DIVISION ONE
FILED: 12/20/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0791
	)	DEPARTMENT C
	)	**MEMORANDUM DECISION**
v.	)	
	)	(Not for Publication –
JOE CERVANTES, JR.,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR20081426

The Honorable William T. Kiger, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

David Goldberg — Fort Collins, CO
Attorney for Appellant

B R O W N, Judge

¶1 Joe Cervantes, Jr. ("Defendant") appeals his convictions for twenty-one counts of sexual conduct with a minor under twelve years of age, two counts of sexual assault of a

minor under fifteen years of age, and two counts of sexual exploitation of a minor under fifteen years of age. Defendant presents six issues on appeal: he was denied his right to self-representation; a digital video disc ("DVD") was improperly admitted into evidence; his convictions were multiplicitous; there was insufficient evidence to support his convictions for sexual assault; the indictment was improperly amended; and the trial court should have granted a mistrial. For the reasons that follow, we affirm.

BACKGROUND[1]

¶2 The offenses involved two victims, "KT" and "MR." KT was the daughter of one of Defendant's former girlfriends. MR was the niece of another of Defendant's former girlfriends. At the time of the offenses, KT was nine or ten years old and MR was eight or nine. Both KT and MR occasionally spent the night at Defendant's home.

¶3 Defendant committed five counts of sexual conduct with a minor and one count of sexual exploitation of a minor against KT between January 1, 2004 and April 2005. He committed the remainder of the offenses against MR between January 15, 2004 and July 31, 2006. Defendant videotaped all but one of the

[1] We construe the evidence in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Defendant. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998) (citation omitted).

offenses. He hid the videotape, but his fiancé became suspicious, discovered the videotape, and viewed it. She then copied it to a DVD and provided the DVD to police.

¶4 At trial, Defendant's former fiancé, the victims' mothers, and MR's aunt identified Defendant and the victims in the video. They also identified Defendant's home as the site of the offenses as well as other scenes depicted in the video. KT, who was fifteen by the time of trial, testified regarding the charge of sexual conduct with a minor that did not appear in the video.

¶5 The jury found Defendant guilty on all counts. The trial court sentenced Defendant to a presumptive, aggregate term of thirteen consecutive terms of life imprisonment without a possibility of parole for thirty-five years plus 234 years' imprisonment. Defendant timely appealed.

DISCUSSION

I. The Right to Self-Representation

¶6 Defendant argues he was denied the right to self-representation when the trial court told him it would not likely continue the matter if he chose to represent himself at trial. We review the decision whether to grant a continuance sought in conjunction with a motion for self-representation for abuse of discretion. *State v. Lamar*, 205 Ariz. 431, 436, ¶ 26, 72 P.3d 831, 836 (2003). Likewise, we review the ruling on a motion for

self-representation for abuse of discretion. *State v. Boggs*, 218 Ariz. 325, 338, ¶ 61, 185 P.3d 111, 124 (2008).

A. Background

¶7 To place this issue in its true context, it is necessary to provide detailed background information. At least twice in 2009, the trial court allowed Defendant to change counsel for reasons that are not disclosed in the record. In January 2010, defense counsel filed a motion to withdraw due to an irreconcilable conflict. The trial court granted the motion and continued the case until August 12, 2010. In July 2010, the trial court received a letter from Defendant requesting a new attorney, which the court treated as a motion for new counsel.[2]

¶8 At the hearing on the motion, Defendant argued his counsel had refused to investigate various matters, but never fully explained exactly what those matters were. Defendant first argued he wanted to know why information from this case had been "entered into" a child support matter in which he was involved, but he never identified the evidence or information in question. He further argued that while he was in jail, he received a "questionnaire" which contained details about this case. He also stated he wanted to know how that information "got out of the hands" of the police; however, he never explained what the questionnaire was, who it was from, its

[2] The letter is not contained in the record on appeal.

purpose, what information it sought or whether the details contained in the questionnaire were available through sources available to the public. Defendant next argued he believed there was "collaboration" which he found "disturbing" between a prosecutor, Defendant's fiancé, the mother of one of the victims and "persons outside the court." Defendant never explained what this "collaboration" entailed, how it may have been improper or even how it disturbed him—he merely argued there was "collaboration." Finally, Defendant argued "testimony" had been given under "duress." Defendant never identified who gave the "testimony," the subject of the testimony, where or when it was given or to whom it was given, nor did he explain what constituted "duress." Most importantly, Defendant never explained how any of these matters had any relevance to his case or otherwise had any effect on his ability to defend his case.

¶9 Without going into detail, defense counsel informed the court he had investigated Defendant's allegations and determined they were not relevant to the case or "to reality." Counsel further noted he would not accuse anyone of wrongdoing as urged by Defendant without evidence. Counsel believed, however, there was nothing to prevent his continued representation of Defendant. The trial court agreed and denied the motion for new counsel.

¶10 Defendant then informed the court he wished to represent himself. The trial court immediately provided Defendant the waiver-of-counsel forms. Defendant read the forms, and the trial court went through the standard colloquy regarding self-representation. The court informed Defendant of what would be required of him if he represented himself, the hazards and difficulties of self-representation, the sentences he faced if convicted, and the enormity of defending this case in particular.

¶11 Defendant indicated he still felt strongly about the issues he raised, but asked, "Will I have time to prepare for all this?" The court reminded Defendant trial was scheduled to begin in one week, and Defendant responded, "I don't have time to prepare for this." The trial judge noted the current trial date had been set nearly seven months prior and had been continued before. Regardless, the judge told Defendant he could represent himself. The judge reiterated several times that if Defendant filed a motion for continuance, the court would consider the motion and make a ruling based on the information available at that time. The judge indicated that while he was not inclined to grant a motion, "I'll cross that bridge when I come to it." Additionally, the judge stated, "I'm not suggesting that it couldn't be continued. Any other questions?" Defendant responded, "No, sir. I'm just thinking."

¶12 As Defendant continued to think, defense counsel expressed his view that self-representation in this case was not only not a good idea, but was a "terrible idea." Defendant responded, "Unfortunately, I have to agree. That won't get [sic] enough time to prepare. Then I don't have a choice." The following discussion then took place between the court and Defendant:

> Court: I'm not prejudging a motion to continue. I will consider it but I'm telling you as I would tell the State, at this stage of this case, . . . where this file is right now, it's going to take significant reasons to continue this jury trial, not saying it might not show them [sic] but don't – don't sign this piece of paper anticipating that you're going to get a six week or six month continuance. Do not do that. Sign this paper only assuming that this matter is set for trial next Thursday. I'll put it that way.
>
> Defendant: I don't have a choice.
>
> . . . .
>
> Court: What you are saying, you don't have a good choice. You don't have something to choose from that you like.
>
> Defendant: Right.
>
> Court: I understand that but I would dispute the way you phrased it. You do have a choice. It's just you don't like them.
>
> Defendant: That's correct.
>
> Court: Well, given that, you're going to stick with being represented at this time?

Defendant: Yes, sir.

There was no further discussion of the issue, and Defendant never moved for a continuance.

B. Analysis

¶13 A defendant has a constitutional right to waive counsel and represent himself. *State v. Moody*, 192 Ariz. 505, 509, ¶ 22, 968 P.2d 578, 582 (1998). A request for self-representation, however, must be unequivocal. *State v. Henry*, 189 Ariz. 542, 548, 944 P.2d 57, 63 (1997). Further, while a defendant has a constitutional right to self-representation, a trial court maintains discretion in determining whether to grant a continuance made in conjunction with a motion to proceed pro se. *Lamar*, 205 Ariz. at 436, ¶ 26, 72 P.3d at 836. In evaluating a motion to continue coupled with a motion for self-representation, a trial court should consider "the reasons for the defendant's request, the quality of counsel, the defendant's proclivity to substitute counsel and the disruption and delay expected in the proceedings if the request were to be granted." *Id.* at 437, ¶ 29, 72 P.3d at 837 (citation omitted).

¶14 We find no error here. First, the trial court never denied Defendant's request for self-representation. Assuming without deciding that Defendant's request was unequivocal, the trial court granted Defendant's motion for self-representation without hesitation. It was Defendant who ultimately withdrew

his request.[3] Second, the trial court never ruled on a motion for continuance because Defendant did not move for one. Had he done so, the *Lamar* factors would have weighed against granting a continuance. Defendant never explained his reasons for requesting a continuance or how further investigation or preparation would have aided his defense. Defendant had shown a proclivity to substitute counsel, having already substituted counsel at least three times. The trial had already been continued once, and victims and witnesses were traveling from out of state to attend the trial, which was scheduled to begin in one week. Therefore, the trial court did not deny Defendant his right to self-representation.

II. Admission of Exhibit 23

¶15 Defendant next contends the trial court erred when it admitted Exhibit 23, which was an additional copy of the DVD containing the video of the offenses. Defendant, however, raised no objection below. "A party must make a specific and timely objection at trial to the admission of certain evidence in order to preserve that issue for appeal." *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993). Because Defendant failed to object to the admission of Exhibit 23, we

[3] In his reply brief, Appellant argues the withdrawal of his request for self-representation was not voluntary. We will not consider arguments or issues first raised in a reply brief. *See State v. Watson*, 198 Ariz. 48, 51, ¶ 4, 6 P.3d 752, 755 (App. 2000).

review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). "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." *Id.* Even once fundamental error has been established, a defendant must still demonstrate the error was prejudicial. *Id*. at ¶ 26.

¶16 Defendant videotaped all but one of the counts for which he was convicted. The DVD copy of the videotape made by Defendant's fiancé was admitted without objection as Exhibit 22. To help the jury view the nearly one-hour video in the context of the twenty-five charges, the State copied the video on to a second DVD and added a chapter menu which provided the ability to quickly go to any one of thirty-eight specific chapters or "scenes" on the DVD. The State also added titles for each of the scenes.[4] The scene titles momentarily appeared as subtitles at the lower right-hand side of the screen at the beginning of each scene. Otherwise, the two DVDs were identical.

[4] These included titles such as "Girls washing car #1" if it involved a general scene that did not involve a specific offense; statements in quotes such as "Bye, Joe" or "You need to sleep" when the audio portion was relevant; descriptions such as "scar on right arm" when specific parts of Defendant's body appeared in the scene; and Roman numerals which corresponded to the counts of the indictment when the video depicted a charged offense.

¶17 The trial court admitted this additional copy of the DVD as Exhibit 23 without objection. Defendant anticipated the admission of Exhibit 23 and even sought to use its admission to his advantage. Prior to trial, Defendant argued the graphic descriptions of the offenses contained in each count of the indictment should not be read to the jury because the language was too shocking. He further argued it was not necessary to read the language to the jury because the jury would be able to track each count as enumerated on the video in Exhibit 23. Defendant's motion was denied.

¶18 It is only now on appeal that Defendant asserts Exhibit 23 should not have been admitted. He argues Exhibit 23 was a computer generated "animation" or "simulation" that required additional foundational support before it could be admitted, it constituted improper opinion evidence, and it invaded the province of the jury.

¶19 Assuming without deciding that admission of Exhibit 23 constituted fundamental error, Defendant cannot establish that the error was prejudicial. Except for the chapters and subtitles, Exhibit 23 was a duplicate of Exhibit 22. Even if Exhibit 23 had been excluded, the State presented overwhelming evidence of Defendant's guilt. *See State v. Fimbres*, 222 Ariz. 293, 304-05, ¶ 43, 213 P.3d 1020, 1031-32 (App. 2009) (finding no prejudice where overwhelming evidence supported conviction).

The jury viewed an otherwise identical video which depicted Defendant committing over twenty sexual offenses against two children under the age of twelve. The absence of chapters and brief subtitles on Exhibit 22 did not render the offenses depicted on that DVD any less patent. In light of the strength of the other evidence against Defendant, we cannot conclude that Defendant suffered any prejudice from the admission of Exhibit 23. *See Henderson*, 210 Ariz. at 568, ¶ 24, 115 P.3d at 608.

III. Multiplicity

¶20 Defendant next argues his convictions were multiplicitous. "Multiplicity is defined as charging a single offense in multiple counts." *State v. Bruni*, 129 Ariz. 312, 318, 630 P.2d 1044, 1050 (App. 1981). Defendant argues the DVD showed he engaged in at most eight instances of continuous, uninterrupted sexual activity, rather than over twenty independent acts. We note, however, that with the two exceptions addressed below, Defendant does not contest the sufficiency of the evidence to support his convictions. Defendant further argues the "sheer number of charges improperly colored the jury's consideration of the evidence." We review a trial court's ruling on multiplicity de novo because it implicates double jeopardy and involves issues of statutory interpretation. *State v. Powers*, 200 Ariz. 123, 125, ¶ 5, 23

P.3d 668, 670 (App. 2001); *see also State v. Brown*, 217 Ariz. 617, 620, ¶ 7, 177 P.3d 878, 881 (App. 2008).

¶21 Defendant's convictions were not multiplicitous. First, repetition of the same statutory violation is not multiplicity. *Bruni*, 129 Ariz. at 320, 630 P.2d at 1052. There is no multiplicity where, as here, the evidence is sufficient to show the commission of numerous separate and distinct offenses, "each of which is a crime in its own right regardless of what occurred prior to or thereafter[.]" *Id.* The indictment alleged twenty-five separate and distinct offenses committed against KT and MR.[5] Exhibits 22 and 23 show Defendant committing at least twenty-three separate, distinct, and independent sexual acts against KT and MR, each of which is a crime in and of itself regardless of what occurred prior to or thereafter. Further, the video shows the two counts of sexual exploitation were separate and distinct acts because Defendant filmed himself committing the acts against each victim separately. While Defendant committed multiple, independent violations of the same offense, there was no instance where a single act was the subject of more than one charge.

¶22 Additionally, we are aware of no authority, and Defendant directs us to none, which requires the State to

[5] Two of the twenty-seven original counts were dismissed prior to trial.

dismiss or withdraw counts or the trial court to sever counts simply because of the "sheer number" of counts in an indictment. Finally, the trial court instructed the jury that each count was a separate and distinct offense, that they must decide each count separately based on the evidence and law that applied to that count, and that their decision on one count must not be influenced by their decision on any other count. "Juries are presumed to follow their instructions." *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996).

IV. Sufficiency of the Evidence of Sexual Assault

¶23 The jury convicted Defendant of two counts of sexual assault against MR. "A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person." Ariz. Rev. Stat. ("A.R.S.") § 13-1406(A) (2010).[6] Defendant does not contest he intentionally or knowingly engaged in sexual intercourse or oral sexual contact with MR during the two charged acts. Defendant argues, however, that there was insufficient evidence these acts were committed without MR's consent.

¶24 "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of

[6] Absent material revision to the statute following the date of the offense, we refer to the current version.

probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) (citation omitted). The case must be submitted to the jury if reasonable minds can differ on inferences to be drawn from the evidence introduced at trial. *State v. Hickle*, 129 Ariz. 330, 331, 631 P.2d 112, 113 (1981).

¶25 The evidence was sufficient to support Defendant's convictions for sexual assault. Defendant is correct that proof of minority alone is insufficient to establish the absence of consent for purposes of A.R.S. § 13-1406. *See State v. Superior Court (Puig)*, 154 Ariz. 624, 628, 744 P.2d 725, 729 (App. 1987).[7] However, the statutory definition of "without consent" includes when "[t]he victim is incapable of consent by reason of . . . sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant." A.R.S. § 13-1401(5)(b) (2010). During the acts charged as sexual assault, MR is clearly either asleep or

[7] We note that *Puig* was disapproved of by our supreme court in *State v. Getz*, 189 Ariz. 561, 565, 944 P.2d 503, 507 (1997). However, the supreme court's disapproval did not pertain to the *Puig* court's holding regarding A.R.S. § 13-1406.

otherwise unconscious. The evidence was more than sufficient to permit a jury to find beyond a reasonable doubt that the acts were committed without MR's consent.

VI. Amendment of the Indictment

¶26 Defendant next asserts the trial court erred when it amended the indictment regarding the two counts of sexual exploitation of a minor alleged in counts 6 and 24. The indictment alleged Defendant committed these offenses when he "recorded, filmed, photographed, developed or duplicated" a visual depiction in which KT (count 6) and MR (count 24) were engaged in exploitive exhibition or other sexual conduct. *See* A.R.S. § 13-3553(A)(1) (2010). The trial court instructed the jury, however, that sexual exploitation of a minor "requires proof that the defendant knowingly possessed any visual depiction in which a minor was engaged in exploitive exhibition or other sexual conduct." *See* A.R.S. § 13-3553(A)(2). The record shows that despite the language of the indictment, Defendant knew the State would seek to convict based on a theory of possession. During his motion for judgment of acquittal made at the close of the state's case, Defendant argued there was insufficient evidence of "knowing possession" to convict him of sexual exploitation. When the trial court sought to verify Defendant was arguing there was insufficient evidence to support a theory of possession, Defendant answered, "Yes, sir." It is

only on appeal that Defendant now argues to instruct the jury on a previously uncharged theory of possession was an improper amendment of the indictment. Defendant concedes he raised no objection below.

¶27 "[W]e will not find reversible error when the party complaining of it invited the error." *State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001). Here, any error was invited. Prior to trial, Defendant twice requested Revised Arizona Jury Instructions ("RAJI") Criminal 35.53 regarding sexual exploitation of a minor. RAJI Criminal 35.53 includes sexual exploitation of a minor based on the possession of a visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct. That the State requested the same instruction is of no matter. Where a defendant invites error through requesting an instruction, the defendant is responsible for that invited error even if the State requested the same instruction. *State v. Yegan*, 223 Ariz. 213, 218-19, ¶¶ 20-21, 221 P.3d 1027, 1032-33 (App. 2009). Because any alleged error regarding RAJI Criminal 35.53 was invited, we do not consider whether it could be fundamental. *Logan*, 200 Ariz. at 565, ¶ 9, 30 P.3d at 632.

VII. Motions for Mistrial

¶28 Finally, Defendant argues the trial court erred when it denied two motions for mistrial. A trial court has broad

discretion on motions for mistrial, and the denial of such a motion is error only if it was a clear abuse of discretion. *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995).

¶29 Defendant first moved for a mistrial based on prosecutorial vouching in closing argument. The first instances of alleged vouching occurred when the prosecutor discussed the investigating detective. Defendant had suggested in his cross-examination of witnesses that the investigation was not conducted in a proper manner and was otherwise insufficient. When the prosecutor addressed this in closing, he argued, "Perhaps it could have been done differently, and I know [the detective] will take that as constructive criticism, if in fact there was anything done wrong. I don't believe there was." Shortly thereafter, the prosecutor stated, "It's very important to identify victims, to find out who they are, find out if they are okay, find out if they need counseling and [the detective] did that better than anybody I've ever seen with a little bit of information she had going in[.]" Finally, the prosecutor argued, "November 14th, [the detective] is in the office and she's working furiously to find out who these girls were, and she documented her every single move. I have never seen . . . so many reportings. Everything was reported. It's all there. Her investigation led to [Defendant] sitting here today."

¶30 Victim KT was the second witness for whom the prosecutor allegedly vouched. The evidence introduced at trial showed that despite the offenses, KT had since done well in school. The prosecutor stated, "That's great. That's good, good news, and it takes a lot of courage to step up to the plate and she did that."

¶31 The trial court held the prosecutor's comments came "very close" to vouching for the witnesses and placing the power and authority of the State behind them. The court, however, denied Defendant's motion.

¶32 Defendant made a second motion for mistrial based on the State's rebuttal argument. Neither party played any portion of Exhibit 23 during closing argument. After Defendant's closing, the trial court asked the prosecutor if he intended to play Exhibit 23 during rebuttal. The prosecutor responded that he intended to play portions of Exhibit 23 because Defendant's closing challenged the sufficiency of the evidence and the identifications of Defendant and the victims in the video. Defendant argued that this would not be proper rebuttal because the prosecutor did not use Exhibit 23 in his initial closing, and Defendant did not reference Exhibit 23 in his closing. The trial court overruled Defendant's objection and held that based on Defendant's closing, the prosecutor could play portions of

Exhibit 23 in rebuttal. Defendant noted he might request surrebuttal.

¶33 The prosecutor used Exhibit 23 four times during his rebuttal. Each time, the prosecutor displayed the verdict form for a count, played the portion of Exhibit 23 that corresponded to that count, and argued the video showed Defendant committing that particular offense against that particular victim. During this process, the trial court overruled Defendant's repeated objections that the use of Exhibit 23 was improper rebuttal. The prosecutor went through this process for counts 1, 2, 3, and 8 and then made no further use of Exhibit 23. Defendant never requested surrebuttal after the prosecutor completed his rebuttal argument. The trial court denied Defendant's motion for mistrial.[8]

¶34 After the trial court denied the motion for mistrial based on prosecutorial vouching, Appellant moved for a mistrial based on the prosecutor's use of Exhibit 23 in rebuttal. Appellant again argued it was improper to use Exhibit 23 in rebuttal, that he did not analyze each count in his closing only because the prosecutor did not do so, and that he was now being denied the opportunity to present a final argument regarding the

[8] The trial court noted it provided its explanation to counsel during a prior sidebar discussion.

video evidence. The trial court denied the motion without any explanation on the record.

¶35 Regarding the claim of vouching, "[t]wo forms of impermissible prosecutorial vouching exist: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993) (citation omitted). Additionally, "a lawyer is prohibited from asserting personal knowledge of facts in issue before the tribunal unless he testifies as a witness." *Id.* "[W]e examine, under the circumstances, whether the jurors were probably influenced and whether the statement probably denied Defendant a fair trial." *Id.* "The focus is on the fairness of the trial, not the culpability of the prosecutor." *Id.* Further, prosecutorial misconduct is not merely "legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial." *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). "Prosecutorial misconduct sufficient to justify reversal must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (internal quotation and citation omitted).

¶36 The prosecutor's comment about KT's courage did not constitute impermissible vouching. The comment did not place the prestige of the government behind KT, suggest that information not before the jury supported her testimony, or constitute an assertion by the prosecutor of personal knowledge of acts in issue.

¶37 Regarding the comments about the detective and her investigation, however, we find otherwise. Despite the fact that the trial court found these statements came "very close" to vouching, we find the prosecutor vouched for the detective when he argued: he did not believe anything was done wrong in the investigation; the detective did a better job than anybody he had ever seen in finding the victims with so little information; and he had never seen so many "reportings" of each step the detective took in her investigation. The prosecutor expressed his personal opinions based on his professional experience as a prosecutor, thereby placing the prestige of the government behind the detective. This was not proper.

¶38 The question, however, is not simply whether the prosecutor's statements were improper, but whether the statements probably influenced the jury and denied Defendant a fair trial. The case against Defendant was based on a video recording he made of himself committing nearly two dozen sexual offenses against two children. The video was provided to police

by a private citizen independently of any police investigation. The victims clearly appeared on the video, and their own mothers identified them. The jury saw KT testify. Defendant, his face, his voice, his clothing, his glasses, his genitalia, and other specific parts of his body appear on the video and were identified by two women with long-term, intimate knowledge of Defendant. Finally, several witnesses identified Defendant's home as the scene of events in the video. Based on this, any issue regarding the quality of the police investigation was at most only marginally relevant to the actual defense of the case. Therefore, the prosecutor's statements regarding the detective's investigation, while improper, would not have influenced the decision of the jury, and Defendant was not denied a fair trial.

¶39 Turning to the prosecutor's rebuttal, "[t]he trial court is vested with great discretion in the conduct and control of closing argument." *State v. Tims*, 143 Ariz. 196, 199, 693 P.2d 333, 336 (1985). "[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions." *Bible*, 175 Ariz. at 602, 858 P.2d at 1205. Further, a prosecutor's argument must be viewed in the context of the arguments of the defendant. *State v. Kerekes*, 138 Ariz. 235, 239, 673 P.2d 979, 983 (App. 1983). "[P]rosecutorial comments which are fair rebuttal to comments

made initially by the defense are acceptable." *State v. Duzan*, 176 Ariz. 463, 468, 862 P.2d 223, 228 (App. 1993).

¶40 Because the prosecutor's rebuttal was not improper, we find no error in the denial of the second motion for mistrial. Defense counsel argued in closing that witnesses and their testimony were tainted because they had been influenced, persuaded, coerced, and compromised through the investigation. Defense counsel further argued the identifications of Defendant and the victims on the video had been contaminated through influence and suggestion. Finally, defense counsel argued, "[E]very bit of evidence has to be scrutinized very carefully. That's your duty. Every element of crime [sic] that is [sic] charged must be scrutinized."

¶41 Based on these arguments, it was permissible for the State to respond in rebuttal and play portions of the video which depicted Defendant committing four sexual offenses against the two victims, thereby showing the testimony of the witnesses and their identifications of Defendant and the victims were not suspect as Defendant argued. In short, it was permissible for the prosecutor to argue that despite Defendant's protests regarding the way the case was investigated, all the jury needed to see was Defendant's own video of himself committing nearly two dozen sexual offenses against two children.

CONCLUSION

¶42 Because we find no reversible error, we affirm Defendant's convictions and sentences.

/s/

_____
MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Judge

/s/
_____
PHILIP HALL, Judge