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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>GREGORY DAVID TAMPLIN,<br><br>Appellant. | 2 CA-CR 2009-0297<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20074736

Honorable Kenneth Lee, Judge

AFFIRMED IN PART; VACATED IN PART

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V Á S Q U E Z, Presiding Judge.

**¶1** After a jury trial, appellant Gregory Tamplin was convicted of first-degree murder, aggravated assault, kidnapping, first-degree burglary, two counts of armed robbery, and two counts of sexual assault. The trial court sentenced him to life in prison with the possibility of parole after twenty-five years for the murder conviction, consecutive seven-year prison terms for the sexual assault convictions, concurrent terms on the other convictions, and consecutive community supervision.

**¶2** On appeal, Tamplin argues that 1) the trial court erred in denying his motion to suppress the victim's pre-trial and in-court identifications; 2) the charges for armed robbery, sexual assault, aggravated assault, kidnapping, and first-degree burglary were barred by the statute of limitations; 3) the prosecutor's improper comments during closing argument, including comments about Tamplin's failure to testify and the strength of the deoxyribonucleic acid (DNA) evidence, deprived him of a fair trial; 4) the trial court erred in giving an instruction that unduly emphasized the weight of circumstantial evidence regarding the elements of intent and premeditation and in giving the *Portillo* reasonable doubt instruction;[1] and 5) the sentence of community supervision was illegal. For the reasons stated below, we vacate the court's order imposing community supervision, but affirm the convictions and sentences in all other respects.

## Factual and Procedural History

**¶3** We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). Sometime after midnight on November 13, 1990, A. woke to the sound of banging on her

[1]*State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995).

front door. Thinking it was her fiancé, R., returning from work without his key, she answered the door. A. was unaware that R. had already returned from work and was lying in the bed next to her. When she opened the door, Tamplin forced his way in, held a gun to her face, grabbed her arm, and walked her toward the bedroom, where R. was standing. Tamplin then ordered R. to lie down on the bed and said, "You owe me big." R. repeatedly begged Tamplin not to shoot, but Tamplin shot him multiple times, killing him. Tamplin then sexually assaulted A. twice in the living room before leaving the apartment, taking with him a bike, $5.00 in quarters, and a gold watch. A. called 9-1-1 from a neighbor's apartment, and during her police interview later that morning, she gave a description of the assailant. At a follow-up interview on November 15, she met with a police sketch artist who used A.'s description to create a composite sketch. No suspect was identified during the initial investigation and the case remained unresolved for a number of years.

**¶4** In 2003, Tucson Police Department (TPD) detectives conducted a "cold case" review and requested the TPD crime laboratory analyze DNA samples from evidence collected during the initial investigation.[2] The samples ultimately were tested in 2007, and a comparison against known DNA profiles revealed a match with a DNA profile for Tamplin. To verify the match, detectives obtained a buccal swab from Tamplin and a new profile prepared from that sample matched the DNA profile from the samples that had been collected during the initial investigation. In August 2007,

[2]At the time the offense was committed, DNA testing was not yet being conducted in the Tucson Police Department crime laboratory.

detectives interviewed A. and told her that a DNA match had been made. A. was shown a photographic lineup consisting of six pictures and asked if she recognized anyone. Although A. was unable to state conclusively that she recognized any of the persons as her assailant, she told the detectives she had a "deep feeling" about Tamplin's photograph. Tamplin was indicted in December 2007 and ultimately convicted of the charges and sentenced as noted above. This timely appeal followed.

## Discussion

### I. Denial of Motion to Suppress

**¶5** When reviewing a trial court's denial of a motion to suppress, we consider only the evidence presented at the suppression hearing, *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996), and "view it in the light most favorable to upholding the court's factual findings," *State v. Gerlaugh*, 134 Ariz. 164, 167, 654 P.2d 800, 803 (1982). "We review the . . . court's ruling . . . for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo." *State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

### A. In-court identification

**¶6** Tamplin first argues the trial court erred in denying his motion to suppress A.'s in-court identification of him, claiming it was tainted by an unduly suggestive pre-trial identification procedure. He contends his photograph was more prominent than the other photographs in the array because his head was larger, his skin tone differed from the others, and there was a "distracting glare" in the middle of his forehead. He also

argues the photographic lineup procedure was unduly suggestive because the officers did not inform A. that the suspect might not be depicted in the photo array.

**¶7** When the officers had shown A. the photographic lineup, they had asked her if she recognized anyone in it. A. stated that she had a "problem with number five," the photograph of Tamplin, "[j]ust a feeling." At the suppression hearing, the trial court viewed the array, concluded that it was not unduly suggestive, and admitted the pre-trial and in-court identifications.

**¶8** Pre-trial identification procedures must comply with due process. *State v. McCall*, 139 Ariz. 147, 154, 677 P.2d 920, 927 (1983). "[T]he ultimate question as to the constitutionality of . . . pretrial identification procedures . . . is a mixed question of law and fact." *Sumner v. Mata*, 455 U.S. 591, 597 (1982). We give deference to the trial court's factual findings, but review the ultimate legal conclusion whether the procedure or resulting identification violates due process de novo. *State v. Garcia*, 224 Ariz. 1, ¶ 6, 226 P.3d 370, 376-77 (2010). Trial courts apply a two-part test to determine if a procedure has complied with due process—whether the procedure is unduly suggestive and, if so, whether the unduly suggestive procedure is cured by the reliability of the identification made pursuant to that procedure. *Manson v. Brathwaite*, 432 U.S. 98, 107-14 (1977).

**¶9** In *State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969), our supreme court set forth the procedure to be followed by a trial court in making that determination. First, if the in-court identification is challenged, the court must hold a hearing to determine whether the pre-trial identification procedure was unduly

suggestive. *Id.* Second, if the pre-trial identification procedure was unduly suggestive, the court must determine whether the in-court identification has been tainted as a result. *Id.* Finally, if requested, the court must instruct the jury that "it must be satisfied beyond a reasonable doubt that the in-court identification was independent of the previous pretrial identification or if not derived from an independent source, it must find from other evidence in the case that the defendant is the guilty person beyond a reasonable doubt." *Id.* "The requirements of *Dessureault* are sequential"; thus, if the trial court concludes that the pre-trial identification was not unduly suggestive it need not determine whether the in-court identification was tainted or give the *Dessureault* jury instruction. *State v. Harris*, 23 Ariz. App. 358, 359, 533 P.2d 569, 570 (1975).

**¶10** We review the trial court's determination that a photographic lineup was not unduly suggestive for an abuse of discretion. *State v. Phillips*, 202 Ariz. 427, ¶ 19, 46 P.3d 1048, 1054 (2002). A photographic array is not unduly suggestive so long as it "depict[s] individuals who basically resemble one another such that the suspect's photograph does not stand out." *State v. Alvarez*, 145 Ariz. 370, 373, 701 P.2d 1178, 1181 (1985). Contrary to Tamplin's argument, we find nothing in the record to suggest that the photographic array was unduly suggestive. And, Tamplin has not cited, nor have we found, any authority to support his contention that the failure to administer a warning that the suspect may not be depicted in the array renders the procedure unduly suggestive. Thus, the court did not abuse its discretion in finding the photographic lineup was not unduly suggestive. In light of that determination, we need not reach the second and third requirements of *Dessureault*.

**B. A.'s viewing of internet photograph**

**¶11** Tamplin nevertheless argues that A.'s in-court identification was tainted because she had conducted internet research the week before trial and had found the same photograph that had been used in the photographic lineup on a local newspaper website. The state apparently had provided this photograph to the media and did not warn A. not to conduct her own investigation before testifying. Tamplin argues this rendered A.'s in-court identification unreliable.

**¶12** Generally, for an in-court identification to be impermissibly tainted and thus inadmissible, the defendant must establish that the taint had been caused by state action. *See State v. Garcia*, 224 Ariz. 1, ¶ 9, 226 P.3d at 377; *see also State v. Williams*, 166 Ariz. 132, 137, 800 P.2d 1240, 1245 (1987) ("due process clause does not preclude every identification that is arguably unreliable; it precludes identification testimony procured *by the state* through unduly suggestive pretrial procedures"). In *Garcia*, the police had released to the media photographs from a security camera showing the defendant during the commission of the crime. 224 Ariz. 1, ¶ 7, 226 P.3d at 377. A witness later saw the photograph "in a reward flier that was neither created nor distributed by the police." *Id.* The court concluded that an unidentified third party's use of police-released photographs to create and distribute the flier did not constitute state action. *Id.* ¶ 11; *see also State v. Prion*, 203 Ariz. 157, ¶ 15, 52 P.3d 189, 192 (2002) (due process concerns not triggered by photograph of defendant on cover of periodical because not result of state action); *State v. Nordstrom*, 200 Ariz. 229, ¶ 24, 25 P.3d 717, 729 (2001) (finding "due process analysis . . . inapposite" when "state action requirement

of the Fourteenth Amendment [could not] be established" because "media, rather than the State, allegedly tainted [the witness's] identification of the defendant").

**¶13** Tamplin contends that "even if the State had played no role in A[.]'s viewing of [his] photo on the Internet, due process nevertheless requires exclusion of A[.]'s in-court identification because the pre-trial viewing of the photograph rendered the identification unreliable." But in *Nordstrom*, our supreme court rejected this same argument, stating that "[o]nly identification evidence allegedly tainted by state action must meet . . . reliability standard[s]." 200 Ariz. 229, ¶ 25, 25 P.3d at 729. And, although A. testified that viewing the picture on the internet made her more certain that Tamplin was the person who had attacked her, Tamplin was given wide latitude in cross-examining her about the effect of seeing the picture on the internet. *See State v. Sustaita*, 119 Ariz. 583, 590, 583 P.2d 239, 246 (1978) (opportunity for cross-examination cures potential error). The trial court did not err in admitting A.'s in-court identification.

**II. Statute of Limitations**

**¶14** Tamplin next contends the trial court abused its discretion in denying his motion to dismiss the charges of aggravated assault, kidnapping, first-degree burglary, armed robbery, and sexual assault, on the ground that they were barred by the statute of limitations. Generally, we review the denial of a motion to dismiss for an abuse of discretion. *State v. Jackson*, 208 Ariz. 56, ¶ 12, 90 P.3d 793, 796 (App. 2004). However, the issue "[w]hether a particular statute of limitations applies is a question of law, which we review de novo." *Harris Trust Bank v. Superior Court*, 188 Ariz. 159, 162-63, 933

P.2d 1227, 1230-31 (App. 1996); *see also State v. Aguilar*, 218 Ariz. 25, ¶ 15, 178 P.3d 497, 502 (App. 2008).

**¶15** In his motion, Tamplin argued that the seven-year limitations period had expired for all these offenses before he was indicted. He conceded however that in *Aguilar*, we determined that the statute of limitations does not begin to run until a person has been identified as a suspect. On appeal, Tamplin contends the trial court's reliance on *Aguilar* resulted in an ex post facto application of a statutory amendment to his case. For this reason, he asks that we overrule the basic holding of *Aguilar* or, in the alternative, find the statute of limitations had expired by the time charges were filed against him based on a tolling theory.

**¶16** At the time Tamplin committed the charged offenses, A.R.S. § 13-107(B) provided for a seven-year limitations period for all class two through class six felonies and the period commenced when the state discovered that the offense had been committed. Ariz. Sess. Laws, ch. 135, § 1. However, effective July 21, 1997, the statute was amended and § 13-107(E) was added. That provision now states: "The period of limitation does not run for a serious offense as defined in section 13-706 during any time when the identity of the person who commits the offense . . . is unknown."[3] Section 13-

[3]At the time § 13-107 was amended to include subsection (E), it referred to A.R.S. § 13-604, which defined serious offenses. *See* Ariz. Sess. Laws, ch. 135, § 1. However, the Arizona criminal sentencing code has been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see id.* § 119, we refer to the current section number rather than that in effect at the time of the offense in this case.

706 defines "serious offense" to include aggravated assault, sexual assault, armed robbery, kidnapping, and first-degree burglary, the offenses committed by Tamplin.

**¶17** In *Aguilar*, the defendant committed sexual assault in 1993, but was not identified as a suspect or charged until 2006. 218 Ariz. 25, ¶¶ 3-5, 178 P.3d at 500. He argued, as Tamplin does, that his claims were barred by the statute of limitations, notwithstanding the amendment adding § 13-107(E), because application of the amended language to his case would violate the retroactivity clause of A.R.S. § 1-244, which states: "No statute is retroactive unless expressly declared therein," as well as both federal and state constitutions. 218 Ariz. 25, ¶¶ 23, 42, 178 P.3d at 503, 509.

**¶18** Relying on *State v. Gum*, 214 Ariz. 397, 153 P.3d 418 (App. 2007), the court in *Aguilar* concluded that § 13-107(E) applied to all offenses for which the limitations period had not expired on the amendment's effective date. And, because the limitations period for Aguilar's offenses had not expired before the amendment became effective, the charge was not barred by the statute of limitations. *Aguilar*, 218 Ariz. 25, ¶¶ 22, 51, 178 P.3d at 503, 511. Again relying on *Gum*, the court also concluded that application of § 13-107(E) to Aguilar's offenses did not violate the retroactivity clause or the federal or state constitutions because statutes of limitations are generally considered to be procedural in nature, and the retroactivity clause of § 1-244 and ex post facto clauses of the federal and state constitutions apply only to substantive laws. *Aguilar*, 218 Ariz. 25, ¶¶ 25-27, 42, 178 P.3d at 504-05, 509.

**¶19** Tamplin urges us to overrule *Aguilar*, claiming, like Aguilar, that the holding violates Arizona's retroactivity law and requires an ex post facto application of

the amendment to his case, in violation of the Arizona and United States Constitutions. However, Tamplin has provided no compelling argument that *Aguilar* was wrongly decided. We therefore decline his invitation to overrule it. At the time § 13-107(E) became effective, the statute of limitations for Tamplin's offenses had not expired. Thus, § 13-107(E) applies to his offenses.

**¶20** Nonetheless, Tamplin argues that, even if § 13-107(E) applies to his offenses, it only served to toll the limitations period once it became effective, so that the time between the commission of the offenses and the enactment of § 13-107(E) should count toward the total limitations period. Thus, he argues, the state had only four months to indict him once it discovered his identity, and it therefore exceeded the limitations period by one month.

**¶21** The plain language of the statute does not support Tamplin's argument. "[T]he best and most reliable index of a statute's meaning is its language." *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991); *see also State v. Aguilar*, 209 Ariz. 40, ¶ 26, 97 P.3d 865, 873 (2004). If the statute is clear and unambiguous, we apply the plain meaning of the statute. *State v. Hinden*, 224 Ariz. 508, ¶ 9, 233 P.3d 621, 623 (App. 2010). Here, § 13-107(E) clearly states that "[t]he period of limitation *does not run* . . . during any time when the identity of the person who commits the offense . . . is unknown." (Emphasis added.) And, as we have concluded, the amendment applies to Tamplin's offenses. Thus, here, the limitations period did not begin to run until 2007, when the state identified Tamplin through DNA testing. The state then had seven years to bring charges against Tamplin, and it did so in less than one year. And although

Tamplin urges us to find that the state did not act diligently in identifying him, we made clear in *Aguilar* that we will not apply a due diligence standard to § 13-107(E). 218 Ariz. 25, ¶ 49, 178 P.3d at 510. The trial court did not abuse its discretion in denying Tamplin's motion to dismiss.

**III. Prosecutor's Comments in Closing Argument**

**¶22** Tamplin next argues the prosecutor made improper comments during closing argument that violated his Fifth Amendment right against self-incrimination and his right to a fair trial under the United States and Arizona Constitutions. *See* U.S. Const. amend. V, amend. XIV, § 1; Ariz. Const. art. II, §§ 4, 10. "'Reversal on the basis of prosecutorial misconduct requires that the conduct be so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992), *overruled in part on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001); *see also State v. Anderson*, 210 Ariz. 327, ¶ 45, 111 P.3d 369, 382-83 (defendant must show misconduct likely denied fair trial). We review a trial court's ruling on a claim of improper prosecutorial conduct for abuse of discretion. *State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006). Constitutional issues are reviewed de novo. *State v. Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d 1119, 1140 (2004).

**A. Comment on failure to testify**

**¶23** Tamplin argues that the prosecutor violated his Fifth Amendment right against self-incrimination when he commented on the fact that Tamplin had not testified at trial. During closing argument, the prosecutor stated that Tamplin had suggested A.

was involved in R.'s death. The prosecutor then said, "although the defense has no burden whatsoever to put on evidence, they have the option to do it. And . . . Mr. Tamplin had the option of testifying." Defense counsel objected and, during a bench conference, argued that the prosecutor's comments constituted burden shifting and amounted to prosecutorial misconduct. The prosecutor responded that the defense had opened the door by suggesting A. had been involved in the murder. The court overruled the objection but ordered the prosecutor to clarify his argument. The prosecutor then said to the jury, "[L]et me be absolutely clear that the defense has no burden to present any evidence. The burden is entirely on the State. However, some of the questions that [defense counsel] raised are asking you to speculate on areas in which the defense could have presented evidence." Defense counsel again objected, and the judge again overruled the objection.

**¶24** Generally "[a] comment by a prosecutor upon the failure of [a] defendant to testify violates the defendant's fifth amendment privilege against self-incrimination." *State v. Morgan*, 128 Ariz. 362, 369, 625 P.2d 951, 958 (App. 1981). Although not all such comments are improper, "comments which actually direct the jury's attention to the failure of the defendant to testify are impermissible." *Id.* Here, the prosecutor's comment that "Tamplin had the option of testifying" drew the jury's attention to the fact that Tamplin had not testified. As such, his comment was improper and defense counsel's objection should have been sustained. *See State v. Still*, 119 Ariz. 549, 551, 582 P.2d 639, 641 (1978); *State v. Arredondo*, 111 Ariz. 141, 143, 526 P.2d 163, 165 (1974).

**¶25** But a finding of error does not end our inquiry. "Prosecutorial misconduct is harmless error if we can find beyond a reasonable doubt that it did not contribute to or affect the verdict." *Hughes*, 193 Ariz. 72, ¶ 32, 969 P.2d at 1192; *see also State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) (reversal not required if error harmless beyond reasonable doubt). Tamplin contends that all comments on a defendant's failure to testify constitute per se, prejudicial error. But the cases he cites in support of this proposition all involve either egregious comments by the prosecutor inviting the jury to take the defendant's silence as evidence of guilt, or a lack of other, admissible evidence such that the prosecutor's comments could have affected the jury's verdicts. *See State v. Sorrell*, 132 Ariz. 328, 329-30, 645 P.2d 1242, 1243-44 (1982) (prosecutor suggested defendant exercised right to silence and later changed his mind because he needed time to make up story); *State v. Rhodes*, 110 Ariz. 237, 238, 517 P.2d 507, 508 (1973) (error prejudicial when "evidence hangs in delicate balance with any prejudicial comment likely to tip the scales in favor of the State"); *State v. Smith*, 101 Ariz. 407, 408-10, 420 P.2d 278, 279-81 (1966) (comment prejudicial when prosecutor suggested defendant chose not to testify to avoid answering questions about prior bad acts).

**¶26** Here, unlike the cases Tamplin relies upon, the prosecutor's comment did not suggest he had chosen not to testify because he was guilty or had something to hide. Rather, the comment was made in the context of rebutting Tamplin's assertion that A. was involved in the crime by noting that he had presented no evidence to support that assertion. *See State v. Sarullo*, 219 Ariz. 431, ¶ 24, 199 P.3d 686, 692 (App. 2008) ("When a prosecutor [merely] comments on a defendant's failure to present evidence to

support his or her theory of the case, it is neither improper nor shifts the burden of proof to the defendant . . . ."). And, in any event, there was ample evidence from which the jury could conclude that Tamplin committed the crimes. A. identified him as the perpetrator before and during trial, and the state presented evidence that the DNA collected from the crime scene matched Tamplin's DNA. As such, the prosecutor's comment was unlikely to "tip the scales in favor of the State." *Rhodes*, 110 Ariz. at 238, 517 P.2d at 508. Therefore, although the prosecutor's comment was error, we conclude it was harmless beyond a reasonable doubt. *See Bible*, 175 Ariz. at 588, 858 P.2d at 1191.

**B. Comment on the DNA evidence**

**¶27** Tamplin also argues the prosecutor improperly vouched for the DNA evidence. Because he did not raise this issue below, we review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). At trial, the prosecutor made the following comment:

> There are home runs by the 240-pound right fielder who just tattooed a pitch up into the upper deck and even out of the stadium. That's what this case is, ladies and gentlemen. That's how strong the evidence in this case is. I mean, absent giving you a videotape of the crime itself, I can't imagine the evidence being much stronger. And I'm going to ask you to find a verdict of guilty on all counts.

Tamplin contends this argument was improper, relying on *State v. Newell*, 212 Ariz. 389, 132 P.3d 833 (2006), for the proposition that "it is impermissible vouching for the State to indicate to the jury that DNA is the most powerful evidence the State can present in support of a defendant's guilt." The state counters that *Newell* is distinguishable because in *Newell*, "[n]o opinions had been elicited about the preeminence of DNA evidence,"

212 Ariz. 389, ¶ 65, 132 P.3d at 847, whereas here, testimony was presented about the universal acceptance of the Tucson laboratory's method of analysis and the widespread use of the computer program used to perform statistical analysis.

**¶28** In any event, even if we assume, without deciding, that the prosecutor's comment constituted fundamental error, we would not reverse because Tamplin has not established he suffered any prejudice. Prosecutorial misconduct does "not require reversal of a defendant's conviction . . . unless it is shown that there is a 'reasonable likelihood' that the 'misconduct could have affected the jury's verdict.'" *Id.* ¶ 67, *quoting Atwood*, 171 Ariz. at 606, 832 P.2d at 623. Here, the trial court instructed the jury that closing arguments are not evidence. We presume the jury followed the court's instruction. *Id.* ¶ 69. And the state presented DNA evidence and identification evidence that together constituted overwhelming evidence of guilt. *Id.* ¶ 70. Furthermore, Tamplin had the opportunity to cross-examine the state's witnesses about the validity and accuracy of DNA testing, and although he elicited testimony that there had been incidents of contamination at the laboratory in the past, he failed to connect those incidents to his case. The prosecutor's comments about the strength of the DNA evidence did not constitute reversible error.

**C. Cumulative impact of misconduct**

**¶29** Tamplin also argues that even if the prosecutor's comments individually do not constitute reversible error, cumulatively they require reversal. To constitute reversible error, the cumulative effect of the misconduct must have "so permeated the entire atmosphere of the trial with unfairness that it denied [Tamplin] due process." *State*

*v. Roque*, 213 Ariz. 193, ¶ 165, 141 P.3d 368, 405 (2006). We cannot say that this occurred here. As the state counters, "[a]ny impropriety here was minor and was confined to isolated incidents during rebuttal closing argument. As such, it was not so pervasive as to constitute a due process violation." Cumulatively, the prosecutor's comments did not constitute reversible error.

## IV. Jury Instructions

### A. Premeditation instruction

**¶30** Tamplin next argues the trial court abused its discretion when it instructed the jury that it could find premeditation and intent through circumstantial evidence but did not give the same instruction for the other mental states. We review a trial court's decision to provide particular jury instructions for an abuse of discretion. *State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003). "We will reverse a conviction when the instructions, taken as a whole, may have misled the jury." *Id.* However, "no case will be reversed because of some isolated paragraph or portion of an instruction which, standing alone, might be misleading." *State v. Norgard*, 103 Ariz. 381, 383, 442 P.2d 544, 546 (1968).

**¶31** Here, the jury was instructed that "premeditation c[ould] be proven by direct or circumstantial evidence," but the trial court did not give a similar instruction for knowledge or recklessness, elements of the lesser-included offense of second-degree murder. Tamplin claims the court therefore misled the jury "into applying the circumstantial evidence instruction only to premeditation and the culpable mental state of intent" and improperly commented on the evidence by "singl[ing] out and unduly

emphasiz[ing] the juror's [sic] ability to use circumstantial evidence to find premeditation and intent." We disagree.

**¶32** In addition to the circumstantial evidence instruction Tamplin complains of, the trial court also gave a general instruction on circumstantial evidence that applied to all the evidence presented in the case. We thus presume the jury was aware that it could rely on circumstantial evidence to find any element of the offenses with which Tamplin was charged. *See Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d at 847 (court presumes jurors follow instructions given). And, during the settling of the jury instructions, defense counsel asked that the circumstantial evidence language in the premeditation instruction be stricken because there was no similar instruction for knowledge and recklessness. However, she then stated, "[n]ot that I would want one, because I don't want one." Thus, to the extent Tamplin is arguing the court erred in not including a separate circumstantial evidence instruction for the mental states of second-degree murder, he informed the court he was not seeking the instruction to which he now claims he was entitled. *See State v. Lucero*, 223 Ariz. 129, ¶ 17, 220 P.3d 249, 255 (App. 2009) (defendant may not lead trial court to take certain action and then claim error on appeal). Taken as a whole, the instructions did not mislead the jury, and we cannot say the trial court abused its discretion in giving this instruction.

**¶33** Nor do we find any merit in Tamplin's claim that the instruction constituted an improper comment on the evidence. Because Tamplin raises this argument for the first time on appeal, we review only for fundamental, prejudicial error. *Henderson*, 210

Ariz. 561, ¶ 22, 115 P.3d at 608.[4] However, he does not argue the error was fundamental; therefore, this argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). In any event, a trial court impermissibly comments on the evidence if it "'express[es] an opinion as to what the evidence proves' or 'interfere[s] with the jury's independent evaluation of that evidence.'" *Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d at 388, *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998). The instruction here did not refer to any evidence in particular or otherwise express the court's opinion on the evidence. Rather, as the state correctly argues, it "pertained to a proposition of law." The trial court did not err in giving this jury instruction.

**B. *Portillo* instruction**

**¶34** Tamplin next contends the trial court committed reversible error in instructing the jury on reasonable doubt using the instruction required by *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995). However, our supreme court has rejected challenges to *Portillo*'s language and has repeatedly upheld it as good law. *See, e.g.*, *State v. Dann*, 220 Ariz. 351, ¶ 65, 207 P.3d 604, 618 (2009); *State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006). We are not at liberty to overrule or disregard that court's rulings, *see State v.*

[4]In his opening brief, Tamplin argues this issue was raised below. He states that his "notice of streamlined objections . . . specified that his objections to jury instructions encompass claims based on the rights to due process and trial by impartial jury." However we disagree that his streamlined objection to jury instructions was broad enough to raise the specific argument that the trial court's instruction here was an improper comment on the evidence.

*Foster*, 199 Ariz. 39, n.1, 13 P.3d 781, 783 n.1 (App. 2000), and therefore do not consider this argument further.

**V. Term of Community Supervision**

**¶35** Last, Tamplin argues the imposition of community supervision constituted an illegal sentence. Because Tamplin did not raise this issue below, we review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). "Generally, imposition of an illegal sentence constitutes fundamental error." *State v. Munninger*, 213 Ariz. 393, ¶ 11, 142 P.3d 701, 705 (App. 2006). The state concedes that community supervision was illegally imposed, and we agree. The trial court imposed community supervision under A.R.S. § 13-603(I), which was added by 1993 Ariz. Sess. Laws, ch. 255, § 6, and became effective "from and after December 31, 1993."[5] And 1993 Ariz. Sess. Laws, ch. 255, § 99, as amended by 1994 Ariz. Sess. Laws, ch. 236, § 17, provides: "The provisions of sections 1 through 86 and sections 89 through 95 of this act apply only to persons who commit a felony offense after the effective date of this act." Because § 13-603(I) became effective in 1994 and Tamplin committed his offenses in 1990, the provisions of § 13-603(I) do not apply to him and imposition of sentence under § 13-603(I) was illegal. Thus, the court erred in imposing community supervision, and we vacate that part of Tamplin's sentence.

[5]*See* 1993 Ariz. Sess. Laws, ch. 255, § 98.

## Disposition

**¶36** For the reasons stated, we affirm Tamplin's convictions and sentences with the exception of the trial court's imposition of community supervision, which we vacate.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge