IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CHRIS EVERETT WILLIAMSON,
Appellant.

No. 2 CA-CR 2014-0008
Filed July 20, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20121779003
The Honorable Paul E. Tang, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Espinosa concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Chris Williamson was convicted of four counts of conspiracy to commit various offenses for his participation in a plan to commit a home invasion robbery to steal drugs. The trial court sentenced him to presumptive, concurrent terms of imprisonment, the longest of which were 9.25 years. On appeal, Williamson argues the court erred by denying his motions: (1) to dismiss for outrageous government conduct; (2) to recuse the Pima County Attorney's Office; (3) for jury instructions concerning the government's destruction of evidence and the definition of "inducement" for his entrapment defense; and, (4) for a mistrial after the prosecution added "incorrect and inflammatory" subtitles to a video played for the jury and after an officer "testified that the defendants were not entrapped." He also argues the four counts of conspiracy are multiplicitous and should be reduced to a single count. We agree the charges were multiplicitous and vacate his convictions for conspiracy to commit armed robbery, to commit aggravated robbery, and to commit possession of a narcotic drug. We otherwise affirm.

Factual and Procedural Background

¶2 The events leading up to Williamson's arrest are sufficiently set forth in *State v. Williamson*, 236 Ariz. 550, ¶¶ 2-7, 343 P.3d 1, 5-6 (App. 2015), which we incorporate here. We present only those facts pertinent to this appeal, which we view in the light most favorable to sustaining Williamson's convictions. *See State v. Almaguer*, 232 Ariz. 190, ¶ 2, 303 P.3d 84, 86 (App. 2013).

¶3 In April 2012, Tucson Police Department (TPD) officers Miguel Verdugo and Brandon Angulo orchestrated a reverse-sting

operation while undercover. Based on an introduction made by a confidential informant, Williamson and the officers met to discuss a "home invasion" of a drug stash house. In subsequent meetings, Williamson introduced the officers to his brother Craig, Randy Chapman, and Timothy Preston Adams, who all agreed to participate. On May 2, 2012, the officers met Williamson and the others in a parking lot and provided them with firearms and a vehicle to be used during the home invasion later that day. The officers then drove away in a separate vehicle, and a Special Weapons and Tactics (SWAT) team moved in to make the arrests.

¶4 A grand jury indicted Williamson and the others for conspiracy to commit kidnapping, conspiracy to commit armed robbery, conspiracy to commit aggravated robbery, and conspiracy to commit possession of a narcotic drug. During a joint trial for Williamson and his brother,[1] the state introduced surreptitiously recorded videos of their meetings with the undercover officers. Williamson and his brother stipulated to the elements of the charges but argued they had been entrapped. The jury found Williamson guilty as charged, and the trial court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Outrageous Government Conduct

¶5 Williamson argues the trial court erred by denying his pretrial "motion to dismiss the prosecution for outrageous government conduct." Generally, "[w]e review a trial court's ruling on a motion to dismiss criminal charges for abuse of discretion," *State v. Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d 756, 759 (App. 2005), but, to the extent Williamson raises constitutional issues, our review is de novo, *see Williamson*, 236 Ariz. 550, ¶ 8, 343 P.3d at 6; *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 307 (App. 2000). "We defer to the trial court's factual findings unless clearly erroneous." *State v. O'Dell*, 202 Ariz. 453, ¶ 8, 46 P.3d 1074, 1077-78 (App. 2002).

[1]Chapman and Adams pled guilty before trial.

¶6 Williamson's motion to dismiss argued "the entire scheme to engage . . . Williamson . . . in a phony home invasion plot was cooked up by [the] officers solely for the purpose of prosecuting . . . Williamson" and they had "provided him with guns, money, and the plan because he lacked the criminal intent to put it together on his own and then busted him for having guns, money and a plan." The trial court denied the motion. After the trial, Williamson filed a motion to vacate on the same grounds, which the court also denied. In doing so, the court relied on *United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013), finding that "under [the] totality of [the] circumstances," the "conduct by these agents [was] not . . . grossly shocking" or even "unreasonable."

¶7 To warrant a dismissal, "the government's conduct must be so egregious that it violates notions of 'fundamental fairness' and is 'shocking to the universal sense of justice.'" *Williamson*, 236 Ariz. 550, ¶ 9, 343 P.3d at 6, *quoting United States v. Russell*, 411 U.S. 423, 432 (1973). The defendant must demonstrate: "(1) the government 'engineer[ed] and direct[ed] a criminal enterprise from start to finish,' or (2) the government used 'excessive physical or mental coercion' to induce the defendant to commit the crime." *Id.* ¶ 11, *quoting United States v. Williams*, 547 F.3d 1187, 1199 (9th Cir. 2008), *and United States v. McClelland*, 72 F.3d 717, 721 (9th Cir. 1995) (alterations in *Williamson*). The defendant's burden is "'extremely high.'" *Id.*, *quoting United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991). In a reverse-sting operation, the defendant must show that officers did more than "suggest the illegal activity," induce the defendant to "'expand or extend previous criminal activity,'" or "provide supplies and expertise." *Id.*, *quoting United States v. Mosley*, 965 F.2d 906, 911 (10th Cir. 1992). And, with regard to coercion, it is not outrageous for the government to "'employ appropriate artifice and deception in their investigation,' 'make excessive offers,' and 'even utilize threats or intimidation [if not] exceeding permissible bounds.'" *Id.*, *quoting Mosley*, 965 F.2d at 912 (alteration in *Mosley*).

¶8 Although "[t]here is no single test for resolving a claim of outrageous government conduct," we approved of the trial court's relying on the factors used by the court in *Black* in

considering the totality of circumstances. *Williamson*, 236 Ariz. 550, ¶ 12, 343 P.3d at 7. Thus, we consider the same factors, including:

> (1) known criminal characteristics of the defendants; (2) individualized suspicion of the defendants; (3) the government's role in creating the crime of conviction; (4) the government's encouragement of the defendants to commit the offense conduct; (5) the nature of the government's participation in the offense conduct; and (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue.

Black, 733 F.3d at 303. Applying those factors in this case, we conclude the government's conduct was not outrageous.

¶9 As to the known criminal characteristics and individualized suspicion of the defendants, the state concedes that Angulo and Verdugo had no knowledge of Williamson prior to the reverse-sting operation. The officers targeted Williamson after receiving a tip from their confidential informant. But the absence of specific suspicion or "reasoned grounds" for an investigation does not imply outrageous conduct by itself. *United States v. Luttrell*, 923 F.2d 764, 764 (9th Cir. 1991). The officers here did not search for an "otherwise innocent person" among a vulnerable population. *United States v. Garza-Juarez*, 992 F.2d 896, 909 (9th Cir. 1993); *see also Black*, 733 F.3d at 302-03 (finding it "troubling" that government targeted generalized population characterized by limited "economic and social conditions"). Instead, as the trial court explained, "the record shows that the [informant] was a roommate of the brother of [Chris and Craig Williamson]."

¶10 Next, we turn to the government's role in creating the crimes of conviction. *See Williamson*, 236 Ariz. 550, ¶ 20, 343 P.3d at 9. As noted above, the government's informant made contact with Williamson, initiating the events that led to his arrest. Also, the

officers' undercover personae and the drug stash house were completely fictional. *See Black*, 733 F.3d at 307 (characterizing government's role as "quite strong" after noting government lacked individualized suspicion but initiated contact and proposed crime). However, the officers only presented Williamson with the opportunity and left the planning of the home invasion to him. And, during their first meeting, when Williamson told the officers he wanted backup for the home invasion, the officers told him, "that's on you" to find a crew.

¶11 Moreover, any concern about the government's role in creating the fictitious crime is further mitigated when we consider the fourth factor—the government's role in encouraging Williamson to take part in the crime. *See Williamson*, 236 Ariz. 550, ¶¶ 22-23, 343 P.3d at 9-10. Five minutes into their first meeting, Williamson told the officers that he was "[r]eady to do some work."[2] He then stated "he had multiple felonies on his record" and "had done burglaries before." Angulo "made [it] very clear that this was not going to be a burglary" and, instead, "would be . . . a robbery of a stash of drugs and that people would be guarding it and that people would be armed." And, the officers told him on several occasions that he could "walk away" without any consequences if he wanted.[3] But despite these repeated warnings, Williamson continued meeting with the officers and participating in the planning of the home

[2]Verdugo explained that, in this context, "work" generally refers to "a narcotic buy" or "a robbery-type crime."

[3]In his reply brief, Williamson points out that Angulo told him, "I know where you live," and argues that "a reasonable person in [his] position undoubtedly would have taken this as a threat." However, the officers denied that the statement was an implied threat, and the trial court found that, generally, "the government's actions here were not unreasonable." *See Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d at 307 ("We defer to the trial court's factual findings that are supported by the record . . . ."). And, even if it was a threat, it did not "'exceed[] permissible bounds'" because it was not aimed at inducing Williamson's participation in the offense. *Williamson*, 236 Ariz. 550, ¶ 11, 343 P.3d at 7, *quoting Mosley*, 965 F.2d at 912.

invasion. *See Black*, 733 F.3d at 302 (defendant "readily and actively acted as [a] willing participant[] with a professed ability to carry out a dangerous armed robbery").

¶12 Williamson nevertheless argues that the officers offered "a huge sum of money to entice [his] participation." In discussing the home invasion, the officers informed him that the stash house held somewhere between thirty to forty kilograms of cocaine. When told that a kilogram of cocaine could be sold for $19,000, Williamson and the others asked for half of the proceeds. We agree that the sum was substantial. But such encouragement "does not rise to the level of outrageous conduct." *Williamson*, 236 Ariz. 550, ¶ 23, 343 P.3d at 10. And, as Verdugo explained at trial, the promise of payment was necessary to make the fictional home invasion believable.

¶13 This leaves the final two factors under *Black*: the government's participation in the offense and the necessity of the actions taken in light of the nature of the criminal enterprise. *See id.* ¶¶ 24-26. The officers supplied Williamson and his co-defendants with firearms, a vehicle, and $60 to purchase other supplies. However, the officers provided these items at the request of Williamson and the others, and Williamson and his brother decided which supplies to purchase, including pepper spray, masks, rubber gloves, and plastic zip ties.

¶14 Furthermore, the violent nature of home invasions warranted the methods used in the reverse-sting operation here. "'The reverse sting tactic was designed to avoid [the risk of harm] to the public and law enforcement officers by creating a controlled scenario that unfolds enough to capture persons willing to commit such an armed robbery without taking the final step of an actual home invasion.'" *Id.* ¶ 26, *quoting Black*, 733 F.3d at 309. In this case, the officers testified that TPD had disabled the firearms and that the vehicle had a remote kill switch so the SWAT team could arrest Williamson and the others safely. We therefore conclude the final two factors weigh against Williamson's claim.

¶15 In sum, the government's role in the reverse-sting operation did not rise to the level of outrageous government

conduct. Accordingly, the trial court did not err in denying Williamson's motion to dismiss. *See Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d at 759; *Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d at 307.

Motion to Recuse Prosecutor's Office

¶16 Williamson argues the trial court erred by "refusing to recuse the Pima County Attorney's Office [(PCAO)] when that office had an interest in protecting the credibility of an officer who hid disclosure and lied under oath." He relies on *Turbin v. Superior Court*, 165 Ariz. 195, 197-98, 797 P.2d 734, 736-37 (App. 1990), to support his argument that the "appearance of impropriety required the disqualification." We review the denial of a motion to disqualify a prosecutor and his office for an abuse of discretion. *State v. Martinez*, 230 Ariz. 208, ¶ 64, 282 P.3d 409, 421 (2012).

¶17 Before trial, the parties discovered Angulo had failed to inform the PCAO that a recording of the first meeting between the officers and Williamson existed and was kept under a separate case number used for the informant. Based on this omission, Williamson filed a supplemented motion to disqualify the PCAO. He argued there was a "witness advocate" problem because prosecutors would need to testify regarding Angulo's failure to turn over the video. He also argued a general appearance of impropriety had emerged because of the PCAO's relationship with Angulo. The trial court denied the motion, noting that no ethical breach was apparent from the record and that it was unlikely the prosecutors who had communicated with Angulo would need to testify at trial.

¶18 In *Turbin*, this court applied Ethical Rule 1.11(c) to determine whether the Navajo County Attorney's Office should have been disqualified after the defendant's first attorney withdrew and joined that office. 165 Ariz. at 196-98, 797 P.2d at 735-37. Ethical Rule 1.11(c) governs "special conflicts of interest for former and current government officers and employees." ER 1.11(c), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42. The rule "prohibits a government lawyer from participating in a matter in which the lawyer participated personally and substantially while in private practice." *Turbin*, 165 Ariz. at 197-98, 797 P.2d at 736-37.

¶19 Generally, "[w]here the conflict is so remote that there is insufficient appearance of wrongdoing, disqualification is not required." *Gomez v. Superior Court*, 149 Ariz. 223, 225, 717 P.2d 902, 904 (1986). However, because of special circumstances in *Turbin*, we concluded disqualification was warranted, noting:

> the severity of the charges, the apparent relative simplicity of the case, the small number of lawyers in the prosecutor's office, the fact that [the first defense attorney] is employed to work on criminal matters, the length of time that [the attorney] represented the defendant, the vigor of [his] representation during which he actively interviewed witnesses, discussed the case with his client, and negotiated with the county attorney, and the unquestioned fact that the motion to disqualify was not brought for the purposes of harassment.

165 Ariz. at 199, 797 P.2d at 738.

¶20 *Turbin* is not applicable here. First, the state's relationship to Angulo in this case is no different from any other prosecution; nearly every criminal trial requires the state to call a police officer as a witness at trial and to bolster that witness's credibility. And, although Angulo's credibility may have been tainted by his conduct, there is no indication that the prosecutors acted in bad faith or unethically. Thus, the appearance of impropriety here does not rise to the same level as in *Turbin*. Second, and more importantly, Williamson does not explain how Ethical Rule 1.11(c) even applies to the prosecutors here. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) ("[A]rgument . . . shall contain the contentions of the appellant . . . and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."). We therefore fail to see how *Turbin* supports Williamson's argument and conclude the trial court did not err in denying his

motion to disqualify the PCAO. *See Martinez*, 230 Ariz. 208, ¶ 64, 282 P.3d at 421.

Jury Instructions

¶21 Williamson contends the trial court erred by denying his motions for jury instructions on the destruction of evidence by police and on the definition of inducement. We review the court's "decisions regarding requested jury instructions . . . for an abuse of discretion." *State v. Larin*, 233 Ariz. 202, ¶ 29, 310 P.3d 990, 998 (App. 2013).

***Willits* Instruction**

¶22 Williamson first argues "the trial court erred when it refused to instruct the jury pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964)." Specifically, he maintains a *Willits* instruction was required because Angulo, "contrary to police policy, destroyed relevant text messages and [tele]phone conversations with [the] confidential informant."

¶23 A *Willits* instruction permits the jury to infer that missing evidence would have been exculpatory "[w]hen police negligently fail to preserve potentially exculpatory evidence." *State v. Fulminante,* 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999). But 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 an *Willits* 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.'" *State v. Speer,* 221 Ariz. 449, ¶ 40, 212 P.3d 787, 795 (2009), *quoting Murray*, 184 Ariz. at 33, 906 P.2d at 566. "Speculation" as to what the evidence might have shown is insufficient. *State v. Smith*, 158 Ariz. 222, 227, 762 P.2d 509, 514 (1988). Instead, "[t]he defendant must 'demonstrate that the lost evidence would have been material and potentially useful to a defense theory supported by the evidence.'" *Williamson*, 236 Ariz. 550, ¶ 36, 343 P.3d at 12, *quoting State v. Glissendorf*, 235 Ariz. 147, ¶ 10, 329 P.3d 1049, 1052 (2014).

¶24 In this case, Angulo testified the informant had told him "there was a home invasion crew lined up to go to work." But the informant denied making this statement. Angulo did not take any notes regarding his conversations with the informant and, although Angulo received telephone calls and text messages from the informant, he did not save any voice messages and deleted all the text messages he had received. Williamson requested a *Willits* instruction based on Angulo's failure to preserve this information.

¶25 Our supreme court considered a similar request for a *Willits* instruction in *Glissendorf*, 235 Ariz. 147, ¶¶ 1-2, 5, 329 P.3d at 1051. In that case, the trial court had denied the defendant's request after police destroyed a video recording of an interview with the victim made several years before the trial. *Id.* ¶¶ 2, 5. Our supreme court reversed, concluding the defendant "easily met the 'tendency to exonerate' standard." *Id.* ¶ 19. It noted there were "several differences" between the victim's account at trial and as recorded in earlier police reports. *Id.* Thus, the destruction of the recording deprived the defendant of potentially exculpatory evidence or, at a minimum, evidence that could have impeached the victim's testimony at trial. *Id.*

¶26 In this case, Williamson similarly maintains there were differences between the testimony of Angulo and the informant. And, he contends, whether or not Williamson had been a member of a "home invasion crew" before the reverse-sting operation affected his defense of entrapment. *See* A.R.S. § 13-206(B)(3) (predisposition). Therefore, we agree that Williamson had "a defense theory" that was "supported by the evidence." *Williamson*, 236 Ariz. 550, ¶ 36, 343 P.3d at 12.

¶27 However, we disagree that the lost messages "'would have been material and potentially useful'" to that theory. *Id.*, *quoting Glissendorf*, 235 Ariz. 147, ¶ 10, 329 P.3d at 1052. Unlike the police interview in *Glissendorf*, the record here does not suggest that the lost evidence would have resolved the alleged conflict in the testimony. Although Angulo and the informant both stated they communicated by text message and cellular telephone, the informant never suggested the disputed statement was in the form

of a text or recorded voice message. Therefore, even if Angulo had saved the messages, Williamson could not eliminate the possibility that the informant told Angulo about the home invasion crew in person or during an unrecorded phone conversation.[4] *See State v. Carlson*, 715 Ariz. Adv. Rep. 4, ¶¶ 40-41 (June 18, 2015) ("Even if we assume . . . that the State could have secured the potentially relevant phone and phone record data, [the defendant] still has not established that this evidence was likely helpful to his defense."). Therefore, the usefulness of the lost evidence is speculative. *See Smith*, 158 Ariz. at 227, 762 P.2d at 514.

¶28 Williamson nevertheless argues that, in his brother's appeal, this court "misapprehend[ed] what the Supreme Court meant by 'potentially useful'" in *Glissendorf* and that we neglected to consider the potential impeachment value of the messages. Williamson, however, has misread our analysis in *Williamson*, 236 Ariz. 550, ¶¶ 37-39, 343 P.3d at 12-13. We agree that impeachment evidence can have a tendency to exonerate, *see Glissendorf*, 235 Ariz. 147, ¶ 19, 329 P.3d at 1054, but Williamson has failed to demonstrate that the evidence here had the potential to impeach Angulo's credibility. For example, he argues that the evidence "would have shown that Angulo was lying about the content of the messages." But Angulo never characterized the contents of the lost recordings. And as we stated above, nothing in the record suggests those

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[4]In his opening brief, Williamson also seems to argue that a *Willits* instruction was warranted because Angulo did not take notes while talking to the informant, despite "TPD . . . procedures [that] required documentation of his conversations." However, he does not explain how the failure to take notes is equivalent to the loss or destruction of evidence, particularly when Angulo was still able to recall and testify as to those conversations. *See Murray*, 184 Ariz. at 33, 906 P.2d at 566 ("A *Willits* instruction is not given merely because a more exhaustive investigation could have been made."); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi) ("[A]rgument . . . shall contain the contentions of the appellant . . . and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."). We therefore decline to address the issue further.

messages would have supported or rebutted Angulo's testimony. Therefore, we reject this argument as well and conclude the trial court did not err in denying Williamson's request for a *Willits* instruction. *See Larin*, 233 Ariz. 202, ¶ 29, 310 P.3d at 998.

Inducement Instruction

¶29 Williamson also argues "the trial court erred in refusing to instruct the jury regarding the definition of inducement where the defense was entrapment and the jury specifically requested such an instruction."

¶30 "A defendant is entitled to a jury instruction on any theory reasonably supported by the evidence." *State v. Belyeu*, 164 Ariz. 586, 590, 795 P.2d 229, 233 (App. 1990). The words within that instruction, however, do not require a definition if they "are used in their ordinary sense and are commonly understood by those familiar with the English language." *State v. Valles*, 162 Ariz. 1, 6, 780 P.2d 1049, 1054 (1989). Only words with a "technical meaning peculiar to the law in the case" require a definition. *State v. Barnett*, 142 Ariz. 592, 594, 691 P.2d 683, 685 (1984).

¶31 In this case, Williamson's defense was entrapment. Section 13-206(B), A.R.S., states:

> A person who asserts an entrapment defense has the burden of proving the following by clear and convincing evidence:
>
> 1. The idea of committing the offense started with law enforcement officers or their agents rather than with the person.
>
> 2. The law enforcement officers or their agents urged and induced the person to commit the offense.

> 3. The person was not predisposed to commit the type of offense charged before the law enforcement officers or their agents urged and induced the person to commit the offense.

¶32 The trial court instructed the jury on this defense. However, Williamson also requested the following instruction taken from *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994): "Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship." The court denied his request, reasoning that "state law on entrapment differs from that under federal law" and that the proposed instruction "could be tantamount to a comment on the evidence."

¶33 Williamson points out that during deliberations, the jury wrote the following note to the trial court: "In our discussion on the issue of entrapment, a concern arose about the definition of (1) urge; (2) induce." The court directed the jury to "please rely on the instructions already provided [to] you." When the court informed the parties about the jury question, Williamson requested his instruction again, arguing the jury had "trouble understanding what 'inducement' meant." The court denied his second request and stated, "Had the parties stipulated to a definition of urge/induce out of . . . a dictionary, [the court] might have considered [reading] it but since there was no stipulation, [the court] just told them to consider what they have in front of them." Both the state and Craig's attorney agreed, noting "there was no instruction for inducement in the state's system."

¶34 The trial court did not err in denying Williamson's requests. *See Valles*, 162 Ariz. at 6, 780 P.2d at 1054; *Barnett*, 142 Ariz. at 594, 691 P.2d at 685. The word "induce" is not a legal or technical term and does not have a peculiar meaning under Arizona law. *State v. Walker*, 185 Ariz. 228, 241, 914 P.2d 1320, 1333 (App. 1995).

¶35 Williamson nevertheless argues "[a] trial court is required to give supplemental instructions when a jury has trouble understanding the law." Rule 22.3, Ariz. R. Crim. P., provides that, "After the jurors have retired to consider their verdict, . . . if they or any party request additional instructions, the court may recall them to the courtroom and . . . give appropriate additional instructions." But our supreme court has rejected the argument that all "jury questions should be clarified with concrete accuracy." *State v. Ramirez*, 178 Ariz. 116, 126, 871 P.2d 237, 247 (1994). Rule 22.3 is discretionary, and, if the original jury instructions were sufficient, a trial court has no duty to respond. *See State v. Cheramie*, 217 Ariz. 212, ¶ 21, 171 P.3d 1253, 1259-60 (App. 2007), *vacated in part on other grounds*, 218 Ariz. 447, 189 P.3d 374 (2008). Only when "'the jury appears to be confused about a legal issue, and the resolution of the question is not apparent from an earlier instruction'" does the court have "a 'responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.'" *Ramirez*, 178 Ariz. at 126, 871 P.2d at 247, *quoting Des Jardins v. State*, 551 P.2d 181, 190 (Alaska 1976).

¶36 As noted above, the trial court's original instruction on entrapment was adequate. *See* § 13-206(B). And, the jurors' question in this case did not suggest they had misinterpreted the law or were so confused by the words "urged and induced" that they could not deliberate. § 13-206(B). Therefore, the court was not required to provide further instruction, *see Ramirez*, 178 Ariz. at 126, 871 P.2d at 247, and did not abuse its discretion by denying Williamson's requests, *see Larin*, 233 Ariz. 202, ¶ 29, 310 P.3d at 998.

Motions for Mistrial

¶37 Williamson contends the trial court erred by denying his motions for a mistrial after the state played a video with "incorrect" subtitles and after an officer testified on the ultimate issue of entrapment. "[A] mistrial is the most dramatic remedy for trial error," and we will not disturb a trial court's decision to deny a mistrial absent an abuse of discretion. *State v. Maximo*, 170 Ariz. 94, 98-99, 821 P.2d 1379, 1383-84 (App. 1991). We also review for an

abuse of discretion the court's evidentiary rulings. *See State v. Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d 456, 473 (2004).

Video with Subtitles

¶38 Williamson argues "the trial court erred in allowing the state to play a video of the meetings between the undercover officers and the defendants where the video had incorrect and inflammatory subtitles selectively added to the video."

¶39 When the state played the video recordings during its case-in-chief, the audio was often difficult to hear. Consequently, the state asked Verdugo to transcribe portions of the videos and used those transcripts to add subtitles. The state then played the subtitled videos to rebut Williamson's defense of entrapment. In one video, as Williamson described a specific burglary he had committed in the past, the words "I shot all of 'em" appeared across the screen. Williamson moved for a mistrial, arguing that he had actually stated, "I showed all of them." The trial court denied the motion.

¶40 "'[T]he requirements for admission of a videorecording [are] the same as for a photo, that it fairly and accurately depicts that which it purports to show.'" *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d 33, 35 (App. 2008), *quoting State v. Paul*, 146 Ariz. 86, 88, 703 P.2d 1235, 1237 (App. 1985). A video "'must be a reasonably faithful representation of the [recorded event] and aid the jury in understanding the testimony or evaluating the issues.'" *Id.*, *quoting Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 8, 148 P.3d 101, 105 (App. 2006). And, the proponent of the video must present a verifying witness, who can "'attest that the [video] accurately portray[s] the scene or object depicted.'" *Id.*, *quoting Lohmeier*, 214 Ariz. 57, ¶ 8, 148 P.3d at 105.

¶41 Here, the parties agreed that the audio portion of the original videos was "awful." Verdugo was present when the recordings were made and had personal knowledge of what had been said. And, he testified before the subtitled video was played that he "fe[lt] that the transcription or the words below the videos

[we]re fair and accurate." The trial court therefore did not err in allowing the video to be shown to the jury, *see id.*, or in denying the subsequent motion for a mistrial, *see Maximo*, 170 Ariz. at 98-99, 821 P.2d at 1383-84.

¶42 Moreover, even assuming for the sake of argument that the trial court erred, any error would have been harmless. "Error is harmless if the reviewing court can say beyond a reasonable doubt that the error did not contribute to the verdict." *Davolt*, 207 Ariz. 191, ¶ 39, 84 P.3d at 470. Here, the court directed the state to explain to the jury that the subtitles were "what [Verdugo] believes was said." Accordingly, the prosecutor asked Verdugo the following:

> [Prosecutor] And you understand that we don't have a transcript that's accurate, that covers all of these videos.
>
> [Verdugo] That's correct.
>
> [Prosecutor] Okay. Have I asked you to go ahead and listen to certain parts of the videos and transcribe what you think you are hearing based on what you hear and your memory?
>
> [Verdugo] Yes, that's correct.

After this discussion, the court advised the jury that the subtitled video, unlike the original recordings, was "for the record, [and] not for [their] purposes of review [during] jury deliberations." *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) ("We presume that the jurors followed the court's instructions."). The court also allowed Williamson to introduce his own transcript of the video, which he used to cross-examine Verdugo. And, during closing argument, defense counsel posited to the jury: "What's reliable? The documentary evidence. Not the documentary evidence that [the state] doctored up . . . , but the actual words. I want you to listen to the words of what he said."

¶43 Any harm created by the subtitles was overcome by Verdugo's testimony, the trial court's admonition, Williamson's cross-examination of Verdugo, and defense counsel's closing argument. We therefore conclude that any error, if such occurred, was harmless. *See Davolt*, 207 Ariz. 191, ¶ 39, 84 P.3d at 470.

Officer Testifying to Ultimate Issue

¶44 Williamson also argues the trial court erred by denying his motion for a mistrial after "an officer testified that the defendants were not entrapped."

¶45 Rule 704(a), Ariz. R. Evid., states that "[a]n opinion is not objectionable just because it embraces an ultimate issue." A witness "may give opinion testimony, even as to the ultimate issue, 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 fact in issue.'" *State v. Doerr*, 193 Ariz. 56, ¶ 26, 969 P.2d 1168 (1998), *quoting* Ariz. R. Evid. 701. The witness may not, however, testify as to the "defendant's guilt or innocence or tell[] the jury how it should decide the case." *State v. King*, 180 Ariz. 268, 280, 883 P.2d 1024, 1036 (1994).

¶46 During Verdugo's testimony, the state played portions of a video that showed the officers telling Williamson: "[I]f you want to walk away, you can walk away." The prosecutor asked Verdugo, "[w]hy is it important, as an undercover officer," to make such statements. Williamson objected, arguing the question called for a "legal conclusion[] as to predisposition." He clarified that Verdugo could testify that he had "been trained to . . . give them an opportunity to walk away," but argued Verdugo should not explain "why." The court directed the prosecutor to rephrase the question.

¶47 The prosecutor then asked: "Can you tell us, . . . the opportunity to walk away, is that something you all are taught to say in undercover training?" Verdugo replied:

> Yes. That's something we're trained to do. And the reason we do it is we try to

> get away from the entrapment issue, where we give them an opportunity to walk away and nothing would ever happen at that point. They would just simply walk away and we would not do anything with the case.

At the end of the direct examination, Williamson moved for a mistrial, arguing Verdugo "specifically" made "a legal conclusion." The court denied the motion.

¶48 Verdugo's testimony may have "embrace[d]" the issue of entrapment, but it did not amount to a statement of Williamson's guilt. Ariz. R. Evid. 704(a); *see King*, 180 Ariz. at 280, 883 P.2d at 1036; *Williamson*, 236 Ariz. 550, ¶ 31, 343 P.3d at 11. Instead, Verdugo described his own training, which further clarified his actions during the recorded meetings. His testimony was not an opinion, much less an opinion regarding the validity of Williamson's defense. Therefore, the trial court did not err by admitting Verdugo's testimony, *see Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d at 473, or by denying Williamson's motion for a mistrial, *see Maximo*, 170 Ariz. at 98-99, 821 P.2d at 1383-84.

Multiplicity

¶49 Williamson argues his convictions for "four counts of conspiracy were multiplicitous" because "only one conspiracy occurred." He did not raise this argument below and, therefore, has forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Nevertheless, multiple punishments stemming from a multiplicitous indictment amount to fundamental error. *See State v. Powers*, 200 Ariz. 123, ¶ 5, 23 P.3d 668, 670 (App. 2001) ("The Double Jeopardy Clause . . . bars multiple punishments for the same offense."); *State v. Nereim*, 234 Ariz. 105, ¶ 22, 317 P.3d 646, 652 (App. 2014) ("'[P]rohibition against double jeopardy is a fundamental right that is not waived by the failure to raise it.'"), *quoting State v. Millanes*, 180 Ariz. 418, 421, 885 P.2d 106, 109 (App. 1994).

¶50 "Charges are multiplicitous if they charge a single offense in multiple counts." *Merlina v. Jejna*, 208 Ariz. 1, ¶ 12, 90 P.3d 202, 205 (App. 2004). Section 13-1003(C), A.R.S., states "[a] person who conspires to commit a number of offenses is guilty of only one conspiracy if the multiple offenses are the object of the same agreement or relationship and the degree of the conspiracy shall be determined by the most serious offense conspired to." The state concedes "that it was improper to convict [Williamson] of four counts of conspiracy because the evidence showed that there was a single conspiracy to commit multiple offenses." We agree.

¶51 When two convictions violate double jeopardy principles, the lesser conviction and sentence must be vacated. *Nereim*, 234 Ariz. 105, ¶ 25, 317 P.3d at 653. Accordingly, we vacate Williamson's convictions and sentences for conspiracy to commit aggravated robbery and to commit possession of a narcotic drug. A.R.S. §§ 13-1003(D) (conspiracy is same class as underlying offense), 13-1903 (aggravated robbery is class-three felony), 13-3408(A)(1), (B)(1) (possession is class-four felony). However, conspiracy to commit kidnapping and to commit armed robbery are both class-two felonies. A.R.S. §§ 13-1304(B), 13-1904(B). In its answering brief, the state asserts that "this Court should vacate the conviction and sentence imposed for conspiracy to commit armed robbery, the second of the counts." In his reply brief, Williamson does not express a preference as to which should be vacated. Instead he asks this court to "vacate the conviction[] and sentence[] for either of those two counts." We therefore vacate the conviction and sentence for conspiracy to commit armed robbery.

Disposition

¶52 For the foregoing reasons, we vacate Williamson's convictions and sentences for conspiracy to commit armed robbery, aggravated robbery, and possession of a narcotic drug. We otherwise affirm.