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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. EDWARD JOHN GARLICK, III Appellant.	)	2 CA-CR 2010-0071 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091318001

Honorable Christopher C. Browning, Judge

AFFIRMED IN PART; REMANDED IN PART

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K E L L Y, Judge.

¶1 Following a jury trial, appellant Edward Garlick was convicted of attempted possession of a narcotic drug, attempting to obtain or procure the administration of narcotics by fraud, and forgery. The trial court sentenced him to presumptive terms of imprisonment on the narcotics offenses and to a slightly aggravated term on the forgery count, all to run concurrently, resulting in a prison sentence of 5.5 years. On appeal, Garlick argues the court erred by refusing to grant a mistrial based on prosecutorial misconduct and by precluding Garlick from introducing certain impeachment material. He also asserts the court erred by aggravating his sentence for the forgery conviction. We affirm the convictions but remand the case for resentencing.

Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Garlick's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In February 2009, Garlick approached the pharmacy counter inside a Tucson grocery store and presented a prescription for oxycodone from Dr. David A. Ruben, along with his driver's license. Because of a previous incident involving a suspicious prescription purportedly written by the same doctor, the pharmacist suspected the prescription had been forged. When Garlick returned to pick up the prescription, the pharmacist asked him to sign a document acknowledging receipt but then told him that the prescription had to be verified before it could be released. At trial, the pharmacist testified that Garlick had "matched the picture" on the driver's license he had presented.[1]

[1]The pharmacist also identified Garlick in court.

Dr. Ruben testified that Garlick was not his patient and that the signature on the prescription was not his.

Discussion

I. Preclusion of Impeachment Evidence

¶3 Garlick argues that the trial court improperly prevented him from impeaching Ruben with the fact that, at the time of trial, he had been placed on probation by the Arizona Board of Medical Examiners. "We evaluate cross-examination restrictions on a case-by-case basis to determine whether the defendant was denied the opportunity to present evidence relevant to issues in the case or the witness' credibility." *State v. Cañez*, 202 Ariz. 133, ¶ 62, 42 P.3d 564, 584 (2002). A court may properly limit cross examination "based on concerns for harassment, prejudice, confusion of the issues, safety of a witness, or marginal relevance." *State v. Dunlap*, 187 Ariz. 441, 456, 930 P.2d 518, 533 (App. 1996). But a court violates a defendant's Confrontation Clause rights if it precludes him from raising issues related to a key government witness's bias, motive, or prejudice, especially where the credibility of the witness is central to the case. *Davis v. Alaska*, 415 U.S. 308, 317-18 (1974).

¶4 On appeal, Garlick contends that his confrontation rights were violated and that the doctor's probationary status was relevant to show that Ruben had an interest in the case. Although Garlick argued below that precluding the evidence would violate his confrontation rights, he claimed only that the doctor's probationary status was probative

of the doctor's overall character for truthfulness.[2] Garlick now argues for the first time that Ruben's probationary status was probative of bias and motive to fabricate. "[A]n objection on one ground does not preserve the issue on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008).

¶5 In general, we decline to address arguments raised for the first time on appeal, *State v. Takacs*, 169 Ariz. 392, 399, 819 P.2d 978, 985 (App. 1991), and we therefore review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). To show fundamental error, Garlick must demonstrate both that the error was fundamental, and that it resulted in prejudice. *Id.* As the state notes, Garlick argued to the jury that Ruben had a motive to lie in order to protect his license to practice medicine and avoid criminal charges, suggesting Garlick suffered no prejudice because he was not precluded from presenting this argument to the jury. Because Garlick does not argue on appeal that he was prejudiced by the court's preclusion of the proffered evidence, he has failed to meet his burden of proof on this issue. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (claim waived by failure to argue fundamental error).

II. Closing Arguments

¶6 Garlick next asserts that "[t]he state improperly shifted the burden of proof" during its rebuttal argument, and that the trial court incorrectly denied his motion for a

[2]During arguments on the state's motion in limine, Garlick's counsel did argue that the "doctor ha[d] [a] motive to testify falsely," but this was in a different context. Garlick's counsel had suggested that the pharmacist would testify Ruben had violated federal law in filling out prescriptions—testimony that the pharmacist did not present and about which he had no personal knowledge.

mistrial based on this prosecutorial misconduct. "Because the trial court is in the best position to determine the effect of a prosecutor's comments on a jury," we review a court's refusal to grant a mistrial based on alleged prosecutorial misconduct for an abuse of discretion. *State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006). To prevail on a claim of prosecutorial misconduct, Garlick was required to "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.'" *Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d at 846, *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). A defendant is denied due process if there is a "'reasonable likelihood . . . that the misconduct could have affected the jury's verdict.'" *State v. Martinez*, 218 Ariz. 421, ¶ 15, 189 P.3d 348, 353 (2008), *quoting State v. Velazquez*, 216 Ariz. 300, ¶ 45, 166 P.3d 91, 102 (2007).

¶7 In this case, Garlick argued in closing that the state had failed to meet its burden of proof. Specifically, he alleged that the state had failed to establish both that Garlick was the same person who attempted to obtain oxycodone with the forged prescription and that the prescription was forged. He noted that although a video camera was installed at the store entrance and a photo lineup had been conducted by police, the state had not presented either as evidence. Additionally, he noted that no evidence had established that the driver's license presented to the pharmacist belonged to Garlick, nor had an expert been called to establish that the signatures on the driver's license and the pharmacy receipt belonged to Garlick or that the prescription was a forgery.

¶8 In rebuttal, the state responded, "The defense doesn't have to subpoena any witnesses. However, the defense can subpoena witnesses." The prosecutor continued, "Defense can bring in the doctors . . . . The defense could have brought in a handwriting expert. The defense could have brought in evidence. Doesn't have to, but it can." Garlick objected to these arguments on the ground that the prosecutor had sought to shift the burden of proof, and the court overruled his objections. Garlick then objected on the ground of speculation when the state began to argue, "Ask yourself this: If there was a handwriting expert out there that would say[, 'A]bsolutely not his signature,[']' if there was one of the doctors out there that would say[, ']I definitely signed that[']–." The court sustained that objection.

¶9 The state continued:

> MR. NAVARRO: Ask yourself, if that could have been done, if you were the defense, would you have done it[?]
>
> MR. HERBERG: Objection, Your Honor. He is continuing to argue the same point.
>
> THE COURT: I sustained that. Move on[ ]to something else, Mr. Navarro. Thank you, sir.
>
> MR. NAVARRO: Yes, Your Honor. Defense counsel argues, also talked about the driver's license. Again, the [motor vehicle division] report, defense could have brought that in.
>
> MR. HERBERG: Same objection.
>
> THE COURT: Overruled as to that.

Following argument, Garlick moved for a mistrial on the grounds that the state's arguments had improperly shifted the burden of proof. The trial court denied the motion.

Garlick contends this was error and therefore his convictions should be reversed.[3] We disagree.

¶10 "Attorneys, including prosecutors in criminal cases, are given wide latitude in their closing arguments to the jury." *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). However, misconduct occurs if the prosecutor "'call[s] to the attention of the jurors matters that they would not be justified in considering in determining their verdict.'" *State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000), *quoting State v. Hansen*, 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1988). "[P]rosecutorial comments which are fair rebuttal to comments made initially by the defense are acceptable." *State v. Duzan*, 176 Ariz. 463, 468, 862 P.2d 223, 228 (App. 1993).

¶11 First, we address whether the prosecutor's comments were appropriate rebuttal to Garlick's arguments in closing. *See State v. Suarez*, 137 Ariz. 368, 376-77, 670 P.2d 1192, 1200-01 (App. 1983) (not appropriate rebuttal when defense counsel had merely questioned failure of state to produce witnesses presumptively favorable to its case). In *State v. Jerdee*, 154 Ariz. 414, 417-18, 743 P.2d 10, 13-14 (App. 1987), this court distinguished between a situation in which defense counsel argues "that because the state failed to call certain witnesses, it had failed to prove its case," and a situation in

[3]Garlick also argues that the prosecutorial misconduct here was intentional and summarily states that retrial is barred under the double jeopardy clause. But he does not sufficiently develop this argument on appeal. Because he fails to cite any authority or point to any intentional misconduct by the state, the argument is waived. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("[O]pening briefs must present significant arguments, supported by authority," and merely "list[ing] counsel's concerns, without argument" is not sufficient.).

which counsel implies the witnesses' "testimony would have been favorable to the defense." The court went on to explain: "When a witness is equally available to both sides, 'no inference should be allowed by either party from the other's failure to call that witness to testify.'" *Id.*, *quoting State v. Condry*, 114 Ariz. 499, 500, 562 P.2d 379, 380 (1977).

¶12 In arguing to the jury that the state failed to prove its case, Garlick did not argue that the evidence would be favorable to the defense, but rather that the state had the burden of proof and by failing to introduce such evidence had not established the elements of the case beyond a reasonable doubt. Thus, Garlick "properly commented upon the failure of the state to produce witnesses and evidence which would be favorable to the state," and his comments did not open the door for the state's rebuttal. *See Suarez*, 137 Ariz. at 377, 670 P.2d at 1201. As such, the state's comments were not invited by error on defense counsel's part and the rebuttal was improper.

¶13 At any rate, we conclude any error by the prosecutor in making an inappropriate rebuttal argument was harmless. Attorney misconduct does not always necessitate reversal. *See State v. Leon*, 190 Ariz. 159, 162, 945 P.2d 1290, 1293 (1997). In determining if particular comments warrant reversal, the test is whether "'the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by those remarks.'" *Suarez*, 137 Ariz. at 377, 670 P.2d at 1201, *quoting Sullivan v. State*, 47 Ariz. 224, 238, 55 P.2d 312, 317 (1936).

¶14 Garlick contends that, as in *State v. Filipov*, 118 Ariz. 319, 325, 576 P.2d 507, 513 (App. 1977), "the cumulative effect of the state's closing argument was prejudicial, 'with a strong possibility that the statements influenced the jury verdict,'" *quoting State v. Woodward*, 21 Ariz. App. 133, 135, 516 P.2d 589, 591 (1973). However, in *Filipov*, the prosecutor repeatedly stated his opinion as to the defendant's guilt, despite the court's admonitions; referred to inadmissible evidence; and "attempt[ed] to inject an issue of national origin into the trial." 118 Ariz. at 324-25, 576 P.2d at 512-13. But, in this case, the prosecutor incorrectly believed he was engaging in proper rebuttal and repeatedly told the jury that the state had the burden of proof and Garlick had no burden whatsoever. And any error was mitigated by the trial court's sustaining Garlick's objection to the state's query, "Ask yourself, . . . if you were the defense, would you have [brought in particular evidence]."

¶15 Likewise, "[i]mproper argument can be cured by proper . . . instructions." *Jerdee*, 154 Ariz. at 418, 743 P.2d at 14; *see also State v. Hernandez*, 170 Ariz. 301, 308-09, 823 P.2d 1309, 1316-17 (App. 1991) (court's instruction on burden of proof and presumption of innocence and prosecutor's reference to court's instruction during closing arguments weigh against reversal). The jury here was instructed that "[w]hen an objection to a question was sustained, you are to disregard the question"; that Garlick was presumed innocent; that the state had the burden of proving guilt beyond a reasonable doubt; and that Garlick was not required to prove his innocence or produce any evidence. Because we assume juries follow their instructions, we conclude that any error in the state's argument was cured by the court's instructions, *see State v. LeBlanc*, 186 Ariz.

437, 439, 924 P.2d 441, 443 (1996), and that the court did not abuse its discretion in denying Garlick's motion for a mistrial.

III. Sentencing

¶16 Garlick also argues that the "trial court improperly imposed an aggravated sentence on the forgery count," by failing to find "any statutory aggravating factors." He maintains that the court erred in considering his "failure to accept responsibility for th[e] crimes" as an aggravating factor since he had consistently maintained his innocence. The state argues, and Garlick concedes, that he did not object below to the sentence and, therefore, he "has forfeited the right to relief unless he can show fundamental, prejudicial error occurred." *State v. Zinsmeyer*, 222 Ariz. 612, ¶ 26, 218 P.3d 1069, 1080 (App. 2009). But, as we have held in the past, the imposition of an illegal sentence constitutes fundamental error. *Id.*

¶17 At sentencing, the trial court noted that Garlick had a prior felony conviction for solicitation to possess marijuana for sale. It then cited "[Garlick's] criminal history, and specifically [his] drug history, and [his] failure to accept responsibility for the[] crimes" as aggravating factors. Garlick argues that all these factors fall under the catch-all provision of A.R.S. § 13-701(D)(24). We agree that "'increas[ing] a defendant's statutory maximum sentence' based solely on the catch-all provision 'violates due process'" and warrants resentencing. *See Zinsmeyer*, 222 Ariz. 612, ¶ 22, 218 P.3d at 1079, *quoting State v. Schmidt*, 220 Ariz. 563, ¶ 10, 208 P.3d 214, 217 (2009) (alteration in *Zinsmeyer*). The state, however, contends that the court's reference to "criminal history" as an aggravating factor constitutes a finding that

"[Garlick] was previously convicted of a felony" under § 13-701(D)(11). *See* A.R.S. § 13-702; *State v. Martinez*, 210 Ariz. 578, ¶ 10, 115 P.3d 618, 621 (2005).

¶18 The state is correct that once the trial court finds one statutory aggravating factor, such as a prior conviction, it may then consider other aggravating factors under § 13-701(D)(24), the catch-all provision. *Martinez*, 210 Ariz. 578, ¶¶ 10, 26, 115 P.3d at 621-22, 625, *citing Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). However, the court must cite the factors used in its calculus, and may not rely solely on § 13-701(D)(24). *See Zinsmeyer*, 222 Ariz. 612, ¶¶ 23-25, 208 P.3d at 1079-80. In *Zinsmeyer*, we held that although the trial court had found the defendant had been convicted of a prior felony, it "did not cite his prior conviction as an aggravating factor." *Id.* ¶ 23. Therefore, "although the court could have relied on [the] prior conviction to aggravate [the defendant's] sentence, it did not do so," and the only aggravating factors actually used fell under the catch-all provision. *Id.* Here, although the court noted that Garlick had one prior felony conviction, it did not cite this prior conviction as an aggravating factor. Instead, the court cited Garlick's "criminal history and specifically [his] drug history."

¶19 The state argues that the phrase "criminal history" is sufficient to allow the court to "properly find and consider additional factors in sentencing." But the cases cited by the state are distinguishable. In those cases, the courts specifically cited felony convictions in addition to "criminal history" in imposing aggravated sentences based on prior criminal history. *State v. Burdick*, 211 Ariz. 583, ¶¶ 11-13, 125 P.3d 1039, 1042 (App. 2005) (sentence aggravated on basis of "'[c]riminal history with multiple

misdemeanor and felony convictions'") (alteration in *Burdick*); *State v. Manzanedo*, 210 Ariz. 292, n.2, 110 P.3d 1026, 1030 n.2 (App. 2005) (not reaching whether "criminal history" alone was sufficient aggravating factor because additional statutory factor had been found); *State v. Estrada*, 210 Ariz. 111, ¶ 9, 108 P.3d 261, 263 (App. 2005) ("extensive history of felony convictions" as aggravating factor).

¶20 The trial court listed Garlick's "criminal history, drug history and failure to accept responsibility for these crimes" as "aggravat[ing] factors." The presentence report revealed that Garlick's "criminal history" included more offenses than the prior conviction previously mentioned by the court. Therefore, the citation to his "criminal history" does not precisely indicate that the court found a prior felony conviction was an aggravating factor, as provided in § 13-701(D)(11). *But cf. Burdick*, 211 Ariz. 583, ¶¶ 11, 13, 125 P.3d at 1042 (aggravating factor of "'[c]riminal history with multiple misdemeanor and felony convictions'" constitutes finding that prior felony convictions are aggravating circumstance). Because the court must first find an enumerated aggravating factor before it may impose an aggravated sentence based upon factors listed in the catch-all provision in § 13-701(D)(24), and because a defendant's "criminal history" is distinct from the statutorily enumerated "prior felony conviction" for the purpose of aggravation, the court erred in aggravating Garlick's sentence. *Schmidt*, 220 Ariz. 563, ¶ 10, 208 P.3d at 217 ("Use of the catch-all as the sole factor to increase a defendant's statutory maximum sentence violates due process . . . ."). We agree with Garlick that this error was fundamental and resulted in prejudice. We therefore vacate Garlick's aggravated sentence for the forgery conviction.

¶21 Garlick also argues that the trial court erred in considering his failure to accept responsibility for his crime as an aggravating circumstance, even though he has maintained his innocence through the proceedings. *See State v. Carriger*, 143 Ariz. 142, 162, 692 P.2d 991, 1011 (1984) (that a defendant "chooses not to publicly admit his guilt . . . is irrelevant to a sentencing determination"). The state concedes that the court erred in considering this as an aggravating factor, and we agree. Because we remand the case for resentencing on other grounds, we caution the court not to consider this factor on remand. *See State v. May*, 210 Ariz. 452, ¶ 1, 112 P.3d 39, 40 (App. 2005) (addressing issue only to extent it was "likely to recur on remand").

Disposition

¶22 We affirm the convictions, vacate the sentence for forgery, and remand the case for resentencing.

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

CONCURRING:

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

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