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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LONNIE KOHLER, *Appellant*.

No. 1 CA-CR 15-0404
FILED 7-27-2017

Appeal from the Superior Court in Maricopa County
No. CR 2013-003609-001
The Honorable John R. Ditsworth, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By David A. Simpson
Counsel for Appellee

Brown & Little, P.L.C., Tempe
By Matthew O. Brown
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Jon W. Thompson joined.

H O W E, Judge:

¶1 Lonnie Kohler appeals his convictions and sentences for four counts of sexual conduct with a minor, class 2 felonies, and one count of influencing a witness, a class 5 felony. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Kohler began touching his daughter, K.K., in a sexual way when she was ten years old, and continued to do so over the next few years. One day in early August 2011, when K.K. was 14 years old, Kohler forced her to have sexual intercourse with him three separate times. Having had enough, K.K. ran away from their Mesa home that day to find a police station and report Kohler. A group of teens from whom she asked for directions at a fast-food restaurant called 9-1-1.

¶3 Police officers met K.K. at the restaurant and took her to a local advocacy center to interview her and to have her undergo a sexual assault examination. The sexual assault nurse examiner found tears in K.K.'s hymen indicative of penetration. Sperm on K.K.'s underwear had DNA matching Kohler's, and Kohler could not be excluded as the donor of DNA on an external genital swab taken from K.K.

¶4 While at the advocacy center, police officers facilitated a confrontation call between K.K. and Kohler, who denied any wrongdoing. Later that evening, officers went to Kohler's apartment, but he did not answer the door. The officers reached Kohler by phone the next day to arrange a meeting with him, which Kohler agreed to do. Instead, he fled with his son to property near Show Low and did not appear. Police apprehended Kohler six months later when he attended a deposition for an unrelated civil lawsuit. The State charged Kohler with four counts of sexual misconduct with a minor.

¶5 While in jail, Kohler made several calls – tape recorded by the jail – to his mother and son, repeatedly instructing them to convince K.K. to recant. He told them to tell K.K. that he was going to give her money that

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he expected to win in the unrelated civil lawsuit. K.K.'s grandmother obliged and called K.K. several times, telling her to recant and offering her money from the lawsuit if she did so. The State consequently also charged Kohler with one count of influencing a witness. Kohler moved to sever the influencing charge from his other charges, but the trial court denied his motion.

¶6 The case proceeded to a 14-day trial. As part of the State's opening statement, the prosecutor said that since the alleged abuse, K.K. had become a vocal advocate against sexual assault. When she took the stand, K.K. explained that she often participated in public speaking engagements on the subject. Kohler did not initially object, but did when she commented that she became an advocate "because child abuse is such a, it's such a rampant thing in America." In objecting, Kohler explained that "while I don't mind the victim talking about what she's doing right now, I think just getting up and using her testimony as a platform against child abuse is inappropriate." The court noted that the victim was only speaking of what she did after school, but told the State to ask her next question because the response was "becoming a narrative." The State subsequently asked the victim about the specific speaking engagements without further objection. On cross-examination, Kohler questioned K.K. extensively about her speaking engagements, attempting to show that she had fabricated the sexual abuse allegations because she enjoys the attention and wanted to "gain her freedom." On redirect, without objection, the State asked additional questions about K.K.'s speaking engagements.

¶7 The State also asked K.K. about her childhood. K.K. relayed that she had not had a stable home as a child because "we didn't have money. And whatever money we did have for a long time was spent on drugs." Kohler objected for lack of foundation and relevance. The court sustained the objection on the foundation ground and, on Kohler's request, struck the answer. Kohler also moved for mistrial, but the court denied, reasoning that it did not believe that the State had intentionally elicited the reference to drugs.

¶8 As part of its case-in-chief, the State also called C.C., the daughter of Kohler's former girlfriend, who testified that Kohler had raped her in 2010 when she was about 11 years old. The State asked C.C. to describe the incident in detail. C.C. stated that she, Kohler, and the other siblings were in the living room when Kohler "said he had alcohol and wanted to go into his part of the trailer," and that she went with him "to drink." Kohler objected, arguing that eliciting information about giving alcohol to a minor was improper under Arizona Rule of Evidence ("Rule")

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404(b) and therefore moved for mistrial. The court overruled Kohler's objection and denied his motion, finding that although admissibility of the use of alcohol under Rule 404(b) had not been considered or ruled on, the use of alcohol had been previously disclosed and the State had not deliberately elicited this evidence, reasoning, "I think we're dealing with children and young witnesses."

¶9 C.C.'s mother also testified, stating that despite the alleged conduct with her daughter, nothing came of the allegations. The State asked C.C.'s mother if she was aware that after C.C. reported the sexual misconduct to police, another woman "hid [Kohler] for two-and-a half years." Kohler objected on grounds of speculation because the mother had no personal knowledge about it. The court sustained and subsequently ordered that the answer be stricken. The court denied Kohler's subsequent request for mistrial, however, after the State explained that Kohler opened the door by questioning the witness extensively on Kohler's whereabouts after C.C. reported the sexual misconduct to police. The State also avowed that it did not know whether the mother knew that the woman had been hiding him.

¶10 The State also called the detective who did a forensic interview with C.C. and her mother as part of the investigation against Kohler. During cross-examination, Kohler argued that he should be allowed to ask the detective about the Navajo County Attorney's Office decision not to pursue charges regarding C.C., because this decision was relevant to the investigating detective's state of mind and to explain why he "stopped working on the case in December of 2010," when he received a letter from the county attorney declining to pursue charges.¹ When the State pointed out that the detective had continued to investigate C.C.'s allegations for several years after December 2010, Kohler stated that he merely wanted to explore "the effect on the listener, effect on [the detective], that he had an indication from the County Attorney's Office that they weren't pursuing charges." The court sustained the State's objection on hearsay and relevance grounds.

¶11 Kohler testified on his own behalf, denying that he had engaged in any sexual conduct with either K.K. or C.C., and repeating

¹ Because Kohler failed to ensure that the letter was forwarded to this court, we presume its contents supported the trial court's ruling. *See State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982).

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C.C.'s mother's testimony that no charges ever came of C.C.'s allegations. He further testified that after he spoke with the officers and agreed he would meet with them the day following K.K.'s report, he rented a car and drove to Show Low to evade arrest on the advice of his lawyer, who told him "don't you dare go" to the meeting. Kohler also stated that his lawyer told him to return to Mesa for an appointment with her two days later, which he claimed that he did before returning to Show Low. On cross-examination, the State asked Kohler whether he had reason to believe that the lawyer whom he claimed advised him to flee and hide out to avoid arrest was a "shady lawyer." Kohler said that he did not because of who recommended him to the lawyer.

¶12 Throughout the State's cross-examination, Kohler made several objections to the State's questioning as argumentative or improperly commenting on the evidence. After some of those objections, however, the State continued with a different line of questioning before the court ruled. When the State concluded its cross-examination, Kohler pointed out to the court that the State "disregards [the] objection and just continues and asks the question." The court stated that it recognized that it had happened and that it had commented on the matter earlier, then asked counsel to "please avoid stepping on your objections." Additionally, in posing questions to the investigating detective on redirect, the prosecutor noted that defense counsel had suggested that the detective had misled the grand jury as to which bedroom the second sexual assault occurred, and asked, "In fact, was [defense counsel] being somewhat misleading because you, just prior to making that statement . . . [you] clarified that that incident occurred in [Kohler's] bedroom?" Kohler objected that the question was argumentative. The court agreed, and the prosecutor rephrased the question.

¶13 Toward the end of trial, Kohler moved for a judgment of acquittal on the influencing a witness charge and one charge of sexual misconduct with a minor. Kohler argued that because the State had not charged the offense with a theory of accomplice liability, the State should have but failed to present sufficient evidence that he had direct contact with K.K. during the relevant period. He also argued that insufficient evidence supported the fourth sexual misconduct charge because K.K.'s testimony regarding the relevant incident was non-specific and could not support a conviction. The trial court denied the motion, however, finding that, considering the evidence in the light most favorable to the State, sufficient evidence existed to allow all charges to go to the jury. The court also stated that although the indictment did not plead the influence charge with an accomplice liability theory, the State could conform the indictment to fit the

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evidence as presented. The court therefore concluded that giving the jury instructions regarding the accomplice liability was appropriate.

¶14 In making its closing argument the next day, the State thoroughly walked through each of the charges and the evidence presented to support them. During its rebuttal argument, the State told the jury that “there’s no evidence of [the lawyer], except for the defendant’s testimony.” Kohler objected, arguing that the State had misstated his argument. The State followed up, stating, “Okay. I take it back. There’s no evidence that there was a meeting on the 11th.” The trial court interjected, reminding the jurors that they needed to look at and rely on their own notes and memories to establish what the facts presented were. Kohler did not voice further concerns.

¶15 The jury convicted Kohler of the charged offenses and found that K.K. was 14 years or younger. Kohler admitted the presence of two aggravating factors: the offenses caused physical and emotional harm to the victim, and Kohler abused a position of trust with the victim. The court imposed aggravated sentences of 27 years on each of the four sexual misconduct convictions, and two years on the conviction for influencing a witness, all terms to be served consecutively, for a total of 110 years in prison. Kohler timely appealed.

DISCUSSION

1. Prosecutorial Misconduct

¶16 Kohler argues that the prosecutor’s misconduct throughout trial requires reversal. To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor’s misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. *State v. Morris*, 215 Ariz. 324, 335 ¶ 46, 160 P.3d 203, 214 (2007). Prosecutorial misconduct constitutes reversible error only if (1) misconduct occurred and (2) a reasonable likelihood exists that the misconduct could have affected the jury’s verdict, thereby depriving the defendant of a fair trial. *Id.* Because Kohler has failed to show that the prosecutor committed any misconduct, his claims fail.

1a. K.K.’s Public Speaking Engagements

¶17 Kohler argues first that the prosecutor committed misconduct by mentioning in opening statement that K.K. engaged in public speaking about being a victim of child abuse and by examining the victim at length about her public speaking. Because he did not object at trial on the grounds

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he now raises on appeal, we review this claim of prosecutorial misconduct for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 568 ¶ 22, 115 P.3d 601, 608 (2005). Kohler has failed to meet his burden on fundamental error review.

¶18 Here, the prosecutor asked K.K. about her extra-curricular activities and what her advocacy entailed. The trial court stated that K.K.'s testimony on her advocacy spoke only to what she did after school and was not improper. Kohler also questioned K.K. extensively about her speaking engagements, attempting to show that she had fabricated the sexual abuse allegations because she enjoyed the attention. Regardless, the evidence that K.K. engaged in public speaking to assist victims of sexual abuse was relevant to refute Kohler's defense that K.K. was immature and impulsive and made up the allegations of abuse "to gain her freedom." Moreover, Kohler's strategic use of this evidence to support his defense shows that any error in allowing the evidence did not rise to the level of fundamental, prejudicial error.

1b. Money Spent on Drugs

¶19 Kohler next argues that the prosecutor engaged in misconduct by deliberately eliciting testimony from K.K. that Kohler spent all his money on drugs. The court sustained Kohler's objection to this statement for lack of foundation and, upon Kohler's request, struck the answer. The court also stated that it did not believe that the prosecutor had intentionally elicited the reference to drugs. The court was in the best position to ascertain if the improper reference to drugs was deliberate, and Kohler has provided us no basis to find that ruling erroneous. *See State v. Lamar*, 205 Ariz. 431, 440 ¶ 45, 72 P.3d 831, 840 (2003) (stating that the defendant's allegation of misconduct "conflicted" with the trial court's finding otherwise—a finding of fact that was not clearly erroneous). The court also repeatedly instructed the jury that it should not consider evidence that had been stricken. Because nothing in this record indicates that the jury failed to heed this instruction, we presume the jury followed it. *See State v. Newell*, 212 Ariz. 389, 403 ¶ 68, 132 P.3d 833, 847 (2006). Under these circumstances, the prosecutor did not engage in misconduct.

1c. Testimony from C.C. and Her Mother

¶20 Kohler also argues the prosecutor engaged in misconduct by asking C.C.'s mother if she was aware that after C.C. reported the sexual misconduct to police, another woman hid the defendant, knowing that the witness had no personal knowledge on this issue. Kohler has provided us

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no basis to conclude that the court erred in denying a mistrial, with its implicit underlying finding that the prosecutor had not deliberately engaged in misconduct. *See Lamar*, 205 Ariz. at 440 ¶ 45, 72 P.2d at 840. In addition, because the court struck the answer, and repeatedly instructed the jury it should not consider evidence that had been stricken, this testimony could not have affected the jury, as necessary for reversal on this basis. *See State v. Jones*, 197 Ariz. 290, 305 ¶ 37, 4 P.3d 345, 360 (2000).

¶21 Kohler also argues that the prosecutor engaged in misconduct by asking C.C. questions that elicited testimony alluding that Kohler gave alcohol to a minor before the final incident of sexual misconduct against her. But Kohler has not shown that the court erred in making its finding that the prosecutor did not deliberately elicit these references, or that the brief reference to alcohol prejudiced him. Under these circumstances, the prosecutor did not commit misconduct by this line of questioning.

1d. References to Kohler's Lawyer

¶22 Kohler argues that the prosecutor engaged in misconduct when she asked Kohler whether he had reason to believe that the lawyer whom he claimed advised him to flee the county and hide out in Show Low to avoid arrest on the instant charges was a "shady lawyer." Kohler did not object at the time, limiting this court to fundamental error review. *See Henderson*, 210 Ariz. at 568 ¶ 22, 115 P.3d at 608. Kohler has failed to meet his burden on fundamental error review. The question was appropriate under the circumstances, because it was designed to show that Kohler's claim that a lawyer had advised him to flee police and hide out, risking her law license, was fabricated.

¶23 Kohler also argues that the prosecutor misrepresented the evidence by arguing that no evidence other than Kohler's testimony showed that the lawyer whom he consulted after K.K. ran away existed. In context, the prosecutor appears to have been arguing, however unartfully, that no corroborating evidence supported Kohler's claims regarding this lawyer's advice to flee the jurisdiction, or that he returned to Mesa two days later to meet with her. This argument fairly represented the evidence. The court also minimized any prejudice from any possible misrepresentation by reiterating that the jurors were the sole judge of the facts based on their own notes and recollections of the evidence.

¶24 Kohler also asserts that this argument constituted improper burden shifting. The law is well-settled, however, that "when a prosecutor comments on a defendant's failure to present evidence to support his or her

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theory of the case, it is neither improper nor shifts the burden of proof to the defendant so long as such comments are not intended to direct the jury's attention to the defendant's failure to testify." *State v. Sarullo*, 219 Ariz. 431, 437 ¶ 24, 199 P.3d 686, 692 (App. 2008) (holding that prosecutor did not shift the burden of proof to defendant by arguing that he had failed to call expert witnesses to support his theory of defense); *State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (holding that prosecutor's argument that defendant failed to present any evidence in support of his theory that eyewitnesses were mistaken was not improper). Similarly, "nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it." *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987). Kohler could have waived any privilege and called the lawyer as a witness, to confirm that she had instructed him to flee and hide out in Show Low. See *State v. Cuffle*, 171 Ariz. 49, 51, 828 P.2d 773, 775 (1992). He did not. The prosecutor's argument accordingly was not improper.

1e. Impugning Defense Counsel's Integrity

¶25 Kohler argues that the prosecutor cast aspersions on defense counsel's integrity by disregarding her objections. On appeal, Kohler mentions only his complaint after the prosecutor completed cross-examination of Kohler that the prosecutor had ignored several of his counsel's objections, and the court's response. But Kohler fails to cite to the specific portions of the cross-examination of Kohler that support his argument. We have reviewed the entire cross-examination, however, and conclude that the prosecutor did not commit any misconduct.

¶26 Kohler also argues that the prosecutor engaged in misconduct by accusing defense counsel of "being misleading" when conducting the redirect examination of the investigating detective. In context, however, the prosecutor's question was argumentative, as the court acknowledged, but did not constitute misconduct.

1f. Power Point Presentation

¶27 Kohler also argues that the prosecutor engaged in misconduct by using an undisclosed booking photo of him in a "misleading" Power Point presentation during closing argument. Kohler does not argue how that Power Point presentation was misleading, and accordingly we decline to review this aspect of his claim. See *State v. Moody*, 208 Ariz. 424, 452 n.9 ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) (providing that failure to present "significant arguments, supported by authority" in opening brief waives

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the issue). The record refutes Kohler’s claim that the State failed to disclose the booking photo, defeating the other aspect of this claim.

1g. Cumulative Error

¶28 Kohler’s argument that the cumulative effect of the incidents requires reversal also fails. Kohler has failed to demonstrate that the “prosecutor intentionally engaged in improper conduct and did so with indifference, if not specific intent, to prejudice the defendant,” as necessary to reverse for cumulative error. *See State v. Gallardo*, 225 Ariz. 560, 568, 570 ¶¶ 35, 46–47, 242 P.3d 159, 167, 169 (2010).

2. Sufficiency of Evidence

¶29 Kohler argues that the court erred when it denied his motion for judgment of acquittal on the charge of influencing a witness because the State did not offer evidence showing that Kohler himself asked the victim to recant, and accomplice liability was not charged in the indictment and therefore was not a proper theory of liability. But Kohler’s argument is misplaced. Although the indictment did not allege accomplice liability, nothing requires an indictment to charge a defendant as an accomplice to permit a jury instruction to that effect, because “[u]nder Arizona law, an accused is a principal regardless of whether he directly commits the illegal act or aids or abets in its commission.” *State v. McInelly*, 146 Ariz. 161, 162–63, 704 P.2d 291, 292–93 (App. 1985). The court in this case construed the evidence as supporting a theory of accomplice liability, and accordingly appropriately instructed the jury on accomplice liability.

¶30 We review the denial of a motion for judgment of acquittal and the sufficiency of the evidence to support a conviction de novo. *State v. West*, 226 Ariz. 559, 562 ¶ 15, 250 P.3d 1188, 1191 (2011). We view the facts in the light most favorable to upholding the jury’s verdict, and resolve all conflicts in the evidence against the defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). In reviewing the denial of a motion for judgment of acquittal, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *West*, 226 Ariz. at 562 ¶ 16, 250 P.3d at 1191. “[W]hen reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal.” *Id.* at 563 ¶ 18, 250 P.3d at 1192.

¶31 A person influences a witness if “such person threatens a witness or offers, confers or agrees to confer any benefit upon a witness in

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any official proceeding or a person he believes may be called as a witness with intent to . . . [i]nfluence the testimony of that person.” A.R.S. § 13-2802(A)(1). A person acts as an accomplice in pertinent part if “with the intent to promote or facilitate the commission of an offense,” he “[s]olicits or commands another person to commit the offense.” A.R.S. § 13-301(1).

¶32 The evidence and reasonable inferences therefrom, viewed in the light most favorable to supporting the conviction, was sufficient to show that Kohler offered to give money to K.K. intending to influence her testimony. As evident from the jail call recordings, Kohler repeatedly told K.K.’s brother and grandmother to tell K.K. to recant, explaining that he would give her money that he would win from a pending civil lawsuit only if she recanted. Although Kohler was careful to state in these jail calls that he had always intended to give K.K. money he won in the lawsuit, the jury could have reasonably inferred that he intended to offer the money in exchange for her recantation. K.K.’s grandmother subsequently called K.K. several times, telling her to recant, and offering her money from Kohler’s lawsuit if she did so. On this record, the court did not err by denying a motion for judgment of acquittal.

3. Preclusion of Evidence

¶33 Kohler argues that the court deprived him of his due process rights by precluding him from introducing evidence that the Navajo County Attorney’s Office declined to pursue charges against him for the alleged sexual abuse of C.C. – an allegation introduced by the State as other act evidence under Arizona Rule of Evidence 404(c). Although we ordinarily review evidentiary rulings for an abuse of discretion, we review evidentiary rulings that implicate a defendant’s constitutional rights *de novo*. *State v. Ellison*, 213 Ariz. 116, 129 ¶ 42, 140 P.3d 899, 912 (2006).

¶34 Kohler argues for the first time on appeal that the evidence was relevant to explain *his* state of mind; that is, if Kohler was aware of the decision not to prosecute the charges involving C.C., he would have had no reason to hide. Kohler also appears to suggest that the letter was relevant to show that C.C.’s allegations were not credible. Because Kohler failed to raise either of these arguments with the trial court, we review this issue only for fundamental error. *See Henderson*, 210 Ariz. at 568 ¶ 22, 115 P.3d at 608. Neither of these arguments have merit.

¶35 No evidence suggested that Kohler was aware of any such decision not to prosecute. The evidence accordingly was not relevant to

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explain his state of mind. The evidence in the record also fails to show the decision not to prosecute “pending new evidence” would have been probative on the issue of C.C.’s credibility. Moreover, any such use of the letter also would violate the rules against hearsay. *See* Ariz. R. Evid. 801(c) and 802. Finally, admitting the Navajo County Attorney’s letter that it would not pursue charges to attack C.C.’s credibility would have been improper because it “infringes upon the jury’s prerogative to determine the ultimate question” in the case. *State v. Moran*, 151 Ariz. 378, 382–83, 728 P.2d 248, 252–53 (1986).

¶36 Additionally, C.C.’s mother had already testified that nothing ever came of those charges, and Kohler himself testified that he was never arrested based on C.C.’s allegations. Kohler also argued in closing that the fact that he was never arrested based on C.C.’s allegations should be considered in evaluating those allegations. On this record, the court did not err, much less fundamentally err to Kohler’s prejudice, by precluding testimony regarding this letter.

4. Denial of Severance

¶37 Kohler argues that the court abused its discretion by denying his motion to sever trial of the sexual misconduct charges from trial of the charge of influencing a witness. We review a trial court’s ruling on a motion to sever for abuse of discretion. *State v. Prince*, 204 Ariz. 156, 159 ¶ 13, 61 P.3d 450, 453 (2003). “When a defendant challenges a denial of severance on appeal, he must demonstrate compelling prejudice against which the trial court was unable to protect.” *Id.* The court here did not abuse its discretion.

¶38 A trial court must grant a motion to sever charges if “necessary to promote a fair determination of the guilt or innocence of any defendant of any offense.” Ariz. R. Crim. Pro. 13.4(a). “In deciding whether to grant a severance the court must balance the possible prejudice to the defendant against interests of judicial economy.” *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). Arizona Rule of Criminal Procedure 13.3(a)(2) provides that joinder is permissible if the offenses “[a]re based on the same conduct or are otherwise connected together in their commission.” Offenses are “otherwise connected together in their commission” when “evidence of the two crimes was so intertwined and related that much the same evidence was relevant to and would prove both, and the crimes themselves arose out of a series of connected acts.” *State v. Prion*, 203 Ariz. 157, 162 ¶ 32, 52 P.3d 189, 194 (2002).

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¶39 No error occurred here. Evidence that Kohler offered the victim money to recant was so intertwined and related to the allegations of sexual misconduct that he wanted her to recant that much of the same evidence was relevant to and would prove both offenses. Joinder accordingly was permissible.

¶40 Further, because evidence of all the crimes would have been admissible at separate trials of the sexual abuse charges and the influencing a witness charge, Kohler cannot show any prejudice from the denial of severance, as necessary for reversal. *See Prince*, 204 Ariz. at 159 ¶ 13, 61 P.3d at 453. Evidence that Kohler tried to bribe the victim to recant would have been admissible at a separate trial for the sexual misconduct charges to show his consciousness of guilt. *See State v. Kemp*, 185 Ariz. 52, 56, 59, 912 P.2d 1281, 1285, 1288 (1996) (holding that evidence of defendant's kidnapping and armed robbery of a couple after committing the charged murder should have been admitted "as evidence of flight showing consciousness of guilt."); *State v. Jeffers*, 135 Ariz. 404, 415, 661 P.2d 1105, 116 (1983) (holding that evidence of attempted escape from jail was relevant to show consciousness of guilt, even though there may have been other explanations for the attempted escape). Conversely, evidence that Kohler engaged in sexual misconduct with the victim would have been admissible at a separate trial on the charge of influencing a witness, to show Kohler's motive for offering the victim money to recant. *See State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995) ("Although motive is not an element of a crime, a trial court may admit evidence of a defendant's other misconduct if the misconduct furnished or supplied the motive for the charged crime.").

¶41 Kohler argues that the court erred by denying severance because the evidence supporting the influencing a witness charge included numerous jail calls that ostensibly revealed that he had been in custody for two years, causing him prejudice akin to the jury seeing him in jail clothes. Kohler did not make this argument before or during trial, limiting this court to review only for fundamental error. *See Henderson*, 210 Ariz. at 568 ¶ 22, 115 P.3d at 608. Kohler fails to cite any legal authority supporting his claim that introducing the jail calls is tantamount to forcing a defendant to wear jail clothes, and we know of no such authority. Jail calls do not implicate the same concerns as forcing a defendant, against his will, to wear jail clothes at trial—jail calls are not a "constant reminder of the accused's condition" with no evidentiary value. *See Estelle v. Williams*, 425 U.S. 501, 504–05 (1976). The jail calls in this case were probative both on the charge of influencing a witness and on Kohler's consciousness of guilt of the charges of sexual misconduct, and would have been admissible even in a

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separate trial of the sexual misconduct charges. The court accordingly did not err, much less fundamentally err, by denying severance on this basis.

¶42 Finally, a denial of severance of charges generally does not prejudice a defendant where the jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt. *Prince*, 204 Ariz. at 160 ¶ 17, 61 P.3d at 454; *State v. Hausner*, 230 Ariz. 60, 75 ¶ 48, 280 P.3d 604, 619 (2012). The court instructed the jury to this effect, thereby minimizing if not eliminating any possible prejudice from the denial of severance.

CONCLUSION

¶43 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
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