DIVISION ONE
FILED: 08/16/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 10-0643
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RUBEN ROMIE AGUILAR, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR20090210

The Honorable Michael R. Bluff, Judge
The Honorable Thomas B. Lindberg, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And William Scott Simon, Assistant Attorney General
Attorneys for Appellee

David Goldberg — Fort Collins, CO
Attorney for Appellant

W I N T H R O P, Chief Judge

¶1 Ruben Romie Aguilar was convicted by a jury of sexual assault, a class 2 felony; kidnapping, a class 2 felony;

robbery, a class 4 felony; aggravated assault, a class 4 felony; aggravated assault, a class 6 felony; identity theft, a class 4 felony; and theft of a credit card, a class 5 felony. The trial court sentenced Aguilar to concurrent terms of imprisonment, the longest being eighteen years on the sexual assault count.

¶2 On appeal, Aguilar argues that the trial court erred by admitting hearsay testimony, limiting his cross-examination of the victim, denying his motions for mistrial, and using improper aggravating factors in imposing sentence. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 The victim was removing items from the trunk of her vehicle in front of her older daughter's home sometime after midnight on July 27, 2008, when a man pulled up next to her in a silver vehicle. The man, who the victim identified at trial as Aguilar, exited his vehicle, and as the victim turned to go back inside the home, he punched her in the face, fracturing her nose and knocking her to the ground. While she was on the ground, the man continued to punch her and grabbed and ripped her underwear. He then ordered the victim into his vehicle and commenced driving out of town.

¶4 Once outside of town, the man stopped at a turnout and sexually assaulted the victim. Afterwards, the man ordered the

victim out of the vehicle. The victim attempted to take her purse with her, but the man ordered her to leave it. After the man drove away, the victim walked to a nearby house, where she called the police.

¶5 A sexual assault exam of the victim revealed that she suffered multiple injuries in addition to the fractured nose, including trauma and bruising to her face, arms, and genital area. When questioned while being treated for her injuries, the victim stated that she did not know the man who attacked her. Later, she told the police that she had seen the man with her younger daughter while at a bar earlier in the evening. Aguilar was the man who had been with the victim's daughter that evening, and his picture was included in a photographic line-up shown to the victim. The victim stated that Aguilar's picture was one of three that looked similar to the man who attacked her, but could not make a positive identification.

¶6 When the victim contacted her bank to cancel the credit and debit cards that had been in her purse, she was informed that one of her cards had been used several hours after the attack to purchase gas at a convenience store. Video from the store's surveillance camera showed a small silver vehicle driving up and stopping at the gas pumps on two occasions consistent with receipts documenting the unauthorized use of the

victim's card. The quality of video, however, was not sufficient to identify the driver.

¶7 Several months later, deoxyribonucleic acid ("DNA") testing linked semen collected from the victim during the sexual assault exam to Aguilar. Skin cells found on the victim's underwear were likewise linked to Aguilar. When arrested and questioned by the police, Aguilar admitted using the victim's debit card to purchase gas, claiming he found her purse on the floor of the bar, but denied knowledge of any sexual assault.[1]

¶8 Appellant timely appealed all his convictions. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).

DISCUSSION

A. Admission of Statements of Identification

¶9 Both of the victim's daughters were allowed to testify about statements made by their mother following the incident in which she identified her attacker as the man she saw with the younger daughter at the bar. Aguilar contends the trial court erred in admitting this testimony because it was inadmissible hearsay. *See* Ariz. R. Evid. ("Rule") 802 ("Hearsay is not

[1] At trial, Aguilar admitted he had sex with the victim earlier on the day in question, but contended such sexual activity was consensual and, in fact, initiated by the victim.

admissible except as provided by applicable constitutional provisions, statutes, or rules."). We review a trial court's ruling on the admissibility of evidence over a hearsay objection for abuse of discretion. *State v. Tucker*, 205 Ariz. 157, 165, ¶ 41, 68 P.3d 110, 118 (2003).

¶10 On appeal, the parties focus primarily on whether the daughters' testimony was admissible as prior consistent statements under Rule 801(d)(1)(B). Aguilar argues that the statements do not qualify as prior consistent statements because they were made after the victim had already told the police that her assailant was the man at the bar with her daughter, so the motive to fabricate had to arise before she spoke with either daughter. We need not decide whether the record supports admission of the statements as prior consistent statements under Rule 801(d)(1)(B), as claimed by the State, because we hold they were admissible under Rule 801(d)(1)(C) as statements of identification. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (stating that "[w]e are obliged to affirm the trial court's ruling if the result was legally correct for any reason").

¶11 Pursuant to Rule 801(d)(1)(C), a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement,

and the statement is . . . one of identification of a person made after perceiving the person." Aguilar contends this rule is limited to "official identifications to law enforcement or under similar circumstances insuring reliability." We disagree. Nothing in Rule 801(d)(1)(C) precludes its application to non-official extra-judicial identifications. *See United States v. Lopez*, 271 F.3d 472, 485 (3rd Cir. 2001) (construing Fed. R. Evid. 801(d)(1)(C), which mirrors the language set forth in the Arizona Rules of Evidence). Indeed, this exception to the rule against hearsay was applied by our supreme court in *State v. Finn*, 111 Ariz. 271, 277-78, 528 P.2d 615, 621-22 (1974), to uphold admission of testimony of a statement of identification by a lay witness in a non-law enforcement context.

¶12 Aguilar's further challenge to one of the statements, that the statement was inadmissible because it was made two weeks after the attack, goes to the weight of the evidence, not its admissibility. *See Lopez*, 271 F.3d at 485 (holding that concerns about conditions or circumstances of identification "that might bear on reliability are matters going to the weight of evidence, which can be addressed on cross-examination, and should not affect the admissibility of the statement"). There was no error by the trial court in admitting testimony by the daughters regarding their mother's statements of identification.

¶13 In conjunction with his hearsay claim, Aguilar argues in a footnote that the trial court also erred in allowing the daughters to testify regarding their belief in their mother's identification. Citing *State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73 (1986), and *State v. Moran*, 151 Ariz. 378, 728 P.2d 248 (1986), Aguilar asserts that this testimony was an improper and prejudicial comment on their mother's credibility. Direct testimony of belief in another witness's testimony is improper. *Lindsey*, 149 Ariz. at 474, 720 P.2d at 75; *see also* Ariz. R. Evid. 608(a) (evidence in form of opinion or reputation attacking or supporting credibility of a witness "may refer only to character for truthfulness or untruthfulness").

¶14 Although Aguilar objected to the daughters' testimony regarding their belief in their mother's identification, he did not do so on the basis that it was improper testimony regarding credibility. "Absent fundamental error, if evidence is objected to on one ground in the trial court and admitted over that objection, other grounds raised for the first time on appeal are waived." *State v. Moody*, 208 Ariz. 424, 455, ¶ 120, 94 P.3d 1119, 1150 (2004) (quoting *State v. Neal*, 143 Ariz. 93, 100, 692 P.2d 272, 279 (1984)). Aguilar does not argue that the error in the admission of testimony of belief in their mother's identification was fundamental. Thus, this claim of error is

waived. *State v. Moreno-Medrano*, 218 Ariz. 349, 354, ¶ 17, 185 P.3d 135, 140 (App. 2008) (citations omitted); *see also State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (holding that the failure to argue a claim usually constitutes abandonment and waiver of such claim (citations omitted)).

B. Limitation on Cross-Examination

¶15 Aguilar next argues that the trial court erred by limiting his cross-examination of the victim regarding her mental health condition and whether an undetermined amount of benzodiazepine found in her system after the assault affected her ability to recall or perceive the events in question. The trial court ruled such evidence to be irrelevant and subject to preclusion pursuant to Rule 403 of the Arizona Rules of Evidence. We review a trial court decision limiting the scope of cross-examination to determine whether the ruling unduly restricted "the defendant's ability to present information bearing on issues or the credibility of witnesses." *State v. Doody*, 187 Ariz. 363, 374, 930 P.2d 440, 451 (App. 1996). The trial court has "considerable discretion in determining the proper extent of cross-examination," and, unless there is a "clear showing of prejudice," we will not disturb its ruling. *Id.*

¶16 "The right of confrontation, which includes the right to cross-examine witnesses, is a fundamental right." *State v. Dunlap*, 187 Ariz. 441, 455, 930 P.2d 518, 532 (App. 1996) (citations omitted). The right of cross-examination, however, is not unlimited. *State v. Riggs*, 189 Ariz. 327, 333, 942 P.2d 1159, 1165 (1997); *see also State v. Fleming*, 117 Ariz. 122, 125-26, 571 P.2d 268, 271-72 (1977) (noting that the right to cross-examination "does not confer [] a license to run at large"). The trial court has wide latitude in imposing reasonable restrictions on cross-examination and may properly limit it "to the presentation of matters admissible under ordinary evidentiary rules, including relevance." *Dunlap*, 187 Ariz. at 333, 942 P.2d at 1165 (quoting *State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996)). The trial court's discretion includes "the power to protect witnesses against cross-examination that does little to impair credibility, but that may be invasive of their privacy." *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982).

¶17 Prior to trial, Aguilar moved to compel disclosure of the victim's psychiatric records based on information that the victim suffers from obsessive compulsive disorder, and was on disability for mental health concerns, and that blood tests from the sexual assault exam showed the presence of benzodiazepine.

The parties agreed to the trial court reviewing the victim's records *in camera* to determine whether they contained information that should be disclosed to the defense. Following review of the records, the trial court ruled that none were subject to disclosure and ordered them sealed.

¶18 Aguilar contends the trial court erred in precluding cross-examination of the victim regarding her mental health condition and requests that this court review the victim's psychiatric records to determine whether the trial court abused its discretion in denying his motion for disclosure. We have reviewed the victim's records and find no error by the trial court in ruling that the records are not subject to disclosure. Further, in the absence of any evidence that the victim's mental health concerns have any relevance to the issues at trial or the credibility of the victim, we find no abuse of discretion by the trial court in precluding cross-examination of the victim regarding her mental health. *See State v. Walton*, 159 Ariz. 571, 581-82, 769 P.2d 1017, 1027-28 (1989) (holding that evidence of witness's psychiatric history was properly excluded absent proof of witness's perception or memory being affected by illness).

¶19 Meanwhile, the State moved *in limine* to preclude evidence that the victim had benzodiazepine in her blood at the

time of the assault, arguing that because the level was never quantified, there was no evidence that the medication had any effect on her sobriety or ability to perceive. After a hearing, the trial court ruled that the effect of the benzodiazepine would be speculative in the absence of quantification, and precluded cross-examination regarding levels and effect of the medication as unduly prejudicial under Rule 403. The trial court further ruled, however, that Aguilar could present evidence regarding the presence of the medication in the victim's blood for purposes of impeaching a statement by the victim to medical personnel that she had not taken any medication the day of the assault.

¶20 There was no abuse of discretion by the trial court in ruling on the State's motion *in limine*. As the trial court correctly noted in its ruling, in the absence of quantification of the amount of benzodiazepine in the victim's system, evidence of its possible effect on the victim would be pure speculation. The trial court does not abuse its discretion in refusing to admit speculative and irrelevant evidence. *See, e.g., State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990).

¶21 Moreover, Aguilar failed to make an offer of proof regarding the evidence of the levels of benzodiazepine that he claims was improperly precluded from being presented through

cross-examination. *See* Ariz. R. Evid. 103(a)(2) (error may not be predicated on a ruling excluding evidence unless substance of evidence is shown by offer of proof or is otherwise apparent from context). The lack of an offer of proof prevents evaluation of whether the trial court "unfairly limited" cross-examination of a witness. *State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996). Mere speculation about possible answers that might be elicited is not sufficient to show prejudice. *Id.* On this record, we find no erroneous limitation on Aguilar's right to cross-examination.

C. Denial of Motions for Mistrial

¶22 Aguilar also argues that the trial court erred in denying his motions for mistrial. We review the denial of a motion for mistrial for an abuse of discretion. *State v. Nordstrom*, 200 Ariz. 229, 250, ¶ 67, 25 P.3d 717, 738 (2001). A mistrial "is the most dramatic remedy for trial error" and should be granted only when justice will otherwise be thwarted. *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983) (citation omitted). We will, therefore, reverse a trial court's decision to deny a mistrial only if a clear abuse of discretion is demonstrated. *State v. McCutcheon*, 162 Ariz. 54, 59, 781 P.2d 31, 36 (1989).

¶23 Prior to trial, Aguilar filed a motion *in limine* to have witnesses use the phrase "sexual assault" rather than the word "rape" when testifying, arguing that the word "rape" is inflammatory. The trial court denied the motion with respect to witness testimony, but requested that the State refer to the offense as "sexual assault" rather than "rape" when questioning witnesses and engaging in argument, unless the term was being used in conjunction with a witness's use of the term.

¶24 During trial, Aguilar moved for mistrials based on the prosecutor's use of the word "rape" on two occasions. The first instance occurred when the prosecutor was questioning Aguilar about why he did not tell the police he had consensual sex with the victim and asked: "Fair to say, you didn't want to come out and admit it because you knew you had raped her?" The second was during closing argument while the prosecutor was recounting the victim's testimony:

> And he reaches down under her skirt and tears out her underwear. Remember that fact because the State will come back and tell you or argue to you why certain things that Mr. Aguilar would like you to believe cannot physically happen.
>
> State argues, rips out her underwear, she says, Keep that thing away from me or Keep away from me. She thinks she's going to get raped right in the middle of the street in front of her daughter's house. Doesn't happen there. Where? The State argues to you [that] Ruben Aguilar gets

> scared when this plan is not going as he expected. Get in the car. She does.

The trial court denied the motions for mistrial, ruling that the prosecutor's use of the word "rape" did not deprive Aguilar of a fair trial.

¶25 Aguilar contends the trial court erred in refusing to grant a mistrial because these two instances of the use of the term "rape" constituted prejudicial prosecutorial misconduct. "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). In determining whether a prosecutor's remarks constitute misconduct sufficient to warrant a mistrial, we consider: (1) whether the remarks called the jury's attention to matters it should not be considering in reaching its decision; and (2) the probability of the jurors being influenced by the remarks. *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992), *overruled on other grounds by Nordstrom*, 200 Ariz. at 241, ¶ 25, 25 P.3d at 729 (citation omitted). In short, our "focus is on the fairness of the trial, not the culpability of the prosecutor." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993).

¶26 Assuming that the prosecutor's use of the word "rape" on the two occasions violated the pre-trial order, the trial court could nevertheless reasonably conclude that it did not deprive Aguilar of a fair trial. As the trial court observed in ruling on the original motion *in limine*, there is nothing about the word "rape" that makes it substantially more prejudicial than the phrase "sexual assault." Moreover, there were repeated references to the word "rape" throughout the trial from witnesses consistent with the pre-trial order prior to the prosecutor's first use of that term. Accordingly, the prosecutor did not put before the jury anything that was not otherwise present at trial. Under these circumstances, there is no reason to believe that the prosecutor's use of the term "rape" on the two isolated occasions in the seven-day trial unfairly prejudiced Aguilar or otherwise caused the jury to decide the issue of guilt on an improper basis. The trial court did not abuse its discretion in denying the motions for mistrial.

D. Imposition of Aggravated Sentence

¶27 At sentencing, the trial court found the following aggravating factors: (1) two prior felony convictions admitted by Aguilar while testifying; (2) physical harm to the victim; (3) emotional harm to the victim; (4) financial harm to the

victim; (5) the value of the property taken (several hundred dollars taken from the victim's purse); and (6) Aguilar's risk to the community based on his criminal history. The trial court further found as mitigating factors that Aguilar was employed and a hard worker, his age, his young family, and that he has several children. Balancing these aggravating and mitigating factors, the trial court concluded that a slightly aggravated sentence of eighteen years was appropriate on the sexual assault conviction together with concurrent presumptive terms of imprisonment on the other six convictions.

¶28 Aguilar contends the trial court erred in imposing the aggravated sentence on the sexual assault count. Specifically, Aguilar argues that the trial court double counted the financial loss factor, improperly considered an element of the aggravated assault count as an aggravator, and considered an aggravator lacking support in the record. Because Aguilar failed to raise this issue in the trial court, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (citations omitted). To obtain relief under this standard of review, Aguilar bears the burden of establishing both that fundamental error occurred and that the error caused him prejudice. *Id.* at ¶ 20.

¶29 Aguilar claims that the trial court double counted the victim's financial loss by finding an additional aggravating factor based on the large amount of money taken by Aguilar from the victim's purse. An aggravating circumstance may not be counted twice in weighing aggravating and mitigating factors. *State v. Tittle*, 147 Ariz. 339, 345, 710 P.2d 449, 455 (1985).

¶30 Financial harm to the victim and the value of property taken are each separate statutory aggravators. *See* A.R.S. § 13-701(D)(3), (9) (Supp. 2010).[2] In this case, as Aguilar stipulated at the restitution hearing, the victim suffered financial losses in addition to the loss of the large amount of cash taken from her purse. Accordingly, the trial court could properly find these two separate aggravators without basing them both on her loss of the cash. *See State v. Meador*, 132 Ariz. 343, 348, 645 P.2d 1257, 1262 (App. 1982) (noting that "an appellate court should be very hesitant to interfere with the trial court's discretion in sentencing as long as there is reasonable evidence in the record to substantiate the aggravating circumstances found by the trial court"). Further, because trial judges "are presumed to know the law and to apply it in making their decisions," we reject Aguilar's claim that

[2] Unless otherwise noted, we cite the current version of the applicable statutes when no revisions material to this decision have since occurred.

the trial court gave improper double weight to the money taken from the victim's purse when considering these two factors in balancing the aggravating and mitigating factors. *State v. Trostle*, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997) (quoting *Walton v. Arizona*, 497 U.S. 639, 653 (1990)).

¶31 We likewise find no merit to Aguilar's claim that the trial court improperly considered the harm to the victim in imposing the aggravated sentence. In describing the physical harm to the victim as an aggravating factor, the trial court referenced the victim's fractured nose. Aguilar argues that use of the fractured nose as an aggravator was error because it was the "serious physical injury" element that elevated the assault to aggravated assault. *See* A.R.S. § 13-1204(A)(1) (Supp. 2010). The flaw in Aguilar's argument is that the trial court did not aggravate the sentence on the aggravated assault charge, only the sentence on the sexual assault charge. Physical harm to the victim is not an element of sexual assault. A.R.S. § 13-1406(A) (2010). Moreover, in describing harm to the victim as an aggravating factor, the trial court specifically noted the many other physical injuries to the victim over and beyond the fractured nose. "Where the degree of the defendant's misconduct rises to a level beyond that which is merely necessary to establish an element of the underlying crime, the trial court

may consider such conduct as an aggravating factor." *State v. Germain*, 150 Ariz. 287, 290, 723 P.2d 105, 108 (App. 1986). There was no error by the trial court considering the physical harm to the victim in imposing the aggravated sentence on the sexual assault count.

¶32 Finally, Aguilar complains about the trial court's finding of "risk to the community based on prior criminal history" as an aggravating factor, arguing that it is not supported by the record. Aguilar's reliance on *State v. Romero*, 173 Ariz. 242, 841 P.2d 1050 (App. 1992), in arguing that prior convictions cannot support a finding of risk to the community is misplaced. In *Romero*, this court held that *arrests* are not sufficient to permit such a finding because arrests alone do not constitute evidence that the defendant in fact committed the alleged crimes. *Id.* at 243, 841 P.2d at 1051 (emphasis added). Here, the trial court's finding was based on actual convictions, not mere allegations of criminal conduct. Nor does the fact that the prior convictions were for non-violent offenses preclude a finding that Aguilar constitutes a risk to the community. Aguilar's repeat offenses reflect a persistent disregard for the law, and property crimes, like crimes against persons, present a real risk to the public order. *See State v. Williams*, 134 Ariz. 411, 414, 656 P.2d 1272, 1275 (App. 1982)

(holding that a court may properly consider for sentencing purposes "protection of society from . . . gross disrespect of our legal system" and noting that such disrespect was evidenced by defendant's criminal record). We also find no merit to Aguilar's argument that the trial court is precluded from finding risk to the community as an aggravator based on his prior convictions for property crimes because two of the convictions were used for enhancement purposes. *See State v. Ritacca*, 169 Ariz. 401, 403, 819 P.2d 987, 989 (App. 1991) (holding that "Double Jeopardy or double punishment principles do not preclude the trial court from using prior convictions to impose an enhanced sentence under the recidivist statute . . . and to find aggravating factors" (citations omitted)).

¶33 Furthermore, even if the trial court could be found to have improperly considered one or more of the challenged factors in aggravation, Aguilar would not be entitled to relief because he has failed to meet his burden of establishing prejudice. The slightly aggravated eighteen-year term of imprisonment imposed on the sexual assault conviction is well within the statutory range for this offense. *See* A.R.S. § 13-703(J) (Supp. 2010) (prescribing a 28-year "maximum" aggravated term for class 2 felony with two or more prior felony convictions). No challenge is raised by Aguilar to several of the aggravating factors found

by the trial court, and the "existence of a single aggravating factor exposes a defendant to an aggravated sentence." *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26, 115 P.3d 618, 625 (2005). We find nothing in the record indicating the trial court would have imposed any lesser sentence, even absent consideration of one or more of the challenged factors. Speculation regarding the possibility of a lesser sentence is insufficient to establish prejudice. *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006); *see also State v. Glassel*, 211 Ariz. 33, 57 n.17, ¶ 101, 116 P.3d 1193, 1217 n.17 (2005) (noting that a defendant is not entitled to appellate relief for use of improper aggravating factors where the issue is not raised in trial court).

CONCLUSION

¶34 For the reasons explained above, Aguilar's convictions and sentences are affirmed.

/s/
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
PATRICK IRVINE, Judge