DIVISION ONE
FILED: 06/19/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0422
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
RODNEY JOHN REED,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Navajo County

Cause No. S0900CR200900941

The Honorable Carolyn C. Holliday, Judge

AFFIRMED

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

Christian C. Ackerley — Lakeside
Attorney for Appellant

T I M M E R, Presiding Judge

¶1 Rodney John Reed appeals from his convictions and sentences for eleven counts of sexual conduct with a minor. He raises arguments relating to jury selection, evidentiary

rulings, and prosecutorial misconduct. For the following reasons, we find no error and therefore affirm.

BACKGROUND

¶2 Reed began engaging in sexual conduct with the victim, C.D., in 1996 or 1997 when she was thirteen years old and in the eighth grade.[1] The two had "fallen in love," and they maintained a sexual relationship intermittently for more than ten years. Reed was married, and his daughter was C.D.'s friend. Reed had been C.D.'s sixth grade teacher.

¶3 C.D. reported the illicit sexual activity to police on January 25, 2009 after she and her husband sought marriage counseling with their church bishop. Police began an investigation, and Reed admitted having consensual sexual activity with C.D. after she had turned eighteen. As the investigation in this matter proceeded, Reed became romantically involved with S.R. Later, C.D. and Reed discussed reestablishing their relationship, but C.D. would only do so if Reed left S.R. On October 27, 2009, when C.D. realized Reed was

[1] Reed does not challenge the sufficiency of evidence supporting his convictions, and in any event, we view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Reed. *State v. Manzanedo,* 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

not going to leave S.R.,[2] C.D. secretly recorded a confrontation call to Reed during which he made inculpatory statements.

¶4 The State charged Reed with eleven counts of sexual misconduct with a minor. Counts 1 through 6 are class two felonies and dangerous crimes against children because the offenses allegedly occurred when C.D. was under fifteen years of age. Counts 7 through 11 are class six felonies. Reed testified at trial, and the jury found him guilty on all counts. The court imposed mitigated thirteen-year consecutive terms of imprisonment for Counts 1 through 6, and the court ordered concurrent mitigated .5-year prison terms for Counts 7 through 10 to be served consecutively to the sentence imposed in Count 6. For Count 11, the court imposed a .5-year term to be served consecutively to the sentence imposed in Count 10. Reed timely appealed.

DISCUSSION

I. Voir Dire

¶5 Reed raises a number of issues regarding jury selection. "We will not disturb the trial court's selection of the jury in the absence of a showing that a jury of fair and impartial jurors was not chosen." *State v. Walden*, 183 Ariz.

[2] At the time of trial, Reed and S.R. were married.

595, 607, 905 P.2d 974, 986 (1995) (quoting *State v. Tison,* 129 Ariz. 546, 551, 633 P.2d 355, 360 (1981)) (rejected on other grounds by *State v. Ives*, 187 Ariz. 102, 108, 927 P.2d 762, 768 (1996)). Although Reed does not explicitly argue the voir dire in this case resulted in a jury that was unfair or partial, we nonetheless address the merits of his arguments to the extent he properly preserved them.

¶6 Reed first argues the court abused its discretion in rejecting his request for two questions to be asked of the jury panel. *See State v. Melendez,* 121 Ariz. 1, 3, 588 P.2d 294, 296 (1978) (concluding scope of voir dire left to trial court's sound discretion). Those questions were:

> Assuming the testimony will be that the defendant engaged in extra-marital affairs with one or more adult women, would that lead you to believe he may have committed the acts he is accused of in this case?
>
> Are you familiar with the adage 'Hell hath no fury like that of a woman scorned?'

Reed contends because he showed a nexus existed between the prejudice addressed in the question and an issue in the case, the court violated his due process rights to a fair and impartial jury.

¶7 The trial court is responsible for conducting voir dire examination of potential jurors for the purpose of "determining their qualifications and to enable the parties to

intelligently exercise their peremptory challenges and challenges for cause." *State v. McMurtrey*, 136 Ariz. 93, 99, 664 P.2d 637, 643 (1983); Ariz. R. Crim. P. 18.5(c), (d), (e) (West 2012). "It is not a legitimate function of voir dire to condition the jury to the receipt of certain evidence or to a particular view of the evidence." *McMurtrey*, 136 Ariz. at 99, 664 P.2d at 643 (1983). Indeed, as the comment to Rule 18.5(e) states:

> Subsection (e,) and the shift of *voir dire* responsibility to the court, are intended to remove entirely the practice of some attorneys of "conditioning" the jury by means of questions and argument which amount to preliminary instructions on the law and facts of the case.

¶8 We find no error in refusing to pose Reed's requested questions because they do not address jurors' prejudices. *See State v. Skaggs*, 120 Ariz. 467, 469-70, 586 P.2d 1279, 1281-82 (1978) ("Due process would require an examination by the trial judge on an issue if there was a nexus shown between the prejudice feared and the issues of the case."). Rather, the questions appear "designed to condition the jurors to damaging evidence expected to be presented at trial and to commit them to certain positions prior to receiving the evidence." *Melendez*, 121 Ariz. at 3, 588 P.2d at 296. The first proposed question does not ask if the jurors bear prejudice towards anyone who engages in an extra-marital affair; it asks how the jurors would

decide the case in light of such evidence. Similarly, the second proposed question fails to touch on any prejudices harbored by the jurors but instead previews Reed's defense strategy of casting the victim in the role of the spurned lover. Accordingly, the trial court did not abuse its discretion by not allowing the questions. *Id.; see also State v. Mauro*, 159 Ariz. 186, 203, 766 P.2d 59, 76 (1988); *McMurtrey*, 136 Ariz. at 99, 664 P.2d 6at 643 (1983).

¶9 Reed next contends the trial court abused its discretion in failing to question the jury panel regarding the prejudicial impact of a statement made in open court by one of the panel members. Reed's argument is based on the following exchange during voir dire immediately following the court's recitation of the charged offenses:

> Court: Has anyone on the . . . jury panel[] ever seen, heard, or read anything about this case, or have you ever heard anyone express an opinion about this case?
>
> A prospective juror: Mr. [C.] has.
>
> Court: Well, Mr. [C.] why don't you come up here over to the side bar.
>
> Mr. [C.]: Boy, all I can tell you is he sure got around.
>
> Court: Mr. [C.], you're not to say anything until you get over to the side bar.

At the side bar, the court excused Mr. C. before repeating its question to the jury panel and continuing voir dire proceedings.

¶10 Reed did not ask the court to question the panel regarding any potential impact Mr. C.'s comment may have had, nor did Reed otherwise object to the court's continuation with voir dire without further addressing any potential issues arising from the outburst. Consequently, we review for fundamental error. *See State v. Velazquez*, 216 Ariz. 300, 309, ¶ 37, 166 P.3d 91, 100 (2007); *see also State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). "Fundamental error" is error that goes 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.'" *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)).

¶11 Reed has not shown fundamental error. The prospective juror's comment did not indicate any knowledge or opinion on Reed's guilt of the charges. At most, the comment conveyed an opinion Reed was sexually promiscuous. Because the jury learned of Reed's extra-marital affairs from the evidence introduced at trial, however, the errant comment could not have deprived him of a fair trial.

¶12 Reed finally argues the court erred in granting the State's motion to excuse potential juror K.J. for cause.

Because Reed arguably raised a proper objection below,[3] we review for abuse of discretion. *State v. Glassel*, 211 Ariz. 33, 47, ¶ 46, 116 P.3d 1193, 1207 (2005), *corrected on other grounds* 211 Ariz. 370, 121 P.3d 1240.

¶13 "[A] defendant is not entitled to be tried by any particular jury, but merely by one which is fair and impartial." *State v. Eisenlord*, 137 Ariz. 385, 392, 670 P.2d 1209, 1216 (App. 1983) (quoting *State v. Thompson,* 68 Ariz. 386, 391, 206 P.2d 1037, 1040 (1949)). The court shall excuse a juror when reasonable grounds exist to believe the juror could not render a fair and impartial verdict. Ariz. R. Crim. P. 18.4(b). Additionally, the court should excuse prospective jurors whose personal views prevent them from serving as fair jurors. *State v. Anderson*, 210 Ariz. 327, 337, ¶ 25, 111 P.3d 369, 379 (2005) (citation omitted).

¶14 The State moved to strike K.J. based on her comments relating to her experiences as a former Arizona State legislator when she "ran a lot of legislation regarding youthful sex offenders because they were very, very much discriminated against." K.J. explained she "saw [sex offense] cases where men

[3] While we are uncertain Reed properly objected to K.J.'s excusal, we assume without deciding the objection was proper. The entirety of Reed's objection was: "I think she can be fair. I mean, my opinion is she could be fair. She can set aside her experiences, and she helped write the laws, for crying out loud. I would leave it up to you, Judge."

were very much accused when they were not guilty . . . ." K.J. further expressed her opinion that Arizona's "sex offender laws . . . are way too stringent," and she recounted cases where there "were young men that ended up with lifetime sex offender . . . stigmas on them, when it was absolutely ridiculous . . . ." When the court or counsel asked K.J. whether she could nonetheless be fair and impartial as a juror in this case, she equivocated.

¶15 K.J.'s foregoing statements provided the court with reasonable grounds to excuse her from further jury duty in this case. The court based its finding of bias upon "determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations [are] entitled to deference . . . ." *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S. Ct. 844, 854, 83 L. Ed. 2d 841 (1985). Viewing the record through this deferential lens, we conclude the court had reasonable grounds to believe K.J.'s personal views would prevent her from rendering a fair and impartial verdict.

II. Evidentiary issues

¶16 Reed raises a number of issues challenging the court's evidentiary rulings. When addressing issues properly preserved by making objections at trial, we review for abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 208, ¶ 60, 84 P.3d 456, 473 (2004). For those issues not subjected to a proper

objection at trial, we review for fundamental error only. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶17 Reed first argues the court erred in allowing the State to cross-examine him "regarding his denial of having had extra-marital affairs with adult women other than [C.D.]" Reed also contends that "[t]he State improperly introduced extrinsic evidence of [Reed's] affairs via Detective Sergeant [C.'s] testimony, to the effect his investigation had revealed [Reed] had been involved with other adult women while married," and then compounded these errors by failing to give the jury a limiting instruction.

¶18 Reed apparently challenges the court's ruling granting the State's motion in limine under Arizona Rule of Evidence 608(b) to introduce evidence that Reed denied to his family and law enforcement that he had engaged in extra-marital affairs. But Reed failed to develop this argument in his brief and has therefore abandoned it on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) ("The appellant's brief shall include . . . the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); *see also State v. Moody,* 208 Ariz. 424, 452, ¶ 101, n.9, 94 P.3d 1119, 1147 n.9 (2004) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an

appellant's position on the issues raised.") (quoting *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

¶19 Additionally, even assuming Reed properly preserved his argument on appeal, we would reject it. Although the court granted the State's motion, the State did not cross-examine Reed about denying his affairs to his family nor introduced evidence of those affairs. Rather, *Reed* introduced evidence of his affairs in questioning Detective C. He therefore invited any error and waived the challenge. *State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001).

¶20 Reed next argues the court erred by prohibiting him from impeaching C.D. with testimony regarding a false allegation she purportedly made of a prior sexual assault by a "cousin." The background to this issue is as follows: Before trial, the court granted, with Reed's acquiescence, the State's motions in limine to introduce evidence of Reed's sexual relationship with C.D. after she turned eighteen. At the hearing on the motions, defense counsel stated he wanted "more latitude than might normally be permitted in cross-examining [C.D.]," and the court, in response to the State's expressed concern regarding what "more latitude" might entail, precluded Reed generally from

alluding to evidence prohibited by Arizona Revised Statutes ("A.R.S.") section 13-1421 (West 2012).[4]

¶21 Section 13-1421, provides in relevant part:

> A. Evidence of specific instances of the victim's prior sexual conduct may be admitted only if a judge finds the evidence is relevant and is material to a fact in issue in the case and that the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence, and if the evidence is one of the following:
>
> . . .
>
> 5. Evidence of false allegations of sexual misconduct made by the victim against others.
>
> B. Evidence described in subsection A shall not be referred to in any statements to a jury or introduced at trial without a court order after a hearing on written motions is held to determine the admissibility of the evidence. . . . The standard for admissibility of evidence under subsection A is by clear and convincing evidence.

¶22 Reed does not direct us to any written request for a hearing as required by § 13-1421(B) to determine the admissibility of a false allegations by C.D. of a prior sexual

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

assault.[5] And our independent review of the record does not reveal such a request. Because Reed failed to comply with § 13-1421(B), the record is likewise devoid of any showing that C.D. had made false allegations of sexual misconduct against others, and the court had no basis for allowing the evidence. Accordingly, the court acted well within its discretion in precluding Reed from impeaching C.D. with such evidence.

¶23 Reed also argues the trial court abused its discretion in sustaining the State's objection that the following question posed by Reed to C.D. assumed facts not in evidence: "Don't you later tell the bishop, after he finds out that you weren't pregnant, that it was all a lie?" Aside from asserting his question was a "legitimate avenue of impeachment," however, Reed does not develop this argument further. He has therefore waived it on appeal. Ariz. R. Crim. P. 31.13(c)(1)(vi).

[5] Even though he did not request a § 13-1421 hearing, Reed twice asked C.D. on cross-examination whether she told others she had been raped by a cousin. Reed also cross-examined S.R. on that subject. Because Reed repeatedly disobeyed the court's prior ruling precluding § 13-1421 evidence, the court correctly reminded defense counsel -- out of the jury's presence -- of counsel's obligation under ER 3.4 to avoid referring to matters not reasonably believed to be relevant or supported by admissible evidence. We find no merit to Reed's characterization of the court's warning as a "threat[] to impose sanctions" designed to "thoroughly intimidate[] Counsel . . . ." The court did not abuse its discretion in reminding counsel of his ethical obligations to the court.

¶24 Moreover, from our review of the exchange, the court properly sustained the State's objection because Reed's question improperly assumed the bishop had discovered C.D. was not pregnant – a fact not in evidence. Reed fails to point to anyplace in the record where the bishop's knowledge of the false pregnancy had been established. Additionally, as the State points out, after the court sustained the objection, Reed immediately rephrased his question to omit the fact not in evidence: "Do you subsequently tell the bishop that it was all a lie, that you made it up?" Consequently, Reed was not prevented from asking C.D. whether she had lied to the bishop, making any error harmless.

¶25 Finally, Reed contends the court erred by precluding him from questioning Detective C. about his purported statement to S.R. during execution of a search warrant at the couple's home that the police were taking computers because they may contain child pornography. We reject this argument because it is based on an erroneous recitation of the court's ruling. Pursuant to the State's motion, the court precluded S.R. from testifying about Detective C.'s statements as impermissible hearsay. The court expressly *permitted* Reed to question Detective C. about these comments. And, even though he had the court's approval and the opportunity to do so, Reed did not ask

Detective C. about any statements he purportedly made to S.R. We do not discern error.

¶26 Assuming Reed intends to argue the court erred by precluding him from asking S.R. about Detective C.'s statement concerning child pornography, we do not discern reversible error. First, we agree with the court the detective's statement did not fall under the present sense impression exception to the hearsay rule. Arizona Rule of Evidence 803(1) has three requirements: "The statement must describe an event or condition, that was perceived by the declarant, and the statement must be made immediately after the event." *State v. Tucker*, 205 Ariz. 157, 166, ¶ 43, 68 P.3d 110, 119 (2003). Detective C. did not describe an event to S.R.; he furnished a reason for taking the computers. The present sense impression exception does not apply. Second, even assuming its applicability, we would not reverse. Any error was harmless in light of the fact the court permitted Reed to question Detective C. about his statement.

III. Prosecutorial Misconduct

¶27 Reed argues the prosecutor improperly impeached him by asking him the following questions concerning the accuracy of his counsel's assertion during opening statement that C.D. had been "stalking" him for ten or twelve years: (1) "[W]ould [your attorney's opening statement] . . . be inaccurate or based on

something other than your statements and representations to him?"; (2) "So today, you're saying that statement from your Attorney really isn't accurate, that it didn't begin in the mid 1990s?" According to Reed, the prosecutor's questions improperly forced Reed "to choose between waiving the attorney-client privilege, or invoking the privilege and leading the jury to believe he had something to hide." Because Reed did not object to these questions at trial, he has waived his claim of error absent fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶28 We do not discern fundamental error from the court's failure to sua sponte strike these questions or take other corrective action. Only the first question arguably implicated Reed's attorney-client privilege in an improper manner. To the extent Reed contends this question amounted to prosecutorial misconduct, we disagree. Assuming without deciding that the question constituted misconduct, we consider whether the remarks deprived Reed of a fair trial. *State v. Atwood,* 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992) (quoting *United States v. Weinstein,* 762 F.2d 1522, 1542 (11th Cir. 1985) (quoting *United States v. Blevins,* 555 F.2d 1236, 1240 (5th Cir. 1977))) (disapproved on other grounds by *State v. Nordstrom*, 200 Ariz. 229, 241, ¶ 25, 25 P.3d 717, 729 (2001)). In making such a determination, we consider:

> (1) whether the remarks call to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks. Misconduct alone will not mandate that the defendant be awarded a new trial; such an award is only required when the defendant has been denied a fair trial as a result of the actions of counsel.

Id. Here, the probability that the jurors were influenced by the prosecutor's first question is remote, and we cannot say the question denied Reed a fair trial. The second question does not touch on the attorney-client privilege. For these reasons, the court did not commit fundamental error.

¶29 Finally, Reed argues the prosecutor engaged in "egregious" behavior by commenting during cross-examination of D.C. that that Reed's extra-marital affairs were immoral. The record does not reflect such a comment in the prosecutor's examination of D.C. Assuming, as the State suggests, Reed refers to the prosecutor's redirect examination of Reed's daughter, Reed failed to object and, absent fundamental error, therefore waived any challenge to the court's failure to take corrective action. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. We do not detect such error. After the daughter testified *during cross-examination by Reed* that her opinion of her father's truthfulness had changed as a result of learning of

his affairs, the prosecutor asked on redirect whether learning Reed "had been involved in what one might describe as immoral activity" caused her to question Reed's truthfulness. At most, the prosecutor's use of the term "immoral activity" as a substitute for "extra-marital affairs" was argumentative; it did not rise to the level of misconduct likely to influence the jurors and deny a fair trial. *Atwood,* 171 Ariz. at 611, 832 P.2d at 628.

CONCLUSION

¶30 For the foregoing reasons, we affirm Reed's convictions and sentences.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
Patricia K. Norris, Judge

/s/
Donn Kessler, Judge