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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

JESUS PACHECO ESCAMILLA, *Appellant*.

No. 1 CA-CR 15-0629
FILED 8-16-2016

Appeal from the Superior Court in Maricopa County
No. CR2014-158777-001
The Honorable Michael W. Kemp, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eliza C. Ybarra
Counsel for Appellee

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

STATE v. ESCAMILLA
Decision of the Court

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Kenton D. Jones joined.

THUMMA, Judge:

¶1 Jesus Pacheco Escamilla appeals his convictions and sentences for aggravated assault, a Class 5 felony and a repetitive offense, and disorderly conduct, a Class 1 misdemeanor. Because Escamilla has shown no reversible error, his convictions and sentences are affirmed.

FACTS¹ AND PROCEDURAL HISTORY

¶2 A grand jury indicted Escamilla on two counts of aggravated assault on a peace officer, for touching an officer with the intent to injure, insult or provoke -- the first time inside and the second time outside the officer's patrol vehicle -- and one count of disorderly conduct for making unreasonable noise.

¶3 The trial evidence shows that one evening in December 2014, Escamilla began to scream and yell obscenities, and threatened a woman sitting next to him at a bus stop near Central and McDowell Avenues in Phoenix. A bystander called 9-1-1 and Phoenix Police Officer E.M. responded to the scene and ultimately arrested Escamilla, who appeared to be intoxicated, for disorderly conduct.

¶4 Escamilla was verbally abusive to the officer at the scene and en route to the booking facility. Upon arrival at the booking facility, Escamilla spit at Officer E.M. in the patrol car. Officer E.M. obtained a spit mask and began audio recording Escamilla's behavior. As Officer E.M. tried to put the mask on Escamilla, he again spit at the officer, this time directly into Officer E.M.'s mouth and eyes. The spitting can be heard on the audio recording. Escamilla admitted spitting toward the front seat of the patrol car on the way to the booking facility, but denied spitting on Officer E.M.

¹ This court views the facts "in the light most favorable to sustaining the verdict, and resolve[s] all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89 (1997).

STATE v. ESCAMILLA
Decision of the Court

¶5 The jury convicted Escamilla of aggravated assault for spitting on the officer outside of the patrol car and disorderly conduct, but acquitted him of aggravated assault for spitting on the officer inside the patrol car. The court sentenced Escamilla to the presumptive term of 2.25 years in prison on the aggravated assault conviction, and a concurrent term of 180 days on the disorderly conduct conviction. This court has jurisdiction over Escamilla’s timely appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A) (2016).²

DISCUSSION

I. The Superior Court Properly Denied Escamilla’s Request For A *Willits* Instruction.

¶6 Escamilla argues the superior court abused its discretion by denying him an instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964) based on the State’s destruction of video evidence from cameras outside the booking facility. He argues the video evidence would have been “potentially helpful” and would have had a “tendency to exonerate” him because (1) it would have shown he never spit on Officer E.M.; and 2) if it did not capture the incident, it would have shown “the lengths by which Officer [E.M.] went in choosing to park the vehicle outside the view of the station cameras so that there would be no objective evidence contradicting his fabrications that Mr. Escamilla intentionally spit in his eyes and mouth.” The court denied the *Willits* instruction on the ground that there was no showing by Escamilla of anything exculpatory on any videotapes, and that the surveillance cameras would not have captured anything relevant or pertinent.

¶7 A *Willits* instruction allows the jury to draw an inference from the State’s destruction of material evidence that the lost or destroyed evidence would be unfavorable to the State. *State v. Fulminante*, 193 Ariz. 485, 503 ¶ 62 (1999). A defendant is entitled to a *Willits* instruction upon proving that “(1) the state failed to preserve material and reasonably accessible evidence that could have had a tendency to exonerate the accused, and (2) there was resulting prejudice.” *State v. Glissendorf*, 235 Ariz. 147, 150 ¶ 8 (2014) (citations omitted). To prove evidence has a tendency to exonerate, the defendant cannot “simply speculate about how the evidence might have been helpful.” *Id.* at 150 ¶ 9. Rather, the defendant must show “a real likelihood that the evidence would have had evidentiary value.” *Id.* This court reviews the denial of a requested *Willits* instruction for abuse of

² Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

STATE v. ESCAMILLA
Decision of the Court

discretion. *Fulminante*, 193 Ariz. at 503 ¶ 62. On this record, Escamilla has shown no abuse of discretion.

¶8 The trial testimony demonstrated the video cameras at the booking facility would not have captured the spitting incident, because the closest cameras would have shown only persons walking into the facility, and not anything that occurred in the parking lot. Whether the video of Officer E.M. walking into the facility to obtain a spit mask would have shown him either wiping spit off himself or not wiping spit off himself is purely speculative, and would not have had any tendency to exonerate Escamilla. Escamilla's theory that the absence of video evidence would have shown the lengths Officer E.M. went to park away from the surveillance cameras is speculative and was contradicted by Officer E.M.'s testimony that officers were told to park where he parked. Escamilla failed to demonstrate that any video evidence "could have had a tendency to exonerate" him, or that he suffered any prejudice from the absence of the video, as necessary to require a *Willits* instruction.

II. The Superior Court Properly Denied Escamilla's Motion for New Trial.

¶9 Escamilla argues that the superior court abused its discretion by denying his motion for new trial. He based his motion upon a claim of prosecutorial misconduct, including through the State's introducing evidence that Officer E.M. had sustained a gunshot wound on the job after this incident, and by arguing in closing that police witnesses would risk their jobs if they testified falsely. The prosecutor argued that questioning as to why Officer E.M. was not in uniform at the time of his testimony was not improper, because the State was required to prove Escamilla knew the officer was a peace officer at the time of the incident; and the rebuttal argument was appropriate because it was responsive to defense counsel's argument that the officers had a motive to fabricate their testimony. After full briefing, the court denied the motion.

¶10 A superior court may grant a new trial if "[t]he prosecutor has been guilty of misconduct." Ariz. R. Crim. P. 24.1(c)(2). "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. Morris*, 215 Ariz. 324, 335 ¶ 46 (2007) (citation omitted). "Prosecutorial 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." *Id.* (citation omitted). The superior court has broad discretion in the matter of granting a new trial, and the appellant

STATE v. ESCAMILLA
Decision of the Court

bears the burden of establishing that the court acted arbitrarily. *State v. Villalobos*, 114 Ariz. 392, 394 (1977).

¶11 Escamilla has not shown the superior court abused its discretion by denying the motion for new trial premised upon the prosecutor's eliciting testimony that Officer E.M. had been shot four months after this incident. The prosecutor's question as to why the officer was not in uniform had relevance, because the prosecutor was required to prove, as an element of the offense of aggravated assault upon a peace officer, that Escamilla knew Officer E.M. was a peace officer at the time of the incident. A.R.S. § 13-1204(A)(8)(a). Defense counsel did not object to the question, or move to strike the officer's response; defense counsel asked only that the court preclude the prosecutor from asking any follow-up questions, a request the court granted.

¶12 Although a juror later submitted a question asking if Escamilla had made good on his recorded threat during the incident to have the officer shot, the court ruled the question was "clearly inadmissible," and did not ask it. The court instructed the jury at the start of trial that if a particular question was not asked, not to guess why or what the answer might have been. Defense counsel did not ask the court to instruct the jury that Escamilla had "absolutely nothing" to do with Officer E.M.'s shooting, as he now argues the court should have done *sua sponte*. The court did instruct the jury, however, that it could consider only evidence presented at trial. The jury is presumed to have followed these instructions. *State v. Velazquez*, 216 Ariz. 300, 312 ¶ 50 (2007). Moreover, there was no reasonable likelihood that this officer's testimony that he had been shot four months after the incident involving Escamilla affected the jury's verdict. On this record, Escamilla has not shown that the superior court erred by denying the motion for new trial on this ground.

¶13 Nor did the court abuse its discretion by denying the motion for new trial based upon the prosecutor's argument in rebuttal closing that the officers "have no motive to make it up. You didn't hear any testimony about how they feel negatively about homeless people or why they'd risk their careers to make up this entire thing . . . in order to get one homeless person." The court overruled defense counsel's objection that this constituted vouching.

¶14 There are "two forms of impermissible prosecutorial vouching: (1) where the prosecutor places the prestige of the government behind its witness; [and] (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. King*, 180 Ariz. 268, 276-77 (1994) (citation omitted). The prosecutor's argument

STATE v. ESCAMILLA
Decision of the Court

did not constitute improper vouching; rather, it was a reasonable response to defense counsel's argument that the testimony of the two officers that Escamilla spit on Officer E.M. was not credible. *See State v. Tyrrell*, 152 Ariz. 580, 581-82 (App. 1987) (holding prosecutor did not improperly vouch for officer when he asked defendant if he could think of any reason that the officer would perjure himself and risk his 14-year career). Moreover, the court instructed the jury that "testimony of a law enforcement officer is not entitled to any greater or lesser importance or believability merely because of the fact that the witness is a law enforcement officer," and the prosecutor emphasized this instruction by telling the jury that "nobody gets a special pass because of their status whether they have a home or badge or not." The court also instructed the jury that what the lawyers said was not evidence. The jury is presumed to have followed these instructions. *Velazquez*, 216 Ariz. at 312 ¶ 50. Finally, on this record, even if the argument was improper, Escamilla has not shown it had any impact on the verdict. For these reasons, he has not shown the superior court abused its discretion by denying the motion for new trial on this ground.

III. Escamilla Has Not Shown That Prosecutorial Misconduct During Trial Requires Reversal.

¶15 Escamilla argues reversal is required because the prosecutor engaged in numerous instances of trial misconduct by appealing to the jurors' sympathies, vouching for the State's witnesses, making improper and argumentative questioning, burden-shifting and attacking defense counsel, which Escamilla claims individually and cumulatively denied him a fair trial.

¶16 To the extent Escamilla's claim is based on the same instances of claimed prosecutorial misconduct discussed above in affirming the denial of his motion for new trial, for the reasons discussed above, they are not persuasive. "[P]rosecutorial 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, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, 238-39 ¶ 11 (App. 2007) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09 (1984)). The proper focus is to consider whether the prosecutor's remarks called to the attention of jurors matters they would not be justified in considering, and the probability, under the circumstances, that the jurors were influenced by the remarks. *State v. Jones*, 197 Ariz. 290, 305 ¶ 37 (2000). "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

STATE v. ESCAMILLA
Decision of the Court

conviction a denial of due process. The misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial.” *Morris*, 215 Ariz. at 335 ¶ 46 (citations omitted).

¶17 Escamilla failed to object to most of the claimed misconduct at trial, meaning review is limited to fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567 ¶ 19 (2005). “Accordingly, [Escamilla] ‘bears the burden to establish that “(1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice.”” *State v. James*, 231 Ariz. 490, 493 ¶ 11 (App. 2013) (citations omitted).

A. Alleged Appeal To Jurors’ Sympathies.

¶18 Escamilla argues the prosecutor improperly appealed to the jurors’ sympathies: (1) in the State’s opening by talking about commuters “heading home to their families after a long day’s work. Others heading out holiday shopping or to holiday parties;” and (2) by eliciting testimony from Officer E.M. on how the spit felt, and that he feared that Escamilla had transmitted a communicable disease to him. He also argues the prosecutor improperly argued in closing that “you are the conscience of our society.”

¶19 Escamilla did not object to that portion of the prosecutor’s opening statement that he now challenges on appeal. He argues on appeal that the remarks were “nothing more than an effort . . . to appeal to the sympathies and passions of the jury.” This conjecture about the mood of other commuters disrupted by Escamilla’s conduct was arguably improper in the opening statement as lacking direct evidentiary support. *See State v. Bible*, 175 Ariz. 549, 602 (1993) (“Opening statement is not a time to argue the inferences and conclusions that may be drawn from evidence not yet admitted.”). The superior court, however, instructed the jury that it must “[d]etermine the facts only from the evidence produced in court,” “what the lawyers said is not evidence” and it “must not be influenced by sympathy or prejudice.” The jury is presumed to have followed these instructions. *Velazquez*, 216 Ariz. at 312 ¶ 50. Accordingly, Escamilla has not shown the remarks constituted fundamental error resulting in prejudice.

¶20 Nor did Escamilla object on grounds of prosecutorial misconduct to the challenged questions of Officer E.M. He argues on appeal that this line of questioning was an intentional effort to appeal to the passions of the jury “by highlighting the disgusting nature of the allegations in this case,” and improperly elicited testimony that Officer E.M. feared contracting a communicable disease, even though subsequent testimony established Officer E.M. later learned Escamilla had no communicable diseases. These questions, however, were appropriate. Evidence that the

STATE v. ESCAMILLA
Decision of the Court

officer was disgusted by the spit, and at the time feared contracting a communicable disease -- a fear Escamilla exploited by telling the officer his whole family was now infected -- was relevant circumstantial evidence that it was Escamilla's intent to injure, insult or provoke the officer. See A.R.S. § 13-1203(A)(3); *State v. Bearup*, 221 Ariz. 163, 167, ¶ 16 (2009) ("Criminal intent, being a state of mind, is shown by circumstantial evidence.") (citation omitted). Escamilla has not shown these questions were improper.

¶21 Nor did Escamilla object to the prosecutor's argument in closing argument that the jury was the "conscience of our society." The prosecutor immediately followed this comment by arguing, "You have the wisdom and the responsibility to decide this case based on the facts, and I ask that you hold the Defendant responsible. Hold him accountable for his actions that day. Find him guilty of disorderly conduct and for two counts of aggravated assault." In context, this reference to the jury being the "conscience of our society" was not improper, as it was linked to the jury's duty to "decide this case based on the facts." On this record, Escamilla has not shown fundamental error resulting in prejudice on this ground.

B. Alleged Improper Questioning.

¶22 Escamilla alleges prosecutorial misconduct based on his cross-examination, where he was asked: (1) if he was "high" at the time of the incident; (2) if he was attempting to elicit sympathy, get out of trouble and not be found guilty, and needed to have jurors believe his version of his story; (3) if he understood that being a felon raised questions about his credibility; (4) whether he would have found it disturbing if he witnessed conduct of the type he had exhibited at the bus stop; (5) whether he knew about the possibility of spit carrying communicable diseases; and (6) whether he thought if someone got sick from being spit on, that would constitute an injury. Escamilla, however, has not shown how any of these allegations rises to the level of fundamental error resulting in prejudice.

¶23 Escamilla argues on appeal that the question as to whether he was "high" was improper because Officer E.M. suspected only that he was drunk. Escamilla, however, denied being drunk, and his attorney did not object to the follow-up question as to whether he was high. Moreover, Escamilla testified he had numerous types of medication in his bags at the bus stop, including Percocet, Diazepam, and cough syrup. On this record, the question was not improper.

¶24 Defense counsel did not object to the questions as to whether Escamilla wanted to get himself out of trouble, did not want to be found guilty, needed the jurors to believe his version of his story, knew that his

STATE v. ESCAMILLA
Decision of the Court

felony conviction affected his credibility and made it “even more questionable,” and would have found it disturbing had he witnessed the conduct he had exhibited at the bus stop. He argues on appeal that these questions were argumentative. Although the superior court would appear to have had the discretion to sustain an objection to some of these questions as argumentative, no such objection was made. On this record, Escamilla has not shown these questions constitute fundamental error resulting in prejudice.

¶25 Defense counsel did object to the prosecutor’s asking Escamilla whether he was “attempting to elicit sympathy based on your story” that police officers routinely kicked him in the ribs or legs at the homeless shelter to get him to leave at 4:30 a.m. The court overruled defense counsel’s objection that the question was “argumentative.” Again, Escamilla has not shown how this was error.

¶26 Escamilla also argues the question about needing the jurors to believe his version of his story improperly shifted the burden of proof, and the questions about his felony conviction affecting his credibility invaded the province of the jury. Escamilla denied he spit on Officer E.M., but the State’s witnesses testified he did spit on Officer E.M. Under these circumstances, where credibility was a key issue at trial, the question about needing the jurors to believe his version of the story did not impermissibly shift the burden of proof. Moreover, the court repeatedly instructed the jury that defendant was presumed by law to be innocent, and the State had the burden of proof, instructions the jury is presumed to have followed. *Velazquez*, 216 Ariz. at 312 ¶ 50. Nor did it invade the province of the jury to ask Escamilla if he knew his felony conviction affected his credibility. As the noted in the court’s jury instructions, the jury could consider evidence of defendant’s prior felony conviction “only as it may affect defendant’s believability as a witness.” *See Velazquez*, 216 Ariz. at 312 ¶ 50.

¶27 Escamilla argues that, in light of subsequent evidence demonstrating he had no communicable diseases, the prosecutor’s questions about the possibility of spit carrying communicable diseases and whether he thought getting sick from spit would constitute an injury were improper appeals to the passions of the jury. The prosecutor had to prove that Escamilla spit on the officer “with the intent to injure, insult or provoke” him. *See A.R.S. § 13-1203(A)(3)*. Escamilla told Officer E.M. after being arrested that now all his family was infected. These questions were relevant to whether Escamilla intended to injure the officer when he spit on him.

STATE v. ESCAMILLA
Decision of the Court

C. Alleged Attack On Defense Counsel.

¶28 Escamilla argues the prosecutor engaged in misconduct by arguing in closing, “And Defense would argue out of both sides of their mouth that the officers are making this entire story up in order to get one homeless person in trouble.” Defense counsel did not object. On appeal, Escamilla argues the argument “improperly implied to the jury that Mr. Escamilla’s counsel was making arguments to the jury it knew to be false.” Counsel has wide latitude in closing arguments. *Jones*, 197 Ariz. at 305 ¶ 37. In considering whether argument is misconduct, this court “looks at the context in which the statements were made as well as the entire record and the totality of the circumstances.” *State v. Nelson*, 229 Ariz. 180, 189 ¶ 39 (2012) (citation omitted). This court will not assume the prosecutor intended the most sinister meaning of ambiguous remarks. *See State v. Dunlap*, 187 Ariz. 441, 462-63 (App. 1997).

¶29 Although it is improper for the prosecutor to attack the integrity of defense counsel, it is not improper to tell the jury that the defense’s closing argument confuses the issues, is contradictory or is misleading. *Cf. State v. Hughes*, 193 Ariz. 72, 85, ¶ 59 (1998) (“Jury argument that impugns the integrity or honesty of opposing counsel is . . . improper.”). In context, on this record, the remark challenged on appeal appears to be an attack on the defense’s theory -- that the officers targeted Escamilla because he was homeless and fabricated the story that he spit on Officer E.M. -- not on defense counsel’s integrity. Again, Escamilla has not shown how this question constitutes fundamental error resulting in prejudice.³

D. Alleged Prosecutorial Misconduct In Aggravation Phase.

¶30 Escamilla argues the prosecutor engaged in misconduct during the aggravation phase, by eliciting testimony from Officer E.M. that he had served in the military overseas and was subject to anti-American sentiment expressed as cursing and swearing similar to what he experienced in this incident, and by arguing Americans do not treat even their enemies dishonorably, using as an example the treatment of Osama bin Laden’s body.

³ For similar reasons, Escamilla has not shown the “prosecutor intentionally engaged in improper conduct and did so with indifference, if not specific intent, to prejudice the defendant” so as to constitute “cumulative error” requiring reversal. *See State v. Gallardo*, 225 Ariz. 560, 568 ¶ 35 (2010).

STATE v. ESCAMILLA
Decision of the Court

¶31 The prosecutor asked the jury to find as aggravating circumstances that: (1) the aggravated assault was committed in an “especially depraved” manner; (2) the offense had caused Officer E.M. physical, emotional or financial harm; and (3) Escamilla had been convicted of a felony within 10 years of the offense. The jury found the State had failed to prove the offense was committed in an “especially depraved” manner, but found the other two aggravating circumstances had been proven. Escamilla argues the alleged prosecutorial misconduct deprived him of a fair hearing on the aggravating circumstances, and asks he be resentenced without consideration of the aggravating factor of emotional harm.

¶32 Because no timely objection was made, the review is for fundamental error resulting in prejudice. Officer E.M. testified he was so concerned about the potential of communicable diseases in the 48 hours following the incident (until the test results revealed he was not infected) that he told his family, including his two young children, to keep their distance. He testified that, emotionally, he likened the experience to being urinated on, and ranked it as disturbing as being shot. On the record presented, Escamilla has not shown the testimony yielded fundamental error resulting in prejudice. Moreover, the court imposed a presumptive prison term on the aggravated assault conviction, finding “the aggravating and mitigating factors balance one another out.” Accordingly, Escamilla has shown no error requiring resentencing.

CONCLUSION

¶33 Escamilla’s convictions and sentences are affirmed.



Amy M. Wood • Clerk of the court
FILED: AA