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, Appellee,	)	No. 1 CA-CR 11-0007
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
JOE BELLMON, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-139208-001DT

The Honorable Robert L. Gottsfield, Judge (Retired)

CONVICTIONS AND SENTENCES AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following Joe Bellmon's conviction of aggravated assault, a Class 3 felony, and shoplifting, a Class 1 misdemeanor. Bellmon's counsel has searched the record and found no arguable question of law that is not frivolous. *See Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Bellmon was given the opportunity to file a supplemental brief but did not do so. Instead, he requested his counsel raise several issues, which we address below. Counsel now asks this court to search the record for fundamental error. After reviewing the entire record, we affirm Bellmon's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 A loss prevention employee of a retail store observed Bellmon enter the store with several empty bags.[1] Bellmon walked to the men's department and put several shirts in a shopping cart. The loss prevention employee next observed Bellmon walk to a different aisle in the back of the store, take the shirts off the hangers and conceal them in one of his bags. Bellmon then proceeded to the front of the store, toward the exit.

[1] Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Bellmon. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

¶3 The loss prevention employee exited the store ahead of Bellmon. Outside the store, she contacted Bellmon, identified herself as a loss prevention employee and told Bellmon he needed to give her the merchandise. She testified Bellmon then pulled a knife out of his pocket. She then told Bellmon, "I just want the merchandise back," and Bellmon threw the bag at her and ran off. Officers apprehended Bellmon at a nearby grocery store and found a knife in his pocket.

¶4 Bellmon was charged with shoplifting and aggravated assault, a dangerous offense. After a three-day trial, a jury convicted him of shoplifting and aggravated assault but found the aggravated assault to be non-dangerous. The superior court sentenced Bellmon to time served for the shoplifting and a mitigated term of 2.75 years for the aggravated assault, with 141 days' presentence incarceration credit.

¶5 Bellmon timely appealed. We have jurisdiction 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 (West 2012).[2]

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

DISCUSSION

A. Issues Raised by Bellmon.

1. Asserted prosecutorial vouching and improper cross-examination.

¶6 Bellmon first argues the prosecutor improperly vouched for the loss prevention employee's veracity and improperly cross-examined Bellmon by asking him whether he thought the employee was lying.

¶7 Bellmon testified he did not use the knife to threaten the employee; rather, he said he had taken the knife out of his pocket while he was still in the store to pick at his fingernails. He said that when the employee approached him outside the store, he was holding the knife in a non-threatening manner. The prosecutor asked Bellmon if he thought the employee was lying about what she saw or had any motive to lie. When Bellmon stated he did not assault the victim, the prosecutor responded, "So she's making this all up?" Bellmon stated, "That's your conjecture," to which the prosecutor responded, "Well, no, my conjecture is she's telling the truth."

¶8 The prosecutor continued the same theme in his closing argument. He directed the jury to the instruction on evaluating testimony for truthfulness, arguing "what you need to do in this case is to evaluate the testimony. Either [the victim] is telling the truth and the defendant is guilty or he's telling

the truth and he's not guilty." The prosecutor then went through several of the factors in the instruction, including motive, bias and prejudice. The prosecutor then said, "If you believe Mr. Bellmon was telling you the truth, that means [the victim is] a liar. It means she made this up."

¶9 "[I]t is improper for the prosecution to vouch for the credibility of the state's witnesses." *State v. Salcido*, 140 Ariz. 342, 344, 681 P.2d 925, 927 (App. 1984). "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, 163 P.3d 1006, 1014 (2007) (citation omitted). A prosecutor's remark that, out of context, appears to place "the prestige of the government" behind a witness may not constitute reversible error if the prosecutor makes it clear that the jury alone must determine the witness's credibility. *State v. Corona*, 188 Ariz. 85, 91, 932 P.2d 1356, 1362 (App. 1997). Similarly, a prosecutor's characterization of a witness as truthful may not warrant reversal when that characterization is "sufficiently linked to the evidence." *Id.*

¶10 Here, the prosecutor's comments were not impermissible prosecutorial vouching. In his closing argument, the prosecutor clearly tied his argument that the loss prevention employee was

credible and Bellmon was not credible to the jury instruction directing the jury to evaluate each witness's testimony. At no point did the prosecutor place the prestige of the government behind the witness rather than directing the jurors to evaluate the testimony for themselves.

¶11 Bellmon also argues that the prosecutor's questions to him about whether the employee was lying were improper. This court has counseled that unless "the only possible explanation for the inconsistent testimony is deceit or lying" or "a defendant has opened the door by testifying about the veracity of other witnesses on direct examination," "the safest and recommended course" is for prosecutors to refrain from asking "'were they lying' questions." *State v. Morales*, 198 Ariz. 372, 375, ¶ 13, 10 P.3d 630, 633 (App. 2000).

¶12 Because Bellmon did not object to the prosecutor's questioning at trial, however, we review his contention for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). 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." *Id.* (quotation omitted). "'Were they lying' questions alone will rarely amount to fundamental error." *Morales*, 198 Ariz. at 376, ¶ 15, 10 P.3d at 634.

¶13 We cannot say the prosecutor's questions constituted fundamental error. When the prosecutor pressed Bellmon to say that the employee was lying, Bellmon stated, "I would go [as] far, as maybe mistaken. Maybe mental recall is not clear after the time that has elapsed, but I wouldn't go so far as to call anyone a liar. That's disrespectful." Bellmon himself mitigated much of the prejudice the prosecutor's questioning might have produced; in any event, the questioning did not deprive him of a fair trial.

2. State's failure to preserve surveillance footage.

¶14 Bellmon next argues the superior court should have dismissed the charges against him because the State failed to preserve store surveillance footage. Before trial, Bellmon moved to dismiss the charges because the defense had received only two minutes of a 12-minute security tape. The superior court held a hearing at which a police officer testified he viewed the 12 minutes of footage with the loss prevention employee after he arrived at the store. The officer stated that although the tape showed Bellmon shoplifting, it did not show the confrontation outside of the store. The loss prevention employee tried to make the officer a copy of the tape, which was impounded. The copy turned out to be blank. The loss prevention employee testified she did not know what had gone wrong with the recording.

¶15 At the close of the State's case, as part of a motion for judgment of acquittal pursuant to Arizona Rule of Criminal Procedure 20, Bellmon argued the State had destroyed evidence and thereby violated his due-process rights. Citing *State v. Youngblood*, 173 Ariz. 502, 844 P.2d 1152 (1993), the court denied the motion, finding there was neither bad faith on the part of the loss prevention employee or the police nor willful destruction of evidence. "[I]n the height of caution," however, the court ruled it would give a *Willits* instruction, over the State's objection. *See State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). Accordingly, the court instructed the jury:

> If you find that the state has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the state, which in itself may create a reasonable doubt as to the defendant's guilt.

¶16 In *Youngblood*, our supreme court held that "[w]ith respect to evidence which *might* be exculpatory, and where there is no bad faith conduct, the *Willits* rule more than adequately complies with the fundamental fairness component of Arizona due process." 173 Ariz. at 506-07, 844 P.2d at 1156-57. "The *possibility* of prejudice is not sufficient to justify the ultimate sanction – an order of dismissal. Instead, the

defendant gets more than the process due with a *Willits* instruction." *Id.* at 507, 844 P.2d at 1157 (citation omitted).

¶17 Bellmon did not dispute the employee's testimony that he placed the shirts in a bag while inside the store and then walked out with them. He only disputed the employee's account about what he did with the knife outside the store. There was no evidence, however, that the missing videotape depicted what happened outside the store, and after a hearing, the court determined there was no evidence of bad faith, either on the part of the loss prevention employee or the State. As such, the *Willits* instruction more than adequately ensured that Bellmon received due process, and the superior court did not err by failing to dismiss the charges against him because of the missing videotape.

3. Inability to interview victim.

¶18 Bellmon next argues he was deprived of due process in that, because his lawyer was not permitted to interview the loss prevention employee, he was unaware of another witness that the employee identified at trial. At the hearing the morning of the second day of trial on the issue of the missing videotape, the court asked the loss prevention employee whether the surveillance camera would be the only other witness of the aggravated assault, and she responded, "There is the associates – the sales associates, cashiers at the front of the store.

They witnessed it." The court then asked the State if any of these witnesses would testify at trial, and the State responded they would not.

¶19 Under Arizona law, a crime victim has the right "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." Ariz. Const. art. 2, § 2.1(A)(5). "Unless the victim consents, the victim shall not be compelled to submit to an interview" by the defense. A.R.S. § 13-4433(A) (West 2012).

¶20 "It is well-accepted that 'if, in a given case, the victim's state constitutional rights conflict with a defendant's federal constitutional rights to due process and effective cross-examination, the victim's rights must yield.'" *P.M. v. Gould*, 212 Ariz. 541, 545-46, ¶ 18, 136 P.3d 223, 227-28 (App. 2006) (quoting *State v. Riggs*, 189 Ariz. 327, 330, 942 P.2d 1159, 1162 (1997)). However, the defendant must show that his due-process rights conflict with and override the victim's rights. *See State v. Connor*, 215 Ariz. 553, 558, ¶¶ 10-11, 161 P.3d 596, 601 (App. 2007).

¶21 Bellmon has made no such showing. While he may believe additional witnesses might corroborate his version of the events, he points to nothing to show what they would say. Nor is there anything in the record to support his implicit

contention that he could not have known without interviewing the employee that others saw what happened outside the store. In short, the victim's refusal to be interviewed, in accordance with Arizona law, did not violate Bellmon's due-process rights.

4. Sufficiency of the evidence.

¶22 Bellmon next argues that insufficient evidence supported his convictions. At trial, Bellmon's counsel moved for a judgment of acquittal, and the superior court denied the motion.

¶23 Under Arizona Rule of Criminal Procedure 20, the superior court may grant a judgment of acquittal before the verdict if there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). We review the superior court's denial of a Rule 20 motion for abuse of discretion and will reverse only when "there is a complete absence of substantial evidence to support the charges." *State v. Carlos*, 199 Ariz. 273, 276, ¶ 7, 17 P.3d 118, 121 (App. 2001). The evidence recounted above was sufficient to support Bellmon's convictions.

5. Ineffective assistance of counsel.

¶24 Finally, Bellmon argues his counsel was ineffective. A claim of ineffective assistance of counsel will not be reviewed on direct appeal. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007); *State v.*

Spreitz, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (ineffective assistance of counsel claim must be raised in Arizona Rule of Criminal Procedure 32 proceeding). We therefore do not reach the merits of Bellmon's argument that his counsel was ineffective.

B. Fundamental Error Review.

¶25 The record reflects Bellmon received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court held appropriate pretrial hearings. It did not conduct a voluntariness hearing; however, the record did not suggest a question about the voluntariness of Bellmon's statements to police. *See State v. Smith*, 114 Ariz. 415, 419, 561 P.2d 739, 743 (1977); *State v. Finn*, 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974).

¶26 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of eight members with two alternates. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned a unanimous verdict, which was confirmed by juror polling. The court received and considered a presentence report, addressed its contents during

the sentencing hearing and imposed legal sentences for the crimes of which Bellmon was convicted.

CONCLUSION

¶27 After reviewing the entire record, we find no reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶28 After the filing of this decision, defense counsel's obligations pertaining to Bellmon's representation in this appeal have ended. Defense counsel need do no more than inform Bellmon of the outcome of this appeal and his future options, unless, upon review, counsel finds "an issue appropriate for submission" to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Bellmon has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Bellmon has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Chief Judge

/s/
DONN KESSLER, Judge