

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Plaintiff/Appellee,

vs.

BRIAN DICK,

Defendant/Appellant.

No. _____

**Court of Appeals No.
2CA-CR2010-0044**

**Pima County Cause No.
CR-2009-0837-001**

**PETITION FOR REVIEW TO
ARIZONA SUPREME COURT**

**BARTON & STORTS, P.C.
Brick P. Storts, III
271 North Stone Avenue
Tucson, Arizona 85701
Telephone: 882-2802
brickstorts@yahoo.com
Pima County Computer No. 55508
Arizona State Bar No. 004507
Attorney for Petitioner DICK**

I.

ISSUES DECIDED AND PRESENTED FOR REVIEW

- I. THE APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT IMPROPERLY ADMITTED APPELLANT'S STATEMENT OF HAVING ONE-NIGHT-STANDS, AND PERMITTED THE JURY TO CONSIDER APPELLANT'S CONSENSUAL AFFAIRS TO DETERMINE THE APPELLANT'S GUILT OF SEXUAL ASSAULT

II.

FACTS

- ¶ 1 The Appellant was indicted for sexual assault pursuant to *A.R.S. § 13-1406*.
- ¶ 2 Prior to trial, the Appellant made specific requests of the State for disclosure of character evidence the State intended to introduce under *Rules 404(b) and 404(c)*, *Arizona Rules of Evidence*, including:
 - A. A letter to Michelle Araneta dated October 12, 2009, which requested in pertinent part a "List of all... bad acts of the defendant which the state will use at trial to prove motive, intent or knowledge, emotional propensity or for any other purpose at trial."
 - B. A Motion for Additional Disclosure-Prior Bad Acts filed October 13, 2009. (R.A. 30)
 - C. An email to Michelle Araneta from defense counsel dated November 2, 2009, which read "If you intend to play my client's statement let me know so we can address the necessary redactions."
 - D. Email from Susan Eazer to undersigned counsel dated November 13, 2009, and undersigned counsel's email response dated November 14, 2009.

(See R.A. 66, Exhibits A-E)

¶ 3 The Appellant listed in his Joint Pretrial Statement, four women as potential witnesses to establish he did not “rape” women in situations similar to that in the instant case. (R.A. 21, p. 3, ll. 6-9, *See also* R.A. 66, Exhibit F; transcripts of interviews with Monique Grame, Michelle Lee, Carole Fonts, Michelle Chacon)

¶ 4 Appellant abandoned his character defense when the State did not provide any prior notice that it intended to use “bad act evidence” against the Appellant. (The witnesses lived out of state and could not be rescheduled to appear once the court made its ruling on the second day of trial admitting the “bad act” evidence in the Appellant’s statement)

¶ 5 On the first day of trial, the Court ruled that character evidence would not be introduced by either party. (R.A. 52, Minute Entry 11-17-09, p. 2)

¶ 6 On the second day of trial, the State sought and obtained, over Appellant’s objection, a ruling admitting portions of the Appellant’s statement relating to him having one night stands, two of which were with other Border Patrol Agents. (**Reporter’s Transcript (R.T.) 11-18-09**, p. 13, l. 25 - p. 21, l. 16)

¶ 7 Appellant had objected to the admission of these portions¹ of the Appellant’s statements on the grounds that the statements constituted “bad act” evidence, and that the Appellant had repeatedly requested notice from the state if such evidence was to be used, and argued that the admission of the requested redactions would constitute

¹ See R.A. 66, Exhibit G (portions of the Appellant’s statement admitted and played for the jury over the Appellant’s objection)

damaging character evidence which violated both the procedural and substantive requirements of *Rules 404(b) and 404(c)*. (**R.T. 11-18-09**, p. 14, l. 10 - p. 16, l. 24)

¶ 8 Ms. Meyer testified that after an evening of playing softball and drinking with her co-workers, her, the Appellant and a friend, Bradley Hayes, left a bar and went to Bradley's apartment. (*Id.*, p. 61, ll. 4-6) Ms. Meyer went to sleep in Bradley's bedroom, then moved to another bedroom, and was awakened by the Appellant pulling her pants down to her ankles. (*Id.*, p. 70, ll. 20-25) Ms. Meyer did not say anything as she had just awakened and was in a state of shock. When the Appellant climbed on top of her, she pushed with her hands onto his chest, at which time the Appellant grabbed both of her wrists with one hand, and penetrated her, having sex with her for approximately one minute. (*Id.*, p. 70, l. 24 - p. 75, l. 4) The Appellant fell asleep, after which she got up, went into the other bedroom where her friend Bradley was sleeping, did not say anything to him, left the apartment, and called a male friend in whom she was somewhat interested, and told him she *thinks* she was raped.

(*Id.*, p. 75, l. 21 - p. 78, l. 25; p. 147, ll. 7-9)

¶ 9 Appellant moved pursuant to *Rule 20, A.R.Cr.P.*, for a directed verdict based on insufficient evidence (**R.T. 11-20-09**, p. 4, l. 11 - p. 5, l. 7), which the Court denied.

(*Id.*, p. 5, ll. 17-21)

¶ 10 Regarding the Appellant's "one-night-stands" statement, the trial court instructed the jury that

Evidence of the Defendant's previous consensual sexual conduct with other persons has been admitted for limited purposes. **It may be considered only to assist you in**, No. 1, understanding the full context

of the Defendant's statements to the investigating officers; and, No. 2, **determining the Defendant's intent and knowledge that he was acting with or without the consent of Ms. Meyer.** You may not consider this evidence for any other purpose.

Id., p. 31, l. 18 – p. 32, l. 1

¶ 11 The Appellant was found guilty of sexual assault. (R.A. 60)

¶ 12 The Appellant timely appealed on 1-27-10. (R.A. 84)

Disposition in Court Below

¶ 13 The Court of Appeals held that:

A. In the form of Ms. Meyer's testimony, there was substantial evidence of knowledge of lack of consent, i.e. that she testified that the Appellant restrained her hands when she tried to push him away and he continued to restrain her for the duration of the assault, and she turned her head so he could not kiss her and she attempted to move away when he sought to penetrate her. Citing to *State v. Williams*, 111 Ariz. 175, 526 P.2d 714 (1974), the Court of Appeals noted that a conviction may be had on the basis of the uncorroborated testimony of the prosecutrix *unless the story is physically impossible or so incredible that no reasonable person could believe it*, and it is the function of the jury to determine whether the testimony of the prosecutrix is such as to make the story credible or reasonable. *Id.*, 111 Ariz. at 177-78, 526 P.2d at 716-17 (1974)(Memorandum Decision (MD), p. 5, ¶ 9) (**Exhibit 1**)

B. The trial court improperly admitted the Appellant's statement that the Appellant had multiple one-night-stands, as the statement was not relevant to show he had non-consensual sex with his co-worker, Border Patrol Agent Andrea Meyer,

however, the error in allowing Appellant's statement was harmless, i.e. that the guilty verdict was purely unattributable to the error, (Id., at pp. 6-7, ¶¶ 11-13) as the State only tangentially referred to the Appellant's statement in closing argument. (Id., at p. 8, ¶ 13). The Court of Appeals could not conclude the statement was otherwise prejudicial or could have influenced the verdict (Id., p. 8, ¶ 14), because the trial court had opined that the Appellant's statement was probably beneficial to him as having one-night-stands was consistent with his defense and, the statement was tempered with a jury instruction limiting its use to "only assist you in ... understanding the full context of [his] statements to the investigating officers" and "determining [his] intent and knowledge that he was acting with or without [Andrea's] consent," and cannot be "consider[ed] ... for any other purpose." Id., at pp. 8-9, ¶ 15

C. The jury is presumed to follow the court's instructions, and found that the limiting instruction mitigated prejudice from the improper admission of the Appellant's statement, thus, the Appellant's statement did not contribute to or affect the verdict and was, therefore, harmless. p. 9, ¶ 15

D. The Appellant failed to demonstrate fundamental error the result of the limiting instruction, and the Appellant cannot demonstrate prejudice. Id., at p. 15, ¶

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III.

REASON WHY PETITION SHOULD BE GRANTED

¶ 14 This Court should grant the Appellant's petition for review because important issues of law have been incorrectly decided. The Court of Appeals correctly determined that the Appellant's statement to police, that he had one-night-stands, was

not relevant to proving the Appellant had non-consensual sex with his co-worker, but incorrectly decided that said information did not prejudice the Appellant, as the jury is presumed to follow the court's instructions, and a limiting instruction mitigated the prejudice that inhered to the Appellant based on admission of that statement.

IV.

ARGUMENT

¶ 15 Notwithstanding the Appellant's requests for disclosure, and specifically advising the prosecutor by email that if the State intended to play the Appellant's statement, to let counsel know so the necessary redactions could be made (Ante., ¶ 2), the State did not advise counsel of its intent to play the recording of the Appellant's statement until the second day of trial.

¶ 16 Over Appellant's objections, the State was permitted to play Appellant's statement, which included comments that the Appellant had "many one (1) night stands before. You meet 'em and you go home with 'em[]", describing how he was at a party where a girl with another guy left the party with the Appellant and he "brought her home and we had sex" because she wanted the Appellant, and that he had slept with two [Border Patrol] agents prior to this. (R.A. 66, Exhibit G)

¶ 17 The State had argued that the Appellant's one-night-stands were not prior bad acts and should be admitted for the sole purpose of showing Appellant's state of mind, that he thought of this act as being consensual, and avowed to the Court that it was not going to get into the fact that he had done this before with other women, only his words, consensually. (R.A. 11-18-09, p. 14, ll. 6-14)

¶ 18 Regardless of what the State would argue relating to the Appellant’s statement, the jury heard the actual words spoken by Appellant, which clearly established the Appellant to be a philanderer. The State’s comments to the jury solidified this image of the Appellant as a person who “thinks pretty highly of himself, who thinks he can get women pretty easily; and maybe he thought that he was, you know, going to be able to get Andrea pretty easily”. (R.T. 11-20-09, p. 16, ll. 10-13 - Closing Arguments)

¶ 19 The Appellant’s statement is prejudicial in that it painted the picture of a person who regarded women as sex mates and that women wanted him. Subsequent to the statement, jurors could not view the Appellant as a Border Patrol agent of high moral character.

¶ 20 The most prejudicial aspect to admission of the Appellant’s statement was the trial court’s limiting instruction which permitted the jury to consider the Appellant’s statement about having one-night-stands for the purpose of “determining the Defendant's intent and knowledge that he was acting with or without the consent of Ms. Meyer.” (Ante., ¶ 10)

¶ 21 The State argued that the statement was not being offered as character evidence to show the Appellant acted in conformity therewith, thus, admission of the statement was not considered under *Rule 404(b)*, but was considered to be admissible under *Rule 403*. (R.T. 11-18-09, p. 14, l. 1 – p. 21, l 16)

¶ 22 The jury instruction was not a limiting instruction at all. The instruction empowered the jury to consider the Appellant’s immoral conduct of having consensual relations with various women for the purpose of determining whether he intended or

knew he was having sex with Ms. Meyer without her consent. Permitting the jury to consider the Appellant's prior immoral,² but lawful, acts as evidence of intent to commit sexual assault, is precisely what *Rules 403 and 404(b)* intend to prohibit.

¶ 23 As the Court of Appeals noted, whether the Appellant was a fornicator, a character trait, was irrelevant to determining whether he knew or intended to have unconsensual sex with Ms. Meyer. (MD, ¶ 12) The trial court's instruction, however, permitted the jury to consider that irrelevant information to determine the ultimate question in this case. If the jury considered the Appellant's character as a philanderer to determine that he knew or intended to have unconsensual sex with Ms. Meyer, then the Appellant's conviction rests upon an improper foundation and must be reversed.

¶ 24 Even if there exists sufficient evidence to support the jury's verdict, the jury's verdict cannot stand if it cannot be said that the irrelevant information did not contribute to the verdict. *State v. Gunches*, 225 Ariz. 22, 26, ¶ 24, 234 P.3d 590, 594 (2010) The State's failure to prove an element of an offense of conviction, i.e. the *mens rea*, would be fundamental error, as it constitutes error going to the foundation of the case and necessarily deprives a defendant of a fair trial. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005)

V.

CONCLUSION

¶ 25 The Appellant's statement to the jury relating to him having one-night-stands was irrelevant to determining whether he intended or knew sex with Ms. Meyer was

² It is unknown whether jurors believed the Appellant's actions were immoral, however, premarital sex, or fornication, is still considered by many to be amoral.

without consent. As such, the trial court's instruction permitting the jury to consider evidence of the Appellant's character trait of being a philanderer to determine the ultimate issue of lack of consent, deprived him of his due process right to a fair trial and, his conviction for sexual assault must be reversed.

RESPECTFULLY SUBMITTED this 22nd day of June, 2011.

BARTON & STORTS, P.C.

s/ Brick P. Storts, III

Brick P. Storts, III
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I, Brick P. Storts, III, hereby assert that the above Petition for Review is in compliance with the rules by utilizing the proportionately spaced Times New Roman font with a 14 point type size.

This Petition contains 10 pages and 2,225 words, not including the Certificate of Compliance or Certificate of Service.

DATED this 22nd day of June, 2011.

BARTON & STORTS, P.C.

s/ Brick P. Storts, III
Brick P. Storts, III
Attorney for Petitioner

STATE OF ARIZONA)
)
COUNTY OF PIMA)

SUBSCRIBED AND SWORN to before me this 22nd day of June, 2011 by Brick P. Storts, III.

s/ Laurie L. Wepfer
Laurie L. Wepfer
Notary Public

My Commission Expires:
6/20/2012

CERTIFICATE OF SERVICE

The undersigned attorney for the Petitioner, Brick P. Storts, III, hereby certifies that the foregoing Petition for Review was efiled this 22nd day of June, 2011 with the Clerk, Arizona Court of Appeals, Division Two. Counsel further certifies that he has caused a copy of this Petition for Review to be hand-delivered by Hawkins & EZ Messenger Service this 22nd day of June, 2011 to the following:

Amy M. Thorson
Assistant Arizona Attorney General
400 West Congress, # S-315
Tucson, Arizona 85701-1367

BARTON & STORTS, P.C.

s/ Brick P. Storts, III
Brick P. Storts, III
Attorney for Petitioner

EXHIBIT 1

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

FILED BY CLERK

JUN -8 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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|-----------------------|---|----------------------------|
| THE STATE OF ARIZONA, |) | |
| |) | |
| Appellee, |) | 2 CA-CR 2010-0044 |
| |) | DEPARTMENT A |
| v. |) | <u>MEMORANDUM DECISION</u> |
| |) | Not for Publication |
| BRIAN DICK, |) | Rule 111, Rules of |
| |) | the Supreme Court |
| Appellant. |) | |
| |) | |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090837001

Honorable Charles S. Sabalos, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson

Tucson
Attorneys for Appellee

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

Tucson
Attorneys for Appellant

ESPINOSA, Judge.

¶1 After a jury trial, Brian Dick was convicted of sexual assault and sentenced to 5.25 years' imprisonment. On appeal, he argues there was insufficient evidence

supporting his conviction, challenges the admission of certain evidence, alleges prosecutorial misconduct, and contests one of the instructions to the jury. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 “[W]e view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant.” *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). One evening in January 2009, Andrea M. played softball with some of her work colleagues and then accompanied them to a restaurant. Because she lived in Nogales and the game was in Tucson, she planned to stay the night at the apartment of Bradley H., a friend from work. The group drank a number of beers at the restaurant and, after several hours, Bradley invited Dick, another player from the team, back to his apartment to continue drinking. Andrea did not talk to Dick during the evening, did not know him apart from the softball team, had never had a conversation with him, and was not interested in him romantically. Dick, Bradley, and Andrea purchased more beer and went to Bradley’s apartment.

¶3 Because Andrea was tired and already had drunk four large beers at the restaurant, she stayed up with the men for only about five minutes, and then lay down and fell asleep in Bradley’s bed, still wearing her softball clothes. At some point, Bradley and Dick, both of whom appeared to be intoxicated, woke her up, and Bradley asked her to move to the other bedroom. When Andrea did not move, Dick picked her up and

started to carry her. At that point, she made him put her down and went into the other bedroom and fell asleep.

¶4 Andrea thereafter awoke from a deep sleep and realized Dick was on top of her, removing her pants and underwear. She attempted to push him off but he grabbed her hands, held them over her head, and tried to kiss her. Andrea turned her face and attempted to move away but Dick opened her legs and inserted his penis into her vagina while still holding her hands above her head. Andrea testified she was in a state of shock and was unable to speak or scream. Dick ejaculated inside her, then rolled over and fell asleep. Andrea believed the incident lasted approximately a minute.

¶5 Once Dick was asleep, Andrea got dressed and went outside to her car, where she telephoned a friend and told him she had been raped. He advised her to call the police, which she did. A medical exam revealed that Andrea had a painful abrasion to her genital area. The nurse who had conducted the examination testified that such abrasions can occur with both consensual and nonconsensual intercourse, but that a research article had concluded they were more commonly caused by nonconsensual intercourse. Police also took pictures of Bradley's apartment and its contents, including two photographs of Dick on the morning of the incident. Dick told them he had gotten into bed with Andrea, she had rolled over and put her head on his chest, they had started kissing, and thereafter had consensual sex.

¶6 Dick was charged with one count of sexual assault. A jury found him guilty, and he was sentenced as outlined above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Sufficiency of the Evidence

¶7 Dick first argues the evidence was insufficient to support his sexual assault conviction. “Every conviction must be based on ‘substantial evidence,’” *State v. Miles*, 211 Ariz. 475, ¶ 23, 123 P.3d 669, 675 (App. 2005), *quoting* Ariz. R. Crim. P. 20(a), which is “‘proof that reasonable persons could accept as sufficient to support a conclusion of a defendant’s guilt beyond a reasonable doubt,’” *id.*, *quoting State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). On appeal, we evaluate the evidence in the light most favorable to upholding the verdict and will reverse a conviction for insufficient evidence “‘only if there is a complete absence of probative facts’” to support the jury’s conclusion. *Id.*, *quoting State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000).

¶8 In order to sustain Dick’s conviction, there must be substantial evidence from which a jury could conclude that he intentionally or knowingly had engaged in sexual intercourse with Andrea without her consent. A.R.S. § 13-1406(A). Dick argues there was insufficient evidence that he “intended or knew the sex act was without [Andrea]’s consent,” contending “[t]he evidence in no way demonstrates that [he] knew

[Andrea] did not want to have sex with him.” He points to the fact that she did not tell him to stop and maintains she “was not restrained in any way.”

¶9 The record, however, contradicts Dick’s latter assertion and reflects substantial evidence that he knew Andrea did not consent to sexual intercourse. At trial, Andrea testified Dick had restrained her hands when she tried to push him away, and he had continued to restrain her for the duration of the assault. She also turned her head so that he could not kiss her and attempted to move away when he sought to penetrate her.¹ The credibility of Andrea’s account was a matter for the jury. *See State v. Lucero*, 204 Ariz. 363, ¶ 20, 64 P.3d 191, 194 (App. 2003); *see also State v. Williams*, 111 Ariz. 175, 177-78, 526 P.2d 714, 716-17 (1974) (explaining “conviction may be had on the basis of the uncorroborated testimony of the [victim] unless the story is physically impossible or so incredible that no reasonable person could believe it” and jury must determine whether victim’s testimony “credible or reasonable”). Andrea’s testimony constituted substantial evidence from which a rational juror could conclude beyond a reasonable doubt that Dick intentionally or knowingly had sexual intercourse with Andrea without her consent.

Admission of Photographs and Statement

¶10 Dick argues the trial court abused its discretion when it admitted into evidence a statement he had made to police in which he said he had engaged in one-night stands with other women, as well as two photographs taken of him the morning after the

¹We are perplexed by Dick’s assertion in his reply brief that “evidence of [Andrea] being restrained . . . and resisting [him] . . . does not support a finding that [he] knew [Andrea] did not consent to having sex with him.”

incident.² He contends this evidence should have been precluded under Rule 403, Ariz. R. Evid., because its probative value was substantially outweighed by the danger of unfair prejudice. *See* Ariz. R. Evid. 403. We review a trial court’s rulings under Rule 403 for an abuse of discretion. *See State v. Villalobos*, 225 Ariz. 74, ¶ 20, 235 P.3d 227, 233 (2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 901 (2011).

Statement

¶11 At trial, Dick objected to the admission of his “one-night stands” statement, arguing it was “not probative because [he was] not denying he had sex with this woman” and was “unduly prejudicial because there may be people who don’t like guys that have one-night stands.” The prosecutor argued the statement was probative because “[a one-night stand is] what he’s saying happened” and it showed “his state of mind” because “it was just a one-night stand in his mind.” She further argued the statement was not any more prejudicial than his defense that he had engaged in a one-night stand with Andrea. The trial court admitted the statement, finding its probative value was not substantially outweighed by the danger of unfair prejudice.

²Dick’s interviews with police were played for the jury. The contested statement, which Dick sought to have redacted, was as follows:

Q[uestion:] Ever had any problems getting girls before?

A[nswer:] . . . [O]nly when I’m shy . . . and don’t really wanna . . . talk to ‘em but . . . I mean, no and I’ve gone home with, I’ve had many one . . . night stands before. You meet ‘em and you go home with ‘em. It happens and, I mean a[m] I a horrible guy for that? Hey, that’s up to whoever . . . wants to judge me

¶12 At the outset, we first address Dick’s argument that the statement was irrelevant. *See State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988) (“Before reaching Rule 403, . . . it is necessary to analyze the proffered evidence under Rule 401[, Ariz. R. Evid.,] to ascertain whether it is relevant.”). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ariz. R. Evid. 401. Our standard for concluding evidence is relevant under Rule 401 “is not particularly high.” *Oliver*, 158 Ariz. at 28, 760 P.2d at 1077. Here, however, we are inclined to agree with Dick that the fact he had had past consensual sexual encounters with other women was irrelevant to whether he knew Andrea consented to having sex on the night of the incident, nor did this information otherwise have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ariz. R. Evid. 401.

¶13 The mere existence of error, however, is not enough to require reversal of a conviction if the error is harmless. *See State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998) (court will not reverse conviction on appeal “if an error is clearly harmless”). “For an error to be harmless, the State must establish beyond a reasonable doubt that [it] did not contribute to or affect the verdict.” *State v. Gunches*, 225 Ariz. 22, ¶ 24, 234 P.3d 590, 594 (2010). ““The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.”” *Id.*,

quoting *State v. Anthony*, 218 Ariz. 439, ¶ 39, 189 P.3d 366, 373 (2008) (omission in *Gunches*). Dick contends the state used his comment to show he “had little regard [for] women in general and would be more likely to force[] a woman to have sex with him.” But the record does not support that contention; the state in fact only tangentially referred to Dick’s statement; the prosecutor’s sole reference during closing argument was that Dick “thinks pretty highly of himself. He thinks he can get women pretty easily; and maybe he thought that he was, you know, going to be able to get Andrea pretty easily”

¶14 Nor can we conclude the statement itself was otherwise prejudicial to Dick or could have influenced the guilty verdict. Indeed, the trial court opined that it “help[ed]” Dick, explaining if “[he] likes women and they like him and they have one-night stands,” this would be consistent with his defense of what had happened with Andrea. *Cf. West v. State*, 24 Ariz. 237, 258, 208 P. 412, 419 (1922) (affirming conviction when wrongly admitted evidence “was probably beneficial” to defendant). We need not determine, however, that the statement was helpful to Dick’s defense, only that it did not contribute to the verdict. *See Gunches*, 225 Ariz. 22, ¶ 24, 234 P.3d at 594.

¶15 And, further tempering any effect of Dick’s statement was the trial court’s limiting instruction: “[e]vidence of [Dick]’s previous consensual sexual conduct with other persons has been admitted for limited purposes” and “may be considered only to assist you in . . . understanding the full context of [his] statements to the investigating officers” and “determining [his] intent and knowledge that he was acting with or without

[Andrea's] consent,” and cannot be “consider[ed] . . . for any other purpose.” The court gave this instruction apparently in response to Dick's concern that “[s]ome people are not going to like guys that have sex outside of marriage” or “are perceived to be . . . predator[s],” and the instruction served to deter the jury from drawing improper conclusions about Dick based on his sexual history. *See State v. Diaz*, 223 Ariz. 358, ¶ 14, 224 P.3d 174, 177 (2010) (jury presumed to follow instructions); *cf. Villalobos*, 225 Ariz. 74, ¶ 20, 235 P.3d at 233 (affirming admission of other-acts evidence under Rule 403; “[a]ny prejudice from the admission of this evidence was appropriately mitigated by the instruction” limiting purposes for which evidence could be considered). In sum, any error in the admission of Dick's statement did not contribute to or affect the verdict and was, therefore, harmless.

Photographs

¶16 Dick also contends the trial court abused its discretion in admitting two photographs taken of him the morning of the incident. One photograph shows Dick standing in a hallway wearing pants, a t-shirt, and a jacket, and the other is a close-up of his head and chest; in both he is holding a placard stating his name and birth date. Dick objected to their admission, arguing they were irrelevant, unduly prejudicial, and that “[i]dentification is not an issue.” The prosecutor argued they were probative because they showed Dick's “general appearance that morning, very hung-over looking and intoxicated” and the full-body photograph also showed “the pants . . . he's wearing,” which she described as “a crucial part of the evidence.” The court allowed the admission

of the photographs on the condition that the prosecutor establish that the use of the placard was a routine part of the investigation.

¶17 On appeal, Dick contends the photographs “depicting him in a hung over and unkept state” were not relevant to the issue of whether “the intercourse . . . was not consensual.” Quoting *Doerr*, 193 Ariz. 56, ¶ 32, 969 P.2d at 1176, the state argues the photographs “show[ed] his appearance just hours after the crime and therefore help[ed] to ‘complete the story’ for the jury” and further contends “[t]he[ir] probative value . . . , even if minimal, was not substantially outweighed by the potential for unfair prejudice,” because they merely show Dick “perhaps somewhat ruffled and tired-looking.”

¶18 After reviewing the photographs, we cannot say the trial court abused its discretion. Although Dick generally argues the photographs are irrelevant, he does not explain why evidence of his previous night’s drinking or how he appeared the morning of the incident was not probative or was cumulative of other evidence. More importantly, Dick has not demonstrated that their probative value, even if marginal, was outweighed by any danger of unfair prejudice. *See* Ariz. R. Evid. 403. The photographs do not appear to portray Dick negatively, especially where the prosecutor made it clear at trial that the placard he was holding did not indicate he was under arrest. Accordingly, Dick has failed to demonstrate reversible error on this basis as well.

Prosecutorial Misconduct

¶19 Dick next argues the state engaged in prosecutorial misconduct when it “deceived the [trial] court to obtain favorable evidentiary rulings for the sole purpose of

assailing [Dick]’s character.” He contends the prosecutor sought to have admitted into evidence the one-night-stand statement and the two photographs of him, addressed in the previous section, so that she later could use this evidence in her closing argument to “obtain a conviction based almost entirely upon debasing [Dick]’s appearance and character.” He maintains the prosecutor’s closing argument “disparagingly relat[ed] to [his] appearance,” portrayed him “as someone [Andrea] would not want to sleep with,” and “misrepresent[ed] [his] statements to portray [him] as a person who believe[d] all women want[ed] him,” which served to “deprive[him] of his due process right to a fair trial.”

¶20 Because Dick did not object to these alleged instances of misconduct, we review the prosecutor’s conduct only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (“Fundamental error review . . . applies when a defendant fails to object to alleged trial error.”); *see also State v. Velazquez*, 216 Ariz. 300, ¶¶ 46-47, 166 P.3d 91, 102 (2007) (prosecutorial-misconduct argument reviewed only for fundamental error where defendant failed to object to comments in opening argument). “To show fundamental error, the defendant must first prove error—that is, here, that misconduct actually occurred.” *State v. Edmisten*, 220 Ariz. 517, ¶ 23, 207 P.3d 770, 777 (App. 2009). “After establishing error, “[t]o prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor’s misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process.”” *Id.*, quoting *State v. Harrod*, 218 Ariz. 268, ¶ 35, 183 P.3d 519, 529 (2008),

quoting *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998) (alteration in *Harrod*).

¶21 “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). “In evaluating the propriety of a prosecutor’s arguments, we consider ‘whether the remarks called to the jurors’ attention matters that they should not consider, and whether, “under the circumstances of the particular case, [the remarks] probably influenced” the jurors.’” *State v. Morris*, 215 Ariz. 324, ¶ 51, 160 P.3d 203, 215 (2007), quoting *State v. Roque*, 213 Ariz. 193, ¶ 128, 141 P.3d 368, 399 (2006), quoting *Sullivan v. State*, 47 Ariz. 224, 238, 55 P.2d 312, 317 (1936) (alteration in *Roque*). Here, the prosecutor’s comments addressed the defense’s theory that Andrea had consented to the sexual intercourse, and actually had initiated the encounter, by arguing such a scenario was illogical:

Why the heck is she going to roll over and start French kissing with a guy who reeks of beers, who she doesn’t know, who she doesn’t like, who she has absolutely no interest in[,] who looks like this, [apparently referencing one of the photographs of Dick] smells bad, and then allow him to remove her shirt . . . ?

¶22 Viewed in context, the use of Dick’s photograph to show how he would have appeared that night did not constitute misconduct because it did not “‘call[] to the jurors’ attention matters that they should not consider.’” *Morris*, 215 Ariz. 324, ¶ 51, 160 P.3d at 215, quoting *Roque*, 213 Ariz. 193, ¶ 128, 141 P.3d at 399. Moreover, as Dick’s attorney pointed out in his own closing argument, “people do things when they’ve been

drinking,” and the fact that Andrea had been drinking that night “may explain why he looked better than he might have the next morning when she’s sober,” and “this is why bars make their money.” Finally, Dick was present at trial and thus, to the extent it was relevant, the jury was able to draw its own conclusions as to his general appearance.

¶23 Concerning the one-night-stand statement, as noted in the previous section, the prosecutor did not mention it apart from saying that Dick thought “pretty highly of himself” and that he could “get women pretty easily.” We do not agree with Dick that this inferential reference to his statement “focus[ed] the jury’s attention on the fact that [he] had little regard for women as persons, but saw them only as conquests,” and “that rape is another form of a conquest.” Instead, this comment, which implied Dick was conceited and thought of himself as attractive to women, even if irrelevant, did not “call[] to the jurors’ attention matters that they should not consider.” *Morris*, 215 Ariz. 324, ¶ 51, 160 P.3d at 215, *quoting Roque*, 213 Ariz. 193, ¶ 128, 141 P.3d at 399.

¶24 Moreover, as the state points out, the jury was instructed repeatedly that the attorneys’ statements during closing arguments were not evidence, and we presume the jury followed its instructions. *See Velazquez*, 216 Ariz. 300, ¶ 50, 166 P.3d at 102-03 (defendant failed to prove fundamental error when jury instructed attorney comments not evidence and jurors presumed to follow instructions). Finally, because we have concluded in the previous section that there was no reversible error in the admission of either the photographs or the statement, Dick’s assertion that the prosecutor had undisclosed, nefarious reasons for seeking their admission likewise fails to demonstrate

prosecutorial misconduct; nor has Dick cited any authority in support of this argument.³ Because we conclude the state did not engage in prosecutorial misconduct, Dick cannot sustain his burden of demonstrating fundamental error.

Jury Instruction

¶25 In his final argument, Dick contends the trial court committed reversible error when it instructed the jury that it could consider his prior consensual sexual conduct in determining his intent or knowledge that he was acting with or without Andrea's consent.⁴ He argues that "[b]ecause the evidence of 'one night stands' had no probative value for the purpose it was given to the jury," the instruction permitting the jury to consider that evidence "for the purpose of determining whether he intended to sexually assault" Andrea "resulted in [him] being convicted based on [inadmissible] evidence."

¶26 Because Dick did not raise this issue below, we again review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19, 20, 115 P.3d at 607.

³To the extent we understand it, we likewise reject Dick's argument that fundamental error occurred because the state failed to disclose that it intended to offer evidence under Rule 404, Ariz. R. Evid., and then used the statement and photographs to "assassinate [his] character." Rule 404 concerns the admission of character evidence, and neither the photographs nor the statement about previous consensual sexual encounters were "[e]vidence of [Dick]'s character or a trait of character" used "for the purpose of proving action in conformity therewith on a particular occasion," Ariz. R. Evid. 404(a), nor were they other wrongs or acts used "to prove [his] character . . . in order to show action in conformity therewith," Ariz. R. Evid. 404(b).

⁴As noted above, the court instructed the jury that it could only consider Dick's "previous consensual sexual conduct with other persons" for "limited purposes," including "determining [his] intent and knowledge that he was acting with or without [Andrea's] consent."

Dick has failed to demonstrate fundamental error here because, even assuming there was error, he cannot demonstrate prejudice. As set forth above, because his statement regarding one-night stands did not imply he had nonconsensual sex with other partners, it was not probative as to whether Dick knew that Andrea did or did not consent to having sex, but its admission nonetheless was harmless and in fact appears consistent with his defense. The court’s decision to give the limiting instruction apparently was in response to Dick’s concern that “[s]ome people are not going to like guys that have sex outside of marriage” or “are perceived to be . . . predator[s].” Accordingly, because the instruction only served to deter the jury from improperly drawing conclusions about Dick based on his prior sexual history, and the evidence otherwise was irrelevant and harmless, Dick has not met his burden of demonstrating prejudice.

Disposition

¶27 For the foregoing reasons, Dick’s conviction and sentence are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge