DIVISION ONE
FILED: 06/21/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. BLAINE KYLE MCNEESE, Appellant.	)	1 CA-CR 10-0122 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-009402-001 DT

The Honorable Susan M. Brnovich, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

Michael S. Reeves — Phoenix
Attorney for Appellant

O R O Z C O, Judge

¶1 Defendant, Blaine Kyle McNeese, appeals from his convictions and sentences for theft, forgery, and identity

theft. He argues: (1) that the trial court abused its discretion when it permitted use of his "free talk" statements for impeachment purposes; (2) that the prosecutor engaged in misconduct when he referred to a "free talk agreement" in direct examination and closing argument; and (3) that the trial court erred in admitting a copy of a traffic citation into evidence after the State destroyed the original. For reasons stated below, we affirm.

FACTS[1] AND PROCEDURAL HISTORY

¶2 On September 30, 2003, Johnny Y. and Shlimon S.[2] arranged to meet with Joni Kylana, a limousine driver. Kylana was taking the victims to meet with his boss to discuss a possible business venture. Johnny and Shlimon met Kylana at a picnic a month earlier. Johnny had a total of $45,000 in cash in a plastic bag on his person. The money consisted of $40,000 that Johnny had raised from personal funds and loans from family members and $5,000 that Shlimon had contributed.

¶3 On route to meet with Kylana, Johnny noticed Kylana driving past him in the opposite lane of traffic while talking

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[1] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

[2] We use the first initial of the victims' last names to protect their privacy as victims. *State v. Maldonado*, 206 Ariz. 339, 341 n.1, ¶ 2, 78 P.3d 1060, 1062 n.1 (App. 2003).

on a telephone. Johnny executed a u-turn to follow him. Johnny then noticed Defendant driving an unmarked Crown Victoria police vehicle in the lane next to him. Defendant, who was also on the telephone at the time, looked at Johnny "funny," but Johnny thought nothing of it and kept driving to the appointed meeting spot.

¶4 Johnny and Shlimon met up with Kylana in a Walgreen's parking lot and transferred to Kylana's car so that they could ride in one car to his workplace. Shlimon sat in the front passenger seat, and Johnny sat in the back seat behind Shlimon. They travelled for a short while when Kylana made "a right turn on a smaller street," and Johnny noticed a police car behind them with its grille lights flashing. Defendant[3] was the driver of the police vehicle and initiated a traffic stop of Kylana's vehicle.

¶5 Defendant approached the driver's side window and made initial contact with Kylana. Defendant was not in uniform, but Johnny could see Defendant's badge and gun and it was "obvious" to him that Defendant was a police officer. Defendant stated that he was "with the Department of Public Safety" (DPS) and informed Kylana that he pulled him over because Kylana had "cut somebody off." He took Kylana's driver's license and went back

[3] Johnny identified Defendant at trial as the person who stopped them and took the money.

to his vehicle for a few minutes. When he returned, Defendant told Kylana, "You're on probation."

¶6 According to Johnny, Defendant then "started getting suspicious" and asked Kylana, "Where are you going?" Kylana replied that they were going to "[a] friend's house." According to Johnny, Kylana was "reacting extremely nervous" and not answering Defendant's questions clearly. Johnny was "shocked as to why [Kylana] was acting all weird" and told Kylana to "be honest." He had "no idea why [Kylana] was answering the questions that way."

¶7 Defendant next made contact with Johnny and Shlimon and took their identification in order to check them. It seemed to Johnny that Defendant was not gone long enough to do a background check. When Defendant returned he started asking if they had any drugs in the car because he smelled marijuana. Defendant then had Johnny and Shlimon get out of the vehicle so that he could search the car.

¶8 Defendant asked Kylana if there were any "large amounts of money or any drugs" in his car. Kylana said that there were not. Defendant looked through the glove compartment and the car's interior, found nothing, and again asked Kylana, "Do you have anything in the car?"

¶9 At that point, Johnny told Kylana in Assyrian, "Please tell him about the money." Johnny had placed the plastic bag of

money under a seat when Defendant had initiated the traffic stop, and he told Kylana where it was. Kylana finally told Defendant that there was "some money" in the car; but when Defendant asked him "[h]ow much," Kylana replied "[c]ouple thousand." Johnny spoke to Kylana in Assyrian again and stated, "Please tell him the truth . . . [h]e is going to find out." Kylana then told Defendant where the money was located, and Defendant seized the money, stating, "[t]his looks like 40 to 50,000, not [a] couple."

¶10 Defendant put the bag of money in the front seat of his vehicle and arrested and handcuffed Kylana. When Johnny told Defendant that it was all a "misunderstanding" and that they would be happy to go downtown and clear things up if he would give them a "citation for the money taken," Defendant started acting "pretty aggressive." Defendant told Johnny and Shlimon, "Don't go down there," because Kylana was "on probation" and "in big trouble." He advised them to just take Kylana's car and leave and that Kylana would "go through the process" and contact them when he got out.

¶11 Johnny and Shlimon were "extremely confused." After Defendant left with Kylana, they contacted an attorney's office and spoke to a paralegal who suggested they go downtown to the jail and bail Kylana out. When they went to the jail, however they were informed that Kylana had never been booked. Several

hours after the incident, Kylana called asking them to pick him up at his "probation officer's office." When they got to the location, Kylana was waiting for them out on the street.

¶12 Johnny asked Kylana for "the ticket for the money" and Kylana gave him the traffic citation the Defendant had given him. The citation, which was issued to Kylana, stated the issuing officer's name as "C. Johnson" and his badge number. Johnny and Shlimon became suspicious of Kylana and asked him to take a polygraph test, which Kylana refused to do. The polygraph examiner the two contacted, a former Sheriff's Department deputy, advised the victims to contact the Internal Affairs Unit of DPS, and referred them to Sergeant R. A. (Sergeant A.) in that unit.

¶13 On October 20, 2003, Sergeant A. initiated an investigation into the incident. He identified the name and badge number on the citation as belonging to Officer C.J., a motorcycle officer assigned to the Metro Phoenix area. During his investigation, Sergeant A. determined that citation books assigned to particular officers, if misplaced or inadvertently left behind in processing rooms, often, for reasons of convenience, were then used by other officers to issue citations. Sergeant A. discovered that the citation issued to Kylana was never filed with any court in Maricopa County. Sergeant A. also was unable to locate an impound report

concerning the cash that was seized. Sergeant A. began to suspect that Officer C.J. was not actually the issuing officer. He made a photocopy of the citation and submitted the original to the crime lab for fingerprint analysis.[4]

¶14 Sergeant A. and his superiors ultimately determined that "there was probably some criminal activity involved." The Internal Affairs investigation was put on administrative hold; and, in 2004, the case was referred to Officer T.R. (Officer R.) for criminal investigation. Officer R. obtained cell phone records for Kylana and Defendant and discovered that the two had called each other seventy-nine times between July 2003 and October 2003, with sixteen of those calls occurring on the date of the crime. He was also able to confirm that Defendant, who was an injured DPS motorcycle officer at the time,[5] had been on "light duty" on September 30, 2003, driving an unmarked police vehicle similar to the one that stopped Kylana.

¶15 From Human Resources, Officer R. obtained three reports previously written by Defendant and submitted them along with a copy of the citation issued to Kylana to the DPS crime lab for handwriting analysis. A DPS crime lab forensic document

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[4] Defendant's fingerprints were not found on the citation.

[5] Defendant resigned from DPS on November 18, 2003.

examiner confirmed that Defendant wrote the citation issued to Kylana on September 30, 2003.

¶16 In January 2005, Detective V.A. (Detective A.) took over the investigation from Officer R. as case agent for the criminal investigation. On June 1, 2005, Detective A. and Detective L.L. (Detective L.) went to Defendant's home to confront him with the evidence they had against him and to enlist Defendant's aide as a potential witness. The discussion took place around the kitchen table. Detective A. particularly requested that Defendant's wife sit with them through the conversation because he believed she "could be considered a conspirator" as she also benefited from the monies taken and was therefore "a part of [the crime]." Detective A. indicated that Defendant could choose to speak with them or not, and Defendant opted to speak with them.

¶17 According to the detectives, during this conversation, Defendant "admitted to making the stop with . . . Kylana, that they had been involved with that, [and] that [Defendant] had obtained . . . part of the cash from that." Detective A. indicated that they knew that $45,000 was taken, and they allege that Defendant admitted that he "got $20,000 out of it." They further testified that Defendant also admitted that he and Kylana had "communicated via the cell phones" about "where they were at" and "that they would make the stop on the guy."

¶18 Detective A. alleged that he confronted Defendant about certain purchases they had learned that Defendant had made that appeared to be "above and beyond" the types of things that were affordable on a "normal highway patrolman salary." Detective A. specifically mentioned "a very large diamond ring his spouse was wearing at the time" and breast augmentation surgery his wife had received. The detectives alleged that Defendant admitted to the purchases by either nodding his head or confirming them.

¶19 The State charged Defendant with theft of cash with a value of $25,000 or more but less than $100,000, a Class two felony (Count 1); forgery, a Class four felony (Count 2); and taking the identity of another, a Class four felony (Count 3). A jury found Defendant guilty of all of the offenses, but found the value of the amount taken in Count 1 to be $3,000 or more but less than $25,000, thereby rendering the theft a Class three felony. The jury also found that the State had proven six aggravating factors.

¶20 On February 9, 2010, the trial court sentenced Defendant to aggravated terms of imprisonment of six years and three years respectively as to Counts one and three and to a presumptive term of imprisonment of two and one half years as to Count two. The court also ordered that the sentences imposed as to Counts two and three be served concurrently but consecutively

to the sentence imposed as to Count one. 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. (2003), 13-4031, and -4033 (2010).[6]

DISCUSSION

Use of Free Talk Statements

¶21 The record contains references to other crimes in which Defendant may have been involved and to several "free talks" in which Defendant participated. Prior to trial, Defendant moved to preclude any testimony regarding the following:

> 1. Any testimony elicited on direct examination of statements made by the Defendant during Free Talks conducted with the County Attorney's Office. The Defendant has participated in three free talks, including two in 2005 and one in September 2009. These statements may not be used against the Defendant during direct exam, only to impeach a witness after he testifies.

¶22 The trial court reviewed Defendant's motions *in limine* prior to initiating jury selection. At that time, the parties confirmed the court's "understanding" that they had agreed that

[6] We cite to the current version of applicable statutes where no revisions material to this decision have since occurred.

"any information provided by [Defendant] during free talks [would] not be admitted in the State's case in chief."

¶23 At trial, Detectives A. and L. testified regarding admissions they stated Defendant made during their "kitchen table" discussions with Defendant and his wife at their home.[7] Specifically, Detective A. testified that Defendant admitted receiving $20,000 for his participation in the theft and nodded in agreement when Detective A. told him that they had information that the money had been used for certain purchases, such as "quads," "a very large diamond ring" and his wife's cosmetic surgery, which were otherwise beyond the means of a "normal highway patrolman salary."

¶24 During a break in the State's case-in-chief, defense counsel informed the trial court that he intended to call Defendant's wife to testify about Defendant's income during the period at issue vis-à-vis the purchases. Counsel informed the court that he expected Defendant's wife to testify that she had sat-in on the kitchen table conversation but that "she didn't hear anything . . . [a]ll they did was schedule an appointment a week later." Counsel further informed the court that he had been told by the prosecutor that, if the wife testified as he expected; the State would then argue that he had "open[ed] the

[7] The parties did not agree to exclude statements made at this "kitchen table" conversation. Ariz. R. Evid. 801(d)(2).

door" to statements made by Defendant to police during the free talk. Counsel stated, "I obviously don't want to call her if it opens the door."

¶25 The State stated that it had not interviewed Defendant's wife yet and did not know what she was going to testify happened at the kitchen table. However, it argued that, if she were indeed to testify in a manner that challenged the Detectives' credibility, particularly concerning the purchase of specific items such as the ring, the State would be entitled to get into Defendant's "free talk" to "rehabilitate" its witnesses. According to the State, during one of the free talks, Defendant told officers, "Yeah, I bought my wife the ring with the money I ripped off with these things I did." The State's argument was that the wife would be "basically testifying for [Defendant]" and should not be allowed to do so in a way that misleads the jury.

¶26 The trial court deferred ruling on the issue until the State interviewed the wife over a break in the trial. After the break, the State informed the trial court that, after interviewing the wife, it still had the same concerns[8] and still

[8] For example, the State stated: "The issues I have are going to be some of the property that's discussed, like the car, like the diamond ring. Specifically the witness actually said she purchased the diamond ring with her own money, whereas [Defendant] told the police that's not true, that he purchased the ring with his money that he got through the funds that were

wished to use some of the statements Defendant had made in his free talk to rebut the wife's expected testimony, specifically in regard to the items purchased with the stolen funds.[9]

¶27 When the trial court announced that it was inclined to permit the State to cross-examine Defendant's wife *only* on those matters about which she testified on direct examination, the following exchange took place:

> [Defense Counsel]: Right, and that's kind of what I talked with [the State] about, is that if I ask her these specific issues, I completely understand. What I don't want it to be is: Well, isn't it true that [Defendant] told the police that he got $20,000. She has no idea about that. . . .
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> The Court: She may say that. I don't know anything about that.
>
> [Defense Counsel]: Okay.
>
> The Court: I think it's fair game.
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> [Defense Counsel]: I don't know I'm -- I'll make -- okay. I just don't -- I don't know the parameters about how far it opens the door, so to speak. I think I'm just. . . .

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actually taken. So I think if we go into some of the property and some of the financial stuff, it's really going to necessitate, in order to effectively cross-examine the witness to get to the truth of the matter, going into some of the free talk information material."

[9] If the wife testified that she had bought the diamond ring with her own money, for example, the State informed the court that he anticipated that his question "would be something like: . . . are you aware that your husband told the police that he purchased the ring with his own money, and he purchased it with money that he used when he took things from people that didn't belong to him?"

> The Court: I don't think for that particular issue, I don't think it would open the door for anything other than him to say: Well, isn't it true that . . . [Defendant] told the police that it came from -- I don't know what he said. One question essentially. She could say yes or no.
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> [Defense Counsel]: Okay. I don't -- all right.
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> The Court: I don't see that it goes much further than that.
>
> [Defense Counsel]: Okay. That's fine. That's all I'm asking to do.
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> [Prosecutor]: It will necessitate predecessor questions: Are you aware that he agreed to talk to the police? You're aware that he went down and talked to the police? And are you aware that he said . . . So they're going to know that there's another interview that was conducted that they're not hearing the totality, I suppose.
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> The Court: That's fine, yeah.

¶28 When trial resumed the State proceeded to call its last witness, Detective L. to the stand. Detective L. confirmed that he had been present at the kitchen table conversation with Detective A. on June 1st; that they had confronted Defendant with the information they had about the September 30th incident, and Defendant admitted he conducted a fake traffic stop. Detective L. testified that Defendant also admitted to receiving a telephone call from Kylana on September 30 making arrangements

for the traffic stop and that he had received $20,000 from Kylana as his share of the monies taken from the car.

¶29 Once the State rested, defense counsel proceeded to call Defendant's wife to the stand. She testified that she had been present during the kitchen table interview but that she had been "so out of it" and so "upset" that she "[didn't] remember too much about" whether or not Defendant was asked questions. She testified that, however, she did "know that [the officers] were saying, you know: Come down. We will do a free talk with you. Come, you know, come down with me. We'll do a free talk, and just kind of doing that. That's pretty much all I remember them saying."

¶30 Defendant's wife also testified about the couple's sources of income at the time, which included contributions from the 100 Club, worker's compensation payments to Defendant, tax refunds, funds derived from the sale of their house, and her own salary. She confirmed that in 2003-2004 the couple purchased items such as new rims for her GMC Yukon, a new television set, and her cosmetic surgery. She also confirmed that they had made several trips to San Diego with their children and also upgraded her diamond ring. She maintained that most of the purchases were made with money from their tax returns, but that she made most of the payments for upgrading her diamond ring with cash from her earnings.

¶31 Before the State began its cross-examination of the wife, defense counsel asked to approach the bench; and the following conversation took place:

> [Defense Counsel]: Your Honor, I tried to be very -- I mean, I really didn't go into --
>
> [Prosecutor]: No, I think - - I think on the individual things, on the ring and the pieces of property and maybe that he agreed to go down and do a free talk, but I don't think it opened the door to everything coming in.
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> The Court: No.

¶32 During cross-examination, Defendant's wife testified that she was only working part-time during the period at issue, that she and Defendant kept separate bank accounts, and that she really was not aware of how much money came into the household because Defendant "took care of all that." She confirmed that she made the payments to upgrade her ring.

¶33 Regarding her memory of the kitchen table conversation, Defendant's wife stated that it was "very possible" that Defendant had "made statements to those police officers that day" that she did not hear because she had become so upset during the conversation and she was distracted and not "paying 100 percent attention." She volunteered that "what was said was that he would go down the next day or the day after and go do a free talk and they would talk about everything . . . in depth." She agreed that it was "very possible" that Defendant

had given police some additional information when he went to the police station but that she did not know "what was said, what was done."

¶34 The State later questioned Defendant's wife "regarding some of the property again." When the prosecutor asked her if it would surprise her "if the Defendant told the police that he had purchased [the] ring with his money," she replied, "[i]t wouldn't surprise me, no." The State then asked if it would surprise her to know that Defendant had told the police that he had paid for her cosmetic surgery "with money that he received illegally." She responded that it would not because "our tax money is what paid for it[,] [s]o tax money comes in, it's ours, and we purchase whatever."

¶35 Defendant's wife consistently maintained that she did not recall the police talking to Defendant about specific items such as the ring or her cosmetic surgery during the kitchen table conversation. She testified that she specifically recalled that they had *not* discussed her cosmetic surgery with the detectives on June 1 because she and Defendant had not told anyone about it, except friends, and because Defendant would never have brought the subject up "with three men around me." When the State asked her if it would surprise her to learn that a police report indicated that he had mentioned the cosmetic surgery to police at a later time, she stated that it would not

surprise her but that Defendant had not mentioned anything about it on June 1.

¶36 On appeal, Defendant argues that the trial court committed reversible error when it permitted the State to use the statements he made to police in a free talk to impeach his wife's testimony.[10] We review a trial court's ruling regarding the admissibility of evidence for an abuse of discretion. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42, 140 P.3d 899, 912 (2006). Absent a clear abuse of discretion, and resulting prejudice to the defendant, this Court will not overturn a trial court's decision on whether or not to admit evidence. *State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997); Ariz. R. Evid. 401, 402, 403. A defendant has been prejudiced if it appears that he has been deprived of a substantial right. *State v. Patterson*, 203 Ariz. 513, 514, ¶ 5, 56 P.3d 1097, 1098 (App. 2002).

¶37 Defendant contends that, because *he* did not testify, *he* did not violate the terms of his free talk agreement, and the State therefore was not entitled to "reference the free talk

[10] Defendant also states that his state and federal constitutional rights were violated in the heading for this issue in his opening brief, however he fails to provide citation to any authority or argument. He has therefore abandoned these claims. *See State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) (failure to present significant argument supported by authority in opening briefs constitutes abandonment and waiver of claim).

information and use the same as impeachment" through his wife. The State responds that, if error occurred, it was "invited error" to which defense counsel "opened the door" when, despite the numerous bench conferences, counsel nonetheless questioned the wife about the acquisition of specific items of property and whether Defendant "said anything [about those acquisitions] during the kitchen table talk." As a result, the State maintains that we need not review Defendant's claim even for fundamental error. We disagree.

¶38 We first address the State's contention that defense counsel "opened the door" to Defendant's free talk statements by specifically questioning Defendant's wife about the source of the funds used to purchase certain items and about what Defendant may or may not have said at their kitchen table conversation. To the extent that the wife testified that she had no specific memory of what Defendant said about the purchases during the kitchen table conversation, it is difficult to perceive how the State was justified in impeaching her rendition of the interview and/or attempting to rehabilitate the credibility of Detective A.'s and Detective L.'s version by using later statements of Defendant to which his wife admittedly was not privy. While Defendant might rightly have been impeached with his prior free talk statements had he in fact taken the stand and testified inconsistently, *see* Ariz. R. Evid.

801(d)(2), the use of those statements to impeach his *wife's* testimony was inappropriate in this case. *See, e.g., State v. Armstrong*, 208 Ariz. 345, 354, ¶ 43, 93 P.3d 1061, 1070 (2004) (copies of witness's "free talk" statements made available to counsel for cross-examination of that witness, in part, precluded a finding of prejudice to defendant).

¶39 Nor were Defendant's free talk statements appropriate to impeach his wife's conflicting testimony that she personally paid for the upgrade to her ring. *See id*. Moreover, the record shows that the State had available to it other means of undermining the wife's testimony. Thus, both Detective A. and Detective L. testified in rebuttal that, contrary to her testimony, Defendant's wife was not "crying uncontrollably" or "upset" during their kitchen table conversation. Detective A. also testified that he had specifically asked Defendant about certain items during that conversation, including the ring, and that Defendant indicated that he paid for those items with "ill-gotten gains."

¶40 Furthermore, the record shows that defense counsel seems to have attempted to argue that Defendant's free talk statements were inappropriate for impeaching his wife. The record also shows that the trial court initially ruled that his

free talk statements were precluded during direct examination of Defendant.[11]

¶41 We next address the State's argument that the error that occurred was "invited" because Defendant later acquiesced to the State's use of his free talk statements for a limited purpose. In *State v. Logan*, our supreme court found that "invited" error occurs when the claimed error is the result of a party's "invitation and request." 200 Ariz. 564, 565, ¶ 8, 30 P.3d 631, 632 (2001). That is because the stated aim of the invited error doctrine is "to police strategic gamesmanship by parties who would inject error into a proceeding in the hope of profiting from the error on appeal." *State v. Lucero*, 223 Ariz. 129, 135, ¶ 17, 220 P.3d 249, 255 (App. 2009) (citing *Logan*, 200 Ariz. at 565-66, ¶¶ 8, 11, 30 P.3d at 632-33).

¶42 We have recognized that invited error does *not* occur when, for example, a Defendant simply stipulates to an error, unless it is also shown that the Defendant proposed the stipulation and "was thus the source of the error." *Lucero*, 223 Ariz. at 136, ¶ 22, 220 P.2d at 256. Invited error also does not occur when a defendant accepts a trial court ruling, even if the defendant seemingly does so "with uncharacteristic acquiescence and meekness." *Id.* (quotation marks and citation

[11] This ruling was correct. Defendant's free talk statements may be used *to impeach him* if he testified at trial but generally *not to impeach his wife or another witness*.

omitted). Our supreme court has restricted the application of this doctrine to those instances involving the "affirmative, independent action of a party requesting error rather than mild acquiescence in that error." *Id*. at 137, ¶ 24, 220 P.3d at 257. The key in deciding whether invited error occurred is to "look to the source of the error." *Id*. at 138, ¶ 30, 220 P.3d at 258.

¶43 It is clear from the record in this case that Defendant did not invite the error that occurred. Defense counsel moved to preclude any free talk statements prior to trial and also argued against their use with regard to Defendant's wife. He therefore did not affirmatively and independently propose that Defendant's free talk statements be used at trial in any fashion. *Id*. at 137, ¶ 24, 220 P.3d at 257. The most that can be said is that defense counsel here eventually acquiesced in the solution proposed by the prosecutor and granted by the trial court. We therefore need only review for fundamental error. *See id*. at 138, ¶ 31, 220 P.3d at 258 (where party merely acquiesced in error, appropriate sanction is to limit appellate review to fundamental error); *see also, State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (failure to object at trial limits scope of appellate review to fundamental error).

¶44 Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential

to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (quotation marks and citation omitted). To merit a reversal under this standard, a defendant must establish both that fundamental error exists and that it caused him prejudice in his case. *Id*. at ¶ 20, 115 P.3d at 607.

¶45 It was error for the trial court to permit use of Defendant's free talk statements even in the limited fashion it did here. However, we find the error does not constitute fundamental error. Defendant argues that the State's use of his "free talk" was so "pervasive" that it "permeated" all of the proceedings and deprived him of a fair trial. We disagree.

¶46 During direct examination, Defendant's wife independently volunteered the fact that the officers had spoken with Defendant about a possible free talk during their kitchen table conversation. On cross-examination, when the State asked her if it was "possible" that Defendant had made statements about his use of the money at the kitchen table talk that she had not heard, she responded that it was "very possible" but then also independently volunteered the information that "one of the things that was said [at the kitchen table] was he would go down the next day or the day after and do a free talk and they would talk about everything." The State then asked Defendant's

wife if Defendant went to speak with officers at the police station at some point after the kitchen table discussion.[12] She confirmed that Defendant had spoken with officers at the station, but that she did not know what was said. The State also asked her if she knew what a "free talk" was, and she responded that she did not know how it worked, but "assumed" that it was to "talk to him and not use what was said against him." That appears to be the extent of the "free talk" references during cross-examination. None of the discussion referred to what Defendant actually said during the free talk.[13]

¶47 Thus, contrary to Defendant's arguments on appeal, the references to statements made by Defendant during his free talks did not so permeate the trial that they resulted in fundamental error in this case. Defendant therefore fails to establish that reversal is required on this basis. *Id.* at ¶ 20, 115 P.3d at 607.

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[12] On rebuttal, Detective A. confirmed that Defendant had participated in a free talk after the kitchen table conversation, but not what Defendant said during the talk.

[13] The State then went on to challenge the wife's recollection of the kitchen table conversation. In challenging her testimony that she did not recall any discussion of her cosmetic surgery, the State asked if it would "surprise" her to learn that "it was in the police report that [Defendant] did in fact say that." This allusion to a "police report" could have been to Detective A.'s report concerning the kitchen table talk and does not necessarily indicate a reference to any statements in a free talk.

¶48 The one statement that the State concedes it improperly derived from the free talk concerned Defendant's reasons for resigning from DPS. In her direct testimony, Defendant's wife stated that the reason Defendant had resigned from DPS was due to the fact that he would have been relegated to a desk job if he returned to work because of his injuries. During cross-examination, the State asked her if it would "surprise" her to learn that he told the police that he resigned because he "did not want to embarrass the department or his father because he had stepped in it so deep." Defense counsel objected because it appeared that the State was reading from the free talk transcript and his question was "going into the free talk" beyond what they had agreed to. The trial court overruled the objection, and Defendant's wife responded that it would "very much surprise [her]" because that was not her "understanding" and she did not believe he would say that.

¶49 On rebuttal, the State asked Detective A. whether Defendant gave him a different reason for resigning. Defense counsel again objected based on the "stipulation not to use the information from the free talk." This time, the trial court sustained counsel's objection, and Detective A. was not permitted to respond.

¶50 While we agree that the State's question was improper insofar as it attempted to overstep the bounds set by the

parties and the trial court for even the limited use of the free talk statements, we find no fundamental error. The jury was instructed that "if the court sustained an objection to a lawyer's question, [the jury] must disregard it and any answer given." It was also instructed that "[w]hat the lawyers said [was] not evidence. Our supreme court has instructed that we must presume that the jury followed the trial court's instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). In any event, the trial court properly precluded Detective A.'s response to the prosecutor's question, ultimately leaving Defendant and the jurors with only the evidence of wife's response. Therefore, while we do not condone the prosecutor's conduct, in light of the trial court's ruling the error was not fundamental.

¶51 Finally, reversal is not required as Defendant cannot establish prejudice given the overwhelming evidence against him at trial. The victim identified Defendant as the individual who made the traffic stop and took the $45,000. An independent handwriting analysis established Defendant as the author of the false citation. Phone records established that Defendant and Kylana were in communication shortly before the traffic stop, and, when ultimately confronted with the evidence against him by Detectives A. and L., Defendant admitted his involvement in the

crime with Kylana and his receipt of a portion of the stolen funds.

Prosecutorial Misconduct During Closing Argument

¶52 Defendant argues that the prosecutor also committed misconduct when he "read from the free talk in closing argument, including items clearly not used in trial." Prosecutorial misconduct occurs when the State places the prestige of the government behind its evidence or when the prosecutor suggests that information not presented to the jury supports the evidence. *State v. Newell*, 212 Ariz. 389, 402, ¶ 62, 132 P.3d 833, 846 (2006). This Court will reverse a conviction because of prosecutorial misconduct when there is misconduct by the prosecutor and a "reasonable likelihood . . . that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *State v. Anderson,* 210 Ariz. 327, 340, ¶ 45, 111 P.3d 369, 382 (2005).

¶53 To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that: "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *State v. Gallardo*, 225 Ariz. 560, 568, ¶ 34, 242 P.3d 159, 167 (2010) (citation omitted). Thus, the simple fact that a prosecutor makes improper remarks does not require reversal unless, under the

circumstances of the particular case, the jury was "probably influenced" by those remarks. *Moody*, 208 Ariz. at 460, ¶ 151, 94 P.3d at 1155.

¶54 The State argues that Defendant did not raise his claims of prosecutorial misconduct before the trial court and that he therefore has waived relief on this issue unless he can prove that fundamental error occurred and that he was prejudiced. We agree. *Henderson*, 210 Ariz. at 567, ¶¶ 19-20, 115 P.3d at 607.

¶55 The specific portion of the State's closing argument Defendant cites as misconduct is the following:

> [Prosecutor]: [Defendant] said: You know what, I know this Joni Kylana person verified by records. I was involved with him. I was involved with this guy Stewart Younan, and the two of them [knew] each other, and I got in with these guys and I agreed to help him out. I [knew] there was going to be large amounts of cash –- I knew what was going to go down. I didn't know when it was going to go down, but basically Joni called me this particular day, and I agreed to pull these guys over. It was like 24th Drive and Glendale. I did a traffic stop.

¶56 Defense Counsel objected by stating, "closing not in evidence [sic]" and "stating evidence that was not introduced during the trial." The trial court overruled Defendant's objections. On appeal, Defendant contends that these statements were derived from information in the free talks and were rendered "[e]ven more egregious" by the fact that the State was

"reading from the free talk"[14] while making them. However, nothing in the record before us verifies Defendant's contention. If in fact the State was reading from the free talk agreement during his closing argument, Defendant never specifically brought that fact to the trial court's attention as misconduct that contributed to the basis for his objections. Furthermore, we see nothing in the record that indicates that the jury had an awareness of what, if anything, the State may have been consulting or referring to at the time it made these statements. Therefore, the objections, as stated, were not sufficient to preserve the issue of prosecutorial misconduct based on improper use of free talk statements for our review. Objection to admission of evidence on one ground will not preserve other issues relating to admission on other grounds. *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993).

¶57 The objected-to portion of the State's argument was prefaced by the State's reference to Defendant's admissions during the kitchen table conversation. At most, the objectionable statements appear to be the State's somewhat overzealous characterization of Defendant's admissions to Detectives A. and L. as well as to some of the other evidence presented at trial, such as the phone records linking Defendant

[14] Defendant has not provided a copy of any free talk transcripts in the record on appeal.

to Kylana in setting up the traffic stop.[15] Prosecutors are afforded "wide latitude" in presenting their closing arguments to a jury. *State v. Morris*, 215 Ariz. 324, 336, ¶ 51, 160 P.3d 203, 215 (2007). The trial court seems also to have viewed the prosecutor's comments in this light, because, in response to Defendant's objections, it considered it appropriate to simply remind the jury of its instructions that the arguments of counsel were not evidence and that the jurors were to rely on their own memories of what was actually said. This was a wise and helpful admonition. Furthermore, based on the evidence, we do not believe that the jury would have viewed the particular statements as necessarily referencing Defendant's free talk discussions. *See Moody*, 208 Ariz. at 459-60, ¶ 149, 94 P.3d at 1154-55 (reviewing court should not lightly infer prosecutor intends ambiguous remark to have most damaging meaning or that

[15] The prosecutor's statement that strays farthest from the mark is, "I was involved with this guy Stewart Younan." There was no evidence at trial that Defendant directly acknowledged his involvement with Younan. However, Defendant's wife testified that she did not like one of Defendant's friends nicknamed "Roscoe;" that he "did not sit well" with her. She also testified that, despite the fact that she specifically forbade Defendant from allowing "Roscoe," whose real name was "Stewart," into their home with their children, Defendant continued to "hang out" with him elsewhere. The evidence at trial later established that "Roscoe" was actually "Stewart Younan" and a cousin of Kylana's. Thus, while perhaps an overstatement, we do not find that the State's statement amounted to misconduct or would necessarily have been interpreted as alluding to matters outside the evidence at trial.

jury sitting through lengthy exhortation will draw most damaging interpretation from "plethora" of interpretations).

¶58 The prosecutor's closing statements in this case did not necessarily reference Defendant's free talk. Therefore, we cannot find that they impermissibly drew the jury's attention to matters outside the record in this case, as Defendant contends.[16] Therefore Defendant has failed to prove that error, let alone fundamental error, occurred. Furthermore, even if we were to consider these statements to have been erroneously permitted, in

[16] The one instance of prosecutorial misconduct that did occur in closing argument is the State's reference to Defendant's conversation about his resignation that took place with Detective A. "after the day in the kitchen." The State told the jury that they had "heard about the conversation today through [Detective A.]" and then went on to say that Defendant had admitted in that conversation to resigning because "this stuff was hitting the fan" and he did not wish to embarrass either the department or his father, who was also a DPS officer. This argument was in direct contradiction of the trial court's ruling sustaining Defendant's objection when the State tried to elicit that very testimony from Detective A. in rebuttal. We also note that Defendant did not object to these statements during the State's closing argument or ask that they be stricken in light of the earlier ruling sustaining his objection. Viewed in the best light, the State may simply have forgotten the outcome of the rebuttal testimony; viewed in a less favorable light, the prosecutor willfully injected information that was not a part of the evidence and that the trial court had specifically excluded. While extremely troubling, we do not find that the clearly improper comments, even if the product of misconduct, were so serious that they affected Defendant's right to a fair trial under the circumstance of this case. *Newell*, 212 Ariz. at 403, ¶ 67, 132 P.3d at 847. We also are mindful of the fact that the jury, following the court's instructions as it must, would have relied on its own memory of events at trial, contrary to the State's argument. *See LeBlanc*, 186 Ariz. at 439, 924 P.2d at 443.

light of the overwhelming evidence of guilt at trial as stated above, Defendant has not demonstrated that the prosecutor's statements caused him prejudice that deprived him of a fair trial. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

Admission of Citation

¶59 Testimony at trial established that the original handwritten citation issued by Defendant was destroyed by the chemicals employed in the process of trying to obtain fingerprints from it. The original, on which the handwriting had been obliterated by the chemical process, was nonetheless admitted at trial as Exhibit 1. A copy of the original citation, Exhibit 2, was not admitted into evidence but was used during the State's case-in-chief. Exhibit 14, a copy of the original citation that had been scanned by DPS Forensic Document Analyst A.K. (Analyst K.) and used by him to analyze the handwriting that identified Defendant as the author of the citation, was admitted into evidence.

¶60 At trial, Defendant objected to the admission of Exhibit 14 because (1) it was not an original, (2) it was disclosed late, and (3) it contained Analyst K.'s markings.[17]

[17] Defendant appears to have argued that the markings were "scientific in nature" and therefore that admission of Exhibit 14 was improper because the jury would rely on Analyst K.'s markings in their analysis of the evidence rather than making their own comparison of the writing on the original citation and the writing contained in the samples of Defendant's handwriting.

Defendant also objected to admission of Exhibit 1 based on "foundation." The trial court admitted Exhibit 14 and Exhibit 1 over Defendant's objections.

¶61 On appeal, Defendant argues that the trial court erred in permitting the State to present the photocopy of the original citation to the jury after it destroyed the original. Defendant cites neither to the record nor to the specific exhibit to which he refers, but we presume it to be Exhibit 2. He also argues that the court erred in admitting the photocopy of the citation used by Analyst K., which, again, without a specific citation by Defendant, we presume to be Exhibit 14. Defendant makes the generalized argument that it was error for the court to admit "copies" of the citation because the original was "destroyed" by the State and because "a genuine question" of "authenticity" was raised about the original. Defendant provides no authority for any of his generalized arguments.

¶62 We review a trial court's rulings concerning the admission or exclusion of evidence for an abuse of discretion. *State v. Tankersley*, 191 Ariz. 359, 369, 956 P.2d 486, 496 (1998), *abrogated on other grounds by State v. Machado*, 226 Ariz. 281, ___, ¶¶ 11-16, 246 P.3d 632, 634-35 (2011). We will not disturb a trial court's ruling concerning the relevance and admissibility of evidence absent a clear abuse of its

considerable discretion. *State v. Alatorre*, 191 Ariz. 208, 211, ¶ 7, 953 P.2d 1261, 1264 (App. 1998).

¶63 Our rules of evidence provide that duplicates are admissible to the same extent as the original unless a "genuine question" is raised as to the authenticity of the original or it would be "unfair" under the circumstances to submit the duplicate. Ariz. R. Evid. 1003. Our review of the record confirms that the State presented sufficient evidence as to the authenticity of Exhibit 1, and sufficient evidence to support the fact that the photocopies, Exhibits 2 and 14, were copies of that original citation. We find the trial court did not abuse its discretion in permitting either the use or admission of the original citation and the photocopies.

CONCLUSION

¶64 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/S/
_____
PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
_____
PATRICIA K. NORRIS, Presiding Judge

/S/
_____
JOHN C. GEMMILL, Judge