DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. CORY GORDON HEIGHTON, Appellant.	)	1 CA-CR 09-0554 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-179780-001 SE

The Honorable Emmet J. Ronan, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
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Attorneys for Appellee

Law Offices of Robert Gaffney — Scottsdale
By Robert Gaffney
Attorney for Appellant

B A R K E R, Judge

¶1 Cory Heighton ("Heighton") appeals his convictions for two counts of sexual conduct with a minor. Heighton contends

that the trial court erred in (1) denying a motion to suppress his confession to the police, (2) in publishing to the jury a videotape recording of the victim in which she described Heighton's acts of sexual abuse, and (3) permitting the same recording to be admitted into evidence. For the following reasons, we affirm.

Facts and Procedural History

¶2 We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Heighton. *State v. Long*, 207 Ariz. 140, 142, ¶ 2, 83 P.3d 618, 620 (App. 2004).

¶3 On December 13, 2007, the victim in this case ("C.") was transported to the Center Against Family Violence after making allegations at school that Heighton - her stepfather - had sexually abused her. During an interview with a forensic interviewer, C. described in detail various sexual acts that Heighton had performed on her and that he had forced her to perform on him. Specifically, C. recounted details of events involving masturbation, fellatio,[1] and cunnilingus.[2]

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[1] Fellatio is defined as "oral stimulation of the penis." Merriam-Webster's Collegiate Dictionary 427 (10th ed. 2001).

[2] Cunnilingus is defined as "oral stimulation of the vulva or clitoris." Merriam-Webster's Collegiate Dictionary 282 (10th ed. 2001).

¶4 Detective L. from the Mesa Police Department informed C.'s mother of the allegations and asked her to make a confrontation phone call to Heighton. During the call, C.'s mother and Heighton agreed to meet each other at a nearby McDonald's restaurant.

¶5 Instead of C.'s mother, Detectives L. and M. met Heighton at the McDonald's. The two detectives were dressed in street clothes but had their police badges showing. They walked up to Heighton inside the restaurant, introduced themselves, and informed Heighton that certain allegations had been made against him. They asked him if he would be willing to go down and speak with them at the station. He agreed. They asked him if he would be willing to ride in a patrol car because they were not permitted to transport civilians in their unmarked vehicle. Heighton agreed.[3] While they waited for the patrol car, the two detectives and Heighton engaged in casual conversation. After five to ten minutes had passed and the patrol car had not arrived, Detective M. told Heighton that if he wanted to,

[3] We note that one portion of the hearing transcript reads that Heighton "wasn't" willing to ride in the patrol car. The State argues that this was probably a typographical error, given the content, and that the word should instead read "was." However, we need not resolve this. Detective L. testified, "[Heighton] knows there is a car coming to give him a ride as he agreed to. . . . [W]e offered to give him a ride. He accepted the ride." This statement is sufficient to establish that Heighton agreed to ride in the patrol car.

Heighton could drive his own vehicle and follow the detectives to the station. Heighton agreed. Before they departed from the parking lot, the patrol car arrived. Detective M. approached the car and told the officers inside "you know, he wants to follow me. Take off." The patrol car left, and Heighton followed the detectives in his own vehicle down to the station.

¶6 At the station, the detectives checked Heighton in at the front desk as a visitor, and he went with them to an interview room. The interview room was approximately eight feet by eight feet with only two chairs and a table.

¶7 Detective M. conducted the interview, which lasted just under sixty minutes. Detective M. started the interview by reminding Heighton that he was there voluntarily. He proceeded to ask Heighton questions about his work schedule, his relationship with C., and finally the allegations. The video recording in evidence shows the detective's demeanor and questioning remained calm throughout the interview, as did Heighton. Ultimately, Heighton made criminal admissions in response to his stepdaughter's allegations. Specifically, Heighton admitted that his stepdaughter had masturbated him ten to fifteen times and performed fellatio on him more than once.

¶8 After Heighton had confessed, Detective M. stated again that Heighton had come in voluntarily, and Heighton explicitly and affirmatively acknowledged that he had. Because

Heighton's admissions gave Detective M. probable cause to believe that he had committed criminal acts, Detective M. read Heighton his *Miranda* rights. Heighton waived his rights and repeated the admissions.

¶9 On December 21, 2007, the State filed an indictment charging Heighton with four counts of sexual conduct with a minor, a class two felony and dangerous crime against children. Specifically, Heighton was charged with engaging in acts of fellatio (once between December 1, 2006 and June 30, 2007, and once on December 12, 2007), masturbation, and cunnilingus with C. who was under the age of fifteen.

¶10 Prior to trial, Heighton moved to suppress the statements he made to the detective in his pre-arrest interview. He argued that his statements were made involuntarily and were the result of custodial interrogation. The court conducted a suppression hearing at which Detective L., Detective M., and Heighton testified. The transcript and video of Heighton's interview were also admitted into evidence for purposes of the hearing. In a subsequent minute entry, the trial court made various findings of fact regarding the claims of custodial interrogation and involuntariness and denied Heighton's motion to suppress.

¶11 At trial, C. recanted her allegations of Heighton's sexual abuse. Although she did not deny having made the

allegations to the interviewer, she testified that she had fabricated the allegations in the interview because she was mad at her stepfather. The State moved to publish to the jury a videotape recording of C.'s forensic interview as a recorded recollection under Rule 803(5) of the Arizona Rules of Evidence. The court granted the request. After the recording was shown to the jury, the court granted the State's request to admit the recording into evidence as an exhibit.

¶12 The jury found Heighton guilty of Count One, sexual conduct with a minor (2006-2007 fellatio), and Count Two, sexual conduct with a minor (masturbation). Heighton was sentenced to life imprisonment on count one and fifteen-years' imprisonment on count two, with sentences to run consecutively. Heighton timely appealed. We have jurisdiction under Arizona Revised Statutes sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A)(2) (Supp. 2008).

Discussion

1. Court's Denial of Heighton's Motion to Suppress

¶13 Heighton argues on appeal that the trial court erred in denying his motion to suppress. In reviewing a motion to suppress, we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's ruling. *State v. Gay*, 214 Ariz.

214, 223, ¶ 30, 150 P.3d 787, 796 (App. 2007). We review de novo the court's legal conclusions. *Id.*

¶14 "In order to be admissible, statements obtained while an accused is subject to custodial interrogation require a prior waiver of *Miranda* rights." *State v. Carter*, 145 Ariz. 101, 105, 700 P.2d 488, 492 (1985). However, the obligation to give *Miranda* warnings only arises "where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *see State v. Hall*, 204 Ariz. 442, 452, ¶ 40, 65 P.3d 90, 100 (2003). In determining whether an interrogation is custodial, we look to "the objective circumstances of the interrogation, not . . . the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994). And, we assess "whether under the totality of the circumstances a reasonable person would feel that he was in custody or otherwise deprived of his freedom of action in a significant way." *Carter*, 145 Ariz. at 105, 700 P.2d at 492. In so doing, we will consider the method used to summon the defendant; whether objective indicia of arrest are present; the site of the questioning; and the length and form of the interrogation. *See State v. Fulminante*, 161 Ariz. 237, 243, 778 P.2d 602, 608 (1988); *State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983).

¶15 In *State v. Carrillo*, police suspected the defendant committed murder. 156 Ariz. 125, 127, 750 P.2d 883, 885 (1988). Police officers contacted the defendant at his house and confronted him with a misdemeanor traffic warrant. *Id*. at 132, 750 P.2d at 890. They requested that the defendant accompany them to the police station, and the defendant did so by riding in the back of the patrol car. *Id*. Police told the defendant that he was not under arrest. *Id*. at 127, 750 P.2d at 885. At the station, the defendant was fingerprinted and photographed. *Id*. at 133, 750 P.2d at 891. He was then placed in a small, windowless interrogation room furnished with only three chairs and a table. *Id*. The police began with questions about the alleged traffic violation, then moved into questions of his criminal history, and then to questions about the murder. *Id*. Ultimately, the defendant confessed to the murder. *Id*. Upon doing so, the police read the defendant his *Miranda* rights and elicited his confession again. *Id*. The interrogation lasted ninety minutes. *Id.* at 892 n.12, 750 P.2d at 134 n.12. Under these circumstances, our supreme court affirmed the trial court's finding that the defendant's pre-*Miranda* statements were admissible because the defendant was not in custody. *Id*. at 892, 750 P.2d at 134.

¶16 In *Cruz-Mata*, the defendant agreed to accompany a detective from the defendant's workplace to the police station.

138 Ariz. at 372, 674 P.2d at 1370. He did so by riding in the passenger seat of the detective's unmarked police car. *Id*. at 373, 674 P.2d at 1371. At the station, the defendant was questioned for approximately ninety minutes, during which time the detective confronted the defendant with the specific evidence against him. *Id.* at 372, 674 P.2d at 1370. Our supreme court concluded that under these circumstances, it would not reverse the trial court's finding that the defendant had not been in custody during the questioning. *Id.* at 373, 674 P.2d at 1371.

¶17 The circumstances in the present case are no more indicative of custodial interrogation than those contained in the two cases outlined above. Applying the pertinent factors, the manner of summoning did not indicate that Heighton was in custody nor were any "objective indicia of arrest" present. Detectives approached Heighton in a public restaurant and asked him if he would be willing to go to the police station to respond to allegations. As in *Carrillo* and *Cruz-Mata*, Heighton was not searched; he was not handcuffed; he was not booked upon his arrival at the police station but instead was checked in as a visitor; and he retained all his personal belongings, including his cell phone. Moreover, Heighton did not ride to the police station inside a police vehicle as did the defendants in both *Carrillo* and *Cruz-Mata*. *Carrillo*, 156 Ariz. at 132, 750

P.2d at 890; *Cruz-Mata*, 138 Ariz. at 372, 674 P.2d at 1370. Instead, Detective M. suggested that Heighton could simply drive himself to the station in his own truck, and Heighton did so. If Heighton were "in custody," it would be highly unusual to be granted such freedom.

¶18 We note that there was testimony presented at the hearing that the patrol car followed Heighton as he in turn followed the detectives to the station. However, conflicting testimony was also present at the hearing. Detective M. testified that when the patrol car arrived, he told the officers inside the car to "take off" because Heighton had agreed to drive himself. Detective L. testified that the patrol car did in fact leave and did not follow Heighton and the detectives back to the station. As stated above, we are bound to view the evidence presented at the hearing in the light most favorable to upholding the trial court's ruling – here, that Heighton was not in custody. Thus, because there is sufficient factual support, we will assume that the patrol car did not follow Heighton back to the police station.

¶19 Although Heighton was never told he was not under arrest, he was also never told that he was, nor did he ever ask. Detectives asked Heighton, "are you willing to come talk to us?" This language would communicate to a reasonable person that he or she had the freedom to not go with the police. Moreover,

during the interview, Detective M. reminded Heighton twice that he had come to the police station voluntarily. After the first reminder, Heighton said nothing in response. After the second reminder, however, Heighton explicitly and affirmatively acknowledged that he had come to the police station voluntarily.

¶20 Additionally, the circumstances of the interview itself fail to establish that Heighton was in custody. Although the interview was conducted in a police station, which "may be considered a 'coercive environment,'" *Cruz-Mata*, 138 Ariz. at 373, 674 P.2d at 1371 (citing *Mathiason*, 429 U.S. at 495), the interviews in *Carrillo* and *Cruz-Mata* were also conducted inside police stations. Indeed, the description of the interview room in this case matches the description given by the court in *Carrillo*. There, the court described the room as a "small, windowless interrogation room furnished solely with three chairs and a table." *Carrillo*, 156 Ariz. at 133, 750 P.2d at 891. Moreover, as our supreme court has stated, "without more, the fact that questioning was conducted in a police station does not require that *Miranda* warnings be administered." *Cruz-Mata*, 138 Ariz. at 373, 674 P.2d at 1371 (citing *Mathiason*, 429 U.S. at 495).

¶21 As to the length of the interview, the full interview with Heighton lasted one hour, which was thirty minutes shorter than either of the interviews in *Carrillo* or *Cruz-Mata*. The

portion of the interview that was conducted prior to Heighton receiving his *Miranda* warnings was only thirty minutes. Whatever the threshold interview length might be, after which a reasonable person would feel that he or she was in custody, thirty minutes does not cross it under the circumstances here.

¶22 In addition, the recording of the interview that was admitted during the suppression hearing shows the demeanor of Detective M. and the tone of his questions were calm and non-aggressive throughout the interview. The atmosphere of the interview was more consistent with a factual investigation in which Heighton was allowed to provide his side of the story than it was of a custodial interrogation.

¶23 Thus, under the totality of the circumstances, we conclude that a reasonable person would not have felt he was "in custody or otherwise deprived of his freedom of action in a significant way."[4] *Carter*, 145 Ariz. at 105, 700 P.2d at 492. The trial court therefore did not err in denying Heighton's motion to suppress.[5]

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[4] Heighton testified that he subjectively believed that he was not free to leave once the two detectives first approached him at the McDonalds restaurant. However, although this may be true, "we deal with objective criteria only in determining whether the interrogation was custodial." *Carrillo*, 156 Ariz. at 134, 750 P.2d at 893.

[5] At the suppression hearing, Heighton argued both that his *Miranda* rights had been violated and that the confession was given involuntarily. However, on appeal, Heighton has failed to

2. Videotape Recording of C.'s Forensic Interview

a. Publication of Recording at Trial

¶24 Heighton argues that the trial court abused its discretion by permitting the State to publish to the jury a videotape recording of C.'s forensic interview under Rule 803(5). A trial court has considerable discretion in ruling on the admissibility of evidence, and we will not reverse such a ruling absent a clear abuse of discretion and resulting prejudice. *Rimondi v. Briggs*, 124 Ariz. 561, 565, 606 P.2d 412, 416 (1980). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Torres v. N. Am. Van Lines, Inc*., 135 Ariz. 35, 40, 658 P.2d 835, 840 (App. 1983). "[T]hat the circumstances could justify a different conclusion than that reached by the [trial court] does not warrant the [appellate] court in substituting its judgment for that of the [trial court]. A difference in judicial opinion is not synonymous with 'abuse of discretion.'" *Quigley v. City Court of Tucson*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982).

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argue that his confession was given involuntarily. Because arguments not made on appeal are waived, we do not consider the voluntariness of Heighton's admissions. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (stating that arguments not made on appeal are abandoned and waived).

¶25 Turning to the applicable rule, Rule 803 provides in pertinent part:

> The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> **(5) Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately . . . .

Ariz. R. Evid. 803. Rule 803(5) applies when at trial, due to memory loss, a witness is unable to testify to some "matter" over which the witness previously had knowledge and had given some form of testimony or statement. *See Ariz. R. Evid.* 803(5). Under those circumstances, Rule 803(5) permits parties to publish the prior testimony to the jury as a substitute for the witness's now unavailable live testimony on the matter in question. *Id*.

¶26 These circumstances were present in our recent opinion *State v. Martin*. 225 Ariz. 162, 235 P.3d 1045 (App. 2010). There, the child victim had spoken with a forensic interviewer and recounted numerous instances of the defendant engaging in sexual conduct with her. *Id*. at 164, ¶ 4, 235 P.3d at 1047. Later at trial, the victim was able to recall and testify to all of those incidents except for one. *Id*. ¶ 6. As to that one

incident, the victim testified that she had truthfully given the details of the incident to the forensic interviewer while the incident was still fresh in her memory. *Id*. We held that under these circumstances, Rule 803(5) permitted the trial court to publish to the jury a redacted recording of the victim's forensic interview as a prior recorded recollection of the sexual act. *Id*. at 165, ¶ 12, 235 P.3d at 1048.

¶27 The circumstances in the current case differ in a significant way from the circumstances in *Martin*. At trial, C. never testified that she could not remember the sexual acts. Instead, C. testified that she lied about the existence of the sexual acts and that Heighton "didn't do anything to [her]." Thus, this is not a case of a witness who "once had knowledge" of a particular matter, but "now has insufficient recollection to enable the witness to testify fully and accurately." We recognize that C. testified at trial that she could not remember the specifics of what she told the interviewer, but that fact is overridden by her statement that whatever she accused her stepfather of (and now could not remember) was a lie. Refreshing her recollection would not assist her – from her perspective – to testify "fully and accurately." That is what Rule 803(5) requires. Thus, the trial court erred in publishing the recording as a recorded recollection under Rule 803(5).

¶28 Nevertheless, we hold that the trial court's error was harmless because the video was properly published as extrinsic evidence of prior inconsistent statements under Arizona Rules of Evidence 801(d)(1)(A) and 613(b). *See State v. Robinson*, 153 Ariz. 191, 205, 735 P.2d 801, 815 (1987) (holding that it was harmless error to admit hearsay statements pursuant to statute when statements should have been admitted under rules of evidence). The combination of rules 801(d)(1)(A) and 613(b) provides that extrinsic evidence of a witness's prior statements may be used at trial as substantive evidence if (1) the prior statements are inconsistent with the witness's in-court statements, (2) the witness is afforded an opportunity to explain or deny the prior statements, and (3) the opposite party is afforded an opportunity to interrogate the witness thereon.[6] Ariz. R. Evid. 613(b); Ariz. R. Evid. 801(d)(1)(A); *see also State v. Skinner*, 110 Ariz. 135, 141-42, 515 P.2d 880, 886-87

[6] The requirement under Rule 801(d)(1)(A) that the witness "be subject to cross examination" adds no additional burden than that which is imposed by Rule 613(b) (i.e. "that the opposite party is afforded an opportunity to interrogate the witness" regarding the inconsistent statements). Therefore, for clarity, we fold the requirement of Rule 801(d)(1)(A) into the requirement of 613(b). If the latter is satisfied, the former will be as well. *See* 1 Daniel J. McAuliffe & Shirley J. Wahl, *Arizona Practice: Law of Evidence* § 608:4 n.34 (rev. 4th ed. 2009) (stating that the cross examination requirement in Rule 801(d)(1)(A) "probably can always be met; and it adds little, if anything, to the requirement in Rule 613(b) . . .").

(1973) (stating that the jury may consider prior inconsistent statements as impeachment and as substantive evidence).

¶29 In *State v. Moran*, a child victim made statements to police investigators alleging that her father had sexually abused her since the age of five. 151 Ariz. 373, 374, 728 P.2d 243, 244 (App. 1985), *vacated on other grounds*, 151 Ariz. 378, 728 P.2d 248 (1986). At trial, the victim recanted her accusations and testified that she had fabricated the sexual acts because she was mad at her parents. *Id*. at 374-75, 728 P.2d at 244-245. The trial court allowed the State to publish a recording of the witness's previous statements as extrinsic evidence of prior inconsistent statements, and we affirmed. *Id*. at 375, 378, 728 P.3d at 245, 248.

¶30 As in *Moran*, the publication of C.'s recorded statements as extrinsic evidence of prior inconsistent statements was proper. First, we find that C.'s in-court testimony was inconsistent with the statements she made to the forensic interviewer. To be regarded as inconsistent, the statements "must directly, substantially and materially contradict testimony in issue." *State v. Navallez*, 131 Ariz. 172, 174, 639 P.2d 362, 364 (App. 1981). During the forensic interview, C. described in detail the numerous incidents in which Heighton sexually abused her. At trial, however, C. testified that she had fabricated the stories about the sexual

conduct. When asked at trial if she could talk about what Heighton had done to her, she responded, “He didn’t do anything to me.” Because C. denied that the sexual acts had occurred, her trial testimony was inconsistent with her prior description of each sexual act.

¶31 Second, the record shows that C. was afforded an opportunity to explain or deny the prior statements. The inconsistency was established on direct examination. In referring to the forensic interview, the State asked C., “What did you say about your dad?” C. responded, “I said he did bad things to me.” When asked if she knew why she had been called to testify, C. said, “Because I lied about what I said about my dad.” The opportunity to explain the inconsistency was provided through the following exchange on cross examination:

> Q: Do you recall why you lied?
>
> A: Because I was mad at my dad.
>
> Q: For what reason?
>
> A: Because he would always get mad at me because – if I did my homework wrong.
>
> Q: Is there something particular that happened, you know, at least close to when you talked to the police? Do you remember?
>
> A: No.
>
> Q: But you remember being mad at him?
>
> A: Yes.

¶32 Accordingly, these two exchanges demonstrate C. was confronted with the inconsistent statements and then afforded an opportunity to explain the inconsistencies.[7] Her explanation was simple: she lied to the interviewer because she was mad at Heighton. These exchanges also establish the third requirement; namely, that the opposing party be afforded an opportunity to interrogate the witness on the inconsistent statements.

¶33 Because Rules 801(d)(1)(A) and 613(b) permitted the recording to be published to the jury, we hold that the publication of the recording under Rule 803(5), which was not satisfied, was harmless error. Thus, we will not disturb the court's ruling.

b. Admission of the Recording as an Exhibit

¶34 Heighton further argues that the trial court committed error when it permitted the recording to be admitted into evidence as an exhibit. Significantly, on this point the State agrees with Heighton. We too hold that it was improper for the trial court to admit the recording into evidence under Rule 803(5). Rule 803(5) states that a recorded recollection "may not itself be received as an exhibit unless offered by an

[7] Although the recording was not published to the jury until after C. was released as a witness, that is not controlling. *Navallez*, 131 Ariz. at 173, 639 P.2d at 363 ("[I]t is not necessary that a witness be asked about prior inconsistent statements before extrinsic evidence of those statements may be admitted so long as the witness is given an opportunity to explain or deny the statements.").

adverse party." Ariz. R. Evid. 803(5). Here, the recording was offered by the State, who was not an adverse party. Thus, we find that the trial court erred in admitting the recording as an exhibit under Rule 803(5). *See Martin*, 225 Ariz. at 166-67, ¶ 13, 235 P.3d at 1048-49 (holding that it was error for a non-adverse party to offer a recording of a forensic interview into evidence under Rule 803(5)).

¶35 However, we find that the recording was properly admitted as an exhibit under Rule 613. In *State v. Rutledge*, a witness told the police in a videotaped interview that the defendant had committed the crime in question. 205 Ariz. 7, 10, ¶ 12, 66 P.3d 50, 53 (2003). At trial, the witness recanted, testifying that he had lied to the police and that the defendant had not been involved. *Id.* at 11, ¶ 20, 66 P.3d 50, 54. The Arizona Supreme Court held that under those circumstances, it was proper to admit into evidence the recording of the witness's interview as extrinsic evidence of prior inconsistent statements under Rule 613. *Id.* at 12, ¶ 25, 66 P.3d 50, 55. As in *Rutledge*, the recording of C.'s forensic interview was extrinsic evidence of C.'s prior inconsistent statements and was thus properly admitted into evidence under Rule 613.

¶36 Moreover, even if we confine our analysis to Rule 803(5), we still find reason to affirm the trial court's ruling. When the State moved the court to place the recording into

evidence under Rule 803(5), Heighton's counsel stated that he had no further objections than that which he had already stated on the record. On the record, Heighton's counsel had argued only that the admission of the recording into evidence was improper because the State had not satisfied the foundational elements under 803(5) – as set out in *State v. Alatorre*, 191 Ariz. 208, 211, ¶ 7, 953 P.2d 1261, 1264 (App. 1998). However, on appeal, Heighton attempts to raise a new objection to the admission of the recording. He now argues that the admission of the recording was improper because it placed unwarranted emphasis on the statements made in the videotape. Because Heighton did not preserve this objection by raising it below, the argument is waived absent fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶37 To prevail under fundamental error review, a party must establish both fundamental error and actual prejudice. *Id*. ¶ 20. Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980 (1984). Here, admitting the recording as an exhibit merely allowed the jury to hear the same evidence it heard during trial. In effect, the exhibit was simply cumulative evidence. An error involving the admission of

cumulative evidence does not constitute fundamental error. *State v. Moody*, 208 Ariz. 424, 455, ¶ 121, 94 P.3d 1119, 1150 (2004); *State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982).

¶38 To establish actual prejudice, a party must show that "absent error, a reasonable jury could have reached a different result." *Martin*, 225 Ariz. at 166, ¶ 14, 235 P.3d at 1049. Heighton cannot meet this burden. First, Heighton cannot prove that the jurors actually watched the recording during deliberations, and "[s]peculative prejudice is insufficient under fundamental error review." *Id*. at ¶ 15. *See State v. Trostle*, 191 Ariz. 4, 13-14, 951 P.2d 869, 878-79 (1997). Second, even if Heighton could prove that the jurors watched the recording during deliberations, the admission of the recording did not present the jurors with any information not properly before them during trial. Third, because Heighton had previously confessed to the acts alleged in counts one and two, there was sufficient evidence outside the recording to find Heighton guilty on those counts. In the end, the jury only found Heighton guilty of the acts to which he confessed to the police (i.e. the 2006-2007 act of fellatio and masturbation). The jury did not find Heighton guilty of any of the additional acts to which C. testified in the recording (i.e. the December 2007 act of fellatio and cunnilingus). Consequently, we hold

that the trial court's decision to allow the recording into evidence was not reversible error.

Conclusion

¶39 For the above-stated reasons, we affirm.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
DONN KESSLER, Presiding Judge

/s/
_____
JON W. THOMPSON, Judge