DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 08-0352
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
JOSEPH PAUL DELUCA, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2001-005011

The Honorable Roland J. Steinle, III, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
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Attorneys for Appellant

P O R T L E Y, Judge

¶1 Joseph Paul Deluca appeals his conviction for first degree murder. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 The victim lived with his mother and fiancé in a house that bordered a golf course. The victim operated a window tinting business from his garage. Some three days before the murder, Deluca, a former employee, arrived at the victim's house just as the victim and his fiancé were leaving. Deluca wanted window tint, but was rebuffed. As Deluca sped away, both men were upset. At approximately midnight the night before the murder, the victim's pager went off. When his fiancé asked who had paged him, the victim answered, "that damn Joey Deluca."

¶3 Sometime after 10:00 a.m. on September 7, 1997, the victim was murdered. A golfer heard shouting and saw someone in the bushes in the area between the backyard of the victim's house and the property next door. Thinking the person was a transient, the golfer called security. When security arrived, they found the victim covered in blood on the ground and called 911.

¶4 The victim was dead when emergency personnel arrived. Following a trail of blood, a pipe wrench was found in the

neighboring backyard, along with a blood-soaked sheet and a razor-edged hair shaper.[1]

¶5 The medical examiner determined that the victim died of multiple blunt force injuries to the head and neck. The wounds were consistent with the victim being beaten with a pipe wrench, possibly while the sheet was over his head.

¶6 Although there were no signs of forced entry into the victim's house, a search revealed that a struggle had taken place in the game room. The room was in disarray, and traces of blood were found in the room and on various objects. Additionally, police found a pair of sunglasses, a rubber glove, a small gold chain, and a small crucifix in the room.

¶7 DNA samples were obtained from objects found in the game room and analyzed, and Deluca could not be eliminated as the minor source of DNA on both the gold chain and rubber glove.

¶8 Deluca was charged with first degree murder. The State argued that the evidence indicated that Deluca held the victim while Mike White beat him with a wrench. The State claimed the evidence showed the victim was attacked in the game room by two people, that the sheet was placed over the victim's head, and that one person held him while another person beat him with the pipe wrench. The State further argued that the

[1] A woman had given the hair shaper to Mike White sometime before the murder when both he and Deluca were living with her.

attackers continued the attack after the victim was able to flee into the backyard of the house and the backyard of the property next door.

¶9 A jury convicted Deluca of first degree murder. The conviction was reversed on appeal in *State v. Deluca*, 1 CA-CR 02-0590 (Ariz. App. Nov. 28, 2003) (mem. decision). Deluca was tried in 2005 and 2007, respectively, but each ended in mistrial because the juries were unable to reach a verdict. Deluca was convicted of first degree murder in this case and sentenced to imprisonment for natural life. We have jurisdiction on his appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031(A)(1) and -4033 (2010).

ANALYSIS

I. Denial of the Motion to Produce

¶10 Deluca asserts the trial court erred when it denied his motion to produce DNA records from the Department of Public Safety ("D.P.S.") offender database ("the database" or "the DPS database"). Deluca does not assert that DPS or the DPS database played any role in the investigation or prosecution of this case. Deluca argues, however, that he was entitled to the records as potentially exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

A. Procedural History

¶11 After the 2005 mistrial, Deluca filed a "Motion to Produce DPS DNA Match Records." Deluca sought records and other information from the database, which at that time contained the DNA profiles of approximately 65,000 Arizona offenders.[2] He argued that in an earlier comparison of every profile in the database, there were many matches at various numbers of genetic markers referred to as "loci."[3] Deluca argued that the existence of so many DNA matches in the database called into question the statistical uniqueness of the DNA found at the crime scene. He argued that information from the DPS database was potentially exculpatory, and necessary for him to prepare his defense. Both the State and DPS objected to production of the information.

¶12 The trial court held an evidentiary hearing. Evidence was introduced that the DPS database contained approximately 65,000 offender profiles. The profiles consisted of genetic information at thirteen loci. The DPS analysis indicated that 122 pairs of profiles matched at nine of the thirteen loci, twenty pairs of profiles matched at ten loci, one pair of

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[2] By the time of trial, there were approximately 123,000 profiles in the database.

[3] Except for what may be necessary to explain our reasoning, we make no attempt to explain the science of DNA, the processes involved in its analysis, or the mathematics involved in probability or frequency calculations used to determine the likelihood that a defendant's DNA is the same as other DNA found at a crime scene. *See State v. Hummert*, 188 Ariz. 119, 122, 933 P.2d 1187, 1190 (1997).

profiles matched at eleven loci, and another pair matched at twelve.

¶13 Experts for both parties agreed that the standard method of computing the possibility of random matches of DNA among a general population was generally known as the "Product Rule."[4] Arizona has recognized that the relevant scientific community has accepted the use of the Product Rule as a proper method to calculate the probability that a defendant's DNA is the same as DNA taken from a crime scene. *State v. Davolt*, 207 Ariz. 191, 209-10, ¶ 68, 84 P.3d 456, 474-75 (2004); *Hummert*, 188 Ariz. at 124-25, 933 P.2d at 1192-93; *see State v. Johnson*, 186 Ariz. 329, 335, 922 P.2d 294, 300 (1996) (modified ceiling method); *State v. Marshall*, 193 Ariz. 547, 551-52, ¶ 11, 975 P.2d 137, 141-42 (App. 1998).

¶14 Deluca's expert, Dr. Laurence Mueller ("Dr. Mueller"), however, focused almost exclusively on his use of the information from the DNA database to conduct new research into the reliability of the Product Rule. He acknowledged that any new research he conducted had to be peer reviewed before the

[4] "The product rule is often described as simple multiplication of the frequency of the occurrence of two alleles in the relevant population. For example, if when looking at one loci the profiles match and one allele is found in ten percent of the population and the other is found in fifty percent of the population, then the probability of a coincidental match is the product of the two frequencies." *Hummert*, 188 Ariz. at 122 n.3, 933 P.2d at 1190 n.3.

results could be published. He also acknowledged that he wanted access to the DPS database so that he could conduct new studies to determine the validity of the Product Rule. In fact, on redirect examination, he stated that the information from the DPS database would allow him the ability "to test the Product Rule" and "determine whether or not the Product Rule works."

¶15 The State's DNA expert, Dr. Ranajit Chakraborty ("Dr. Chakraborty"), testified that the DPS database does not meet the population requirement to make calculations based on the Product Rule. He testified that the Product Rule is violated if the population database used to make the calculations includes relatives, and there was no dispute that the DPS database included relatives. There was also evidence that the database might contain duplicate profiles of the same person.

¶16 Dr. Chakraborty testified that the presence of relatives in a DNA database produces "deviation from the Hardy-Weinberg Equilibrium." *See Johnson*, 186 Ariz. at 332-33, 922 P.2d at 297-98 (discussing the Hardy-Weinberg Equilibrium). Our supreme court recognized that the Product Rule may not be used to make probability or frequency calculations where the database used is not in Hardy-Weinberg equilibrium. *Hummert*, 188 Ariz. at 122, 933 P.2d at 1190.

¶17 In resolving the issue, the trial court held that the Product Rule was generally accepted in the scientific community

and by courts under the standards identified in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and that the courtroom was not the proper forum to challenge the validity of the Product Rule. The court also found that the information from the DPS database was not relevant, and even if relevant, any probative value of the evidence outweighed its prejudicial effect because it would confuse the jury. Although Deluca filed a series of motions for reconsideration, the trial court did not reconsider the ruling.

¶18 At trial in this case, the jury heard Deluca's DNA expert criticize the statistical calculations of the State's DNA expert, as well as his criticisms of the Product Rule. The State's expert had determined that the DNA profile derived from the evidence found on the victim's fingernails, which was attributed to Deluca, would only match one in millions of people. Deluca's expert, Dr. Mueller, calculated that the DNA profile for some evidence found on the victim's fingernails would actually match one in 3790 people in the Caucasian population, for one sample, and one in 271 people for another. Dr. Mueller also testified that DNA matches at or below nine loci, as relied upon by the State, were not sufficient to identify a person as the contributor. The jury also heard testimony that within the DPS database there were pairs of matches at various numbers of loci.

B. Discussion

¶19 "[W]hether a criminal defendant is entitled to discover certain evidence is a matter within the trial court's discretion." *State v. Roberts*, 139 Ariz. 117, 120, 677 P.2d 280, 283 (App. 1983). A defendant is entitled to disclosure of evidence material to either guilt or punishment. *Brady*, 373 U.S. at 87. Evidence is material in a constitutional sense, however, only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)) (internal quotation marks omitted). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-10 (1976).

¶20 We find no error in the denial of Deluca's motion. Despite the competing testimony of the experts, the trial court determined that the information contained in the DPS database was not potentially exculpatory and irrelevant. The court heard testimony that the mere fact that profile matches existed in this type of offender database had no bearing on whether the Product Rule was a valid method of calculating statistical probabilities or frequencies of DNA matches in general

populations. The court heard testimony that it would be improper, if not impossible, to attempt to contest the validity of the Product Rule with a database that contained an unknown number of relatives, where the degree of relationship between those relatives was unknown, and where the ethnicity and complete genetic profile of each person in the database was unknown. The trial court also heard testimony that to use mathematical models to address the missing factors would be unreliable because the models could be adjusted to get whatever result was desired. Further, Deluca's expert acknowledged that the analysis he wished to conduct was "new," "novel," and "a start at doing these types of analyses" from a "new angle." The trial court correctly ruled that the courtroom is not the proper forum to challenge scientific theories already accepted within the scientific community with untested, new, novel, incomplete, and/or otherwise unproven theories.

¶21 Finally, the jurors heard testimony about the number of matches within the DPS database, and that despite the State's claims of statistical uniqueness, there existed a comparatively small database in which many pairs of DNA profiles matched each other. The jury also heard expert testimony that criticized the statistical calculations of the State's expert and were provided calculations to support the theory that the DNA evidence attributed to Deluca was not found in only one person in

millions, but could be found in one person in every few thousand or even a few hundred people. The jury was free to reject or otherwise discount the sufficiency of the DNA evidence that connected Deluca to the murder. Because there is nothing to indicate that the information within the DPS database would have been potentially exculpatory, or that production of any additional information from the DPS database would have otherwise affected the outcome of trial, the trial court did not abuse its discretion when it denied the motion to produce.

II. The Denial of the Motions for Mistrial

¶22 Deluca next asserts that the trial court erred when it denied two motions for mistrial. Deluca argues that a mistrial should have been granted after the State cross-examined two of Deluca's witnesses with information from the DPS database. Deluca also argues that it was impermissible to cross-examine witnesses with information that the State had not previously disclosed and that the cross-examination constituted prosecutorial misconduct. Deluca did not, however, raise the issue of prosecutorial misconduct below.

A. Background

¶23 Deluca made his first motion for mistrial after the testimony of his DNA expert. Deluca questioned Dr. Mueller about the matches of DNA profiles within the DPS database and then questioned him about the numbers of matches in the DPS

database at various numbers of loci. On cross-examination, the State asked Dr. Mueller if the DPS database was divided according to race, if the database contained relatives, and to address the number of recorded loci matches. Deluca moved for a mistrial and argued that it was unfair for the State to cross-examine Dr. Mueller with information contained in the DPS database that had not been previously disclosed. The motion was denied.

¶24 Deluca moved for mistrial a second time after the State's cross-examination of Randall Johnson ("Johnson"), the supervisor of the DPS DNA Database Unit. Deluca questioned Johnson about the existence of the DPS database and the number of partial matches within the database at various numbers of loci, as he had done with his expert, Dr. Mueller. On cross-examination, Johnson testified that the DPS database contained relatives, but information in the database alone would not allow one to determine whether the profile matches within the database were relatives. Johnson also testified that when a more discriminating DNA testing kit was used, none of the DNA profiles within the DPS database matched at nine loci. Deluca then moved for a mistrial, again arguing that the State utilized information from the DPS database that had not been previously disclosed. The trial court denied the motion. Deluca

unsuccessfully reasserted both motions for mistrial after closing argument.

B. Discussion

¶25 The failure to grant a motion for mistrial is error only if it was a clear abuse of discretion. *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995). The trial court's decision will be reversed only if it is "palpably improper and clearly injurious." *Id.* (citing *State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989) (internal quotation marks omitted), *aff'd* 497 U.S. 639 (1990)).

¶26 The failure to object to alleged prosecutorial misconduct at the time of trial waives the issue absent fundamental error. *State v. Wood*, 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994). "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Even if fundamental error has been established, a defendant must still demonstrate the error was prejudicial. *Id*. at ¶ 26. When reviewing prosecutorial misconduct claims, we focus 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).

¶27 We find no error. The scope of cross-examination is a matter left to the discretion of the trial court. *State v. Robinson*, 165 Ariz. 51, 57-58, 796 P.2d 853, 859-60 (1990). As the trial court noted, Arizona has "wide open" cross-examination, which means "cross-examination may extend to all matters covered by direct examination, and to any other matter within the knowledge of the witness having relevancy to the issues at the trial." *State v. Mincey*, 130 Ariz. 389, 405, 636 P.2d 637, 653 (1981) (quoting *State v. Gilreath*, 107 Ariz. 318, 320, 487 P.2d 385, 387 (1971)) (internal quotation marks omitted); Ariz. R. Evid. 611(b). The Rule is especially applicable to the cross-examination of expert witnesses. *See Slade v. Schneider*, 212 Ariz. 176, 180, ¶ 22, 129 P.3d 465, 469 (App. 2006); *Emergency Dynamics, Ltd. v. Superior Court (Mohave Emergency Physicians, Inc.)*, 182 Ariz. 32, 35, 932 P.2d 297, 300 (App. 1997). Finally, Arizona Rule of Criminal Procedure 15.1 did not require any additional disclosure by the State.

¶28 Dr. Mueller testified on direct examination regarding the existence of the DPS database and the number of DNA profiles that matched within the database. His testimony implied that the existence of these matches showed that the statistical calculations of the State's DNA expert were wrong. The State could, therefore, cross-examine him as to whether he knew if the database was divided by race and whether he knew if it contained

profiles from relatives. Because Dr. Mueller also testified regarding the number of nine loci matches in the database, the State could cross-examine him about whether he knew which nine of the thirteen-loci profiles matched. Consequently, there was nothing improper about the cross-examination of Dr. Mueller.

¶29 Similarly, Johnson testified on direct examination regarding the existence of the DPS database and the number of partial matches at various numbers of loci. This testimony also implied that the statistical calculations of the State's DNA expert were wrong. The State was free to cross-examine him about whether the database contained relatives, and whether it contained information which would permit identification of relatives within the database. Regarding the reference to the more discriminating DNA testing kit, again, Arizona recognizes wide-open cross-examination, especially of experts. Johnson and Dr. Mueller testified on direct examination regarding the number of matches in the DPS database at nine loci. It was not improper for the State to attempt to establish through cross-examination of Johnson that there may have actually been fewer or no matches. Thus, the trial court did not abuse its discretion when it denied the motions for mistrial.

III. Denial of the Motion to Dismiss

¶30 Deluca next contends that the trial court erred when it denied his motion to dismiss. He argues it was a violation of "fundamental fairness" to try him a fourth time after his first conviction was reversed and the subsequent two trials resulted in hung juries. The trial court found that there was no basis for dismissal and denied the motion.

¶31 We review the decision of whether to grant a motion to dismiss for abuse of discretion, *State v. Pecard*, 196 Ariz. 371, 376, ¶ 24, 998 P.2d 453, 458 (App. 1999), and here we find none. When a mistrial is granted because the jury is unable to reach a verdict, the defendant may be retried. *State v. Marks*, 113 Ariz. 71, 73, 546 P.2d 807, 809 (1976). "Under such circumstances jeopardy does not attach and there is no limit to the number of trials but the discretion of the court." *Id*. (quoting *State v. Woodring,* 95 Ariz. 84, 85-86, 386 P.2d 851, 852 (1963)) (internal quotation marks omitted); *see State v. Aguilar*, 217 Ariz. 235, 238, ¶ 10, 172 P.3d 423, 426 (App. 2007) ("When a defendant moves for a mistrial, the state may generally reprosecute unless the mistrial was the product of prosecutorial misconduct or judicial overreaching."). Here, there was no statutory or constitutional basis to prevent Deluca's retrials.

¶32 Moreover, Deluca's reliance on *State v. Huffman*, 222 Ariz. 416, 215 P.3d 390 (App. 2009), is unavailing. In *Huffman*,

the defendant was tried a third time after the first two trials resulted in hung juries. *Id.* at 418, ¶ 1, 215 P.3d at 392. Prior to the third trial, the defendant moved to dismiss in part on general grounds of due process and fundamental fairness. *Id*. at ¶ 8. We found that even where a subsequent retrial may not be barred by double jeopardy, retrial could conceivably be barred after balancing the interests of the State against the interests of the defendant pursuant to Arizona Rule of Criminal Procedure 16.6. *Id*. at 420-21, ¶¶ 10-13, 215 P.3d at 394-95. While we identified the factors considered by other jurisdictions to decide whether to dismiss after a mistrial, we found those factors were no different from the general balancing of interests required by Rule 16.6 when considering a motion to dismiss. *Id.* at 422, ¶ 15, 215 P.3d at 396. We further held that not only is a trial court not limited to any specific factors in its determination of whether to grant a motion to dismiss, the trial court is not required to identify any findings to support its ruling. *Id*. at 422-23, ¶¶ 15-18, 215 P.3d at 396-97. Finally, we stated that where a defendant seeks dismissal, and cites to relevant authority and the State responds, the appellate court "must assume" that the trial court considered the interests of justice after balancing the interests of the defendant against the interests of the State. *Id*. at 423, ¶ 18, 215 P.3d at 397. As a result, we found that

the trial court did not abuse its discretion when it denied the motion and allowed the defendant to be tried a third time. *Id.*

¶33 While *Huffman* recognized that dismissal could be required even where retrial is not barred by double jeopardy, it did not create any new law and did not overturn the trial court's Rule 16.6 balancing analysis. Moreover, because Deluca did not argue that his retrial was barred by double jeopardy,[5] the trial court did not abuse its discretion by refusing to grant the motion to dismiss.

IV. The Failure to Admit Evidence of Acts of Violence

¶34 At trial, Deluca argued that Brian Epstein ("Epstein") committed the murder. Epstein testified at a prior trial but died before this trial. Deluca asserts that the trial court erred when it precluded statements that Christine Randall ("Randall") allegedly made about acts of violence Epstein had committed.

¶35 Deluca offered the first series of statements allegedly made by Epstein through Randall. She testified that Epstein was a thief, wore sapper gloves, and was both capable of and had a reputation for violence. When Deluca asked Randall if Epstein ever told her about duct-taping people and robbing them, the trial court sustained the State's hearsay objection. When

[5] The Due Process Clause does not provide greater protection than the Double Jeopardy Clause. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 116 (2003).

Deluca asked Randall if Epstein ever told her about beating up people and/or committing home invasions, the court again sustained the State's hearsay objections. In a subsequent offer of proof, Deluca argued that Randall would testify that Epstein talked about duct-taping and robbing people, bragged about beating up people, and talked about committing home invasions. Deluca argued that these statements were admissible pursuant to Arizona Rule of Evidence 804(b)(3) as statements against interest. Randall, however, admitted during the offer of proof that Epstein never provided any specific information about the alleged incidents, that Epstein was a braggart, and that she did not know whether his statements were reliable. The trial court sustained the State's hearsay objection because there was nothing to corroborate the trustworthiness of the statements as required pursuant to Arizona Rule of Evidence 804(b)(3).

¶36 Deluca offered another series of statements allegedly made by Epstein through witness Kenny Butcher ("Butcher"). Butcher testified that Epstein was very aggressive, very violent, and wore sapper gloves. Although Deluca tried three times to ask Butcher if Epstein enjoyed hurting people, the court sustained each hearsay objection. In an offer of proof, Deluca argued that Butcher would testify that Epstein bragged about beating people with pool cues and pistols and that Epstein often carried a weapon. The trial court sustained the State's

hearsay objection noting there was nothing to corroborate Epstein's alleged statements.

¶37 "The trial court has considerable discretion in determining the relevance and admissibility of evidence, and we will not disturb its ruling absent a clear abuse of that discretion." *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). "[F]or a statement to be admissible under [Arizona Rule of Evidence 804(b)(3)], the declarant must be unavailable, the statement must be against the declarant's interest, and there must be corroborating circumstances that 'clearly indicate the trustworthiness of the exculpatory statement.'" *State v. Tankersley*, 191 Ariz. 359, 370, ¶ 45, 956 P.2d 486, 497 (1998) (internal quotation marks omitted); Ariz. R. Evid. 804(b)(3) ("A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.").

> The judge's inquiry [regarding the admissibility of evidence pursuant to Arizona Rule of Evidence 804(b)(3)] should be limited to the question of "whether evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true." If the judge determines that a reasonable person could conclude that the statement could be true, the evidence comes in for the jury's consideration.

State v. Lopez, 159 Ariz. 52, 54-55, 764 P.2d 1111, 1113-14 (1988) (quoting *State v. LaGrand*, 153 Ariz. 21, 28, 734 P.2d 563, 570 (1987)) (citation omitted).

¶38 We find no error. There was nothing to corroborate the trustworthiness of Epstein's alleged statements. There was no information regarding when the statements were made or the circumstances under which they were made, when the alleged acts identified in the statements occurred, or the circumstances surrounding those alleged acts. The witnesses offered nothing more than vague, generalized statements about Epstein's own vague, generalized statements. Further, Randall testified that Epstein was a braggart and she had no idea if his statements were reliable. Consequently, the trial court did not abuse its discretion when it sustained the hearsay objections to Epstein's alleged statements under these circumstances.

V. The Admission of DNA Evidence

¶39 Finally, Deluca contends that the trial court erred when it admitted DNA evidence obtained from clippings and/or scrapings taken from the victim's fingernails. Deluca argues that there was a smudge in a copy of a photograph of the filter paper that contained the clippings and scrapings, indicating an irregularity in the chain of custody, and the evidence was inadmissible. Deluca further argues that the smudge indicated

that the DNA evidence obtained from the clippings and/or scrapings could have been contaminated.

A. Background

¶40 The nail clippings and scrapings were obtained during the autopsy of the victim. During the autopsy, everyone in the room wore protective clothing; namely gowns, masks, head covers and gloves while the victim's nails were clipped and scraped.

¶41 The evidence was collected in a folded piece of filter paper pursuant to the medical examiner's office protocol. Everyone who came in contact with the filter paper wore gloves. After they were secured, the nail clippings, scrapings, and filter paper were sealed in an envelope and submitted for forensic examination.

¶42 After the evidence was examined, the clippings and scrapings were placed back on the filter paper and sent to a private laboratory for DNA testing. The private laboratory received the sealed package from the police department with the filter paper still folded around the clippings and scrapings. The package was opened; the items were cataloged and photographed. The smudge at issue appears in one of those photographs.

¶43 A witness testified that because nail clippings and scrapings are usually taken before the body is cleaned for the autopsy, it was possible that any blood on a decedent's hands

could transfer upon contact with another surface even a day after death.

¶44 Deluca objected to the admission of DNA tests conducted on the nails and scrapings by the private lab because the smudge on the filter paper had never been explained. Deluca argued that this was proof of an irregularity in the chain of custody and showed that the State had failed to establish a continuous chain of custody. The trial court overruled the objection and held that the presence of the smudge and/or any irregularity in the chain of custody went to the weight to be given the evidence and not its admissibility.

B. Discussion

¶45 We review a trial court's evidentiary rulings for a clear abuse of discretion, *Amaya-Ruiz*, 166 Ariz. at 167, 800 P.2d at 1275, and we find none. The sufficiency of an evidentiary foundation is governed by Arizona Rule of Evidence 901(a). *State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991). The Rule provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Ariz. R. Evid. 901(a). Furthermore, authentication based on a chain of custody need only show "continuity of possession" and need not disprove every possibility of tampering. *State v. McCray*, 218

Ariz. 252, 256, ¶ 9, 183 P.3d 503, 507 (2008) (quoting *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996)) (internal quotation marks omitted). To the extent evidence of the chain of custody may be incomplete or in conflict with other evidence, such "concerns go to the weight rather than the admissibility of the evidence." *Id*. at 257, ¶ 15, 183 P.3d at 508; *see State v. Morales*, 170 Ariz. 360, 365, 824 P.2d 756, 761 (App. 1991) (holding that any flaw in the chain of custody goes to weight, not admissibility). Likewise, the possibility that evidence might have been contaminated also goes to the weight of the evidence, not its admissibility. *State v. Gonzales*, 181 Ariz. 502, 511, 892 P.2d 838, 847 (1995). For these reasons, the trial court did not abuse its discretion when it admitted the DNA evidence obtained from the victim's fingernails.

CONCLUSION

¶46 Because we find no error, we affirm Deluca's conviction and sentence.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Judge

/s/
_____
PATRICIA A. OROZCO, Judge