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

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0765
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JUSTIN JAMES THRASHER,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-173377-001DT

The Honorable Joseph C. Welty, Judge

AFFIRMED

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J O H N S E N, Judge

¶1 A jury convicted Justin James Thrasher of second-degree murder, a Class 1 felony and dangerous offense; leaving

the scene of a fatal accident, a Class 2 felony; and endangerment, a Class 6 felony and dangerous offense.

FACTS AND PROCEDURAL BACKGROUND

¶2 A Nissan Maxima traveling more than 100 miles-per-hour in a 45 miles-per-hour zone before sunrise one morning struck a motorcycle from behind, killing the rider. Thrasher, who was identified as the driver of the Nissan by a passenger with him in the vehicle, fled on foot. Police found him more than an hour later, hiding in a nearby greenbelt. A blood sample taken from him more than four hours after the accident revealed a blood alcohol content of .207.

¶3 Police also discovered an intoxicated 18-year-old woman near where Thrasher was found. The woman denied being in the Nissan and said she was walking home from a nearby party and became lost. At trial, the woman repeated her account that she had not been in the Nissan, and the jury acquitted Thrasher on a charge of endangerment referring to the woman.

¶4 The superior court sentenced Thrasher to mitigated terms of imprisonment totaling 18 years. We have jurisdiction of his timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033(A) (West 2012).[1]

[1] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

DISCUSSION

A. Instruction on Leaving the Scene of an Accident.

¶5 Thrasher first contends the superior court erred in instructing the jury on the offense of leaving the scene of an accident involving injury or death in violation of A.R.S. § 28-661(A) (West 2012). He argues the court erred by failing to instruct the jury that the crime requires proof that the defendant knew or should have known that the accident involved injury. *See* Revised Arizona Jury Instructions, Title 28 DUI Instruction 28.661. Because Thrasher did not object at trial, our review is limited to a search for fundamental error. *State v. Valenzuela*, 194 Ariz. 404, 405, ¶ 2, 984 P.2d 12, 13 (1999); *see also* Ariz. R. Crim. P. 21.3(c) ("No party may assign as error on appeal the court's giving or failing to give any instruction . . . unless the party objects thereto before the jury retires to consider its verdict . . . .").

¶6 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. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To obtain relief under this standard of review, a

defendant must establish both that fundamental error occurred and that the error caused him prejudice. *Id.* at ¶ 20.

¶7 Relying on *State v. Blevins*, 128 Ariz. 64, 623 P.2d 853 (App. 1981), Thrasher argues the superior court's failure to instruct on the element of knowledge constitutes fundamental error. In *Blevins*, as here, an intoxicated automobile driver struck a motorcycle, killing the rider. *Id.* at 65-66, 623 P.2d at 854-55. On appeal, this court cited *State v. Porras*, 125 Ariz. 490, 610 P.2d 1051 (App. 1980), for the proposition that "liability under A.R.S. § 28-661 attaches only where a defendant has actual knowledge of the personal injury or knowledge that the accident was of such a nature that one would reasonably anticipate that it resulted in personal injury." *Id.* at 68, 623 P.2d at 857. The court reversed the conviction in that case because "[n]o . . . instruction was given on the crucial element of knowledge of personal injury or knowledge from which one would reasonably anticipate personal injury to another." *Id.*

¶8 The failure to give the instruction on knowledge was fundamental error in *Blevins* because the defendant had "vigorously contested his knowledge" that the accident involved an injury to a person. *Id.* The defendant there admitted he had hit the motorcycle, but denied seeing who might have been driving the motorcycle and "maintained consistently that the motorcycle had been lying down in the road when he hit it." *Id.*

Because the defendant's "knowledge of a personal injury or of facts which would lead one to reasonably anticipate that personal injury had resulted from the collision was the chief issue of the case relating to the charge of leaving the scene of an accident," an instruction on this issue was "vital to the rights" of the defendant "on these facts." *Id.*

¶9 By contrast, Thrasher's defense was that he was not the driver. He did not argue he should be acquitted of the charge of leaving the scene because he did not know the accident caused personal injury. Consistent with his defense that he was not the driver, he did not ask for instructions on lesser-included offenses for leaving the scene of a non-injury accident. *See* A.R.S. §§ 28-662, -664, -665 (West 2012). Under the facts and circumstances of this case, the failure to instruct on the element of knowledge of injury on the charge of leaving the scene does not rise to the level of fundamental error as defined by our supreme court. *See State v. Van Adams*, 194 Ariz. 408, 415, ¶ 18, 984 P.2d 16, 23 (1999) (no fundamental error in failing to instruct on premeditation when defendant asserted defense of total innocence); *State v. Evans*, 109 Ariz. 491, 493, 512 P.2d 1225, 1227 (1973) (no fundamental error in failing to instruct on specific intent for charge of assault to rob where omission did not deprive defendant of his defense) *superseded by statute on other grounds*; *State v. Fullem*, 185

Ariz. 134, 139, 912 P.2d 1363, 1368 (App. 1995) (collecting cases).

¶10 Moreover, Thrasher cannot show prejudice from the alleged error. Whether a defendant can make the requisite showing of prejudice depends on the facts of his particular case. *Henderson*, 210 Ariz. at 569, ¶ 28, 115 P.3d at 609. Under the facts of this case, to establish prejudice Thrasher would have to show that if the missing instruction were given, a reasonable jury could have reached a different verdict on the charge of leaving the scene. *Id.*

¶11 In arguing that the jury might have found he was not aware of injury from the accident, Thrasher notes the front-seat passenger in the Nissan testified he did not see what they struck. Thrasher argues from this that the jury could find he likewise did not see the motorcyclist before the Nissan slammed into him. But the knowledge requirement relates to what Thrasher knew or should have known at the time he left the scene of the collision, not what he may have apprehended before the accident. Thrasher does not suggest that the collision occurred anywhere other than in the center of the roadway; nor does he cite any evidence for the proposition that one could conclude the Nissan collided with anything other than another vehicle. Indeed, his passenger also testified he saw another vehicle nearby just before the collision. Finally, the collision caused

a huge fireball that left debris strewn over a wide area, which would cause anyone to reasonably think some personal injury had resulted. Thus, we conclude that even if the instruction had been given, any reasonable jury would have found Thrasher knew serious injury had resulted or that, in the words of the *Blevins* court, he had "knowledge that the accident was of such a nature that one would reasonably anticipate that it resulted in personal injury." 128 Ariz. at 68, 623 P.2d at 857.[2]

B. Impeachment with Misdemeanor Conviction.

¶12 Thrasher filed a pretrial motion to impeach the front-seat passenger with evidence of an out-of-state conviction for disorderly conduct pursuant to Arizona Rule of Evidence 609. The superior court denied the motion because the crime of disorderly conduct does not involve dishonesty or false statement. Thrasher argues the court erred by refusing to consider the underlying facts of the conviction in finding that it did not qualify under Rule 609. We review the ruling for

[2] The State's theory was that Thrasher left the scene of a fatal accident; it does not argue on appeal that the knowledge element of the crime would have been satisfied by Thrasher's knowledge that his front-seat passenger suffered a relatively minor injury in the collision. *See* A.R.S. § 28-661(A) (stating duty of driver in "accident resulting in injury to or death of a person"); (B) (establishing class of felony when accident "result[s] in death or serious physical injury"); (C) (establishing class of felony when accident "result[s] in an injury other than death or serious personal injury").

abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 303, 896 P.2d 830, 843 (1995).

¶13 At the relevant time, Rule 609 provided, in pertinent part:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record, if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, and if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or (2) involved dishonesty or false statement, regardless of the punishment.

Ariz. R. Evid. 609(a).

¶14 Thrasher concedes the disorderly conduct conviction at issue does not fall within Rule 609(a)(1), but argues it should have been admissible pursuant to Rule 609(a)(2) because the underlying facts of the offense demonstrate dishonesty or false statement. According to his motion, the witness "and an accomplice announced themselves to a cab driver as unmarked police officers" and tried to extort the driver by intimating they were investigating him for driving while intoxicated. According to the motion, the witness was arrested for impersonating a police officer, but pled guilty only to the reduced charge of disorderly conduct.

¶15 Thrasher cites several federal decisions for the proposition that "the trial court may look beyond the elements of an offense that is not considered a per se crime of dishonesty to determine whether the particular conviction rested upon facts establishing dishonesty or false statement." *United States v. Mejia-Alarcon*, 995 F.2d 982, 989-90 (10th Cir. 1993); *see also United States v. Payton*, 159 F.3d 49, 57 (2nd Cir. 1998) ("we will look beyond the elements of the offense to determine whether the conviction rested upon facts establishing dishonesty or false statement"); *Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215, 216 (7th Cir. 1989) ("the manner in which the witness committed the offense may have involved deceit, and if that is shown the conviction is admissible under Rule 609(a)(2)"); *United States v. Dorsey*, 591 F.2d 922, 935 (D.C. Cir. 1978) ("Rule 609(a)(2) may be operative if the prosecution can show that, although the prior crime was not characterized by an element of fraud or deceit, it nonetheless was committed by such means.").

¶16 The superior court relied on *State v. Malloy*, 131 Ariz. 125, 639 P.2d 315 (1981), in ruling that it could look only to the elements of the offense and not to the witness's underlying conduct in determining whether the offense was admissible for impeachment under Rule 609(a)(2). In *Malloy*, our supreme court considered whether a misdemeanor conviction for

attempted burglary would be admissible for impeachment purposes. *Id.* at 127-28, 639 P.2d at 316-17. In holding that the conviction in that case was not admissible pursuant to Rule 609(a), the court explained, "The crime of burglary does not necessarily involve an element of deceit or falsification and, consequently, is not admissible under Rule 609(a)(2)." *Id.* at 128, 639 P.2d at 318.

¶17 Like the superior court, we understand our supreme court's use of the term "necessarily" means that a witness may be impeached with a misdemeanor conviction only if the offense included deceit or falsification as an element of the crime, e.g., perjury, fraud or false pretense. Regardless of whether the federal courts may have interpreted Rule 609 of the Federal Rules of Evidence to allow consideration of facts underlying the offense to determine admissibility, as an intermediate appellate court, we are bound by the decisions of our supreme court and do not have the authority to modify or disregard them. *State v. Smyers*, 207 Ariz. 314, 318, ¶ 15, n.4, 86 P.3d 370, 374 (2004). Because the offense of disorderly conduct does not necessarily involve an element of dishonesty or false statement, we hold the superior court did not err in denying Thrasher's motion to impeach the witness with his prior misdemeanor conviction.[3]

[3] Rule 609 was amended effective January 1, 2012. Added by the amendment is a provision that, "for any crime regardless of

¶18 We further do not accept Thrasher's contention that the court's refusal to permit impeachment with the misdemeanor conviction denied him his Sixth Amendment right to confront his accuser. A defendant does not have an absolute right to cross-examine a witness in any manner he desires. *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988). When evidence is properly excluded under the rules of evidence, its preclusion does not impinge upon the Sixth Amendment. *State v. Davis*, 205 Ariz. 174, 179, ¶ 33, 68 P.3d 127, 132 (App. 2002); *see also State v. LaGrand*, 153 Ariz. 21, 29, 734 P.2d 563, 571 (1987) (holding proper exclusion of hearsay evidence did not violate defendant's rights). Moreover, even though the superior court did not permit Thrasher to impeach the witness with the fact of his conviction, Thrasher could have sought to cross-examine the witness about the facts of his arrest pursuant to Arizona Rule

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the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement." According to the comment to the 2012 amendment, the change was made "to clarify that this evidence may be admitted only 'if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement.'" We need not decide whether this amendment reflects a prospective adoption of the federal approach. Neither Thrasher nor the State argues on appeal that the language our supreme court adopted in amending Rule 609 is relevant to this appeal. And under the Arizona law applicable to this case, we have no reason to believe that the witness's disorderly conduct plea in the prior case necessarily was based on an admission to making a false statement or committing a dishonest act.

of Evidence 608(b) (allowing cross-examination with specific instances of conduct that are "probative of the character for truthfulness or untruthfulness").

¶19 Thrasher's reliance on *State v. Conroy*, 131 Ariz. 528, 642 P.2d 873 (App. 1982), as support for his argument under the Confrontation Clause is misplaced. The conviction there was admissible under Rule 609 but the court precluded it because its probative value was outweighed by its prejudicial effect. *Id.* at 530, 642 P.2d at 875. Here, the conviction was inadmissible under Rule 609 without regard to any balancing of its probative value against prejudice under Rule 403.

C. Sufficiency of Evidence.

¶20 Thrasher also contends there was insufficient evidence to support his convictions. In particular, he argues there was no credible evidence that he was the driver or that he knew the accident involved serious injury. We review claims of insufficient evidence *de novo*. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶21 In considering this argument, we only determine whether substantial evidence exists to support the verdicts. *State v. Scott*, 177 Ariz. 131, 138, 865 P.2d 792, 799 (1993); *see also* Ariz. R. Crim. P. 20(a) (court shall enter judgment of acquittal "if there is no substantial evidence to warrant a conviction"). "Substantial evidence is proof that reasonable

persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996).

¶22 We already have concluded the evidence compelled the conclusion that the driver of the Nissan knew or should have known that personal injury resulted from the collision. As for the jury's verdict that Thrasher was the driver, the testimony of the front-seat passenger that Thrasher was the driver was more than sufficient to permit the jury to find beyond a reasonable doubt that he was the driver. Thrasher argues this witness's testimony was not credible because other evidence raised questions regarding his truthfulness. But we do not reweigh the evidence; we view it in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against the defendant. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). It is the jury, and not the appellate court, that weighs the evidence and determines the credibility of witnesses. *State v. Reynolds*, 108 Ariz. 541, 543, 503 P.2d 369, 371 (1972).

¶23 Our review of the record on appeal finds substantial evidence to support all three of Thrasher's convictions.

D. Motion for New Trial.

¶24 Prior to sentencing, Thrasher filed a motion for new trial in which he argued he was denied a fair trial by the

presentation of false and misleading testimony. The superior court denied the motion, finding Thrasher had a full opportunity to impeach or dispute any assertedly false or misleading testimony and therefore was not deprived of a fair trial. We review a court's ruling denying a motion for new trial for an abuse of discretion. *Spears*, 184 Ariz. at 287, 908 P.2d at 1072.

¶25 In his motion, Thrasher argued the accounts of the front-seat passenger and the woman were inconsistent with those given by other witnesses at trial and their own prior out-of-court statements. A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and requires reversal. *United States v. Agurs*, 427 U.S. 97, 103 (1976). To establish a due process violation based on perjured testimony, however, the defendant must prove that the prosecution knew or should have known that the testimony was actually false. *Hayes v. Ayers*, 632 F.3d 500, 520 (9th Cir. 2011). Mere inconsistency in testimony by governmental witnesses does not establish knowing use of false testimony. *United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1989); *see also United States v. Bailey*, 123 F.3d 1381, 1396 (11th Cir. 1997) (perjury not established by fact that witness's "testimony is challenged by another witness or is inconsistent with prior statements" (quotation omitted)). The record here is devoid of any evidence

that the prosecutor knowingly induced or encouraged any witness to testify to anything but the truth, and "we do not presume that the prosecutor used false testimony." *Sherlock*, 962 F.2d at 1364.

¶26 Thrasher further argued in his motion for new trial that an expert witness improperly left the jury with the misimpression that no female DNA was found on the driver's side airbag, impairing his defense that the woman was driving the Nissan. Based on our review of the record, the superior court reasonably could find that Thrasher had a full opportunity to impeach or dispute any alleged false or misleading testimony presented at trial. Under these circumstances, the court did not abuse its discretion in ruling that Thrasher was not deprived of a fair trial.

E. Violation of Rule of Exclusion of Witnesses.

¶27 At the beginning of trial, the rule of exclusion of witnesses was invoked. *See* Ariz. R. Crim. P. 9.3(a). During the first day of testimony, the prosecutor informed the court that prospective witnesses M. and J. had been observed in the courtroom and had been asked to leave. The court inquired how long they had been present and whose testimony they had heard. The prosecutor stated he believed they had been present during testimony by D. After being told about the expected nature of

M.'s and J.'s testimony, the trial court concluded the matter as follows:

> I would gather since they heard testimony vastly different than the subject of their own testimony, that it doesn't create a problem with the trial. Just simply urge both sides to be mindful. It does appear we have some folks coming and going. Let's make sure they are not your witnesses. All right?
>
> Thank you.

¶28 Although Thrasher did not object at trial to the manner in which the court handled the violation of Rule 9.3(a), he argues on appeal that the violation requires a new trial because M.'s testimony was tainted by hearing testimony by C., a witness who testified after D. Our review of this issue is limited to fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶29 M. and C. were motorists in separate vehicles who testified they saw the Nissan speed past immediately before the collision and that they believed there were two males in the front seats of the Nissan. Thrasher maintains that even though the prosecutor informed the superior court he thought M. was present only during D.'s testimony, "the record indicates that [M.] was present for [C.]'s testimony because there were no breaks in the proceedings and [C.] was the witness immediately following [D.]" Thrasher concludes that because M. provided no

description of the driver of the Nissan to the police at the scene of the accident, his testimony must have been tainted by hearing the testimony by C. that there were two males in the front seats.

¶30 A violation of Rule 9.3(a) does not require reversal. *State v. Hadd*, 127 Ariz. 270, 277, 619 P.2d 1047, 1054 (App. 1980). Generally, the "admission of testimony after a rule violation is a matter of discretion with the trial judge, and absent an abuse of that discretion and subsequent prejudice to appellant, we will not interfere." *Id.*; *accord State v. Jones*, 185 Ariz. 471, 483, 917 P.2d 200, 212 (1996).

¶31 Thrasher's claimed prejudice is purely speculative. As the superior court noted in addressing the matter with counsel, people were coming and going throughout the trial. Nothing in the record indicates that M. and J. were in the courtroom when C. testified. To constitute fundamental error, "the error must be clear." *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). Thus, in reviewing for fundamental error, we "will not reverse a conviction based on speculation or unsupported inference." *State v. Diaz*, 223 Ariz. 358, 361, ¶ 13, 224 P.2d 174, 177 (2010); *see also State v. Doerr*, 193 Ariz. 56, 61, ¶ 18, 969 P.2d 1168, 1173 (1998) (declining to "indulge in . . . guesswork" based on defendant's speculation that the remarks of two jurors tainted the entire

panel); *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006) (defendant may not rely on speculation unsupported by the record to show prejudice).

F. Alleged Prosecutorial Misconduct.

¶32 Finally, Thrasher contends he was denied his right to a fair trial due to prosecutorial misconduct. Because Thrasher failed to raise this contention in the superior court, our review again is limited to fundamental error. *State v. Speer*, 221 Ariz. 449, 458, ¶ 42, 212 P.3d 787, 796 (2009).

¶33 In reviewing claimed prosecutorial misconduct, our "focus is on the fairness of the trial, not the culpability of the prosecutor." *Bible*, 175 Ariz. at 601, 858 P.2d at 1204. "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial . . . .'" *State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984)). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191

(1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

¶34 Thrasher's first instance of claimed prosecutorial misconduct involves the timing of the State's disclosure of the front-seat passenger's misdemeanor conviction. Thrasher argues that the prosecutor's failure to disclose the conviction until right before trial violated the prosecutor's duty to make timely disclosure of exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963), and Rule 15.1 of the Arizona Rules of Criminal Procedure. Thrasher asserts he was prejudiced by the untimely disclosure in that it prevented him from properly investigating the information and fully researching the admissibility of the conviction under Arizona Rule of Evidence 609, resulting in the superior court's erroneous ruling precluding admission of evidence of the conviction. In light of our holding that the court did not err in ruling that the conviction is not admissible for impeachment purposes under Rule 609, Thrasher is unable to establish the requisite prejudice on this contention of prosecutorial misconduct.

¶35 Thrasher's second claim of prosecutorial misconduct is directed at comments made by the prosecutor in closing argument regarding a traffic accident reconstruction expert retained by the defense. This expert opined, based on his examination of the Nissan and his observations of how Thrasher fit in the

driver's seat, that it was very unlikely that Thrasher would have been able to drive the Nissan, given the placement of the steering wheel and the seat as it was positioned in the aftermath of the accident. Relying on *Hughes,* 193 Ariz. at 86, ¶ 59, 969 P.2d at 1198, Thrasher argues the prosecutor improperly implied unethical conduct on the part of the expert by referencing the fact that he was paid by the defense.

¶36 "Attorneys, including prosecutors in criminal cases, are given wide latitude in their closing arguments to the jury." *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). The prosecutor is permitted to argue all reasonable inferences from the evidence, but may not make insinuations unsupported by the evidence. *Hughes*, 193 Ariz. at 85, ¶ 59, 969 P.2d at 1197. Accordingly, there is no misconduct in commenting in closing argument on the credibility of a witness if the remarks are based on facts in evidence. *State v. Williams*, 113 Ariz. 442, 444, 556 P.3d 317, 319 (1976).

¶37 Unlike the situation in *Hughes*, which involved, among acts of misconduct, the prosecutor arguing without any support in the record that the defense had paid the expert to fabricate a diagnosis, the comments Thrasher challenges were based on the expert's own testimony. *See Hughes*, 193 Ariz. at 86, ¶ 61, 969 P.2d at 1198. The first reference by the prosecutor to the expert being paid by the defense was in the context of

responding to an argument by defense counsel about the violent nature of the crash. The prosecutor reminded the jury that "his expert, the one that he's paying . . . completely contradicts what he just told you about this violent crash, his own expert." The only other reference was made in addressing the expert's opinion about the likelihood of Thrasher having been the driver of the Nissan. At this point in closing argument, the prosecutor pointed out, referring to the expert's own testimony, that the expert's opinion was not the most objective determination and that it was based on how Thrasher, who the expert admitted had a "huge incentive" to look as uncomfortable as possible while sitting in the vehicle, appeared not to fit in the driver's seat. In no sense can it be said that the prosecutor's remarks concerning the defense expert were without support in the record.

¶38 There was no misconduct, much less fundamental error, in the prosecutor's closing argument. Accordingly, we also reject Thrasher's argument that we should find reversible error based on the doctrine of cumulative error. *See State v. Bocharski*, 218 Ariz. 476, 492, ¶ 75, 189 P.3d 403, 419 (2008) ("Absent any finding of misconduct, there can be no cumulative effect of misconduct sufficient to permeate the entire atmosphere of the trial with unfairness.").

CONCLUSION

¶39 We affirm Thrasher's convictions and sentences.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Chief Judge

/s/
PETER B. SWANN, Judge