IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06-01-2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA,	)	1 CA-CR 07-0796
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
PHILLIP GREGORY SPEERS,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200000472

The Honorable Christopher T. Whitten, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Katia Mehu, Assistant Attorney General
Attorneys for Appellee

Phillip Gregory Speers, *In Propria Persona* — Tucson

N O R R I S, Judge

¶1 Phillip Gregory Speers appeals from his convictions and sentences on two counts of child molestation involving two second grade students, each a class two felony and dangerous

crime against children.[1] Speers does not challenge the sufficiency of the evidence to support the convictions, and unless otherwise discussed, the particulars of the offenses are not pertinent to the issues raised on appeal.

¶2 Speers was originally convicted in 2003 on four counts of child molestation and one count of sexual conduct with a minor, but this court reversed those convictions on appeal because of evidentiary error and remanded for a new trial. *State v. Speers*, 1 CA-CR 03-0812 (Ariz. App. Feb. 24, 2005) (mem. decision).[2] On retrial in 2007, a jury convicted Speers on two of the child molestation counts, but acquitted on the three other counts. The superior court sentenced Speers to consecutive 17-year prison terms with credit for 2,553 days of presentence incarceration.

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[1]Although the unsigned minute entry from the sentencing hearing, filed September 4, 2007, characterizes the first count as "non-dangerous" and does not address the dangerousness of the second count, the signed judgment and sentence entered by the court correctly characterizes both offenses as "dangerous crime[s] against children pursuant to [A.R.S. § 13-604.01]."

[2]Speers was also separately tried and convicted on two counts of sexual exploitation of a minor (the "sexual exploitation case"). We vacated those convictions for evidentiary error and remanded for a new trial. *See State v. Speers*, 209 Ariz. 125, 98 P.3d 560 (App. 2004). The State ultimately stipulated to the dismissal without prejudice of that case.

DISCUSSION

I. Speedy Trial

¶3 Speers argues the superior court abused its discretion in denying his motion to dismiss for violation of his speedy trial rights under Rule 8 of the Arizona Rules of Criminal Procedure and the United States and Arizona Constitutions. The superior court denied his motion finding the "delays were occasioned on [Speers'] behalf" or agreed to by him with time being waived. The superior court also found there was "no prejudice" because when it made its ruling Speers still needed additional time to prepare for trial.

¶4 We will uphold a superior court's Rule 8 speedy trial determination absent abuse of discretion and resulting prejudice. *State v. Spreitz*, 190 Ariz. 129, 136, 945 P.2d 1260, 1267 (1997). "[T]he determination of abuse of discretion depends on the facts of each case." *Id.* We review the federal and state constitutional claims de novo, but review the factual findings related to these claims for abuse of discretion. *State v. Smith*, 215 Ariz. 221, 233, ¶ 57, 159 P.3d 531, 543 (2007).

A. Rule 8 Right to Speedy Trial

¶5 When a judgment of conviction is reversed on appeal and a new trial ordered, Rule 8.2(c) of the Arizona Rules of Criminal Procedure states the new trial "shall commence within 90 days of the service of the mandate of the Appellate Court."

Ariz. R. Crim. P. 8.2(c). This court issued its mandate in this matter on June 28, 2005, and it was served on the Yuma County Superior Court on June 30, 2005. Accordingly, in the absence of excused delay, Rule 8 required trial to begin no later than September 28, 2005. *See* Ariz. R. Crim. P. 8.4 (excluding certain periods of delay from computation of time limit). The second trial did not begin, however, until July 2, 2007.

¶6 The right to a speedy trial under Rule 8 is more strict than the constitutional right. *Spreitz*, 190 Ariz. at 136, 945 P.2d at 1267. The Rule 8 right is not fundamental, but rather "a procedural right." *Id.* at 139, 945 P.2d at 1270 (quoting *State v. Henry*, 176 Ariz. 569, 578, 863 P.2d 861, 870 (1993)); *see also State v. Killian*, 118 Ariz. 408, 411, 577 P.2d 259, 262 (App. 1978) (Rule 8 "does not grant the appellant any 'fundamental right' which cannot be waived by his counsel"). Consequently, this right to a speedy trial may be waived by a defendant. *See Spreitz*, 190 Ariz. at 136, 945 P.2d at 1267.

¶7 "The purpose of Rule 8 is to insure that a criminal defendant is not forgotten while the orderly administration of justice swirls around him on all sides but leaving him untouched." *State v. Ferguson*, 120 Ariz. 345, 347, 586 P.2d 190, 192 (1978). Although there was a two-year period between service of the mandate on the first appeal and the beginning of trial, neither Speers nor his right to speedy trial was ignored

or overlooked by the superior court and counsel. As the following summary shows, Speers' decision to proceed *pro per* and the considerable time he needed to pursue multiple pretrial motions and prepare for trial caused the delay.

¶8 After remand, the superior court held a status hearing on July 15, 2005. At this hearing, Speers exercised his constitutional right to represent himself and assumed responsibility for his defense.[3] In discussing the trial date, the prosecutor cited the pertinent section of Rule 8 and advised the court and Speers trial was to "commence within 90 days of the service of the mandate of the appellate court." The court set a tentative trial date of October 4, 2005. To this, Speers stated he had a number of motions he wanted to file before trial and essentially asked if the trial date could be postponed for this reason. The court informed Speers he should file his motions, they would be resolved "in the normal course of business," and "if that necessitates a continuance and if that's appropriate to do under the law, we'll continue [the trial]." The court also informed Speers if his motions required a continuance, the delay would be chargeable against him.

¶9 At subsequent status hearings, the court, the prosecutor, and Speers discussed several of the motions he

[3]After it accepted Speers' waiver of counsel, the court assigned Speers advisory counsel.

intended to file and it became clear the trial would not begin on October 4.[4] The court did not, however, take any formal action to change the trial date. Finally, during a status hearing before the Honorable John N. Nelson on September 29, 2005, the prosecutor placed the conflict between Speers' speedy trial rights and his right to prepare a defense squarely before the superior court and Speers. The prosecutor explained the State was ready to proceed to trial on the date scheduled or at any time, but did not want to interfere with Speers' trial rights and sought guidance in resolving the situation. In response, after first stating he intended to challenge Judge Nelson for cause, Speers explained he was "certainly not opposed" to continuing or vacating the trial date so he could have more time to file motions and prepare for trial. Judge Nelson vacated the October 4 trial date and informed Speers his challenge for cause necessitated a waiver of the Rule 8 time limits. Judge Nelson also confirmed Speers understood that if he filed additional motions "that will also delay the setting of a trial."

¶10 Speers' challenge to Judge Nelson was resolved in Speers' favor on November 28, 2005. After several other judges recused themselves and one was noticed by the State, on January

[4]During this period, the superior court judge first assigned to the case moved and Speers challenged for cause the second judge assigned to the case.

3, 2006, the case was permanently assigned to the Honorable Mark Wayne Reeves. At a January 18, 2006 status hearing, the prosecutor advised the superior court the State could be prepared to try the case in three weeks, but noted Speers had not pursued the appointment of an expert and had not yet filed the motions he had previously indicated he intended to pursue. In response to questions by the court, Speers explained he needed an expert witness on false memory and suggestibility as well as a computer expert. Speers also briefly described several motions he wished to file he asserted would dispose of the case. Speers explicitly agreed to "waive time" for these matters.

¶11 The superior court held status conferences throughout 2006, but did not set a trial date because of the pendency of various matters relating to Speers' experts, motions, and pretrial discovery requests. In February 2006, Speers notified the court and the State he intended to file at least 30 motions, which he briefly described. Beginning that same month and continuing through November 2006, Speers filed at least 16 motions and requests in the superior court, including motions to modify conditions of release, for appointments of experts and paralegal, to compel interviews, for transcripts, for disqualification of the Yuma County Attorney's Office, and for reconsideration on these and other subjects. At a November 15,

2006 status conference, Judge Reeves explained he was leaving the bench at the end of the year and would have to transfer the case for reassignment. Without objection from either the State or Speers, Judge Reeves advised the parties he would not schedule another status hearing in the case "because if you all file motions and the like it's going to delay things."

¶12 On January 19, 2007, a status hearing was held before the Honorable Larry Kenworthy. In reviewing the status of the case and discussing the setting of a trial date, the superior court observed that in conjunction with the appointment of Dr. B. as an expert witness for Speers, Judge Reeves had ordered Dr. B. to prepare a report. When asked about the status of the report, Speers told the court he had not been able to contact Dr. B. since the court had appointed him and was not sure when Dr. B.'s report would be ready.[5] Speers also told the court the State had "scared off" his computer expert, *see infra* ¶¶ 30-32, and he was "not sure how helpful" it would be to set a trial date because he still did not have a time frame as to when he would be ready for trial. During the hearing, Speers raised for the first time his Rule 8 right to a speedy trial, stating he believed the time limit for trying him under the rule had expired. The prosecutor reiterated the State was prepared to go

[5]Speers informed the court his "volunteers" had been working with Dr. B. and he did not know the status of their dealings with Dr. B.

forward at any time, and expressed frustration with the delays which he asserted had been caused by Speers. In response to Speers' comments about his right to a speedy trial, the superior court scheduled trial for May 7, 2007.

¶13 One week later, on January 26, 2007, Speers filed a notice of change of judge pursuant to Arizona Rule of Criminal Procedure 10.2. As a consequence, Judge Kenworthy vacated the May 7, 2007 trial date and, because all Yuma County Superior Court judges and/or commissioners had either been peremptorily removed or had recused themselves from the case, the Presiding Judge of the Superior Court of Yuma County transferred the case to the Presiding Judge of the Superior Court of Pima County for reassignment. In February 2007, the Presiding Judge of the Pima County Superior Court assigned the case to the Honorable Michael Cruickshank, and Judge Cruickshank was assigned a motion filed by the State objecting to Speers' Rule 10.2 challenge to Judge Kenworthy. Because Judge Cruikshank questioned whether he had jurisdiction to rule on the State's motion, at his suggestion, the State filed a special action. This court granted review, but denied relief on March 22, 2007, holding the State had failed to file a timely response to Speers' Rule 10.2 notice and had therefore lost its right to challenge the notice.

¶14 While the special action was pending, Speers moved to dismiss for prosecutorial misconduct, prosecutorial

vindictiveness, and violation of his speedy trial rights. He also moved to have a DNA analysis of certain evidence, and to disqualify the Yuma County Attorney's Office.[6]

¶15 Because of the expected length of trial, in April 2007 the case was ultimately reassigned to a Maricopa County Superior Court judge, the Honorable Christopher Whitten. At an April 25, 2007 status hearing, the superior court scheduled trial to start on July 2, 2007, set deadlines for pretrial discovery including disclosure of expert witness reports, ruled on several discovery requests submitted by Speers, and denied Speers' motion to dismiss for violation of his speedy trial rights, noting Speers was still not prepared for trial. Not only was Speers not ready for trial when he filed his speedy trial motion and when it was ruled on, but at a subsequent status hearing on May 4, 2007, Speers requested an extension of time for submittal of his experts' reports. The superior court granted the request, and set new disclosure deadlines.

¶16 The superior court summarily disposed of several of Speers' pending motions and then held an evidentiary hearing on the remaining motions on June 4-5, 2007. After considering the

[6]This was Speers' second motion to disqualify the Yuma County Attorney's Office. *See supra* ¶ 11. The court had denied Speers' first motion, finding none of his allegations amounted to State misconduct warranting disqualification.

evidence presented, the superior court denied the motions on June 24, 2007, and trial began on July 2, 2007.

¶17 Given the above pretrial proceedings which we have condensed for the sake of brevity, the superior court did not abuse its discretion in denying Speers' Rule 8 speedy trial motion. Rule 8.4(a) allows for the exclusion of all time "occasioned by or on behalf of the defendant." From the very first status hearing in 2005 and throughout 2006, Speers made it abundantly clear he intended to pursue multiple motions before proceeding to trial. He repeatedly informed the superior court he would need time to prepare the motions and have them decided and he agreed to waive time for that purpose. In contrast, the State informed the court on several occasions it was ready to try the case. But, to avoid infringing on Speers' trial rights, the State asked for assurances Speers was willing to waive the requirements of Rule 8. The record reflects Speers was agreeable to this arrangement.

¶18 Although Speers did not expressly agree to waive his speedy trial rights on the record at each status hearing in 2005 and 2006, he implicitly confirmed his waiver during this time by failing to raise any Rule 8 objection or object to the superior court's failure to set a trial date after it vacated the October 4, 2005 trial date. *See supra* ¶ 9. "[A] defendant may waive speedy trial rights by not objecting to the denial of [a] speedy

trial in a timely manner." *Spreitz*, 190 Ariz. at 138, 945 P.2d at 1269. Speers did not assert a speedy trial violation until January 2007. Even at that time, however, Speers still had not contacted Dr. B. about preparation of his report, a prerequisite to Dr. B.'s testimony at trial. Given that we had reversed Speers' convictions and remanded for a new trial because this type of expert had not been allowed to testify at Speers' trial, the State and superior court were naturally and appropriately hesitant to require Speers to proceed to trial without him. In fact, in order to accommodate Speers with respect to this expert, the superior court ultimately extended the deadline for disclosure of his report to June 29, 2007, essentially the eve of trial, and even permitted Speers to disclose his computer expert's testimony after trial had begun. On this record, the superior court could reasonably find the pretrial delay was "occasioned by or on behalf of" Speers. *See State v. Piatt*, 132 Ariz. 145, 150, 644 P.2d 881, 886 (1981) (no violation of speedy trial rights where delay complained of was occasioned by actions of defendant).

¶19 Moreover, even if Speers could establish a Rule 8 speedy trial violation, he would only be entitled to reversal if he could show the delay harmed his defense or deprived him of a fair trial. "The law is well-established in this state that a conviction will not be reversed unless the record shows an error

prejudicial to some substantial right of the defendant." *State v. Vasko*, 193 Ariz. 142, 147, ¶ 22, 971 P.2d 189, 194 (App. 1998). The test for prejudice when a speedy trial violation occurs is whether the defendant has shown "that his defense has been harmed by the delay." *Id.* A defendant who fails to establish his defense was harmed or he was deprived of a fair trial has not established prejudice sufficient to warrant reversal for a Rule 8 violation. *State v. Wassenaar*, 215 Ariz. 565, 571, ¶ 16, 161 P.3d 608, 614 (App. 2007).

¶20 Speers argues he demonstrated such prejudice because he lost a nonexpert and a computer expert witness; he was prevented from reinterviewing the parents of the victims; and he was precluded from working as a research consultant and associating with others as a consequence of his incarceration.[7] He also asserts the delay subjected him to "[p]ublic obloquy," depleted the resources of his family and friends, and caused anxiety to himself, his family, and his friends.

¶21 These claims fail to show the delay harmed Speers' defense or deprived him of a fair trial. Although a witness who testified at his first trial did not testify at his second

[7]Speers also argues the delay caused him "to limit the scope of cross-examination of other witnesses." His failure to identify these witnesses or present argument in support of this claim in his briefing constitutes abandonment and waiver. *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); *Norgord v. State ex rel. Berning*, 201 Ariz. 228, 233, ¶ 20, 33 P.2d 1166, 1171 (App. 2001).

trial, her failure to do so was unrelated to the delay. *See infra* ¶ 57. Speers' claim the witness would have been available to testify in person if the trial had occurred earlier is, thus, pure speculation.

¶22 Similarly, Speers did not "lose" his computer expert because of any delay. Even if we were to accept Speers' argument he "lost" this witness because of witness "intimidation," the alleged misconduct occurred before Speers raised his speedy trial claim. And, as with the other witness, his claim he would not have "lost" this witness if trial had occurred earlier amounts to pure speculation.

¶23 Speers' inability to reinterview the victims' parents was also not attributable to pretrial delay. The superior court rejected his reinterview request in August 2006, long before he asserted any speedy trial violation. *See supra* ¶ 12.

¶24 Finally, the other disruptions and the toll the litigation may have taken on Speers or his family and friends is not a harm to his defense or his right to a fair trial. As has our supreme court, we recognize the importance of Speers' and his family's anxiety in awaiting trial and appreciate the loss of liberty sustained by trial delay. *See State v. Soto,* 117 Ariz. 345, 348, 572 P.2d 1183, 1186 (1977). These factors alone, however, are not sufficient to require reversal after conviction for a Rule 8 violation when, as here, Speers has not

suffered any prejudice to his trial rights. *See Wassenaar*, 215 Ariz. at 571, ¶ 16, 161 P.3d at 614; *Vasko*, 193 Ariz. at 147, ¶ 22, 971 P.2d at 194.

B. Constitutional Right to Speedy Trial

¶25 Both the United States and Arizona Constitutions guarantee the right to a speedy trial. U.S. Const. amend VI; Ariz. Const. art. 2, § 24. Neither, however, requires trial to be held within a specific period of time. *Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270. Whether delay in the start of trial is sufficient to reverse a conviction is determined using the four factors articulated in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): (1) the length of the delay, (2) the reason for the delay, (3) whether there has been a demand for a speedy trial, and (4) whether the defendant suffered any prejudice. *Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270. In weighing these factors, the most important is prejudice to the defendant, while the least important is length of the delay. *Id.* at 139-40, 945 P.2d at 1270-71. None of the four, however, is either a sufficient or necessary condition to a finding of violation of the constitutional right to a speedy trial. *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193. Rather, the factors are to be applied in "a balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Id.* at

530, 92 S. Ct. at 2191-92. Considering these four factors, Speers' constitutional speedy trial rights were not violated.

¶26 First, we agree the length of delay in this case -- two years from mandate to trial -- is of concern and certainly sufficient to trigger inquiry into the other *Barker* factors. *See Doggett v. United States*, 505 U.S. 647, 652 n.1, 112 S. Ct. 2686, 2691 n.1, 120 L. Ed. 2d 520 (1992) (delay approaching one year "unreasonable enough" to trigger *Barker* inquiry). But, second, as discussed above, trial was delayed principally because of Speers' pursuit of numerous pretrial motions and failure to promptly prepare for trial. Like the situation in *Barker*, the record here "strongly suggests that while he hoped to take advantage of the delay . . . and thereby obtain dismissal of the charges, [defendant] definitely did not want to be tried." 407 U.S. at 535, 92 S. Ct. at 2194.

¶27 Third, while Speers did raise the issue of his right to a speedy trial before trial, he did not do so until January 2007, more than 18 months after the mandate, and even then he advised the superior court he was still not ready to set a trial date. When a defendant's assertion of his speedy trial rights is untimely, it bears little weight in the *Barker* analysis. *Spreitz*, 190 Ariz. at 140, 945 P.2d at 1271.

¶28 Fourth, Speers' trial rights were not prejudiced by the delay. Unlike a speedy trial claim under Rule 8, prejudice

to a defendant in the context of a constitutional speedy trial claim is not confined to possible prejudice to his defense. *Moore v. Arizona*, 414 U.S. 25, 26-27, 94 S. Ct. 188, 190, 38 L. Ed. 2d 183 (1973). "Inordinate delay, wholly aside from possible prejudice to a defense on the merits, may seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Id.* at 27, 94 S. Ct. at 190 (quoting *Barker*, 407 U.S. at 537, 92 S. Ct. at 2195 (White, J., concurring) (internal quotation omitted)). Speers based his claim of prejudice on these factors, tracking the words of this quotation to and even including the phrase "public obloquy." These factors, however, "are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty." *Id.* (quoting *Barker*, 407 U.S. at 537, 92 S. Ct. at 2195) (White, J., concurring). In some cases, these factors can shift the balance in deciding whether there has been a violation of constitutional speedy trial rights under the *Barker* analysis. *Id.* at 27-28, 94 S. Ct. at 190. In this case, however, because the other factors all weigh against finding a constitutional violation, the factors identified by Speers fail to show a violation of his

constitutional right to a speedy trial. *See Spreitz*, 190 Ariz. at 140, 945 P.2d at 1271 (no constitutional violation notwithstanding five years in pretrial custody).

II. Witness Intimidation

¶29 Speers next argues the superior court should have granted his motion to dismiss the case for witness intimidation by the prosecutors and certain detectives working on the case. We review a superior court's ruling on a claim of witness intimidation for abuse of discretion. *State v. Jones*, 197 Ariz. 290, 301, ¶ 20, 4 P.3d 345, 356 (2000).

¶30 At Speers' request, in March 2006, the superior court appointed Jason C. as Speers' computer expert. Jason C. was with Speers on November 9, 2006, when Speers interviewed the police detectives who had examined his computers. Before the interview, Jason C. had been allowed to inspect, but not copy, an image copy of the hard drive from one of Speers' computers. During the interviews, Detective H. observed an EnCase dongle in Jason C.'s laptop computer; because Detective H. believed the only reason "someone" would use a dongle would be to view contraband image files, which he believed Jason C. was not authorized to have, he asked Jason C. why he was using the devise.[8] Jason C. explained he had been able to remove the

[8]A dongle is a security key device necessary to run certain software programs. EnCase is a brand of forensic

contraband images and was simply using the EnCase software to review the remaining data. When Detective H. and the prosecutor were not initially satisfied with Jason C.'s explanation, the discussion devolved into name calling, with Jason C. calling the detective an "idiot" on more than one occasion and the prosecutor responding, "[i]f he's an idiot, then you're a jerk." After tempers cooled and the prosecutor stated he accepted Jason C.'s representation he did not have contraband images on his computer, Speers finished Detective H.'s interview.

¶31 Before Speers could begin the next interview with Detective S., that detective demanded assurances from Jason C. he did not have any contraband images. Accordingly, the prosecutor asked Jason C. whether he had retained any of the contraband images. Jason C. again explained how he was using the EnCase software, allowed Detective S. to view his computer, and then "demonstrated" he did not have any contraband images. Satisfied, Detective S. proceeded with the interview.

¶32 At an evidentiary hearing on Speers' motion, Speers testified Jason C. told him he had believed the detectives would have arrested him if he had refused to prove he did not have any contraband images on his computer. Speers further testified Jason C. left town the next day without keeping a scheduled

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software used by law enforcement and others to analyze computer data without disrupting or changing the media.

appointment and then failed to respond to attempts by Speers and his defense team to contact him. As a result, Speers was not able to use Jason C. as his computer expert, and had to use a different expert at trial, whom he asserted was not as well qualified as Jason C.

¶33 Governmental interference with a defendant's ability to present witnesses is a violation of due process. *Webb v. Texas*, 409 U.S. 95, 98, 93 S. Ct. 351, 353, 34 L. Ed. 2d 330 (1972); *see also Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). In analyzing a due process claim of witness intimidation, "[t]he dispositive question in each case is whether the government actor's interference with a witness's decision to testify was 'substantial.'" *United States v. Serrano*, 406 F.3d 1208, 1216 (10th Cir. 2005) (quoting *United States v. Crawford*, 707 F.2d 447, 449 (10th Cir. 1983)). "Interference is substantial when the government actor actively discourages a witness from testifying through threats of prosecution, intimidation, or coercive badgering." *Serrano*, 406 F.3d at 1216.

¶34 The superior court found there had not been any misconduct by the prosecutor or police detectives directed at intimidating the expert from testifying on Speers' behalf.

There is nothing in the record indicating the detectives raised the issue of possible contraband on Jason C.'s laptop for any reason other than they believed a violation of the law was possibly being committed in their presence. Although the detectives were mistaken in their belief, and as the superior court commented in its ruling, their manner was "abrupt and impolite, at best," the court could reasonably conclude, considering the situation in its entirety, their actions were not calculated to discourage Jason C. from being a defense witness.

¶35 Speers argues the superior court made "too much of the finding that the prosecutors and detectives had not *tried* or *intended* to intimidate [Jason C.]," citing *In re Martin*, 744 P.2d 374 (Cal. 1987). In *Martin*, the California Supreme Court held a defendant must demonstrate three elements to establish a claim of witness intimidation by the State: (1) misconduct by a state actor; (2) causality between the misconduct and his ability to present the witness; and (3) materiality, that is the witness's testimony would have been material and favorable. 774 P.2d at 393. Addressing the element of misconduct, the California Supreme Court stated a defendant "is not required to show that the governmental agent involved acted in bad faith or with improper motives. Rather, he need show only that the agent engaged in activity that was wholly unnecessary to the proper

performance of his duties and of such a character as to transform . . . a willing witness to one who would refuse to testify." *Id.* (internal citations and quotations omitted).

¶36 Even under the California test, for reasons already discussed, the superior court could reasonably conclude the detectives' conduct was not "wholly unnecessary" to the proper performance of their duties as law enforcement officers. Additionally, Speers failed to demonstrate what the California Supreme Court described as causality. At the hearing, Speers testified Jason C., who was from New Zealand, was nervous about the possibility of being arrested, but also stated he was "nervous" for other reasons unrelated to the incident at the interviews -- his hotel room had been burglarized and his electronic gear stolen.

¶37 On this record, therefore, we cannot say the superior court abused its discretion in denying Speers' motion to dismiss for witness intimidation.

III. Double Jeopardy

¶38 Before his second trial, Speers moved to dismiss, asserting further prosecution violated his double jeopardy rights because the prosecutor had engaged in misconduct during his first trial. The superior court denied the motion without requiring the State to respond. Whether retrial is barred by

double jeopardy is a question of law we review de novo. *State v. Moody*, 208 Ariz. 424, 437, ¶ 18, 94 P.2d 1119, 1132 (2004).

¶39 As an initial matter, we reject Speers' argument the superior court acted improperly in not requiring the State to file a response or allowing a reply before ruling on the motion. The Arizona Rules of Criminal Procedure do not prohibit the summary denial of a motion without requiring a response. Ariz. R. Crim. P. 35.1(a) (party "may" file response). If a response is filed, the moving party is entitled to file a reply. *Id.* If no response is filed, however, there is no need for or right to a reply. *See id*. (reply "shall be directed only to matters raised in a response"). Thus, Speers was not deprived of any right by the superior court when it ruled on his motion without a response from the State.

¶40 The double jeopardy clauses of the Fifth Amendment and Article 2, Section 10, of the Arizona Constitution protect a criminal defendant from multiple prosecutions for the same offense. *State v. Minnitt*, 203 Ariz. 431, 437, ¶ 27, 55 P.3d 774, 780 (2002). The guarantee against double jeopardy, however, is not absolute. *Id.* at 437, ¶ 28, 55 P.3d at 780. As a general rule, retrial is not barred by double jeopardy principles when a defendant obtains reversal of a conviction on appeal for reasons other than insufficient evidence. *Burks v. United States*, 437 U.S. 1, 12, 98 S. Ct. 2141, 2148, 57 L. Ed.

2d 1 (1978). Retrial is also usually permitted when a defendant successfully moves for or consents to a mistrial. *Minnitt*, 203 Ariz. at 437, ¶ 28, 55 P.3d at 780.

¶41 One circumstance in which double jeopardy will bar retrial is "when the prosecutor engages in improper conduct that is not merely the result of legal error or negligence, but constitutes intentional conduct that the prosecutor 'knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal [] and the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.'" *Id.* at 438, ¶ 29, 55 P.3d at 781 (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984)). This bar to retrial exists even when the superior court fails to grant a mistrial if the conviction is reversed on appeal as a result of "egregious and intentional prosecutorial misconduct [that] prevented acquittal." *State v. Jorgenson*, 198 Ariz. 390, 393, ¶ 13, 10 P.3d 1177, 1180 (2000).

¶42 When, as in this case, there has been no finding of prosecutorial misconduct through the granting of a motion for mistrial or by reversal on appeal, a defendant may only assert a double jeopardy bar to retrial based on prosecutorial misconduct at the prior trial if he moved for mistrial or if the misconduct was concealed by the prosecutor. *Moody*, 208 Ariz. at 438, ¶ 21,

94 P.3d at 1133. In *Moody*, our supreme court further required, as an additional prerequisite to appellate review of the denial of such a double jeopardy claim, that the defendant seek relief by special action prior to trial:

> This court has never reviewed a double jeopardy claim based on prosecutorial misconduct if the defendant had not previously moved for mistrial or sought relief by special action from the trial court's denial of his motion to dismiss on those grounds. [Defendant] provides no compelling reasons to diverge from this practice.

Id. at 438, ¶ 23, 94 P.3d at 1133. Because Speers neither moved for a mistrial for prosecutorial misconduct nor sought special action relief from the court's denial of his motion to dismiss on double jeopardy grounds, this issue is not properly before us.

¶43 Moreover, even if the issue was properly before us, we would be compelled to affirm the superior court's ruling because Speers failed to include the complete transcript of the first trial in the record on appeal and without it we have no way of determining whether the alleged prosecutorial misconduct was "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992)). "It is the defendant's duty, as the party seeking relief, to prepare the

record in such a manner as to allow the appellate court to pass upon the questions raised on appeal." *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995). Accordingly, "[w]here matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court." *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982); *see also State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990) ("An appellate court will not speculate about the contents of anything not in the appellate record.").

IV. Motion to Suppress

¶44 During their investigation of the sexual misconduct allegations against Speers in 2000, police seized two computers, one from Speers' apartment and the other from his parents' home, and examined them pursuant to search warrants. The forensic examination of the computers revealed a number of graphic image files depicting minors under the age of 15 engaged in exploitive exhibition or other sexual conduct located in the "temporary internet files" section on the hard drives of the computers. The files found on the computer from Speers' apartment formed the basis for the charges filed against him in the sexual exploitation case. *Speers*, 209 Ariz. at 128, ¶¶ 4-7, 98 P.3d at 563. The results of the examination were also introduced at Speers' first trial in this case as evidence of sexual

propensity. *See* Ariz. R. Evid. 404(c). Speers does not dispute the lawfulness of the seizure and examination of the computers before his first trial.[9]

¶45 Beginning in late 2004 or early 2005, the police reexamined the computers without obtaining a warrant. Speers argues the reexamination without a warrant was an unreasonable search and seizure in violation of his rights under the United States and Arizona Constitutions and the superior court should have suppressed the evidence obtained by police from this reexamination. *See* U.S. Const. amend. IV; Ariz. Const. art. 2, § 8. We review constitutional issues and purely legal issues de novo. *Moody*, 208 Ariz. at 445, ¶ 62, 94 P.3d at 1140.

¶46 The Fourth Amendment and its Arizona counterpart protect against unreasonable searches and seizures. *State v. Allen*, 216 Ariz. 320, 323, ¶ 9, 166 P.3d 111, 114 (App. 2007). A "search" under the Fourth Amendment occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85 (1984); *see also State v. Olm*, 223 Ariz. 429, ___, ¶ 5, 224 P.3d 245, 247 (App. 2010). When items are lawfully seized and then examined

[9]We affirmed the superior court's denial of Speers' motion to suppress evidence obtained from the search of the computers in Speers' appeal from his first trial. *Speers*, 1 CA-CR 03-0812, at *12-*16.

by the police, a subsequent examination by a law enforcement officer does not result in a constitutional violation because of the reduced expectation of privacy in the items. *Hell's Angel Motorcycle Corp. v. McKinley*, 360 F.3d 930, 933-34 (9th Cir. 2004). Thus, "once an item in an individual's possession has been lawfully seized and searched, subsequent searches of that item, so long as it remains in the legitimate uninterrupted possession of the police, may be conducted without a warrant." *United States v. Burnette*, 698 F.2d 1038, 1049 (9th Cir. 1983). As the *Burnette* court explained:

> We believe our decision here is fully consistent with our prior decisions and with the policies underlying the Fourth Amendment's warrant requirement. Requiring police to procure a warrant for subsequent searches of an item already lawfully searched would in no way provide additional protection for an individual's legitimate privacy interests. The contents of an item previously searched are simply no longer private.

Id. (footnotes omitted).

¶47 As part of his argument, Speers asserts computers should be treated differently from other evidence for Fourth Amendment purposes "because they are able to hold a library's worth of personal information," citing *United States v. Walser*, 275 F.3d 981 (10th Cir. 2001). There is a split of authority as to whether and how to apply certain Fourth Amendment doctrines, such as the plain-view doctrine, to computer searches. *Compare,*

e.g., Frasier v. State, 794 N.E.2d 449, 465-66 (Ind. Ct. App. 2003) (computers analogous to other document containers), *with United States v. Carey*, 172 F.3d 1268, 1275 (10th Cir. 1999) (computers deserve special treatment because "electronic storage is likely to contain a greater quantity and variety of information") (internal quotation omitted). The issue addressed in these decisions, however, concerns the *scope* of a permissible search of a computer.

¶48 In contrast, Speers is not asserting the State was attempting to obtain evidence from the computers outside of the category of evidence described in the warrants authorizing the first examination of the computers. Instead, he is asserting the State should have obtained a new warrant before reexamining the computers. Because the second examination, regardless of when it occurred, did not infringe on any reasonable expectation of privacy Speers had in the computers, the State did not need to obtain a new warrant before the reexamination. Accordingly, the superior court did not improperly deny Speers' motion to suppress.

V. Refusal to Compel Interviews

A. Senate Bill 1126

¶49 Speers next argues the superior court should not have denied his motion to compel interviews of the victims' parents because it based its denial on an amendment to the Victims' Bill

of Rights not in effect at the time of its ruling. *See* 2006 Ariz. Sess. Laws 146-47 (Senate Bill 1126, allowing the parent of a minor victim to refuse a defense interview); Ariz. Rev. Stat. ("A.R.S.") § 13-4433(H) (Supp. 2006) (effective Sept. 21, 2006).[10] Although the court should not have relied on a not yet effective amendment, it nevertheless did not err in denying Speers' motion. *See Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 56, ¶ 36, 213 P.3d 197, 205 (App. 2009) ("affirm the verdict if there is a basis to do so even if the court gave a wrong or insufficient reason").

¶50 In addition to arguing the court could deny Speers' motion because Senate Bill 1126 could be applied retroactively, the State also pointed out Speers had interviewed the parents of the minor victims in the case in 2001 and had cross-examined some of the parents during the first trial. Under these circumstances, Speers was not entitled to reinterview the parents. *See State v. Jessen*, 134 Ariz. 458, 461-62, 657 P.2d 871, 874-75 (1982) (superior court did not abuse its discretion

[10]In its ruling, the court denied Speers' motion "based on Senate Bill 1126 in conjunction with the ruling in *Warner*." The court's reference to *Warner* was to *State v. Warner*, 168 Ariz. 261, 812 P.2d 1079 (App. 1990). In that case, this court held the right to interview a victim was procedural under Arizona Rule of Criminal Procedure 15, and "[a]lthough the general rule is that legislation will have prospective application only, the rule is otherwise where the legislation is merely procedural in nature and does not affect substantive rights." *Id*. at 264, 812 P.2d at 1082.

in refusing to allow deposition of witnesses after first trial when defendant had their prior statements and transcripts of testimony); *State v. Superior Court*, 122 Ariz. 594, 596, 596 P.2d 732, 734 (1979) (absent exceptional circumstances, defendant is entitled to only one discovery opportunity).

B. Constitutional Grounds

¶51 Speers also argues the court should not have denied his motion to compel the interviews because he had a constitutional due process right to interview the parents before trial. To the extent a defendant "sets forth a constitutional claim in which he asserts that the information is necessary to his defense, however, we will conduct a de novo review." *State v. Connor*, 215 Ariz. 553, 557, 161 P.3d 596, 600 (App. 2007).

¶52 Under the facts of this case, Speers did not have a constitutional right to compel the pretrial interviews, and his reliance on *State ex rel. Romley v. Superior Court* (*Roper*), 172 Ariz. 232, 836 P.2d 445 (1992), is misplaced. In *Roper*, this court recognized there might be circumstances when a defendant's right to a fundamentally fair trial might supersede a victim's right to be free of discovery under the state constitution. Victims' Bill of Rights, Ariz. Const. art. 2, § 2.1; *see also* A.R.S. §§ 13-4401 to -4440 (2010). There, the defendant was charged with aggravated assault for stabbing her husband. The defendant presented evidence her husband had multiple

personalities, some of which were violent, had received psychiatric treatment for this disorder for several years, and had been arrested for assaulting the defendant on several occasions. *Id*. at 234, 237, 836 P.2d at 447, 450. We authorized the superior court to make an in camera inspection of the victim's medical records and to order disclosure to the defendant if the records contained exculpatory information essential to establishing she had acted in self-defense or necessary to impeaching the victim as relevant to that defense.

¶53 By contrast, in this case, Speers made no factual showing the interviews were essential to his defense or his cross-examination of the victims or their parents. As he clarified during oral argument on his motion to compel, Speers asserted he needed the interviews for the "primary purpose" of gaining "some insight into the -- what has been occurring in the alleged victims' lives since the initial accusation and the trials and to have the perspective of [his memory expert] on those issues."[11] Speers' defense to the charges, however, was that the victims' accusations were based on false or distorted memories implanted through suggestive police questioning, conversations with their parents, and rumor mongering. Before

[11]He also argued he should be allowed to interview the parents to obtain information about any "conduct" he had not "heard of before." In our view, before the second trial Speers had been afforded ample opportunity to question the parents about the events alleged by the victims.

the second trial, however, Speers had ample opportunity to develop evidence supporting this defense. As discussed above, not only had he interviewed the parents before the first trial but he had cross-examined them during that trial.

VI. Evidentiary Rulings

¶54 Speers also challenges several rulings by the superior court regarding the admission of evidence. We review rulings on admissibility of evidence for abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56, 796 P.2d 853, 858 (1990).

A. Admission of Prior Testimony

¶55 Speers contends the superior court should not have allowed the State to introduce prior testimony of a witness who did not appear at trial. The witness was a teacher at the school where Speers taught and was a witness at his first trial. After hearing testimony regarding the prosecution's efforts to locate the witness, the superior court found the witness was unavailable and allowed the State to read the witness's prior testimony to the jury. Speers maintains the record does not support the superior court's finding of unavailability.

¶56 A criminal defendant has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. To introduce testimonial hearsay consistent with this right, the State must establish: (1) the witness who provided the testimony is unavailable, and (2) the defendant previously had an

opportunity to cross-examine the witness.[12] *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374. "A witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a *good faith effort* to obtain his presence at trial." *State v. Montano*, 204 Ariz. 413, 420, ¶ 25, 65 P.3d 61, 68 (2003) (internal quotation omitted). The length to which the State must go to produce a witness is a question of reasonableness. *Id.* at 420, ¶ 26, 65 P.3d at 68. It is within the discretion of the superior court to determine whether the State made sufficient efforts. *State v. Edwards*, 136 Ariz. 177, 181, 665 P.2d 59, 63 (1983).

¶57 Here, the prosecutor attempted to contact the witness before trial to let her know the trial "was going to happen," and a detective attempted to contact the witness several times over a three-week period. The detective repeatedly went to the witness's home, spoke to neighbors, and went to the business of the witness's spouse in attempting to locate the witness. The detective learned from the spouse the witness had suffered a nervous breakdown and had decided to leave town to avoid testifying. The spouse refused to disclose the witness's

[12]The witness's testimony from the first trial is "testimonial" hearsay as described by the United States Supreme Court: "whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial . . . ." *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004).

location to the police and invoked the marital communications privilege to avoid revealing where the witness was when questioned in court.[13] Under these circumstances, the court did not abuse its discretion in finding the witness was unavailable.

B. Admission of Letters

¶58 Speers also argues the superior court should not have admitted into evidence portions of letters he wrote to a girlfriend while he was in jail before his first trial. The superior court ruled the evidence was admissible to rebut character evidence presented by Speers.

¶59 Speers' argument in his opening brief consists of one four-sentence paragraph stating admission of the letters "violated [his] due process rights under the Fifth and Fourteenth Amendments of the United States Constitution; Art. 2, § 24 of Arizona's Constitution; and Rules 402, 403 and 404(c) of Ariz.R.Evid. *See State v. Aguilar*, 209 Ariz. 40, 49, 97 P.3d 865, 874 (App. 2004)," and asserting, without factual

[13]Speers argues the spouse improperly invoked the marital communications privilege in refusing to reveal where the witness was. We disagree. The privilege can be waived if a spouse testifies about otherwise privileged communications or denies having relevant communications with his or her spouse. *State v. Harrod*, 218 Ariz. 268, 275, ¶ 15, 183 P.3d 519, 526 (2008). Here, the spouse properly invoked the privilege, and did not waive it, although he confirmed the witness had told him where she (and her daughter) were (and had visited them at that location) and expressed his own opinion the witness was not "emotionally capable" of testifying at trial. Finally, the spouse did not invoke the privilege with respect to the couple's child, as Speers asserts.

development, "[t]he court clearly erred as to every factual finding used to justify the ruling."

¶60 Arizona Rule of Criminal Procedure 31.13 states, in pertinent part: "The appellant's brief shall include . . . the contentions of the appellant with respect to the issues presented, and the reasons therefore, with citations to the authorities, statutes and parts of the record relied on." Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also Moody*, 208 Ariz. at 452 n.9, ¶ 101, 94 P.3d at 1147 n.9 ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised.") (quoting *Carver*, 160 Ariz. at 175, 771 P.2d at 1390). Because Speers failed to brief this issue properly, we decline to address it. *See State v. Sanchez*, 200 Ariz. 163, 166, ¶ 8, 24 P.3d 610, 613 (App. 2001) (issue waived because defendant failed to develop argument in his brief).[14]

C. Admission of Speers' Prior Testimony

¶61 Speers contends the superior court violated Arizona Rule of Evidence 106 by not admitting certain portions of his prior testimony responsive to excerpts offered by the State. Rule 106 provides: "When a writing or recorded statement or part

[14]Speers addressed this argument in more detail in his reply brief. We may disregard substantive issues raised for the first time in the reply brief. *State v. Cannon*, 148 Ariz. 72, 79, 713 P.2d 273, 280 (1985).

thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Ariz. R. Evid. 106. This rule "is a partial codification of the rule of completeness." *State v. Prasertphong*, 210 Ariz. 496, 499, ¶ 14, 114 P.3d 828, 831 (2005). The rule of completeness does not require admission of an entire statement; instead, only the portion of a statement "necessary to qualify, explain or place into context the portion already introduced" need be admitted. *Id.* at 499, ¶ 15, 114 P.3d at 831 (quoting *United States v. Branch*, 91 F.3d 699, 728 (5th Cir. 1996)). Thus, "Rule 106 does not create a rule of blanket admission for all exculpatory statements simply because an inculpatory statement was also made." *State v. Cruz*, 218 Ariz. 149, 162, ¶ 58, 181 P.3d 196, 209 (2008).

¶62 The excerpts of Speers' prior testimony introduced by the State were limited to admissions he had (1) looked at child pornography on the internet, (2) encrypted files on his computer, and (3) deleted certain images from his computer. The superior court admitted the portions of Speers' prior testimony requested by Speers responsive to these three subjects, but disallowed his designations that were unrelated. Because the excluded portions did not "qualify, explain or place into

context" the prior testimony introduced by the State, the superior court did not abuse its discretion in refusing to admit them into evidence.

D. Admission of Web Pages

¶63 Speers argues the superior court should not have admitted evidence his computer had been used to access sexually explicit images on a web site because the admission of this evidence essentially required him to "defend against the very acts for which he had won acquittal" in the sexual exploitation case. We disagree; the acquittals in the sexual exploitation case did not involve the images introduced into evidence in this case.

¶64 Speers was charged in the sexual exploitation case with 18 counts of sexual exploitation of a minor based on images from this web site found on the hard drive of his computer. *Speers*, 209 Ariz. at 128, ¶ 7, 98 P.3d at 563. Sixteen of the images were from thumbnail pictures that would have appeared on the computer screen in a grid-like formation from a web page, and each constituted a separate file that had been automatically stored on his computer as a temporary internet file. *Id.* Two images were full-sized enlargements of two of the thumbnails. *Id.* The jury acquitted Speers on the charges relating to his alleged possession of the thumbnail images, but found him guilty

on the two counts of knowing possession of the full-size images. *Id*. at 129, ¶ 9, 98 P.3d at 564.

¶65 Before the second trial, Speers moved in limine to bar the State from introducing all images, web pages, and associated source code into evidence on due process and double jeopardy grounds. The superior court granted the motion in part, stating: "The State is not to introduce any evidence of anything on the [] website except for the two full-sized images and the two related thumbnail images for which the defendant was convicted in the previous trial." During trial, the State asked the court to reconsider its ruling, asserting it needed to introduce into evidence certain portions of pages from this website so it could show the images from these pages had been consciously accessed. After acknowledging it had been confused about the "content and what had been charged" in the sexual exploitation case, the superior court granted the motion and allowed the State to introduce into evidence 16 thumbnails and one enlarged image from the first page of the website (none of which had been charged in the sexual exploitation case) and four enlarged images from the second page of the website (two of which had not been charged in that case and the two that gave rise to his convictions in that case). The State thereafter introduced into evidence the thumbnails and enlarged images permitted by the court.

¶66 Speers argues admission of evidence of the web site was contrary to *State v. Little*, 87 Ariz. 295, 306-07, 350 P.2d 756, 763-64 (1960), which held evidence of a prior offense is inadmissible in the prosecution of a subsequent offense if the defendant was acquitted of the prior offense. As our supreme court stated in *Little*: "A verdict of acquittal should relieve the defendant from having to answer again, at the price of conviction for that crime or another, evidence which amounts to a charge of a crime of which he has been acquitted." *Id.* at 307, 350 P.2d at 764. Speers' reliance on *Little* is misplaced; as we have described, the court did not allow the State to introduce evidence of any alleged prior offense that had resulted in an acquittal.

¶67 Speers also contends admission of this propensity evidence violated Arizona Rules of Evidence 402, 403, and 404(c)(1). Speers challenged the admission of this evidence on these same grounds in his appeal from the first trial and this court held "[t]here was no error" in its admission. *Speers*, 1 CA-CR 03-0812, at *8-*12. Generally, issues raised and decided in a prior appeal of the same case cannot be raised again in a subsequent appeal. *State v. Waldrip*, 111 Ariz. 516, 518, 533 P.2d 1151, 1153 (1975); *see also Employers Mut. Liab. Ins. Co. v. Indus. Comm'n*, 115 Ariz. 439, 441, 565 P.2d 1300, 1302 (App. 1977) ("if an appellate court has ruled upon a legal

question and remanded for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case"). We, therefore, decline to revisit our prior decision on this issue.

¶68 Finally, contrary to Speers' contention, Arizona Rule of Criminal Procedure 16.1 does not preclude the superior court from reconsidering its pretrial ruling and admitting the additional evidence. Rule 16.1(d) expressly allows the superior court to reconsider pretrial rulings "for good cause."[15] The superior court's determination it had mistakenly excluded otherwise admissible evidence based on a misunderstanding of the facts constituted good cause for modifying its prior ruling. *See State v. Davis*, 137 Ariz. 551, 560, 672 P.2d 480, 489 (App. 1983) (superior court had good cause to reconsider ruling on evidence because of new information).[16]

[15]Rule 16.1(d) provides in full as follows: "Except for good cause, or as otherwise provided by these rules, an issue previously determined by the court shall not be reconsidered."

[16]We reject Speers' assertion the court's reconsideration of its ruling was prejudicial because the court had "denied [him] sufficient funds" to retain a particular computer expert. The court found the expert's estimated charges were excessive and authorized a $10,000 payment unless Speers made a showing of good cause for an increase.

VII. Juror Misconduct

¶69 Speers argues the superior court should have granted his motion for a mistrial because during deliberations, one juror told other jurors he had an adult relative who had been molested as a young child, and when he asked the relative whether she remembered the "facts," she told him she "remembered everything as if it was today." The court questioned the other jurors about the juror's statement and asked, if deliberations were to continue, would they be able to consider only evidence admitted in court. After receiving assurances they would, the superior court excused the juror who had made the statement, replaced that juror with an alternate, denied Speers' motion for mistrial, and instructed the jury they were to determine the facts only from the evidence presented during the trial and were to set aside and disregard all past deliberations and begin deliberations "all over again."

¶70 When an allegation of juror misconduct arises, a superior court has considerable discretion to determine whether the misconduct requires a mistrial or other corrective action. *State v. Apodaca*, 166 Ariz. 274, 276-77, 801 P.2d 1177, 1179-80 (App. 1990). Absent abuse of discretion, we will not reverse a superior court's ruling as to whether such alleged juror misconduct merits a mistrial. *Id.* Moreover, juror misconduct is not a ground for mistrial unless the defendant demonstrates

actual prejudice or if prejudice may be fairly presumed from the facts. *State v. Miller*, 178 Ariz. 555, 558, 875 P.2d 788, 791 (1994).

¶71 Here, there is no question juror misconduct occurred. The juror not only failed to disclose his family member's molestation during voir dire but then related to other jurors the conversation he had with her regarding her ability to remember the event. *See* Ariz. R. Crim. P. 24.1(c)(3) (juror misconduct includes "[r]eceiving evidence not properly admitted during the trial," and "[p]erjuring himself or herself or willfully failing to respond fully to a direct question posed during the voir dire examination").

¶72 Any prejudice from the juror's failure to make proper disclosure during voir dire, however, was cured by the court's dismissal of the juror and substitution of an alternate. And, Speers was not deprived of a fair trial because the jurors' receipt of the extrinsic evidence did not taint the verdict. As discussed above, after learning of the situation, the superior court questioned the other jurors as to whether, if deliberations continued, they would be able to limit their consideration to only evidence introduced during the trial. After receiving assurances they could, the court then reinstructed the jury regarding its duty to determine the facts based only on the evidence produced in court and directed it to

set aside all past deliberations and start over again. The superior court is in the best position to judge the credibility of the jurors, *State v. Hoskins*, 199 Ariz. 127, 139, ¶ 37, 14 P.3d 997, 1009 (2000), and our supreme court has instructed us jurors are presumed to follow their instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Under these circumstances, the superior court did not abuse its discretion in denying Speers' request for a mistrial.

CONCLUSION

¶73 For the foregoing reasons, we affirm Speers' convictions and sentences.

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
_____
DANIEL A. BARKER, Judge

/s/
_____
PETER B. SWANN, Judge