

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LUIS ARMANDO VARGAS,
Appellant.

No. 2 CA-CR 2016-0324
Filed January 29, 2019

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20144526001
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Erin K. Sutherland, Assistant Public Defender, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Vásquez and Judge Brearcliffe concurred.

STARING, Presiding Judge:

¶1 Luis Armando Vargas appeals from his convictions for first-degree murder, burglary in the second degree, kidnapping, arson of a structure, theft of means of transportation, and theft of a credit card. We affirm Vargas's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Vargas. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). K.R. was a sixty-two-year-old woman, who had been disabled by childhood polio and lived alone.¹ On the evening of February 14, 2008, she telephoned her mother, and the next morning, her sister went to her home to check on her. Her sister found: K.R.'s turquoise-colored van and keys were missing; the security door and front door were closed but unlocked; K.R.'s crutches were near the front door; her purse was on the floor; a space heater was overturned and its cord was missing; the kitchen phone cord was missing; and K.R.'s eyeglasses and leg braces were next to her bed. K.R.'s sister immediately called the police and reported K.R. missing. Officers commenced an extensive search for K.R.

¶3 That same morning, before K.R.'s sister discovered her missing, a security camera recorded a man, later identified by eyewitnesses and relatives as Vargas, driving up to an automatic teller machine (ATM) in a turquoise van, and unsuccessfully attempting to use K.R.'s bank card. An hour later, Vargas went to the door of an AutoZone store in the same shopping center as the ATM and asked for help with his vehicle. Two hours later, Vargas went to a Checker's auto parts store, located across the street from AutoZone, and asked for help with what he said was his girlfriend's van. One of the Checker's employees followed Vargas to a turquoise van parked outside and attempted to help him start it, without success.

¹K.R. required leg braces and crutches to walk.

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¶4 Shortly thereafter, Vargas went without a vehicle to a gas station across the street from the Checker's store and purchased \$1.00 of gasoline. A Checker's employee later saw smoke billowing from the same turquoise van, which had been left outside the store.

¶5 Investigators determined the van was K.R.'s and gasoline had been poured on the back seat and ignited. In the van, they also found the missing cord from the overturned space heater in K.R.'s home. Vargas's fingerprints were found on the overturned space heater, and eyewitnesses and family members identified him as the man with the turquoise van who had tried to use K.R.'s bank card at the ATM, went to both auto parts stores, and purchased \$1.00 of gasoline at the gas station. K.R. was never found.

¶6 After a jury trial, Vargas was convicted as noted. The trial court sentenced him to life in prison without the possibility of release for the murder, and an additional 63.25 years for the other offenses. This appeal followed; we have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

Allegations of Prosecutorial Misconduct

¶7 On appeal, Vargas raises several allegations of prosecutorial misconduct, including that the state committed misconduct by: (1) improperly presenting the case to the grand jury; (2) improperly arguing inferences in its opening statement; (3) discussing precluded topics; (4) misstating evidence, asking misleading questions, and soliciting speculative testimony; (5) improperly posing argumentative questions attacking defense witnesses; (6) attempting to elicit expert testimony from non-expert witnesses or experts in a different field; (7) attacking the credibility of defense counsel outside the presence of the jury; (8) injecting Vargas's custodial status and arrest; (9) shifting the burden by vouching; (10) misstating evidence in closing; and (11) introducing hearsay through improper impeachment and refreshing witness recollections. Vargas maintains "the prosecutor's pervasive pattern of misconduct cumulatively deprived [him] of his right to a fair trial."

¶8 Prosecutorial misconduct is "intentional conduct which the prosecutor knows to be improper and prejudicial" and that "is not merely the result of legal error, negligence, mistake, or insignificant impropriety." *State v. Martinez*, 221 Ariz. 383, ¶ 36 (App. 2009) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09 (1984)). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that '(1) misconduct is indeed

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present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Moody*, 208 Ariz. 424, ¶ 145 (2004) (quoting *State v. Atwood*, 171 Ariz. 576, 606 (1992)). Reversal is warranted when prosecutorial misconduct "so permeated the trial that it probably affected the outcome and denied [the] defendant his due process right to a fair trial." *State v. Blackman*, 201 Ariz. 527, ¶ 59 (App. 2002). We find misconduct harmless, however, when it is clear "beyond a reasonable doubt that it did not contribute to or affect the verdict." *Id.* (quoting *State v. Towery*, 186 Ariz. 168, 185 (1996)).

¶9 "We evaluate each instance of alleged misconduct," *State v. Morris*, 215 Ariz. 324, ¶ 47 (2007), and then consider the cumulative effect on the fairness of Vargas's trial, see *State v. Hughes*, 193 Ariz. 72, ¶ 26 (1998). "[T]he standard of review depends upon whether [Vargas] objected." *Morris*, 215 Ariz. 324, ¶ 47. When a defendant has objected at trial, we review allegations of misconduct for harmless error; however, when a defendant fails to object, we review for fundamental error.² *State v. Martinez*, 230 Ariz. 208, ¶ 25 (2012); *State v. Edmisten*, 220 Ariz. 517, ¶ 22 (App. 2009). For the reasons that follow, we conclude that Vargas has failed to establish the existence of misconduct in connection with any of his arguments. See *Moody*, 208 Ariz. 424, ¶ 145. And, because we find no misconduct with respect to his individual allegations, we further conclude Vargas has failed to establish cumulative error. See *State v. Bocharski*, 218 Ariz. 476, ¶ 75 (2008) ("Absent any finding of misconduct, there can be no cumulative effect of misconduct sufficient to permeate the entire atmosphere of the trial with unfairness.").

Grand Jury

¶10 Vargas argues the state initiated its pattern of misconduct during grand jury proceedings, where he alleges the prosecutor asked detectives leading questions, cut off grand jurors' questions, and "inserted

²A defendant who fails to object at trial forfeits the right to appellate relief unless he can show trial error, and that the error went to the foundation of the case, took from him a right essential to his defense, or was so egregious that he could not possibly have received a fair trial. *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). If a defendant can show an error went to the foundation of the case or deprived him of a right essential to his defense, then he must also separately show prejudice resulted from the error. *Id.* If a defendant shows the error was so egregious he could not have received a fair trial, however, he has necessarily shown prejudice and must receive a new trial. *Id.*

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facts into the record” by including them in questions. After the grand jury indicted Vargas, he moved to remand the indictment, alleging prosecutorial misconduct and that a detective’s misleading testimony denied the grand jury the opportunity to hear exculpatory evidence. The trial court denied the motion.

¶11 Vargas acknowledges the proper means for addressing prosecutorial misconduct in grand jury proceedings is a special action, *see State v. Snelling*, 225 Ariz. 182, ¶ 11 (2010), but nonetheless argues the prosecutor’s alleged misconduct is relevant “because it demonstrates the pervasive nature of the State’s misconduct and that it was a pattern that began at the very outset of this case.” Further, he does not dispute the state’s argument that the grand jury proceedings could not have affected the verdict at trial or denied him a fair trial. And, Vargas admittedly does not seek relief specifically from the state’s alleged misconduct at the grand jury proceedings. Thus, we find this argument waived. *See State v. Bolton*, 182 Ariz. 290, 298 (1995) (“Failure to argue a claim on appeal constitutes waiver of that claim.”).

Opening Statement

¶12 Vargas alleges the state committed misconduct when it engaged in improper argument during its opening and referred to evidence that was not ultimately admitted at trial. Specifically, he argues the state improperly argued inferences and conclusions when it said police officers had followed up on “seemingly ridiculous” leads during the investigation, even though the state did not introduce any evidence of such leads. Vargas does not address whether the state had a good faith basis for referring to evidence of officers pursuing other leads, but does argue that the state’s failure to offer such evidence was “clearly intended to be an argument in support of its case.” Further, Vargas concedes the alleged misconduct during opening statements may not warrant reversal, but asserts that the cumulative effect of this instance and his other allegations of misconduct deprived him of a fair trial.

¶13 Because Vargas did not object during the state’s opening statement, we review for fundamental error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018); *see also Martinez*, 230 Ariz. 208, ¶ 25; *State v. Rutledge*, 205 Ariz. 7, ¶ 30 (2003) (fundamental error review because “shifting the burden” inadequate objection to preserve alleged prosecutorial misconduct). And, because he does not argue fundamental error on appeal, any argument that error arose from the opening statement is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (argument

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waived where defendant does not argue unpreserved error was fundamental).

Discussing Precluded Topics

¶14 Vargas argues the state committed misconduct by referring to precluded fingerprint evidence during its opening statement, asking defense expert Paul Carroll about precluded topics, and then referring to Carroll's testimony on precluded topics during its closing argument. As noted, Vargas did not object during the state's opening statement; nor did he object during its closing argument. Therefore, we review only for fundamental error. See *Escalante*, 245 Ariz. 135, ¶ 12; see also *Martinez*, 230 Ariz. 208, ¶ 25; *Rutledge*, 205 Ariz. 7, ¶ 30. Further, because Vargas does not argue fundamental error in connection with the state's opening or closing, the arguments concerning discussion of precluded topics in opening and closing are waived. See *Moreno-Medrano*, 218 Ariz. 349, ¶ 17. Vargas, however, did object to Carroll being questioned about precluded topics. We review the trial court's allowance of those questions for harmless error. See *Martinez*, 230 Ariz. 208, ¶ 25.

¶15 During his interview with police, Vargas invoked his right to remain silent and then said he had never been in K.R.'s house. Before trial, the state moved to admit Vargas's interview, but conceded that all statements made after he invoked his right to remain silent were inadmissible. The trial court precluded admitting Vargas's statement that he had never been in K.R.'s house.

¶16 Before opening statements, the state filed a motion to admit Vargas's statement to police that he had never been inside K.R.'s home, if he suggested at trial that his fingerprints were on K.R.'s space heater because he had helped her move it previously. The trial court did not have time to consider the motion and ordered that "neither side get into this subject matter as part of their openings." The following day, Vargas said he did not intend to suggest that he had been in K.R.'s house previously, and the court denied the state's motion.

¶17 Before Carroll testified, the state moved to limit his testimony to the two opinions he expressed in his interview with the state: (1) the police should have used sequential lineups; and (2) the witnesses who did not identify anyone in the lineups should have been shown lineups with "the other suspects." The court granted the state's motion, limiting Carroll's testimony to "the opinions he disclosed in the interview," items

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that were found in the van, and “[the] issue that came up with not recording which lineup a witness was shown.”

¶18 On cross-examination, the state asked Carroll about specific identifications that had been made in the case, and Vargas objected, arguing that was precluded by the trial court’s earlier ruling. The court observed “[Carroll] can say he has no opinion,” and the state went on to ask Carroll about the value of fingerprint evidence. Vargas objected during a break in Carroll’s cross-examination, asserting that if the state further questioned Carroll about fingerprint evidence, then he might volunteer his opinion that fingerprint evidence does not indicate when or how a fingerprint was left on a surface, which Carroll had been told not to mention because it could open the door to Vargas’s inadmissible statement. The court reminded Carroll to only answer the specific question before him and “not to volunteer information that is not called for as part of the question.” Finally, the state asked Carroll if he believed witnesses in this case should have been shown photo lineups that included another lead the police had investigated. Vargas objected, arguing that the topic had been precluded by the court and that if the state asked Carroll about whether specific leads should have been included in the lineups, then Vargas would discuss the other leads on redirect. After an extensive bench conference, the state changed its line of questioning and dropped the issue.

¶19 We find no prosecutorial misconduct arising from the state’s questions to Carroll about specific identifications made by witnesses, the value of fingerprint evidence, and the photo lineups used in this case. The questions were all directed at establishing that Carroll was not particularly familiar with the facts of this case and, ultimately, at discrediting his opinions. This was an appropriate line of inquiry. Carroll answered that he did not have an opinion about the identifications made or about the photo lineups that were used, and he gave no testimony that had been precluded by the trial court’s rulings.

Misstating Evidence, Asking Misleading Questions, Eliciting Speculative Testimony

¶20 Vargas argues the state committed misconduct when it: misstated the condition of his teeth; asked Detective Kelley whether the plug to the space heater was bent because it had been ripped from the wall; referred to sweatpants in security footage as “gray” even though all clothing looked gray because the video was black and white; and asked K.R.’s neighbors whether they had seen Vargas after she disappeared. Because Vargas did not object to any of these questions at trial, we review

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for fundamental error. *See Escalante*, 245 Ariz. 135, ¶ 12; *see also Martinez*, 230 Ariz. 208, ¶ 25. And, because Vargas does not argue fundamental error in connection with these points, his arguments are waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17.

¶21 Vargas also contends the state committed misconduct by asking Kelley whether the features of the van’s anti-theft device provided any indication whether K.R. was alive after being taken from her home. Vargas objected to the question on the ground that it sought speculation from the detective. The trial court sustained the objection. Because Vargas objected on the basis of speculation, rather than misconduct, we review only for fundamental error. *See Rutledge*, 205 Ariz. 7, ¶ 30. And, once again, because Vargas does not argue fundamental error, his argument is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17.

Argumentative Questioning of Defense Witnesses

¶22 Vargas argues the state “repeatedly and improperly posed argumentative questions attacking [his] fact and expert witnesses.” Because he failed to object at trial,³ again we review only for fundamental error. *See Escalante*, 245 Ariz. 135, ¶ 12; *see also Martinez*, 230 Ariz. 208, ¶ 25.

¶23 Specifically, Vargas asserts the state committed misconduct when it cross-examined Carroll on the issue of whether eyewitnesses had identified Vargas as the man in the security footage and when it pointed to excerpts from Carroll’s book about the unreliability of eyewitness identifications, and then asked Carroll whether he had used such purportedly unreliable practices in the past as a detective. Additionally, Vargas argues the prosecutor committed misconduct when he asked argumentative questions of Vargas’s stepmother. Vargas, however, does not argue that allowing any of these questions amounted to fundamental error.⁴ His arguments are waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17.

³The sole objection Vargas made here was to the date of a photograph shown to his stepmother. This was inadequate to preserve the issue of prosecutorial misconduct. *See Rutledge*, 205 Ariz. 7, ¶ 30.

⁴Vargas merely argues “this is simply another example of the pervasive pattern of misconduct that infected this trial” and the state’s alleged argumentative questioning of Carroll and Vargas’s stepmother was designed to “make the witness look bad” and “communicate [the state’s] disbelief and incredulity” of the testimony. Vargas’s argument is curious; casting doubt on the credibility of witness testimony is a proper purpose of

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Eliciting Expert Testimony from Non-Experts

¶24 Vargas argues the state committed misconduct when it attempted to elicit expert testimony from Kelley, a fingerprint analyst, and a DNA analyst, asserting they were not qualified experts in the relevant fields. Vargas objected, on foundation grounds, when the state asked Kelley about an eyewitness identification in this case; however, the trial court overruled the objection as untimely. Vargas did not object to the testimony of the fingerprint or DNA analysts. Therefore, as to prosecutorial misconduct, we review only for fundamental error. *See Escalante*, 245 Ariz. 135, ¶ 12; *see also Martinez*, 230 Ariz. 208, ¶ 25; *Rutledge*, 205 Ariz. 7, ¶ 30; *State v. Vermuele*, 226 Ariz. 399, ¶ 10 (App. 2011).

¶25 Vargas does not explain how allowing the testimony from Kelley, the fingerprint analyst, or the DNA analyst constituted fundamental error, merely arguing that these instances were “part of [the state’s] pattern of misconduct.” This argument, too, is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17.

Attacks on Defense Counsel

¶26 Vargas argues the state committed misconduct when: a prosecutor said the “idea that Luis Vargas has great teeth is basically a falsehood being perpetrated on the jury, and we have the evidence to prove it”; the state accused defense counsel of “doublespeak”; and the state accused defense counsel of lying to a witness. Notably, all of these comments were made outside of the presence of the jury. Thus, even were we to conclude these comments amounted to prosecutorial misconduct, Vargas could not show the requisite “reasonable likelihood” that they affected the jury’s verdict. *See Moody*, 208 Ariz. 424, ¶ 145; *see also Blackman*, 201 Ariz. 527, ¶ 59.

¶27 Next, Vargas asserts that it was misconduct for the prosecutor to: argue to the jury that defense counsel would have them believe Vargas had “pearly whites” when defense counsel did not characterize them as such; suggest to the jury that the defense wanted to distract them with irrelevant evidence; portray defense counsel as having argued that a hair found in the van was K.R.’s when defense counsel made no such suggestion; and object to Kelley reading statements from deceased witnesses after both the state and Vargas had previously stipulated to

cross-examination. *See State v. Torres*, 97 Ariz. 364, 366 (1965) (cross-examiner given “great latitude” to impeach credibility).

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reading them. At trial, Vargas did not object that any of these instances constituted prosecutorial misconduct; therefore, we review for fundamental error. *See Escalante*, 245 Ariz. 135, ¶ 12; *see also Martinez*, 230 Ariz. 208, ¶ 25. And, again, because Vargas does not argue fundamental error, the arguments are waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17.

¶28 Vargas did, however, object to the following part of the state’s rebuttal:

I’m not going to waste your time pulling up the photo of [K.R.]. Why are you being told that a black hair [found in her van] could have been [hers] when you know, and have looked at images of her, that she had long, blondish, reddish hair My goodness, who would try to mislead you in that manner?

Vargas objected that this amounted to an improper personal attack on his counsel, and the trial court sustained the objection. We review for harmless error. *See Martinez*, 230 Ariz. 208, ¶ 25.

¶29 “Prosecutors are afforded ‘wide latitude in presenting their closing arguments to the jury.’” *State v. Ramos*, 235 Ariz. 230, ¶ 22 (App. 2014) (quoting *State v. Jones*, 197 Ariz. 290, ¶ 37 (2000)). Although impugning the integrity or honesty of opposing counsel is improper, criticizing defense theories and tactics is proper in closing argument. *Id.* ¶ 25. In *Ramos*, the prosecutor claimed in his rebuttal that defense counsel’s focus on the state’s failure to prove a fact was an attempt to divert the jury from relevant evidence by raising “red herrings” and “distractions.” *Id.* ¶ 24. The prosecutor also told the jury that defense counsel was asking them to speculate and “check [their] common sense at the door.” *Id.* (alteration in original). There, we concluded that although these comments suggested that defense counsel was attempting to mislead the jury, the comments merely criticized defense tactics and did not amount to misconduct. *Id.* ¶ 25.

¶30 Here, the state argues the portion of rebuttal at issue employed a rhetorical question that was “arguably a criticism of defense tactics, which is allowed.” The state also asserts that even if the rebuttal were improper, “it was not so prejudicial as to deny Vargas a fair trial” because the jurors were instructed that what attorneys say in closing arguments is not evidence. We agree. Like the prosecutor in *Ramos*, the state here suggested defense counsel was attempting to focus the jury on

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evidence collected in K.R.'s van, in an effort to divert the jury's attention from other evidence. We conclude the challenged portion of the rebuttal was nothing more than a permissible criticism of the defense's tactics.

Other-Acts Evidence

¶31 Vargas argues the state committed misconduct when it "injected" his custodial status and arrest as improper other-acts evidence by: asking Kelley questions about Vargas's possessions and what he was wearing when police arrested him; admitting photo lineups that included his mug shot; and admitting a video of a jail visit.

¶32 Because Vargas did not object to the questioning of Kelley or the admission of lineups that included his mug shot, we review only for fundamental error. *See Escalante*, 245 Ariz. 135, ¶ 12; *see also Martinez*, 230 Ariz. 208, ¶ 25. Vargas does not argue allowing Kelley's testimony on this subject or the admission of the mug shot was fundamental error; therefore, his arguments are waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17.

¶33 During trial, the state moved to admit three videos of jail visits that show the state of Vargas's teeth. Vargas argued the videos were "prejudicial, irrelevant, and cumulative." The trial court found "the relevance outweigh[ed] that prejudice" because the key issue in this case was identification and several witnesses identified him, in part, because of his teeth. The court explained the videos "reveal additional information you really don't see in still shots in terms of how his mouth would appear in normal lighting and in a conversation." The court admitted one of the videos and instructed the jury not to consider the fact that the video shows Vargas in custody.

¶34 Vargas argues the video was improperly admitted as other-acts evidence and appears to argue the trial court erred in finding the probative value outweighed the danger of unfair prejudice.⁵ Specifically, he argues "[i]t is unquestionable" that the jail video "showed nothing more than the already admitted sanitized photographs" and "was simply a means of telling the jury that Luis Vargas was a bad man with a lengthy criminal history." We disagree.

⁵ Although this argument is included under the prosecutorial misconduct section of Vargas's briefs, he does not argue this was misconduct.

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¶35 We review the admission of evidence for an abuse of discretion. *See State v. Leteve*, 237 Ariz. 516, ¶ 41 (2015); *see also State v. Williams*, 209 Ariz. 228, ¶ 13 (App. 2004). Here, the trial court found the probative value of the video outweighed the prejudice of showing Vargas in custody, pursuant to Rule 403, Ariz. R. Evid. As noted, the video showed Vargas's teeth as eyewitnesses would have seen them. The only issue in this case was identification, and because several witnesses identified Vargas based on his teeth, the video was highly probative. Therefore, we find no abuse of discretion. *See Bocharski*, 200 Ariz. 50, ¶ 21 (we will not disturb trial court's Rule 403 determination absent clear abuse of discretion).

Burden-Shifting and Vouching

¶36 Vargas argues the state shifted the burden of proof and engaged in vouching, which amounts to misconduct. Because Vargas did not object on these grounds at trial, we review for fundamental error. *See Escalante*, 245 Ariz. 135, ¶ 12; *see also Martinez*, 230 Ariz. 208, ¶ 25; *Rutledge*, 205 Ariz. 7, ¶ 30.

¶37 At trial, Vargas asked Kelley about a latex glove with a hair on it that was collected from K.R.'s van, when it was in the Tucson Police Department's impound lot, and whether the glove or hair had been tested for DNA. After the jury retired for the day, the state gave notice that it intended to ask Kelley whether Vargas had ever asked to have the glove and hair tested for DNA. The court ruled that:

so long as the State makes clear during their closing argument, if they address this piece of evidence, that they clearly point out that the State carries the burden of proof throughout, and that never shifts, then it's an appropriate argument. . . . I think it's appropriate for [the state] to ask [Kelley] whether or not the defense ever made a request to have that item examined independently.

The state never asked Kelley whether Vargas requested to have the glove and the hair examined, but later pointed out during Kelley's testimony that she was retired when the glove and hair were collected, and she deferred questions about those items to Detective Cheek. Cheek was never called as a witness. Later at trial, the state asked a DNA analyst whether Vargas had requested DNA testing of any item. The state also asked a fingerprint

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analyst whether the fingerprints found on the space heater had been made available to Vargas to conduct his own examination.

¶38 During closing, Vargas noted that Cheek was never called as a witness, and the state said in its rebuttal:

And the evidence, uncontroverted, there is no evidence suggesting there is not a [fingerprint] match. And there are two experts who say there are two fingerprints that match to Luis Vargas. Uncontroverted.

Why would it be, why would it be that another expert would not be called? And for that matter, on the glove, the question is raised, well, Detective Cheek is sitting over there. He could bring so much to this discussion of the glove and the bottle. And the answer to that, again, is that although the burden is always on the State, if you are going to stand up here and say Detective Cheek knows all the answers to this very important question, and, by gosh, somebody should have called him, put him on the stand, and he could have answered these critical questions in this important case, you know, that falls on both parties. If there is a party who thinks that he has some critical information . . . if they want to talk about that, then put him on the stand. But if you don't put him on the stand, it seems to suggest that you might [not] want to know the answers.

Vargas argues the above questions and arguments amounted to burden-shifting and vouching “by raising an improper inference in the minds of the jurors – that the defense did not test the items for DNA, call Cheek to testify, or have the fingerprints independently examined because the evidence would have inculpated Luis.”

¶39 As noted, because Vargas did not object at trial, we review only for fundamental error. However, because Vargas does not argue the alleged burden-shifting or vouching amounted to fundamental error, his argument is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17.

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Misstating Evidence during Closing

¶40 Vargas asserts the state committed misconduct when it “repeatedly misstated the evidence during closing arguments and inserted inflammatory argument.” Specifically, he argues the state misstated evidence about DNA and identifications in the case, and that the state’s “inflammatory misstatement that the space heater was the closest thing to a murder weapon was absolutely misconduct.” Because Vargas did not object, we review for fundamental error. *See Escalante*, 245 Ariz. 135, ¶ 12; *see also Martinez*, 230 Ariz. 208, ¶ 25. Further, because Vargas does not argue fundamental error, this argument is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17.

Introducing Hearsay Statements

¶41 Vargas asserts that the state committed misconduct by eliciting hearsay statements through “improper impeachment and refreshing recollections.” First, Vargas argues the state improperly impeached a fingerprint analyst, to which he objected and was overruled. On appeal, however, Vargas does not argue the impeachment was misconduct. Therefore, this argument is waived. *See Bolton*, 182 Ariz. at 298.

¶42 Second, he argues the state committed misconduct when it “improperly” admitted a witness’s hearsay statements, to which Vargas did not object. Therefore, we review only for fundamental error. *See Escalante*, 245 Ariz. 135, ¶ 12; *see also Martinez*, 230 Ariz. 208, ¶ 25. Vargas, however, does not argue the admission of the out-of-court statements was fundamental error; thus, this argument is waived.⁶ *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17.

Preclusion of Testimony as Sanction for Disclosure Violation

¶43 Vargas argues the trial court erred in precluding his eyewitness identification expert, Carroll, from rendering opinions beyond what he disclosed in his interview with the state, as a sanction for the

⁶On appeal, Vargas concedes that the alleged hearsay elicited by the state was likely admissible and admits “he does not claim prejudice” and “never argued that the prosecutor committed misconduct.” Apparently, he only “included this discussion in the argument related to prosecutorial misconduct, because it is another example of [the state] playing fast and loose with the Rules of Evidence.”

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defense's failure to disclose Carroll's opinions. The imposition of sanctions for failure to disclose in accordance with Rule 15, Ariz. R. Crim. P., is left to the sound discretion of the trial court, and absent a clear abuse of discretion, we will not find error. See *State v. Naranjo*, 234 Ariz. 233, ¶ 29 (2014); see also *State v. Hill*, 174 Ariz. 313, 325 (1993).

¶44 Vargas disclosed Carroll, a retired police detective, as an expert on eyewitness identification, and the state interviewed Carroll approximately four months before trial. During the interview, Carroll answered some of the state's questions about photo lineup procedures used generally and in this case. In that interview, however, Carroll also refused to answer some of the state's questions about the procedures used in this case. At trial, Vargas referred to some of Carroll's previously undisclosed opinions about the case, and the state moved to limit his testimony to only the opinions he had expressed in his interview with the state. The trial court noted repeatedly that, as the proponent of Carroll, it is "incumbent upon [the defense] to make sure that all those opinions are disclosed," and then precluded his undisclosed opinions. Thus, Carroll's testimony was limited to "specific issues that have emerged during trial" and his two opinions disclosed in his interview with the state: (1) the police should have used sequential lineups; and (2) witnesses who failed to pick a suspect out of the first lineup they were shown should have been shown lineups with all of the other suspects.

¶45 Rule 15.7 authorizes courts to sanction a party for discovery violations, including failure to timely disclose an expert witness's opinion. However, sanctions "must be proportional to the violation and must have 'a minimal effect on the evidence and merits.'" *State v. Payne*, 233 Ariz. 484, ¶ 155 (2013) (quoting *Towery*, 186 Ariz. at 186). Because "preclusion is rarely an appropriate sanction for a discovery violation," *State v. Delgado*, 174 Ariz. 252, 257 (App. 1993), it should only be imposed when less stringent sanctions would not achieve the ends of justice, see *State v. Smith*, 140 Ariz. 355, 359 (1984). Before precluding a witness, a court must consider: (1) how vital the witness's testimony is to the proponent's case; (2) whether the testimony will surprise or prejudice the other party; (3) whether the discovery violation was the result of bad faith or willfulness; and (4) any other relevant circumstances. *Naranjo*, 234 Ariz. 233, ¶ 30. "In reviewing a trial court's choice and imposition of sanctions under Arizona Rule of Criminal Procedure 15.7, we will find an abuse of discretion only when 'no reasonable judge would have reached the same result under the circumstances.'" *Id.* ¶ 29 (quoting *State v. Armstrong*, 208 Ariz. 345, ¶ 40 (2004)).

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¶46 Here, the trial court precluded only the witness's undisclosed opinions, and did so only after considering the importance of the witness, the surprise and prejudice to the state, and the extent to which preclusion was sought by the state. It also considered but rejected Vargas's argument that a second interview with Carroll before he testified was sufficient to cure the prejudice to the state. Finally, the court found Vargas's failure to disclose all of Carroll's opinions was not the result of investigative difficulties or last-minute oversight, but rather a lack of diligence in preparing Carroll for his interview with the state. Because the court considered the surrounding circumstances and only precluded the undisclosed opinions, rather than the witness entirely, we conclude it did not abuse its discretion.

Expert Testimony from Non-Experts

¶47 Vargas argues Kelley's testimony about eyewitness identification and criminalist Edward Burns's testimony about similarities between Vargas and the man in the security footage are inadmissible because neither Kelley nor Burns are qualified experts in those fields. He also asserts this testimony was inadmissible because "it touched on the ultimate issue to be decided and the jury was in the same position to evaluate the evidence and draw its own conclusions."

Detective Kelley

¶48 As noted, Vargas did not timely object to Kelley's testimony about eyewitness identifications. Therefore, we review for fundamental error. *See Escalante*, 245 Ariz. 135, ¶ 12; *see also Vermuele*, 226 Ariz. 399, ¶ 10. The state asked Kelley whether "people have trouble with photo lineups, in your experience" and Kelley replied:

On occasion. And if I can explain? In this occasion, some of the witnesses had just seen him for a brief amount of time, had seen the subject with the van. And at that time, [he was] just asking for help. It wasn't like it was a crime where something had happened and they were ingraining this person's appearance in their head. They were later asked to give a description of a person that they had seen for a period of time, maybe up to five minutes. So depending on the situation, or if somebody had

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known somebody previous[ly], it might assist in whether they can identify them in a lineup.

When the state asked about the witnesses in this case, Kelley said:

The witnesses here, in dealing with the subject with the van, didn't realize it was even important at the time. So when they're approached by officers attempting to identify or describe the subject they had encountered, now they're thinking back. Rather than, as I'm saying, if it's perhaps a robbery situation, where you know the person you are encountering is a bad person, so you're maybe tuning in more and trying to pay more attention to the fine details of the person's description.

Kelley then went on to say that her explanation of why eyewitnesses might not identify someone in a lineup "could certainly apply" to the Conoco clerk who sold gasoline to the man in the security footage.

¶49 On appeal, Vargas asserts this was inadmissible expert testimony because Kelley was not qualified as an expert on the subject of eyewitness identification. Specifically, he argues that because Kelley did not have "specialized training in eyewitness identification or the psychology behind it," "the admission of her statements regarding the science behind eyewitness identification was erroneous." The state argues Kelley did not need specialized training in eyewitness identification and the psychology behind it, and that her experience qualifies her to testify about why eyewitnesses sometimes do not identify suspects in a lineup. We agree.

¶50 Under Rule 702, Ariz. R. Evid., a witness is qualified as an expert by knowledge, skill, experience, training, or education to testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;

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- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702 is not intended to preclude the testimony of experience-based experts. *McMurty v. Weatherford Hotel, Inc.*, 231 Ariz. 244, ¶ 17 (App. 2013) (citing Ariz. R. Evid. 702 cmt. to 2012 amend.). “The test of whether a person is an expert is whether a jury can receive help on a particular subject from the witness. The degree of qualification goes to the weight given the testimony, not its admissibility.” *State v. Davolt*, 207 Ariz. 191, ¶ 70 (2004) (citation omitted).

¶51 Here, Kelley’s testimony was based on her twenty-two years of experience as an officer and detective, which includes her experience conducting lineups with eyewitnesses. Thus, she is an experience-based expert on the subject of eyewitness identifications. See *McMurty*, 231 Ariz. 244, ¶¶ 11-17. Further, we believe the jury could have received help on the subject of identifications from Kelley. See *Davolt*, 207 Ariz. 191, ¶ 70. Thus, we find no error, fundamental or otherwise.

Forensic Video Analyst, Edward Burns

¶52 Similarly, Vargas argues criminalist Edward Burns’s testimony about similarities between Vargas and the man in the security footage was inadmissible because “he had no specialized knowledge or training above the average layperson when it comes to comparing facial features.” He not only challenges Burns’s qualifications, but also contends Burns’s testimony “touched on the ultimate issue to be decided” – that is, the issue of identification. We review a trial court’s admission of expert testimony and evidence for an abuse of discretion. See *State v. Richter*, 245 Ariz. 1, ¶ 11 (2018); see also *State v. Salazar-Mercado*, 234 Ariz. 590, ¶ 13 (2014).

¶53 Burns, who worked on the case as a forensic video analyst, was asked to compare images taken from security footage with known images of Vargas. Before Burns testified, Vargas objected to him identifying the suspect in security footage as Vargas because Burns did not have specialized training in facial recognition. In response, the state said Burns would not testify there was a match, but rather would say the images are “consistent” with known images of Vargas. Vargas further objected to the phrase “consistent with,” and the trial court ruled that Burns could testify about features of the suspect in the footage, and point out if those same

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features were present in photos of Vargas, but could not say they were a match.

¶54 Vargas maintains his argument that although Burns was qualified to testify about particular characteristics he observed in the security footage, he was not qualified to compare those to Vargas because he was not an expert in facial recognition. In addition, Vargas argues the trial court erred in admitting Burns’s “expert opinion on the ultimate issue of identification” because “the jury could use their own experience and knowledge” to compare the characteristics pointed out by Burns with photos of Vargas. Because identity was the only matter at issue in this case, Vargas argues Burns’s testimony could not have been harmless error.

¶55 The state argues Burns was qualified to offer expert opinion testimony because of his extensive experience in comparing images and articulating similarities and differences between them. The state also asserts that even if Burns was not qualified to compare the security footage with photos of Vargas, Burns’s testimony would nonetheless be admissible as lay opinion. Lastly, the state argues that if any error occurred, it was harmless.

¶56 In this instance, even if we assume the trial court erred by admitting Burns’s testimony, we conclude any such error was harmless. The jurors could have compared the footage to Vargas themselves, a fact he acknowledges. Further, in light of the testimony of other witnesses who identified Vargas, including members of his family, Vargas’s fingerprints being found on K.R.’s space heater, and the heater cord being found in K.R.’s van, we do not believe there is a reasonable probability that the verdict would have been different had Burns not testified. *See State v. Hoskins*, 199 Ariz. 127, ¶ 57 (2000) (we will not reverse conviction based on erroneous admission of evidence unless “reasonable probability” that verdict would have been different without the evidence).

Pretrial Services Worker’s Testimony

¶57 Vargas argues the trial court erred in admitting the testimony of a pretrial services worker because the testimony was more prejudicial than probative. We review a trial court’s ruling on admissibility of evidence for an abuse of discretion. *Richter*, 245 Ariz. 1, ¶ 11.

¶58 Before trial, the state disclosed a pretrial services worker who would testify that it was her job to make sure people, including Vargas, attended court hearings and that Vargas had attended his February 12 hearing, but was absent on February 22. Vargas objected to any mention of

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the court hearings and offered to stipulate that he had been in Tucson on the day K.R. disappeared. Because the state did not agree to stipulate, the court said the pretrial services worker could testify that it “was [her] obligation to confirm the presence of the defendant, as well as other folks, at court hearings, and whether or not he attended the two scheduled hearings both before and after” K.R. went missing. She testified and did not disclose the nature of any of the matters in which Vargas was involved, although she did refer to him once as the “defendant.”

¶59 Vargas argues the court abused its discretion by admitting this “highly prejudicial” testimony because there was other evidence establishing his presence in Tucson in February 2008. He further argues the testimony was improper other-acts evidence, that Vargas’s presence in Tucson “was not an essential element of the offense,” and that the testimony was not harmless error. We disagree.

¶60 “[T]he state is not required to accept a stipulation when the prejudicial potential of the evidence is substantially outweighed by the state’s legitimate need to prove the facts to which the defendant offers to stipulate.” *State v. Leonard*, 151 Ariz. 1, 8 (App. 1986). Therefore, the state was under no obligation to accept Vargas’s offer to stipulate, and the state needed to show Vargas was in Tucson at the time K.R. disappeared. Here, the pretrial services worker’s testimony was proper because it was relevant to the state showing Vargas was in the area in which the crimes were committed. Generally, relevant evidence is admissible unless it is precluded by the United States or Arizona Constitution or applicable rules or statutes. *See* Ariz. R. Evid. 402. Further, the court limited the testimony and precluded the witness from discussing the nature of the court matters or her specific job, so the jury never heard Vargas was involved in other criminal matters.⁷ Thus, the trial court did not abuse its discretion in admitting the testimony.

Accomplice Liability Instruction

¶61 Vargas argues the trial court erred in instructing the jury on accomplice liability because the state’s theory at trial was that Vargas acted alone. Generally, we review a trial court’s decision of whether to give a jury

⁷As noted, the witness made one reference to “defendant,” and a bench conference ensued. The state pointed out that there are defendants in various non-criminal proceedings. Vargas declined the court’s offer to strike the testimony containing the reference or give a limiting instruction, instead simply insisting that it not happen again.

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instruction for an abuse of discretion. *State ex rel. Thomas v. Granville*, 211 Ariz. 468, ¶ 8 (2005). However, because Vargas did not object to the jury instruction, we review for fundamental error. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 7.

¶62 Vargas contends the jury should not have been instructed on accomplice liability because there was no evidence that more than one person had been involved in the crimes. The state's theory at trial was that Vargas acted alone in kidnapping and murdering K.R., in stealing her bank card and van, and in lighting her van on fire. Evidence supporting the state's theory included: Vargas's fingerprint on the overturned space heater; the heater cord being found in the van; security footage of a man driving the van and attempting to use K.R.'s bank card at an ATM; footage of a man buying \$1.00 of gasoline that was used to set the van on fire; and witnesses identifying Vargas as the suspect in the footage, the man who purchased the gasoline, and the man with K.R.'s van. At trial, Vargas denied all involvement with the offenses. Vargas argues these theories preclude a finding of accomplice liability and that the instruction allowed the jury to reach a compromise verdict. We disagree.

¶63 "An accomplice instruction should only be given if reasonably supported by the evidence." *State v. Baldenegro*, 188 Ariz. 10, 13 (App. 1996). Based on the evidence, we believe the jury could have reasonably found that even if Vargas did not commit the offenses, he had "agree[d] to aid, or attempt[ed] to aid another person" in kidnapping and murdering K.R., stealing her van and bank card, and then lighting her van on fire. Thus, we find no error, let alone fundamental error, in the trial court's accomplice liability instruction. *See State v. Rodriguez*, 192 Ariz. 58, ¶ 16 (1998) ("A party is entitled to an instruction on any theory reasonably supported by the evidence.").

Disposition

¶64 For the foregoing reasons, we affirm Vargas's convictions and sentences.