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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JAMES LOYD ARMSTRONG, *Appellant*.

No. 1 CA-CR 15-0497
FILED 8-4-2016

Appeal from the Superior Court in Maricopa County
No. CR2014-106804-001
The Honorable M. Scott McCoy, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Chris DeRose
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Kevin D. Heade
Counsel for Appellant

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Randall M. Howe joined.

C A T T A N I, Judge:

¶1 James Loyd Armstrong appeals his three trafficking in stolen property convictions and the resulting sentences. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 On January 20, 2014, D.T. contacted Mesa police to report a missing credit card, handgun, and radio transmitter. D.T. told the police he thought Armstrong had stolen the items. Subsequent investigation revealed that Armstrong sold the handgun to Pioneer Pawn on December 6, 2013, pawned a rifle (also owned by D.T.) to Pioneer Pawn on January 14, 2014, and sold the radio transmitter to Viper Hobby in mid-January.

¶3 The State charged Armstrong with two counts of burglary, three counts of trafficking in stolen property, and one count of fraudulent use of a credit card. Regarding the trafficking in stolen property charges, the indictment alleged that Armstrong had trafficked in Pioneer Pawn's property (the handgun and rifle) and Viper Hobby's property (the radio transmitter). At trial, Armstrong moved for a judgment of acquittal because the State had presented only evidence that D.T.'s property was trafficked, not that Armstrong had trafficked in property belonging to Viper Hobby or Pioneer Pawn as stated in the indictment. In denying that request, the court found that Armstrong had been given sufficient notice of the charged offenses, but recommended that the State amend the indictment to conform to the evidence presented at trial. The State accordingly moved to amend the indictment, and the jury subsequently convicted Armstrong of the three

trafficking charges.[1] Armstrong timely appealed, and we have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 13-4033.[2]

DISCUSSION

I. Amending the Indictment.

¶4 Armstrong argues that the court erred by allowing the State to amend the indictment to conform to the evidence. We review the court's decision allowing amendment for an abuse of discretion, and where, as here, a defendant objects to the amendment, we determine whether the error (if any) was harmless. *See State v. Freeney*, 223 Ariz. 110, 114, ¶ 26 (2009); *State v. Buccheri-Bianca*, 233 Ariz. 324, 329, ¶ 16 (App. 2013). If there is a finding of error, the State has the burden "to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18 (2005).

¶5 Under Arizona Rule of Criminal Procedure 13.5(b), if a defendant does not consent to an amendment to the charges against him, the charges may be amended "only to correct mistakes of fact or remedy formal or technical defects." A defect is formal or technical when the amendment does not change the nature of the offense or otherwise prejudice the defendant. *State v. Bruce*, 125 Ariz. 421, 423 (1980). A proposed amendment may not alter the elements of the charged offense, *Freeney*, 223 Ariz. at 113, ¶ 17, and a defendant is "necessarily and actually prejudiced" if the State fails to give constitutionally adequate notice of the amended charges. *Id.* at 114, ¶ 26.

¶6 Armstrong argues that the amendment did more than remedy a formal or technical defect, and that he is entitled to relief under *State v. Johnson*, 198 Ariz. 245 (App. 2000) (as corrected). In *Johnson*, the defendant was charged with sexual conduct with a minor and child molestation. *Id.* at 246, ¶ 1. At trial, the court granted (over the defendant's objection) the State's motion to amend the indictment to conform to the victim's testimony that different sexual acts had occurred than had been alleged in the indictment. *Id.* at 247, ¶¶ 2–3. In reversing the convictions, this court held

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[1] The court granted Armstrong's motion for a judgment of acquittal on the fraudulent use of a credit card, and the jury found Armstrong not guilty of the burglary charges.

[2] Absent material revisions after the relevant date, we cite a statute's current version.

that the amendments, which changed the nature of the sex acts charged, prejudiced the defendant because they "greatly impaired [his] ability to prove his defense to the jury." *Id.* at 248, ¶ 12 (alteration in original). The court noted in particular that the defendant would have cross-examined expert witnesses differently, and would have been able to attack the victim's inconsistent statements to support his defense that he was not the perpetrator. *Id.* at 248–49, ¶¶ 12–13.

¶7 Here, in contrast, Armstrong clearly had notice of the nature of the property he was charged with trafficking, and that it allegedly was taken from D.T. Months before trial, at the settlement conference, Armstrong acknowledged that D.T. was the alleged victim, and at trial, the State characterized the case as Armstrong violating D.T.'s "trust and generosity," clearly identifying him as the victim.

¶8 In contrast to *Johnson*, the amendments at issue in the instant case did not change the nature of the charged offenses. To be found guilty of trafficking in stolen property, the State had to show beyond a reasonable doubt that Armstrong recklessly sold, transferred, or otherwise disposed of another person's stolen property. *See* A.R.S. §§ 13-2301(B)(3), -2307(A). The amendment that changed the alleged owner of the property (whether Pioneer Pawn and Viper Hobby or D.T.) did not change the statutory elements because the State properly alleged that Armstrong trafficked in *another person's* stolen property. Therefore, the court did not err by granting the request to amend the indictment.

¶9 Moreover, even assuming that granting the amendment was error, Armstrong was not prejudiced. Armstrong has not suggested that the amendment affected "his litigation strategy, trial preparation, examination of witnesses, or argument" or any other aspect of his defense. *See Freeney*, 223 Ariz. at 115, ¶ 28. Armstrong's defense was that D.T. gave him the guns and transmitter as payment for repair work he had done on D.T.'s car. Thus, whether Pioneer Pawn and Viper Hobby (as the indictment alleged) or D.T. (as the amendment alleged) owned the property was not significant; Armstrong's defense was that he was the rightful owner, and both the indictment and the amended charge simply asserted that someone else owned the property and that Armstrong was not authorized to take it. Unlike in *Johnson*, Armstrong did not claim he would have cross-examined witnesses differently, or that he was prevented from highlighting inconsistent victim statements. Indeed, Armstrong's cross-examination of D.T. included attacking his credibility based on inconsistent dates and other conflicting testimony, as well as soliciting testimony that D.T. was angry with Armstrong over the work on the car and wanted his

property back. Thus, the amendment did not affect Armstrong's presentation of his defense, and therefore amending the indictment was harmless.

II. Prosecutorial Misconduct.

¶10 Armstrong contends that the prosecutor engaged in misconduct by appealing to the jurors' emotions and commenting on his failure to testify. Because Armstrong did not raise these objections at trial, we review only for fundamental, prejudicial error. *See State v. Roque*, 213 Ariz. 193, 228, ¶ 154 (2006); *Henderson*, 210 Ariz. at 567, ¶¶ 19–20.

¶11 Prosecutors are given wide latitude in closing argument; they may make any argument based on reasonable inferences from the evidence presented, but may not make unsupported allegations. *See State v. Morris*, 215 Ariz. 324, 336, ¶ 51 (2007); *see also State v. Comer*, 165 Ariz. 413, 426–27 (1990). To warrant reversal based on misconduct, the cumulative effect of the misconduct must be so pronounced and persistent that it permeates the entire trial with unfairness, such that the resulting conviction is a denial of due process. *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26 (1998).

¶12 The prosecutor framed the case as one in which Armstrong had violated the "trust and generosity" of his (former) friend D.T., a contention he repeated throughout his opening statement and closing argument. Armstrong argues this improperly appealed to the jurors' passions.

¶13 The evidence presented at trial showed that D.T. and Armstrong were friends, and that D.T. had Armstrong work on his cars to help Armstrong financially. Given these circumstances, it was not an unreasonable inference that Armstrong violated D.T.'s trust and generosity, and the prosecutor's argument did not unduly incite the jurors' passions.

¶14 Finally, Armstrong argues that the prosecutor improperly commented on his silence. In his closing argument, the prosecutor stated that "there's no dispute that it was the defendant who committed these acts." Armstrong contends that this was an indirect comment on his failure to testify, because only his testimony could have created that dispute. But a prosecutor may properly argue that the State's evidence has not been contradicted, provided that such a statement is not calculated to direct the jurors' attention to the defendant's failure to testify. *See Hughes*, 193 Ariz. at 87, ¶ 64; *State v. Byrd*, 109 Ariz. 10, 11 (1972). And here, nothing indicates that the prosecutor attempted to direct the jurors' attention to Armstrong's silence. *Cf. State v. Still*, 119 Ariz. 549, 551–52 (1978) (holding that the

prosecutor improperly commented on the defendant's silence when, during closing argument, he gestured at the defendant and stated that he had not heard any explanation regarding the facts underlying the charged offense). Accordingly, Armstrong has not established that the prosecutor engaged in misconduct.

CONCLUSION

¶15 For the foregoing reasons, we affirm Armstrong's convictions and sentences.