

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



DIVISION ONE  
FILED: 07/12/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0337  
)  
Appellee, ) DEPARTMENT A  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
EDVIN MITA, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)

---

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-119184-001 DT

The Honorable Warren J. Granville, Judge

**AFFIRMED**

---

Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Division  
and Michael T. O'Toole, Assistant Attorney General  
Attorneys for Appellee

Michael J. Dew, Attorney at Law Phoenix  
Attorney for Appellant

---

**K E S S L E R**, Judge

¶1 Defendant Edvin Mita ("Mita") appeals his convictions and sentences for sexual assault, aggravated assault, possession of cocaine and drug paraphernalia, and other charges. He argues

the court fundamentally erred in failing to sever the charges and in instructing the jury on sexual assault, and abused its discretion in discovery sanctions and evidentiary rulings. For the reasons that follow, we affirm his convictions and sentences.

#### **FACTUAL BACKGROUND**

¶2 A grand jury indicted Mita on eight counts of sexual assault and related charges and possession of cocaine and drug paraphernalia. These charges arose from separate incidents that were alleged to have occurred on three nights in July and November 2009 involving three women. On each occasion, Mita allegedly sexually assaulted the women after spending time with them in a Scottsdale bar.

¶3 In September 2010, Mita filed a motion to sever the eighteen counts on which he was indicted into four separate trials, one for each alleged victim and one for the drug charges. The court held an evidentiary hearing on Mita's motion during which the court considered the following evidence: 1) the expert testimony of a sexual abuse psychologist, who testified that he believed Mita had a propensity to commit sexually aberrant acts; 2) copies of photographs showing the injuries of the third victim, K.H.; 3) transcripts of a call made by the second victim, D.D., to Mita (the "confrontation call"); and 4) recorded interviews with each of the three victims. The court

denied Mita's motion to sever, and Mita did not renew this motion during trial as is required by Arizona Rule of Criminal Procedure 13.4(c).

¶4 Prior to trial, upon the State's motion, the court precluded Mita from introducing evidence of K.H.'s alleged financial difficulties, holding that the probative value of the evidence was outweighed by danger of prejudice and potential for confusion. However, the court did not preclude Mita from questioning K.H. about specific conversations he had with her regarding her finances. At trial, Mita testified that K.H. had told him she had financial problems. Upon the State's objection, and after hearing Mita's proffer of evidence and argument from the parties, the court ruled that evidence of K.H.'s finances was inadmissible under Arizona Rules of Evidence 402 and 403.

¶5 At trial, the State called a forensic nurse ("Bertino") as a witness who testified about the nature and healing of bruises. Mita objected to this testimony on competency grounds, which the court overruled, and then he moved for a mistrial claiming the State did not disclose Bertino as an expert witness. The court ultimately concluded the State

violated Arizona Rule of Criminal Procedure 15.1(b)(4)<sup>1</sup>, but denied Mita's motion for mistrial and his request to strike Bertino's testimony. The court offered to have Mita suggest alternative sanctions, allowed Mita an opportunity to re-interview Bertino and have her re-called as a witness, and afforded Mita's expert witness additional time to review Bertino's cited reference. Mita declined to suggest alternative sanctions.

¶6 During a discussion of jury instructions, Mita objected to the instruction regarding the definition of consent. Mita proposed an instruction which would clarify that a victim could still consent even if impaired by drugs or alcohol. The court denied Mita's request for the additional instruction, but added language to clarify that the burden is on the State to prove the "without consent" element. Neither the court nor counsel discussed the *mens rea* requirement applicable to the "without consent" element. The court instructed the jurors on the elements of sexual assault as follows:

The crime of sexual assault requires the State to prove any of the following: The defendant intentionally or knowingly caused another person to have oral contact with his penis without the other person's consent; or the defendant intentionally or knowingly penetrated the vulva or anus of another person with a part of his body without the other

---

<sup>1</sup> The court cited to former Arizona Rule of Criminal Procedure 15.1(a)(4). The applicable subsection was amended in 2008 and is now contained in Rule 15.1(b)(4).

person's consent.

Without consent includes but is not limited to any of the following: The victim is coerced by the immediate use or threatened use of force against a person or property; or the victim is incapable of consent by reasons of drugs, alcohol, sleep or any other similar impairment of cognition, and such condition is known or should have reasonably been known to the defendant.

¶7 A jury acquitted Mita of the sexual assault and related charges involving the first two victims, and three charges of sexual assault involving the third victim, but convicted him of the drug charges and one count of sexual assault and one count of aggravated assault of the third victim, K.H.<sup>2</sup> The judge sentenced Mita to consecutive terms in prison totaling eleven years. Mita filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, and - 4033(A)(1) (2010).

## **DISCUSSION**

### **I. Severance**

¶8 Mita argues the court fundamentally erred in failing to sever trial of the charges arising from separate assaults of the three women, claiming the court heard no testimony from the victims and failed to specify whether it found the victims or

---

<sup>2</sup> The court also found Mita guilty of three misdemeanor charges tried to the bench: theft from the first victim, assault of the second victim, and threatening or intimidating the third victim.

Mita more credible. We review a trial court's ruling on severance for abuse of discretion. *State v. Prince*, 204 Ariz. 156, 159, ¶ 13, 61 P.3d 450, 453 (2003). We likewise review a trial court's ruling on admissibility of evidence for abuse of discretion. *State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996). Because Mita failed to renew his severance motion "at or before the close of evidence," as required by Rule 13.4(c), however, we review for fundamental error only. See *State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996). Mita thus bears the burden of establishing error, that the error was fundamental, and that the error caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005).

¶9 When, as in this case, joinder is based solely on the offenses having the same or similar character, a defendant is entitled to severance "unless evidence of the other offense or offenses would be admissible under applicable rules of evidence if the offenses were tried separately." Ariz. R. Crim. P. 13.4(b). Denial of a motion to sever under Rule 13.4(b) requires reversal "if the evidence of other crimes would not have been admitted at trial" for a proper evidentiary purpose. *State v. Aguilar*, 209 Ariz. 40, 50-51, ¶ 38, 97 P.3d 865, 875-76 (2004) (citation omitted). Because the sexual contact in this case was between adults, cross-admissibility of the other acts

under Arizona Rule of Evidence 404(c) hinged on the court finding that clear and convincing evidence demonstrated that the sexual contact was without consent, an issue that relies on a credibility determination. See *Aguilar*, 209 Ariz. at 50, ¶ 35, 97 P.3d at 875.

¶10 At the evidentiary hearing on the motion to sever, the only live witness was a sexual abuse psychologist, who opined that Mita's sexual contacts with the victims evidenced a character trait giving rise to an aberrant sexual propensity under Rule 404(c). The State submitted as exhibits recordings of police interviews with the victims, the confrontation call D.D. made to Mita, and photographs showing extensive bruising that K.H. had reported she sustained during the assault. The State argued that the evidence showed the first victim was too intoxicated to consent, and Mita violently raped the other two women. Defense counsel argued the victims' allegations were not credible, contending: 1) each victim had a motive to fabricate the assault, 2) two of the victims continued to socialize with Mita after the alleged assaults, and 3) witness testimony showed that not all of K.H.'s bruising occurred the night of the alleged assault. The court verified with counsel before taking the issue under advisement that the only "issue is consent or lack of consent."

¶11 The court ruled that severance was not necessary or

appropriate because evidence of each of the alleged crimes would be cross-admissible at separate trials under Rule 404(b) and/or Rule 404(c). With respect to the Rule 404(b) analysis, the court found the State was capable of presenting clear and convincing evidence that the crimes alleged against each victim were of "the same or similar character (sexual contact without consent), [were] based upon the same or similar conduct by Defendant against each victim . . . , and could be seen as a common scheme or plan . . . ." With respect to the Rule 404(c) analysis, the court found 1) clear and convincing evidence demonstrated that defendant was "the person who had sexual contact with each victim," 2) "sexual contact without consent of each victim provides a reasonable basis to infer that Defendant had a character trait giving rise to an aberrant sexual propensity to commit the charged crimes," and 3) the evidentiary value of the proof was not substantially outweighed by the factors identified in Rule 403, taking into consideration each of the factors identified in Rule 404(c).

**¶12** Mita relies on *Aguilar* to argue that the court fundamentally erred because it heard no testimony from the victims and failed to make any finding on whether it found Mita's or the victims' version of events more credible. Unlike *Aguilar*, here the court heard the first-person accounts necessary to make the credibility determination when it reviewed



the recorded interviews of the victims and the confrontation call. See *State v. Lebrun*, 222 Ariz. 183, 187, ¶ 15, 213 P.3d 332, 336 (App. 2009) (holding the trial court did not err in finding charged acts were cross-admissible under Rule 404(c) when the court had the opportunity to hear the victims' own statements and first-person accounts of what they observed). Although the court did not separately and explicitly state it found clear and convincing evidence that Mita's sexual contact with each victim was "without consent," it implicitly did so in its finding that Mita's "sexual contact without consent of each victim" provided a reasonable basis to infer Mita's aberrant sexual propensity. The court did not phrase this finding in conditional language, as Mita alleges. To find that the sexual contact was without consent, the court necessarily had to believe the victims' version of events, and not Mita's, to the extent it was presented on the tape of the confrontation call. We are not persuaded that the court fundamentally erred to Mita's prejudice by failing to explicitly place on the record this credibility determination. Nor are we persuaded by Mita's argument that the wording of the court's minute entry shows that the court deferred this credibility determination to the jury.

¶13 Furthermore, Mita was acquitted of the majority of charges against him, and therefore, it is unlikely the jurors were unfairly influenced by the joinder of the charges. Thus,

Mita has not established any prejudice. Accordingly, we find the court did not fundamentally err in denying Mita's motion to sever.

## **II. Discovery Sanction**

¶14 Mita argues that the trial court abused its discretion in failing to properly sanction the State for its failure to disclose Bertino as an expert witness. Mita argues that the court's offer of a continuance was "no 'sanction' at all," and at the very least, the court should have stricken Bertino's testimony regarding her medical opinion on the cause and aging of bruises.

¶15 We review a trial court's imposition of sanctions for discovery violations for abuse of discretion. *State v. Lee*, 185 Ariz. 549, 555-56, 917 P.2d 692, 698-99 (1996). Arizona Rule of Criminal Procedure 15.7 identifies several sanctions a court may impose for failing to comply with disclosure rules, including "granting a continuance." A court may impose any remedy or sanction for nondisclosure that it finds just under the circumstances. Ariz. R. Crim. P. 15.7(a). "Preclusion is a sanction of last resort, to be imposed only if other less stringent sanctions are not applicable." *State v. Moody*, 208 Ariz. 424, 454, ¶ 114, 94 P.3d 1119, 1149 (2004) (citations and internal quotation marks omitted). In selecting the appropriate sanction, the courts should "seek to apply sanctions that affect

the evidence at trial and the merits of the case as little as possible since the Rules of Criminal Procedure are designed to implement, not to impede, the fair and speedy determination of cases." *State v. Fisher*, 141 Ariz. 227, 246, 686 P.2d 750, 769 (1984). In determining the appropriate sanction, the trial court must take into account "the significance of the information not timely disclosed, the impact of the sanction on the party and the victim[,] and the stage of the proceedings at which the disclosure is ultimately made." Ariz. R. Crim. P. 15.7(a).

**¶16** In denying Mita's motion for a mistrial, dismissal of the charges, or to strike Bertino's testimony about the nature and aging of bruises, the court found first, that the State had violated the discovery rules by failing to disclose Bertino as an expert. The court found, however, that defense counsel had interviewed this witness before trial "on the aging of bruising, specifically," and, in asking for her curriculum vitae, had treated her as more than a "percipient witness," acknowledging "that her testimony was beyond mere observation." The court further found that "the only material surprise to her testimony" was her specific reference to a study on the aging of bruises. The court ordered the State to provide defense counsel a copy of the article on which Bertino relied and offered defense counsel the opportunity to interview her on the study, and to recall her

as a witness on this issue. The court also noted that defense counsel had previously noticed his own medical expert to opine on the aging of bruises, and “[h]e [would] be afforded the time needed to review [Bertino’s] cited reference.” The court recognized, however, that “[t]he topic of aging bruises is not rocket science or brain surgery, but more an area within the common experience of lay jurors who are afforded the power to weigh expert opinion as they deem warranted.” The court finally invited defense counsel to seek remedies for the violation of the disclosure rules other than dismissal of the charges, a mistrial, or striking of the testimony, but defense counsel offered no alternatives.

¶17 The court did not abuse its discretion. First, we cannot say that “no reasonable judge would have reached the same result under the circumstances,” as necessary to find an abuse of discretion in his imposition of a sanction for a disclosure violation. *State v. Armstrong*, 208 Ariz. 345, 354, ¶ 40, 93 P.3d 1061, 1070 (2004) (citation omitted). Under similar circumstances, when the state failed to disclose the full scope of an expert witness’s testimony, our supreme court found that the trial court acted properly by giving the defendant an opportunity to re-interview the witness. *State v. Roque*, 213 Ariz. 193, 210-11, ¶¶ 51-52, 141 P.3d 368, 385-86 (2006).

¶18 Second, Mita has failed to show how he was prejudiced

by the court's ruling. For error to be harmless and not prejudicial, we must be able to say beyond a reasonable doubt that the error did not affect the verdict. *State v. Rienhardt*, 190 Ariz. 579, 586, 951 P.2d 454, 461 (1997). Both defense witness, Dr. Keen, and the State's witness, Dr. Corey, testified consistently with Bertino that the appearance of a bruise is affected by a variety of factors and that it's difficult to evaluate the exact age of a bruise. Thus, even without Bertino's testimony, the State was able to produce evidence of the uncertainty of the ages of bruises.

¶19 On this record, we conclude the court thoroughly and thoughtfully considered the appropriate factors in determining the sanction and did not abuse its discretion in denying the requested relief and instead allowing defense counsel the opportunity to re-interview Bertino and recall her as a witness on this issue. See *Roque*, 213 Ariz. at 210-11, ¶¶ 51-52, 141 P.3d at 385-86; *Moody*, 208 Ariz. at 454, ¶ 114, 94 P.3d at 1149.

### **III. Limitation on Cross-Examination**

¶20 Mita next argues the trial court impermissibly restricted defense counsel's cross-examination of K.H. concerning her financial difficulties, depriving him of the opportunity to argue she was motivated to falsely accuse him of sexual assault because he had refused to give her money.

¶21 The court initially ruled that defense counsel was

allowed to cross-examine K.H. on any conversations she had with Mita regarding money but precluded defense counsel from mentioning any financial judgments and/or lawsuits against K.H. "unless the information is backed up by prior conversations." At trial, Mita began to testify about conversations in which K.H. told him about her financial difficulties. Upon the State's objection and after hearing Mita's proffer of evidence and counsel's arguments outside the presence of the jury, the court found that K.H. never directly asked Mita to give her money, and Mita's conversations with K.H. regarding her finances did not imply that she did. Thus, other than evidence of K.H. actually asking Mita for money, the court precluded evidence of the victim's financial difficulties, "as collateral, speculative and an undue waste of time."

¶22 A defendant has the right under the Confrontation Clause to cross-examine a witness concerning her bias, motive, and prejudice, and on issues that directly bear on her credibility. See *Davis v. Alaska*, 415 U.S. 308, 316-18 (1974); see also *State v. Gertz*, 186 Ariz. 38, 41-42, 918 P.2d 1056, 1059-60 (App. 1995). Trial judges retain wide latitude, however, to impose reasonable limits on cross-examination, based on concerns about prejudice, confusion of the issues, and marginal relevance. *State v. Canez*, 202 Ariz. 133, 153, ¶ 62, 42 P.3d 564, 584 (2002). "We evaluate cross-examination

restrictions on a case-by-case basis to determine whether the defendant was denied the opportunity to present evidence relevant to issues in the case or the witness' credibility." *Id.* Although we ordinarily review evidentiary rulings for abuse of discretion, we review evidentiary rulings that implicate the Confrontation Clause *de novo*. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42, 140 P.3d 899, 912 (2006).

¶23 The court did not commit reversible error under the circumstances. Any specific financial difficulties that K.H. might have had at the time of the alleged sexual assault had little or no relevance on this record. K.H. testified she had never asked Mita for money, a claim Mita did not later dispute. Moreover, Mita told the court that the only time he had actually told K.H. he was not going to give her any money was in February 2010, two months after she filed the assault report with police and a month after she agreed to prosecute. Mita's theory that K.H. had fabricated the allegations because he refused to give her money was pure conjecture, not supported even by his own proffer under oath. The court's ruling that defense counsel could ask K.H. about any conversations in which she asked Mita for money, but could not cross-examine her about her specific financial difficulties, was a reasonable limitation for the reasons cited by the court: the precluded inquiry involved a collateral issue, its relevance was based on speculation, and it

would cause an undue waste of time. See *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982) (“The court may prevent cross-examination into collateral matters of a personal nature having minor probative value.”); *State v. Riley*, 141 Ariz. 15, 20, 684 P.2d 896, 901 (App. 1984) (“[T]he right of cross-examination . . . does not confer a license to run at large into irrelevant matters.”).

#### **IV. Jury Instruction**

¶24 Mita finally argues the trial court fundamentally erred in failing “to instruct on the *mens rea* of defendant concerning the ‘without consent’ element of the crime of sexual assault.” We review the adequacy of jury instructions in their entirety to determine if they accurately and adequately reflect the law. *State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000). We will not reverse “unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors.” *State v. Sucharew*, 205 Ariz. 16, 26, ¶ 33, 66 P.3d 59, 69 (App. 2003) (citation omitted).

¶25 Because Mita failed to object to the sexual assault instruction on the ground he now raises on appeal, we review this claim of error for fundamental error only. See *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Accordingly, Mita has the burden to show error, that the error was fundamental, and that he was prejudiced thereby. See *id.* at 567, ¶ 20, 568, ¶



22, 115 P.3d at 607, 608.

¶26 The court instructed the jury pursuant to A.R.S. § 13-1406(A) (2010), that to convict Mita of the offense of sexual assault, it must be convinced beyond a reasonable doubt that:

The defendant intentionally or knowingly caused another person to have oral contact with his penis without the other person's consent; or the defendant intentionally or knowingly penetrated the vulva or anus of another person with a part of his body without the other person's consent.

The court further defined "without consent" pursuant to A.R.S. § 13-1401(5) (a) (2010) as including, but not limited to, when "[t]he victim is coerced by the immediate use or threatened use of force against a person or property," and pursuant to A.R.S. § 13-1401(5) (b) as when the victim is incapable of consent because of drugs, alcohol, sleep, or similar impairment, and "such condition is known or should have reasonably been known to the defendant."

¶27 Mita relies on *State v. Kemper*,<sup>3</sup> 229 Ariz. 105, 271 P.3d 484 (App. 2011), to argue the court fundamentally erred in

---

<sup>3</sup> In *Kemper*, the trial court instructed the jury as follows:

The crime of sexual assault requires proof that the defendant:

1. Intentionally or knowingly engaged in sexual intercourse or oral sexual contact with another person; **and**
2. Engaged in the act without the consent of the other person.

failing to instruct the jury that a defendant "must actually know the sex is unwanted." Mita argues the language "intentionally or knowingly" in the instruction modifies only "engaging in," not "without consent." Although the "without consent" instruction given to the jury pursuant to A.R.S. § 13-1401(5)(b) included the appropriate *mens rea* element, Mita claims that definition was inapplicable to K.H., the only victim as to whom he was convicted, because there was no evidence of a mental disorder, defect, intoxication, or sleep. He argues that the additional "without consent" definition given to the jury that was directly applicable to Kimberly H., dealing with coercion or threat of force lacked the necessary *mens rea* element required by *Kemper*.<sup>4</sup>

¶28 The instructions in this case are distinguishable from those given in *Kemper*, which we found required reversal. See *Kemper*, 229 Ariz. at 106-07, ¶¶ 5-7, 271 P.3d at 485-86. In *Kemper*, the instruction entirely omitted the *mens rea* from a separately identified lack of consent requirement of the offense. See *id.* at 106, ¶ 3, 271 P.3d at 485. The *Kemper* instruction was artificially divided into two subsections with

---

229 Ariz. at 106, ¶ 3, 271 P.3d at 485.

<sup>4</sup> The State's theory was that Mita coerced K.H. into engaging in sex with him "by the immediate use or threatened use of force," under the definition of "without consent" found in A.R.S. § 13-1401(5)(a), and by ignoring her pleas for him to stop.

only the first subsection including a *mens rea*. *Id.* This division suggested the State only had to prove the defendant “knowingly” engaged in sexual contact, leaving no room for the defendant to argue he did not know the sexual contact was without consent. *See State v. Cagle*, 228 Ariz. 374, 377-78, 266 P.3d 1070, 1073-74 (App. 2011) (for the proposition that when a statute distinguishes among the elements of an offense using subsections, and only one of the subsections contains a prescribed mental state, that mental state does not apply to the separately identified elements in the other subsections).

¶29 In contrast, the first instruction here, which tracked A.R.S. § 13-1406(A), identified the *mens rea* applicable to the entire offense, including without consent. Unlike in *Kemper*, the instruction was not arbitrarily divided into two parts; rather it was constructed so that the requisite mental state, “knowingly,” applied to all elements of the offense. *See* A.R.S. § 13-202(A) (2010) (“If a statute defining an offense prescribes a culpable mental state . . . without distinguishing among the elements of such offense, the prescribed mental state shall apply to each such element . . . .”). The instruction was taken directly from the applicable statute and allowed Mita to argue his theory that the victims consented to the sexual contact. *See State v. Witwer*, 175 Ariz. 305, 309, 856 P.2d 1183, 1187 (App. 1993).

¶30 Moreover, unlike in *Kemper*, the court further enlightened the jury on the appropriate legal standard by defining "without consent" pursuant to A.R.S. § 13-1401(5)(a) and (b). See *Kemper*, 229 Ariz. at 107 n.2, ¶ 5, 271 P.3d at 486 n.2. In doing so, the court used the statutory language of A.R.S. § 13-1401(5) so not to exclude other types of lack of consent: "Without consent includes but is not limited to any of the following . . . ." The definitions of "without consent" given to the jury were examples and not the only ways the State could prove lack of consent. This was made clear for the jury during the State's closing argument in which the prosecutor stated, "there's many different ways in which you can find that someone did not give their consent . . . some of which are listed in your instructions." Thus, each example provided to the jury did not need to contain its own separate *mens rea*. The applicable *mens rea* for the entire offense was included in the instruction.

¶31 Even if the jury found the instruction ambiguous or confusing with respect to whether "knowingly" applied to the "without consent" element, the court's inclusion of the definition of "knowingly" made the State's burden clear. The court defined "knowingly" to mean "the defendant acted with awareness of or belief in the existence of conduct or circumstances constituting an offense. [Knowingly] does not

mean the defendant must have known that the conduct was forbidden by law." This definition correctly instructed the jury as to the State's burden and allowed Mita to argue that he believed the victims consented. See *Witwer*, 175 Ariz. at 309, 856 P.2d at 1187.

¶32 Finally, counsels' closing arguments provided additional guidance to the jury. See *State v. Milke*, 177 Ariz. 118, 123, 865 P.2d 779, 784 (1993) (holding a jury was not misled by a deficient jury instruction when counsels' closing arguments adequately covered the defense's theory); see also *State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989) ("Appellate courts do not evaluate jury instructions out of context. Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions." (citation omitted)). During closing arguments, Mita's counsel adequately covered his defense theory that the State had failed to prove Mita knew the victims had not consented: "He doesn't think he raped her and rough sex does not equal rape." Mita's counsel further argued that in light of the fact that the State was unsure of its own theory as to what acts were consensual, Mita could not have known the sexual contact with the victims was without consent. Mita's closing arguments clarified for the jury that the State was required to show Mita knew the acts were not consensual.

¶33 The State's closing argument also clarified the State's burden. In his closing, the prosecutor instructed the jury that a victim need not say the word "no" to communicate lack of consent. He argued that a lack of consent can be communicated "in her words, her body language, anything." This argument implies that a lack of consent must have been somehow communicated to Mita for him to be convicted.

¶34 Thus, any ambiguity in the jury instruction was cured by counsels' closing arguments. Under these circumstances, we are not persuaded that the court committed any error, let alone fundamental error.

#### CONCLUSION

¶35 For the foregoing reasons, we affirm Mita's convictions and sentences.

/s/  
\_\_\_\_\_  
DONN KESSLER, Judge

CONCURRING:

/s/  
\_\_\_\_\_  
ANN A. SCOTT TIMMER, Presiding Judge

/s/  
\_\_\_\_\_  
PATRICIA K. NORRIS, Judge