IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MARCOS ANTONIO ALCANTAR,
Appellant.

No. 2 CA-CR 2020-0105
Filed August 31, 2022

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NOT FOR PUBLICATION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 Pima County
No. CR20181862001
The Honorable Javier Chon-Lopez, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Casey Ball, Assistant Attorney General, Phoenix
Counsel for Appellee

Megan Page, Pima County Public Defender
By Erin K. Sutherland, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

S T A R I N G, Vice Chief Judge:

¶1 Marcos Alcantar appeals from his convictions and sentences for six counts of sexual conduct with a minor and two counts of sexual assault. For the reasons that follow, we affirm Alcantar's convictions and sentences.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the jury's verdicts, and thus resolve all reasonable inferences against Alcantar. *See State v. Gill*, 248 Ariz. 274, ¶ 2 (App. 2020). Alcantar and his partner Yvette adopted C.V. and her biological sister A.V. At the time, C.V. was six years old and A.V. was four. Alcantar and Yvette had previously adopted a child who was older than C.V. and A.V., and they later had a biological child of their own, P.O.

¶3 In 2014, when C.V. was sixteen, Yvette was diagnosed with cancer. C.V. stopped attending school to care for Yvette and began sleeping on the living room couch while Yvette slept nearby on a hospital bed. At some point, C.V. asked Alcantar if she could borrow his phone to communicate with her friends because she did not have her own cell phone. Alcantar then asked if he could perform oral sex on her, and although she did not "want him to do that," he went ahead and did so. C.V. testified the oral sex became a "regular thing," with Alcantar performing oral sex on her "the whole time" she was sixteen in exchange for use of his phone while Yvette was asleep in the same room. Before Yvette died in December 2014, C.V. confronted Alcantar about the sexual acts and "told him [to] . . . stop." Alcantar apologized, started crying, and told her not to tell anyone, and the oral sex stopped.

¶4 Following Yvette's death, and after C.V. had turned seventeen, C.V. began sleeping in Alcantar's bed with him because Alcantar claimed he wanted to prevent her from sneaking out of the house at night. C.V. was having trouble sleeping, and Alcantar began giving her melatonin

or Trazodone[1] to help her sleep. C.V. testified she "would fall asleep" but "would wake up from . . . the Trazodone sleep" to Alcantar "licking [her] again or him on top of [her]," having, or attempting to have, intercourse with her. She further testified this occurred "[p]robably like every night," always after she had been given Trazodone and always involving both oral sex and intercourse.

¶5 After she turned eighteen, C.V. left the house and moved in with her boyfriend, J.D. After C.V. moved out, A.V. confronted Alcantar about his sexual contact with C.V., and he responded that C.V. "was grown, she knew it, [and] she could have said no." C.V. ultimately told her boyfriend's mother about the acts, and she called the police.

¶6 In 2018, a grand jury indicted Alcantar for six counts of sexual conduct with a minor under the age of eighteen and two counts of sexual assault.[2] Following a five-day jury trial, he was convicted as charged and sentenced to consecutive and concurrent terms of imprisonment totaling fourteen years. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶7 On appeal, Alcantar argues he was deprived of due process because the indictment failed to provide adequate notice of the charges against him, the state's presentation of evidence at trial rendered the charges duplicitous, and he may have been convicted for offenses not presented to the grand jury. He further contends the trial court erred in denying his motions for mistrial based on the introduction of irrelevant and prejudicial evidence during the testimony of several of the state's witnesses. Additionally, Alcantar asserts the court erred in allowing three of the state's witnesses to testify that C.V. had disclosed the sexual contact to them before such contact was reported to law enforcement. Finally, he alleges the state

[1]The parties stipulated that Trazodone is a prescription medication used "for helping people sleep."

[2]Alcantar was also charged with a prescription-only drug violation, but this count was dismissed with prejudice on the first day of trial on the state's motion.

committed various instances of prosecutorial error that individually and cumulatively deprived him of his right to a fair trial.

Indictment

¶8 As noted, Alcantar contends his right to due process was violated because "the indictment failed to give sufficient notice of the charges" against him and "the State's presentation of evidence rendered the charges duplicitous." We review constitutional and legal issues de novo. *See State v. Moody*, 208 Ariz. 424, ¶ 62 (2004).

Notice

¶9 We first address Alcantar's argument that the "indictment failed to give adequate notice as to which acts constituted the charged offenses." Because Alcantar failed to challenge the indictment before trial, he has forfeited review for all but fundamental, prejudicial error.[3] *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018); *see also State v. Hargrave*, 225 Ariz. 1, ¶ 28 (2010) (applying fundamental error review to duplicitous indictment argument). To establish fundamental error, Alcantar must show error that (1) went to the foundation of his case, (2) denied him a right essential to his defense, or (3) was so egregious as to deny him the possibility of a fair trial. *See Escalante*, 245 Ariz. 135, ¶ 21. Under the first two prongs, he must also show prejudice. *See id.* If a defendant shows the error was so egregious he

[3]Relying on *State v. Anderson*, 210 Ariz. 327, ¶¶ 14-18 (2005), the state maintains Alcantar's argument regarding the sufficiency of the indictment is "forfeited entirely" under Rule 13.5(d), Ariz. R. Crim. P., which requires a defendant to challenge a defect in a charging document by filing a pretrial motion pursuant to Rule 16, Ariz. R. Crim. P. However, as the state acknowledges, our supreme court has subsequently concluded that where a defendant had failed to challenge the indictment before trial, review of his duplicity argument was waived absent fundamental, prejudicial error. *State v. Hargrave*, 225 Ariz. 1, ¶ 28 (2010). "[B]ecause we find no prejudice in the case before us," we assume without deciding that fundamental error review is appropriate with regard to Alcantar's argument that the indictment failed to provide him with sufficient notice. *State v. Butler*, 230 Ariz. 465, ¶ 15 (App. 2012) (describing *Hargrave*'s application to all cases involving duplicitous indictment as "questionable" but nonetheless applying fundamental error review).

could not have received a fair trial, however, he has necessarily shown prejudice and must receive a new trial. *Id.*

¶10 The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. Const. amend. VI; *see also* Ariz. Const. art. II, § 24. "An indictment is legally sufficient if it informs the defendant of the essential elements of the charge, is definite enough to permit the defendant to prepare a defense against the charge, and affords the defendant protection from subsequent prosecution for the same offense." *State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, ¶ 36 (App. 2010). To determine whether a defendant received constitutionally sufficient notice, we examine "whether the defendant had actual notice of the charge, from either the indictment or other sources." *State v. Freeney*, 223 Ariz. 110, ¶ 29 (2009); *see also Far W. Water & Sewer*, 224 Ariz. 173, ¶ 36 (indictment read in light of facts known by both parties).

¶11 Each count of the indictment in this case listed a date range spanning one year, which corresponded to the dates when C.V. was either sixteen or seventeen years old. Counts One through Six of Alcantar's indictment charged him with sexual conduct with a minor under the age of eighteen pursuant to A.R.S. § 13-1405. Count One alleged that, "[o]n or about the 7th day of May, 2014 through the 6th day of May, 2015," Alcantar had "committed sexual conduct with a minor, by intentionally or knowingly engaging in an act of oral sexual contact, with C.V., to wit: The first time defendant performed oral sex on the victim when she was sixteen years old." Count Two was identical to Count One but specified the charged act was "the last time [Alcantar] performed oral sex on [C.V.] when she was sixteen years old." Similarly, Counts Three and Five alleged that, "[o]n or about the 7th day of May, 2015 through the 6th day of May, 2016," Alcantar had engaged in oral sexual contact with C.V., respectively referring to the first and last times he performed oral sex on C.V. when she was seventeen. Counts Four and Six were alleged to have been committed within the same date range as Counts Three and Five, both occurring when C.V. was seventeen, with Count Four stating the charged act was "the first time [Alcantar] had vaginal intercourse with [C.V.]" and Count Six stating the charged act was "the last time [he] had vaginal intercourse with [C.V.]."

¶12 Counts Seven and Eight charged Alcantar with sexual assault occurring "[o]n or about the 7th day of May, 2015 through the 6th day of May, 2016"—the year C.V. was seventeen—pursuant to A.R.S. § 13-1406(A). Count Seven alleged he had "intentionally or knowingly engag[ed] in

sexual intercourse or oral sexual contact with C.V. by performing oral sex on the victim after administering Trazodone, without her consent." Count Eight alleged he had "intentionally or knowingly engag[ed] in sexual intercourse or oral sexual contact with C.V., by engaging in vaginal intercourse with the victim . . . after administering Trazodone to her, without her consent."

¶13 Before trial, Alcantar noticed two defenses—"[b]urden of [p]roof" and "[g]ood [c]haracter"—but made no challenge with respect to the indictment. At trial, the state presented evidence that Alcantar had regularly performed oral sex on C.V. "the whole time" she was sixteen and sleeping on the couch. It also presented evidence that "[p]robably . . . every night" when C.V. was seventeen, Alcantar had performed oral sex on her before getting on top of her and putting his penis between the lips of her vagina, always after he had given her Trazodone, and that this had occurred in Alcantar's bedroom. In its closing argument, the state asserted that based on C.V.'s testimony that Alcantar had performed oral sex on her more than once during the year that she was sixteen, "there had to be a first time and there had to be a last time." It further argued he had performed oral sex on her "multiple times" after she turned seventeen before "escalat[ing] to vaginal intercourse."

¶14 Alcantar asserts the indictment in this case did not provide sufficient notice of the charges against him because it "include[d] a time period of a full year" in the description of each charge. He concedes the state is not required to prove the date of the offense as an element of sexual assault or sexual conduct with a minor, but he argues the state was still required "to be reasonably specific as to the date in order to provide [him] an opportunity to prepare a defense." Alcantar contends that because the state argued the evidence showed the alleged sexual acts had "happened multiple times," and therefore "there necessarily had to be a first and a last time," it effectively "shifted the burden to [him] to try and decipher which act he was being charged with committing." Thus, he maintains, he was prevented from investigating or raising an alibi or other affirmative defense because "there is no specific charge—the only potential defense a person could raise in such a situation is 'I didn't do it.'"

¶15 The state counters Alcantar had adequate notice of the charges against him based on the information contained within the indictment and discovery provided before trial, including the grand jury transcript, C.V.'s interview with a detective, police reports, and forensic interviews of C.V.'s siblings. Moreover, it argues Alcantar admitted the

indictment provided adequate notice of the charges against him months before trial, pointing to defense counsel's acknowledgment in October 2019 that the state wanted C.V. "to be able to say this was happening in this timeframe" and that counsel thought that was "fair." It also points to the following statement by defense counsel:

> I think I'm on notice from all the disclosure that that's the issue and even the indictment isn't specific to dates. I think she has to stay within the date range of the indictment, but it's not—I don't believe she's locked into a situation where she . . . has to say on May 15th this happened. I think that she can say between this timeframe I was being abused and this is what was happening.

¶16 The state further argues that, contrary to Alcantar's assertion, he was not prevented from preparing a defense based on the indictment's alleged lack of specificity as to the dates of the charged offenses. And, relying on several out-of-state cases—*People v. Jones*, 792 P.2d 643 (Cal. 1990), *Commonwealth v. Kirkpatrick*, 668 N.E.2d 790 (Mass. 1996), *overruled on other grounds by Commonwealth v. King*, 834 N.E.2d 1175 (Mass. 2005), and *State v. Vance*, 537 N.W.2d 545 (N.D. 1995)—it asserts that due process does not "require a young victim of repetitive, extensive sexual abuse stretching over a long period to identify specific times and locations of abuse when, from the victim's perspective, there is little or no basis for any such differentiation."

¶17 On reply, Alcantar argues that although he conceded before trial that the indictment had provided sufficient notice when combined with the state's disclosure, such notice was "void" based on C.V.'s testimony at trial referring to "new acts," after which he objected based on a violation of his "due process right to notice." Moreover, he asserts, the cases cited by the state are distinguishable because the victims in those cases "were very young children at the time of the abuse." In support of his argument, Alcantar points to A.R.S. § 13-1417, which permits a conviction for continuous sexual abuse of a child where the child is under fourteen years old and "is unable to distinguish between the acts of abuse in a meaningful way." Alcantar contends "the legislature did not extend § 13-1417 to sexual abuse experienced by a 16- or 17-year-old" likely because "by that age, the minor should be able to distinguish between the events and tie them to certain occasions or locations, unlike a small child."

Thus, he argues, "[b]ecause C.V. was sixteen and seventeen years old at the time of the alleged abuse, the State was bound to provide [him] with a more specific time frame tha[n] a 365-day period."

¶18 In *State v. Copeland*, 253 Ariz. 104, ¶ 15 (App. 2022), we concluded that "due process does not require that an indictment precisely delineate numerous molestations when those acts are alleged to have been committed against a child victim and to have happened repeatedly over a substantial period of time with little or no basis for the child to make any such differentiation." In reaching this conclusion, we looked to out-of-state case law, specifically *Jones*, 792 P.2d 643, and *State v. Lente*, 453 P.3d 416 (N.M. 2019).

¶19 In *Jones*, the California Supreme Court concluded that a child victim's generic testimony was sufficient to satisfy due process where the victim was able to describe the kind of acts committed, the number of acts committed "(e.g., 'twice a month' or 'every time we went camping')," and the general time frame "to assure the acts were committed within the applicable limitation period." 792 P.2d at 655. The court reasoned that because the elements of the offenses did not include specific acts and locations, the grand jury and pretrial discovery procedures had informed the defendant of the allegations, and because cases "involving multiple counts of residential child molestation" generally turn on the credibility of victims, "even generic testimony (e.g., an act of intercourse 'once a month for three years') outlines a series of *specific*, albeit undifferentiated, incidents *each* of which amounts to a separate offense, and *each* of which could support a separate criminal sanction." *Copeland*, 253 Ariz. 104, ¶ 10 (quoting *Jones*, 792 P.2d at 654). Similarly, in *Lente*, the New Mexico Supreme Court concluded that charging documents in resident child molestation cases require only "minimal differentiation between criminal counts," 453 P.3d 416, ¶ 43 (quoting *Valentine v. Konteh*, 395 F.3d 626, 636-37 (6th Cir. 2005)), which can be satisfied by "specifying the exact sex-abuse crimes that allegedly occurred and identifying the dates or date ranges when those crimes purportedly happened," *id.* ¶ 71 (citing *Jones*, 792 P.2d at 655-56).

¶20 We conclude the indictment in this case provided Alcantar with sufficient notice of the charges against him. It identified C.V. as the victim, asserted the offenses had occurred in Pima County, included a description of each offense, and provided a general time frame within which the offenses were alleged to have been committed. "The state was not required to provide notice of the specific acts giving rise to the charges

or the manner in which the offenses would be proven," *Copeland*, 253 Ariz. 104, ¶ 13, nor was it required to establish the date of the offense as an element of sexual assault or sexual conduct with a minor, *see State v. Jones*, 188 Ariz. 534, 543 (App. 1996) (date of offense not element of sexual assault), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239 (2012); *State v. Davis*, 206 Ariz. 377, ¶ 60 (2003) (agreeing that "the date of the offense is not an element of the crime of sexual conduct with a minor").

¶21 Further, each count mirrored the language of the applicable statutes defining the offenses. *See* §§ 13-1405, 13-1406(A); *State v. Miller*, 100 Ariz. 288, 297 (1966) (charging document tracking statutory language generally provides sufficient notice). And, because the indictment "must be read in the light of the facts known by both parties," given the state's pretrial disclosures, which informed Alcantar of the nature of the allegations, including the locations and approximate date ranges of the alleged offenses, we cannot say he lacked adequate notice of the charges against him. *Far W. Water & Sewer*, 224 Ariz. 173, ¶ 36 (quoting *State v. Magana*, 178 Ariz. 416, 418 (App. 1994)); *see Jones*, 792 P.2d at 655, 657 (specific date, time, place, and circumstances not elements of molestation and prosecution utilizing generic testimony does not violate due process because sufficient notice generally provided by pretrial disclosure, including preliminary hearing or grand jury transcripts).

¶22 As to Alcantar's assertion that cases such as *Jones* are inapplicable based on C.V.'s age, we disagree. Although the victims in *Jones*, *Kirkpatrick*, and *Vance*, upon which the state relies, and *Copeland*, upon which we rely, were between the ages of eight and fourteen at the time of the offenses, the principles set out in *Jones* are nevertheless applicable in cases involving older victims. *Jones*, 792 P.2d at 645; *Kirkpatrick*, 668 N.E.2d at 792; *Vance*, 537 N.W.2d at 550; *Copeland*, 253 Ariz. 104, ¶ 2; *see People v. Matute*, 127 Cal. Rptr. 2d 472, 478 (Ct. App. 2002) (although sex crimes against victim were committed when she was fifteen and sixteen, her age "makes little difference with regard to her inability to differentiate among the continual rapes perpetrated by defendant"). As the *Jones* court acknowledged, while a "young victim" who has been "molested over a substantial period by a parent or other adult residing in [her] home . . . may have no practical way of recollecting, reconstructing, distinguishing or identifying by 'specific incidents or dates' all or even any such incidents," "even a mature victim might understandably be hard pressed to separate particular incidents of repetitive molestations by time, place or circumstance." 792 P.2d at 648. Such reasoning is consistent with recognition of the undeniable emotional trauma that can accompany being

a victim of sexual offenses. Accordingly, although C.V. was sixteen and seventeen years old at the time of the offenses in this case, she was not, as Alcantar suggests, required to "distinguish between the events and tie them to certain occasions or locations," especially given the evidence indicating each instance of sexual conduct and sexual assault when C.V. was seventeen occurred after Alcantar had given her Trazodone.

¶23 Further, although Alcantar asserts the indictment's lack of specificity prevented him from "formulat[ing] alternative defenses," like the defendant in *Copeland*, "he has not shown or argued he was unaware of or surprised by the continuously recurring conduct alleged." 253 Ariz. 104, ¶ 14. Alcantar fails to "meaningfully explain[] how he would have defended differently had the indictment and [C.V.] been more specific," instead broadly asserting "there would be no way to raise an alibi or any other affirmative defense." *Id.* ¶ 15; *see State v. Hamilton*, 177 Ariz. 403, 410 n.6 (App. 1993) (defendant's assertion that he was unable to present alibi defense "because he could not reconstruct his life for a specific year, is a theoretical, not an actual, prejudice that could be asserted any time an offense was alleged to have occurred over a period of time"); *Kirkpatrick*, 668 N.E.2d at 794 (rejecting claim of inability to prepare defense where no showing defense would have been different had victim been more specific as to dates and times of sexual assaults). Moreover, he "has not shown that [an alibi] defense was available." *Copeland*, 253 Ariz. 104, ¶ 15. For these reasons, Alcantar was not deprived of due process, and his argument fails.

Duplicitous Charges

¶24 Alcantar argues the state presented evidence of multiple acts to support each count of sexual conduct with a minor and sexual assault, thereby rendering the charges against him duplicitous. Thus, he contends, the trial court's failure to provide "curative measures" could have resulted in non-unanimous jury verdicts, a circumstance that constitutes "fundamental, prejudicial" error requiring reversal.

¶25 C.V. told investigators that when she was seventeen, some of the instances of oral sex and intercourse occurred after Alcantar had given her either Trazodone or melatonin. Accordingly, a detective testified before the grand jury that C.V. had reported Alcantar "administered Melatonin and in addition on some occasions a drug called Trazodone" to her, and "many times when she was administered one or the other of these that she fell asleep and would wake up because Alcantar was having sex with her either vaginally or otherwise in his bed." The detective further testified that when C.V. refused to take any medication, "there was no sexual activity."

¶26 At trial, C.V. testified that the sexual acts committed when she was seventeen had only occurred when she had been administered Trazodone. The trial court subsequently raised the following issue with regard to C.V.'s testimony:

> So here's what I want to ask. I typically don't like to ask questions, but as I hear the testimony right now, she testified that there was no—as I remember it, no oral sex or sexual intercourse when she was 17 that did not involve being under the influence of [T]razodone. That's my understanding of what she said.

The parties agreed with the court's characterization of C.V.'s testimony, and the court expressed concern that this testimony "would get rid of . . . three, four counts."

¶27 The state initially responded that because C.V. had testified "the oral happened multiple times and the vaginal intercourse happened multiple times" when she was seventeen, and because the sexual conduct counts included "first time" and "last time" descriptions, "the appropriate thing to do would be to amend the indictment to make the assaults in the alternative." The state subsequently argued that although it "might have charged all of those counts as sexual assaults" if it had understood C.V.'s statement to mean none of the sexual acts occurred when she had not been given Trazodone, "the fact remains that would only mean that all of these sexual conducts could be considered sexual assaults," and there was no need to amend the indictment. Thus, the state asserted, C.V.'s testimony merely created an issue as to "whether count seven and count eight have to be considered as the same conduct and, therefore, require concurrent sentencing." Alcantar disagreed, arguing there was "insufficient evidence to put these charges in front of a jury," but the trial court declined to address his argument until the close of the state's evidence.

¶28 The next day, Alcantar moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., acknowledging the state had "met [its] burden" with regard to the six counts of sexual conduct with a minor but apparently arguing the evidence was insufficient to distinguish the two counts of sexual assault. Further, he argued, the state could not cure the problem by amending the indictment. The state countered that although Alcantar's conduct "could meet both the definition of sexual conduct with a minor and sexual assault," no curative measures were necessary because the testimony created only a sentencing issue. Further, it asserted, the issue

"could be easily cured by making it explicit that the times that we are talking about in terms of the sexual assaults are the last times that he engaged in and he performed oral sex on the victim after administering Trazodone and the last time that he engaged in vaginal intercourse with the victim after administering Trazodone or it could be the first time." Alcantar challenged the state's argument based on "a due process issue of notice," asserting dismissal was the appropriate remedy and stating, "I think they're going to have to choose."

¶29 The trial court denied Alcantar's motion, concluding the state had presented substantial evidence to warrant convictions on the two counts of sexual assault and Alcantar "had notice of both sexual conduct and sexual assault." The court noted that if Alcantar was convicted of the sexual conduct with a minor and sexual assault charges, it would entertain another motion "if there's briefing or case law that illustrates that the analysis is wrong, that you could be convicted of both on the same act."

¶30 Alcantar subsequently renewed his Rule 20 motion on "multiplicity" grounds, arguing the jury could potentially reach non-unanimous verdicts on the sexual assault charges given the "vague timeframe" alleged. Thus, he argued, the state needed to "elect which ones they're going to . . . dump." The state responded that because sexual conduct with a minor and sexual assault have distinct elements, and therefore neither is a lesser-included offense of the other, there was "no danger of a lack of unanimity," "especially given the standard instruction that the jury will receive that [it] must consider each count separately." The state continued, asserting that the risk of non-unanimous jury verdicts was more likely to arise in situations where the charges were duplicitous, and "[t]hat's not a situation that [Alcantar] is raising here" because he appeared to be concerned with whether the elements of the offenses "overlap[ped] too much." The trial court denied Alcantar's renewed motion, concluding that "he could only be punished as to concurrent time on one of them if he's convicted of both conduct and sexual assault."

¶31 Criminal defendants have the constitutional right to a unanimous jury verdict. Ariz. Const. art. II, § 23; *see also State v. Payne*, 233 Ariz. 484, ¶ 81 (2013). Thus, the jury must unanimously agree as to "whether the criminal act charged has been committed." *State v. Herrera*, 176 Ariz. 9, 16 (1993) (quoting *State v. Encinas*, 132 Ariz. 493, 496-97 (1982)). A duplicitous charge exists "[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, ¶ 12 (App. 2008); *see State v. Butler*,

230 Ariz. 465, ¶ 13 (App. 2012) (duplicitous charge and duplicitous indictment—which, on its face, alleges multiple crimes within one count—both present similar problems with respect to jury unanimity). Such a charge need not be cured before trial and can be remedied by "requir[ing] 'the state to elect the act which it alleges constitutes the crime, or instruct[ing] the jury that they must agree unanimously on a specific act that constitutes the crime before the defendant can be found guilty.'" *Klokic*, 219 Ariz. 241, ¶¶ 13-14 (quoting *State v. Schroeder*, 167 Ariz. 47, 54 (App. 1990) (Kleinschmidt, J., concurring)). "To constitute reversible error, the defendant must have been prejudiced by it when considered in conjunction with all the evidence in the case." *State v. Waller*, 235 Ariz. 479, ¶ 34 (App. 2014) (quoting *State v. Kelly*, 149 Ariz. 115, 117 (App. 1986)). "If the defendant suffers no prejudice from the duplicitous charging, his conviction need not be reversed." *Id.*

¶32 As to the six counts of sexual conduct with a minor, Alcantar contends the state failed to "narrow [C.V.]'s testimony by trying to relate the charged first and last acts to a particular date, holiday, or other memorable event," and, despite the state's attempts to distinguish between acts occurring on the couch and on the bed, it "is impossible to determine when she alleged that the last oral sex at 16 occurred and the first oral sex at seventeen occurred." Additionally, he argues any narrowing with respect to the first alleged instances of sexual conduct was insufficient "because the State never directed the jury to any particular time or attempted to elect a particular act, but rather, allowed the individual jurors to decide for themselves when the first and last time had occurred."

¶33 Alcantar characterizes the two counts of sexual assault as "even more problematic," asserting "there was not even a first or last time alleged in the indictment." He contends that "when it became clear for the first time from [C.V.]'s trial testimony that the sexual conduct charges and sexual assault charges were based on the same acts rather than separate incidents," the state "offered to cure the problem by telling the jury that the charged acts were either the first or last acts so there was no confusion" but ultimately "failed to make such an election." Thus, Alcantar argues, the jurors were allowed "to pick-and-choose which of the multiple acts each juror wanted to convict [him] of committing." For example, he contends "one juror could have chosen to convict on the first act, another for one in the middle, or another for the indefinite 'final' act," and therefore "there is a real danger that the different jurors convicted [him] for different acts, thereby resulting in a non-unanimous verdict." Accordingly, he argues the

trial court was required to take remedial measures to ensure that he received a unanimous jury verdict.

¶34 The state responds the sexual conduct with a minor charges were not rendered duplicitous by the evidence presented at trial because "[e]ach count referred to a 'first' and 'last' time, which are inherently singular acts." Further, although the state concedes that the evidence rendered the two sexual assault counts duplicitous, it contends that because sexual conduct with a minor and sexual assault each require "proof of an additional fact which the other does not," *Blockburger v. United States*, 284 U.S. 299, 304 (1932), C.V.'s testimony "created only a sentencing issue under A.R.S. § 13-116," which "the trial court resolved . . . by running Count 7 concurrent to Counts 1-6, and Count 8 consecutive to Count 7." Further, it asserts there was no risk of the jury reaching a non-unanimous verdict on any of the charges, including the sexual assault charges, because "(1) all the acts C.V. testified to occurred as part of a larger criminal episode; (2) Alcantar offered the same all-or-nothing defense for the entire timespan and (3) there was no reasonable basis for either C.V. or the jury to distinguish between the acts because they occurred almost daily," and, when she was seventeen, only after Alcantar had given her Trazodone. Thus, it concludes, "the lack of curative measures was harmless, and Alcantar fails to meet his burden of showing fundamental error."

¶35 Alcantar does not argue on appeal that his Rule 20 motion below was sufficient to preserve his duplicity arguments for our review. Nonetheless, even assuming Alcantar's assertion that the jurors could potentially reach non-unanimous verdicts together with his ambiguous statement that the state was required to "elect which ones they're going to . . . dump" was sufficient to preserve this issue, we find no error. *See State v. Petrak*, 198 Ariz. 260, ¶ 27 (App. 2000) (although defense counsel failed to object using the word "duplicity," he sufficiently preserved the issue because his comments provided trial court with opportunity to provide a remedy).

¶36 Based on C.V.'s specific testimony regarding the first time Alcantar performed oral sex on her, including that it had occurred on the couch when she was sixteen after she asked to use Alcantar's phone, Count One was not rendered duplicitous by the evidence presented at trial. As the state contends, "C.V.'s testimony clearly marked this as the first event and the 'to wit' description for Count 1 was 'the first time defendant performed oral sex on the victim when she was sixteen years old.'" There was no risk of a non-unanimous jury verdict as to this count.

¶37 Even assuming the remaining counts were rendered duplicitous by C.V.'s testimony, because there was no risk of non-unanimous jury verdicts, no curative measures were required. The dispositive issue before the jury was whether to believe C.V.'s accusations or Alcantar's blanket denial that he had committed any of the sexual acts, and the jury's verdicts in this case indicate it found C.V. credible and disregarded the only defense Alcantar had offered. *See Schroeder*, 167 Ariz. at 53 (duplicitous indictment not prejudicial where "only if the jury unanimously accepted the victim's version of the events could they find defendant guilty of sexually abusing her"); *see also State v. Whitney*, 159 Ariz. 476, 480 (1989) (defendant not prejudiced by alleged duplicity where the "defense was that the offenses charged never took place and that the victims merely fabricated their stories"). Indeed, as the *Jones* court discussed, in cases involving ongoing sexual abuse by a "resident child molester," 792 P.2d at 645, "the jury either will believe the child's testimony that the consistent, repetitive pattern of acts occurred or disbelieve it. In either event, a defendant will have his unanimous jury verdict . . . and the prosecution will have proven beyond a reasonable doubt that the defendant committed a specific act, for if the jury believes the defendant committed all the acts it necessarily believes he committed each specific act . . . ," *id.* at 659 (quoting *People v. Moore*, 260 Cal. Rptr. 134, 144 (Ct. App. 1989)).[4] Because Alcantar was not prejudiced by any duplicity in the charges against him, he was not deprived of his right to due process, and his argument fails. *See Waller*, 235 Ariz. 479, ¶ 34.

Grand Jury Presentation

¶38 Alcantar next argues he was deprived of due process because his convictions for sexual assault "are likely convictions for offenses never presented to the grand jury," a constitutional claim we review de novo. *See*

[4]As the state points out, the *Jones* court suggested that under these circumstances, the jury should be given a modified unanimity instruction that, "in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim." 792 P.2d at 659. Although the defendant in *Jones* did not receive this modified instruction, the court nevertheless affirmed his convictions, noting the defendant "had the benefit of an unqualified unanimity instruction," *id.*, which provided that the jury was required to unanimously agree as to "the commission of the same specific act or acts constituting [the] crime within the time period alleged," *id.* at 645.

Moody, 208 Ariz. 424, ¶ 62. Defendants cannot be convicted of crimes not presented to the grand jury as part of the indictment process. *State v. Cummings*, 148 Ariz. 588, 590 (App. 1985); *see* U.S. Const. amends. V, XIV, § 1; Ariz. Const. art. II, §§ 4, 30. Pursuant to Rule 13.5(b), Ariz. R. Crim. P., a "grand jury indictment limits the trial to the specific charge or charges stated in the . . . grand jury indictment." A conviction for an offense for which a defendant was not indicted constitutes "fundamental error requiring a reversal." *Merrill v. State*, 42 Ariz. 341, 348-49 (1933).

¶39 As previously stated, a detective testified before the grand jury that C.V. had reported Alcantar "administered Melatonin and in addition on some occasions a drug called Trazodone" to her, and "many times when she was administered one or the other of these that she fell asleep and would wake up because Alcantar was having sex with her either vaginally or otherwise in his bed." The detective also testified C.V. had told investigators that "sometimes she refused to take the medication, and on those occasions, there was no sexual activity." Further, the detective testified that Alcantar had performed oral sex on C.V. "at least twice" when she was both sixteen and seventeen years old and had vaginal intercourse with C.V. "at least twice" when she was seventeen years old. The prosecutor then asked the detective whether Alcantar, "on at least two occasions," had given C.V. Trazodone "before performing oral sex on her at least twice," to which the detective responded, "Yes."

¶40 The grand jury subsequently returned a true bill on all counts of the proposed indictment, including two counts of sexual assault occurring when C.V. was seventeen years old. Count Seven alleged Alcantar had committed sexual assault by "performing oral sex on [C.V.] after administering Trazodone," and Count Eight alleged he had committed sexual assault by "engaging in vaginal intercourse with [C.V.] . . . after administering Trazodone."

¶41 Alcantar argues that because the state sought to indict him "for sexual conduct with a minor for acts not involving the administration of Trazadone" in addition to two sexual assaults involving administration of the drug, the testimony before the grand jury was "ambiguous" in that it did not "clarify which act was performed after the administration of which supplement or drug." Further, he contends "the only clear evidence presented to the grand jury of sexual assaults committed after the administration of [T]razadone involved acts of oral sex," and therefore the "only sexual assault charges that could . . . properly be presented to the petit jury for deliberation were related to two incidents where [he]

administered Trazadone to [C.V.] and then performed oral sex on her while he thought she was asleep."

¶42 Contrary to Alcantar's assertion that the state failed to present evidence supporting the count of sexual assault involving vaginal intercourse after the administration of Trazodone, the detective testified that "many times" after C.V. had been administered either Trazodone or melatonin, she woke to Alcantar "having sex with her either vaginally or otherwise in his bed." Further, Alcantar's argument amounts to a challenge to the sufficiency of the evidence presented to the grand jury. Such a challenge is inappropriate on appeal. *See State v. Snelling*, 225 Ariz. 182, ¶ 12 (2010) ("Courts generally do not concern themselves with the evidence underlying a grand jury indictment." (quoting *State v. Jessen*, 130 Ariz. 1, 5 (1981))); *State v. Gortarez*, 141 Ariz. 254, 258 (1984) (except where indictment is based on perjured testimony, "review of matters relevant only to the grand jury proceedings cannot be sought by appeal from a conviction"); *State v. Just*, 138 Ariz. 534, 541-42 (App. 1983) (challenge to grand jury's probable cause determination moot after conviction). Alcantar's argument therefore fails.

¶43 Additionally, Alcantar contends "it is clear that the charges presented to the grand jury were related to separate and distinct acts of sexual intercourse—not the other acts of intercourse alleged as sexual conduct with a minor—and it was only at trial that C.V.'s story changed and the charged offenses all merged together." He asserts that because C.V.'s trial testimony "clarified that the charged separate acts" forming the basis of the sexual assault charges "were actually the same acts" forming the basis of the sexual conduct with a minor charges, "the petit jury never heard testimony regarding separate and distinct acts of sexual intercourse after the administration of Trazodone." Thus, he concludes, given "the fact that there was evidence presented of multiple sexual assaults coupled with the State's failure to elect which incident formed the basis of the charges, it is absolutely possible that the jury convicted [him] of committing a sexual assault that was not the sexual assault the grand jury indicted him on." Because Alcantar failed to raise this argument below, we review solely for fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 12.

¶44 In support of his argument, Alcantar relies on *State v. Mikels*, 119 Ariz. 561 (App. 1978). There, the defendant was indicted by a grand jury for an act of sodomy that took place in a shower stall "[o]n or about the 25th day of February." *Id.* at 562. At trial, the victim testified the "incident in the shower stall took place around the 12th or 13th of February," and

there had been an additional act of sodomy that occurred on February 25 in a jail cell bunk. *Id.* During its closing argument, the state "asked the jury to find [the defendant] guilty of the sodomy which occurred in the bunk and the defense attorney based his final argument to the jury on the same act." *Id.* From the record, it appeared the defendant had been convicted for the act of sodomy that took place in the bunk, and, as a result, we vacated his conviction, concluding he "was not convicted of the crime for which he was indicted." *Id.* at 562-63.

¶45 *Mikels* is distinguishable. Indeed, as the state points out, "*Mikels* involved only two distinct acts of sodomy while Alcantar was continuously abusing C.V. over the span of two years." Unlike the grand jury in *Mikels*, which was informed of only one of the two acts of sodomy, the grand jury in this case was informed that C.V. began sleeping in Alcantar's bed when she was approximately seventeen years old, "the sexual activity [then] progressed from oral contact to vaginal sex with the victim," and "many times" when C.V. was given either melatonin or Trazodone, she "would wake up because Alcantar was having sex with her either vaginally or otherwise in his bed." The grand jury was also informed that Alcantar had performed oral sex on C.V. "at least twice when she was 17 years old," had had vaginal intercourse with her "at least twice when she was 17," and had given her Trazodone before performing oral sex on her "at least twice." Thus, given the testimony before the grand jury indicating the acts had occurred multiple times over the course of the year during which C.V. was seventeen without reference to specific dates or details, which we conclude was appropriate under the circumstances of this case, *Mikels* is of no assistance to Alcantar, and his argument fails.

¶46 Further, although Alcantar asserts on reply that he is not "argu[ing] that the indictment was erroneously amended to conform to the evidence presented at trial," as the state contends, "C.V.'s testimony that all the assaults after she turned 17 involved Trazodone did not somehow constructively amend the indictment or otherwise . . . require that all the acts of sexual conduct be separate from both acts of sexual assault." *See* Ariz. R. Crim. P. 13.5(b) (charging document deemed amended to conform to admitted evidence, but unless defendant consents, "charge may be amended only to correct mistakes of fact or remedy formal or technical defects"). Indeed, C.V.'s testimony at trial was not so inconsistent with the evidence presented to the grand jury that Alcantar was convicted of a "new and different matter[] of substance without the concurrence of the grand jury." *State v. O'Haire*, 149 Ariz. 518, 520 (App. 1986). Instead, C.V.'s trial testimony merely indicated Trazodone had been used in all the sexual acts

occurring when she was seventeen. This additional evidence does not, as Alcantar suggests, make it likely that his sexual assault convictions were for offenses not presented to the grand jury. The nature of the offenses did not change following the state's presentation of evidence at trial, *see State v. Montes Flores*, 245 Ariz. 303, ¶ 16 (App. 2018), and all elements necessary for conviction on each of the charged offenses as described in the grand jury's indictment were proven, *see* §§ 13-1405, 13-1406(A); *cf. State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 17 (App. 2013) ("An amendment that alters the elements of the charged offense . . . is not authorized under Rule 13.5(b).").

Motions for Mistrial

¶47 Alcantar argues the trial court erred in denying seven of his motions for mistrial, asserting "the State's witnesses repeatedly inserted irrelevant and prejudicial evidence as well as inadmissible and prejudicial other act evidence into the trial." Specifically, he challenges more than a dozen spontaneous statements made by three of the state's witnesses—C.V., A.V., and E.G. Alcantar asserts the challenged testimony "tainted the jury and made it impossible for [him] to have a fair trial."

¶48 "We review the admission of evidence and the denial of a mistrial for an abuse of discretion." *State v. Burns*, 237 Ariz. 1, ¶ 56 (2015). A declaration of mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, ¶ 43 (2003) (quoting *State v. Adamson*, 136 Ariz. 250, 262 (1983)). "We give great deference to the trial court's decision because [it] 'is in the best position to determine whether the evidence will actually affect the outcome of the trial.'" *State v. Doty*, 232 Ariz. 502, ¶ 17 (App. 2013) (quoting *State v. Jones*, 197 Ariz. 290, ¶ 32 (2000)). To determine whether a mistrial should have been granted based on witness testimony, we look to "(1) whether the jury . . . heard what it should not hear, and (2) the probability that what it heard influenced [it]." *State v. Laird*, 186 Ariz. 203, 207 (1996). We will reverse a court's denial of a mistrial only if there is a reasonable probability the jury's verdict would have been different if the allegedly improper testimony had not been presented. *State v. Welch*, 236 Ariz. 308, ¶ 21 (App. 2014).

¶49 The trial court has broad discretion in determining the admissibility of evidence. *State v. Harrison*, 195 Ariz. 28, ¶ 21 (App. 1998). Relevant evidence is admissible unless it is otherwise precluded by the federal or state constitution or an applicable statute or rule. Ariz. R. Evid. 402. Evidence is relevant if "it has any tendency" to make a fact of

consequence in determining the action "more or less probable than it would be without the evidence." Ariz. R. Evid. 401. Nonetheless, even relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Ariz. R. Evid. 403.

¶50 Evidence of a defendant's other crimes, wrongs, or acts is admissible if offered for a proper purpose, so long as it is relevant to prove that purpose and its probative value is not substantially outweighed by the danger of unfair prejudice. *State v. Anthony*, 218 Ariz. 439, ¶ 33 (2008); *see also* Ariz. R. Evid. 404(b)(2) (proper purposes include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). "As a general rule, evidence that defendant committed other bad acts is not admissible to show either that defendant acted in conformity with the other bad acts, Rule 404(b), or that defendant is a 'bad' person worthy of conviction." *State v. Correll*, 148 Ariz. 468, 476 (1986). However, "Arizona has long recognized that testimony about prior bad acts does not necessarily provide grounds for reversal." *Jones*, 197 Ariz. 290, ¶ 34.

¶51 On appeal, Alcantar asserts that "[m]uch of the evidence that was inserted into the trial by . . . witnesses had been precluded by agreement or by court order prior to the trial precisely because it was highly prejudicial and improper." Further, he argues, because the "trial court sustained objections to much" of the testimony he now challenges on appeal and "struck it from the record, sometimes absent a request from the defense," "it is clear that the trial court believe[d] that the evidence was improper and that it called the jurors' attention to matters that should not be properly considered during deliberations." Thus, he argues, because this case turned on C.V.'s credibility, which had been challenged several times throughout trial, as well as the credibility of other witnesses, there is "a high probability that the jury was influenced by the inundation of highly prejudicial and inflammatory evidence" admitted at trial and any error was therefore not harmless.

¶52 As an initial matter, Alcantar argues each of his motions for mistrial "built upon the last and were interrelated," and "[t]he crux of each subsequent motion . . . was that with each new piece of prejudicial and improper evidence that had been admitted, the jury became more and more tainted, thereby making it impossible for [him] to receive a fair trial." But, in criminal cases, Arizona rejects the "cumulative error doctrine" outside the context of prosecutorial misconduct claims. *See State v. Hughes*, 193 Ariz. 72, ¶ 25 (1998). Alcantar cites no authority providing otherwise,

and we find none.[5] Therefore, we address each of his motions for mistrial individually.

¶53 Alcantar appears to assert all of his arguments related to his motions for mistrial are subject to harmless error review. Where Alcantar contemporaneously moved for a mistrial, or contemporaneously objected and subsequently moved for a mistrial based on the same testimony, we review for harmless error. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005) ("Reviewing courts consider alleged trial error under the harmless error standard when a defendant objects at trial and thereby preserves an issue for appeal."); *State v. Harris*, 157 Ariz. 35, 36 (1988) (contemporaneous objection required so court can remedy objectionable action; party cannot permit error to go unrectified and later seek mistrial), *abrogated on other grounds by State v. Urrea*, 244 Ariz. 443, ¶ 19 (2018). "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." *Henderson*, 210 Ariz. 561, ¶ 18. However, because a motion for mistrial on one ground does not preserve the issue on another ground, *State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008), we review testimony that did not serve as a basis for any of Alcantar's motions for mistrial only for fundamental error, *see Escalante*, 245 Ariz. 135, ¶ 12. Similarly, where Alcantar failed to contemporaneously object to testimony and later moved for a mistrial based on that testimony, we review only for fundamental error. *See State v. Cruz*, 218 Ariz. 149, ¶ 101 (2008).

Second Motion[6]

¶54 C.V. testified that after Yvette had died, Alcantar forced her to sleep in his bed "because [she] was sneaking out," spontaneously adding

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[5]At oral argument in this court, Alcantar attempted to distinguish the "cumulative error doctrine" from cumulative harm created by the repeated introduction of the same type of unfairly prejudicial evidence, which he claims occurred here. As authority, Alcantar cited *State v. Garcia*, 200 Ariz. 471 (App. 2001), and *State v. Hughes*, 189 Ariz. 62 (1997). We disagree that *Garcia* and *Hughes*, neither of which involved the question of whether cumulative harm necessitated a mistrial, support recognizing such a distinction.

[6]Alcantar first moved for a mistrial based on the state's opening statement. Because he does not challenge on appeal the trial court's denial of this motion, we do not address it.

that "the only reason [she] snuck out was because [she] went to go lose [her] virginity" to a boy she met on the internet "because [she] didn't want to lose it to [Alcantar]." Alcantar did not contemporaneously object or move for a mistrial. He later suggested that the trial court instruct the jury to disregard C.V.'s statement in order to avoid further testimony regarding her sexual history after the court expressed concern that such testimony would violate the rape shield statute. The court noted that C.V.'s statements were "already out there," and Alcantar moved for a mistrial, contending C.V.'s "testimony . . . violated the rape shield" and could not be cured.[7] The court denied Alcantar's motion and instead allowed him to ask C.V. about "the fact that she had boyfriends before [J.D.]" and "that she was intimate with them or with one of them."

¶55 Alcantar now asserts C.V.'s testimony that she snuck out of the house to lose her virginity so that she would not lose it to Alcantar was "completely irrelevant" and "highly prejudicial because there was testimony that she was sneaking out before Yvette even got sick and the charged abuse began, implying that there may have been previous abuse, particularly when coupled with the testimony regarding 'off the record' stuff." Further, Alcantar argues C.V.'s testimony "carried the danger of undue sympathy for [C.V.]'s plight—in addition to being sexually abused by [Alcantar], [C.V.] had to engage in self-abuse by sneaking around to try to have sex with random boys she met on the internet so that she would not lose her virginity to [him]."

¶56 Because Alcantar did not contemporaneously object to C.V.'s testimony, we review the trial court's denial of his motion for mistrial only for fundamental error. *See Cruz*, 218 Ariz. 149, ¶ 101; *Escalante*, 245 Ariz. 135, ¶ 21. And, although Alcantar asserts he was prejudiced by the admission of C.V.'s testimony, he fails to argue introduction of this testimony—or the court's denial of his motion for mistrial—constituted fundamental error. He has therefore waived review of this issue on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (failure to argue fundamental error waives claim on appeal), *disapproved on other grounds by State v. Vargas*, 249 Ariz. 186, ¶¶ 1, 19-20 (2020).

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[7]We note that the purpose of Arizona's rape shield law is "to protect victims of [sex crimes] from being exposed at trial to harassing or irrelevant questions concerning any past sexual behavior," not to protect defendants. *State v. Gilfillan*, 196 Ariz. 396, ¶ 15 (App. 2000); *see* A.R.S. § 13-1421.

¶57 In any event, Alcantar fails to establish prejudice as required for reversal under fundamental error review. *See Escalante*, 245 Ariz. 135, ¶ 21. Indeed, unsolicited statements from a witness "whose credibility is already at issue" do not "carry the same weight or effect as a statement from a court official." *Jones*, 197 Ariz. 290, ¶ 35. Further, the court instructed the jury not to be influenced by sympathy or prejudice, and we presume the jury followed this instruction. *See State v. Newell*, 212 Ariz. 389, ¶ 68 (2006).

Third and Fourth Motions

¶58 C.V. testified at trial that after she had moved in with J.D., she returned to Alcantar's home for approximately one week. C.V. explained that, one night during that week, she had wanted to go to a party with A.V. and P.O., but Alcantar told her she could not go. She further described that, after she had informed Alcantar that she was not going to stay at home with him, "that's when it got kind of like crazy and he attacked [her] that night." At that point, the state interrupted C.V.'s testimony, and Alcantar objected to "the last part of [her] statement." Alcantar asked the trial court to strike C.V.'s testimony regarding the attack before renewing his motion for mistrial, asserting C.V. was impermissibly "going into 404(b) material" despite instructions to only respond to the question being asked. The court denied Alcantar's motion and instead struck C.V.'s answer as nonresponsive, instructing the jury it was "not to consider . . . what she stated at the end of her answer."

¶59 The state continued its direct examination of C.V., instructing her to respond only to the question being asked. C.V. testified that she and Alcantar had argued verbally on the night in question, after which she ran barefoot to Yvette's cousin E.G.'s house a block away. C.V. stated that when she had arrived at approximately 10:00 p.m., she "was just like shook, like [she] just ran away from somebody." She also testified she had been "breathing hard" and crying when she arrived at E.G.'s home.

¶60 Following the state's direct examination of C.V., Alcantar again moved for a mistrial, asserting that although the trial court had struck C.V.'s statement about Alcantar attacking her, C.V.'s subsequent testimony regarding her condition when she arrived at E.G.'s house nevertheless insinuated he had "attempted to sexually assault her that night when she was home alone without the [other] kids." The state responded that it had "asked a series of very directed questions to prevent [C.V.] from repeating what she had previously said about being attacked" and did not intend to imply there had been a sexual assault that evening. The trial court acknowledged that C.V.'s testimony was problematic and directed the state

to clarify that "no type of sexual attack o[f] any kind occurred that night." After C.V. confirmed that there had been "no sexual component" to her argument with Alcantar, the court implicitly denied Alcantar's motion. Because Alcantar moved for a mistrial immediately following C.V.'s testimony regarding the "attack," and argues on appeal, as he did below, that such testimony involved improper other-act evidence, Alcantar has preserved this issue for our harmless error review. *See Henderson*, 210 Ariz. 561, ¶ 18.

¶61 Alcantar argues the trial court erred in denying his third and fourth motions for mistrial based on C.V.'s testimony that he had "attacked" her before she ran to E.G.'s house, arguing such testimony did "nothing to prove the charges" in this case and only showed that he was "a person of bad character and a serial abuser of [C.V.]." Further, he asserts the state's attempt to cure the testimony by asking C.V. to clarify that he had not sexually assaulted her that night "is of no consequence" because, although such clarification "may have prevented the jury from believing that [he] sexually assaulted [C.V.], the testimony still left open the possibility that [he] had physically assaulted [her]," "an inference confirmed by [E.G.]'s testimony."[8]

¶62 The state counters the trial court successfully cured C.V.'s unsolicited statement by immediately striking the testimony and instructing the jury not to consider it. Further, it argues, after Alcantar asserted C.V.'s testimony suggested he had sexually assaulted her before she ran to E.G.'s house, the court allowed the state to ask C.V. additional questions in order to clarify that no sexual assault had occurred that night. Additionally, the state notes that "neither party referenced the altercation in their closing arguments."

¶63 "When a witness unexpectedly volunteers an inadmissible statement, the action called for rests largely within the discretion of the trial court which must evaluate the situation and decide if some remedy short of mistrial will cure the error." *Adamson*, 136 Ariz. at 262. A court is required to grant a mistrial only when improper testimony is so prejudicial

[8]To the extent Alcantar relies on E.G.'s testimony that C.V. had "told [her] that [Alcantar] had hit her" to establish the trial court erred in denying his third and fourth motions for mistrial, any such argument is unavailing. Alcantar did not renew his motion for mistrial based on E.G.'s subsequent testimony, and therefore we do not consider it in determining whether the court abused its discretion with respect to these motions.

that it is likely to lead jurors to convict a defendant that they otherwise would have acquitted. *See State v. Prince*, 204 Ariz. 156, ¶ 20 (2003). Otherwise, the appropriate remedy is to strike the improper testimony and instruct the jury to disregard it. *State v. Herrera*, 203 Ariz. 131, ¶ 8 (App. 2002); *Jones*, 197 Ariz. 290, ¶ 34. The fact that testimony is unsolicited can mitigate any potential prejudice caused by the admission of "other act" evidence. *See State v. Koch*, 138 Ariz. 99, 102 (1983); *Jones*, 197 Ariz. 290, ¶ 35; *see also Adamson*, 136 Ariz. at 261-62 (no abuse of discretion in denying a mistrial where an alibi witness unexpectedly stated that the defendant had been arrested for an unrelated crime).

¶64 Even if the jury should not have heard C.V.'s unsolicited testimony regarding the "attack," there is no reasonable probability the jury's verdicts would have been different in the absence of such testimony. *See Welch*, 236 Ariz. 308, ¶ 21; *Koch*, 138 Ariz. at 102. Immediately following C.V.'s statement, the trial court struck it as nonresponsive and instructed the jury "not to consider . . . what she stated at the end of her answer there regarding . . . Alcantar." The court instructed the jury multiple times during trial not to consider stricken testimony, reminding the jury in its final instructions that "[a]ny testimony stricken from the court record must not be considered." Jurors are presumed to follow the court's instructions. *Newell*, 212 Ariz. 389, ¶ 68. Moreover, even assuming Alcantar preserved for our review his contention that C.V.'s testimony "left open the possibility that [he] had physically assaulted" her, we find no error in the admission of the testimony at issue and, in any event, we cannot say it materially influenced the jury's verdicts. *Cf. State v. Herrera*, 232 Ariz. 536, ¶ 30 (App. 2013) (no error in admitting evidence of "less graphic and less inflammatory" acts than those charged). The court did not abuse its discretion in denying Alcantar's third and fourth motions for mistrial. *See Burns*, 237 Ariz. 1, ¶ 56; *Adamson*, 136 Ariz. at 262.

Fifth Motion

¶65 At the conclusion of C.V.'s testimony, the jury submitted several questions regarding the sexual acts alleged to have occurred on the couch. During its follow-up examination, the state asked C.V. if Alcantar had asked her "if he could go down on [her]" the "other times that he did that when [she was] 16," and C.V. responded, "No, but [it] was like off-the-record stuff where before like the assaults start happening, there was a moment or a time where . . . ." Alcantar objected before C.V. finished her statement, and the trial court sustained the objection, striking her answer as nonresponsive. The court then took its afternoon recess, during which

Alcantar moved for a mistrial. He argued that because C.V. had repeatedly offered nonresponsive statements regarding "another event," including "her statement about the things being off the books," she "basically blew up every single thing that [the parties] agreed upon prior to her testimony," and striking the testimony and instructing the jurors to disregard it would not cure the problem. The court denied Alcantar's motion. The state concedes Alcantar preserved this issue for harmless error review.

¶66 Alcantar asserts C.V.'s testimony regarding "off the record stuff that [he] did" constituted inadmissible other-act evidence under Rule 404(b), broadly asserting such evidence "tainted the jury and made it impossible for [him] to have a fair trial." The state responds that C.V.'s testimony "was too vague for the jury to even speculate as to what she was talking about," and the trial court cured any potential prejudice by striking her answer from the record.

¶67 Alcantar fails to show there is a reasonable probability that C.V.'s vague, unsolicited, stricken testimony referring to "off-the-record stuff," even if improper, had any effect on the jury's verdicts. *See Welch*, 236 Ariz. 308, ¶ 21; *Koch*, 138 Ariz. at 102. The testimony in question was almost unintelligible. And, as noted, the jurors were instructed multiple times over the course of the trial to disregard stricken testimony, and we presume they followed these instructions. *See Newell*, 212 Ariz. 389, ¶ 68. Accordingly, the trial court did not abuse its discretion in denying Alcantar's fifth motion for mistrial. *See Burns*, 237 Ariz. 1, ¶ 56; *see also Jones*, 197 Ariz. 290, ¶¶ 34-35 (no error in denying mistrial where unsolicited testimony "made relatively vague references to other unproven crimes and incarcerations").

Sixth Motion

¶68 C.V. testified at trial that Alcantar had repeatedly performed oral sex on her when she was sixteen years old. She further testified that when she had confronted him and "told him [to] stop," he apologized, "broke down and started crying," and stated he had been "touched as a little boy" by his uncle. Although Alcantar did not initially object, after C.V. repeated her testimony that he had informed her he was abused as a child, Alcantar objected "as to relevance."[9] The trial court overruled the objection. C.V. subsequently referred to the "confrontation," stating she had told Alcantar she did not "want this to happen to [her] anymore" and "he ended

[9]The transcript incorrectly attributes this objection to the state.

up telling [her] about the whole thing that happened with him." Alcantar did not object.

¶69 Additionally, C.V. testified that when Alcantar attempted to have sexual intercourse with her, he had difficulty penetrating her vagina because his penis "was not as hard as it needed to be." C.V. stated she was not sure whether Alcantar's penis was "soft or . . . just like small or something." Alcantar did not contemporaneously object to C.V.'s testimony.

¶70 The next day, Alcantar moved for a mistrial, arguing that, after hearing C.V.'s testimony regarding his own abuse as a child, the jury would believe he was "more likely to abuse somebody else." The state responded that it had no intention of arguing that "someone who says he was molested is more likely to molest." Additionally, Alcantar argued he was entitled to a mistrial because C.V. had testified about the size of his penis "in a sort of very nasty teenage way," resulting in prejudice. The state countered that there was "no reason to believe that a jury is likely to find that . . . Alcantar is more or less likely to have committed these acts based on the size of his genitals" and that C.V.'s testimony was relevant because it provided context as to why Alcantar struggled "to get his penis inside of her" and showed C.V. had "information that other people would not have." The trial court denied Alcantar's motion for mistrial, stating C.V.'s testimony, "including that [Alcantar] was abused himself," was not "so prejudicial that it would cause an unfair trial."

¶71 Alcantar asserts evidence that he was molested as a child was improper and prejudicial and "[t]he only relevance [it] has to the charges is the implication that sexually abused people often sexually abuse others." He maintains that "[s]uch an implication is analogous to profile testimony, which is inadmissible because it creates a danger that the jury will convict a defendant, not for what he has done, but for what others have done." Supporting his argument, Alcantar cites *Proffit v. State*, 193 P.3d 228, ¶ 9 (Wyo. 2008), in which the Wyoming Supreme Court, in discussing several instances of allegedly improper testimony, stated "evidence that the appellant was molested as a child could have suggested to jurors that he, too, became a molester." Although the state contends Alcantar's objection on relevance grounds to C.V.'s testimony about his molestation was insufficient to preserve this issue for our review, we nevertheless assume without deciding that harmless error review is appropriate. *See Henderson*, 210 Ariz. 561, ¶ 18; *Hamilton*, 177 Ariz. at 409 (assuming without deciding issue preservation).

¶72 The state argues Alcantar's statement that he had been molested as a child was "highly relevant because it placed his apology to C.V. in context and supported the mens rea element of the oral-sex offenses." It continues, "When Alcantar sought to excuse his behavior by telling C.V. he had been molested as a child, Alcantar demonstrated (1) that he was specifically apologizing for unlawful sexual conduct with a minor, not just some general bad act or for being a strict parent, and (2) that he had knowingly committed the offenses." Further, the state argues, because it did not introduce evidence that Alcantar had been molested as a child for the purpose of showing he had a "propensity to commit the charged acts," this case is distinguishable from several out-of-state cases cautioning against the introduction of such evidence for that purpose. *See Kirby v. State*, 208 S.W.3d 568, 573 (Tex. Ct. App. 2006); *Nelson v. State*, 782 P.2d 290, 296 (Alaska Ct. App. 1989); *State v. Jahnke*, 353 N.W.2d 606, 609-10 (Minn. Ct. App. 1984). Thus, it argues, relying on *Hayes v. State*, 474 P.3d 1179, 1189 (Alaska Ct. App. 2020), even if evidence of Alcantar's own abuse as a child should not have been admitted, the trial court did not abuse its discretion in denying his motion for mistrial on this basis.

¶73 We cannot say the trial court abused its discretion in denying Alcantar's motion. The state did not purposely elicit the challenged testimony; indeed, as it points out, "[e]ach of C.V.'s references to the statement was nonresponsive" to its questions. *See State v. Miller*, 234 Ariz. 31, ¶¶ 25-26 (2013) (no abuse of discretion in denying mistrial motion based on witness's unexpected statement that she did not know defendant was felon); *State v. Almaguer*, 232 Ariz. 190, ¶¶ 27-29 (App. 2013) (no abuse of discretion in denying mistrial motion based on unsolicited comment in violation of previous court order). Moreover, at no point during trial did the state suggest to the jury that Alcantar was more likely to have committed the charged offenses given C.V.'s testimony regarding his statement that he had been molested by his uncle as a child, let alone rely on his statement for that purpose. *See State v. Ellison*, 213 Ariz. 116, ¶ 62 (2006) (no error where problematic testimony was brief, state did not rely on it, and jurors were unlikely to use it against defendant). And, aside from one brief reference to the statement in its closing argument in the context of Alcantar's apology to C.V., the state did not repeat the challenged testimony. *See Hayes*, 474 P.3d at 1189 (any error in admission of testimony that defendant had been molested as a child was harmless where prosecution did not dwell on testimony, only referencing it once in closing arguments for the purpose of bolstering victim's credibility). Thus, even assuming the jury should not have heard C.V.'s testimony as to Alcantar's statement that he had been molested as a child, the court did not abuse its

broad discretion in denying Alcantar's motion for mistrial. *See Burns*, 237 Ariz. 1, ¶ 56; *Jones*, 197 Ariz. 290, ¶ 32.

¶74 Alcantar also argues C.V.'s testimony about the size of his penis "was irrelevant and prejudicial because it was another needless derogatory statement." However, because Alcantar failed to contemporaneously object to C.V.'s statement, we review the trial court's denial of his motion for mistrial on this basis only for fundamental error. *See Cruz*, 218 Ariz. 149, ¶ 101. And, because Alcantar fails to argue the court's denial of his motion constituted fundamental error, we consider his argument waived.[10] *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17.

Seventh Motion

¶75 Before trial, Alcantar moved to preclude witness testimony going to an "ultimate opinion," noting the state had "advised that it [would] not introduce" opinions about whether he had committed the charged offenses. In its minute entry following the hearing on Alcantar's motion, the trial court acknowledged the state had indicated "that should anyone [al]lude" to an opinion as to whether Alcantar had committed the charged offenses, it would "re-direct them and ensure that it is not presented to the jury, as [it] has already cautioned the witnesses regarding such testimony."

¶76 At trial, A.V. testified that after C.V. had moved out of the house, A.V. got into an argument with Alcantar during which she called him a pedophile. A.V. stated Alcantar had asked her why she called him a pedophile, to which A.V. responded, "[Y]ou know why." She then testified that she had "call[ed] him a pedophile because, unfortunately, he is one." Alcantar asked the trial court to strike A.V.'s last statement, and the court agreed. He then moved for a mistrial based on his pretrial motion to preclude opinion testimony. The court denied Alcantar's motion.

¶77 Alcantar contends A.V.'s testimony that he is a pedophile was an "improper and irrelevant" opinion going to the ultimate issue of his guilt because it "was a direct statement that she believes [he] did what was

[10]Even were we not to apply waiver, and conclude that admission of this statement was erroneous, we would nonetheless conclude it did not prejudice Alcantar as required for a finding of fundamental error. We do not believe such a fact, true or not, could have had any influence on the jury's verdicts.

alleged and that is why he is a pedophile." He has preserved this issue for our review based on his pretrial motion to preclude opinion testimony, contemporaneous objection at trial, and motion for mistrial on the same grounds he asserts on appeal. *See Henderson*, 210 Ariz. 561, ¶ 18; *State v. Bolton*, 182 Ariz. 290, 306 n.5 (1995) (challenges to admissibility of evidence preserved by motion to preclude or by specific, contemporaneous objection to admission).

¶78 The state counters the trial court did not abuse its discretion in denying Alcantar's motion for mistrial because the court immediately struck A.V.'s unsolicited statement and repeatedly reminded the jury not to consider such testimony. Further, it argues, A.V.'s statement was not "particularly prejudicial" in light of her testimony that, with regard to the sexual contact, Alcantar had stated C.V. "wanted it," "she was grown, she knew it, [and] she could have said no."

¶79 Even if the jury should not have heard A.V.'s testimony that Alcantar is a "pedophile," we cannot conclude there is a reasonable probability it affected the verdicts in this case. The trial court immediately struck A.V.'s testimony regarding "her opinion of" Alcantar and repeatedly instructed the jurors throughout trial that they were not to consider stricken testimony. Again, we presume the jury followed these instructions. *See Newell*, 212 Ariz. 389, ¶ 68. Further, A.V.'s testimony was unsolicited, brief, and not mentioned at any point thereafter. *See Miller*, 234 Ariz. 31, ¶¶ 25-26; *Almaguer*, 232 Ariz. 190, ¶¶ 27-29 (no reasonable probability jurors influenced by improper but isolated testimony); *Laird*, 186 Ariz. at 207 (upholding denial of mistrial because inadmissible testimony was brief compared to "extensive trial testimony"). Because the court was in the best position to assess the effect, if any, of A.V.'s remarks on the jury and could reasonably conclude the statement would not influence the verdicts, *see Doty*, 232 Ariz. 502, ¶ 17, it did not abuse its discretion in denying Alcantar's seventh motion for mistrial, *see Burns*, 237 Ariz. 1, ¶ 56.

Eighth Motion

¶80 Alcantar filed a pretrial motion seeking to preclude witnesses from testifying as to their opinion about whether he had committed the charged offenses, and the state indicated it did not plan to introduce such testimony. At trial, on direct examination of E.G., the state asked her if "there c[a]me a point when [she] noticed anything unusual" between Alcantar and C.V., to which E.G. responded, "[I]t was a weird relationship, so it was always like questionable."

¶81 Alcantar immediately moved for a mistrial, arguing E.G.'s testimony was an opinion going to the ultimate issue in violation of the trial court's "pretrial rulings." The court disagreed, stating, "No, she hasn't said anything. The ultimate issue is [whether] he did this to her or not." Alcantar then argued E.G. lacked "foundation to have an opinion" because she is "not an expert." In denying Alcantar's motion, the court concluded E.G. was entitled to testify regarding "what she observed and her feelings about what she observed." Again, because Alcantar moved to preclude opinion testimony as to the ultimate issue of his guilt before trial and immediately moved for a mistrial following E.G.'s statement based on the state's agreement not to elicit such testimony, he has preserved this issue for our review. *See Henderson*, 210 Ariz. 561, ¶ 18; *Bolton*, 182 Ariz. at 306 n.5.

¶82 On appeal, Alcantar again contends E.G.'s testimony that his relationship with C.V. was "questionable" constituted improper and irrelevant opinion testimony going to the ultimate issue of his guilt in this case. He continues, "The clear inference from [E.G.]'s opinion" is that the relationship was "improper, which then leads to the inference that she believes the allegations were true." However, as the trial court observed, E.G.'s testimony did not indicate she believed Alcantar had committed the charged offenses, and therefore it did not violate the parties' pretrial agreement or the court's rulings. The court did not err in denying Alcantar's eighth motion for mistrial. *See Burns*, 237 Ariz. 1, ¶ 56.

Additional Testimony

¶83 Alcantar further challenges as improper eight statements made by witnesses during trial that did not serve as the basis for any of his motions for mistrial. Specifically, he appears to argue the court erred in not sua sponte declaring a mistrial based on (1) C.V.'s testimony that Alcantar would "smack [her] butt" when she would wear shorts; (2) C.V.'s testimony that she "told [Alcantar] something about his sister that happened to [her] as a kid"; (3) C.V.'s and A.V.'s testimony about prior physical abuse in the home; (4) C.V.'s testimony that J.D.'s father stated, "[T]hat fool's crazy," referring to Alcantar; (5) A.V.'s testimony that she "would have to steal from a yard sale" to get the things she wanted; (6) A.V.'s testimony that Alcantar and Yvette made her out to be "crazy" and "a mental case"; (7) A.V.'s testimony that she was "knocked . . . out cold" after Alcantar gave her one of his Trazodone pills; and (8) A.V.'s testimony that "[n]o parent" makes a child sleep in the parent's bed to prevent the child from sneaking out.

¶84 Because Alcantar did not cite any of these statements as the basis for one of his motions for mistrial, we review only for fundamental error. *See Laird*, 186 Ariz. at 207 ("If a party wants a mistrial, it ordinarily must ask for one."); *Ellison*, 213 Ariz. 116, ¶ 61 (absent fundamental error, "a defendant cannot complain if the court fails . . . to sua sponte order a mistrial"). And, as the state correctly argues, because he "only briefly referenc[es] these eight points of testimony as part of his harmless-error analysis" for the testimony that did serve as a basis for one of his motions, Alcantar has "failed to develop meaningful fundamental-error argument for any of them." We therefore consider these arguments waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17.

Prior Consistent Statements

¶85 Alcantar argues the trial court erred "in allowing testimony that [C.V.] made prior consistent statements before reporting the abuse to law enforcement where the motive to fabricate existed at the time the statements were made." We review a trial court's evidentiary rulings for a clear abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167 (1990).

¶86 "Hearsay" is specifically defined by Rule 801(c), Ariz. R. Evid., but is commonly described as "[a]n out-of-court statement offered to prove the truth of the matter asserted." *State v. Bass*, 198 Ariz. 571, ¶ 20 (2000). Under Rule 802, Ariz. R. Evid., unless otherwise expressly permitted, "[h]earsay is not admissible." But, pursuant to Rule 801(d)(1)(B), an out-of-court statement, even if offered for the truth of the matter it asserts, is not hearsay if it "is consistent with the declarant's testimony" and is offered "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying." To be admissible, the prior consistent statement must have been made before the motive to fabricate arose. *State v. Martin*, 135 Ariz. 552, 554 (1983). Questioning that raises an inference that "the witness had a reason to fabricate her story later" satisfies Rule 801(d)(1)(B). *See In re Maricopa Cnty. Juv. Action No. JV-133607*, 186 Ariz. 198, 201 (App. 1996) (quoting *State v. Bargas*, 763 P.2d 470, 472 (Wash. Ct. App. 1988)).

¶87 Before trial, Alcantar filed a motion in limine, arguing:

> The victim [C.V.] advised multiple people prior to speaking to law enforcement that she had been molested. The State has indicated that it wishes to introduce the statements made to [L.D.] who in turn called the police as a way of

> "completing the story" or providing context. These statements are hearsay under Rule 802 and do not fall under any exception pursuant to Rule 803 or 804.

¶88 At the motions hearing, the state asserted that although it intended to introduce "the fact of [L.D.'s] report," it did not intend to "introduce the substance of the statement to [L.D.] or anyone else, unless it is somehow called for by the defense," noting its belief that "the facts and the timing [are] relevant, but not the details of what had been disclosed." At the conclusion of the hearing, the trial court asked the parties if they "were clear on all" of its rulings, and defense counsel stated, "I think so." In its minute entry, the court acknowledged that "[b]y agreement of counsel and the Court," the state had indicated it "believe[d] the fact and the timing of this issue is relevant; however, not the specific details of what had been disclosed." On the first day of trial, in discussing issues related to voir dire, defense counsel stated, "I think . . . what we agreed on, [C.V. is] going to be allowed to say that, yes, I told, you know, [L.D.] and then that was how the report was generated, because [L.D.], you know, reported it to law enforcement."

¶89 During its opening statement, the state informed the jury that L.D. had called the police after hearing a voicemail Alcantar left for C.V., and that when officers came to talk to C.V., she "explain[ed] what ha[d] been going on." The state also told the jury it would hear testimony from A.V. and E.G. that C.V. had told them "what was going on." Alcantar subsequently moved for a mistrial, arguing that although the parties had agreed the state "could discuss that [C.V.] . . . told [L.D.], because that's how these things got reported," the state had also referred to the fact that C.V. told A.V. about the sexual contact. Alcantar argued this "was a hearsay statement," "was not ruled on, was not admitted," and "directly contradict[ed]" what the parties had agreed the state "was going to do." The state responded that "the fact of the conversations was not out of bounds" and that it had not introduced any hearsay statements because it did not discuss what C.V. told any of the witnesses. The court denied Alcantar's motion for mistrial. During Alcantar's opening statement, he asserted that C.V.'s allegations against him were "retaliatory" because he had imposed "rules and structure" to prevent her from sneaking out and using drugs and had "cut[] off her check." He also asserted the jury would hear from "multiple witnesses" who would testify C.V. "has a reputation for being untruthful."

¶90 The state called C.V. as its first witness. C.V. testified that Alcantar had repeatedly performed sexual acts on her when she was sixteen and seventeen years old. The state asked C.V. if she had ever talked to L.D. "about stuff going on." C.V. responded affirmatively and stated she had explained to L.D. and J.D. that "everything they were . . . telling me and kind of not guessing, but predicting, I told them it was true." C.V. also testified she had told A.V. "everything" about "what was going on." Additionally, C.V. testified that she had come "out with the truth and told [E.G.] everything that had happened." Alcantar did not object to any of this testimony. That same day, the state asked L.D. on direct examination whether, "when [she] called 911," C.V. had "at that point specifically told [her] anything that had happened," to which she responded, "Yes."

¶91 The next morning, Alcantar again moved for a mistrial, asserting the state had elicited hearsay in violation of the trial court's rulings by asking witnesses, "[D]on't tell me what somebody said, but did [they] talk about stuff[?]" The state countered that it was "not introducing any of those statements" and, in any event, was "not introducing them for their truth." The court denied Alcantar's motion. Shortly thereafter, when addressing the admissibility of E.G.'s testimony regarding what she had told C.V. after C.V. disclosed the sexual acts to her, Alcantar acknowledged, and the court agreed, that E.G. "gets to testify to the fact that . . . a report was made to her."

¶92 A.V. subsequently testified that when she was approximately fourteen years old, C.V. had "talked to [her] about something that was going on between her and [Alcantar]." Similarly, when the state asked E.G. whether C.V. had disclosed "something between her and [Alcantar] that . . . was concern[ing] to [E.G.] and was sexual," E.G. responded affirmatively. During the state's closing argument, it referred to L.D.'s, A.V.'s, and E.G.'s testimony that C.V. had disclosed the fact of the sexual contact to them.

¶93 Although it is unclear whether the trial court determined the statements at issue constituted prior consistent statements and admitted them on this basis, we assume without deciding that Alcantar's general hearsay objections were sufficient to preserve this issue for our review. *See Henderson*, 210 Ariz. 561, ¶ 18; *Hamilton*, 177 Ariz. at 409. Under harmless error review, "[t]he inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Anthony*, 218 Ariz. 439, ¶ 39 (quoting *State v. Bible*, 175 Ariz. 549, 588 (1993)); *see Henderson*, 210 Ariz. 561, ¶ 18.

¶94 Alcantar asserts the trial court erred in allowing L.D., A.V., and E.G. to testify that C.V. had told them about the sexual acts before police became involved, claiming such testimony constituted "inadmissible hearsay offered to improperly bolster [C.V.]'s credibility" because C.V.'s motive for fabrication existed before she made these "out-of-court disclosures." In support of his argument, Alcantar alleges the evidence established C.V. had "wanted out of the house by the time she was in fifth grade—well before she ever claimed [his] sexual abuse began to occur," rendering Rule 801(d)(1)(B)(i) inapplicable. Although he acknowledges the state "did not get into the actual contents" of C.V.'s statements, he nevertheless argues the "content of and purpose for admitting the statements was obvious by implication—[C.V.] had previously told other people that [Alcantar] was sexually abusing her, so her testimony at trial must be true." Further, he asserts any error was not harmless because "[t]his case hinged on [C.V.]'s credibility as a witness and the veracity of her claims," and, because he "sufficiently challenged" C.V.'s credibility, the testimony "likely affected the verdict."

¶95 The state responds that none of the testimony about which Alcantar now complains constitutes hearsay because only the fact of C.V.'s disclosure of the abuse to L.D., A.V., and E.G. was admitted, rather than her "prior statements." Further, it argues, "even if the testimony could be considered an implied statement from C.V., the purpose of the testimony was to show the effect on the listener" and provide context for other testimony, "not to prove the truth of the matter asserted." Moreover, the state contends that any error in the admission of the testimony was "entirely harmless because C.V.'s credibility did not hinge on the prior disclosures" and such evidence was cumulative to C.V.'s own testimony about the disclosures and the testimony of two other witnesses.

¶96 On reply, Alcantar challenges the state's contention that any error in allowing such testimony was harmless, asserting the state's position on appeal that C.V.'s credibility did not hinge on the prior disclosures "directly contradicts [its] position below." *See State v. Coghill*, 216 Ariz. 578, ¶ 31 (App. 2007) ("[T]he state's contention that the evidence . . . had a negligible impact on the case is undermined by the prosecutor's strenuous and persistent efforts to place that evidence before the jury despite its questionable probative value."). Further, he argues, "the evidence of multiple disclosures on different occasions made to multiple people is not cumulative" because "with the erroneous introduction of each

additional disclosure, the veracity of C.V.'s claim increased exponentially."[11]

¶97 Alcantar fails to address on appeal the fact that he essentially conceded the admissibility of L.D.'s and E.G.'s testimony regarding the fact that C.V. had told them about the sexual contact. *See State v. Hughes*, 22 Ariz. App. 19, 22 (1974) ("The rule is well established in this jurisdiction that a defendant is bound by courtroom concessions made by his counsel in his presence."). However, even assuming without deciding the challenged testimony constituted hearsay and was wrongly admitted, thus overlooking that only the fact of disclosure and no actual statements were disclosed, any resulting error was harmless beyond a reasonable doubt. Alcantar does not challenge that C.V. herself testified that she had told L.D., A.V., and E.G. that Alcantar had performed sexual acts on her, and we disagree with his assertion that the witnesses' vague testimony was not cumulative to C.V.'s own testimony on this matter. Further, C.V. was subjected to thorough cross-examination. *See State v. Hoskins*, 199 Ariz. 127, ¶ 66 (2000) (any error in admitting witness's prior consistent statements harmless when they were included in witness's testimony and witness was thoroughly cross-examined); *State v. Granados*, 235 Ariz. 321, ¶ 35 (App. 2014) (even erroneous admission of cumulative evidence constitutes harmless error); *State v. Yonkman*, 233 Ariz. 369, ¶ 27 (App. 2013) (victims testifying about each other's statements harmless error in part because statements consistent and both victims subject to cross-examination). Thus, we are confident that L.D.'s, A.V.'s, and E.G.'s testimony regarding C.V.'s "disclosures" had no effect on the jury's verdicts in this case. *See Anthony*, 218 Ariz. 439, ¶ 39.

¶98 Moreover, contrary to Alcantar's assertion at oral argument in this court, *Copeland* is distinguishable and therefore not controlling with regard to this issue. There, the victim's physical education teacher testified the victim had told her, while crying, that her stepfather "had touched her in the wrong way" more than once, gesturing to her breasts and genitals. *Copeland*, 253 Ariz. 104, ¶ 3. Additionally, the school counselor testified that the victim had stated her stepfather "had been touching her" in "[t]he way a man shows that he loves a woman." *Id.* (alteration in *Copeland*). We concluded the hearsay testimony at issue was not harmless because, among other things, the state had relied on it to prove its case-in-chief, repeatedly

[11]Alcantar does not appear to challenge on appeal J.D.'s testimony that C.V. had disclosed to him "some things that [Alcantar] had been doing to her."

using it to bolster the victim's credibility in its opening statement and closing argument and to "identify Copeland as the perpetrator."[12] *Id.* ¶¶ 25, 31. Specifically, during its closing argument, the state argued as follows:

> [The victim] told you that [Copeland] loves her like a girlfriend or the way a man loves a woman. And she said loves her like a girlfriend. Well, remember [the] school counselor . . . remembered [the victim] describing it as the way a man loves a woman? Kind of corroborating that [the victim] consistently reports it in that manner.

Id. ¶ 25 (first, fourth, and fifth alterations added, second and third alterations in *Copeland*).

¶99 Here, in contrast, the state did not introduce C.V.'s actual statements to L.D., A.V., and E.G., and the testimony regarding C.V.'s disclosures was comparatively vague and far less emotionally charged than the testimony at issue in *Copeland*. And, although C.V.'s disclosures were referenced repeatedly throughout trial, including in the state's opening statement and closing argument, unlike in *Copeland*, the state did not heavily rely on these disclosures to corroborate C.V.'s testimony. Thus, while "the repeated admission of inadmissible hearsay can be highly prejudicial" when credibility is "'the central issue' because of scant physical evidence or a dearth of corroborating eyewitnesses," *id.* ¶ 29 (quoting *State v. Thompson*, 167 Ariz. 230, 235 (App. 1990)), on the record before us, we cannot say the testimony regarding the fact of C.V.'s disclosures had any effect on the jury's verdicts, *see Anthony*, 218 Ariz. 439, ¶ 39.

Prosecutorial Error

¶100 Alcantar contends several instances of prosecutorial error "individually and cumulatively tainted the verdict, thereby depriving

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[12]We also noted the trial court's statement at sentencing that the teacher's and school counselor's testimony, "together with the testimony of the child herself, were the most compelling testimony that was heard in this trial. It brought home to everyone, the jury and everyone sitting in the courtroom, the profound effect that these acts have had on this child." *Copeland*, 253 Ariz. 104, ¶ 32.

[him] of his due process right to a fair trial."[13] For prosecutorial error to warrant reversal, a defendant must demonstrate (1) "error indeed occurred," and (2) "there is a 'reasonable likelihood . . . that the [error] could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Vargas*, 251 Ariz. 157, ¶ 9 (App. 2021) (alteration in *Vargas*) (quoting *In re Martinez*, 248 Ariz. 458, ¶ 43 (2020)). When a defendant objects, the issue is preserved for our review under this standard. *State v. Murray*, 250 Ariz. 543, ¶ 13 (2021). However, when a defendant fails to object to alleged prosecutorial error, we review only for fundamental error. *Id.* ¶ 14. We typically review each alleged instance for error before deciding "whether the cumulative effect of any errors we find 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Payne*, 233 Ariz. 484, ¶ 106).

¶101 Alcantar argues that, during the state's opening statement, it improperly introduced "prejudicial evidence that [he] 'lost his mind,'" introduced hearsay statements bolstering C.V.'s credibility, and gave the jury the impression that he had confessed to giving C.V. Trazodone. Further, he asserts the state elicited improper and prejudicial testimony about a physical "attack" during its direct examination of C.V. Finally, Alcantar contends the state improperly referenced C.V.'s testimony regarding Alcantar having been sexually abused as a child and made arguments appealing to the jurors' "sympathy and emotion" in its closing argument.

Opening Statement

¶102 As discussed above, before trial, Alcantar moved to preclude evidence that C.V. had advised "multiple people prior to speaking to law enforcement that she had been molested," arguing such statements—specifically, statements made to L.D.—constituted inadmissible hearsay. At the hearing on Alcantar's motion, the state indicated it intended to

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[13] Our supreme court recently instructed courts to distinguish between "error" and "misconduct." *In re Martinez*, 248 Ariz. 458, ¶ 47 (2020). Prosecutorial error describes conduct that infringes on a defendant's constitutional rights but does not necessarily implicate "a prosecutor's ethical culpability." *Id.* ¶¶ 45, 47. Alcantar refers to his claims as allegations of prosecutorial error. We agree that his claims involve alleged prosecutorial error, not prosecutorial misconduct.

introduce the fact of C.V.'s report "but not the details of what had been disclosed," and the trial court acknowledged as much in its minute entry.

¶103 On the first day of trial, the court addressed Alcantar's motion to preclude L.D.'s testimony regarding a recording of a voicemail Alcantar had left for C.V., which was lost after it was placed into evidence. Alcantar asserted a *Willits* instruction[14] would "not cure the problem" because the jury would still hear L.D.'s "biased description of the phone call as 'proof' that [he] was in a jealous rage" and was "insane." In response, the state asserted it was "not going to introduce that [L.D.] thought that [Alcantar] was f'ing insane."

¶104 The same day, the state indicated it intended to introduce a portion of a statement Alcantar had made to detectives. Alcantar objected, arguing that if the state introduced part of his statement, "then all of it comes in." The next day, after the state explained that it only intended to introduce the portion of the statement in which Alcantar had acknowledged that C.V. slept in his bed and that he "takes Trazodone, so he has it in the house," Alcantar withdrew his objection.

¶105 During its opening statement, the state told the jury that in early 2017, C.V. "went out for the night" with J.D. and "didn't come home," after which "Alcantar basically lost his mind" and confronted J.D. while carrying a gun. Alcantar objected, arguing the state had introduced "prejudicial statements." The court overruled the objection and reminded the jury that "what's stated in opening statements is not evidence, that's just what [the state] thinks the evidence will show." The state subsequently rephrased its statement, asserting Alcantar had "showed up carrying a gun and he was very upset."

¶106 The state also told the jury during its opening statement that C.V. had informed A.V. and E.G. "what was going on" between her and Alcantar. Additionally, the state asserted that "all along [Alcantar] had been giving kids, the kids at night, would give them melatonin to help them sleep. And at that point, he started giving [C.V.] his own prescribed Trazodone." It continued, "[C.V.] would sometimes wake and she would

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[14]*See generally State v. Willits*, 96 Ariz. 184, 191 (1964); *State v. Hunter*, 136 Ariz. 45, 50 (1983) (A *Willits* instruction tells the jury "that if it [finds] that the state or any agent of the state allowed material evidence to be destroyed, then it [can] infer that the evidence would be against the interests of the state.").

find that, as she was coming out of this Trazodone [stupor], she would wake to find him with his mouth on her and she would wake to find him inside of her." Further, it stated the evidence would show that "Alcantar acknowledges that [C.V.] was sleeping in his bed" and that "he acknowledged, yeah, he's prescribed Trazodone, he gives the kids stuff to sleep."

¶107 At the conclusion of the state's opening statement, Alcantar moved for a mistrial, arguing that he had previously voiced his concern "about some of the language that's going to [be] used," including referring to him as "insane," and that the state had "assured the Court that [it] would not use language like that." In addition, Alcantar argued the state had improperly referred to the fact that C.V. told A.V. about Alcantar's sexual acts because C.V.'s "statement" was hearsay. Further, he argued a mistrial was warranted because the state had "made a deliberate direct misstatement to the jury about what he said" regarding his administration of Trazodone.

¶108 The state responded it had agreed it "would not elicit any statements where they said that he was quote, fucking insane," and, accordingly, it had not said Alcantar was "insane" during its opening statement. It further argued that it had not specifically stated "what [C.V.] told" A.V. and therefore "did not give any of the hearsay statements." The state also asserted it had not said that Alcantar "administers Trazodone" or that "he admitted to using Trazodone" but rather that "he admitted to giving the kids stuff to help them sleep, which is accurate." The trial court denied Alcantar's motion for mistrial. Because Alcantar objected to and moved for mistrial based on the state's remarks during its opening statement, Alcantar has preserved this issue for our review. *See Murray*, 250 Ariz. 543, ¶ 13.

¶109 Alcantar asserts on appeal that by telling the jury he "lost his mind," the state "improperly inserted prejudicial labels, despite a previous agreement not to elicit that type of evidence." The state counters that it was "simply describing an incident in which Alcantar became unreasonably upset," and, contrary to Alcantar's argument, its description was consistent with its agreement not to discuss L.D.'s opinion of Alcantar. We agree with the state. Indeed, it made no reference to L.D.'s opinion that Alcantar was "insane" in its opening statement, and we find no error.

¶110 Alcantar further contends the state introduced "improper hearsay statements" implying that C.V. "had disclosed [Alcantar] was sexually abusing her to two other witnesses" in addition to L.D. Therefore,

he argues, because "the parties had reached an agreement that the fact of one of the prior disclosures could come in, thus signaling to the defense and the court that the others would not be coming in," the state "essentially blind-sided the defense with the hearsay statements that had no relevance other than to bolster [C.V.]'s credibility . . . thereby improperly prejudicing the jury against [him] from the start." However, as addressed above, even were we to conclude the testimony regarding C.V.'s disclosures was inappropriate, any resulting error was harmless beyond a reasonable doubt. We similarly conclude there is no reasonable likelihood that any error related to the state's reference to these disclosures in its opening statement deprived Alcantar of a fair trial. *See Vargas*, 251 Ariz. 157, ¶ 9.

¶111 Additionally, Alcantar argues the state's assertion "regarding what [he] had said about the Trazadone carried the clear implication that he had admitted to giving the kids Trazadone when no such admission was made." The state counters its statement that Alcantar acknowledged "he gives the kids stuff to sleep," taken in context, "referred to an earlier statement telling the jury the evidence would show that [he] had been giving the kids melatonin to help them sleep at night" and "did not convey a false impression that [he] had admitted to giving all the kids Trazodone." Again, we agree with the state. In light of its previous statement during its opening that "all along" Alcantar had been giving the other children melatonin to help them sleep at night but at some point started giving C.V. his prescribed Trazodone, we find no error. *See State v. Rutledge*, 205 Ariz. 7, ¶ 33 (2003) ("Whether a prosecutor's comment is improper depends upon the context in which it was made . . . ."). Alcantar's claims of prosecutorial error related to the state's opening statement fail.

C.V.'s Testimony

¶112 As we have discussed, C.V. provided unsolicited testimony on direct examination indicating Alcantar had "attacked" her before she ran to E.G.'s house. Alcantar objected, asking the trial court to strike C.V.'s statement and moving for a mistrial. The court denied his motion for mistrial but struck C.V.'s testimony as nonresponsive and instructed the jury to disregard it. The state then elicited testimony from C.V. that she had run to E.G.'s house that night, and when she arrived, she was barefoot, crying, "breathing hard," and "shook, like [she] just ran away from somebody."

¶113 Alcantar moved for a mistrial based on the state's "followup questions about how [C.V.] ran over there, that she was breathing heavily, those types of things," arguing the state had deliberately insinuated

Alcantar "attempted to sexually assault [C.V.] that night when she was home alone without the [other] kids." The state responded that because C.V. continued to spontaneously offer "problematic" testimony, it had "asked a series of very directed questions to prevent [C.V.] from repeating what she had previously said about being attacked" and "in no way meant to say there was a sexual assault" that night. The trial court concluded C.V. was an "inexperienced" witness and had inadvertently "done it to herself" by bringing up prior sexual contact. Accordingly, it directed the state to clarify that "no type of sexual attack o[f] any kind occurred that night, just an argument." Upon additional questioning, C.V. confirmed that "there was no sexual component" to her argument with Alcantar that night, and the court implicitly denied Alcantar's motion for mistrial.

¶114 On direct examination of E.G., the state asked her to explain "what [she] remember[ed]" about the night C.V. ran to her house without saying "what anybody told" her. E.G. testified C.V. had arrived "crying," "upset," and "barefooted," and "told [her] that [Alcantar] had hit her." The trial court advised E.G. not to "repeat what [C.V.] said" and struck E.G.'s answer upon Alcantar's request. During cross-examination, Alcantar attempted to elicit testimony that C.V. had also hit him during the altercation. He asked E.G. to confirm that C.V. had told her Alcantar hit her, "they had been engaged in a physical fight," and C.V. had "hit [Alcantar] so hard that his glasses flew." E.G. stated she did not remember whether C.V. had told her that she hit Alcantar.

¶115 Alcantar argues on appeal that the state's "continued questioning" of C.V. and elicitation of "testimony that did not directly speak to an attack[] but confirmed that some sort of attack had occurred" was improper based on the trial court's ruling "that the evidence of an attack was so objectionable that it was to be stricken from the record and the jury was told that it was not to consider the evidence." Thus, he asserts, the state committed prosecutorial error because it intentionally "called the jury's attention to matters it would not be justified in considering and because it referred by innuendo to evidence that the court had ruled inadmissible."

¶116 Further, Alcantar contends, C.V.'s "subsequent testimony that there was no sexual attack did not cure the prejudice, because there was a clear implication of a physical attack, which was later confirmed by [E.G.]'s improper testimony." Alcantar asserts the error was not harmless because "the evidence in this case was not overwhelming," and "[t]his purported attack against [C.V.] was the only alleged assault corroborated

by physical indicators that an attack had occurred which a third party witnessed." And, he asserts, C.V.'s testimony was "highly prejudicial and likely used by the jury as propensity evidence—because [she] credibly testified to this attack, her testimony regarding the other attacks must also be credible."

¶117 The state responds its line of questioning regarding C.V.'s condition on the night she told E.G. about the sexual acts was not intended to elicit testimony implying Alcantar had attacked C.V. that night. Instead, it asserts the questions were "meant to elicit details surrounding the disclosure that matched [E.G.]'s expected testimony" that C.V. had "show[n] up late at night, barefooted, and out of breath after an argument with Alcantar." Moreover, it contends, C.V.'s testimony was neither erroneous nor prejudicial because the trial court "imposed the proper remedies to the unsolicited testimony" from both C.V. and E.G., "including striking the first two references to any physical assault," "instructing the jury to not consider the statements," and permitting the state to clarify that no sexual assault had occurred that night. And, as to Alcantar's argument that he was prejudiced by C.V.'s testimony regarding her condition when she arrived at E.G.'s house together with E.G.'s unsolicited testimony that he hit C.V., the state maintains the court immediately struck E.G.'s testimony and repeatedly instructed the jury not to consider stricken testimony, curing any potential prejudice.

¶118 As we concluded above, even if C.V.'s testimony regarding her condition on the night she ran to E.G.'s house implied Alcantar had physically attacked her, admission of such testimony was not erroneous. *See Herrera*, 232 Ariz. 536, ¶ 30 (no error in admitting "less graphic and less inflammatory" acts than those charged). It follows that the state did not err in eliciting this testimony. Moreover, we agree with the state that E.G.'s "confirm[ation]" that an attack occurred could not have denied Alcantar a fair trial given that the trial court immediately struck E.G.'s testimony and repeatedly instructed the jury to disregard stricken testimony. *See Newell*, 212 Ariz. 389, ¶ 69. Alcantar's argument fails. *See Vargas*, 251 Ariz. 157, ¶ 9.

Closing Argument

¶119 During its closing argument, the state referred to C.V.'s testimony regarding Alcantar's apology and his abuse as a child, stating that after C.V. had told him to "[s]top touching [her]," he "said that he was sorry and . . . that this had happened to him as a kid." The state concluded its argument by asserting that Alcantar had "committed every crime in th[e]

indictment and he is relying on [the jury] to let him get away with . . . what he thought [C.V.] would let him get away with."

¶120 In its rebuttal argument, the state argued as follows:

> The only possible thing that [C.V.] can get out of this, the only possible thing she can get is the smallest measure of justice. Guilty or not guilty, she'll walk out of this courtroom and she'll go back to her fast food job. Guilty or not guilty, [A.V.] is still going to have to figure out financial aid or go without her dream of becoming a dentist. Guilty. Guilty would be one small measure of justice, because . . . Alcantar was supposed to be her dad, and instead he was her abuser and her rapist.

At that point, Alcantar asked to approach the bench, arguing the state's "last comments about justice were improper jury argument, because they referred essentially to punishment." The trial court stated Alcantar "should have objected before," and Alcantar responded that he "didn't want to interrupt" during the state's argument. The court noted Alcantar had "made [a] record."

¶121 Because Alcantar did not object to the state's argument that he had been abused as a child or that he "is relying on [the jury] to let him get away with" the alleged sexual abuse of C.V., we review these instances only for fundamental error. *See Murray*, 250 Ariz. 543, ¶ 14; *Escalante*, 245 Ariz. 135, ¶¶ 12, 21. However, as Alcantar correctly asserts, because he objected to the state's argument regarding a "small measure of justice" for C.V., asserting it constituted "improper jury argument," he has preserved this issue for our review. *See Murray*, 250 Ariz. 543, ¶ 13; *Vargas*, 251 Ariz. 157, ¶ 9.

¶122 "Prosecutors are given 'wide latitude' in closing arguments." *State v. Goudeau*, 239 Ariz. 421, ¶ 210 (2016) (quoting *State v. Herrera*, 174 Ariz. 387, 396 (1993)). "Unlike opening statements, during closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions." *Bible*, 175 Ariz. at 602. But attorneys may not "make arguments which appeal to the passions and fears of the jury." *State v. Comer*, 165 Ariz. 413, 426 (1990). Statements have the potential to improperly appeal to jurors' emotions, prejudices, or passions when they

urge the jury to convict the defendant "for reasons wholly irrelevant to his own guilt or innocence." *Herrera*, 174 Ariz. at 396 (quoting *United States v. Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir. 1984)). Even if the state's argument extends beyond the permissible limits, the consideration is whether the argument was "so unduly prejudicial as to have amounted to a denial of a fair trial" and whether, "under the circumstances of the particular case, the remarks of counsel were likely to have influenced the jury in reaching a verdict." *State v. King*, 110 Ariz. 36, 42-43 (1973).

¶123 Alcantar argues the state fundamentally erred in "calling the jurors' attention to the prejudicial and irrelevant testimony that [he] said he had been molested as a child" during its closing argument. He asserts the state's reference to such evidence "went to the foundation of the case because it relieved the prosecution of its burden of proving that [he] did what [C.V.] alleged, and invited the jury to convict him because he had been abused and abusers commit abuse." Further, he argues the alleged error was prejudicial because the jury "could have reached a different verdict" in the absence of the state's argument, which "appeal[ed] to emotion and invit[ed] the jury to consider improper evidence." However, given our above conclusion that there is no reasonable probability that introduction of testimony indicating Alcantar was molested as a child affected the jury's verdicts, Alcantar cannot establish the state's single reference during its closing argument to such testimony in the context of his apology to C.V., even if improper, constituted fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 21; *Murray*, 250 Ariz. 543, ¶¶ 15-16 (*Escalante*'s prejudice prong "is a higher burden to overcome" than standard for objected-to prosecutorial error); *cf. Hayes*, 474 P.3d at 1189.

¶124 Alcantar also asserts the state erred "by telling the jurors that [he] was relying on them to let him get away with the crime" because it "implied that they would . . . be complicit if they failed to convict" him of the charged offenses. Alcantar contends this statement is similar to the prosecutor's improper argument in *State v. Arias*, 248 Ariz. 546, ¶ 70 (App. 2020), which "insinuate[ed] that the jurors would be complicit in the victim's killing if they failed to convict" the defendant. Further, he asserts the state's argument constituted fundamental, prejudicial error because it "relieved the State of its burden to prove its case through actual evidence" and instead encouraged jurors to convict based on emotion, and without this argument, "a jury could have reached a different verdict."

¶125 The state, however, argues the context in which the statement was made indicates it was merely "an argument that the evidence showed

Alcantar's guilt beyond a reasonable doubt," and, at most, it was "a characterization of Alcantar's defense and a comment on the fact that the abuse had gone undetected for nearly two years." Moreover, it contends Alcantar's reliance on *Arias* is misplaced because the prosecutor's arguments in that case were far more inflammatory than those present here. Additionally, the state asserts "any potential prejudice was immediately mitigated by the prosecutor's admonition that the jury 'follow the evidence and follow the law' to find Alcantar guilty, and the trial court's instructions to not be influenced by sympathy or prejudice."

¶126 In *Arias*, the prosecutor argued the defendant had asked the jurors "to carry those gas cans for her" and "help her fill them" before urging them to fulfill their "duty" and return "a verdict of guilt" so they could leave behind "the stench of gasoline" instead of "contaminating their hands." 248 Ariz. 546, ¶ 70. And, although we concluded on appeal that the state's remarks had "appeal[ed] to the jurors' passions and fears" and "unquestionably exceeded permissible bounds," we nevertheless affirmed the conviction, noting that despite a "pattern of intentional misconduct [that had] saturated the trial," there was "no reasonable likelihood that the misconduct affected the jury's verdict." *Id.* ¶¶ 71, 73.

¶127 The prosecutor's statement at issue here, that Alcantar "committed every crime in th[e] indictment and he is relying on [the jury] to let him get away with . . . what he thought [C.V.] would let him get away with," is far less inflammatory than the state's metaphor in *Arias*. Moreover, even if this argument was improper, in light of the state's having directed the jury to "follow the evidence" from the witness stand and to consider all testimony presented, as well as the trial court's instructions not to "be influenced by sympathy or prejudice," Alcantar fails to establish the state's argument constituted fundamental, prejudicial error requiring reversal. *See Murray*, 250 Ariz. 543, ¶ 14.

¶128 Finally, Alcantar contends the state's argument that his conviction would be a "small measure of justice" for C.V. improperly "asked the jury to consider [his] punishment as a means of allowing [C.V.] to go on with her life, a clear appeal to sympathy and emotion that was very persuasive" given evidence that C.V. had "had a hard life." In support of his argument, Alcantar cites *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 117 (2018), for the proposition that "statements asking the jury to do justice for the victim are improper in that they ask the jury to strike a balance between the victim's and the defendant's rights." Alcantar asserts the state cannot establish its argument had no effect on the jury's verdicts because "a

reasonable juror would feel sympathy for" C.V., noting the state repeated this argument twice and it was the last thing the jury heard at the conclusion of the state's rebuttal argument.

¶129 The state responds its argument was not improper because it did not encourage the jury to "contemplate punishment" or ask "the jury to balance C.V.'s and Alcantar's interests." Instead, it contends, the statement referred to "C.V.'s motive for testifying about the abuse." Moreover, the state maintains any potential prejudice was "eliminated by the court's instructions to the jurors not to be swayed by sympathy or prejudice" and that in order to convict Alcantar, they were required to find him guilty beyond a reasonable doubt.

¶130 In *Acuna Valenzuela*, the prosecutor argued to the jury during closing argument in the penalty phase of trial that "sometimes like now crimes are just so outrageous, so extreme, and so violent all . . . we hold dear in society that they cry out for the maximum penalty. Justice in this case, justice for [the victim], deserves no less." 245 Ariz. 197, ¶ 116. There, we concluded the statement was "arguably inappropriate insofar as it asked the jury to 'strike some sort of balance between the victim's and the defendant's rights.'" *Id.* ¶ 117 (quoting *Bible*, 175 Ariz. at 603). However, we ultimately concluded the defendant had failed to demonstrate prejudice as required to establish fundamental error based on the brief and isolated nature of the statements. *Id.*

¶131 Here, unlike in *Acuna Valenzuela*, the state's argument, taken in context, goes to C.V.'s motive and credibility and thus does not raise concerns about striking a balance between the victim's and defendant's rights. *See Goudeau*, 239 Ariz. 421, ¶ 196 (in determining whether argument is misconduct, we look to "the context in which the statements were made as well as 'the entire record and to the totality of the circumstances'" (quoting *State v. Nelson*, 229 Ariz. 180, ¶ 39 (2012))). Indeed, earlier in its rebuttal argument, in discussing "[w]hether the witness has any motive, bias, or prejudice," the state asked the jury, "What do either [C.V. or A.V.] get out of this? How enjoyable did that look for either one of them?" And, in making the statements about which Alcantar now complains, the state reminded the jury that "the only possible thing" C.V. could get by reporting the abuse "is the smallest measure of justice," and, regardless of whether it found Alcantar guilty of the charged offenses, she would "walk out of this courtroom and . . . go back to her fast food job." Thus, as the state argues, its statements "tied directly back to earlier statements about C.V.'s motives and credibility." We find no error in the state's argument that a conviction

would be a "small measure of justice" for C.V. *See Herrera*, 174 Ariz. at 396-97 (no error where prosecutor urged jurors "to do justice" if they found burden of proof had been met); *Jones*, 197 Ariz. 290, ¶ 43 (asking jurors to find defendant "guilty on behalf of those people and their families and the people of the State of Arizona" not improper as state "did not attempt to inflame the jury or make an emotional plea to ease the suffering of the poor families").

Cumulative Error

¶132 Alcantar asserts that although the "prosecutorial errors committed in this case were sufficiently egregious to warrant reversal standing alone," the cumulative effect of the errors also deprived him of his right to a fair trial. However, none of the state's alleged errors standing alone denied Alcantar a fair trial, and his argument regarding cumulative error similarly fails. We do not find any prosecutorial error in the record. But, even assuming the state erred in referring to C.V.'s disclosures to A.V. and E.G., and the testimony that Alcantar had been molested as a child, as well as arguing that Alcantar was "relying on [the jury] to let him get away with . . . what he thought [C.V.] would let him get away with," these instances were not "persistent and pervasive" and nothing in the record indicates the prosecutor intentionally erred to prejudice Alcantar. *State v. Hulsey*, 243 Ariz. 367, ¶ 122 (2018) (in assessing cumulative error, appellate court considers "whether persistent and pervasive misconduct occurred and whether the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not [a] specific intent, to prejudice the defendant." (quoting *State v. Lynch*, 238 Ariz. 84, ¶ 51 (2015))). Accordingly, Alcantar fails to establish the cumulative effect of any errors "so permeated and infected his trial as to render it unfair." *Acuna Valenzuela*, 245 Ariz. 197, ¶ 120 (quoting *Hulsey*, 243 Ariz. 367, ¶ 123).

Disposition

¶133 For the foregoing reasons, we affirm Alcantar's convictions and sentences.