

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

NATHANIEL EDUARDO CAÑEZ,
Appellant.

No. 2 CA-CR 2012-0020
Filed April 18, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20100880001
The Honorable Christopher C. Browning, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Lori J. Lefferts, Pima County Public Defender
By Rebecca A. McLean, Assistant Public Defender, Tucson
Counsel for Appellant

STATE v. CAÑEZ
Decision of the Court

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Howard concurred.

MILLER, Judge:

¶1 Nathaniel Cañez was convicted after a jury trial of multiple counts of aggravated assault, simple assault, felony criminal damage, fleeing from a law enforcement vehicle, driving under the influence of marijuana (DUI), and driving with a metabolite of marijuana in his body. On appeal, he contends the trial court erred when it denied his motion for a mistrial, which had been based on the prosecutor's references to Cañez's suppressed statements to investigators. For the following reasons, we affirm Cañez's convictions and sentences, but vacate the criminal restitution order (CRO).

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Cañez. *See State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005). In March 2010, a civilian employee of the Pima County Sheriff's Office witnessed a car driven by Cañez run a red light. The employee called his office to report reckless driving. Two sheriff's deputies spotted Cañez's car and began pursuing it. Cañez eventually crashed into a truck, which flipped on its side and hit a passenger vehicle. Several people were injured, including Cañez. At the hospital, Cañez's blood tested positive for THC,¹ the "main active chemical found in marijuana."

¶3 Cañez was charged with eight counts of aggravated assault with a dangerous instrument, two counts of criminal damage related to the vehicles at the intersection, fleeing from a law

¹Tetrahydrocannabinol.

STATE v. CAÑEZ
Decision of the Court

enforcement vehicle, DUI, and driving with a dangerous drug or its metabolite in his body. Before trial, the state dismissed one count of aggravated assault and reduced two counts to simple assault. The trial court directed a judgment of acquittal on one of the simple assaults, and the state dismissed one count of criminal damage at the end of trial. The jury found Cañez guilty of the remaining counts. He was sentenced to concurrent terms of imprisonment, the longest of which was eighteen years.²

Prosecutorial Misconduct

¶4 Cañez argues the trial court erred in denying his motion for mistrial. He contends the motion should have been granted because the state committed prosecutorial misconduct when the prosecutor's questions "convey[ed] to the jury that [the detective] had a conversation with Mr. Cañez at the hospital," violating a suppression order and allowing the jury "to speculate about the contents of the conversation."³

²We are aware that the transcript of sentencing indicates a sentence of nineteen years on Count Five, while the minute entry shows a seventeen-year sentence. Although oral pronouncement of a sentence generally controls when there is a discrepancy with the written judgment, *State v. Hanson*, 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App. 1983), we cannot "correct a sentencing error that inures to the detriment of a criminal defendant," see *State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990).

³ Cañez also notes that prosecutors "must refrain from referring to a defendant invoking his fourth or fifth amendment rights." To the extent Cañez is arguing such statements violated his constitutional rights, that argument is not supported by the facts. No reference was made at trial as to whether Cañez refused to make a statement, and nothing in the record indicates that Cañez invoked his rights.

STATE v. CAÑEZ
Decision of the Court

¶5 We review a trial court’s denial of a mistrial for prosecutorial misconduct for abuse of discretion.⁴ *State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2005). “The trial judge is in the best position to determine whether a particular incident calls for a mistrial because the trial judge is aware of the atmosphere of the trial, the circumstances surrounding the incident, the manner in which any objectionable statement was made, and the possible effect on the jury and the trial.” *State v. Williams*, 209 Ariz. 228, ¶ 47, 99 P.3d 43, 54 (App. 2004). To determine if the prosecutor’s statements constituted misconduct warranting reversal, “a trial court should consider two factors: (1) whether the prosecutor’s statements called to the jury’s attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks.” *Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d at 846.

¶6 Before trial, Cañez filed a motion to suppress his statements to law enforcement officers on the ground that they were involuntary. At the suppression hearing, Deputy C. testified that he had questioned Cañez in the hospital without informing him of his *Miranda*⁵ rights, and that Cañez had admitted he smoked marijuana that day. Detective M. testified that he had spoken with Cañez and read him his *Miranda* rights, but because Cañez had not answered if he understood, Detective M. did not get a statement. The trial court

⁴Although Cañez argues prosecutorial misconduct on appeal, and the state answered that argument, we note that the argument before the trial court was more generally for a mistrial based on the violation of the suppression order, and did not explicitly mention prosecutorial misconduct. The result would not change if the argument on appeal were based on the impropriety of the witness testimony. See, e.g., *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003) (denial of mistrial based on witness testimony reviewed for abuse of discretion; trial court considers whether testimony called jury’s attention to matters it should not have considered and probability jury influenced by testimony).

⁵*Miranda v. Arizona*, 384 U.S. 436 (1966).

STATE v. CAÑEZ
Decision of the Court

granted the motion to suppress all statements Cañez made at the hospital.

¶7 During opening statements, the prosecutor stated that Deputy C. “went and spoke to” Cañez at the hospital. Cañez asked to reserve a motion. During the state’s case-in-chief, Detective M. testified that he saw the vehicle before the accident and learned the driver’s identity. The prosecutor then asked, “And did you end up speaking with that person?” Cañez objected before the detective answered, stating that between opening statements and this question, the jury had “been told twice [Cañez] made a statement that should never have come before this jury based on the Court’s ruling,” and that the prosecutor’s question implied that Cañez made a statement the jury would not get to hear. The court concluded that it did not “think the implication [was] very strong in that regard,” but sustained the objection on foundation grounds. Cañez moved for a mistrial, which the trial court denied. The court said it would consider a curative instruction, but Cañez never submitted one.

¶8 We agree with the trial court that the prosecutor’s question did not imply that Cañez made a statement. The context of the question was identification—an effort to link Cañez to the scene of the accident and the hospital. After the objection was sustained, the prosecutor rephrased the question, asking if Detective M. had “contact with” Cañez. The follow-up to that question was whether the detective could identify Cañez in the courtroom. The state did not ask if Cañez had made a statement to Detective M., and in fact, Cañez had not made such a statement because he never answered Detective M. when asked if he understood his *Miranda* rights. The trial court did not err in finding that the question did not improperly call the jury’s attention to matters it should not have considered.

¶9 Even assuming the question was improper, a mistrial is not required “unless it is shown that there is a ‘reasonable likelihood’ that the ‘misconduct could have affected the jury’s verdict.’” *Newell*, 212 Ariz. 389, ¶ 67, 132 P.3d at 847, quoting *State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992), disapproved on other grounds by *State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001). Cañez contends the question “left the jury wondering about matters it absolutely could not consider, which likely affected its verdicts.”

STATE v. CAÑEZ
Decision of the Court

But Detective M. never answered the question because the objection was sustained, and the jury was instructed “not to guess what the answer to the question might have been.” We presume jurors follow instructions. *State v. Manuel*, 229 Ariz. 1, ¶ 24, 270 P.3d 828, 833 (2011). The trial court did not err in denying Cañez’s motion for mistrial.⁶

Criminal Restitution Order

¶10 Although Cañez has not raised the issue on appeal, we find fundamental error associated with the CRO. See A.R.S. § 13-805.⁷ In its sentencing minute entry, the trial court ordered that “all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections.” The trial court’s imposition of the CRO before the expiration of Cañez’s sentence “constitute[d] an illegal sentence, which is necessarily fundamental, reversible error.” *State v. Lopez*,

⁶Cañez includes two other questions by the prosecutor in his argument that the trial court erred in denying the mistrial: (1) whether the detective had made “contact with” Cañez, and (2) if the detective had seen Cañez at the hospital. These questions occurred after the trial court denied the mistrial, and could not have contributed to the court’s determination. To the extent Cañez appeals an error other than denial of the mistrial, the argument is not properly raised on appeal, and is therefore waived. See Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant’s brief shall contain argument with “citations to the authorities, statutes and parts of the record relied on”); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995). The argument is without merit in any event. Neither question improperly implied that statements were made to police; the questions were asked in the context of the detective identifying Cañez, in court, at the hospital, and at the scene of the collision.

⁷Cañez’s sentencing predates the effective date of the most recent amendment of A.R.S. § 13-805, which now allows the entry of a criminal restitution order in favor of those entitled to restitution. See 2012 Ariz. Sess. Laws, ch. 269, § 1.

STATE v. CAÑEZ
Decision of the Court

231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This remains true even though the court ordered the imposition of interest be delayed until after Cañez's release. *See id.* ¶ 5.

Disposition

¶11 For the foregoing reasons, we vacate the CRO but otherwise affirm Cañez's conviction and sentence.