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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ESTEBAN JAVIER TERRAZAS, Appellant.	2 CA-CR 2011-0341 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100580001

Honorable Jane L. Eikleberry, Judge

AFFIRMED IN PART; VACATED IN PART

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Alan L. Amann
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes
Tucson
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Esteban Terrazas was convicted of manslaughter, a class-two felony, and sentenced to a presumptive prison term of 10.5 years. On appeal, Terrazas argues the trial court erred by: (1) denying his pretrial motion to dismiss on grounds of prosecutorial misconduct; (2) denying his request for a *Willits*[1] instruction; (3) granting the state's motion to preclude evidence of a witness's possession and use of drugs; and (4) permitting the state to conduct improper cross-examination. For the reasons that follow, we affirm the conviction and sentence but vacate the court's criminal restitution order.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the conviction. *See State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). Late one evening in October 2009, Terrazas went to R.M.'s house in Tucson to settle a dispute. When Terrazas went inside, R.M. and his girlfriend, A.T., were sitting on a couch in the living room. According to A.T., Terrazas walked over to R.M. and said, "Why are you texting me all the fucked-up text messages." After a heated verbal exchange, Terrazas said, "I have got something for you," and suggested that they "take it outside." R.M. then "jumped up" and pushed Terrazas into the kitchen. A.T. heard a commotion, and, as she got up to go into the kitchen, she heard gunshots. As she grabbed R.M. and pushed him toward the couch, Terrazas walked "back into the living room and shot [R.M.] again."

[1]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

¶3 After Terrazas left the house, A.T. went outside and screamed for a neighbor to call 9-1-1. When officers arrived, they found R.M. lying on the couch bleeding and A.T. straddling him, trying to render assistance. Officers discovered three nine-millimeter shell casings on the living room floor that were determined to have been fired from the same gun. An autopsy revealed R.M. had a total of five gunshot wounds to his left hand, both arms, and chest, including one fatal gunshot that perforated his aorta and lungs. The medical examiner testified that the three bullets recovered from R.M.'s body could have caused all five wounds.

¶4 Terrazas was charged with first-degree murder and aggravated assault. At his first trial, he was acquitted of aggravated assault, but, because the jury was unable to reach a verdict on the charge of first-degree murder, the trial court declared a mistrial as to that charge. At a second trial, the jury found Terrazas not guilty of first-degree murder but guilty of the lesser-included offense of manslaughter. The court sentenced him as described above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Prosecutorial Misconduct

¶5 Before his second trial, Terrazas moved the trial court to reconsider its denial of his motion for a mistrial and to dismiss the case because of prosecutorial misconduct during his first trial.[2] Terrazas claimed that, in the first trial, the prosecutor

[2]Terrazas does not challenge on appeal the trial court's denial of his motion to reconsider the request for a mistrial. Because the first trial resulted in a mistrial, that

willfully violated the court's order precluding the state from introducing evidence that he previously had sold methamphetamine to the victim. And he argued principles of double jeopardy barred retrial. The court denied the motion, and the case proceeded to trial.

¶6 On appeal, Terrazas argues the trial court erred in denying his "motion to dismiss based on intentional prosecutorial misconduct during the first trial." He contends "[t]he failure to do so violated his rights to be protected from double jeopardy under the state and federal constitutions." We review for an abuse of discretion a trial court's decision whether to dismiss an indictment on double jeopardy grounds. *Miller v. Superior Court*, 189 Ariz. 127, 129, 938 P.2d 1128, 1130 (App. 1997). But, "[w]hether double jeopardy bars retrial is a question of law, which we review de novo." *State v. Moody*, 208 Ariz. 424, ¶ 18, 94 P.3d 1119, 1132 (2004).

¶7 The double jeopardy clauses of the state and federal constitutions protect a criminal defendant from multiple prosecutions for the same offense.[3] *See* Ariz. Const. art. II, § 10; U.S. Const. amend. V; *see also State v. Minnitt*, 203 Ariz. 431, ¶ 27, 55 P.3d 774, 780 (2002). "As a general rule, if the defendant successfully moves for or consents

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issue is moot in any event. "Where the jur[ors] disagree and are discharged by the court, then the status of the case is the same as though there had been no trial at all" on the charges as to which the jurors could not agree. *State v. Woodring*, 95 Ariz. 84, 86, 386 P.2d 851, 852 (1963). Thus, except to the extent it relates to the motion to dismiss further prosecution, the propriety of the court's ruling on the request for a mistrial is not before us.

[3]Although Terrazas argues the second trial violated his rights under the Fifth and Fourteenth Amendments of the United States Constitution and article II, § 10 of the Arizona Constitution, he presents no separate argument based on the federal constitution. We thus consider his claim only under the Arizona Constitution, which provides broader protection in this context. *See Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984).

to a mistrial, retrial is not barred on double jeopardy grounds." *Minnitt*, 203 Ariz. 431, ¶ 28, 55 P.3d at 780. But, in *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984), our supreme court held that double jeopardy will bar a retrial if (1) a mistrial was granted on grounds of improper conduct by the prosecutor, (2) the conduct was "not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amount[ed] to intentional conduct which the prosecutor kn[e]w[] to be improper and prejudicial, and which he pursue[d] for any improper purpose with indifference to a significant resulting danger of mistrial or reversal," and (3) the prosecutor's conduct caused prejudice that could be cured only by a mistrial. The prosecutor's conduct must be "so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself." *Minnitt*, 203 Ariz. 431, ¶ 30, 55 P.3d at 781.

¶8 Citing the first factor articulated in *Pool*, the state argues Terrazas has not preserved this issue for our review because he failed to timely move for a mistrial in the first trial. Terrazas contends that his motion to preclude evidence of a methamphetamine sale "was sufficient to preserve the error for review because the motion is deemed to be the objection." We disagree. While it is true that a "previously made motion to preclude particular testimony preserves the issue for appeal, even if there is no objection contemporaneous to the challenged testimony," *State v. Bolton*, 182 Ariz. 290, 306 n.5, 896 P.2d 830, 846 n.5 (1995), this applies only when a trial court denies a motion to preclude and the defendant challenges the admission of the evidence on appeal, *see State v. Sharp*, 193 Ariz. 414, ¶ 22, 973 P.2d 1171, 1178 (1999). Terrazas has cited no

authority for the proposition that the issue is preserved where, as here, the trial court granted the defendant's motion to preclude and the state allegedly violated the court's order without objection.

¶9 In order to preserve a double jeopardy claim based on prosecutorial misconduct, a defendant generally must move for a mistrial in a timely manner.[4] *Moody*, 208 Ariz. 424, ¶ 21, 94 P.3d at 1133; *see also State v. Jorgenson*, 198 Ariz. 390, ¶ 7, 10 P.3d 1177, 1179 (2000) (defendant has same constitutional protection if motion for mistrial granted or denied). And a motion for a mistrial based upon prosecutorial misconduct during closing argument "must be lodged either during the final argument of opposing counsel or at the completion of the final argument." *State v. Evans*, 88 Ariz. 364, 371, 356 P.2d 1106, 1110 (1960); *see also State v. Smith*, 126 Ariz. 534, 535, 617 P.2d 42, 43 (App. 1980). The purpose of this rule is to allow the trial court to "instruct the jury to disregard the comments." *Evans*, 88 Ariz. at 371, 356 P.2d at 1110; *see also Moody*, 208 Ariz. 424, ¶ 124, 94 P.3d at 1151 (failure "to lodge a specific, contemporaneous objection" deprived court of opportunity to correct error with "immediate curative instruction"). Because Terrazas waited until the jury retired to begin deliberations before requesting a mistrial, the trial court did not err in finding he had "waived any presumed error by failing to object during closing arguments and giving the [c]ourt a real opportunity to address the matter."

[4]This issue can be preserved without a motion for a mistrial "where a prosecutor . . . engages in egregious conduct clearly sufficient to require a mistrial but manages to conceal his conduct until after trial." *Minnitt*, 203 Ariz. 431, ¶ 35, 55 P.3d at 782. But, Terrazas does not claim the misconduct here was in any way concealed by the prosecutor.

¶10 Even if the issue had been preserved properly, it is without merit in any event. As we have noted, before the first trial, the court granted Terrazas's motion to preclude any evidence that he previously had sold methamphetamine to R.M. At that trial, Terrazas testified he had fixed R.M.'s computer and R.M. was angry because the computer was not working. During cross-examination of Terrazas, the prosecutor asked the court to clarify its ruling on the motion to preclude. The court explained that he could ask Terrazas "whether th[e] fight was about drugs" but could not elicit such testimony from A.T. Without objection, the prosecutor then asked Terrazas, "Isn't it true that you were mad at [R.M.] because you [had] sold him methamphetamine—and he thought that you had shorted him?"; Terrazas answered, "No."

¶11 And during his rebuttal closing argument, the prosecutor made the following comment:

> I told you at the beginning of the case that you may not find out what this is about, what this fight is about. But you get to consider it and think what makes the most sense. Does it make sense that this man fixed his computer and that [R.M.] suddenly kind of went berserk. . . .
>
> . . . .
>
> Now is that credible? Or, or is it more likely that [Terrazas] sold some drugs to [R.M., and R.M.] is upset about it because he thinks he has gotten shorted.

¶12 Even assuming, without deciding, that the prosecutor's conduct was improper, it did not constitute intentional misconduct that he knew to be "improper and prejudicial" and nevertheless pursued for an "improper purpose with indifference to a significant resulting danger of mistrial or reversal." *Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72. During the hearing on Terrazas's motion to dismiss, the trial court noted that

"during [Terrazas's] testimony the [prosecutor] appropriately approached the bench and asked permission before he asked [Terrazas] whether he had sold any meth to [R.M.]" "The trial court's firsthand observations and assessments are entitled to substantial deference in this context." *State v. Martinez*, 230 Ariz. 208, ¶ 30, 282 P.3d 409, 416 (2012). And in denying Terrazas's motion, the court concluded he had not been prejudiced by the "one question to [Terrazas,] which he denied"—and to which counsel failed to object—and the "one line or two" in the prosecutor's closing argument. "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The court did not abuse its discretion by denying Terrazas's motion to dismiss.

***Willits* Instruction**

¶13 Terrazas next argues the trial court erred by denying his request for a jury instruction pursuant to *State v. Willits*, 98 Ariz. 184, 393 P.2d 274 (1964), regarding the state's failure to: (1) collect as evidence a box of ammunition found in R.M.'s house, (2) preserve and test for DNA[5] "fuzz" on a revolver found in the living room, and (3) test R.M.'s vitreous eye fluid to determine the level of methamphetamine in his system. We review a trial court's refusal to give a *Willits* instruction for an abuse of discretion. *State v. Speer*, 221 Ariz. 449, ¶ 39, 212 P.3d 787, 795 (2009).

[5]Deoxyribonucleic acid.

¶14 A *Willits* instruction permits the jury to infer that missing evidence would have been exculpatory and is appropriate "[w]hen police negligently fail to preserve potentially exculpatory evidence." *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999). However, the destruction or failure to preserve evidence does not automatically entitle a defendant to a *Willits* instruction. *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). "To receive a[n] instruction, the 'defendant must show (1) that the state failed to preserve material and reasonably accessible evidence having a tendency to exonerate him, and (2) that this failure resulted in prejudice.'" *Speer*, 221 Ariz. 449, ¶ 40, 212 P.3d at 795, *quoting Murray*, 184 Ariz. at 33, 906 P.2d at 566. "A trial court does not abuse its discretion by denying a request for a *Willits* instruction when a defendant fails to establish that the lost evidence would have had a tendency to exonerate him." *Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93.

¶15 At trial, Terrazas testified that after he entered R.M.'s house, R.M. pointed a revolver at Terrazas in an attempt to rob him and pistol whipped him when he did not give R.M. any money. Terrazas stated he then retreated to the kitchen where he noticed a gun on the table and grabbed it. According to Terrazas, he then came out of the kitchen and, fearing that R.M. would shoot him, shot R.M. three or four times. Officers recovered a .357-caliber revolver from a couch in the living room. And, the medical examiner who tested R.M.'s vitreous eye fluid discovered the presence of methamphetamine, which he testified can cause aggression and agitation.

¶16 On appeal, Terrazas maintains the box of ammunition, fuzz found on the revolver, and vitreous eye fluid "would [have] corroborat[ed] his version of events, and

contradict[ed A.T.]'s version, . . . thereby tending to exonerate him, and he was prejudiced because he was deprived of tangible evidence to corroborate his testimony." We address each item in turn.

¶17 Terrazas argues that if the box of ammunition contained nine-millimeter bullets, that evidence would have exonerated him by corroborating his claim that he found a loaded nine-millimeter gun on R.M.'s kitchen table. At trial, a detective testified the box was "photographed and left in place but not taken." However, the detective explained that, had it contained nine-millimeter bullets, the box would have been collected as evidence because of the nine-millimeter casings found in the living room. There simply is no indication officers acted in bad faith by not collecting the box of ammunition. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). And, because Terrazas's request for a *Willits* instruction necessarily rested upon the box containing nine-millimeter bullets, it is not apparent that it had any evidentiary value, much less exculpatory value. *Speer*, 221 Ariz. 449, ¶ 37, 212 P.3d at 795 (due process violated only when exculpatory value of evidence apparent). We find no error in the trial court's denial of the instruction as to the box of ammunition.

¶18 We reach the same conclusion regarding the fuzz found on the revolver. Terrazas argues his claim that R.M. had pistol whipped him would have been corroborated if the fuzz contained his DNA. But the DNA supervisor who examined the revolver described the fuzz as "dust or dirt," and nothing in the record suggests it had any

"tendency to exonerate him." *Id.* Terrazas's claim that the fuzz on the revolver would have supported his version of events is thus wholly speculative. *See Fulminante*, 193 Ariz. 485, ¶ 63, 975 P.2d at 503 (where evidence defendant claimed might have supported alibi defense was "highly questionable at best").

¶19 As to R.M.'s vitreous eye fluid, Terrazas suggests the state failed to perform additional testing to quantify the amount of methamphetamine in R.M.'s system, which, if done, would have corroborated his claim that R.M. was the aggressor. At trial, the medical examiner testified that R.M. had methamphetamine in his system and explained that agitation and aggression are symptoms associated with its use. He stated he did not order additional testing that "probably" could have quantified the amount of methamphetamine in R.M.'s system. But, as the state points out, "[a] *Willits* instruction is not given merely because a more exhaustive investigation could have been made." *Murray*, 184 Ariz. at 33, 906 P.2d at 566. At most, evidence of the quantity of methamphetamine was cumulative of the evidence that already established R.M. had the drugs in his system. Because Terrazas has not established he was prejudiced by the lack of additional testing, *see Speer*, 221 Ariz. 449, ¶ 40, 212 P.3d at 795, the court did not abuse its discretion in refusing his request for a *Willits* instruction.

Evidence of Witness's Drug Possession and Use

¶20 Terrazas next argues the trial court erred when it precluded evidence of A.T.'s "drug possession and possible drug usage" for impeachment purposes. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. King*, 213 Ariz. 632, ¶ 15, 146 P.3d 1274, 1278 (App. 2006).

¶21 Before the first trial, the state filed a motion to preclude "[e]vidence of suspected methamphetamine located in [A.T.]'s purse." In response, Terrazas argued the evidence should be admitted because it established A.T.'s "bias, interest and prejudice" and her "ability to remember and perce[ive]." He also suggested other witnesses could testify that A.T. appeared to be under the influence of methamphetamine that night. The trial court granted the state's motion, ruling: "Defense counsel can cross-examine [A.T.] as to whether she was under the influence of any drugs or alcohol on the evening in question . . . [but cannot] go any further than that." Before the second trial, Terrazas moved the court to reconsider its ruling, and the court denied the motion. On cross-examination, Terrazas asked A.T. whether she had "do[ne] any drugs" the day of the incident or was under the influence that night; she answered no.

¶22 Terrazas maintains he should have been permitted to impeach A.T. with evidence of her "drug possession and possible drug usage" because "if she was under the influence, it would affect her ability to observe and remember, which could render her testimony less credible." Impeachment evidence must be relevant to be admissible. Ariz. R. Evid. 401, 402. "A witness'[s] ability to perceive or recall critical facts is highly relevant to [her] credibility." *State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989). Thus, "[e]vidence of intoxication at the time of observation is admissible to attack a witness on her ability to perceive and remember." *State v. Orantez*, 183 Ariz. 218, 222, 902 P.2d 824, 828 (1995). But we are aware of no authority for the proposition that evidence of a witness's possession of drugs, standing alone, can be used to support a claim that she was under the influence of drugs at the time in question. We also conclude

the trial court did not abuse its discretion in finding Terrazas's evidence to refute A.T.'s claim that she had not used drugs—the vague testimony of two witnesses—was "not terribly reliable to attack [A.T.'s] credibility as a witness or her ability to observe properly." *See State v. Munguia*, 137 Ariz. 69, 71, 668 P.2d 912, 914 (App. 1983) (rule proscribing impeachment on collateral matters based on questionable utility).

¶23 Nevertheless, even assuming the trial court erred in precluding the impeachment evidence, we "'will not reverse a conviction if an error is clearly harmless.'" *State v. Green*, 200 Ariz. 496, ¶ 21, 29 P.3d 271, 276 (2001), *quoting State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998). "Error is harmless if we can say beyond a reasonable doubt that it did not affect or contribute to the verdict." *Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d at 1176. In determining whether a trial court's improper preclusion of evidence is harmless, we consider whether such evidence would have been merely cumulative to other properly admitted evidence. *State v. Carlos*, 199 Ariz. 273, ¶ 24, 17 P.3d 118, 124 (App. 2001).

¶24 Here, the jury heard other evidence calling A.T.'s credibility and ability to perceive into doubt. On cross-examination, Terrazas highlighted numerous inconsistencies between A.T.'s trial testimony and prior statements. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 39, 25 P.3d 717, 732 (2001) (error in precluding impeachment evidence harmless given thoroughness of impeachment), *overruled on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). Terrazas also impeached A.T. with evidence that her ability to "observe and remember" was otherwise impaired or affected that night. Specifically, A.T. admitted she had drunk an alcoholic

beverage and had taken over-the-counter, pain medication. She also explained she was "trying not to pay any attention to what was going on" between Terrazas and R.T., and, although the physical altercation eventually got her attention, she could not see everything that was happening.

¶25 Moreover, as the state points out, to the extent A.T. testified that R.M. had initiated the altercation by getting "nose to nose" with Terrazas and pushing him, her testimony actually supported Terrazas's claim that R.M. was the aggressor. We are satisfied beyond a reasonable doubt that any error in precluding the evidence did not contribute to or affect the verdict.[6] *See Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d at 1176. And because we reach this conclusion, we need not address Terrazas's argument that preclusion of A.T.'s drug possession and usage violated his state and federal constitutional rights to confront the witness. "A constitutional error is harmless if it can be said beyond a reasonable doubt that the error had no influence on the verdict of the jury." *State v. Luzanilla*, 179 Ariz. 391, 398, 880 P.2d 611, 618 (1994).

[6]Terrazas also argues the evidence should have been admitted to show A.T. "had a motive to fabricate to minimize her exposure to criminal charges for possession and use of a dangerous drug." But A.T. admitted to officers she believed the substance in her purse was methamphetamine and she had used methamphetamine two days before the incident. Moreover, nothing in the record suggests the state chose not to charge A.T. in exchange for her testimony.

Terrazas further contends the evidence should have been allowed because it would have corroborated his theory that R.M. was under the influence of methamphetamine. But the jury heard evidence from the medical examiner that R.M. had methamphetamine in his system. *See Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d at 1176.

Improper Cross-Examination

¶26 Terrazas contends the trial court "erred in denying repeated objections to the prosecutor's improper cross-examination of [him]." We review a trial court's rulings on the scope of cross-examination for an abuse of discretion. *State v. Altman*, 107 Ariz. 93, 95, 482 P.2d 460, 462 (1971).

¶27 During the prosecutor's cross-examination of Terrazas, the following exchange occurred:

> Q: And the first time that you gave a recorded statement was at the previous [trial], and that was about a year and a half after you shot and killed the victim, right?
>
> A: True.
>
> Q: So let's talk about the information you had before you made that very first statement. You heard [the last witness] talking about the disclosure, right?
>
> A: Yes.
>
> Q: And that's where you get every single piece of evidence that the [s]tate could possibly use against you, right?
>
> A: To my defense, yes.

The examination continued with the prosecutor asking Terrazas about his personal access to and knowledge of the pretrial disclosure.

¶28 Terrazas maintains that during this exchange the prosecutor "repeatedly insinuated that [he] was lying and that he had the opportunity to concoct a self-defense scenario that fit the facts because he had the benefit of pretrial disclosure." He appears to suggest this entire line of questioning was improper because it was irrelevant and

argumentative. Terrazas also contends the prosecutor infringed on his attorney-client privilege by implying that defense counsel had provided the pretrial disclosure used to "fabricate a story."

¶29 A witness may be cross-examined on any relevant matter, Ariz. R. Evid. 611(b), and a defendant who offers himself as a witness "may be cross-examined to the same extent and subject to the same rules as any other witness," A.R.S. § 13-117(A). "'Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.'" *State v. Conroy*, 131 Ariz. 528, 530, 642 P.2d 873, 875 (App. 1982), *quoting Davis v. Alaska*, 415 U.S. 308, 316 (1974). Because Terrazas's prior knowledge of the evidence the state intended to present at trial was relevant to the credibility of his version of events, it was a proper matter for cross-examination. *Cf. State v. Jones*, 109 Ariz. 378, 380, 509 P.2d 1025, 1027 (1973) (prosecutor's line of questioning was attempt to show alibi defense was afterthought or fabricated). Terrazas, nevertheless, maintains "the prosecutor had no factual predicate that [he] fabricated his story." But, as the state points out, the prosecutor had a good-faith factual basis to ask these questions based on the "subtle differences" in Terrazas's testimony between the first and second trials.[7]

[7]We also reject Terrazas's contention that, through cross-examination, the prosecutor improperly expressed his "personal opinion that Terrazas had fabricated a scenario to fit a self-defense theory." Although a prosecutor must not express his or her personal opinion about a defendant's guilt or innocence, *State v. Byrd*, 109 Ariz. 10, 11, 503 P.2d 958, 959 (1972); *State v. Filipov*, 118 Ariz. 319, 323, 576 P.2d 507, 511 (App. 1977), the prosecutor here was not stating his personal opinion by asking Terrazas about his access to and knowledge of the pretrial disclosure.

¶30 Terrazas also argues this line of questioning was improper because it was argumentative. Specifically, Terrazas references the prosecutor's questions concerning "how th[e] disclosure could be used to 'lie' about what happened" and characterization of "Terrazas's account of the shooting as 'incredible' and 'unbelievable.'"[8] During cross-examination, the prosecutor asked Terrazas, "So you have all the information the [s]tate is going to use before you make any recorded statement. And you would agree with me that it wouldn't be smart to say that something happened if there is any kind of physical evidence that contradicted that?" Defense counsel objected, arguing the prosecutor was misleading the jury into believing Terrazas's testimony during the first trial was his only recorded statement. The prosecutor clarified his question, and, without further objection, Terrazas responded, "If someone were to lie, it would not be smart for them to do that."

¶31 Shortly thereafter, the prosecutor asked Terrazas, "Your story is an incredible one, right?" Defense counsel objected to the form of the question, and the trial court overruled the objection. The prosecutor then suggested Terrazas's story was "remarkable," clarifying "What are the chances that right when you are attacked you find a loaded gun . . . ?" The prosecutor subsequently asked, "So if that really happened to

[8]To the extent Terrazas suggests that other questions during this exchange were argumentative, he has waived those arguments on appeal. In his opening brief, Terrazas summarily contends that the prosecutor's questions implying he had "used the disclosure to fabricate a story" were improperly argumentative. He refers us to several pages of the transcript without citing any particular questions or explaining how they were argumentative. Such argument is not sufficient on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1) (appellant's brief shall include argument containing "contentions of the appellant with respect to the issues presented, and the reasons therefor"); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

you, it would make sense that you would tell anybody who would listen about that incredible story?" The court again overruled defense counsel's form-of-the-question objection.

¶32 Terrazas never objected to these specific questions on the grounds they were argumentative—the argument he now raises on appeal. Because an objection on one ground does not preserve the issue on another ground, *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008), Terrazas has forfeited these issues for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). Terrazas does not argue that fundamental error occurred, and we cannot find any error that can be characterized as such; accordingly, the arguments are waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

¶33 We likewise reject Terrazas's argument that the prosecutor's cross-examination of him infringed on the attorney-client privilege by implying that defense counsel had provided Terrazas with the pretrial disclosure used to "fabricate a story." Because no objection based on attorney-client privilege was lodged below, Terrazas has not argued that fundamental error occurred, and we cannot find error that can be so characterized, the argument is waived. *See id.* ¶¶ 16-17.

Criminal Restitution Order

¶34 At sentencing, the trial court entered a criminal restitution order requiring Terrazas to pay certain fees and assessments. Although the court specified that "no costs or interest [shall] accrue until [Terrazas] is released from the Department of Corrections," the restitution order nevertheless constitutes an illegal sentence. *See State v. Lopez*, ___

Ariz. ___, ¶ 2, 298 P.3d 909, 910 (App. 2013); *State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). Because we will not ignore fundamental error when it is found, *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007); *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002) (illegal sentence constitutes fundamental error), we vacate the criminal restitution order.

Disposition

¶35 For the forgoing reasons, we affirm the conviction and sentence but vacate the criminal restitution order.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge