IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LUIS ARMANDO VARGAS,
Appellant.

No. 2 CA-CR 2016-0324
Filed March 16, 2021

Appeal from the Superior Court in Pima County
No. CR20144526001
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

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OPINION

Vice Chief Judge Staring authored the opinion of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Vice Chief Judge:

¶1 This case comes to us on remand from our supreme court. *State v. Vargas*, 249 Ariz. 186, ¶ 25 (2020), *vacating State v. Vargas*, No. 2 CA-CR 2016-0324 (Ariz. App. Jan. 29, 2019) (mem. decision). The sole question before us is whether Vargas has established that several unobjected-to instances of prosecutorial error or misconduct cumulatively deprived him of a fair trial. *Id.* ¶¶ 3, 15, 25. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Vargas. *See State v. Murray*, 247 Ariz. 583, ¶ 2 (App. 2019). K.R. was a sixty-two-year-old woman who had been disabled by childhood polio and lived alone.[1] On the evening of February 14, 2008, she telephoned her mother, and the next morning, her sister went to her home to check on her. Her sister found: K.R.'s turquoise-colored van and keys missing; the security door and front door closed but unlocked; K.R.'s crutches near the front door; her purse on the floor; a space heater overturned and its cord missing; the kitchen phone cord missing; and K.R.'s eyeglasses and leg braces next to her bed. K.R.'s sister immediately called the police and reported K.R. missing. Officers commenced an extensive search for her.

¶3 That same morning, before K.R.'s sister discovered she was missing, a security camera recorded a man, later identified by eyewitnesses and relatives as Vargas, driving up to an automatic teller machine (ATM) in a turquoise van and unsuccessfully attempting to use K.R.'s bank card. An hour later, Vargas went to the door of an AutoZone store in the same shopping center as the ATM and asked for help with his vehicle. Two hours later, Vargas went to a Checker's auto-parts store located across the street from AutoZone and asked for help with what he said was his girlfriend's van. One of the Checker's employees followed Vargas to a turquoise van parked outside and attempted to help him start it, without success.

¶4 Shortly thereafter, Vargas walked to a gas station across the street from the Checker's store and purchased $1.00 of gasoline. A Checker's employee later saw smoke billowing from the same turquoise van, which had been left outside the store.

[1]K.R. required leg braces and crutches to walk.

¶5 Investigators determined the van belonged to K.R. and gasoline had been poured on the back seat and ignited. Inside the van, investigators found the missing cord from the overturned space heater in K.R.'s home. Vargas's fingerprints were found on the overturned space heater, and eyewitnesses and family members identified him as the man with the turquoise van who had tried to use K.R.'s bank card at the ATM, sought help at both auto-parts stores, and purchased $1.00 of gasoline at the gas station. K.R. was never found.

¶6 After a jury trial, Vargas was convicted of first-degree murder, second-degree burglary, kidnapping, arson of a structure, theft of a means of transportation, and theft of a credit card. The trial court sentenced him to life in prison without the possibility of release for the murder and an additional 63.25 years for the other offenses.

¶7 On appeal, Vargas challenged his convictions and sentences, arguing eleven instances of prosecutorial misconduct, all involving multiple acts, had cumulatively deprived him of a fair trial. In our previous decision, we addressed portions of his claims that the state had committed prosecutorial misconduct in questioning an expert witness about precluded topics, "attacking" defense counsel in its rebuttal closing, and seeking admission of a jail video on their merits and found no error. *Vargas*, No. 2 CA-CR 2016-0324, ¶¶ 14–19, 28–30, 33–35. And, because Vargas failed to develop two of his arguments on appeal, we found those arguments waived pursuant to *State v. Bolton*, 182 Ariz. 290, 298 (1995). *Vargas*, No. 2 CA-CR 2016-0324, ¶¶ 11, 41. However, citing *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008), we concluded Vargas's failure to separately argue fundamental error for each allegation of unobjected-to misconduct constituted waiver of his remaining prosecutorial misconduct claims. *Vargas*, No. 2 CA-CR 2016-0324, ¶¶ 13, 14, 20, 21, 22–25, 27, 32, 39, 40, 42. After addressing Vargas's other arguments—that the trial court had erred in precluding testimony of an expert witness as a sanction for a disclosure violation, admitting expert testimony from non-experts and prejudicial testimony from a pretrial services worker, and instructing the jury on accomplice liability—we affirmed his convictions and sentences. *Id.* ¶¶ 43–64.

¶8 Vargas petitioned our supreme court for review of our decision, and that court granted review solely as to whether Vargas had "preserv[ed] fundamental error review for individual claims of prosecutorial misconduct by arguing that cumulative instances of . . . misconduct constituted fundamental error." Concluding Vargas was not required to have argued "that each instance of alleged misconduct

individually deprived him of a fair trial," the court vacated our decision as to Vargas's cumulative error claim and directed us to consider the claims we had found waived pursuant to *Moreno-Medrano*. *Vargas*, 249 Ariz. 186, ¶¶ 7, 14, 15, 25. On remand, we must determine "[w]hether Vargas has carried his burden of persuasion to establish that [error] did occur for each allegation and that they cumulatively denied him a fair trial." *Id.* ¶ 15.

Discussion

¶9 Vargas reasserts his prosecutorial error claims,[2] arguing they cumulatively amounted to fundamental, prejudicial error and deprived him of his right to a fair trial.[3] In addition, he now argues each individual claim constituted fundamental error. To succeed on a claim of prosecutorial error, a defendant must show that error indeed occurred and that there is a "reasonable likelihood . . . that the [error] could have affected the jury's verdict, thereby denying defendant a fair trial." *In re Martinez*, 248 Ariz. 458, ¶ 43 (2020) (quoting *State v. Hulsey*, 243 Ariz. 367, ¶ 89 (2018)). After "evaluat[ing] each instance of alleged misconduct," *State v. Morris*, 215 Ariz. 324, ¶ 47 (2007), we consider the cumulative effect on the fairness of Vargas's trial, *see State v. Hughes*, 193 Ariz. 72, ¶ 26 (1998).

¶10 As noted in our previous decision, Vargas did not properly object to any of the following alleged instances of prosecutorial error, and we review his claims solely for fundamental error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). "[T]he first step in fundamental error review is determining whether trial error exists." *Id.* ¶ 21. A defendant who

[2]Our supreme court recently clarified that "[w]hen reviewing the conduct of prosecutors in the context of 'prosecutorial misconduct' claims, courts should differentiate between 'error,' which may not necessarily imply a concurrent ethical rules violation, and 'misconduct,' which may suggest an ethical violation." *In re Martinez*, 248 Ariz. 458, ¶ 47 (2020). In his supplemental brief, Vargas refers to his claims as allegations of prosecutorial error. Hereinafter, we do the same.

[3]In his supplemental brief, Vargas purports to withdraw his claim as to the state's conduct during the grand-jury proceedings. But, because Vargas did "not seek relief specifically from the state's alleged misconduct at the grand jury proceedings" on appeal and, in any event, did not dispute that any alleged prosecutorial error at the grand-jury proceedings could not have affected the verdict at trial, we found his argument waived pursuant to *Bolton*, 182 Ariz. at 298 ("Failure to argue a claim on appeal constitutes waiver of that claim."). *Vargas*, No. 2 CA-CR 2016-0324, ¶ 11.

establishes error must then show "the error went to the foundation of the case," took from him a right essential to his defense, or was so egregious that he could not possibly have received a fair trial. *Id.* If a defendant only shows an error went to the foundation of the case or deprived him of a right essential to his defense, then he must also separately show prejudice resulted from the error. *Id.* If a defendant shows the error was so egregious he could not have received a fair trial, however, he has necessarily shown prejudice and must receive a new trial. *Id.* "Consistent with the third prong of *Escalante*, a defendant claiming cumulative error based on prosecutorial misconduct need not separately assert prejudice since a successful claim necessarily establishes the unfairness of a trial." *Vargas*, 249 Ariz. 186, ¶ 13.

Opening Statement

¶11 Vargas first asserts prosecutorial error occurred when the state, in its opening statement, improperly "argue[d] inferences and conclusions, unsupported by evidence that would be presented." Specifically, he contends the state "discuss[ed] evidence that was never proffered regarding the extent of the investigation and the even ridiculous sounding leads that detectives ran down." Vargas maintains the state used this improper argument to rebut his claim "that law enforcement's shoddy investigation focused on [him] to the exclusion of others," "lessen[ing] its requisite burden . . . and . . . invit[ing] the jury to draw inferences and conclusions from that evidence to prove facts the defense disputed."

¶12 During its opening statement, the state addressed the jury as follows:

> [Y]ou are going to hear from literally dozens of witnesses, and there are absolutely going to be some complications and some questions that we can't answer. . . . There were lots of people who came forward. If you have an investigation of this scope and of this length, people come out of the woodwork. Some people think that they are receiving information through psychic powers literally. Some people think that they know a guy who kind of looks like that person, and they observe something suspicious, and they're going to share that with the police. And the police did their best to follow all of those leads. A lot of names came up. The police investigated a lot of names.

As an example of one such lead, the state noted police had found identification for "a man named Nicholas Halula . . . in front of a mobile home [in K.R.'s neighborhood]. And even though it was found in front of . . . the front door to a mobile home that is parked in front [of] the Halula family home, they still ran down that lead."

¶13 With respect to the extent of its investigation, the state referred to evidence it anticipated presenting—and did in fact present—at trial. Contrary to Vargas's contention, the state presented such evidence as to the extent of its investigation throughout the fourteen-day trial. In any event, during its closing argument, the state pointed to evidence that had been presented about the police investigation, including that mistakes were made and that "there [wa]s more DNA testing" than the detective had ever done before. It argued the reasonable inference from the evidence presented throughout the trial that the police investigation had been thorough; therefore, Vargas cannot establish prejudice. *See State v. Bible*, 175 Ariz. 549, 602 (1993) (where "comment during opening statement was improper at that point, it was a reasonable inference from evidence later introduced and would have been proper during closing argument" and defendant was not deprived of a fair trial).

¶14 Additionally, Vargas asserts the state made an improper argument by "explaining away the lack of identification by any of the eyewitnesses."[4] Specifically, Vargas challenges the following statement made during the state's opening:

> [N]o one except for one person even kind of identifies . . . Vargas in any of those lineups. And you'll see some of the pictures that were used in those lineups and realize the comparison between just the collarbone and up in these photographs and a still official photograph like your passport photo, your driver's license photo, there is very little resemblance to . . . Vargas living, breathing, moving throughout [the] world, moving

[4] Although we could find this argument waived for lack of development, *see* Ariz. R. Crim. P. 31.10(a)(7)(A) (opening brief must contain argument "with supporting reasons for each contention"); *Bolton*, 182 Ariz. at 298, we exercise our discretion and resolve the issue on its merits, *see State v. Smith*, 203 Ariz. 75, ¶ 12 (2002).

> through the Conoco, moving through the Wells Fargo ATM video.

He contends this "improper testimony" relieved the state "of some of the burden of producing actual evidence, and directly impacted key elements of the defense." We disagree.

¶15 The state's comments above constituted an appropriate discussion of the evidence the jury would see and potential weaknesses in the state's case. *See State v. King*, 180 Ariz. 268, 278 (1994) ("Opening statements are intended to inform the jury of what the party expects to prove and prepare the jury for the evidence that is to be presented."). Vargas has not cited any authority, and we find none, indicating it is improper for the state to acknowledge potential weaknesses in its case during opening statement. Moreover, even were we to assume the comments were improper, they nonetheless reflected a reasonable inference from the evidence admitted at trial, particularly the photos of Vargas used in the lineups and still photos from the ATM and gas station videos, and, therefore, Vargas cannot show prejudice. *See Bible*, 175 Ariz. at 602.[5]

¶16 To the extent Vargas argues the state erred by mentioning Halula as an example of a lead that detectives had investigated but presented no evidence about at trial, we disagree. As the state notes, "[s]pecific evidence may be referenced in the opening statement as long as the proponent has a good faith basis for believing the proposed evidence exists and will be admissible." *State v. Pedroza-Perez*, 240 Ariz. 114, ¶ 12 (2016). Vargas does not contend in his opening brief that the state did not have a good-faith basis for mentioning the Halula evidence. In fact, Vargas mentioned the same lead during his opening statement. Because the state was permitted to discuss evidence it anticipated presenting at trial, which is the proper purpose of opening statements, *see King*, 180 Ariz. at 278, we find no error.

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[5]Further, the trial court instructed the jury before trial, "What is said in opening statement is not evidence, nor is it argument. The purpose of an opening statement is to help you prepare for anticipated evidence." "Absent evidence to the contrary, we presume the jury followed [its] instructions." *State v. Payne*, 233 Ariz. 484, ¶ 151 (2013); *see State v. Prince*, 204 Ariz. 156, ¶ 9 (2003). "[C]autionary instructions by the court generally cure any possible prejudice from argumentative comments during opening statements." *State v. Manuel*, 229 Ariz. 1, ¶ 24 (2011).

¶17 In any event, Vargas again cannot establish prejudice. Indeed, "[t]he trial process itself accounts for the risk that the trial evidence will not match the opening statements." *Pedroza-Perez*, 240 Ariz. 114, ¶ 13. As noted, the jury was instructed that what attorneys say in opening statements is not evidence or argument, and we presume jurors followed their instructions. *See State v. Prince*, 204 Ariz. 156, ¶ 9 (2003). "[S]uch an instruction typically cures any potential prejudice" when evidence presented at trial does not match the opening statements. *Pedroza-Perez*, 240 Ariz. 114, ¶ 13. Vargas's claim of prosecutorial error fails.

Discussing Precluded Topics

¶18 Vargas next contends the state committed fundamental error by referring to the fingerprint found on the space heater in K.R.'s home during opening statements "despite the fact that the court had ordered the parties to stay away from the issue." Further, he claims the state improperly questioned defense expert Paul Carroll about "opinions far beyond the scope of the opinions disclosed in the first interview," which had been precluded, and then referred to that testimony during its closing argument. Vargas maintains the state "manufactur[ed] a disclosure violation in order to get opinions helpful to the defense precluded, and then [took] unfair and improper advantage of the court's preclusion of those opinions by eliciting opinions only helpful to the State," depriving him "of his essential right to establish a viable defense and of his ability to effectively rebut the State's case."[6]

¶19 Before its opening statement, the state notified the trial court that if Vargas suggested during trial that he had helped K.R. move her space heater at some point before her disappearance, it would seek admission of his otherwise inadmissible statement that he had never been inside her house. Because the court had not yet had a chance to consider the issue, it ordered that "neither side get into this subject matter as a part of their openings." During its opening statement, the state mentioned that the space heater had been "tipped over" and the cord "ripped off," and that the cord was later found in K.R.'s burning van. It also stated Vargas's fingerprints had been found on the space heater.

[6] In our previous decision, we concluded the trial court had not abused its discretion in precluding Carroll's undisclosed opinions after finding Vargas's failure to disclose those opinions to the state resulted from "a lack of diligence in preparing Carroll for his interview with the state." *Vargas*, No. 2 CA-CR 2016-0324, ¶ 46.

¶20 Vargas conceded in his opening brief that "[t]his single act, standing alone, may not be sufficient to raise a claim of prosecutorial misconduct" and encouraged this court to consider his argument "in conjunction with [the state]'s conduct related to the defense expert" because it showed the state's "disregard for court orders and the desire to obtain unfair advantages . . . early in the trial." However, in his supplemental brief, Vargas contends this error alone constituted fundamental error. As the state argues, however, the trial court ordered the parties to avoid any suggestion that Vargas had previously helped K.R. move the space heater, "not to avoid discussing the heater and the fingerprints at all." The state did not err in referring to the heater, cord, and fingerprints during its opening statement.

¶21 We previously addressed Vargas's argument that the state erred by asking Carroll about precluded topics and we found no prosecutorial error "arising from the state's questions to Carroll about specific identifications made by witnesses, the value of fingerprint evidence, and the photo lineups used in this case." *Vargas*, No. 2 CA-CR 2016-0324, ¶¶ 14, 19. Specifically, we concluded these questions were appropriate because they "were all directed at establishing that Carroll was not particularly familiar with the facts of this case and, ultimately, at discrediting his opinions." *Id.* ¶ 19. Moreover, Carroll did not provide any opinion as to the identifications made or photo lineups used and "gave no testimony that had been precluded by the trial court's rulings." *Id.*

¶22 On remand, Vargas contends we failed to address his claims that the state had elicited precluded testimony from Carroll "related to the value of fingerprints, surveillance videos, and still photos as corroborative evidence, the 'triangulation' form of investigation, and [the] value of statements of corroborative evidence and value given to false statements or how the State used these opinions during closing." We now address these claims.

¶23 As discussed in our previous decision, before Carroll testified, the trial court had limited his testimony to "specific issues that [had] emerged during trial," including "the finding of the latex glove and water bottle in [K.R.]'s van" and "[the] issue that came up with not recording which lineup a witness was shown," as well as the two opinions he expressed in his interview with the state: "(1) [that] the police should have used sequential lineups; and (2) [that] the witnesses who did not identify anyone in the lineups should have been shown lineups with 'the other suspects.'" *Vargas*, No. 2 CA-CR 2016-0324, ¶¶ 17, 44.

¶24 On cross-examination, the state asked Carroll about corroboration of eyewitness identifications. Carroll confirmed that such identifications are "usually substantiated by other forms of evidence," such as fingerprints, surveillance video, and still photos, with "fingerprints being one of the best" types of corroborative evidence. The state also asked Carroll about the "triangulation" form of investigation discussed in his book. Carroll stated that when investigating a criminal case, "what you're looking for is to fill the three sides of a triangle; you'd like to have a statement or confession; you'd like to have physical evidence; and you'd like to have eyewitness evidence; and each should corroborate each other." The state continued, asking Carroll:

> [W]hen you're talking about the triangle, and you're talking about physical evidence like fingerprints, and you're talking about eyewitness evidence, and then you're also talking about statements of the defendant, when you were a detective, did you ever give weight to a statement that, while it was not a confession, contained information that you could prove to be false?

¶25 As we understand his argument, Vargas contends Carroll's testimony was expressly limited to his two opinions previously disclosed to the state. However, the state's motion to preclude, and thus the trial court's order, were directed at Carroll's additional, undisclosed opinions about the police investigation in this case rather than completely precluding Carroll from testifying about specific aspects of the case. The questioning about which Vargas now complains is primarily related to Carroll's book on eyewitness identifications, which had been disclosed to the state, as well as his own past experience as a detective. Therefore, Carroll gave no testimony that had been precluded by the court's rulings. And, in light of our conclusion that the state did not elicit precluded testimony from Carroll, Vargas's argument that the state improperly referred to Carroll's testimony during its closing argument similarly fails.

Misstating Evidence, Asking Misleading Questions, and Eliciting Speculative Testimony

¶26 Vargas argues the state committed misconduct when it: misstated the condition of his teeth; asked Detective Kelley whether the plug to the space heater was bent because it had been ripped from the wall; asked Kelley whether the engagement of the van's anti-theft kill switch

indicated K.R. had been alive after being taken from her home;[7] referred to sweatpants in security footage as "gray" even though the video was in black and white; and asked K.R.'s neighbors whether they had seen Vargas after she disappeared.[8] He contends these "repeated misstatements and manipulations of the evidence went to the foundation of the case by improperly proving circumstantial evidence the State used to satisfy its burden of proof, directly impacting several key factual disputes."

¶27 Vargas claims the state misrepresented the condition of his teeth, "directly impact[ing] the question of whether . . . he was the person seen with K.R.'s van shortly before it was burned." Specifically he points to the state's "repeated characterization of [his] teeth as having the bottom half of the top teeth missing—which did not comport with the actual state of his teeth, but did match the descriptions given by an eyewitness from K.R.'s neighborhood and the clerk at Checkers." During its direct examination of Kelley, the state asked her whether she had noticed if Vargas "had the bottom half of his top teeth missing," and she responded, "Yes." Then, on cross-examination, after being shown a photo of Vargas's teeth, Kelley stated "[i]t's not the entire half of the tooth, but the bottom part of the tooth is missing" on his two front incisors. On redirect, the state again asked Kelley if Vargas had "parts of his top teeth missing," and Kelley responded he was missing "the bottom half of the top teeth." The state then showed her a photograph and asked whether it depicted what she had seen "in terms of [Vargas] missing [the] bottom half of his top teeth," and she stated that it did. Based on Kelley's testimony, the state did not misstate the evidence. Vargas's argument is without merit.

¶28 On direct examination, the state asked Kelley "whether one of the plug ends [of the space-heater cord] appeared bent as though it had been ripped from the wall." Kelley confirmed that "[o]ne of the ends does

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[7]Vargas objected to this question on the basis of speculation, and the trial court sustained the objection. However, his objection did not preserve his claim of prosecutorial error, and we review for fundamental error. *See State v. Rutledge*, 205 Ariz. 7, ¶ 30 (2003) ("shifting the burden" objection insufficient to preserve issue of prosecutorial misconduct).

[8]For the first time in his supplemental brief, Vargas asserts the state erred by repeating these alleged misstatements during its closing argument. In his opening brief, Vargas made no such contention, and therefore this argument is waived and outside the scope of our review on remand. *See Bolton*, 182 Ariz. at 298; Ariz. R. Crim. P. 31.10(a)(7)(A).

look like it has been bent, so it could have possibly been ripped from the wall." Vargas argues the state's elicitation of this testimony was speculative and "highly sensational because it led to the impression of an incredibly violent struggle and rage-filled action by the perpetrator," and he was left with "no way to rebut this speculation." The state counters this question "did not call for speculation given the evidence that the cord had been removed from a heater that had been tipped over; in other words, there was evidence supporting an inference of someone having used force on the heater and cord." We agree. The state's question merely asked Kelley for her opinion, and because "[l]ay witnesses may give opinion testimony . . . when it is 'rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness' testimony or the determination of a fact in issue,'" we find no error. *State v. Doerr*, 193 Ariz. 56, ¶ 26 (1998) (quoting Ariz. R. Evid. 701).

¶29 Vargas also challenges the state's question to Kelley as to whether the engagement of the kill switch in K.R.'s van indicated she had been taken from her home while she was alive. Kelley testified that "[i]f the van was running and the chip was removed, it would not start again if the van was turned off," and the state subsequently asked her if that told her "anything about [K.R.] and whether she was alive or not after she was taken from her home." Vargas objected to this question, claiming it called for speculation, and the trial court sustained his objection.[9] Because no speculative testimony was elicited, we find no error. Even if this question invited speculation, the jury was instructed that if the court sustained an objection to an attorney's question, the jury was not to "guess what the answer might have been." *See Prince*, 204 Ariz. 156, ¶ 9 (we presume jurors follow instructions).

¶30 The state asked Kelley about the belongings found in Vargas's backpack, which had been retrieved in Bisbee. Kelley confirmed she had found a "pair of gray sweatpants" in a backpack, and the sweatpants were admitted into evidence. Later, when the state asked Kelley about the clothing the suspect had been wearing in the ATM surveillance video, it described the sweatpants covering the suspect's face as "gray" several times. Specifically, when showing her several still images from the video, the state asked "whether it look[ed] to [her] like there could be gray sweatpants that are being used to cover the face, or gray sweatpants being

[9]This objection was insufficient to preserve Vargas's prosecutorial error claim. *See Rutledge*, 205 Ariz. 7, ¶ 30 (objection on one ground does not preserve issue on another ground).

used to be worn for clothing, or something else, or none of the above." Kelley testified that the gray sweatpants had been covering the suspect's head.

¶31 Vargas argues the state repeatedly misstated the evidence by referring to the sweatpants worn by the person in the surveillance video as "gray" because the video was in black and white and everything—including K.R.'s turquoise van—appeared gray. He claims this "amounted to a manufacturing of inculpatory evidence" based on the "pair of gray sweatpants [he had] in his backpack when Detective Kelley first made contact with him in Bisbee." And, he contends, this "speculation" was "portrayed to the jury as fact, which the jury would likely conclude was supported by some other piece of evidence" of which the state was aware. The state counters that its question to Kelley as to whether the person in images from the video appeared to be wearing gray sweatpants on their head "was not based on speculation but, rather, the detective's interpretation of what the evidence . . . showed." Further, it contends, "the jury was free to look at the images themselves to determine whether the sweatpants were gray and to compare them to the ones in evidence belonging to Vargas." Again, we agree. *See State v. Peltz*, 242 Ariz. 23, ¶ 17 (App. 2017) (witness may draw reasonable inference from firsthand knowledge and perceptions in providing opinion testimony).

¶32 Finally, Vargas argues it was improper for the state to ask witnesses if they had seen Vargas after K.R. disappeared because the state "knew the reason he never returned [to the neighborhood] was not because of consciousness of guilt, which is what [it] asked the jury to conclude from the evidence, but was a result of [his] arrest and subsequent incarceration." Although Vargas concedes the evidence of his purported flight was "completely accurate," he maintains "the manner in which [it] was presented was designed to mislead the jury on a key factual dispute . . . and to assist in proving the prosecution's case." The state counters "[t]he purpose of the questions was not to insinuate that Vargas did not return to the scene of his crime, as Vargas claims," but instead "to elicit evidence supporting an inference that Vargas had fled." Indeed, the state presented evidence Vargas had been found in Bisbee following K.R.'s disappearance. And, as noted, Vargas does not contend evidence of his flight was inadmissible. Likewise, he does not challenge the instruction that the jury "may consider any evidence of [him] running away." We find no error.

¶33 And, in any event, Vargas cannot establish he was prejudiced by the state's questions. The jury was instructed to "[d]etermine the facts only from the evidence produced in court," which was "the testimony of

witnesses and the exhibits introduced in court," and did not include questions by the attorneys. On this record, Vargas's prosecutorial error claims fail.

Argumentative Questioning of Defense Witnesses

¶34 Vargas asserts that the state committed prosecutorial error in its "argumentative, impertinent, and insulting" questioning of his stepmother and defense expert Carroll and that such questioning "directly impacted the character, integrity, and believability of witnesses testifying positively for the defense on key factual issues." The only objection Vargas made during the questioning of these witnesses was to the date of a photograph shown to his stepmother and was inadequate to preserve anything other than fundamental error. *See Rutledge*, 205 Ariz. 7, ¶ 30.

¶35 Specifically, Vargas challenges the state's cross-examination of Carroll as to whether eyewitnesses had identified Vargas as the man in the security footage, its pointing to excerpts from Carroll's book on the topic of unreliability of eyewitness identifications, and its subsequent inquiry about whether Carroll had used such purportedly unreliable practices in the past as a detective.

¶36 Vargas called Carroll to testify regarding eyewitness identification and investigative techniques. During the state's cross-examination of Carroll, the following exchange occurred:

> Q. I'm asking you, are you coming into court and offering an opinion that Bobby Chavez, or Tessa Vargas, or Francisco Vargas, that they recognized Luis Vargas, that they did that because of any improper police action?
>
> A. I didn't see where they identified him at all.
>
> Q. So sitting here today, you are unaware of the fact that Bobby Chavez, Tessa Vargas, Francisco Vargas have come to court and told the jury that they recognize Luis Vargas in the Conoco images?
>
> A. I had no—excuse me—I had no foreknowledge of that. In what I reviewed, there was no ID of that, there was no mention of

> that. And if there would have been, identification from memory is, that's him; it falls out immediately. You don't have to look at something over a length of time.

¶37 During the state's questioning of Carroll as to certain transcripts he had reviewed, Carroll indicated he had reviewed the same disclosure since he last spoke with the state and noticed additional transcripts of which he had previously been unaware. The state then commented: "So in the second week of trial, after I had an opportunity to ask you some questions, you went back and boned-up on the case . . . ?" And, after Carroll testified that none of the eyewitnesses had identified Vargas in a lineup, the state posed the following question: "And so forgive me, I don't mean to be impertinent, but you flew out here from Florida to talk to us about lineups in a case where nobody made an identification out of a lineup?"

¶38 Upon further discussion about eyewitness identification, the following exchange took place:

> Q. Are you saying Eric Hunt, or Enedina Garza, or Andrew Black, that they're wrong in recognizing the man in the flier as the man who sought help with [K.R.]'s van?
>
> A. I don't think I saw the—excuse me. I don't think they saw him with the van, at least in what I reviewed. The descriptions of the people that I reviewed from the people that saw this gentleman at a given hour within the Conoco video were different. I mean, they talked about a jacket.
>
> Q. Wait. Let's back up for second. I don't mean to cut you off, but is it your testimony under oath to this jury that Andrew Black and Eric Hunt did not see this suspect that they recognized on the flier as seeking help with [K.R.]'s van, that they did not see that person with the van; is that your testimony under oath?
>
> A. Eric Hunt went and helped with the van, I believe. I don't believe the others did.

> Q. You don't believe Andrew Black went out and saw him at the van?
>
> A. He may have seen him at the van. I don't think he saw him in the van.
>
> Q. Did you read Andrew Black's statements?
>
> A. I'm sure I did.
>
> Q. And so you want to say that you don't believe he saw the man with the van?
>
> A. I don't remember seeing that. It's possible. I don't remember it.

¶39 The state subsequently asked Carroll about investigative leads in the case:

> Q. And I interviewed you [at] 7 AM last Friday morning, the second week of trial, and you still didn't know what investigative leads you were talking about; is that true?
>
> A. I don't think that was the extent of our conversation. I think I told you that's what I would have done, and I didn't know specifically what you were going to ask me.
>
> Q. No; I don't mean about what I was going to ask you. What I'm trying to get at is the state of your knowledge of this case as of the end of week two of trial, okay, by the time that you have billed $1200 and some shrapnel, and you're coming here to testify.

¶40 When questioning Carroll about the book he authored on eyewitness identifications, the following occurred:

> Q. I mean, and I know you said this morning that you think it's a good idea maybe to show—well, I don't want to mischaracterize. You were saying something about [how] it's okay to show a lineup years later?

> A. I said I have done it years later. I didn't say it was a good idea, but sometimes that's the first chance I get.
>
> Q. Oh, goodness. Did those cases result in a conviction, to your knowledge?
>
> A. They must have.
>
> Q. Are you worried about that at all?
>
> A. No.
>
> Q. But you wrote a whole book about how eyewitness identifications can be really flawed because people's memories can be bad, especially about facial recognition; right?
>
> A. That's correct.
>
> Q. And, in fact, you have a chart in your book, and it talks about percent of memory over time; and by seven days, we're down to ten percent of memory; right?
>
> A. That's correct.
>
> Q. I mean no disrespect if I ask this; of course you've solved cases when you were a detective; right?
>
> A. Lots.
>
> Q. I mean, you solved a lot of cases, and there were cases that you solved where you did not show every witness every lead in a lineup; right?

¶41 The state subsequently asked Carroll for his opinion regarding the investigation of K.R.'s van:

> Q. So we've got a van that was in evidence and searched four times in February. And you were sent materials about the case?

> A. Yes.
>
> Q. And you have offered opinions to the jury. I just need to figure out the scope of your opinions. Are you telling the jury whether or not the van was still an active crime scene [on] February 28th, of 2008?
>
> A. If it was impounded, my answer would be yes.
>
> . . . .
>
> Q. So do you feel comfortable coming into trial and offering opinions about the state of the van as a crime scene without having reviewed evidence of the searches that were conducted of that vehicle?
>
> A. Well, I've reviewed the reports that said they searched it. And if it was impounded, I would still consider it to be impounded for a reason.

¶42 Based on the above, Vargas contends the state improperly "questioned Carroll's knowledge of the case with misleading questions that either mischaracterized the previous conversation or twisted his testimony." Further, he claims, the state "implied that Carroll had attempted to disadvantage the State by 'boning up' on the case during the second week of trial and after [the state] had the opportunity to interview him." In addition, Vargas contends the state, after successfully moving to preclude other areas of questioning, attempted to make Carroll "look bad to the jury" by questioning the reason for his testimony "because no eyewitness identifications had been made and that was his area of expertise." And, Vargas asserts the state improperly attempted to insinuate Carroll was lying when he was unable to recall or misstated a fact and "impugned [his] previous work as a detective."

¶43 Vargas relies on *State v. Roque*, 213 Ariz. 193, ¶ 161 (2006), for the proposition that "a prosecutor cannot attack [an] expert with non-evidence, using irrelevant, insulting cross-examination and baseless argument designed to mislead the jury." There, the prosecutor "attempted to ridicule" an expert witness's publications and other qualifications, and, in the absence of any supporting evidence in the record, asked him if his

school had been "started by a bunch of teachers offering classes to the people in New York on things like acupuncture and that sort of thing." *Id.* ¶ 160. Although our supreme court ultimately concluded the state's questions had not denied Roque a fair trial and the prejudice had been mitigated by the witness's "effective[]" answers, it noted the questioning "constitutes an incident of misconduct that, while not individually reversible, contributes to our analysis of cumulative prosecutorial misconduct." *Id.* ¶ 161.

¶44 Unlike in *Roque*, the state here did not attempt to "insult[]," "ridicule," or "attack [Carroll] with non-evidence." *Id.* ¶¶ 160, 161 (quoting *In re Zawada*, 208 Ariz. 232, ¶ 14 (2004)). Vargas cites no binding authority, and we find none, requiring reversal under the circumstances of this case. Indeed, "it is proper to inquire into the reasons for [an expert's] opinion, including the facts upon which it is based, and to subject the expert to a most rigid cross-examination concerning his opinion and its sources." *State v. Wood*, 180 Ariz. 53, 66 (1994) (quoting *State v. Stabler*, 162 Ariz. 370, 374 (App. 1989)). Moreover, casting doubt on the credibility of witness testimony is a proper purpose of cross-examination. *See State v. Torres*, 97 Ariz. 364, 366 (1965) (cross-examiner given "great latitude" to impeach credibility of witness). Thus, as the state contends, "asking Carroll questions about his preparation, his opinions, and the purpose of his testimony were all proper" on cross-examination. We find no error, much less fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 21.

¶45 Vargas also challenges the state's questions to his stepmother regarding her perception of the shoes the suspect was wearing in the gas station security video and the state of Vargas's teeth. Vargas called his stepmother to testify that she was unable to identify the person in the gas station video as Vargas and to explain why she believed Vargas was not the person in the video.

¶46 On direct examination, she testified that the person in the video "looked like he was wearing cowboy boots," which she had never seen Vargas wear, and that Vargas's teeth were not black, rotten, or missing, and she did not remember them being chipped. On cross-examination, the following exchange occurred:

> Q. So I did hear you correctly, ma'am, that you claim to see cowboy boots in that video?
>
> A. Looked like it to me.

Q. That's one of the reasons why you know it's not Luis; right?

A. That's one of them; right.

Q. And you were asked about Luis' appearance, so I do want to ask you about some other images. You talked about Luis having good teeth, and nice teeth, and everything like that?

A. They weren't short and they weren't black.

Q. So, were they that?

A. They were white.

Q. Whatever you want to call that?

A. They weren't short, and they weren't black, and they were white.

Q. I'm asking you if those are Luis' teeth; do you see that?

A. Yes, I do.

Q. Is that Luis?

A. Looks like it.

. . . .

Q. . . . We've established it and it's in evidence. Can you agree with me, his teeth looked like that in July of 2008?

A. Uh-huh.

Q. That's yes, for the record?

A. Yes.

Q. Another way his teeth looked in July of 2008?

A. Uh-huh.

Q. Would be that, too; right?

A. Yes. White.

Q. And this is white to you?

¶47 Vargas contends the state's "feigned incredulousness at [his stepmother's] testimony regarding the boots and [Vargas]'s teeth" constituted prosecutorial error. But, given the state's "great latitude" to impeach the credibility of witnesses on cross-examination, again, we find no error. *Torres*, 97 Ariz. at 366.

Eliciting Expert Testimony from Non-Experts

¶48 Vargas contends the state erred "by repeatedly eliciting expert testimony from unqualified fact witnesses, and attempting to elicit testimony outside other witnesses' fields of expertise," specifically challenging the testimony of Detective Kelley, a fingerprint expert, and a DNA analyst. First, Vargas maintains the state improperly elicited testimony about the "psychology behind witness identifications" from Kelley, claiming she was not qualified to offer such testimony.

¶49 After establishing that an eyewitness in this case had failed to identify Vargas in a photo lineup, the state asked Kelley whether, in her experience, "people have trouble with photo lineups." She responded:

> On occasion. And if I can explain? In this occasion, some of the witnesses had just seen him for a brief amount of time, had seen the subject with the van. And at that time, [he was] just asking for help. It wasn't like it was a crime where something had happened and they were ingraining this person's appearance in their head. They were later asked to give a description of a person that they had seen for a period of time, maybe up to five minutes. So depending on the situation, or if somebody had known somebody previous[ly], it might assist in whether they can identify them in a lineup.

¶50 When the state asked about the witnesses in this case, Kelley said:

> The witnesses here, in dealing with the subject with the van, didn't realize it was even important at the time. So when they're approached by officers attempting to identify or describe the subject they had encountered, now they're thinking back. Rather than, as I'm saying, if it's perhaps a robbery situation, where you know the person you are encountering is a bad person, so you're maybe tuning in more and trying to pay more attention to the fine details of the person's description.

Kelley went on to state that her explanation of why eyewitnesses might not identify someone in a lineup "could certainly apply" to the Conoco clerk who had sold gasoline to Vargas.[10]

¶51 In our previous decision, we addressed Vargas's claim that Kelley's testimony about eyewitness identification was inadmissible. *Vargas*, No. 2 CA-CR 2016-0324, ¶¶ 48-49, 51. Because, under Rule 702, Ariz. R. Evid., a witness can be "qualified as an expert by knowledge, skill, experience, training, or education," we concluded Kelley was "an experience-based expert on the subject of eyewitness identifications" and her testimony was admissible "based on her twenty-two years of experience as an officer and detective, which includes her experience conducting lineups with eyewitnesses." *Id.* ¶¶ 50-51. And, we noted that Kelley's testimony could have been helpful to the jury on the subject of identifications. *Id.* ¶ 51; *see State v. Davolt*, 207 Ariz. 191, ¶ 70 (2004) ("The test of whether a person is an expert is whether a jury can receive help on a particular subject from the witness."). As to Vargas's prosecutorial error claim, because we found no error in the admission of Kelley's testimony regarding eyewitness identification, we find no error in the state's elicitation of such testimony.

¶52 Vargas also contends the state erred in eliciting testimony about DNA from the fingerprint expert because the state failed to establish the expert had any specialized training in DNA testing or comparison. After asking the expert about the subjectivity involved in fingerprint

[10]Vargas raised an untimely objection to Kelley's testimony based on lack of foundation. This objection was insufficient to preserve his claim of prosecutorial error. *See Rutledge*, 205 Ariz. 7, ¶ 30; *State v. Vermuele*, 226 Ariz. 399, ¶ 10 (App. 2011).

analysis, the state asked him if DNA analysis also involves "some subjectivity." The expert confirmed that he had "worked in the crime lab with DNA analysis for years" and stated: "I'm not a DNA analyst, and I've never had the training, but I've heard some discussions among DNA criminalists about how they're interpreting data, and is there enough. And when it gets mixtures and that, they have that subjectivity that comes into play to determine is this a true event or not."[11] Thus, as the state contends, the fingerprint analyst's testimony was not inadmissible expert testimony because he "testified to his firsthand knowledge of discussions among DNA criminalists" with whom he had worked, and we find no error. *See Peltz*, 242 Ariz. 23, ¶ 17.

¶53 As to Vargas's contention that the state improperly tried to elicit fingerprint testimony from the DNA analyst, we disagree. On redirect examination, the state asked the DNA analyst the following questions:

> Q. Do you think wearing gloves might interfere with the ability to leave fingerprints behind?
>
> A. I'm not an expert on that, so I really wouldn't say, but I would assume that's why you wear gloves; yes.
>
> Q. Well, there might be a lot of reasons. You wear them in testing, right?
>
> A. You're right. If you did not want to leave fingerprints behind, I would assume you would wear gloves. That's how I should have said that.
>
> Q. I want to take it a different way. Forget about anybody's intention. If I put a latex glove on this hand, and I touched this desk, do you think that's going to make it pretty dang hard for me to leave a fingerprint on the desk?

[11] Vargas did not object that the expert's testimony constituted inadmissible hearsay, nor does he so argue on appeal; we therefore need not address that issue on appeal.

> A. I really don't feel comfortable. I mean, it seems obvious, but I don't have training in that field. I don't want to testify outside my range.

The state contends the purpose of its questions to the DNA analyst was to "ascertain if the witness had the expertise" to testify regarding fingerprints. And, in any event, no inadmissible testimony was elicited. We find no error.

Attacks on Defense Counsel

¶54 Vargas asserts it was prosecutorial error for the state to "attack" defense counsel in an attempt to "discredit the attorneys and accuse [them] of improper conduct." Specifically, he contends the state attacked defense counsel by: arguing to the jury that defense counsel would have them believe Vargas had "pearly whites" when defense counsel did not characterize them as such; suggesting to the jury that the defense wanted to distract them with irrelevant evidence; implying defense counsel was lying about finding DNA in fingerprints; and objecting to Kelley reading statements from deceased witnesses after both the state and Vargas had previously stipulated to reading them and then apologizing to her for forcing her to read that stipulation.[12] Vargas claims these arguments "created a basis for the jury to decide the case against [him] because of a distaste for and dislike of counsel" and "relieved the State of its burden to present sufficient evidence."[13]

¶55 "Prosecutors are afforded 'wide latitude in presenting their closing arguments to the jury.'" *State v. Ramos*, 235 Ariz. 230, ¶ 22 (App. 2014) (quoting *State v. Jones*, 197 Ariz. 290, ¶ 37 (2000)). Although

[12]We previously addressed Vargas's claim that the state attacked defense counsel by portraying him as having argued a hair found in the van was K.R.'s when he made no such suggestion and we found no error. *Vargas*, No. 2 CA-CR 2016-0324, ¶¶ 27–30.

[13]On remand, Vargas withdraws his claim as to alleged attacks on defense counsel made outside the presence of the jury. However, we previously rejected this claim, concluding that because the jury did not hear the statements, Vargas could not show a reasonable likelihood that they had affected the jury's verdicts. *Vargas*, No. 2 CA-CR 2016-0324, ¶ 26; *see State v. Moody*, 208 Ariz. 424, ¶ 145 (2004); *see also State v. Blackman*, 201 Ariz. 527, ¶ 59 (App. 2002).

impugning the integrity or honesty of opposing counsel is improper, criticizing defense theories and tactics is proper in closing argument. *Id.* ¶ 25. In *Ramos*, the state claimed in its rebuttal that defense counsel's focus on the state's failure to prove a fact was an attempt to divert the jury from relevant evidence by raising "red herrings" and "distractions." *Id.* ¶ 24. It also told the jury that defense counsel was asking it to speculate and "check [its] common sense at the door." *Id.* We concluded that although these comments suggested defense counsel was attempting to mislead the jury, the comments merely criticized defense tactics and did not amount to misconduct. *Id.* ¶ 25.

¶56 Here, when discussing the testimony regarding Vargas's broken teeth during closing, the state argued "the defense has focused on the pearly-white nature" of Vargas's teeth in one of the trial exhibits. The state further argued "[t]his is not a man who, in regular light, as it would have been that morning, would look like he had pearly whites." Contrary to Vargas's argument, this did not constitute an attack on defense counsel. The state had presented evidence that Vargas had broken teeth and was merely arguing a reasonable inference from that evidence. *See State v. Moody*, 208 Ariz. 424, ¶ 180 (2004) (counsel given "wide latitude" in closing to comment on evidence and argue reasonable inferences from it (quoting *State v. McDaniel*, 136 Ariz. 188, 197 (1983))). And, "[c]riticism of defense theories and tactics is a proper subject of closing argument." *Ramos*, 235 Ariz. 230, ¶ 25 (alteration in *Ramos*) (quoting *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997)).

¶57 Further, the state commented that there had been "some attempt by the defense to suggest" that evidence of other attacks in the neighborhood "must mean that there is somebody else out there." And, the state noted "the defense started out this trial by posing a different question to you entirely; one that you're not being asked to decide." Later, when discussing the suggestion that the crime scene had been contaminated, the state argued:

> But let me ask you this: After all the questions about garbage in crime scenes that you were forced to endure, tell me about all the ways that that glove and that bottle put [Vargas's] fingerprint on that space heater. Tell me about all the ways that that glove and that bottle put [Vargas's] face and body into the Conoco, or ma[d]e him lie about his whereabouts in

> Tucson, and his abrupt flight from Tucson. This is a distraction.

¶58 Like the prosecutor in *Ramos*, the state properly suggested defense counsel was attempting to divert the jury's attention from other evidence in the case. *See id.* ¶¶ 24-25. The state's arguments were nothing more than permissible criticism of the defense's tactics specifically directed at Vargas's defenses of mistaken identity, third-party culpability, insufficient investigation, and contaminated evidence. *See id.* ¶ 25.

¶59 During its closing, the state argued, "[I]t's not what defense counsel said, oh, look, there's DNA in a fingerprint. Turns out that's completely wrong. Somebody told you something that is completely wrong, and counter to the evidence in their opening statement. Why would they do that?" It appears the state was refuting the following statement made during Vargas's opening, after he noted no samples of DNA matching his own had been collected in this case: "So how could that be if he was in the house, leaves a fingerprint, but no DNA? Right there I left a fingerprint and I've left DNA." Indeed, the state contends its argument was "expressly referring to defense counsel's statement in opening statements . . . that fingerprints *always* contain DNA" and "it was that contention the [state] was labelling as untrue." Within this context, the state's argument amounted to criticism of defense theories and tactics, not a personal attack on defense counsel's character. *See id.*

¶60 Finally, Vargas claims the state attacked defense counsel during trial by objecting to Kelley reading statements from deceased witnesses after both the state and Vargas had previously stipulated to reading them, and then apologizing to Kelley for forcing her to read the stipulation again on redirect. Prior to Vargas's cross-examination of Kelley, he indicated he "was planning on having [her] . . . read the stipulation" the parties had reached as to statements made by deceased witnesses. The court agreed, and the state did not object. On cross-examination, Vargas asked Kelley to read the stipulation, and before she began reading, the state objected, stating: "[T]hat's a little unusual. I would ask that we agree on a method for reading the stipulation." The court then held a bench conference during which the parties agreed that Kelley would read the stipulation aloud, and she proceeded to do so.

¶61 The following day, on redirect, the state asked Kelley to read portions of the stipulation and at least twice apologized to her based on the length of the statements she was being asked to read. When asking Kelley specific questions related to the statements included in the stipulation, it

stated it was "sorry to perpetrate this upon" her. The state then confirmed with Kelley that she had gotten "stuck reading [the stipulation] yesterday on cross-examination" and stated that now they were "just trying to flesh it out."

¶62 Vargas contends that because the state had previously agreed to have Kelley read the stipulation, its apologetic statements and added commentary in front of the jury constituted attacks on defense counsel, calling into question "counsel's integrity and honesty, and impl[ying] that the defense was attempting to hide the ball." Specifically, he argues that by "adding this commentary to the questions, [the state] implied that the defense had unnecessarily imposed a burden upon Kelley by forcing her to read a stipulation that [the state] agreed to have her read, and that the defense had attempted to withhold a portion of the stipulation by not having her read it all, and that . . . they were going to 'flesh it out' in order to make sure the jury heard all of the evidence." However, as the state argues, neither its objection to the method of introducing the stipulation nor its comments when questioning Kelley on redirect constituted a personal attack on defense counsel. Although it is improper for the state to impugn the integrity or honesty of opposing counsel, *see Ramos*, 235 Ariz. 230, ¶ 25, contrary to Vargas's argument, the state's comments in this case do not appear to have been "designed to discredit [defense counsel] and accuse [them] of improper conduct."

¶63 Vargas cites no binding authority, and we find none, requiring reversal on the record before us. And, even if any of the statements were improper, they were not so prejudicial as to deny Vargas a fair trial in light of the jury instructions indicating that what attorneys say is not evidence. *See Prince*, 204 Ariz. 156, ¶ 9. We find no error, much less fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 21.

Other-Acts Evidence

¶64 Vargas argues the state erred by seeking admission of "the fact of his arrest, multiple mug shot booking photos, and . . . jail video visits that showed nothing more than the already admitted sanitized photographs" for the purpose of "telling the jury that [he] was a bad man with a lengthy criminal history." Further, he claims the "improper insertion of [his] arrest and in-custody status relieved the State of its burden to prove each element of the offense by inviting the jury to decide the case on the basis of evidence of [his] bad character rather than actual substantive evidence."

¶65 Specifically, Vargas contends the state "injected" his custodial status and arrest into the trial by asking Kelley questions about Vargas's possessions and what he was wearing when police arrested him and admitting photo lineups that included his mug shot. During Kelley's testimony, the state admitted into evidence the photo lineups she had shown to one of the Checker's employees. Vargas did not object, but when the state realized the photos showed Vargas draped in cloth, which indicated the photos were mugshots, it requested a bench conference to confirm the defense did not take issue with the state publishing the photos to the jury. Vargas stated it was "fine" for the state to publish the photos. In response to the state's questions, Kelley also testified about what Vargas had been wearing and the belongings he had in his possession at the time of his arrest.

¶66 The state did not err by introducing evidence of Vargas's arrest and lineup photos that included his mugshot; such evidence was properly admitted. Vargas was on trial for first-degree murder, and "[c]ertainly the jurors were aware that [he had been] arrested and had spent some time in custody prior to trial. Such knowledge is not prejudicial and does not deny defendants the presumption of innocence." *State v. Murray*, 184 Ariz. 9, 35 (1995). Moreover, the jury was properly instructed that the state "must prove each element of each charge beyond a reasonable doubt" and that Vargas was presumed innocent. We presume the jury followed these instructions. *See Prince*, 204 Ariz. 156, ¶ 9. No error occurred, much less fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 21.

¶67 Additionally, Vargas reasserts his claim that the state erred in seeking admission of jail videos for the purpose of showing the condition of his teeth, contending that while we concluded "the trial court had not abused its discretion by admitting the video," we failed to address his argument in the context of prosecutorial error. However, because we concluded no error occurred in the court's admission of the jail video, *Vargas*, No. 2 CA-CR 2016-0324, ¶¶ 33–35, and, in any event, the jury was instructed not to consider the fact that the video showed Vargas in custody, *see Prince*, 204 Ariz. 156, ¶ 9, we find neither error nor prejudice.

Burden Shifting and Vouching

¶68 Vargas contends the state's "argument that the defense could have requested DNA testing on the latex glove" found in K.R.'s van—and its implication that "the defense made no such request because [Vargas] knew it would incriminate" him—constituted improper vouching and burden shifting and was not supported by the evidence. At trial, Vargas

asked Kelley about a latex glove with a hair on it that had been collected from K.R.'s van when it was in the Tucson Police Department's impound lot and whether the glove or hair had been tested for DNA. After the jury retired for the day, the state gave notice that it intended to ask Kelley whether Vargas had ever asked to have the glove and hair tested for DNA. The trial court ruled:

> [S]o long as the State makes clear during their closing argument, if they address this piece of evidence, that they clearly point out that the State carries the burden of proof throughout, and that never shifts, then it's an appropriate argument. . . . I think it's appropriate for [the state] to ask [Kelley] whether or not the defense ever made a request to have that item examined independently.

¶69 The state never asked Kelley whether Vargas had requested to have the glove and the hair examined. But the state pointed out during Kelley's testimony that she had been retired when the glove and hair were collected, and Kelley deferred questions about those items to Detective Cheek. Cheek was never called as a witness. Later, the state asked a DNA analyst whether Vargas had requested DNA testing of any item. The state also asked a fingerprint analyst whether the fingerprints found on the space heater had been made available to Vargas to conduct his own examination.

¶70 During closing, Vargas noted that Cheek was never called as a witness, and the state said in its rebuttal:

> And the evidence, uncontroverted, there is no evidence suggesting there is not a [fingerprint] match. And there are two experts who say there are two fingerprints that match to Luis Vargas. Uncontroverted.
>
> Why would it be, why would it be that another expert would not be called? And for that matter, on the glove, the question is raised, well, Detective Cheek is sitting over there. He could bring so much to this discussion of the glove and the bottle. And the answer to that, again, is that although the burden is always on the State, if you are going to stand up here and

> say Detective Cheek knows all the answers to this very important question, and, by gosh, somebody should have called him, put him on the stand, and he could have answered these critical questions in this important case, you know, that falls on both parties. If there is a party who thinks that he has some critical information . . . if they want to talk about that, then put him on the stand. But if you don't put him on the stand, it seems to suggest that you might [not] want to know the answers.

¶71 Vargas argues the above questions and arguments amounted to burden shifting and vouching "by raising an improper inference in the minds of the jurors—that the defense did not test the items for DNA, call Cheek to testify, or have the fingerprints independently examined because the evidence would have inculpated [Vargas]." However, well-established Arizona law provides the state "may properly comment on the defendant's failure to present exculpatory evidence which would substantiate [the] defendant's story, as long as it does not constitute a comment on [the] defendant's silence." *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160 (1987) (cross-examination of defendant on, and argument related to, defendant's failure to produce any test results of a breath sample at trial was permissible); *accord State v. Fuller*, 143 Ariz. 571, 575 (1985) (state's references to defendant's failure to present any positive evidence were permissible in a case with potential alibi witnesses); *State v. Cozad*, 113 Ariz. 437, 439 (1976) (not improper for state to examine defendant on his failure to produce babysitter as alibi witness). "Such comment is permitted by the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it." *McDougall*, 153 Ariz. at 160. This principle extends to the state's examination of witnesses to elicit testimony regarding a defendant's failure to produce exculpatory evidence. *See id.*

¶72 Here, the state's questions to the DNA and fingerprint analysts as to whether Vargas had requested independent testing or examination of evidence were proper and did not shift the burden of proof even if they gave rise to the inference that such evidence would have been unfavorable to him. *See id.*; *State v. Lehr*, 201 Ariz. 509, ¶¶ 55–57 (2002) (rejecting defendant's claim that state's question whether experts outside police department could evaluate fingerprints shifted burden to defendant to prove his innocence). Further, during its rebuttal closing, the state allowably discussed Vargas's failure to call Cheek as a witness, especially

in light of the fact that, during his own closing argument, Vargas noted the state's failure to call Cheek as a witness. *See McDougall*, 153 Ariz. at 160; *see also State v. Alvarez*, 145 Ariz. 370, 373 (1985) ("Prosecutorial comments which are a fair rebuttal to areas opened by the defense are proper.").

¶73 Moreover, the trial court instructed the jury that "[t]he State must prove guilt beyond a reasonable doubt based on the evidence," "[t]he defendant is not required to produce evidence of any kind," "[a] defendant's decision not to produce any evidence is not evidence of guilt," and "[t]he law does not require a defendant to prove innocence." Jurors are presumed to follow their instructions. *See Prince*, 204 Ariz. 156, ¶ 9. Both parties also referred in their arguments to the fact that the state had the burden of proof. On this record, we find no error, prejudicial or otherwise. *See Escalante*, 245 Ariz. 135, ¶ 21.

¶74 "Prosecutorial vouching occurs if, among other things, 'the prosecutor suggests that information not presented to the jury supports' the evidence, testimony, or witness." *State v. Payne*, 233 Ariz. 484, ¶ 109 (2013) (quoting *State v. Vincent*, 159 Ariz. 418, 423 (1989)). Vargas appears to argue the state vouched for the strength of its case during its closing argument by suggesting evidence not presented to the jury, including fingerprint evidence and Detective Cheek's testimony, was advantageous to the state. The state counters it "was not suggesting that any evidence not presented to the jury supported [its] case with respect to fingerprint evidence," but rather it "was noting the absence of any evidence contradicting the State's case." Similarly, with respect to Cheek, the state notes it "was responding to the defense implication that [his] testimony somehow would have aided the defense" by arguing Vargas had had the ability to call Cheek as a witness in support of his case. We agree. No vouching, and thus no error, occurred.

Misstating Evidence During Closing

¶75 Vargas asserts the state committed prosecutorial error when it "repeatedly misstated the evidence during closing arguments and inserted inflammatory argument." In particular, he argues the state misstated evidence about DNA and identifications in the case, and its "inflammatory misstatement that the space heater was the closest thing to a murder weapon was absolutely misconduct."

¶76 "Counsel is given 'wide latitude' in closing argument to 'comment on the evidence and argue all reasonable inferences' from it." *Moody*, 208 Ariz. 424, ¶ 180 (quoting *McDaniel*, 136 Ariz. at 197). "Unlike

opening statements, during 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. And, courts should look to the "context in which the statements were made as well as 'the entire record and to the totality of the circumstances.'" *State v. Goudeau*, 239 Ariz. 421, ¶ 196 (2016) (quoting *State v. Nelson*, 229 Ariz. 180, ¶ 39 (2012)). Further, arguments made by counsel generally carry less weight than instructions from the court, which "are viewed as definitive and binding statements of the law," while arguments by counsel "are usually billed in advance to the jury as matters of argument, not evidence . . . and are likely viewed as the statements of advocates." *Boyde v. California*, 494 U.S. 370, 384 (1990).

¶77 As noted, during closing argument the prosecutor stated: "[I]t's not what defense counsel said, oh, look, there's DNA in a fingerprint. Turns out that's completely wrong. Somebody told you something that is completely wrong, and counter to the evidence in their opening statement. Why would they do that?" In addition to arguing this was an attack on defense counsel, Vargas contends this was a misstatement of the evidence because two DNA witnesses testified at trial that it was possible to find DNA in a fingerprint. Although a DNA analyst testified during trial that it is "theoretically" possible to get a DNA profile from a fingerprint that had been lifted from a crime scene, and a police sergeant testified fingerprints could be processed for DNA even if they had "been around for a long time," as noted, the state's argument was "expressly referring to defense counsel's statement in opening statements . . . that fingerprints *always* contain DNA." In context, and given the state's "wide latitude" to argue reasonable inferences from the evidence during closing arguments, we find no error. *Moody*, 208 Ariz. 424, ¶ 180 (quoting *McDaniel*, 136 Ariz. at 197). And, to the extent the state's arguments imprecisely characterized the evidence adduced at trial, we presume the jurors followed their instructions that attorneys' arguments are not evidence. *See Prince*, 204 Ariz. 156, ¶ 9.

¶78 The state also argued during closing that "four relatives," including Vargas's father and Robert Chavez, to whom Vargas was like a son, had identified Vargas as the person in the gas station. Vargas challenges this statement, claiming that neither his father nor Chavez "had made a firm identification" and that a defense expert had testified "none of the family members had made what could be considered an[] actual identification." However, as the state notes, Chavez had identified Vargas in an image from the gas station footage at trial. Similarly, Vargas's father confirmed he had previously stated the suspect "looked like" Vargas in images from the video and testified "it could be [Vargas] in the video." The

other two relatives also testified the man in the footage looked like Vargas. Thus, the state did not misstate the evidence.

¶79 The state also argued, "How do you know [Vargas] did it? Because he left two of his fingerprints behind on the closest thing that you have in this case to a murder weapon: the tipped over space heater . . . with the cord ripped off. The cord that is found in her burning van." Later, the state again referred to the space-heater cord as "the closest thing to a murder weapon there is in this case." Vargas claims these arguments misstated the evidence because "no evidence regarding the cause of K.R.'s death had been presented, and [the state] acknowledged that it was unknown how K.R. died."

¶80 Notwithstanding the state's acknowledgements that "[t]he exact nature of the suffering, the terror, the sheer horror of [K.R.'s] death will never be known," and "despite weeks of testimony," no one "really know[s] exactly how [she] died," its argument was proper. We agree with the state's contention that "evidence that the space heater had been tipped over and the cord ripped off, combined with the evidence that the cord was found in [K.R.]'s van, allows [for] a reasonable inference that the cord from the space heater was used in her death in some manner." Again, lawyers are permitted to argue reasonable inferences from the record during closing argument, and we find no error. *See Moody*, 208 Ariz. 424, ¶ 180; *Bible*, 175 Ariz. at 602.

Introducing Hearsay Statements

¶81 Finally, Vargas asserts the state committed prosecutorial error when it introduced hearsay statements by improperly refreshing a witness's recollection pursuant to Rule 803(5), Ariz. R. Evid.[14] Specifically, he claims that when the witness did not recall making certain statements to police, the state "either play[ed] a portion of the audio of his . . . interview in open court, or read from the transcript, and then ask[ed] if his memory had been refreshed." Vargas contends that when he began cross-examining the witness in a similar manner, the state "immediately objected, urging

[14] Vargas also argued the state had improperly impeached a fingerprint analyst notwithstanding his objection at trial. But, Vargas failed to allege such impeachment constituted misconduct, and we found his argument waived. *Vargas*, No. 2 CA-CR 2016-0324, ¶ 41; *see Bolton*, 182 Ariz. at 298; Ariz. R. Crim. P. 31.10(a)(7)(A).

hearsay and that [Vargas] could not just read the transcript until it could be shown to be a prior inconsistent statement."

¶82 Although we previously concluded Vargas's claim had been waived based on his failure to argue fundamental error, we noted his concession that the hearsay was likely admissible, as well as his admissions that "he [did] not claim prejudice" and had "never argued that the prosecutor committed misconduct." *Vargas*, No. 2 CA-CR 2016-0324, ¶ 42 & n.6. Instead, he indicated he had only "included this discussion in the argument related to prosecutorial misconduct, because it is another example of [the state] playing fast and loose with the Rules of Evidence." *Id.* n.6 (alteration in original). Based on Vargas's concessions, we need not address this argument. *See Bolton*, 182 Ariz. at 298.

Cumulative Error

¶83 Vargas fails to establish the existence of prosecutorial error or misconduct in connection with any of his arguments on remand. And, as noted, we previously found no error as to his allegations that: (1) the state improperly questioned Carroll concerning "specific identifications made by witnesses, the value of fingerprint evidence, and the photo lineups used in this case"; (2) the state attacked defense counsel during its rebuttal closing argument with respect to the hair found in K.R.'s van; and (3) the trial court improperly admitted a jail video. *Vargas*, No. 2 CA-CR 2016-0324, ¶¶ 19, 28, 30, 33, 35. As our supreme court recently clarified, "because none of these instances amount to prosecutorial error, we need not consider if the individual acts collectively amount to 'persistent and pervasive misconduct.'" *State v. Smith*, 250 Ariz. 69, ¶ 146 (2020) (quoting *State v. Escalante-Orozco*, 241 Ariz. 254, ¶ 91 (2017)); *see State v. Bocharski*, 218 Ariz. 476, ¶ 75 (2008) ("Absent any finding of misconduct, there can be no cumulative effect of misconduct sufficient to permeate the entire atmosphere of the trial with unfairness."). Vargas has not met his burden of establishing that cumulative prosecutorial error deprived him of a fair trial. *See Vargas*, 249 Ariz. 186, ¶ 14 (in order to be entitled to reversal based on cumulative prosecutorial error, a defendant must, among other things, establish he was denied a fair trial).

Disposition

¶84 For the foregoing reasons, we affirm Vargas's convictions and sentences.