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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: 6/25/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 12-0016  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
) Rule 111, Rules of the  
AARON WASHINGTON, ) Arizona Supreme Court)  
)  
Appellant. )  
)  
)  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-006294-001

The Honorable Daniel G. Martin, Judge

**AFFIRMED**

Thomas C. Horne, Attorney General Phoenix  
by Joseph T. Maziarz, Acting Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
by Thomas K. Baird, Deputy Public Defender  
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Defendant Aaron Washington appeals his convictions and sentences for kidnapping, sexual abuse, and child molestation. He contends the trial court erred by stating on record that the victim had identified him and rejecting his claim of prosecutorial misconduct. Finding no error, we affirm.

#### FACTS AND PROCEDURAL BACKGROUND

¶2 Washington was indicted for two counts of kidnapping, three counts of sexual abuse, and one count of child molestation following his attack of two teenage girls. At trial, both victims testified about their attacks and positively identified Washington as their assailant. The jury found him guilty of the three counts related to R.F. but acquitted him of the remaining counts related to D.J. After sentencing, Washington appealed.

#### DISCUSSION

##### I

¶3 Washington contends the court erred by stating that R.F. had identified him as her assailant during trial.<sup>1</sup> He

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<sup>1</sup> The in-court identification by R.F. proceeded as follows:

Q [R.F.], I'm going to ask you again, do you see the person that did this to you that day in court today?

A Yes.

Q Can you tell us what he looks like? What he's wearing and where he's seated.

contends that his shirt was a different color. Because Washington failed to object at trial, we review his claim for fundamental prejudicial error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶14 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.* "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* at ¶ 20.

¶15 Here, there is nothing in the record to indicate that the court erred by stating that the record reflected that R.F. had identified the defendant during trial. R.F. testified where Washington was sitting, what type of shirt he was wearing, and

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A He's seated to the left of me.

Q What kind of clothes does he have on?

A A button up shirt.

Q What color?

A He [sic] looks greenish.

[Prosecutor]: Your Honor, may the record reflect the identification of the defendant?

The Court: *The record will so reflect.*

(Emphasis added.)

that his shirt was greenish. The court observed and heard her testimony and noted, without objection, that the record would reflect she had identified Washington, regardless of how she perceived the precise color of his shirt.

¶16 The jury was also listening and watching R.F. and was free to find that R.F. had identified Washington by his shirt or its hue, or to reject her identification. Any potential deficiency in R.F.'s ability to identify Washington properly goes to credibility, which is a question for the jury. See *State v. Myers*, 117 Ariz. 79, 84-85, 570 P.2d 1252, 1257-58 (1977). Because there is nothing in the record to suggest that his shirt did not appear greenish, we find no fundamental error here.

¶17 Moreover, Washington has failed to demonstrate any resulting prejudice. See *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. Although Washington argues that the court's statement of what the record reflected supplanted the jury's independent responsibility to evaluate the identification, there is no support for his speculation. Washington had a full and fair opportunity to thoroughly cross-examine R.F. regarding her direct testimony identifying Washington, and did so. We presume the jury "[was] capable of assessing the credibility of a witness and the weight to be given to testimony constituting a less-than-positive identification," *State v. Neito*, 118 Ariz.

603, 606, 578 P.2d 1032, 1035 (App. 1978), and followed the court's instructions "not [to] be concerned with any opinion [it] feel[s] [the court] ha[d] about the facts." See *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006) (stating that "[w]e presume that the jurors followed the court's instructions"). Consequently, we find no error in the court's statement that the record would reflect that R.F. identified Washington during her trial testimony.

## II

¶8 Washington also contends the court abused its discretion by denying his motion for new trial on the basis of prosecutorial misconduct. We disagree.

¶9 "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, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Because "misconduct alone will not cause a reversal," *State v. Hallman*, 137 Ariz. 31, 37, 668 P.2d 874, 880 (1998), "the focus is on the fairness of the trial, not the culpability of prosecutor." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993).

¶10 Prosecutors have an obligation to not knowingly encourage or present false testimony. *State v. Rivera*, 210

Ariz. 188, 194, ¶ 28, 109 P.3d 83, 89 (2005). However, “[c]ontradictions and changes in a witness’s testimony alone do not constitute perjury and do not create an inference, let alone prove, that the prosecution knowingly presented perjured testimony.” *Tapia v. Tansy*, 926 F.2d 1554, 1563 (10th Cir. 1991).

¶11 Here, the court did not abuse its discretion in finding that there was no prosecutorial misconduct. Although R.F. testified inconsistently about whether she had spoken to the prosecutor during a break,<sup>2</sup> she clearly testified that no one

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<sup>2</sup> On cross-examination, R.F. testified as follows:

Q Have you talked to any of the officers or the prosecutor *about any of your testimony that you have or will be giving today* before you came here?

A Today?

Q Either today, today on our break. We just had lunch. Any time.

A No.

(Emphasis added.)

On redirect, she testified as follows:

Q Have we met a couple of times over the last few months?

A Only once.

Q Once. And *I’ve talked to you today outside and on breaks*; is that right?

had coached her during the break. The jury, then, could assess that inconsistent testimony to determine whether R.F. was credible and whether the State had produced sufficient evidence to prove beyond a reasonable doubt that Washington had attacked her as alleged in the indictment. The fact that Washington was acquitted of the charges related to D.J. demonstrates that the jurors were attentive to the testimony of each victim, independently determined their credibility and whether the State met its burden of proof.

¶12 Moreover, despite Washington's contention that he was unable to fully examine and impeach R.F. regarding the substance of her conversation with the prosecutor, there is nothing in the record to suggest Washington was prohibited from requesting the opportunity to re-cross-examine R.F. about the conversation. He chose not to. Consequently, we find no abuse of discretion in the court's denial of Washington's motion for new trial.

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A Yes.

Q At any time have I or the detective or anyone, anybody, told you what you needed to say?

A No.

Q Is everything that you're telling us here today the truth?

A Yes.

**CONCLUSION**

¶13 Based on the foregoing, we affirm Washington's convictions and sentences.

/s/

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MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

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SAMUEL A. THUMMA, Judge

/s/

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DONN KESSLER, Judge