IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

KENNETH MANYGOATS, *Appellant*.

No. 1 CA-CR 13-0070
FILED 11-19-2013

Appeal from the Superior Court in Coconino County
No. S0300CR201200586
The Honorable Dan R. Slayton, Judge

AFFIRMED

COUNSEL

Arizona Attorney General, Phoenix
By Michael O'Toole

Counsel for Appellee

Coconino County Public Defender, Flagstaff
By Brad Bransky

Counsel for Appellant

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Margaret H. Downie joined.

T H O M P S O N, Judge:

¶1 Kenneth Manygoats (defendant) appeals from his convictions and sentences for kidnapping, sexual abuse, and assault. On appeal, he argues that the trial court abused its discretion by (1) admitting a witness's pretrial identification of him; (2) excusing a venire person for cause; (3) permitting the prosecutor to elicit testimony that he had invoked his Fifth Amendment rights; and (4) allowing a witness to explain the underlying circumstances of a conviction. He also claims that fundamental error occurred because "numerous hearsay statements" were admitted at trial and the prosecutor committed misconduct when he engaged in "vouching." For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 On July 18, 2012, defendant laid down behind a woman who was asleep on the grass in Ponderosa Park in Flagstaff, inserted his hands down her pants, and touched her vagina. The woman woke up and fought to get defendant off of her, but he held her down, choked her and hit her in the face as he attempted to pull off her trousers. When other people in the park noticed what was happening and intervened, defendant stood up and quickly left through a gate at the rear of the park. Within minutes, he was apprehended by Flagstaff Police Officer Charles Hernandez, who responded to a 911 call and took him into custody.

¶3 The state charged defendant with count 1, kidnapping, a class 2 felony; count 2, sexual abuse, a class 5 felony; count 3, attempted sexual assault, a class 3 felony; and count 4, assault, a class 3

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[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

misdemeanor. After a trial, a jury found him guilty of kidnapping, sexual abuse, and assault, as charged, but not guilty of attempted sexual assault. Defendant 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)(1992), 13-4031 and 13-4033 (2010).

DISCUSSION

A. Witness's Pretrial Identification

¶4 On July 18, Teresa B., a woman whose backyard abuts Ponderosa Park, identified defendant as the victim's assailant while Defendant was seated in the back seat of Officer Hernandez's patrol car at the scene. She had viewed a part of the incident and had approached Hernandez, wanting to assist with the investigation. Prior to trial, defendant moved to suppress Teresa's pretrial identification of him, arguing that it was obtained by an "unnecessarily suggestive" procedure that rendered it inherently unreliable. After holding an evidentiary hearing on the motion, the trial court held that the manner in which the one-person show up was conducted by Hernandez was not "unduly suggestive" and also found that the identification was "reliable enough" to deny the motion to suppress under the factors listed in *Neil v. Biggers*, 409 U.S. 188 (1972). On appeal, defendant argues that the court's error in finding that the pretrial identification was not unduly suggestive deprived him of a fair trial. We do not agree.

¶5 We review a trial court's ruling on the admissibility of a pretrial identification for an abuse of discretion. *State v. Moore*, 222 Ariz. 1, 7, ¶ 17, 213 P.3d 150, 156 (2009). "A trial court's ruling on a motion to suppress is reviewed solely based on the evidence presented at the suppression hearing," *State v. Newell*, 212 Ariz. 389, 396, ¶ 22, 132 P.3d 833, 840 (2006) (citation omitted), viewed in the light most favorable to sustaining the trial court's ruling. *State v. Teagle*, 217 Ariz. 17, 20, ¶ 2, 170 P.3d 266, 269 (App. 2007). While we defer to the trial court's factual findings that are supported by the record and not clearly erroneous, we review *de novo* the court's legal determinations derived from those facts. *Moore*, 222 Ariz. at 7, ¶ 17, 213 P.3d at 156.

¶6 On appeal, defendant renews his argument that Teresa's one-on-one identification was "inherently" and "unduly" suggestive due to the fact that he was seated alone in the back of the police vehicle when she identified him. He maintains that the trial court erred in finding the

procedure was not "unduly suggestive" and that it did so because it improperly applied the *Biggers* reliability factors in reaching its conclusion. We find no error.

¶7 The Supreme Court has recognized that due process concerns arise only when law enforcement officers use a procedure that is both suggestive and unnecessary. *Perry v. New Hampshire*, __ U.S. __, 132 S. Ct. 716, 724 (2012). Even when police use such a procedure, however, suppression of the identification is not the inevitable consequence. *Id*. Instead of imposing a *per-se* exclusionary rule, a trial court is required to assess "on a case-by-case basis . . . whether improper police conduct created a 'substantial likelihood of misidentification.'" *Id*. In making an assessment, the reliability of the eyewitness identification is the linchpin. *Id*. at 724-25 (internal quotations and citations omitted). "Where the indicators of a witness's ability to make an accurate identification are outweighed by the corrupting effect of law enforcement suggestion, the identification should be suppressed." *Id*. at 725 (internal quotations and citations omitted). "Otherwise, the evidence (if admissible in all other respects) should be submitted to the jury."

¶8 A due process check for reliability comes into play only when a defendant establishes that improper police conduct occurred. *Id*. at 726. Even then, applying a "totality of the circumstances" approach, the identification may be admissible if it meets the *Biggers* standards. *Id*. at 725. Under *Biggers*, the factors to be considered in evaluating the likelihood of misidentification include: (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description, (4) the level of demonstrated certainty by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200.

¶9 In *State v. Kelly*, 123 Ariz. 24, 26, 597 P.2d 177, 179 (1979), our supreme court found that a "one-man show-up" while the defendant was held in a squad car "at the scene of the crime or near the time of the criminal act [was] permissible," and that it is for the trial court to determine the fairness of the prior identification. In *State v. Williams*, 144 Ariz. 433, 440, 698 P.2d 678, 685 (1985), the court held that a "reliable" one-person show-up identification is properly admissible at trial because it "allows the police to either have the culprit identified while the witness has a fresh mental picture of him or her or else release an innocent person and continue searching for the culprit before he or she escapes detection." Thus, while the supreme court acknowledged that a "one-man show-up"

may be "inherently suggestive," it held that the resultant identification did not violate due process so long as the identification possessed sufficient indicia of reliability under the totality of the circumstances. *Id.* at 439-40, 698 P.2d at 684-85.

¶10 Viewing the evidence at the suppression hearing in the light most favorable to the trial court's ruling as required by *Teagle*, 217 Ariz. at 20, ¶ 2, 170 P.3d at 269, the court here properly admitted Teresa's prior identification of defendant at the scene. First, the evidence supports the trial court's determination that the manner in which Hernandez conducted the one-man show-up was not unduly or improperly suggestive.

¶11 Officer Hernandez testified that he responded to a 911 dispatch call of an assault in Ponderosa Park by a suspect described as an "Indian male" wearing a "maroon shirt, light jeans [and a] baseball cap" headed towards a Circle K. He arrived at the scene within five to ten minutes of the call, and immediately located defendant, a Native American who was wearing jeans and holding a "purple"[2] shirt while talking to two other men. Hernandez detained defendant, handcuffed him, and placed him in the rear of the patrol vehicle. Hernandez then walked into the park to locate potential witnesses.

¶12 Teresa approached Hernandez in the park and told him that she "wanted to provide more information to help . . . apprehend the suspect from the park." She told him what she had seen and heard, and described the male involved as "wearing a purple shirt and blue jeans." When Hernandez asked her whether she would be able to identify the man, she indicated that she could identify him if she saw him again. He then asked her if she would be willing to "take a look at somebody." Hernandez explained that he had someone in the back of his patrol car, and asked her to "look and see if it was or was not the man she saw in the park." Furthermore, Hernandez testified that he was aware from his years of experience about the importance of telling a witness that it "could or could not" be the person, and that he was certain that he had followed "proper police protocol" and had couched his inquiry as "was or was not" the person involved.

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[2] Hernandez testified that "purple" and "maroon" were interchangeable to him. A photograph of the clothing defendant wore, including the shirt, was available at the hearing and at trial.

¶13 Hernandez then escorted Teresa over to his patrol vehicle, where, "immediately upon peering into the vehicle," Teresa positively asserted, "Yup, that's him." According to Hernandez, she exhibited no uncertainty or hesitation in her identification. Teresa also testified at the hearing that she was "certain" on that day that the man she saw in the police car was the same man she had seen in the park with the victim.

¶14 The one-man show-up by Hernandez was clearly warranted here because it was held minutes after the offense was committed and while she still had a "fresh mental picture" of the man she had just observed. *See Williams*, 144 Ariz. at 440, 698 P.2d at 685. Furthermore, while we do not ignore the inherently suggestive nature of showing a witness someone in a patrol car, we agree with the trial court that police here did not engage in any "unduly suggestive" conduct in obtaining the identification. The purpose of excluding identification evidence obtained under "unnecessarily suggestive circumstances" is to deter improper police procedures in the first place and is inappropriate in cases where there is no improper procedure. *Perry*, __ U.S. __, 132 S. Ct. at 726.

¶15 Here, the police were still in the very initial stages of their investigation, and Hernandez was justified in attempting to determine whether he had detained the right person or if he needed to continue searching. *Id*. Furthermore, Hernandez only asked Teresa to see "if" the person in his patrol car "was or was not" the man she had seen, thereby giving her the opportunity to confirm, deny, or simply voice any uncertainty regarding whether defendant was the man she had seen. *See Kelly*, 123 Ariz. at 26, 597 P.2d at 179 (citing favorably that victim was given opportunity to "either confirm or deny the defendant's identity" when brought to squad car to view defendant). Given these facts, Hernandez did not engage in any improper police conduct that resulted in "unnecessarily suggestive circumstances" that should be deterred by suppressing the identification in this case. *See Perry*, __ U.S. __, 132 S. Ct. at 726. The trial court therefore did not abuse its discretion in finding that the one-man show-up procedure in this case was not "unduly suggestive."

¶16 The court's inquiry could have stopped there. *See id.* (due process check for reliability arises only if improper police conduct occurs). Nonetheless, given the inherent suggestiveness associated with any one-person show-up identification, the trial court here went on and evaluated the overall reliability of the witness's identification pursuant to *Biggers* to doubly ensure that due process was met.

¶17 At the evidentiary hearing, Teresa testified that on July 18 she heard a woman saying "[s]top it" and "[d]on't" and "[q]uit it" and also heard "the sound of fists hitting someone or something like a thump, thump sound" coming from the park. She ran upstairs to her bathroom, where she had an unobstructed view of the park, and saw a woman "sitting on the ground" who was "crying . . . and looked disheveled" and was "pulling up her pants," and also saw "a guy" who was "rushing out towards the alleyway" to go "out the gate." Although she only saw the side of the man's face, Teresa testified that she thought he was "either Hispanic or Native American" and that his hair was dark. She remembered the clothes he wore, and described them, including their colors, to Hernandez when she contacted him in the park. She told Hernandez that she would be able to identify the man if she saw him again and was certain when she saw the man in the patrol car that he was the man she had seen in the park. Furthermore, she was still "certain" at the hearing that the person she had identified to Hernandez and that was sitting in the patrol car on July 18 was the man she had seen leaving the park.

¶18 Applying the five *Biggers* factors to this testimony supports the trial court's finding that Teresa's identification was reliable. 409 U.S. at 199. First (opportunity to view), it was uncontested that Teresa had an unobstructed view of the park out her bathroom window and the parties stipulated that the sun had not yet set on July 18 when the incident occurred. Second (degree of attention), it is clear that Teresa's attention was focused on the persons involved because she was induced to go upstairs to see what was happening by the cries of a woman. Furthermore, she testified that she gave the matter more attention than she usually gave because the situation seemed "more important" to her. Third (accuracy of prior description), Teresa's description of the man she saw matched the description given by the independent 911 caller and also matched what defendant was wearing when Hernandez arrived at the park, even if defendant had the purple shirt in his hands and not on his body at that moment. Her description that he was "either Hispanic or Native American" corroborated the 911 caller, who identified the suspect as a "Native American." Fourth (length of time between crime and confrontation), the evidence is undisputed that the identification occurred within minutes of Teresa seeing the man walk out of the park. Hernandez arrived on the scene shortly after the crime occurred, immediately located defendant, and escorted him to the patrol car. Teresa's identification took place shortly thereafter. Fifth (level of certainty), Hernandez testified that, immediately upon seeing defendant, Teresa stated "Yup, that's him," without displaying any uncertainty or hesitancy. Although at the

evidentiary hearing Teresa was not able to identify defendant and also could no longer remember the color of the clothing he wore on the day of the crime, she testified that on July 18 she had been "certain" about the color of the clothing and "certain" that the "guy in the car was the guy . . . in the park." More importantly, at the hearing, Teresa continued to be "certain" that the man she saw in the police car on July 18 was the man she saw in the park. Based on the *Biggers* factors and the totality of the circumstances, the trial court properly concluded that there was a reliable basis for Teresa's pretrial identification independent of any possible suggestive element attributable to the one-man show-up. 409 U.S. at 199.

¶19 Defendant contends that the identification was not reliable because, even though Teresa based her identification of him primarily on his clothing, when she identified him in the patrol car he was not actually wearing the purple shirt. However, the fact that Teresa did properly identify the color of the shirt he wore despite the fact that he was no longer wearing it arguably contributes to the reliability of her identification because it implies that her identification was not strictly based on his clothing, but also attributable to her observation of him. Furthermore, she testified that the color of his hair, his ethnicity and his "build" were "consistent" with the man she saw in the park.

¶20 Defendant also argues that her identification was not reliable because, at the evidentiary hearing, Teresa recalled that the suspect had worn a bandana (when in fact he had a baseball cap when arrested), and also recalled that the suspect's hair was long when it was described by the 911 caller as short. These inconsistencies affected the weight of Teresa's identification rather than its admissibility and were properly the subject of cross-examination at trial. *Moore*, 222 Ariz. at 9, ¶ 29, 213 P.3d at 158. We find no abuse of discretion in the trial court's denial of the motion to preclude the pretrial identification in this case.

B. Exclusion of Prospective Juror for Cause

¶21 Defendant is a Native American. During *voir dire*, in an in-chambers discussion, a prospective juror, also a Native American, informed the trial court that he was related to defendant "clanwise" through the juror's father. The juror also informed the court that the town they all lived in, Kaibeto, was a "reasonably small town;" that they all lived "in the same area;" and that he therefore would often have the occasion to see people "more closely related" to defendant. "[B]ecause of the close relationship," the juror stated that he "would not feel good" and would not feel "comfortable" in rendering judgment on defendant. Before

leaving chambers, the juror addressed defendant and told him, "I see your Mom all the time."

¶22 As a result of this discussion, the prosecutor moved to strike the juror for cause. Defense counsel objected, noting that the juror was "one of the few Native Americans in this panel" and that the panel did not "seem to be reflective of the racial makeup of the county anyhow." The trial court granted that prosecutor's motion to strike, noting that the juror was "very adamant" about the fact that he "will not feel comfortable" about sitting on the panel and that the juror's "close relationship" with defendant's family was a "race-neutral" explanation for the strike.

¶23 On appeal, defendant argues that the trial court abused its discretion in excusing the juror for cause. He notes that Arizona Rule of Criminal Procedure 18.4(b) provides that a juror's excuse for cause is proper only "when there is a reasonable ground to believe that a juror cannot render a fair and impartial verdict," and that it makes no provision for excusing a juror who feels "uncomfortable" when the juror maintains that he can be "fair and impartial."

¶24 We review a trial court's decision to excuse a juror for cause for an abuse of discretion. *State v. McGill*, 213 Ariz. 147, 152, ¶ 14, 140 P.3d 930, 935 (2006). "Because the trial court has the opportunity to observe prospective jurors first hand, the trial judge is in a better position than are appellate judges to assess whether prospective jurors should be allowed to sit." *State v. Blackman*, 201 Ariz. 527, 533, ¶ 13, 38 P.3d 1192, 1198 (App. 2002) (citing *State v. Lavers*, 168 Ariz. 376, 390, 814 P.2d 333, 347 (1991)). Therefore we "will not disturb a trial court's decision on a motion to strike a juror for cause unless we find a clear abuse of discretion." *Id*.

¶25 In general, we agree with the proposition that a trial court need not remove a juror for cause who expresses discomfort but nonetheless "maintains he could be fair and impartial." However that is not what happened here. The prospective juror in this case never "maintained" that he could be fair and impartial. Instead, when either defense counsel or the trial court asked him directly if he thought his discomfort with the family situation would affect his ability to be fair and impartial, he only replied that the question was "really hard" for him to answer, that he "just would not feel good . . . about it," and that he "[would not] feel comfortable . . . because of the close relationship." Furthermore, when the trial court specifically asked him whether due to his discomfort he "[w]ould find it difficult, in essence, to render judgment on Mr. Manygoats," his succinct reply was, "Yes."

¶26 Nothing in the in-chambers colloquy suggests that the prospective juror indicated that he could be fair and impartial despite his unease about his close family relationship to the accused. It provides instead reasonable grounds for the trial court to infer that the level of discomfort expressed by the juror would impair his ability to render a fair and impartial verdict in the case. The trial court did not abuse its discretion in finding this a race-neutral basis for excusing the juror for cause. *McGill*, 213 Ariz. at 152, ¶ 14, 140 P.3d at 935.

C. Comment on Fifth Amendment Right to Remain Silent

¶27 The 911 caller reported that the man in the park wore a white baseball cap. During cross-examination at trial, Teresa testified that she told defense counsel in an interview that the man she saw wore a white bandana. Hernandez testified that he did not see defendant wearing a baseball cap when he detained him, however a light colored baseball cap was among the items of his clothing placed into personal property at the jail.

¶28 During cross-examination, Hernandez stated that he could not say for certain where the baseball cap had come from, and that defendant had not had a hat on either when Hernandez encountered him or when Teresa viewed him in Hernandez's patrol car. Defense counsel asked Hernandez if Hernandez "pick[ed] it up off the street" or if it might have "already been at the jail." Hernandez said he did not remember picking up the hat and denied that the hat was already at the jail. Defense counsel also asked Hernandez if he had "ever" shown the hat to defendant "at any time" and also if Hernandez "recall[ed] [defendant] ever telling [him] that [it] was not his hat?" Hernandez responded that he had not shown the hat to defendant and that he did not recall defendant telling him it was not his hat.

¶29 Based on this line of questioning, during an "unreported bench conference" the prosecutor argued that defense counsel had "opened a door" and that the state should be allowed to follow up with Hernandez about his attempt to obtain information from defendant. The trial court agreed. The prosecutor then asked Hernandez, on redirect, whether Hernandez would have liked to have spoken with defendant. Hernandez answered "[s]ure" and also stated that he attempted to do so, but that defendant "basically said he didn't want to talk." The following exchange then took place:

> [Prosecutor]: When someone tells you that, do you respect that as their right?
>
> [Defense Counsel}: Objection withdrawn.
>
> The Court: All right.
>
> [Hernandez]: Yes. I mean they don't say I want a lawyer or anything like that. But yes, when they say they don't want to talk, we take that as pretty much invoking their right not to speak.

Later, while the jury was at recess, defense counsel moved for a mistrial, arguing that the statements were an "unconstitutional comment on Mr. Manygoats's invocation of his right to remain silent." The trial court denied the motion, stating:

> I think by the phrasing of the question by [defense counsel], Did Mr. Manygoats, in essence, at any time or ever tell you that wasn't his hat? Then by the phrasing of the question, [defense counsel] withdrawing the objection, and then the manner in which Officer Hernandez responded, I find that there was no comment on the post-arrest invocation of Mr. Manygoats's right to an attorney, therefore, the Motion for Mistrial is denied.

¶30 On appeal, defendant argues that the trial court "committed fundamental error" in finding that defense counsel "opened the door to evidence of his 5th Amendment invocation."[3] We decline to review for fundamental error. If anything, the fact that defendant withdrew his objection to the line of questioning at trial borders on "invited error." *See State v. Pandelli*, 215 Ariz. 514, 528, ¶ 50, 161 P.3d 557, 571 (2007) (party

[3] Defendant does not challenge the court's denial of his motion for mistrial, therefore we need not address it. *Carrillo v. State*, 169 Ariz. 126, 132, 817 P.2d 493, 499 (App. 1991) ("Issues not clearly raised and argued on appeal are waived.").

who agrees to admissibility of evidence may not assign the same as error on appeal).

¶31 A trial court's determination that a party "opened the door" to otherwise inadmissible evidence is reviewed for an abuse of discretion. *State v. Roberts*, 144 Ariz. 572, 575, 698 P.2d 1291, 1294 (App. 1985). *See also State v. Gilfillan*, 196 Ariz. 396, 405-06, ¶¶ 34-38, 998 P.2d 1069, 1078-79 (2000) (denial of mistrial after officer stated he terminated interview after defendant requested attorney not abuse of discretion).

¶32 Here, the line of questioning pursued by defense counsel clearly implied that Hernandez not only failed to "ever" question defendant about his involvement. It also implied that Hernandez was omitting the fact that defendant, at some point, had told him it was not his hat. The trial court did not abuse its discretion in finding that counsel had "opened the door" to explaining why Hernandez had not questioned defendant on the subject or by also permitting the testimony to rebut the implication that defendant denied that the hat was his and that Hernandez was keeping his statements from the jury. While the officer need not have expounded on the issue as much as he did in his response ("I mean they don't say I want a lawyer or anything like that"), we do not find that his response suggested to the jury that defendant had invoked his rights to counsel here or that he was guilty because of it. *See Gilfillan*, 196 Ariz. at 406, ¶ 36, 998 P.2d at 1079 (due process right violated when suspect who is assured that right to remain silent will not be used against him then has silence used to impeach an explanation at trial). We find no abuse of discretion in the trial court's determination that defendant "opened the door" to the statements.

D. Explanation of Prior Misdemeanor Conviction

¶33 During cross-examination of the victim, defense counsel elicited the fact that she had been convicted of false reporting to law enforcement in Flagstaff City Court in March 2009. On redirect, the prosecutor asked the victim to tell the jury what the false reporting conviction "was all about." Defense counsel objected that he did not believe that was allowed. The trial court called a brief recess to allow defense counsel to research the issue, after which it heard argument on the issue.

¶34 The prosecutor argued that nothing in Ariz. R. Evid. 609 prevented the victim from explaining the circumstances of her conviction and that he suspected that defense counsel's argument was based on that

fact that a defendant's convictions are often "sanitize[d]." He explained that the victim's false reporting had "nothing to do with the false accusation of another person of committing a crime," but was based on the fact that the victim provided false identification information to attempt to escape a DUI. Therefore he should be permitted to clarify any potentially false impression the jury might derive from defense counsel's question. Defense counsel stated that he "always thought" that, if the state impeached his client with a felony, he was not permitted to "explain how it wasn't such a bad felony," and assumed that applied to misdemeanors also. He cited nothing in Rule 609 that precluded an explanation, but added that it might violate Ariz. R. Evid. 608 "as being a specific instance of truthfulness or untruthfulness." The trial court overruled defense counsel's objections under both Rule 609 and 608, and the victim testified at trial that her conviction was based on the fact that she had given police her daughter's social security number and date of birth because she did not "want to get charged for DUI."

¶35 On appeal, defendant argues that the trial court abused its discretion in admitting the evidence because "[e]xplanations regarding prior felon[ies] . . . are simply not allowed in Arizona." He cites *State v. Pavao*, 23 Ariz. App. 65, 530 P.2d 911 (1975) for this argument and maintains that allowing the victim to "mitigate and explain proper impeachment" prejudiced him because it "lessened the value of [his] impeachment."

¶36 "The decision whether to admit or exclude evidence is left to the sound discretion of the trial court." *State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App. 1989). What constitutes proper rehabilitation of a witness is also a matter largely within the trial court's discretion. State v. Christensen, 129 Ariz. 32, 37, 628 P.2d 580, 585 (1981). We will not reverse a trial court's rulings on issues of relevance and admissibility of evidence absent a clear abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990).

¶37 As the state points out, *Pavao*, on which defendant primarily relies, was decided before the Arizona Rules of Evidence were adopted in 1977. *State v. Campoy*, 220 Ariz. 539, 545, ¶ 17, 207 P.3d 792, 798 (2009). In any case, *Pavao*, notes only that the "better procedure" is to disallow such explanations because allowing a defendant or witness to explain a prior conviction "would merely open up a reinvestigation of the former case," potentially creating "confusion and doubt regarding a matter previously tried." 23 Ariz. App. at 67, 530 P.2d at 913. None of these potential

drawbacks applied here where the victim did not contest the conviction but essentially provided the elements of the crime.

¶38 In any event, we see no prejudice to defendant. Rather than undermine his impeachment, it appears to have assisted it. Although the prosecutor believed that the false reporting did not involve the false accusation of another person of a crime, in fact the victim implicated to police that it was her daughter who was driving the car. Thus defense counsel argued in closing, with some merit, that the victim willingly threw "her own daughter under the bus" in her attempt to avoid a DUI charge. The trial court did not abuse its discretion in permitting the explanation testimony in this case. *Murray*, 162 Ariz. at 214, 782 P.2d at 332.

E. Admission of Hearsay Statements

¶39 Defendant argues that it was fundamental error for the trial court to admit at trial "[d]etailed hearsay descriptions given in the dispatch calls and event chronologies from unknown sources of not only the alleged crime, but also the perpetrator's description." He contends that the statements far exceeded what was necessary to explain the investigation and made it "virtually impossible" to defend his case. We find his arguments without merit.

¶40 Defendant concedes that he did not raise these arguments before the trial court and that we are limited to a fundamental error review. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prevail under this standard of review, he must prove both that fundamental error exists and that the error caused him prejudice. *Id*. at ¶ 20, 115 P.3d at 607. Fundamental error is error going "to the foundation of [the] case, [error that] takes away a right . . . essential to [the] defense, and [error] of such magnitude that [the defendant] could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Defendant fails to meet these burdens.

¶41 Hearsay testimony is an out of court statement offered in evidence at trial to "prove the truth of the matter asserted." Ariz. R. Evid. 801 (c) (1) and (2). First, the "descriptions" of events and persons by "unknown sources" contained in the dispatch calls were not used by the state to prove the truth of what was asserted, but only to establish why police responded to the park and why they contacted defendant. *See State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991) (out of court statements admitted to show "how events unfolded" and not as

proof of truth of matter asserted are not hearsay). *See also United States v. Cromer*, 389 F.3d 662, 676 (6th Cir. 2004) (out of court statements used for purpose of explaining how events came to pass or why officers took certain actions, and not for truth of matter asserted, not hearsay). Furthermore, defense counsel stipulated to the admission and playing of the 911 tape that formed the basis of the dispatch information[4] at trial. Therefore defendant has failed to prove that any error occurred, let alone fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. Nor has he shown prejudice. *Id*. Rather than hinder his defense, as he claims, the record shows that he was able to use discrepancies between the dispatch information and Teresa's statements, for example, to suggest that the police had the wrong man.

¶42 Defendant also argues that fundamental error occurred because the trial court permitted hearsay statements from a second officer who was at the scene. That officer testified at trial that, when she contacted Teresa at the scene, Teresa indicated that she had already identified defendant in the patrol car to Officer Hernandez and also that Teresa expressed no hesitation about her identification. However, even assuming it was error to admit the officer's statements, it is not fundamental and prejudicial error. The statements were cumulative because Teresa herself testified repeatedly at trial that she was "certain" that the man she identified in the patrol car was the man she saw in the park. *See State v. Moody*, 208 Ariz. 424, 455, ¶ 121, 94 P.3d 1119, 1150 (2004) (admission of hearsay evidence not fundamental error where it was "merely cumulative"). Thus, defendant fails to show that their admission deprived him of a fair trial. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

F. Prosecutorial Misconduct/Vouching

¶43 During his cross-examination of the victim, defense counsel stated "Now, at some point fairly recently you met with [the prosecutor]" and then asked her when that was. The victim responded "Monday," which was three days earlier.

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[4] We decline to address a Confrontation Clause argument that defendant raises on appeal because he fails to fully brief and argue the argument on appeal. *See Carrillo*, 169 Ariz. at 132, 817 P.2d at 499. We note only that the woman who made the call testified at trial.

¶44 Troy S., who was playing basketball in the park on July 18, observed the assault, and testified at trial as an eye witness. He testified that he saw defendant slap the victim when she resisted him. Troy was also asked on direct about various statements he had made during an interview with the prosecutor, and defense counsel, and a detective. On cross-examination, defense counsel pointed out the fact that at the interview a month earlier, however, Troy had told them that he did not remember seeing defendant hit the victim. Troy responded that he remembered better now than at the interview.

¶45 Based on these questions by defense counsel, the prosecutor asked each witness if he had ever tried to suggest what they should say and also if he had ever told them to do anything other than to tell the truth. Both witnesses answered no to his questions.

¶46 Not having objected to the questioning at trial, defendant argues that fundamental error occurred in the form of prosecutorial vouching because, by his questions, the prosecutor placed the prestige of the government behind each witness and announced his personal belief in each witness's veracity. We disagree.

¶47 "Two forms of impermissible prosecutorial vouching exist: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993) (citation omitted). The first type of vouching involves a prosecutor's personal assurances of the witness's truthfulness. *State v. Dunlap*, 187 Ariz. 441, 462, 930 P.2d 518, 539 (App. 1966). The second involves prosecutorial remarks that bolster the witness's credibility by references to materials outside the record. *Id.* Neither occurred here.

¶48 By the time of trial, both the victim's and Troy's memories of the events had become somewhat attenuated, and defense counsel understandably questioned each about apparent discrepancies between their statements to police, during subsequent interviews, and during trial testimony. Rightly or wrongly, the prosecutor here interpreted defense counsels questions as implying that some of the changes in their testimony were attributable to his improper influencing of the witnesses as the trial drew nearer. The prosecutor's follow up questions did not proffer his personal affirmation of the veracity of either the victim's or Troy's testimony and did not suggest that matters outside the record supported their testimony. They merely countered the perceived

innuendo that some of the inconsistencies in their statements and testimony were the result of the prosecutor's attempts to improperly influence their testimony at trial. The questions did not constitute prosecutorial vouching. *State v. Rosas-Hernandez*, 202 Ariz. 212, 219, ¶ 26, 42 P.3d 1177, 1184 (App. 2002) Again, Defendant has failed to meet the burden of showing that fundamental error occurred. *Henderson*, 210 Ariz. at 567, ¶20, 115 P.3d at 607.

CONCLUSION

¶49 For the foregoing reasons, we affirm defendant's convictions and sentences.