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, v. ANTHONY JAMES MERRICK, Appellant.	)	1 CA-CR 11-0834 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-007643-001

The Honorable Patricia A. Starr, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
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Attorneys for Appellee

Tyrone Mitchell, PC — Phoenix
by Tyrone Mitchell
Attorneys for Appellant

Anthony James Merrick — Florence
Appellant

P O R T L E Y, Judge

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Defendant Anthony James Merrick has advised us that, after searching the entire record, he has been unable to discover any arguable questions of law, and has filed a brief requesting us to conduct an *Anders* review of the record. Defendant, however, has raised numerous issues in his supplemental brief.

FACTS[1]

¶2 While awaiting trial for fraudulent schemes and gift card fraud in Maricopa County Cause No. CR2010-005367-001, Defendant, with the help of Vicki McFarland, tried to get two people to fabricate testimony in an attempt to avoid conviction. Specifically, Defendant called McFarland between April 2009 and October 2010 using his jail booking information or the booking numbers belonging to others. McFarland subsequently called the Perryville Prison chaplain and requested a pastoral visit with Eve Ford. When she learned that inmates have to set up the pastoral visits, which would also require a background check, McFarland did not call back.

[1] We review the facts "in the light most favorable to sustaining the [verdict]." *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989) (citation omitted).

¶3 The police subsequently secured a search warrant and searched Ms. McFarland's home. They discovered letters from Defendant to McFarland that gave her pointers on how to testify; letters discussing the Fundamental Christian Temple Church and pastoral visits; and letters about Eve Ford, Dominick Hurley, and David Harris, and their roles in the gift card matter.

¶4 Defendant was subsequently indicted for three counts of conspiracy to commit tampering with a witness, class 6 felonies, conspiracy to commit perjury, a class 4 felony, and obstructing criminal investigations or prosecutions, a class 5 felony. He requested and was allowed to act as his own lawyer. After one count of conspiracy to tamper with a witness was dismissed without prejudice (involving Candice Henry), the case was tried and the jury found him guilty of the remaining charges.

¶5 Defendant filed an unsuccessful motion for new trial. The State then presented evidence that Defendant had prior felony convictions and the court found that the State had proven that Defendant had two prior felony convictions beyond a reasonable doubt. Defendant was then sentenced to 4.5 years in prison for each of the conspiracy to tamper with witnesses, twelve years for conspiracy to commit perjury and six years for obstructing an investigation or prosecution. The sentences were concurrent, but consecutive to his sentences in CR2010-005367.

¶6 We have jurisdiction over this appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033(A)(1) (West 2012).

DISCUSSION

¶7 Defendant raises sixteen issues in his supplemental brief. The issues can be generally categorized as follows: (1) the court erred when it denied his motion to dismiss for lack of jurisdiction; (2) the court erred when it allowed the State to sit at the counsel table next to the jury box; (3) the court erred by denying various motions to preclude or admit evidence; (4) the court erred by denying his motion for a neuropsychologist; (5) the court erred by denying his motion for mistrial; and (6) the court erred by denying his motion for new trial.

I.

¶8 Defendant first argues that the court erred by denying his motion to dismiss the case for lack of jurisdiction. Specifically, he argues that his written communications with McFarland could not be presented to the grand jury because they were "confessions, counseling and spiritual guidance, as well as other religious sacraments. The[] communications were made with the belief that they were confidential and privileged, as is set forth in the church creed."

¶9 The record reveals that Defendant raised the issue in his motion for new finding of probable cause, which was ultimately dismissed as untimely. He also raised the issue in a separate motion to dismiss. The State argued, however, that A.R.S. § 13-4062 (West 2012) was inapplicable because McFarland, even if she was an ordained minister, did not testify. The State also argued that there was nothing in the seized letter or recorded telephone conversations that amounted to a religious confession. The court agreed, and dismissed the motion after finding that none of the "materials presented in this case are inadmissible pursuant to any protection offered by A.R.S. § 13-4062, regarding confessions to clergy."

¶10 A superior court has jurisdiction over a felony criminal case. *State v. Maldonado*, 223 Ariz. 309, 312-13, ¶¶ 20-21, 223 P.3d 653, 656-57 (2010) (citation omitted). Moreover, even if we assume for sake of argument that the recorded telephone conversations and letters to McFarland were part of a relationship between clergy and penitent, the court still had subject matter jurisdiction over the felony charges. If the recorded conversations were truly between clergy and a penitent, the State might lose the ability to use the recorded calls and letters, but it would not divest the court of jurisdiction.

¶11 And, even though the grand jury considered the evidence, which we will assume for argument was subject to the clergy-penitent relationship, Defendant did not timely challenge the grand jury proceeding, and did not challenge the trial court's ruling by special action. Accordingly, any defect in the grand jury proceeding was waived by his failure to timely challenge the proceedings, but never divested the superior court of jurisdiction. Therefore, we find no error.

II.

¶12 Defendant next contends that the court erred when his motion for constitutional seating in the courtroom for trial was denied. We disagree.

¶13 Defendant has not cited any case law that would require the court to determine or rearrange the seating arrangement. Despite the fact that he attached a social science article to the motion, Defendant omits that, regardless of the seating arrangement, witnesses have to testify to the jury and the jury can only receive exhibits after being marked, identified and admitted by the court.

¶14 Moreover, and regardless of the seating arrangement, the State had to demonstrate that Defendant was guilty beyond a reasonable doubt based on admissible evidence. Accordingly, the seating arrangement does not modify or undermine the basis of

constitutional rules of a criminal trial. Therefore, the court did not err by denying the motion.

III.

¶15 Defendant next contends that the court erred by precluding or admitting evidence. We review the court's rulings for an abuse of discretion. *See State v. Wassenaar*, 215 Ariz. 565, 575, ¶ 38, 161 P.3d 608, 618 (App. 2007).

A.

¶16 The first argument Defendant raises is that the recorded telephone conversations and letters to McFarland were privileged religious communications. We disagree.

¶17 Section 13-4062 provides that a member of the clergy cannot "without consent of the person making the confession" testify about the substance of any confession. Again, assuming for argument that McFarland was an ordained member of the clergy, the State did not ask her to testify. Instead, the State used recorded telephone conversations that Defendant made while jailed; conversations that Defendant knew were being monitored before he made them and were not private.

¶18 Moreover, our decision in *State v. Archibeque* does not support Defendant's position. 223 Ariz. 231, 221 P.3d 1045 (App. 2009). There, the defendant, in the presence of his wife, privately spoke to their LDS bishop about his crimes. *Id*. at 236, ¶ 17, 221 P.3d at 1050. The State indicated it intended to

call the bishop to testify and the trial court found that the privilege existed and was not waived. *Id*. at 234, ¶ 3, 221 P.3d at 1048. We subsequently affirmed the trial court's ruling. *Id.* at 238, ¶ 26, 221 P.3d at 1052.

¶19 Here, the State did not call McFarland to testify. There was no evidentiary hearing, nor did Defendant call her to testify that his telephone calls and letters were privileged religious communications. Moreover, there is information in the record that supported the State's argument to the trial court that, even if McFarland was a clergy member, she was not acting as such when talking with Defendant. In the recorded telephone conversations and letters there was no mention that Defendant was confessing and needed religious or spiritual assistance. In fact, the evidence is to the contrary. His April 17, 2010 letter to McFarland states: "I am going to want to claim The 'Fundamental Christian Temple' as my church and religion. You should check the name availability with the corp. comm. as a non-profit church. Also, the I.R.S. I'm going to want to incorporate the non-profit church and get I.R.S. approval as a 501(c)(3)." The letter demonstrates that the church did not exist before April 2010, McFarland was not then an ordained member of the church and Defendant only wanted to create it to attempt to hide behind religion.

¶20 The communications did not evince a "human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." *Waters v. O'Connor*, 209 Ariz. 380, 384, ¶ 17, 103 P.3d 292, 296 (App. 2004) (quoting *Trammel v. United States,* 445 U.S. 40, 51 (1980)). Accordingly, the trial court did not abuse its discretion by admitting the telephone recordings and the letters seized at McFarland's residence.

B.

¶21 Defendant also contends that the court abused its discretion by granting the State's motion in limine which precluded him from presenting a freedom of religion defense pursuant to A.R.S. § 41-1493.01 (West 2012).

¶22 Section 41-1493.01 is part of Title 41, article 9, entitled "free exercise of religion protected." Section 41-1493.01 provides that one has a fundamental right to free exercise of religion, and applies while a person is employed by the state or other governmental entity.

¶23 Although the statutory free exercise of religion provision protects employees of state government, it is not a defense to criminal conduct. The legislature did not make the free exercise of religion a defense in Title 13 of the Arizona Revised Statutes. And, Defendant has not cited to any case

where § 41-1493.01 has been presented as a defense in a criminal case, and we have not discovered one. Consequently, the trial court did not err by granting the State's motion in limine.

C.

¶24 Defendant next contends the trial court erred by denying his October 19, 2011 motion in limine to preclude sixteen telephone calls. He contends that the calls were irrelevant, confusing, prejudicial, misleading, hearsay, and violated his confrontation rights under the state and federal constitution. The trial court found otherwise, and we agree.

¶25 Although the motion in limine was untimely, the court reviewed the motion and heard argument just before opening statements. After listening to the argument, the court denied his objections. After reviewing the argument and trial testimony, we find no abuse of discretion.

D.

¶26 The last evidentiary issue raised is whether the admission of the telephone calls and letters prevented Defendant from exercising his constitutional right to testify. Defendant argues that he "was forced into a Hobson[']s choice of constitutional rights. If [he] testified or called McFarland to testify, he would waive his right to religious freedom and his privileged communications. If he didn't testify or call

McFarland to testify . . . he would lose his right to testify in his own defense." We disagree.

¶27 Defendant had the constitutional right to testify. He also had the constitutional right not to testify. The choice was solely his, and he made a choice.

¶28 Defendant could have called McFarland to testify to attempt to establish that their communications were in fact those between a member of the clergy and a penitent. If so, and subject to her cross-examination, his religious privilege could have been established, not waived. And, if the privileged communication had been established, the recorded telephone calls and letters may have been precluded. But, even if the trial court disagreed with McFarland's testimony about the privileged communication, the evidentiary issue would have been fully litigated for appeal, very similar to *Archibeque,* 223 Ariz. at 236, ¶ 17, 221 P.3d at 1050.

¶29 Moreover, if Defendant had decided to testify, he would have had the opportunity to explain to the jury his version of the facts, and what he meant in his telephone calls and letters. Although he could have been cross-examined, the jury would have had to consider the additional evidence, decide the credibility of the witnesses, and the weight to be given to his testimony in reaching its verdict.

¶30 His decision not to testify is one each defendant has to make during the course of a trial. Many defendants make the same decision, whether based on the trial evidence, the State's ability to cross-examine them or their prior felony convictions that might be used to attempt to impeach them pursuant to Arizona Rule of Evidence 609. Consequently, the admission of the recorded telephone calls and letters did not unconstitutionally prevent Defendant from testifying. He voluntarily made the choice.

IV.

¶31 Defendant argues that the trial court erred by denying his request for the appointment of a neuropsychologist. He requested the appointment alleging that he had problems "with word selection, memory, confusion, planning and problem solving – all are issues which could negate elements of the offenses." The court properly denied the request.

¶32 Arizona Rule of Criminal Procedure 15.9(a) provides that an "indigent defendant may apply for the appointment of an investigator and expert witness . . . if the defendant can show that such assistance is reasonably necessary to present a defense adequately at trial or sentencing." And, due process would require the appointment of an expert where there is a reasonable necessity for the testimony. *See Jones v. Sterling*, 210 Ariz. 308, 314, ¶ 27, 110 P.3d 1271, 1277 (2005). Based on

the language of the Rule and Defendant's request, the issue is whether the trial court abused its discretion in denying his request.

¶33 Here, Defendant did not make a showing to the trial court that a neuropsychologist was needed to examine him and testify as part of his defense. First, the assertions in his motion that he had suffered traumatic brain injuries, concussions and had been in a coma were unsupported. He did not provide any medical records to support his claims, did not identify where the accidents took place, when they may have occurred, or where he had been hospitalized, and did not provide a release to secure his relevant medical records.

¶34 Moreover, the court was free to consider the myriad pleadings Defendant had filed to determine whether he had any noticeable problems with "word selection, memory, confusion, planning or problem solving" that may have warranted the appointment of a neuropsychologist. The court found none, and we find no abuse of discretion.

V.

¶35 Defendant next contends that the court erred by denying his motion for mistrial. Specifically, he argues that the court erred by denying it after the State, in its opening statement, told the jury that he had been convicted in the earlier matter. He also argues that the State was precluded

from telling the jury that he was in jail and that the evidence was overwhelming. We review the denial of a motion for mistrial for abuse of discretion. *State v. Jones,* 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000).

¶36 The trial court determined that the State did not violate any pretrial order during its opening statement. We agree.

¶37 During the opening statement the State told the jury that Defendant was in jail awaiting trial on the gift card fraud case. The State never told the jury that he had been convicted of gift card fraud. Consequently, there was no abuse of discretion when his motion for mistrial was denied.

¶38 Defendant also claims that the court should not have allowed the State to tell the jury that he was in jail or that the evidence was overwhelming. Defendant waived those objections because he did not object during the opening statement and did not include those issues in his motion for mistrial. Moreover, because the court's instructions to the jury at the outset of the case and in final instructions included the instruction that what the lawyers said was not evidence, we find no fundamental error or resulting prejudice. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

VI.

¶39 Defendant also contends that the trial court erred by denying his motion for new trial. We review the denial of a motion for new trial for an abuse of discretion. *State v. Spears,* 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996) (citation omitted); *State v. Mincey,* 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984) (citation omitted).

A.

¶40 Defendant claims that the court should have allowed Dominick Hurley[2] to testify because he had relevant information for the defense; namely, that certain statements in the letters he wrote to McFarland were true. We disagree.

¶41 After Defendant filed a motion for order to transport Dominick Hurley to trial as a defense witness, the court granted it in part by ordering that Hurley be transported from prison so he could participate in a pretrial deposition. Hurley was transported and participated in a pretrial deposition in the presence of the trial judge. During the post-deposition argument, Defendant claimed that Hurley had lied in the underlying trial as well as in the deposition and only the truth was contained in the letters. The court consequently determined that Hurley's testimony would contradict Defendant's assertions,

[2] Mr. Hurley was a co-owner of Defendant's tattoo parlor and was involved in the underlying gift card fraud criminal matter.

and he was not a proper witness "because his testimony is not relevant to Defendant's asserted defense that the contents of the letters are not a 'script,' but in fact are true."

¶42 Despite Defendant's argument that certain statements in the letters were true, the letters were not written by Hurley. He was deposed. The court listened to Hurley's testimony, judged his credibility and then determined that Hurley did not have relevant evidence. Because the judge was in the best position to make that determination, we find no abuse of discretion.

B.

¶43 Defendant next contends that the court violated his constitutional rights to confront witnesses against him because it did not require the State to call McFarland to testify as to her statements in the recorded telephone conversations. He omits, however, two important facts. First, the State presented the recorded telephone calls he made to McFarland to attempt to prove its case and not for the truth of anything that McFarland may have stated. As a result, her statements were only included to give context to his statements. Because her statements in the recorded telephone conversations were not offered for the truth of what was being said, that is, testimonial, there was no confrontation violation.

¶44 Second, Defendant did not attempt to subpoena McFarland or have her testify voluntarily. Moreover, he could not have used her testimony to attempt to demonstrate that his post-arrest statements were exculpatory because they are inadmissible hearsay and he did not demonstrate a separate admissible basis for their admission. *See State v. Pandeli*, 200 Ariz. 365, 372-73, ¶¶ 19-23, 26 P.3d 1136, 1143-44 (2001), *vacated on other grounds*, *State v. Pandeli*, 536 U.S. 953 (2002); Ariz. R. Evid. 804(b)(3).

¶45 Defendant also argues that portions of the transcripts of the telephone calls were redacted and he should have been allowed to present a complete transcript pursuant to Rule 106. In response to Defendant's objections during trial, the court held a hearing, reviewed the information and determined that the redactions were appropriate under *State v. Cruz*, 218 Ariz. 149, 162, ¶ 58, 181 P.3d 196, 209 (2008). Consequently, the court did not abuse its discretion by not requiring the State to provide unredacted transcripts or requiring it to call McFarland to testify about her statements.

C.

¶46 Defendant also claims that his letters and recorded telephone conversations to McFarland were privileged as attorney work product. McFarland was not, however, appointed by the court to be his investigator after he was allowed to act as his

own lawyer. Moreover, because Defendant was both lawyer and client, once he communicated privileged information to a third person, like McFarland, he waived any privilege. *Ulibarri v. Superior Court,* 184 Ariz. 382, 385, 909 P.2d 449, 452 (App. 1995). Consequently, the court did not err by rejecting the claim for new trial.

D.

¶47 Defendant also claims that the court erred by refusing to exclude one page of a letter that had not been previously disclosed to him. We disagree.

¶48 The State wanted to use the exhibits from Defendant's earlier trial, CR2010-005367, in this case, and provided Defendant with a copy of those exhibits the day after the third day of trial.[3] One of the documents was a letter about Eve Ford. Defendant objected to the letter because the State had not given him a copy of both sides of the letter in his earlier case. He argued that if he had received both sides of the letter it would have changed the way he conducted his pretrial investigation and trial preparation.

¶49 The court examined the letter. The court found that the full letter had been admitted as an exhibit in

[3] The exhibits in CR2010-005367 had been filed with Defendant's appeal in that matter. After the exhibits were retrieved from the Clerk of the Court of Appeals, a copy of the exhibits were provided to the Defendant.

CR2010-005367, and that Defendant had seen the complete letter during that trial. The court also determined that having the complete letter would not have changed his pretrial investigation or trial preparation. As a result, the court allowed the State to use the letter. Because the court determined that Defendant had previously seen the letter which was admitted at the earlier trial, the court did not abuse its discretion by allowing the letter to be used in this case. *See* Rule 106.

E.

¶50 Defendant's next contention is that the evidence was insufficient to convict him. He raised the issue during trial by requesting a directed verdict after the State had rested. We review the denial of a Rule 20 motion de novo. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011) (citation omitted). The motion must be denied if reasonable jurors can draw divergent inferences from the evidence. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). We will affirm the ruling unless "no substantial evidence supports the conviction." *State v. Pena*, 209 Ariz. 503, 505, ¶ 7, 104 P.3d 873, 875 (App. 2005) (citation omitted). Substantial evidence consists of circumstantial or direct "proof that reasonable persons could accept as adequate and sufficient to support a

conclusion of [the] defendant's guilt beyond a reasonable doubt." *Id.* (citation and internal quotation marks omitted).

¶51 Defendant was tried for conspiracy to commit tampering with a witness, conspiracy to commit perjury, and obstructing criminal investigations or prosecutions. The first charge, conspiracy to commit tampering with a witness, required the State to prove beyond a reasonable doubt that (1) the defendant agreed with one or more others that one of them or another would engage in certain conduct; (2) the defendant intended to promote or assist in the commission of the conduct; the intended conduct would constitute tampering with a witness and defendant knew that such conduct was a crime; and (3) an overt act was committed by one of the co-conspirators in furtherance of such conduct. *See* A.R.S. §§ 13-1003, -2801, -301-304 (West 2012). Moreover, tampering with a witness required proof that a defendant knowingly induced a witness or a person the defendant believed would be called as a witness to testify falsely. A.R.S. § 13-2804 (West 2012).

¶52 The State presented evidence and testimony that Defendant called McFarland, and sent letters and post cards outlining the fictitious testimony he wanted Eve Ford and David Harris to present at the underlying gift card fraud trial. Although Defendant had only met Ford once for an hour and had never met Harris, he was willing to offer them compensation,

through McFarland, for their fictitious testimony; namely, tuition assistance would be provided for Ford's children and Harris would receive $500 to $1000 for fabricating testimony about Hurley. Both testified that no one contacted them with an offer of compensation, and they knew nothing about the underlying facts of the gift card fraud.

¶53 The next charge was conspiracy to commit perjury, which required that, in addition to the four elements of conspiracy, A.R.S. § 13-1003, the State needed to prove beyond a reasonable doubt that someone made a false sworn statement, that he or she believed it to be false when he or she made it, and that it concerned a material issue. A.R.S. § 13-2702 (West 2012). Here, Defendant called and sent cards and letters to McFarland detailing that she would testify at the underlying trial that she never saw Defendant with any gift cards at any time.

¶54 The final charge was obstruction of a criminal investigation or prosecution which required proof that the Defendant knowingly attempted by bribery or misrepresentation to obstruct, delay or prevent communication of information or testimony relating to a violation of a criminal statute to a law enforcement officer, prosecutor, or magistrate. A.R.S. § 13-2409 (West 2012). The evidence supporting the charge included the fact that Defendant, by calls and letters and cards to

McFarland, convinced her, Ford and Harris to testify falsely at the underlying trial in return for monetary inducements or cash. Consequently, based on all the evidence presented during the State's case-in-chief there was sufficient evidence to withstand Defendant's Rule 20 motion, and we find no error.

¶55 Moreover, after both sides rested, the jury was properly instructed as to the elements of the offenses and burdens of proof. Consequently, because the jury had to determine the facts from the evidence presented and was properly instructed, there was sufficient evidence to support the convictions.

F.

¶56 Defendant claims the court erred by refusing to give a *Willits*[4] instruction. Specifically, he argues that a document that the police had seized from McFarland's house was left behind and destroyed. As a result, he contends that he was entitled to the instruction. We disagree.

¶57 "We review the refusal to give a *Willits* instruction for an abuse of discretion." *State v. Fulminante,* 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999) (citation omitted). "A *Willits* instruction is appropriate when the state destroys or loses evidence potentially helpful to the defendant." *State v. Lopez,* 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990) (citations

[4] *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

omitted). To warrant a *Willits* instruction, a defendant must establish: (1) the State failed to preserve material, accessible evidence that might tend to exonerate him; and (2) resulting prejudice. *Fulminante,* 193 Ariz. at 503, ¶ 62, 975 P.2d at 93; *see also State v. Murray,* 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). There is no error in refusing to give the requested instruction if the defendant fails to establish that the evidence would have had a tendency to exonerate him. *Id.* (citation omitted).

¶58 Here, after the police searched McFarland's house they seized cards and letters. One letter, however, was inadvertently left after it had been photographed, and someone other than the police destroyed it. The photograph was marked and admitted at trial. Although Defendant argues that some parts of the letter could not be seen in the photograph and tended to contradict other information, the information in the visible portion of the photograph does not support his argument that it had any tendency to exonerate him. Because the trial court was able to review the exhibit and determined that a *Willits* instruction was not required, we find no abuse of discretion.

G.

¶59 Defendant also alleges that the court erred when it denied his motion for new trial by ignoring alleged

prosecutorial misconduct that led to his conviction. We review the ruling for an abuse of discretion. *State v. Hansen,* 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988).

¶60 In reviewing his claims of prosecutorial misconduct, our "focus is on the fairness of the trial, not the culpability of the prosecutor." *State v. Bible,* 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993). "[Prosecutorial] [m]isconduct alone will not cause a reversal, but only where the defendant has been denied a fair trial as a result of the actions of counsel." *State v. Hallman,* 137 Ariz. 31, 37, 668 P.2d 874, 880 (1983). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes,* 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)).

¶61 Defendant argues that the prosecutor engaged in misconduct during closing argument when she urged the jury to draw certain inferences from the evidence. Relying on the prosecutor's rebuttal argument, he claims misconduct was committed by "lying to the jury; [m]isleading the jury and failing to correct the false impressions and inferences of facts; suppressing exculpatory evidence from the jury; [and] failing to investigate exculpatory evidence." He also contends

that "the prosecution asked the jury to infer that the letters sent to McFarland were lies."

¶62 Despite Defendant's objections during the rebuttal argument, the trial court did not abuse its discretion by denying the motion for new trial because of prosecutorial misconduct. The court instructed the jury at the outset of trial and again in the final instructions that "the parties have talked to you about the law and the evidence. What [was] said is not evidence, but it may help you to understand the law and the evidence." We presume that the jury followed the instructions, *State v. Newell,* 212 Ariz. 389, 403, ¶ 69, 132 P.3d 833, 847 (2006), and determined the facts from the evidence produced in court.

¶63 Defendant also argues that the State engaged in misconduct by arguing that the State purposefully misled the jury to gain a conviction. He essentially is repackaging all of his complaints about the proceeding under the rubric of prosecutorial misconduct. As a result, we do not find that the trial court abused its discretion by denying his motion for new trial.

VII.

¶64 Having addressed the issues in the supplemental brief, we also reviewed the opening brief and searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451

P.2d at 881. We did not find any reversible error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. With advisory counsel available for consultation, Defendant represented himself. And, the sentences imposed were within the statutory limits.

¶65 After this decision is filed, the obligation of appellate counsel to represent Defendant has ended. Counsel must only inform Defendant of the status of the appeal and Defendant's future options, unless counsel identifies an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 585, 684 P.2d 154, 157 (1984). Defendant may, if desired, file a motion for reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure.

CONCLUSION

¶66 Accordingly, we affirm Defendant's convictions and sentences.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
PHILIP HALL, Judge

/s/
_____
DIANE M. JOHNSEN, Judge