IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

STEVEN JAMES BRYDIE,
Appellant.

No. 2 CA-CR 2020-0012
Filed March 10, 2021

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Gila County
No. P0400CR201800419
The Honorable Timothy M. Wright, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Michael F. Valenzuela, Assistant Attorney General, Phoenix
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Steven Brydie was convicted of negligent homicide, and the trial court sentenced him to fifteen years' imprisonment. On appeal, he contends the court erred (1) by erroneously precluding him from cross-examining a witness about the witness's arrests for drug offenses; (2) in denying his request for recross-examination of another witness; (3) and in denying his motion for a mistrial involving the prosecutor's remarks about a precluded matter. He also argues cumulative prosecutorial misconduct denied him a fair trial. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming Brydie's conviction. *See State v. Molina*, 211 Ariz. 130, ¶ 2 (App. 2005). In the predawn hours of July 28, 2018, Brydie, his girlfriend Katie, his friend Mark, and Jack, a physically disabled man who Katie assisted, drove to nearby ancient ruins to view the sunrise.[1] Katie drove, Brydie sat in the passenger seat, Mark sat behind Katie, and Jack sat behind Brydie. During the trip, Brydie pulled a gun out of his waistband and held it in his lap. The gun belonged to Jack, and Brydie had removed it from Jack's lift chair earlier when he helped Jack get into the vehicle. When they arrived at the ruins, Katie told Brydie to put the gun away, but he did not do so. Instead, he began pointing it at the others, threatening to kill everyone in the vehicle. As Brydie pointed the gun at Jack and began cocking the hammer, Jack reached out to push the gun away and it discharged. The bullet struck Mark, killing him.

¶3 The state charged Brydie with second-degree murder and two counts of aggravated assault. A jury found him not guilty of second-degree

[1] To protect their privacy and for ease of reference, we use pseudonyms and refer to the victim as Mark, Brydie's girlfriend as Katie, and the other primary witness as Jack.

murder and the aggravated assault counts, but it found him guilty of negligent homicide, a lesser-included offense of second-degree murder. He was sentenced as described above; this appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Denial of Cross-examination about Witness's Drug Arrests

¶4 Brydie argues the trial court erred in precluding him from cross-examining Jack about Jack's three arrests "for methamphetamine sales, possession and use" that occurred after the incident. He maintains that Jack's arrests "establish a pattern of addiction" that "ha[d] a tendency to diminish [his] credibility." "We review a trial court's ruling on the admissibility of evidence for an abuse of discretion." *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 7 (App. 2013).

¶5 Evidence of drug or alcohol use at or near the time of the alleged incident is admissible to impeach a witness's ability to "perceive, remember, and relate" what happened. *State v. Orantez*, 183 Ariz. 218, 222-23 (1995). Likewise, evidence of a witness's history of drug use also may be relevant to show an effect on the witness's ability to perceive and remember relevant events, *State v. Walton*, 159 Ariz. 571, 582 (1989), *aff'd*, 497 U.S. 639 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 609 (2002), but a court has broad discretion over whether to permit inquiry into such areas, *see Buccheri-Bianca*, 233 Ariz. 324, ¶ 8 ("Trial courts retain wide latitude to impose reasonable limits on cross-examination to prevent confusion of the issues or interrogation that is only marginally relevant."); *cf. State v. Prince*, 160 Ariz. 268, 273 (1989) ("Although Rule 608(b) of the Arizona Rules of Evidence permits a trial court to allow evidence of specific instances of conduct of a witness on cross-examination if those instances are probative of the witness's character for truthfulness or untruthfulness, it also permits the discretionary exclusion of such testimony.").

¶6 Here, the trial court did not err in precluding Brydie from asking Jack about his drug arrests. To the extent the arrests suggest that Jack used drugs, such evidence was at most marginally relevant to show that his ability to perceive and recount the incident was diminished given that the arrests occurred over a year later. In contrast, in the case Brydie cites in support of his argument, *Orantez*, the evidence of drug use was not remote from the events at issue—there was "evidence of drug use at the

exact time of the incident" about which the witness testified. 183 Ariz. at 222.

¶7 Moreover, the trial court did not preclude Brydie from all inquiry into Jack's drug use other than the day of the shooting; it also allowed inquiry into his drug use at the time of his testimony at trial. Indeed, Brydie asked Jack if he was on medication the first day of his testimony at trial, and Jack responded that he had taken "Xanax, [his] extended release morphine," and several other medicines that day. In response to juror-submitted questions, Jack stated that no drugs had been used nor alcohol consumed at the time of the shooting. However, in response to a more specific juror question whether he was under the influence of any drugs, like marijuana or methamphetamine, while at the ruins, Jack stated, "[Y]es, I have a medical marijuana card because I have glaucoma." Although the court only allowed evidence of Jack's drug use during the day of the shooting and when he testified at trial, he cites no authority that the court abused its discretion in doing so.

¶8 Finally, the trial court found that "any minimal probative value" of the drug-related arrests was "substantially outweighed by the danger of unfair prejudice or confusion of [the] issues" and, thus, were precluded under Rule 403, Ariz. R. Evid. We agree with the court's determination. The evidence of Jack's criminal conduct carried risks of unfair prejudice, and the probative value of the evidence was minimal because it was remote from the events at issue. In addition, Jack had merely been arrested, not convicted. *Cf. State v. Johnson*, 106 Ariz. 539, 540 (1971) (witness generally "may not be impeached by specific acts of misconduct not amounting to a conviction for a felony").

¶9 Brydie offers no authority suggesting that the trial court lacked discretion to exclude the evidence under Rule 403 in these circumstances; he merely makes an unsupported, conclusory statement that "[t]he probative value of this evidence substantially outweighs any prejudice that may have resulted from its admission." Brydie has not shown that the court abused its discretion in precluding evidence of Jack's arrests.[2]

[2] Brydie also argued below that the arrests were admissible to establish Jack's bias by showing that he might have hoped to get more lenient treatment in those other cases if he offered helpful testimony against Brydie. Because he has not argued this claim on appeal, we do not consider

Denial of Recross-examination

¶10 Brydie argues that the trial court erred by denying his request to recross-examine Katie. We review a trial court's decision whether to allow recross-examination for an abuse of discretion. *State v. Smith*, 138 Ariz. 79, 81 (1983).

¶11 On direct examination by the state, Katie testified that after the shooting, the group did not immediately call police, and instead, Jack had called his wife to the scene. According to Katie, once Jack's wife arrived, Jack and his wife concocted a false story about what had happened and pressured Katie to go along with the fabrications. The group—except for Brydie, who had run away—then returned to Jack's house in his wife's car, and Jack finally called the police. During cross-examination, Katie testified that Jack and his wife had fabricated the story because they were concerned "[p]robably [about] the drugs." On redirect, the state asked Katie about the kind of drugs in the vehicle that Jack had been worried about, and she testified it was methamphetamine. After redirect concluded, Brydie requested permission to recross-examine Katie about "[w]hose meth it was." The trial court denied the request, finding that the state's inquiry on redirect "did not go into new areas."

¶12 On appeal, Brydie contends the court's ruling was erroneous because the state's inquiry into the drugs on redirect "opened the door to the presence of methamphetamine in the vehicle when the shooting occurred," bearing on the credibility of the state's witnesses. But the record supports the trial court's conclusion that the state's inquiry on redirect had not ventured into new territory. Brydie had already elicited from Katie on cross-examination that drugs were present at the scene. He could have questioned her then about what kind of drugs were in the vehicle and who had possessed them, but he did not do so, despite the court's express permission to inquire into the witnesses' drug use that day. The court thus acted well within its discretion to deny Brydie's request for recross-examination. *See State v. Williams*, 113 Ariz. 14, 16 (1976) ("It is well established in Arizona . . . that there is no right to recross unless some new issue arises during redirect; otherwise, it is a matter of the trial court's sound discretion." (quoting *State v. Jones*, 110 Ariz. 546, 550 (1974))).

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it. *See State v. Carver*, 160 Ariz. 167, 175 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

Denial of Motion for Mistrial for Prosecutorial Misconduct

¶13 Brydie claims that the trial court erroneously denied his motion for a mistrial after the prosecutor remarked in closing argument that the court had precluded the state from calling Brydie's investigator as a witness. He maintains the remarks called into question "the issue of why [the jury] had not heard from the defense investigator and whether defense counsel had even effectively utilized [him]." "We review a trial court's failure to grant a mistrial for an abuse of discretion." *State v. Moody*, 208 Ariz. 424, ¶ 124 (2004).

¶14 Before closing argument and outside the presence of the jury, the trial court denied the state's request to call Brydie's investigator as a rebuttal witness, ruling that the state had already concluded its rebuttal. During closing argument, the prosecutor referred to the fact that the investigator had not testified and that the court had precluded the state from calling him as a witness:

> [Prosecutor]: [T]he defense, they're not required to present any evidence, that's true. That's a constitutional principle. But they did, they subpoenaed witnesses. They presented evidence. You've got an investigator sitting right here. Never bothered to go out there and look at those holes.
>
> [Brydie's Counsel]: Your Honor, I object to his referring to [the defense investigator], who has not been a witness in this case. And he has no idea what goes on in the privilege of the attorney/client relationship . . . in which [the investigator] is included. I object to his calling the jury's attention to that, and ask the Court to direct the State counsel to stop doing that.
>
> [Prosecutor]: And I was from prohibited from calling him as a witness.
>
> [Brydie's Counsel]: Objection, Your Honor.

¶15 "Although attorneys are given wide latitude in their arguments to the jury, an attorney may not refer to evidence which is not in the record, nor may he 'testify' as to matters not in evidence." *State v. Salcido*, 140 Ariz. 342, 344 (App. 1984) (quoting *State v. Bailey*, 132 Ariz. 472,

477-78 (1982)). As the state appropriately concedes, the prosecutor improperly referred to matters outside the evidence. First, it was improper for the prosecutor to state that the investigator "had never bothered to go out there [to the crime scene] and look at those [bullet] holes." The investigator did not testify at trial, and the fact that he had not visited the crime scene was not in evidence.

¶16 Second, it was improper for the prosecutor to state that he had been prohibited from calling the investigator as a witness, as that matter was also not in evidence and unknown to the jury. *See State v. Leon*, 190 Ariz. 159, 163 (1997) (prosecutor "not entitled to refer, by innuendo or otherwise, to evidence that had been ruled inadmissible"). The remarks were unfairly prejudicial in that they implied the investigator would have offered testimony favorable to the state had the trial court not prevented the jury from hearing from him.

¶17 Mistrial is the most drastic remedy for trial error, however, and should be granted only if the interests of justice require it. *State v. Miller*, 234 Ariz. 31, ¶ 25 (2013). In general, "[t]he proper response to an improper prosecutorial comment is an objection, motion to strike, and a jury instruction to disregard the stricken comment." *State v. Lynch*, 238 Ariz. 84, ¶ 48 (2015), *rev'd on other grounds*, ___ U.S. ___, ___, 136 S. Ct. 1818 (2016).

¶18 Here, the trial court properly sustained Brydie's objections and ordered the references to the investigator stricken from the record. Although the court did not contemporaneously give an instruction for the jury to disregard the improper commentary, Brydie did not request one. In its final instructions, the court also directed the jury to disregard matters that had been stricken or subject to sustained objections. The court also appropriately instructed the jury that it should determine the facts only from the evidence, that evidence consisted only of witness testimony and exhibits, and that closing arguments were not evidence. We presume the jury followed its instructions and the improper remarks did not affect the verdict. *See State v. Newell*, 212 Ariz. 389, ¶ 69 (2006) (prosecutor's improper comments did not affect verdict where objection to comments sustained without contemporaneous instruction to disregard comments but jury received general instructions to disregard information subject to sustained objections).

¶19 It is Brydie's burden to overcome that presumption by showing a reasonable likelihood that the improper remarks nonetheless influenced the jury. *See id.* ¶ 67. Brydie has not met that burden here. In

his opening brief, he does not address the remedial actions taken by the trial court, nor develop an argument why those actions were insufficient and a mistrial was required. In particular, he does not address the relative strength of the evidence against him or discuss how the improper remarks could have influenced how the jury viewed the evidence against him. Even in his reply brief, Brydie merely states that the court's actions "d[id] little" to offset the juror's reactions to the improper remarks without explaining how they could have affected the verdict. He briefly addresses the evidence against him only to refute the state's argument that the evidence was overwhelming—a showing the state need not make under the circumstances here.

¶20 Moreover, Brydie fails to cite any authority for the proposition that a mistrial is required under similar circumstances. He focuses on *Miller*, 234 Ariz. 31, ¶¶ 23-27, in which our supreme court concluded the defendant's motion for mistrial was properly denied, despite the error that had occurred. Although Brydie argues that a different outcome is dictated here because of the brevity of the improper remarks in *Miller* and the intentional nature of the remarks here, again, he offers no authority to support that conclusion. In short, Brydie has not shown that the trial court abused its discretion in denying his motion for mistrial.

Cumulative Prosecutorial Misconduct

¶21 Brydie raises several other instances of claimed prosecutorial error or misconduct and argues that their cumulative effect, along with the prosecutor's improper remarks regarding his investigator, denied him a fair trial. We address the cumulative effect of prosecutorial misconduct, evaluating each instance to determine if misconduct occurred and, if so, its effect. *State v. Goudeau*, 239 Ariz. 421, ¶ 192 (2016). We will reverse only if the defendant demonstrates that the prosecutor's misconduct infected the trial with unfairness to such an extent that the defendant was denied due process. *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 66 (2018). To that end, the defendant must establish both error or misconduct and a reasonable likelihood that it could have affected the verdict by being "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial." *Goudeau*, 239 Ariz. 421, ¶ 193 (quoting *State v. Morris*, 215 Ariz. 324, ¶ 46 (2007)). Where, as here, the defendant did not object to some of the instances of prosecutorial misconduct now claimed, "it is not necessary to separately argue fundamental error for each allegation of misconduct in a claim of cumulative error." *State v. Vargas*, 249 Ariz. 186, ¶ 17 (2020).

¶22 Brydie first contends that the prosecutor committed misconduct by questioning jurors about why they rendered their verdicts during prior jury service, including asking one juror, over Brydie's denied objection, "Could you tell me the reason . . . why you found [the defendant in the juror's previous case] not guilty?" But generally, a party may ask prospective jurors questions "designed to elicit information relevant to asserting a possible challenge for cause or enabling a party to intelligently exercise the party's peremptory challenges." Ariz. R. Crim. P. 18.5(e). The challenged questions here appear to have been designed to do just that.[3]

¶23 Moreover, none of the cases Brydie relies on to support his argument involve a challenge to similar questioning, much less a successful one. *See State v. Trostle*, 191 Ariz. 4, 12 (1997) (no apparent challenge to inquiry into juror's verdict in prior jury service); *State v. Sorrell*, 95 Ariz. 220, 223 (1964) (same); *see also State v. Adams*, 109 Ariz. 556, 557 (1973) (upholding trial court's preclusion of questioning about results of prior criminal cases on which jurors had served; information was irrelevant "without knowing how the particular juror voted," and counsel had "made no attempt to ask them"). Indeed, *Adams* suggests that questioning about previous verdicts is permissible to gain information about "whether the juror [is] defense-oriented or prosecution-oriented." 109 Ariz. at 557. The trial court thus acted well within its "discretion to determine the scope of voir dire" when it allowed these questions. *State v. Smith*, 215 Ariz. 221, ¶ 37 (2007).

¶24 Next, Brydie claims the prosecutor committed misconduct by calling defense counsel "whin[]y" as the jury was walking past them on the way out of the courtroom. Although the prosecutor effectively acknowledged making the improper comment, he denied that it was within earshot of the jury, and there is no evidence that any juror heard the remark. Moreover, Brydie neither requested that the trial court ask the jurors whether they had heard the remark, nor asked the court to make any findings based on its own observation of the incident. Because Brydie did not make a record that jurors heard this improper statement, we have no basis on which to conclude that the remark had any influence on the jury.

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[3]This is not a situation where the jurors were being improperly asked about their thought process in arriving at their verdict in the case currently before the court. *See* Ariz. R. Crim. P. 24.1(d) (prohibiting court from receiving evidence about "subjective motives or mental processes leading a juror to agree or disagree with the verdict" when considering motion for new trial for juror misconduct).

Cf. State v. Towery, 186 Ariz. 168, 185 (1996) (mistrial not the proper remedy for harmless prosecutorial misconduct); *State v. Rojas*, 247 Ariz. 399, ¶ 12 (App. 2019) (suggesting that remedy for extraneous information received by jury available only if "it is shown the jury received extraneous information"). Similarly, the jury was not present when the prosecutor stated that defense counsel "lies in this courtroom consistently." We therefore conclude that this arguably improper remark also had no effect on the jury and does not contribute to Brydie's claim of cumulative prosecutorial misconduct.

¶25 Brydie also claims that the trial court erroneously denied his objection when the prosecutor stated, "So I would urge you to listen to all of the evidence, but I would simply ask that you not fall for the defense trap of trying to divert your attention from what really happened, what actually happened." Brydie maintains that this characterized him as a liar.

¶26 Although "it is improper to impugn the integrity or honesty of opposing counsel," *Newell*, 212 Ariz. 389, ¶ 66, the prosecutor's remark did not rise to the level of calling defense counsel a "liar" and was not the kind of serious attack on his character that might contribute substantially to a claim of cumulative prosecutorial misconduct. Rather, it could be interpreted as a suggestion that defense counsel would try to direct the jury's attention away from important matters and toward irrelevancies. Although a prosecutor should not "argue the merits of [the state's] case" during opening statements, *State v. Burruell*, 98 Ariz. 37, 40 (1965) (quoting *State v. Erwin*, 120 P.2d 285, 313 (Utah 1941)), nor "argue the inferences and conclusions that may be drawn from evidence not yet admitted," *State v. Bible*, 175 Ariz. 549, 602 (1993), and, assuming on these bases the remark was improper, such a remark contributes little toward a showing of cumulative prosecutorial error meriting reversal.

¶27 Brydie next points to the prosecutor's remarks, made without objection during closing argument, that a witness had been "harassed on [the] witness stand by defense counsel" and that the cross-examination involved "hours and hours and hours and hours" of "relentless repetition." But although Brydie characterizes these remarks as "a direct attack on the character and credibility of defense counsel," we again do not view it in such dire terms. Rather, the remarks were part of a proper argument that Brydie's counsel had not landed any telling blows on the witness's testimony despite lengthy and repetitive cross-examination. Such remarks fall within the wide latitude of permissible closing argument. *See Goudeau*, 239 Ariz. 421, ¶ 196. To the extent the prosecutor's comments were hyperbole, jurors could evaluate for themselves whether the remarks

matched their own perception of the evidence. In the same vein, we detect no error in the prosecutor's characterization of the defense case as "nothing but one big, huge smoke screen." Indeed our supreme court has ruled nearly identical commentary to be permissible. *See State v. Amaya-Ruiz*, 166 Ariz. 152, 171 (1990).

¶28 Brydie also claims that later during closing argument, the prosecutor "t[old] the jury that defense counsel had essentially called them racists" during voir dire:

> [Prosecutor]: Remember when you were being selected, the defendant asked you whether you had any problem with the defendant being black. There was no purpose to that question either. The question was, essentially, are any of you racists. And there is not even a hint—
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> [Brydie's Counsel]: Your Honor.
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> [Prosecutor]: —of any kind of racist—
>
> [Brydie's Counsel]: I object.
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> [Prosecutor]: —in this case—
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> [Brydie's Counsel]: Your Honor.
>
> [Prosecutor]: And he injected it by playing those clips.
>
> THE COURT: Mr. Soos, please stop. There's been an objection.

¶29 These remarks referred to defense counsel's proper questions to the jury about whether they could be fair and impartial to Brydie, and insinuated that counsel had somehow insulted the jurors or had otherwise done something improper. The remarks thus improperly impugned the integrity of Brydie's counsel. *See Newell*, 212 Ariz. 389, ¶ 66. Worse, the remarks involved a racially charged matter that had potential to inflame the jury. *See Morris*, 215 Ariz. 324, ¶ 58 (despite wide latitude in making arguments, prosecutor "cannot make arguments that appeal to the fears or passions of the jury"). Although the state argues that Brydie's inquiry into racial matters at trial "opened the door" to the commentary, our review of

the record does not support this claim, nor the false and inflammatory insinuation that Brydie's questioning during voir dire was improper.

¶30 But as it had done when the prosecutor improperly commented about Brydie's investigator, the trial court appropriately sustained Brydie's objection to these remarks and struck them from the record. And although the court did not instruct the jury to disregard the remarks, Brydie again did not request such an instruction, and as mentioned above, the court instructed the jury generally to disregard matters stricken from the record. The court's appropriate actions mitigated the risk of unfair prejudice from the remarks. *See Lynch*, 238 Ariz. 84, ¶ 52 (court cured prejudice from prosecutor's improper remarks by sustaining objections and appropriately instructing jury).

¶31 In every instance of prosecutorial error or misconduct that occurred in this case, the trial court sustained Brydie's objection and struck the improper remarks from the record, and it appropriately instructed the jury to disregard stricken material. Given the court's rulings and instructions, Brydie has the burden to overcome a presumption that the curative measures were insufficient to overcome any prejudice by showing a reasonable likelihood that the improper remarks nonetheless influenced the jury. *See Newell*, 212 Ariz. 389, ¶ 67-69. In other words, in addition to showing error, Brydie must "set forth the reasons why the cumulative misconduct denied [him] a fair trial with citation to applicable legal authority." *Vargas*, 249 Ariz. 186, ¶ 14 (stating criteria for showing of cumulative prosecutorial misconduct when defendant has burden of persuasion in fundamental error analysis). As discussed above, Brydie fails to meaningfully address the evidence against him or analyze how the improper remarks could have influenced the jury. Other than briefly addressing the evidence in his reply brief to argue that it was not overwhelming, he relies on conclusory statements that the misconduct "permeated his entire trial" and influenced the "entire atmosphere of the trial."

¶32 The few instances of misconduct Brydie has shown did not permeate the trial to the extent that a showing of overwhelming evidence was necessary to establish that the misconduct did not influence the verdict. *See Acuna Valenzuela*, 245 Ariz. 197, ¶¶ 65-120 (upholding conviction despite several instances of prosecutorial misconduct and no showing of overwhelming evidence); *but see State v. Arias*, 248 Ariz. 546, ¶¶ 71-77 (App. 2020) (overwhelming evidence necessary to overcome "egregious" misconduct that "undeniably permeated" and "saturated" trial). And finally, Brydie does not cite any case reversing a conviction under

circumstances similar to those here. On the contrary, Arizona appellate courts have sustained convictions on multiple occasions despite misconduct of a magnitude similar to what occurred here. *See, e.g.*, *Acuna Valenzuela*, 245 Ariz. 197, ¶¶ 65-120 (claim of cumulative prosecutorial misconduct rejected despite several instances of prosecutorial impropriety); *Lynch*, 238 Ariz. 84, ¶¶ 51-52 (same). We conclude that although the prosecutor made improper remarks on more than one occasion during trial, Brydie has not shown cumulative misconduct so pervasive that he could not have received a fair trial.

Disposition

¶33 For the foregoing reasons, we affirm Brydie's conviction and sentence.