IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

STEPHEN RAY WILLIAMS,
Appellant.

No. 2 CA-CR 2014-0183
Filed November 27, 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NOT FOR PUBLICATION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. CR20133225001
The Honorable Howard Fell, Judge Pro Tempore

REVERSED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 After a jury trial, Stephen Ray Williams was convicted of one count of first-degree murder, one count of burglary, two counts of armed robbery, two counts of aggravated robbery, and two counts of kidnapping. He was sentenced to life in prison without the possibility of release for twenty-five years, plus concurrent and consecutive sentences totaling an additional 10.5 years. On appeal, Williams contends the trial court erred by refusing his request for an alibi/non-presence jury instruction, he was denied a speedy trial due to pre-indictment and pre-trial delay, and prosecutorial misconduct prevented him from receiving a fair trial. Because we agree that the court should have given an alibi instruction, we reverse his convictions and sentences, and remand the case for a new trial.[1]

Factual Background

¶2 When reviewing a trial court's denial of a proposed jury instruction, we view the facts in the light most favorable to the party requesting the instruction. *See State v. King*, 225 Ariz. 87, ¶ 13, 235 P.3d 240, 243 (2010). R.C. and his longtime friend and roommate, L.C., went to bed around 10:00 or 11:00 p.m. on June 28, 2011. They later awoke to a loud noise. A man whom R.C. identified at trial as Manny

[1]In view of the remand, we do not address Williams's additional argument that the evidence was not sufficient to support the convictions.

Pesqueira[2] came into their bedroom with what looked like a revolver and demanded money and drugs. He left the bedroom, but returned with R.C.'s machete and threatened them. After he left the bedroom a final time, another man came into the bedroom. R.C. testified he was tall, dark-skinned, and "like bulky, like kind of fat." The man was holding what looked like the same revolver Pesqueira had displayed and, without warning, shot L.C. in the head.[3] He then pointed the gun at R.C.'s head, but Pesqueira yelled something, and the man lowered the gun. Pesqueira and the other man then ran from the apartment, taking a coin jar, wallets, cell phones, and a laptop computer. R.C. looked out the window and saw them leave in a small sport utility vehicle (SUV).

¶3 R.C. was scared and wanted to leave the apartment immediately. He left shirtless, driving directly to a friend's house eight to ten minutes away. He arrived at 2:30 a.m. on June 29. His friend encouraged him to call 9-1-1, but R.C. was afraid to do so because of his status as an undocumented immigrant. He called and hung up twice, but the third time stayed on the line to report the shooting and related details.

¶4 At 2:43 a.m., Tucson Police Officer Travis Carpenter received a radio bulletin alerting police to look for a maroon Isuzu Rodeo SUV. Carpenter headed toward the area where the vehicle was last seen. He saw a red or maroon Honda Passport, which he testified looks similar to an Isuzu

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[2]Pesqueira was tried separately and convicted of armed robbery, aggravated robbery, two counts of kidnapping, two counts of aggravated assault with a deadly weapon, and first-degree murder arising out of this incident. *See State v. Pesqueira*, 235 Ariz. 470, ¶ 1, 333 P.3d 797, 800 (App. 2014).

[3]L.C. died several days later as a result of the gunshot wound.

Rodeo, and began to follow it while awaiting backup. The Honda turned onto a side street and came to an abrupt stop. Williams exited the passenger side door with his hands up, and then the Honda sped off. He acknowledged having an outstanding warrant from an unrelated domestic violence incident and was arrested. Police officers later found R.C.'s stolen laptop and change jar in the Honda. The change jar had Williams's fingerprint on it.

¶5 Hours after the shooting, another officer brought Williams to R.C.'s location for a one-man show-up. At that time, R.C. told the officer that Williams was not the shooter. But at trial, when asked what the shooter looked like, R.C. pointed to Williams and said, "Like him."

¶6 After Williams was arrested, police swabbed his hands for the presence of trace chemical residues consistent with having fired a weapon. Lab tests failed to detect any such residue. The analyst's report observed that the absence of trace residue could mean that (1) Williams had not fired a gun that night, (2) he had fired a gun that did not leave trace residues, or (3) he washed or wiped off his hands between the time he fired a gun and the time the test was administered. Police never located the gun used in the crime.

¶7 Williams testified at trial he was not the man who had shot L.C.; moreover, he denied ever having met or seen the victims, or having been in their apartment. Williams's alibi defense relied on his own testimony and that of two other witnesses—his wife and his brother Joshua.

¶8 Williams testified he had visited Joshua in the late afternoon on June 28 to give him a tattoo. Other than trips to buy beer earlier in the evening, Williams stated he had remained at Joshua's house working on the tattoo until his wife came over. Defendant's wife testified she had arrived at the house "maybe a little after 1:00, around 2:00" a.m. on June 29, and attempted to get him to agree to come home with her. She explained that instead of leaving, they had talked or

argued for what "had to be 45 minutes to an hour." In the end, both of them testified that Williams had refused to leave with her, and instead had gone back inside to finish the tattoo. They also both said she had left him to find his own ride home later.

¶9 Williams and Joshua each testified that after Williams had finished the tattoo, Joshua called Pesqueira to give Williams a ride home. Pesqueira picked up Williams from Joshua's house. Williams testified he had moved a jar of change that was on the seat of the SUV so he could sit down, and in so doing left a fingerprint on it. Shortly thereafter, police began to follow the SUV, and Pesqueira started driving erratically. Williams told Pesqueira he didn't want to be involved in a police chase. Pesqueira then stopped the car, and around 2:50 a.m. by Carpenter's estimate, Williams got out and was arrested.

Refusal of the Alibi Instruction

¶10 Williams argues the trial court erred when it denied his request for an alibi instruction. We review a trial court's denial of a requested jury instruction for an abuse of discretion. *State v. Garcia*, 224 Ariz. 1, ¶ 75, 226 P.3d 370, 387 (2010). A party is entitled to a jury instruction on any theory of the case reasonably supported by the evidence. *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). But a trial court is not required to give a proposed instruction if its substance is adequately covered by other instructions. *Id.* The critical inquiry is whether or not the given instructions, considered as a whole, "adequately set forth the law applicable to the case." *Id.*

¶11 "Evidence tending to show that the defendant had no opportunity to commit the crime because he was at another place when the crime occurred raises the alibi defense." *Id.* ¶ 17. To determine whether the evidence reasonably supported an alibi theory in this case we must consider when the crime could have occurred. R.C. testified

they had gone to bed around 10:00 or 11:00 p.m. and were asleep for a while; placing the earliest time around 11 p.m. However, the events at the apartment occurred quickly, and shortly thereafter, R.C. drove to a friend's house located about eight or ten minutes away. He arrived at the friend's house at 2:30 a.m., and from there he reported the crime. Thus, in the light most favorable to Williams, *King*, 225 Ariz. 87, ¶ 13, 235 P.3d at 243, the crimes occurred after 11:00 p.m. on June 28, but more likely after 1:00 a.m. and not later than 2:20 a.m. on June 29.

¶12 Williams's testimony placed him at Joshua's house from 10:30 p.m. on June 28 up until Pesqueira picked him up, shortly before his arrest at 2:50 a.m. on June 29. Thus, viewing the evidence presented at trial in the light most favorable to Williams, despite the considerable evidence tending to rebut Williams's account, he offered an uninterrupted alibi for the timeframe when the shooting occurred. And no physical evidence placed him at the crime scene. The evidence reasonably supported an alibi theory.

Alibi Instruction Not Adequately Covered by Other Instructions

¶13 During the settling of jury instructions, the state contended, and the trial court agreed, that the substance of the alibi instruction was adequately covered by the other instructions:

> I'm going to refuse [the alibi instruction]. It's clear to the jury that the State has to prove its case beyond a reasonable doubt. And certainly one of the issues is whether or not Mr. Williams was present at the time that the crime was committed. So it's covered by the Court's instruction.

¶14 Williams's proposed alibi instruction was based on *State v. Rodriguez* and the State Bar of Arizona's *Revised*

Arizona Jury Instructions (Criminal) Standard 11 (1996).[4] In *Rodriguez*, our supreme court considered whether a trial court's refusal to provide an alibi instruction was reversible error when the defendant had presented evidence to reasonably support an alibi theory. 192 Ariz. 58, ¶ 21, 961 P.2d at 1010. In that case, the state argued the trial court had not erred in refusing the alibi instruction, because the substance of an alibi instruction was sufficiently encompassed in the instructions the court gave regarding the elements of the crime and reasonable doubt. *Id.* ¶ 23. Our supreme court rejected the state's argument. *Id.* ¶¶ 25-26. "When the court does not expressly instruct the jury on alibi," the court reasoned, "jurors may incorrectly assume that the defendant bears the burden of proving his alibi." *Id.* ¶ 25. The court concluded that a trial court errs if it refuses to give an alibi instruction despite reasonable evidence supporting an alibi theory. *Id.* ¶ 26.

¶15 As in *Rodriguez*, the generic burden of proof instructions given in this case were not adequate to cover Williams's alibi theory. "Because the standard burden of proof instructions do not redress the risk of burden shifting engendered by alibi evidence," the trial court erred in denying Williams's request for an alibi instruction. *Id.*

Harmless Error

¶16 Erroneous failure to give an alibi instruction does not automatically require reversal. *Id.* ¶ 27. Ordinarily a reviewing court will first determine whether such error was harmless. *Id.* "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005). The state limits its argument to whether it was error to deny the

[4]The instruction appears as Standard Criminal 43 in the 2015 revision. State Bar of Arizona, *Revised Arizona Jury Instructions (Criminal)* Std. 43 (2015).

alibi instruction. Since the state has not argued harmless error here, we regard any such claim as abandoned and waived.[5] *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim."); Ariz. R. Crim. P. 31.13(c)(1)(v)-(vi), (2). We therefore treat denial of the alibi instruction as error mandating reversal and a new trial. *Rodriguez*, 192 Ariz. 58, ¶ 34, 961 P.2d at 1012. Because Williams's claims of error regarding speedy trial violation and prosecutorial misconduct may arise upon remand, we address them here. *See State v. May*, 210 Ariz. 452, ¶ 1, 112 P.3d 39, 40 (App. 2005).

Speedy Trial

¶17 Williams argues he was denied his right to a speedy trial in violation of Rule 8, Ariz. R. Crim. P., as well as the United States and Arizona constitutions. Williams was first arraigned in July 2011, under Pima County Cause Number CR20112278. The state then filed a supervening indictment after victim L.C. died, and a murder charge became available. Williams was arraigned in the new cause, CR20112669, in August 2011, and CR20112278 was dismissed without prejudice the same month.

¶18 Trial was set for July 17, 2012, and Williams affirmatively waived any applicable Rule 8 speedy trial rights in connection with that trial date. On July 2, 2012, the prosecutor filed a motion to continue the trial to give the state more time to obtain fingerprint analyses. The court denied the motion. On July 10, the prosecutor moved to dismiss the case without prejudice, citing "prosecutorial discretion." The

[5]After we issued our decision in this case, the state filed a motion for reconsideration arguing this court has an independent duty to determine whether any error is harmless even when the state does not argue the error is harmless. We address this issue in the appendix below, which is hereby added to our original decision.

trial court granted that motion and dismissed CR20112669 without prejudice the same day.

¶19 The state again indicted Williams on August 6, 2013, under the cause number leading to this appeal, CR20133225. He was arraigned on August 27. After another remand and a new indictment, he moved to dismiss with prejudice on speedy trial grounds. In an under-advisement ruling dated October 28, 2013, the trial court denied the motion. Although the court recognized there had been "'irregularities' in the prosecution" against Williams, which "might be properly characterized as errors or mistakes on the part of the State," the court concluded, "[I]n the end, the Defendant has failed to articulate any unique and specific prejudice that has already inured to him as a result of these 'irregularities.'" The case went to trial on February 25, 2014, and on February 28, the jury found Williams guilty on all counts.

Rule 8, Ariz. R. Crim. P.

¶20 To comport with our rules of criminal procedure, a defendant facing a non-capital first-degree murder charge must be tried within 270 days of arraignment, subject to certain exceptions not at issue here. Ariz. R. Crim. P. 8.2(a)(3)(i), (4). If a case against a defendant is dismissed without prejudice, and the state later re-files the charges, this 270-day window begins anew. *See State v. Mendoza*, 170 Ariz. 184, 187, 823 P.2d 51, 54 (1992).

¶21 Here, charges were twice brought against Williams under different case numbers and then timely dismissed without prejudice, thus resetting the Rule 8 clock. *Id.* In 2013, the state re-filed charges, including first-degree murder, against Williams in the present case. He was arraigned on August 27, 2013. His jury trial commenced well under 270 days later on February 25, 2014.

¶22 Williams's Rule 8 rights were not violated. Other than their effect in resetting the Rule 8 clock, the prior dismissals without prejudice are irrelevant to his argument that Rule 8 was violated under the present cause number. And in the case before us, the trial occurred fewer than 270 days after the arraignment. The trial court did not abuse its discretion.

Unconstitutional Pre-Indictment Delay Claim

¶23 Williams further contends the trial court erred when it denied his September 2013 motion to dismiss under the present cause number, which alleged that his federal and state constitutional rights to a speedy trial had been violated due to unreasonable pre-indictment delay. His argument necessarily encompasses a claim that the trial court in Cause Number CR20112669 erred in granting the state's motion to dismiss without prejudice in that case, and that such motion amounted to bad-faith delay on the part of the prosecutor because the state had been dilatory in obtaining the fingerprint analysis.

¶24 We must reject this argument because the proper vehicle to challenge a trial court's ruling on a motion to dismiss is a petition for special action, not an appeal. *State v. Meza*, 203 Ariz. 50, ¶ 18, 50 P.3d 407, 411-12 (App. 2002); *cf. Nelson v. Roylston*, 137 Ariz. 272, 273, 669 P.2d 1349, 1350 (App. 1983). This is true with respect to the court's ruling on defendant's motion to dismiss on speedy trial grounds in the present case, *see, e.g.*, *Meza*, 203 Ariz. 50, ¶ 18, 50 P.3d at 411-12, as it was with respect to the court's ruling on the state's motion to dismiss without prejudice in Cause Number CR20112669, *see State v. Paris-Sheldon*, 214 Ariz. 500, ¶¶ 20-24, 154 P.3d 1046, 1053-55 (App. 2007). We lack jurisdiction to consider these claims in the context of this appeal. *See* A.R.S. § 13-4033(A); *Paris-Sheldon*, 214 Ariz. 500, ¶ 20, 154 P.3d at 1053.

¶25 Furthermore, Williams's claim would fail even if it were properly before us.[6] Assuming, for the sake of argument, that undue pre-indictment delay occurred, we agree with the trial court's conclusion that "[d]efendant has failed to articulate any unique and specific prejudice" resulting from such delay. *See State v. Zuck*, 134 Ariz. 509, 515, 658 P.2d 162, 168 (1982), (prejudice to defendant is "most important" of four factors from *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972), used to determine whether delay of trial necessitates reversal).

¶26 Williams contends the trial court's prejudice conclusion overlooks strategic factors. First, he points out that if Cause Number CR20112669 had gone to trial on July 17, 2012, as scheduled, the state would not yet have obtained the fingerprint evidence linking him to the stolen change jar. Second, he notes that before trial, R.C. had maintained that Williams was not involved, but at trial, R.C. had what Williams calls a "sudden change in heart" and instead implicated Williams.

¶27 Neither of these contentions reveal the sort of prejudice necessary to prevail on a speedy trial claim. To show prejudice, a defendant must demonstrate not merely that any delay strengthened the prosecution's case, but rather that such delay harmed his own defense. *State v. Vasko*, 193 Ariz. 142, ¶ 22, 971 P.2d 189, 194 (App. 1998). Williams's fingerprint argument falls in the former category and is insufficient. *Id.*; *accord Zuck*, 134 Ariz. at 515, 658 P.2d at 168. Williams's claim of prejudice from R.C.'s inconsistent identification is similarly unavailing. Our system of justice affords all interested parties a mechanism to highlight inconsistencies between a witness's testimony and earlier

[6] We preliminarily address the merits of Williams's argument because the issue is likely to arise again on remand, which we order below on other grounds. *See State v. May*, 210 Ariz. 452, ¶ 1, 112 P.3d at 40.

statements—that mechanism is impeachment by a prior inconsistent statement. *See, e.g.*, *State v. Hernandez*, 232 Ariz. 313, ¶ 47, 305 P.3d 378, 388 (2013) ("Prior inconsistent statements can be used substantively and to impeach."); *see also* Ariz. R. Evid. 607 and 801(d)(1)(A). At trial, Williams had ample opportunity to impeach R.C. with prior inconsistent statements regarding identification during cross-examination, and in fact did so at length. Thereafter, R.C.'s credibility and the proper weight to be given to his testimony were matters for the jury alone to decide. *See, e.g.*, *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38, 312 P.3d 123, 133 (App. 2013). Even if the issue were properly before us, and even were we to assume that Williams was denied a speedy trial, he has failed to show prejudice.

Prosecutorial Misconduct

¶28 Williams argues that several instances of alleged prosecutorial misconduct prevented him from receiving a fair trial, both individually and collectively. He did not raise these arguments below; thus, we review only for fundamental error and resulting prejudice. *See State v. Wood*, 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994) (fundamental error); *see also Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608-09 (prejudice). Fundamental error is such that "goes to the foundation of [the] case, takes away a right that is essential to [the] defense, and is of such magnitude that [the defendant] could not have received a fair trial." *Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d at 608. Once the defendant has established fundamental error, to warrant reversal, he must further demonstrate that the prosecutorial misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Harrod*, 218 Ariz. 268, ¶ 35, 183 P.3d 519, 529 (2008), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). We address each of Williams's prosecutorial misconduct allegations below, but in so doing, we find no fundamental error.

***Brady* Violations**

¶29 Williams argues the prosecution twice withheld favorable material evidence from him, thus denying him due process of law. We analyze his contentions with reference to *Brady v. Maryland*, 373 U.S. 83, 87 (1963), in which the United States Supreme Court held that the state's withholding of evidence favorable to the defense and "material" to guilt or punishment violates due process, regardless of the good faith or bad faith of the prosecution. For *Brady* purposes, evidence is "material" if there is a "'reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *State v. Benson*, 232 Ariz. 452, ¶ 24, 307 P.3d 19, 27 (2013), *quoting Smith v. Cain*, ___ U.S. ___, ___, 132 S. Ct. 627, 630 (2012).

¶30 First, Williams points to the prosecutor's failure to alert defense counsel to R.C.'s testimony at co-defendant Pesqueira's trial. The testimony contained various inconsistencies with his statements to police officers on the morning of the crime and his testimony at Williams's trial. At Pesqueira's trial, R.C. testified that the shooter was "like Afro, Afro-American" and did not have tattoos. But when asked at Williams's trial what the shooter looked like, R.C. pointed toward the defense table and said the shooter looked "[l]ike him." Williams is Native American and has prominent tattoos on both arms. Williams insists that this amounts to the prosecutor "knowingly present[ing] . . . false evidence." We disagree. The prosecutor did not conceal the fact that R.C. had not always identified Williams as the shooter. To the contrary, in both her opening statement and closing argument, she acknowledged that R.C. did not recognize Williams at the show-up the morning after the crime. Furthermore, Williams had ample opportunity on cross-examination to bring out inconsistencies between R.C.'s trial testimony and other of his former statements pertaining to identification of the shooter. For instance, defense counsel highlighted that R.C. had told the 9-1-1 operator that the

shooter was black, about 5'8", and wearing a white T-shirt, while Williams is Native American, 6'3", and was wearing a black shirt at the time of his arrest. The inconsistencies in identifications between the trials of Pesqueira and Williams were of the same nature as those acknowledged by the prosecutor and were subject to full cross-examination.

¶31 Second, Williams alleges a *Brady* violation amounting to misconduct in that the prosecutor did not alert defense counsel to the testimony of another witness, M.F., at Pesqueira's trial, which was inconsistent with M.F.'s testimony at Williams's trial. Impeachment evidence withheld by the state warrants a new trial only if it "'substantially undermine[s] testimony that was of critical significance at trial.'" *State v. Arvallo*, 232 Ariz. 200, ¶ 36, 303 P.3d 94, 100 (App. 2013), *quoting State v. Orantez*, 183 Ariz. 218, 221, 902 P.2d 824, 827 (1995). M.F. heard the SUV crash into a retaining wall about a half-mile down the road from where Williams had exited and he reported the incident to police. At Williams's trial, he briefly testified he "kind of" remembered hearing the crash and "somebody running," but could offer virtually no specifics. He repeatedly stated he was nervous, as well as prone to mental problems and memory loss. Defense counsel did not cross-examine him, and Williams admits that he "had basically nothing to say" at trial. M.F.'s testimony was sufficiently limited that at the hearing on Williams's motion for a new trial, the trial judge opined that M.F. "didn't know . . . what happened that night. He was like a non-witness. He was worthless." Such minimal testimony—exclusively concerning what happened after Williams got out of the SUV—could not have been of "critical significance" to the jury's verdicts. There is not a reasonable probability that disclosure of the former testimony which

might have further eroded M.F.'s credibility would have changed the outcome of the trial.[7]

State's Argument Regarding Exculpatory Evidence

¶32 Williams argues the prosecutor improperly invited the jury to disregard exculpatory evidence—specifically, the results of the gunshot residue test. The gunshot residue lab technician did not testify at trial; rather, the parties stipulated to his expert qualifications and his written report was admitted as an exhibit. The parties drew competing inferences from the absence of gunshot residue.

¶33 Williams maintains that the evidence was clear that he had no opportunity to wash or wipe off his hands at any point before the test was administered, and alleges that the prosecutor's suggestion to the contrary in closing argument constituted a knowing misrepresentation. We do not agree. Although a police officer testified that Williams had no opportunity to wash or wipe off his hands from the time he was arrested until the time the test was performed, the jury could have reasonably concluded that Williams had sufficient opportunity to wash or wipe off his hands at some point between the firing of the shot and the moment he was arrested, such as while he was riding in the SUV. In her closing argument the prosecutor invited the jury to infer as much, while nevertheless acknowledging that the test results "could mean he didn't fire a gun; that's a possibility." It is not prosecutorial misconduct to encourage the jury to make one plausible inference from the evidence rather than another. *See, e.g.*, *State v. Price*, 111 Ariz. 197, 201, 526 P.2d 736, 740 (1974).

State's Argument Regarding Alibi Testimony

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[7]To the extent that disclosure of R.C.'s or M.F.'s former testimony might have aided Williams's defense somewhat, he will have another opportunity at his new trial.

¶34 Williams's final argument regarding prosecutorial misconduct relates to the state insinuating that Williams made up his testimony about getting a ride from Pesqueira, despite testimony from its own witness to that effect. In its case-in-chief, the state called Williams's brother, and he testified he had called Pesqueira to give Williams a ride home on the night of the crime. Williams testified consistently with his brother. In its rebuttal, however, the state recalled the detective with whom Williams had spoken on the morning after the crime and elicited testimony to the effect that Williams had not mentioned anything that morning about getting a ride home from somebody named Pesqueira. In her closing argument, the prosecutor urged the jury to be skeptical of the theory that Pesqueira would nonchalantly come and give Williams a ride home immediately after participating in a home-invasion-turned-homicide.

¶35 Again, Williams has not met his burden of showing fundamental error. His brief does not advance a clear legal theory of error. One could read his argument as an appeal to the common-law "voucher" rule, which held that a party calling a witness could not question the truth thereof, but that rule has been abandoned. *See, e.g.*, *State v. Lewis*, 111 Ariz. 115, 117-18, 523 P.2d 1316, 1318-19 (1974); *see also* Ariz. R. Evid. 607. It was not prosecutorial misconduct for the prosecutor to cast doubt on her own witness's testimony about Pesqueira giving Williams a ride home. Another possible reading of Williams's argument is that it was misconduct for the prosecutor to cast doubt on his alibi. But the state may impeach an alibi. *State v. Jones*, 109 Ariz. 378, 379-80, 509 P.2d 1025, 1026-27 (1973). And the state's closing argument, which merely "call[ed] the attention of the jurors to matters which they were justified in considering in determining their verdict," such as alibi witness credibility, was not improper. *Id.* Williams has not identified any prosecutorial misconduct amounting to fundamental error. And having found no individual instance of misconduct, "there can be no cumulative effect of misconduct sufficient to

permeate the entire atmosphere of the trial with unfairness" either. *State v. Lynch*, 225 Ariz. 27, ¶ 65, 234 P.3d 595, 607 (2010), *quoting State v. Bocharski*, 218 Ariz. 476, ¶ 75, 189 P.3d 403, 419 (2008).

Disposition

¶36 In light of the foregoing, we reverse Williams's convictions and sentences and remand for a new trial.

Appendix: Motion for Reconsideration

¶37 As discussed in Footnote 5, after we issued our decision in this case, the state filed a motion for reconsideration arguing this court has its own duty to determine whether any error is harmless even when the state has not argued harmless error. Because the state raised a non-trivial matter that arose after the decision was filed, we modify the decision by adding this appendix in which we address the state's argument.

¶38 Our supreme court has made clear that the state carries a "heavy burden" to convince the appellate court beyond a reasonable doubt that the guilty verdict in the case was unaffected by trial error. *State v. Bible*, 175 Ariz. 549, 590, 858 P.2d 1152, 1193 (1993); *see also Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607 (harmless error review places burden on state to prove beyond reasonable doubt that error did not contribute to or affect verdict). It is not within our purview to disregard supreme court precedent. *State v. McPherson*, 228 Ariz. 557, ¶ 13, 269 P.3d 1181, 1186 (App. 2012). Moreover, adopting the state's position that this court sua sponte determine harmlessness would not only relieve the state of its burden, but would deprive the defendant of the opportunity to address the issue. We note that other courts are in accord that the state may waive a harmless error argument. *See United States v. Giovannetti*, 928 F.2d 225, 226 (7th Cir. 1991) (per curiam); *State v. Porte*, 832 N.W.2d 303, 313 (Minn. Ct. App. 2013) (state's failure to assert harmless error argument

waives harmlessness issue unless "obvious" that error was harmless); *see also State v. McKinney*, 777 N.W.2d 555, 561 (Neb. 2010) (well established that appellate court has discretion to overlook state's failure to argue harmless error). Finally, in a recent decision that included a harmless error analysis, we observed that although the state failed to explicitly argue harmless error, it provided the functional equivalent in its substantive analysis. *State v. Ortiz*, No. 2 CA-CR 2014-0330, ¶ 71, 2015 WL 6143128 (Ariz. Ct. App. Oct. 16, 2015). Here, we have no functional equivalent.

¶39 This is not to suggest that where a technical error occurs, but there is no question that the guilty verdict reflects substantial justice, the conviction will nevertheless be reversed. Ariz. Const. art. VI, § 27; *cf. State v. Veloz*, 236 Ariz. 532, ¶ 3, 342 P.3d 1272, 1274 (App. 2015) (when found, appellate court will not ignore fundamental error). But in this case, the failure to give an alibi instruction risked the jury assuming the defendant was required to prove his alibi. *Rodriguez*, 192 Ariz. 58, ¶ 25, 961 P.2d at 1011. This is more than a technical error, and this court's review of the record to consider the parties' arguments did not suggest that reversal flies in the face of substantial justice. For these reasons, we also decline the state's request to exercise our discretion to search and analyze the record for prejudice.