

IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

DIMITRI POLANCO ROMERO,

Appellant.

No. CR-24-0237-PR

Court of Appeals
No. 2 CA-CR 2023-0010

Pima County Superior Court
No. CR-20203538-001

**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL
JUSTICE IN SUPPORT OF APPELLANT ROMERO**

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INTEREST OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief in support of Mr. Romero because the right to a fair trial and a jury verdict untainted by prosecutorial error goes to the core of AACJ's mission. *See State v. Dansdill*, 246 Ariz. 593, ¶ 30 (App. 2019) (“touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of trial”), *quoting Smith v. Phillips*, 455 U.S. 209, 219 (1982). Despite this Court's recent efforts to clarify the standards for reviewing prosecutorial error, lower courts and litigants are still struggling with “the interplay between fundamental error review and review for prosecutorial misconduct,” particularly when assessing un-preserved cumulative prosecutorial error claims. *State v. Murray*, 250 Ariz. 543, ¶ 11 (2021); *see also State v. Vargas*, 249 Ariz. 186, ¶ 11 (2020). The Court of Appeals' split

opinion in this case perfectly illustrates the challenges and varying interpretations of this Court's jurisprudence in this area. This brief provides additional argument and authority to illustrate the confusion in this challenging area of the law, and to urge the Court to provide additional guidance with respect to how appellate courts are to evaluate prosecutorial error claims subject to fundamental error review. *Cf. Vargas*, 249 Ariz. 186, ¶ 7 (accepting review to correct COA's erroneous application of standard of review).

ARGUMENT

I. The Court of Appeals and Practitioners Still Need Guidance on What Constitutes Prosecutorial Error.

This case raises several important questions concerning the proper assessment of prosecutorial error claims in general. Though this Court has recently endeavored to clarify the applicable standards of review, appellate courts are still struggling to apply them, in particular, when reviewing cumulative prosecutorial error claims subject to fundamental error review.

This case perfectly illustrates the lingering confusion. A divided panel reached three different conclusions regarding which claims constituted prosecutorial error and then applied different standards to assess the cumulative effect of those errors. *See State v. Romero*, 556 P.3d 305, ¶¶ 35, 64-68, 70, 74, 78-79 (Ariz. App. 2024). Nor is the *Romero* opinion necessarily an outlier. *Compare State v. Murray*, 247 Ariz. 447 (App. 2019), with *State v. Murray*, 247 Ariz. 583 (App. 2019), both

opinions vacated by Murray, 250 Ariz. 543. The standard for evaluating cumulative prosecutorial error remains muddled and has led to inconsistent analyses and results, particularly with respect to the showing a defendant must make to establish prosecutorial error. *See In re Martinez*, 248 Ariz. 458, ¶¶ 46-47 (2020) (clarifying that “prosecutorial misconduct” is a term of art “used to describe conduct by the government that violates a defendant’s rights whether or not that conduct was or should have been known by the prosecutor to be improper and whether or not the prosecutor intended to violate the Constitution or any other legal or ethical requirement”); *Murray*, 250 Ariz. 543, ¶ 12 (concluding prosecutorial error was fundamental, reversible error despite characterizing misstatement of the law as “inadvertent error rather than intentional conduct”); *but see State v. Robinson*, 253 Ariz. 121, ¶ 68 (2022) (stating it “is not enough” to merely show the prosecutor’s conduct “permeated the trial with unfairness as to make the resulting conviction a denial of due process,” and suggesting defendant must also show prosecutor acted with “requisite ‘indifference, if not [] specific intent, to prejudice’” him), *quoting State v. Lynch*, 238 Ariz. 84, ¶ 51 (2015)

This Court should accept review to once again clarify that prosecutorial error is not limited to intentional misconduct or improper *argument*, and instead encompasses “any conduct that infringes a defendant’s constitutional rights,” including inadvertent trial errors that result in prejudice and an unfair trial.

- A. The majority’s analyses erroneously focus on the prosecutor’s intent rather than the impact his errors had on the fairness of Romero’s trial. Pool’s “intentional prosecutorial misconduct” standard does not apply to a cumulative prosecutorial error claims subject to fundamental error review.

This Court recently clarified that “the term ‘prosecutorial misconduct’ broadly encompasses *any conduct* that infringes a defendant’s *constitutional rights*. It sweeps in prosecutorial conduct ranging from inadvertent error or innocent mistake to intentional conduct.” *Murray*, 250 Ariz. 543, ¶ 11, *quoting In re Martinez*, 248 Ariz. 458, ¶¶ 46-47 (2020) (emphasis in *Murray*). In other words, whether conduct amounts to “prosecutorial misconduct”—or, more aptly, “prosecutorial error”—depends primarily upon the effect of the conduct rather than the prosecutor’s intent in carrying out that conduct. *Martinez*, 248 Ariz. 458, ¶ 46; *see also Murray*, 250 Ariz. 543, ¶ 12; *cf. State v. Hughes*, 193 Ariz. 72, ¶ 33 (1998) (stressing prosecutor’s duty “as a minister of justice” is to “see that defendants receive a fair trial”).

Despite this recent clarification, this Court and the court of appeals continue to cite language from older cases that state a defendant must establish the prosecutor acted with “the requisite ‘indifference, if not [] specific intent, to prejudice’” him to establish a cumulative prosecutorial error claim. *State v. Robinson*, 253 Ariz. 121, ¶ 68 (2022)¹; *see also State v. Montoya*, 554 P.3d 473, ¶ 54 (2024) (“We consider

¹ It appears that this Court’s focus on the prosecutor’s intent in *Robinson* may have simply reflected the defendant’s characterization of his cumulative error claim. On appeal, Robinson argued that “the prosecutor engaged in ‘persistent and pervasive misconduct’ that deprived him of due process. Specifically, he

whether ‘persistent and pervasive’ [error] occurred and whether the ‘cumulative effect of the [errors] shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant.’”); *State v. Shortman*, 253 Ariz. 121, ¶ 68 (2022); *State v. Piper*, 2023 WL 7510940, ¶ 32 (Ariz. App., Nov. 14, 2023) (prosecutor’s questions do not “evidence an intent to inflame the jurors”).

The “indifference, if not, specific intent” language derives from *Pool v. Superior Court*—a case that articulates the standard for barring retrial after a “mistrial is granted because of improper conduct or actions by the prosecutor.” *Pool v. Superior Court*, 139 Ariz. 98, 108-09 (1984). But *Pool*’s analysis is inapposite where, as here, a defendant asserts a claim of cumulative prosecutorial error subject to fundamental error review, as opposed to asserting a claim based on prosecutorial misconduct so egregious that retrial must be barred. See *State v. Minnitt*, 203 Ariz. 431, ¶¶ 29-31 (2002) (clarifying that *Pool* drew an important distinction between prosecutorial error and misconduct that is so egregious that “the double jeopardy clause will bar re-prosecution”).

characterized the prosecution’s actions as “a deliberate effort ‘to steer’ [the witness’] testimony” and to “inflame the jurors.” *Robinson*, 253 Ariz. 121, ¶ 66. Nevertheless, it is not entirely clear whether the Court’s analysis was so limited, as is evinced by the concurrence’s reading of that language as requiring a defendant to show the prosecutor acted with indifference, if not specific intent, to prejudice him. *Romero*, 556 P.3d 305, ¶ 75.

In *Pool*, this Court held that jeopardy attaches and retrial is barred when a mistrial is granted due to misconduct by the prosecutor that: (1) prejudices the defendant and (2) is “not merely the result of legal error, negligence, mistake, or insignificant impropriety,” but rather “as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial.” 139 Ariz. at 108-09. After applying that rule, this Court concluded that retrial was barred because “portions of the [prosecutor’s] questioning are so egregiously improper that we are compelled to conclude that the prosecutor intentionally engaged in conduct which he knew to be improper, that he did so with indifference, if not specific intent, to prejudice the defendant.” *Id.* at 109; *see also State v. Jorgenson*, 198 Ariz. 390, ¶ 6 (2000) (holding that “even in the absence of a declared mistrial, double jeopardy bars retrial in situations where the trial became patently unfair and the conviction was obviously obtained by intentional prosecutorial misconduct”); *Minnitt*, 203 Ariz. 431, ¶ 45.

This Court later characterized this rare and “egregious” type of error as akin to structural error. *See Minnitt*, 203 Ariz. 431, ¶ 29 (“Intentional and pervasive misconduct on the part of the prosecution to the extent the trial is structurally impaired is one” circumstance where double jeopardy “will bar re-prosecution”). It also explained its decision in *Pool* was “based on the view that a defendant’s constitutional guarantee to be free from multiple trials would be severely impacted

by the [type of] prosecutor’s misconduct . . . that permeates the process and intentionally destroys the ability of the tribunal to reach a fair verdict.” *Id.* ¶¶ 29-30. Specifically, the Court had concerns that “the prosecutor’s purposes . . . were to avoid acquittal, prejudice the jury, and obtain a conviction with indifferent to the danger of mistrial or reversal,” and that similar misconduct would occur in future trials. *Id.* ¶¶ 31, 44 (“In most instances, the remedy for prosecutorial misconduct is a new trial. However, the record in the instant case is now replete with evidence that the prosecutor, with full knowledge, introduced false testimony in two tries and thus seriously damaged the structural integrity of both.”) (citations omitted).

Finally, in concluding that the State was barred from retrying Minnitt, this Court noted that the remedy for prosecutorial misconduct is ordinarily a new trial, citing *State v. Towery*, 186 Ariz. 168 (1996) and *State v. Atwood*, 171 Ariz. 576, 611 (1992). Both of those cases’ prosecutorial misconduct analyses focused on the result of the prosecutor’s improper remarks, rather than the prosecutor’s intent in making them. *See Atwood*, 171 Ariz. at 607 n.5 (rejecting State’s “dismiss[al of the prosecutor’s] statement as ‘an inadvertent slip of the tongue’ because, even “[a]ccepting this as true” and “finding that the prosecutor did not realize that he was endangering defendant’s right to a fair adjudication of his guilt or innocence, *such inadvertence would not negate this argument if the result was indeed prejudicial*”) (emphasis added); *see also Towery*, 186 Ariz. at 184 (“Even accepting the

prosecutor’s assertion that he decided in good faith that the exculpatory statement referred to the murder charge, we believe it improper for the State to fail to first notify defense counsel and the court of its intent to use evidence in this manner.”). Thus, *Pool*’s “intentional misconduct” standard was intended to be reserved for the rare case where prosecutorial misconduct was so egregious that the defendant could not be retried.

Nevertheless, for years, *Pool*’s “intentional misconduct” standard has been applied in cases where defendants were not asserting that prosecutorial misconduct barred retrial. *See, e.g., State v. Hulsey*, 243 Ariz. 367, ¶ 122 (2018); *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 119 (2018); *State v. Payne*, 233 Ariz. 484, ¶ 134 (2013). Even after this Court clarified in *Martinez* and *Murray* that prosecutorial error includes “inadvertent error or innocent mistake” and does not require a defendant to prove a prosecutor intentionally infringed upon his rights, this Court and the court of appeals have continued to require defendants to prove the prosecutor’s mental state to establish prosecutorial error. *See supra*.

The majority’s and the concurrence’s analyses was similarly focused on the prosecutor’s intent. In concluding that it was prosecutorial error to introduce the improper NIBIN testimony, the majority did not focus its analysis on whether it infringed upon Romero’s rights. *See Romero*, 556 P.3d 305, ¶ 42. Instead, it cited an unpublished memorandum decision in which the prosecutor had been involved to

show he “knew or reasonably should have known that the introduction of NIBIN testimony through unqualified detectives had been found to be improper.” *Id.* ¶ 42, *citing Pool*, 139 Ariz. at 107. The concurrence was even more explicit in its reliance on *Pool*’s “indifference, if not [] specific intent” requirement. *Romero*, 556 P.3d 305, ¶¶ 74-75. This Court should accept review and clarify that *Pool*’s “intentional prosecutorial misconduct” standard does not apply to cumulative prosecutorial error claims unless the defendant asserts the error/misconduct was so egregious as to bar retrial.

B. Prosecutorial error encompasses “evidentiary” and “trial errors” that infringe upon a defendant’s rights.

Evidentiary error can amount to prosecutorial error if it infringes upon a defendant’s constitutional rights. *Martinez*, 248 Ariz. 458, ¶ 45. In rejecting *Romero*’s claim that the prosecutor erred in eliciting inadmissible lay opinion testimony from Detective Brumitt concerning the identity of the person depicted in the video, the majority concluded that “[n]ot every trial error amounts to prosecutorial error merely because it involves evidence presented by a prosecutor.” *Romero*, 556 P.3d 305, ¶ 35. Rather than consider the effect of that error on *Romero*’s constitutional rights, the majority simply faulted *Romero* for “fail[ing] to cite any pertinent legal authority establishing that the testimony in question, even if improper, constitutes prosecutorial error.” *Id.*, *quoting Vargas*, 249 Ariz. 186, ¶¶ 14-15. The majority also implicitly concluded that “trial errors”—even those caused

by a prosecutor’s actions—cannot be construed as prosecutorial error and, instead, must be treated as an evidentiary error by the trial court. *Id.* (in rejecting Romero’s argument noting “[h]is overarching argument on appeal is prosecutorial error, not that the trial court erred in permitting the challenged testimony”).

It is true, as the dissent correctly noted, that “it can be difficult to draw the line between evidentiary error and prosecutorial error.” *Romero*, 556 P.3d 305 (App. 2024) (Sklar, J., dissenting). It is also clear, particularly from oral argument, that the court of appeals was struggling with this distinction, as well as the idea that any trial error by a prosecutor that infringed upon a defendant’s rights could be characterized as prosecutorial error, regardless of whether such error was inadvertent or unintentional. It appeared to have concerns that characterizing evidentiary errors as such would chill prosecutors from asking “potentially objectionable questions” on a significant point in the case—i.e., when the admissibility of those questions was perhaps unclear under the rules of evidence and existing case law. Though the court of appeals’ questions and concerns regarding “the line between evidentiary error and prosecutorial error” are understandable and yet another reason why this Court should grant review, the majority’s attempt at drawing that line was plainly erroneous and inconsistent with Arizona law.

This Court has previously concluded that “trial errors” or “evidentiary errors” can amount to prosecutorial error. For example, it has repeatedly disapproved of

questions to a witness that raise unsupported prejudicial insinuations that have no basis in facts or evidence. *See Hughes*, 193 Ariz. 72, ¶ 59 (counsel’s questioning and argument cannot make insinuations unsupported by evidence); *State v. Cornell*, 179 Ariz. 314, 331 (1994) (improper for prosecutor to ask questions implying counsel had coached defendant to feign symptoms of epilepsy); *Pool*, 139 Ariz. at 103 (counsel’s suggestion by question or innuendo of unfavorable matter not in evidence or for which no proof exists is improper); *State v. Holsinger*, 124 Ariz. 18, 21 (1979); *Ruth v. Rhodes*, 66 Ariz. 129 (1947) (“cross examination by insinuation, the sole purpose of which is to leave an impression with the jury or a fact or state of affairs that is not proved, or to get before the jury by indirection that will not be proved is impermissible”); *In re Zawada*, 208 Ariz. 232, ¶¶ 26-27 (2004) (prosecutorial error to ask defense witness unfounded and prejudicial questions); *State v. Bailey*, 132 Ariz. 472, 479 (1982).

It has also concluded it is improper for prosecutors to ask questions of witnesses that draw attention to irrelevant, inadmissible, and/or prejudicial matters. *See Cornell*, 179 Ariz. at 326-37 (prosecutor’s questions to witness about whether verdict of not guilty by reason of insanity would result in defendant’s release were improper because they diverted jurors’ attention from issue of insanity and focused instead on results of acquittal); *Holsinger*, 124 Ariz. at 21 (prosecutor’s conduct in asking defendant whether she had a long criminal history was “improper and highly

prejudicial”); *State v. Roque*, 213 Ariz. 193, ¶ 158 (2006) (prosecutor’s “question improperly inject[ing] the prosecutor’s opinion of the validity of a psychiatric test” was prosecutorial error); *State v. Anderson*, 110 Ariz. 238, 240-41 (1973) (improper questioning of defendant regarding pretrial silence was prosecutorial error).

Leading questions may also be prosecutorial misconduct if they bring improper matters to the jury’s attention, pertain to non-cumulative and otherwise inadmissible evidence, or otherwise result in prejudice. *Robinson*, 253 Ariz. 121, ¶ 69 (suggesting prosecutor’s improper leading questions may have amounted to prosecutorial error if they had directed jury’s attention to matters outside the record or “introduced [something] new” into evidence); *cf. Acuna Valenzuela*, 245 Ariz. 197, ¶¶ 71-73 (prosecutorial error to refer to evidence not in record and to “testify” regarding matters not in evidence if remarks call improper matters to jury’s attention and risk influencing jury’s verdict). These cases again demonstrate that the focus of the prosecutorial error inquiry is the result or impact of the error, rather than the prosecutor’s intent.

Here, the majority erroneously drew the “line” between prosecutorial error and evidentiary error at those errors made with a reckless indifference, if not a specific intent, to prejudice the defendant. This is clear from the fact that it found prosecutorial error as to the NIBIN testimony, but not the lay opinion testimony. As to the NIBIN testimony, the majority based its finding of prosecutorial error on the

fact that the prosecutor knew or should have known that line of questioning was improper since he was the prosecutor in an unpublished case where it had held such questioning was impermissible. Yet, it found it was not prosecutorial error to introduce inadmissible lay opinion testimony. Rather than considering the effect of those errors on the fairness of Romero's trial, the court of appeals erroneously evaluated what it believed the prosecutor should have known about the propriety of asking those questions.

CONCLUSION

AACJ requests this Court grant review and address the questions posed in Romero's petition.

RESPECTFULLY SUBMITTED this 18th day of December, 2024.

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