

ARIZONA SUPREME COURT

THE STATE OF ARIZONA,

Appellee,

v.

CLAUDIUS C. MURRAY,

Appellant.

Arizona Supreme Court No.
CR-20-0008-PR

Court of Appeals
No. 2 CA-CR 2018-0312

Pima County Superior Court
No. CR-20170096-002

**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL
JUSTICE IN SUPPORT OF PETITION FOR REVIEW**

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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 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. 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 because the issues presented in this case touch the very bedrock of our criminal-justice system—the requirement that the government prove a criminal defendant guilty beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358 (1970). Criminal convictions must receive proper review by Arizona’s appellate courts, even when trial counsel does not object to the errors at issue. Courts are tasked with protecting a defendant’s constitutional rights to due process and a fair trial. Leaving trial errors unreviewed, or improperly reviewed, undermines the “respect and confidence of the community in applications of the criminal law,” *id.*

at 364, and as relevant here, undermines the accused's right to be convicted only upon proof beyond a reasonable doubt.

REASONS THE PETITION SHOULD BE GRANTED

This case involves important questions concerning the foundational building block of our criminal justice system—the requirement that the government prove a defendant guilty beyond a reasonable doubt—and the role that a prosecutor’s arguments have in informing the jury how to apply this standard. Two different panels of the court of appeals analyzed the same prosecutorial error but did so in three different ways, with a unanimous opinion in this case and a divided opinion in the companion case of Murray’s co-defendant. *State v. Easton Murray*, 247 Ariz. 447 (App. 2019). But every judge who has reviewed the prosecutor’s argument in this case has concluded that it misstated the applicable standard. In other words, there is no disagreement that the prosecutor’s argument constituted trial error. These different approaches to the same question highlight why the Court should review this case to provide guidance to lower courts and practitioners on several important and recurring issues.

First, this Court should evaluate whether the error here—the prosecutor’s misstating the reasonable-doubt standard in rebuttal argument, after final instructions and immediately before jury deliberations—can constitute reversible error even when there was no objection below. Courts, including the U.S. Supreme Court, have concluded that instructions that misstate the reasonable-doubt standard

are structural errors requiring automatic reversal. This treatment is consistent with empirical research showing that the way courts frame the reasonable-doubt standard has real influence on the way jurors evaluate a defendant's guilt. On the other hand, this Court's precedents have held that misstatements of the law can be "cured" if the jury instructions correctly state the law. These concepts bump up against each in this case, and the opinion below leaves criminal defendants with no remedy for erroneous statements by a prosecutor, as long as the jury instructions correctly state the reasonable-doubt standard.

Second, the three different analyses in the two *Murray* cases demonstrate that, even in the wake of this Court's decision in *State v. Escalante*, 245 Ariz. 135 (2018), which clarified the standard for fundamental-error review, the court of appeals and practitioners still need guidance on applying this standard, particularly in cases like this one involving claims of prosecutorial misconduct. This Court's current standard for evaluating prosecutorial misconduct is muddled and inconsistent and needs to be addressed.

I. The Court of Appeals’ Opinion Unacceptably Undermines the Reasonable-Doubt Standard.

Only a jury “acting on proof beyond a reasonable doubt may take a person’s liberty. That promise stands as one of the most vital protections against arbitrary government.” *United States v. Haymond*, 139 S. Ct. 2369 (2019). Proof beyond a reasonable doubt is among the “essentials of due process and fair treatment.” *Winship*, 397 U.S. at 359. Together with the Sixth Amendment right to a trial by jury and the Fifth Amendment’s guarantee of due process, these “pillars of the Bill of Rights” ensure that the government must prove to the jury every criminal charge beyond a reasonable doubt. *Haymond*, 139 S. Ct. at 2376. The reasonable-doubt standard “provides concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’” *Winship*, 397 U.S. at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 45 (1895)).

The U.S. Supreme Court has consistently treated questions that involve this burden of proof as different. In *Cage v. Louisiana*, 498 U.S. 39 (1990), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Court held that a defective reasonable-doubt instruction resulted in structural error because there “being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional

error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate.” *Id.* at 280 (emphasis in original). In *Neder v. United States*, 527 U.S. 1 (1999), the Court subjected failure to instruct the jury on an essential element of the charged offense to harmless-error analysis and held that the only instructional error that rises to the level of structural error is a defective reasonable-doubt instruction as described in *Cage* and *Sullivan*.

Reasonable doubt is a “difficult concept” that eludes easy definition. *State v. Portillo*, 182 Ariz. 592, 596 n.5 (1995). Given this difficulty along with the importance of the right at stake, words matter. Modern empirical research shows that jurors often fail to understand the presumption of innocence, and the definition of reasonable doubt may get “lost in translation.” *Stoltie v. California*, 501 F. Supp. 2d 1252, 1257 (C.D. Cal. 2007), *aff’d sub nom. Stoltie v. Tilton*, 538 F.3d 1296 (9th Cir. 2008). In this area, uncontroverted research shows that the way instructions are worded, particularly instructions that define the burden of proof, affects the likelihood of conviction, especially in close cases. See Lawrence Solan, *Convicting the Innocent Beyond a Reasonable Doubt: Some Lessons About Jury Instructions from the Sheppard Case*, 49 Clev. St. L. Rev. 465, 483 (2001); David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 *Judicature* 478 (1976).

One study showed, in a closed universe, that the definition of the reasonable-doubt standard given to jurors had a significant impact on their decision. Depending on the wording of the instruction, jurors were more or less likely to convict regardless of the actual strength of the evidence. Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 Law & Hum. Behav. 655, 665-69 (1996).

Recognizing the results of these studies is crucial in this case because the last definition of reasonable doubt that jurors heard before they began deliberations was the prosecutor's gross misstatement of that standard. The prosecutor told the jury that they could convict if they thought the defendant "might" be guilty, diluting this standard beyond recognition to something even below the preponderance-of-the-evidence standard. A criminal defendant "would be at a severe disadvantage . . . amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." *Winship*, 397 U.S. at 363. Here, the prosecutor's erroneous statement of the law on burden of proof caused exactly that disadvantage.

That is why a prosecutorial error in misstating the burden of proof should be viewed differently, especially when that statement is the very last thing the jury

hears, like here. As it would with a reasonable-doubt instruction, an appellate court should put a different lens on its analysis when a prosecutor misstates the burden. And, as discussed below, allowing such crucial misstatements to be “cured” by correct instructions essentially leaves serious errors unreviewed.

II. In the Wake of *Escalante*, the Court of Appeals and Practitioners Still Need Guidance on Fundamental-Error Analysis, Particularly How to Evaluate Prejudice.

In *State v. Escalante*, this Court sought “to clarify what a defendant must show to establish fundamental, prejudicial error” because there was “[s]ome confusion about what fundamental error review entails.” 245 Ariz. 135, 140 ¶¶ 11-12 (2018). Even after *Escalante*, however, confusion remains about how the court of appeals should apply fundamental-error review and evaluate prejudice. Specifically, lower courts and practitioners need guidance on the standard for evaluating prosecutorial misconduct, as is evident in both *Murray* cases. This Court should also eliminate or limit the presumption that jurors follow instructions, because the result of this rule is to leave many substantial trial errors ignored and unreviewed.

In this case, the court of appeals determined that the “state’s characterization of the reasonable-doubt standard was a gross, improper misstatement of the law.” Op. ¶ 44. But despite this egregious misstatement, the court held that it was

nevertheless “cured” by the trial court’s correct instructions on the burden of proof along with the instruction that the lawyer’s arguments are not evidence. *Id.* ¶¶ 45-46. Although not entirely clear from the opinion, the court seems to have reached this conclusion applying the *Escalante* standard. *See id.* ¶ 42.

In *Easton Murray*, the court similarly concluded that the prosecutor’s rebuttal argument was “erroneous” because it “misrepresent[ed] the reasonable-doubt standard, under which a juror must be ‘firmly convinced of the defendant’s guilt’ to find the defendant guilty.” 247 Ariz. at 457-58 ¶¶ 32-33 (quoting *Portillo*, 182 Ariz. at 596). The *Easton Murray* court then applied this Court’s standard for prosecutorial misconduct (rather than the *Escalante* standard) and determined that the error did not require reversal because it did not “so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* ¶ 33 (quoting *State v. Hughes*, 193 Ariz. 72, 79 ¶ 26 (1998)). Under that standard, the court found relevant that “[t]he prosecutor made other, proper arguments explaining the reasonable-doubt standard, and more importantly, the court properly instructed the jury on the reasonable-doubt standard.” *Id.* The court found that the error was not prejudicial based on the “presumption that the jurors followed the trial court’s instructions,” and thus reversal was not warranted. *Id.* at 459 ¶ 37 (quoting *State v. Bush*, 244 Ariz. 575, 582 ¶ 16 (2018)).

Judge Eckerstrom’s dissent likewise concluded that the prosecutor’s rebuttal “plainly misrepresented the law.” *Id.* ¶ 41 (Eckerstrom, J., concurring in part, dissenting in part). Judge Eckerstrom then applied *Escalante* and concluded that the error went “to the foundation of the case” because it “relieve[d] the prosecution of its burden to prove a crime’s elements,” it “directly impact[ed]” the resolution of a core factual question,” and it “deprive[d] the defendant of constitutionally guaranteed procedures.” *Id.* ¶ 43 (quoting *Escalante*, 245 Ariz. at 141 ¶ 18). As Judge Eckerstrom pointed out, the majority opinion “neither addresses nor disputes the foundational nature of the error” and thus fails entirely to apply the *Escalante* standard. *Id.* ¶¶ 45-47.

In light of these divergent analyses on the very same issue, the Court should take this opportunity to clarify how the court of appeals and practitioners should apply fundamental-error analysis in cases raising issues of prosecutorial misconduct.

A. The Court Should Clarify the Standard for Prosecutorial Misconduct.

One important issue on which lower courts and practitioners need this Court’s guidance is how to conduct fundamental-error analysis in combination with other substantive standards, particularly as relevant to this case, the standard for prosecutorial misconduct. *See Easton Murray*, 247 Ariz. at 463 ¶ 58 (Eckerstrom,

J., concurring in part, dissenting in part) (noting that there is no “published Arizona case squarely addressing prejudice in the context of a prosecutor’s improper distortion of the reasonable-doubt standard”). Indeed, in this case the court of appeals noted that “[t]his case may provide the Arizona Supreme Court with the opportunity to determine the circumstances, if any, in which a single act of prosecutorial misconduct—a gross misstatement of the burden of proof during rebuttal—is sufficient to warrant reversal under fundamental-error analysis.” Op. ¶ 46 n.7.

This Court recently heard oral arguments in another case that exposed the confusion over the standard for evaluating prosecutorial misconduct in the context of fundamental-error review. *State v. Vargas*, No. CR-19-0071-PR (oral arguments held on Feb. 13, 2020). During argument, several justices noted issues that could benefit from this Court’s clarification.

Much of the confusion stems from the standard for prosecutorial misconduct that this Court established in *Hughes*: “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.’” 193 Ariz. at 79 ¶ 26 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). This continues to be one standard that Arizona courts apply to claims

of prosecutorial misconduct. *See, e.g., State v. Morris*, 215 Ariz. 324, 335 ¶ 46 (2007); *State v. Newell*, 212 Ariz. 389, 402 ¶ 60 (2006); *State v. Sanders*, 245 Ariz. 113, 132 ¶ 92 (2018); *State v. Arias*, --- P.3d ---, ¶ 30, 2020 WL 1429876, at *5 (Ariz. App. Mar. 24, 2020). This Court also uses a contrary standard: “In determining whether an argument is misconduct, we 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.” *State v. Riley*, --- P.3d ---, ¶ 125, 2020 WL 1145988 (Ariz. Mar. 10, 2020) (quoting *State v. Goudeau*, 239 Ariz. 421, 466 ¶ 196 (2016)).

Reliance on *Donnelly*’s standard for prosecutorial misconduct is problematic because it overlooks isolated or less egregious errors that nevertheless could have some effect on the verdict. In addition, applying the *Donnelly* standard on direct review is improper because *Donnelly* was conducting federal habeas review of a state conviction. *Donnelly*, 416 U.S. at 642 (Court’s “review was ‘the narrow one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court.’”) (citation omitted); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (standard of review for misconduct claims on habeas review is “the narrow one of due process and not the broad exercise of

supervisory power.”). The Court has noted that “[d]irect review is the principal avenue for challenging a conviction” and as such, an error that would justify reversal on direct appeal may not in collateral proceedings. *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). *See also State v. Denz*, 232 Ariz. 441, 446 ¶ 15 (App. 2013) (rejecting applicability of federal habeas jurisprudence in state post-conviction review). That different standards should apply to different procedural postures is evident because the Supreme Court applied a different standard when a prosecutorial misconduct claim came to it on direct review. *See United States v. Young*, 470 U.S. 1, 11-12 (1985) (Court acknowledging that it “must consider the probable effect the prosecutor’s [statement] would have on the jury’s ability to judge the evidence fairly”).

Further confusing the issue is calling all trial errors involving a prosecutor’s conduct “prosecutorial misconduct” with the focus on the prosecutor’s intent, rather than treating it as prosecutorial error with a focus on how the error may have affected the verdict. This Court has recognized that there is a distinction between “simple prosecutorial error, such as an isolated misstatement or loss of temper, and misconduct that is so egregious that it raised concerns over the integrity and fundamental fairness of the trial itself.” *State v. Minnitt*, 203 Ariz. 431, 438 ¶ 30 (2002) (citing *Pool v. Super. Ct.*, 139 Ariz. 98, 108-09 (1984)). In cases where the

conduct is egregious and committed with intent, the conduct should be referred to as “misconduct.” In all other instances, a different label should be attached, such as “prosecutorial error.” *See State v. Dansdill*, 246 Ariz. 593, 601 ¶ 27 n.7 (App. 2019) (noting that the term “‘prosecutorial misconduct’ can be semantically misleading” and advising that the court would refer to claims as “improper argument” when applicable).

With the isolated exception of *Dansdill*, the court of appeals has repeatedly conflated the standard for reversing a conviction, which requires a focus on the fairness of the trial, and that for barring retrial, which requires divining the prosecutor’s mental state. *See, e.g., State v. Ramos*, 235 Ariz. 230, 237 ¶ 22 (App. 2014) (citing *Pool* standard for intentional conduct where defendant requested only reversal). Both divisions have repeated the error even since *Dansdill*. *See State v. Watson*, No. 2 CA-CR 2017-0171, 2019 WL 5866773, ¶ 39 (mem., Oct. 31, 2019); *State v. Taft*, No. 1 CA-CR 18-0714, 2020 WL 85395, ¶ 21 (mem., Jan. 7, 2020). This issue requires this Court’s review.

B. The Court Should Eliminate or Limit the Presumption That Jurors Follow the Court’s Instruction Even When Contradicted by the Prosecutor’s Argument.

The court of appeals found no reversible error in this case because, even though “the state’s mischaracterization of the reasonable-doubt standard was

particularly egregious,” the trial court had previously instructed the jury that “what the lawyers say is not evidence.” Op. ¶ 46. The court then stated that it was bound to follow the principle that jurors are presumed to follow their instructions based on this Court’s previous decisions. *Id.* (citing *State v. Long*, 207 Ariz. 140, 145 ¶ 23 (App. 2004)). This reasoning actually ignored other important principles given by this Court.

First, this Court has held that the presumption that jurors follow instructions does not mean that all errors are cured by instructions. *State v. Carlson*, 237 Ariz. 381, 397 ¶ 61 (2015) (“This is not to say that all such errors are harmless so long as the trial court provides an appropriate instruction.”). In *State v. Anthony*, this Court found that the error in admitting other-acts evidence suggesting that the defendant molested his stepdaughter was not harmless even in the face of overwhelming evidence of guilt. 218 Ariz. 439, 446 ¶ 40 (2008). In reaching that conclusion, the Court rejected the State’s argument that the error was cured because “[t]he trial court properly instructed the jury that the ‘other acts’ evidence could be considered only on the issue” of the defendant’s motive. *Id.* See also *Easton Murray*, 247 Ariz. at 458 ¶ 34 n.5 (“[W]e do not suggest that a proper reasonable-doubt instruction will always suffice to cure improper argument regarding the burden of proof.”).

Second, jury instructions must be viewed in light of counsel's arguments. *State v. Rodriguez*, 114 Ariz. 331, 334 (1977); *State v. Edmisten*, 220 Ariz. 517, 522-23 ¶ 15 (App. 2009); *State v. Johnson*, 205 Ariz. 413, 417 ¶ 11 (App. 2003) (“[I]n evaluating the jury instructions, we consider the instructions in context and in conjunction with the closing arguments of counsel.”).

Decisions like this case essentially treat the presumption that jurors follow instructions as an irrebuttable presumption, meaning that no argument of the State can ever be reversible error so long as the written jury instructions are accurate. *See, e.g., State v. Mullins*, No. 2 CA-CR 2018-0069, ¶ 18, 2018 WL 6261486 (Ariz. App. Nov. 28, 2018) (concluding that prosecutor's improper comments in closing arguments about drug cartels were unsupported by evidence but harmless based on the “presumption that jurors follow their instructions” because the trial court instructed the jury that “what the lawyers say is not evidence”). It is thus apparent that the court of appeals is chronically ignoring improper prosecutorial argument because of the perceived “curative” function of jury instructions. This ignores common wisdom that “[i]f you throw a skunk into the jury box, you can't instruct the jury not to smell it.” *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962).

This Court should revisit and eliminate or limit the presumption that jurors follow the court's instructions because in practice it creates an irrebuttable

presumption, leaving many significant trial errors unreviewed. Instead, this Court should adopt a rule that acknowledges that correct jury instructions are an important factor to consider when evaluating whether a trial error is prejudicial. But especially in cases where the prosecutor's arguments contradict the jury instructions, the fact that the written instructions correctly state the law should not be determinative.

CONCLUSION

AACJ urges the Court to grant review in this case and resolve these myriad inconsistencies in Arizona law.

RESPECTFULLY SUBMITTED this 27th day of March, 2020.

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