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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

RUSSELL DEAN MILLSAPS, *Appellant*.

No. 1 CA-CR 16-0473
FILED 7-31-2018

Appeal from the Superior Court in Maricopa County
No. CR2015-001734-001
The Honorable Joseph P. Mikitish

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

H O W E, Judge:

¶1 This appeal is filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969). Counsel for Russell Dean Millsaps has advised this Court that counsel found no arguable questions of law and asks us to search the record for fundamental error. Millsaps was convicted of 5 counts of molestation of a child and 13 counts of sexual exploitation of a minor, all Class 2 felonies. Millsaps has filed a supplemental brief, which the Court has considered. After reviewing the record, we affirm Millsaps's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the judgment and resolve all reasonable inferences against Millsaps. *See State v. Fontes*, 195 Ariz. 229, 230 ¶ 2 (App. 1998). On or between October 1, 2012, and March 13, 2013, Millsaps molested his granddaughter M.M. by engaging in sexual contact with her multiple times while she was under 15 years old. During this period, Millsaps also molested another granddaughter, P.M., by engaging in sexual contact with her while she was under 15 years old. Also during this period, Millsaps possessed 13 images of children under 15 years old engaged in exploitive exhibition or sexual conduct. In April 2015, Millsaps was indicted with 10 counts of child molestation, 13 counts of sexual exploitation of a minor, and 5 counts of sexual conduct with a minor, all Class 2 felonies. In addition to the incidents involving his granddaughters, these counts included allegations that Millsaps had molested and engaged in oral or sexual contact with a young boy, K.D., about 20 years earlier.

¶3 Millsaps moved to sever the counts, to suppress photos found on his cell phone, and to suppress his pretrial identification. He also requested a *Dessureault*¹ hearing regarding the pretrial identification. The court held an evidentiary hearing on the motions. The court denied the

¹ *State v. Dessureault*, 104 Ariz. 380 (1969).

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motion to sever and the motion to suppress the photos on Millsaps's cell phone. The court also denied Millsaps's *Dessureault* motion, but it stated that it would give the jury an identification instruction and allow Millsaps to cross-examine the detectives involved with the identification and to make the argument to the jury that the identification was unduly suggestive. At an evidentiary hearing, the court ordered the State to refrain from mentioning the quantity of images located on Millsaps's computer, but it allowed the State to say that "additional" images were found on his computer.

¶4 During trial, the court held a hearing regarding Mesa Police Department ("MPD") Detective Roxana Meicke, the case agent during Millsaps's investigation. Millsaps learned that Detective Meicke had been arrested, was no longer with the MPD, and had an order of protection placed against her by her husband. Millsaps moved for a mistrial alleging that the State had concealed Detective Meicke's troubled history and that he required more time to gather and review the details about Detective Meicke's conduct. The State responded that a mistrial was not warranted because although Detective Meicke was the case agent and requested the search warrants, Homeland Security Investigations had actually conducted the investigation necessary to obtain the warrants. The State also noted that it was unaware of Detective Meicke's conduct and did not conceal the information. The State further noted that Millsaps had sufficient time to review Detective Meicke's files and could call Detective Meicke as a witness and impeach her if he wished. The court then requested and received Detective Meicke's personnel files along with files from her dissolution proceedings and order of protection. The court reviewed the materials and found that they did not warrant a mistrial and ordered that Millsaps could call Detective Meicke as an adverse witness and inquire about her convictions and her termination from MPD. The court subsequently denied Millsaps's motion for a mistrial.

¶5 Later at trial, M.M. testified about the incidents between her and Millsaps. She remembered that police officers arrived at her home when she was seven years old and took her to another location, but she could not remember where they took her. She also testified that she thought her mother, two brothers, and P.M. had accompanied her. She further testified that she believed her mother was at home when the police arrived. M.M. stated that after being escorted to the new location, she met a woman and truthfully spoke to her about the incidents. She also testified that she remembered things more easily soon after they happened rather than at trial. She had difficulty, however, remembering some aspects of her interactions with Millsaps, including not remembering if some of the

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incidents occurred when she was six years old and how she felt during the molestation. Afterwards, P.M. also testified about her experiences with Millsaps.

¶6 The next day, the State moved to admit M.M.'s recorded interview with a forensic interviewer because she was not able to remember some details related to the incidents, and because she testified that she had told the truth during the forensic interview soon after the events. Millsaps objected on confrontation grounds and requested that the recording be redacted if admitted. The State responded that the entire recording was directly related to the offenses charged. The court allowed the recording to be played and denied Millsaps's request for redactions. Next, M.M.'s and P.M.'s mother ("Mother") testified about the relationship between Millsaps and the family members and the day that her children were interviewed. In contrast to M.M.'s recollection, Mother testified that her second son had not been born yet because she was still around five months pregnant. Mother also clarified that she was not at home when the officers transported her children to the interviewing site, Center Against Family Violence ("CAFV"), despite M.M.'s earlier testimony. Instead, she had been at work when she learned of the investigation and met her children later at CAFV. Afterwards, a MPD forensic interviewer testified that she was with the children in the transporting van and had interviewed M.M. and P.M. at the CAFV. The forensic interviewer testified that M.M.'s interview had been recorded, and the State played the recording for the jury.

¶7 Next, a sexual maturity rating expert testified about the photos found on Millsaps's cell phone and stated that each of the children were under 15 years old. Afterwards, an officer testified that he presented a photo lineup to K.D., and while doing so informed K.D. that the person that molested him may or may not be in the lineup. The officer then testified that K.D. identified Millsaps within the lineup.

¶8 An agent with Homeland Security Investigations then testified that during an investigation, she came across a series of explicit emails and shared them with a fellow agent in Phoenix. The other agent then testified that he had received the packet of emails and then requested and received certified records from Yahoo regarding an email address. The agent reviewed the emails and IP addresses associated with the email account, and he found that the subscriber listed for the account was "Russell Millsaps." He then located two possible residential addresses for Millsaps, one belonging to Millsaps and the other belonging to his son with the same name. While at one of the residences, the agent saw two female children in the front yard playing with an adult male. He then testified that

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he gave MPD the information he had obtained and the following day MPD executed search warrants for both residences.

¶9 Next, K.D. testified that he had informed a counselor about being molested and sexually contacted by “Brother Millsaps” and later informed the MPD about the incidents. K.D. described the perpetrator as a white male belonging to the Latter-day Saints Church, with big teeth and large glasses. He also thought the perpetrator had a son named Skylar, but was not certain. K.D.’s remaining testimony was consistent with the counts alleged against Millsaps. Then a MPD officer testified that he received this information from K.D. in an interview. Because the officer knew that Millsaps was being investigated and matched some of the perpetrator’s description, he created a photo lineup that included Millsaps’s photo. The officer then testified that K.D. identified Millsaps in the photo lineup.

¶10 Later at trial, a MPD computer forensic analyst testified that he helped search Millsaps’s residence. The analyst stated that Millsaps’s computer and cell phone were found in the house. He found images showing sexually exploited minors on the cell phone’s memory card as well as a “thumbnail database”² for a Yahoo account. Next, a former computer forensics analyst testified that he had also searched Millsaps’s computer. He stated that he “found several hundred images of photos[,]” to which Millsaps objected based on the court’s earlier order and moved for a mistrial. The court sustained the objection and instructed the jury to ignore the response, but denied the motion for a mistrial. The court reasoned that Millsaps’s defense throughout the case had not been that the images were not sexually exploitive of children, but that no proof beyond a reasonable doubt established that Millsaps knowingly possessed them on his computer or cell phone. Thus, the court concluded that striking the answer and ordering the jury to ignore the response were sufficient. Lastly, a video and image analyst with the Department of Public Safety testified that he analyzed the 13 images at issue and concluded that the “images were of real people, and the people in [the images] were what they purported themselves to be.” The State then rested, and Millsaps rested as well without calling any witnesses. The jury found Millsaps guilty of 5 counts of child molestation and 13 counts of sexual exploitation of a minor.

¶11 The trial court conducted the sentencing hearing in compliance with Millsaps’s constitutional rights and Arizona Rule of Criminal Procedure 26. For the 18 counts that Millsaps was convicted of,

² A thumbnail database is a cache account where photos that are viewed on a computer or cell phone are stored.

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the court sentenced him to 17 years' imprisonment for each count, to be served consecutively for a total of 306 years' imprisonment. The court credited Millsaps with 1205 days' presentence incarceration. Although the victims did not pursue restitution, the court ordered Millsaps to pay \$540 in assessments. Millsaps timely appealed.

DISCUSSION

¶12 We review the entire record for reversible error. *State v. Thompson*, 229 Ariz. 43, 45 ¶ 3 (App. 2012). Counsel for Millsaps has advised this Court that after a diligent search of the entire record, counsel has found no arguable question of law. However, in his supplemental brief, Millsaps argues that (1) the trial court abused its discretion by allowing a recorded interview to be played for the jury, (2) the trial court should have granted a mistrial after the State withheld negative details about Detective Meicke, (3) the State engaged in prosecutorial misconduct by adding charges without a reasonable likelihood of conviction, (4) the trial court should have granted a mistrial after the State's violation of a court order, and (5) the cumulative effect of prosecutorial misconduct unduly prejudiced Millsaps and denied him a fair trial.

¶13 Millsaps first argues that the trial court abused its discretion by allowing the jury to view M.M.'s recorded interview. This Court reviews the admissibility of hearsay evidence for an abuse of discretion. *State v. Franklin*, 232 Ariz. 556, 559 ¶ 10 (App. 2013). Arizona Rule of Evidence ("Rule") 803(5) allows for the admissibility of a recorded recollection. The record being admitted must concern a matter that a witness once had knowledge but cannot recall well enough to testify fully and accurately, and the previous testimony must have been made while it was fresh in the witness's memory and made truthfully. Ariz. R. Evid. 803(5); *State v. Martin*, 225 Ariz. 162, 165 ¶ 12 (App. 2010).

¶14 Here, M.M. testified that she could not remember some details about the incidents, such as where she was interviewed, how she felt when Millsaps molested her, and her age during the molestation. She also testified to some details that were factually impossible, such as believing that her unborn brother had also been at CAFV. M.M. testified that she had spoken truthfully during the interview and that she remembered details more easily soon after they occurred than during trial. Thus, the foundational requirements to present the video to the jury were satisfied, and the trial court did not abuse its discretion.

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¶15 Millsaps counters that M.M.'s inability to remember where she was interviewed, her age at the interview, and how she felt during the molestation was insufficient to allow the jury to view the video. He contends that allowing videos to be played whenever a witness fails to remember minor details undermines Rule 803(5). Millsaps, however, does not provide legal authority to support this assertion; thus, this Court will not consider it. *See John Munic Enters., Inc. v. Laos*, 235 Ariz. 12, 21 ¶ 30 (App. 2014). Additionally, Millsaps argues that the trial court erred by allowing the entire video to be played rather than a redacted version, as was the case in *Martin*. While the video in *Martin* was redacted, the video's redaction was not at issue in the case and the Court did not find that a video admitted under Rule 803(5) must be redacted. As such, *Martin* does not support Millsaps's contention, and his argument fails.

¶16 Next, Millsaps contends that the State violated *Brady*³ by failing to disclose negative details about Detective Meicke's background and that the trial court erred by not granting a mistrial. "When an untimely disclosure occurs, the opposing party may move for sanctions, in which case the trial court shall impose any sanction it finds appropriate." *State v. Ramos*, 239 Ariz. 501, 504 ¶ 9 (App. 2016). When imposing a sanction, the trial court should consider (1) the vitality of the proponent's case, (2) the degree to which the evidence has prejudiced the opposing party, (3) whether the conduct was willful or motivated by bad faith, and (4) the availability of a sufficient and less stringent sanction. *Id.* Under *Brady*, the State violates a defendant's right to due process if it does not disclose evidence that is favorable to the defense and material to the defendant's guilt or punishment. *State v. Benson*, 232 Ariz. 452, 460 ¶ 24 (2013). The State must disclose not only information that it possesses, but also information within the possession or control of persons who have participated in the investigation or evaluation of the case. *State v. Meza*, 203 Ariz. 50, 55 ¶ 21 (App. 2002). Thus, for purposes of disclosures, a law enforcement agency investigating a criminal action acts as an arm of the prosecutor. *Id.* Regardless of good or bad faith, the State's failure to follow *Brady* by willfully or inadvertently withholding favorable evidence violates a defendant's due process rights. *Milke v. Mroz*, 236 Ariz. 276, 280 ¶ 6 (App. 2014).

¶17 Here, the State did not immediately disclose Detective Meicke's troubled history, but it was unaware of her negative conduct and did not purposely withhold the information. The court requested and reviewed Detective Meicke's personnel and dissolution files and did not

³ *Brady v. Maryland*, 373 U.S. 83 (1963).

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find that a *Brady* violation had occurred. Therefore, the court found that the information did not warrant a mistrial and ordered that Millsaps, who also had access to these files, could call Detective Meicke as an adverse witness to inquire about her convictions and termination from the MPD. The State did not call Detective Meicke as a witness, and neither did Millsaps. After reviewing Detective Meicke's files and the court's actions, we find that the trial court did not abuse its discretion by applying the less stringent sanction of allowing Millsaps to call Detective Meicke as an adverse witness.

¶18 Millsaps notes that the State decided not to call Detective Meicke as a witness because "the State learned that Meicke had been fired for misconduct and attempted to conceal it by quietly removing her name from the witness list[.]" This assertion, however, is not supported by any facts in the record and is mere speculation. The record shows that the State did not know about Detective Meicke's negative actions, and no contradicting evidence has been presented. Similarly, Millsaps asserts that Detective Meicke was likely consulted and interviewed regarding her supporting affidavit for the search warrants. Like his earlier assertion, this statement is mere speculation, and thus, is not persuasive.

¶19 Millsaps next argues that the State engaged in prosecutorial misconduct by adding charges related to K.D. without a reasonable likelihood of conviction. A trial court's denial of a mistrial for prosecutorial misconduct is reviewed for an abuse of discretion. *See State v. Newell*, 212 Ariz. 389, 402 ¶ 61 (2006). "To prevail on a claim for 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. Goudeau*, 239 Ariz. 421, 465 ¶ 193 (2016). "A conviction will be reversed for prosecutorial misconduct only if (1) the prosecutor committed misconduct and (2) a reasonable likelihood exists that the prosecutor's misconduct could have affected the verdict." *Id.* Here, the State presented evidence that supported charges related to the offenses involving K.D. While the evidence connected to K.D. may not have been as strong as the evidence related to M.M. and P.M., the charges were not baseless. As such, the State did not engage in prosecutorial misconduct. Millsaps counters that the State likely knew that Millsaps would not be convicted of the crimes against K.D., but again, that assertion is mere speculation unsupported by the record.

¶20 Similarly, Millsaps argues that the trial court erred by not granting a mistrial when the State elicited a response about the number of images on Millsaps's computer, thereby violating a court order. The State

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violated the trial court's order to refrain from eliciting testimony about the number of images on Millsaps's computer. The court sustained the objection and instructed the jury to ignore the response but denied the motion for mistrial. The court noted that Millsaps's defense was not that the images were not sexually exploitive of children, but rather that no proof beyond a reasonable doubt established that Millsaps knowingly possessed them on his computer. As such, the trial court did not abuse its discretion by finding that striking the answer and instructing the jury to ignore the response sufficiently cured the error.

¶21 Last, Millsaps contends that even if the above errors were harmless, the cumulative effects of each of these errors and the State's misconduct unduly prejudiced him and denied him a fair trial. "[A]n incident may nonetheless contribute to a finding of persistent and pervasive misconduct if the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant." *State v. Morris*, 215 Ariz. 324, 335 ¶ 47 (2007). Millsaps has presented nothing showing that the State intended to prejudice him. Moreover, he has not shown that absent the State's actions, he would have received a different verdict. Thus, this argument fails.

¶22 We have read and considered counsel's brief and fully reviewed the record for reversible error, *see Leon*, 104 Ariz. at 300, and find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, counsel represented Millsaps at all stages of the proceedings, and the sentences imposed were within the statutory guidelines. We decline to order briefing and affirm Millsaps's convictions and sentences.

¶23 Upon the filing of this decision, defense counsel shall inform Millsaps of the status of the appeal and of his future options. Counsel has no further obligations unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Millsaps shall have 30 days from the date of this decision to proceed, if he desires, with a proper motion for reconsideration or petition for review.

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CONCLUSION

¶24

For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
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