ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JODI ANN ARIAS, Appellant.	1 CA–CR15–0302 Maricopa County Superior Court No. CR2008–031021–001 DT

APPELLEE'S ANSWERING BRIEF

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

Joseph T. Maziarz
Chief Counsel

Terry M. Crist, III
Assistant Attorney General
Criminal Appeals Section
2005 N. Central Ave.
Phoenix, Arizona 85004–1508
Telephone: (602) 542–4686
cadocket@azag.gov
(State Bar Number 028348)

Attorneys for Appellee

QUESTIONS PRESENTED FOR REVIEW

1. Has Arias meet her "extremely heavy burden" to show that trial publicity was so pervasive as to require a presumption of prejudice? If not, did publicity cause actual prejudice despite the jurors' assurances they did not view media coverage of the trial?

2. Did it violate the Confrontation Clause for an officer to testify to writing in his report that a .25 caliber handgun was stolen from Arias's grandparents' home? Alternatively, was any error made harmless by Arias's admission that the gun was taken?

3. Did the trial court abuse its discretion under Arizona Rule of Evidence 704(b) by allowing the State's psychologist to describe Arias's organization and planning in cleaning up after the murder?

4. Did the trial court commit fundamental or structural error by requiring Arias to wear a stun belt that she concedes the jury never saw?

5. Did the trial court clearly err by finding the prosecutor's peremptory strikes were not purposefully discriminatory on the bases of race or gender?

6. Did the prosecutor commit misconduct that cumulatively deprived Arias of a fair trial?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions

Rules

Statutes

Other Authorities

STATEMENT OF THE CASE

The State charged Jodi Arias *via* indictment in Maricopa County Superior Court on a single count of first degree murder (premeditated and felony murder). (R.O.A. 1.) The evidence presented at trial and viewed in the light most favorable to upholding the conviction for first degree murder, *see* *State v. Greene*, 192 Ariz. 431, 437, ¶ 12 (1998), shows Arias killed Travis Alexander with premeditation and not, as she claimed at trial, in self-defense.

A. ARIAS AND ALEXANDER.

Arias met Alexander in September 2006, at a convention sponsored by their mutual employer PrePaid Legal. (R.T. 2/5/13, at 56, 58, 67.) They began dating in February 2007. (R.T. 2/6/13, at 51.) Because he lived in Mesa and she in California, their relationship was primarily a long-distance one. (*See, e.g.*, *id.* at 73–74.) But Arias began to suspect Alexander of being unfaithful to her after she surreptitiously read messages on his phone. (Exh. 274, 12:45.) They broke up in June 2007. (R.T. 2/11/13, at 47). But they did not stop talking, and Arias moved to Mesa that summer. (*Id.* at 59–60, 88.) Her apartment was a 15-minute drive from Alexander's house. (R.T. 2/11/13, at 60.)

Arias and Alexander supposedly had a "don't-ask-don't-tell policy" about dating other people. (Exh. 274, 13:27.) Still, they continued to carry on

a sexual relationship. (*Id.* at 66; R.T. 2/13/13, at 45.) In August 2007, Arias went to Alexander's house unannounced. (R.T. 2/20/13, at 12.) Peeking through a window, she observed Alexander "making out" with another woman. (*Id.* at 13, 15.) Upset, she ran from the house. (*Id.* at 14.) Another time, Arias came into Alexander's home unannounced while he was with a girlfriend. (R.T. 1/30/13, at 114.) When Arias saw the woman, she again ran from the house. (*Id.*)

In April 2008, Arias moved back to California, staying with her grandparents in Yreka. (R.T. 2/13/13, at 63.) She and Alexander continued to communicate and at least once engaged in a sexually explicit phone call. (*Id.*; *See* Exh. 428.) On May 19, Alexander told a female friend *via* instant message that Arias was stalking him and eavesdropping on his social media conversations. (R.T. 4/8/13, at 77, 85.) He said he was afraid of her. (R.T. 4/10/13, at 11.) On May 26, Alexander became angry with Arias in a series of digital messages. (*See* Exh. 450.) Arias had done something and wanted to explain herself over the phone because "it's too incriminating for any email/voicemail." (*Id.*, No. 7374.) Not satisfied with her explanation, Alexander called her disparaging names and said he had "never in [his] life been hurt so bad by someone." (*See id.*, No. 14829.) He called her "evil" and said she was "the worst thing that ever happened to [him]." (*Id.*, No. 14831.)

During this time, Alexander had begun showing interest in another woman, M. Hall. (R.T. 1/2/13, at 86, 94.) Although she did not reciprocate, Hall agreed to go with Alexander on a trip to Cancun as friends. (*Id.* at 86, 94, 101–02.) They were due to leave on June 10. (*Id.* at 105.) By May 28, Arias and Alexander had discussed the trip. (R.T. 2/26/13, at 113.) She knew he had an extra ticket but was taking someone else. (*Id.*)

The same day, police responded to a reported burglary at the Yreka home. (R.T. 1/14/13, at 7, 24.) The burglary was "unusual" because the burglar had not taken various bills and small items throughout the house. (*Id.* at 1/14/13, at 31.) Arias reported cash missing from her bedroom but her laptop was still there. (*Id.* at 25–26.) Her grandfather's safe was missing only one of his four guns: a .25 caliber pistol. (*Id.* at 20; R.T. 2/28/13, at 186; Exhs. 344, 0:01–0:04, 345.)

B. ARIAS'S TRIP TO ARIZONA.

On June 2, 2008, Arias traveled 90 miles from Yreka to Redding to rent a car instead of using her own. (R.T. 1/10/13, at 17; R.T. 1/16/13, at 21.) She told the rental car manager she only intended to drive around town. (R.T. 1/16/13, at 21, 23.) She refused his selection of a red car and asked for something less "loud." (*Id.*)

Arias spent the night in Monterey. (R.T. 2/19/13, at 77.) The next morning, she borrowed two five-gallon gasoline cans from an ex-boyfriend. (*Id.* at 93. 99.) Arias had called him several times about the gas cans before her trip. (*Id.* at 92–93.) She purchased a third gas can at a Walmart near Salinas. (R.T. 2/27/13 at 92.) Although she claimed to have returned the can, a Walmart representative said there were no records of such a return. (*Id.* at 93; R.T. 4/23/13, at 45, 62.) Arias testified she wanted the cans to store presumably-cheaper gasoline purchased in Nevada and Utah. (R.T. 2/19/13, at 96.) But Arias filled the cans with gas purchased in Pasadena. (R.T. 2/27/13, at 96–97.) As Arias drove toward Mesa, she powered off her cell phone. (R.T. 2/19/13, at 104.) Her front license plate was detached, lying in her floorboard, and her back plate was upside down. (R.T. 2/20/13, at 39; R.T. 2/28/13, at 11.) By her own admission, Arias arrived in Mesa around 4 a.m. on June 4. (R.T. 2/19/13, at 106.) Later that day, Arias killed Alexander. (R.T. 2/4/13, at 98.)

Arias had plans to meet a man, R. Burns, for a date in West Jordan, Utah on June 4. (R.T. 1/9/13, at 9.) Burns attempted to call her four times between 9:00 a.m. and 9:30 p.m., but each call went straight to voicemail. (*Id.* at 12–15.) When Arias later called Burns around 9:30 p.m., she told him her phone's battery died because she lost her charger and she bought a new charger at a gas station. (*Id.* at 16.) At trial, however, she claimed to have found her

phone charger under the passenger seat of the rental car. (R.T. 2/20/13, at 27.) Arias also called Alexander's phone on the evening of June 4 near the Nevada border. (R.T. 1/15/13, at 62.) She left a voicemail purporting to make future plans and asking him to call her back. (*Id.*; Exh. 365.)

The next day in Utah, a police officer saw Arias's rear license plate was upside down. (R.T. 1/16/13, at 10.) The officer initiated a traffic stop and Arias claimed friends must have played a trick on her. (*Id.* at 11.) The officer let her go. (*Id.*) Arias then met with friends and went on the date with Burns. (R.T. 2/13/13, 92; R.T. 2/20/13, at 28.) She told a friend she hoped she could remain friends with Alexander so that, one day, their children would play together. (*Id.* at 20.)

Arias returned the rental car in Redding on June 6. (R.T. 1/16/13, at 24.) She drove the car 1,925 miles. (*Id.* at 26.) All of the car's floor mats were missing, and there were stains on the back seat resembling "Kool-aid." (*Id.* at 27.) The next day, Arias sent an email to Alexander, apologizing for not coming to see him in Mesa. (Exh. 505.)

C. DISCOVERING ALEXANDER'S BODY.

Hall was unable to reach Alexander, so she and a few friends went to his house on June 9, 2008. (R.T. 1/2/13, at 104.) Gaining entry into his locked bedroom suite, they found his naked body slumped in the shower. (*Id.* at 111,

113; R.T. 1/3/13, at 64.) A responding officer noted Alexander appeared to have been dead for some time. (R.T. 1/2/13, at 147.) There was a large amount of blood in the bathroom and the hallway connecting it to the bedroom. (R.T. 1/10/13, at 53, 61.) There was an especially large pool of blood on the carpet at the end of the hallway. (*Id.* at 90.) It appeared that some of the surfaces had been washed with water. (*Id.* at 102.)

Police found a spent .25 caliber casing in a pool of blood on the bathroom floor. (R.T. 1/3/13, at 122–23.) This suggested to a blood spatter analyst that Alexander was already bleeding by the time he was shot. (R.T. 1/10/13, at 78.) Police further lifted a palm impression from blood on a wall. (R.T. 1/8/13, at 42.) They also found a strand of hair in the hallway. (R.T. 1/10/13, at 84.) The palm print matched a known exemplar of Arias. (R.T. 1/9/13, at 140.) Subsequent DNA testing of the blood on the wall revealed a mixture that matched two profiles: Alexander's and Arias's. (R.T. 1/10/13, at 150–51). DNA testing also matched the hair to Arias. (*Id.* at 155.)

In the washing machine, police found a camera containing a memory card. (R.T. 1/3/13, at 82.) A computer forensics detective was able to extract a number of stored and deleted photos from the card. (R.T. 1/14/13, at 77, 81.) One batch of deleted photos depicted Arias posing nude on Alexander's bed. (*Id.* at 83; Exh. 164–165, 167–69.) Another depicted Alexander, also nude and

lying on the bed. (R.T. 1/14/13, at 89; Exh. 166.) Timestamps indicated these photos were taken between 1:42 and 1:47 p.m. on June 4, 2008. (Exhs. 164–169.) Another batch of photos, taken between 5:22 and 5:30 p.m., showed Alexander posing in the shower. (Exhs. 141–160.) These were followed by three deleted photos. (R.T. 1/14/13, at 102.) The first, taken at 5:31 p.m. was an out-of-focus shot of the bathroom ceiling. (*Id.*: Exh. 161.) The second, taken at 5:32 p.m., was an upside-down photo of Alexander's body lying in blood on the bathroom floor with Arias's shoe-clad foot between his body and the camera. (R.T. 1/14/13, at 105–107; Exh. 162.) The third, taken at 5:33 p.m., showed Alexander lying in the hallway between his bathroom and bedroom. (Exh. 163.) Deleting a photo from that particular camera was a fairly involved task, requiring five steps. (*Id.* at 78.)

Medical Examiner Dr. Kevin Horn observed Alexander's body was in an intermediate state of decomposition. (R.T. 1/8/13, at 51.) The cause of death was blood loss. (*Id.* at 93.) Alexander suffered a total of 27 knife wounds and a gunshot wound to the head. (R.T. 5/3/13, at 106 (prosecutor's uncontroverted summary).)

Alexander had defensive wounds on his hands, likely obtained while attempting to ward off knife strikes. (R.T. 1/8/13, at 55, 58.) He also suffered knife wounds to his shoulder, abdomen, chest, back, and the back of his head.

(*Id.* at 68, 76, 80, 84–85.) All of these injuries would produce bleeding and thus occurred before Alexander's death. (*Id.* at 83.) Alexander suffered two wounds on the outside of his chest and another stab slipped through the ribs and punctured the pericardial sac around his heart. (R.T. 1/18/13, at 61–64.) This wound was enough to cause eventual, though not immediate, unconsciousness and death. (*Id.* at 67.) In addition, Alexander's throat was cut open from ear to ear. (*Id.* at 85.) This severed his windpipe and trachea and would have caused unconsciousness in seconds and death in minutes. (*Id.* at 86–87, 89–90.)

Finally, Alexander was shot in the head. (*Id.* at 90–91.) The bullet entered the front of his skull and traveled downward and leftward to terminate in his left cheek. (*Id.* at 91.) Although the brain itself was too decomposed to examine, the bullet must have passed through the right frontal lobe, sending shockwaves through the rest of the brain. (*Id.* at 123–24; R.T. 4/25/13, at 9.) This would have resulted in immediate unconsciousness and an inability to function, quickly followed by death. (R.T. 1/8/13, at 94.)

Having performed over 6,000 autopsies, Dr. Horn opined that because the throat slash and gunshot would have been immediately incapacitating and fatal, they must have occurred after the other injuries, including the stab to the heart. (*Id.* at 72, 96–98.) Dr. Horn was clear that the gunshot wound could not

have occurred first because Alexander would have been unable to resist the subsequent knife strikes that caused his defense wounds. (R.T. 4/25/13, at 9, 11.) Further, Alexander must have been alive when his throat was cut, but it was not clear whether he was still alive when he was shot. (*Id.* at 97.)

The bullet lodged in Alexander's cheek was .25 caliber—the same size as the spent casing found on the bathroom floor and the same size as the gun taken from the Yreka home. (*Id.* at 152–54; R.T. 1/14/13, at 20.)

D. ARIAS'S STATEMENTS.

On June 9, 2008, Arias left a voicemail for the responding homicide detective, Esteban Flores. (R.T. 1/3/13, at 8–9; Ex. 389.) Flores returned her call the next day. (R.T. 1/3/13, at 9–10.) Arias told him the last time she spoke with Alexander was June 3. (Exh. 274, 2:05.) She asked when the murder happened and whether the killer used a weapon, particularly a gun. (Exh. 273, 0:49.) At trial, she admitted she made this call "in an effort to pretend like [she] was never there." (R.T. 2/20/13, at 58.) Similarly, Arias attended Alexander's memorial service because she "thought that if [she] didn't show up it would look suspicious because Travis and [her] were close and a lot of people knew that." (*Id.* at 63.) At the service, she introduced herself to Hall. (R.T. 1/2/13, at 115.) Hall did not know her. (*See id.*)

Local police arrested Arias in Yreka on July 15, 2008. (R.T. 1/10/13, at 9.) Detective Flores interviewed her the same day. (R.T. 1/15/13, at 71.) Arias insisted she was "absolutely not" at Alexander's house on June 4, 2008. (Exh. 357, 0:07.) She claimed she did not go "anywhere near" Phoenix. (*Id.* at 5:15.) She held to this story even after Detective Flores showed her the photos of her at Alexander's house on the day of his death. (*Id.* at 7:00–8:00; Exh. 358, 7:30–13:45.) She insisted, "if Travis were here today he would tell you that it wasn't me." (*Id.* at 6:00.) She added, "if I'm found guilty, I don't have a life." (Exh. 357, 9:14.) At trial, Arias admitted the story was not true and was instead what she "thought would comport with what the forensics would show" in order to "create a way for [her] to not have been responsible for it." (R.T. 2/20/13, at 79.) As she explained, "I was also very scared of what might happen. I didn't want my family to know I had done that. And I just couldn't bring myself to say that I did that." (*Id.* at 78.)

The next day, Arias admitted to traveling to Alexander's house on June 4 and to having sex with him. (Exh. 381, 7:15, 10:00.) But instead of admitting to killing him, she claimed two intruders broke into the house and shot him. (*Id.*, 32:45.) She claimed one of the intruders, a woman, wanted to kill her but the other, a man, let her live after threatening her family. (*Id.*, 48:45–52:35.) Arias supposedly did not tell this story at first to protect her family. (*Id.* at

19:45.) But at trial, she admitted the story was "all BS." (R.T. 2/20/13, at 106.)

Arias smiled while posing for her booking photo. (Exh. 477, 0:10.) She did so because she thought Alexander wanted her to smile and because she "knew it would be all over the internet." (*Id.*, 1:00.) Arias gave multiple interviews to TV news outlets, including 48 Hours, Inside Edition, and ABC News. (R.T. 2/4/13, at 99; R.T. 2/20/13, at 91, 100.) One of the 48 Hours interviews occurred in August 2008 while Arias was detained in Yreka and before she had been extradited back to Arizona. (R.T. 2/20/13, at 91.) In those interviews, she continued to insist she did not kill Alexander. She told 48 Hours, "I would never hurt Travis." (Exh. 477, 1:18.) She also repeated her intruder story to both 48 Hours and Inside Edition. (Exhs. 247, 500, 501.) To Inside Edition she said, "No jury is going to convict me." (Exh. 248.) While she claimed at the time this was because she was innocent, she later said at trial she had planned to avoid conviction by killing herself. (*Id.*; R.T. 2/4/13, at 99.)

Arias was evaluated by a defense psychologist, Dr. R. Samuels, to whom she continued to tell the intruder story. (R.T. 3/14/13, at 49.) When taking the post-traumatic stress diagnostic scale used to diagnose post-traumatic stress disorder ("PTSD"), Arias answered she had suffered trauma from "nonsexual assault" from a "stranger." (*Id.* at 100; R.T. 3/18/13, at 167.)

In 2011, jail security confiscated a magazine Arias had given to a visitor. (R.T. 2/21/13, at 162.) Arias had written in pencil a series of short phrases spread out over multiple pages. (R.T. 2/21/13, at 170–71; Exh. 466.) Together, they read:

> You fucked up. What you told my attorney next day directly contradicts what I have been saying for over a year. Get down here ASAP and see me before you talk to them again and before you testify so we can fix this. Interview was excellent, must talk ASAP.

(*Id.*) The magazine also contained the handwritten name and telephone number of an ABC News producer whom she had met several times in 2009. (R.T. 2/21/13, at 164–165; Exh. 466.) Arias's ex-boyfriend, M. McCartney, was scheduled to meet with the prosecutor a few days later. (R.T. 2/21/13, at 174.)

E. THE PROSECUTION.

Following the indictment, the State filed a notice of intent to seek the death penalty. (R.O.A. 32.) On September 15, Arias noticed as defenses "mere presence," "no criminal intent," and "mistaken identity." (R.O.A., 9.) But two days later, she changed her defenses to "self-defense" and "justification." (R.O.A., at 11.) Notwithstanding, Arias claimed at trial she "confessed" in the Spring of 2010 that both of her stories were untrue. (R.T. 2/20/13, at 78, 105–07.) She instead admitted to killing Alexander on June 4,

2008. (R.T. 2/4/13, at 98.) But this time, she said she acted in self-defense. (*Id.*)

Arias claimed that on January 21, 2008, she walked into Alexander's bedroom as he allegedly masturbated to a photograph of a young boy. (R.T. 2/11/13, at 128.) She further claimed he admitted to being sexually attracted to children. (*Id.* at 140.) Arias kept a journal, and while she did not write an entry for that day, the next entry on January 24, 2008 read, "I haven't written because there has been nothing noteworthy to report." (Exh. 511.) Moreover, Arias told a defense psychotherapist, A. LaViolette, that the picture of the child was on Alexander's computer rather than being a physical photograph. (R.T. 4/3/13, at 36.). At any rate, police did not find pictures of children—sexually explicit or otherwise—at Alexander's house or on his computer. (R.T. 4/23/13, at 160.)

Arias further claimed Alexander was physically abusive. Specifically, she claimed that during an argument in April 2008, he "body slammed" her onto the floor of his bedroom and kicked her hand, breaking her left ring finger. (R.T. 2/11/13, at 147, 149.) Although she claimed at trial her finger was permanently crooked, it appeared normal in a photo she took with her sister on May 15, 2008. (*See id.* at 151; Exhs. 452, 453.) She also claimed that in March 2008, Alexander slapped her when she told him about her plan to

move back to California. (R.T. 2/12/13, at 61–62.) Yet this conflicts with her journal account of the event:

> Well, Travis and I talked some more in his car, and we were able to say some things, at least I was, that we've been wanting to say for a long time. It was the beginning of a bitter-sweet closure. ... I leaned in to give him a hug and a kiss on his cheek to say goodbye and he turned his head so that our lips met. It was a series of 3 very tender, very slow, very soft kisses. I love his lips. ... we ended up being naughty again. That will be another advantage to me moving away, since we can't seem to keep our hands off of each other.

(Exh. 471.)

Arias claimed she would not have written about the abuse in her journal because of her belief in the "law of attraction," which supposedly forbade writing negative things about people. (R.T. 3/4/13, at 137.) She also claimed Alexander reviewed her journal and ripped out any pages that disparaged him. (*Id.* at 137.) Both claims conflicted with her journal entry of August 26, 2007:

> Well, I guess it's a good thing that nobody else reads this, because I write right now that I love Travis Victor Alexander so completely that I don't know any other way to be. I wish I did, because at times my heart is sick and saddened over all that has come to pass. I don't understand it, and at times I still have a hard time believing it. He makes me sick, and he makes me happy. He makes me sad & miserable, and he makes me feel uplifted and beautiful. All ... in all, I shouldn't be wording it as if he "makes" me feel these things. It all originates from w[ith]in. All of my darkness is a result of my own creation, it is the fruit of my thoughts planted continually and w[ith] too much repetition.

(Exh. 510.) Arias's explanation also conflicted with an entry dated January 24, 2008:

> Well, speaking of Travis, he frustrates me and thrills me. I love love love him, and he sings to me, goes out of his way for me, displays massive amounts of unconditional love for me in countless ways. I'm almost haunted by it. But it still remains that I cannot marry him. I ... can't quite put my finger on it, but something is just off w[ith] that boy
>
> ....
>
> I certainly wasn't thrilled—no—I was DEVASTATED when I discovered that he wasn't being faithful to me. I just don't get why men cheat!!!! ... It is a subtle feeling. But it doesn't go away. It nags. It pulls at the solar plexus until it's justified through the discovery of ugly hidden truths. Infidelity is so awful and causes ridiculous pain. ... I'm going to stop writing about this right now. It is of no benefit. I could just rip out the last few pages, but I'll refrain from doing that.

(Exh. 511.)

In her first interview with Detective Flores, Arias said there "was no reason" why she would ever "want to hurt" Alexander because "he never raped me" and "except for some mean words that he said ... there's no reason why" she would want to hurt him. (Exh. 358, 14:30; Exh. 368, 0:50–1:10.) On the other hand, she reported four abusive incidents to the State's psychologist, Dr. J. DeMarte, and at trial. (4/16/13, at 46.) But to a non-testifying defense psychologist, she reported substantially more incidents—so many that the psychologist thought they caused Arias to suffer post-traumatic stress disorder. (*Id.* at 44–47.)

As to the killing itself, Arias claimed that after having sex with Alexander on June 4, 2008, they mutually decided to take the photos of him posing in the shower. (R.T. 2/19/13, at 59–60.) While taking the photos, Arias said she dropped the camera. (R.T. 2/20/13, at 8.) This supposedly angered Alexander, who picked Arias up off the ground and "body slammed" her onto the bathroom floor. (*Id.* at 9.) Arias said she rolled away and ran into an adjoining closet. (*Id.*) There, she climbed onto a high shelf and grabbed a handgun Alexander supposedly kept. (*Id.* at 15.)

Arias said Alexander entered the closet and she ran back into the bathroom. (R.T. 2/28/13, at 87.) There, she pointed the gun at him. (R.T. 2/20/13, at 17.) She said he lunged at her "like a linebacker" and grabbed her by the waist. (*Id.*) Then, "the gun went off." (*Id.*) She claimed she "didn't mean to shoot him or anything" and "didn't even think [she] was holding the trigger." (*Id.* at 17.) She "didn't know that [Alexander] got shot until Flores told" her. (R.T. 2/20/13, at 71.) Alexander then supposedly tacked her and shouted that he would kill her. (*Id.*) Arias then claimed to have a complete lapse in memory; other than a fleeting image, she said her next full memory was driving her rental car in the desert. (*Id.* at 20.)

In contrast, Arias previously told Detective Flores she did not think Alexander "would allow" her to take photos of him posing in the shower.

(Exh. 357, 4:05.) She also told LaViolette she shot Alexander in the closet, not in the bathroom. (R.T. 3/19/13, at 49.) Arias also repeatedly told Detective Flores that Alexander did not own a gun. (Exh. 273, 1:10; Exh. 381, 14:08.) The police did not find any evidence of a gun, such as a case or ammunition. (R.T. 4/24/13, at 41.)

F. CONVICTION AND SENTENCE.

Following a 67-day trial, the jury found Arias guilty of first-degree, premeditated murder. (R.T. 5/8/13, at 11.) They further found, as an aggravating circumstance, that Arias committed the murder in an especially cruel manner. (R.T. 5/15/13, at 113.) A four-day penalty phase ended in a hung jury. (R.T. 5/23/13, at 6.) A second, 51-day penalty phase also ended in a hung jury. (R.T. 3/5/15, at 6.) On April 13, 2015, the trial court sentenced Arias to natural life in prison without the possibility of release. (R.T. 4/13/15, at 56.)

Arias filed a timely notice of appeal from the judgment and sentence. (R.O.A. 2083). This Court has jurisdiction under Arizona Constitution Article VI, Section 9, and Arizona Revised Statutes §§ 12–120.21(A)(1), 13–4031, and –4033(A).

ARGUMENTS

I

PUBLICITY DID NOT DEPRIVE ARIAS OF A FAIR TRIAL.

The publicity surrounding this trial was not so oppressive as to cause presumed or actual prejudice. (O.B. at 19.) Arias was responsible for generating much of the media interest herself and has not shown most of the coverage was inaccurate or inflammatory. And while the court permitted live broadcasting of most of the trial, such a practice is not inherently prejudicial and the court's filming guidelines ensured the trial was not disruptive. Third-party spectators unfortunately did harass defense counsel and witnesses, but Arias fails to show this prejudiced her defense in any way. Because most of what occurred here is a product of any nationally prominent case, this Court should not set a precedent that would render high profile defendants untriable.

As discussed below, the trial court took extensive measures to protect the jury and the jurors themselves repeatedly said they had not viewed media coverage and could remain fair and impartial. Moreover, the trial court repeatedly found the jurors were not prejudiced. Absent evidence to the contrary, this Court should not second-guess the trial court or the jurors. The record confirms Arias received a fair trial.

A. STANDARD OF REVIEW.

Although Arias raised certain aspects of her trial publicity claim below,[1] she never requested a mistrial or filed a motion for new trial on the basis that trial publicity prevented the jury from reaching an impartial verdict. She has therefore forfeited her claim but for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005).

Fundamental error exists when "(1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to [her] defense, or (3) the error was so egregious that [s]he could not possibly have received a fair trial." *State v. Escalante*, 245 Ariz. 135, 142 ¶ 21 (2018). To prevail, a defendant must show (1) that the trial court erred, (2) that the error was "fundamental," and (3) that the error caused the defendant prejudice. *Id.* Prejudice varies by case, but generally requires the defendant to show that absent the fundamental error "a reasonable jury could have reached a different verdict." *Id.* at 144, ¶ 29. This is an objective standard that the defendant cannot meet through "imaginative guesswork." *Id.* at 144, ¶ 30. Critically, the defendant bears the burden of persuasion throughout the analysis. *Escalante*,

[1] Arias moved for sequestration but does not claim on appeal that the denial of that motion alone is grounds for reversal. (R.O.A. 364.) And while Arias made a post-trial argument that trial publicly required a mistrial of the *penalty phase*, she never argued publicity was a ground for a new trial of the guilt phase. (R.O.A. 1139.)

245 Ariz. at 142 ¶ 21. Reversal thus occurs only in "rare cases." *Henderson*, 210 Ariz. at 567, ¶ 19. This discourages "a defendant from taking his chances on a favorable verdict, reserving the 'hole card' of a later appeal on a matter that was curable at trial, and then seeking appellate reversal." *Id.* (citation and internal alterations omitted).

B. ADDITIONAL BACKGROUND.

In 2011, the trial court granted motions for CBS to take photographs in the courtroom and for *InSession* to use three cameras to broadcast the trial online. (R.O.A. 346, 388.) The court ordered CBS not to use flashbulbs, to photograph witnesses, and to take photographs outside the courtroom. (R.O.A. 346.) The court further ordered *InSession* not to broadcast *voir dire* or oral arguments, when any party objects, or if the court found "interference." (R.O.A. 388.) The trial court denied motions to reconsider the media coverage and a motion to sequester the jury. (R.O.A. 348, 364, 389.) In 2012, the court granted Arias's motion to exclude witnesses from the courtroom and to prohibit them from watching media coverage of the trial. (R.O.A. 447 (sealed).)

During the first month of trial in January 2013, Juror 3 reported that a co-worker saw her on television when one of the cameras panned toward the jury. (R.T. 1/8/13, at 4.) Juror 3 said this would not affect her ability to be fair and impartial. (*Id.* at 5.) Because Juror 3 had told other jurors about the

incident, the court polled each juror in turn, and all indicated they could still be fair and impartial. (*Id.* at 7–22.)

Two weeks later, Juror 11 reported that an unknown person from "the media" asked him if he was on the jury during the lunch break. (R.T. 1/30/13, at 71.) He ignored the questioner and continued walking. (*Id.*) Juror 11 said the incident would not prevent him from being fair and impartial. (*Id.* at 72.) Because he discussed the incident with other jurors, the court polled them individually, and none indicated the story would compromise their objectivity. (*Id.* at 72–89.) The trial court decided to ask security to post a guard in front of the courthouse before and after trial to ensure the jurors were not approached. (*Id.* at 89–90.) Arias renewed her motion for sequestration but the court denied it, reasoning there were "less onerous means of dealing with the intensive media situation in this case." (*Id.* at 90.) The same day, the superior court marshal's office informed the court of three changes it would make to its security protocol. (*See* R.O.A. 1332 (sealed).)

In February, defense counsel saw footage of Arias's leg restraint on television. (R.T. 2/5/13, at 4.) At the end of the day, defense counsel told the court that a news report mentioned details of the recorded phone-sex tape, even though the court had excused the public from the courtroom when playing the tape. (*Id.* at 110.) However, the segment did not include audio of the tape, did

not use quotes, and nothing was "taken out of context." (*Id.*) Defense counsel worried spectators were speaking to the media and thought someone might have left and retrieved an audio recording device in the courtroom. (*Id.* at 111.) The court doubted this because there were three security officers watching the courtroom at all times, and courtroom spectators were told only specific media representatives were allowed to communicate from inside the courtroom *via* Twitter. (*Id.* at 112.) *InSession* released a copy of the phone-sex recording. (*Id.* at 111.) The prosecutor confirmed the State did not disclose it. (R.T. 2/6/13, at 109.)

The court conducted bench conferences in chambers and had security "sweep" the courtroom for recording devices. (*Id.* at 109.) At the end of one trial day, the court polled the jurors individually and a few mentioned they could hear the shutter "clicking" when photos were taken. (R.T. 2/20/13, at 112–39.) The same jurors said they did not miss any testimony, nor would it impact their ability to be fair and impartial. (*Id.* at 113, 129–30.) The court said it would ask the photographers not to engage noise-making shutters during open court. (*Id.* at 113.)

It appeared as if jurors were filmed entering the courthouse on March 13. (R.T. 3/13/13, at 53.) Security informed the court it could not restrict the media from filming jurors off courthouse grounds, so the court offered the

jurors escorts to prevent them from being filmed again. (*Id.*) The court then polled each juror, and none had any concerns about the possible filming. (*Id.* at 55–84.) None took the court's offer for additional security. (*Id.*)

On March 21, a spectator told the bailiff that another spectator had said, "Jodi, I wish you were dead." (R.T. 3/21/13, *ex parte* conference #2, at 4 (sealed).) The bailiff had the person removed. (*Id.* at 4–5.) There was no indication that counsel, the court, or the jurors heard the statement. (*See id.*)

Dr. Samuels received a threatening email from an unknown person. (R.O.A. 1334 (sealed).) LaViolette also received disparaging voice messages. (R.T. 3/27/13, *ex parte* hearing, at 4 (sealed).) Court security allowed defense counsel and experts to park in a secure location underneath the courthouse. (R.T. 3/18/13, at 5.) Dr. Samuels and LaViolette apparently received an escort to and from the courtroom as well. (*See* R.T. 3/25/13, at 95.) On April 3, defense counsel informed the court that unknown people sent threatening voice messages to counsel and LaViolette. (R.T. 4/3/13, at 3 (sealed).) LaViolette had not listened to the message directed at her. (*Id.* at 4.) Counsel agreed to forward the messages to courtroom security to determine if they contained actionable threats. (*Id.* at 6–7.)

The media began requesting daily copies of the transcripts, including bench conferences. (R.T. 3/25/13, at 100.) The trial court allowed the

disclosure but granted Arias's request to seal prospective bench conferences until the end of trial. (*Id.* at 102–03.) On March 27, another judge held oral argument on whether to prevent a public records disclosure of Arias's defense costs. (R.T. 3/27/13, oral argument, at 4.) Defense counsel made an *ex parte* avowal that the commentator Nancy Grace criticized LaViolette's high fees on her radio program. (R.T. 3/27/13, *ex parte* hearing, at 4 (sealed).) The court declined to stop the disclosure. (R.O.A. 913.)

The bailiff heard Juror 5 make a joke about LaViolette's $300-per-hour fee and admonished her not to say such things. (R.T. 4/2/13, at 17–18.) Juror 5 also came to court crying one day. (*Id.* at 8.) She explained she suffered from depression, took certain medications for the condition, and did not feel she could attend therapy during the course of the trial because she would be unable to discuss the case. (*Id.* at 16.) Juror 5's husband was a truck driver who figured out which trial she sat as a juror on, but he knew nothing more. (*Id.* at 19–20.) He listened to radio coverage of the trial and was concerned Juror 5 might be removed from the jury. (*Id.* at 19.) But Juror 5 had not learned anything about the case through her husband. (*Id.* at 28.) Defense counsel suspected Juror 5's husband was listening to HLN, a satellite radio station, that he accused of being "slanted toward the prosecution." (*Id.* at 56.)

Juror 5 also stated that the previous week, a photographer took a photo of her outside the courthouse. (*Id.* at 23.) She ignored him. (*Id.*) Nothing about the incident affected her ability to be impartial. (*Id.*) Indeed, Juror 5 said she had not formed an opinion about the case and had "no leaning toward one side or the other." (*Id.* at 22.) Although she was emotional, Juror 5 wanted to continue as a juror. (*Id.*)

The trial court polled the other jurors about Juror 5's joke and the photograph incident. (*Id.* at 45–56.) Those aware of either said neither would affect their objectivity. (*Id.*) The trial court was initially inclined to keep Juror 5 on the jury but decided to remove her upon learning Juror 5 had not disclosed her depression medications on her jury questionnaire. (*Id.* at 43, 58.) Juror 5 apparently began attending the trial as a spectator and was approached by reporters. (R.T. 4/4/13, p.m., at 73–74; R.T. 4/8/13, at 31.) The court had her escorted from the courtroom, outside the view of the other jurors, at the end of the day. (*Id.* at 74.) The court also polled the remaining jurors as to whether they had any contact with Juror 5; none had. (R.T. 4/8/13, at 38.)

The media obtained a copy of Arias's journal and a police interview with her parents and broadcasted portions of both. (R.T. 4/4/13, a.m., at 4.) The prosecutor indicated his office had responded to public records requests for these items and he had "no control" over the decision. (*Id.* at 5.) Arias again

moved to sequester the jury. (*Id.* at 4.) The trial court denied the request, noting there was no reason to doubt the jurors' avowals that they were not watching media coverage of the trial. (*Id.* at 8.) When the parties discussed the matter again a few days later, the court ordered the Maricopa County Attorney's Office to cease complying with public records requests about the case until the conclusion of trial. (R.T. 4/8/13, at 208.)

The prosecutor was observed signing autographs and posing for photos with members of the public outside the courthouse. (R.T. 4/15/13, at 13.) An eyewitness testified no jurors were present. (*Id.* at 14.) The trial court held a hearing on the matter, and based on the eyewitness testimony concluded there was "no evidence that signing autographs and posing for photographs under these very limited circumstances could affect the jury's verdict since there were no jurors present." (*Id.* at 76.)

Defense counsel mentioned additional harassing calls on April 8. (R.T. 4/8/13, at 25.) The court denied a motion to withdraw on that basis, finding "all of the defense team has been doing their jobs effectively" and finding no "basis for any determination that the defendant is not receiving excellent legal [c]ounsel and assistance." (*Id.* at 26–27.)

On the second day of her cross-examination, LaViolette asked *ex parte* to be released from testifying. (*Id.* at 5.) She was concerned about the

harassment and threats and said she had stopped listening to her messages. (*Id.* at 6.) She claimed the stress was increasing her blood pressure and making her emotional, and her doctor had recommended she not testify beyond another week. (*Id.* at 6–7, 19.)

The trial court declined to release LaViolette from testifying. (*See id.* at 18.) Noting LaViolette had already testified for nearly two weeks, the court observed "there was no inclination to the jury that you were having any kind of affect from any of the publicity" and did not "believe there's anyone who think[s] that you have not conducted yourself appropriately [and] professionally." (*Id.* at 9.) The court also did not "believe that the defendant has been harmed in any way by any of this publicity so far." (*Id.* at 10.) The court said security would continue looking into threats but noted ceasing to testify was not likely to improve the situation. (*Id.* at 11.)

The court suggested making the prosecutor aware of LaViolette's health issues, but defense counsel objected because they wanted the jurors to see "the full splendor of who [the prosecutor] is." (*Id.* at 11–13.) The court also offered to remove the cameras, but LaViolette said that would not affect her stress level because she believed she would suffer harassment as long as she testified, regardless of whether her testimony was broadcasted. (*Id.* at 16.) The court again ordered security to escort LaViolette to and from court. (*Id.* at 30.) The next morning, LaViolette claimed she was having more stress-related health issues. (R.T. 4/9/13, at 4.) The court again refused to release her from her subpoena. (*Id.*)

A member of the public called the prosecutor's office to say he had called LaViolette who defended her in-court opinions. (R.T. 4/11/13, at 4.) LaViolette explained she had returns calls to several of her harassers to encourage them to keep open minds about the case. (*Id.* at 5–6.) The court stated this violated an order it gave to LaViolette the previous week not to discuss the case with anyone and again admonished LaViolette not to do so. (*Id.* at 6, 12.)

Also in April, someone apparently posted a picture of the defense team at dinner to a Facebook page dedicated to supporting Alexander. (R.T. 4/10/13, at 94–95.) The post generated about 800 comments, some of which were disparaging. (*Id.* at 94.) Two days later, someone posted another photo of the defense team at dinner, accompanied by more disparaging comments. (R.T. 4/12/13, *ex parte* conference, at 3 (sealed).) Arias's attorney argued the media was "stoking" this behavior through opinion pieces stating LaViolette needed to accept that public scrutiny was a necessary consequence of a high-profile case. (*Id.* at 8.) The court denied another motion for counsel to withdraw because counsel were managing to represent Arias effectively despite the scrutiny. (*Id.* at 8–9.) Counsel also asked to have the cameras removed from the courtroom, arguing that the public's ability to watch the proceedings contributed to the harassment. (*Id.* at 9.) The trial court reminded defense counsel they had recently rejected this remedy. (*Id.* at 10.) The Court also said

the State should be allowed to respond to such a request, so Arias should file a written motion. (*Id.* at 10.)

LaViolette received more threats over the weekend before April 15. (R.T. 4/15/13, at 95.) Defense counsel told the court the Alexander Facebook page falsely claimed attorney Willmott had a marijuana possession conviction, although others on the page correctly noted the information was false. (*Id.* at 97.) It also appeared that someone had made fake social media profiles for the court reporter and judge. (*Id.* at 130–31.)

Defense counsel disclosed another death threat on April 19. (R.T. 4/19/13, at 7 (sealed).) They referred the information to the Maricopa County Sheriff's Office. (*Id.* at 6.) The head of courtroom security agreed this message was a true threat. (*Id.* at 7.) Arias requested the court remove the cameras from the courtroom. (*Id.* at 12.) The prosecutor argued removing the cameras would only anger the disgruntled spectators. (*Id.* at 11.) The head of security similarly doubted removing the cameras would improve the security situation. (*Id.* at 13.) The court noted that even if the cameras were removed, the media would still be present and would communicate all that happened at trial to the public. (*Id.* at 14.) The court mentioned the defense attorneys in another recent high-profile trial received similar harassment even though that case was not televised. (*Id.* at 18–19.) As a result, the court could not find

"that continuing camera coverage will impact the safety and well-being of any of the parties, the attorneys or the witnesses." (*Id.*) The court restated its belief that the jurors were diligently avoiding all media discussion of the trial. (*Id.* at 15.) Even so, the court was willing to employ less restrictive measures like directing the camera operators to avoid filming Willmott's face. (*Id.*)

Juror 8 was arrested for driving while intoxicated. (R.T. 4/23/13, at 4.) The court excused Juror 8 for a different reason: making a false statement on the jury questionnaire. (R.T. 4/25/13, in chambers, at 3 (sealed).) The court lifted the admonition against discussing the case but encouraged Juror 8 not to do so. (*Id.* at 5.) Several days later, the Gilbert Police Department responded to media requests with information about Juror 8's arrest. (R.T. 4/30/13, at 5 (sealed).) Juror 8 then began receiving calls from journalists. (*Id.*) The trial court admonished the police department for its disclosure to the media. (*Id.* at 7.)

On May 2, defense counsel reported the media had a copy of a correspondence between Alexander and a friend that was in evidence. (R.T. 5/2/13, at 8.) The prosecutor avowed his office did not disclose it. (*Id.* at 9.) The court also learned that someone was waiting with a video camera for the jurors at their parking lot the previous day, but security managed to prevent the jurors from being recorded. (*Id.* at 9–10.) The court polled the jurors; a few

saw the camera but none said it would affect their objectivity. (*Id.* at 12–34.) The court ordered escorts for the jurors. (*Id.* at 35.)

Shortly after the jury read the verdict, Arias gave an interview to Fox Channel 10. (R.T. 5/9/13, at 6 (sealed).) Arias "hinted" to her attorneys about interviews, and they advised her not to agree to them, but they were not aware she had conducted this interview until after it concluded. (*Id.* at 6–7; R.T. 5/14/13, at 10 (sealed).) Other media outlets asked to speak with Arias over the following days. (R.T. 5/14/13, at 5–6.) Arias wanted to speak with the media, but her attorneys advised against it. (*Id.* at 10–11.) After speaking with Arias, the court ordered that no media interviews would be granted until the penalty phase concluded. (*Id.* at 18.)

Arias filed a motion for mistrial of the sentencing phase because a mitigation witness was refusing to appear to testify. (R.O.A. 1139.) The court held oral argument at Arias's request, where she argued the witness would not appear because of the alleged unfairness in the guilty phase trial caused by the court's failure to sequester the jury and the media publicity. (R.T. 5/20/13, at 9–12.) The court denied the motion, later explaining "the argument that the defendant did not receive a fair trial because the jury was not sequestered is totally baseless" because the court had polled the jurors throughout the trial and they repeatedly stated they had not observed media coverage. (*Id.* at 17; R.T.

5/21/13, at 16.) The court further found "no basis to conclude that the presence of the media in this trial affected the outcome of this trial." (*Id.* at 17.) The court found its corrective actions, including sealing certain conferences, mitigated any potential prejudice from publicity.[2] (*Id.*)

C. TRIAL PUBLICITY DID NOT CAUSE PRESUMED OR ACTUAL PREJUDICE.

Due Process "requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). To obtain reversal based on a claim that publicity violated a defendant's right to a fair trial, a defendant must show "under the totality of the circumstances, the publicity attendant to the defendant's trial was so pervasive that it caused the proceedings to be fundamentally unfair." *State v. Bush*, 244 Ariz. 575, 581, ¶ 11 (2018) (citation and quotation marks omitted). This is not simply a sum of the "quantity" of publicity but an analysis of its "effect." *State v. Cruz*, 218 Ariz. 149, 156, ¶ 13 (2008). There is a two-step analysis: (1)

[2] Arias claims the court "threatened to report defense counsel to the state bar for suggesting she failed to ensure that Arias received a fair trial." (O.B. at 50.) That is not what occurred. At oral argument, defense counsel Nurmi argued the trial court "failed" its duty to protect Arias's rights "time and time again" and "[t]his cannot be a modern day version of days gone by of stoning or of witch trials." (R.T. 5/20/13, at 10–11.) The trial court found these statements were "purposeful and planned" in light of the Arias's request for public oral argument. (R.T. 5/21/13, at 19.) The court further found the comments were "unprofessional and at times may have violated ethical rules." (*Id.*) The court ordered a copy of the transcript to evaluate whether it would pursue further action. (*Id.* at 20.)

"whether the publicity so pervaded the proceedings that the trial court erred by not presuming prejudice" and (2) "whether the defendant showed actual prejudice." *Bush*, 244 Ariz. at 581, ¶ 11. The defendant bears the burden throughout. *Cruz*, 218 Ariz. at 157, ¶ 20 (2008) (holding the defendant failed to meet the "very heavy" burden of establishing presumed prejudice); *Bible*, 175 Ariz. 549, 566–67 (1993) (holding defendant had the burden of showing actual prejudice). Arias cannot meet her burden at either stage.

1. *This Court should not presume prejudice.*

"Courts rarely presume prejudice due to outrageous pretrial publicity." *Cruz*, 218 Ariz. at 581, ¶ 12 (citation and internal punctuation omitted). The defendant bears an "extremely heavy burden" to show "the publicity is so unfair, so prejudicial, and so pervasive that the trial court cannot give any credibility to the jurors' answers during voir dire." *Id.* (citation and internal punctuation omitted). The standard is also exacting because it requires defendants to rebut many of the core presumptions of criminal trials: that *voir dire* produces impartial juries and that trial courts are generally better judges of trial atmosphere than appellate courts. *See Bible*, 175 Ariz. at 565. Courts describe offending press coverage as "so extensive or outrageous that it permeates the proceedings or creates a 'carnival-like' atmosphere,' devoid of the fundamental and essential elements of dignity, order, and decorum." *Id.* at

581–82, ¶ 12 (citations and internal punctuation omitted); *see also State v. Bible*, 175 Ariz. 549, 563 (1993) (requiring a defendant to show publicity "so outrageous that it promises to turn the trial into a mockery of justice or a mere formality"). A defendant must essentially show "that the jurors have formed preconceived notions concerning the defendant's guilt and that they cannot lay those notions aside." *State v. Chaney*, 141 Ariz. 295, 302 (1984).

Arias is right that presumed prejudice is akin to structural error in that the error "so profoundly distort[ed] the trial that injustice is obvious without the need to *further* consider prejudice." *See Escalante*, 245 Ariz. at 142, ¶ 20 (emphasis added). But she is incorrect to treat prejudice as unmeasurable. (O.B. at 52.) Both steps of the *Sheppard* analysis require evaluating the probable impact of publicity on the jury. *See Cruz*, 218 Ariz. at 156, ¶ 13 (considering "the effect of pretrial publicity, not merely its quantity"); *id.* at 157, ¶ 21 ("The relevant inquiry for actual prejudice is the effect of the publicity on the objectivity of the jurors" actually seated.").

Despite many reported decisions addressing trial publicity, no Arizona appellate court has held a defendant met the heavy burden to show presumed prejudice. Even the United States Supreme Court presumes prejudice sparingly and has not done so in over 50 years. *Compare Sheppard*, 384 U.S. 333; *Rideau v. Louisiana*, 373 U.S. 723 (1963), *and Estes v. Texas*, 381 U.S.

532 (1965) *with* *Skilling v. United States*, 561 U.S. 358, 380 (2010) (declining to presume prejudice); *and* *Chandler v. Florida*, 449 U.S. 560, 574 (1981). Despite the volume of publicity here, this case resembles the Supreme Court's more recent decisions rejecting presumed prejudice.

a. Arias actively courted the media.

Arias smiled in her booking photo to generate attention on the internet. (Exh. 477, 0:10.) She gave three televised interviews before trial, one as early as during her detention in California. (R.T. 2/4/13, at 99; R.T. 2/20/13, at 91, 100.). She met with a news producer several times before trial. (R.T. 2/21/13, at 164–65.) She even conducted an interview on the day of her conviction and over the objection of her attorneys. (R.T. 5/9/13, at 6–7; R.T. 5/14/13, at 10.) Arias was thus responsible for much of the public fascination with and media attention on her trial.

This estops Arias from using her trial publicity as a basis for reversal. *See* *State v. Miles*, 186 Ariz. 10, 16 (1996) (holding the defendant was "hard pressed to complain about" the publicity caused by a televised interview to which he consented); *see also* *Bush*, 244 Ariz. at 582, ¶ 14 (declining to presume prejudice "merely because the media published an interview to which [the defendant] agreed"). The situation is akin to invited error, which forbids a defendant from "injecting error in the record and then profiting from it on

appeal." *State v. Logan*, 200 Ariz. 564, 633, ¶ 11 (2001) (citation and internal alterations omitted). This ensures a defendant "cannot complain about a result he caused." *State v. Kemp*, 185 Ariz. 52, 60–61 (1996). Even if invited error does not strictly apply, its underlying rationale should bar a defendant from courting public attention at trial and later complaining about the resulting publicity on appeal. If not a total bar, this Court should at least consider Arias's role in stoking publicity as a factor weighing against meeting the heavy burden to establish presumed prejudice.

b. The jurors repeatedly confirmed they could be impartial.

Voir dire was extensive; it lasted seven days and included a lengthy jury questionnaire, general questions by the court and individual questions by both counsel. The court informed the prospective jurors that they could not view media reports of the case and asked if anyone had concerns about publicity, but no one raised their hand. (R.T. 12/10/12, at 68–69.) The court also asked if anyone had seen media reports about the case since jury selection began, and again there were no hands. (R.T. 12/18/12, at 103–04.) It does not appear that any of the empaneled jurors had prior knowledge about the case. *See Bolton*, 182 Ariz. at 301 (1995) (noting "only" 5 of the 15 jurors had prior knowledge of the case). This weighs against prejudice. *See Bible*, 175 Ariz. at 566 (holding the empaneled jurors' *voir dire* answers that they could be fair and

impartial "undercut Defendant's prejudice claim"). In fact, *Skilling* distinguished itself from earlier decisions finding presumed prejudice in small jurisdictions because the trial occurred in the Houston area where 4.5 million people resided. 561 U.S. at 383. Maricopa County is similarly large at 4.3 million residents. *QuickFacts: Maricopa County*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/maricopacountyarizona (last visited Jan. 7, 2018) (population estimate as of July 1, 2017).[3] Therefore, "the suggestion that 12 impartial individuals could not be empaneled is hard to sustain." *Skilling*, 561 U.S. at 383.

Once empaneled, the trial court polled the jurors as a group at least 16 times and polled them individually 4 times about whether they were exposed to media coverage or if the behavior of journalists and other jurors compromised their objectivity:

Group Poll	**Individual Poll**
R.T. 1/2/13, at 8	R.T. 1/8/13, at 10–22
R.T. 1/14/13, at 5	RT 3/13/13, at 55–85
R.T. 1/17/13, at 36	R.T. 4/2/13, at 30–40, 45–
R.T. 1/20/13, a.m., at 4	R.T. 5/2/13, at 12–34
R.T. 1/29/13, at 4	

[3] This Court should take "judicial notice of county classification and the populations thereof according to the … United States census." *Hernandez v. Frohmiller*, 68 Ariz. 242, 257 (1949).

R.T. 2/4/13, at 6
R.T. 2/12/13, at 12
R.T. 2/19/13, at 3
R.T. 2/25/13, at 6
R.T. 3/4/13, at 46
R.T. 3/13/13, at 12
R.T. 3/25/13, at 9
R.T. 4/4/13, at 10
R.T. 4/8/13, at 38.
R.T. 4/24/13, at 30
R.T. 5/1/13, vol. 1, at 4

These polls also included repeated admonitions to avoid media contact. (*Id.*)

This is quite different from *Sheppard*, where jurors admitted to hearing about inflammatory news reports during jury selection and were *never* polled during trial about whether they viewed the ongoing reporting. *Sheppard*, 384 U.S. at 347, 357. This further weighs against presuming prejudice. *State v. Bigger*, 227 Ariz. 196, 202, ¶ 19 (App. 2011) (declining to presume prejudice when "the trial court made substantial efforts to ensure a fair and unbiased jury was seated"); *see also State v. Stokley*, 182 Ariz. 505, 514 (1995) ("It would be strange to presume prejudice in a case in which the record negates actual prejudice").

c. The content of the publicity was not prejudicial.

The volume of publicity in this case was undoubtably extensive. But the few Supreme Court decisions presuming prejudice "cannot be made to stand for the proposition that juror exposure to news accounts of the crime alone presumptively deprives the defendant of due process." *Skilling*, 561 U.S. at 380. Therefore, "the quantity of publicity alone will not justify a presumption of prejudice." *Bigger*, 227 Ariz. at 201, ¶ 12 (declining to presume prejudice despite extensive coverage including "over 1,400 television news segments, 300 newspaper articles, and other electronic media coverage, including a "blog" and "website").

On appeal, Arias says little about the content of the news coverage, which weighs against a presumption of prejudice. *See State v. Stanley*, 167 Ariz. 519, 528 (1991) (noting, when refusing to presume prejudice, "no newspaper articles or other examples of pretrial publicity were attached to [the trial] motion for change of venue"); *accord State v. Trostle*, 191 Ariz. 4, 11 (1997) (holding a defendant did not meet his burden to show presumed prejudice even when documenting "65 television broadcasts and 15 newspaper articles disseminated in the Tucson area prior to trial"). Although Arias generalizes coverage as "inaccurate," she does not point to any specific stories that were factually untrue, contained inadmissible information, or were

otherwise inflammatory. Arias does mention a few opinion pieces from commentators including Nancy Grace who thought defense costs were too high and LaViolette ought to take the criticisms against her in stride. But those were not so inflammatory as to assume Arias's guilt or discuss inadmissible evidence. *See Skilling*, 561 U.S. at 382–83 (distinguishing *Rideau* because while articles against the defendant were "not kind," they lacked a "confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"). Courts have tolerated more inflammatory coverage than what Arias has shown here. *Bigger*, 227 Ariz. at 201, ¶ 13 (declining to presume prejudice "even when the alleged crime was heinous and the media had reported inaccurate information"); *see also Bible*, 175, Ariz. at 560 (refusing to presume prejudice even when some reports included inaccurate and inadmissible information).

At least some of the information released by news outlets was admissible. For instance, the phone-sex recording released by *InSession* was ultimately played at trial. (R.T. 2/5/13, at 110.) Likewise, witnesses extensively discussed Arias's journal, and she does not point to any broadcasted excerpts that were not introduced at trial. (R.T. 4/4/13, a.m., at 4.)

One potentially inflammatory disclosure was perhaps the video showing Arias's restraints. (R.T. 2/5/13, at 4.) But the record only indicates this

happened once and does not suggest any juror watched the broadcast. Even if they had, a "brief and inadvertent" glimpse of Arias's restraints would not be reversibly prejudicial on its own. *See State v. Murray*, 184 Ariz. 9, 26 (1995).

The record does contain some false rumors about trial participants, such as defense attorney Willmott's false marijuana conviction. But the chief source of these rumors were social media accounts—not the journalists. (R.T. 4/10/13, at 94–95; R.T. 4/15/13, at 95.) These sites were more obscure than traditional news sources like newspapers, radio broadcasts, and television programs. There is no reason to suspect that jurors who repeatedly stated they had not viewed even traditional news reports would have actively sought out websites openly supporting the victim. And even if they had, rumors about defense counsel are less prejudicial than rumors about the defendant.

Nor does Arias establish that the general tenor of media coverage was negative toward her. Trial counsel discussed his opinion that one radio station, *HLN*, and one commentator, Nancy Grace, were unfavorable to Arias, but this is not enough to establish a broad pattern about the general media. *See Bolton*, 182 Ariz. at 300 (noting "the press coverage of the victim's death and defendant's emergence as a suspect was neither disruptive to the court proceedings nor suggestive of defendant's guilt or innocence").

This sharply contrasts with the Supreme Court's older jurisprudence. The *Sheppard* Court observed "[m]uch of the material printed or broadcast during the trial was never heard from the witness stand" including: the defendant "purposely impeded" his murder investigation; he hired a "prominent criminal lawyer"; he "was a perjurer" and a "bare-faced liar"; he "had sexual relations with numerous women" and fathered an illegitimate child with a convict; and his murdered wife "characterized him as a 'Jekyll-Hyde.'" 384 U.S. at 356–57. In *Rideau*, the media thrice televised a 20-minute "interview" where the defendant appeared to confess to the crimes. 373 U.S at 725; *see also Skilling*, 561 U.S. at 382–83 (distinguishing *Rideau* on this basis). Short of this pervasive, inflammatory, and inaccurate reporting, the coverage here was not inherently prejudicial.

d. The media did not take over the proceedings.

The trial court gave instructions for when and where reporters and camera operators could sit, film, and post online. (R.O.A. 388; R.T. 2/5/13, at 112.) Security personnel actively monitored the media throughout the trial. (*Id.*) Apart from a few isolated incidents, the in-court media caused no major disruptions to the trial. When incidents did occur, the trial court dealt with them swiftly and polled the jurors to ensure they were not prejudiced. (R.T. 1/30/13, at 71–89.) Arias points to a single instance where a few jurors

complained about the noise of camera shutters. (O.B. at 42.) But the trial court said it would admonish the camera operators to make less noise and no juror indicated this prevented him or her from focusing on the trial. (R.T. 2/20/13, at 112–39.) It also appears some jurors were photographed on a few occasions. (*See* R.T. 4/2/13, at 23.) Arias does not explain why this was inherently prejudicial. In any case, the jurors told the court it would not affect their impartiality, and nothing in the record suggests otherwise. (*Id.*, at 45–56.)

The case is thus like *Atwood*, where the media may have been a "felt presence" but were not "disruptive or overly manipulative." 171 Ariz. at 631; *see also Bible*, 175 Ariz. at 568 (noting "[t]he record does not show that the trial court failed to control the courtroom"). The atmosphere was markedly different in *Sheppard*. There, the constant movement of reporters in and out of the courtroom "often caused so much confusion that, despite the loud-speaker system installed in the courtroom, it was difficult for the witnesses and counsel to be heard." 384 U.S. at 344. The defendant often had to leave the courtroom in order to speak with his attorney. *Id.* Reporters occupied the entire courtroom floor and made television broadcasts from a room adjoining the jury room. *Id.* at 343. And most offensively to the Court, the trial court took the "unprecedented" action of seating 20 news reporters at counsel table and at a special table near the jury box. *Id.* at 355. *Estes* also involved "considerable

disruption," where a booth was constructed in the back of the courtroom from which a large number of camera operators filmed the trial. 381 U.S. at 536. There were also cables, wires, and microphones littered throughout the courtroom. *Id.* Without these distractions, it cannot be said of Arias's trial that "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard." *Sheppard*, 384 U.S. at 355.

e. Broadcasting the trial was not inherently prejudicial.

Photographing and filming trial proceedings is not inherently prejudicial. *Chandler*, 449 U.S. at 574. Instead, a defendant must show "broadcast coverage of [her] particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process." 449 U.S. at 581; *accord State v. Cardenas*, 146 Ariz. 193, 195 (App. 1985). As already explained, the court directed how and when proceedings could be filmed, and there is no indication the filming itself caused any disruptions. Like another Arizona trial involving "gavel-to-gavel television coverage of the proceedings broadcast daily," the cameras here "did not diminish the solemnity and sobriety of the courtroom." *Atwood*, 171 Ariz. at 630–31.

Arias argues the presence of cameras signaled to the jury that the trial was "special." (O.B. at 41.) In support, she cites *Estes's* criticisms of filming

trials, but as noted above, the media were far more distracting in that case. More importantly, the Supreme Court later explained *Estes* did not announce a *per se* prohibition on filming courtroom proceedings. *Chandler*, 449 U.S. at 574. Instead, a defendant must "something more than juror awareness that the trial is such as to attract the attention of broadcasters." *Id.* at 581. The *Chandler* Court found a lack of empirical evidence to support the claim that in-court cameras had an adverse psychological impact on jurors. *Id.* at 575–76. It further held many of concerns in *Estes* about the distraction of televising trials were rooted in the outdated technology of the time, involving "cumbersome equipment, cables, distracting lighting, [and] numerous camera technicians." *Id.* at 810–11. If advances in broadcasting in the 19-years between *Estes* and *Chandler* allayed these concerns, the following 38 years have even further relegated *Estes's* rationale to history. Without more, the bare fact that the trial court permitted a live broadcast was not prejudicial.

Arias makes much of the few instances where jurors were filmed. (O.B. at 41.) But much like her claim against photographing jurors, Arias fails to explain why this is prejudicial beyond her defunct trial-is-special argument. The jurors in this case said they were not affected by being filmed, and nothing in the record casts doubt on their answers. (R.T. 1/8/13, at 7–22.) Arias also complains the live feed had no "delay" that would allow editors to remove

unwanted content. (O.B. at 43.) But she cites no authority requiring such a delay. She also claims, without citation, that the camera crews were "sloppy" in ways that did not benefit her. (O.B. at 53.) Even if true, Arias fails to explain how it prejudiced a jury that did not watch news broadcasts.

In essence, Arias's arguments would effectively ban the filming of trials altogether. Because *Chandler* holds to the contrary, Arias has not justified presuming prejudice on this basis.

f. Publicity did not cause prejudicial harassment by third parties.

Much of Arias's publicity argument, and her argument against televising the trial, is that it led to fharassment against defense counsel and witnesses. (O.B. at 43.) Undoubtably, the trial participants were subject to harassment and threats. But while unfortunate, this does not require this Court to presume prejudice.

First, much of the harassment was not accomplished by journalists. Arias suspects the live broadcast emboldened spectators to harass trial participants. (O.B. at 48–49.) But she offers little to explain why televised trials would generate substantially more harassment than other highly publicized trials. At the time, the trial court and head of security doubted the cameras contributed to the third-party harassment. (R.T. 4/19/13, at 13–14.) The court even compared this case to another high-profile yet untelevised trial

where the participants likewise received harassment. (*Id.* at 18–19.) This is unlike *Sheppard* where newspapers had published the names of all of the venire panelists and prospective jurors received letters, telephone calls, and attention before they were even empaneled. 384 U.S. at 342.

Arias makes much of an order the trial court issued six months after the guilt phase concluded that prohibited live broadcasting of the second penalty phase and sealed much of the proceedings. (O.B. at 37–38, 43, 51–52; R.O.A., Item 1279 (sealed).) In doing so, the court described the third-party harassment suffered by trial participants during the guilt phase *and* since then. (R.O.A., Item 1279, at 2–3.) By this point, the court found "a correlation between the threats received by attorneys and witnesses and the live camera coverage." (*Id.* at 5.)

Even so, the order does not prove the live broadcast or third-party harassment prejudiced the guilt phase jury. First, by this point six months after the verdict, substantially more harassment had occurred, including harassment of excused jurors following the first penalty phase. (*Id.* at 2.) Second, the court's decision to prohibit future live broadcasts was predicated on a key fact not present at the guilt phase: all of Arias's penalty phase witnesses refused to testify if cameras were present. (*Id.* at 4.) In contrast, Arias and her experts repeatedly declined invitations to remove the cameras before reversing course

at the end of the guilt phase, and even then no witnesses refused to testify. (R.T. 4/8/13, at 16; R.T. 4/12/13, at 10.)

Third, the court concluded the cost of providing the same level of security for the penalty phase jurors was too high. (*Id.* at 3.) Fourth, although this Court can and should defer to the trial court's factual findings, it has already determined the trial court went too far in prohibiting media access to the penalty phase. *See* KPNX-TV Channel 12 v. Stephens, 236 Ariz. 367, 369, ¶ 1 (App. 2014) (reversing the trial court's order closing the courtroom during Arias's testimony). Fifth, using the court's penalty phase remedies to infer prejudice at the guilt phase would chill trial courts from taking corrective action late in proceedings, lest their earlier rulings be called into question. Indeed, this is why evidence of subsequent remedial measures are generally inadmissible to show culpability. Ariz. R. Evid. 407.

But most importantly, the court itself foreclosed using its order to retroactively find prejudice. The court emphasized that it "[did] not believe live camera coverage of the first trial impacted the jury's verdict in the first trial. This Court was constantly monitoring the jury to assure the jurors were not affected by the live camera coverage of the first trial." (*Id.* at 5.)

Even if the court's order did establish a clear link between the media's conduct and third-party harassment, Arias fails to link the harassment to jury

prejudice. Such a link is necessary, because even death threats to a juror's family are not irrebuttably prejudicial. *See People v. Harris*, 43 Cal. 4th 1269, 1304 (2008) (refusing to reverse a trial even though someone made a death threat against a juror's father because the juror "repeatedly and unequivocally stated that his ability to deliberate impartially would not be affected by the threat"). Here, the trial court's penalty phase order prohibiting cameras noted that "no … contact" between harassers and jurors occurred. (R.O.A. 1279, at 3.)

Arias asserts without citation her experts could not present "their best testimony." (O.B. at 54.) But she does not identify any testimony her experts failed to give but for third-party harassment. Nor does she explain what testimony her experts could have delivered better. Her unsupported, subjective assertions are not enough to meet the heavy burden to presume prejudice. *See State v. Payne*, 233 Ariz. 484, 500, ¶ 33 (2013) (holding publicity did not cause actual prejudice when spectators and camera operators made outbursts outside presence of the jury because the defendant failed "to connect these isolated events to actual prejudice or bias of any jury member"). In any case, the trial court found no prejudice, concluding LaViolette was composed and professional and trial counsel managed to effectively represent Arias despite the harassment. (R.T. 4/8/13, at 9; R.T. 4/12/13, at 8–9.) A review of the

record confirms this: LaViolette was thorough and spirited in her testimony, particularly on cross-examination. (*See, e.g.*, R.T. 4/4/13, p.m., at 111–12.)

The State does not minimize the harassment to Arias's defense team. But absent a link to either the media's conduct or the jury's verdict, this harassment does not warrant a new trial.

g. The prosecutor did not prejudice the jury.

Arias speculates the prosecutor's aggressive questioning of witnesses encouraged those who watched the live broadcast to harass the defense team. (O.B. at 45.) She offers nothing to support this conjecture, nor again can she link the harassment to jury prejudice. The State will explain below that the prosecutor's questioning did not prejudice the trial. (*See* Argument VI, *infra*.) Arias further argues the prosecutor's posing with spectators was prejudicial. (R.T. 4/15/13, at 76.) Even if this increased the volume of publicity somewhat—a dubious proposition absent evidence—Arias does not explain how it encouraged spectators to harass her attorneys and witnesses.

This is again different from *Sheppard*, where the prosecutor was instrumental in releasing *prejudicial* information to the media. 384 U.S. at 361. While the prosecutor's office here may have complied with some public records requests, Arias does not allege any of the released information

prejudiced the jury. (R.T. 4/4/13, a.m., at 4–5.) Therefore, the record does not support her claim that the prosecutor contributed to prejudicial publicity.

h. The atmosphere of the trial was not utterly corrupted.

Arias argues the atmosphere of the courthouse was "circus-like" because spectators arrived in costumes. (O.B. at 48.) She references a comment by defense counsel a year after trial that during the penalty phase, "somebody dressed up as a puppy dog was in full costume outside in front of the courthouse this morning." (R.T. 11/23/14, at 6.) This reminded counsel that "last year we had somebody dressed up as a bunny rabbit." (*Id.*) Counsel did not know if this had anything to do with the case, and there is nothing in the record to support Arias's claim on appeal that the costumes were "efforts to influence the jury." (*Id.* at 48.) Such a superficial resemblance to a carnival is not what *Sheppard* was concerned with, nor does it somehow enable Arias to meet the heavy burden to show presumed prejudice.

In fact, the Supreme Court warned against publicity that creates a "kangaroo court" where the outcome is but a "hollow formality." *See Rideau*, 373 U.S. at 726. Arias did not receive that sort of trial. The jury actively participated, asking 410 questions. (R.O.A. 1115.) Although some of these questions expressed skepticism of defense witnesses, others probed the State's case. (*See, e.g.* R.T. 4/25/13, at 30 (asking the medical examiner, toward the

end of trial, whether it was "possible you could be wrong about Alexander being able to ambulate for only a few seconds after the gunshot").) The jury deliberated for four days and asked to see the floor plan of Alexander's apartment. (R.O.A. 1122, 1126, 1127, 1129, 1130.) Their verdict was not a forgone consequence of the publicity.

This is especially critical because the evidence against Arias was overwhelming. (*See* Argument VI(C)(4), *infra*.) *See State v. Carlson*, 202 Ariz. 570, 578, ¶ 23 (2002) (noting, when rejecting presumed prejudice, "the verdicts are strongly supported by overwhelming and undisputed evidence presented at trial"). Despite this, the same jury still hung on whether to impose the death penalty. *Cf. Skilling*, 561 U.S. at 383–84 (noting it was "of prime significance" that the jury acquitted the defendant on several counts). Therefore, publicity did not render the trial "little more than a mockery of justice so that [this Court] must disregard the jurors' averments of impartiality." *Carlson*, 202 Ariz. at 578, ¶ 23.

i. The trial court took corrective action to mitigate any prejudice.

The court gave extensive instructions. When empaneling the jury, it instructed them to avoid media exposure:

> There may or may not be news media coverage of the trial. What the news media covers is up to them. If there is media coverage, you must avoid it during the trial. If you do encounter something

> about this case in news media during the trial, end your exposure to it immediately and report to me as soon as you can. If there are cameras in the courtroom during the trial, do not be concerned about them. Court rules require that the proceedings be photographed or televised in such a way that no juror can be recognized.

(R.T. 12/20/13, Vitoff, at 26–27.) At the close of trial, the court instructed the jury to "[d]etermine the facts only from the evidence produced in court." (R.T. 5/2/13, at 37.) After closing arguments, the court instructed the jurors that they should discuss the case when all jurors were present in the deliberation room and, "You're not to discuss the case with each other or anyone else during breaks or recesses." (R.T. 5/3/13, at 152–53.) This is in stark contrast to *Sheppard*, where jurors "were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case." 384 U.S. at 353. If media reporting was inflammatory, it did not reach the jurors. *See Atwood*, 171 Ariz. at 632–33 (finding no actual prejudice in light of the repeated admonition to avoid media exposure).

In addition, the court took swift action to mitigate incidents involving the media including creating a security plan, monitoring reporters during proceedings, admonishing media personnel when necessary, and even adjusted their travel route when necessary to avoid reporters. (R.T. 2/5/13, at 112; R.O.A. 1332 (sealed).) Arias complains these measures actually caused more prejudice by signaling the trial was "different" and the juror's safety was at

issue. (O.B. at 51, 53.) Not so. As already explained, *Chandler* rejected this trial-is-special argument. 449 U.S. at 581. After all, more benign features of the trial already signaled its unusual, high-profile nature including its 6-month duration and the State's intent to seek the death penalty.

Critically, finding prejudice in the trial court's corrective actions would thrust courts into a no-win scenario where courts cannot allow prejudice but are powerless to remedy it. *See Payne*, 233 Ariz. at 500, ¶ 34 (rejecting the argument that the trial court's directives to route jurors away from media and witnesses evidenced prejudice because "[s]uch admonitions … are precisely the type of prophylactic measures courts should take to avoid tainting the jury). Paradoxically, Arias faults the trial court for "dragg[ing] her feet" in protecting Arias's attorneys and witnesses.[4] (*Compare* O.B. at 42 *with* O.B. at 47.)

In this regard, the position of trial courts is precarious. A criminal trial is "a public event" and "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). The public and the press "have a

[4] Arias further claims the trial court was quicker to protect the State's counsel and witnesses than hers. (O.B. at 47.) This argument is not relevant, as Arias does not claim it prejudiced the presentation of her witnesses. It also conflicts with the record. The trial court explained how the defense team repeatedly declined protections offered by the court. (R.T. 5/21/13, at 16.) This was part of the charge of judicial bad faith that prompted the court to consider sanctions against defense counsel. (*Id.* at 19–20; *see* note 2, *supra*.)

constitutional right of access to criminal trials." *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 603 (1982). Indeed, this Court granted special action relief to reverse the trial court's decision to exclude the media and public from portions of Arias's second penalty phase. *KPNX-TV Channel 12*, 236 Ariz. at 369, ¶ 1. The supreme court also granted special action relief against a trial court that required artists to submit juror sketches for approval because the court's legitimate motivation of avoiding a *Sheppard* violation did not justify imposing an unconstitutional prior restraint on the media outlet's First Amendment rights. *KPNX Broad. v. Superior Court In & For Maricopa County*, 139 Ariz. 246, 251 (1984). Although the fairness of the trial was paramount, the trial court was not free to employ any restraint against the media.

Ultimately, this Court should evaluate publicity in light of what was within the trial court's control. Otherwise, high-profile defendants would be effectively untriable. But a defendant cannot escape justice through infamy alone, nor is a trial court powerless to ensure the trial survives appeal.

Presumed prejudice essentially reduces to whether publicity was so pervasive that this Court could not trust the jurors who said they did not view media coverage. *See Cruz*, 218 Ariz. at 581, ¶ 12. The trial court addressed

that very issue when explaining why public records disclosures were unlikely to prejudice the jury:

> I have actually had a conversation as recently as noon today with a Judge on this Court who said I have seen nothing in the news media about the case period. So there are people out there who haven't seen anything about this case.
>
> And the jurors are adamant in their statement that they have not. They have looked me in the eye on a regular basis and say they have not seen anything or heard anything in the media and I believe them.

(R.T. 4/8/13, at 209.) The trial court sat "in the locale where the publicity is said to have had its effect" and could base its evaluation on its "perception of the depth and extent of news stories that might influence a juror." *Skilling*, 561 U.S. at 386. As such, this Court should be especially reluctant to make "after-the-fact assessments of the media impact on jurors," which "lack the on-the-spot comprehension of the situation possessed by trial judges." *Id.* Like the trial court, this Court should not presume prejudice.

2. *The jury was not actually prejudiced.*

Absent presumed prejudice, a defendant may only obtain reversal by demonstrating "the pretrial publicity was actually prejudicial and likely deprived him of a fair trial." *Cruz*, 218 Ariz. at 157, ¶ 21 (citation omitted). This requires evaluating "the effect of the publicity on the objectivity of the jurors actually seated." *Id.* (citation omitted); *see also State v. Befford*, 157

Ariz. 37, 40 (1988) ("It is the effect of publicity on a juror's objectivity that is critical, not the extent of publicity").

Contrary to Arias's assertion on appeal, she bears the burden to make this showing and the State is not required to disprove actual prejudice under the harmless error standard. (O.B. at 55.) A court reviewing step two has not yet found any error that would justify shifting the burden to the State. Indeed, actual prejudice is incorporated into the trial publicity analysis and is subject to the defendant's burden to show that trial publicity requires reversal. *See Bush*, 244 Ariz. at ¶ 15. At any rate, Arias's failure to request a new trial on the basis of adverse publicity below means the proper standard of review is for fundamental error where she would bear the burden at every stage of the analysis. *Escalante*, 245 Ariz. at 142 ¶ 21.

Whatever the source of her burden, Arias cannot meet it. Like the defendant in *Cruz*, Arias presents no evidence of actual prejudice. To the contrary, the record affirmatively shows the trial court went to great lengths to ensure the jurors remained impartial, including through extensive *voir dire*, repeated polling, careful instructions, and prompt responses to isolated incidents. Nothing suggests any jurors had prior knowledge of the case nor does anything in the record suggest they gained information from outside the courtroom. *See Bigger*, 227 Ariz. at 202, ¶ 21 (finding no actuall prejudice

when "during voir dire no seated juror admitted having formed any opinion on Bigger's guilt or innocence").

Arias's few allegations of actual prejudice amount to nothing. She claims the noise of the still camera shutters distracted the jury, but the jurors themselves denied this. (O.B. at 53; R.T. 2/20/13, at 112–39.) Although Arias's restraints did appear in one news broadcast, nothing in the record suggests any juror watched the program. Arias further fails to link the incidents of harassment to anything that would have affected the verdict.

"Whether a juror can render a fair and impartial verdict is a decision for the trial court." *Chaney*, 141 Ariz. at 303. The trial court here observed the jurors "demeanor and the tenor of [their] answers" and was "in a position to determine first hand whether a juror can render a fair and impartial verdict." *Id.* The court repeatedly concluded "the defendant has not been harmed in any way by any of this publicity." (*See, e.g.*, R.T. 4/8/13, at 10.) Arias offers this Court no basis on which to second-guess the trial court's conclusion. Absent actual prejudice, there was no fundamental error.

II

THE TESTIMONY ABOUT THE STOLEN GUN DID NOT VIOLATE THE CONFRONTATION CLAUSE AND ANY ERROR WAS HARMLESS.

The State did not violate the Confrontation Clause or the Arizona Rules of Evidence when asking an officer whether a .25 caliber handgun was reported stolen from Arias's grandparents' home. (*See* O.B. at 57.) The statement was not offered for the truth of the matter asserted but instead to explain why Detective Flores asked Arias about the gun during her interrogation. This rebutted the defense claim that Detective Flores fed Arias baseless information about the gun. In any case, Arias admitted at trial to knowing about the stolen gun, which both proved the substantive fact and rendered any error from the officer's testimony harmless.

A. STANDARD OF REVIEW.

Reviewing courts will not reverse a trial court's application of the hearsay rule absent an abuse of discretion. *State v. Forde*, 233 Ariz. 543, 564, ¶ 77 (2014). But this Court analyzes the Confrontation Clause *de novo*. *State v. Hill*, 236 Ariz. 162, 165, ¶ 10 (App. 2014).

B. ADDITIONAL BACKGROUND.

Before trial, Arias moved to preclude any mention that a .25 caliber gun was stolen from her grandparents' home because the responding officer's

testimony to that fact would be based on hearsay. (R.O.A., 562.) The State responded that other admissible evidence—Arias's own statements—established that fact. (R.O.A., 568.) In a written order, the trial court allowed the State to introduce Arias's admission to Flores that she knew the gun was stolen. (R.T. 12/19/12; R.O.A., 587, at 2.) The court did not rule on the responding officer's statements.

At trial, Yreka Police Officer Friedman testified about his role in investigating the burglary of the Yreka home on May 28, 2008. (R.T. 1/14/13, at 6.) The prosecutor asked what items were taken, to which Arias objected on hearsay grounds. (*Id.* at 16.) Defense counsel argued the only way Friedman would have known what items were taken, showing the .25 handgun, is if someone told him. (Id. at 17.) The prosecutor responded the answer was "not offered for the truth of the matter asserted" but instead "to show what it was that [Friedman] wrote down in his report," illustrating "what it was that he believed was stolen." (*Id.* at 17–18.) The State did intend to establish the underlying fact that the gun was stolen "by the next witness, Detective Flores, who is going to introduce the three snippets involving the stolen gun." (*Id.* at 17.) On this avowal, the trial court permitted the question to show "what he wrote in his report, and then there will be reference to his report later." (*Id.* at

19.) Officer Friedman then answered, "I wrote in my report that a small .25 caliber handgun ... had been taken." (*Id.* at 19–20.)

Later that day, the State introduced through Detective Flores clips from his first interview with Arias. (*Id.* at 39.) In the first clip, Flores says that the gun stolen from the Yreka house matched the caliber of the one used to shoot Alexander, to which Arias replied, "a .25 auto was used to kill Travis?" (Exh. 343, 0:20.) In the second clip, she admitted to knowing a gun was stolen:

> Q. We're just playing games here. That gun was in your possession. When did you report it stolen?
>
> A. I didn't even know that there were guns until my grandparents reported it stolen the day their house was broken into.

(Exh. 344, 0:01–0:04.) In the third clip, Arias described the stolen gun:

> Q. Have you ever shot that .25 auto? Have you ever touched it?
>
> A. The one that was stolen? I've never seen it. [long pause] My grandpa said it looks like a toy gun. I don't know what a .25 looks like.

(Exh. 345.) Arias confirmed on cross-examination that she knew the gun was stolen. (R.T. 2/27/13, at 140, 186.)

During closing arguments, the prosecutor argued that Arias admitted that a .25 caliber gun was stolen and the suspicious nature of the burglary supported the inference that Arias was the thief: "There's no other explanation than she's

the one that stole the .25 caliber gun, this very small gun that according to her looks like a toy." (R.T. 5/2/13, at 87–89.)

C. FRIEDMAN'S STATEMENT WAS NOT HEARSAY AND DID NOT VIOLATE THE CONFRONTATION CLAUSE.

The Sixth Amendment's Confrontation Clause prohibits the admission of "testimonial hearsay statements made by a non-testifying witness unless that person is unavailable and the defendant had a prior opportunity for cross-examination." *State v. Forde*, 233 Ariz. 543, 561, ¶ 65 (2014) (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)). But a statement does not violate the Confrontation Clause if it is not hearsay; that is, if it is not offered "to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c); *see State v. Foshay*, 239 Ariz. 271, 277, ¶ 30 (App. 2016) (citing *Crawford*, 541 U.S. at 59 n.9). One way in which a statement is not hearsay is if it is offered to show the effect of the statement on the listener whose conduct is relevant. *State v. Rivers*, 190 Ariz. 56, 60 (App. 1997). For instance, "[a]n out-of-court statement is ... not hearsay if it is offered, not for the truth of the matter asserted, but instead to explain the reasons for or propriety of a police investigation." *See United States v. Collins*, 996 F.2d 950, 953 (8th Cir.1993); *accord United States v. Johnson*, 875 F.3d 1265, 1279 (9th Cir. 2017).

Here, Officer Friedman's knowledge about what was stolen was derived from what the residents reported to him. However, the State offered his

statement not to prove that a .25 caliber gun was in fact stolen, but instead to show his and Detective Flores's belief that such a gun was stolen, which explained why Flores asked Arias about the gun during her interrogation. This rebuted Arias's stated contention that during the interrogation, Flores conjured the discussion of the gun unprompted. Indeed, defense counsel, when repeating the same argument while objecting, incorrectly claimed Arias "never said anything in this interview about the gun. It was all Detective Flores' questioning." (R.T. 1/14/13, at 18–19.)

Had the State presented Detective Flores's questions to Arias without first asking about Officer Friedman's report, Arias could have argued the State had invented the theft of the .25 caliber gun to trap Arias during her interrogation. Therefore, the State could present Friedman's testimony for the non-hearsay purpose of anticipating this potential counterargument. *See United States v. Davis*, 154 F.3d 772, 778 (8th Cir. 1998) (finding an officer's recounting of the out-of-court statements of other witnesses was relevant for the non-hearsay purpose of buttressing the police investigation, when the government "could have reasonably interpreted [defense counsel's opening] comments as attacks on the propriety of the investigation").

Arias further argues the prosecutor misled the trial court by claiming Officer Friedman's statement was admissible for a non-hearsay purpose but

later using it during closing arguments as "substantive" evidence that Arias stole the gun. (O.B. at 61–62.) The record shows otherwise. For one, Arias never objected to this at trial, so at best any error is reviewable only for fundamental error. To the point, the prosecutor never avowed he would not argue Arias stole the gun; in fact, he expressed his intention to introduce Arias's admissions through Detective Flores. (R.T. 1/14/13, at 17.) And when discussing the burglary during closing arguments, the prosecutor referred not to Officer Friedman's testimony, but to Arias's admissions, including her description of the weapon as resembling a "toy gun." (R.T. 5/2/13, at 87.) This argument was neither misleading nor otherwise improper. Absent hearsay, Friedman's statement was not inadmissible.

D. ANY ERROR IN ADMITTING FRIEDMAN'S STATEMENT WAS HARMLESS.

Even if a trial court erroneously admits a statement that violates the Confrontation Clause, this Court will not reverse if the error was harmless. *State v. Medina*, 232 Ariz. 391, 405, ¶ 53 (2013). This comports with the Arizona Constitution's prohibition against reversing cases "for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done." ARIZ. CONST. Art. 6, § 27. One way in which errors are harmless is when the inadmissible evidence is merely cumulative to other, admissible evidence. *State v. Williams*, 133 Ariz. 220, 226

(1982) (holding "erroneous admission of evidence which was entirely cumulative constituted harmless error").

Here, Officer Friedman's statement was cumulative with better evidence proving the theft of the gun: Arias's own words. This, alone, made any error harmless. *Cf. State v. Waggoner*, 139 Ariz. 443, 445 (1983) (holding an officer's testimony that the defendant had been charged in another proceeding with carrying a concealed weapon was not unfairly prejudicial, because the jury already knew from other trial evidence the police found a stolen pistol underneath the passenger seat of the defendant's car). Arias told Detective Flores she heard the gun was stolen and claimed her grandfather compared it to a toy gun. (Exhs. 344, 345.) She also admitted at least twice on cross-examination to knowing the gun was stolen. (R.T. 2/27/13, at 140; R.T. 2/28/13, at 186.) And while Arias claimed the source of her knowledge was her grandfather, the jurors could instead conclude she knew about the stolen .25 gun because she took it herself. In light of this ample, independent evidence, there is not even a reasonable probability that the jury would have acquitted Arias absent Officer Friedman's statement.

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE'S EXPERT TO OPINE ABOUT ARIAS'S POST-MURDER ORGANIZATION AND PLANNING.

The State's psychologist did not violate the evidentiary rule against testifying about a defendant's mental state when opining that Arias's coverup of the murder exhibited organization and planning. (*See* O.B. at 68.) The expert only described conduct occurring *after* the murder and did not offer an opinion about premeditation or any other mental state occurring before or during the murder. Even if otherwise, Arias opened the door to such testimony when her psychologist claimed the disorganized nature of the coverup supported a diagnosis of dissociative amnesia. Therefore, the evidence was admissible.

A. STANDARD OF REVIEW.

This Court "review[s] a trial court's ruling on the admissibility of expert testimony for an abuse of discretion." *State v. Ortiz*, 238 Ariz. 329, 333, ¶ 12 (App. 2015). In doing so, this Court views "the evidence in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *Id.*

B. ADDITIONAL BACKGROUND.

Arias called a psychologist Dr. Richard Samuels to testify in her defense. (R.T. 3/14/13, at 30.) Crediting Arias's third story that Alexander attacked her, Samuels opined Arias had a "fight or flight reaction" that caused "dissociative amnesia" by impeding her ability to form memories during the period of acute stress. (*Id.* at 72; R.T. 3/18/13, at 27.) Samuels further opined the photographs showed a "disorganized" crime scene. (R.T. 3/18/13, at 111.) This was significant because during such moments of acute stress, the subject is solely concerned with survival and her "higher cognitive levels are no longer processing correctly." (R.T. 3/21/13, at 26–27.) Although she can still make some decisions, "they are not higher level decisions," because "extravagant planning does not occur during acute stress." (*Id.* at 27.)

On rebuttal, the State called Dr. Janeen DeMarte, a clinical psychologist. (R.T. 4/16/13, at 7.) While taking issue with other aspects of Dr. Samuels's opinion, she agreed that subjects entering a fight-or-flight state had diminished "higher order" behaviors. (*Id.* at 167.) The prosecutor then asked if DeMarte saw "any higher order behaviors here that speak against the fight or flight memory loss issue?" (*Id.*) Arias objected, claiming this invited DeMarte to opine as to whether Arias had the ability to premeditate the murder. (*Id.*) The prosecutor responded DeMarte's opinion was about Arias's claimed memory

during and after the murder, not her ability to premeditate before the murder. (*Id.* at 168.) Arguing that "premeditation is what happened before the killing," he avowed DeMarte would "focus in on factors that happened after the killing." (*Id.*) The trial court overruled the objection. (*Id.* at 170.)

Qualifying that "I'm just talking about the memory afterwards," the prosecutor asked, "what happened after the killing that indicate[s] to you that this was not ... fight or flight circumstances?" (*Id.* at 170.) Dr. DeMarte saw evidence of higher order behaviors in Arias deleting the photos and her "clean up" of the crime scene, which exemplified "organization and planning." (*Id.* at 171–72.) Arias raised the same objection again, and the prosecutor maintained that Dr. DeMarte was "rebutting Dr. Samuels'[s] statement about fight or flight after the killing." (*Id.* at 172–74.) The court again overruled the objection because "[t]he question in context does not relate to the murder, but with regard to what happened after the murder." (*Id.* at 175.) As such, "this is an appropriate area for rebuttal." (*Id.*) Dr. DeMarte then elaborated that deleting the photos was an "organizational process" involving "higher order function" that suggested Arias was not experiencing a fight-or-flight reaction. (*Id.* at 177–78.)

C. DR. DEMARTE'S TESTIMONY WAS ADMISSIBLE IN ITS OWN RIGHT AND AS REBUTTAL.

1. *Dr. DeMarte's opinion complied with Rule 704.*

Although "[a]n opinion is not objectionable just because it embraces an ultimate issue," a criminal "expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." Ariz. R. Evid. 704. The rule precludes only "testimony from which it necessarily follows ... that the defendant did or did not possess the requisite mens rea." *United States v. Morales*, 108 F.3d 1031, 1037 (9th Cir. 1997); *accord United States v. Bennett*, 161 F.3d 171, 182 (3d Cir. 1998). However, the rule is not so broad as to exclude "an expert's opinion on any matter from which the factfinder might infer a defendant's mental state." *Morales*, 108 F.3d at 1037. Instead, it permits "testimony supporting an inference or conclusion that the defendant did or did not have the requisite mens rea, so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not necessarily follow from the testimony." *Morales*, 108 F.3d at 1038; *accord Opinion on ultimate issue*, 3 WHARTON'S CRIMINAL EVIDENCE § 13:9 (15th ed.) ("Even with this rule, experts are still permitted to describe the nature of a defendant's mental illness or other mental condition and its effects. The rule simply prohibits the expert from taking the final step of

opining whether the defendant had the particular mental state that is an element of the charge or defense.").

Dr. DeMarte's opinion complied with Rule 704(b). First, she did not opine that Arias had an elemental mental condition. Courts have read Rule 704 to preclude experts from testifying about whether a defendant had the capacity for premeditation. *United States v. Campos*, 217 F.3d 707, 711 (9th Cir. 2000). But Dr. DeMarte never opined that Arias had the ability to premeditate the murder of Alexander. Not once did DeMarte ever use the word "premeditate," nor did she even purport to discuss Arias's state of mind before the murder. By discussing only what occurred *after* the murder, she did not opine about whether Arias had formed premeditation *before* killing Alexander. Instead, DeMarte's purpose was to explain why Arias did not suffer dissociative amnesia caused by entering a fight-or-flight state. Because neither dissociative amnesia nor fight-or-flight reactions are elemental mental states of first degree murder, DeMarte discussion of those conditions did not implicate Rule 704(b).

That is true even if the jury could have used Arias's *post-hoc* behavior to infer her pre-murder state of mind. In *Morales*, the Ninth Circuit held when determining whether the defendant "willfully made false booking entries," she could present an expert to opine that she had "a weak grasp of bookkeeping principles" because even if the jury believed the expert, "the jury would still

have had to draw its own inference from that predicate testimony to answer the ultimate factual question—whether Morales willfully made false entries." 108 F.3d at 1037. And in *State v. Welch*, this Court held that a computer expert's testimony that it was not possible to accidentally download child pornography was not an opinion that the defendant knowingly did so, because the expert did not directly conclude that the defendant downloaded the files with a knowing state of mind. 236 Ariz. 308, 315, ¶ 24 (App. 2014). Likewise, DeMarte's discussion of Arias's behavior after the murder may have helped the jury draw some inferences about her ability to form premeditation beforehand, but DeMarte did not connect the dots herself. At worst, DeMarte's opinion was penultimate.

2. *Dr. Samuels's testimony opened the door to Dr. DeMarte's opinion.*

As discussed, *supra*, invited error "applies to situations where evidence adduced or comments made by one party make otherwise irrelevant evidence relevant or require some response or rebuttal." *State v. Wilson*, 185 Ariz. 254, 259 (App. 1995). When a party thus "open[s] the door' to later, otherwise objectionable testimony, there is no error." *State v. Leyvas*, 221 Ariz. 181, 188–89, ¶ 25 (App. 2009).

Even if Dr. DeMarte's testimony would have violated Rule 704(b) on its own, it was fair rebuttal to Dr. Samuels. Arias, through Samuels, put her *post-*

hoc mental state at issue by claiming she suffered dissociative amnesia and citing the "disorganized" nature of the crime scene as evidence of a fight-or-flight response. (R.T. 3/18/13, at 111.) By "voluntarily and strategically probing those issues," Arias opened the door for the State to proffer her acts of organization and planning to rebut her diagnosis of dissociative amnesia. *See* *Leyvas*, 221 Ariz. at 189, ¶ 26 (holding that even though a witness had not identified the defendant on direct examination, the defendant opened the door to an identification on redirect examination, without the need to assess reliability, by challenging the witness's pre-trial identification on cross-examination). Therefore, any theoretical error in permitting DeMarte's testimony was also invited.

3. *Any error was harmless.*

Even if Dr. DeMarte's testimony somehow violated the Rules of Evidence, any potential error was harmless. The court dispelled any prejudice from her testimony by instructing the jury they are not bound to accept expert testimony:

> A witness qualified as an expert by education or experience may state opinions on matters in that witness's field of expertise and may also state reasons for those opinions. Expert opinion testimony should be judged just as any other testimony. You're not bound by it. You may accept it or reject it in whole or in part and you should give it as much credibility and weight as you think it deserves considering the witness's qualifications and

> experience, the reasons given for the opinions, and all the other evidence in the case.

(R.T. 5/2/13, at 41.)

Moreover, as explained below, the evidence of premeditation was overwhelming. *See* Argument IV(C)(4), *infra*. The jury heard evidence of the stolen gun, Arias's efforts to conceal her road trip to Mesa, and how she coaxed Alexander into a vulnerable position in the shower before attacking. (R.T. 1/3/13, at 122–23; R.T. 1/10/13, at 17; R.T. 1/14/13, at 31; R.T. 1/16/13, at 21, 23; R.T. 2/19/13, at 93, 99; R.T. 2/20/13, at 39; R.T. 2/28/13, at 11; Exhs. 141–160.). Plus, two sources of her motive—Alexander's disparaging messages and his decision to take someone else to Cancun—occurred well before her suspicious road trip to Mesa. (R.T. 2/26/13, at 113; Exh. 450.) And she demonstrated her consciousness of guilt through her unconvincing trial testimony about uncorroborated abuse and a self-defense claim that was physiologically impossible. *See Wright v. West*, 505 U.S. 277, 296 (1992) (considering the defendant's contradictory, vague, and evasive testimony as substantial evidence supporting his convictions because "if the jury did disbelieve West, it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt").

Therefore, any hypothetical error from DeMarte's testimony would not have affected the verdict.

IV

REQUIRING ARIAS TO WEAR A STUN BELT DURING TRIAL WAS NEITHER FUNDAMENTAL NOR STRUCTURAL ERROR.

Arias's challenge to wearing a stun belt at trial lacks merit. (*See* O.B. at 78.) The Supreme Court has unequivocally held "[a]n appellate court will not find error on the ground that the defendant was shackled unless it is shown that the jury saw the shackles." *State v. McMurtrey*, 136 Ariz. 93, 98 (1983). Arias herself admits "there is *no evidence* that the jurors saw [her] stun belt." (O.B. at 79 (emphasis added).) Notwithstanding her reliance on a vacated, non-binding decision, *United States v. Sanchez-Gomez*, 859 F.3d 649 (9th Cir. 2017), *vacated*, *United States v. Sanchez-Gomez*, 859 F.3d 649 (2018), binding precedent dictates that neither fundamental nor structural error occurred.

A. STANDARD OF REVIEW.

Arias acknowledges she never objected to wearing a stun belt during trial, so she has forfeited the claim absent a showing of fundamental, prejudicial error. *State v. Dixon*, 226 Ariz. 545, 551, ¶ 24 (2011). And if Arias were correct that the court should have determined whether she was dangerous enough to require restraints, her failure to request a hearing and make a factual record completely waives her claim on appeal. *State v. Mills*, 196 Ariz. 269,

273, ¶ 15 (App. 1999) (holding a defendant's unpreserved challenge to wearing leg restraints at trial was waived).

Arias asserts the routine shackling of a defendant absent an individualized determination of dangerousness amounts to structural error. (*Id.* at 83.) It does not. This Court has already required the defendant to show prejudice when failing to object to wearing a stun belt, *Dixon*, 226 Ariz. at 551, ¶ 24, and in the more extreme case where the jury actually saw the trial restraints, *State v. Apelt*, 176 Ariz. 349, 361 (1993) ("We hold that the brief and inadvertent exposure of a handcuffed or shackled defendant to members of the jury outside the courtroom is not inherently prejudicial, and the defendant is not entitled to a new trial absent a showing of actual prejudice."). This Court is not at liberty to depart from these precedents. *See State v. Brown*, 233 Ariz. 153, 162 (App. 2013) ("We have no authority to overrule or disregard the decisions of our supreme court.").

Even on a blank slate, the alleged error could not be labeled structural. There are "relatively few" structural errors and all involve situations where prejudice cannot be "quantitatively assessed in the context of other evidence presented." *State v. Ring*, 204 Ariz. 534, 552–53, ¶¶ 45–48 (2003). Arias claims her stun belt implicated her right to be present during trial because "the constant threat of electrocution [sic] extracted an undecipherable toll on her

ability to focus on the proceedings." (O.B at 83.) But far from "undecipherable," Arias could have pointed to concrete actions she was unable to undertake due to her fear of "electrocution" had she objected. Thus, there is no reason to depart from the well-established principle reviewing forfeited shackling claims for fundamental error.

B. ADDITIONAL BACKGROUND.

Arias wore a stun belt during trial. (R.T. 1/10/13, at 62.) On January 10, 2013, defense counsel complained the belt she had been wearing for two or three days was too large and uncomfortable. (*Id.* at 62–63.) The prosecutor commented that because Arias had not stood in front of the jury, they were unlikely to have seen the belt. (*Id.* at 63.) Arias did not suggest otherwise. (*Id.*) Her counsel clarified she was not objecting to wearing the belt but simply that it was too large. (*Id.* at 64.) The trial court said it would look into the matter. (*Id.*) Arias did not raise the issue again.

When describing how Alexander supposedly lunged at her, Arias said "[h]e was like a—I can just describe it as a linebacker unless I get up and act it out which I'd like to not do, if possible." (R.T. 2/28/13, at 126.) The prosecutor responded, "Then do it; go ahead. Show us how he was standing … You could do it just from there." (*Id.* at 126–27.) Defense counsel objected because the demonstration risked revealing Arias's stun belt to the jurors. (*Id.*

at 133.) The court excused the jury and Arias demonstrated the pose. (*Id.* at 132.) The court discussed the possibility of removing the stun belt for the duration of the demonstration. (*Id.* at 133.) The prosecutor said it was important that Arias make the demonstration because the details of her account were "the pivotal moment" of the case. (*Id.* at 134.) However, he offered to withdraw his request if court security was unwilling to remove the restraints. (*Id.* at 136.) At that point, defense counsel objected, arguing it would reflect poorly on Arias if she could not perform the demonstration in front of the jury. (*Id.*) Ultimately, Arias's restraints were temporarily removed and she demonstrated the "linebacker" pose to the jury. (*Id.* at 137, 139–41.)

C. BINDING PRECEDENT PERMITTED ARIAS'S HIDDEN RESTRAINTS.

"An appellate court will not find error on the ground that the defendant was shackled unless it is shown that the jury saw the shackles." *State v. McMurtrey*, 136 Ariz. 93, 98 (1983). Indeed, "[m]atters of courtroom security are left to the discretion of the trial court" and reviewing courts "will uphold a trial court's decision concerning trial security measures when the decision is supported by the record." *State v. Davolt*, 207 Ariz. 191, 211, ¶ 84 (2004). Although the court cannot routinely shackle defendants absent an individualized determination of dangerousness, when the restraints are "*visible to the jury*," no such requirement exists when the restraints are not visible. *See*

Dixon, 226 Ariz. at 551–52, ¶¶ 22, 27 (holding *Deck v. Missouri*, 554 U.S. 662 (2005), "requires reversal only if restraints are visible to the jury") (emphasis in original). This is equally true when the restraint at issue is a stun belt. *See id.* at 552, ¶ 31.

Much like the court in *Dixon*, the trial court here "repeatedly took steps to prevent the jury from seeing the leg brace and stun belt." Arias admits such efforts were successful and concedes "there is *no evidence* that the jurors saw [her] stun belt." (O.B. at 79 (emphasis added).) As a result, the trial court did not commit error, let alone fundamental error. *See McMurtrey*, 136 Ariz. at 98 (affirming the shackling of a defendant at trial absent any "competent evidence before this court indicating that any juror saw Appellant in shackles").

Arias relies on *Sanchez-Gomez*, 859 F.3d at 660, for the proposition that she "has the constitutional right to be free of shackles and handcuffs in the presence of the jury absent an essential state interest that justifies the physical restraints." (O.B. at 77.) But the United States Supreme Court vacated the Ninth Circuit's decision in *Sanchez-Gomez*, holding the Ninth Circuit's conclusion that routine pre-trial shackling was unconstitutional was moot once the defendants had been tried and convicted. 138 S. Ct. at 1542. Ordinarily, Ninth Circuit opinions are not binding in Arizona and will not upset settled precedent. *See State v. Vickers*, 159 Ariz. 532, 543, n.2 (1989). And in this

case, the vacated opinion has "no precedential value" at all. *Wetherill v. Basham*, 197 Ariz. 198, 202 n.1 (App. 2000) (citation omitted).

Arias further attempts to carve out an exception for stun belts, relying on the Seventh Circuit's observation that the restraint may cause a defendant to appear nervous in front of the jury. *Stephenson v. Neal*, 865 F.3d 956, 958 (7th Cir. 2017).[5] (O.B. at 79.) But while that court reversed the penalty phase of the trial when the defendant was required to wear a stun belt absent a determination of dangerousness, the court emphasized the belt was *visible* to the jurors. *Id.* Not only was the stun belt here not visible, but Arias has not made any claim, at trial or on appeal, that she was overly nervous or was otherwise limited in her ability to participate in her own defense. In fact, a review of her 19 days of trial testimony, particularly her spirited cross-examination, demonstrates she was quite active in defending herself.[6] At best,

[5] Arias further relies on *Morris v. State*, an unpublished decision from the Texas court of appeals, reversing a trial court's decision to repeatedly shock a defendant for failing to answer the court's questions. No. 08–16–00153–CR, 2018 WL 1082345 (Tex. App. Feb. 28, 2018). This memorandum decision has "no precedential value." Tex. R. App. P. 47.7. Moreover, it is materially distinguishable from this case, where Arias never received an electric shock.

[6] Arias does suggest her "smirking" and "memory problems" could have been attributed to the stun belt. (O.B. at 84.) But it was central to her theory of the case that her inability to recall what happened was caused by dissociative amnesia. (R.T. 3/18/13, at 27.) To suggest now that the stun belt was the real source of her memory issues is self-serving and unsupported by the record.

any assertion that the stun belt prejudiced her is speculative, which is insufficient to prevail under fundamental error review. *See State v. Dalton*, 241 Ariz. 182, 189, ¶ 29 (2016) (refusing, on fundamental error review and in the absence of evidence, to speculate that an alternate called mid-deliberation would not have fully deliberated with the other jurors simply because the court did not instruct the panel to begin its deliberations anew).

Finally, Arias claims that the prosecutor's request for her to demonstrate the "linebacker" pose was a deliberate attempt to expose her restraints to the jury. (O.B. at 81.) But the record shows otherwise. It was Arias who initially offered to demonstrate the "linebacker" pose, and her counsel insisted on her performing it. (R.T. 2/28/13, at 126, 136.) Although the prosecutor agreed, his willingness to withdraw his request for a demonstration undermines the accusation that he intended to underhandedly reveal Arias's restraints to the jury. (*Id.* at 134, 136.) Ultimately, the jury did not see the restraints, so nothing prejudicial occurred. (*Id.* at 141.)

In sum, the trial court did not err by requiring Arias to wear the stun belt, and no fundamental, prejudicial error resulted.

V

THE TRIAL COURT DID NOT CLEARLY ERR WHEN FINDING THE PROSECUTOR'S PEREMPTORY STRIKES WERE NOT PURPOSEFULLY DISCRIMINATORY.

Contrary to Arias's claim on appeal, the prosecutor did not engage in purposeful discrimination on the basis of race or gender when exercising his peremptory strikes. (*See* O.B. at 85.) The trial court found no purposeful discrimination. In light of the record supporting the prosecutor's race- and gender-neutral reasons for his strikes, that conclusion was not clearly erroneous.

A. STANDARD OF REVIEW.

In evaluating a *Batson* challenge, the trial court plays a "pivotal role." *State v. Urrea*, 244 Ariz. 443, ¶ 16 (2018) (citing *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). A trial court's denial of a *Batson* challenge requires a factual finding that the prosecutor did not engage in purposeful discrimination. *State v. Hernandez*, 170 Ariz. 301, 304 (App. 1991). This Court will affirm that finding unless it was clearly erroneous. *Id.*; *State v. Garcia*, 224 Ariz. 1, 10, ¶ 22 (2010). A decision is not clearly erroneous "where there are two permissible views of the evidence." *Hernandez v. New York*, 500 U.S. 352, 369 (1991). To determine whether a peremptory strike was racially motivated, the trial court must assess the demeanor and credibility of both the prosecutor

and members of the venire. *See Thaler v. Haynes*, 559 U.S. 43, 44–45 (2010). As a result, the trial court's denial of a *Batson* challenge is entitled to "great deference." *State v. Cañez*, 202 Ariz. 133, 147, ¶ 27 (2002) (citing *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986). Even so, this Court reviews the ultimate legal determination of whether a constitutional violation has occurred *de novo*. *See State v. Newell*, 212 Ariz. 389, 401, ¶ 52 (2006).

B. ADDITIONAL BACKGROUND.

Arias raised a challenge alleging racial discrimination to the prosecutor's strikes against the three black members of the venire: prospective jurors 28, 116, and 154.[7] (R.T. 12/20/12 (Stutsman), at 14, 24.) She also alleged gender discrimination motivated the strikes of 6 women: prospective jurors 9, 23, 60, 79, 112, and again, 154. (*Id.* at 18.) The State will describe the circumstances of each challenge, along with the prosecutor's justification, below. *See* Argument V(C), *infra*. In each case, the trial court found Arias stated a *prima facie* case of discrimination but the prosecutor's stated rationale was racially neutral. (R.T. 12/18/12, Stutsman, at 17–18, 23, 28.) Ultimately, the court found "that the defense has failed to carry its burden of proving purposeful discrimination" as to any strike. (*Id.* at 18.)

[7] Arias has not maintained her challenges to jurors 28 and 116 on appeal, so the State will not discuss them.

C. THE TRIAL COURT DID NOT CLEARLY ERR WHEN FINDING THE PROSECUTOR DID NOT ENGAGE IN PURPOSEFUL DISCRIMINATION.

Peremptory strikes occupy "an important position in our trial procedures" and serve as "a necessary part of trial by jury." *See Holland v. Illinois*, 493 U.S. 474, 481 (1990) (citation omitted). By "enabling each side to exclude those jurors it believes will be most partial toward the other side," peremptory challenges "assur[e] the selection of a qualified and unbiased jury." *See id.* (citation omitted; emphasis in original). As a result, a peremptory strike does not violate the Fourteenth Amendment's Equal Protection Clause unless the defendant meets the burden of showing that the prosecutor engaged in "purposeful discrimination." *See Batson*, 476 U.S. at 93. Such discrimination may be based on either race or gender. *See id.* at 82; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994).

There are three stages to a *Batson* challenge: (1) the defendant must make a *prima facie* showing of discrimination; (2) the prosecutor must offer a race-neutral reason for the strike; and (3) the trial court must decide whether the defendant has carried the burden of proving purposeful discrimination. *See Cañez*, 202 Ariz. at 146, ¶ 22 (citing *Purkett v. Elem*, 514 U.S. 765, 766 (1995)). Critically, the defendant retains the ultimate burden of persuasion to show purposeful discrimination at each stage of the *Batson* analysis. *See Garcia*, 224 Ariz. at 10, ¶ 21.

Here, the prosecutor offered race- and gender-neutral reasons for his peremptory strikes and the trial court agreed there was no *Batson* violation, so it is unnecessary for this Court to reevaluate the first two steps of the *Batson* analysis. *Hernandez*, 500 U.S. at 359 ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.").

Once the State offers a race-neutral explanation for exercising the peremptory strike, the defendant has the burden of persuading the trial court that the State's reason was pretextual and that its true motivation was to purposefully discriminate. *See Purkett*, 514 U.S. at 767; *State v. Gay*, 214 Ariz. 214, 220, ¶ 17 (App. 2007). This fact-intensive analysis requires the trial court to consider the plausibility of the prosecutor's stated reason in light of accepted trial strategy. *See Gay*, 214 Ariz. at 220, ¶ 17. Step three also requires the trial judge to assess the prosecutor's demeanor, which is the best evidence of his or her credibility. *See State v. Gallardo*, 225 Ariz. 560, 565, ¶ 11 (2010). Because the "trial court is in a better position to assess" credibility than an appellate court, its "finding at this step is due much deference." *Newell*, 212 Ariz. at 401, ¶ 54.

The trial court here did not clearly err by finding the prosecutor's peremptory challenges were not motivated by purposeful discrimination.

1. *Juror 9.*

Juror 9 had been abused by her ex-husband but did not report it to authorities. (R.T. 12/17/12, at 27.) She also said in her questionnaire that she did not believe in the death penalty "unless there is no other way to protect society."[8] (*Id.* at 18.) In response to a question from the prosecutor, Juror 9 confirmed she did not believe in the death penalty but would "respect the law" and impose it "if the facts were proven that the case met the criteria." (*Id.* at 18.)

The prosecutor explained he struck Juror 9 because (1) she had a "domestic violence past" that she did not report; (2) she was a victim of childhood sexual abuse; and (3) she was "a disbeliever or very tepid believer of the death penalty" because she "doesn't believe in the death penalty unless there's no other way to protect society." (*Id.* at 20–21.)

[8] With the exception of Juror 60, it does not appear that any of the questionnaires for the first jury venire panel are in the record. Given the appellant's duty to "see that the record before [the reviewing court] contains the material to which they take exception," this Court presumes missing portions of the record "support the action of the trial court." *State v. Zuck*, 134 Ariz. 509, 513 (1982). As a result, the State will assume as true unchallenged descriptions of the contents of juror questionnaires.

Arias challenges the prosecutor's characterization of Juror 9 as a "disbeliever" in the death penalty because she denied needing 100 percent certainty in order to impose it. (O.B. at 95.) Indeed, Juror 9 did say she "did not believe in" the death penalty unless "necessary." (R.T. 12/17/12, at 18.) Although Juror 9 also said she may be able to impose it under some circumstances, that is not inconsistent with the prosecutor's characterization that she was "a disbeliever or very tepid believer of the death penalty." (*Id.* at 20–21.) *See State v. Escalante-Orozco*, 241 Ariz. 254, 271, ¶ 36 (2017) (upholding a strike based on perceived "opposition to the death penalty or potential reluctance in imposing the death penalty if warranted"). *Batson* permits prosecutors to strike jurors "who have expressed reservations about capital punishment" even when they are "not excludable for cause." *State v. Bolton*, 182 Ariz. 290, 302 (1995). And a judge may even excuse for cause a juror who opposes the death penalty but agrees to follow the law. *State v. Roque*, 213 Ariz. 193, 204, ¶ 18 (2006). It thus stands to reason that a prosecutor may strike a juror who, as here, expresses reservations about the death penalty but claims she can follow the law. *Newell*, 212 Ariz. at 401–02, ¶ 58 (finding no purposeful discrimination in striking a juror who initially said she could not vote to impose the death penalty but later said she could follow

the court's instructions and vote for the death penalty because these "contradictory responses" justified a strike on a basis other than race).

The prosecutor also expressed concerns about Juror 9's domestic violence and sexual abuse history, which were salient in light of Arias's claims of abuse. (R.T. 12/20/12 (Stutsman), at 20.) Arias labels these reasons "unpersuasive" without explaining why. (O.B. at 96.) This falls short of her burden. *State v. Bustamante*, 229 Ariz. 256, 261, ¶ 17 (App. 2012) (reiterating that "it is the defendant who bears the ultimate burden of persuasion that the prosecutor's peremptory strike was racially motivated"). Accordingly, the trial court did not clearly err when finding no purposeful discrimination.

2. *Juror 23.*

Juror 23 said in her questionnaire she would "want to know beyond any doubt that the person is guilty" and that it is "hard to take somebody's life." (R.T. 12/17/12, at 21.) During *voir dire*, the prosecutor told her "it appears that you want 100 percent certainty" and advised her that the legal standard was instead proof beyond a reasonable doubt. (*Id.*) When he asked if that was correct, she replied, "98 percent. No, it's not correct, I guess." (*Id.*) She said she did not need "a hundred percent certainty" and later added that she would "have to see the evidence that proved the person did it." (*Id.* at 22.)

The prosecutor struck Juror 23 because she "would want to know 100 percent beyond any doubt that the person is guilty." (R.T. 12/20/12, at 21.) While "[s]he later tried to laugh it off" by saying it might be "98 percent," the prosecutor doubted her qualified answer and thought she had a "cavalier attitude." (*Id.*)

Arias argues the prosecutor "created a fake reason to strike" Juror 23 by claiming Juror 23 wanted "100 percent certainty" when the juror had denied that characterization of her position. (O.B. at 92.) But Juror 23's insistence that she did not require "100 percent certainty" did not change the fact that she earlier wanted proof "beyond *any* doubt" and thought it "hard to take somebody's life." (R.T. 12/17/12, at 21 (emphasis added).) When asked about this, her first response was to joke that she only needed 98 percent certainty. (*Id.*) The prosecutor's interpretation of her statement—that Juror 23 wanted complete certainty—was reasonable, even as the juror attempted to qualify her position during *voir dire*. Again, once Juror 23 expressed hesitation about the death penalty, the prosecutor was not required to accept her later qualification that she might be able to impose it under some circumstances. *Newell*, 212 Ariz. at 401–02, ¶ 58.

The prosecutor also struck Juror 23 because her "98 percent" joke and "cavalier attitude" made him question whether she would take the trial

seriously. (R.T. 12/20/12, at 21.) Unlike this Court, the trial court was present to observe Juror 23's demeanor and neither it nor the defense challenged this assessment of Juror 23's attitude. This was thus a neutral and independent reason supporting the peremptory challenge. *See United States v. Krout*, 66 F.3d 1420, 1429 & n.13 (5th Cir. 1995) (affirming the trial court's rejection of a *Batson* challenge based on the juror's "casual attitude"). Together, these reasons show the trial court's decision to credit the prosecutor was not clearly erroneous.

3. *Juror 60.*

Juror 60 wrote in her questionnaire that 30 years ago, she was involved in a "drunk verbal argument" with her husband involving "some hair pulling and shoving on both sides" that resulted in her spending a night in jail. (R.O.A. 1354, at 16.) Regarding the death penalty, she further wrote:

> I don't want to see any person die because of my religious belief but it says in the Bible not to murder. The State would have to prove with no doubt. As even God has people punished to death. Sometimes there are really crazy people that deserve death (as in Bundy).

(*Id.* at 23.) In response to the prosecutor's questioning, she added that she could impose the death penalty but "it depends.": "If the State proves that this person deserves the death penalty then I could deliver it, I could decide, it would depend on the facts." (*Id.*)

The prosecutor stated he struck Juror 60 because (1) she had a domestic violence issue in her past "where there was some hair pulling on both sides" resulting in her going to jail and (2) her religious beliefs caused her to not "want to see any person die." (*Id.* at 19.)

Arias contends the prosecutor's reasons for striking Juror 60 were pretextual because he did not ask her *voir dire* questions, her domestic violence situation was 30 years old, and she said she could impose the death penalty in some cases. (O.B. at 96–97.) But a prosecutor need not *voir dire* every juror in order to exercise a peremptory strike, particularly when there are other sources of information about her including her questionnaire. *United States v. Grandison*, 885 F.2d 143, 147 (4th Cir. 1989) ("We refuse to require the government to ask follow-up questions to every stricken venireman during *voir dire* in order to defeat a *Batson* challenge."). Given Arias's heavy focus on domestic violence in her theory of the case, it was not unreasonable for the prosecutor to believe that anyone with a domestic violence incident in their past might struggle to be impartial. And regardless of her *voir dire* answers to defense counsel, the questionnaire response that she would require proof "with no doubt" before considering the death penalty was reason enough to strike her. *Newell*, 212 Ariz. 389, 401–02, ¶ 58. Accordingly, the trial court did not clearly err when finding no purposeful discrimination.

4. *Juror 79.*

Juror 79's husband was a Baptist pastor in Phoenix. (R.T. 12/17/12, at 105.) She was very active in his church and taught Sunday School. (*Id.*) In response to defense counsel's *voir dire*, she responded that she could support the death penalty "if circumstances apply," including the "reason for the crime if I can see that a person had been pushed over the edge or, you know, maybe life imprisonment would be considered too." (*Id.* at 111.) When explaining his reason for striking Juror 79, the prosecutor mentioned her husband's occupation as a minister and discussed her statement about not imposing the death penalty on defendants who were pushed over the edge. (*Id.* at 22.)

Arias argues without explanation that striking Juror 79 for being married to a minister was "gender-based discrimination." (O.B. at 93.) But it is not obvious why this is so. The prosecutor did not say he struck Juror 79 simply because she was married. It was the status of Juror 79's spouse as a minister, and his concerns about Juror 79's reluctance to impose the death penalty, that formed the basis for the strike. Nothing in the record suggests the prosecutor would have acted differently had Juror 79 been male. Arias further contends upholding this strike would reinforce gender stereotypes (O.B. at 93), but she does not identify which stereotype would be perpetuated.

Again, the prosecutor's primary reason for the strike—Juror 79 would be reluctant to impose the death penalty to someone who was "pushed over the edge"—was more compelling. (R.T. 12/17/12, at 111.) Given Arias's abuse claims, the trial court could well credit the prosecutor's concern that Juror 79 may believe Arias was "pushed over the edge" by Alexander. The court's findings were thus not clearly erroneous.

5. *Juror 112.*

Juror 112 wrote in her questionnaire that her "ex-boyfriend had a different point of view and disagreement and then there was a restraining order." (R.T. 12/17/12, at 99.) On *voir dire*, the prosecutor commented that there must be more to the story if a court issued a restraining order, and Juror 112 answered that her ex-boyfriend was abusive and "put his hands on [her]." (*Id.* at 99.) She also said that another ex-boyfriend had been murdered. (*Id.* at 100.) A third boyfriend was charged and convicted of murder. (*Id.* at 102.) She claimed that these experiences would not affect how she viewed the evidence in this case. (*Id*. at 104.)

Initially, the prosecutor moved to strike Juror 112 for cause, but the trial court denied the request. (R.T. 12/17/12, at 37.) His reasons for striking Juror 112 were (1) she was dishonest about the reason for having a restraining order

against a boyfriend; (2) one of her boyfriends was murdered; and (3) one of her boyfriends was convicted of murder. (*Id.* at 20.)

Arias argues that despite Juror 112's multiple issues with violent boyfriends, she may not have sympathized with Arias and "it is just as plausible" that she would criticize Arias's failure to report her alleged abuse at the hand of Alexander. (O.B. at 97.) But that is not the test. The prosecutor did not have to definitely prove Juror 112 was disposed against the State because his "reasons for the exercise of a peremptory strike need not rise to the level necessary to support a strike for cause." *Hernandez*, 170 Ariz. at 305. And arguing there is a chance the juror might be biased in favor of the State does not change the fact that the juror would be biased in favor of *someone*. *See Batson*, 476 U.S. at 91 (recognizing that peremptory challenges "traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury"). It is no stretch of the imagination to suspect that a juror whose boyfriends have been abusive, murdered, and murderers may have difficulty remaining impartial in a case involving alleged domestic abuse and murder. This is especially so when Juror 112 offered inconsistent reasons for the restraining order against her abusive ex-boyfriend. (R.T. 12/17/12, at 99.)

Therefore, the trial court's decision to believe the prosecutor was not clearly erroneous.

6. *Juror 154.*

Juror 154 wrote in her questionnaire that she had an objection to the death penalty because she considered it "to be murder?". (R.T. 12/18/12, at 35.) When the prosecutor asked her about this during *voir dire*, she said her answer followed from her religious beliefs as a Christian that "if you kill someone, it's considered murder." (*Id.*) She added the question mark because whether she considered the death penalty to be murder "would depend on the situation." (*Id.*) She and the prosecutor discussed this at length, with her saying she was neither "for" nor "against" the death penalty and her evaluation "just depends" on "a case-by-case basis." (*Id.* at 36.) When asked whether she saw "the imposition of the death penalty as part of this process in the State of Arizona as murder?" she answered, "Not necessarily." (*Id.* at 37.) She was hesitant to answer a hypothetical question regarding about when she would impose the death penalty because she was "speaking based on like something actual." (*Id.* at 40.) She eventually answered that if a person was convicted beyond a reasonable doubt, the death penalty would not be murder. (*Id.* at 41–42.)

The prosecutor told the trial court he struck Juror 154 because (1) she answered in her questionnaire that the death penalty "is akin to murder?"; (2) she paused for 10–30 seconds before answering the prosecutor's *voir dire* questions and appeared "unhappy"; (3) her answers gave the prosecutor the impression that she "would not deliberate with anybody until she had an opinion"; and (4) she exhibited negative body language when answering *voir dire* questions, including grimacing, twitching, and attempting to deflect. (R.T. 12/20/12 (Stutsman) at 15–16.)

Arias challenges the prosecutor's characterization that Juror 154 was "against the death penalty" because on *voir dire* she eventually answered that she was neither for nor against the death penalty. (O.B. at 93.) But the totality of the juror's comments was more equivocal. Her questionnaire response inquired whether the death penalty was equivalent to "murder" and at times she seemed to indicate that all forms of killing are normatively murder. (R.T. 12/18/12, at 35.) While she allowed for the possibility that some impositions of capital punishment might not be murder, she was also hesitant to flesh out those circumstances through her resistance to answering hypotheticals. (*Id.* at 37–40.) This ambiguity well supported the prosecutor's suspicion that Juror 154 may be hesitant to impose the death penalty.

The prosecutor further cited Juror 154's negative body language. (R.T. 12/20/12 (Stutsman) at 15–16.) *See Hernandez*, 170 Ariz. at 305 (holding it "permissible to rely on a prospective juror's mode of answering questions as a basis for peremptory selections" and "appropriate to consider factors which reflect attitude"). Arias claims the prosecutor "did not describe" this body language; but he did. (O.B. at 95.) Juror 154 took 10–30 seconds to answer questions and appeared "very unhappy." (R.T. 12/20/12 (Stutsman) at 15.) She would "grimace" and "twitch" and attempt to "deflect" questions. (*Id.* at 16.) Neither defense counsel nor the trial court disputed these characterizations, and the court implicitly credited them by finding no purposeful discrimination. *See State v. Bustamante*, 229 Ariz. 256, 261, ¶ 17 (App. 2012) ("In failing to object to the prosecutor's characterization of this prospective juror's language problems at the time, defendant failed to meet his burden to show that this reason was merely a pretext for racial discrimination."). Because the trial court "is in a position to observe matters that cannot be captured by a written appellate record," this Court should defer to its finding. *Id.* at 301, 305 (App. 1991).

Arias further disputes the prosecutor's conclusion that Juror 154 "would not deliberate with anybody until she had an opinion" because she told defense counsel that during deliberations, she would respect each person's right to form

their own moral conclusions. (R.T. 12/18/12, at 59–60; O.B. at 94.) But the prosecutor could reasonably interpret Juror 154's unwillingness to answer hypothetical questions as evasiveness. And in light of her body language, he could conclude that she would be similarly unwilling to deliberate with other jurors. It was not pretextual for the prosecutor to rely on Juror 154's actions over her words.

7. *Conclusion.*

Throughout, Arias asserts that the prosecutor "did not want women on his jury" and took deliberate steps to that effect. (O.B. at 93.) But this unsupported inference alone cannot carry her burden to show clear error. *See Newell*, 212 Ariz. at 402, ¶ 58 (refusing to reverse the denial of a *Batson* challenge when the defendant "offered no evidence, other than inference, to show that the peremptory strike was a result of purposeful racial discrimination"). She also urges the court to consider that six of the prosecutor's strikes were against women. (O.B. at 98.) But at least six of the empaneled jurors were female, which suggests the prosecutor did not have an ulterior motive to exclude women from the jury.[9] *See State v. Roque*, 213 Ariz. 193, 204 ¶ 15 (2006) ("Although not dispositive, the fact that the state accepted

[9] The record only appears to indicate the apparent gender of 16 of the 18 empaneled jurors. The State has compiled this information into a chart attached as Appendix A.

other minority jurors on the venire is indicative of a nondiscriminatory motive") (alterations omitted).

Many of Arias's claims derive from her allegation that the prosecutor mischaracterized juror statements. But the trial court observed all of the jurors and never contradicted the prosecutor's account. Because this Court is in an inferior position to know what the jurors said and did, it should not second-guess the trial court's conclusion.

Finally, Arias contends the trial court failed to follow *Batson's* step three by failing to make "a deliberate decision on the ultimate question of purposeful discrimination." (O.B. at 98.) But the trial court explicitly and repeatedly found the prosecutor had not engaged in purposeful discrimination. (R.T. 12/20/12, at 18, 23, 28.) Arias faults the court for not "assessing the evidence" and instead "merely conclude[ing]" that the prosecutor did not engage in purposeful discrimination. (O.B. at 98.) But this Court should not assume that the trial court had no reasons for its conclusions simply because it did not detail them in the record. Indeed, *Batson* does not require the court to articulate findings on the record; even courts that encourage the practice refuse to reverse for its absence. *See, e.g.*, *U.S. Xpress Enterprises, Inc. v. J.B. Hunt Transp., Inc.*, 320 F.3d 809, 814 (8th Cir. 2003) (holding that while specific *Batson* findings are strongly urged, "the failure of the trial judge to articulate his

analysis of step three on the record did not constitute clear error"). By finding no purposeful discrimination, the court implicitly credited the prosecutor's race- and gender-neutral reasons for striking the jurors. On this record, Arias's claims fail.

VI

THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT, AND THE CUMULATIVE EFFECT OF ANY THEORETICAL MISCONDUCT DID NOT DEPRIVE ARIAS OF A FAIR TRIAL.

The prosecutor did not engage in pervasive misconduct that deprived Arias of a fair trial. (*See* O.B. at 101.) Many of the incidents mentioned in Arias's brief did not involve improper conduct at all and others are not cognizable because they occurred outside the jury's presence. While the prosecutor unsurprisingly made some mistakes during Arias's 69-day trial, those errors did not prejudice the jury in light of the court's curative actions and the overwhelming evidence of Arias's guilt. Prejudice, not the prosecutor's culpability or need for deterrence, is the sole basis on which an appellate court may reverse a conviction. Because there was none here, this Court should affirm.

A. LEGAL STANDARDS.

1. *Standard of Review.*

The standard of review depends on whether Arias objected to individual incidents of alleged misconduct. *See State v. Morris*, 215 Ariz. 324, 335, ¶ 47 (2007) This Court assesses "each claim of misconduct" individually, reviewing "objected-to claims for harmless error and unobjected-to claims for fundamental error." *State v. Hulsey*, 243 Ariz. 367, 388, ¶ 88 (2018). This Court will affirm the trial court's denial of motions for mistrial based on allegations of cumulative misconduct absent an abuse of discretion. *Id.* Then, this Court "reviews the cumulative misconduct to determine whether the total effect rendered defendant's trial unfair." *Id.* This showing is the defendant's burden to bear. *State v. Goudeau*, 239 Ariz. 421, 465, ¶ 193 (2016).

2. *Prosecutorial Misconduct.*

Courts do not "reverse convictions merely to punish a prosecutor's misdeeds nor to deter future misconduct." *State v. Cornell*, 179 Ariz. 314, 328 (1994). When a prosecutor has committed misconduct but no prejudice resulted, the appropriate remedy is "not reversal but affirmance followed by appropriate sanctions against the offending actor." *State v. Valdez*, 160 Ariz. 9, 14 (1989). This is so even when the prosecutor's conduct "were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181

(1986). Even in the most extreme cases where prosecutorial misconduct bars retrial, courts do so "not to punish prosecutorial misconduct, but to safeguard defendants' double jeopardy rights."[10] *State v. Korovkin*, 202 Ariz. 493, 496, ¶ 10 (App. 2002).

Because of this, "[m]isconduct alone will not cause a reversal, but only where the defendant has been denied a fair trial as a result of the actions of counsel." *State v. Hallman*, 137 Ariz. 31, 37 (1983). A prosecutorial misconduct claim thus requires the defendant to "demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26 (1998) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). This is a two-stage inquiry; a defendant bears the burden to show "(1) the prosecutor committed misconduct and (2) a reasonable likelihood exists that the prosecutor's misconduct could have affected the verdict." *Goudeau*, 239 Ariz. at 465, ¶ 193. Unlike ordinary claims, courts may consider the cumulative effect of all of the prosecutor's misconduct when determining

[10] For this reason, Arias's citation to the ABA standards (O.B. at 143), is irrelevant. *See State v. Skinner*, 110 Ariz. 135, 149 (1973) (declining to reverse a conviction for alleged violations of the ABA standards because while such rules "are certainly helpful in determining whether or not the conduct complained of is acceptable, the question before us is whether the trial is fair. If the trial is fair, we will not reverse merely to punish the misdeeds of counsel.").

whether the defendant received a fair trial. *Hughes*, 193 Ariz. at 79, ¶ 26. Even so, "[a] party is entitled to a fair trial, not a perfect one." *Skinner*, 110 Ariz. at 149.

3. *A misconduct claim does not encompass conduct occurring outside the jury's presence.*

Because "the touchstone of due process analysis ... is the fairness of the trial, not the culpability of the prosecutor," *Smith v. Phillips*, 455 U.S. 209, 219 (1982), courts should not consider the cumulative error of incidents that could not have affected the jurors, such as those occurring outside their presence. *Cf. id.* at 595 (holding a judge's statement could not have prejudiced the defendant because it was made outside the jury's presence). For instance, our supreme Court declined to reverse on a prosecutor's statement, made outside the jury's presence, that a female defense attorney should be careful not to catch gonorrhea from the defendant because while unprofessional, the statement could not have deprived the defendant of a fair trial. *State v. Speer*, 221 Ariz. 449, 458, ¶ 44 (2009); *see also State v. Armstrong*, 208 Ariz. 345, 357, ¶ 60 (2004) (rejecting a misconduct claim based on a prosecutor's personal attacks on defense counsel during pretrial hearings and sidebars because "the acrimonious conduct occurred outside the presence of the jury").

Consequently, this Court should not consider the following allegations contained in Arias's brief, which occurred outside the jury's presence:

- The prosecutor allegedly violated court orders protecting witness anonymity. (O.B. at 139–140.)
- The prosecutor signed autographs and posed for photos on the courthouse steps.[11] (O.B. at 143–144.)
- The prosecutor's alleged, "inappropriate sexualized comments" during hearings, sidebars, and the penalty phase. (O.B. at 146 & n.5.)
- The prosecutor's conduct in other cases with reported appellate decisions. (O.B. at 148.)
- The prosecutor's statements to reporters about his trial strategy. (O.B. at 149; App. 29.[12])

Arias justifies discussing these events because "part of the persistent and pervasive misconduct analysis is whether the prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant." (O.B. at 103.) But a prosecutor's state of mind is not relevant to the "touchstone" question of whether she received a fair trial. *See United States v. Madsen*, 809 F.3d 712, 717 (1st Cir. 2016) (explaining "'misconduct' is not limited to 'deliberate wrongdoing,' but may include a statement of fact that is mistaken or unsupported by any evidence") (citation

[11] As described in Argument I(B), *supra*, the trial court concluded no prejudicial misconduct occurred because no jurors witnessed the event. (R.T. 4/15/13, at 76.)

[12] The State has filed a motion to strike Appendix 29 on the basis that the news article was written well after the trial and was not part of the record on appeal.

omitted); *see also Prosecutional misconduct as ground for reversal*, 1 FEDERAL TRIAL HANDBOOK: CRIMINAL § 13:23 (4th ed.) (explaining prosecutorial misconduct may be either "inadvertent, a mistake, or a moment of poor judgment" or "an intentional act"). This rule is intuitive—a trial might become unfair just as readily through unintentional errors as through deliberate ones.

It is true Arizona courts sometimes recite that misconduct "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal." *See, e.g.*, *State v. Ramos*, 235 Ariz. 230, 237, ¶ 22 (App. 2014). But these decisions conflate the standards for (1) when misconduct warrants a new trial with (2) when the Double Jeopardy Clause of the Arizona Constitution bars retrial.

All Arizona cases repeating such language cite, without analysis, *Pool v. Superior Court*, 139 Ariz. 98 (1984).[13] *Pool* was concerned with "defining the

[13] Most do so indirectly. For instance, *State v. Hulsey*, 243 Ariz. 367, 394, ¶ 122 (2018), cites *State v. Lynch*, 238 Ariz. 84, 100, ¶ 51 (2015), which cites *State v. Gallardo*, 225 Ariz. 560, 570, ¶ 46 (2010), which cites *State v. Morris*, 215 Ariz. 324, 339, ¶ 67 (2007), which cites *State v. Hughes*, 193 Ariz. 72, 79, ¶ 28 (1998), which cites *Pool*. But as explained below, even *Hughes* does not cite the portion of *Pool* defining prosecutorial misconduct but instead cites the analysis for when mistrials caused by misconduct bar subsequent retrials.

line at which prosecutorial misconduct bars retrial." *Id.* at 105. Observing that not all mistrials caused by misconduct bar retrial, the Court focused on "the prosecutor's motive to provoke a mistrial." *Id.* at 105 (quotation marks omitted). As a result, the Court announced a three-part test for when "jeopardy attaches under art. 2, § 10 of the Arizona Constitution":

> (1) Mistrial is granted because of improper conduct or actions by the prosecutor;
>
> (2) such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
>
> (3) the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Id. at 109. The source of this Court's citations about intentionality come, not from the prosecutorial misconduct element of the test (step one), but instead from the factor that determines which instances of misconduct bar retrial (step two). *See Hughes*, 193 Ariz. at 80, ¶ 31. Indeed, our supreme court has since reaffirmed the distinction between "simple prosecutorial error," and "misconduct that permeates the process and *intentionally* destroys the ability of the tribunal to reach a fair verdict." *State v. Minnitt*, 203 Ariz. 431, 438, ¶ 30 (2002) (emphasis added).

Arias has not argued a retrial is precluded by *Pool*. Therefore, this Court should not consider alleged instances of misconduct, even if probative to the prosecutor's motive, that occurred outside the presence of the jury.

B. INDIVIDUALLY, THE PROSECUTOR'S CONDUCT WAS PROPER AND/OR NOT PREJUDICIAL.[14]

1. *The prosecutor's closing argument was proper and/or did not cause fundamental, prejudicial error.*

During closing arguments, attorneys have "wide latitude to argue reasonable inferences from the evidence." *Hulsey*, 243 Ariz. at 389, ¶ 97. This is especially so because closing arguments "are seldom carefully constructed in toto before the event" and "improvisation frequently results in syntax left imperfect and meaning less than crystal clear." *DeChristoforo*, 416 U.S. at 646–47. Even so, lawyers cannot make insinuations that have no evidentiary support, *Hulsey*, 243 Ariz. at 389, ¶ 97. Nor may they "make arguments which appeal to the passions and fears of the jury," *State v. Comer*, 165 Ariz. 413, 426 (1990). The analysis involves two factors: "(1) whether the prosecutor's statements called to the jury's attention matters it should not have considered in

[14] The State has filed a motion to strike Appendices 3–8 and 11–28 on the basis that they improperly state additional arguments in violation of Ariz. R. Crim. P. 31.11(b). Consequently, the State will not discuss "examples" of alleged misconduct found only in appendices to Arias's Opening Brief.

reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks." *Goudeau*, 239 Ariz. at 466, ¶ 196.

Arias did not object to any of the prosecutor's statements she now challenges on appeal, so this Court should review them only for fundamental error. *Hulsey*, 243 Ariz. 367, 388, ¶ 88.

a. The challenge to Arias's credibility was supported by evidence.

Arias first takes issue with the prosecutor repeatedly calling her a "liar." (O.B. at 107; *see* R.T. 5/2/13, at 143.) While the language is disfavored, Arizona courts have held calling witnesses liars is not "so offensive, inflammatory or prejudicial as to require reversal" when supported by the evidence. *State v. Miniefield*, 110 Ariz. 599, 602 (1974). As other courts have concluded, a testifying defendant "puts his veracity at issue" and "[a]s long as such a characterization is reasonably seen as drawing conclusions from, and is actually supported by, the evidence … the prosecutor does not commit error by characterizing the defendant as a liar." *United States v. Poole*, 735 F.3d 269, 277 (5th Cir. 2013) (citation and internal quotation marks omitted); *accord United States v. Moreland*, 622 F.3d 1147, 1161 (9th Cir. 2010) ("[T]he prosecution may refer to a defendant as a liar if it is commenting on the evidence and asking the jury to draw reasonable inferences.") (citation and internal quotation marks omitted).

If anything, Arias opened the door to the term herself. Defense counsel said in opening statements that Arias "did not always tell the truth about what happened that night." (R.T. 1/2/13, at 56.) Arias repeatedly admitted to having been untruthful:

- She agreed her not-in-Mesa story was "an absolute lie." (R.T. 2/25/13, at 20.) She shaped the story to conform to the known evidence. (R.T. 2/20/13, at 79.)

- She testified "the intruder story was all BS." (R.T. 2/20/13, at 106.)

- She agreed she was "inconsistent in [her] lies" about the intruder story and "couldn't keep [her] lies straight." (R.T. 2/27/13, at 51, 52.)

- She said at trial "it was hurting me to lie." (R.T. 2/25/13, at 17.)

- She said she had lied to "everyone." (R.T. 2/25/13, at 48–49.)

- She initially lied to Dr. Samuels. (R.T. 2/26/13, at 52.)

Her testimony frequently contradicted the evidence:

- She wrote there was "nothing noteworthy to report" during the period she supposedly learned of Alexander's alleged pedophilia. (R.T. 2/11/13, at 128; Exh. 511.)

- She claimed Alexander hit her during a conversation about moving back to California but said in her journal the conversation was pleasant and ended with sex. (R.T. 2/12/13, at 61; Exh. 471.)

- She said Alexander reviewed her journal but wrote no one else read it. (R.T. 3/4/13, at 137; Exh. 510.)

- She reported far more incidents of abuse to the non-testifying defense psychologist than she claimed at trial. (4/16/13, at 44–47.)

Even the trial court observed "all of the experts have acknowledged that Ms. Arias has lied. [Defense counsel] even acknowledged it in [the] opening statement. She acknowledged it here in her testimony. So there is no issue here that the defendant has lied in the past." (R.T. 4/16/13, at 62.)

The prosecutor thoroughly discussed these and other incidents of Arias's untruthfulness from the record. (*See, e.g.*, R.T. 5/2/13, at 143–44, 146–47.) Therefore, his attacks on her credibility were permissible. *See Hulsey*, 243 Ariz. 367, 390, ¶ 97 (2018) (holding the prosecutor's statement that the jury should not trust a defense witness did not cross the line because "the record did contain facts on which he could fairly base his argument"); *Miniefield*, 110 Ariz. at 599, 602 (declining to reverse when the prosecutor called defense witnesses "liars").

Arias's claim is less about inaccuracy and more emphasis: she argues the prosecutor "personalize[d]" the fact that Arias lied to the jurors in an attempt to "incite" them. (O.B. at 107.) But Arias's untruthfulness merited emphasis. As the only witness to Alexander's death, her credibility was critical to the case and essential to her self-defense theory. Against the overwhelming evidence that she killed Alexander, Arias could only escape conviction if the jury believed her self-defense story. The fact that she told multiple inconsistent stories to a number of people was a strong reason for the jury to disbelieve her.

But Arias argued that while she had misled people in the past, her in-court testimony was true. The fact that her testimony was inconsistent with incontrovertible evidence—leading to the conclusion she was misleading the jury—was a yet stronger reason for the jurors to disbelieve her. *See West*, 505 U.S. at 296. The prosecutor thus had a legitimate reason to emphasize Arias had not just deceived others in the past; she was actively misrepresenting to the jurors now. Therefore, the prosecutor did not err, let alone commit fundamental error.

b. The challenge to LaViolette's credibility was supported by evidence.

Arias similarly challenges the prosecutor's statements that LaViolette was "a liar," who had "problems with the truth." (O.B. at 107; R.T. 5/2/13, at 72, 148–50.) But again, the prosecutor based his conclusion on evidence in the record. First, LaViolette's *curriculum vitae* said she gave the keynote address at a conference in Los Angeles, but a printed schedule for the event listed someone else as the keynote speaker. (R.T. 4/18/13, at 52, 57–58; Exh. 597.) LaViolette claimed she delivered a "keynote breakout," but the schedule did not describe her breakout as a "keynote" address. (R.T. 4/18/13, at 57–58.) Second, LaViolette said that she had testified on behalf of men "one or two times," but on cross-examination, she could not provide any names and ultimately admitted she only wrote reports for those clients. (R.T. 4/12/13, at

16, 78, 80–81.) Though perhaps not egregious misstatements, these events reasonably supported the prosecutor's conclusion that LaViolette had not told the truth.

The prosecutor also called LaViolette an "advocate" who was "lying on behalf of the person that you evaluated" and whose testimony was therefore "contaminated" and "foul." (R.T. 5/2/13, at 150.) It is indeed "improper for counsel to imply unethical conduct on the part of an expert witness *without having evidence to support the accusation*." *State v. Hughes*, 193 Ariz. 72, 86, ¶ 59 (1998) (emphasis added). While the prosecutor's language was strong, there was evidentiary support for the argument that LaViolette was biased and incredible:

- LaViolette opened her interview with Arias by apologizing because she "felt badly" at having read through her journal. (R.T. 4/8/13, at 160–62.)
- LaViolette bought books and magazine subscriptions for Arias while she was in jail. (R.T. 4/8/13, at 165–66.) DeMarte opined such gifts were "inappropriate." (R.T. 4/16/13, at 28.)
- LaViolette interviewed Arias for 44 hours, which DeMarte testified was "extreme." (R.T. 4/16/13, at 24–25.)
- LaViolette was paid by the defense for her testimony. (R.T. 4/4/13, at 119.)
- LaViolette avoided asking Arias certain sexual questions because she was "old fashioned" and such questions did "not come easy to [her] to ask." (R.T. 4/9/13, at 100)

- LaViolette said she had "feelings" about Arias and "liked" her "in terms of working with her." (R.T. 4/11/13, at 157.) DeMarte later explained it was important for evaluations to not feel compassion for the subject, lest they lose objectivity. (R.T. 4/16/13, at 28.)

- A juror asked why LaViolette "looked at Ms. Arias multiple times during cross-examination with the prosecutors when there were breaks and sidebars to meet eyes with Jodi and give her a small, warm smile." (R.T. 4/11/13, at 157.) LaViolette admitted to doing so "just to acknowledge her." (*Id.*) Another juror asked why, when the prosecutor marked an exhibit, LaViolette "looked at Jodi, gave a half-smile, and shrugged [her] shoulders." (*Id.* at 159.) LaViolette said she did not realize she had done it but did not deny it. (*Id.*)

The prosecutor could also point to examples of this bias at work. Much of LaViolette's testimony was based on her interpretation of written journals, text messages, and emails by Arias and Alexander. To reach her conclusion that Alexander abused Arias, LaViolette appeared to minimize, or arguably ignore, contrary written statements:

- LaViolette claims she saw no evidence of stalking behavior even though Alexander told a friend that Arias was stalking him, was probably monitoring their messages, and he was "extremely afraid" of her. (R.T. 4/8/13, at 82, 84–86, 90.)

- LaViolette interpreted Arias's claim there was nothing noteworthy to report before January 24, 2008 as "part of the promise not to write negative things." (R.T. 4/10/13, at 77.) She agreed with the characterization that she was "taking these words and interpreting them to mean that something noteworthy did happen." (*Id.*) DeMarte opined an evaluator should not look behind a subject's written words in this way. (R.T. 4/16/13, at 19–20.)

- She said Alexander had a history of lying but Arias did not. (R.T. 4/8/13, at 141.) In her opinion, Arias only began lying after killing Alexander. (R.T. 4/12/13, at 35.)

The prosecutor could thus reasonably argue that LaViolette uncritically believed Arias and disbelieved Alexander in what amounted to advocacy for her defense.

Arias claims the prosecutor's closing statements violated the holding in *Hughes*, but there, "the evidence did not support" the prosecutor's "insinuatine." 193 Ariz. 72, 86, ¶ 60 (1998). (O.B. at 107–08.) Arias further cites to *Comer*, where the Supreme Court found inappropriate, yet harmless, the prosecutor's labeling of a defendant as "a monster," "filth," and "the reincarnation of the devil." 165 Ariz. at 427. (O.B. at 108.) But while "contaminated" and "foul" doubtlessly have pejorative connotations, they also have the descriptive, benign meanings that LaViolette's biases compromised the jury's ability to rely on her conclusions. This Court should not assume the jury adopted the more incendiary interpretation. *See DeChristoforo*, 416 U.S. at 646–47 ("A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."). The prosecutor's comments, though strong, were far less prejudicial than the name-calling of which *Comer* disapproved.

c. The challenge to Dr. Samuels's credibility was based in evidence.

Arias next argues the prosecutor improperly insinuated that Samuels had "inappropriate feelings" for Arias. (O.B. at 108.) The prosecutor said:

> And one of the things about Mr. Samuels and the issue of all this lying is one of the things that he did is that he had trouble with regard to this scoring and rescoring. And there were some issues as to really what the motivation was for the rescoring. ... Dr. Janeen DeMarte indicated, well, there's no reason to be rescoring something three times unless you perhaps want to change the scores or with regard to the MCMI....

(R.T. 5/2/13, at 150.) Arias claims the prosecutor was referring to Samuel's cross-examination, where the prosecutor asked if he had chosen to dismiss evidence contradicting a diagnosis of PTSD (that Arias told the intruder story on national television) because of his "feelings" for Arias. (R.T. 3/25/13, at 111; O.B. at 108.) Although the trial court sustained an objection to that question, the prosecutor did elicit testimony from Samuels that supported his closing remark questioning the doctor's motivation.

Samuels spent 25–35 hours interviewing Arias. (R.T. 3/18/13, at 132.) He also gave her a self-help book to "help" her with her supposed depression and because "she was suicidal." (R.T. 3/18/13, at 126–28, 133). Samuels agreed his code of ethics as a psychologist prohibit an evaluator from providing treatment and offering gifts to the patient. (*Id.* at 116–17, 133.) But he did "see" the book as a gift and was motivated to offer it because he was a

"compassionate person." (*Id.* at 133; R.T. 3/21/13, at 45.) He also did not report Arias's threats of suicide to anyone who could provide treatment. (R.T. 3/18/13, at 137–38.) In addition, Dr. Samuels rescored one of Arias's diagnostic tests: a computer had generated results shortly after she had completed the test, but Samuels later recalculated the score by hand, ostensibly due to an "arithmetic error." (R.T. 3/25/13, at 10–11, 25.)

Again, DeMarte criticized the length of the interview and such gift-giving as blurring the lines between an objective clinical evaluator and a treating therapist. (*Id.* at 32–33.) She further explained one of the dangers of clinical interviewing is that an evaluator may allow their "compassion" for the subject to compromise their objectivity. (*Id.* at 27.) Moreover, she opined there was no legitimate reason to re-score the test by hand; the only reasons to do so would be "if it wasn't scored properly the first time or if they were trying to manipulate the data." (*Id.* at 64.)

Given this record, the prosecutor's closing argument was a reasonable inference form Samuel's admitted compassion and DeMarte's opinion about how such compassion compromised objectivity. Therefore, the prosecutor's comment was permissible.

d. The prosecutor did not disparage defense counsel.

While a prosecutor may not 'impugn[] the integrity or honesty of opposing counsel," he may discuss "[c]riticism of defense theories and tactics." *Ramos*, 235 Ariz. at 238, ¶ 25. Arias claims the prosecutor improperly accused defense counsel of "condemn[ing]" [Alexander] for being a bad Mormon." (O.B. at 108.) The prosecutor said: "But that's not what this case is about. And they want you to think that's what this case is about, this is about Mormonism and the fact that Mr. Alexander was engaging in sexual intercourse." (R.T. 5/2/13, at 116.) Indeed, defense counsel explored Alexander's adherence to the Mormon Church's teachings on sexual morality with multiple witnesses at trial:

- Counsel asked M. Hall about the seriousness of the sin of sexual immorality and whether Alexander was in good standing with the Mormon Church. (R.T. 1/2/13, at 124–26.)

- Counsel asked an ex-girlfriend, L. Diadone, about the "law of chastity" and whether Alexander claimed to be a virgin. (R.T. 1/30/13, at 168–69.)

- Counsel asked a friend, D. Freeman, whether Alexander followed the law of chastity. (R.T. 1/31/13, at 9.)

- Counsel elicited from another former girlfriend, D. Reid, that she had sex with Alexander and this caused him to lose his "Temple recommend" (R.T. 4/23/13, at 120.)

- Arias claimed on direct-examination that Alexander falsely led her to believe the law of chastity permitted sexual acts other than vaginal intercourse. (R.T. 2/11/13, at 14–15.)

By placing at issue Alexander's religious beliefs about sex and standing in the Mormon church, Arias opened the door for the prosecutor to fairly respond that these issues did not cast doubt on her guilt. *See* State v. Alvarez, 145 Ariz. 370, 373 (1985) ("Prosecutorial comments which are a fair rebuttal to areas opened by the defense are proper.").

Arias also alleges the prosecutor disparaged defense counsel when saying Arias "came into court and staged her defense." (O.B. at 108; R.T. 5/2/13, at 143.) But unlike Arias's cited authority—*Hughes* 193 Ariz. at 86 ¶¶ 55–61—the prosecutor did not accuse defense counsel of staging the defense; he accused Arias herself and supported his claim only with evidence of Arias's false statements before and during the trial. The challenges to Arias's credibility were well supported by the record, so the comment was permissible.

e. The prosecutor did not make improper propensity arguments.

In March 2008, Alexander asked Arias, *via* text message, what had happened to the diamond ring in his drawer. (Exh. 737, at 61.[15]) Arias said she had it and would give it to him but asked him not to be angry. (*Id.* at 61–62.) Dr. Samuels testified Arias had "low self-esteem" and was "relatively pretty

[15] Although these text messages were offered only at the second penalty phase, experts read and discussed their contents at trial. (R.O.A. 1854.) The State refers to them here only to provide this Court with helpful background.

much a pacifist." (R.T. 3/14/13, at 51.) LaViolette similarly testified Arias was a battered woman with no history of stalking behavior. (R.T 4/4/13, p.m., at 87; R.T. 4/8/13, at 82.)

On rebuttal, Dr. DeMarte concluded Arias had borderline personality disorder that included the symptom of "inappropriate intense anger." (R.T. 4/16/13, at 109.) In support of that conclusion, she considered an email Arias wrote to Alexander where she admitted to violent tendencies: "I found out, much to my regret, that my anger is very destructive. I've never beaten up anybody over it, but I've kicked holes in walls, kicked down doors, smashed windows, broken things. It hurts people and it hurts me." (*Id.* at 134; Exh. 623.) The prosecutor also asked DeMarte whether Arias engaged in aggressive behavior by stealing a ring from Alexander when she moved back to California. (R.T. 4/18/13, at 157.) Arias objected, arguing she never admitted to stealing the ring. (*Id.*) The court was "concerned" about the use of the word "theft," but before it could rule, the prosecutor agreed to ask whether Arias "took" the ring. (*Id.* at 157–58.) He did so, and DeMarte answered that taking the ring demonstrated Arias's aggressive stalking behavior. (*Id.*) The prosecutor argued in closing that Alexander "had a ring stolen by" Arias and the email discussed "her violent tendencies." (R.T. 5/2/13, at 65–66, 83.)

On appeal, Arias claims the ring-theft argument violated the trial court's order and both arguments improperly suggested propensity. (O.B. at 110–11.) Arizona Rule of Evidence 404(b) allows evidence of "other crimes, wrongs, or acts" when admissible for purpose other than proving "character" or "conformity therewith" including to rebut a defense. *See State v. Jeffers*, 135 Ariz. 404, 419 (1983). The two prior acts at issue here informed DeMarte's opinion that Arias had borderline personality disorder and became inappropriately angry. This, in turn, rebutted the defense experts' opinions that Arias was a meek pacifist who was battered and did not stalk Alexander. *See Jeffers*, 135 Ariz. at 419. (allowing evidence that the defendant "doped" the victim and threw her out a window on a prior occasion to rebut the defense theory that he loved the victim too much to hurt her). And the specific events were admissible as data relied upon by DeMarte, regardless of whether they were independently admissible. *See* Ariz. R. Evid. 703 (allowing evidence relied upon by an expert to be presented to the jury, even if otherwise inadmissible, if "experts in the particular field would reasonably rely on those kinds of facts," and the "probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect"). As a result, the prosecutor's closing argument did not improperly suggest propensity so much as it rebutted Arias's claim of passivity.

Moreover, the prosecutor's argument that Arias stole the ring was a reasonable inference from DeMarte's testimony that she "took" it, coupled with DeMarte's conclusion that this constituted aggressive behavior. At any rate, the prosecutor only mentioned each event once, buried within lists of other evidence. And the trial court instructed the jurors to consider other acts evidence "to establish the defendant's motive, intent, preparation or plan" but not "to determine the defendant's character or character trait or to determine that the defendant acted in conformity with the defendant's character or character traits and therefore committed the charged offense." (R.T. 5/2/13, at 41–42.) In light of the presumption that the jurors followed this instruction, any potential error was neither fundamental nor prejudicial. *See State v. Miller*, 234 Ariz. 31, 39, ¶ 22 (2013) (finding no fundamental error in the admission of a witness interview discussing the defendant's prior arsons and assaults because "the statements were brief" the State did not emphasize them during closing argument, and the court instructed the jurors to consider other acts evidence only for a proper purpose).

f. The prosecutor's arguments were not unduly inflammatory.

Arias argues the prosecutor attempted to prejudice the jurors by arguing Arias "had a craven wish for fame." (O.B. at 109.) But while he said Arias

"crave[d] the media,"[16] he did so when arguing she falsely told the intruder story on national television. (R.T. 5/2/13, at 157.) And contrary to Arias's contention on appeal, the prosecutor *did* link this to the evidence by explaining how Arias made false statements on television to "stage the scene through the use of the media." (*Id.* at 55.)

Nor did the trial court abuse its discretion by permitting the prosecutor to argue Arias's preparations for the murder made her "cold[]" and "without feeling."[17] (R.T. 5/2/13, at 122–23; O.B. at 109.) The prosecutor argued Arias intended her media appearances to project a "calm" image of herself that would cast doubt on her ability to perform such a brutal murder, when in reality her calculated deception suggested she was emotionally capable of killing Alexander in cold blood. (R.T. 5/2/13, at 157.)

Arias further challenges the prosecutor's closing remarks. (O.B. at 111–12.) After arguing Arias lied about returning the third gas can, the prosecutor said:

> What the State is asking you to do is to not leave this courtroom filled with the stench of gasoline on your hands. That's what

[16] One who *craves* fame need not be *craven*. *See* WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 471 (1996) (defining *crave* as "[t]o long for; want greatly; desire eagerly" and *craven* as "cowardly; contemptibly timid; pusillanimous").

[17] In this one instance, Arias made an objection that the trial court overruled.

> we're asking you to do because it's not true. She's already talked to you about this, these gas cans, it's not true that she returned them. But she [is] asking you to help her. She [is] asking you symbolically to help her carrying them out and taking those cans with you. But what the State is asking you to do is your duty.

(R.T. 5/3/13, at 180.) In his next breath, the prosecutor explained, "your duty is to follow the law ... and apply it to the facts." (*Id.*)

In context, the prosecutor metaphorically impressed upon the jurors the seriousness of their task and implored them to reject Arias's demonstrably false statements. *See State v. Herrera*, 174 Ariz. 387, 396 (1993) (finding no misconduct in the comment that "if the state has met its burden and the law does apply, then you do your duty so a civilized society can keep going" because the "duty" was to convict only if the State met its burden). This is a better reading than Arias's claim on appeal that the statement appealed to the jurors' fears, made them complicit in Arias's crime, and advised them their duty was to convict. *See also DeChristoforo*, 416 U.S. at 646–47. The danger of prejudice was especially low given the court instructed that the jury's duty is to "decide this case by applying these jury instructions to the facts as you determine them." (R.T. 5/2/13, at 36.) *See State v. Dann*, 205 Ariz. 557, 570 ¶ 46 (2003) (assuming "jurors followed the court's instructions").

g. There was no fundamental, prejudicial error.

"[T]he mere fact that a prosecutor makes improper remarks does not require reversal unless, under the circumstances of the case, the jury was probably influenced by those remarks." *State v. Moody*, 208 Ariz. 424, 460, ¶ 151 (2004) (citation and internal alterations omitted). If the prosecutor erred at all, it did not rise to the level of fundamental, prejudicial error. This is best demonstrated by Arias's decision not to object during closing arguments. *See James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999) (finding the failure to object illustrative of the lack of prejudice because "[d]efense counsel heard the alleged misconduct and was in a far better position to judge its significance to the trial than an appellate court reading a cold transcript"); *accord State v. Williams*, 236 Ariz. 600, 604, ¶ 21 (App. 2015). The court instructed the jurors that "[w]hat the lawyers said is not evidence" and further admonished them to "not be influenced by sympathy or prejudice." (R.T. 5/2/13, at 37.) *See Morris*, 215 Ariz. at 336–37, ¶ 55 ("Even if the prosecutor's comments were improper, the judge's instructions negated their effect."). And if anything indeed rose to the level of a fundamental error, it could not have prejudiced Arias in light of the overwhelming evidence of her guilt as explained in Argument VI(C)(2), *infra*. On its own, then, the closing argument does not merit reversal.

2. *The prosecutor's cross-examination of witnesses was permissible and/or not prejudicial.*

a. The impeachment of Dr. Samuels was permissible and/or not prejudicial.

As discussed above, it was not improper for the prosecutor to ask about and comment on whether Dr. Samuels allowed his compassion for Arias to affect his objectivity. Not only were the prosecutor's closing arguments on the subject not fundamental errors, but the trial court did not abuse its discretion in denying a mistrial based on the cross-examination. (*See* O.B. at 114.)

A mistrial is a "most dramatic remedy" that a trial court should grant "only when it appears that that is the only remedy to ensure that justice is done." *State v. Blackman*, 201 Ariz. 527, 538, ¶ 41 (App. 2002). As a result, the decision not to grant one is not reversible absent an abuse of discretion. *Bible*, 175 Ariz. at 598. The trial court is entitled to such deference because it "is in the best position to evaluate the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial." *Id.*

Although the trial court sustained two questions on the subject as argumentatively phrased (R.T. 3/19/13, at 24 *and* R.T. 3/25/13, at 111), the court denied a mistrial and permitted further questioning on the matter because "the parties are entitled to question the bias of any witness." (R.T. 3/25/13, at

112.). Given Samuels's admitted compassion for Arias, the topic of question was permissible.

Arias also claims the trial court should have granted a mistrial when the prosecutor allegedly put discovery issues before the jury. (O.B. at 114.) After Samuels admitted that his report contained errors, he said he corrected them in a revised copy. (R.T. 3/19/13, at 115–16.) The prosecutor asked whether the amendment was provided to the State, and Arias objected because Samuels testified to never filing a formal amended report. (*Id.* at 116.) The court saw no harm in the question and ruled there was no prejudice because Samuels had already said he did not file a written report and, in any case, did not know what was disclosed to the State. (*Id.* at 118.) Samuels later testified that psychologists generally do not provide raw data to attorneys. (R.T. 3/20/13, at 34.) In light of this answer, there is no reason to suspect the jury would have thought Samuels's failure to provide the amendments to the State was deceptive.

Arias further argues the prosecutor misled the jury by asking Samuels whether he felt sorry for Arias. (O.B. at 132.) Samuels had said he felt "compassion" for Arias, but did not feel "sympathy" for her, which to him meant feeling "sorry" for her. (R.T. 3/21/13, at 165–67.) The prosecutor asked about the Webster's Dictionary definition of "compassion," which includes

feelings of "sympathy." (*Id.* at 161.) Samuels initially agreed to the Webster's definition, but later returned to saying he did not feel "sorry" for Arias. (*Id.* at 162, 167.) When the prosecutor later asked whether Samuels's feelings of "sympathy" continued from one interview to the next, he answered, "No." (*Id.* at 172.) A few days later, he prosecutor asked Samuels if he remembered saying that he "felt sorry" for Arias. (R.T. 3/25/13, at 149.) Samuels answered, "I didn't say I felt sorry." (*Id.*) The prosecutor then asked, "[y]ou used the word sorry in connection with the first interview of the defendant?" but Samuels answered he did not "remember saying that." (*Id.*) The prosecutor then asked if Samuels remembered using "the word sorry when we were discussing the Webster's definition," to which Samuels answered that they "were talking about semantics at that point," so while he may have used the word, "that's not the context in which [the prosecutor is] using it now." (*Id.*) Arias did not object, so the matter is reviewable only for fundamental error.

Arias claims it was misleading to elicit that Samuels had used the word "sorry." (O.B. at 132.) But the prosecutor dispelled any confusion when he immediately referenced the dictionary, and Samuels further clarified matters when explaining he used "sorry" in a different context. The prosecutor thus did not err, nor did fundamental, prejudicial error result.

Next, Arias argues it was misleading for the prosecutor to ask Dr. Samuels whether the raw score on a test Samuels used to diagnose PTSD "doesn't mean anything." (O.B. at 119, R.T. 3/19/13, at 66.) Arias's unadjusted score on the test was 69 but the "cutoff point" for a clinical disorder was 75. (R.T. 3/19/13, at 63–65.) Samuels said it was an improper use of the test to infer Arias fell below the cutoff for a PTSD diagnosis and the prosecutor was "misinterpreting the value of the test" because he had "no knowledge in this area." (*Id.* at 64, 66.) Samuels also claimed the prosecutor was "looking at a score that has no meaning" and "[t]he 75 doesn't mean anything." (*Id.* at 66.) The prosecutor replied, "Right. It doesn't mean anything. That's why they threw it in there, right?" and later, "They put that number 75 because it doesn't mean a thing, right?" (*Id.* at 66–67.) Samuels answered, "It means something, but not the way you're saying." (*Id.* at 67.) The trial court overruled an objection and permitted further examination on the matter. (*Id.*)

Arias argues the prosecutor's sarcasm signaled his personal disagreement with the Samuels's answer. (O.B. at 119.) But that is too ambiguous to support a claim for misconduct. *See DeChristoforo*, 416 U.S. at 646. Indeed, the prosecutor could explore whether Samuels was correct to diagnose Arias with PTSD in light of her score below the threshold. The prosecutor's good-faith basis for the question was supported both by this

common-sensical reading of the score and DeMarte's later testimony that Arias's score below the threshold of 75 indeed was not "clinically relevant." (R.T. 4/16/13, at 66.) At any rate, the jury was not confused; they knew Samuels's position that the prosecutor was misinterpreting the score and could believe Samuels in the face of any incendiary by the prosecutor. Consequently, any error was not prejudicial.

b. The impeachment of LaViolette was permissible and/or not prejudicial.

It was not improper for the prosecutor to ask if LaViolette used leading questions during her interviews with Arias. (R.T. 4/9/13, at 150; *see* O.B. at 117.) Whether LaViolette asked leading questions was relevant to whether she expressly or implicitly suggested answers to Arias, which would undermine the reliability of her conclusions. Even if the question were improper, LaViolette answered she did not. (R.T. 4/9/13, at 150.) As a result, there was nothing in evidence for the jury to consider against Arias. *Cf. State v. Hardy*, 230 Ariz. 281, 293, ¶ 61 (2012) (holding that a prosecutor's unanswered question was not testimony because "there was no testimony that could be deemed improper").

It was also appropriate for the prosecutor to ask about LaViolette's $250-an-hour fee. (R.T. 4/4/13, p.m., at 119; *see* O.B. at 117.) *See, e.g.*, *United States v. Edwardo-Franco*, 885 F.2d 1002, 1010 (2d Cir. 1989) (holding the trial court improperly precluded defense counsel from asking a government

expert about his fee because an expert's fee "is highly relevant to the question of his potential bias and interest") (citation omitted); *see also Impeachment of an Expert—Financial Interest*, 21 AM. JUR. PROOF OF FACTS 2d 73 (updated September 2018) (finding it "universally recognized" that a lawyer may explore an expert's fee on cross-examination "because it establishes bias in favor of the party by whom a witness is being remunerated").

Arias further argues it was misleading for the prosecutor to ask whether LaViolette was "now telling" the jury that one of Alexander's ex-girlfriends said she was "anorexic." (R.T. 4/8/13, at 79; O.B. at 118–19.) Arias claims this was misleading in light of the court's ruling that LaViolette could opine that Alexander dated vulnerable women but could not give specifics about what made them so. (O.B. at 119; R.T. 4/4/13, a.m., at 22; *see* R.T. 4/4/13, p.m., at 68.) LaViolette did not claim the girlfriend was anorexic on direct examination but volunteered it during cross-examination. (R.T. 4/4/13, p.m., at 62–63, 79.) When the prosecutor asked if LaViolette was "now telling" him this, the court sustained an objection before she could answer. (*Id.* at 79–80.)

The best interpretation of this question was to establish that LaViolette mentioned anorexia for the first time on cross-examination, not that she had changed her answer. *See* *DeChristoforo*, 416 U.S. at 646–47. LaViolette herself contributed to the confusion by not following the court's order. At any

rate, the court sustained the objection and later instructed the jurors, "If the Court sustained an objection to a lawyer's question, you must disregard it and any answer given." (R.T. 5/2/13, at 38.)

In addition, several other incidents cited by Arias resulted in sustained objections:

- When LaViolette gave an answer that contradicted her testimony from before a break, the prosecutor asked, "Isn't it true that previously before the break and whatever it is that you did during the break—". (R.T. 4/9/13, at 120.) Arias interjected an objection before he finished the question. (*Id.*)

- After LaViolette responded to a question with "Do you want the truth, Mr. Martinez, or do you want a yes or no?," the prosecutor replied "If you have a problem understanding the question, ask me that. … Do you want to spar with me? Will that affect the way you view the testimony?" (R.T. 4/4/13, p.m., at 111–12.)

- In response to LaViolette's answer that a line of questioning exceeded her expertise, the prosecutor replied, "Or it could be that as you sit out there, you're advocating on behalf of the defendant and you're only presenting things that benefit her?" (R.T. 4/9/13, at 142–43.)

(O.B. at 116–17.) These argumentative questions may not have been well-advised. But again, the court sustained Arias's objections and instructed the jurors not to consider them. That cured any potential prejudice. *See State v. Lynch*, 238 Ariz. 84, 92, ¶ 10 (2015) (holding that "on balance" the courts sustained objections and instructions not to consider lawyers' argument as evidence "cured any prejudice" caused by the prosecutor's argumentative

remarks), *rev'd on other grounds by Lynch v. Arizona*, 136 S. Ct. 1818 (2006); *see also State v. Manuel*, 229 Ariz. 1, 6, ¶ 25 (2011) (presuming "the jury followed the court's instructions and disregarded questions to which objections were sustained").

c. The impeachment of Dr. Geffner was permissible and/or not prejudicial.

Arias called Dr. Robert Geffner to rebut Dr. DeMarte's findings and to support Dr. Samuels's diagnosis that Arias had PTSD. (R.T. 5/1/13, vol. 1 at 114.) On cross-examination, the prosecutor elicited from Geffner that in another case where he testified, a Tennessee family court called him a "hired gun" whose testimony was "completely without merit." (*Id.* at 197.) *See O'Rourke v. O'Rourke*, No. M2007-01833–COA–R3–CV, 2010 WL 4629035, at *11 (Tenn. Ct. App. Nov. 10, 2010) (unpublished) (upholding discovery sanctions against the party who called Geffner, noting the trial court "stated that Dr. Geffner's testimony was 'completely without merit and that he truly fits the definition of a hired gun.'"). Dr. Geffner also agreed that courts criticized, and excluded, his testimony in Hawaii and Texas. (R.T. 5/1/13, vol. 1, at 200–04.)

A prosecutor may impeach an expert with criticisms of his testimony by other courts. *See United States v. Terry*, 702 F.2d 299, 316 (2d Cir. 1983) (finding no prosecutorial misconduct in cross-examining an expert about other

courts that had criticized his testimony because "[p]roof that a judge of the District of Columbia Superior Court before whom [the expert] had testified as an expert had found that [the expert] had 'guessed under oath' was probative of the weight to be accorded to his testimony"). Here, the prosecutor permissibly called Geffner's credibility into question by citing the decisions of other courts that had done the same. Because the words were from two courts and not the prosecutor, this case does not involve the sort of baseless personal attacks that constituted misconduct in Arias's cited authority. *See People v. McBride*, 228 P.3d 216, 223 (Colo. App. 2009) (noting the prosecutor "made repeated personal attacks on a defense expert" including calling him a "hired gun expert"); *Sipsas v. State*, 102 Nev. 119, 125 (1986) (calling a defense expert "[t]he hired gun from Hot Tub Country"). (O.B. at 118.)

Arias further claims the prosecutor lacked a good-faith basis to ask Dr. Geffner if he spoke with DeMarte about flaws in her testing, when the prosecutor knew the rule of exclusion of witnesses meant Geffner would not have heard DeMarte's testimony. *See generally* Ariz. R. Evid. 615. (O.B. at 120.) But that is not the best reading of the question. On direct examination, Dr. Geffner testified DeMarte believed "summary scales" for a test did not exist. (R.T. 5/1/13, vol. 1, at 95.) He elaborated on cross-examination that DeMarte did not know about or understand the summary scales. (R.T. 5/1/13,

vol. 2, at 20.) The prosecutor asked, "How do you know that she didn't know what she needed to do?" (*Id.* at 20–21.) He continued:

> Q: Sir, you didn't speak to Janeen DeMarte about it, did you?
>
> A: No, sir.
>
> Q: You never asked her whether or not she knew about the … the summary scales, did you?
>
> A: No, sir.
>
> Q: And, in fact, you never saw anything in writing that indicated from her that she didn't know, right?

(*Id.* at 21.) The court then overruled an objection. (*Id.* at 22.)

In context, the prosecutor was not asking Geffner about DeMarte's trial testimony to demonstrate his lack of thoroughness. (O.B. at 120.) Instead, he challenged Geffner's ability to divine DeMarte's knowledge and understanding of summary scales without having spoken to her at all. This did not implicate the rule of exclusion, so the prosecutor did nothing misleading or improper.

d. The prosecutor's questions did not amount to testimony.

A prosecutor may not "refer to evidence which is not in the record or 'testify' regarding matters not in evidence." *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 71 (2018). The test is "(1) whether the remarks called improper matters to the jury's attention, and (2) the probability under the circumstances that the improper remarks influenced the jury's verdict." *Id.*

Contrary to Arias's assertions on appeal, the prosecutor did not use the premise of his questions to implicitly testify. Arias's first incident involves her cross-examination testimony about the knife she used to stab Alexander. (O.B. at 131, 135.) She claimed to not have a knife before the period where she lost her memory. (R.T. 3/13/13, at 51.) The prosecutor asked:

> Q. Again, according to what you explained to the jurors, if he's already down and is not going to be able to get up, that means that you had to come back to him, right?
>
> A. I didn't explain that to the jurors.
>
> Q. Ma'am, that means you have to come back to him with the knife, don't you?

(*Id.*). Arias objected that the question mischaracterized the evidence and was argumentative, which the trial court sustained. (*Id.* at 51, 92.). Then, in response to further questioning, Arias indicated she had told the jury she remembered dropping a knife but said she did not remember grabbing it in the first place. (*Id.* at 92.) The prosecutor later asked, "at some point, you remember that you had a knife in your hand, correct?" (*Id.* at 92.)

These questions did not insert false facts into the trial. Arias admitted stabbing Alexander and afterward dropping the knife. (R.T. 2/20/13, at 21 ["I remember dropping the knife and it clanged to the tile."]; R.T. 2/28/13, at 189 [acknowledging stabbing Alexander with a knife].) In context, the prosecutor's questions did not presume Arias said she escaped Alexander's alleged assault

and returned with a knife. Instead, the questions presumed what Arias had admitted: that at some point she held a knife and stabbed Alexander with it. At any rate, there was no danger of prejudice because the jurors could recall Arias's prior testimony for themselves.

Arias further faults the prosecutor for "asserting" she left her rental car to investigate a license plate when she supposedly denied doing so. (O.B. at 135.) But that is not the best reading of the evidence. Arias denied tampering with her license plate; she instead claimed teenagers removed the front plate. (R.T. 2/20/13, at 38–40.) She accounted for the front plate in her backseat by saying she saw something "bright" and concluded, "this is my license plate." (*Id.* at 40.) But on cross-examination, she said she "didn't really see what [it] was. That's why [she] got out to investigate." (R.T. 2/27/13, at 158.) Defense counsel even objected to a question as "asked and answered" because "[s]he said she got out to investigate three times now." (*Id.* at 160.) In light of Arias's conflicting answers, asking questions premised on her leaving the car to investigate the license plate did not amount to testimony.

Arias also claims the prosecutor testified about the load-bearing weight of Alexander's closet shelves. (O.B. at 131.) Arias claimed on cross-examination that she climbed a shelf held by pegs to grab a gun. (R.T. 3/13/13, at 159–60.). The prosecutor asked her if she knew the shelves were rated to

hold 40 pounds. (*Id.* at 160.) The trial court sustained a lack-of-foundation objection. (*Id.*) Arias then answered she did not know the "rating" of the shelves. (*Id.*) Later, Detective Flores testified that he returned to Alexander's closet and placed his weight on one of the shelves, causing it to break. (R.T. 4/23/13, at 47–48; Exh. 644.)

Because Arias answered the prosecutor's question in the negative, the rating of the shelves did not enter the jury's consideration. *See Hardy*, 230 Ariz. at 293, ¶ 61. And the specific rating of the shelf was never mentioned again. *See Hulsey*, 243 Ariz. at 392, ¶ 114 (holding an erroneous reference was not fundamental error in light of "its brevity and inconsequential nature"). Any prejudice was also diminished by Detective Flores's later testimony that the shelf could not support his weight. The trial court instructed the jury the lawyers' comments were not evidence, and nothing rebuts the presumption that the jury followed this instruction. If the prosecutor erred at all, it was not prejudicial.

e. The prosecutor's questions were not argumentative and/or were not prejudicial.

Counsel are not permitted to ask argumentative questions—questions that present arguments to the jury rather than elicit relevant testimony from the witness. *People v. Anderson*, 420 P.3d 825, 861 (Cal. 2018).

Some of the questions Arias challenges were not argumentative. As background for Arias's first example, she had testified the last time she saw the knife she used to stab Alexander is when he used it to cut a rope in the bedroom. (R.T. 3/13/13, at 29.) She claimed not to know where the knife was prior to the attack. (*Id.* at 29–30.) In response to whether she had the knife when she shot Alexander, Arias answered, "I guess. I don't know." (*Id.* at 35.) The prosecutor replied, "No, no, no, there is no guessing here now." (*Id.*)

This was not argumentative: speculative testimony is inadmissible. *United States v. Tapaha*, 891 F.3d 900, 906 (10th Cir. 2018) ("[T]estimony is inadmissible when it is speculative."); *See* Ariz. R. Evid. 602 (requiring witnesses to have "personal knowledge of the matter"). As a result, the prosecutor's question simply reminded Arias not to guess. This accorded with the jury instruction not to "guess about any facts." (R.T. 5/2/13, at 37.)

Next, Arias challenges the prosecutor's question to Dr. Geffner about whether he took the case out "of the goodness of your heart." (O.B. at 123; R.T. 5/1/13, vol. 1, at 205.) Geffner had said he was not receiving a fee for his testimony apart from his usual salary. (*Id.*) He also professionally knew LaViolette. (*Id.* at 204.) Arias did not object. Although the summary of Geffner's testimony was arguably sarcastic, it was not inaccurate. The

prejudice was thus minimal and did not amount to fundamental, prejudicial error.

Further, Arias challenges an exchange between the prosecutor and one of Alexander's friends at Pre-Paid Legal about whether the company was a "pyramid scheme." (O.B. at 124; R.T. 1/29/13, at 37.) The line of questioning was not argumentative, because it concerned the witness's characterization of his business. Admittedly, the subject matter was not pertinent. Yet it is difficult to imagine what prejudice could come of the questioning. If anything, it actually hurt the State by creating an inference that Alexander too was part of a "pyramid scheme." In the absence of an objection, any error was neither fundamental nor prejudicial.

Other questions were unobjected-to and did not amount to fundamental, prejudicial error. First, when Dr. Samuels said he gave Arias a book to help her "come to terms" with her tendency to create alternate realities, the prosecutor asked if Samuels felt his "role [was] that of a support group." (R.T. 3/21/13, at 167.) This question was relevant; whether Samuels had unethically crossed the line from evaluator to therapist was at issue and it would be helpful to know whether Samuels considers his role to be like that of a support group leader. While the prosecutor may have expected Samuels to deny the comparison, the question had some merit in allowing the jury to view Samuels's demeanor

while giving his answer. *See State v. Fischer*, 242 Ariz. 44, 50, ¶ 19 (2017) ("It is primarily the province of the jury to determine the credibility of witnesses and to find the facts.") If the probative value of such a response was slight, so too was any danger of prejudice.

On the other hand, the State agrees the following were argumentative:

- After LaViolette said "biased" was not the right word to describe her attitude toward Arias, the prosecutor replied, "No. That is the correct word. Isn't it true that you are biased in favor of the defendant, yes or no?" (R.T. 4/8/13, at 160.)

- After Arias testified to trying to escape Alexander after shooting him, the prosecutor asked, "And at the time you're trying to get away, which you now seem to remember, you don't have the knife, right?" (R.T. 3/13/13, at 50.)

- When Arias claimed to have a memory issue, the prosecutor asked, "If it benefits you, you have a memory issue?" (R.T. 2/21/13, at 106.)

While these questions were unnecessary, the first two were unobjected-to and are thus reviewable for fundamental error. In light of the witness's denials and the jury instruction that lawyers' comments are not evidence, there was no fundamental, prejudicial error. (R.T. 5/2/13, at 37.) *See Morris*, 215 Ariz. at 336–37, ¶ 55 ("Even if the prosecutor's comments were improper, the judge's instructions negated their effect."). And the trial court cured any potential prejudice arising from the third question by sustaining the objection and later

instructing the jury not to consider such questions. *See Lynch*, 238 Ariz. at 92, ¶ 10; *Manuel*, 229 Ariz. at 6, ¶ 25.

In addition, Arias challenges the prosecutor's use of questions calling attention to witnesses' non-responsive answers. (O.B. at 124–25; *see* R.T. 1/29/13, at 46 ("You don't get to ask the questions. I do."); R.T. 4/12/13, at 119–20 ("Am I asking you whether somebody was in a good mood or not? Yes or no, am I asking you that?"); R.T. 3/25/13, at 193 ("Did I ask you where it was?").) Our supreme court has labeled "inappropriate" the comment, "No, let me ask you the question." *Lynch*, 238 Ariz. at 100, ¶ 52. But *Lynch* held the question was not prejudicial under harmless error review following an overruled objection. *Id.* The lack of prejudice is even stronger here under the fundamental error standard, since Arias has not pointed to any instance where she objected. The comments did not inject inadmissible evidence into the trial. And the goal of preventing non-responsive answers was legitimate, even if there was a better remedy in asking the court to strike the answer and admonish the witness to answer responsively. *See Rutledge v. Arizona Bd. of Regents*, 147 Ariz. 534, 545 (App. 1985) (stating that if an attorney believes an answer is nonresponse, "it was incumbent upon him to object and request that the court strike the answer and admonish the jury"). Such errors of style, rather than substance, were not prejudicial.

f. The prosecutor's tone was not prejudicial.

Arias claimed she thought the gun she supposedly took from Alexander's closet was unloaded because Alexander told her so. (R.T. 2/27/13, at 134–35.) The prosecutor explored this issue on cross-examination:

> Q: Okay. So you believe it's not loaded and you haven't received any statements to the contrary, right?
>
> A: No. He took it one night when he was—
>
> Q: So you haven't received any statements to the contrary, right?
>
> A: From him I did receive statements to the contrary.

(*Id.* at 135.) In response to a jury question, Arias answered Alexander "told me it was not loaded." (R.T. 3/6/13, at 111.)

On follow-up, the prosecutor asked whether Arias "believe[d] that the gun was unloaded," to which she responded, "I believed him." (R.T. 3/13/13, at 155.) The prosecutor asked the question again and Arias gave the same answer but also added, "He loaded it at one point in early December." (*Id.*) When the prosecutor asked if that was something Arias had not volunteered before, she answered she had mentioned Alexander loading the gun but had not given a date. (*Id.*) The prosecutor then returned to the question of whether in light of this information, Arias knew the gun was unloaded. (*Id.* at 156.) She answered that, "I didn't know. I didn't check it." (*Id.*) The prosecutor followed with "[d]id I ask you if you check[ed] it, ma'am," and then asked

whether Arias had said in response to a jury question "that you believed the gun was unloaded." (*Id.* at 157.) Arias answered she did not remember. (*Id.*) The prosecutor then asked if Arias had trouble remember[ing] her prior testimony, but the court sustained an objection. (*Id.*)

Arias argues the prosecutor's skeptical questioning implied her answers were "wrong." (O.B. at 126–27.) But a prosecutor is not required to accept a witness's word on cross-examination and may test the accuracy and credibility of the testimony. *See State v. Osborn*, 220 Ariz. 174, 177, ¶ 9 (App. 2009) (noting "the purpose of cross-examination is 'a full and fair opportunity to probe and expose.'") (citing *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985)). Arias also claims the questioning was misleading because the prosecutor suggested Arias's follow-up answer contradicted her response to the jury question. (O.B. at 127.) Although Arias did not tell the jurors she was certain the gun was unloaded, as the prosecutor's follow-up question suggested, neither were her answers entirely consistent. She told the jurors Alexander "assured" her the gun was unloaded and she believed him, but later told the prosecutor she did not know if it was true. On appeal, Arias suggests the prosecutor was dishonest to focus on what she *knew* when she only discussed what she *believed*. (O.B. at 127.) But he asked about belief as well, instead

distinguishing between what Arias believed about the gun and what she believed about Alexander.

Epistemological hair-splitting aside, there was no danger of prejudice. Arias did not object that the questioning was misleading, and the court sustained her objection to the final question as argumentative. The jurors could compare Arias's current answers with her previous ones for themselves and received instructions not to consider the prosecutor's questions as evidence. Any potential error was neither fundamental nor prejudicial.

Arias further claims the prosecutor's tone and questioning were uncivil. She generally cites to other instances where she claims he behaved uncivilly without describing them in detail. (O.B. at 127; R.T. 3/13/13, at 142–4; R.T. 4/4/13, vol. 2, at 111–14.) She also lists several discrete instances where defense counsel accused the prosecutor of yelling at witnesses:

- Arias said she has memory problems "when men like you are screaming at me or grilling me…" (R.T. 2/21/13, at 107.) There was no objection.

- Defense counsel asked the court to admonish the prosecutor not to yell at Dr. Samuels; the prosecutor denied yelling, and the court found, "[i]t's close but not quite there. (R.T. 3/25/13, at 190–91.)

- Defense counsel accused the prosecutor of "yelling" at and "badgering" LaViolette; the prosecutor denied yelling, and the court characterized it as "a little overzealous" and asked him to "scale it back." (R.T. 4/4/13, vol. 2, at 112–13.)

- Defense counsel accused the prosecutor of yelling at LaViolette; the prosecutor denied it and, the court responded, "Your voice did raise. Take a deep breath and let's move forward." (R.T. 4/10/13, at 37–38.)

(O.B. at 127–28.)

Admittedly, the record suggests the prosecutor was a zealous advocate, and the trial court occasionally intervened when circumstances warranted correction. But many of the defense witnesses were difficult and non-responsive:

- Arias answered she had memory problems "when men like you are screaming at me or grilling me…" (R.T. 2/21/13, at 107.)

- Dr. Samuels interjected during an objection and the court repeatedly admonished him to give responsive answers. (R.T. 3/19/13, at 18, 21, 25, 67.)

- LaViolette answered a yes-or-no question with "[d[o you want the truth, Mr. Martinez, or do you want a yes or no?" (R.T. 4/4/13, p.m., at 111–12.)

This gave the prosecutor some leeway on cross-examination. *State v. Sanders*, 245 Ariz. 113, ¶ 102 (2018) (noting, in response to a claim that the prosecutor argued with a witness, the "witness was irritated by what he perceived to be the prosecutor's disrespect for his military service" and the witnesses' refusal "to answer the prosecutor's questions about his military service").

Even assuming the prosecutor's behavior occasionally crossed the line of professionalism, it was not prejudicial. His questions did not introduce

inflammatory evidence, the court sustained timely objections and admonished the prosecutor, and the witnesses could explain their answers on redirect examination. *See Hulsey*, 243 Ariz. at 393, ¶ 121 (holding any prejudice caused by the prosecutor cutting off the witness's answers on cross-examination "subsided on redirect, when defense counsel gave [the witness] an opportunity to explain any inconsistencies"). The prosecutor's approach was sometimes counterproductive, as was the case with the "pyramid scheme" questions. And the jurors were just as likely as not to hold the prosecutor's tone and semantic quibbles against him.

Arias cites *Lynch* for disapproval of the prosecutor's behavior, but that decision held "[a]lthough the State's cross-examination was aggressive, and the court would have been well within its discretion to have sustained the objections and required the prosecutor to rephrase his questions in a more civil manner" the questions were not prejudicial because the prosecutor did not call the witness "pejorative names, refer to matters not in evidence, suggest unfavorable matter for which no proof exists, or abuse defendant in any other way." 238 Ariz. at 93, ¶ 12. The trial court did not think the prosecutor's tone merited a mistrial. (*See* R.T. 4/4/13, vol. 2, at 112–13.) This Court should defer to the trial court's assessment. *See Hulsey*, 243 Ariz. at 389, ¶ 95

(holding the defendant "has given this Court no reason to overturn the trial court's conclusion that the prosecutor's tone had no effect on the verdict").

3. *The prosecutor's speaking objections were appropriate and/or not prejudicial.*

"Arizona law does not explicitly prohibit speaking objections, but '[t]o the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.'" *Lynch*, 238 Ariz. at 94, ¶ 17 (citing Ariz. R. Evid. 103(d)).

In her first claim, Arias testified she had trouble remembering things and would lose focus when people yelled at her. (R.T. 3/5/13, at 63, 65.) She began to say the first time she experienced this was when driving with Alexander on the way to the Getty Center. (*Id.* at 67.) The prosecutor interjected: "Objection. Speculation. If she doesn't remember, how can she relate something she doesn't remember?" (*Id.* at 67.) Defense counsel later asked about the next time Arias remembered losing focus, to which she answered, "The next time I think he flipped out on me I think was mid-August." (*Id.* at 68.) The prosecutor interjected: "I am going to object to the characterization, 'flipping out.' Is she answering the question of whether she had the reaction, or according to her, Mr. Alexander getting upset?" (*Id.* at 68–69.) Again, the court sustained the objection and defense counsel asked a clarifying question.

Neither objection was improper. With his first objection the prosecutor explained why the question was speculative and with his second he explained why it was unclear whether Arias's answer was responsive. Neither comment inserted inadmissible evidence. *See Lynch*, 238 Ariz. at 94, ¶ 16 (finding the prosecutor did not insert inadmissible evidence when objecting to a question asking what a witness recalled on the basis that "[i]f he wants to just ask him what is in the transcript, I have no objection to that but what he remembers is irrelevant").

In another incident, defense counsel asked LaViolette if she reviewed information about Alexander's childhood that came from Alexander himself. (R.T. 4/4/13, p.m., at 29.) The prosecutor interjected: "Objection. Misstates the testimony. It did not come from him." (*Id.*) In response to a follow-up question, LaViolette explained she reviewed Alexander's writings. In any case, the trial court sustained the objections, so this Court should defer to its determination that the objections were meritorious, let alone permissible.

Arias claims the prosecutor used the objection to disagree with LaViolette's answer, but the better reading of his objection is that he thought the question assumed LaViolette spoke with Alexander while he was still alive—a fact not in evidence and indisputably untrue. Even if the prosecutor

misinterpreted the question, there was no prejudice: LaViolette quickly clarified what she reviewed and the jury had heard all the prior testimony.

As a third example, Arias references her own testimony where she stated that Alexander once pulled his hand away from hers while in a group of people. (R.T. 2/6/13, at 66.) Defense counsel asked whether this left Arias "with the impression that Mr. Alexander didn't want people to know if you were in [any] way intimately involved with him?" (*Id.* at 67.) The prosecutor interjected, "Objection. Speculation. Maybe he didn't want to have sex with her?" But again, this objection did not insert inadmissible facts into the case—it instead explained why the prosecutor thought it speculative for Arias to opine about Alexander's motivations.

In another event, defense counsel asked Arias if, by the time of Alexander's funeral, she had forgiven herself "for not escaping," and the prosecutor objected for "assum[ing] facts not in evidence that she was escaping." (R.T. 2/20/13, at 66; O.B. at 124.) When defense counsel said Arias had already testified about not escaping, the prosecutor replied, "Judge, I make the objections. The way it works, I make the objections, you decide." (*Id.*) Notwithstanding the rhetoric, this comment did not inject inadmissible evidence into the trial and thus did not prejudice the jurors. *See Lynch*, 238 Ariz. at 94, ¶ 16.

Arias further argues that even if these objections did not insert inadmissible evidence, they were unduly argumentative. (O.B. at 131.) But when making an objection, an attorney must necessarily give some argument for why the question was inappropriate. If speaking objections are permissible at all, then the minimal explanation for the objection in these questions must be permissible. To the extent the prosecutor exceeded what was required, he did not say anything that would have made it more likely for the jury to convict on an improper basis. Therefore, no prejudice resulted.

4. *The prosecutor did not violate court orders.*

Absent prejudice, a violation of the trial court's order alone is not *per se* reversible. *Cf. State v. Martinson*, 241 Ariz. 93, 100, ¶ 29 (App. 2016) (holding the state's arguably intentional violation of the trial court's order not to pursue a certain theory of guilt that resulted in a mistrial did not bar a retrial because the defendant "cannot establish the requisite prejudice arising from that conduct that would bar retrial on double jeopardy grounds"). This accords with a misconduct claim's focus on fairness—not culpability or deterrence. *See Bible*, 175 Ariz. at 145. Here, Arias cannot show either a violation of court orders or prejudice.

Arias argues the prosecutor violated court orders when repeating questions to which the court sustained objections. (O.B. at 137.) In her

example, Arias claimed she told M. McCartney about Alexander abusing her. (R.T. 2/25/13, at 190.) On cross-examination, the prosecutor asked, "Do you know why he would claim no knowledge of that?" (*Id.* at 190.) The court overruled a hearsay objection but sustained a speculation objection. (*Id.*) The prosecutor then asked, "So you don't know whether or not he, when interviewed, whether or not he admitted to knowing about that?" (*Id.*) Arias again objected, claiming the prosecutor asked the same question again. (*Id.* at 190–91.) The trial court sustained the objection because the prosecutor needed to lay more foundation. (*Id.* at 191.) But it denied the request for a mistrial because it did not find "the cross-examination has exceeded what I consider to be permissible boundaries." (*Id.* at 191.) The prosecutor then moved on. (*Id* at 192.)

The two questions were not in fact the same: the first asked why McCartney would disclaim knowledge of the abuse and the second asked whether Arias knew that McCartney had disclaimed such knowledge. The better interpretation of this brief exchange is that the prosecutor was attempting to lay foundation so the question would no longer be speculative. *See DeChristoforo*, 416 U.S. at 646–47. Although the court held the prosecutor needed further foundation, it did not conclude he had violated its order. In short, nothing improper occurred.

As a second example, Arias cites to the cross-examination of LaViolette, where the prosecutor asked a question, the court sustained an objection, then the prosecutor asked, "Correct?" (R.T. 4/9/13, at 143.) But the court reminded the prosecutor the question had been sustained and the witness did not answer, so necessarily there was no prejudice.[18]

5. *The prosecutor did not ask witnesses to comment on the veracity of other witness's statements.*

A witness may not opine as to whether the statement of another witness is true, as this invades the province of the jury. *See State v. Reimer*, 189 Ariz. 239, 241 (App. 1997). Arias contends the prosecutor violated this rule when asking Arias whether she told LaViolette that Alexander had masturbated to a picture of a child on a computer, and when Arias denied it, asking her if she heard LaViolette testify to this at a pretrial hearing. (R.T. 2/21/13, at 126–27.) Arias objected to that question, and the court overruled it. (*Id.* at 129.) The court's ruling was correct and not an abuse of discretion. The prosecutor was not asking Arias to say whether LaViolette's version of the incident was true;

[18] Arias further claims the prosecutor improperly renewed objections after the trial court had overruled them. (O.B. at 137.) But she cites no instance of this in the body of her brief, instead citing Appendix 27 which contains a number of alleged incidents. Because this Court should strike Appendix 27, *see* note 14, *supra*, Arias has effectively abandoned the argument. *State v. Carver*, 160 Ariz. 167, 175 (1989).

he was instead asking whether LaViolette told a different version of the story than the one Arias gave at trial. Rather than proving a witness's veracity, this question would reveal whether Arias had made prior inconsistent statements, which *are* admissible. *Cf. Lynch*, 238 Ariz. 84 at ¶ 15 (holding questions about why an expert believed some witnesses was a permissible test of her "bias and credibility" rather than an invitation to evaluate witness veracity).

Arias similarly claims the prosecutor's question to her about McCarney asked her to comment on his truthfulness. (O.B. at 143.) But again, the question invited Arias to explain whether *she* was telling the truth in light of the alleged fact that McCartney did not corroborate her story. In any event, the court sustained the question and the witness did not answer, so no prejudice resulted. *See State v. Prince*, 226 Ariz. 516, 538, ¶ 90 (2011) (finding no prejudice in a prosecutor's misstatement of the law during argument because "[a]fter the judge sustained defense counsel's subsequent objection, the prosecutor immediately corrected himself, alleviating any prejudice caused by his misstatement").

6. *The prosecutor's use of an autopsy photo was not prejudicial.*

Arias claims the prosecutor sought to intentionally prejudice the jury by displaying a graphic crime scene photo while cross-examining L. Diadone. (O.B. at 145.) Diadone had written an email to Alexander stating her reasons

for wanting to end their relationship. (R.T. 1/30/13, at 39.) She said on cross-examination that she now thought some of her comments in the email were "unfair." (*Id.* at 123.) As the prosecutor asked his next question, he began to display an autopsy photo depicting Alexander's slashed throat, which the State had admitted during Dr. Horn's testimony. (*Id.* at 123; R.T. 1/8/13, at 69; Exh. 205.) Arias objected and moved for a mistrial. (R.T. 1/30/13, at 123–24.) Defense counsel stated that Diadone and Alexander's family in the gallery were crying. (*Id.* at 124.) Defense counsel further accused the prosecutor of not immediately removing the photo upon hearing the objection. (*Id.* at 124.) The prosecutor said he had not displayed the entire photo. (*Id.*) He argued the photograph was already in evidence and he was "entitled" to show the witness that "self-defense is not appropriate." (*Id.* at 124–26.)

The court stated it did not see the photo because the prosecutor had removed it too quickly. (*Id.* at 127.) It sustained the objection but declined to declare a mistrial. (*Id.* at 126.) At the end of the day, the court instructed the jurors that while "some of the evidence in this matter may elicit emotional responses from witnesses and from those seated in the gallery, … in evaluating the evidence you should not be influenced by sympathy or prejudice." (*Id.* at 202.)

The record does not reveal any relevant purpose for asking Diodone about this particular photograph. Even so, the trial court did not abuse its discretion when concluding the event did not prejudice the jury or warrant a mistrial. The jury had already seen the photo, which was in evidence. Although it was graphic, so was the murder it depicted. *See State v. Rushing*, 243 Ariz. 212, 220, ¶ 31 (2017) (holding autopsy photos from "a shockingly violent murder, which had been vividly described to jurors by witnesses" were "unlikely" to have "so inflamed jurors that a danger of unfair prejudice existed"). Plus, the photo was only partially visible for a brief period of time. Although defense counsel complained that the prosecutor should have removed the photo more promptly, even the trial court did not have enough time to view it.

Nor did the reaction of Diodone and the members of the gallery require a mistrial. Their reactions were understandable in light of the injuries to Alexander and would have been the same regardless of whether Arias was guilty. *See Bible*, 175 Ariz. at 597–98 (affirming the denial of a mistrial when the victim's father shouted "[t]hat fucking asshole," during a witness's description of a sexual assault because "[n]o information was conveyed other than the father's animosity toward Defendant, a feeling that could hardly have surprised the jurors"). The court instructed the jurors not to base their decision

on the reaction of the gallery members and later advised them to not allow their emotions to sway their verdict. *See id.* (noting the court's instruction that the jurors base their decisions on facts rather than the emotional outburst). Arias argues the prosecutor deliberately sought to evoke an emotional reaction, but that is not relevant to a misconduct claim. *Id.* at 601 (focusing "on the fairness of the trial, not the culpability of the prosecutor"). (O.B. at 145–46.) The trial court was in the best position to "evaluate the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial." *Id.* at 598. Its ruling, then, was not clearly erroneous.

7. *Conclusion.*

The State has already addressed why the following claims lack merit:

- The prosecutor did not mislead the court about how he intended to use Officer Friedman's testimony that a .25 caliber handgun was reported stolen from Arias's grandparents' home. *See* Argument II, *supra*.

- The prosecutor did not improperly use expert testimony to show Arias's premeditation. *See* Argument III, *supra.*

- The prosecutor did not attempt to show the jury Arias's restraints. *See* Argument IV, *supra*.

Therefore, no individual instance of alleged misconduct prejudiced Arias's trial.

C. ANY CUMULATIVE ERROR DID NOT AMOUNT TO AN UNFAIR TRIAL.

Even if the prosecutor erred, this Court must decide whether the aggregate of those errors were "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial," amounting to a denial of due process. *Acuna Valenzuela*, 245 Ariz. at 224, ¶ 119. This requires the Court to determine whether there was a "reasonable likelihood … that the misconduct could have affected the jury's verdict, thereby denying the defendant a fair trial." *Id.* Arias cannot meet that test because the aggregate weight of any error was slight, the trial court mitigated any potential prejudice, and any residual prejudice does not outweigh the overwhelming evidence of guilt.

1. *The trial court found any cumulative prejudice did not amount to a denial of due process.*

Arizona courts give "great latitude to conclusions drawn by judges who observe trial behavior first hand." *Hulsey*, 243 Ariz. at 389, ¶ 95. When disposing of Arias's motions for mistrial, the trial court repeatedly found both that individual incidents were not prejudicial and there was not enough cumulative prejudice to justify a mistrial:

Basis	Reason	Citation
Showing autopsy photo to Diadone.	The jury instructions not to be influenced by emotion cured any prejudice.	1/30/13, at 126–27
Calling a surprise witness; all of the prosecutor's conduct	No prosecutorial misconduct	2/13/13, at 32

until this point		
Speaking objections and mutual dialogue between prosecutor and defense counsel	It was sufficient to ask counsel to approach before making objections	2/20/13, at 67.
Asking Arias why McCarthy claimed no knowledge of her abuse allegations	The cross examination had not "exceeded permissible boundaries."	2/25/13, at 191.
Argumentative questions during Arias's cross-examination	The prosecutor improved after being admonished not to ask argumentative questions earlier in the day. The "cumulative nature" of the argumentative questions did not amount to justifying a mistrial.	2/25/13, at 242
Yelling at witnesses (disputed by the prosecutor)	The prosecutor's conduct did not rise "to the level that would require any kind of admonition of the court."	3/18/13, at 135
Asking questions about Dr. Samuels's relationship with Arias	There was "no legal basis" for a mistrial Dr. Samuels's relationship with Arias was a relevant subject on cross-examination	3//19/13, at 32
The prosecutor's cross-examination of witnesses was cumulatively prejudicial	Admonished both parties to limit speaking objections	3/20/13, at 76
The prosecutor again asked about Dr. Samuels's feelings for Arias	The subject matter was relevant to show the witness's possible bias	3/25/13, at 112
"Yelling" at and "badgering" LaViolette	The prosecutor was a little "overzealous" but his style of cross-examination did not warrant a mistrial	4/4/13, vol. 2, at 112–13

The totality of the prosecutor's questioning of LaViolette	General denial	4/8/13, at 131
Cumulative error in proceedings to date; the prosecutor signing autographs with spectators on courthouse steps	Signing autographs occurred outside presence of jurors and there was no evidence they were prejudiced Cannot make finding that justice would be "thwarted" absent mistrial	4/15/13, at 76, 90–91
Post-trial request for mistrial of penalty phase due to cumulative prosecutorial misconduct	The prosecutor's style was not unduly aggressive and there was "no basis" for granting a mistrial	5/21/13, at 18

The court's reasoning when denying the post-trial motion merits emphasis:

> I have been practicing law in this state since 1980. I see attorneys come into this Court every day. While I will agree that Mr. Martinez does have a very aggressive style, I could name without even thinking hard of at l[e]ast ten other current criminal practitioners who have an equal or more aggressive style than Mr. Martinez. Most of those attorneys are deemed to be extremely skilled lawyers and are well sought out by defendants and others. Some of these lawyers are also prosecutors.

(R.T. 5/21/13, at 18.)

A cold transcript cannot convey the full context of a prosecutor's conduct, but the trial court was in the best position to observe the intangibles: "whether the prosecutor is unduly sarcastic, his tone of voice, facial expressions, and their effect on the jury, if any." *State v. Hansen*, 156 Ariz. 291, 297 (1988). This Court should therefore defer to the trial court's repeated,

updating conclusion that the prosecutor's behavior did not permeate the atmosphere of the trial with unfairness.

2. *The trial court mitigated any danger of prejudice.*

The trial court was careful to sustain objections in order to limit what evidence came before the jury. The court admonished the prosecutor to avoid argumentative questions (R.T. 2/25/13, at 89), and directed both counsel to approach for lengthy speaking objections. (R.T. 2/20/13, at 67.) The trial court further cured any prejudice through its instructions. Those instructions included:

- It was the jurors' duty to "decide this case by applying these jury instructions to the facts," which comes "only from the evidence produced in court." (R.T. 5/2/13, at 36.)
- The jurors should not be "influenced by sympathy or prejudice." (*Id.*)
- What the lawyers say during their argument is not evidence. (*Id.* at 37.)
- When the court sustains an objection, the jurors should not consider the question or answer. (*Id.* at 38.)
- The jury should not consider other act evidence for a purpose other than determining the defendant's character or actions in conformity to character. (*Id.* at 41–42.)

(R.T. 5/2/13, at 36–42.) Arias has not rebutted the presumption the jurors followed these instructions. *See Acuna Valenzuela*, 245 Ariz. at 219, ¶ 77 (holding "[t]he presumption that jurors follow a court's instructions …

eradicates a slight possibility of any taint from vouching…") The instructions thus counterbalanced any cumulative error. *See Lynch*, 238 Ariz. at 92, ¶ 10.

3. *The prosecutor's observance of courtroom decorum was not prejudicial.*

Many of Arias's claims amount to the allegation that the prosecutor behaved uncivilly. But any lapses of courtroom decorum did not increase the probability that the jury would return a guilty verdict on an improper basis. As explained above, they may even have had the opposite effect. Reversing a conviction on this basis would only serve to punish the prosecutor at the expense of a guilty defendant. *Acuna Valenzuela*, 245 Ariz. at 224, ¶ 119 (holding while "lack of respect, poor courtroom decorum, and unnecessary verbal attacks on defense counsel and experts" are "unbecoming of an Arizona prosecutor," the cumulative affect did not amount to a due process violation and the court would not "reverse convictions merely to punish a prosecutor's misdeeds [ ]or to deter future misconduct").

4. *The overwhelming evidence of guilt mitigated any cumulative error.*

By her own admissions, Arias placed beyond issue that she killed Alexander. (R.T. 2/4/13, at 98.) The only questions for the jury to resolve were whether she did so with premeditation and without justification.

The evidence of premeditation was strong. Arias exhibited premeditation when she "act[ed] with either the intention or the knowledge that [s]he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection." A.R.S. § 13–1101(1). Here, Arias stole her grandfather's .25 caliber handgun a week before the murder. The burglar passed over other valuables to steal this one weapon, which so happened to be the same caliber as the weapon that shot Alexander. (R.T. 1/3/13, at 122–23; R.T. 1/14/13, at 31.) The timing of the theft suggested her motive: two days after Alexander's heated email exchange and on the same day she learned he was taking another woman to Cancun. (R.T. 2/26/13, at 113; Exh. 450.) Nor was it believable that Alexander owned the gun she used to shoot him. Arias told Detective Flores several times Alexander did not own a gun before taking the witness stand to say otherwise. (Exh. 273, 1:10; Exh. 381, 14:08.) The police did not recover any evidence of gun ownership, such as the box, holster, or ammunition. (R.T. 4/24/13, at 41.) Arias was the only person in Alexander's bedroom suite from the time of his death until when his body was discovered, yet she had no interest in disposing of all traces that he owned a handgun. And conveniently, she claimed no memory of cleaning up the crime scene. (R.T. 2/20/13, at 20.)

Additionally, nearly everything about Arias's road trip to Mesa was calculated to deceive onlookers. Arias rented a car instead of driving her own and did so in a town 90 miles away from where she lived. (R.T. 1/10/13, at 17; R.T. 1/16/13, at 21.) She refused a red vehicle in favor of a more forgettable color. (R.T. 1/16/13, at 23.) She falsely told the rental car manager that she only intended to drive around town. (*Id.*) She used gas cans to avoid buying gasoline near Phoenix. (R.T. 2/19/13, at 93, 99.) She drove without readable license plates, having removed her front plate and rotated her rear plate upside down. (R.T. 2/20/13, at 39; R.T. 2/28/13, at 11.) And she powered off her cell phone for much of June 3 and June 4. (R.T. 2/19/13, at 104; R.T. 2/20/13, at 27.) Although she claimed this was because she temporarily lost her phone charger, her trial explanation of finding the charger under the passenger seat contradicted her story to R. Burns about buying a new one at a gas station. (Compare 1/9/13, at 9 with R.T. 2/20/13, at 27.) From this, the jury could infer Arias turned off her phone to conceal her movements within Arizona.

Moreover, the sequence of photos showed Arias attacked Alexander while he was crouched and nude in the shower. (Exhs. 141–160.) By coaxing him into a vulnerable position before stabbing him, Arias demonstrated planning and reflection.

Likewise, there was ample evidence Arias killed Alexander intentionally and not in self-defense. Killing Alexander would have been justified only if Arias used deadly force "[w]hen and to the degree a reasonable person would believe that deadly physical force [was] immediately necessary to protect [her]self against the other's use or attempted use of unlawful deadly physical force." A.R.S. § 13–404. The clearest refutation of Arias's self-defense claim was the evidence she planned and premeditated the murder. Plus, the 27 stab wounds, the gunshot to the head, and his slashed throat revealed unbridled anger, not reasonable fear. (R.T. 5/3/13, at 106.) Arias also cleaned up the crime scene by moving the body, deleting the nude photos of herself, hiding the camera in the washing machine and discarding the murder weapons in the desert. (R.T. 1/3/13, at 82; R.T. 1/10/13, at 102; R.T. 1/14/13, at 83.) She even left phone and email messages to Alexander pretending she had not gone to visit him. (R.T. 1/15/13, at 62; Exh. 505.)

While a person who genuinely acted in self-defense might have contacted the police after resorting to using force, Arias actively obstructed the investigation. The day Alexander's body was discovered, she attempted to contact Detective Flores, which resulted in a conversation where she pressed him for information and denied being present in Mesa. (Exhs. 274, 389.) After her arrest, Arias repeated the same false story despite Flores confronting her

with the incontrovertible photos of her at Alexander's house the day he died. (Exh. 358.) Yet she changed her story in her second interview, claiming intruders killed Alexander and threatened her. She also told this second story in TV interviews. (*See* Exhs. 381.) But even she admitted at trial this was "all BS," and these two false stories were shaped to conform to the known evidence in order to throw off suspicion. (R.T. 2/20/13, at 79, 106.) Recognizing the danger that other witnesses may contradict these stories, Arias attempted to influence someone's testimony by smuggling notes through the magazine confiscated by jail security. (R.T. 2/21/13, at 170–71; Exh. 466.)

Arias's conflicting stories also undermined the credibility of her in-trial claims of self-defense. Other evidence contradicted Arias's trial testimony as well. Her accusations that Alexander was an abusive pedophile were uncorroborated and conflicted by her own journal entries. (Exhs. 471, 510, 511.) The same journal entries refuted Arias's trial explanation for why she did not write about Alexander's purported failings. (Exh. 510.) Her reason for bringing gas cans on the road trip made little sense when she filled them with more expensive California gasoline. (R.T. 2/19/13, at 96; R.T. 2/27/13, at 96–97.) And her story about firing the gun before stabbing Alexander was impossible when Alexander suffered defensive knife wounds after supposedly receiving an incapacitating headshot. (R.T. 1/8/13, at 94; R.T. 4/25/13, at 9,

11.) The fact is, Arias told many falsehoods: to the rental car manager, to the officer who pulled her over, to her friends in Utah, to Detective Flores, and to news reporters on national television. There was every reason to expect the jury would doubt Arias's latest story and to instead treat her deception as further evidence of guilt. *See West*, 505 U.S. at 296.

Ultimately, Arias refuted her own self-defense theory. She claimed at trial the gun went off accidentally and she did not even realize she had fired it. (R.T. 2/20/13, at 17.) But a person cannot accidentally engage in self-defense; Arias could not simultaneously kill Alexander unintentionally and kill him out of a belief that deadly physical force was reasonably necessary. According to Arias's story, Alexander had simply pushed her down at that point; he did not tackle her until after she pointed a gun at him and he did not threaten to kill her until after she fired the gun. (*Id.* at 9, 17.) Even under her version of events, it was she who escalated to deadly force. *See* A.R.S. §§ 13–404, –405 (requiring force to be proportionate to the threat); *see also State v. King*, 225 Ariz. 87, 91, ¶ 18 (2010).

Arias presented much expert evidence, based on her own self reporting, to show she suffered PTSD as a result of the murder. (R.T. 3/14/13, at 128; *but see* R.T. 4/16/13, at 164 [Dr. DeMarte disputing the diagnosis.].) Not only was this evidence contested, but it was not all that probative; Arias could have

suffered the same post-traumatic stress from acting in self-defense or intentionally murdering Alexander. Arias also presented evidence, again based on self-reports and conflicted by the State, that she was a battered woman. (R.T. 4/4/13, p.m., at 87; *but see* R.T. 4/16/13, at 194 [Dr. DeMarte disputing claims of abuse].) While Arizona law does permit jurors to assess self-defense from the perspective of a reasonable battered woman, A.R.S. § 13–415, neither Arias nor her experts gave any explanation for why a battered woman in Arias's purported position would have been more likely to believe deadly force was reasonably necessary than other sorts of people.

This was not a case where "the evidence hangs in delicate balance with any prejudicial comment likely to tip the scales in favor of the State." *State v. Rhodes*, 110 Ariz. 237, 238 (1973). Even if the prosecutor erred, it can be said with near certainty those errors did not make the difference between conviction and acquittal. They are at most non-prejudicial—drops in the ocean of inculpatory evidence.

5. *Conclusion.*

In service of her cumulative error argument, Arias focuses less on the individual allegations of misconduct and more on the big picture, analogizing the prosecutor's behavior to threads of a tapestry. (O.B. at 102.) But the individual incidents matter, and there are fewer true threads than Arias claims.

Either the prosecutor did not err, his statements were permissible in context, his conduct occurred outside the jury's presence, or his mistakes were non-prejudicial and mitigated by curative instructions. Short of "pervasive," what threads remain do not form the picture of an unfair trial. *Cf.* *Goudeau*, 239 Ariz. at 469, ¶ 214 (finding the cumulative error of the prosecutor's improper arguments "during eleven of the State's thirteen opening arguments" was not sufficient to violate due process). They are instead more like a few frayed ends in an entirely different picture of Arias's overwhelming guilt. *See id.* at 466, ¶ 199 (holding "any prejudice was ameliorated by the trial court's limiting instructions and the overwhelming proof of guilt").

Much of Arias's argument focuses on the prosecutor's mental state: that he is experienced, he stated in interviews that his conduct was deliberate, and he has been admonished by Arizona courts before. (O.B. at 147–48.) The Supreme Court, however, held such factors irrelevant in *Moody* because courts "do not reverse convictions merely to punish a prosecutor's misdeeds or to deter future misconduct." 208 Ariz. at 460, ¶ 152 (citation and internal alterations omitted). Although some opinions have mentioned a prosecutor's experience or recklessness, such bad faith is only relevant to determine whether Double Jeopardy bars a retrial under *Pool*. Indeed, each of Arias's authorities discussed prosecutorial *scienter* within the context of a *Pool* claim. *State v.*

Minnitt, 203 Ariz. 431, 440, ¶ 45 (2002); *State v. Jorgenson*, 198 Ariz. 390, 393, ¶ 14 (2000). A *Pool* claim is not before this Court now, and the prosecutor's mental state is otherwise irrelevant. *Moody*, 208 Ariz. at 460, ¶ 52 (holding "reversal is required only when the defendant has been denied a fair trial as a result of the actions of the prosecutor") (citation and internal alterations omitted); *see also Darden*, 477 U.S. at 181 (holding it is not enough for reversal "that the prosecutors' remarks were undesirable or even universally condemned"). Given the trial court's remedial measures and the overwhelming evidence of guilt, Arias's trial was fair, and this Court should affirm.

CONCLUSION

Based on the foregoing authorities and arguments, the State respectfully requests this Court affirm the conviction and sentence.

Respectfully submitted,

Mark Brnovich
Attorney General

Joseph T. Maziarz
Chief Counsel

/s/
Terry M. Crist, III

Assistant Attorney General
Attorneys for Appellee

7191918