

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

GERMAN B. VALDEZ,  
*Appellant.*

No. 2 CA-CR 2013-0463  
Filed January 30, 2015

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.*

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Appeal from the Superior Court in Santa Cruz County

No. S1200CR201200092

The Honorable Anna M. Montoya-Paez, Judge

**AFFIRMED**

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COUNSEL

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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

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ESPINOSA, Judge:

¶1 After a jury trial, German Valdez was convicted of one count of sexual conduct with a minor under fifteen years of age, a class two felony. The trial court sentenced him to a mitigated thirteen-year prison term and later modified the sentence to require sex offender registration. On appeal, Valdez challenges the court's ruling denying his motion in limine to require the state to prove scienter as to the victim's age, and he contests several of the court's rulings on evidentiary issues. For the following reasons, we affirm.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Between mid-August and early September 2010, Valdez had sexual intercourse with A.U., a fourteen-year-old girl, four times. A.U. subsequently learned she was pregnant and when Valdez failed to "take responsibility" for the baby, A.U.'s parents called police. Following the birth of the child, DNA<sup>1</sup> testing indicated Valdez was the father.

¶3 In May 2012, Valdez was charged with sexual conduct with a minor under fifteen years of age pursuant to A.R.S. § 13-1405.<sup>2</sup> He was later convicted and sentenced as described

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<sup>1</sup>Deoxyribonucleic acid.

<sup>2</sup>Section 13-1405(A) provides: "A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is

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above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

**A.R.S. § 13-1405 and Scienter of Age**

¶4 Valdez first argues the trial court erred in denying his motion in limine to require the state to prove scienter as to A.U.'s age. In support, he advances four related arguments: (1) the First Amendment requires the state to prove scienter; (2) "strict liability" under § 13-1405 chills constitutionally protected, intimate relationships; (3) the trial court misinterpreted the mens rea requirements of § 13-1405; and (4) offenses not requiring mens rea are disfavored. We review a trial court's denial of a motion in limine for an abuse of discretion, *State v. Gamez*, 227 Ariz. 445, ¶ 25, 258 P.3d 263, 267 (App. 2011), but review de novo questions of constitutional law and statutory interpretation, *see id.* ¶ 26; *State ex rel. Thomas v. Klein*, 214 Ariz. 205, ¶ 5, 150 P.3d 778, 780 (App. 2007).

*First Amendment*

¶5 Arizona's courts have determined that § 13-1405 does not require the state to prove scienter of age. *See Gamez*, 227 Ariz. 445, ¶ 38, 258 P.3d at 269; *State v. Falcone*, 228 Ariz. 168, 172-73, ¶ 18, 264 P.3d 878, 882-83 (App. 2011); *see also State v. Superior Court*, 104 Ariz. 440, 441-42, 454 P.2d 982, 983-84 (1969) (construing predecessor to § 13-1405, former A.R.S. § 13-611, 1962 Ariz. Sess. Laws, ch. 52, § 1). Valdez, however, argues that not requiring the state to prove scienter or allowing an affirmative defense of mistake of fact as to the victim's age violates the First Amendment of the United States Constitution. In support, he cites *United States v. United States District Court for the Central District of California*, 858 F.2d 534 (9th Cir. 1988), in which pornographers using a sixteen-year-old actress were charged with violating 18 U.S.C. § 2251(a), which imposes strict liability for sexually exploiting children, and the defendants offered as a defense that she had provided false

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under eighteen years of age." "Sexual conduct with a minor who is under fifteen years of age is a class 2 felony." A.R.S. § 13-1405(B).

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documentation of her age. Reasoning “the first amendment does not permit the imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech,” the court held that a defendant charged with violating § 2251(a) may avoid liability with “clear and convincing evidence [ ] that he did not know, and could not reasonably have learned, that the actor or actress was under 18 years of age.” *Id.* at 540, 543.

¶6 Valdez asserts the same rationale should apply to other activities protected by the First Amendment such as freedom of association, the right to marry and the “derivative” “right to date.” As the state points out, however, the core concern of *District Court* was the statute’s chilling effect on freedom of expression, and sexual conduct is not protected by the First Amendment. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 289 n.8 (6th Cir. 1998) (sexual conduct not protected by First Amendment under theory that sexual act itself constitutes protected expression); *Recreational Devs. of Phoenix, Inc. v. City of Phoenix*, 83 F.Supp.2d 1072, 1092 (D. Ariz. 1999) (noting general agreement no First Amendment protection for physical sexual conduct); *State v. Conforti*, 688 So.2d 350, 355 (Fla. Dist. Ct. App. 1997) (paid sex acts performed to music in dark, private room not expressive conduct protected by First Amendment);<sup>3</sup> *see also IDK, Inc. v. Clark County*, 836 F.2d 1185, 1192-93 (9th Cir. 1988) (regulation of expressive association implicates First Amendment; regulation of intimate associations implicates right of privacy).

¶7 Further, since *District Court* was decided, every circuit court of appeals to consider the issue has rejected mistake-of-age as a defense in § 2251(a) cases. *See United States v. Fletcher*, 634 F.3d 395, 404 (7th Cir. 2011) (“every other circuit to have considered the question” has disagreed with Ninth Circuit’s conclusion in *District Court*); *United States v. Humphrey*, 608 F.3d 955, 960 (6th Cir. 2010) (Ninth Circuit “stands alone” in determination First Amendment

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<sup>3</sup>*Conforti* involved a criminal statute. We are unconvinced by Valdez’s attempt to distinguish the cases cited by the state because they “do not involve criminal statutes but regulatory laws.”

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requires reasonable mistake-of-age defense under § 2251(a)); *see also United States v. Malloy*, 568 F.3d 166, 173 n.2 (4th Cir. 2009) (rejecting mistake-of-age defense); *United States v. Wilson*, 565 F.3d 1059, 1069 (8th Cir. 2009) (same); *United States v. Deverso*, 518 F.3d 1250, 1258 (11th Cir. 2008) (same). And the United States Supreme Court has noted, albeit in dicta, that Congress acted with deliberate intent when it omitted knowledge of the victim's age from the elements of § 2251(a). *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 76-77 (1994) (discussing legislative history of § 2251). We therefore reject Valdez's claims based on *District Court* and the First Amendment. *See also State v. Montano*, 206 Ariz. 296, n.1, 77 P.3d 1246, 1247 (2003) (Ninth Circuit constitutional interpretations not binding on this court).

*Protected Relationships*

¶8 In a similar vein, Valdez claims that § 13-1405, imposed without a mens rea requirement as to age, constitutes a "statutory intrusion into the First Amendment protected relationships of dating, procreation and close relationships." He cites *IDK, Inc.*, 836 F.2d 1185, for the proposition that a dating relationship is recognized under the First Amendment for purposes of freedom of association.

¶9 Valdez correctly notes that *IDK, Inc.* held that intimate relationships such as "those that attend the creation and sustenance of a family" and "similar 'highly personal relationships'" are protected. 836 F.2d at 1193. But the source of that protection was the due process clause of the Fourteenth Amendment,<sup>4</sup> *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984); *IDK, Inc.*, 836 F.2d at 1193, and the protection is not unqualified, *see Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding due process clause protects consensual adult sexual activity, but emphasizing "[t]he present case does not involve

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<sup>4</sup>Both the First and Fourteenth Amendments are implicated in cases where freedom of association is asserted for purposes of group expression, *see IDK, Inc.*, 836 F.2d 1185, 1193-94, but this case does not involve association for purposes of expression.

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minors”). Indeed, this court has held that sexual conduct with a minor is not protected by the Fourteenth Amendment. *See State v. Fischer*, 219 Ariz. 408, ¶ 17, 199 P.3d 663, 669 (App. 2008). And we have long recognized “the right of the state in the area of sexual activity to regulate the wellbeing of children and protect them from potential harm . . . .” *State v. Snyder*, 25 Ariz.App. 406, 407, 544 P.2d 230, 231 (1976). Accordingly, we reject Valdez’s claim that § 13-1405 impermissibly interfered with his right to engage in a constitutionally protected relationship.

*Statutory Interpretation*

¶10 Valdez next contends the Supreme Court’s decision in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), dictates that when a criminal statute introduces the elements of a crime with the word “knowingly,” the word applies to each element. Interpretation of state statutes, however, is the province of state courts. *See State v. Hardesty*, 222 Ariz. 363, n.7, 214 P.3d 1004, 1008 n.7 (2009) (Supreme Court’s interpretation of federal statute “persuasive” but “technically not binding in our interpretation” of state statute); *State v. Locks*, 91 Ariz. 394, 395–96, 372 P.2d 724, 725 (1962) (construction of state laws exclusive responsibility of state courts). Even the Supreme Court is bound by a state court’s construction of a state statute. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993) (“There is no doubt that we are bound by a state court’s construction of a state statute.”). Consequently, we are not persuaded the trial court misinterpreted § 13-1405 in light of Arizona’s own precedent. *See Gamez*, 227 Ariz. 445, ¶¶ 37-38, 258 P.3d at 269 (interpreting § 13-1405 to require state to prove defendant “knowingly and intentionally engaged in sexual intercourse” with minor under fifteen, but not defendant’s knowledge of victim’s age); *Falcone*, 228 Ariz. 168, ¶ 18, 264 P.3d at 882-83 (concluding legislature intended state to prove defendant “had knowingly engaged in sexual conduct” with a minor, but made available defense of lack of knowledge of victim’s age only if victim over fifteen).

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*Mens Rea Requirement*

¶11 Valdez further contends a mental state as to the victim's age must be imputed because offenses requiring no mens rea are disfavored. Although Valdez is correct that "criminal intent is generally required for criminal conduct, it is within the power of the legislature to criminalize certain acts without regard to the actor's intent." *State v. Thompson*, 138 Ariz. 341, 345, 674 P.2d 895, 899 (App. 1983); see A.R.S. § 13-202(B) (absent express culpable mental state, none required). The legislature deliberately did not require the state to prove the defendant's knowledge of the victim's age under § 13-1405. See *Falcone*, 228 Ariz. 168, ¶ 14, 264 P.3d at 881-82 (discussing statutory history of § 13-1405). Accordingly, the trial court did not err by denying Valdez's motion in limine.

**Evidentiary Issues**

¶12 Valdez challenges various evidentiary rulings by the trial court over the course of the trial. We review such rulings for an abuse of discretion. *State v. Ellison*, 213 Ariz. 116, ¶ 42, 140 P.3d 899, 912 (2006); see also *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990) (trial court afforded considerable discretion in determining relevancy and admissibility of evidence).

*Aberrant Sexual Propensity Evidence*

¶13 Valdez argues the trial court improperly admitted under Rule 404(c), Ariz. R. Evid., evidence of three uncharged instances of sexual intercourse between Valdez and A.U. The court found the evidence "sufficient to permit the trier of fact to find [Valdez] committed the act," and that sexual conduct with a fourteen-year-old demonstrated aberrant sexual propensity. The court further determined that presenting evidence of the other acts was not unfairly prejudicial, noting the acts were close in time and similar, and found them admissible under Rules 404(b) and (c).

¶14 Rule 404(c) "permits the admission of evidence of uncharged acts to establish 'that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense

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charged.’’ *State v. Garcia*, 200 Ariz. 471, ¶ 26, 28 P.3d 327, 331 (App. 2001), *quoting* Ariz. R. Evid. 404(c). In reviewing the admission of such evidence, we view any disputed facts “in the light most favorable to the proponent, maximizing [ ] probative value and minimizing [ ] prejudicial effect.” *State v. Kiper*, 181 Ariz. 62, 66, 887 P.2d 592, 596 (App. 1994).

¶15 Before admitting propensity evidence under Rule 404(c), the trial court must find:

[1.] . . . clear and convincing evidence supports a finding that the defendant committed the other act. [2.] . . . the commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the charged sexual offense. [And 3.] . . . the evidentiary value of proof of the other act is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other factors mentioned in Rule 403.

*State v. Aguilar*, 209 Ariz. 40, ¶ 30, 97 P.3d 865, 874 (2004) (citations omitted). In weighing probative value and unfair prejudice, the court considers factors such as the remoteness of the other act, the similarity or dissimilarity of the other act, frequency of the other act, surrounding circumstances, relevant intervening events and other similarities or differences. Ariz. R. Evid. 404(c)(1)(C).

¶16 Citing *State v. Aguilar*, Valdez argues the trial court failed to consider whether the sexual conduct was consensual prior to admitting the other acts under Rule 404(c). In *Aguilar*, our supreme court reversed the admission of “other acts” of sexual assault because the trial court had based its Rule 404(c) finding on the defendant’s admission of sexual conduct without taking further evidence on whether the conduct had been consensual. 209 Ariz. 40, ¶¶ 33-35, 97 P.3d at 875. That is, if the other acts were consensual, they were not sexual assaults, and thus would not “provide[] a reasonable basis to infer that the defendant had a character trait

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giving rise to an aberrant sexual propensity to commit the crime charged.” Ariz. R. Evid. 404(c)(1)(B). Here, however, the charged act and other act evidence all constituted illegal acts of sexual conduct with a fourteen-year-old minor, deemed by law incapable of consent. *See State v. Fristoe*, 135 Ariz. 25, 30, 658 P.2d 825, 830 (App. 1982) (“A.R.S. § 13-1405 proscribes *all* sexual conduct with a minor . . . [and t]hat the minor consented does not prevent the act from being a crime.”) (emphasis in original); *cf.* A.R.S. § 13-1407(B) (defense available to § 13-1405 prosecution only if victim fifteen or older).<sup>5</sup>

¶17 Valdez further asserts the trial court failed to address the context of the other acts in its prejudice analysis. Specifically, it did not acknowledge that A.U. had considered Valdez to be her boyfriend, had “made specific efforts to sneak out of her house to see [him] and contradicted her story as to where the sexual encounters actually occurred.”<sup>6</sup> That A.U. considered Valdez to be her boyfriend and met him secretly—apparently indicating her consent—do not lessen the probative value of the other acts evidence or increase any resulting prejudice to Valdez. At fourteen, A.U. was incapable of consent, *see* § 13-1407(B), and the other acts were of the same nature and close in time to the charged act, Ariz. R. Evid. 404(c)(1)(C). Given the other acts’ similarity and proximity to the charged act, we cannot agree with Valdez that they would have

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<sup>5</sup>We do not address here any issue concerning whether evidence of a reasonable belief that the victim was older is relevant to rebut sexual propensity evidence presented pursuant to Rule 404(c).

<sup>6</sup>A.U. testified the first sexual encounter occurred at a park, the second at Valdez’s residence, and the third and fourth instances in Valdez’s car. But during cross-examination she admitted telling a police deputy all four incidents occurred in Valdez’s vehicle. Any such discrepancies, however, went to the weight of her testimony, not its admissibility. *See State v. King*, 213 Ariz. 632, ¶ 34, 146 P.3d 1274, 1282 (App. 2006) (discrepancies in evidence affect its weight, not its admissibility).

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“provoke[d] an emotional response in the jury . . . apart from its judgment as to his guilt or innocence of the crime charged.”

*Arizona’s Rape Shield Law, A.R.S. § 13-1421*

¶18 Valdez next contends the trial court erred in excluding from evidence statements by A.U. regarding her sexual history. Prior to trial, the state moved to preclude Valdez from introducing such evidence, citing Arizona’s Rape Shield Law, § 13-1421. The court granted the motion and precluded the evidence.

¶19 At trial, Valdez made an offer of proof relating to a statement by A.U. implicating her sexual history and sought to question either A.U. or a police deputy about A.U.’s statement to the deputy indicating she knew Valdez was her baby’s father because she had not had sexual intercourse with anyone else since the previous May. Valdez intended to show “there were other people that she was with beforehand.”

¶20 Section 13-1421(A) provides that “[e]vidence relating to a victim’s reputation for chastity and opinion evidence relating to a victim’s chastity are not admissible in any prosecution” of a sexual offense. However, “specific instances of the victim’s prior sexual conduct” may be admitted if relevant, material, probative value is not outweighed by inflammatory or prejudicial nature, and is one of the following:

1. Evidence of the victim’s past sexual conduct with the defendant.
2. Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or trauma.
3. Evidence that supports a claim that the victim has a motive in accusing the defendant of the crime.
4. Evidence offered for the purpose of impeachment when the prosecutor puts

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the victim's prior sexual conduct in issue.

5. Evidence of false allegations of sexual misconduct made by the victim against others.

§ 13-1421(A). Such evidence may only be introduced after a hearing on written motions to determine its admissibility. § 13-1421(B).

¶21 In challenging the trial court's ruling, Valdez asserts "[t]he evidence [he] sought to introduce at trial would have contradicted A.U.'s statements . . . and thus challenged her credibility before the jury." As the state points out, however, Valdez never indicated what specific evidence he wished to introduce,<sup>7</sup> nor which exception to § 13-1421 he believed would allow its admission. The failure to do so constitutes waiver of that issue. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (failure to argue claim usually constitutes waiver of the claim and "[m]erely mentioning an argument is not enough").

¶22 Valdez also contends evidence of A.U.'s sexual conduct was admissible to support a claim that she had a motive to accuse him of the crime. *See* A.R.S. § 13-1421(A)(3). He asserts "there was uncontroverted evidence that A.U. . . . wanted him to . . . financially support the child." Her testimony, according to Valdez, "clearly established that if [Valdez] did not step up and take responsibility for the child, she would report the matter to the police." But Valdez, again, failed to indicate what evidence of A.U.'s sexual conduct he was seeking to introduce at trial and, just as importantly, explain its relevance. *See Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (failure to develop and support

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<sup>7</sup> To the extent Valdez may have intended to introduce evidence of A.U.'s subsequent social and sexual conduct, which was the subject of the state's motion to preclude, he again has not identified specific evidence he would have introduced and, in any event, we are unable to see how such evidence could be relevant, except for impermissible reasons.

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argument waives issue on appeal). Further, as the state observes, A.U.'s apparent motive to accuse Valdez of the crime was already before the jury and, given the DNA results showing Valdez to be the father of A.U.'s child, additional evidence of that motive would have served little purpose. The trial court committed no abuse of its discretion in precluding it.

¶23 Valdez next maintains § 13-1421 is unconstitutional because it violated his right to confront the witnesses against him and present a complete defense, apparently because it hindered him from challenging A.U.'s credibility. As Valdez notes, constitutional arguments may be considered for the first time on appeal. *See State v. Gilfillan*, 196 Ariz. 396, n.4, 998 P.2d 1069, 1074 n.4 (App. 2000). Valdez acknowledges this court evaluated and upheld the constitutionality of § 13-1421 in *Gilfillan*, but contends the statute's validity "requires a case-by-case evaluation."<sup>8</sup> He asserts he had a "constitutional right to present evidence challenging A.U.'s prior statements because it concerned the key issue in the case—the credibility of the State's witness." Valdez, however, fails to support his argument. While indicating he would have refuted A.U.'s statement to the deputy that she had not had sexual relations with anyone else since May 2010, and alluding to the evidence precluded by the court under § 13-1421, he does not identify any specific evidence contradicting A.U.'s statement, or, once again, demonstrate the relevancy of such evidence in light of the DNA results, the validity of which he did not challenge below. Moreover, to the extent Valdez sought to impeach A.U.'s general credibility with the excluded evidence, numerous courts have concluded that "a defendant fails to state a confrontation-clause violation where the testimony barred by the rape-shield law challenges only the

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<sup>8</sup>Valdez discusses at length Supreme Court decisions post-dating *Gilfillan*, *Crawford v. Washington*, 541 U.S. 36 (2004) (concerning admission of out-of-court testimonial statements), and *Davis v. Washington*, 547 U.S. 813, 821 (2006) (discussing types of "testimonial" statements), but they are not on point and do not affect our analysis here.

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witness's general credibility." *Jordan v. Warden, Lebanon Correctional Inst.*, 675 F.3d 586, 596 (6th Cir. 2012); *see, e.g., Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1, 8 (1st Cir. 2003); *Redmond v. Kingston*, 240 F.3d 590, 593 (7th Cir. 2001); *Quinn v. Haynes*, 234 F.3d 837, 851 & n.13 (4th Cir. 2000); *Hughes v. Raines*, 641 F.2d 790, 793 (9th Cir. 1981).

*Motion to Suppress DNA Evidence*

¶24 In January 2012, the state obtained an order allowing it to collect Valdez's DNA and submit it to a forensic examination laboratory. Police then served the order on Valdez, collected the DNA sample, and submitted the sample for testing. Valdez was subsequently charged with the instant offense, as described above. Before trial, he filed a motion to suppress the DNA results, which the court denied after a hearing.

¶25 Valdez asserts the trial court erred in admitting the DNA evidence because the state had failed to obtain a search warrant to test the evidence, thus violating his rights under the Fourth Amendment. In 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 sustaining" the court's decision, *State v. Dean*, 206 Ariz. 158, ¶ 9, 76 P.3d 429, 432 (2003). We review purely legal or constitutional issues de novo. *State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

¶26 Section 13-3905, A.R.S., provides that a magistrate may issue an order for detention of an individual to obtain evidence of identifying physical characteristics when the following exists: (1) "[r]easonable cause for belief that a felony has been committed"; (2) procurement of the evidence could contribute to the identification of the perpetrator; and (3) the evidence is not available from specified law enforcement sources. As the state points out, an order issued under § 13-3905 does not violate a defendant's Fourth Amendment rights when issued pursuant to a showing of probable cause. *See State v. Wedding*, 171 Ariz. 399, 403, 831 P.2d 398, 402

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(App. 1992) (no Fourth Amendment violation where § 13-3905 order supported by probable cause). Probable cause exists “when an officer has reasonably trustworthy information sufficient to lead a reasonable person to believe that the offense was committed and that the person to be arrested committed it.” *Id.* at 404, 831 P.2d at 403. At the suppression hearing, the trial court found that the facts presented to the magistrate constituted probable cause, exceeding the reasonable cause standard of § 13-3905(A)(1).<sup>9</sup>

¶27 Valdez concedes the collection of his DNA was proper, but nevertheless contends his “Fourth Amendment rights were implicated by the subsequent testing of the buccal swabs for DNA.” He argues “the actual[ ] testing for DNA is a subsequent search that requires a search warrant under . . . probable cause,” citing *Mario W. v. Kaipio*, 230 Ariz. 122, ¶ 1, 281 P.3d 476, 477 (2012). In that case, juveniles charged with certain offenses challenged a statute requiring them to submit to the collection and testing of their DNA as a condition of pre-trial release. *Id.* ¶¶ 1-3. The court determined the collection of DNA was justified by the possibility of a juvenile absconding and therefore consistent with the Fourth Amendment, *id.* ¶¶ 23-25, but found no sufficient state interest in processing the DNA prior to adjudication or such failure to appear. *Id.* ¶¶ 18-20, 32. The court specifically noted there was no claim the DNA profiles would provide evidence that any of the juveniles committed the charged offenses, “[n]or d[id] the State even reasonably suspect that a juvenile committed another offense for which the DNA profile might provide investigative assistance.” *Id.* ¶¶ 6, 9, citing *Hayes v. Florida*, 470 U.S. 811, 817 (1985) (Fourth Amendment permits seizures for purpose of fingerprinting if reasonable suspicion suspect committed crime, reasonable basis for believing

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<sup>9</sup>The court noted A.U. had given birth to a child and had stated she was impregnated by Valdez, which he had denied. It further observed that A.U. had described Valdez’s vehicle and that her brother had indicated he had picked her up at Valdez’s residence.

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fingerprinting will establish or negate suspect's connection with crime, and if procedure carried out with dispatch).

¶28 The reasoning of *Mario W.* is inapplicable here.<sup>10</sup> The state had probable cause to believe Valdez's DNA profile would either provide evidence he had committed the offense or exonerate him. And, as the trial court noted, the § 13-3905 order specifically provided for "the identification of DNA," necessarily requiring both collection and testing of the sample. We see no abuse of discretion by the court in denying Valdez's motion to suppress the DNA evidence.

**Disposition**

¶29 For all of the foregoing reasons, Valdez's conviction and sentence are affirmed.

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<sup>10</sup> We need not address *Mario W.*'s continuing viability following the Supreme Court's decision in *Maryland v. King*, \_\_\_ U.S. \_\_\_, \_\_\_, 133 S. Ct. 1958, 1966-67, 1979-80 (2013) (upholding state statute permitting both collection and analysis of DNA from arrestees before conviction as not violative of Fourth Amendment).