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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESSE FLORES MORENO, Appellant.	2 CA-CR 2008-0096 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070158

Honorable Richard S. Fields, Judge

AFFIRMED

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P E L A N D E R, Judge.

¶1 After a jury trial, appellant Jesse Moreno was convicted of four counts of burglary; two counts each of aggravated assault, sexual abuse, and sexual assault; and

one count each of kidnapping and attempted armed robbery. The trial court imposed a combination of presumptive and aggravated, concurrent and consecutive sentences totaling 30.5 years' imprisonment. On appeal, Moreno raises multiple issues, none of which merits reversal. Accordingly, we affirm.

Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). One evening in December 2006, the victim, C., went into a drugstore. When she returned to her vehicle, a man later identified as Moreno was in the backseat. He held a gun to her head and threatened to kill her. Moreno blindfolded C., kissed her, fondled her, and forced her to perform oral sex on him. He then demanded $100 from her, and C. told him she had money at her home. She drove Moreno to her residence, where he took $100 from a box containing approximately $400, telling her he would not take it all because she needed the rest to live on. He then fondled her again before ordering her to drive him back to where he had parked his car. After Moreno left her car, C. stopped a Tucson police officer and reported the incident.

¶3 The next night, C. went to her mother's home for dinner. Afterward, C.'s mother, driving her own car, accompanied C. when she returned home. When C. pulled into her carport and got out of her car, Moreno approached and demanded her car keys, threatening her with a meat cleaver. C.'s mother had parked behind C.'s car and thus blocked Moreno from escaping in it. C. called 911, and Moreno ran away. A Tucson

police officer responded to C.'s call and found Moreno nearby, carrying two bags that contained items of C.'s property.

Discussion

I. Victim's mental health evidence

¶4 In several related arguments, Moreno contends he was "denied his constitutional right to present a defense when the trial court erroneously prevented him from investigating and presenting evidence of [C.'s] mental health and character trait of impulsivity." "[A] court's determination of the relevance and admissibility of the evidence will not be disturbed on appeal absent a clear abuse of the court's discretion." *State v. Gilfillan*, 196 Ariz. 396, ¶ 29, 998 P.2d 1069, 1078 (App. 2000).

¶5 The state disclosed C.'s mental health records below for the trial court to inspect in-camera. After its inspection, the court held a status conference to discuss the records. Although noting he did not "know what's exactly in the records," Moreno's counsel expressed an interest in "anything go[ing] to [C.'s] veracity because of her mental illness or anything about delusions or anything like that." The court ordered the records sealed, stating, "[T]here is nothing in the records that would be relevant to the capability of the victim to relate or perceive."

¶6 After the conference, Moreno moved the trial court to reconsider its ruling, arguing the court had stated C. had "a history of bipolar disorder and schizophrenia" and such a diagnosis "necessarily requires that [C.] must have reported delusions at some point." The court denied the motion. Thereafter, the state moved to preclude any

evidence of C.'s mental health diagnosis or treatment. Citing *Brady v. Maryland*, 373 U.S. 83 (1963), Moreno then moved to compel disclosure of C.'s mental health records, including a second set of documents that had apparently been provided to the court after the first set. The court ordered the state to disclose a portion of C.'s mental health records to the defense.

¶7 The trial court later granted the state's motion to preclude in part. It allowed "limited cross-examination about the diagnosis and medications the alleged victim has regarding being bi-polar," expert testimony about the "symptoms of bi-polar" disorder, and questioning about whether C. "consistently or properly uses her prescribed medications." The court ruled any other evidence about C.'s mental health history was either too uncertain and remote in time to be relevant or was barred by *Pope v. Superior Court*, 113 Ariz. 22, 545 P.2d 946 (1976).

A. Rape shield law and admissibility of mental health evidence

¶8 Moreno first asserts that he "sought to introduce evidence of [C.'s] character traits and her ability to perceive, not her sexual history," and argues that "this type of evidence is not governed by *Pope*" or by Arizona's rape shield law, A.R.S. § 13-1421. He maintains this character evidence, including alleged evidence of hallucinations and delusions, is admissible under Rule 404(a), Ariz. R. Evid. The rule provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." But it provides an exception for "[e]vidence of a pertinent trait of character of the victim of the crime

offered by an accused." Ariz. R. Evid. 404(a)(2). "Behavior that results from a mental illness when appropriate medication is not taken would qualify as 'a pertinent trait of character offered by the accused,' and thus [be] admissible pursuant to Arizona Rules of Evidence 404(a)(2)." *State v. Connor*, 215 Ariz. 553, n.4, 161 P.3d 596, 603 n.4 (App. 2007).

¶9 Such evidence, however, must be relevant, *see* Ariz. R. Evid. 402, and its probative value must not be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ariz. R. Evid. 403. The trial court found that any evidence of hallucinations or delusions was too remote in time to be relevant. After reviewing C.'s mental health records, we cannot say the court abused its discretion in reaching that conclusion. *See Gilfillan*, 196 Ariz. 396, ¶ 29, 998 P.2d at 1078. There is no medical evidence C. had suffered any such symptoms within years of the incidents in question. Additionally, the trial court ruled Moreno could call an expert to testify about the symptoms of bipolar disorder. It also allowed Moreno to cross-examine C. "about whether or not she consistently or properly uses those medications" and whether her mental health problems "affect[ed] [her] ability to perceive and relate accurately."

¶10 Beyond merely challenging C.'s ability to perceive, however, Moreno also argues the trial court abused its discretion in precluding evidence of C.'s "reckless sexual behavior." The specific evidence precluded was a reference to such behavior on one of

C.'s psychiatric evaluations. The evaluating therapist referred to "reckless sexual encounters [with] men" but did not explain what that phrase meant or describe the behavior to which it referred.

¶11 According to Moreno, this alleged behavior demonstrates that C. was impulsive and that her "character trait of impulsivity is relevant to the issue of consent." He maintains C.'s "impulsivity, which stemmed from her bipolar disorder and had manifested as reckless sexual behavior," was admissible to "dispute [C.'s] claim of no consent." But, although the evidence rules allow admission of evidence of aberrant sexual propensity in an accused, *see* Ariz. R. Evid. 404(a)(1), 404(c), they do not provide for the blanket admission of such evidence against a victim. And, § 13-1421(A) specifically bars "[e]vidence of specific instances of the victim's prior sexual conduct" unless it is relevant, its probative value is not outweighed by its prejudicial nature, and it falls into one of five specific categories. Moreno maintains "the evidence [here was] admissible as showing motive to fabricate," which falls within the exception set forth in § 13-1421(A)(3).[1]

[1]Moreno also suggests that C.'s "impulsivity" made it "more probable that [she] consented to sexual relations with [him]" and that "inconsistencies in the evidence could have raised a reasonable doubt about the veracity of [C.'s] accusations." But neither of these evidentiary uses falls within the exceptions provided in § 13-1421. *See Pope*, 113 Ariz. at 26, 545 P.2d at 950 ("It would be . . . unreasonable to allege a link between the prior improper sexual activity of a prosecutrix in a rape prosecution and the truthfulness of her sworn testimony.").

¶12 We agree with the trial court that there are "all sorts of things that the words 'reckless sexual encounter' could be." Nothing in the therapist's comment suggests that the referenced behavior included the type of "sexual impulsivity" Moreno alleges. Likewise, one passing reference to such behavior does not suggest that C.'s mental health treatment was focused on sexual impulsivity, nor does it "create[] an inference that [C.] was distraught over her sexual behavior and wanted to change it," thus giving her a motive to fabricate her accusation of sexual assault, as Moreno contends. "The standard for admissibility of evidence under [§ 13-1421(A)] is by clear and convincing evidence." § 13-1421(B); *see also State v. Roque*, 213 Ariz. 193, ¶ 75, 141 P.3d 368, 390 (2006) (clear and convincing evidence persuades trier of fact that truth of contention is "'highly probable'"), *quoting In re Neville*, 147 Ariz. 106, 111, 708 P.2d 1297, 1302 (1985). The therapist's isolated notation here did not supply clear and convincing evidence that C.'s past sexual behavior was consistent with Moreno's allegations.

¶13 We also have no basis for disturbing the trial court's conclusion that the proffered evidence was "too remote" and not relevant. *See* § 13-1421(A) (court must find evidence relevant before admitting it under exceptions to general rule barring evidence of victim's past sexual conduct). Approximately eight months before Moreno assaulted her, C. had reported having engaged at some unspecified time in what her therapist described as "reckless sexual encounters" with men. In view of the vagueness of the reference, and the amount of time that had elapsed, we cannot say the trial court abused its discretion in precluding the evidence. *See Brown v. U.S. Fid. & Guar. Co.*,

194 Ariz. 85, ¶ 25, 977 P.2d 807, 812 (App. 1998) ("Otherwise relevant evidence may be excluded if it is too remote in time from the proposition being proved."). In sum, evidence of C.'s prior sexual behavior was not admissible, even if it arguably stemmed from a "character trait of impulsivity" related to her mental illness, and the trial court did not abuse its discretion in precluding it. *See Gilfillan*, 196 Ariz. 396, ¶ 29, 998 P.2d at 1078.

¶14 Next, Moreno contends § 13-1421 is unconstitutional on its face because it deprives him of the right to present a defense and confront witnesses. *See* U.S. Const. amends. VI, XIV. He also claims the statute violates the constitutional separation-of-powers doctrine and rule-making authority of the supreme court. *See* Ariz. Const. art. III; art. VI, § 5. Division One of this court has already addressed all of those arguments, finding § 13-1421 constitutional. *See Gilfillan*, 196 Ariz. 396, ¶¶ 17-28, 998 P.2d at 1074-77. We see no reason to deviate from that decision and therefore reject Moreno's contentions. *See State v. Benenati*, 203 Ariz. 235, ¶ 7, 52 P.3d 804, 806 (App. 2002) (decision from other division persuasive unless found clearly erroneous or inapplicable based on changed conditions).

¶15 Moreno also maintains § 13-1421 is unconstitutional as applied to him because it violated his rights to receive due process and to confront and cross-examine witnesses by preventing him from challenging C.'s testimony. He argues that, "because of her mental disorder, she had a character trait predisposing her to sexual impulsivity" and that "[s]he also may have been delusional in how she remembered the interaction."

Although the defendant in *Gilfillan* also unsuccessfully challenged the constitutionality of § 13-1421 "as applied" to him, 196 Ariz. 396, ¶ 18, 998 P.2d at 1075, such a challenge requires case-by-case evaluation. *Id*. ¶ 23. "We review the constitutionality of statutes de novo." *State v. Stummer*, 219 Ariz. 137, ¶ 7, 194 P.3d 1043, 1047 (2008).

¶16 The Due Process Clause of the Fourteenth Amendment ensures defendants a "meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). A defendant also has the right under the Sixth Amendment to confront and cross-examine the witnesses against him. *See Davis v. Alaska*, 415 U.S. 308, 315 (1974). "[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, 998 P.2d at 1075; *see also Michigan v. Lucas*, 500 U.S. 145, 149 (1991); *LaJoie v. Thompson*, 217 F.3d 663, 669 (9th Cir. 2000) (balancing defendant's constitutional right to present evidence with potential for prejudice on case-by-case basis). Consequently, a court retains wide latitude in limiting testimony "'based on concerns about . . . harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *State v. Cañez*, 202 Ariz. 133, ¶ 62, 42 P.3d 564, 584 (2002), *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

¶17 As noted above, the trial court acted well within its discretion in ruling C.'s mental health records referred to periods too remote in time to be relevant, and Moreno failed to show by clear and convincing evidence that C. previously had exhibited the

sexually impulsive behaviors he alleged. Thus, we cannot say his constitutional rights were violated by the court's proper application of § 13-1421 to exclude the evidence. *See Gilfillan*, 196 Ariz. 396, ¶ 33, 998 P.2d at 1078; *State v. Davis*, 205 Ariz. 174, ¶ 33, 68 P.3d 127, 132 (App. 2002) ("[A] defendant's constitutional rights are not violated where, as here, evidence has been properly excluded.").

B. *Brady* material

¶18 Moreno also asserts C.'s "medical records [we]re *Brady* material that must be disclosed to the defense." He contends that C.'s "mental health is highly relevant to [his] defense" and that her mental health records were "exculpatory both in terms of impeachment of [C.'s] ability to perceive and raising a reasonable doubt on the issue of consent." "[W]hether a criminal defendant is entitled to discover certain evidence is a matter within the trial court's discretion." *State v. Tyler*, 149 Ariz. 312, 314, 718 P.2d 214, 216 (App. 1986).

¶19 Under *Brady*, the defense is not entitled to disclosure of all of the state's evidence; rather, the state is required "only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 675 (1985); *see also State v. Montaño*, 204 Ariz. 413, ¶ 52, 65 P.3d 61, 72 (2003) ("'The test for a *Brady* violation is whether the undisclosed material would have created a reasonable doubt had it been presented to the jury.'"), *quoting State v. Dumaine*, 162 Ariz. 392, 405, 783 P.2d 1184, 1197 (1989). In this case, the state provided the mental health records to the trial court for an in-camera inspection to determine which

portions should be disclosed to Moreno. Having reviewed those sealed records, we agree with the trial court that the undisclosed materials either related to events too remote in time or were otherwise irrelevant to Moreno's defense. *See United States v. Streit*, 962 F.2d 894, 900 (9th Cir. 1992) ("Th[ose] sealed records have been made available to this court for review, and we find no exculpatory or impeachment evidence requiring disclosure."). In sum, we cannot say the trial court abused its discretion in ruling Moreno was not entitled to disclosure of all of C.'s mental health records. *Tyler*, 149 Ariz. at 314, 718 P.2d at 216.

C. Motion for continuance

¶20 Moreno also asserts the trial court abused its discretion in denying his motion for a continuance, which he requested to allow his counsel more time to "evaluate how [C.'s] mental health conditions might have impacted the incident with [him] or [her] perception of it." "The granting of a continuance is within the discretion of the trial court, and its decision will only be disturbed upon a showing of a clear abuse of such discretion and prejudice to defendant." *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990).

¶21 The state initially provided C.'s mental health records to the trial court for review in August 2007. Subsequently, additional records were given to the court on December 19, 2007, and the court provided Moreno with portions of those records on December 21. Moreno moved for a continuance based on the newly discovered records, which he had not yet seen, immediately before the state's disclosure in December. He

argued that "there simply would not be sufficient time to prepare for trial given the need to review [any] records" and that the short amount of time before trial prevented him from "explor[ing] possible defenses . . . due to the late disclosure by the State." The trial court denied the motion, observing that "the issue of the victim's mental health status ha[d] been out there for quite some time." Moreno's trial began on January 10, approximately three weeks after the state's disclosure.

¶22 He contends that, because the three-week "period [between the disclosure and trial] included the Christmas and New Year['s] holidays," it was "virtually impossible [for him] to retain an expert on short notice" and that "defense counsel needed the court's initial ruling in order to guide its consultation with an expert." For the first time on appeal, he also argues he could have attempted to locate men with whom C. had had "reckless sexual encounters." As discussed above, however, testimony from any such witnesses, assuming they existed and could have been found, would have been barred by the rape shield law in any event. *See* § 13-1421. Thus, even had the trial court abused its discretion in denying the requested continuance, Moreno has failed to demonstrate prejudice. *See Amaya-Ruiz*, 166 Ariz. at 164, 800 P.2d at 1272.

¶23 Additionally, as the trial court pointed out, C.'s mental health had been an issue in the case long before trial. Moreno was aware of her diagnosis at least four months before trial and could have sought experts on that basis alone well before the holiday season began. In view of that fact, we cannot say the court abused its discretion

in denying Moreno's request for a continuance based on his desire to further investigate C.'s mental health history.

II. Prosecutorial misconduct

¶24 Moreno next asserts "[i]mproper prosecutorial conduct deprived [him] of a fair trial." He maintains the prosecutor "intentionally and repeatedly engaged in improper conduct and was at least indifferent to the prejudice" her conduct caused. He therefore contends his convictions should be reversed and claims retrial is barred by double jeopardy. "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which [s]he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To prevail on a claim of prosecutorial misconduct, "[t]he defendant must show that the offending statements, in the context of the entire proceeding, 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d 833, 846 (2006), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). We review for an abuse of discretion a trial court's refusal to grant a mistrial or new trial based on alleged prosecutorial misconduct. *Id*. ¶ 61.

¶25 "The first step in evaluating [Moreno's] prosecutorial misconduct claim is to review each alleged incident to determine if error occurred." *Roque*, 213 Ariz. 193, ¶ 154, 141 P.3d at 403. Even if an incident is not itself error, however, it "may nonetheless contribute to a finding of persistent and pervasive misconduct, if 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.'" *Id.* ¶ 155, *quoting Hughes*, 193 Ariz. 72, ¶ 31, 969 P.2d at 1192 (citation omitted). We therefore review the incidents in question for error and to determine if any of them "should count toward [Moreno's] prosecutorial misconduct claim." *Id.* We then determine the cumulative effect of those incidents on the fairness of Moreno's trial. *See id.*

¶26 Moreno points to several statements and questions by the prosecutor as instances of prosecutorial misconduct in this case. He claims the prosecutor engaged in improper questioning of witnesses, improperly impugned defense counsel, vouched for the victim's credibility, and commented on Moreno's failure to testify. Moreno moved for a new trial, claiming "the cumulative effect" of such statements and questions by the prosecutor had "denied [him] a fair trial." The trial court denied the motion, stating it did not "find any misconduct" and Moreno had received a fair trial.

¶27 Moreno first argues the prosecutor "violated the court's order precluding certain testimony." Before C. testified, the court ruled she could not testify that Moreno had been on drugs but could state he had appeared to be "on something." When the

prosecutor subsequently asked her about Moreno and the box of money in her apartment, C. testified Moreno had said he would not take all the money and she had thought, "[T]hat's crazy. That's just nuts. I mean this guy's on drugs or something." The trial court sustained Moreno's objection to that testimony. Immediately following the objection, the prosecutor asked C. if the reason she had thought that was "[b]ecause it was so odd" that Moreno took only part of the money.

¶28 We agree with the state that "[t]he prosecutor could not have anticipated that [C.] would respond to a question regarding the box [she] kept her money in by stating" she had thought Moreno was on drugs. And, unlike the prosecutor in *Pool*, on which Moreno relies, the prosecutor here did not "immediate[ly] repe[at] . . . questions to which objections had just been sustained." 139 Ariz. at 102, 677 P.2d at 265. She did not question C. further about whether Moreno had been on drugs but merely clarified why C. had formed the impression she had. Furthermore, Moreno does not cite, nor have we found, any authority supporting his apparent suggestion that an unexpected and inappropriate statement by a witness for the state should be attributed to the prosecutor and treated as prosecutorial misconduct. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall contain citations to authority). Nor has Moreno cited anything in the record to support his broad assertion that the prosecutor, "[e]ither intentionally or with gross indifference," failed to "tell [C.] about the limits on her testimony." Ariz. R. Crim. P. 31.13(c)(1)(iv); *cf. State v. Brewer*, 110 Ariz. 12, 16, 514 P.2d 1008, 1012

(1973) (no error in denying mistrial when "no evidence of misconduct on the part of the State such as failure to adequately warn the witness not to give this testimony").

¶29 Moreno also argues the prosecutor committed misconduct in asking the state's DNA[2] analyst whether "[t]here was extra DNA . . . that could have been tested," when the trial court had instructed her it would "allow [a] question [as to] whether or not the entire sample was consumed" but would not allow questioning on whether the defense could have done its own testing. The court sustained Moreno's objection and instructed the jury to disregard the question and answer. When Moreno later moved for a mistrial on the basis of the question, the trial court denied the motion, stating it believed the prosecutor had failed to understand its ruling and, in any event, the question had not prejudiced Moreno. We agree.

¶30 As both the state and Moreno point out, the presence of Moreno's DNA on C.'s body was not inconsistent with his consent defense. He argues, however, that the presence of his blood on a sock found in C.'s car "was enough to raise an inference that [he] had broken the window to gain access to the vehicle." He maintains the question therefore "could have impermissibly shifted the burden to [him] of disproving the DNA results from the sock in violation of due process." But a prosecutor's comment on a defendant's failure to produce evidence does not shift the burden of proof unless it constitutes a comment on the defendant's decision not to testify. *State v. Sarullo*, 219 Ariz. 431, ¶ 24, 199 P.3d 686, 692 (App. 2008). The question at issue here was not

[2]Deoxyribonucleic acid.

related to Moreno's decision not to testify and, therefore, did not shift the burden of proof. Likewise, we cannot say, in the context of the entire proceeding, that this question, the answer to which was stricken by the trial court, "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"[3] *Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191, *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

¶31 Moreno next contends the prosecutor in her rebuttal closing argument impugned defense counsel by "accus[ing] counsel of using a 'shotgun approach'"; by arguing that, if C.'s testimony had been entirely consistent, counsel would instead have said "you can't believe her" because her story was exactly the same; and by stating, "Defense counsel also stands up and questions how [C.] responded immediately after this man raped her." "Jury argument that impugns the integrity or honesty of opposing counsel is . . . improper." *Hughes*, 193 Ariz. 72, ¶ 59, 969 P.2d at 1198. But, "[c]riticism of defense theories and tactics is a proper subject of closing argument." *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997). Here, although "we are concerned with some of the phrasing of the prosecutor's [statements] which seem to impugn the integrity of defense counsel and suggest to the jury that defense counsel is being deceitful," *State v. Denny*, 119 Ariz. 131, 134, 579 P.2d 1101, 1104 (1978), we cannot say those

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[3]The trial court instructed the jury that, "[w]hen testimony was ordered stricken from the record, [it was] not to consider that testimony as evidence." We presume the jurors followed that instruction. *See State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007).

statements did more than criticize Moreno's defense tactics or that they rose to an improper level.

¶32 Moreno also maintains the prosecutor in her rebuttal closing argument improperly vouched for C. when she stated defense counsel had "absolutely no explanation for what the defendant did to the victim, other than the absolute truth, which is he raped her." Later, responding to defense counsel's arguments that C.'s story was inconsistent because Moreno appeared alternately in her account as a rapist and a nice guy, the prosecutor also stated, "[T]here are Ph.D. students worldwide who spend their entire career attempting to understand . . . the criminal mind." We note, first, that "prosecutors have wide latitude in presenting their closing arguments to the jury." *State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000). Likewise, "'[c]omments that are invited and prompted by opposing counsel's arguments are not improper if they are reasonable and pertinent to the issues raised.'" *State v. Moody*, 208 Ariz. 424, ¶ 180, 94 P.3d 1119, 1159 (2004), *quoting State v. Trostle*, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997) (alteration in *Moody*). The prosecutor's later statement about students of the criminal mind falls into that category and was not improper.

¶33 As for the prosecutor's statements about C.'s truthfulness, "[i]t is black letter law that it is improper for a prosecutor to vouch for a witness." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993). "Two forms of impermissible prosecutorial vouching exist: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury

supports the witness's testimony." *State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989). Nothing in the prosecutor's statements suggested the existence of information not presented at the trial. And the prosecutor's statements here differ from those made in the cases on which Moreno relies, where the prosecutors' comments amounted to statements of personal belief in a particular aspect of a witness's testimony. *See State v. Lamar*, 205 Ariz. 431, ¶¶ 53-54, 72 P.3d 831, 841-42 (2003); *State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989). Here, the prosecutor did not vouch specifically for C.'s testimony. Rather, she merely urged the state's position, already evident in the fact of its prosecution of Moreno, that he had in fact sexually assaulted C. Thus, the prosecutor did not "place[] the prestige of the government behind [the state's] witness." *Dumaine*, 162 Ariz. at 401, 783 P.2d at 1193.

¶34 Last, Moreno asserts the prosecutor improperly "comment[ed] on [his] failure to testify" by saying in closing argument that there had "not been a shred, a lick, a piece of evidence to indicate that this is a consensual relationship." Because Moreno did not object to that statement below, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (defendant who fails to object to alleged trial error forfeits right to appellate relief absent showing of fundamental, prejudicial error).

¶35 As noted above, "[w]hen a prosecutor comments on a defendant's failure to present evidence to support his or her theory of the case, it is neither improper nor [does it] shift[] the burden of proof to the defendant so long as such comments are not intended

to direct the jury's attention to the defendant's failure to testify." *Sarullo*, 219 Ariz. 431, ¶ 24, 199 P.3d at 692; *see also State v. Herrera*, 203 Ariz. 131, ¶ 19, 51 P.3d 353, 359 (App. 2002) ("It is well settled that a 'prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify.'"), *quoting State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985). "[A]n impermissible comment upon a defendant's invocation of his right not to testify occurs when 'the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify.'" *State v. Bracy*, 145 Ariz. 520, 535, 703 P.2d 464, 479 (1985), *quoting United States v. Soulard*, 730 F.2d 1292, 1306 (9th Cir. 1984).

¶36 "An exception to this rule occurs when it appears that the defendant is the only one who could explain or contradict the state's evidence." *State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985). Moreno argues that was the case here, contending he and C. were "the only two people who would know whether or not" the sex acts had been consensual. Even assuming that is so, "the statements must be examined in context to determine whether the jury would naturally and necessarily perceive them to be a comment on the failure of the defendant to testify." *State v. Schrock*, 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986). Here, the prosecutor made the statement to which Moreno now objects immediately after reviewing the evidence the state had presented against him, following her statement about the lack of any evidence of consent by stating,

"[E]verything [was] to the contrary." Viewed in that context, the prosecutor's statements did not improperly comment on Moreno's failure to testify. *See Bracy*, 145 Ariz. at 535, 703 P.2d at 479.

¶37 Moreno has failed to show error in connection with any of the prosecutor's statements to which he objects. Incidents that are not themselves reversible error can contribute to reversible, cumulative error. *Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d at 403. But cumulative error cannot exist when, as here, a defendant fails to establish that any of the instances constitutes error. In the absence of any specific occurrence of error, we cannot say Moreno's trial was so permeated with unfairness that he was denied due process. *See Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191. And, because we conclude no prosecutorial misconduct occurred, we need not address Moreno's argument that double jeopardy principles would bar a retrial.

III. Hearsay evidence

¶38 Moreno also maintains the trial court "erred in sustaining the state's hearsay objection" to his questioning of detectives about certain statements made to and by C. He argues "the statements were not being elicited to show the truth of the matter asserted, but for their effect on the listener." "We review a trial court's rulings on the admission of evidence for an abuse of discretion." *State v. Dann*, 220 Ariz. 351, ¶ 66, 207 P.3d 604, 618 (2009); *see also Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 24, 97 P.3d 876, 881 (App. 2004).

¶39 While questioning one of the investigating detectives, Moreno asked her whether she had asked C. "three times" if "she was telling the truth" and if C. had "said that this is . . . what happened." Moreno then asked the detective if she had "told [C.] that the glass that was found in the [drugstore's] parking lot didn't match up with the glass from her car," and the state objected "to the hearsay." At an ensuing bench conference, Moreno's counsel explained he was not offering the testimony "for the truth of the matter" but "for present sense impression and effect on the listener." Defense counsel acknowledged he sought in part to elicit from the detectives whether "they had any doubt about the victim's story" and whether C. had said "she needed to offer proof of this incident in order to present it to the police" and "the proof that she offered was the broken window and the rock." The court ruled defense counsel could "ask questions of th[e] detective . . . about whether they had doubts and questioned the consistency of the victim's reports," but the court would not allow testimony about C.'s responses to the detectives' questions.

¶40 "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). "Hearsay is not admissible except as provided by applicable constitutional provisions, statutes, or rules." Ariz. R. Evid. 802. Moreno argues he "did not offer the statements of [C.] and the detectives to prove the truth of the matter asserted but merely to show that words were spoken." Therefore, he contends the

proffered evidence was not hearsay. *See State v. Nightwine*, 137 Ariz. 499, 502, 671 P.2d 1289, 1292 (App. 1983).

¶41 "The hearsay rule is inapplicable where the statements are offered for some valid purpose other than to prove the matter asserted in the statement." *State v. Rivera*, 139 Ariz. 409, 413-14, 678 P.2d 1373, 1377-78 (1984). But we cannot say the proffered evidence here was merely "offered to show [its] effect on one whose conduct is in issue." *Id*. at 414, 678 P.2d at 1378. Moreno asserts he sought to admit the evidence "to show how [C.] had reacted to the detective[s'] questions and how the detectives had reacted to [C.'s] account," but he does not explain what conduct of the detectives C.'s statements would serve to explain. Rather, he contends that the evidence went to C.'s credibility and that, although the detective testified C.'s account had been "consistent," the jury "may have drawn a different inference if the actual questions asked by the detectives had come into evidence." According to Moreno, "[t]he jury should have had the opportunity to hear the actual words the detectives asked [C.] and her responses thereto to judge the credibility of [her] account."

¶42 Thus, Moreno's argument makes clear that ultimately he had not sought to introduce C.'s statements to show how they had influenced the detectives' conduct but, rather, to create a broader question about C.'s credibility. Under the circumstances, the trial court did not abuse its discretion in ruling the statements inadmissible, rejecting Moreno's contention that they were not hearsay but only offered to show their effect on the listener.

¶43 Additionally, even assuming the evidence could have been properly admitted for some other nonhearsay purpose, the statements were simply cumulative of earlier testimony on the same point, to which Moreno had interposed no objection. Thus, their preclusion was not error. *See State v. Fischer*, 219 Ariz. 408, n.12, 199 P.3d 663, 672 n.12 (App. 2008). As the state points out, the detective testified that, in the process of "ask[ing] [C. a] lot of questions to test her credibility," she had told C. that the glass on the ground outside her car did not match the glass in C.'s car window. And, C. testified she had told detectives the broken window and glass were "proof that [Moreno] broke into the car." That testimony essentially overlapped with the additional testimony Moreno sought to elicit from the detective. Therefore, the trial court could, and did, rightly restrict the proffered testimony about the "actual words" exchanged based on the cumulative nature of that testimony. *See id*. In sum, the court did not abuse its discretion in precluding the testimony. *See Dann*, 220 Ariz. 351, ¶ 66, 207 P.3d at 618.

IV. *Portillo* instruction

¶44 Finally, Moreno contends structural error occurred when the trial court instructed the jury on reasonable doubt as mandated by the Arizona Supreme Court in *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). Our supreme court repeatedly has confirmed the validity of that instruction, *see State v. Glassel*, 211 Ariz. 33, ¶ 58, 116 P.3d 1193, 1210 (2005); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003); and we are bound by its rulings. *See State v. Stanley*, 217 Ariz. 253, ¶ 28, 172 P.3d 848, 854 (App. 2007). Therefore, no error occurred.

Disposition

¶45 Moreno's convictions and sentences are affirmed.

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John Pelander, Judge

CONCURRING:

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Joseph W. Howard, Chief Judge

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Philip G. Espinosa, Presiding Judge