

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2007-0341
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
TYRONE JAMES KESSLER,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052694

Honorable Deborah Bernini, Judge

AFFIRMED

Barton & Storts, P.C.
By Brick P. Storts, III

Tucson
Attorneys for Appellant

V Á S Q U E Z, Judge.

¶1 Following a jury trial, Tyrone Kessler was convicted of first-degree murder. The trial court sentenced him to life in prison with the possibility of release after twenty-five years. Kessler appealed. We affirm.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing he has reviewed the entire record and found “no arguable question of law” to raise on appeal. He notes several issues, however, that he describes as “either harmless error or contrary to established case law” that he concludes do not warrant reversal. Kessler has filed a supplemental brief in which he raises various evidentiary issues, claims he was deprived of his right to testify in his own defense by the trial court’s pretrial rulings, and asserts several instances of prosecutorial misconduct. He also appears to contend the evidence against him was insufficient to support the jury’s guilty verdict.¹

¶3 Viewed in the light most favorable to upholding the jury’s verdict, *see State v. Newnom*, 208 Ariz. 507, ¶ 2, 95 P.3d 950, 950 (App. 2004), the evidence at trial established the victim had moved into the condominium next door to Kessler on Memorial Day weekend 1987. She was found beaten, gagged, and strangled to death in her bedroom the following Wednesday, the victim of an apparent sexual assault. Ligature marks appeared on both her neck and wrists. Kessler’s deoxyribonucleic acid (DNA) matched that found in semen on the victim’s nightgown, a blanket, and the mattress pad in her bedroom. His DNA profile also matched that of numerous hairs found at the scene, and his fingerprints were found on a bannister in the victim’s home. Despite counsel’s suggestion that Kessler and the victim had engaged in consensual sex before the murder, there was no evidence that showed

¹Kessler also alleges he received ineffective assistance from his trial counsel. Claims of ineffective assistance of counsel, however, may be raised only in a petition for post-conviction relief under Rule 32, Ariz. R. Crim. P., and will not be addressed on direct appeal. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

Kessler and the victim had even known each other. The evidence was more than sufficient to sustain the jury's guilty verdict based on a theory of either premeditated or felony murder.² See A.R.S. § 13-1105(A)(1), (2) (defining first-degree murder as intentionally or knowingly causing death of another with premeditation or in course of committing sexual assault or kidnapping); see also *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) ("Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction."), quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976).

¶4 None of the evidentiary issues Kessler raises relates to the accuracy of the DNA testing. He claims, however, the testimony that he could not be excluded as the donor of certain DNA samples other than those mentioned above was "extremely prejudicial."³ He also contends the trial court erred in granting the state's motion in limine to exclude statements he had made to detectives in 2005, in denying his motion to preclude evidence of other acts, and in ruling the state would be allowed to rebut character evidence of nonviolence and introduce evidence of Kessler's reputation for untruthfulness should he testify. And he contends detectives improperly opined or implied that the cord of a vacuum cleaner found at the scene could have caused the ligature marks on the victim's neck.

²The verdict form shows that all twelve jurors found Kessler guilty under both theories.

³Kessler appears to believe this testimony related to testing of vaginal, oral, and anal swabs, from which no DNA was obtained. The testimony he cites in support of his argument, however, refers to samples obtained from a hand towel and washcloth found in the victim's bathtub that did contain DNA.

¶5 The prosecutor, however, did not present any of the evidence covered in Kessler’s motion to preclude. And Kessler waived any challenge to the trial court’s in limine rulings regarding the admissibility of impeachment evidence by failing to testify at trial. *See State v. Smyers*, 207 Ariz. 314, ¶¶ 12-15, 86 P.3d 370, 373-74 (2004) (holding nontestifying defendant waives any challenge to trial court’s pretrial ruling admitting impeachment evidence). Kessler contends the court’s rulings affected his decision not to testify and thus essentially deprived him of his right to testify in his own defense. But our supreme court rejected the viability of such a claim in *Smyers*, thus we do not address it here. *See id.*

¶6 Assuming for purposes of this appeal that Kessler preserved the remainder of his evidentiary claims by objecting in the trial court,⁴ we find no cause for reversal because, even assuming the trial court abused its discretion in admitting or excluding the evidence, any error was harmless beyond a reasonable doubt. *See State v. Armstrong*, 218 Ariz. 451, ¶ 20, 189 P.3d 378, 385 (2008) (reviewing evidentiary rulings under harmless error standard); *State v. Krone*, 182 Ariz. 319, 321, 897 P.2d 621, 623 (1995) (“For error to be harmless, and therefore not prejudicial, we must be able to say ‘beyond a reasonable doubt, that the error did not contribute to or affect the verdict.’”), *quoting State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). Testimony that Kessler could not be excluded as the donor of DNA in some samples taken from the scene was not prejudicial in light of the evidence that other samples clearly matched Kessler’s DNA. Moreover, Kessler did not contest his presence in the victim’s home. He suggested rather that he had consensual

⁴Kessler’s claims are often unclear and therefore difficult to parse to determine whether specific objections were made to all testimony he complains about on appeal.

intercourse with the victim before someone else killed her. Evidence about the possible cause of the victim's ligature marks did not affect Kessler's defense. And the state did not introduce any of the character or other-act evidence covered by the court's in limine rulings. Further, given the evidence presented at trial, we easily can say that the introduction of Kessler's statements to police, in which he apparently claimed variously that he did not know the victim and that he and the victim had been having a sexual affair, would not have affected the jury's verdict.⁵

¶7 Kessler claims there were various instances of prosecutorial misconduct. He asserts the prosecutor proffered false or misleading testimony, attempted to capitalize on lost evidence, and unfairly attacked the claims and veracity of his alibi witness. "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, 969 P.2d 1184, 1191 (1998), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Further, because Kessler failed to object below, he must demonstrate the alleged misconduct resulted in fundamental, prejudicial error. See *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); see also *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990) ("failure to object to comment in closing argument constitutes waiver of the right to review unless the comment

⁵Kessler contends the prosecutor alluded to Kessler's statements in opening argument, which he argues triggered the additional ruling that, if the state were to introduce any portion of the statements, the balance of them would be admissible. Kessler's counsel, however, did not thereafter attempt or move to admit the statements, as the ruling, in fact, allowed. To the extent Kessler contends he should have, as we noted above, issues of ineffective assistance of counsel cannot be raised on direct appeal.

amounts to fundamental error”). Kessler has failed to demonstrate misconduct, let alone misconduct that could be characterized as fundamental error. His claims that the prosecutor proffered false and misleading testimony are completely unfounded, and we find no misconduct in the prosecutor’s cross-examination of Kessler’s witnesses. Moreover, the state conceded some items of potential evidentiary value had been lost. In accordance with *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), the trial court had instructed the jury it was entitled to “draw an inference unfavorable to the State” if it found “the State, including the office of the Medical Examiner, the University Medical Center, or the Pima County Sheriff’s Department ha[d] lost, destroyed or failed to preserve evidence whose contents or quality are material to the issues of this case.”

¶8 Pursuant to our obligation under *Anders*, we have reviewed the record for fundamental, prejudicial error. Finding no error that can be so characterized, we affirm Kessler’s conviction and sentence.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge