

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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STATE OF ARIZONA,  
*Appellee,*

v.

JOHN GORDON CRAIN, JR.,  
*Appellant.*

No. 1 CA-CR 19-0502  
FILED 2-2-2021

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Appeal from the Superior Court in Maricopa County  
No. CR2019-005421-001  
The Honorable John R. Hannah, Judge  
The Honorable Cari A. Harrison, Judge (Ret.)

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix  
By Joshua C. Smith  
*Counsel for Appellee*

Maricopa County Public Defender's Office, Phoenix  
By Margaret M. Green  
*Counsel for Appellant*

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**OPINION**

Presiding Judge James B. Morse Jr. delivered the opinion of the Court, in which Judge Maria Elena Cruz and Judge Paul J. McMurdie joined.

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**M O R S E**, Judge:

¶1 John Crain Jr. ("Crain") appeals his convictions and sentences for aggravated assault and misconduct involving weapons, arguing the superior court committed fundamental error by failing to sever the two charges. For the following reasons, we affirm.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 Crain was on felony probation in November 2018 and subject to regular home inspections by probation officers. He lived in a one-bedroom apartment with his mother and cousin, and he was not permitted to possess a firearm while on probation.

¶3 On the morning of November 5, 2018, Crain's new probation officer, BK, came to conduct a home visit at Crain's apartment. When BK knocked on the door, a female voice asked who was knocking, and BK announced herself as a probation officer. BK was wearing a badge; her vest had "probation" printed across the front and back in white letters.

¶4 BK later testified that Crain answered the door wearing boxers and holding an item covered by a cloth or some clothing. BK testified that Crain pointed the object sideways at her and said, "My f---ing cousin ain't here." BK could not see the object beneath the cloth but believed it was a firearm based on the object's length, rectangular shape, "the way it was pointed out," and Crain's "aggressive demeanor[.]" BK retreated, and Crain shut the door. Moments later, Crain reappeared in the doorway without anything in his hands, wearing pants, and greeted BK by saying, "My bad, my bad."

¶5 BK then introduced herself to Crain as his new probation officer. Crain offered to let BK inspect his apartment, but BK declined. BK gave Crain her business card before she left. Crain called BK later that day, left a voicemail, and sent her a text message saying, "Hey [BK] this is John [C]rain you came to see me this morning just giving you my cell number[.]"

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¶6 BK told her supervisor that she believed Crain had pointed a firearm at her. BK also told her husband, a federal border patrol agent, and he reported the incident to Phoenix Police. Two days later, police executed a search warrant for Crain's apartment. Ten people were in the apartment—three adults, a teenager, and six children—and police found a loaded handgun underneath a pile of men's, women's, and children's clothing and assorted papers in Crain's bedroom closet. Some of the papers had Crain's name on them.

¶7 DNA evidence collected from the handgun showed a mix of at least four people, and a DNA analyst testified that no further identification could be drawn from the tests. A records trace failed to show any connection between Crain and the firearm.

¶8 A grand jury indicted Crain for aggravated assault using a deadly weapon or simulated deadly weapon and misconduct involving weapons while being a prohibited possessor. Crain timely moved to sever trial of the charges, arguing the State would need to present evidence of a prior felony conviction to prove his misconduct-involving-weapons charge, and the convictions would not otherwise be admissible on his aggravated-assault charge. The superior court denied Crain's motion to sever, finding the fact that Crain was on probation was admissible to prove both charges. Crain did not renew his motion to sever before the close of evidence.

¶9 Crain's former probation officer and BK both testified they supervised Crain on felony probation. The superior court then ruled that, if Crain testified, the State could impeach Crain with two of his prior felony convictions. Crain elected to testify in his own defense and admitted that he was on probation for the prior felony convictions. During cross-examination, the State impeached Crain with sanitized versions of two of his prior felony convictions.

¶10 Crain's mother testified that she did not see a firearm or a covered object in Crain's hands when he went to the door to meet BK. A police detective testified that, on the day of the search warrant, Crain's mother did not say she had witnessed the event when detectives told her of the incident.

¶11 Crain denied pointing a handgun at BK, claimed he did not have anything in his hands when he first opened the door, and said he never told BK that his "f---ing cousin ain't here." Crain also said that his girlfriend and her children were staying with him in his bedroom the day the search warrant was executed and claimed he did not know about the

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handgun in his closet. He testified he carried his girlfriend's luggage into the apartment and emptied her bags into the bedroom closet when she and her children came to stay with him the day after BK came to visit. Crain stated that the women's clothing and makeup police found on top of the firearm in the closet belonged to his girlfriend and her children.

¶12 During cross-examination, Crain denied ever asking his girlfriend to claim that the gun was found in her purse to make his case "go away." The State later played an audio recording of a phone call between Crain and his girlfriend. During the call, Crain asked his girlfriend to tell Crain's lawyer that the police "found that gun in your purse" to "put a hole in their f---ing case and they're going to have to throw that bullshit out."

¶13 At the close of the State's case-in-chief, Crain moved for a judgment of acquittal pursuant to Rule 20 of the Arizona Rules of Criminal Procedure ("Rule 20 motion"). The superior court denied Crain's motion.

¶14 The jury found Crain guilty of both aggravated assault and misconduct involving weapons. The superior court sentenced Crain as a repetitive offender to concurrent terms of 11.25 years in prison for aggravated assault and 10 years in prison for misconduct involving weapons.

¶15 Crain timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A).

**DISCUSSION**

**I. Denial of the Motion to Sever.**

¶16 Crain claims that the superior court erred when it denied his motion to sever trial of the two counts. Two or more offenses may be joined in an indictment as separate counts if they: "(1) are of the same or similar character; (2) are based on the same conduct or are otherwise connected together in their commission; or (3) are alleged to have been part of a common scheme or plan." Ariz. R. Crim. P. 13.3(a). The trial court must sever trial of counts that have been joined, either on motion or on its own initiative, "if necessary to promote a fair determination of any defendant's guilt or innocence of any offense." Ariz. R. Crim. P. 13.4(a). When a pretrial motion to sever is denied, "the defendant must renew the motion during trial before or at the close of evidence[.]" otherwise, "the right to severance is waived . . . ." Ariz. R. Crim. P. 13.4(c). Because Crain failed to renew his motion to sever, he acknowledges that we review for fundamental error.

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*State v. Gutierrez*, 240 Ariz. 460, 465, ¶ 12 (App. 2016). Crain bears the burden to show that any error was both fundamental and prejudicial. *State v. Soliz*, 223 Ariz. 116, 119, ¶ 11 (2009).

¶17 Crain relies on *State v. Burns* to argue the superior court erred when it failed to sever trial of the weapons charge from the aggravated-assault charge. 237 Ariz. 1, 14-15, ¶¶ 34-39 (2015). In *Burns*, the Arizona Supreme Court held the trial court abused its discretion when it declined to sever the trial of a misconduct-involving-weapons charge from sexual assault, kidnapping, and first-degree murder charges. *Id.* at 14, ¶ 36. The Court noted that the defendant did not testify at trial, and "[b]ut for joinder of the misconduct-involving-weapons charge, the evidence of [the defendant's] prior felony convictions would not have been admissible during the guilt phase." *Id.* at ¶ 35. The Court found that while the defendant's "possession of the murder weapon was cross-admissible for the murder and the weapons charge, his prior conviction was not and its admission created a serious risk of prejudice." *Id.* at ¶ 36 (citing *United States v. Nguyen*, 88 F.3d 812, 815 (9th Cir. 1996)).

¶18 The Court also reasoned that the superior court's curative instruction was insufficient because "[s]uch an instruction requires the jury to ignore prior felony convictions in a capital criminal prosecution[,] which the Court found was "well beyond moral capacities." *Id.* at 14-15, ¶ 37 (citing *United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985)). However, the Court found the error was harmless given the overwhelming evidence of the defendant's guilt and that the State did not emphasize the felony convictions during closing argument. *Id.* at 15, ¶ 38. Nevertheless, the Court emphasized that "[a]bsent an appropriate factual nexus, trial courts generally should not join a misconduct-involving-weapons charge, or any charge that requires evidence of a prior felony conviction, unless the parties have stipulated to a defendant's status as a prohibited possessor." *Id.* at ¶ 39.

¶19 Evidence that Crain was on probation was relevant to the assault charge because it explained his relationship with BK and the reason for BK's visit to his apartment. Crain does not argue the court should have excluded that evidence. Crain also acknowledges that evidence he possessed a handgun was relevant to both charges but argues that his prior felony convictions were relevant only to the misconduct-involving-weapons charge. He contends there was no "appropriate factual nexus" allowing the two charges to remain joined, and his prior felony convictions would not have been admissible to prove the aggravated-assault charge if it were tried separately. *See id.*

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¶20 Beginning with the first step of fundamental-error review, we conclude that the superior court erred by failing to sever Crain's charges. *See State v. Escalante*, 245 Ariz. 135, 142, ¶ 21 (2018) ("[T]he first step in fundamental error review is determining whether trial error exists."). The superior court correctly concluded that Crain's status as a probationer was relevant to the aggravated-assault charge. However, one can be on probation without having been convicted of a felony, *see, e.g.*, A.R.S. § 13-902(A)(5)-(7) (authorizing probationary terms for misdemeanor convictions), and Crain's status as a felon was not relevant to prove the aggravated assault, *Burns*, 234 Ariz. at 14, ¶¶ 34-35. In other words, if the charges had been tried separately, the jury deciding the assault charge would have heard evidence that Crain was on *probation*, but not necessarily that he was on *felony* probation.

¶21 But finding an error is only the first step in fundamental-error review. In the second step, Crain must demonstrate the "error goes to the foundation of the defendant's case, takes away a right essential to the defense, or is of such magnitude that it denied the defendant a fair trial." *Escalante*, 245 Ariz. at 138, ¶ 1. Crain asserts fundamental error only under the first prong. Crain argues the failure to sever counts for trial went to the foundation of his case because it directly impacted a critical factual dispute of the case, *i.e.*, whether he pointed a handgun or simulated handgun at BK. *See id.* at 141, ¶ 18 ("An error generally goes to the 'foundation of the case' if it . . . directly impacts a key factual dispute . . .").

¶22 Crain claims that in deciding a key factual dispute, *i.e.*, whether to accept his or BK's account of the events, the jury was swayed by knowing of his prior felony convictions. But Crain testified, properly was impeached with his prior felony convictions, *see* Ariz. R. Evid. 609, and the jury was instructed that it could consider the prior convictions only for purposes of credibility and not as evidence of guilt on the aggravated-assault charge.

¶23 Thus, Crain cannot meet his burden to show that the denial of his motion to sever went to the foundation of his case and necessarily caused the jury to improperly consider his prior convictions in deciding the key factual dispute. *See State v. Riley*, 248 Ariz. 154, 171-72, ¶¶ 32-36 (2020) (finding defendant did not meet burden to prove that error was fundamental where instructions and course of trial lessened the significance of the error); *State v. Smyers*, 207 Ariz. 314, 316, ¶ 5 (2004) (affirming that a defendant's decision not to testify can waive his ability to challenge pretrial rulings on appeal). Crain does not challenge the superior court's decision to allow impeachment with his felony convictions. Because

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Crain's decision to testify independently allowed the jury to hear of his prior felony convictions, he cannot prove prejudice from any error in denying severance. *See Burns*, 237 Ariz. at 14, ¶¶ 34-35 (noting defendant did not testify and his prior convictions would not have been otherwise admissible); *see also State v. Mowell*, 672 N.W.2d 389, 404 (Neb. 2003) ("Simply put, Mowell chose to testify at his trial; therefore, even if count III had been severed, evidence of his prior felony convictions would have been properly admitted to potentially impeach his testimony."); *Kirk v. Commonwealth*, 464 S.E.2d 162, 165-66 (Va. Ct. App. 1995) (finding harmless error when severance was denied but defendant testified and prior convictions were admitted for impeachment purposes); *Ferrell v. State*, 810 S.W.2d 29, 32 (Ark. 1991) (finding denial of severance was harmless when an instruction was given regarding proper consideration of defendant's prior conviction, defendant voluntarily testified, and his prior felony conviction was introduced during cross-examination).<sup>1</sup>

¶24 Crain argues that "[s]urely his decision to testify was influenced by the court's improper denial of his Motion to Sever." But Crain does not provide any record support for this assertion, and we decline to speculate about why Crain elected to testify. *See State v. Dickinson*, 233 Ariz. 527, 531, ¶ 13 (App. 2013) (stating that a defendant "may not rely upon 'speculation' to carry his burden" on fundamental-error review (quoting *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14 (App. 2006)); *see also Kirk*, 464 S.E.2d at 165 n.1 ("Nothing in the record suggests that Kirk's election to testify was tied to the denial of his severance motion."); *Ferrell*, 810 S.W.2d at 32 (noting no evidence that "appellant was in any way compelled to testify by introduction of the [prior felony] conviction"). Moreover, the circumstances of this case make such speculation inappropriate. Crain's defense was based on disputing BK's testimony about their interaction, and his own testimony was important, if not necessary, to that defense. Because Crain fails to demonstrate the denial of his motion to sever went to the

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<sup>1</sup> Although these out-of-state cases are persuasive in determining whether the error was fundamental, we emphasize that fundamental-error review differs from the harmless-error review applied in those cases. Under fundamental-error review, the burden is on defendant "to establish that (1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice." *Riley*, 248 Ariz. at 170, ¶ 24. In contrast, harmless-error review requires the State to prove beyond a reasonable doubt that the error did not affect the verdict. *Escalante*, 245 Ariz. at 144, ¶ 30. For the reasons discussed in this opinion, the burden on Crain to show fundamental error is dispositive and we do not decide whether the superior court's error would have been harmless had Crain preserved his motion to sever.

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foundation of his case, he fails to establish fundamental error. *See Escalante*, 245 Ariz. at 142, ¶ 21.<sup>2</sup>

¶25 Even if Crain established the superior court's error was fundamental, and we assumed the jury considering the assault charge would not have otherwise heard of his prior felony convictions, Crain still fails to prove resulting prejudice. *See Riley*, 248 Ariz. at 179-80, ¶ 88 (providing that defendant must prove prejudice under fundamental-error review without relying on speculation). "Establishing prejudice from fundamental error varies depending on the nature of the error and the unique case facts." *Escalante*, 245 Ariz. at 144, ¶ 29. Even with severance, the jury would have known that Crain was on supervised probation for a prior conviction at the time of the offense, heard BK's testimony describing the event, and learned that a handgun was later found in Crain's room underneath paperwork bearing his name. *Supra* ¶¶ 3-11, 19-20. The jury also would have heard a recording of Crain asking his girlfriend to claim that the gun had been found in her purse and heard Crain deny, under oath, making such a request. *Supra* ¶ 12; *see United States v. Davis*, 909 F.3d 9, 19 (1st Cir. 2018) ("It is a 'well-settled principle that false exculpatory statements are evidence—often strong evidence—of guilt.'" (quoting *Al-Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010))). While improper evidence of a prior felony conviction raises serious issues, it does not automatically result in reversible error. *Burns*, 237 Ariz. at 14-15, ¶¶ 37-38. Crain bears the burden of proving resulting prejudice and does not point to any evidence or record support for the proposition that the jury would have returned a different verdict had it known he was on supervised probation for a prior conviction of some sort, but not necessarily a felony. *See Dickinson*, 233 Ariz. at 531, ¶ 13. Because he has not met that burden, he has failed to show reversible fundamental error.

## II. Jury Instructions.

¶26 Crain argues that the superior court committed fundamental error when it failed *sua sponte* to give a separate-counts and mere-presence

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<sup>2</sup> Although a defendant's decision to testify may impede his ability to prove fundamental error, this does not permit trial courts to deny severance based on the assumption that a defendant may testify in his or her defense. *See Hackney v. Commonwealth*, 504 S.E.2d 385, 389 (Va. Ct. App. 1998) ("[W]e will not condone a trial court's clear error in . . . refusing to sever the possession of a firearm by a felon charge predicated on the assumption that an accused will testify and render the error harmless.").



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instruction to the jury. Crain did not request these instructions, nor did he object to the lack of these instructions.

¶27 "[A] trial court has a duty to instruct on the law relating to the facts of the case when the matter is vital to a proper consideration of the evidence, even if not requested by the defense and failure to do so constitutes fundamental error." *State v. Avila*, 147 Ariz. 330, 337 (1985). We review jury instructions "in their entirety[.]" and "when the substance of a proposed instruction is adequately covered by other instructions, the trial court is not required to give it." *State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75 (2000). Because Crain failed to object to the instructions given, we review for fundamental error. *State v. Romero*, 248 Ariz. 601, 603-04, ¶ 8 (App. 2020).

**A. Separate-Counts Instruction.**

¶28 Crain claims the superior court committed fundamental error by failing to give a separate-counts instruction, thereby allowing the jury to confuse or conflate evidence relevant to his aggravated-assault charge with evidence relevant to his misconduct-involving-weapons charge. The Revised Arizona Jury Instruction for "separate counts" provides:

Each count charges a separate and distinct offense. You must decide each count separately on the evidence with the law applicable to it, uninfluenced by your decision on any other count. You may find that the State has proved beyond a reasonable doubt, all, some, or none of the charged offenses. Your finding for each count must be stated in a separate verdict.

Rev. Ariz. Jury Instr. ("RAJI") Std. Crim. 30 (4th ed. 2016).

¶29 Crain argues the court's failure to provide the jury a separate-counts instruction relieved the prosecution of its burden to prove all elements of both counts, diminished his credibility, and undermined Crain's right to the presumption of innocence. He argues the failure to provide a separate-counts instruction prejudiced him because the jury may have found differently had it been properly instructed.

¶30 Although it would have been appropriate to provide a separate-counts instruction, the superior court instructed the jury that "the State must prove each element of each charge beyond a reasonable doubt" and instructed the jury that evidence of Crain's prior convictions could not be considered evidence of guilt on the aggravated-assault count. The

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superior court also provided the jury with separate verdict forms for each count. Furthermore, in closing argument, the State noted that the proof necessary for the two counts differed, stating that "under [the aggravated-assault count], [Crain] could be found guilty either if you believe it to be a gun or a simulated weapon. For [the misconduct-involving-weapons count], that is not the case."

¶31 We conclude that the instructions, verdict forms, and argument, viewed in their entirety, sufficiently informed the jury that the State was required to prove each charge separately, and that finding Crain guilty of one charge did not require the jury to find him guilty of the other. *See Hoskins*, 199 Ariz. at 145, ¶ 75 (finding the superior court did not err in omitting a separate-counts instruction where it had instructed that the State was required to prove "each charge" and "each element" beyond a reasonable doubt and had used separate verdict forms for each crime); *State v. Payne*, 233 Ariz. 484, 509, ¶¶ 91-92 (2013) (noting verdict forms may remedy an alleged deficiency in jury instructions); *State v. Bruggeman*, 161 Ariz. 508, 510 (App. 1989) (stating that jury instructions are not evaluated out of context, and attorneys' closing argument can clarify instructions). Furthermore, Crain's speculation that the jury may have been confused is not enough to carry his burden of proving prejudice under fundamental-error review. *See Riley*, 248 Ariz. at 180, ¶ 88 ("Riley has pointed to no evidence in the record indicating he was prejudiced by the duress instruction, but rather asks us to speculate that the jurors were misled or confused by the instruction.").

**B. Mere-Presence Instruction.**

¶32 Crain testified he did not know there was a handgun in his closet and implied it could have belonged to his girlfriend or another adult staying in his apartment. Crain argues a mere-presence instruction would have explained how the jury should consider the relevant testimony and evidence. Crain argues the jury could have returned a different verdict had it been properly instructed. The RAJI for "mere presence" provides:

Guilt cannot be established by the defendant's mere presence at a crime scene, mere association with another person at a crime scene or mere knowledge that a crime is being committed. The fact that the defendant may have been present, or knew that a crime was being committed, does not in and of itself make the defendant guilty of the crime charged. One who is merely present is a passive observer

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who lacked criminal intent and did not participate in the crime.

RAJI Std. Crim. 43.

¶33 While a mere-presence instruction might have been appropriate given the trial evidence, the superior court instructed the jury that it must determine the facts based solely on the evidence presented at trial, that it must not think Crain was guilty merely because of the charges against him, and that Crain was presumed innocent. The superior court further instructed the jury that the State had to prove Crain knowingly possessed the handgun. Crain argued both that he did not know the gun was present in his room and that he did not knowingly possess the gun. By finding Crain knowingly possessed the handgun, the jury implicitly rejected his assertion that he was merely present. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68 (2006) (presuming that jurors follow jury instructions). Thus, assuming without deciding that a mere-presence instruction would have been appropriate, the other instructions sufficed to inform the jury of the law, and Crain does not show how any error went "to the foundation of the defendant's case," denied him "a right essential to" his defense, or denied him "a fair trial." *Escalante*, 245 Ariz. at 138, ¶ 1; *cf. State v. Doerr*, 193 Ariz. 56, 65, ¶¶ 36-38 (1998) (finding the superior court properly rejected a mere-presence instruction where the evidence did not support it and where the defense advanced its theory that a third person committed the crime). Moreover, Crain cannot establish prejudice by speculating that the jury would have returned a different verdict had the superior court provided a mere-presence instruction. *See Riley*, 248 Ariz. at 180, ¶ 88.

### III. Alleged Prosecutorial Misconduct.

¶34 Crain argues that the prosecutor committed misconduct during closing argument by shifting the burden of proof onto Crain, vouching for BK, and dishonestly representing certain facts to the jury. Crain argues that each instance of alleged misconduct alone is sufficient to require reversal. He also argues that, when considered cumulatively, the alleged misconduct requires reversal.

¶35 Crain argued during closing arguments that he did not know there was a handgun in his closet and implied that his girlfriend might have brought it with her when she came to stay with him. Crain also attacked BK's credibility. During rebuttal closing argument, the prosecutor stated:

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The State has the burden to prove what happened in this case beyond a reasonable doubt, and based on all the evidence, I feel the State has met that burden as to both counts.

The defense chose to put a case on, their right to do. No obligation to do so because I have to make my case. They don't have to do anything. They have the presumption of innocence.

However, to get up here and call witnesses and then insinuate that, "Oh, it must be [Crain's girlfriend]. The only person that came in was the day before. It must be [Crain's girlfriend]," that has been the concept of the defense case without saying it. And I bring all that up because, just like myself, they have the ability to bring in witnesses. Now, that is not to say that they are required to put on any witnesses, but they have beat that repetitively that it has to have been her, it has to have been her.

¶36 The prosecutor also asked the jury "[w]hat motive would someone like [BK] have to lie about the incident or to fabricate" the incident, as she did not know Crain, and did not need to "conjure up anything" if she wanted to search Crain's apartment.

¶37 The prosecutor argued Crain texted BK the day after she visited his apartment to smooth things over and make sure he was not in trouble, saying: "The State would submit to you what he's doing right now is he's feeling. Is this bad? Am I in trouble about this? Let me see what her response is. He's feeling out the situation. That's what the State would submit to you."

**A. Standard of Review.**

¶38 Because Crain did not object during the trial, we review Crain's prosecutorial misconduct claims for fundamental error. *State v. Arias*, 248 Ariz. 546, 555, ¶ 31 (App. 2020). "We will reverse a conviction for prosecutorial misconduct only if (1) the prosecutor committed misconduct and (2) a reasonable likelihood exists that the prosecutor's misconduct could have affected the verdict." *State v. Benson*, 232 Ariz. 452, 463, ¶ 40 (2013). "Reversal is warranted when prosecutorial misconduct 'so permeated the trial that it probably affected the outcome and denied [the] defendant his due process right to a fair trial.'" *State v. Murray*, 247 Ariz. 583, 589, ¶ 8 (App. 2019) (quoting *State v. Blackman*, 201 Ariz. 527, ¶ 59 (App. 2002)).

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**B. Burden Shifting.**

¶39 Crain argues that the prosecutor shifted the burden of proof when he asked the jury to speculate why Crain did not call his girlfriend as a witness. He argues the prosecutor improperly asked the jury to speculate about what Crain's girlfriend's testimony would have been and improperly focused attention on Crain's failure to call her as a witness.

¶40 "The State improperly shifts the burden when it implies a duty upon the defendant to prove his innocence or the negation of an element" of a charge, or "when it comments upon the failure of a defendant to testify or present a defense." *State v. Johnson*, 247 Ariz. 166, 203, ¶ 149 (2019). "A prosecutor may properly comment on a defendant's failure to present exculpatory evidence which would substantiate [the] defendant's theory, provided the remark is not a comment on the defendant's silence." *Riley*, 248 Ariz. at 174, ¶ 53. When a prosecutor improperly comments on a defendant's failure to call a witness, prejudice is determined by considering whether the remarks "call[ed] to the attention of the jurors matters which they would not be justified in considering in determining their verdict," and whether it is probable the remarks influenced the jury. *State v. Suarez*, 137 Ariz. 368, 377 (App. 1983) (quoting *Sullivan v. State*, 47 Ariz. 224, 238 (1936)).

¶41 The prosecutor did not engage in impermissible burden shifting. The prosecutor emphasized that Crain had no obligation to produce evidence or call witnesses and that it was the State's burden to prove Crain guilty beyond a reasonable doubt. Moreover, the prosecutor connected Crain's girlfriend's absence at trial both to defense counsel's closing argument implicating her and to the phone conversation in which Crain asked her to say that the police discovered the handgun in her purse. The prosecutor merely argued that Crain could have offered evidence corroborating his defense but did not do so. *See Riley*, 248 Ariz. at 174, ¶ 54 (finding prosecutor "merely commented on [the defendant's] failure to present witnesses to support the theory of his defense"). Given Crain's arguments, this was a proper rebuttal.

**C. Vouching.**

¶42 Crain argues the prosecutor vouched for BK's credibility when he asked the jury, "What motive would someone like [BK] have to lie about the incident or to fabricate about the incident?" Crain argues the prosecutor improperly asked the jury to evaluate BK's credibility based on the State's assurance that she was reliable, rather than on the evidence.

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¶43 "Prosecutorial vouching occurs 'when the prosecutor places the prestige of the government behind its witness' or 'where the prosecutor suggests that information not presented to the jury supports the witness's testimony.'" *State v. Garza*, 216 Ariz. 56, 64, ¶ 23 (2007) (quoting *State v. Dumaine*, 162 Ariz. 392, 401 (1989)). "Placing the prestige of the state behind its witness involves personal assurances of a witness's veracity, while the second type of vouching involves prosecutorial remarks that bolster a witness's credibility by reference to matters outside the record." *Johnson*, 247 Ariz. at 204, ¶ 157 (quoting *State v. Acuna Valenzuela*, 245 Ariz. 197, 217, ¶ 75 (2018)).

¶44 The statement Crain challenges did not attempt to place the government's prestige behind BK's testimony, nor did it draw the jury's attention to evidence it should not have considered. *See State v. Buccheri-Bianca*, 233 Ariz. 324, 329, ¶¶ 14-15 (App. 2013) (finding no prosecutorial misconduct where the prosecutor asked the jury what motive the victims would have to lie). Instead, the prosecutor "was merely arguing a reasonable inference drawn from the evidence presented to the jury." *Id.*; *see also State v. Hill*, 174 Ariz. 313, 322 (1993) ("We have consistently held that wide latitude is to be given in closing arguments and that counsel may comment on the evidence and argue all reasonable inferences therefrom."). The prosecutor did not argue the jury should believe BK simply because she was a probation officer or because she was called as a State witness. Instead, the prosecutor pointed out that BK had no motive to lie – she had not met Crain previously, and she did not need to lie to search his residence – while asserting Crain and his mother both had a motive to lie. Accordingly, no prosecutorial vouching occurred.

**D. Alleged Dishonest Argument.**

¶45 Crain claims the prosecutor "dishonest[ly] [and] deliberately" confused the jury when he suggested that Crain called and texted BK to assuage bad feelings from their initial meeting. Because Crain testified that he called and texted BK to provide her with up-to-date contact information, he claims the prosecutor's argument misstated the evidence and called for the jury to consider information outside the case's facts.

¶46 We disagree. The argument that Crain contacted BK to smooth things over was based upon a reasonable inference drawn from the evidence. *See State v. Morris*, 215 Ariz. 324, 336, ¶ 51 (2007) ("Prosecutors have 'wide latitude' in presenting their arguments to the jury[,] and are 'permitted to argue all reasonable inferences from the evidence . . .'" (quoting *State v. Jones*, 197 Ariz. 290, 305, ¶ 37 (2000)). The jury heard

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testimony that Crain apologized to BK, saying "[m]y bad, my bad" when he reappeared at the door. The prosecutor linked Crain's apology to his subsequent attempt to contact BK, and it was a reasonable inference to argue his subsequent text messages were a continuation of his effort to ensure he was not in trouble. Moreover, we do not believe that the prosecutor's argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Arias*, 248 Ariz. at 555, ¶ 30 (quoting *Morris*, 215 Ariz. at 335, ¶ 46).

**E. Cumulative Error.**

¶47 Crain argues the alleged prosecutorial misconduct – shifting the burden to the defense, vouching for a witness, and attributing a guilty motive to Crain for complying with his probation's terms and conditions – all occurred during closing argument, and thus resulted in cumulative error.

¶48 "Even if the alleged acts of [prosecutorial] misconduct do not individually warrant reversal, we must determine whether the acts 'contribute to a finding of persistent and pervasive misconduct.'" *State v. Bocharski*, 218 Ariz. 476, 491-92, ¶ 74 (2008) (quoting *State v. Roque*, 213 Ariz. 193, 228, ¶ 155 (2006)). Because the prosecutor's closing arguments did not constitute prosecutorial misconduct, they cannot rise to the level of cumulative prosecutorial misconduct. Crain therefore fails to establish that the prosecutor's arguments constituted "persistent and pervasive misconduct" requiring reversal. *Id.* at 492, ¶ 74 (quoting *Roque*, 213 Ariz. at 228, ¶ 155).

**IV. Substantial Evidence.**

¶49 Crain argues substantial evidence did not support the misconduct-involving-weapons charge and, thus, the superior court abused its discretion when it denied his Rule 20 motion. A conviction for misconduct involving weapons requires proof that Crain knowingly possessed a deadly weapon while being a prohibited possessor.

¶50 The sufficiency of the evidence is subject to de novo review. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011). "We review the sufficiency of evidence presented at trial only to determine whether substantial evidence supports the jury's verdict, 'viewing the facts in the light most favorable to sustaining the jury verdict.'" *State v. Cox*, 217 Ariz. 353, 357, ¶ 22 (2007) (quoting *Roque*, 213 Ariz. at 218, ¶ 93). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution,

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any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¶51 Crain argues that BK testified that she never actually saw a gun and testified only that Crain held an object covered by a cloth, which she believed was a gun. Crain further asserts that when police found the handgun, two other adults, a teenager, and six children were staying in the apartment, and the gun was found beneath paperwork and assorted clothing belonging to men, women, and children. Crain argues the jury may have simply decided to believe BK when she testified that he pointed a handgun at her and assumed from those facts that the handgun recovered from his apartment two days later was in his dominion and control on the earlier occasion. But evidence that Crain possessed the firearm during BK's visit may support a reasonable inference that he continued to know of the weapon and maintain dominion and control over it when police found it when they executed the search warrant two days later. *See State v. Paris-Sheldon*, 214 Ariz. 500, 510, ¶ 32 (App. 2007) ("If reasonable minds can differ on the inferences to be drawn from the evidence, a trial court has no discretion to enter a judgment of acquittal and must submit the case to the jury." (quoting *State v. Alvarez*, 210 Ariz. 24, 27, ¶ 10 (App. 2005))); *see also State v. Stidham*, 164 Ariz. 145, 146 (App. 1990) ("It is a principle of evidence law that the existence of a particular fact before or after the act in question may be shown to indicate the existence of that same condition at the time of the act.").

¶52 Moreover, aside from BK's testimony about her visit to Crain's apartment, there was substantial evidence that Crain had constructive possession of the handgun when police found it. *See West*, 266 Ariz. at 562, ¶ 16 ("Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction."). "Constructive possession exists when the prohibited property 'is found in a place under [the defendant's] dominion [or] control and under circumstances from which it can reasonably be inferred that the defendant had actual knowledge of the existence of the [property].'" *State v. Cox*, 214 Ariz. 518, 520, ¶ 10 (App. 2007) (quoting *State v. Villavicencio*, 108 Ariz. 518, 520 (1972)). Constructive possession may be proven by circumstantial evidence, but "a person's mere presence at a location where a prohibited item is located is insufficient to show that he or she knowingly exercised dominion or control over it." *State v. Gonsalves*, 231 Ariz. 521, 523, ¶ 10 (App. 2013).

¶53 The handgun was discovered in Crain's bedroom closet, underneath men's, women's, and children's clothing and paperwork



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bearing Crain's name. Crain and his girlfriend were the only adults staying in his bedroom the day of the search, and Crain later falsely denied asking his girlfriend to claim that the gun was found in her purse rather than under the clothes and paperwork. The jury was not required to accept Crain's testimony and could consider his false denials as evidence of guilt. *See Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion) ("And if the jury did disbelieve West, it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt."). A "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See Jackson*, 443 U.S. at 319. Thus, Crain has failed to show that his convictions are not supported by substantial evidence.

**CONCLUSION**

¶54 We affirm Crain's convictions and sentences.



AMY M. WOOD • Clerk of the Court  
FILED: AA