IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CHARLES B. BEELER,
Appellant.

No. 2 CA-CR 2020-0131
Filed April 20, 2023

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201701068
The Honorable Jason R. Holmberg, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Judge Sklar and Judge O'Neil concurred.

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

¶1 Charles Beeler appeals from his convictions and sentences for two counts of sexual conduct with a minor. He argues the trial court lacked jurisdiction and erred in various evidentiary rulings. He also contends several instances of prosecutorial misconduct require reversal and the court erred in imposing consecutive life sentences. For the following reasons, we affirm Beeler's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's verdicts and resolve all reasonable inferences against Beeler. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). In March 2017, D.A.—born in June 2006—was living in Pinal County with her biological mother and Beeler, her stepfather. D.A. and her mother had shared a home with Beeler since D.A. was approximately four years old. Beeler "was like a father" to D.A.

¶3 One day that March, D.A. stayed home from school because she was sick. Beeler worked nights and typically slept during the day. D.A. went upstairs to get into bed and rest with Beeler. After she did so, Beeler started kissing her on the lips. D.A. "froze" and then fell asleep. When she woke up, Beeler's hand was in her pants and his finger was in her vagina. D.A. pretended to be asleep. At that time, D.A. did not tell anyone what had happened.

¶4 The next day, D.A. again stayed home sick from school. As she was sitting on Beeler's lap watching television, she jokingly put her legs up in front of the television to block Beeler's view of the screen. Beeler "reach[ed] his hand in [her] pants again, except he put his finger in [her] vagina and he kept pushing it until it really hurt, until [she] put [her] feet down." D.A. left the couch but again did not tell anyone about Beeler's acts.

¶5 When D.A. returned to school, she told her best friend, her teacher, and the dean of students about the two incidents, after which the incidents were reported to police. D.A. was forensically interviewed and examined. She subsequently moved in with her biological father and then temporarily lived with several other family members before moving into a group home.

¶6 The state charged Beeler with two counts of sexual conduct with a minor, alleging in the indictment that he had "intentionally or knowingly engag[ed] in sexual intercourse or oral sexual contact with D.A., a person under the age of fifteen (15) years, to wit: digital penetration in bedroom" and "digital penetration on couch." Beeler waived his right to a jury trial, and, after a three-day bench trial, the court found Beeler guilty of both counts and sentenced him to consecutive life sentences. 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

Venue

¶7 Beeler argues for the first time on appeal that the state failed to establish the charged offenses had occurred in Pinal County and that therefore the trial court "lacked jurisdiction over the case." Beeler conflates venue with jurisdiction. Under article II, § 24 of the Arizona Constitution, a defendant has a right to a "trial by an impartial jury of the county in which the offense is alleged to have been committed." *See also* A.R.S. § 13-109(A) ("Criminal prosecutions shall be tried in the county in which conduct constituting any element of the offense or a result of such conduct occurred . . . .").

¶8 Although we have stated that "proper venue is a jurisdictional requirement," *State v. Agnew*, 132 Ariz. 567, 577 (App. 1982), our supreme court has clarified that "jurisdiction is the power of a court to try a case," while "venue concerns the locale where the power may be exercised," *State v. Willoughby*, 181 Ariz. 530, 543 (1995). And unlike subject matter jurisdiction, which may be raised at any time, *State v. Chacon*, 221 Ariz. 523, ¶ 5 (App. 2009), "venue may be waived or changed," *Willoughby*, 181 Ariz. at 537 n.7.[1] The state need only establish venue by a

[1]Typically, a defendant waives a claim as to venue unless he moves to change venue before trial. *State v. Girdler*, 138 Ariz. 482, 490 (1983); Ariz. R. Crim. P. 10.3(c). Although Beeler acknowledges that "failing to dispute

preponderance of the evidence, and such evidence may be either direct or circumstantial. *State v. Mohr*, 150 Ariz. 564, 566 (App. 1986); *State v. Detrich*, 178 Ariz. 380, 384 (1994). And, "if there is proof of facts from which the court can take judicial notice of venue, such proof is sufficient." *State v. Scott*, 105 Ariz. 109, 110 (1969).

¶9 Beeler contends the state failed to present any "actual evidence of the address or location of the residence" where the charged offenses had occurred "other than [D.A.]'s general assertion that she had lived in San Tan Valley." Contrary to Beeler's arguments, however, the state established by a preponderance of the evidence that the offenses had occurred in Pinal County. A detective from the Pinal County Sheriff's Office testified that in 2017, he had been "asked to help with an investigation of alleged sexual abuse of a child that had happened in San Tan Valley, Pinal County, Arizona." Further, D.A. testified she had lived in a house in San Tan Valley with Beeler and the sexual contact had occurred "in the house" when she was home sick from school. Additionally, during her testimony, D.A.'s mother confirmed their San Tan Valley home is located in Pinal County. And Beeler conceded below that the fact that San Tan Valley is within Pinal County "came out during testimony." *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."). Venue was proper in Pinal County.[2] *See Mohr*, 150 Ariz. at 566; *Detrich*, 178 Ariz. at 384.

Prior Allegations of Sexual Misconduct

¶10 Beeler argues the trial court erred in "precluding the defense from presenting two prior false allegations of sexual abuse made by [D.A.] against other people, which resulted in an unconstitutional denial of the

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venue at the trial level may render the issue waived," he points to our supreme court's opinion in *State v. Detrich*, 178 Ariz. 380 (1994), in which the court "considered and decided a question of venue raised on appeal but not below." In our discretion, we address the merits of Beeler's arguments regarding venue. *See State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7 (App. 2012) (waiver is discretionary).

[2]Because we conclude the state had already established venue was proper in Pinal County by a preponderance of the evidence, we need not address Beeler's argument that the trial court improperly took judicial notice that San Tan Valley is located within Pinal County.

right to present a defense in violation of the Sixth and Fourteenth Amendments." We review a trial court's ruling regarding the admissibility of evidence under the Arizona Rape Shield Law, codified as A.R.S. § 13-1421, for an abuse of discretion. *See State v. Gilfillan*, 196 Ariz. 396, ¶ 29 (App. 2000), *overruled on other grounds by State v. Carson*, 243 Ariz. 463, ¶ 10 (2018). We review constitutional issues de novo. *See State v. Guarino*, 238 Ariz. 437, ¶ 5 (2015).

¶11 "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). "[A] defendant's right to present relevant testimony is not limitless," however, and may be balanced against the state's legitimate interests in criminal proceedings. *Gilfillan*, 196 Ariz. 396, ¶ 20; *see Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (right to present relevant testimony may be limited to accommodate legitimate state interests); *see also LaJoie v. Thompson*, 217 F.3d 663, 669 (9th Cir. 2000) (balancing defendant's constitutional right with potential for prejudice on case-by-case basis).

¶12 Under § 13-1421, "[e]vidence of specific instances of the victim's prior sexual conduct may be admitted only if" the proponent of such evidence proves by clear and convincing evidence that (1) the "evidence is relevant and is material to a fact in issue in the case"; (2) the evidence fits one of five categories, including "false allegations of sexual misconduct made by the victim against others"; and (3) "the inflammatory or prejudicial nature of the evidence does not outweigh" its probative value. § 13-1421(A)(5), (B); *see Gilfillan*, 196 Ariz. 396, ¶ 16; Ariz. R. Evid. 608(b). Although this section "clearly implicates the . . . Sixth and Fourteenth Amendments to the United States Constitution . . . to the extent that it operates to prevent a criminal defendant from presenting relevant evidence, confronting adverse witnesses and presenting a defense," we have previously held that these restrictions are facially constitutional. *Gilfillan*, 196 Ariz. 396, ¶¶ 20, 23 ("rape shield statute serves a legitimate state interest in protecting against the harassment of a victim" and restrictions are not disproportionate to purpose statute serves).

¶13 A challenge to the constitutionality of § 13-1421 "as applied" to a particular defendant requires case-by-case evaluation. *Id.* ¶¶ 18, 23. Before trial, Beeler moved to "admit evidence of prior false sexual accusations" D.A. had purportedly made against others after accusing Beeler of the sexual offenses charged in the case. At a hearing under § 13-1421, he sought to admit evidence of "two different specific false

allegations" of sexual conduct: one occurring in February 2019, involving a claim by D.A. that she had been "raped by a boy at school," and the other occurring in April 2019, involving a claim by D.A. that she had been "touched inappropriately" by another resident of her group home. As evidence of the first false accusation, Beeler relied on witness testimony from D.A.'s uncle's girlfriend, Valery Carls; D.A.'s mother; and Detective Beck of the Mesa Police Department. As to the second false accusation, Beeler relied solely on the testimony of Davida Simmons, the manager of the group home where D.A. had resided in the spring of 2019.

¶14 Valery testified that in February 2019, a police officer had dropped D.A. off at Valery's house after finding her "walking along the freeway." Valery went through D.A.'s phone out of "concern[] for her well-being" and discovered messages D.A. had written stating she was "planning to commit suicide" and had been "raped by a boy at school." A screenshot Valery had taken of the messages about D.A. being raped was admitted as an exhibit. During cross-examination by the state, Valery testified she had "never talked to [D.A.] about th[e] screenshot" or the "statement of being raped," had not been "present when [D.A.] was using th[e] application," and did not "recall ever seeing [D.A.] use her name or identify herself by name on the application." On redirect, she explained she had been able to determine D.A. wrote the messages because they included medical information and family history "only [D.A.] would know."

¶15 Next, D.A.'s mother testified she had seen the screenshot Valery took of D.A.'s messages and had viewed the messages directly on D.A.'s phone. She testified she had been able to determine D.A. wrote the messages because "[i]t was her user name" and "her phone," and D.A. "was the only one in possession of the phone." D.A.'s mother also testified the messages included "information . . . that only [D.A.] would know." When she asked D.A. if she had been raped, D.A. "did not give [her] an answer." And, like Valery, D.A.'s mother never saw D.A. "identify herself by name in the conversations she was having."

¶16 Detective Beck, an investigating officer in the rape claim, testified he had initially received another officer's report related to the allegation. He then tried but failed to locate the messages on D.A.'s phone indicating she had been sexually assaulted. He also made several attempts to interview D.A. but was unsuccessful, and the investigation was ultimately closed because he "wasn't able to determine one way or the other the information that was provided."

¶17 Beeler attempted to elicit testimony that Beck had learned—through a crisis counselor's conversation with another officer—that D.A. "relayed that she had not, in fact, been sexually assaulted." Although the trial court denied Beeler's motion to admit Beck's supplemental police report, which included D.A.'s relayed statement, it allowed Beck to testify he had learned from the other officer that D.A. "said she was not sexually assaulted" for the limited purpose of the statement's "effect on the hearer," specifically, how it had impacted the detective's investigation. At the end of the hearing, Beeler argued this testimony constituted "reliable hearsay" establishing D.A. had denied her original allegations of sexual assault.

¶18 With respect to the second prior false allegation, Simmons testified that in April 2019, a resident of the group home she managed had reported to a staff member, who then reported to Simmons, that D.A. stated she had been "inappropriately touched" by another resident. The reporting resident was not present during the alleged incident. When Simmons questioned D.A. and the resident who had allegedly touched her, both denied inappropriate touching occurred. Simmons concluded "that [D.A.] had not, in fact, been inappropriately touched as she alleged" and the allegation appeared to be an attempt by D.A. "to get out of the group home."

¶19 At the conclusion of the hearing, the trial court determined that Beeler had not met his burden of proving D.A.'s prior allegations were false by "clear and convincing evidence." The court explained the evidence Beeler had presented was "chock-full of hearsay," continuing,

> And while [Beeler] say[s] that some of this is reliable because it's a police report, it is like triple hearsay and I don't find it very reliable. Even if it was, it still doesn't meet the clear and convincing standard.
>
> The allegation that [D.A.] was raped by an unnamed boy at school was never proven to be false. There's plenty of—of evidence, I think, that needed to support the allegation that that was patently false.
>
> The group home, again, we're dealing with hearsay that . . . [a resident] then tells another staff member, which is another layer of hearsay. That staff member then reports to Ms.

> Simmons, another layer of hearsay. And Ms. Simmons then talks to both [D.A.] and the other girl, and they both said nothing happened. This is not clear and convincing. The motion to admit this into the substantive trial is denied.

¶20 Beeler does not argue in his opening brief that the trial court abused its discretion in concluding he had not proven the allegations false by clear and convincing evidence. *See State v. Larson*, 222 Ariz. 341, ¶ 23 (App. 2009) (arguments not raised in opening brief deemed waived). Instead, he asserts that based on the lack of "physical evidence of sexual abuse," D.A.'s credibility "was immensely important to a determination of guilt, and the inability of the defense to present the information that clearly bore on the question of [D.A.]'s credibility was hugely unfairly prejudicial." In any event, we conclude the court did not err in precluding evidence of D.A.'s purported false allegations on the basis of insufficient evidence.

¶21 The record supports the trial court's reasoning that Beeler failed to prove by clear and convincing evidence that D.A. had previously made false accusations of sexual misconduct. Evidence is clear and convincing if it makes the thing to be proved "highly probable." *State v. King*, 158 Ariz. 419, 424 (1988) (quoting *In re Neville*, 147 Ariz. 106, 111 (1985)). Given the layers of hearsay in both assertedly false allegations, the evidence offered concerning those allegations does not, as a matter of law, rise to the level of clear and convincing. Thus, the court did not abuse its discretion in concluding Beeler had failed to meet his burden. *See Gilfillan*, 196 Ariz. 396, ¶ 29. Accordingly, the court's exclusion of Beeler's proffered evidence pursuant to § 13-1421 did not deprive him of his constitutional right to present a complete defense. *See id.* ¶ 33; *State v. Davis*, 205 Ariz. 174, ¶ 33 (App. 2002), *as amended* (Apr. 23, 2003) ("[A] defendant's constitutional rights are not violated where, as here, evidence has been properly excluded.").

Witness Testimony

¶22 Beeler argues the trial court committed reversible error by admitting certain witness testimony. We generally review a court's decision as to admissibility of such evidence for an abuse of discretion. *See State v. Carlos*, 199 Ariz. 273, ¶ 10 (App. 2001). However, as noted, we review de novo evidentiary rulings that implicate constitutional issues, including those involving the Confrontation Clause. *See Guarino*, 238 Ariz. 437, ¶ 5; *State v. Ellison*, 213 Ariz. 116, ¶ 42 (2006).

Nelson's Testimony

¶23 Beeler argues the trial court abused its discretion in admitting testimony by pediatric nurse practitioner Cynthia Nelson concerning the "incident history" a detective had provided to her before her forensic examination of D.A. He contends the testimony constituted inadmissible, prejudicial hearsay and its admission deprived him of his Sixth Amendment right to confront the witnesses against him. *See* U.S. Const. amend. VI. Because Beeler did not object to the testimony, he must establish that its admission constituted fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). To establish fundamental error, Beeler 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 id.* ¶ 21. Under the first two definitions, he must also show prejudice. *See id.* This requires Beeler to establish that "without the error, a reasonable jury could have plausibly and intelligently returned a different verdict." *Id.* ¶ 31. If Beeler establishes error so egregious he could not have received a fair trial, however, he has necessarily shown prejudice and must receive a new trial. *See id.* ¶ 21.

¶24 Hearsay is an out-of-court statement offered "in evidence to prove the truth of the matter asserted," Ariz. R. Evid. 801(c), and is inadmissible unless it falls within an exception to the hearsay rule, Ariz. R. Evid. 802. "The Confrontation Clause prohibits the admission of testimonial hearsay unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination." *State v. Forde*, 233 Ariz. 543, ¶ 80 (2014); *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

¶25 At trial, the state called Nelson to testify about her forensic examination of D.A. When asked if she had been provided information as to why such an examination was requested, Nelson testified a detective had given her the "incident history." She continued,

> The history I was provided—[D.A.] had had a forensic interview in Pinal County at one of the advocacy centers, and—that same day. And then she had been transported to Childhelp, which is where my office was in Phoenix, that evening. And the history was that [D.A.] . . . had made some type of a disclosure that had prompted a referral from the school. And so she had been taken from school that day and interviewed. And she had disclosed some

> digital-vaginal penetration contact by her stepfather.

Nelson subsequently testified as follows:

> When I got the incident history from the detective, he said that . . . he had listened to [D.A.'s] forensic interview. I was not at the center where that occurred. He said that she had said that it had hurt to—when she urinated or peed a few times after these incidents.

¶26 Beeler argues the trial court fundamentally erred in admitting this testimony because it "was not only hearsay," but "double hearsay from a detective about what was reported to him by someone else and then reported to the nurse who was stating it in trial." He contends this testimony was "unfairly prejudicial as there was no proper purpose to the evidence being asserted by" Nelson. Further, Beeler argues that because "[t]he evidence of guilt was slight," "[t]hese improper admissions could well have tipped the balance in favor of a guilty verdict that otherwise would not have been obtained."

¶27 Even assuming without deciding admission of the challenged testimony constituted fundamental error, any such error is not reversible because Beeler fails to show he was prejudiced. *See Escalante*, 245 Ariz. 135, ¶ 21. The improper admission of evidence is not prejudicial when the evidence is "entirely cumulative." *State v. Williams*, 133 Ariz. 220, 226 (1982). "[E]vidence is cumulative . . . when it 'supports a fact otherwise established by existing evidence,' meaning that it was 'superfluous and could not have affected the verdict.'" *State v. Copeland*, 253 Ariz. 104, ¶ 27 (App. 2022) (quoting *State v. Bass*, 198 Ariz. 571, ¶ 40 (2000)).

¶28 Here, D.A. testified on direct examination that Beeler had put "his finger in [her] vagina" on two occasions. Additionally, Nelson, whose duties included performing a comprehensive physical examination of D.A., testified that D.A. had explained to her that it "hurt to pee for a few times after the incidents, but it didn't hurt to pee the day [Nelson] saw her, that she no longer had discomfort." *See* Ariz. R. Evid. 803(4) (providing exception to rule against hearsay for statements made for medical diagnosis or treatment). Nelson's testimony recounting the history the detective provided to her was therefore cumulative to D.A.'s own testimony as to Beeler's conduct, as well as Nelson's testimony concerning what D.A. had told her during the examination, neither of which Beeler challenges on

appeal. *See Copeland*, 253 Ariz. 104, ¶ 27; *State v. Bolton*, 182 Ariz. 290, 298 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim."). Thus, we conclude Beeler has failed to establish he was prejudiced by the admission of Nelson's testimony repeating the detective's report. *See Escalante*, 245 Ariz. 135, ¶ 21.

¶29 Beeler further asserts he was prevented from challenging at trial "the hearsay testimony being presented by someone other than the original speaker, not the nurse, and not the detective, but whoever reported it to the detective," in violation of the Confrontation Clause. The Confrontation Clause does not bar testimonial hearsay when the declarant appears at trial and is subject to cross-examination. *Crawford*, 541 U.S. at 59 n.9 ("[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."). Thus, to the extent Beeler is arguing that he was prevented from confronting the "original speaker," we disagree. The original declarant was D.A., who testified at trial and was subject to cross-examination by Beeler.

¶30 And, to the extent Beeler argues admission of Nelson's testimony violated his rights under the Confrontation Clause because he was unable to cross-examine the detective who had relayed the incident history to her, he fails to sufficiently develop this argument. *See State v. Vargas*, 249 Ariz. 186, ¶ 22 (2020) ("if the appellant fails to properly develop an argument, the court may consider it abandoned and waived"). Further, as discussed above, the testimony was cumulative, and Beeler therefore fails to establish he was prejudiced as required for a showing of fundamental error. *See Escalante*, 245 Ariz. 135, ¶ 21; *Copeland*, 253 Ariz. 104, ¶ 27.

D.A.'s Testimony Regarding Effects of Sexual Abuse

¶31 Additionally, Beeler argues the "trial court committed reversible error when it allowed irrelevant, prejudicial evidence of the . . . decline in the quality of D.A.'s life" after the charged acts of sexual conduct had occurred "to be introduced as evidence of D.A.'s veracity." A trial court has broad discretion in determining the admissibility of evidence. *State v. Harrison*, 195 Ariz. 28, ¶ 21 (App. 1998). Because Beeler objected at trial to D.A.'s testimony regarding the effects of the sexual acts on her life, we review for harmless error. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005). The state must establish any error was harmless by proving beyond a reasonable doubt that the error "did not contribute to or affect the verdict

or sentence." *Id.*; *see also Copeland*, 253 Ariz. 104, ¶ 27 (error harmless when evidence of guilt is overwhelming or evidence is cumulative).

¶32 At trial, the state asked D.A. how her "life ha[d] changed since . . . these incidents with [Beeler] happened" in March 2017. Beeler objected on relevance grounds, and the court overruled his objection. D.A. subsequently testified that as a result of the incidents, she has issues "getting close to people," has "social anxiety," gets "scared being around a lot of people," and has "made attempts to kill [her]self and harm [her]self."

¶33 On appeal, Beeler argues D.A.'s "weak," "uncorroborated," and "irrelevant" testimony that her "life had gotten worse tends to elicit sympathy" and was "solely intended to bring out highly prejudicial evidence because D.A.'s life had become, in fact, horrible." Thus, he contends, it "cannot be said beyond a reasonable doubt that sympathy for D.A." did not "tip[] the verdict." The state responds that the evidence was relevant "[b]ased on Beeler's defense that [D.A.] fabricated the sexual abuse allegations in an attempt to live with her father . . . [and] because it addresses an issue in dispute," specifically, "whether her allegations are maliciously false." In reply, Beeler asserts the testimony was not "relevant to [D.A.'s] veracity" because she "made the accusations before experiencing the consequences."

¶34 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.

¶35 D.A.'s testimony about the effect of Beeler's actions satisfied the forgiving definition of relevance contained in Rule 401. *See State v. Roque*, 213 Ariz. 193, ¶ 109 (2006) ("The threshold for relevance is a low one . . . ."), *abrogated on other grounds by State v. Escalante-Orozco*, 241 Ariz. 254, ¶ 15 (2017). Further, even were we to conclude the trial court erred in admitting the challenged testimony, any such error is harmless. *See Henderson*, 210 Ariz. 561, ¶ 18.

¶36 D.A.'s mother testified as a defense witness at trial. During her testimony, she explained D.A.'s "life [has been] significantly worse since these allegations came out." Specifically, she testified that D.A.'s

mental health had "declined significantly" and that D.A. had attempted suicide and been deprived of "stable" living and educational environments. Thus, D.A.'s testimony as to the quality of her life was cumulative to her mother's testimony, which Beeler does not challenge on appeal. *See Copeland*, 253 Ariz. 104, ¶ 27 (evidence cumulative when it supports fact otherwise established by existing evidence); *Bolton*, 182 Ariz. at 298. Any error was therefore harmless beyond a reasonable doubt. *See Henderson*, 210 Ariz. 561, ¶ 18.

D.A.'s Testimony Regarding "Late-Disclosed" Allegations

¶37 Beeler argues the trial court erred in allowing the state to present evidence related to "new allegations of criminal/other act conduct" disclosed after trial had commenced in violation of his right to a fair trial under both the United States and Arizona Constitutions. Specifically, he challenges admission of D.A.'s testimony regarding "new allegations of 'kissing'" in connection with the first charged instance of sexual conduct, arguing he was deprived of "notice" and "ability to defend against the allegations." Defendants have a due process right to a fundamentally fair trial, which includes the right to present a complete defense. *Trombetta*, 467 U.S. at 485; *State v. Dunbar*, 249 Ariz. 37, ¶ 25 (App. 2020).

¶38 At trial, after the state had begun examining its first witness, but before D.A. testified, it informed the court that during a meeting with D.A. the previous week, she had disclosed that Beeler "kissed her on the lips as well" as "part of the first touching in this case." The state explained it had disclosed the allegation to defense counsel, and defense counsel twice confirmed he did not object. The court stated it did not think it needed to make a finding under Rule 404(c), Ariz. R. Evid., because it did not believe the disclosed conduct constituted an "other act."

¶39 With respect to the first charged incident of sexual conduct, D.A. testified at trial that after she had laid down with Beeler to take a nap, he "started kissing [her] . . . [o]n [her] lips." D.A. explained that she had "froze[n]," fallen asleep, and "woke[n] up to [Beeler's] hand in [her] pants" with "his finger in [her] vagina." She further testified that "[a]fter he removed his hand, he licked his finger."

¶40 On appeal, Beeler argues his right to a fair trial was violated "by the State disclosing and being allowed to utilize new allegations after trial had commenced" because he "had no prior notice or ability to defend against the allegations made regarding kissing the victim after trial started." Further, he asserts "the kissing disclosure was not part of" the

previously disclosed accounts of the first incident and D.A.'s testimony "that there was also kissing that was going on in the bedroom *prior to anyone falling asleep* and *separate from the one action alleged* to have occurred after the nap" is "hugely consequential" to a defense that D.A.'s account had been the result of confusion or a dream. And he contends "it internally corroborates her otherwise questionable story regarding the one incident."

¶41 To the extent Beeler suggests that the "kissing disclosure" was not intrinsic to the first instance of charged sexual conduct, was erroneously admitted as "other act conduct" without a hearing or consideration of Rule 404(b) and (c), and should have been precluded based on the state's "late disclosure," he has failed to adequately support these claims. Any such arguments are therefore waived.[3] *See Vargas*, 249 Ariz. 186, ¶ 22; Ariz. R. Crim. P. 31.10(a)(7)(A) (argument must contain supporting reasons and citations to legal authority). Thus, Beeler fails to demonstrate error, fundamental or otherwise. *See Escalante*, 245 Ariz. 135, ¶ 21.

Propriety of Life Sentences

¶42 Beeler argues for the first time on appeal that the trial court could not impose life sentences because it failed to make specific findings in its pronouncement of the verdicts as to whether his convictions were based on "penetration or masturbatory contact." Thus, he contends, his sentences are "illegal" under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because, pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), *Apprendi* requires courts to impose sentences "solely on the basis of the facts reflected in the jury verdict." He asserts that this rule also applies to a bench trial and the court's failure to make a specific finding barred it from sentencing him based on penetration. Because Beeler failed to raise this issue below, we review only for fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 12.

¶43 Under the Sixth and Fourteenth Amendments to the United States Constitution, "[o]ther than the fact of a prior conviction, any fact that

[3]Beeler also asserts he should be permitted to raise claims of ineffective assistance of counsel on appeal without "hav[ing] to wait for PCR review" based on, among other things, his trial attorney's failure to object to these "new allegations of 'kissing.'" In his reply brief, however, Beeler withdraws this argument "to preserve all allegations of ineffective assistance of counsel for his petition for post-conviction relief, should one be necessary."

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476 & 490; *see also* U.S. Const. amend. VI; U.S. Const. amend. XIV, § 1. "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict*," unless the defendant admitted the facts. *Blakely*, 542 U.S. at 303.

¶44 "A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age." A.R.S. § 13-1405(A). "Sexual intercourse" is defined as "penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva." A.R.S. § 13-1401(A)(4).

¶45 Section 13-705, A.R.S., provides enhanced sentences for dangerous crimes against children, including sexual conduct with a minor. Under the version of § 13-705 in effect at the time of Beeler's offenses, subsection (A) required that an adult defendant who is convicted of first-degree sexual conduct with a minor twelve years old or younger be sentenced to life imprisonment. 2014 Ariz. Sess. Laws, ch. 224, § 2. This subsection "d[id] not apply to masturbatory contact." *Id.* If a sexual conduct conviction was based on masturbatory contact with a minor under twelve years old, § 13-705(B) provided the trial court discretion to impose either a life sentence or a more lenient sentence. In contrast, if the sexual conduct was based on masturbatory contact with a victim who was twelve years of age, § 13-705(C) provided only for a more lenient sentence than life imprisonment. 2014 Ariz. Sess. Laws, ch. 224, § 2.

¶46 Beeler was charged with two counts of sexual conduct with a minor under fifteen years old in violation of §§ 13-1405, 13-1401, and 13-705. The indictment included a "to wit" description of the conduct alleged—"digital penetration in bedroom" and "digital penetration on couch." During the bench trial, evidence was presented to prove each count. The trial court found Beeler guilty but did not recite, either in its oral pronouncement of the verdicts or the related minute entry, the "to wit" descriptions specifying the "digital penetration" expressly contained in Beeler's indictment.[4] The court further found D.A. had been ten years old at the time of both offenses.

[4]Although Beeler asserts in his supplemental opening brief that the transcript of the hearing in which the court announced its verdicts "did not

¶47 At the sentencing hearing, the trial court initially noted it had "very little discretion of what sentence to impose in this case because of those special finding[s] of 12 or younger." The state subsequently argued, "The court is bound to impose two consecutive life sentences a[n]d the state request[s] that the court follow the law in this case and impose that sentence." Defense counsel stated she "underst[oo]d what the mandatory sentences are in this case" and that mitigation was not at issue based on the court's sentencing obligations under the law. The court sentenced Beeler to consecutive life sentences for the two counts of sexual conduct with a minor.

¶48 In support of his argument on appeal that in order to impose life sentences, the trial court, in its pronouncement of the verdicts, was required to make "a specific finding whether the sexual intercourse consisted of penetration or masturbatory contact," Beeler relies on *State v. Munoz*, No. 2 CA-CR 2018-0309 (Ariz. App. Aug. 21, 2020) (mem. decision). This case is distinguishable. In *Munoz*, an unpublished memorandum decision,[5] we applied the same version of § 13-705 applicable in this case and concluded the trial court had fundamentally erred in sentencing the defendant under subsection (A) instead of (C) because evidence of both penetrative and masturbatory contact of a twelve-year-old victim was presented at trial and the indictment, jury instructions, and verdict forms all failed to specify the sexual contact alleged, describing it only as "sexual intercourse or oral sexual contact." No. 2 CA-CR 2018-0309, ¶¶ 2, 14, 19 & 15.

¶49 Beeler fails to identify any evidence in the record indicating the sexual contact at issue was masturbatory rather than penetrative. Indeed, D.A. repeatedly testified Beeler had placed his finger "inside of [her] vagina." Unlike in *Munoz*, the contact here "is unquestionably identified in the trial court's verdict" because Beeler's indictment stated that each count was based on a separate incident of digital penetration. Further, even if evidence of masturbatory contact had been presented in this case, because D.A. was ten years old at the time of the charged incidents, the statutory maximum is a life sentence under § 13-705(B), and there was no

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make it into the record on appeal, although it was apparently designated," the transcript was subsequently added to the appellate record.

[5]*Munoz* was issued after January 1, 2015, and therefore it can be cited "for persuasive value" if "no opinion adequately addresses the issue before the court." *See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

error under *Apprendi*. *See* 2014 Ariz. Sess. Laws, ch. 224, § 2; *Apprendi*, 530 U.S. at 490. The court did not err in sentencing Beeler to consecutive terms of life imprisonment under § 13-705.

Prosecutorial Misconduct

¶50 Beeler argues the state "engaged in multiple acts of prosecutorial misconduct sufficient to rise to the level of a due process violation and require reversal due to the fundamentally unfair convictions that occurred as a result." "The term 'prosecutorial misconduct' broadly encompasses any conduct that infringes a defendant's constitutional rights. It sweeps in prosecutorial conduct ranging from inadvertent error or innocent mistake to intentional misconduct." *In re Martinez*, 248 Ariz. 458, ¶ 45 (2020). While it makes no difference to our analysis, prosecutorial error—rather than prosecutorial misconduct—is the correct terminology when there is no ethical rule violation. *See State v. Murray*, 250 Ariz. 543, ¶ 12 (2021).

¶51 "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Objected-to prosecutorial error is reversible only if the defendant establishes that "(1) misconduct exists and (2) 'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Morris*, 215 Ariz. 324, ¶¶ 46 & 47 (2007) (quoting *State v. Anderson*, 210 Ariz. 327, ¶ 45 (2005)); *Murray*, 250 Ariz. 543, ¶ 13. Because Beeler failed to object to any of the following alleged acts of prosecutorial misconduct on that basis, we review only for fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶¶ 12, 21, 31; *State v. Hulsey*, 243 Ariz. 367, ¶ 88 (2018); *see also Murray*, 250 Ariz. 543, ¶ 16 ("Critically, *Escalante*'s prejudice prong is difficult to satisfy and is a higher burden to overcome than in the inquiry conducted for objected-to prosecutorial misconduct." (citation omitted)). To the extent Beeler contends the state's conduct amounts to cumulative error, we first review each individual claim of prosecutorial error for fundamental error. *See Hulsey*, 243 Ariz. 367, ¶ 88. We then assess whether the total impact of any errors rendered the trial unfair. *See id.*

Baumgarth's Testimony

¶52 Beeler argues the state committed misconduct by eliciting testimony from a nurse practitioner, Julie Baumgarth, intended to impeach

Nelson's testimony and to discredit anticipated defense expert testimony. He contends the state used the testimony to "unfairly attack physicians who have 'much different training' and who 'do not have forensic training specifically looking at genitals, specifically for injury associated with sexual abuse.'"

¶53 Before Baumgarth's testimony, Nelson testified she had conducted a forensic examination of D.A. during which she noticed a small area of "discrete focal redness" near the "right lower side" of D.A.'s hymen. She explained that a "normal variant" such as a birthmark or an "irritation" resulting from friction, poor hygiene, or heat could have been the cause of the redness. She further testified that it is "common to see diffuse redness" in which "the whole area is red" and that such redness is "more . . . hygiene or heat related." But the focal redness she observed during her examination of D.A. "made more of an impression on [her] because it was one specific area." However, she could not "validate or negate th[e] possibility" that the reported sexual abuse had occurred based solely on the focal redness. Accordingly, she asked D.A. to come back one month later so she could determine if the focal redness was a "normal variant" for D.A. She also testified that in the majority of child sexual abuse cases, the forensic examinations are "completely normal and there are no findings." Additionally, Nelson explained that based on relevant literature and research, an injury is not always present "when there is a disclosure of penetration."

¶54 Four days after Nelson's examination, Baumgarth conducted an additional examination. At trial, Baumgarth testified she "had been told that [she] was seeing [D.A.] as a repeat exam. [D.A.] had been seen by one of [her] coworkers. And because [D.A.] was going to be leaving town, they asked [Baumgarth] to do a follow-up exam." Baumgarth testified she had noted only "diffuse redness" that was "very nonspecific," and therefore she could not conclude the redness "mean[t] that something happened." She testified that redness can occur for a variety of reasons but that diffuse redness is "more related to hygiene or infection and/or irritation." Baumgarth noted that a "focal redness," which is less common, "is more significant to [her]." She further testified that based on her experience and relevant literature, it is "very rare" to find injury in young children during a forensic examination and "a lack of injury does not mean nothing happened." In response to Beeler's specific questioning on the position of John McCann, a "leading authorit[y] in this field" whose work was later relied on by Beeler's expert witness, that "redness is not indicative of sexual trauma," she testified, "I believe that's what he feels." In response to

Beeler's next question as to whether that is a widely accepted opinion, she testified, "I think redness is always considered . . . nonspecific."

¶55 Beeler argues the state's "sole purpose" in requesting a second physical examination "a few short days" after Nelson's initial examination was ultimately to impeach her testimony at trial as to the "meaning of diffuse redness." He contends the state used Baumgarth's testimony "to impeach the findings of [Nelson] who unwittingly was in agreement with the defense expert" that "redness is not . . . a specific indicator of sexual abuse."

¶56 As Beeler acknowledges on reply, he failed to provide legal authority to support his argument in his opening brief. We could therefore consider it waived. *See Larson*, 222 Ariz. 341, ¶ 23. In any event, Beeler's assertions are not supported by the record. First, Baumgarth's testimony did not impeach Nelson's testimony.[6] Instead, both she and Nelson testified that focal and diffuse redness can occur for various reasons but that focal redness is less common and therefore more significant. Further, both Baumgarth and Nelson testified that, based on their experience as well as pertinent literature, a lack of injury is not dispositive—rather, it is common for there to be no injury in cases of sexual abuse. Finally, Baumgarth's testimony did not contradict expert literature on this topic. Indeed, she appeared to agree with McCann's position that redness is not a specific indicator of sexual trauma. And Beeler points to no evidence establishing the state specifically selected Baumgarth to perform the second examination. No error, fundamental or otherwise, occurred. *See Hulsey*, 243 Ariz. 367, ¶ 88.

¶57 Beeler also asserts the state committed misconduct by re-asking Baumgarth a question as to which the trial court had previously sustained an objection. The state initially asked Baumgarth whether, "at least in the Phoenix area, or the Arizona community," there is a "belief in the medical environment that a nurse practitioner, such as [he]rself, is better trained and equipped to treat and examine a victim of sexual abuse." Beeler objected, arguing the state's question "[c]all[ed] for speculation," and the court sustained the objection.

¶58 The state later asked Baumgarth, "[I]n your training and experience, who is better capable of treating a victim of sexual abuse:

[6]During his closing argument, Beeler asserted that Baumgarth had testified to "much of the same" information as Nelson.

someone with your training, or a gynecologist who's never done a forensic medical examination?" She responded, "Well, I think that the forensic person's most qualified to deal with that scenario." The state then asked her whether, to her knowledge, gynecologists in Phoenix "have that special training beyond what [she has] to treat them." At that point, Beeler objected, again arguing the question called for speculation, and the trial court sustained the objection. Beeler argues he was unable to object to the state's question regarding whether forensic examiners or gynecologists are "better capable" of treating victims of sexual abuse before the state elicited the "answer [it] was seeking in the first place."

¶59 Beeler appears to rely on *Pool v. Superior Court*, 139 Ariz. 98 (1984), to support his argument that "re-asking a question after proper objections are sustained" amounts to prosecutorial misconduct.[7] Unlike the situation in *Pool*, however, the record does not support a claim that the state's conduct was so "egregiously improper" that we must conclude the prosecutor knew it was improper and was indifferent to whether it prejudiced Beeler. *Id.* at 109. In contrast to *Pool*, the state here did not immediately repeat questions after an objection had been sustained. *See id.* at 102. Moreover, the state modified its subsequent question, asking Baumgarth about her own belief rather than the belief of the Arizona medical community. Beeler fails to establish the state committed prosecutorial error on this basis. *See Hulsey*, 243 Ariz. 367, ¶ 88.

Cold-Expert Testimony

¶60 Beeler also argues the state committed misconduct by questioning its cold expert—forensic interviewer Amy Heil—about the "'common' types of disclosures and the rarity of false allegations by children." Heil testified she had not "been told anything about the facts of th[e] case" and would "provide testimony on general characteristics of child sexual abuse." The state elicited testimony from Heil that there are two main categories of false allegations: erroneous false allegations and malicious false allegations. Heil explained that erroneous false allegations are more common than malicious false allegations, which often occur in

[7]To the extent Beeler contends the state committed misconduct by asking Baumgarth if she would agree with a "professional['s], doctor['s], [or] nurse['s]" statement that "in digital penetration of a ten-year-old girl's vagina[,] . . . you would expect to see tearing, bleeding, lacerations, [and] bruising" he fails to meaningfully develop any such argument in his opening brief. *See Vargas*, 249 Ariz. 186, ¶ 22.

situations involving high-conflict divorce or adolescent girls "trying to change their living situation." In response to Beeler's question about the frequency of malicious false allegations when a child wants to live with another parent, Heil confirmed this is "one of the more common scenarios for" malicious false allegations. But in response to the state's questioning during redirect, she testified that "[f]alse allegations, in general, are fairly uncommon, in general, in sexual abuse." At the conclusion of Heil's testimony, the trial court stated that "when there's testimony from a forensic interviewer regarding the rarity of certain things happening, for instance, the malicious allegations, whether they're common or rare, it's an inappropriate question." Thus, it stated, it would not be "considering that information in determining whether the State[had] met [its] burden of proof."

¶61 Despite the trial court's decision not to consider Heil's testimony regarding the rarity of false allegations, and Beeler's acknowledgment that he therefore cannot argue he was unfairly prejudiced by such testimony, he argues the state's "problematic" questioning of Heil is "further evidence of the prosecutor's numerous instances of misconduct." We disagree. Beeler fails to show the state's elicitation of Heil's generalized testimony as to the rarity of false allegations constitutes error. *Cf. State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 30 (App. 2013) (trial court did not abuse its discretion in admitting expert's testimony on rarity of false allegations because the witness "did not state that any of the victims in th[e] case should be believed or disbelieved; rather, she testified generally about factors that may prompt a child to falsely report molestation").

¶62 Beeler also argues the "prosecutor committed misconduct when he elicited [Heil's] testimony about how sex offenders select and groom their victims" because it was an "impermissible use of cold expert testimony as sex offender profiling." Profile evidence is evidence "offered to implicitly or explicitly suggest that *because* the defendant has those characteristics, a jury should conclude that the defendant must have committed the crime charged." *State v. Haskie*, 242 Ariz. 582, ¶ 14 (2017). Profile evidence cannot be used as "substantive proof of the defendant's guilt." *Id.* ¶ 15. While "testimony about victim behavior that also describes or refers to a perpetrator's characteristics has the potential to be 'profile' evidence, it is not categorically inadmissible." *Id.* ¶ 16. And, even if an expert's "general statements refer[] to an abuser's characteristics," they are admissible when those statements "primarily serve[] the purpose of explaining victim behavior" and the probative value of the testimony outweighs any prejudice. *Id.* ¶¶ 20, 22.

¶63 At trial, Heil described the process of victimization, which includes five stages, two of which are victim selection and grooming. Regarding the victim-selection stage, she testified that "some behavioral characteristics . . . may make a child more vulnerable or at higher risk for possibly becoming the victim of sexual abuse." These characteristics include disability, introversion, low self-esteem, absent caregivers, drug or alcohol abuse in the home, mental illness within the home, unstable living situations, and previous victimization. Heil further agreed that "behavioral issues or mental health issues [could] contribute to a child's vulnerability to abuse." She then explained how the selection process may impact the victim, stating that the victim "may not recognize the abuse, or the build-up to the abuse when it starts to occur," or may have difficulty communicating about "what is occurring."

¶64 With respect to the grooming stage, Heil testified it involves "the introduction of physical contact," which can "appear very benign and neutral, and nonthreatening and nonmanipulative. So it could be things like wrestling with the child, horseplaying with the child, helping the child bathe, or use the bathroom, snuggling with the child, having the child sit on their lap, tucking the child in at night." She continued, "Sometimes during grooming the abuser will begin to introduce nudity to the child. So they may walk in on the child while the child is bathing or changing clothes." She testified grooming impacts a victim by making the "child feel like they are somehow responsible or at fault . . . because they engaged in those prior behaviors or activities."

¶65 Here, Heil did not make any comparison to the facts of the instant case, and her testimony on the victim-selection stage did not describe abusers. *See Haskie*, 242 Ariz. 582, ¶ 22. And although in her testimony concerning the grooming stage she described how an abuser might groom a child, the purpose of the state's questions was to establish the impact on the child victim, which is a proper purpose, namely that grooming results in the child victim feeling that they are at fault. *See id.* ¶¶ 16, 18. Further, Heil's testimony helped the factfinder—in this case the trial judge and not a jury—understand some of the counterintuitive characteristics of child abuse victims.[8] *See id.* ¶¶ 5, 22. No error, fundamental or otherwise, occurred. *See Hulsey*, 243 Ariz. 367, ¶ 88.

[8]For example, Heil's testimony may help explain some of D.A.'s counterintuitive behaviors Beeler claimed did not "make sense" in closing argument, including sitting in Beeler's lap before the second incident.

¶66 Beeler further contends the state engaged in misconduct by relying on Heil's sex-offender "profile evidence" in its closing argument "as substantive evidence of guilt." In closing, the state argued as follows:

> But [Beeler] does say in [his custodial] interview that he had engaged in intrusive grooming behaviors by de-pantsing [D.A.], pouring ice into the shower, by horseplaying. He did say that he did rub her butt in bed. He did say that, yes, she was sitting on his lap. But when confronted with the allegation of penetrating her vagina, his response is, "I don't think so."
>
> The Court can apply common sense, reason, to that statement and find that that is, indeed, strong evidence of guilt. He said, "I don't think so."

The state also argued "mental illness or emotional or behavioral disorders" are a "completely inappropriate consideration for this Court in terms of the credibility of the witness." Rather, it asserted, "The only relevant consideration for that evidence is going towards the victim selection. That is the only relevant consideration of that evidence for this Court."

¶67 We disagree that these statements amounted to misconduct because "[e]ach side is permitted to argue its version of the evidence to the jury," as long as the attorneys do not misstate the law and do not draw the fact finder's attention to matters it should not consider. *State v. Serna*, 163 Ariz. 260, 266 (1990); *see also State v. Goudeau*, 239 Ariz. 421, ¶ 196 (2016) (prosecutors given wide latitude in making closing arguments). *But cf. State v. Johnson*, 247 Ariz. 166, ¶ 24 (2019) (counsel cannot comment on matters not introduced into evidence). Here, the state did describe Beeler's behavior as "intrusive grooming," which was arguably an allusion to Heil's testimony. But it did so in the context of describing Beeler's custodial interview. The state was not arguing that Beeler met the profile of an abuser. Rather, it was contrasting Beeler's "I don't think so" response with his acknowledgment that he had engaged in the other conduct. It suggested that had Beeler not penetrated D.A.'s vagina, he would have more assertively denied it given that he had admitted to grooming behaviors that could raise suspicion. This was a reasonable comment on the evidence, and we find no error, fundamental or otherwise. *See Hulsey*, 243 Ariz. 367, ¶ 88.

D.A.'s Testimony Regarding Effects of Sexual Abuse

¶68 Beeler further contends the state committed prosecutorial misconduct by eliciting testimony that "D.A. has anxiety and has made several attempts on her own life." As discussed, the state asked D.A. on direct examination how her "life ha[d] changed since . . . these incidents with [Beeler] happened" in March 2017. Beeler objected on relevance grounds, and the court overruled his objection. D.A. testified she has issues "getting close to people," has "social anxiety," gets "scared being around a lot of people," and has "made attempts to kill [her]self and harm [her]self." Although Beeler objected to the state's questioning on relevance grounds, this objection was insufficient to preserve his claim of prosecutorial error. *See State v. Musgrove*, 223 Ariz. 164, ¶ 4 (App. 2009) (defendant's relevance objection did not preserve claim of prosecutorial misconduct). Thus, we review solely for fundamental, prejudicial error. *See Hulsey*, 243 Ariz. 367, ¶ 88.

¶69 Beeler relies on *State v. Bragonier*, 2 CA-CR 2020-0242 (Ariz. App. Feb. 9, 2022) (mem. decision),[9] in asserting the state "elicited testimony that this Court has suggested in similar circumstances constitutes prosecutorial misconduct." In that case we concluded that no prosecutorial error had occurred because the state did not "intentionally disregard[the] court by re-asking questions after proper objections [wer]e sustained." *Id.* ¶ 15. Here, the trial court overruled Beeler's objection to D.A.'s testimony on relevance grounds, and therefore the state did not pursue questioning in violation of the court's ruling. *See id.* Beeler fails to establish error occurred.

Late-Disclosed Allegations

¶70 Finally, Beeler argues the state's disclosure during trial of D.A.'s statement that Beeler had kissed her in connection with the first instance of sexual conduct "should also be considered" prosecutorial misconduct because the "State should have known and disclosed" this allegation "well in advance of trial considering its constant access to D.A. for the two years preceding the trial." Beeler fails to develop and support this argument with legal authority in his opening brief. *See Vargas*, 249 Ariz. 186, ¶ 22; Ariz. R. Crim. P. 31.10(a)(7)(A) (opening brief must contain

[9]*Bragonier* was issued after January 1, 2015, and therefore it can be cited "for persuasive value" if "no opinion adequately addresses the issue before the court." Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

argument with supporting reasons and citations to legal authority). We therefore consider it waived.[10] Because we conclude Beeler failed to establish any instances of prosecutorial error or misconduct, we need not address his argument regarding cumulative error. *See State v. Smith*, 250 Ariz. 69, ¶ 146 (2020).

Disposition

¶71 For the foregoing reasons, we affirm Beeler's convictions and sentences.

[10]To the extent Beeler also suggests the state committed prosecutorial error by eliciting testimony from Nelson regarding the history the detective had given her, Beeler waives any such argument by failing to develop and support it with legal authority. *See Vargas*, 249 Ariz. 186, ¶ 22; Ariz. R. Crim. P. 31.10(a)(7)(A). And, Beeler waives any argument that the state erred in attempting to discredit a physician testifying as an expert witness for the defense by referring to a "medical malpractice case"; he fails to raise it in either of his opening briefs on appeal. *See Larson*, 222 Ariz. 341, ¶ 23.