigation had been inadequate. The prosecutor admitted he had failed to disclose this identification, and the court sustained Martinez's objection and precluded any testimony concerning it. Thus, even if the prosecutor should have disclosed this identification, there was no prejudice to Martinez.[8]

---

[7]The trial court instructed the prosecutor not to elicit any further testimony regarding Ceniceros-Lopez's statement about his wallet or make any argument to the jury related to that testimony. When the prosecutor referred to the testimony during his closing argument, the trial court swiftly admonished him. Although the prosecutor's reference violated the court's order, it does not warrant a new trial. *See Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191 (improper argument warrants reversal only if it "'so infected the trial with unfairness as to make the resulting conviction a denial of due process'"), *quoting Donnelly*, 416 U.S. at 643.

[8]Martinez claims he was prejudiced because the jury heard the testimony and "w[as] able to see that the defense objected to the testimony." But the testifying officer did not complete his answer regarding the pretrial identification before Martinez objected. Thus, the jury did not hear which of two individuals, neither of whom was

Conduct during Trial

¶36 Martinez asserts the prosecutor committed misconduct by "engag[ing] in constant non-verbal communications with the jury, continually violat[ing] the court's order regarding speaking objections, laugh[ing] at the defense, and rais[ing] his voice and gestur[ing] toward Mr. Martinez in a demeaning manner on multiple occasions." He provides numerous citations to the record as examples of the prosecutor's conduct. We note, however, that the trial court commented on few of the complaints Martinez made and, indeed, stated that "counsel on both sides have become theatric at times." And Martinez has provided only inaccurate citations to the record to support other purported instances of misconduct. In any event, the court was in the best position to evaluate the effect of the prosecutor's conduct on the jury. *See State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992), *quoting State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988) ("'[T]he trial court is in a better position to judge whether the prosecutor is unduly sarcastic, his tone of voice, facial expressions, and their effect on the jury, if any. Accordingly, we defer to the trial court's judgment in the absence of patent error.'"), *disapproved of on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717

Martinez, the witness had identified. Moreover, Martinez did not ask the court to strike any portion of the officer's testimony, and we agree with the state "the fact that the objection was made cannot itself be prejudice sufficient to warrant a mistrial." *See State v. Kemp*, 185 Ariz. 52, 61-62, 912 P.2d 1281, 1290-91 (1996) (no prejudice where objection "immediately sustained before the witness answered the question").

(2001). We find no basis in the record to disturb the court's determination that the prosecutor's conduct did not warrant a mistrial or new trial.[9]

¶37 Martinez also contends the prosecutor committed misconduct during closing by referring to Solano as a "mad dog," "dog," and "attack dog" and emphasizing that Solano did Martinez's bidding. We first note that, although the prosecutor's characterizations arguably were inappropriate, *see State v. Trostle*, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997), they were consistent with Martinez's own position that Solano was a "dangerous, violent man with a hair trigger." In such circumstances, even assuming the prosecutor's characterization of Solano was improper, we cannot reasonably conclude it "'so infected 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*, 416 U.S. at 643.

¶38 In any event, Martinez did not object to these statements and thus has waived on appeal all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). And Martinez fails to argue in his opening brief that fundamental error occurred, thereby waiving the claim entirely. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (argument waived because defendant "d[id] not argue the alleged error was fundamental"). Accordingly, we do not address it further.

[9]As to Martinez's related contention the prosecutor committed misconduct by ignoring the trial court's order precluding questioning about "cop killer bullets," we observe that the court acknowledged its directions on that point had been unclear and further explained them to the prosecutor. There was no misconduct.

¶39 Martinez also contends the prosecutor "persuaded defense counsel" it was unnecessary to call a witness who would have corroborated another witness's testimony, "only to then take advantage of this during closing argument" by asserting the other witness's testimony was mistaken. He has provided no accurate citation to the record in support of this argument, however. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). When Martinez raised this argument in the trial court shortly after closing, the prosecutor stated he previously had commented that he did not think the witness was "lying" but had said he did not "know whether she's right or not." The court denied Martinez's request for a mistrial, and he has provided no basis for us to disturb that ruling.

¶40 For the reasons stated, we reject Martinez's argument that misconduct by the prosecutor denied him a fair trial. We have identified only three instances of questionable conduct by the prosecutor—his failure to disclose a witness's pretrial identification, his characterization of Solano during closing, and his reference to Ceniceros-Lopez's testimony during closing argument. As we noted above, Martinez was not prejudiced by the first two instances, and the latter reference was insufficiently prejudicial to warrant a new trial.

Motion to Sever

¶41 Martinez next asserts the trial court erred by denying his motion to sever the charges. He reasons that, because the state alleged "four separate cases" tied together only by the state's allegation of a criminal enterprise, the charges were joined pursuant to Rule 13.3(a)(1), which entitled him to severance as a matter of right. The state responds

that the charges were joined pursuant to Rule 13.3(a)(3), "common scheme or plan," and Martinez was entitled to severance only if "necessary to promote a fair determination of [his] guilt or innocence." Ariz. R. Crim. P. 13.4(a). We need not resolve this dispute, however, because Martinez is not entitled to relief in any event. We review the denial of a motion to sever for an abuse of discretion. *State v. LeBrun*, 222 Ariz. 183, ¶ 5, 213 P.3d 332, 334 (App. 2009).

¶42 Pursuant to Rule 13.4(b), a defendant is entitled as a matter of right to severance of charges joined under Rule 13.3(a)(1) because they "[a]re of the same or similar character." But a defendant is not entitled to severance in that circumstance if "evidence of the other offense or offenses would be admissible under applicable rules of evidence if the offenses were tried separately." Ariz. R. Crim. P. 13.4(b). As the state points out, because the four "sets" of charges were predicate offenses for the charge of conducting a criminal enterprise, evidence of each charged offense necessarily would be admissible to prove the criminal-enterprise charge.

¶43 Martinez disagrees, arguing that conclusion "wrongly assumes there was a single conspiracy such that evidence of all the individual offenses would have been admissible on Count 1 alone, and because it incorrectly equates Count 1 with being such a conspiracy." This argument appears to conflate joinder under Rule 13.3(a)(3), permitting joinder when the offenses "[a]re alleged to [be] a part of a common scheme or plan," with severance under Rule 13.4(b). Nothing in Rule 13.4(b) requires the offenses

to be connected by anything but common evidence—as the charges against Martinez plainly are because they all are part of the alleged criminal enterprise.

¶44 And, if the offenses were joined under Rule 13.3(a)(3), severance was not required. Pursuant to Rule 13.4(a), a trial court must grant a motion to sever offenses joined under Rule 13.3(a)(3) when "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense." A trial court abuses its discretion in denying a motion to sever if the defendant can establish that, at the time he moved to sever, he had demonstrated to the court that the failure to sever would result in "'compelling prejudice against which the trial court was unable to protect.'" *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995), *quoting State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983).

¶45 But "a defendant is not prejudiced by a denial of severance where the jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt." *State v. Prince*, 204 Ariz. 156, ¶ 17, 61 P.3d 450, 454 (2003); *see also State v. Johnson*, 212 Ariz. 425, ¶ 13, 133 P.3d 735, 740 (2006) (instructing jury to consider counts separately ameliorated prejudice from joinder). The trial court instructed the jury here to "decide each count separately on the evidence, . . . uninfluenced by [its] decision as to any other count." And the court correctly instructed the jury on the state's burden to prove each charge beyond a reasonable doubt. We presume the jury followed those instructions. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Indeed, the jury acquitted Martinez of two of the charges,

strongly suggesting it understood and followed the court's instructions. We find no prejudice.

Venue

¶46 Martinez next asserts the trial court erred in denying his motion to dismiss for improper venue the charges naming Escajeda and Ceniceros-Lopez as victims. Martinez was convicted of aggravated assault and threatening and intimidating as to both victims, and of armed and aggravated robbery of Ceniceros-Lopez.[10] He asserts these crimes "took place solely in Maricopa County" and contends he did not know either man before arriving in Maricopa County nor know they would be at Cornejo's shop where the crimes occurred.

¶47 Under our constitution, a criminal defendant has the right to "trial by an impartial jury of the county in which the offense is alleged to have been committed." Ariz. Const. art. II, § 24; *see also* A.R.S. § 13-109(A). Although "proper venue is a jurisdictional requirement" in Arizona criminal prosecutions, *State v. Agnew*, 132 Ariz. 567, 577, 647 P.2d 1165, 1175 (App. 1982), the state is required to prove venue only by a preponderance of the evidence, *State v. Mohr*, 150 Ariz. 564, 566-67, 724 P.2d 1233, 1235-36 (App. 1986). And, "[v]enue may be proven by indirect or circumstantial evidence." *Id.* at 566, 724 P.2d at 1235.

¶48 Venue is proper in the county "in which conduct constituting any element of the offense . . . occurred." § 13-109(A); *see also State v. Cox*, 25 Ariz. App. 328, 330-

[10]Because Martinez was acquitted of robbing Escajeda, any claim that venue for those charges was improper is moot.

31, 543 P.2d 449, 451-52 (1975) (venue proper only in county where criminal act occurred). There was circumstantial evidence Martinez possessed in Pima County the wallets of Ceniceros-Lopez and his brother that had been taken in the robberies. The wallets were found next to Cornejo's body, Martinez's possessions were found nearby, and Martinez was present when Cornejo's body was left on a Tucson street. *See* § 13-109(B)(6) ("A person who obtains property unlawfully may be tried in any county in which such person exerts control over the property."). Venue was proper in Pima County for the robbery charges.

¶49 Martinez also was charged with threatening and intimidating Escajeda and Ceniceros-Lopez in violation of A.R.S. § 13-1202(A)(3), which states: "A person commits threatening or intimidating if the person threatens or intimidates by word or conduct: . . . [t]o cause physical injury to another person . . . in order to promote, further or assist in the interests of . . . a criminal syndicate or a racketeering enterprise." Thus, the existence of a racketeering enterprise was an element of the threatening and intimidating charges. Because acts related to that enterprise occurred in Pima County, acts constituting an element of threatening and intimidating occurred in Pima County, and venue therefore was proper. § 13-109(A).

¶50 The aggravated assault charges present a closer question. The state does not dispute that Martinez did not know either Escajeda or Ceniceros-Lopez before obtaining a gun and traveling to Maricopa County to kidnap Cornejo. The state contends, however, in an underdeveloped argument, that obtaining the gun and forming the intent

to kidnap Cornejo "constituted elements of the aggravated assaults"—namely, "intent and gun possession." The state was required to demonstrate Martinez used a deadly weapon in committing aggravated assault. *See* A.R.S. §§ 13-1203, 13-1204. Thus, his possession of the gun in Tucson arguably is relevant to whether he possessed a gun at Cornejo's shop. But it does not constitute an element of the offense and, by itself, cannot make venue proper in Pima County.

¶51 Nor can Martinez's forming in Tucson the intent to kidnap Cornejo in Maricopa County reasonably be construed as conduct constituting an element of aggravated assault. Although aggravated assault requires proof of intent, *see* §§ 13-1203, 13-1204, nothing about his intending to kidnap Cornejo, even when coupled with his possession of a gun, evinces any intent by Martinez to assault two individuals he did not know would be present. The state identifies nothing in the record permitting the inference that Martinez obtained the gun for the purpose of assaulting any person who happened to be present when he and Solano kidnapped Cornejo. And the fact venue was proper for the other crimes of which Escajeda and Ceniceros-Lopez were victims does not make venue in Pima County proper for the related assaults that occurred in Maricopa County. *See State v. Agnew*, 132 Ariz. 567, 579-80, 647 P.2d 1165, 1177-78 (App. 1982) ("We have found no authority holding that where venue is established for co-defendants or for counts that are otherwise properly joined, venue is 'boot strapped' for a crime that otherwise must be charged in another jurisdiction."). We agree with Martinez that venue

in Pima County was improper as to these two aggravated assault counts, and we therefore vacate his convictions and sentences for those offenses.

Admission of Ledger

¶52 Martinez next asserts the trial court erred in admitting into evidence a ledger, apparently containing a record of drug transactions, found in the truck Vera had used to travel to Tucson to deliver marijuana to Martinez in exchange for Cornejo's release. The ledger contained the names "Flaco" and "Tio," ostensibly referring to Martinez and his father, and appeared to document drug transactions among Martinez and his father and Cornejo and Chavez. Martinez asserts the ledger was admitted without proper foundation, constituted inadmissible hearsay, and violated his confrontation rights.

¶53 Because we conclude any error in admitting the ledger was harmless, we need not determine whether its admission was proper. "Error is harmless if it can be shown beyond a reasonable doubt that the error did not affect the verdict." *State v. Jones*, 185 Ariz. 471, 486, 917 P.2d 200, 215 (1996). Beyond the allegations regarding the criminal-enterprise charge, Martinez was charged with no drug offenses, but there was ample evidence apart from the ledger supporting the allegations of drug trafficking made in support of the criminal-enterprise charge. Moreover, the jury found Martinez guilty of several crimes that served as predicate offenses for the criminal-enterprise charge. Thus, we conclude beyond a reasonable doubt the jury would have reached the same verdict on that charge had the drug ledger not been admitted.

Admission of Out-of-Court Statements

¶54 Martinez argues the trial court erred by admitting, through Vera's and Yssenia's testimony, the statements of four individuals who did not appear as witnesses.[11] The individuals in question participated in obtaining marijuana to transport to Tucson to obtain Cornejo's release from Martinez. Martinez asserts they were not coconspirators with him and, therefore, their statements were inadmissible hearsay. "We will not disturb a trial court's determination on the admissibility and relevance of evidence absent an abuse of discretion." *State v. Jeffrey*, 203 Ariz. 111, ¶ 13, 50 P.3d 861, 864 (App. 2002).

¶55 Inadmissible hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). Nonhearsay includes "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Ariz. R. Evid. 801(d)(2)(E). For hearsay statements of coconspirators to be admitted against a defendant, the state must establish: "(1) the existence of a conspiracy; (2) the defendant's connection to the conspiracy; (3) that the statements were made in the course of the conspiracy by a co-conspirator; [and] (4) that the statements were made in furtherance of the conspiracy . . . ." *State v. Stanley*, 156 Ariz. 492, 495, 753 P.2d 182, 185 (App. 1988).

¶56 Martinez argues these four individuals were not coconspirators because they had no "single goal" in common with him. He asserts there were, in fact, two

[11]Although Martinez asserts the court erred by admitting Escajeda's out-of-court statements, he does not identify any such statements in the record.

conspiracies—one, involving Martinez, to kidnap and ransom Cornejo, and a separate conspiracy among the four individuals to rescue him. Thus, Martinez reasons, because he was not involved in the same conspiracy as the four men, they cannot be considered his coconspirators.

¶57 Martinez primarily relies on *United States v. Perry*, 550 F.2d 524 (9th Cir. 1977), for the proposition that a conspiracy must have a "single goal." But Martinez misreads *Perry*. In that case, the appellate court determined the trial court properly had refused a jury instruction that stated, "'if you should find from the proofs in this case that there are two or more disconnected conspiracies, you must not find the defendants in this case guilty of the conspiracy charged in the indictment.'" *Id.* at 532. The *Perry* court observed that a conspiracy could be comprised of multiple, separate agreements between individuals "joined together by their knowledge of [the conspiracy's] essential features and scope, though not of the exact limits, and by their single goal." *Id.* at 533. Nothing in that statement suggests that all members of a conspiracy must have only one, shared goal, to the exclusion of other, competing goals. The *Perry* court's statement means only that, for a conspiracy to exist, the conspirators must have a common goal—not that they may not also have other individual or collective goals.

¶58 Martinez demanded from those individuals, as ransom for Cornejo, a delivery of marijuana. Consistent with those demands, the individuals obtained

marijuana and delivered it to Martinez.[12] *See* A.R.S. § 13-1003. This constituted a conspiracy to transport illegal drugs, and Vera's and Yssenia's testimony about the four men's out-of-court statements therefore did not constitute hearsay.[13]

Motion to Preclude Identification

¶59 Last, Martinez asserts the trial court erred in denying his motion to preclude Vera's in-court identification of him. On January 26, 2006, police officers showed Vera a photographic lineup that included a picture of Martinez. Vera stated she previously had seen Martinez but could not be "100 percent certain" that she had seen him at Cornejo's shop. She further stated at one point that she "d[id]n't think that was the one that was there because . . . I remember he was really skinny." A detective then said to her, "[O]f course he looks different [because] [it] was just a photograph" and commented that the photograph only showed Martinez "from the neck up." Vera nonetheless declined to

[12]Martinez does not argue the individuals' statements are inadmissible hearsay because their participation in the conspiracy to deliver marijuana to Martinez was unwilling, prompted only by Martinez's kidnapping of Cornejo. We observe that, for a coconspirator's participation in a conspiracy to be involuntary due to duress, that duress must be sufficient to "'overbear [the coconspirator's] will.'" *United States v. Freeman*, 208 F.3d 332, 342 (1st Cir. 2000), *quoting Slater v. United States*, 562 F.2d 58, 62 (1st Cir. 1976). Nothing in the record suggests such duress was present here.

[13]To the extent Martinez argues, separately from his hearsay argument, that admitting the statements violated his confrontation rights, we reject that argument. The United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 56 (2004), described "statements in furtherance of a conspiracy" as "not testimonial" and a hearsay exception, and the Supreme Court recently has commented, "[A]n incriminating statement in furtherance of [a] conspiracy would probably never be . . . testimonial. The co-conspirator hearsay rule does not pertain to a constitutional right . . . ." *Giles v. California*, ___ U.S. ___, 128 S. Ct. 2678, 2691 n.6 (2008) (plurality opinion); *see also United States v. Allen*, 425 F.3d 1231, 1235 (9th Cir. 2005) (coconspirator's statement nontestimonial).

identify Martinez positively as the man she had seen at the shop. At a hearing on Martinez's motion to preclude her in-court identification, Vera testified the officers present at the photographic lineup "didn't pressure [her] to sign anything."

¶60 Eleven months after being shown the photographic lineup, Vera was deposed in court with Martinez present. She informed a police officer that she recognized Martinez as the man she had seen when the marijuana was delivered to Tucson and he was the same person she had "met . . . in person, the night before [Cornejo] was killed." Vera identified Martinez at trial as having been present at Cornejo's shop and having been in Tucson when the marijuana was delivered.

¶61 The trial court determined the identification procedure did not violate Martinez's due process right. The court determined Vera had "recognized the defendant" at the photographic lineup but "felt she was less than 100% positive." Noting that "[n]othing about that first glint of recognition rendered the procedure unduly suggestive," the court stated, "The follow-up comments and involvement can be easily raised on cross-examination." The court also found that Vera's identification at the deposition "corroborate[d] the [photographic] identification" and that the jury could "consider the later circumstances in judging the certainty of Ms. Vera without any implication of a due process violation."

¶62 A criminal defendant is entitled to have a pretrial identification procedure conducted in a fundamentally fair manner. *State v. Smith*, 146 Ariz. 491, 496, 707 P.2d 289, 294 (1985). "Pretrial identifications which are fundamentally unfair implicate the

due process clause of the Fourteenth Amendment." *State v. Prion*, 203 Ariz. 157, ¶ 14, 52 P.3d 189, 192 (2002). To suppress a pretrial identification on due process grounds, a defendant must prove that the circumstances surrounding the identification "'were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *State v. Gonzales*, 181 Ariz. 502, 509, 892 P.2d 838, 845 (1995), *quoting Simmons v. United States*, 390 U.S. 377, 384 (1968). We review for an abuse of discretion a trial court's ruling regarding the fairness of a challenged identification. *State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002).

¶63 Martinez asserts the procedure at the photographic lineup was impermissibly suggestive because the police "did not accept [Vera's] answers" that she was not certain the man she recognized was the same man she had seen at Cornejo's shop and instead "argued with her." *Cf. State v. Alexander*, 108 Ariz. 556, 564, 503 P.2d 777, 785 (1972) (officer impermissibly told witnesses they had selected "wrong photo" but later selected the "'correct' photo"). But, before the detectives made any comments, Vera already had stated she recognized Martinez's photograph. And their comments did not prompt her to change her position that she was not positive the photograph depicted the man she had seen at Cornejo's shop. Thus, we agree with the trial court that the detectives' conduct did not render the procedure unduly suggestive.

¶64 Relying on *State v. Via*, 146 Ariz. 108, 704 P.2d 238 (1985), and *Thigpen v. Cory*, 804 F.2d 893 (6th Cir. 1986), Martinez also contends Vera's identification of him at her deposition was unduly suggestive because she had failed to identify him at the

photographic lineup. In *Via*, our supreme court determined that, when the identified defendant had been "the only person common to the photographic lineup and the subsequent live lineup," the procedure was "unduly suggestive." 146 Ariz. at 119, 704 P.2d at 249. The court relied on *State v. Webber*, 292 N.W.2d 5, 10 (Minn. 1980), in which the Minnesota Supreme Court concluded a procedure was "unnecessarily suggestive" when the complainant did not "identify the picture" of the defendant, but the defendant was the only "person in the [later, live] lineup whose picture ha[d] recently been shown to the complainant." The Sixth Circuit Court of Appeals reached a similar conclusion in *Thigpen*, finding a procedure unduly suggestive where a witness identified a defendant after seeing him at two court proceedings despite previously having failed to identify him at a live lineup at which the witness identified a second individual involved in the crime. 804 F.2d at 896.

¶65 We find those cases distinguishable. Here, Vera stated during the photographic lineup that she recognized Martinez, although she declined to identify him positively as the man she had seen at Cornejo's shop. Nothing in *Via* or *Thigpen* suggests the witnesses in those cases had indicated any recognition of the defendants during the first lineup. Moreover, here, eleven months had passed between the photographic lineup and Vera's identification of Martinez at the deposition. In *Thigpen*, only twelve days had elapsed between the lineup and the first court proceeding where the witness identified the defendant. 804 F.2d at 895. Although nothing in *Via* indicates how much time had elapsed between the lineup and identification there, the court relied

on *Webber*, which notes the witness "recently" had seen the defendant's photograph. 292 N.W.2d at 10. Because Vera had recognized Martinez at the photographic lineup and because considerable time had passed between that lineup and her positive identification of him, we conclude the trial court did not abuse its discretion in determining Martinez had failed to demonstrate the procedure used was "'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *Gonzales*, 181 Ariz. at 509, 892 P.2d at 845, *quoting Simmons*, 390 U.S. at 384.

Disposition

¶66 We vacate Martinez's convictions and sentences for the aggravated assaults of Ceniceros-Lopez and Escajeda, but we affirm his remaining convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

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

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