No. 20-___

In The

Supreme Court of the United States

Rodney Lynn Dalton,

Petitioner,

v.

State of Arizona,

Respondent.

On Petition for a Writ of Certiorari from the Arizona Supreme Court

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDICES

A. Memorandum Decision
B. Denial of Review
C. Opening Brief to Arizona Court of Appeals
D. Petition for Review to Arizona Supreme Court
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APPENDIX A

MEMORANDUM DECISION OF THE ARIZONA COURT OF APPEALS, DIVISION 1, MAY 10, 2022.

State v. Dalton
Court of Appeals of Arizona, Division One
May 10, 2022, Filed
No. 1 CA-CR 21-0201

Reporter
2022 Ariz. App. Unpub. LEXIS 393 *; 2022 WL 1468771

STATE OF ARIZONA, Appellee, v. RODNEY LYNN DALTON, Appellant.

Notice: THIS DECISION IS SUBJECT TO FURTHER APPELLATE REVIEW. MOTIONS FOR RECONSIDERATION OR PETITIONS FOR REVIEW TO THE ARIZONA SUPREME COURT MAY BE PENDING. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

NOT FOR OFFICIAL PUBLICATION.

UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT

PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

Subsequent History: Review denied by State v. Dalton, 2023 Ariz. LEXIS 21 (Ariz., Jan. 6, 2023)

Prior History: [*1] Appeal from the Superior Court in Yavapai County. No. P1300CR201801024. The Honorable Krista M. Carman, Judge.

Disposition: AFFIRMED AS MODIFIED.

Counsel: Arizona Attorney General's Office, Phoenix, By Joshua C. Smith, Counsel for Appellee.

Jones, Skeleton, & Hochuli, PLC, Phoenix, By Elizabeth B. N. Garcia, Co-Counsel for Appellant.

Beus Gilbert McGroder, PLLC, Phoenix, By Lori L. Voepel,, Co-Counsel for Appellant.

Judges: Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Cynthia J. Bailey and Judge D. Steven Williams joined.

Opinion by: Peter B. Swann

Opinion

MEMORANDUM DECISION

SWANN, Judge:

P1 Rodney Lynn Dalton appeals from his convictions and sentences for sexual assault and kidnapping. For the following reasons, we affirm the convictions and sentences as modified.

FACTS AND PROCEDURAL HISTORY

P2 Shortly after marrying Dalton, Margaret gave birth to their twins, James and Hannah, in June 2003.2 She has five other children from a previous marriage. Early in Margaret's relationship with Dalton, she learned that he expected sexual intercourse on a daily basis. As time went on, this became more of a demand.

P3 In December 2009, Dalton asked Margaret to join him in their bedroom. When Margaret refused, Dalton [*2] dragged her to the bedroom, prevented her from leaving, and forced her to engage in sexual intercourse. She told him "no" multiple times. Months later, in March 2010, Dalton began to initiate sexual intercourse with Margaret. When she refused, Dalton ripped off her clothes and forced her to engage in sexual intercourse. She cried and told him to stop throughout the offense.

P4 Late one evening in the spring of 2012, Margaret and Hannah fell asleep in the same bed. Margaret awoke to Dalton digitally penetrating her vagina and told him to stop. Despite Margaret's protests, Dalton digitally penetrated her vagina a second time and then forced her to engage in penile-vaginal intercourse. At some point, Hannah woke up and tried

to help her mother. Dalton only stopped when Hannah ran crying from the bedroom.

P5 In August 2014, Margaret returned home from a work trip. Dalton joined Margaret in the shower and tried to engage in penile-anal intercourse. When she expressed discomfort, he forced her to engage in penile-vaginal intercourse. Later that evening, Margaret awoke to Dalton digitally penetrating her vagina. Over her protests, he forced her to engage in sexual intercourse.

P6 Hoping to save [*3] the marriage, Margaret did not report the offenses to law enforcement. While meeting with marriage counselors, the couple discussed Dalton's inability to take "no" for an answer with regard to sexual intercourse. Margaret also expressed concerns about what she called "forced sex" in emails to Dalton and her personal journals.

P7 Margaret filed for divorce in 2015. After a contentious divorce, Dalton struggled to maintain a relationship with his children and they grew increasingly resistant to visitation. James and Hannah would run away to avoid Dalton and, on one occasion, were detained by law enforcement for violating the terms of visitation.

P8 In April 2018, James sent a letter to various superior court judges and law enforcement agencies in an effort to terminate visitation. In the letter, James disclosed that Dalton had physically and emotionally abused their family, detailing specific instances of abuse and threatening behavior. The letter also indicated that Dalton had sexually abused Margaret. An investigation by law enforcement ensued, ultimately leading to Margaret disclosing the offenses and James and Hannah providing corroborating details. Later, at trial, Dalton claimed [*4] Margaret and the children fabricated the allegations as part of a "master plan" to have him arrested.

P9 The grand jury indicted Dalton on Counts 1 and 2, sexual assault and kidnapping, committed on or about December 2009; Count 3, sexual assault, committed on or about March 2010; Count 4, sexual assault, committed on or about March 1, 2012; and Count 5, sexual assault, committed on or about August 2014.3 All of the counts constituted class 2 felonies and domestic violence offenses. During trial, the state amended the date of the offense alleged in Count 4 to have occurred between March and October 2012.

P10 The jury returned guilty verdicts on all counts. The superior court sentenced Dalton to an aggregate term of 28 years' imprisonment, imposing concurrent

sentences in Counts 1 and 2 and consecutive sentences in Counts 3, 4, and 5. The court applied 48 days of presentence incarceration credit to the sentence in each count. Dalton appeals.

DISCUSSION

I. THE INDICTMENT PROVIDED ADEQUATE NOTICE.

P11 Dalton argues the dates of offenses listed in the indictment lacked specificity, depriving him of adequate notice of the underlying charges and his right to present an alibi defense. We review [*5] the superior court's ruling on the sufficiency of an indictment for an abuse of discretion. *See State v. Malvern*, 192 Ariz. 154, 155, ¶ 2, 962 P.2d 228 (App. 1998).

P12 An indictment "must fairly indicate the crime charged, must state the essential elements of the alleged crime, and must be sufficiently definite to apprise the defendant so that he can prepare his defense to the charge." *State v. Maxwell*, 103 Ariz. 478, 480, 445 P.2d 837 (1968); see also Ariz. R. Crim. P. 13.1(a). When the date is not an essential element of the offense, the indictment need not list an exact date to provide adequate notice of the underlying charge. *See State v. Ariz. Mines Supply Co.*, 107 Ariz.

199, 201, 484 P.2d 619 (1971). The mere assertion of an alibi defense does not compel the state to allege an exact date of offense. *See State v. Davis*, 206 Ariz. 377, 391, ¶ 70, 79 P.3d 64 (2003).

P13 Before trial, Dalton moved to dismiss all counts in the indictment except Count 4, arguing the date ranges listed in the indictment failed to give him adequate notice of the underlying charges. The superior court disagreed and denied the motion. At trial, the state presented evidence that the offenses occurred either on a specific date or within a date range. In turn, Dalton attacked gaps in the state's timeline, pointed out disparities between testimony and the indictment, and argued he lacked the opportunity to commit the offenses on the alleged dates.

P14 We discern no error. The state [*6] was not required to allege Dalton committed the offenses on an exact date. See A.R.S. §§ 13-1304(A)(3) (elements of kidnapping), -1406(A) (elements of sexual assault); see also *State v. Verdugo*, 109 Ariz. 391, 392, 510 P.2d 37 (1973) (finding evidence a sexual assault occurred "on or about" a given date to be sufficient). The indictment listed the charged offenses for each count, the essential elements of the offenses, the associated victim, and the relevant date range. The dates

introduced at trial fell within the ranges listed in the indictment. Dalton was not prevented from attacking the state's timeline and mounting a vigorous defense. The indictment provided adequate notice of the underlying charges.

II. THE AMENDMENT TO COUNT 4 DID NOT CONSTITUTE ERROR.

P15 Dalton argues the superior court erred by allowing the state to amend the date of the offense alleged in Count 4 and contends the amendment prevented him from presenting an alibi defense. We give the court considerable discretion in ruling on a motion to amend the indictment. See S*tate v. Sammons*, 156 Ariz. 51, 54, 749 P.2d 1372 (1988).

P16 Without the defendant's consent, an indictment may only be amended to "correct mistakes of fact or remedy formal or technical defects." Ariz. R. Crim. P. 13.5(b). "A defect may be considered formal or technical when its amendment does not operate to change [*7] the nature of the offense charged or to prejudice the defendant in any way." *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55 (1980). Absent actual prejudice, a defect "as to the date of the offense alleged in the indictment does not change the nature of the offense, and therefore may be remedied by

amendment." *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182 (App. 1996), abrogated on other grounds, *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012).

P17 At trial, Margaret testified that the offense alleged in Count 4 occurred in the "spring of 2012." Over Dalton's objection, the superior court allowed the state to amend the date of the offense alleged in Count 4 to occur between March and October 2012 based on Margaret's testimony. Dalton elicited testimony that the couple was separated for much of 2012 and they did not live at the location where the offense occurred until April 2012, and he later argued that the evidence did not support the state's timeline.

P18 The amendment conformed to the evidence at trial and did not impact the nature of the offense. Dalton was not prevented from presenting evidence contradicting the state's timeline, and arguing he lacked the opportunity to commit the offense. Any purported harm to Dalton's alibi defense is theoretical. *See State v. Hamilton*, 177 Ariz. 403, 410 n.6, 868 P.2d 986 (App. 1993) ("Defendant's assertion that he was unable to present an alibi defense, because [*8] he could not reconstruct his life for a specific year, is a theoretical, not an actual, prejudice that could be asserted any time an offense was alleged to have occurred over a period of time."). Without

more, Dalton has failed to show the amendment to the alleged date of offense constituted actual prejudice. We find no error.

P19 To the extent Dalton claims the amendment did not conform to Margaret's testimony, we are not persuaded. While the superior court appeared to conflate portions of testimony associated with Counts 3 and 4 in making its ruling, the amendment is supported by the record. *See State v. Moreno*, 236 Ariz. 347, 350, ¶ 5, 340 P.3d 426 (App. 2014) ("We will uphold the court's ruling if legally correct for any reason supported by the record.").

III. THE EVIDENCE PRESENTED AT TRIAL DID NOT RENDER COUNT 4 A DUPLICITOUS CHARGE.

P20 Dalton claims that Count 4 constituted a duplicitous charge, depriving him of the right to a unanimous jury verdict. Because Dalton raises this issue for the first time on appeal, we review only for fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, 140, 142, ¶¶ 12, 21, 425 P.3d 1078 (2018).

P21 A duplicitous charge occurs when "the text of an

indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, 244, ¶ 12, 196 P.3d 844 (App. 2008). An unremedied [*9] duplicitous charge results in prejudice, and therefore fundamental error, if the defendant shows that the jury may not have reached a unanimous verdict. See *State v. Delgado*, 232 Ariz. 182, 188, ¶¶ 18-19, 303 P.3d 76 (App. 2013). Remedial measures are unnecessary if "all the separate acts that the State intends to introduce into evidence are part of a single criminal transaction." *Klokic*, 219 Ariz. at 244, ¶ 15. We may consider whether the defendant presented the same defense as to each of the acts in making this determination. *Id*. at 245, ¶ 18.

P22 The indictment listed Count 4 as a sexual assault, involving sexual intercourse or oral sexual contact. As relevant here, "sexual intercourse" includes digital and penile penetration of the vulva. See A.R.S. § 13-1401(A)(4). As to the offense alleged in Count 4, the state elicited testimony that Dalton digitally penetrated Margaret's vagina twice and, without a break in time, forced her to engage in penile-vaginal intercourse. Dalton did not request remedial measures be taken to identify which specific act constituted the offense.

P23 Without a break in time, the forced digital

penetration and penile-vaginal intercourse were "part of a single criminal transaction," and the superior court did not need to take remedial measures to ensure a unanimous verdict. *See Klokic,* 219 Ariz. at 244, ¶ 15. Dalton offered [*10] the same defense for all acts, including a categorical denial he committed any of the offenses. See *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638 (1989) (rejecting claim of duplicitous charge when the defendant offered a blanket denial). Dalton has not established error, fundamental or otherwise.

IV. THE ADMISSION OF OTHER-ACT EVIDENCE DID NOT RESULT IN UNDUE PREJUDICE.

P24 Dalton argues the superior court's admission of overwhelming other-act evidence resulted in prejudice. We review the court's ruling on other-act evidence for an abuse of discretion. *See State v. Robinson*, 165 Ariz. 51, 56, 796 P.2d 853 (1990).

P25 Evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b)(1). Such evidence, however, may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R.

Evid. 404(b)(2). This list is not exhaustive and may include any relevant evidence admitted for a purpose other than to show the defendant's propensity to commit the alleged offense. *See State v. Scott*, 243 Ariz. 183, 187, ¶¶14-15, 403 P.3d 595 (App. 2017). Moreover, the defendant may open the door to otherwise inadmissible other-act evidence if he raises the subject in his opening statement and lines of questioning. See *State v. Mincey*, 130 Ariz. 389, 404-05, 636 P.2d 637 (1981); *State v. Connor*, 215 Ariz. 553, 563, ¶ 35, 161 P.3d 596 (App. 2007). If introduced [*11] by the defendant, the state may present "any competent evidence that directly replies to or contradicts any material evidence introduced by the accused." *State v. Fulminante*, 161 Ariz. 237, 254, 778 P.2d 602 (1988).

P26 Before trial, the state argued, and the superior court agreed, that instances of Dalton's emotional and physical abuse of James, Hannah, and Margaret's children from a previous marriage would be admissible to refute an inference that Margaret biased the children against him and that the allegations arose out of a concerted effort to end visitation. The court strove to narrow the use of the other-act evidence, specifically precluding any mention of Dalton's arrests or convictions related to the abuse. From the outset of trial, Dalton painted

Margaret as a "master manipulator" who used the children to spread her false narrative. Dalton elicited testimony that, although he was a loving and supportive father, James and Hannah treated him with extreme disrespect and once told him they had "a plan and you're not going to like it."

P27 As Dalton continued to place the children's behavior at issue, the superior court allowed the state to admit the other-act evidence. At the close of evidence, the court instructed the jury that the other-act [*12] evidence was admitted solely to explain the behavior of the state's witnesses and not as proof Dalton acted in conformity with any character trait in committing the alleged offenses. The state stressed the court's limiting instruction in closing argument.

P28 By placing the children's behavior at issue, Dalton opened the door to evidence explaining the motivation behind that behavior. Even if otherwise objectionable, the other-act evidence was ultimately offered for the proper purpose of rebutting Dalton's theory of the case. Because Dalton brought the issue into contention as early as his opening statement, he cannot claim error from the state presenting evidence to contradict his claims. *See State v. Hausner*, 230 Ariz. 60, 79, ¶ 76, 280 P.3d 604 (2012). And the superior court mitigated any potential prejudice by

providing a sufficiently limiting instruction. See State v. Newell, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833 (2006) ("We presume that the jurors followed the court's instructions."). We find no abuse of discretion.

P29 Dalton further argues the state's use of other-act evidence to demonstrate his sexual propensity to commit the charged offenses constituted error. See Ariz. R. Evid. 404(c) (requirements for admitting and limiting the jury's consideration of sexual propensity evidence). Dalton failed to adequately preserve [*13] this issue at trial and waived all but fundamental error review. Ariz. R. Evid. 103(a); *see State v. Walker*, 181 Ariz. 475, 481, 891 P.2d 942 (App. 1995). The state properly used evidence of Dalton's forceful sexual conduct, either generally during the marriage or committed directly before a charged offense, as intrinsic to the charged offenses or to rebut Dalton's consent defense. *See State v. Ferrero*, 229 Ariz. 239, 243-44, ¶¶ 20-22, 274 P.3d 509 (2012) (evidence may be admitted as intrinsic if it "directly proves the charged act" or "is performed contemporaneously with and directly facilitates commission of the charged act"); *State v. Scott*, 243 Ariz. 183, 187, ¶ 15, 403 P.3d 595 (App. 2017) (other-act evidence may be admitted to rebut consent defense to sexual assault). Insofar as the state painted Dalton as sexually aggressive, the jury could have drawn the same conclusion from

evidence solely related to the charged offenses, which involved multiple instances of forced sexual intercourse. Absent a showing of prejudice, any error in the state's use of the evidence did not amount to fundamental error. *See Escalante*, 245 Ariz. at 142, ¶ 21.

V. THE CUMULATIVE IMPACT OF THE ALLEGED INSTANCES OF PROSECUTORIAL ERROR DOES NOT WARRANT REVERSAL.

P30 Dalton contends that the cumulative impact of prosecutorial error deprived him of the right to a fair trial. He argues the prosecutor engaged in multiple instances of vouching, improper argument, [*14] harassing and argumentative conduct, and he also argues that the prosecutor relied on improper other-act evidence. In considering such a claim, we review objected-to instances for harmless error and unobjected-to instances for fundamental error. See *State v. Hulsey*, 243 Ariz. 367, ¶ 88, 408 P.3d 408, 429 (2018). After reviewing the instances for error, we determine whether the total impact rendered the defendant's trial unfair. Id.

P31 Prosecutorial error "broadly encompasses any conduct that infringes a defendant's constitutional rights," ranging from inadvertent error to intentional

misconduct. *In re Martinez*, 248 Ariz. 458, 469, ¶ 45, 462 P.3d 36 (2020). We give prosecutors wide latitude in their cross-examination of adverse witnesses and in providing impassioned remarks in closing argument. *See State v. Amaya—Ruiz*, 166 Ariz. 152, 171, 800 P.2d 1260 (1990) (criticism of defense theories permissible); *State v. Gonzales*, 105 Ariz. 434, 437, 466 P.2d 388 (1970) (emotional remarks are the "bread and butter weapon of counsel's forensic arsenal"); *State v. Holden*, 88 Ariz. 43, 54-55, 352 P.2d 705 (1960) (rigorous cross-examination of the defendant and defense witnesses permissible).

P32 Throughout trial, both Dalton and the prosecutor aggressively litigated their respective cases and engaged in combative argument in front of the jury. While the prosecutor appeared critical of Dalton's defense and grew increasingly argumentative, we do not find that any particular instance rose [*15] to the level of harassing Dalton or his counsel, vouching for the state's witnesses or information not presented to the jury, or shifting the burden of proof. The prosecutor used the other-act evidence for a proper purpose, requested clarifying rulings from the superior court, and limited witnesses from testifying as to precluded evidence. Without condoning the prosecutor's combative behavior in front of the jury, we do not find any of the alleged instances amounted

to error.

P33 The superior court properly instructed the jury, and the state repeatedly confirmed in closing argument, that statements made by counsel were not evidence, the only evidence came from the witnesses and exhibits introduced in court, the state carried the burden of proof, and the other-act evidence could only be considered for a limited purpose. See Newell, 212 Ariz. at 403, ¶ 68. On this record, we do not find that the alleged instances of prosecutorial error, considered cumulatively, prevented Dalton from receiving a fair trial.

VI. THE SUPERIOR COURT MISCALCULATED THE AMOUNT OF PRESENTENCE INCARCERATION CREDIT.

P34 Dalton argues the superior court miscalculated the amount of presentence incarceration credit applied to his sentences and, [*16] in this regard, the state concedes error. A defendant is statutorily entitled to credit for "[a]ll time actually spent in custody pursuant to an offense." A.R.S. § 13-712(B). The court's failure to grant the proper amount of presentence incarceration credit constitutes fundamental error. *See State v. Cofield*, 210 Ariz. 84, 86, ¶ 10, 107 P.3d 930(App. 2005).

P35 Although the parties agree that the superior court erred in calculating Dalton's presentence incarceration credit, they do not agree as to the amount owed. Dalton argues he is entitled to 68 days of presentence incarceration credit, including credit for the five days he spent in custody before the grand jury returned the indictment. The state disagrees, arguing Dalton was not held in custody before the indictment.

P36 The record shows that Dalton was arrested on two separate occasions before the grand jury returned the indictment, totaling five days of presentence incarceration credit. We find support for this conclusion in the state's notice of complaint, release documents, and an addendum filed by the adult probation department. Dalton is therefore entitled to 68 days of presentence incarceration credit, and we modify his sentences accordingly.

P37 Finally, Dalton received presentence incarceration credit for [*17] his sentences in each count, including consecutive sentences. "When consecutive sentences are imposed, a defendant is not entitled to presentence incarceration credit on more than one of those sentences." *State v. McClure*, 189 Ariz. 55, 57, 938 P.2d 104 (App. 1997). Though tasked

with reviewing the proper amount of presentence incarceration credit to be awarded, the state failed to address this error. "It is clear in this case that the state, had it chosen to do so, could have challenged the incorrect pre-sentence incarceration credit on appeal or by appropriate post-trial motion." *State v. Lee*, 160 Ariz. 323, 324, 772 P.2d 1176 (App. 1989). We lack the jurisdiction to correct an illegally lenient sentence absent appeal or cross-appeal by the state. *See State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741 (1990). We cannot correct this error.

CONCLUSION

P38 We affirm Dalton's convictions and resulting sentences as modified.

APPENDIX B

ORDER OF THE ARIZONA SUPREME COURT DATED JANUARY 6, 2022

State v. Dalton
Supreme Court of Arizona
January 6, 2023, Decided
CR-22-0142-PR

Reporter
2023 Ariz. LEXIS 21 *

STATE OF ARIZONA v RODNEY DALTON
Notice: DECISION WITHOUT PUBLISHED OPINION
Prior History: [*1] Court of Appeals, Division One. 1 CA-CR 21-0201.

State v. Dalton, 2022 Ariz. App. Unpub. LEXIS 393, 2022 WL 1468771 (Ariz. Ct. App., May 10, 2022)
Opinion

ORDERED: Petition for Review DENIED.
Chief Justice Brutinel did not participate in the determination of this matter.

APPENDIX C

OPENING BRIEF TO THE ARIZONA COURT OF APPEALS

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,
Appellee,
vs.
RODNEY LYNN DALTON,
Appellant.
No. 1 CA-CR 21-0201
Yavapai County Superior Court
No. P1300CR201801024

OPENING BRIEF

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Cases

Statutes

Other Authorities

INTRODUCTION

Rodney Lynn Dalton ("Rodney") appeals from his convictions and sentences for kidnapping and four counts of sexual assault.

Rodney was indicted after his ex-wife, MD, claimed he had sexually assaulted her during their marriage. The allegations came to light just days after the family court ordered unsupervised visitation with Rodney and his children, and Rodney's teenage son, JD, wrote a letter to the authorities asserting he did not want unsupervised

visitation with Rodney, who he claimed had been abusive to the family.

The indictment's broad allegations regarding the dates of the offenses with which Rodney was charged failed to provide him adequate notice, in violation of Rodney's state and federal due process rights. The evidence demonstrated that both Rodney and MD traveled for work, and were often apart for days at a time. The lack of specificity in the charging document prevented Rodney from preparing and presenting the alibi defense he noticed. The harm resulting from the lack of notice was aggravated when, on the first day of trial and without prior disclosure, MD identified a specific date for Count 5. Moreover, after the defense challenged MD's testimony regarding the only sexual assault that had been charged with a narrowed date range, Count 4, the court erroneously permitted the state to amend that charge to allege a broader 8-month time range that was not consistent with the evidence adduced.

Before trial began, the prosecutor, who knew Rodney and MD from prior misdemeanor proceedings, pushed the court to admit other-act evidence relating to the contentious divorce proceedings and child custody issues between

Rodney and MD. The state did not, however, timely disclose to the defense the specific acts it intended to admit in its case-in-chief or a proper basis (under Rule 404) for their admission. Instead, shortly before trial, the state noticed its intent to introduce other-act evidence if "parental alienation" was raised. It then filed a motion in limine seeking to limit the defense's cross-examination of Rodney's children (including JD, who wrote the letter). The state argued that if the children were impeached with specific acts of misconduct, or if testimony regarding their behavior during their visits with Rodney were admitted, it would "open the door" to other acts to explain the children's feelings.

The trial court failed to conduct a proper assessment or weighing of all the other-acts the state threatened to introduce. In an unconstitutional limitation of Rodney's rights to present a complete defense and to a fair trial, the court forced a Hobson's choice on Rodney. He could forego a complete defense to the evidence the state presented against him, or—if he decided to probe HD and JD's bias and motive with more than just general observations of their behavior—he would be forced to undergo an unfair trial in which numerous acts of alleged child abuse would be admitted to

explain the reasons for the children's bias and motives.

Although the prosecutor repeatedly sought admission of the other-act evidence, arguing the defense had "opened the door" to its admission, it was the state who first introduced other-act evidence in its opening statement and in examining its first witness. Also in its opening and examination of its first witness, the state adduced evidence regarding (and therefore put at issue) MD's motives for failing to raise her sexual-assault allegations in years-long contentious family court proceedings, and the children's motives for not wanting to visit Rodney or participate in reunification. Notably, although the state explored testimony relating to parental alienation and whether MD's conduct had caused the children to not want to visit Rodney, the strictures of the court's ruling prevented Rodney from responding to the state's evidence without "opening the door" to other-act evidence.

Rodney attempted to stay within the bounds of the objectionable limitations imposed but, given the impossibility of the Hobson's choice presented him, he was found to have "opened the door" to other-act evidence in his cross-examination of the

state's first witness. Applying an incorrect legal standard, the trial court opened the floodgates to admission of such a considerable amount of other-act evidence of child and sexual abuse, that it overtook the trial. The other-act evidence permeated the trial and was so overwhelming and prejudicial that Rodney did not receive a fair trial. In addition to numerous other-acts, the state admitted multiple acts on which Counts 4 and 5 could have been based. Although the state recognized the risk this posed of a non-unanimous jury verdict by specifying the act Count 5 was based on, it failed to make a similar election for Count 4. Consequently, Rodney was deprived of a unanimous jury verdict on Count 4, which could have been based on any one of multiple acts.

The prejudice caused by the substantial other-act evidence was further enhanced by cumulative prosecutorial misconduct permeating the proceedings. The prosecutor improperly impugned defense counsel's credibility, characterized her own cross-examination questions as "evidence" the jury could consider, vouched for the credibility of the state's witnesses, claimed evidence not presented to the jury supported the state's case, relied on the untimely disclosed other-

act evidence, demonstrated an improper demeanor, and shifted the burden of proof. The cumulative effect of the prosecutor's misconduct was so egregious that Rodney could not have received a fair trial. Absent this misconduct, the jury could have reached a different verdict.

After a 7-day trial, in which the state's case focused on uncharged sexual acts against MD and uncharged acts of child abuse, the jury deliberated for less than three hours and convicted Rodney of all charged offenses. At sentencing, the trial court incorrectly calculated the presentence incarceration credit to which Rodney was entitled. Rodney has timely appealed the convictions and sentences.

The overwhelming other-act evidence that predominated trial, together with the compounding errors, abuse of discretion, and prosecutorial misconduct, deprived Rodney of a fundamentally fair trial. This Court should vacate Rodney's convictions and sentences, and order a new trial that complies with his federal and state constitutional rights.

STATEMENT OF FACTS AND THE CASE

A. The Marriage.

Rodney and MD married in 2003, when she was pregnant with their twins, HD and JD. [Tr. 3/22/21, at 63:25-64:9, 65:18, 67:1-7] MD also had five children from a previous marriage who spent part of their time in the family home. [Id. at 64:13-65:5, 65:16; Tr. 3/23/21, A.M., at 37:18-38:5] During their marriage, Rodney and MD were frequently apart because of work travel commitments. [Tr. 3/23/21, A.M., at 34:11-14, 22-23, 51:24-25] Due to their work schedules, they were sometimes apart for days at a time. [Id. at 35:3-8, 36:25-37:2, 49:16-18, 51:11-19]

On the days they were at home together, Rodney and MD had an active sexual relationship. [Tr. 3/22/21, at 68:17-69:722] Although there were times she was disinclined to engage with Rodney, MD generally acquiesced to his requests for sex. [Id. at 69:8-15, 84:5-8; Tr. 3/23/21, A.M., at 63:1-19] The differences in the couple's expectations regarding work travel and their sexual relationship caused conflict. [Tr. 3/22/21, at 68:17-69:7; Tr. 3/24/21, at 22:7-9] In 2010, MD and Rodney sought the assistance of counselor Jeanine Foreman. [Tr. 3/22/21, at 70:6-8, 72:14-17; Tr. 3/23/21, A.M., at 100:20-101:15; Tr. 3/24/21, at 14:19-15:2, 21:21] Although they visited Foreman together for the

first session [Tr. 3/23/21, A.M., at 101:9-10; Tr. 3/24/21, at 15:25], most counseling sessions in the years that followed involved MD alone. [Tr. 3/22/21, at 71:10-11, Tr. 3/24/21, at 16:5-6, 57:1-58:14, 62:8-16]

B. The Divorce.

In 2015, when HD and JD were in middle school, MD initiated divorce proceedings. [Tr. 3/22/21, at 101:6-8, 102:23-25] The divorce was contentious and involved property and child-custody issues. [Id. at 102:15-22] The twins' relationship with Rodney deteriorated during the proceedings, resulting in the court ordering reunification services, which Carol Kibbee provided. [Id. at 103:23-25, 105:12-18, 105:25-106:4, 106:16-18; Tr. 3/23/21, A.M., at 59:9-11; Tr. 3/24/21, at 239:19-23, 261:13-20; Tr. 3/25/21, at 46:24-47:10] The children's relationship with Rodney did not improve despite those services, and as they got older, their resistance increased to the point they ran away during scheduled visitations. [Tr. 3/22/21, at 121:21-23; Tr. 3/23/21, P.M., 42:5-43:22; Tr. 3/24/21, at 158:12-22, 239:23-240:8, 275:11-278:2; see also Tr. 3/25/21, at 57:7-17, 59:16-19, 60:15-18, 64:18-22, 70:12-71:11, 72:22-24, 73:20-75:23]

In Spring 2018, shortly before Rodney was arrested on the charged offenses, JD and HD told Rodney and his girlfriend they were not "doing anymore visits," and stated, "We have a plan and you're not going to like it." [Tr. 3/24/21, at 278:19-23, 279:13-19; Tr. 3/25/21, at 135:4, 142:22- 143:13; Tr. 3/30/21, A.M., at 83:10-84:13]

In April 2018, just after the family court ordered the children to participate in unsupervised visits with Rodney, the Prescott Police Department received a letter written by JD. [Tr. 3/24/21, at 93:14-24, 149:22-150:4, 197:21-10] In it, JD (who along with HD had resisted visitations with Rodney throughout the contentious divorce and did not want to have unsupervised visits with him) claimed Rodney had physically and emotionally abused him and the family, and had sexually abused MD. [Id. at 151:19-23, 157:2-9; see also id. at 141:15-20, 149:1-5, 198:8-10] When police questioned her, MD reported (for the first time) that Rodney had sexually assaulted her. [Tr. 3/22/21, at 114:15-18; Tr. 3/24/21, at 225:22-226:6]

C. The Indictment.

Rodney was subsequently indicted on four counts of sexual assault, and one count of kidnapping. [IR 2] The alleged offenses spanned a

four-and-a-half-year period in the marriage, and four of five counts were alleged to have occurred within month-long time frames. [Id.] Despite Rodney's objection that the broad time frames gave him insufficient notice to prepare his defense (including an alibi defense [IR 84]), the court declined to dismiss the charges. [Tr. 3/12/21, at 8:22-9:13; see also Tr. 3/22/21, at 6:12-14]

D. The Trial.

At trial, MD testified that Rodney had assaulted her on four different occasions by engaging in penetrative intercourse without her consent. [Tr. 3/22/21, at 73:4-77:16, 82:2-85:3, 90:21-95:6, 98:14-99:1; see also Tr. 3/24/21, at 248:16-249:23] MD also testified regarding numerous uncharged acts of sexual abuse, child abuse, and physical aggression. [Tr. 3/22/21, at 72:5-11, 85:10-11, 97:1-19, 98:3-13, 100:8-16, 102:5-10, 115:4-18, 120:22-25; Tr. 3/23/21, P.M., at 69:18-21, 86:19-87:9; see also Tr. 3/30/21, P.M., at 21:8-15, 37:10-13, 42:3-13] She was not the only witness to do so.

In its direct examinations of Foreman, Sergeant Lopez, JD, and HD, and cross-examinations of Kibbee, John Stankewicz (a visitation supervisor), and Rodney, the state also

introduced a considerable amount of other-act evidence. [Tr. 3/24/21, at 17:17, 18:5-19, 25:18-23, 27:20-28:18, 31:9-13, 32:6-14, 33:2-9, 36:23-37:4, 39:12, 40:9-41:2, 41:16-20, 48:1-23, 86:18-88:11, 99:3-100:2-7, 100:18-23, 141:17-22, 159:24, 160:1-162:11, 162:19-163:1, 164:21-165:3, 166:2-25, 212:19-213:11, 216:7-217:16, 243:22-25, 244:1-10, 244:17-245:25, 280:9-14; Tr. 3/25/21, at 24:7-25:7, 79:3-14, 89:4-21, 91:10-12, 110:5-20, Tr. 3/29/21, A.M., at 32:3-16, 33:15-17, 49:2-53:21, 115:10-118:8, 118:20-24, 119:11-24; Tr. 3/29/21, P.M., at 30:20-32:21, 63:3-15, 55:4-9, 57:13-17]

In closing argument, the state improperly relied on the other-act evidence for propensity purposes. [See Tr. 3/30/21, P.M., at 94:7-13; see also id. at 79:16-10, 83:21-25, 84:14-85:12, 85:22-86:5, 96:16-19] In addition to the highly prejudicial other-act evidence which permeated the trial, the prosecutor's cumulative misconduct was so egregious it deprived Rodney of a fair trial. She improperly impugned defense counsel's credibility, characterized her cross-examination questions as "evidence" the jury could consider, vouched, relied on untimely disclosed other-act evidence, had an improper demeanor, and shifted the burden of proof during closing. [See Tr. 3/29/21, P.M., at 61:23-25;

Tr. 3/30/21, A.M., at 43:22-25, 52:19-23, 95:10-104:4, 115:17-132:10; Tr. 3/30/21, P.M., at 84:14-85:12, 97:7-12, 99:24-100:3, 101:14-20, 104:16, 108:10-20, 110:6-23; Tr. 3/31/21, at 36:11-17, 52:23-53:7, 55:13-20, 64:2-6, 65:11-12, 68:22-24, 75:5-7; see also Tr. 3/22/21, at 87:25-88:17]

E. Verdict, Sentence, and Appeal.

The jury found Rodney guilty of all counts of sexual assault and kidnapping. [IR 121-25; Tr. 3/31/21, at 79:4-81:21] At sentencing, the trial court found community support in mitigation, "harm to the victims" in aggravation, and imposed presumptive terms of imprisonment totaling 28 years. [Tr. 5/13/21, at 30:24-32:1] The trial court awarded Rodney only 48 days of presentence incarceration credit toward his sentences. [Id. at 32:2-8]

Rodney timely appealed, and this Court has jurisdiction pursuant to A.R.S. § 12-120.21(A)(1). [IR 141]

ISSUES PRESENTED FOR REVIEW

1. Were Rodney's constitutional rights to due process and notice violated by the broad time ranges alleged in the indictment, the admission of previously undisclosed testimony establishing a

date for Count 5, and the improper amendment broadening the time range for Count 4?

2. Did the trial court violate Rodney's rights to a complete defense and a fair trial by applying the wrong legal standard and admitting other-act evidence that was so comprehensive and prejudicial that it overwhelmed the proceedings?

3. Was Rodney deprived of his right to a unanimous jury verdict when multiple sexual acts were admitted to prove Count 4, and the state did not elect which act the charge was based on?

4. Does the cumulative prosecutorial misconduct, which includes improper argument, vouching, and burden shifting, require reversal here?

5. Did the trial court commit fundamental, prejudicial error by incorrectly calculating the number of days of presentence incarceration credit Rodney was entitled to receive?

LEGAL ARGUMENT

I. THE INDICTMENT'S BROAD TIME RANGES AND COUNT 4'S ERRONEOUS AMENDMENT UNCONSTITUTIONALLY DEPRIVED RODNEY OF ADEQUATE NOTICE.

A. Standard of Review.

Because Rodney objected below, the indictment's lack of specificity and the notice argument underlying that challenge are reviewed for abuse of discretion. *State v. Freeney*, 223 Ariz. 110, 114, ¶26 (2009); *State v. Johnson*, 198 Ariz. 245, 247, ¶4 (App. 2000). His challenge to the erroneous amendment of Count 4 based on the court and parties' misunderstanding of MD's testimony is, however, reviewed for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶19 (2005).

Fundamental error occurs when, considering the totality of the circumstances, the trial court commits an error that: (1) "went to the foundation of the case," (2) "took from the defendant a right essential to his defense," or (3) "was so egregious that he could not possibly have received a fair trial." *State v. Escalante*, 245 Ariz. 135, 142, ¶21 (2018). A "separate showing of prejudice" is only required for errors that deprive the defendant of a right essential to their defense or that go to the foundation of the case. Id. (citation omitted).

B. Relevant Procedural Background.

The indictment's date ranges for four of the five charged offenses were broad. [IR 2] Counts 1, 2, 3, and 5 each alleged approximately month-long timeframes. [Id.] By contrast, Count 4 identified a

specific day – "on or about March 1, 2012." [Id.]

Before trial, Rodney filed a Motion to Dismiss Counts 1, 2, 3, and 5, arguing there was insufficient notice of the specific dates of the alleged offenses, and a high risk of prejudice from the lack of notice. [IR 81] Rodney argued that the absence of more specific dates prevented him from presenting an alibi defense, as he was unable to address where he had been at the time the alleged offenses occurred. [Id. at 4; see also IR 84]

The state maintained it did not have to allege an exact date in the indictment because the date was not an element of the offense. [Tr. 3/12/21, at 4:16-5:2; see IR 89, 91, 95] The state also contended an alibi had not been disclosed, and expressed difficulty understanding how greater specificity would help Rodney since he and MD were married and lived together, sleeping in the same bedroom "every night together." [Tr. 3/12/21, at 5:3-14] The defense responded that due process and the rules did not permit the assaults to be charged with such vague timeframes, and explained that if Rodney knew a more specific date, it would be possible to assert an alibi defense if he was not in town when the alleged offense occurred. [Id. at 7:3-22, 8:2-8] The court denied Rodney's Motion and his

subsequently re-urged request to dismiss those counts. [Id. at 8:22-9:13; Tr. 3/22/21, at 6:12-14]

Even though the vague dates deprived Rodney the opportunity to use his work-travel records to support an alibi defense, MD used her work-travel records without prior disclosure to belatedly claim Count 5 had occurred on a specific day within the within the month-long period alleged. [Id. at 96:3-7] MD claimed to have identified the date just two days before she testified, by looking at data on her computer regarding her travel arrangements. [Tr. 3/23/21, P.M., at 38:6-17; see also Tr. 3/25/21, at 13:2-4]

Following MD's surprise testimony, Rodney moved for mistrial. [Tr. 3/23/21, A.M., at 9:9-10:25] He objected to being ambushed with a specific date that had never been disclosed in the testimony of the state's first witness's identification, after he had just argued to the jury based on the vague time frame alleged. [Id. at 9:22-12:16, 25:25-26:11] The court denied the motion. [Id. at 29:13]

When the defense cross-examined MD regarding the time frame of the second alleged assault on which Count 3 was based, she testified it had occurred "in the springtime, warmer, maybe spring, summer," and that she did not "recall the

exact date." [Tr. 3/23/21, P.M., at 88:21-95; see also id. at 89:4-5; id. at 105:13-15] Also during MD's cross-examination, the defense called into question her testimony regarding Count 4 (the only charge for which an approximate date had been identified), by challenging her recollection of when, and in which house, the assault occurred. [Tr. 3/22/21, at 90:12-94:15, 95:25-96:2; Tr. 3/23/21, A.M., at 111:18-20; Tr. 3/25/21, at 38:13-39:7; see also Tr. 3/22/21, at 94:7-15, 94:25]

Based on MD's testimony, the state sought to amend Count 4 of the indictment to allege a broader 8-month timeframe at the close of its case-in-chief. [IR 111; Tr. 3/25/21, at 35:22-36:19, 38:13-22] Although Rodney objected to the broad timeframe, the judge permitted the amendment, noting her "recollection of the testimony" was that Count 4 occurred when "it was warm and it was 2012," the date was not an element of the offense, and "[t]hese are notice pleadings." [IR 111; Tr. 3/25/21, at 38:24-39:7]

C. Legal Analysis.

The Sixth Amendment's right to notice requires a charging document to "describe the offense with sufficient specificity so as to enable the

accused to prepare a defense and to permit him to avail himself of the protection against double jeopardy." *State v. Sanders,* 205 Ariz. 208, 213, ¶16 (App. 2003), abrogated on other grounds by *Freeney*, 223 Ariz. 110; see also U.S. Const. amend. V, VI, XIV; *State v. Rivera*, 207 Ariz. 69, 73, ¶12 (App. 2004).

Absent a defendant's consent, Arizona's procedural rules permit a charge to "be amended only to correct mistakes of fact or remedy formal or technical defects." Ariz. R. Crim. P. 13.5(b). "A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *Johnson*, 198 Ariz. at 247, ¶5 (citation omitted).

To determine whether an amendment has prejudiced a defendant, appellate courts will consider, inter alia, whether the order granting the amendment violated the defendant's "right to 'notice of the charges against [the defendant] with an ample opportunity to prepare to defend against them.'" *Id.* at 248, ¶8 (citation omitted). "To be meaningful, an 'ample opportunity to prepare to defend' against amended charges generally must occur before the state has rested its case." *Id.* at

249, ¶13. If the amendment violates a defendants' right to notice and ample opportunity to prepare his defense, it "has not corrected a technical defect and is impermissible." Id. at 248, ¶8.

1. Rodney Was Deprived Of Notice And An Adequate Opportunity To Prepare His Alibi Defense By The Untimely Assertion Of A Date For Count 5.

Here, the broad time ranges alleged for Counts 1, 2, 3, and 5 did not provide adequate notice of the offenses with which Rodney was charged, particularly when the state elicited testimony that he continually had non-consensual sex with MD. The broad timeframes also deprived Rodney of an opportunity to review his travel records and prepare an alibi defense in response to the charged offenses.

The deprivation of adequate notice severely prejudiced Rodney. *See Freeney*, 223 Ariz. at 114, ¶26 ("For Sixth Amendment purposes, when a defendant does not receive constitutionally adequate notice of the charges against him, he is necessarily and actually prejudiced."). That prejudice was amplified when Rodney was ambushed by MD's sudden and undisclosed claim that Count 5 occurred the day after she returned

from a work conference. *See R.S. v. Thompson in & for Cty. of Maricopa*, 251 Ariz. 111, ¶16 (2021) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts.") (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)); *Johnson*, 198 Ariz. at 248, ¶10 ("A defendant should not be taken by surprise by the state's failure to thoroughly interview the victim and properly disclose its case."). This constitutionally inadequate notice warrants reversal.

2. Count 4's Amendment Was Not Supported By The Evidence And Prejudiced Rodney.

The amendment to Count 4 constituted fundamental error, and was unsupported by the evidence. MD did not testify that Count 4 occurred when the weather was warm. She testified that Count 3 occurred when the weather was warm. [Tr. 3/23/21, P.M., at 88:21-95, 89:4-5, 105:13-15] Her uncertainty regarding when Count 4 occurred did not justify the amendment. [Tr. 3/23/21, A.M., at 107:16-19]

Rodney was prejudiced by the timing of the state's motion to amend, which occurred at the close of its case-in-chief, after it rested. [Tr. 3/25/21, at 35:22-38:22] *Johnson*, 198 Ariz. at 249, ¶13 (finding state

prejudiced defendant's defense where it moved to amend after it rested, and where the victim was its last witness). Had the indictment not been amended in error, a jury could have found the charge not proven beyond a reasonable doubt, particularly where the defense challenged whether the offense could have occurred when, and where, MD claimed it had occurred. The widening of the date range for Count 4 was particularly prejudicial because it deprived Rodney of this defense, and of an opportunity to present alibi testimony for the specific date alleged.

II. THE TRIAL COURT ADMITTED OVERWHELMING OTHER-ACT EVIDENCE THAT WAS SO CONSIDERABLE AND PREJUDICIAL IT RENDERED THE TRIAL FUNDAMENTALLY UNFAIR.

A. Standard of Review.

Admission of other-act evidence is reviewed for an abuse of discretion. *State v. Yonkman*, 233 Ariz. 369, 373, ¶10 (App. 2013) (citation omitted). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *State v. Sandoval*, 175 Ariz. 343, 347 (App. 1993) (citation omitted).

Although Rodney's objections to admission of the

Rule 404 evidence adequately preserved this claim, reversal is warranted even under fundamental error review because its admission overwhelmed the proceedings and deprived Rodney of a fair trial. *See State v. Fulminante*, 193 Ariz. 485, 503, ¶64 (1999) ("An objection is sufficiently made if it provides the judge with an opportunity to provide a remedy.").

B. Relevant Procedural Background.

1.The State's Push To Admit Other-Act Evidence.

Just two weeks before trial, the state noticed its intent to "use other act evidence" if Rodney raised the "issue of 'parental alienation'" at trial. [IR 88] The state also noticed 11 "rebuttal" witnesses it intended to use if the defense raised either "Good Character" or "Parental Alienation." [IR 90]

At the final pretrial conference, after the prosecutor intimated her intent to file a motion seeking to preclude testimony regarding parental alienation, the court decided to address the Rule 404 issues on the first day of trial. [Tr. 3/12/21, at 10:4-13:4] The defense objected to the late motion, which was, in fact, a disguised Rule 404(b) motion for which the state was required to give adequate notice. [*Id.* at 13:5-14] Conceding it would be inappropriate to use the other-act evidence in its case-in-chief, the state

maintained it was not filing a late Rule 404(b) notice because it did not "intend to use 404(b) evidence unless the door [was] opened and then it's rebuttal evidence." [*Id*. at 20:18-25]

Rodney explained that because JD's letter had initiated the case, and HD was an eyewitness, testimony regarding their behavior was relevant. [*Id*. at 22:10-24]

He also clarified that he did not intend to elicit parental alienation testimony from Kibbee, and could call her as an eye witness to HD and JD's behavior toward Rodney, without blaming MD for their conduct. [*Id*.]

Four days later, and just six days before trial, the state filed an untimely Motion in Limine seeking to preclude testimony regarding observations of specific instances of HD and JD's behavior during supervised visits with Rodney, as well as testimony "relating to 'parental alienation.'" [IR 98; Tr. 3/12/21, at 21:15-18] The state also sought to limit defense counsel's cross-examination of HD and JD, contending that if the court allowed HD or JD to be impeached with specific instances of misconduct surrounding their visits with Rodney, the state would be "entitled to present evidence of the actual reasons why the children dislike[d]" Rodney. [IR 98]

The state similarly claimed that observations of the children's conduct during supervised visits would "open the door" to Rodney's other acts (including ones "completely unrelated to alleged 'parental alienation'"). [*Id.*]

In response, Rodney reiterated that he did not intend to call Kibbee to testify regarding parental alienation. [IR 100] Rodney objected to the state's attempt to eliminate his right to present a complete defense by limiting his ability to challenge the credibility of the witnesses against him. [*Id.*] Rodney further explained that the state's references to evidence relating to other sexual acts sounded like propensity evidence, which was inadmissible because there been no Rule 404 hearing or findings. [*Id.*] Rodney further argued that the "bad man" messaging reflected in the state's argument was inappropriate, and should be precluded. [*Id.*]

The state maintained that although the defense could ask HD and JD "about their anger/dislike toward their father, both should be permitted to explain their reasons why," including reasons that "have nothing to do with 'parental alienation," such as "years of emotional and physical abuse." [IR 101] It asserted that if Rodney questioned or argued the

"children's negative feelings" for him, the court should find the door "open to the well-document reasons" for those negative feelings. [*Id.*]

On morning of the first day of trial, the court addressed the other-act evidence dispute. [IR 103] It ruled that parental alienation testimony was inadmissible, as its probative value was outweighed by its prejudice and risk of causing jury confusion. [*Id.*] However, it found Kibbee's testimony not relating to parental alienation was relevant to Rodney's defense under Rule 401, and its probative value substantially outweighed any unfair prejudice or confusion. *[Id.*] But, the court determined that if Kibbee's testimony went "beyond general observations of behavior" and addressed "specific instances of conduct or specific interactions" with Rodney and the children, it would "open the door to the State to rebut that evidence" with "otherwise inadmissible 404 evidence." [*Id.*]

The court further ruled that Rodney could question JD and HD "about bias and prejudice" on cross-examination, but noted that if he did so, the state could allow the children "to explain reasons for this bias and prejudice." [*Id.*] It stated that if specific instances of conduct were addressed in cross-

examination, the door would be open "for specific instances of conduct to be rebutted by the state." [*Id.*] Finally, the court decided that a "404 hearing [was] not necessary," opining "this is not 404(b) evidence being offered by the State for the purposes of 404(b), it is only for rebuttal." [*Id.*] And despite the state's earlier references to numerous uncharged other acts of which Rodney had not been convicted [see IR 88, 98, 101], the court opined that there was "clear and convincing" evidence of the other acts the court was "aware of" because Rodney had "pled guilty" to them. [IR 103]

Prior to opening statements, the prosecutor pressed to preview Rodney's defense so she could determine what arguments to make in her opening statement. [Tr. 3/22/21, at 5:10-6:3] Objecting to the limitations placed on his ability to impeach HD and JD without opening the door to overwhelming other-act evidence, Rodney noted his defense was being hamstrung and that navigating the line the court had drawn was "like riding a bicycle on the edge of a razor blade." [*Id.* at 6:10-22] The court reiterated that Rodney could discuss HD and JD's relationship with Rodney in general terms, but he would open the door to other-act evidence if specific incidents of conduct were mentioned. [*Id.* at 8:9-21]

Still seeking clarification on the direction of Rodney's anticipated defense, the prosecutor argued that any impeachment, even a general impeachment, regarding HD and JD's dislike for Rodney would open the door to the other-act evidence. [*Id.* at 9:4-10:9] In essence, the prosecutor maintained that Rodney had to forego his right to impeach two of the main witnesses against him, or risk the introduction of substantial, prejudicial other-act evidence having no relevance to the charged acts. [*Id.* at 10:10-14] The court noted that it did not disagree with the prosecutor, and informed Rodney he could not "get more than one or two questions into that type of impeachment" without opening the door to the state, stating the case was one "where really everything comes in or not much comes in at all." [Id. at 10:15-23]

After again pushing for a preview of Rodney's defense, the prosecutor asserted that she had to explain why JD wrote the letter to the jury. [Id. at 11:7-18] Noting the letter was not written contemporaneous to the allegations it made, and disputing the limitations put on his ability to question JD about the three-year period between the last-alleged act and the written letter, defense counsel emphasized he did not want to open the

door to admission of other-act evidence. [Id. at 11:19-12:24] In response, the prosecutor expressed disbelief that anyone could think the children's dislike of Rodney could come in without getting into the children's reasons for refusing to visit Rodney. [Id. at 12:25-14:7] Defense counsel again objected to the lack of a Rule 404(b) hearing, and noted the court had not made the necessary Rule 404(b) findings. [Id. at 14:8-20]

Although the prosecutor was essentially seeking approval to use the other-act evidence preemptively in her opening statement (to lay out the state's anticipated case), the court nevertheless reiterated that a Rule 404(b) hearing was unnecessary because: (a) the state was not asking to use the evidence in its case-in-chief; (b) it was not "coming in [] for purposes under 404(b), which would be to show something else, motive, all—the list of all the things;" and (c) was not being used to show "action and conformity therewith," but rather for use "in response in rebuttal to impeachment." [Id. at 14:21-15:9] When Rodney objected that the abuse and violence was, in fact, being admitted to show "conformity therewith," the court stated, "[b]ut it's not in the 404(B) purpose if it's in rebuttal," and opined it did not have to have a 404(b) hearing if

there was "clear and convincing evidence." [Id. at 15:12-16] The court further stated that because Rodney had pled guilty to the two misdemeanor offenses, there was clear and convincing evidence of those acts, and it was therefore "confident" they could "come in under 404." [Id. at 15:17-20] The court, however, ruled that for purposes of the opening statement, "all doors [were] still closed." [Id. at 10:3-17]

2. The State's Opening Argument Previewed Other-Act Evidence It Intended To Elicit.

Despite the court's recommendation that the prosecutor "play it safe" [*Id.* at 19:4, 9], she previewed multiple prejudicial other-acts in her opening. Specifically, she asserted that evidence would be admitted that:

- MD "suffered sexual assault by" Rodney "over a period of years," that was "[n]ot just persistent sex," was "outright forceful, angry, aggressive sexual assault" [*Id*. at 44:14-16];
- When he "was in a bad mood because it had been several days since he'd had sex" with MD, Rodney joined MD in the shower uninvited and tried to "have anal sex with her" but instead, after MD informed him it "hurt[s] too bad," had "vaginal sex

with her as she cried" [*Id.* at 50:21-51:6];

• Rodney's "inability to take no for an answer" was repeatedly addressed in counseling, and he was "counseled … on several occasions that no means no," but "[i]t didn't stop" [*Id.* at 52:22-53:6]; and

•MD kept a diary in which she "often would talk about these incidents with Rod … about the forced sex" [at 56:2-5].

The prosecutor also argued that Rodney and MD had gone through a "tumultuous" divorce, where the "primary issue was regarding visitation" with the twins, who were court-ordered to visit Rodney, but did not want to. [*Id.* at 53:12-21] She asserted police first became aware of MD's claims when JD sent a letter to law enforcement because of his frustration with not being heard regarding his desire not to see Rodney, due to the "emotional and sexual abuse" he heard at home. [*Id.* at 53:22-54:24] The state's preview of the other-act evidence it intended to introduce in its case-in-chief was conservative. Substantially more was introduced.

3. The State, Not Rodney, First Elicited Other-Act Evidence.

During MD's direct examination, the state elicited testimony regarding multiple other-acts, including that:

- "[T]here were issues with Rodney and his behavior with … his step-children," and "later issues" with Rodney and the twins. [*Id.* at 72:5-11];
- MD had been having "a hard time," not just because of Count 3's offense, but "[b]ecause of a lot of them." [*Id.* at 85:10-11];
- In August 2014, Rodney got into the shower, upset with MD because he thought she was cheating on him, and tried to have anal sex with her, and she was "crying" and "saying it hurts pretty bad." [*Id.* at 97:1-19];
- In the shower, when MD "was telling him, please stop. Please stop. It hurts. Please don't do this," Rodney turned her around, and although she told him "no" and she did not want to have sex, he was "so mad" and pushed her against the shower wall, and had "regular intercourse" with her as she was crying. [*Id.* at 98:3-13];
- There were "incidents" involving a child, one in 2012, and one in 2015, that prompted MD to initiate divorce proceedings. [*Id.* at 100:8-16];
- The issue of "forced sex" came up in "[p]robably 75 percent of the [counseling] sessions, probably the majority of them." [*Id.* at 102:5-10];
- HD took a "domestic violence" class after junior high and told MD afterwards that "this stuff has

happened." [*Id.* at 115:4-18]; and

•There were "some other domestic violence things for [her] attorney" in her journal. [*Id.* at 120:22-25].

Despite its strong opposition to admission of parental alienation testimony, the state elicited testimony regarding whether the criminal proceedings were part of a divorce-revenge theory, or intended to prevent Rodney from having visitation with his children. [*Id.* at 116:19-118:6]

Depicting MD as a supportive mother and Rodney as a "bad dad," the state elicited testimony that MD did not try to prevent the twins from visiting Rodney during the divorce, and that although the twins had court-ordered visitation, they did not go because Rodney did not show up to pick up the children when they were supposed to be picked up for visits. [*Id.* at 103:16-25, 105:17-20, 117:8-16] MD affirmed the prosecutor's insinuation that Rodney "wasn't doing the visitation" and "that might be because he knows the kids don't want to go with him." [*Id.* at 117:17-20]

The state also elicited testimony that Kibbee had been assigned as a reunification specialist during the divorce proceedings, and that the twins did not like her, expressed strong feelings about not liking her, and were resistant to reunification. [Id. at

105:25-106:4, 121:10-23]

Following MD's direct testimony on day one of trial, and even though the defense had offered no evidence for the state to "rebut," the prosecutor again asked the court to admit other-act evidence relating to the 2015 misdemeanor assault against Rodney's stepson, contending "the door was opened." [*Id.* at 124:6-15] Rejecting her assertion that the opening statement opened the door, the court found the door had not yet been opened. [Id. at 126:12-14]

4. Rodney's Mistrial Motion.

Rodney moved for mistrial based on the introduction of evidence relating to: (a) the "bad dad" testimony he was precluded from defending against without "opening the door" to other-act evidence, (b) the already admitted other-act evidence of multiple sexual assaults (other than the four charged offenses), and (c) the other-act evidence regarding domestic violence. [Tr. 3/23/21, A.M., at 13:6-14:12]

In response, the prosecutor reiterated her belief that the defense's decision to call Kibbee had alone flung the door to other-act evidence "wide open." [*Id.* at 17:11-18:12; id. at 19:13-16] Still frustrated with the order preventing her from bringing

additional other-act evidence into the state's case-in-chief, the prosecutor complained that she "needed to be getting into this with [her] witnesses" [*Id.* at 21:4-11], and asked the court to reconsider its ruling. [*Id.* at 23:2-19]

The trial court ruled the door had not yet been opened, and denied the mistrial motion. [*Id.* at 24:15-25:1; see also Tr. 3/23/21, P.M., at 22:8-23:16]

5. MD's Cross-Examination And The "Open Door."

During MD's cross-examination, the state moved to introduce other-act evidence to show MD did not leave Rodney because she did not want to leave the children alone with Rodney due to his physical abuse of two sons from her first marriage, and the twins. [Tr. 3/23/21, P.M., at 24:10-26:12] Disapproving defense counsel's objection that Rodney's defense was being hamstrung, and that he had not opened the door to the admission of other-act evidence, the court maintained it had not "allowed any of these other acts to come in." [*Id.* at 30:16-31:24]

After the defense impeached MD's direct-examination testimony that her family court lawyer had advised her not to raise the abuse claims in the family court, the trial court suddenly ruled that the door was opened to other-act evidence of child and

sexual abuse. [*Id.* at 44:3-48:6, 52:2-19, 60:6-9; see also id. at 29:20-30:3]

Consistent with the state's position, the court erroneously concluded it was not required to assess the other-act evidence under Rule 404 because it was being used to explain the condition and context of the twins' relationship with Rodney. [Tr. 3/24/21, at 120:15-121:22, 127:22-128:2] Other-act evidence was thereafter elicited in the testimony of several other witnesses.

6. The Flood Of Other-Act Evidence Subsequently Admitted.

a. Jeanine Foreman's Testimony.

Foreman's testimony introduced substantial bad character and propensity evidence. Specifically, she testified that:

- Rodney had "anger issues" and control issues. [*Id.* at 17:17, 18:16-19, 41:16-20];
- There were concerns about Rodney's interactions with his stepchildren. [*Id.* at 18:5-10];
- MD had fears and concerns about Rodney's interactions with HD and JD. [*Id.* at 18:11-15, 31:9-13, 32:6-14];
- Rodney displayed aggressive, assertive behavior in the bedroom. [*Id.* at 25:18-23];
- "Pretty frequently" Rodney became angry and

"physically aggressive" during counseling sessions when he was told "no means no," whether with respect to his sexual relations with MD or discipline methods with the twins. [*Id.* at 36:23-37:4, 39:12, 40:9-18, 48:1-23];

•MD went through something as a child that was triggered by her sexual relationship with Rodney, had told Rodney about it, and he continued to do the triggering acts. [*Id.* at 27:20-28:18];

•MD was afraid to divorce Rodney because of issues with how he disciplined HD and JD. [*Id.* at 33:2-9, 40:21-41:2];

•Foreman and MD had concerns about the safety of the family. [*Id.* at 48:17-23]; and

•Foreman referred MD to the Yavapai Family Advocacy Center in Prescott, which, as the prosecutor described it, "works with victims involving criminal cases." [Id. at 86:18-88:11; see also id. at 91:23-92:12].

b.Sergeant Lopez's Testimony.

Sergeant Lopez similarly testified to other-acts, testifying that:

•MD's diary talked about Rodney forcing himself on her after she told him no on at least ten occasions. [*Id.* at 99:3-24; id. at 100:3-7; Tr. 3/25/21, at 24:7-25:7)];

•MD had told him the same thing when he interviewed her. [Tr. 3/24/21, at 99:25-100:2]; and
•There were concerns during the investigation about the children's safety. [*Id.* at 100:18-23].

c.JD's Testimony.

JD also testified regarding several acts of physical and emotional abuse. He testified that:
•He was "scared" about having unsupervised visits with Rodney. [*Id.* at 141:17-22, 164:21-165:3];
•In his letter to police, he stated he and his family had been emotionally and physically abused by Rodney, and that MD had been sexually abused. [*Id.* at 149:22-150:23, 151:19-23, 157:2-9];
•Rodney was "physically abusive" and had:
1. Laid hands on his half-siblings when they lived at home. [*Id.* at 160:1-11]
2.Kneed JD in the face. [*Id.* at 160:17-161:1]
3.Choked HD. [*Id.* at 160:17, 161:2-162:11]
4.Physically picked MD up from JD's bed and angrily made her come upstairs with him when she slept in JD's bed at night. [*Id.* at 166:2-18]
5. He remembered hearing MD say "no, I don't want to" behind closed doors at some point in his life. [*Id.* at 166:19-25; *but see id.* at 190:5-7; Tr. 3/25/21, at 8:1-8, 9:18-23 (confirming he did not see or hearing anything happen after that)];

•Rodney was "verbally abusive" and had:
1.Threatened to kill JD. [Tr. 3/24/21, at 161:11-15]
2.Called JD a "mama's boy and cry baby." [*Id.* at 162:19-163:1, 212:19-213:11]
3.Threatened to "kick his ass." [*Id.* at 216:7-13]
4.Called him "stupid and idiot." [*Id.* at 216:24-217:2]
5.Called him "gay" because he put pink shoelaces on his football cleats for breast cancer awareness. [*Id.* at 216:24-217:2]
6.Would threaten to give the children "something to cry about" if they were crying because of "whatever" they were hearing upstairs. [*Id.* at 217:12-16]
[*Id.* at 159:24, 217:3-11]
d.HD's Testimony.
HD's testimony likewise addressed numerous acts. In addition to saying her stepbrother was "choked" [Id. at 236:24], she testified Rodney had:
•Laid hands on her step-siblings. [*Id.* at 243:22-25];
•Laid hands on JD. [*Id.* at 244:1-3];
•Laid hands on her, and choked her. [*Id.* at 244:4-5, 244:17-245:22];
•Did things that "harmed" her. [*Id.* at 245:23-25];
•Hurt her on other occasions. [*Id.* at 280:9-14]; and
•Spoke to her and JD in a threatening tone and threatened them. [*Id.* at 244:6-10]

e.Cross-Examination of Carol Kibbee.

During Kibbee's cross-examination, the prosecutor referred to multiple other-acts, including allegations that Rodney:

- "was always abusive, always angry, always controlling." [Tr. 3/25/21, at 79:3-4];
- "laid hands" on the children. [*Id.* at 79:7-8];
- "laid hands on their older brother[]." [*Id.* at 79:10-12];
- "was abusive to their mother." [*Id.* at 79:13-14];
- choked HD. [*Id.* at 89:4-21];
- threatened to kill JD. [*Id.* at 110:5-20]; and
- had a "physical altercation" with his stepson. [Tr. 3/29/21, P.M., at 57:13-17];

The prosecutor also claimed that five years of Rodney and MD's couple's counseling involved "issues of forced sex." [*Id.* at 91:10-12]

f.Cross-Examination of John Stankewicz.

The prosecutor again referred to other-acts while cross-examining John Stankewicz, who had supervised several of Rodney's visits with the children. [Tr. 3/29/21, A.M., at 27:1-6] These included questions regarding his lack of knowledge of uncharged acts and threats toward the children, whose rude and uncooperative behavior he had observed. [*Id.* at 32:3-16, 33:15-17, 49:2-53:21]

g.Cross-Examination of Rodney.

While cross-examining Rodney, the prosecutor referred to numerous other-acts, including other acts of physical abuse, intended insults, and threats such as:

- Choking HD. [*Id.* at 115:10-117:8];
- Calling JD "mama's boy." [*Id.* at 117:9-118:4];
- Calling JD a "bench warmer." [*Id.* at 118:5-8];
- Calling JD a "cry baby." [*Id.* at 118:20-21];
- Calling JD "gay." [*Id.* A.M., at 118:22-24];
- Threatening to kill his children and stepchildren. [*Id.* at 119:11-13];
- Threatening to "kick the asses of a lot of the kids." [*Id.* at 119:19-24];
- Laying hands on the children "not spanking their bottoms, but acting out of anger and striking them in anger." [Tr. 3/29/21, P.M., at 30:20-32:12, 63:3-15];
- Laying hands on his stepsons. [*Id.* at 32:13-21];
- MD being "fearful" about the things that would happen" between Rodney and his stepsons. [*Id.* at 55:4-9].

[*See also id.* at 21:8-15, 37:10-13; Tr. 3/30/21, P.M., at 42:3-13]

Moreover, while cross-examining Rodney, the prosecutor insinuated MD had discussed

"something that happened to her as a young girl and that what [Rodney] would [do] to her sexually was bringing back those memories." [Tr. 3/29/21, P.M., at 46:23-47:3] The defense strenuously objected, arguing that had no bearing on the charged offenses, and its prejudicial effect outweighed any probative value. [*Id.* at 47:10-24]

The court directed the prosecutor (who claimed that was "the only time" she was going to "bring it up") to move on from the molestation, but she instead immediately returned to that same topic, asking at least six more questions, and further clarifications of her questions, before the court, once again, directed her to "move on." [*Id.* at 48:13-50:22]

Rodney moved for mistrial based on admission of the highly prejudicial childhood-trauma trigger testimony. [IR 116; Tr. 3/30/21, A.M., at 4:14-5:4] The court recognized the testimony did not "even go to this issue of this trial as to whether or not the defendant sexually assaulted," but concluded its admission was not unduly prejudicial, maintaining it went "to the consistency of his statement with regard to sex and discussing sex and the issues with sex." [*Id.* at 6:20-25; see also IR 117, 120]

The overwhelming amount of other-act evidence, particularly of child abuse, was so significant it

earned comment from both the prosecutor and the judge. [Tr. 3/29/21, P.M., at 15:1-11, 93:23-25]

Finally, although claiming the other-act evidence was admitted to show the children and MD's state of mind, the prosecutor's closing argument relied on the other-act evidence for propensity—to argue MD's testimony was credible because it was "consistent" with other-act testimony. [Tr. 3/30/21, P.M., at 94:7-13; *see also id.* at 79:16-10, 83:21-25, 84:14-85:12, 85:22-86:5, 96:16-19] She also correlated Rodney's conduct involving the other-acts of child abuse to the allegations of sexual assault against MD. [See Tr. 3/30/21, A.M., at 97:13-18; *see also id.* at 20:1-21:24; Tr. 3/24/21, at 19:2-19; 36:23-37:4, 40:3-18; Tr. 3/30/21, P.M., at 20:16-21:24] And consistent with her opening statement, which invited the jury to send a message to Rodney, she urged them to hold him accountable "for the first time in 10 years." [*See* Tr. 3/22/21, at 52:23-53:6, 57:11-14; Tr. 3/30/21, P.M., at 111:8-15]

C.Legal Analysis.

Arizona courts have long recognized the "high probability of prejudice" that can result from admission of other-act evidence, and the impact that evidence can have on a jury's verdict. See *State v. Terrazas*, 189 Ariz. 580, 584 (1997). Other-act

"evidence is quite capable of having an impact beyond its relevance to the crime charged and may influence the jury's decision on issues other than those on which it was received, despite cautionary instruction from the judge." *Id.* In fact, "[s]tudies confirm that the introduction of a defendant's prior bad acts 'can easily tip the balance against the defendant.'" *Id.* Trial courts must therefore "assure the state is not permitted to prove a defendant's guilt of one act through excessively prejudicial evidence of other acts." *State v. Ives*, 187 Ariz. 102, 111 (1996).

Protecting against this prejudice, Rules 404(b) and (c) place limitations on the admission of other-act evidence. Rule 404(b) does not permit admission of other act evidence "to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b)(1). Even if evidence falls under one of the exceptions under Rule 404(b), the trial court must still "find by clear and convincing evidence that the defendant committed the act," and "must find the other-act evidence 'is relevant and ... its probative value is not substantially outweighed by unfair prejudice.'" *Yonkman*, 233 Ariz. at 373, ¶11; see Ariz. R. Evid. 403.

By contrast, before other-act evidence can be admitted under Rule 404(c) to show a defendant "had a character trait giving rise to an aberrant sexual propensity to commit the offense charge," the trial court is required to make three specific findings regarding sufficiency of the evidence that the act was committed, its ability to provide a "reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged," and whether its probative value was not outweighed by unfair prejudice. Ariz. R. Evid. 404(c)(1)(A)-(D). In any case where other-act evidence is admitted pursuant to Rule 404(c), the court is required to "instruct the jury as to the proper use of such evidence." Ariz. R. Evid. 404(c)(2).

Here, the trial court abused its discretion by admitting overwhelming other-act evidence that was so prejudicial it unquestionably tipped the balance against Rodney and resulted in convictions, not based on the evidence of the charged offenses, but on the substantial, prejudicial uncharged other-acts. The error was so egregious, Rodney could not possibly have received a fair trial.

1.The Trial Court Violated Rodney's Due Process Right To Present A Complete Defense.

"Due process requires that a defendant receive a fundamentally fair trial, including a meaningful opportunity to present a complete defense." *R.S.*, 251 Ariz. at 117, ¶13 (citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)); see U.S. Const. amend. VI, XIV; Ariz. Const. Art. 2 § 4; *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

"The right to conduct a complete defense includes the right to cross-examine witnesses," *State v. Foshay,* 239 Ariz. 271, 279, ¶36 (App. 2016) (citation omitted), and "the exposure of a witness' motivation in testifying is a proper and important function" of that constitutional right. *Davis v. Alaska*, 415 U.S. 308, 316–17 (1974) (citation omitted). In assessing the reasonableness of limits placed on this right, the appellate court assesses "whether the defendant has been denied the opportunity of presenting to the trier of fact information which bears either on the issues in the case or on the credibility of the witness." *Foshay,* 239 Ariz. at 279, ¶36 (quoting *State v. Fleming*, 117 Ariz. 122, 125 (1977)); *see also* Ariz. R. Evid. 611(b). Here, the trial court conditioned Rodney's ability to present a complete defense on the erroneous and

prejudicial introduction of overwhelming other-act evidence absent the protection of the scrutiny required by Rules 401, 403, and 404. By ruling that Rodney could not impeach the credibility of the state's witnesses without opening the door to substantial, and unquestionably prejudicial other-act evidence, the trial court gave him a Hobson's choice. He could forego his opportunity to defend against the state's evidence, which included undeniably impeachable testimony, or be tried in a fundamentally unfair trial based predominantly on uncharged acts. This Hobson's choice violated Rodney's due process right to a fundamentally fair trial, and of his right to present a complete defense. The "choice" was so impossible that Rodney's cross-examination of the state's first witness alone was found to have "opened the door" to the flood of other-act evidence of child abuse, physical abuse, and sexual abuse.

The impossibility of presenting a defense is highlighted in the testimony of that first witness, MD. For example, the trial court permitted the state to introduce MD's direct-examination testimony about the importance of religion in her marriage, and how it influenced her decision not to leave Rodney despite the alleged abuse. [Tr.

3/22/21, at 68:7-16, 99:6-10, 108:19-109:18] However, when defense counsel tried to probe her justifications for not leaving Rodney [Tr. 3/23/21, A.M., at 66:15-68:13, 104:20-105:3], he was reprimanded that there was a point the court could find MD's explanation of her choices was "no longer other acts," but "rebuttal." [Tr. 3/23/21, P.M., at 29:20-30:3]

The court also allowed MD's direct-examination testimony that she supported Rodney having visitation with the twins who, at that time, were not having visitation with Rodney because he had stopped coming to pick them up. Yet, the defense was precluded from showing MD had been found in contempt in the family court for failing to have the children at ordered visitation on six different occasions. [*Id.* at 12:19-23] Defense counsel was also informed he could not adduce testimony to show Rodney was, in fact, prevented by court order from seeing JD and HD, and later just HD, without "opening the door" to a litany of other-act evidence. [*Id.* at 10:21-12:22, 23:13-16]

Finally, the court permitted MD to testify that the criminal allegations against Rodney were not made to get revenge, and that she had not raised the assaults in the divorce proceedings because her

divorce attorney advised her not to raise it there. [Tr. 3/22/21, at 109:25-110:14, 116:19-25] Yet, when the defense impeached MD's testimony and showed it was she who recommended to the divorce attorney that the allegations not be raised in those proceedings based on her conversation with the prosecutor, the trial court both struck that testimony and decided the floodgates had been opened to other-act evidence of child and sexual abuse. [Tr. 3/23/21, P.M., at 44:3-48:6, 52:2-19, 60:6-9] From that point on, the trial became focused on other-act evidence that was so overwhelming and prejudicial Rodney "could not possibly have received a fair trial." *Escalante*, 245 Ariz. at 141, ¶16.

The deprivation of Rodney's constitutional right to present a complete defense without being forced to undergo a fundamentally unfair trial went to the foundation of the defense. *Escalante*, 245 Ariz. at 141, ¶19. Rodney was invariably prejudiced by the deprivation of this right. *See State ex rel. Romley v. Super. Ct. In & For Cty. Of Maricopa*, 172 Ariz. 232, 236 (App. 1992) (recognizing the "denial of due process is a denial of fundamental fairness, shocking to a universal sense of justice").

MD's credibility was paramount because her

testimony alone was presented to establish four of the five offenses of which Rodney was convicted. [Tr. 3/22/21, at 73:18, 79:2-3 (children were asleep, and did not wake up to MD's knowledge during first alleged assault (Counts 1-2)); *id.* at 83:6-7 (expressing MD's surprise that noise "didn't wake up the kids" during second alleged assault (Count 3)); *id.* at 98:16-17 (claiming third incident (Count 5) happened in the middle of the night)] Thus, Rodney was not only prevented from impeaching MD's credibility with her misrepresentations, but was also subjected to a barrage of other-act evidence the state used to improperly bolster MD's credibility regarding the charged offenses. [*See* Tr. 3/30/21, P.M., at 83:21-85:5; see also Tr. 3/29/21, P.M., at 12:21-13:7]

2.The Trial Court Applied The Incorrect Legal Standard In Admitting The 404 Evidence.

a.Rebuttal Evidence Is Not Exempt From Rule 404's Requirements.

The court's (and prosecutor's) belief that "rebuttal" evidence was not subject to Rule 404's requirements was erroneous. Rule 404 evidence does not lose its potential for prejudice and become exempt from Rule 404's admissibility requirements simply because a party intends to use it in rebuttal (or as

was the case here, in its case-in-chief based on the prosecutor's desire to draw the sting from the defendant's anticipated defense). [See IR 103; Tr. 3/12/21, at 20:18-25; Tr. 3/22/21, at 14:21-15:20; Tr. 3/24/21, at 121:13-21, 120:10-121:6] *See State v. Burns*, 237 Ariz. 1, 18, ¶52 (2015) (recognizing rebuttal as a permitted purpose for seeking admission of other-act evidence, not as an exemption from the Rule's requirements).

The court's misunderstanding of when Rule 404's requirements apply is reflected not only in its belief that "rebuttal" evidence was exempt from those requirements, but also in its decision to delay addressing the other-act evidence until the first day of trial. [Tr. 3/12/21, at 10:13-13:4] It is also reflected in its failure to make the necessary assessments and specific findings, and failure to even notice it had permitted the state to introduce other-act evidence long before it decided the defense had opened the door. [Tr. 3/23/21, P.M., at 30:16-31:24; see IR 88, 98, 101, 103]

The court's legal error resulted in admission of other-act evidence that was plainly irrelevant, more prejudicial than probative, and so extensive it overwhelmed the trial and caused reversible error. *See State v. Anthony*, 218 Ariz. 439, 445, ¶34 (2008)

(finding reversible error where trial court applied the "wrong legal standard to "its evaluation of the prior bad acts evidence," notwithstanding the given other-act jury instruction, where the evidence of defendant's guilt on the charged offense was sufficient to support the conviction, but the state could not show the verdict was "surely unattributable" to the admitted other-act evidence). Had the court applied the correct legal standard and applied Rules 403 and 404's admissibility assessments before trial, it would have recognized the state's intent to conduct a trial-by-other-act, and avoided a fundamentally unfair trial. [See Tr. 3/29/21, P.M., at 7:13-14]

b.The Trial Court Did Not Find There Was Clear And Convincing Evidence Of All The Other-Acts.

The trial court found only two of the numerous other-acts admitted were established by clear and convincing evidence—the 2012 assault on Rodney's step-son and the 2015 choking incident involving HD which resulted in the misdemeanor convictions. [IR 103] The trial court's failure to find each of the other-acts proven by clear and convincing evidence before admitting them was error. See *Terrazas*, 189 Ariz. at 584.

c.The Trial Court Failed To Make Specific Findings

Before Admitting Sexual Propensity Evidence.

Although neither Rule 404(b) nor 404(c) expressly require an evidentiary hearing, Rule 404(c) does require the court to make specific findings before admitting sexual propensity evidence. Ariz. R. Evid. 404(c)(1)(D); *State v. LeBrun*, 222 Ariz. 183, 186, ¶10 (App. 2009).

The trial court undeniably failed to make specific findings before admitting sexual propensity evidence. Its failure to "perform this critical function" was error. *See State v. Garcia*, 200 Ariz. 471, 478, ¶37 (App. 2001) (concluding jury instruction did not relieve court's "need to properly evaluate and balance the evidence before admitting it at all," and holding that "[b]ecause the court did not perform this critical function, it abused its discretion in allowing the evidence of the uncharged acts before the jury").

d.The Trial Court Failed To A Conduct An Adequate Rule 403 Analysis Of The Other-Act Evidence.

The trial court was also required to make Rule 403 findings regarding each other-act admitted, and failed to do so. *See Ives*, 187 Ariz. at 111 ("The rules of evidence are designed to provide fair trials, and trial judges should not treat Rule 403 as an empty

promise."). This was undisputedly one of those "situations in which evidence sought to be introduced [was] more prejudicial than probative," and the state achieved its guilty verdicts through the admission of "excessively prejudicial evidence of other acts." *Id.*

The trial judge was clearly aware of her Rule 403 obligation, as she attempted to conduct the weighing when she assessed the admission of the 2015 change-of-plea testimony and precluded evidence of the orthodontic procedure on JD's braces. [See Tr. 3/24/21, at 128:2-3; Tr. 3/29/21, P.M., at 15:2-4; IR 115] Her failure to conduct a similar weighing for each bad act admitted was fundamental error. Even if, assuming arguendo, some of the other-acts had been admissible for a proper Rule 404 purpose, they should nevertheless have been precluded under Rule 403 because of their inflammatory and highly prejudicial nature. *See State v. Vigil*, 195 Ariz. 189, 193, ¶26 (App. 1999) (citation omitted). Rodney was prejudiced by the court's failure to conduct an adequate Rule 403 weighing.

3.The Other Acts Were Inadmissible.

The other-acts the state admitted were not admissible under Rules 404(b) or (c). First, the

state failed to meet its burden of establishing each of the other-acts alleged by clear and convincing evidence. Second, the state did not admit the other-acts of child abuse for a proper purpose, as demonstrated by its closing argument, which used the other-acts for a propensity purpose, which is not permitted under Rule 404(b). Third, even if the other-acts of child or sexual abuse had been established by clear and convincing evidence, and admitted for a proper purpose, they would nevertheless have been inadmissible because they were inflammatory, and highly prejudicial. *See State v. Aguilar*, 209 Ariz. 40, 49, ¶31 (2004) (recognizing the "danger of undue prejudice" is particularly great with other sexual acts) (citation omitted); *State v. Coghill*, 216 Ariz. 578, 583, ¶19 (App. 2007) ("In the context of Rule 404(b), Arizona courts have emphasized the importance of the trial court's role in removing unnecessary inflammatory detail from other-act evidence before admitting it."). The trial court's erroneous admission of the substantial, and highly prejudicial other-act evidence was not only fundamental error that went to the foundation of the case, it was error so egregious that Rodney could not possibly have received a fair trial. Reversal is therefore

warranted. *See Escalante*, 245 Ariz. at 146, ¶42; *see also State v. Naranjo*, 234 Ariz. 233, 246-47 ¶63 (2014) (finding admission of other-act evidence reversible error where it "merely depict[ed] [the defendant] as a bad person").

4.Rodney Did Not Open The Door To The Other-Act Evidence.

Notwithstanding the prosecutor's repeated assertions that the defense opened the door to the other-act evidence, she was determined to admit the other-act evidence from the beginning of trial, and repeatedly pushed the court to find the other-act evidence admissible. See supra, § II(B)(1)-(3); see also Tr. 3/29/21, P.M., at 7:13-14.

Ignoring the prosecutor's determination to introduce other-act evidence, and her actual introduction of that evidence in her case-in-chief, the trial court erroneously concluded Rodney had opened the door to the overwhelming prejudicial other-act evidence by impeaching MD's direct examination testimony, which it subsequently struck. [Tr. 3/23/21, P.M., at 44:3-48:6, 52:2-19, 60:6-9] Contrary to its belief that it had not yet admitted other-act evidence [*id.* at 31:21-22], the trial court permitted the state to elicit other-act evidence long before MD's cross-examination, and

wrongly believed Rodney opened the door. [Id. at 52:2-19, 60:6-9] Notably, the prosecutor's opening statement and direct examination of MD introduced multiple other acts. Thus, it was the state, not Rodney, who first brought in the other-act testimony. Moreover, as discussed above, the choice presented to Rodney of foregoing a complete defense or undergoing a trial-by-other-act was no choice at all. *See, supra*, § II(C)(1). In these circumstances, Rodney—who pushed for a Rule 404 hearing, objected to the admission of Rule 404 evidence, and notified the court of the impossibility of the restrictions it was placing on his defense--did not "invite" the error that deprived him of a fair trial.

5. Admission Of The Other-Act Evidence Was Undeniably Harmful And Prejudiced Rodney.

The record makes abundantly clear that the focus of this trial was not on whether Rodney was guilty of the five charged offenses, but whether his ex-wife and children were justified in their accusations against him, and would finally be able to send him a message based on years of sexual and physical abuse they had allegedly endured at his hands. From the outset, the prosecutor invited the jury to use its verdicts to send a message to a man who was

not going to change, and had refused to listen to more than one woman who had told him "no means no." [See Tr. 3/22/21, at 52:23-53:6, 57:11-14] That theme reverberated throughout the trial. [See, e.g., id. at 69:10-21, 70:12; Tr. 3/24/21, at 22:22-18:4, 18:22-19:5, 26:19-27:6, 28:2-19, 30:15-31:2, 36:16-38:3, 40:3-20, 47:21-23, 53:1-55:5, 85:22-87:15, 246:10-247:7, 249:24-250:5, Tr. 3/29/21, A.M., at 125:22-126; Tr. 3/29/21, P.M., at 42:5-10, 53:18-25, 55:12-14; Tr. 3/30/21, A.M., at 19:18-21:24, 23:9-15, 83:14-16, 85:2-5, 97:5-12, 105:10-106:24, 111:9-15; Tr. 3/30/21, P.M., at 19:18-21:2; Tr. 3/31/21, at 66:3-9] The prosecutor furthered that theme by tying the sexual abuse and alleged child abuse together, both in its questioning and by arguing Rodney would not listen to "no means no" for either type of conduct. [Tr. 3/24/21, at 19:2-19; 36:23-37:4, 40:3-18; Tr. 3/30/21, A.M., at 20:1-21:24, 97:13-18; Tr. 3/30/21, P.M., at 20:16-21:24] Even the jury's questions reflected the impact the other-act evidence and "no means no" theme had on the trial. [See, e.g., IR 108, at pdf 4; IR 110, at pdf 9; IR 118, at pdf 5] Moreover, the state used the other-act evidence as propensity evidence when, in closing, the prosecutor argued that "one of the most important things" was whether a witness's testimony was "consistent with

the other evidence," and maintained that MD's testimony was "consistent" with evidence which included references to other-act testimony. [Tr. 3/30/21, P.M., at 79:16-10, 83:21-25, 84:14-85:12, 85:22-86:5, 96:16-19]

The fundamental error resulting from admission of the other-act evidence, and the court's failure to apply the appropriate safeguards, was so egregious Rodney did not receive a fair trial. See Vigil, 195 Ariz. at 194.

D.The Trial Court Committed Fundamental, Prejudicial Error By Failing To Instruct The Jury On The Sexual Other-Acts.

A trial court is required to "instruct the jury as to the proper use" of sexual propensity evidence. Ariz. R. Evid. 404(c)(2). Here, the trial court failed not only to adequately screen the admission of sexual propensity evidence, but also to adequately instruct the jury on its use.

The trial court's other-act jury instruction was limited to the alleged abuse of HD, JD, and their half-siblings, and merely stated:

> *You have heard testimony of other acts alleged to have been committed involving [HD] and [JD] and their half-siblings. You may only consider this evidence as it*

> *related to the state of mind and/or actions of the victim, [MD], and witnesses, [JD] and [HD].*
>
> *You must not consider these other acts to determine the defendant's character or character trait or to determine that the defendant acted in conformity with such character or character trait and therefore committed the charged offense.*

[Tr. 3/30/21 P.M., at 65-66 (emphasis added)]. The other sexual abuse acts, particularly the triggering of MD's childhood victimization, was so prejudicial that the failure to instruct the jury on its use, impacted the verdict and constituted reversible error. *See Aguilar*, 209 Ariz. at 49, ¶31 (citation omitted).

The overwhelming other-act evidence before the jury was so prejudicial and considerable that it overshadowed the limited testimony regarding the charged acts, and caused the jury to render guilty verdicts after less than 3 hours of deliberations. [Tr. 3/31/21, at 79:11-13]

III.COUNT 4'S DUPLICITOUS CHARGE DEPRIVED RODNEY OF A UNANIMOUS JURY VERDICT IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

A.Standard of Review.

The duplicitous charges are reviewed for fundamental error. *See Henderson*, 210 Ariz. at 567, ¶19.

B.Relevant Procedural Background.

MD's testimony introduced multiple acts that could have served as the basis for Rodney's convictions on Counts 4 and 5. Specifically, MD's testimony established three possible penetrations that could have served as a basis for Count 4: (1) a digital penetration that occurred while she was sleeping, and that Rodney stopped when she told him to stop [Tr. 3/22/21, at 92:1-22]; (2) a subsequent digital penetration; and (3) a penile penetration. [*Id.* at 92:24-93:21] MD's testimony similarly established multiple penetrations that could have served as the basis for Count 5: (1) a digital penetration that occurred while she was sleeping, and (2) a subsequent penile penetration. [*Id*. at 98:16-23]

On the fifth day of trial, recognizing the "potential for an inconsistent verdict on Count 5," the prosecutor asked the court to clarify on the verdict forms that Count 5 was based on the penile, rather than the digital, penetration. [Tr. 3/29/21, at 9:2-23] Count 5's verdict form was subsequently amended to specify the charge was based on "sexual

intercourse by penile penetration." [IR 125] Despite its similarity to Count 5, no similar election was made for Count 4, and the verdict form did not specify whether the charge was based on one of the two digital penetrations, or the penile penetration. [IR 124]

C.Legal Analysis.

Duplicitous charges "raise[] the possibility that the defendant's right to a unanimous jury verdict under the Arizona Constitution may be violated." *State v. Klokic*, 219 Ariz. 241, 248, ¶32 (App. 2008); see also Ariz. Const. Art. 2, § 23. "This is because, in such cases, it is possible for the jury to unanimously agree that the defendant committed the offense charged without unanimously agreeing as to which of the alleged criminal acts the defendant committed to complete the offense," and when that occurs, "a court 'cannot be certain which offense served as the predicate for the conviction ... [and] the real possibility of a non-unanimous jury verdict exists.'" *Klokic*, 219 Ariz. at 248, ¶32 (citation omitted). The unremedied possibility of a non-unanimous jury verdict is fundamental error. *State v. Davis*, 206 Ariz. 377, 390, ¶64 (2003) (citation omitted).

A charge is duplicitous "[w]hen the text of an

indictment refers to only one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *Klokic,* 219 Ariz. at 244, ¶12. A duplicitous charge can, "[d]epending on the context, … deprive the defendant of 'adequate notice of the charge to be defended,' create the 'hazard of a non-unanimous jury verdict,' or make it impossible to precisely plead 'prior jeopardy [ ] in the event of a later prosecution.'" *Id.* (quoting *Davis*, 206 Ariz. at 389, ¶54).

"[I]f the State introduces evidence of multiple criminal acts to prove a single charge, the trial court is normally obliged to take one of two remedial measures to ensure that the defendant receives a unanimous jury verdict." *Id.* at 244, ¶14. "It must either require 'the state to elect the act which it alleges constitutes the crime, or instruct the jury that they must agree unanimously on a specific act that constitutes the crime before the defendant can be found guilty.'" *Id*. (citation omitted).

Here, Count 4, like Count 5, was a duplicitous charge, yet the trial court did not require the state to elect an act or instruct the jury that it had to unanimously agree on a specific act. [IR 119] This was fundamental error.

Although all three acts were penetrative and

occurred on the same night, there was a reasonable basis for the jury to distinguish between them. *See id*. at 248, ¶32 ("[E]ven when both events occur as part of a larger criminal episode, acts may not be considered part of the same criminal transaction if … there is otherwise a reasonable basis for distinguishing between them."). Specifically, there were different circumstances relating to voluntariness and consent that could have resulted in the jurors reaching different verdicts based on different acts. For example, a juror could have found lack of consent for only the first digital penetration which occurred while MD was sleeping, and found Rodney guilty based on that penetration. A juror may also have been particularly motivated to base its verdict on the digital penetration considering the highly prejudicial testimony that this conduct triggered MD's childhood trauma. Or, a juror may have instead found the digital penetration involuntary based on the ambiguous testimony regarding whether Rodney was asleep in bed when the encounter began, and the couple's practice of sleeping unclothed. [Tr. 3/22/21, at 91:2-4, 91:16-22; Tr. 3/23/21, A.M., at 109:15-111:1; Tr. 3/24/21, at 272:5-7; *see also* Tr. 3/30/21, at 65:4-11 (instructing jury it could only convict Rodney of a

crime if he consciously performed a bodily movement "as a result of effort and determination")] Alternatively, a juror could have found the penile penetration not proven beyond a reasonable doubt based on ambiguity in HD's testimony regarding whether Rodney had penile penetrative sex with MD, or attempted to do so. [*See, e.g.*, Tr. 3/24/21, at 268:15-18, 273:1-274:15] Unlike Count 5, the court did not take curative measures to address the duplicative charge. The deprivation of Rodney's right to a unanimous jury verdict prejudiced him, and requires reversal. *See Klokic*, 219 Ariz. at 246, ¶24 (discussing *Davis'* determination that "[i]n the absence of appropriate curative measures by the trial court," failure to cure duplicative charge "required reversal").

IV. CUMULATIVE PROSECUTORIAL MISCONDUCT TAINTED THE PROCEEDINGS AND DEPRIVED RODNEY OF A FAIR TRIAL IN VIOLATION OF HIS DUE PROCESS RIGHTS.

"To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶26

(1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "The term 'prosecutorial misconduct' broadly encompasses any conduct that infringes a defendant's constitutional rights," and includes "conduct ranging from inadvertent error or innocent mistake to intentional misconduct." *Matter of Martinez*, 248 Ariz. 458, 469, ¶45 (2020). Objected-to prosecutorial misconduct warrants reversal where: "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying the defendant a fair trial." *State v. Anderson*, 210 Ariz. 327, 340, ¶45 (2005) (citations omitted); *see also State v. Murray*, 250 Ariz. 543, ¶13 (2021) (affirming continued application of standard of review articulated in Anderson for objected-to misconduct); *Hughes*, 193 Ariz. at 80, ¶32 (noting prosecutorial misconduct is only harmless "if we can find beyond a reasonable doubt that it did not contribute to or affect the verdict."). If, however, the misconduct was not objected to below, a cumulative prosecutorial-misconduct claim is reviewed for fundamental error. *See State v. Vargas*, 249 Ariz. 186, 190, ¶14 (2020). Under this standard, a defendant need only "assert cumulative error exists," cite to the record and legal authority

establishing identified instances of prosecutorial misconduct, and "set forth the reasons why the cumulative misconduct denied the defendant a fair trial with citation to applicable legal authority." *Id.* A defendant is not, however, "required to argue that each instance of alleged misconduct individually deprived him of a fair trial," nor is he required to "separately assert prejudice since a successful claim necessarily establishes the unfairness of a trial." Id. at 190, ¶¶13, 15.

Here, the cumulative prosecutorial misconduct that deprived Rodney of a fair trial resulted from both objected-to and un-objected-to misconduct. Because Rodney's satisfaction of "Escalante's heightened prejudice prong'" also satisfies "the prosecutorial misconduct prejudice inquiry," he will argue his claim under fundamental error review, even though the cumulative impact of the objected-to misconduct, standing alone, requires reversal. *See Murray*, 250 Ariz. at 549, ¶16.

A. Cumulative Error Exists.

Cumulative prosecutorial misconduct occurred in the form of the prosecutor's improper criticism of defense counsel's credibility, improper characterization of her cross-examination questions

as "evidence" the jury could consider, vouching, reliance on untimely disclosed other-act evidence, improper demeanor, and burden shifting. *See id.* at ¶¶14-15.

1. The Prosecutor Improperly Impugned Defense Counsel's Credibility.

"Jury argument that impugns the integrity or honesty of opposing counsel is … improper." *Hughes*, 193 Ariz. at 86, ¶60. Here, the prosecutor did just that, by telling the jury she had "counted at least ten times when [defense counsel] said something that was totally inaccurate," while pointing at him. [Tr. 3/31/21, at 52:23-53:7] She later repeated her assertion that defense counsel was not to be believed because what he "said about the evidence" was inaccurate. [Id. at 75:5-7] This argument was error. It also constituted improper vouching when considered in the context of the prosecutor's other arguments regarding the accuracy of the information she claimed to have read into the record, see infra. *See State v. Payne*, 233 Ariz. 484, 512, ¶109 (2013) (citations omitted).

2. The Prosecutor Erroneously Argued The Jury Could Consider Her Questions During Rodney's

Cross-Examination As Evidence.

During her cross-examination of Rodney, the prosecutor brought Foreman's counseling notes to the stand and, in a claimed attempt to "get [Rodney's] memory first" before allowing him to refresh his recollection with the records, asked a series of questions regarding specific counseling notes. [Tr. 3/29/21, P.M., at 42:17-55:9, 57:3-62:12, 63:3-7] The questions were framed as seeking to determine what Rodney remembered from the counseling sessions. [Id.] The prosecutor would ask Rodney whether he remembered specific details from the counseling sessions, but did not permit him to refresh his recollection with the notes that were not submitted to the jury for deliberations. [Id.; IR 126] Notably, some questions regarding the notes included references to other-acts. [See, e.g., Tr. 3/29/21, P.M., at 50:24-51:1, 20-23, 54:16-25, 55:4-6, 57:13-15, 60:10-12, 63:3-7]

During her rebuttal closing argument, the prosecutor improperly vouched for the accuracy of the notes she "read" during her cross-examination questions, and argued they were evidence the jury could consider, stating:

> *I would submit to you if there was anything misquoted when I read those*

> *records, when Jeanine Foreman was on the stand and when the defendant was on the stand, you would have heard an objection. We would have been at the bench, and the testimony would have been stricken because we're not allowed to make up words. We're not allowed as attorneys to not read what's on a piece of paper, the actual words.*

[Tr. 3/31/21, at 55:13-20 (emphasis added)]

The prosecutor had previously argued that MD's testimony was "support[ed] and corroborate[d]" by Foreman's testimony. [Tr. 3/30/21, P.M., at 84:14-85:12] Her discussion of the "testimony" she claimed bolstered the credibility of MD's testimony, however, also referenced information that the prosecutor had read from Foreman's records during her cross-examination of Rodney. [*Id.* at 84:14-17] The prosecutor argued the notes were evidence the jury could consider, saying:

> *You heard me reading from. You will not have the counseling notes just as you won't have the police reports. The rules just down allow that. But what is said in the courtroom is evidence. All of that is evidence you can consider.*
>
> *And you heard me read from those*

> *records, both with Jeanine Foreman on the stand, with [MD] on the stand and with Rodney Dalton on the stand.*

[*Id.* at 84:18-25 (emphasis added)] The prosecutor's closing argument, later referred (once again) to what she had read from the notes. [*Id.* at 97:7-12] In a similar vein, when arguing that the testimony of two defense witnesses was not credible, the prosecutor challenged that testimony based on information she incorporated into her questions. [Tr. 3/30/21, A.M., at 95:10-104:4; Tr. 3/30/21, P.M., at 101:14-20; Tr. 3/30/21, A.M., at 115:17-132:10; Tr. 3/30/21, P.M., at 104:16]

As the "spokesperson for the state," which is "an entity whose goal is to see justice done," a prosecutor's "remarks carry special prestige," and have a "great potential" to persuade the jury. *State v. Dansdill*, 246 Ariz. 593, 602, ¶30 (App. 2019) (citing *United States v. Phillips*, 527 F.2d 1021, 1023 (7th Cir. 1975)) (internal quotation marks omitted). A prosecutor is not a witness against the defendant, however, and is not allowed to "refer to evidence which is not in the record or 'testify' regarding matters not in evidence." *State v. Acuna Valenzuela*, 245 Ariz. 197, 217, ¶71 (2018) (citation omitted).

The prosecutor's questions regarding what Rodney could "remember" were not evidence. Her argument to the jury that her "accurate" questions were evidence it could consider was improper, and drew the jury's attention to improper matters. *See State v. Neil*, 102 Ariz. 299, 300 (1967) ("[A]rguments must be based on facts which the jury is entitled to find from the evidence and not on extraneous matters that were not or could not be received in evidence.").

The prosecutor's argument was also improper vouching because it placed the prestige of the government behind MD's testimony. *Acuna Valenzuela*, 245 Ariz. at 217, ¶75 (citation omitted). By suggesting that the information she personally "read" to the jury was accurate and "consistent" with MD's testimony, the prosecutor assured the jury that MD's version of events was the "accurate" version. *See State v. Johnson*, 247 Ariz. 166, 204, ¶157 (2019) (citations omitted). This was error.

3. The Prosecutor Improperly Vouched For HD's Credibility.

In addition to her comment regarding the notes she read, and impugning defense counsel's credibility, the prosecutor vouched for HD's credibility. During her cross-examination, HD began crying. [Tr.

3/31/21, at 36:11-16, 70:22-25] The prosecutor vouched for the veracity of HD's tears, which had been challenged in Rodney's testimony and the defense's closing argument, by asserting her opinion regarding the demonstration. [Tr. 3/30/21, A.M., 52:19-23; Tr. 3/31/21, at 36:11-17] Asserting her personal opinion on the genuineness of the tears, the prosecutor argued HD was "clearly very upset to the point that I didn't even want to ask her anymore questions. She was so upset." [*Id.* at 68:22-24] This comment was an improper assurance that HD was credible because her tears were genuine. *See Johnson*, 247 Ariz. at 204, ¶157 (citations omitted).

4. The Prosecutor Improperly Claimed That Evidence Outside The Record Supported The State's Case.

Vouching also occurs when "'the prosecutor suggests that information not presented to the jury supports the witness's testimony.'" *Johnson*, 247 Ariz. at 204, ¶157 (citations omitted); accord *State v. Acuna Valenzuela*, 245 Ariz. 197, 217, ¶75 (2018) (citations omitted).

In discussing Foreman's counseling records, the prosecutor claimed that MD's religious beliefs regarding submission were reflected in records that

had not been presented to the jury stating, "it's in every one of the counseling records, every one, and I didn't read every one to you folks because it would have probably made this trial into a two-and-a half-week trial had I done so." [*Id*. at 64:2-6] Notably, the counseling records were not submitted to the jury in deliberations. [IR 126] By informing jurors the state had more than two times the amount of evidence to present than had been presented in the 7-day trial, the prosecutor sought to bolster MD and Foreman's testimony and credibility. *See Acuna Valenzuela*, 245 Ariz. at 217, ¶75 (citations omitted). This error was further compounded when, in discussing the defense's challenge to the sufficiency of the state's evidence, the prosecutor claimed there were "a lot of witnesses [she] could have called." [Id. at 65:11-12] These comments suggested information not before the jury supported MD's testimony and the state's claims, and were therefore improper. *See State v. Salcido*, 140 Ariz. 342, 344 (App. 1984) (citations omitted).

5. The Prosecutor Erroneously Used Other-Act Evidence In Its Case-In-Chief That Had Not Been Properly Disclosed.

The state is required to disclose all information regarding "other acts" it intends to admit under

Rule 404(b) before trial, and is required to identify, in that disclosure, the other-act evidence it intends to admit, the permitted purpose for which it is intended, and the reasoning supporting that purpose. Ariz. R. Evid. 404(c)(3)(A); see also Ariz. R. Crim. P. 15.1(b)(7).

The state's notice of its intent to use other-act evidence of "parental alienation" was raised at trial was filed just two weeks before trial. [IR 88] As much as the state claimed the notice was a "rebuttal" notice, its use of other-act evidence in its opening statement and direct examination of MD belied that claim. [See Tr. 3/12/21, at 10:4-13:5-14, 20:18-25] The notice was untimely and deprived Rodney of the required disclosures that could have prevented the trial-by-other-act that resulted. *See State v. Rodriguez*, 192 Ariz. 58, 64, ¶33 (1998) (recognizing prosecutor's responsibilities "go beyond the duty to convict defendants," and that "'the prosecution has a duty to see that defendants receive a fair trial.'") (citation omitted).

6. The Prosecutor's Demeanor Toward Rodney Was Improper.

The trial on the present charges was not the first time the prosecutor and Rodney had crossed paths. She had also prosecuted Rodney in the 2015

proceeding, which resulted in his plea to two misdemeanor offenses. [Tr. 3/23/21, A.M., at 96:16; Tr. 3/29/21, P.M., at 7:12-15; Tr. 5/13/21, at 23:4-14; IR 137] Her demeanor toward Rodney in this case was improper, as was her singular determination to elicit the substantial other-act evidence she had intended to use in the 2015 case [Tr. 3/29/21, P.M., at 7:13-14], and her attempt to blame its introduction into this case on the defense.

During MD's direct examination, and despite the prosecutor's protestations that she had not done so, defense counsel was forced ask that she stop turning around, pointing at Rodney and staring at him, to get a reaction out of him [Tr. 3/22/21, at 87:25-88:17] Later, during Rodney's cross-examination, the prosecutor's questioning method appeared to be aimed at getting a rise out of him, when she placed Foreman's counseling notes in front of him, asked numerous questions regarding his recollection of their contents, and refused to permit him to review the specific notes she was reading from to refresh his recollection. [See Tr. 3/30/31, P.M., at 105:5-106:16 (closing argument claiming Rodney did not like not being in "control" in cross); see also Tr. 3/29/21, P.M., at 42:17-55:9, 57:3-62:12, 63:3-7] Also while crossing Rodney, the

prosecutor's questioning elicited a badgering objection, which was sustained. [Id. at 61:23-25] The following day, when that cross-examination continued, even the court recognized the prosecutor's "tone could be slightly nicer." [Tr. 3/30/21, A.M., at 43:22-25] This demeanor was inappropriate. *See Hughes*, 193 Ariz. at 80, ¶33 ("The prosecutor has an obligation to seek justice, not merely a conviction, and must refrain from using improper methods to obtain a conviction.") (citations omitted).

7. The Prosector Unconstitutionally Shifted The Burden of Proof To Rodney.

In closing, the prosecutor shifted the burden of proof by telling the jury Rodney had to explain why JD wrote the letter, why HD went to counseling, and why Foreman wrote "what she wrote 10 years ago." [Tr. 3/30/21, P.M., at 108:10-20] The burden shifting was made more apparent when the prosecutor argued that for the jury "to have reasonable doubt," it would have to find that MD: (a) "just flat out lied to [the jury] from that witness stand," (b) was "diabolically evil," and (c) was "so evil she told her 13-year-old son to write this letter accusing her husband of rape, that she told her young daughter to go to a counselor and say that

she'd seen her father forcing sex on her mother, that she would put her children through coming into this courtroom, raising their hands, swearing to tell the truth and directing them to lie." [*Id.* at 110:6-19] The prosecutor argued, "if you think she's lying, then you have to find that she's a pretty evil woman." [*Id.*at 110:6-23]

The state's argument impermissibly shifted the burden of proof to Rodney, and violated his state and federal due process rights. U.S. Const. Amend. XIV; Ariz. Const. art. 2, § 4. The state bears the burden of proving each element of a charged offense beyond a reasonable doubt. *See State v. Jensen*, 153 Ariz. 171, 176 (1987) (citing *In re Winship*, 397 U.S. 358, 365 (1970)). By implying Rodney had to "explain" anything, and suggesting jurors had to conclude MD was "diabolically evil" to find her testimony did not satisfy the state's burden of proof, the state shifted its burden to Rodney. *See Johnson*, 247 Ariz. at 203, ¶149 ("The State improperly shifts the burden when it implies a duty upon the defendant to prove his innocence or the negation of an element.").

B. The Cumulative Misconduct Was Fundamental And Deprived Rodney of A Fair Trial.

The above errors both went to the foundation of the

case and deprived Rodney of his essential rights to notice and due process. The cumulative effect of the prosecutor's misconduct was fundamental error so egregious that Rodney "could not possibly have received a fair trial." *Escalante*, 245 Ariz. at 142, ¶21; *see also State v. Rhodes*, 110 Ariz. 237, 238 (1973) (finding prosecutor's improper closing was not harmless where evidence of guilt was not overwhelming and instead "[hung] in delicate balance with any prejudicial comment likely to tip the scales in favor of the State").

Rodney was prejudiced when the prosecutor threw the weight of the state behind the testimony of the only two witnesses who claimed to have observed the charged offenses occur – MD and HD. Their credibility was paramount to achieving a conviction. The prejudicial impact of the prosecutor's claim that she had read accurate evidence into the record which bolstered MD's testimony was further compounded by her attacks on the credibility of defense counsel and the defense witnesses.

Absent these cumulative errors—which also included the prosecutor's assurance that there were additional witnesses and more than twice the amount of evidence supporting the state's case than

she presented at trial; burden-shifting arguments; use of untimely disclosed other-act evidence; and demeanor toward Rodney—a reasonable jury could have concluded MD and HD were not credible, and the state's evidence was insufficient to satisfy its burden of proof. Reversal is therefore warranted. *See Murray*, 250 Ariz. at 551, 548 ¶¶14, 26; *State v. Woodward*, 21 Ariz. App. 133, 134-35 (1973) (reversing a conviction because the court could not conclude the State's closing remarks did not cumulatively influence the jury verdict); *State v. Filipov*, 118 Ariz. 319, 323 (App. 1977) ("We believe that while any one of the improper statements taken alone might not warrant a mistrial, the cumulative effect of the argument was prejudicial and mandates reversal.").

V. RODNEY IS ENTITLED TO ADDITIONAL DAYS OF PRESENTENCE INCARCERATION CREDIT.

A. Standard of Review.

The trial court's calculation of presentence credit is reviewed for fundamental, prejudicial error. *Escalante*, 245 Ariz. at 142, ¶21. The "failure to grant a defendant full credit for presentence incarceration" is fundamental error. *See State v. Cofield*, 210 Ariz. 84, 86, ¶10 (App. 2005) (citation

omitted).

B. Relevant Background.

Rodney was first arrested for the charged offenses on May 10, 2018. [IR 137, pdf 7] He was released the following day. [*Id.*]

Rodney was next arrested on July 9, 2018 after the Yavapai County Attorney's Office filed a Felony Complaint alleging the same charges Rodney was subsequently indicted for. [IR 8, at 1 & pdf 9-11; IR 137, at pdf 2, 7; IR 17, at pdf 17] He was released on July 11, 2018, after posting bond. [IR 8, at 2 & pdf 12-14; IR 137, at pdf 7]

On July, 13, 2018, following issuance of the grand jury indictment, Rodney was re-arrested. [See IR 5, at pdf 14-15] He reposted bond on August 1, 2019, and was subsequently released. [IR 19; see also IR 11, 21, 16].

Rodney was remanded into custody on March 31, 2021, the day the jury returned its guilty verdicts. [Tr. 3/31/2021, at 85:25-86:5] He was sentenced on May 13, 2021. [IR 135]

The presentence report recommended an illegal aggravated term based on Rodney's assertion of his constitutional right not to participate in the presentence interview, and included an incorrect calculation of the days Rodney was incarcerated

before sentencing. [IR 136] See U.S. Const. amend. V, XIV; Ariz. Const. Art. 2 § 10; *State v. Hardwick*, 183 Ariz. 649, 656 (App. 1995); *see also* A.R.S. § 13-702(C). The trial court struck the Probation Officer's improper recommendation, and awarded Rodney 48 days of presentence incarceration credit. [IR 135; Tr. 5/13/21, at 3-4]

C. LEGAL ANALYSIS

A defendant is entitled to receive credit for "[a]ll time actually spent in custody pursuant to an offense" prior to sentencing. A.R.S. § 13-712(B). This includes each day (whether full or partial) spent custody, but excludes the day of sentencing. State v. Carnegie, 174 Ariz. 452, 454 (App. 1993); State v. Lopez, 153 Ariz. 285, 285 (1987).

Rodney is entitled to two and three-days' credit for the first and second arrests, which were based on the same offenses of which he was ultimately convicted. He is also entitled to at least 20-days' credit for the time he was detained following his July 13, 2018 arrest. Excluding the day of sentencing, Rodney was also detained for 43 days from the time he was remanded into custody following the jury's verdicts, till the day of sentencing. Thus, in total, Rodney was entitled to receive 68 days of presentence incarceration credit,

and the trial court fundamentally erred in failing to award the correct amount of credit. Requiring Rodney to serve a sentence which includes days in custody that he has already completed is prejudicial.

IV. CONCLUSION

For the foregoing reasons, Rodney respectfully asks this Court to vacate his convictions and sentences, and remand for a new trial.

DATED this 4th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

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A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)

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A petition or cross-petition for review, a response to a petition or cross-petition for review, or a combined response and cross-petition, and is submitted under Rule 23(h)

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/s/ Lori L. Voepel

CERTIFICATE OF SERVICE

Lori L. Voepel, being first duly sworn, upon oath

states that on this 4th day of November, 2021, she caused the original of the foregoing OPENING BRIEF to be electronically filed with the Clerk of the Court and that she caused a copy of the foregoing brief to be e-Served through AZTurboCourt, to:

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APPENDIX D

PETITION FOR REVIEW TO THE ARIZONA SUPREME COURT

ARIZONA SUPREME COURT

STATE OF ARIZONA,
Plaintiff/Respondent,
vs.
RODNEY LYNN DALTON,
Defendant/Petitioner.

No. CR-22-0142-PR
Arizona Court of Appeals
No. 1 CA-CR 21-0201
Yavapai County Superior Court
No. P1300CR201801024

PETITION FOR REVIEW

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I. INTRODUCTION

This case warrants this Court's discretionary review for several reasons. First, in affirming convictions obtained by the state's introduction of highly inflammatory other-act evidence which predominated the trial, the court of appeals created a split in its treatment of convictions obtained by trial-by-other-act strategies. There was no reasonable basis to distinguish this case from *State v. Chantry*, No. 1 CA-CR 19-0427, 2021 WL 733414 (Ariz. App. Feb. 25, 2021) (mem. decision), review denied (Jan. 4, 2022), where the court concluded that the same type of conduct (trial by other-act) by the same prosecutor warranted reversal. Whether the state may employ a trial-by-other-act strategy in violation of a defendant's constitutional rights to a complete defense and fair trial is a recurring issue of statewide importance that warrants review.

Disregarding evidence showing otherwise, the court

erroneously concluded Dalton's opening statement opened the door to the admission of voluminous and inflammatory child abuse evidence that had no bearing on the charged offenses. Misapplying *State v. Ferrero*, 229 Ariz. 239 (2012), and failing to correctly apply Rules 403 and 404(c), the court also found that sexual-propensity evidence, including evidence suggesting Dalton constantly raped M.D., was "intrinsic" to the charged offenses, and was relevant to rebut Dalton's consent defense. This Court should grant review to correct the court's erroneous finding and failure to apply Rules 404(c) and 403. It should also grant review to clarify that neither sexual-propensity evidence suggesting Dalton constantly raped M.D. during their 12-year marriage, nor uncharged sexual acts that were temporally and circumstantially distinct from the charged offenses were "intrinsic" under Ferrero.

Second, the violation of a defendant's constitutional rights to due process and notice is an issue of statewide importance. Considering the two components of the error in isolation, the court of appeals incorrectly determined that the deprivation of constitutionally adequate notice to Dalton was not error, even though: (1) the indictment alleged broad time ranges that prevented Dalton from

presenting a noticed alibi defense he could have supported; (2) M.D. belatedly specified a date for Count 5 at trial, based on her own records; and (3) the trial court allowed the state to amend Count 4 to allege a broad time range not supported by the evidence after the state rested, and after Dalton's successful cross-examination undermined M.D.'s claims about that offense. This error on an important issue of law warrants review.

Third, in concluding multiple acts introduced for Count 4 were part of the same transaction, the court of appeals applied only half the test identified in *State v. Klokic*, 219 Ariz. 241, 245 ¶18 (App. 2008), and did not address Dalton's argument that there was a reasonable basis for the jury to distinguish between the acts. This Court should grant review to resolve whether multiple acts can constitute part of the same transaction where there is a reasonable basis for the jury to distinguish between the acts.

Fourth, the court of appeals found no prosecutorial error deprived Dalton of a fair trial. This ruling runs contrary to well-established case law and evidence establishing the prosecutor's impugnment of defense counsel's credibility, characterization of her cross-examination questions as evidence the jury could consider, vouching, claim that counseling

notes not in evidence bolstered M.D.'s credibility, use of improperly disclosed other-act evidence, improper demeanor, and burden shifting. Review is warranted to address the court's legally incorrect decision.

Each of these issues of state-wide importance warrant this Court's review.

II. FACTS AND PROCEDURAL HISTORY

Rodney Lynn Dalton was charged with five felony offenses after his ex-wife, M.D., claimed he had sexually assaulted her on four occasions during their marriage. [IR-2.] The claims came to light just days after the family court ordered that Dalton could participate in unsupervised visits with his and M.D.'s two children—J.D. and H.D. [Tr.3/24/21, at 93, 149-50, 197.] Although his testimony later established he had never observed any sexual abuse [*id.* at 190; Tr.3/25/21, at 8-9], Dalton's son (who resisted visitations with Dalton during his parents' contentious divorce), wrote a letter to the police claiming Dalton had physically and emotionally abused him and his family, and sexually abused M.D. [Tr.3/24/21 at 141, 149, 151, 157, 166, 198.]

A. Trial By Other-Act Evidence.

Before trial, the state noticed its intent to use other-act evidence if Dalton explored the children's parental alienation. [IR-88, 90; Tr.3/12/21, at 10-13, 20.] Although the state intended to introduce evidence of J.D.'s letter which triggered its investigation, just six days before trial it also sought to limit Dalton's cross-examination of the children to preclude impeachment by specific instances of misconduct during their visits with Dalton, and preclude testimony about observations of the children's behavior during their visits. [IR-98, 100-101; Tr.3/12/21, at 21; Tr.3/22/21, at 11.] On the first day of trial, the trial court, inter alia, ruled that the state could introduce otherwise inadmissible other-act evidence if Dalton questioned either J.D. or H.D. about bias and prejudice on cross-examination, or introduced specific instances of the children's conduct. [IR-103; Tr.3/22/21, at 5-6, 8-15.] This ruling precluded Dalton from impeaching two of the principal witnesses against him without risking the introduction of voluminous, prejudicial other-act evidence that had no relevance to the charged offenses. [*Id.*]

The state was first to preview other-act evidence and put the children's behavior at issue. [*Id.* at 44,

50-54, 56.] The state was also first to introduce uncharged sexual and child abuse acts, including forced anal sex, numerous instances of forced sex, domestic violence, and issues regarding Dalton's behavior with his stepchildren and children, during its direct examination of the very first witness. [*Id.* at 72, 85, 97-98, 100, 102, 115, 120.] The state also elicited testimony suggesting the criminal proceedings were not initiated to prevent Dalton from having visitation with the children, and depicting M.D. as a "supportive" mother, while depicting Dalton as a "bad dad" who did not actively participate in visitation. [*Id.* at 103, 105, 116-18.] The prosecutor's intent to admit overwhelming other-act evidence in the state's case-in-chief was made apparent by her repeated demands to introduce the evidence even before Dalton rebutted the state's inaccurate depiction of Dalton and M.D.'s parenting roles and relationships with their children. [Id. at 124; Tr.3/23/21, A.M., at 17-19, 21, 23; Tr.3/23/21, P.M., at 24-26] The prosecutor's persistence paid off, and the floodgates to the admission of other-act evidence opened after Dalton impeached M.D.'s testimony claiming that her family-court lawyer advised her not to raise the abuse claims in the family court. [Id. at 29-30, 44-

48, 52, 60.] Without subjecting the testimony to the rigors of Rules 402, 403, and 404(b) or (c), the trial court thereafter permitted the state to elicit and reference numerous instances of propensity and bad character evidence through seven additional witnesses. The references included allegations that Dalton (among other things), raped M.D. on more than ten occasions, knowingly triggered M.D.'s childhood trauma with his sexual acts, had "anger" and "control issues," was "aggressive" in the bedroom, became angry and physically aggressive when told "no means no" with respect to sex with M.D. or his discipline of the children, kneed J.D. in the face, choked H.D. and one of his stepsons, was physically and verbally abusive, and threatened to kill J.D. and "kick his ass." [Tr.3/24/21, at 17-19, 25, 27-28, 31-33, 36-37, 39-41, 86-88, 91-92, 99-100, 141, 149-51, 157, 159-66, 212-13, 216-17, 236, 243-45, 280; Tr.3/25/21, at 24-25, 79, 89, 110; Tr.3/29/21, A.M., at 27, 32-33, 49-53, 115-19; Tr.3/29/21, P.M., at 4-9, 16, 21, 24-26, 30-33, 37, 46-50, 55, 57, 63, 91.] In closing, the prosecutor relied on the other-act evidence for propensity purposes, arguing that M.D.'s testimony was credible because it was "consistent" with the other-act evidence. [Tr.3/30/21, P.M., at 79, 83-86, 94, 96; see also

Tr.3/24/21, at 19; 36-37, 40; Tr.3/30/21, A.M., at 20-21, 97; Tr.3/30/21, P.M., at 20-21.]

On appeal, Dalton challenged the admission of inflammatory other-act evidence that predominated his trial. [OB, 20-56.] Dalton objected to the violation of his constitutional right to present a complete defense, and the trial court's ruling conditioning his right to a fair trial on him foregoing impeachment of two of the state's primary witnesses. [*Id.* at 42-47.] He also objected to the trial court's failure to adhere to Rules 401, 403 and 404's requirements, and failure to instruct the jury on the sexual propensity evidence admitted. [Id. at 47-56.]

Despite the sheer volume and highly inflammatory content of the other-act evidence admitted, the court of appeals found no abuse of discretion or error in its admission. [Mem. Dec., ¶¶24-29.] Ignoring that the state was first to preview other-act evidence in its opening statement and first to put the children's behavior and M.D.'s motives for divorce at issue, the court found Dalton opened the door to the other-act evidence by "placing the children's behavior at issue" in his opening statement. [*Id.* at ¶28.] The court also concluded that a limiting instruction that addressed only the

child-abuse acts remedied any prejudice. [*Id.*; Tr.3/30/21 P.M., at 65-66.] Misapplying Ferrero, the court further concluded that the sexual propensity evidence, including testimony suggesting Dalton constantly raped M.D. and specific acts such as forced anal sex, were "intrinsic" to the charged offenses and admissible to rebut Dalton's consent defense. [*Id.* at ¶29.]

B. Deprivation of Adequate Notice.

The five offenses Dalton was charged with spanned a four-and-a-half-year period in his and M.D.'s approximately 12-year marriage. [IR-2.] Four offenses alleged month-long timeframes, whereas Count 4 specified a date. [Id.] Had the state alleged more specific dates, Dalton could have supported his noticed alibi defense since he and M.D. frequently traveled for work and were sometimes apart for days at a time. [IR-84; Tr.3/23/21, A.M., at 34-37, 49, 51.] Although the lack of specificity prevented Dalton from supporting his alibi defense, M.D. used her records just two days before trial, to ambush Dalton with her claim that Count 5 had occurred on a specific day during the alleged month-long period. [Tr.3/22/21, at 96; Tr.3/23/21, P.M., at 38; see also Tr.3/25/21, at 9-13, 25-26.] The lack of adequate notice was further compounded when the

state was permitted to amend Count 4—the only count alleging a specific date—to a broader 8-month time range after it rested, and after Dalton successfully cross-examined M.D. on her claims about when and where the offense had occurred. [IR-111; Tr.3/22/21, at 90-96; Tr.3/23/21, A.M., at 111; Tr.3/23/21, P.M., at 73, 88-89, 105; Tr.3/25/21, at 35-36, 38-39.]

On appeal, Dalton challenged the unconstitutional deprivation of adequate notice. [OB, 11-20.] Contrary to the substantial evidence detailing how Dalton could have supported his alibi defense had more specific dates been alleged, how M.D. used her own records to specify a date at trial, and how Count 4's amendment was not supported by the evidence, the court erroneously concluded that any harm to Dalton's alibi defense was theoretical, that Count 4's amendment conformed to the evidence, and that Dalton received adequate notice. [Mem. Dec., ¶¶11-19.]

C. Duplicitous Charge.

M.D. identified multiple acts on which Count 4 was based: (1) a digital penetration that occurred while she was sleeping, and that Dalton stopped when she told him to stop; (2) a second digital penetration; and (3) a penile penetration. [Tr.3/22/21, at 92-93.]

The state did not elect which act Count 4 was based on. [IR-124.]

On appeal, Dalton challenged Count 4's duplicitous charge, which deprived him of his constitutional right to a unanimous jury verdict. [OB, 56-60.] Citing Klokic, Dalton argued that here was a reasonable basis for the jury to distinguish between the three acts [id.], a contention that neither the state nor court of appeals disputed. [AB, 44-48; Mem. Dec., ¶¶20-23.] Ignoring the reasonable-basis element of Klokic's "same transactions" test, the court relied solely on temporal proximity and Dalton's assertion of innocence to find the charge was not duplicitous. [*Id*.]

D. Cumulative Prosecutorial Misconduct.

Several prosecutorial errors occurred at trial. The prosecutor:

(1) Impugned defense counsel's credibility by accusing the defense witnesses of having an agenda and trying to tell the jury things it was not supposed to hear, and telling the jury she had "counted at least ten times" defense counsel had said "something that was totally inaccurate" while claiming her own representations to the jury were accurate. [Tr.3/30/21, P.M., at 99-100; Tr.3/31/21, at

52-53, 55, 75];
(2) Characterized her cross-examination questions as "accurate" evidence the jury could consider [Tr.3/30/21, A.M., at 95-104, 115-32; Tr.3/30/21, P.M., at 84-85, 97, 101, 104; Tr.3/31/21, at 55; see also Tr.3/29/21, P.M., at 42-55, 57-63];
(3) Vouched for H.D.'s credibility by asserting her opinion on the authenticity of H.D.'s tears on the stand [Tr.3/30/21, A.M., 52; Tr.3/31/21, at 36, 68, 70];
(4) Claimed evidence outside the record—in the form of "a lot of witnesses [she] could have called" and counseling notes that were not admitted into the record and that would have doubled the length of the trial—supported M.D.'s claims [Tr.3/31/21, at 64-65; IR-126];
(5) Used improperly disclosed other-act-evidence in the state's case in chief [IR-88; Tr.3/12/21, at 10-13, 20];
(6) Engaged in improper demeanor toward Dalton, who she knew from a prior matter, such as by pointing and staring at him, baiting him, badgering him, and using an improper tone [Tr.3/22/21, at 87-88; Tr.3/29/21, P.M., at 42-55, 57-63; Tr.3/30/21, A.M., at 43; see also Tr.3/31/21, at 52-53; Tr.3/23/21, A.M., at 96; Tr.3/29/21, P.M., at 7; Tr.5/13/21, at 23;

IR-137];

(7) Unconstitutionally shifted the burden of proof to Dalton by arguing he had to explain why J.D. wrote the very letter which put the children's conduct at issue, why H.D. went to counseling, and why the couple's counselor wrote "what she wrote 10 years ago," and arguing that the jury could only have reasonable doubt if it found, inter alia, that M.D. was "diabolically evil." [Tr.3/30/21, P.M., at 108, 110.]

On appeal, Dalton challenged each of the errors which cumulatively deprived him of a fair trial. [OB, 61-75.] The court of appeals summarily concluded it could find no error, notwithstanding its recognition that the prosecutor "appeared critical of Dalton's defense and grew increasingly argumentative," and its refusal to condone her "combative behavior. [Mem. Dec., ¶32.] It also found that the identified instances of prosecutorial error did not cumulatively prevent Dalton from receiving a fair trial. [Id. at ¶¶30, 33.]

III. ISSUES PRESENTED FOR REVIEW

1. The court of appeals failed to distinguish this case from *Chantry*, where the prosecutor's introduction of inflammatory other-act evidence which predominated the trial warranted reversal.

Should Dalton's convictions and sentences have been reversed where, like Chantry, the same prosecutor employed a trial-by-other-act strategy which unconstitutionally deprived Dalton of a fair trial and violated his right to present a complete defense?

2. Did the court of appeals correctly conclude that sexual-propensity evidence—including evidence suggesting Dalton constantly raped M.D. over a 12-year period and specific sexual acts that were temporally and circumstantially distinct from the charged acts—constituted intrinsic evidence under *Ferrero?*

3. Did the court of appeals erroneously conclude Dalton received constitutionally adequate notice of the charges against him where the state alleged broad time ranges which prevented Dalton from supporting his noticed alibi defense, allowed M.D. to belatedly identify a specific date for Count 5 at trial, and then stripped Dalton of the fruits of a successful cross-examination by amending Count 4 to allege a broad time range not supported by the evidence?

4. Did the court of appeals erroneously conclude Count 4 was not duplicitous where it failed to apply the reasonable-basis element of Klokic's "same

transactions" test, and disregarded the voluntariness and consent issues that differentiated the multiple acts introduced for that offense?

5. Did the court of appeals incorrectly find cumulative prosecutorial misconduct did not deprive Dalton of a fair trial where the record and well-established authority demonstrate the prosecutor's vouching, improper impugnment of defense counsel's credibility, improper use of other-act evidence, improper demeanor toward Dalton, and unconstitutional burden-shifting?

IV. REASONS THE COURT SHOULD GRANT REVIEW

1.

In *Chantry*, the same prosecutor who tried Dalton's case employed the same trial-by-other-act strategy she employed here. [See Tr.3/22/21, at 2] Like this case, *Chantry* involved allegations of sexual offenses that occurred years before the indictment and trial, and hinged on the victim's credibility. 2021 WL 733414, at *1 ¶¶2-15. As she did here, the prosecutor elicited inflammatory other-act testimony to obtain a conviction. *Id.* at ¶¶27, 37-38. Although only two witnesses had personal knowledge of the charged offenses, numerous

witnesses testified about graphic, highly prejudicial uncharged acts, which the state then used for sexual propensity purposes in closing. *Id.* at *4, 8 ¶¶21-24, 37-38. Recognizing that other-act evidence admitted for a proper purpose is still "subject to Rule 402's relevancy test and Rule 403's balancing test," *Chantry* applied well-established law in concluding that the amount of other-act evidence admitted at trial "went far beyond what was necessary" for the asserted purpose, and found its admission constituted reversible error. *Id.* at *6-8 ¶¶27-28, 33-35. There is no rational basis to distinguish between this case and *Chantry*.

Application of the well-established case law applied in *Chantry* should have resulted in the same conclusion here—that the admission of the inflammatory, highly prejudicial child-abuse and sexual-propensity evidence was reversible error. The court of appeals' failure to reach a consistent result in this case warrants review.

Also warranting review is the court's incorrect conclusion that Dalton opened the door to the other-act evidence, and its erroneous affirmation of the unconstitutional ruling conditioning Dalton's impeachment of the state's witnesses and response to the letter which put the children's behavior at

issue, on the introduction of inflammatory and overwhelming other-act evidence that was not subjected to the scrutiny and weighing required by Rules 402, 403, and 404. See U.S. Const. amend. V, VI, XIV; Ariz. Const. art. 2 § 4. As demonstrated in M.D.'s cross examination, it was impossible for Dalton to present any defense to the state's case and M.D.'s misrepresentations without forfeiting his constitutional right to a fair trial. Even assuming, arguendo, some of the other-act evidence was admissible for a proper purpose, it should still have been precluded under Rule 403 because its inflammatory and prejudicial content outweighed any limited probative value it might have had. There is also no question that the trial court failed to make the required Rule 404(c) findings for the sexual propensity evidence, and failed to instruct the jury on its proper use, as required. Ariz. R. Evid. 404(c)(1)(A)-(D), (2).

As this Court recognized decades ago, "the introduction of a defendant's prior bad acts 'can easily tip the balance against the defendant.'" *State v. Terrazas*, 189 Ariz. 580, 584 (1997). That is exactly what happened here, where the state introduced days of highly-prejudicial, inflammatory propensity evidence which had limited probative

value, in order to obtain convictions. Review is warranted to correct the court's erroneous conclusion that the admission of other-act evidence was not reversible error.

2. In *Ferrero*, this Court held that "evidence is intrinsic … if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." 229 Ariz. at 243 ¶20. This doctrine "may not be invoked merely to 'complete the story' or because evidence 'arises out of the same transaction or course of events' as the charged act." *Id*. In this case, sexual-propensity evidence suggesting that Dalton constantly raped M.D. during their approximately 12-year marriage was not "intrinsic" to the four charged offenses which occurred in 2009, 2010, 2012, and 2014. *See id*. at 244 ¶21. It did not "directly" prove the four charges, nor was it performed "contemporaneously with" and in facilitation of the offenses. The same is true for specific other-act testimony, such as the anal-sex incident, which was temporally and circumstantially distinct from the charged conduct on which Count 5 was based. This Court should grant review to clarify that the broad scope of sexual-propensity evidence admitted was not

intrinsic under Ferrero.

Moreover, because the sexual-propensity evidence was not intrinsic, the trial court had to subject it to the scrutiny required by Rules 403 and 404(c), and instruct the jury on the proper use of the evidence, which it failed to do. Ariz. R. Evid. 404(c)(2). Review is warranted to correct the court of appeals' affirmation of the unfettered admission of prejudicial sexual-propensity evidence. See *State v. Naranjo*, 234 Ariz. 233, 246-47 ¶63 (2014); *State v. Aguilar*, 209 Ariz. 40, 49 ¶31 (2004).

3.

An indictment is constitutionally required to give a defendant sufficient notice of the charges against him, such that he can prepare his defense and avail himself of double jeopardy's protection. U.S. Const. amend. V, VI, XIV; *State v. Sanders*, 205 Ariz. 208, 213 ¶16 (App. 2003), abrogated on other grounds by *State v. Freeney*, 223 Ariz. 110 (2009). Without a defendant's consent, an amendment can only "correct mistakes of fact or remedy formal or technical defects." Ariz. R. Crim. P. 13.5(b). An amendment that changes the nature of the offense or prejudices the defendant is not "formal or technical." *State v. Johnso*n, 198 Ariz. 245, 247 ¶5 (App. 2000).

Here, the state charged Dalton with such broad time ranges for four of the offenses, that it deprived him an opportunity to present the alibi defense the evidence showed he could have supported. This not only prejudiced him, but allowed M.D. to ambush him at trial with a specific date for Count 5, which he then had no opportunity to rebut with his own records. See id. at 248 ¶10. Dalton presented a strong defense to the one count charged with specificity. However, the state stripped him of the fruits of his effective cross-examination undermining M.D.'s testimony about Count 4, by amending the charge to assert a broader 8-month time range not supported by the evidence, and doing so after the state rested. See id. at 248-49 ¶¶ 8, 13. These errors deprived Dalton of constitutionally adequate notice and an opportunity to prepare his defense. By looking at the amendment in isolation of the other notice issues, the court of appeals failed to appreciate the prejudicial impact of these errors. [See Mem. Dec., ¶¶11-19.] Its conclusion that Count 4's amendment conformed to the evidence was not only contradicted by the record, but disregarded its impact on the fruits of Dalton's cross-examination. [Id. at ¶¶18-19.] This Court should grant review to correct the

court's decision on this important issue of law.

4.

Review is also warranted to correct the court of appeals' incorrect determination that the three penetrative acts introduced for Count 4 were part of a single criminal transaction, rendering the charge not duplicitous. *Klokic* recognized that even when multiple acts "occur as part of a larger criminal episode, [they] may not be considered part of the same criminal transaction if the defendant offers different defenses to each act or there is otherwise a reasonable basis for distinguishing between them." 219 Ariz. at 248 ¶32 (emphasis added). Thus, a court must determine whether a reasonable basis exists for distinguishing between acts even where temporal proximity establishes they occurred as part of a larger criminal episode and a defendant asserts the same defenses to each of the acts. *Id.*; see also Ariz. Const. art. 2, § 23; *State v. Davis*, 206 Ariz. 377, 390 ¶64 (2003).

In reaching its incorrect decision the court of appeals assessed only the temporal proximity of the acts and Dalton's defenses, but failed to assess the circumstances surrounding the acts which established a reasonable basis for distinguishing between them. [*See* AB, 44-48 (not disputing

reasonable basis).] Its failure to apply both components of *Klokic*'s test created a split in the court's treatment of such claims that requires this Court's resolution. This Court has previously cited *Klokic*'s two-part test, and should now grant review to affirm that the existence of a reasonable basis to distinguish between multiple acts precludes a finding that they are part of the same transaction, regardless of temporal proximity or a defendant's defenses. *See State v. Sanders*, 245 Ariz. 113, 130 ¶71 (2018).

On this record a reasonable basis existed to distinguish between the acts. For example, a jury could have found the first digital penetration was involuntary (i.e. not done consciously and as a result of "effort and determination"), given testimony that Dalton and M.D. were both naked and asleep in bed when the encounter began. [Tr.3/22/21, at 91; Tr.3/23/21, A.M., at 109-11; Tr.3/24/21, at 272; see also Tr.3/30/21, at 65.] The consent and voluntariness concerns that could have caused a jury to treat the penetrations differently; the inflammatory testimony regarding M.D.'s childhood trauma and digital penetrations; or the ambiguity in H.D.'s testimony regarding whether the penile penetration occurred are just some

examples of the reasonable bases that required the state to either elect an act, or the jury to unanimously agree to an act. [OB, 59-60; Tr.3/24/21, at 268, 273-74:15; Tr.3/29/21, P.M., at 46-50.] Review is warranted to correct the unconstitutional deprivation of Dalton's right to a unanimous verdict.

5.

Finally, review is warranted to correct the court of appeals' failure to apply well-established case law in concluding that no prosecutorial error occurred that deprived Dalton of a fair trial. [Mem. Dec., ¶¶30-33.] Prosecutorial error occurred in Dalton's trial. First, the prosecutor's accusation that defense counsel had told the jury several "totally inaccurate things" was improper under well-established case law prohibiting the impugnment of counsel's integrity or honesty, as were the prosecutor's attacks on the key defense witnesses. *See State v. Hughes*, 193 Ariz. 72, 85-86 ¶¶59-60 (1998); *State v. Bailey*, 132 Ariz. 472, 479 (1982). The court's conclusion that this was not error runs contrary to this authority.

Second, the court's contention that the prosecutor

did not vouch is unsupported by the record and long-standing case law holding a prosecutor vouches when she: (1) "suggests that information not presented to the jury supports the evidence, testimony, or witness"; or (2) "places the prestige of the government behind its witness," such as by giving personal assurances of a witness's veracity. *State v. Johnson*, 247 Ariz. 166, 204 ¶157 (2019) (citations omitted); *State v. Acuna Valenzuela*, 245 Ariz. 197, 217 ¶75 (2018); *State v. Payne*, 233 Ariz. 484, 512 ¶109 (2013) (cleaned up). The prosecutor's arguments that she—in contrast to defense counsel who she claimed said "totally inaccurate" things—had read the jury accurate information in her cross-examination questions because she was "not allowed to make up words," was vouching under this Court's binding precedent. Her arguments that the jury could consider her cross-examination questions—in which she read from notes that were not admitted into evidence—as evidence that was consistent with M.D.'s testimony also placed the state's prestige behind those unadmitted records and M.D.'s testimony, and was vouching. *See Acuna Valenzuela*, 245 Ariz. at 217 ¶71.

The prosecutor continued to vouch when she improperly claimed that records that would have

doubled the length of the trial and that were not presented to the jury supported M.D.'s testimony, and when she claimed that there were "a lot of witnesses" she could have (but did not) call, in attempting to rebut Dalton's challenge to the sufficiency of the evidence. These arguments relying on witnesses and information not in evidence were vouching, as was the prosecutor's expression of her personal opinion about the genuineness of H.D.'s tears on the stand. *See Johnson*, 247 Ariz. at 204 ¶157. On this record, the court's conclusion that no vouching occurred was a legal error that warrants review.

Third, as discussed above, the state did not admit the child-abuse and sexual-propensity evidence for a proper purpose. The state's failure to properly disclose the other-act evidence it intended to introduce at trial was also misconduct which deprived Dalton of the required disclosures that could have enabled him to prepare an even stronger objection to the overwhelming other-act evidence the state ultimately introduced. Ariz. R. Evid. 404(c)(3)(A); Ariz. R. Crim. P. 15.1(b)(7). The court's conclusion that its admission without proper disclosure was not error is itself a legal error that warrants review. Also warranting review are the

court's erroneous rulings that the prosecutor's conduct and burden-shifting arguments were not error. *See Johnson*, 247 Ariz. at 203 ¶149. The conclusion that no prosecutorial error occurred is a legal error.

That the errors deprived Dalton of a fair trial is also clear. Dalton's convictions hinged on M.D.'s credibility as there was no overwhelming evidence of guilt. The timing of M.D.'s claims, the circumstances of the letter triggering the investigation, the absence of physical evidence, and the passage of time were just some of the factors undermining her credibility. On this record, a court cannot reasonably conclude that the prosecutor's errors did not cumulatively influence the jury's verdicts. *See State v. Murray*, 250 Ariz. 543, 551, 548 ¶¶14, 26 (2021); *State v. Woodward*, 21 Ariz. App. 133, 134-35 (1973). Review is warranted to correct the court of appeals' erroneous conclusion otherwise.

V. CONCLUSION

For the foregoing reasons, Dalton respectfully requests the Court to grant review.

DATED this 28th day of April, 2023.

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APPENDIX E

CONSTITUTIONAL PROVISIONS

USCS Const. Amend. 14, Part 1 of 15

Current through the ratification of the 27th Amendment on May 7, 1992.

United States Code Service

Amendment 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

USCS Const. Amend. 14

USCS Const. Amend. 5, Part 1 of 13
Current through the ratification of the 27th Amendment on May 7, 1992.
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Amendments
Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

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No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

USCS Const. Amend. 5