NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARIUS KEON BYNUM, Appellant.	)	2 CA-CR 2009-0373 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800451

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann — Tucson
Attorneys for Appellee

Gail Gianasi Natale — Phoenix
Attorney for Appellant

K E L L Y, Judge.

¶1 After a jury trial, Marius Bynum was convicted of one count each of kidnapping, sexual abuse, and threatening or intimidating, and eight counts of sexual assault. He was sentenced to a combination of presumptive, maximum, consecutive, and concurrent prison terms totaling sixty-one years. Bynum appeals his convictions and sentences. He argues the trial court violated his constitutional right to confront his accusers, improperly admitted other-acts testimony under Rule 404, Ariz. R. Evid., and abused its discretion by imposing consecutive terms on the kidnapping and sexual abuse counts. He also argues A.R.S. § 13-1406(C) is unconstitutional. Finding no error, we affirm.

Background

¶2 "'We view the facts in the light most favorable to sustaining the convictions.'" *State v. Musgrove*, 223 Ariz. 164, ¶ 2, 221 P.3d 43, 45 (App. 2009), *quoting State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In May 2007, L. was walking alone at night when Bynum offered her a ride. L. testified Bynum had given her a false name and told her he "needed to stop by his room" for gas money. L. waited in the vehicle while Bynum went into the room. He then came back to the door and asked L. to come inside "while he changed his shirt." L. agreed, but after some time, she decided "he really didn't want to take [her]" and attempted to leave. Bynum then "grabbed [her] by the neck and threw [her] on the bed."

¶3 During the night, Bynum threatened L. and forced her to engage in multiple sexual acts. L. testified he had threatened her with a hammer, hit her, pulled her hair, and choked her. Bynum forced L. to perform oral sex on him and to have vaginal intercourse

with him. He then ordered her to take a shower while he watched, instructing her "[t]o use soap and shampoo." After the shower, Bynum again ordered L. to perform oral sex on him and forced her to have vaginal intercourse and anal sex with him. When Bynum eventually fell asleep, L. escaped and sought help.

¶4 Detective Angela Davis, the lead case investigator, collected evidence and interviewed Bynum at his workplace. The interview was recorded and transcribed. At trial, Detective John Kosmider, who had been present at the interview, referred to the transcript in testifying about what had been said. Both parties also used the transcript during Bynum's testimony.

¶5 At trial, C. testified she had been raped by Bynum in August 2007. She said Bynum had broken into her house, used a knife and physical violence to force her into multiple sex acts, and given her a false name. Specifically, she testified Bynum had threatened her with the knife, punched her, pulled her hair, and head-butted her. C. told the jury Bynum first forced her to perform oral sex on him and then repeatedly forced her to have vaginal intercourse and to perform and receive oral sex. She also testified he had attempted to engage in forced anal sex, but had been unable to complete the act.

¶6 Bynum admitted to having sex with both L. and C. but asserted the encounters were consensual. The jury found Bynum guilty of eleven of the fifteen counts with which he was charged. This appeal followed.

Discussion

I. Confrontation Clause

¶7 Bynum argues the admission of evidence from Davis's interview of him violated his Confrontation Clause rights because she did not appear at trial.[1] We review de novo Confrontation Clause challenges to the admissibility of evidence.[2] *State v. Boggs*, 218 Ariz. 325, ¶ 31, 185 P.3d 111, 119 (2008). Bynum concedes he did not object to the testimony regarding Davis's questioning or the interview and his claim is therefore limited to fundamental error review.[3] *See id.*

¶8 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, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden "[to] establish both that fundamental

[1]Another detective, who took over the case when Davis left, indicated that Davis was away on military deployment.

[2]To the extent Bynum argues the evidence from the interview was improperly admitted because the transcript was not authenticated, this argument is waived. He did not object on foundation grounds below nor does he argue on appeal that any flaw in authentication procedure constituted fundamental, prejudicial error in and of itself. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). And Bynum presents no argument why Kosmider, who was present at the interview, could not properly authenticate the transcript in Davis's absence.

[3]Citing *Moreno-Medrano*, the state argues that by failing "to adequately argue fundamental, prejudicial error," Bynum waived this argument on appeal. 218 Ariz. 349, ¶ 17, 185 P.3d at 140. Bynum, however, unlike Moreno-Medrano, argues in his opening brief that the denial of his right to confront Davis was fundamental error, and we therefore decline to apply waiver on this ground. *Id.*

error exists and that the error . . . caused him prejudice." *Id.* ¶ 20. Because Bynum has not demonstrated that any error occurred, he has not sustained his burden. *See id.* ¶ 23 (defendant must first prove error); *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991) (before considering whether error is fundamental, we must find error).

¶9 Bynum maintains his rights under the Confrontation Clause were violated because he could not cross-examine Davis on her "testimonial statements" in the interview. But he fails to identify any specific statement as "testimonial." *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). Instead, he claims the trial court should have precluded evidence of the interview in its entirety under *Crawford v. Washington*, 541 U.S. 36 (2004) because Davis was absent from trial and he had no prior opportunity to cross-examine her. *See State v. Parks*, 211 Ariz. 19, ¶ 30, 116 P.3d 631, 637 (App. 2005) (witness's out-of-court testimonial statement "may not be admitted at trial unless the declarant is unavailable and the accused received a prior opportunity to cross-examine the witness"). In *Crawford*, the United States Supreme Court concluded that even if an out-of-court statement was reliable, it could not be admitted if it violated the right of the accused to confront the witnesses against him. 541 U.S. at 68-69; *see also* U.S. Const. amend. VI. But the Confrontation Clause does not apply to all out-of-court statements—only those that are testimonial. *See Davis v. Washington*, 547 U.S. 813, 821 (2006) ("Only [testimonial] statements . . . cause the declarant to be a 'witness' within the meaning of the Confrontation Clause.").

¶10 In Davis's interview of Bynum, most of her statements were questions related to the investigation. She also made some accusatory statements—telling Bynum

he had misidentified a person related to the investigation, that he smelled like beer, and that the victim disputed the sex had been consensual. None of these statements are prohibited by the Confrontation Clause.

¶11 In *Crawford*, the Court defined testimony as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S. at 51. The "'use of a statement to prove something other than the truth of the matter asserted'" does not violate a defendant's Confrontation Clause rights. *Boggs*, 218 Ariz. 325, ¶ 32, 185 P.3d at 120, *quoting State v. Smith*, 215 Ariz. 221, ¶ 26, 159 P.3d 531, 539 (2007). Davis's questions to Bynum were not solemn declarations or affirmations made for the purpose of proving a fact; instead they were questions made for the purpose of eliciting information from him. Thus, her questions were not testimonial, and their admission did not violate the Confrontation Clause.

¶12 Additionally, the admission of accusatory statements made by Davis does not violate the Confrontation Clause. Our supreme court has recognized that confronting a suspect with accusatory statements is a "valid interrogation technique" that does not violate the Confrontation Clause. *See id.* ¶¶ 29-35 (no Confrontation Clause violation in admission of detective's accusations in interview that codefendant had told police that defendant "did all the shootin[g]"; such accusations a valid interrogation technique and not made for purpose of trial testimony); *State v. Roque*, 213 Ariz. 193, ¶¶ 69-70, 141 P.3d 368, 388-89 (2006) (no Confrontation Clause violation where videotaped recording of detective's interview of defendant contained repeated statements by detective of non-testifying witness because statements merely a valid interrogation technique).

¶13 Nor was there a Confrontation Clause violation based on the admission of out-of-court statements by L. or Bynum. To the extent that Davis attributed to L. an out-of-court statement that the sex was not consensual, the Confrontation Clause was not violated because L. was present for trial and subject to cross-examination. And Bynum's own statements to Davis were properly admitted as non-hearsay admissions by a party-opponent through the testimony of Kosmider, who was present when the statements were made. *See* Ariz. R. Evid. 801(d)(2) (statement not hearsay if offered against party and is party's own statement).

¶14 "Had [Bynum] objected at trial, he might well have been entitled to an instruction that the statements . . . were introduced as part of the interrogation and could not be used to prove the truth of the matters asserted." *Boggs*, 218 Ariz. 325, ¶ 35, 185 P.3d at 120. But, because Bynum's Confrontation Clause rights were not violated, we find no error, let alone fundamental error, in the trial court's admission of statements from Davis's interview of Bynum. *See Lavers*, 168 Ariz. at 385, 814 P.2d at 342.

II. Other-Acts Evidence

¶15 Bynum next argues the trial court violated his rights under the Fifth, Seventh, and Fourteenth Amendments to the United States Constitution and article II, § 10 of the Arizona Constitution when it admitted evidence that Bynum had raped C. He asserts that the admission of C.'s testimony violated the prohibition against double jeopardy, because a different jury had found him not guilty of the charges related to that incident. He also contends the evidence was inadmissible under Rule 404(c), Ariz. R. Evid., because "a jury [had] found him not guilty beyond a reasonable doubt" and

because the incidents were not sufficiently similar to establish an "aberrant sexual propensity."[4] Finally, he contends the evidence was inadmissible because the state failed to provide timely notice of its intent to offer other-acts evidence.

¶16 As an initial matter, Bynum's arguments regarding the other-acts evidence are based primarily on his misunderstanding or mischaracterization of the effect of jury verdicts in a criminal prosecution. We begin, therefore, by pointing out that an acquittal does "'not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.'" *See Dowling v. United States*, 493 U.S. 342, 349 (1990), *quoting United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984); *State v. Terrazas*, 189 Ariz. 580, 584 n.3, 944 P.2d 1194, 1198 n.3 (1997) ("earlier acquittal could be based upon the failure of the state to have proved the prior bad acts beyond a reasonable doubt").

a. Double Jeopardy and Collateral Estoppel

¶17 Bynum objected to C.'s testimony on the grounds that it placed him in double jeopardy and that the state was collaterally estopped from arguing he had sexually assaulted C. Although collateral estoppel is a distinct doctrine, *see State v. Nunez*, 167

[4]Bynum also contends the jury instructions regarding this evidence were improper and confused the issues. Prior to C.'s testimony, the trial court informed the jury "[Bynum] was charged and went to trial, but the jury found him not guilty of the charges," and instructed "[y]ou may not convict [him] of the crimes charged simply because you find that he committed the August 2007 acts[,] or that he had a character trait that predisposed him to commit the crimes charged." Both here and in the trial court Bynum claimed without support that the instructions would confuse the jury. Bynum does not explain how the instructions were confusing, nor does he argue the instructions were incorrect as a matter of law. We therefore deem this issue waived due to a lack of sufficient argument. Ariz. R. Crim. P. 31.13(c); *State v. Detrich*, 188 Ariz. 57, 64, 932 P.2d 1328, 1335 (1997).

Ariz. 272, 277, 806 P.2d 861, 866 (1991), "[t]he prohibition against double jeopardy also incorporates collateral estoppel principles." *State v. Rodriguez*, 198 Ariz. 139, ¶ 5, 7 P.3d 148, 150 (App. 2000). We review de novo whether a defendant's right to avoid double jeopardy has been violated. *Musgrove*, 223 Ariz. 164, ¶ 10, 221 P.3d at 46.

¶18 "The double jeopardy protections extended by the Arizona Constitution are coextensive with those provided by its federal counterpart." *Lemke v. Rayes*, 213 Ariz. 232, n.2, 141 P.3d 407, 411 n.2 (App. 2006). Both the United States and Arizona Constitutions prohibit "(1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *Id.* ¶ 10. Citing *State v. Hopson*, 112 Ariz. 497, 543 P.2d 1126 (1975), Bynum contends that C.'s testimony at the present trial put him in jeopardy twice. We disagree.

¶19 Multiple prosecutions are considered to be for the same offense when they "have identical statutory elements or if one is a lesser included offense of the other" or "if the second prosecution requires proof of the same conduct that constituted the offense for which the accused has already been prosecuted." *Fitzgerald v. Superior Court*, 173 Ariz. 539, 544, 845 P.2d 465, 470 (App. 1992). Although both cases here included sexual assault charges, Bynum was not prosecuted for the attack on C. in this case; instead, the charges in this case arose from wholly separate conduct, his attack on L. Likewise, he did not face punishment for the attack on C., because L. was the only alleged victim in this case. Nor was the jury required to find that Bynum had assaulted C. in order to convict Bynum of any of the offenses against L. *See id.*

¶20 Bynum also contends, however, that because the issue of whether he assaulted C. had been litigated in the previous trial, the state was collaterally estopped from relitigating the same issue in this case by presenting C.'s testimony. "'[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Dowling*, 493 U.S. at 347-48, *quoting Ashe v. Swenson*, 397 U.S. 436, 443 (1970). But, collateral estoppel will not "in all circumstances bar[] the later use of evidence relating to prior conduct which the Government failed to prove violated a criminal law." *Id.* at 350.

¶21 For collateral estoppel to apply, Bynum must "demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Id.* Double jeopardy is not violated by the introduction of "relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Id.* at 348. Further, contrary to Bynum's contention, "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Id.* at 342-43.[5] Here, the state did not have to

[5]Bynum attempts to distinguish *Dowling* by claiming its holding is limited to federal cases and the conduct for which he was charged in the present trial was of the same type as for the trial regarding C. We are not persuaded by these arguments. First, *Terrazas* does not limit *Dowling* to federal cases, as Bynum contends. 189 Ariz. at 584 n.3, 944 P.2d at 1198 n.3 (*Dowling* rule consistent with Arizona law). And, despite Bynum's implication otherwise, the charges were not based on the same conduct as the earlier prosecution related to C. *See Quinton v. Superior Court*, 168 Ariz. 545, 551, 815 P.2d 914, 920 (App. 1991) ("We should carefully distinguish between proving the same conduct in two prosecutions and using the same evidence in two prosecutions"; same evidence permissible).

establish beyond reasonable doubt that Bynum had committed the acts C. described. Rather, C.'s testimony was admissible if "clear and convincing evidence support[ed] a finding that [Bynum] committed the [acts against C.]" Ariz. R. Evid. 404(c); *State v. Aguilar*, 209 Ariz. 40, ¶ 30, 97 P.3d 865, 874 (2004); *Terrazas*, 189 Ariz. at 584, 944 P.2d at 1198. We therefore conclude C.'s testimony did not violate double jeopardy and the state was not collaterally estopped from offering evidence of the assault on C.

b. Evidence of Aberrant Sexual Propensity

¶22 Bynum next contends that even if C.'s testimony did not violate double jeopardy or collateral estoppel principles, "[t]he two events are not similar enough" to establish an "aberrant sexual propensity" under Rule 404(c). "We review the trial court's rulings on the admissibility of the evidence for abuse of discretion." *Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d at 874.

¶23 Rule 404(c) provides that for sexually based offenses "evidence of other crimes, wrongs, or acts may be admitted . . . if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." In *Aguilar*, our supreme court held that "the sexual propensity exception of Rule 404(c) is not restricted to cases in which the charges involve sodomy, child molestation, or lewd and lascivious conduct. Instead, the exception applies to the sexual offenses listed in A.R.S. § 13-1420(C), which includes charges involving nonconsensual heterosexual contact between adults." *Aguilar*, 209 Ariz. 40, ¶ 28, 97 P.3d at 873-74. In such cases, it is the nonconsensual nature of the acts that demonstrate an "aberrant sexual propensity." *Id.* ¶ 34.

¶24 Here, the state offered C.'s testimony under Rule 404(c) to show that Bynum "had a character trait giving rise to an aberrant sexual propensity to commit the offense [against L.]" Ariz. R. Evid. 404(c). The jury in this case was not asked to find beyond a reasonable doubt that Bynum had raped C. Rather, it was instructed to consider whether clear and convincing evidence supported a finding that Bynum had raped C. and whether such conduct "provide[d] a reasonable basis to infer that [Bynum] had a character trait giving rise to an aberrant sexual propensity." Ariz. R. Evid. 404(c)(1)(A) and (B); *see also Aguilar*, 209 Ariz. 40, ¶ 30, 97 P.3d at 874.

¶25 The trial court made specific findings as required by Rule 404(c)(1)(D), and Bynum concedes there were "limited similarities" in the women's testimony. He challenges only the court's finding "that the evidence [was] sufficient . . . to permit the trier of fact to find by clear and convincing evidence that the other acts . . . occurred." He argues that since "a jury found beyond a reasonable doubt that Mr. Bynum's sex with [C.] was [consensual]," there was insufficient evidence of an "aberrant sexual propensity." Nothing in the record suggests that the jury in the previous trial made any such finding. By acquitting Bynum of charges related to his conduct with C., the previous jury determined only that the state had failed to prove Bynum's guilt beyond a reasonable doubt. *See Dowling*, 493 U.S. at 349; *Terrazas*, 189 Ariz. at 584 n.3, 944 P.2d at 1198 n.3.

¶26 In this case, both women testified Bynum had provided them with a false name, had forced them to engage in oral and vaginal sex multiple times, had or had attempted to have forced anal sex with them, had physically assaulted them, and had

threatened them with a weapon. The evidence also showed that each sexual assault had begun with Bynum forcing the women to perform oral sex on him. We conclude that substantial evidence supported the trial court's finding that C.'s testimony provided a reasonable basis to infer Bynum had an aberrant sexual propensity, and it did not abuse its discretion in admitting this evidence. *See Aguilar*, 209 Ariz. 40, ¶¶ 34-35, 97 P.3d at 875.

c. Timeliness of Notice

¶27 Finally, Bynum contends the state's notice of intent to present evidence under Rule 404(c) "was untimely" and did not comply with Rule 404(c)(3). Bynum did not object to the timeliness or adequacy of the state's notice at trial, and is therefore limited to fundamental error review. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. In its answering brief, the state asserts that this argument is frivolous. We agree to the extent Bynum has failed to explain how the state's notice was insufficient under Rule 404(c). *See State v. Detrich*, 188 Ariz. 57, 64, 932 P.2d 1328, 1335 (1997) ("[m]ere assertions of error are insufficient").[6]

¶28 Rule 404(c)(3) requires that "no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause," "the state shall make disclosure to the defendant as to such acts as required by Rule 15.1, [Ariz. R. Crim. P.]" Here, it is undisputed that the state filed a notice seeking to introduce other acts pursuant

[6]Although Bynum maintains the state's notice lacked detail and was insufficient under the rules, he provides no authority to support his claim.

to Rule 404(b) and (c) on October 16, 2008—more than ten months before the scheduled trial date of August 17, 2009.

¶29 Bynum asserts without explanation that the state's "[n]otice does not come close to complying" with Rule 404(c)(3)'s requirement to disclose "such acts." The state's notice disclosed that C. would testify "that [Bynum] entered her residence while she was sleeping on the night of August 25, 2007, struck her multiple times, dragged her at knifepoint through the residence, bound her hands with a handkerchief and repeatedly forced her to engage in oral and vaginal intercourse." The state also provided Bynum with the police reports from the C. incident. And even if Bynum could explain why this notice was inadequate, he does not explain how he was prejudiced by the alleged error. He has thus failed to sustain his burden under the fundamental error standard. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607; *see also State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 16, 185 P.3d 135, 140 (App. 2008).

III. Sentences

¶30 Bynum next contends the trial court abused its discretion by imposing consecutive terms on the kidnapping and sexual abuse counts because consecutive terms were not required. Bynum also argues A.R.S. § 13-1406(C), which requires the trial court to impose consecutive sentences on sexual assault counts, is unconstitutional. Because Bynum failed to object to the sentences below, he is limited to fundamental error review. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. "To be fundamental, the error 'must be clear, egregious, and curable only via a new trial.'" *State v. Bible*, 175

Ariz. 549, 572, 858 P.2d 1152, 1175 (1993), *quoting State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991).

¶31 Although he is correct that "[t]he prejudicial nature of unobjected-to error must be examined in light of the entirety of the record," Bynum fails to establish that any error occurred. *See id.* He contends only that the trial court "should have considered the two lesser convictions to be part of a 'spree offense'" and imposed concurrent sentences on these counts. But, because he provides no authority that the court was required to do so, we cannot say the court erred in its imposition of consecutive sentences on the kidnapping and sexual abuse counts. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607; *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) ("Although we do not search the record for fundamental error, we will not ignore it when we find it.").

¶32 Bynum next contends § 13-1406(C) is unconstitutional, constituting cruel and unusual punishment under the Eighth Amendment of the United States Constitution and article II, § 15 of the Arizona Constitution. He concedes that our supreme court "has found similar sentencing schemes to be constitutional," and raises the issue without argument "simply to preserve it." Fundamental error principles also apply when the alleged unobjected-to error is constitutional in nature. *See Bible*, 175 Ariz. at 572, 858 P.2d at 1175. Bynum presents no argument other than an unsupported assertion the statute is unconstitutional. "Merely mentioning an argument is not enough . . . ." *State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004). A defendant "'must present significant arguments, supported by authority'" in order to avoid abandonment of the

argument on appeal. *Id.*, *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); *see also* Ariz. R. Crim. P. 31.13(c); *State v. Williams*, 220 Ariz. 331, ¶ 8, 206 P.3d 780, 783 (App. 2008). Further, Bynum "'has not argued, much less carried his burden to establish, fundamental error,'" and we therefore consider the argument waived and do not address it. *Williams*, 220 Ariz. 331, ¶¶ 9-10, 206 P.3d at 783, *quoting State v. Ramsey*, 211 Ariz. 529, n.6, 124 P.3d 756, 766 n.6 (App. 2005).

Disposition

¶33 Bynum's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge