DIVISION ONE
FILED: 01/26/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0191
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	
WILLIAM ORTA, JR.,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	
	)	
	)	

Appeal from the Superior Court in Yuma County

Cause No. CR S1400CR200400864

The Honorable John P. Plante, Judge

AFFIRMED

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

Paul J. Mattern, Attorney at Law — Phoenix
By Paul J. Mattern
Attorney for Appellant

B R O W N, Judge

¶1 William Orta Jr. appeals his convictions and sentences on one count of molestation of a child ("Count One"), and one count of engaging in sexual conduct with a minor under the age of twelve ("Count Two"). For the reasons that follow, we affirm.

BACKGROUND

¶2 The victim, fourteen years old at the time of trial, testified that on two separate occasions Orta initiated sexual contact with her. The first time was when she was sleeping in the same bedroom as Orta and her mother at her "nana's" house. In that instance, Orta took her hand, put it down his pants, and had her touch his penis. She was uncertain about when this occurred. During the second encounter, when she was nine or ten years old, Orta came into her bedroom at night and put two fingers inside her vagina. Orta did not testify at trial.

¶3 The jury convicted Orta on both counts. The judge sentenced Orta to a mitigated term of ten years in prison on Count One, and a life term without possibility of parole for thirty-five years on Count Two. Both terms were ordered to be served consecutively. Orta timely appealed. We have

jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 13-4031 (2001), -4033 (Supp. 2009).[1]

DISCUSSION

¶4 Orta argues that four issues merit reversal: 1) the adequacy of the indictment, 2) violation of speedy trial rights, 3) preclusion of witness testimony, and 4) prosecutorial misconduct.

I. Adequacy of the Indictment

¶5 Orta argues he was denied a fair trial because Count One of the indictment failed to give proper notice of the offense charged, and the charges in Count One and Count Two were multiplicitous. Specifically, he contends that because "sexual contact" is broadly defined under the governing statute, he was forced to guess at what type of contact formed the basis of the charge in Count One. He also aserts that the indictment's lack of specific dates as to when the alleged offenses occurred deprived him of the requisite notice of the charges. Finally, he argues that Counts One and Two were duplicitous or multiplicitous because each count did not clearly charge a separate act, implicating his right to protection against double

[1] Unless otherwise indicated, we cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

jeopardy and against double punishment under A.R.S. § 13-116 (2001).

¶6 Orta was indicted on July 15, 2004. Count One alleged that on or about July 2003, Orta molested the victim by intentionally or knowingly engaging in sexual contact or causing a person to engage in sexual contact with her, in violation of A.R.S. § 13-1410 (Supp. 2009). Count Two alleged that on or about July 2003, Orta intentionally or knowingly engaged in sexual intercourse or oral sexual contact with the same victim, in violation of A.R.S. § 13-1405 (2001). Count Two specifically added a description of the manner in which this offense was committed as "to wit: [Orta] digitally penetrated the victim's vagina."

¶7 In February 2007, Orta filed a motion to dismiss Count One, making the same arguments that he now raises in this appeal. In response, the State argued that not only did Count One provide constitutionally adequate notice of the charge, but, Orta knew the nature of the charge because he had received three years of extensive discovery, which included a copy of the victim's videotaped interview. The trial court denied Orta's motion to dismiss, reasoning that Count One was specific enough to afford Orta the constitutionally requisite notice of the charges he faced and to allow him to prepare a defense.

¶8 We review a trial court's ruling on a motion to dismiss the indictment for abuse of discretion. *State v. Ramsey,* 211 Ariz. 529, 532, ¶ 5, 124 P.3d 756, 759 (App. 2005). We review a trial court's ruling on a multiplicity claim that implicates double jeopardy de novo. *See id.*

¶9 We reject Orta's claim that the molestation charge in Count One was insufficient to provide the constitutionally requisite notice because it did not describe the precise act of sexual contact alleged to have occurred. "Due process requires that a defendant be given 'notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge.'" *State v. Rivera*, 207 Ariz. 69, 73, ¶ 12, 83 P.3d 69, 73 (App. 2004) (citation omitted); *see* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."). In accordance with this requirement, Rule 13.2 of the Arizona Rules of Criminal Procedure provides that the indictment shall be "a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged," with a citation to the statute allegedly violated. Ariz. R. Crim. P. 13.2(a),(b). However, "[t]here is no requirement that the defendant receive notice of how the State will prove his responsibility for the alleged offense." *State v. Arnett*, 158 Ariz. 15, 18, 760 P.2d 1064, 1067 (1988) (citation

omitted). "All that is necessary is that the [defendant] have actual notice of the underlying charges." *State v. Bailey,* 125 Ariz. 263, 265, 609 P.2d 78, 81 (App. 1980).

¶10 Count One of the indictment plainly sets forth the charge that Orta molested the victim by engaging her or causing another person to engage her in sexual contact, a single crime that may be committed in a number of ways. *See* A.R.S. § 13-1410 (prohibiting sexual contact with a child under fifteen); A.R.S. § 13-1401(2) (Supp. 2009) (defining sexual contact in pertinent part as touching any part of the genitals or anus by any part of the body or causing a person to engage in such contact). The State was not required to provide notice in the indictment of the specific act which gave rise to the charge, or the manner in which it would prove the offense. *See Arnett*, 158 Ariz. at 18, 760 P.2d at 1067. Moreover, when a defendant receives actual notice of the charges against him by other means, such as discovery, he may not argue that his indictment was insufficiently specific. *See State v. Delgado*, 174 Ariz. 252, 255, 848 P.2d 337, 340 (App. 1993). In this case, Orta did not deny that he received discovery that revealed what the victim told the police about the two incidents that gave rise to the charges, and accordingly, the nature of the act that gave rise to Count One. We therefore reject Orta's claim that he did not

receive adequate notice before trial of the nature of the charge in Count One against which he needed to prepare a defense.

¶11 We likewise reject Orta's argument that the indictment's failure to specify precisely when the offenses occurred, other than "on or about July 2003," and any variance therefrom at trial, requires dismissal. The date of the conduct is not an element of either child molestation or sexual conduct with a minor. *See* A.R.S. § 13-1410(A) (defining elements of crime of child molestation); A.R.S. § 13—1405(A) (defining elements of crime of sexual conduct with a minor). By generally identifying the dates of the incidents that gave rise to the charges as "on or about July 2003," and providing the victim's date of birth, the indictment provided Orta sufficient notice that the two incidents were alleged to have occurred on or about the month that the victim turned ten years old. By further referencing the statute that provides for enhanced sentencing based on her age in Count Two, the State revealed all that was required to charge the offenses and identify the potential sentencing exposure. *See* A.R.S. § 13-1405.[2]

[2] The jury was not asked to, and did not, make a finding that the victim was under the age of twelve when Orta committed the offense of molestation charged in Count One. The jury made a finding that the victim was under the age of twelve only with respect to the offense in Count Two, sexual conduct with a minor, which exposed Orta to an enhanced sentence if the victim is under the age of twelve.

¶12 Moreover, any change between the time of the offense as alleged in the indictment and the time of the offense presented at trial serves to automatically amend the indictment to conform to the evidence at trial. Such automatic amendment is constitutionally permitted unless the amendment results in a change in the nature of the underlying offense, or in actual prejudice to Orta. Ariz. R. Crim. P. 13.5(b); *State v. Sanders,* 205 Ariz. 208, 214, ¶ 19, 68 P.3d 434, 440 (App. 2003) ("[T]he test to determine what amendments are constitutionally permitted is whether the amendment changes the nature of the offense or prejudices the defendant in any way."). Here, the change in the time period alleged in the indictment did not change the nature of the offense by modifying an essential element of the crime. *See Sanders,* 205 Ariz. at 214, ¶¶ 19-20, 68 P.3d at 440. Regardless of whether the offense occurred "on or about July 2003," or it occurred earlier, the nature of the underlying offense is the same. As a result, Orta bears the burden of showing that he suffered actual prejudice from the amendment, which he has not done. *See State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996).

¶13 Orta argues that he was prejudiced by the victim's testimony that the incident in Count One possibly occurred four years earlier than alleged in the indictment. He claims that such a change in the time period of the alleged offense denied

him the ability to prepare an adequate defense against the mandatory life sentence that attaches when the victim is under twelve years of age. This argument fails because the indictment alleges the victim was only ten years old at the time of both offenses. Under these circumstances, any variance between the dates alleged in the indictment and the testimony at trial could not have prejudiced Orta.

¶14 We also reject Orta's claim that the lack of specificity in the indictment created multiplicitous charges,[3] and a risk of double jeopardy. An indictment is "multiplicitous" if it charges a single offense in multiple counts. *State v. Powers,* 200 Ariz. 123, 125, ¶ 5, 23 P.3d 668, 670 (App. 2001) (citation omitted), *decision approved*, 200 Ariz. 363, 26 P.3d 1134 (2001). On its face, the indictment charges Orta with two distinct offenses: child molestation based on "sexual contact" with the victim, and sexual conduct with a minor, based on digital penetration. Moreover, the record at trial, which is consistent with the victim's statements to police before trial, shows that the charges clearly arose from two separate acts, and constituted two distinct offenses. The

[3] Although appellant asserts in his caption to this argument that the indictment was duplicitous, in the body, he argues that the charges were multiplicitous. An indictment is "duplicitious" when it charges multiple crimes in one count. *Ramsey*, 211 Ariz. at 532, ¶ 6, 124 P.3d at 759 (citations omitted). The victim testified at trial that only two sexual incidents occurred.

victim testified at trial that Orta engaged in sexual misconduct on two separate occasions. The first occurred when she was living with her "nana," and Orta took her hand, put it down his pants, and had her touch his penis. This conduct formed the act that gave rise to the charge of molestation, comprised of sexual contact with the victim. The second occurred when the victim was about ten years old, and Orta inserted two fingers inside her vagina. This conduct formed the act that gave rise to Count Two. The entire record of the trial would be available to prevent any double jeopardy should the State seek to prosecute Orta again for the same acts. *See State v. Bruce,* 125 Ariz. 421, 423-24, 610 P.2d 55, 57-58 (1980). Thus, we reject Orta's claim that the charges were multiplicitous, exposing him to the risk of double punishment under A.R.S. § 13-116 and double jeopardy.

II. Speedy Trial Violation

¶15 Orta also argues he was the victim of "multiple and cumulative speedy trial violations," under Arizona Rule of Criminal Procedure 8, and the federal constitution, and, because prejudice is presumed from the lengthy delay in bringing him to trial, "the convictions must be vacated and dismissed with prejudice." He argues that the court abused its discretion in

denying his motion to dismiss for speedy trial violations,[4] and later by delaying his trial beyond the time afforded by the Arizona Supreme Court.

A. Speedy Trial Rights under Rule 8

¶16 We will affirm a trial court's ruling on a defendant's motion to dismiss for violation of speedy trial rights unless the defendant demonstrates that the court abused its discretion and that prejudice resulted. *State v. Spreitz*, 190 Ariz. 129, 136, 945 P.2d 1260, 1267 (1997). Our determination of whether the court abused its discretion "depends on the facts of each case." *Id.*

¶17 Our supreme court has recognized on several occasions that Rule 8 provides "stricter speedy trial rights than those provided by the United States Constitution." *Id.* (citation omitted); *see also State v. Schaaf,* 169 Ariz. 323, 327, 819 P.2d 909, 913 (1991). Rule 8.2 provides that a defendant in custody is entitled to be tried within one hundred fifty days of his arraignment on the charges, subject to allowable exclusions under Rule 8.4, which include "[d]elays occasioned by or on behalf of the defendant[.]" *See* Ariz. R. Crim. P. 8.2(a), 8.4(a). Delays caused by defense motions for continuances, even continuances to consider substantive motions, and special

[4] Orta's first motion to dismiss for violation of speedy trial rights was filed approximately two years after his arraignment.

actions, are considered delays occasioned "by or on behalf of the defendant." *State v. Blakley*, 204 Ariz. 429, 441, ¶ 62, 65 P.3d 77, 89 (2003). "Every defense delay is to be excluded," even if it does not result in an actual delay of the trial date. *Mathews v. State*, 162 Ariz. 208, 209, 782 P.2d 326, 327 (App. 1989). "[D]elays agreed to by defense counsel are binding on a defendant, even if made without the defendant's consent." *Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270.

¶18 Moreover, a defendant may waive his speedy trial rights by not objecting in a timely manner. *Id.* at 138, 945 P.2d at 1269. He may not "wait until after the [Rule 8.2 time limit] has expired and then claim a Rule 8 violation after it is too late for the trial court to prevent the violation." *Id.* (citation omitted). Reversal on speedy trial grounds additionally requires a showing that defendant was prejudiced by the delay. *State v. Vasko*, 193 Ariz. 142, 149, ¶ 31, 971 P.2d 189, 196 (App. 1998).

¶19 We find that the trial court did not violate Orta's speedy trial rights under Arizona law either by the two-year delay preceding his Rule 8 motion, or the shorter delay he experienced after the Arizona Supreme Court suspended the Rule 8 time limits because of extraordinary circumstances. The record outlined below demonstrates that Orta caused all of the early delays in this case by repeated requests for continuances, all

of which time Orta expressly confirmed that he had waived. Orta caused more delay by changing his attorney, necessitating further continuances. Even later delays were caused by Orta's disclosure two weeks before trial of an expert witness, resulting in extensive litigation requiring continuance of the trial date. Moreover, Orta has failed to show that the delay in bringing him to trial caused him any prejudice.

1. Orta's Early Requests for Continuances

¶20 A grand jury indicted Orta on July 15, 2004, and he was arraigned on the charges on July 23, 2004. Between July 23, 2004, and October 22, 2004, ninety days included in the Rule 8 calculus passed, one of which was excludable for purposes of assigning a new judge after the State filed a notice of change of judge. All of the delays between October 22, 2004, and November 1, 2005, insofar as can be determined from the record on appeal,[5] resulted from Orta's requests for continuances to allow him to prepare for trial or to reach a plea agreement. This time was thus excludable time. *See State v. Henry*, 191

[5] The record on appeal does not include transcripts of numerous hearings between 2004 and 2007, or written requests for the continuances. "Where 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). Moreover, until the final delay, no one kept track on the record of the last day for trial, or the days excluded from time.

Ariz. 283, 284-85, 955 P.2d 39, 40-41 (App. 1997); s*ee also Blakley*, 204 Ariz. at 441, ¶ 62, 65 P.3d at 89.

2. Judge's Rejection of Plea Agreement

¶21 On November 1, 2005, the parties presented the trial court with a signed plea agreement in which Orta agreed to plead guilty to two counts of aggravated assault. Defense counsel stipulated to a continuance of the sentencing date, and on December 20, 2005, after the court informed the parties that it intended to reject the stipulations in the plea agreement, Orta withdrew from the agreement. Under Arizona law, after the court rejects a defendant's plea, sixty days remain within which to begin the trial. *See State v. Doskocil*, 113 Ariz. 413, 415, 555 P.2d 659, 661 (1976).

¶22 Orta continued to request continuances throughout early 2006 after the case was assigned to another judge. At Orta's request, the trial court continued the evidentiary hearing on his motion to suppress from May 15, 2006, until May 23, 2006. After considering supplemental briefing, the court denied the motion on July 5, 2006.

¶23 At a status hearing on July 19, 2006, Orta's counsel asked for a trial date, volunteered that there was a "whole host of excluded time in this case," agreed with the judge that Orta had waived his time limits "altogether," and added, "[A]s a

matter of fact, we started this case all over again." Defense counsel then agreed to a trial date of November 14, 2006.

3. Orta's Rule 8 Motion to Dismiss and Motion for Continuance

¶24 On September 22, 2006, a new attorney for Orta[6] filed a motion to dismiss, in which it was argued for the first time that Orta's speedy trial rights had been violated by the failure to bring him to trial for two years. The State responded that the November 14, 2006, trial was set to take place only nineteen non-excludable days after the rejection of the plea agreement, well within the legal limits, excluding time expressly waived by Orta. The trial court agreed with the State's position and denied Orta's motion. Thus, we find no abuse of discretion in the court's denial of Orta's motion to dismiss. *See Spreitz*, 190 Ariz. at 136, 945 P.2d at 1267.

¶25 Defense counsel immediately filed a motion to continue the trial date to allow her to conduct witness interviews. The State objected, in part on the ground the victim's rights to a speedy trial were at risk. The court granted the motion to continue and reset the trial date for February 27, 2007. This time was excluded because it was by or on behalf of Orta.

---

[6] The record indicates the new attorney filed a notice of appearance as co-counsel on August 30, 2006, without informing appellant's current attorney. The current attorney subsequently filed a notice of withdrawal. A hearing to determine counsel was held on October 5, 2006, adding further delay to the proceedings.

4. Special Action, Evidentiary Hearing

¶26 We further find that the subsequent delay of another four months was also "by or on behalf of" Orta, and thus was excludable time under Rule 8.4(a). Two weeks before the new trial date of February 27, 2007, Orta notified the State for the first time that he intended to call an expert as a witness at trial. The State filed a motion to preclude Orta's expert as a discovery sanction, which the trial court granted. Orta obtained a stay from this court pending its consideration of his petition for special action. This court accepted jurisdiction of the petition, granted relief, and the trial court received the mandate on April 30, 2007. *State v. Orta*, 1 CA-SA 07-0041 (Ariz. App. March 22, 2007) (decision order).

¶27 The trial court set an evidentiary hearing on the expert's testimony for May 17, 2007, which was then continued to May 31, 2007 at Orta's request. After the evidentiary hearing, the court ruled Orta's expert could testify. The court set a new trial date of June 26, 2007. Contrary to Orta's argument on appeal, this was excludable time, because it was by or on behalf of Orta, and was without objection from Orta.

5. Continuance for Extraordinary Circumstances Under 8.4(d)

¶28 We also find that the subsequent two-month delay in bringing Orta to trial was excludable time under Rule 8.4(d) and

thus did not violate his speedy trial rights under Arizona law. Less than a week before the trial date, the State filed a motion to continue trial, its first unilateral motion to continue, in which it asked the court to apply for a suspension of the Rule 8 time limits pursuant to Rule 8.4(d).[7] The court held an emergency hearing on June 25, 2007, vacated the June 26 trial date and forwarded a request to the Arizona Supreme Court to suspend Rule 8 limits until July 17, 2007. Orta objected on speedy trial grounds, arguing that his expert witness and three lay witnesses might not be available, and, in any case, "the time has probably run out already."

¶29 By order dated June 29, 2007, the Chief Justice approved the request for suspension of Rule 8, and designated the matter as an extraordinary case.[8] The order did not require trial to occur on or by a specific date.

---

[7] Rule 8.4(d) states "[t]he following periods shall be excluded from the computation of time limits set forth in Rule 8.2 and 8.3: [d]elays necessitated by congestion of the trial calendar . . . in which case the presiding judge shall apply to the Chief Justice of the Arizona Supreme Court for suspension of any of the rules of Criminal Procedure." In this case, the State was in the middle of a lengthy trial in front of the same judge assigned to Orta's case. The court was unsuccessful in assigning Orta's case to a different court for trial and therefore applied to the Supreme Court for suspension of Rule 8 in this matter.

[8] Although the order referenced Rule 8.1, under the circumstances, it was clearly intended to reference Rule 8.4(d). *Compare* Ariz. R. Crim. P. 8.1(e) (dealing with "extraordinary

¶30 The trial court, *sua sponte*, continued the trial twice more without objection from Orta. The court advised defense counsel that it was interpreting the supreme court order as a directive that the case was "not to be continued past what is absolutely the earliest possible date that we can go," as if "it was just enough to get it past the [other] trial." Orta objected only to the third continuance of the trial, to August 28, 2007, arguing that the supreme court order directed that his trial would "immediately follow" completion of the other trial, and it appeared that the court was allowing additional time for the State to prepare for Orta's trial. The court explained that it merely wanted additional time to ensure that it had correctly anticipated when the other trial would be completed.

¶31 We reject Orta's argument, raised for the first time on appeal, that the trial court also violated his speedy trial rights by continuing the trial beyond July 17, 2007, the date submitted to the supreme court. The supreme court's order did not set a specific date for trial. Orta did not object, thus apparently agreeing that the order directed the court to set the trial date at the earliest possible date after the other trial finished. The record contains no suggestion that Orta's trial

---

cases") *with* Ariz. R. Crim. P. 8.4(d) (dealing with delays necessitated by congestion of the trial calendar).

was delayed beyond what was required to finish the other trial. We find no Rule 8 violation.

¶32 Trial commenced on August 28, 2007. On the third day of trial, during *voir dire*, the court granted Orta's request for a mistrial. Under Rule 8.2(c), a trial ordered after a mistrial shall commence within sixty days from the entry of the order of the court. *See* Ariz. R. Crim. P. 8.2(c). The new trial began on October 29, 2007, the last day allowable under Rule 8.2(c). For the foregoing reasons, we find no violation of Orta's speedy trial rights under Rule 8.

B. Federal Speedy Trial Rights

¶33 We also reject Orta's argument that the lengthy delay in bringing him to trial violated his speedy trial rights under the United States Constitution. The federal constitutional provision does not "provide a specific time limit within which trial must be held." *State v. Henry*, 176 Ariz. 569, 578, 863 P.2d 861, 870 (1993). We apply the following factors to determine whether a delay requires reversal under the federal constitution: (1) the length of the delay; (2) reasons for the delay; (3) defendant's assertion of the right; and (4) resulting prejudice. *Id*. at 578-79, 863 P.2d at 870-71 (citations omitted). In weighing these factors, we give the least weight to the length of the delay; the prejudice to the defendant is the most significant factor. *Id.* As the pretrial delay

approaches one year, the delay is considered "presumptively prejudicial," that is, unreasonable enough to trigger a speedy trial analysis. *See Doggett v. United States,* 505 U.S. 647, 652 n.1 (1992) (citation omitted).

¶34 The delay in this case was more than three years, and thus was "presumptively prejudicial," triggering the speedy trial analysis. *See id.* In applying the four factors to the pretrial delay in this case, however, we find that Orta was the most responsible for the three-year delay by repeatedly seeking continuances, including a continuance to allow his new attorney to conduct additional discovery, by disclosing an expert weeks before trial, filing a special action to ensure the expert would be allowed to testify, and seeking a continuance of the evidentiary hearing on the expert's testimony.

¶35 Orta did not timely raise his objections to the delays. His first attorney expressly waived all previous delays at a hearing two years after his arraignment. Shortly thereafter, Orta's second attorney, apparently unaware of the waiver, filed a motion to dismiss on speedy trial grounds, the first time Orta asserted his speedy trial rights. The record reveals that Orta failed to assert his speedy trial rights for nearly another year, and then only in response to the State's request for suspension of the speedy trial rules because of court congestion.

¶36 Finally, Orta has failed to claim any actual prejudice to his ability to defend against the State's claims from the trial delay, and the record reveals none. Under these circumstances, we find no violation of Orta's federal speedy trial rights.

III. Preclusion of Witnesses

¶37 Orta next argues that the trial court abused its discretion by refusing to allow two defense witnesses to testify, thereby denying him a fair trial and violating his confrontation rights.

¶38 The constitutional rights to due process guarantee a defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky,* 476 U.S. 683, 690 (1986) (citations omitted). However, "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions," including, application of reasonable evidentiary rules. *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

¶39 We are not persuaded by Orta's claim. In June 2005, Orta filed affidavits by M.T. and A.T. which state that they had been told by S.C., a friend of the victim, that the victim had recanted. This issue did not surface until the fifth day of trial, when Orta informed the court that he intended to call S.C. as a defense witness regarding the victim's recantation.

She went on to say that if S.C. denied that the victim recanted, she would call M.T. and A.T. to impeach S.C.'s testimony. The State objected to their proposed testimony on the grounds it would involve multiple layers of hearsay and impeachment on a collateral issue. The State also objected on the grounds that the victim already testified as to what she had told S.C., thus impeachment was unnecessary. The court decided to "leave the issue of [M.T. and A.T.] to a later day."

¶40 Several days later, the court ruled that S.C. could testify, but with respect to M.T. and A.T., it was "very reluctant" stating that it "need[ed] some authority before [it could] allow them to testify" but acknowledged that it could be convinced that such testimony would be permissible. When asked if she was prepared to discuss the possible testimony of M.T. and A.T., defense counsel responded, "Judge, I wish to discuss that after S.C. has testified."

¶41 S.C. subsequently testified as to what the victim told her. After her testimony, and outside the presence of the jury, the following exchange took place:

> THE COURT: Are there some matters that need to be brought before the Court?
>
> MS. CRUZ (defense counsel): Yes, Your Honor, the defense, pardon me, the defense re-urges its prior request to call . . . [M.T. and A.T.], and the reasons for that request are

> as follows – if I could have just a moment, Judge?
>
> THE COURT: All right. As you may recall, it wasn't that the Court said you could not call [M.T. and A.T.], it was certain information that couldn't be elicited.[9]
>
> MS. CRUZ: If I can have a moment with my client, your Honor?
>
> THE COURT: Yes, you may.
>
> MS. CRUZ: Judge, actually, the defense rests at this time.

Based on the foregoing, Orta's claim that the court abused its discretion and violated his due process and confrontation rights fails. The record indicates that Orta ultimately chose not to call the witnesses, presumably as a matter of trial strategy.

IV. Prosecutorial Misconduct in Closing Argument[10]

¶42 Orta next argues that the State engaged in inflammatory misconduct by referring to Orta's family, who were present in the courtroom, and arguing that for three years the

---

[9] The record does not show that the trial court ever ruled that "certain information couldn't be elicited," or ruled on any issue with respect to this testimony, and Orta fails to cite to any portion of the record that shows any such ruling.

[10] Orta also argues for the first time in his reply brief that the State engaged in misconduct by arguing, "It's your job to make sure that if you are convinced he did this, to make sure it really never happens again." By failing to raise this argument in his opening brief, Orta has waived it. *See State v. Guytan*, 192 Ariz. 514, 520, ¶ 15, 968 P.2d 587, 593 (App. 1998).

victim had fought this "army," and that she and her friends and family had been put through the "wringer" by three years of interviews, court hearings, and testimony, and her entire life had been "scrutinized." Orta failed to object to the referenced argument below, limiting us to review for fundamental error only. *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Orta thus bears the burden of establishing error, that the error was fundamental, and that the error caused him prejudice. *Id*. at 568, ¶ 22, 115 P.3d at 608.

¶43 "[P]rosecutors have wide latitude in presenting their closing arguments to the jury: 'excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury.'" *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (citation omitted). To determine whether a prosecutor's remarks are improper, we consider whether the remarks called to the attention of jurors matters they would not be justified in considering, and the probability, under the circumstances, that the jurors were influenced by the remarks. *Id*. (citation omitted). To require reversal, the misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee,* 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (citation

omitted).

¶44 We find that the State did not exceed permissible boundaries in its closing argument. The victim's credibility, that is, whether she was telling the truth when she testified that Orta had molested her, or whether she had fabricated the allegations, was the sole contested issue for trial. Orta's only defense at trial was that the victim was lying, because she hated him, and wanted him away from her family. The State's references to the "army of supporters" sitting behind Orta in the courtroom, the intense scrutiny the victim had undergone for the past three and a half years, and the "wringer" her family and friends were put through as a result of her allegations, were all made in the context of discussing the expert's testimony that children may make and maintain false allegations to receive "some kind of reward" or "some kind of positive attention." The State argued:

> [The victim] has not been rewarded for her disclosure. Even after her disclosure, she had to go to [Orta's] mother's house every day after school for a couple of hours to be watched by [Orta's] mother. She's got her grandma, her grandpa, 17 grand kids, a whole cadre of aunts, uncles, and cousins. Look at the army of supporters [Orta] has. This is what [the victim] was up against for three and a half years, while she sits back there by herself with her mother and an advocate from our office, and in the background there's Lori and Michelle [two friends of the victim].

> Everything she's ever done in her life has been scrutinized, by that family, by the police, by us, and maybe that's what justice requires. But when you're asking a 14 year old about breaking a cup in the kitchen and telling on your brother, and that's the worst thing we can come up with on her? She has not been rewarded. Everybody in her family, everybody who's ever known her has been drug in for interviews by the police; her brother, her friends, Lori, the whole family have all gone through the [wringer] in the last three and a half years; three and a half years of interviews and court hearings, testimonies. Those closest to her are the ones that were brought in for testimony. And she's being rewarded for her disclosure? She no longer sees her stepbrother and sisters.
>
> She's got everybody calling her a liar. She's got nana asking her about it; and not once, other than that one time with S.C., did she waver, not once. And yet here she is spending hours after school every single day, ten [sic] days a week, with [Orta's] family.

¶45 The jurors had the same opportunity as Orta to see the gallery, and it was not unreasonable for the State to use the gallery to illustrate the split in the family caused by the allegations, and the opposition she faced in continuing to insist that the allegations were true. The argument was relevant, not on the issue of Orta's guilt or innocence, but on the issue of the victim's credibility, the key issue at trial. Nor was it unreasonable, based on the evidence at trial, for the State to argue that "everything she's ever done in her life has been scrutinized, by that family, by the police, by us," and

that her whole family and her friends had been put through the wringer as a result of her allegations.

¶46 The evidence showed that the victim was at Orta's mother's house every weekday after school for two years after she made the allegations, and Orta's mother asked her about the allegations several times in the three and a half years preceding trial. The evidence also showed that Orta had a large extended family, including aunts, uncles, and cousins, who would gather at his mother's house, but that the victim no longer had contact with Orta's children, her stepbrothers and sisters. The victim's own brother testified that he heard about the allegations at school and asked her several times if the allegations were true. The victim and her brother were both questioned at trial about their relationship with each other and Orta, whether she had ever told a lie, and what it was like living with Orta. They were also questioned about her relationships with her friends. Further, the evidence showed that the victim's friends and family members had been subjected to police and other pretrial interviews. Several testified at trial, undoubtedly a stressful experience that could reasonably be construed as being put "through the wringer." On this record, we find the State's closing argument did not exceed permissible boundaries, and was not misconduct requiring reversal.

CONCLUSION

¶47 For the foregoing reasons, we affirm Orta's convictions and sentences.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge