

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
MAR 31 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2008-0057
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JAMES LEWANDOWSKI,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
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APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071116

Honorable Michael J. Cruikshank, Judge

AFFIRMED IN PART; VACATED IN PART

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V Á S Q U E Z, Judge.

¶1 Appellant James Lewandowski appeals his convictions for possession of a dangerous drug, methamphetamine; possession of a narcotic drug, cocaine base; and possession of drug paraphernalia.¹ He argues the state committed three instances of prosecutorial misconduct; the trial court erred by failing to order a mistrial sua sponte when the state referred to inadmissible evidence during its opening statement; and the trial court’s reasonable doubt jury instruction lowered the state’s burden of proof, resulting in structural error. Lewandowski also contends the trial court’s entry of a criminal restitution order reducing his criminal fines to a civil judgment constituted an illegal sentence because it resulted in the premature accrual of interest. For the reasons that follow, we affirm Lewandowski’s convictions and sentences. However, as discussed in our separately filed opinion in this matter, we vacate the restitution order. *See* Ariz. R. Civ. App. P. 28(g) (court of appeals may issue separate published opinion as to those issues warranting publication).

Facts and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the convictions.” *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). On March 10, 2007, around 10:30 p.m., Sahuarita police officer Blevins observed a man sitting in a blue pickup truck parked at a shopping center with its engine running. It appeared as though the man was about to smoke something, but, because he was startled by Blevins’s approach, he dropped what he was holding onto his lap. Upon speaking with the man, Blevins noticed his eyes

¹Lewandowski was also charged with endangerment, but that charge was apparently dismissed prior to trial.

were watery, he responded slowly to questioning, and his speech was slurred. Despite Blevins's instruction to keep his hands on the steering wheel, the man grabbed items from the center console and threw them into his lap. He then put the car into reverse, and, when Blevins tried to wrest the keys from the ignition, the man locked the doors and rolled up the window. Blevins called for backup and attempted to prevent the truck from leaving, but the driver backed into Blevins's patrol car, drove onto the sidewalk, and fled. When Blevins located the truck a short while later, it had been abandoned. Inside, Blevins and another officer found a small plastic bag containing a "crystalline type material," a "dime size kind of white yellowish rock," and two glass cylinders with burnt residue on them.

¶3 The next day, Lewandowski, the owner of the truck, reported it stolen. Blevins went to an address in Tucson and immediately recognized Lewandowski as the person driving the truck on the previous evening. Lewandowski was arrested and charged in connection with the items found in his truck. Following a jury trial, he was convicted on all counts, and the trial court sentenced him to concurrent, enhanced, mitigated prison terms, the longest of which was eight years. The court also imposed fines and surcharges totaling \$5,400 and entered a criminal restitution order for that amount. This appeal followed.

Discussion

A. Prosecutorial Misconduct

¶4 Lewandowski first contends the prosecutor made improper comments during his opening statement and closing argument that denied Lewandowski a fair trial and require reversal. "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate

that the prosecutor’s misconduct ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). If we can conclude beyond a reasonable doubt that any misconduct did not contribute to or otherwise affect the verdict, it is harmless error. *State v. Roque*, 213 Ariz. 193, ¶ 152, 141 P.3d 368, 403 (2006).

1. Improper vouching

¶5 During trial, one of the police officers testified he had weighed the rock of crack cocaine found in Lewandowski’s truck and, according to the Sahuarita Police Department’s scale, the drug weighed 6.68 grams. However, the Department of Public Safety (DPS) crime laboratory reported that it weighed 1.65 grams. Nonetheless, the officer testified the cocaine shown to him at trial, and weighed by DPS, was the same rock he had weighed. During his closing argument, defense counsel argued that the weight discrepancy cast doubt on the officer’s testimony. In rebuttal, the prosecutor told the jury, “[I]f I saw a dime-sized crack rock, if I saw it a couple months later and . . . it was smaller, I think I would know.” The trial court overruled Lewandowski’s objection to the prosecutor’s comment. On appeal, Lewandowski contends the remark constituted improper prosecutorial vouching.

¶6 Although both counsel are given leeway in opening and closing arguments, it is improper for a prosecutor to “vouch for the credibility of the state’s witnesses.” *State v. Salcido*, 140 Ariz. 342, 344, 681 P.2d 925, 927 (App. 1984). A prosecutor engages in improper vouching by giving a personal assurance of a witness’s veracity or by referring to

matters outside the record to bolster a witness's credibility. *Id.* Here, by informing the jury that he would have been able to tell if the quantity of crack cocaine introduced at trial was different than the cocaine seized months before, the prosecutor arguably placed himself in the shoes of the testifying officer. However, the trial court concluded that, under the circumstances, the prosecutor was posing a hypothetical situation to the jury, and we must defer to that finding, because the trial court is in the "best position to assess the impact of a witness's statements." *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003).

¶7 But even assuming error occurred, it was harmless. *See Roque*, 213 Ariz. 193, ¶ 159, 141 P.3d at 404 (reviewing individual incident of misconduct for harmlessness before assessing cumulative impact of all incidents). As the prosecutor stated in closing, one of the two main issues in this case was whether the cocaine tested by DPS was the same drug taken from Lewandowski's truck. At trial, the state established a proper chain of custody for the cocaine's admission into evidence, and, despite the weight discrepancy, three officers unequivocally testified the substance introduced at trial was the same substance that had been seized from Lewandowski's truck.

¶8 Moreover, the jury was properly instructed that counsels' arguments were not evidence, that it "must decide the believability of witnesses," and that it could find facts only from the evidence presented during trial. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) (because jurors presumed to follow law, improper comment during closing cured by instruction precluding jury from considering counsel's arguments as evidence).

Therefore, we can say the prosecutor’s comment did not “contribute to or affect the verdict” and was not reversible error. *Roque*, 213 Ariz. 193, ¶ 159, 141 P.3d at 404.

2. Impugning defense counsel

¶9 Lewandowski also argues the prosecutor impugned defense counsel during his rebuttal argument by telling the jury that “[w]hat [defense counsel has] been trying to do throughout is confuse you” and by urging the jury not to “let [defense counsel] use smoke and mirrors to draw you away from the point.” Although he did not object during closing, Lewandowski now suggests these statements “unfairly characterized defense counsel’s appeal to the jury to fulfill its duty and hold the State to its burden of proof as an attempt to use ‘smoke and mirrors’ to confuse the jury.” Thus, he contends, because the improper remark “maligned” defense counsel’s explanation of the burden of proof and the weaknesses in the state’s case, it undermined the foundation of his case and constitutes reversible error.

¶10 Because Lewandowski failed to object below, we review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is “error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *Id.*, quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). And, to demonstrate prejudice, Lewandowski must show that but for the error, the jury could have reached a different verdict. *See id.* ¶ 27 (to show prejudice, defendant must show reasonable jury applying correct standard of proof could have reached different conclusion than trial court).

¶11 “[P]rosecutors have wide latitude in presenting their closing arguments to the jury.” *State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000). However, it is improper for a prosecutor during closing argument to attack the integrity of defense counsel or criticize counsel’s role in the proceedings. *See Hughes*, 193 Ariz. 72, ¶ 59, 969 P.2d at 1198; *State v. Walton*, 159 Ariz. 571, 582, 769 P.2d 1017, 1028 (1989). Thus, although it is not improper to tell the jury that the defense’s theory and closing argument may confuse the issues and is thus misleading, it is, however, improper to convey to the jury that defense counsel intended that result. *See State v. Denny*, 119 Ariz. 131, 134, 579 P.2d 1101, 1104 (1978) (finding reversible error where prosecutor’s objections “seem[ed] to impugn the integrity of defense counsel and suggest[ed] to the jury that defense counsel [wa]s being deceitful”).

¶12 The prosecutor’s comments in this case present a close question. They were clearly intended as a rebuttal to Lewandowski’s argument that the lack of forensic evidence tying him to the items found in his vehicle created reasonable doubt about his guilt. However, they arguably went beyond merely challenging defense counsel’s argument that the state had not met its burden of proof and suggested defense counsel himself had intentionally tried to lead the jury astray. Thus, to the extent the prosecutor suggested defense counsel intended to confuse the jury, his comments were improper. However, the comments were an isolated occurrence, and there was no obvious intent by the prosecutor to impugn defense counsel. Furthermore, as discussed above, the jury was adequately instructed that the arguments of counsel were not evidence. We conclude that any misconduct did not constitute fundamental, prejudicial error.

3. Comment on right to remain silent

¶13 Lewandowski next argues the prosecutor committed misconduct by referring in his opening statement to evidence he should have known was inadmissible. The prosecutor told the jury:

Now, you're also going to hear about a[n] interview with Det[ective] Bunting . . . of the Sahuarita [Police] Department. You're going to hear how obstinate and unwilling to cooperate in this interview, curiously for someone reporting a stolen car. However, . . . he was unwilling or unable to tell . . . Det[ective] Bunting where he had left his . . . truck on March 10th, the previous day, who he left it with, and he wouldn't tell [Bunting] where he was on March 10th.

Lewandowski contends that, because the prosecutor alluded to statements obtained in violation of his right to remain silent, the prosecutor's comments "violated [his] constitutional right against self-incrimination, went to the heart of his defense, and deprived him of due process and a fair trial." Lewandowski acknowledges he did not timely object to these comments. However, he argues that, because "the court was aware of the error and defense counsel expressed dismay and shock that the prosecutor would do something so inappropriate, . . . harmless error review should apply." Alternatively, he contends the trial court's failure to declare a mistrial sua sponte resulted in fundamental error.

¶14 Lewandowski should have lodged his objection when the prosecutor made the statements, but he failed to do so. *See State v. Thomas*, 110 Ariz. 120, 132, 515 P.2d 865, 877 (1973) (where prosecutor continually referred to inadmissible evidence during questioning of witness, supreme court, "while . . . question[ing] the trial tactics of [the prosecutor]," noted "a more timely objection by defendant's attorney would have been

helpful”). When the error here was later brought to the trial court’s attention, the court told the parties it would address the issue at the end of trial by instructing the jury to “disregard anything the lawyers say in opening or closing if it doesn’t conform with something that was presented in the evidence.” Lewandowski accepted this remedy without objection and failed to object to the court’s actual jury instruction, which contained different wording that he now asserts was insufficient to cure the error. *See State v. Rojers*, 216 Ariz. 555, ¶ 24, 169 P.3d 651, 656 (App. 2007), *quoting Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607 (defendant may not “tak[e] his chances on a favorable verdict, reserving the “hole card” of a later appeal on [a] matter that was curable at trial, and then seek[] appellate reversal”) (second alteration in *Henderson*).

¶15 Furthermore, we disagree with Lewandowski’s contention at oral argument that he did not have the opportunity to request a more severe remedy for the error during trial. Although admonishing defense counsel for not raising this issue prior to trial, the trial court was nonetheless open to addressing and appropriately resolving this issue when it arose during trial. Thus, instead of accepting the remedy offered by the court, Lewandowski could have requested a specific instruction telling the jury to disregard the offending comments or a mistrial. He did neither and accepted the court’s remedy without comment. There is nothing in the record to suggest he was prevented from making these requests, and we can conceive of numerous strategic reasons Lewandowski’s trial counsel would not want a more specific instruction or a mistrial. *See State v. Levato*, 186 Ariz. 441, 444, 924 P.2d 445, 448 (1996) (defendant bound on appeal by counsel’s tactical decisions at trial). Thus, by failing

to object timely to the court’s remedy, for what both parties acknowledged was error, Lewandowski has waived all but fundamental error review of the remedy the court provided.

¶16 After Lewandowski was arrested and taken to a police substation, Detective Bunting informed him of his rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). Lewandowski indicated he understood his rights and told Bunting, “I don’t want to talk to you.” Bunting nevertheless continued to question him, eliciting the responses that formed the basis of the prosecutor’s opening remarks. The state does not dispute that the statements Lewandowski made were obtained in violation of his right to remain silent under the Fifth Amendment to the United States Constitution and, therefore, were inadmissible.² *See State v. Flower*, 161 Ariz. 283, 287, 778 P.2d 1179, 1183 (1989) (violation of defendant’s right to remain silent not cured by his answers to subsequent questioning; statement must be suppressed); *State v. Schinzel*, 202 Ariz. 375, ¶ 28, 45 P.3d 1224, 1231 (App. 2002). Thus, the issue before us is whether the prosecutor’s comments about the interview were erroneous.

¶17 “[A] defendant’s due process is violated when [the state] introduces a statement at trial that the defendant asserted his right to remain silent.” *State v. Gilfillan*, 196 Ariz. 396, ¶ 36, 998 P.2d 1069, 1079 (App. 2000). This is because “granting a person the right to remain silent, and then penalizing [the] person for exercising that right, is inconsistent.” *State v. Downing*, 171 Ariz. 431, 434, 831 P.2d 430, 433 (App. 1992). Here, Lewandowski

²The state suggests on appeal that the prosecutor’s statements were not error, but it does not challenge the trial court’s ruling that Lewandowski’s statements were inadmissible because they were taken in violation of the Fifth Amendment.

had invoked his right to remain silent, but the prosecutor nonetheless told the jury it would hear evidence that Lewandowski had been unwilling to answer questions, clearly implying that such evidence would give rise to an inference of guilt. The prosecutor's comments thus went directly to the heart of the prohibition against commenting on a defendant's invocation of the right to remain silent and were improper.³ See also *State v. Hardin*, 99 Ariz. 56, 58, 406 P.2d 406, 407 (1965) (“It is well established that reference in argument to the jury to anything not legally admissible . . . in the particular case is highly improper . . .”).

¶18 At oral argument Lewandowski relied heavily on *State v. Sorrell*, 132 Ariz. 328, 645 P.2d 1242 (1982), for the proposition that a prosecutor's comment on a defendant's silence requires reversal per se when the comment was deliberate and willful. In *Sorrell*, the prosecutor commented on the defendant's post-arrest silence in his opening statement, elicited testimony about the defendant's silence, and again referred to it during closing argument. *Id.* at 329, 645 P.2d at 1243. The defendant did not object at any time. *Id.* The court found the comments constituted fundamental error, and noted, “Appellate courts . . . are reluctant to apply the harmless error doctrine when it appears that the error was deliberate and willful.”⁴ *Id.* at 330, 645 P.2d at 1244.

³We note that some of the prosecutor's remarks arguably refer only to Lewandowski's demeanor, and not to specific statements he made. A reference to a defendant's demeanor is different than a reference to the inadmissible statements themselves and would generally be admissible. See *State v. Ramirez*, 178 Ariz. 116, 125, 871 P.2d 237, 246 (1994); *State v. Mauro*, 159 Ariz. 186, 197-98, 766 P.2d 59, 70-71 (1988) (prosecutor may comment on defendant's demeanor during questioning but not defendant's silence).

⁴We note that despite its reluctance to assess harmless under the circumstances, the court nonetheless concluded that “[f]rom an examination of the entire record, . . . it

¶19 Here, however, it appears from the record that there was genuine confusion on the part of the prosecutor and defense counsel, both as to the identity of the officer to whom Lewandowski had invoked his right to remain silent and the time at which he did so. Although this confusion could have been avoided with a pretrial motion in limine, Lewandowski did not file one. And, once the issue was brought to the trial court’s attention, the state readily admitted the error in its opening statement. We therefore decline to find the prosecutor’s error was “willful and deliberate” and instead review for fundamental error and prejudice.

¶20 Lewandowski argues the prosecutor’s statements constituted fundamental error because, “[e]mphasizing that Mr. Lewandowski had been obstinate and unwilling to cooperate, the prosecutor used his opening statement to cast Lewandowski in a negative light and cast doubt on his central defense—that his truck had been stolen and that Officer Blevins had misidentified him.”⁵ We agree the statements cast Lewandowski in a negative light, but he has not demonstrated they rose to the level of fundamental, prejudicial error.

¶21 There was substantial evidence of Lewandowski’s guilt. Although Blevins initially described Lewandowski as an Hispanic male, at trial Blevins testified he had no difficulty seeing Lewandowski the night of the offense and explained he had originally

cannot be said beyond a reasonable doubt that the prosecutor’s misconduct did not contribute to the verdict.” *Sorrell*, 132 Ariz. at 330, 645 P.2d at 1244.

⁵In addressing this contention, other than to note that the trial court was not obligated to order a mistrial, the state has wholly failed to address whether the reference to these statements during opening argument constituted fundamental error.

described Lewandowski as Hispanic because his skin had a darker pigmentation. And his identification of Lewandowski as the driver of the truck was unequivocal. The state also introduced the testimony of Juan H., who said Lewandowski had asked him to tell the police that he and Lewandowski had been in Phoenix on March 10. Although Juan had originally told officers they had been in Phoenix that day, during his testimony at trial he repeatedly admitted that was not true. He further testified that, on March 11, Lewandowski had told him that he had been approached by a police officer the night before, fled from the officer, and had eventually abandoned his truck.

¶22 Furthermore, as noted above, the jury was instructed: “In their opening statements and closing arguments the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence, but it may help you understand the law and the evidence.” The court further instructed, “You must find the facts only from the evidence produced in court. The evidence which you are to consider consists of exhibits and the testimony of witnesses.” This provided clear direction to the jury that the prosecutor’s comments had no evidentiary value and that it should only consider the testimony and exhibits produced at trial as the basis for its verdicts. Because we presume the jury followed its instructions, we must conclude it did not rely on the prosecutor’s improper statements. *State v. Miles*, 211 Ariz. 475, ¶ 30, 123 P.3d 669, 677 (App. 2005) (presuming jurors disregarded evidence presented on particular issue, as instructed); *see also Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d at 847.

¶23 Considering the strong evidence of Lewandowski’s guilt together with the court’s instructions to the jury, we cannot say the prosecutor’s isolated reference to the inadmissible evidence, made at the very beginning of trial and not repeated later, went to the “foundation of [Lewandowski’s] case, . . . t[ook] from [him] a right essential to his defense, [or was] error of such magnitude that [he] could not possibly have received a fair trial.” See *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, quoting *Hunter*, 142 Ariz. at 90, 688 P.2d at 982. He has also not established that the verdict could have been different but for the error. See *id.* ¶ 27; see also *State v. Roque*, 213 Ariz. 193, ¶ 159, 141 P.3d 368, 404 (2006).

¶24 And considering, as we must, the cumulative effect of the prosecutor’s improper comments we noted above, we are convinced that any misconduct did not so permeate the trial with unfairness as to require reversal. See *Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191. We therefore conclude the trial court did not abuse its discretion by failing to sua sponte order a mistrial. See *State v. Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d 899, 916 (2006) (trial court does not err by failing to order mistrial sua sponte absent fundamental error); see also *State v. Laird*, 186 Ariz. 203, 207, 920 P.2d 769, 773 (1996) (“*Sua sponte* mistrials can raise double jeopardy issues. If a party wants a mistrial, it ordinarily must ask for one.”) (citation omitted).⁶

⁶Lewandowski argues double jeopardy would bar retrial in this case, even in the absence of a declared mistrial. However, he did not move for a mistrial on the basis of prosecutorial misconduct; thus, double jeopardy protections do not apply. *State v. Moody*, 208 Ariz. 424, ¶ 20, 94 P.3d 1119, 1132 (2004). And because, as we have said, Lewandowski has not demonstrated fundamental, prejudicial error occurred, we need not further address this issue. See *Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d at 916.

B. *Portillo* Instruction

¶25 Lewandowski also argues the trial court’s jury instruction on reasonable doubt lowered the state’s burden of proof and created structural error requiring reversal. However, the court gave the specific instruction mandated by our supreme court in *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). The supreme court has repeatedly reaffirmed the validity of the *Portillo* instruction, *see, e.g., State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007), and we are not at liberty to overrule or disregard its rulings, *see State v. Foster*, 199 Ariz. 39, n.1, 13 P.3d 781, 783 n.1 (App. 2000).

Disposition

¶26 For the reasons stated above and in our published opinion, we affirm Lewandowski’s convictions and prison sentences but vacate the criminal restitution order.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge