

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

RONALD EUGENE PACK,  
*Appellant.*

No. 2 CA-CR 2015-0220  
Filed August 5, 2016

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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NOT FOR PUBLICATION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.*

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Appeal from the Superior Court in Pima County  
No. CR20140024001  
The Honorable Casey F. McGinley, Judge Pro Tempore

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Joseph T. Maziarz, Section Chief Counsel, Phoenix  
By Mariette S. Ambri, Assistant Attorney General, Tucson  
*Counsel for Appellee*

Steven R. Sonenberg, Pima County Public Defender  
By Abigail Jensen, Assistant Public Defender, Tucson  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

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

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M I L L E R, Judge:

¶1 After a jury trial, Ronald Pack was convicted of aggravated assault with a deadly weapon or dangerous instrument and sentenced to 7.5 years' imprisonment. On appeal, Pack argues the trial court should have granted his motion for a mistrial based on witness testimony indicating that he previously used drugs and implying that his acquaintances were current drug users. For the following reasons, we affirm.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In December 2013, Pack and his neighbor, T.D., were drinking in Pack's apartment. The two began arguing loudly after T.D. told Pack she disapproved of the people he allowed in his apartment. T.D. eventually pushed Pack, causing him to fall. He responded by stabbing T.D. in the abdomen with a steak knife.

¶3 Pack was charged with aggravated assault with a deadly weapon or dangerous instrument. His first two trials ended in mistrials. After the third trial, Pack was found guilty and sentenced as described above. He filed a motion for delayed appeal pursuant to Rule 32.1(f), Ariz. R. Crim. P., which the trial court granted. This appeal followed.

**Discussion**

¶4 Pack contends the trial court erred by denying the two motions for mistrial he made during T.D.'s testimony. When a witness unexpectedly offers improper testimony and a mistrial is

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requested, the trial court should consider: “(1) whether the remarks called to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks.” *State v. Stuard*, 176 Ariz. 589, 601, 863 P.2d 881, 893 (1993). We review the denial of a motion for mistrial for an abuse of discretion, giving deference to the trial judge, who “is in the best position to determine whether the evidence will actually affect the outcome of the trial.” *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000).

¶5 Pack first moved for mistrial after T.D. mentioned heroin use by visitors to Pack’s apartment. She was asked whether other people were in the apartment during the events and their locations. T.D. responded:

Sitting on the couch. And then I believe the—well, okay. So I’m not sure—I’m not sure because I have never seen, but there was a girl in the bathroom supposedly—okay. So they did heroin, and I didn’t know anything about heroin. The only time I ever seen heroin—

The prosecutor interrupted T.D.’s testimony and attempted to redirect her focus on the locations of the other people in the apartment, which the trial court supported with an admonition that she “focus on only answering the questions [the prosecutor] asks.” Pack moved for a mistrial arguing that T.D.’s comments unfairly prejudiced him by implying people were using heroin in his apartment the day he stabbed T.D. The state argued that the jury members had been “voir dired on whether they ha[d] prejudice against drug use,” and that T.D. was implying “she didn’t associate with these people because she knew they did heroin, not that they were using heroin at that point in time.”<sup>1</sup> The trial court agreed that

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<sup>1</sup>The transcript of voir dire is not in the record, but Pack agreed during the motion for mistrial that “the jury ha[d] been voir dired about the use of drugs regarding witnesses that are taking the stand.”

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the testimony regarding heroin was not responsive to the question asked, but determined a mistrial was not necessary to cure any prejudice. Following the bench conference, the court struck the testimony and instructed the jury to disregard it.

¶6 The next day, during cross-examination, T.D. was asked about what started the argument with Pack. She responded that she was upset with Pack because he let the “wrong kind of people” into his apartment. On redirect, the state asked, “Why did you think [Pack] needed protecting?” T.D. answered, “Because he’s a disabled vet. I mean, he had a drug issue, and a lot of people, I mean, when . . . .” Pack objected and the trial court sustained, striking the testimony. Pack again moved for a mistrial, arguing that he was in the unfair position of having to take the stand to refute T.D.’s allegation that he was a drug user. The court denied the motion, but noted that an additional remedy could be “some kind of instruction.” The court left it to the parties to determine whether and, if so, what kind of instruction would be appropriate.

¶7 Later, defense counsel reported to the trial court that the parties had agreed the improper testimony could be addressed from the bench, and offered an instruction. When the jury returned from recess the court informed the members:

Before lunch there was some testimony about some potential drug use by Mr. Pack. What I can tell you is the reason I sustained the objection and I struck the testimony is that I found the testimony to be inappropriate because the parties all agree there’s no evidence . . . of any drug use by Mr. Pack as it relates to this case in any way, shape, or form. So that’s why I struck the testimony, and I wanted to make sure you were clear as to what you could and could not consider.

The parties were asked if they wished to make any further record on the matter, and neither party did.

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¶8 To the extent T.D.'s testimony implied that Pack was a drug user and associated with other drug users, it was inadmissible. *See State v. Bailey*, 160 Ariz. 277, 280, 772 P.2d 1130, 1133 (1989). However, we must also determine whether the trial court abused its discretion "by determining that, under the circumstances of the case, the jury was not so influenced by the remarks that [Pack] was denied a fair trial." *Id.* Testimony implying prior bad acts does not necessarily require reversal. *See, e.g., Jones*, 197 Ariz. 290, ¶ 34, 4 P.3d at 360 (mistrial not necessary where testimony "made relatively vague references to other unproven crimes or incarcerations" and judge gave limiting instruction); *Bailey*, 160 Ariz. at 280, 772 P.2d at 1133 (statements implying defendant served time in prison "relatively innocuous" in context of testimony and fact jurors would have no idea how much time was spent in prison or for what crime).

¶9 Here, T.D.'s first statement implied at most that Pack knew people who used heroin, and the second statement indicated that Pack had a drug issue in the past. Both statements were vague in context of her testimony, and there was no other implication that drugs were involved in the incident. The jury had also been questioned before trial about their prejudice against drug use, albeit in the context of witness testimony. Finally, the trial court explicitly informed the jury pursuant to a stipulated oral instruction that there was no evidence of drug use by Pack in this case. As with other instructions, we presume the jury observed this specific, curative instruction. *See State v. Miller*, 234 Ariz. 31, ¶ 22, 316 P.3d 1219, 1228 (2013).

¶10 Pack relies on several cases to argue he suffered prejudice requiring a mistrial. In those cases the trial court did not immediately sustain an objection to the improper testimony; further, the improper testimony suggested the defendant had previously been arrested or charged with a crime. *See State v. Saenz*, 98 Ariz. 181, 184-85, 403 P.2d 280, 282 (1965); *State v. Gallagher*, 97 Ariz. 1, 7-8, 396 P.2d 241, 245 (1964); *State v. Jacobs*, 94 Ariz. 211, 212-14, 382 P.2d 683, 684-85 (1963); *State v. Babineaux*, 22 Ariz. App. 322, 324, 526 P.2d 1277, 1279 (1974). Here, the testimony did not implicate a prior criminal history, and the court sustained Pack's objections, struck the testimony, instructed the jury not to consider evidence to which

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an objection was sustained, and instructed the jury there was “no evidence” of Pack’s drug use in this case.

¶11 Pack also relies on an inapposite case to argue the curative instruction given was insufficient to outweigh the unfair prejudice. *See State v. Anthony*, 218 Ariz. 439, ¶ 40, 189 P.3d 366, 373 (2008). In *Anthony*, the trial court instructed the jury that improperly-admitted “other acts” evidence could only be considered for motive, not for proof of murder, but our supreme court concluded the error could not be harmless where the allegation that the defendant molested his step-daughter was a “repeated theme” of the state’s closing argument. *Id.* ¶¶ 34-42. In contrast, the “other acts” evidence here involved a passing reference to drug use by Pack or his acquaintances, which the trial court addressed by informing the jury there was no evidence of drug use by Pack<sup>2</sup>; moreover, the issue was not raised again in closing argument. Under the circumstances of this case, the court did not err by denying Pack’s motion for mistrial.<sup>3</sup>

**Disposition**

¶12 For the foregoing reasons, we affirm Pack’s conviction and sentence.

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<sup>2</sup>The language was proffered by Pack and was sufficiently strong that he observed the proposed instruction would “take care of it.”

<sup>3</sup>Pack briefly argues his due process rights were violated, but cites no case law and does not further develop a constitutional argument. Because he has failed to argue this claim on appeal, we do not address it. Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).