IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CHRISTOPHER M. CLEMENTS,
Appellant.

No. 2 CA-CR 2022-0166
Filed October 28, 2024

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20183978001
The Honorable Deborah Bernini, Judge
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Sklar authored the decision of the Court, in which Judge Brearcliffe and Judge Kelly concurred.

S K L A R, Presiding Judge:

¶1 Christopher Clements appeals his convictions and sentences for first-degree murder and kidnapping of thirteen-year-old victim, M.G. He argues that: (1) the trial court improperly declined to strike expert testimony about the location of his cell phone due to a disclosure violation; (2) the court improperly denied a jury instruction concerning lost evidence of a DNA sample; (3) the state committed prosecutorial error in its closing argument; (4) police improperly seized his electronic devices; (5) the court improperly admitted evidence of images on those devices; and (6) the judge who decided certain pretrial motions was biased such that structural error occurred. For the following reasons, we reject these arguments and affirm Clements's convictions and sentences.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 We view the trial evidence in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Clements, though not all factual material we describe was presented to the jury. *See State v. Nunn*, 250 Ariz. 366, ¶ 2 (App. 2020). On June 3, 2014, Clements kidnapped M.G. while she was walking to a friend's house, killed her, and left her body in the desert northwest of Tucson. Police began investigating M.G.'s death when her body was found a few days after her disappearance, but the case remained unsolved for three years.

¶3 Clements became a suspect in early 2017. At that time, he was in jail in Maricopa County on unrelated charges. He was also assisting police in investigating the murder of a different child, I.C. In doing so, he led them to the site where M.G.'s body had been recovered. Although Clements did not reference M.G. at that time, the recovery site was isolated and not publicly known. Police therefore began investigating him for M.G.'s murder.

¶4 In September 2018, a grand jury indicted Clements for first-degree murder and kidnapping of M.G., a minor under fifteen. In the same indictment, he was also charged with the kidnapping and murder of

I.C., as well as the burglary of I.C.'s house. In addition, he was charged with numerous other crimes, including fourteen counts of sexual exploitation of a minor, which related to images of minor children found in Clements's possession.

¶5 The murder and kidnapping charges related to M.G. were severed, and they are the sole focus of this appeal. After a thirteen-day trial in September 2022, the jury found Clements guilty of both offenses. It unanimously agreed that he had committed felony murder, with kidnapping as the underlying felony. It did not unanimously agree that the murder was premeditated. The trial court sentenced him to natural life plus seventeen years' imprisonment. Clements appealed.

DISCLOSURE VIOLATION INVOLVING CELL PHONE MAPS

¶6 We first address Clements's argument that the trial court erred in declining to strike testimony from one of the state's expert witnesses who testified about material that had not been disclosed. When a disclosure violation has occurred, we review the court's choice of sanction for an abuse of discretion. *See State v. Naranjo*, 234 Ariz. 233, ¶ 29 (2014).

I. Nature of disclosure violation

¶7 The testimony at issue concerned location data from Clements's cell phone. The state's cell phone expert, Sy Ray, testified at trial that on June 4, 2014 between 12:20 a.m. and 2:20 a.m., Clements's phone received a signal from a cell tower with coverage extending to the location where M.G.'s body was found. To obtain this information, Ray had used Clements's cell phone records to determine which towers received the phone's signal and when that signal was passed off to a different tower. From that information, Ray estimated Clements's location and movements on June 3 and 4. He also created maps showing the coverage areas of the towers, which were admitted into evidence.

¶8 Before trial, however, the state had disclosed different maps. Unlike the maps used at trial, those maps showed the location of M.G.'s body as outside the cell tower coverage areas for Clements's phone. Apparently unbeknownst to the state, though, Ray had not prepared the disclosed maps. They had instead been prepared by the Tucson Police Department (TPD) and mistakenly disclosed as Ray's. Although Ray had prepared his own maps before trial, the state inadvertently failed to disclose them.

¶9 One week after Ray testified, Clements moved to strike his testimony. The state conceded that it had violated its disclosure obligations by failing to disclose Ray's maps. But it argued that preclusion was not a proper remedy because: (1) Ray's testimony was consistent with his pretrial interview conducted by Clements; (2) Ray had been cross-examined and could still be re-called to the stand; and (3) the harm from precluding his testimony would be significant. The trial court denied Clements's motion.

II. Whether trial court abused its discretion in denying motion to strike

¶10 In deciding how to sanction a party's disclosure violation, Rule 15.7(c) of the Arizona Rules of Criminal Procedure requires the trial court to "determine the significance of the information not timely disclosed, the violation's impact on the overall administration of the case, the sanction's impact on the party and the victim, and the stage of the proceedings when the party ultimately made the disclosure." This court's opinion in *Jimenez v. Chavez*, 234 Ariz. 448, ¶ 17 (App. 2014), similarly requires courts to consider "(1) the importance of the evidence; (2) the surprise or prejudice to the opposing party; (3) whether the violation was motivated by bad faith; and (4) any other relevant factors."

¶11 Any sanction "must be proportional to the violation and must have a minimal effect on the evidence and merits." *Naranjo*, 234 Ariz. 233, ¶ 30 (quoting *State v. Payne*, 233 Ariz. 484, ¶ 155 (2013)). A court need not impose a sanction where the disclosure violation was harmless. Ariz. R. Crim. P. 15.7(b)(1). Preclusion is rarely a proper sanction. *Naranjo*, 234 Ariz. 233, ¶ 30. It is appropriate only when "less stringent sanctions would not achieve the ends of justice." *Id.*

¶12 In explaining its decision not to strike Ray's testimony, the trial court tracked the *Jimenez* factors, which rely in part on Rule 15.7(c). It found that although the evidence from the undisclosed maps was important, Clements was not surprised by the differences. He had already known that the state would present evidence that his cell phone signal was detected in the area where M.G.'s body was found. The court further found that the violation was not in bad faith because Clements's pretrial interview with Ray was telephonic, which potentially prevented the parties from seeing Ray's maps and realizing that they differed from the Tucson police maps the state had disclosed. Finally, the court found that Clements was not prejudiced because his own expert witness had been present during the entirety of Ray's testimony and later had the opportunity to present contrary testimony on the maps.

¶13 Although we agree with Clements that the state violated its disclosure obligations, the trial court did not abuse its discretion in declining to strike Ray's testimony. First, the record supports its conclusion that despite the maps' importance, Clements was not surprised by their introduction. For example, testimony that Clements's cell phone was in the area of M.G.'s body had been presented to the grand jury and at a pretrial evidentiary hearing. Ray's testimony was also consistent with his pretrial interview and his report.

¶14 The trial court also had a sufficient basis for finding that Clements was not prejudiced. The significance of Ray's testimony was that Clements's phone had been in the general area of M.G.'s body in the early morning of June 4, but its exact location could not be determined. While in that area, the phone disconnected from the network at around 2:30 a.m. and did not reconnect for four hours. This same information was available through the evidence that had been properly disclosed and accessible to Clements, which included Ray's pretrial interview and report. The court did not abuse its discretion by considering that information in context, rather than focusing narrowly on the maps. And Clements diminished any prejudice by presenting testimony from his own expert that highlighted the differences between the previously disclosed maps and the maps Ray discussed at trial.

¶15 Finally, the trial court did not abuse its discretion in concluding that the state did not act in bad faith. Contrary to Clements's perspective, which he emphasized at oral argument before this court, nothing in the record suggests that the state intentionally disclosed the wrong maps or concealed them from Clements. It was therefore reasonable for the court to conclude that the disclosure was inadvertent and primarily due to the limitations of a telephonic interview, not the result of "willful misconduct" or "bad faith." *Naranjo*, 234 Ariz. 233, ¶¶ 30, 34.

¶16 Clements argues that the state knew before Ray testified that the maps would be different from those that were disclosed. He further argues that the state misled the trial court by asserting, when it moved to admit Ray's maps during trial, that the content of the sets of maps was "identical," though they contained "some slight, slight difference[s] in terms of the coverage areas." Even though "identical" and "slight" were not accurate, the court was in a better position than we are to weigh the extent of the differences between the two sets of maps in conjunction with the other *Jimenez* factors. We therefore defer to its perspective and

judgment concerning sanctions. *State v. Meza*, 203 Ariz. 50, ¶ 19 (App. 2002).

¶17 This deference is especially proper because Clements requested only that Ray's testimony be stricken, not any lesser remedy such as striking the maps from the record. *See Naranjo*, 234 Ariz. 233, ¶ 30 ("'[P]reclusion is rarely an appropriate sanction for a discovery violation' and should be invoked only when less stringent sanctions would not achieve the ends of justice." (alteration in *Naranjo*) (citation omitted) (quoting *State v. Delgado*, 174 Ariz. 252, 257 (1993))). Thus, we cannot conclude that the court abused its discretion in declining to strike Ray's testimony.

INSTRUCTION CONCERNING PRESERVATION OF EVIDENCE

¶18 Clements further argues that the trial court abused its discretion in denying his proposed jury instruction about the state's purported failure to preserve DNA evidence. We review the court's decision to grant or deny such an instruction for an abuse of discretion. *State v. Murray*, 184 Ariz. 9, 33 (1995).

¶19 The evidence at issue was a small quantity of male DNA on anal swabs taken from M.G.'s body. When the investigation began in 2014, police declined to test that DNA to develop a profile. Approximately two years later, the sample had degraded, and no DNA profile could be obtained.

¶20 After police focused their investigation on Clements in 2017, they sent for testing other male DNA taken from M.G.'s pubic-hair combings. An analyst created a partial profile, which was consistent with a profile generated from buccal swabs obtained from Clements.

¶21 In Clements's view, had the anal-swab DNA been tested when it was obtained in 2014, it could have exonerated him by excluding him as a contributor. He therefore twice requested an instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964), which would have informed the jury that it could draw a negative inference from the state's failure to preserve evidence. *See State v. Glissendorf*, 235 Ariz. 147, ¶ 5 (2014). The trial court denied both requests.

¶22 To be entitled to a *Willits* instruction, a defendant must show "(1) the state failed to preserve obviously material and reasonably accessible evidence that could have had a tendency to exonerate the

accused; and (2) there was resulting prejudice." *State v. Hernandez*, 250 Ariz. 28, ¶ 10 (2020).

¶23 We assume, as the state does, that this evidence was material. We therefore focus on whether testing the anal-swab DNA could have had a tendency to exonerate Clements. *See Glissendorf*, 235 Ariz. 147, ¶ 18. We are guided by our supreme court's opinion in *Hernandez*. There, the court concluded that the police's failure to collect DNA and fingerprint evidence from a car did not entitle the defendant to a *Willits* instruction. *Hernandez*, 250 Ariz. 28, ¶¶ 19-25. The driver, who fled from an officer and abandoned the car, had been charged with unlawful flight from law enforcement. *Id.* ¶¶ 2-6. The officer had seen his face at the time, and later identified him twice from photographs. *Id.* ¶¶ 2-4. The court concluded that any DNA or fingerprint evidence from the car would not "conclusively exculpate" the driver. *Id.* ¶ 21. Even if he were the driver, he might not have left identifiable DNA or fingerprints. *Id*.

¶24 Here too, the trial court reasonably concluded that the anal-swab DNA would not have had the tendency to exonerate Clements. Had there been sufficient male DNA to test, investigators might have created a partial profile. That profile would have either been consistent or inconsistent with Clements's DNA. If consistent, that would have inculpated him. But if inconsistent, it would not necessarily have exculpated him because the DNA from the pubic-hair combings was still consistent with his profile. At most, it might have suggested that another person was also involved in M.G.'s death. As such, the court did not abuse its discretion in denying Clements's requested jury instruction.

PROSECUTORIAL ERROR

¶25 Clements also argues that the state committed prosecutorial error during closing argument by making a statement not reasonably supported by the evidence. We review this argument for fundamental error because Clements did not object at trial. *See State v. Murray*, 250 Ariz. 543, ¶ 16 (2021).

¶26 The statement at issue concerned M.G. being transported in the trunk of Clements's car. The prosecutor argued: "[W]hile the State can't tell you exactly when or exactly how this defendant abducted [M.G.], we absolutely know that he did because she ended up in his trunk and then she ended up in the desert 30 miles away from her home . . . ."

¶27 Prosecutorial error is any conduct infringing on a defendant's constitutional rights. *Id.* ¶ 12. It broadly encompasses both inadvertent error and intentional misconduct. *Id.* Although prosecutorial error can occur during closing arguments, "[p]rosecutors have 'wide latitude' in presenting their arguments to the jury." *State v. Morris*, 215 Ariz. 324, ¶ 51 (2007) (quoting *State v. Jones*, 197 Ariz. 290, ¶ 37 (2000)). A prosecutor may argue and draw inferences reasonably supported by the evidence. *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 88 (2018). However, a prosecutor may not make insinuations unsupported by the evidence. *Morris*, 215 Ariz. 324, ¶ 51 (2007).

¶28 We conclude that the evidence reasonably supported the inference that M.G. "ended up in [Clements's] trunk." Clements's former girlfriend testified that around midnight on the night M.G. disappeared, Clements had woken her up and asked if they had any more bleach. After she did not find more bleach, he left in her car to buy some. When he returned, he asked if she had looked in the trunk of his car. He then drove his car to the area where M.G.'s body was later found.

¶29 From this evidence, the prosecutor could reasonably argue that Clements had hidden M.G.'s body in his car's trunk. That would explain his question to his former girlfriend. It would also explain why he drove her car rather than his to buy bleach, and then switched back to his car to dispose of M.G.'s body.

¶30 Clements asserts, though, that the prosecutor's argument improperly stacked inferences. He relies on *Buzard v. Griffin*, 89 Ariz. 42, 47 (1960), which states that "in order to draw an inference from an inference, the prior inference must be established to the exclusion of any other reasonable theory rather than by a probability." However, our supreme court has overruled this requirement. *See State v. Harvill*, 106 Ariz. 386, 391 (1970) (stating that "there is no logically sound reason" for distinguishing the weight of direct and circumstantial evidence); *see also Lohse v. Faultner*, 176 Ariz. 253, 259 (App. 1992) ("[T]he inference upon inference rule has no further validity in Arizona."). Accordingly, whether to accept the prosecutor's inference was a proper fact question for the jury. *State v. Lee*, 189 Ariz. 590, 603 (1997). The prosecutor's inference does not constitute prosecutorial error.

¶31 Clements also criticizes the prosecutor for using the phrase "we absolutely know." Our supreme court has discouraged prosecutors from saying "we know," but that phrasing is not fundamental error. *Acuna Valenzuela*, 245 Ariz. 197, ¶¶ 83-85. And although the word "absolutely"

was imprecise, it was not so unsupported by the evidence to constitute an unreasonable inference. *Cf. State v. Goudeau*, 239 Ariz. 421, ¶ 196 (2016) (stating that we consider statement's context, entire record, and totality of circumstances in examining closing-argument statements). Moreover, the jury was instructed that the prosecutor's closing argument was not evidence, and we assume the jury followed these instructions. *See State v. Gallardo*, 225 Ariz. 560, ¶ 40 (2010). We find no fundamental, prosecutorial error.

MATERIAL FOUND ON CLEMENTS'S ELECTRONIC DEVICES

¶32 Clements raises two issues concerning material that police found on his electronic devices. The material includes Clements's internet searches suggesting an interest in M.G.'s death. It also includes photographs of children taken by Clements and other images he downloaded from the internet. Clements argues that: (1) the devices, and thus the material on them, are fruits of an illegal search and should have been suppressed; and (2) the trial court abused its discretion in admitting the images into evidence.

I. Illegal search

¶33 We begin with the illegal-search issue. We generally review the denial of a motion to suppress for an abuse of discretion. *State v. Scott*, 255 Ariz. 288, ¶ 7 (App. 2023). But "what constitutes the 'fruit' of the state's 'poisonous tree' is a mixed question of fact and law," so we review the trial court's legal conclusions de novo and draw all reasonable inferences in favor of upholding its factual findings. *Id.* (quoting *State v. Hackman*, 189 Ariz. 505, 508 (App. 1997)).

A. Factual background on searches

¶34 Clements's devices were initially obtained by the Maricopa County Sheriff's Office (MCSO) during the investigation that led to Clements being jailed. Clements's challenge focuses on the search that led the sheriff's office to seize them. That search occurred in January 2016, when the sheriff's office had obtained several court orders permitting it to live-track one of Clements's cell phones to obtain its location.

¶35 From the live tracking, the MCSO learned Clements's address in Tucson. Tucson police then obtained and executed a search warrant, seized multiple electronic devices, and released them to the MCSO. The following year, after Clements became a suspect in M.G.'s death, the Pima

County Sheriff's Department and TPD obtained warrants to search the contents of those devices. After executing those warrants, TPD discovered Clements's search history, as well as the images of children.

¶36 Before trial, Clements moved to suppress evidence obtained from his devices. He argued, as he does on appeal, that searching those devices was illegal. He focuses not on the warrants authorizing them but on the orders allowing the live tracking which led to the devices' seizure. Those orders, he asserts, were illegal, so the evidence on the devices was fruit of the poisonous tree.

B. Analytical framework

¶37 The Fourth Amendment prohibits the state from using "evidence seized during an unlawful search" as "proof against the victim of the search." *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). Thus, evidence obtained by exploiting an illegal arrest or search must generally be excluded to deter unlawful officer conduct. *Brown v. Illinois,* 422 U.S. 590, 599-600 (1975); *Wong Sun*, 371 U.S. at 486. In arguing that the search was illegal, Clements relies in part on the United States Supreme Court's opinion in *Carpenter v. United States*, 585 U.S. 296 (2018). *Carpenter* holds that the police generally need a warrant before accessing location data from cell phones. *Id.* at 319.

¶38 In the appeal from Clements's Maricopa County conviction, a different division of this court rejected his argument that the location-data searches were illegal. *State v. Clements*, No. 1 CA-CR 22-0276, ¶¶ 9-13 (Ariz. App. Dec. 5, 2023) (mem. decision). It concluded that the 2015 and 2016 orders were the functional equivalent of a search warrant. *Id.* It also concluded that even if they were not, suppression was unwarranted because police had relied on them in good faith. *Id.* ¶¶ 14-18. Clements asks us to reach a different conclusion here, but we need not address the issue. We instead assume without deciding that the devices were illegally seized.

¶39 Even where an illegal search or seizure has occurred, the challenged evidence obtained may be admissible when the connection between the police's unlawful conduct and the evidence's discovery is so attenuated that it dissipates the conduct's illegality. *Wong Sun*, 371 U.S. at 487-88. Thus, "when there is no cognitive nexus between the police misconduct and the crime for which the defendant is ultimately tried," the evidence need not be excluded because exclusion would not serve its deterrent purpose. *State v. Booker*, 212 Ariz. 502, ¶ 11 (App. 2006).

C. Attenuation factors

¶40 We evaluate attenuation by weighing three factors: (1) the "temporal proximity" between the unconstitutional conduct and the discovery of evidence; (2) any "intervening circumstances"; and (3) "the purpose and flagrancy of the official misconduct," which is a particularly significant factor. *Brown*, 422 U.S. at 603-04; *see also State v. Hummons*, 227 Ariz. 78, ¶ 9 (2011).

1. Temporal proximity

¶41 Of the three factors, temporal proximity weighs least heavily. *Hummons*, 227 Ariz. 78, ¶ 10. Even so, it weighs against exclusion here. Police searched Clements's electronic devices for evidence relating to the murder, with a warrant, more than a year after obtaining the allegedly illegal orders and seizing those devices. By contrast, in most cases where temporal proximity weighs in favor of suppression, the evidence is discovered within hours of the illegal conduct. *See, e.g.*, *Scott*, 255 Ariz. 288, ¶ 18 ("no delay"); *State v. Huez*, 240 Ariz. 406, ¶ 22 (App. 2016) (illegal stop and discovery "uninterrupted" and happened "fairly quickly"); *State v. Guillen*, 223 Ariz. 314, ¶ 16 (2010) (consent obtained "within a few hours" of dog sniff).

¶42 Clements argues, though, that the temporal proximity factor weighs in favor of suppression because the police live tracked his cell phone and executed the allegedly tainted warrant to search his home on the same day. However, we typically look to the "time elapsed between the illegality and the acquisition of evidence." *Hummons*, 227 Ariz. 78, ¶ 9. Our court also recently focused on the proximity between the "exploitation" of illegally obtained evidence and the defendant's confession, which occurred after he was confronted with that evidence. *Scott*, 255 Ariz. 288, ¶¶ 16-18.

¶43 We agree with Clements that the starting point for the temporal-proximity analysis is the allegedly illegal live tracking in January 2016. But regardless of whether we must measure proximity from that event to the acquisition of, or to the exploitation of, the material on Clements's devices, the acquisition and exploitation both occurred much later, when the devices were searched under the subsequent warrants obtained by Tucson police and the Pima County sheriff. They did not occur the day police searched his home.

¶44 Indeed, Clements was not even a suspect in M.G.'s case until March 2017, fourteen months after the live tracking. The warrants at issue,

which authorized the search of Clements's devices, were not issued until several months later. Nothing in the record suggests that Tucson police or the Pima County sheriffs searched the devices earlier, let alone exploited the evidence they contained. We therefore reject Clements's interpretation of the temporal-proximity factor.

2. **Intervening circumstances**

¶45 The existence of intervening circumstances also weighs against suppression. An intervening circumstance provides a legal basis for a search notwithstanding the police's illegal seizure. *See Hummons*, 227 Ariz. 78, ¶ 11. A valid warrant is an intervening circumstance if the warrant was wholly unconnected to the illegal act. *See id.*; *Utah v. Strieff*, 579 U.S. 232, 240 (2016).

¶46 As noted, police did not suspect that Clements had kidnapped and murdered M.G. until 2017, when he led them during the I.C. investigation to the desert location where M.G.'s body had been previously found. Only after that did police obtain the new warrants to search the devices.

¶47 Clements does not dispute that probable cause existed for those warrants, which police could have obtained regardless of whether they already possessed the devices. *Cf. State v. Gulbrandson*, 184 Ariz. 46, 58 (1995) (applying similar standard to independent-source analysis). Nor does he dispute that police would have sought that warrant once he became a suspect. These intervening circumstances dissipate any causal connection between the allegedly improper live-tracking orders and this case's search warrants. *See Booker*, 212 Ariz. 502, ¶ 11 (if no cognitive nexus between misconduct and ultimate crime exists, exclusionary rule purpose not served).

¶48 Clements argues that if the devices had not been seized in January 2016, he might have disposed of them before police obtained the 2017 warrants. But Clements was in custody for most of the intervening time. Other than speculation, Clements offers no explanation of how he might have disposed of those devices while in custody.

3. **Purpose and flagrancy of misconduct**

¶49 Finally, the "purpose and flagrancy" of any police misconduct also weigh against suppression. *Brown*, 422 U.S. at 604. Even if some misconduct occurred, we agree with the trial court that it was not

flagrant. When police obtained the live-tracking orders, no statute or case law required a search warrant. The United States Supreme Court did not decide *Carpenter*, which concerned this issue, until 2018. 585 U.S. 296. Moreover, police included a probable cause statement in each proposed order, and two neutral magistrates approved them.

¶50 Even today, no binding precedent requires a search warrant to obtain real-time tracking data. *See Carpenter*, 585 U.S. at 316 (declining to express a view on "real-time" cell site location information); *cf. State v. Smith*, 250 Ariz. 69, ¶ 24 (2020) ("Courts have consistently applied the good-faith exception to CSLI orders issued prior to *Carpenter*."). This includes *United States v. Jones*, 565 U.S. 400 (2012), upon which Clements relies. That case instead holds that attaching a GPS tracking device to a vehicle is a physical trespass on an "effect" that constitutes a Fourth Amendment search. *Id.* at 404-05. The absence of clear case law guidance counsels against suppression. *See Guillen*, 223 Ariz. 314, ¶¶ 20-21 (concluding that flagrancy of alleged violation was de minimis where applicable case law was "far from clear").

¶51 Finally, although Clements advances an argument that MCSO had engaged in "flagrant and systemic" conduct concerning electronic surveillance, he has pointed to nothing in the record supporting this theory. We thus determine that he has waived it. *See State v. Carver*, 160 Ariz. 167, 175 (1989) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim."); *see also* Ariz. R. Crim. P. 31.10 (detailing requirements for appellate briefs).

¶52 We therefore conclude that the seizure and exploitation of evidence from Clements's electronic devices was attenuated from any purported illegality resulting from the live-tracking orders. It follows that we must affirm the trial court's decision not to suppress the evidence.

II. Admission of images found on Clements's electronic devices

¶53 We turn next to the admission of certain evidence obtained from the devices, namely, two sets of images that were admitted under Rule 404(b) of the Arizona Rules of Evidence. The first set contained photographs that Clements had taken of young girls around Tucson. The second contained approximately 1,200 images of what the parties and the trial court called "child erotica." We review the court's evidentiary rulings for an abuse of discretion. *State v. Winegardner*, 243 Ariz. 482, ¶ 5 (2018).

We also defer to the court's factual findings if they are reasonably supported by the evidence. *See State v. Adair*, 241 Ariz. 58, ¶ 9 (2016).

A. Background on other-acts evidence under Rule 404(b)

¶54 Rule 404(b) generally precludes admission of other-acts evidence "to prove the character of a person in order to show action in conformity therewith." This rule is consistent with Rule 404(a)'s general prohibition on "[e]vidence of a person's character or a trait of character." In most cases, Rule 404(b)'s limitation precludes the admission of evidence that the defendant had a propensity to commit the charged offense. *See State v. Ferrero*, 229 Ariz. 239, ¶¶ 11-12 (2012) (stating that Rule 404(b) evidence must be admitted for non-propensity purpose).

¶55 Rather, sexual-propensity evidence is admissible under Rule 404(c), but that rule applies only in cases where "a defendant is charged with having committed a sexual offense." Clements's kidnapping and murder charges were not sexual offenses, so Rule 404(c) does not apply. A.R.S. §§ 13-1401 to 13-1429 (enumerating criminal sexual offenses); A.R.S. § 13-1304(A)(3) (kidnapping not included as criminal sexual offense); A.R.S. § 13-1105(A)(2) (first-degree murder not included as criminal sexual offense). Nor does the Rule 404(c) case law upon which Clements relies. *See, e.g.*, *State v. Rix*, 256 Ariz. 125 (App. 2023); *State v. Hopkins*, 177 Ariz. 161, 164 (App. 1993).

¶56 Under Rule 404(b), which does apply here, other-acts evidence is admissible if relevant to show "proof of motive, opportunity, intent, preparation, [or] plan." Ariz. R. Evid. 404(b)(2). In determining admissibility under Rule 404(b), courts must find that the evidence's prejudicial impact does not substantially outweigh its probative value. *State v. Allen*, 253 Ariz. 306, ¶ 58 (2022). The evidence's prejudicial impact substantially outweighs its probative value if it tends to "suggest decision on an improper basis, such as emotion, sympathy or horror." *State v. Vigil*, 195 Ariz. 189, ¶ 26 (App. 1999).

¶57 In concluding that the images were admissible, the trial court found that "[t]he subject matter of the erotica and photographs indicate a fixation with mostly young Hispanic females with an apparent age range of under ten years of age through early teenage years." It further found that although M.G. was "post-pubescent, and many of the girls in the photographs appear[ed] much younger," M.G.'s appearance was similar to "many of the young girls in the photographs." The court therefore concluded that the images were relevant to "show [Clements's] motive,

intent, opportunity, and plan." The court's ruling did not distinguish between the two categories of images—the photographs taken by Clements and the "child erotica." But in reviewing that ruling, we address each category separately.

B. Admission of photographs taken by Clements

¶58 We turn first to the photographs taken by Clements, many of which depict Hispanic females around M.G.'s age. Several photographs show three children, including a shirtless young girl, in a backyard. At the hearing on the images' admissibility, police testified that Clements took these photographs unbeknownst to the girl or her family, outside the backyard fence. Another series of photographs depicts a young girl playing with two children in a residential parking lot. Some of these photographs show the young girl looking directly into the camera and lifting her shirt, exposing her stomach. Several other photographs depict a girl outside an apartment. The girl's mother did not recognize Clements or know why he would have pictures of her daughter.

¶59 Additional photographs depict other girls in public places. Many of these girls were petite, like M.G., who was five feet tall and weighed ninety-one pounds when she was killed. Other girls, however, appear younger than M.G. All of these photos were downloaded to Clements's devices in 2013 and early 2014.

¶60 The state argued that these photographs were relevant to show Clements's motive, opportunity, plan, preparation, and modus operandi to kidnap and murder M.G. We find no abuse of discretion in the trial court's admission of these images. We agree they were relevant, at a minimum, to show Clements's motive and opportunity to kidnap M.G. They demonstrate that within a year before killing M.G., Clements took pictures of mostly young, Hispanic girls who were strangers to him, without their parents' knowledge or consent. These facts tend to prove his motive to kidnap a similar-looking girl, such as M.G., as well as his seeking out an opportunity to do so. These photographs also contain no inherently sexual content, so their prejudicial impact does not substantially outweigh their probative value.

C. Admission of remaining images

¶61 The approximately 1,200 images of "child erotica" present a more difficult question. This term was used by the parties to describe sexualized photographs of young children that do not constitute child

pornography. *See* A.R.S. § 34-501(1) (definition of "child pornography"). In accordance with the severance of those counts of the indictment, no images of child pornography were admitted. Most of the admitted images appear to be downloaded from the internet. They also depict girls far younger than M.G. The girls in many of the images are depicted in sexualized poses, often with little or no clothing.

1. **Relevance of images to Clements's motive**

¶62 The state argues that these images are relevant to show Clements's "motive to kidnap [M.G.]" by demonstrating his "sexual interest in young girls." It highlights that M.G.'s body was found naked and that Clements's DNA could not be excluded from the DNA found on M.G.'s pubic-hair combings. In the state's view, this evidence "establishe[d] his motive to kidnap M.G." and "ma[de] it more likely that [he] kidnapped and murdered" her.

¶63 However, we see no meaningful distinction between evidence admitted for such a purpose and the type of character evidence that is prohibited by Rules 404(a) and 404(b). The trial court offered no plausible explanation for how these images are relevant to Clements's motive, intent, opportunity, plan, or modus operandi concerning M.G.'s murder or kidnapping. Motive is "something," especially a "willful desire," that leads someone to act. *Motive*, Black's Law Dictionary (12th ed. 2024). The state presented no compelling evidence—either in seeking admission of the images or at trial—that possessing sexualized images of children suggests that the possessor desires to kidnap or kill children.

¶64 Instead, the images were evidence of a negative character trait, which the state improperly offered "to show action in conformity therewith." Specifically, the state sought to link possession of these kinds of images to a greater likelihood that one would kidnap and kill children, even children who do not resemble those in the images. *See* Ariz. R. Evid. 404(b)(1); *State v. Coghill*, 216 Ariz. 578, ¶¶ 23-24 (App. 2007) (improper to admit evidence of adult pornography under Rule 404(b) "on the theory that a person who downloads adult pornography would be more prone to download child pornography").

2. **Prejudicial effect of images**

¶65 In addition, any probative value of these images is substantially outweighed by unfair prejudice. We generally defer to a trial court's Rule 403 balancing determination and review that determination for

an abuse of discretion. *State v. Thompson*, 252 Ariz. 279, ¶ 41 (2022) (applying abuse-of-discretion standard); *State v. Gomez*, 250 Ariz. 518, ¶ 15 (2021) (noting deference to trial court's Rule 403 balancing). We also view the evidence "in a light most favorable to its *proponent*, maximizing its probative value and minimizing its prejudicial effect." *State v. Castro*, 163 Ariz. 465, 473 (App. 1989) (quoting *United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983)).

¶66 Even applying this standard, we do not accept the trial court's balancing determination. Reasonable jurors would likely have found the images highly offensive, given the young age and sexualized poses of many of the children depicted. In addition, the quantity of images—approximately 1,200 on the drive that was admitted into evidence—would likely leave the jury with an indelibly negative impression of Clements's character, for reasons wholly unrelated to the charges. *See State v. Grannis*, 183 Ariz. 52, 55, 57 (1995) (trial court abused discretion by admitting pornographic photographs in first-degree murder case because, although "marginally relevant," danger of unfair prejudice substantially outweighed probative value), *disapproved on other grounds by State v. King*, 225 Ariz. 87, ¶¶ 9, 12 (2010). We therefore conclude that the court abused its discretion in admitting the "child erotica" images.

3. **Harmless error**

¶67 When a defendant preserves an objection to an error at trial, we review the error for harmlessness. *State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005). "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Id.* Where evidence of a defendant's guilt is overwhelming, the error is harmless. *State v. Spreitz*, 190 Ariz. 129, 142 (1997); *see also State v. Bible*, 175 Ariz. 549, 589 (1993). We therefore address whether overwhelming evidence supported Clements's convictions for kidnapping and felony murder, notwithstanding the improperly admitted images. As the same evidence applies to both crimes, we describe the evidence first. And because we have concluded the trial court did not err in admitting several pieces of evidence that were the subject of issues addressed above, that evidence is included in our analysis.

a. **Evidence leading to the convictions**

¶68 Clements's cell phone data reflects that when M.G. went missing on the evening of June 3, 2014, he and M.G. were in the same area.

M.G. left her house shortly before 10 p.m. Around the same time, Clements was driving near that location.

¶69 As noted above, when Clements briefly returned home around midnight, he asked his then-girlfriend if they had any more bleach. He left in her car to buy bleach, returned, and asked her if she had looked in the trunk of his car. He then traveled to the area where M.G.'s body was later found. He was in that general area early in the morning on June 4. Ray testified that Clements's phone movements from that morning presented a "unique pattern," indicating that he did not frequent the area. Clements also used a police scanner application while there.

¶70 After returning home the next morning, Clements had his girlfriend wash his clothes, the shower curtain, and the floor. In the months and years that followed, Clements searched the internet multiple times for information about M.G. He searched for her name, the cemetery where she is buried, "body found in desert," "trace evidence found on body," and "Tucson teen was murdered." He wrote letters to his then-girlfriend referring to M.G. by name as well as the location where her body was found. Nonetheless, in his interview with detectives, Clements equivocated on whether he recognized M.G.'s name.

¶71 As also noted above, Clements led police to that location while assisting in the investigation of I.C.'s death. In doing so, he mentioned a nearby tire pit, the location of which had not been publicly disclosed. This was significant because M.G.'s body had been concealed by tires nearby, and no other tire pits were in the area.

¶72 Perhaps most significantly, the DNA evidence from M.G.'s pubic-hair combings was consistent with Clements's profile, and four other suspects were all excluded as contributors. The DNA analyst also testified that the likelihood of a male in the general population possessing the same partial profile as that of the DNA recovered from the pubic-hair combings is approximately one in 8,600.

b. **Overwhelming evidence of kidnapping**

¶73 As applicable here, kidnapping requires proof that Clements knowingly restrained M.G. with the intent to inflict death or physical injury. *See* § 13-1304(A)(3). A defendant restrains another person by "restrict[ing that] person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or

by confining such person." A.R.S. § 13-1301(2). The jury was properly instructed that restraint can occur through physical force or intimidation, though the statute allows for other forms of restraint as well. *State v. Latham*, 223 Ariz. 70, ¶ 16 (App. 2009) (explaining that in addition to these means, restraint can also occur through deception); *see also* A.R.S. § 13-1301(2)(b) (stating restraint can occur when victim is under eighteen and lawful custodian has not acquiesced).

¶74 "A defendant acts 'intentionally' when his 'objective is to . . . engage in that conduct.'" *State v. Villa*, ___ Ariz. ___, ¶ 8, 548 P.3d 1146, 1149 (App. 2024) (alteration in *Villa*) (quoting A.R.S. § 13-105(10)(A)). Intent can be formed in the moment and inferred from the circumstances. *See id.* ¶¶ 8-10 (person may act "under circumstances that would deprive a reasonable person of self-control, yet remain guilty of committing a[n] . . . intentional act"); *State v. Greene*, 255 Ariz. 37, ¶ 8 (2023) (evidence defendant had victim's wallet immediately following murder was sufficient to show that defendant intended to profit from murder "no later than the moment he picked up the object to kill [the victim]" (quoting *State v. Greene*, 192 Ariz. 431, ¶ 32 (1998))).

¶75 The record before us presents overwhelming evidence that Clements kidnapped M.G. While it is unclear exactly how M.G. ended up in Clements's car on the night of June 3, we cannot conjure any plausible explanation other than Clements knowingly restraining her. Importantly, although the state could not prove the exact means of M.G.'s death, the medical examiner ruled out a gunshot wound or blunt force trauma—means that could have been accomplished without Clements first restraining M.G.

¶76 Moreover, no other plausible explanation exists for M.G. walking in the same location that Clements was driving, never arriving at her destination, and being found dead over thirty miles away. The sheer distance between M.G.'s home and the isolated recovery location further demonstrates that she was restrained by either movement "from one place to another or by confining." § 13-1301(2). And years later, he led police to that exact area while assisting with another investigation.

¶77 Overwhelming evidence also proves that Clements intended to inflict death or physical injury upon M.G. He concealed his actions as well as M.G.'s body, he was fixated on her death, and DNA consistent with his was found in her pubic area.

c. **Overwhelming evidence of first-degree murder**

¶78 Overwhelming evidence also supports Clements's first-degree-murder conviction for felony murder. As applicable here, first-degree murder requires proof that Clements kidnapped M.G. and in doing so caused her death. *See* § 13-1105(A)(2). Because overwhelming evidence proves Clements kidnapped M.G., we therefore focus on whether in the course of kidnapping her, he caused her death.

¶79 At trial, Clements argued that it was uncertain whether M.G. was murdered or died in some other manner. However, M.G. did not have any preexisting health issues, and an autopsy, which listed her cause of death as "homicide by unspecified means," did not reveal any disease that would have resulted in her death. Nor was there any evidence that she died of a drug overdose, as Clements speculated at oral argument. We therefore conclude there was overwhelming evidence that he murdered her, and the trial court's error in admitting the images was harmless beyond a reasonable doubt.

STRUCTURAL ERROR DUE TO JUDICIAL BIAS

¶80 Finally, Clements argues that structural error occurred due to the asserted bias of the original trial judge. That judge recused from the case in March 2022, though she had issued numerous pretrial rulings, including on the motion to suppress and admission of the images. We have found no reversible error in those decisions. Nonetheless, structural error can occur even if a biased judge did not otherwise commit reversible error. *Cf. State v. Granados*, 235 Ariz. 321, ¶ 7 (App. 2014) (structural error is "prejudicial per se" and requires reversal).

¶81 The assertions of bias arise out of a letter that the original judge wrote to a newspaper about the county attorney. In the letter, the judge spoke highly of a prosecutor who had testified at a hearing in this case. The judge described him as "honest, ethical, talented, and compassionate," "a beacon of professionalism and integrity," and having "no peer." She also criticized the county attorney for "unfounded and inaccurate character attacks" on the prosecutor and for "disparag[ing]" him. The letter does not mention Clements or refer to his case, and it was published six months after the hearing.

¶82 The judge was publicly reprimanded by the Commission on Judicial Conduct for writing the letter. In its order, the Commission

identified six rules that the judge had violated. These include a rule requiring judges to "perform the duties of judicial office . . . without bias or prejudice." *See* Ariz. Code of Judicial Conduct Rule 2.3(A). The Commission did not, however, conclude that the judge was biased against Clements. It instead concluded that she had created "a perception that she was biased in favor of [the prosecutor]," and had thus "cause[d] her impartiality to be reasonably questioned."

¶83 After the reprimand, the judge recused herself. Clements asked the new judge to reconsider several of the prior judge's rulings. That judge denied Clements's motion.

¶84 A biased trial judge may constitute structural error. *See Granados*, 235 Ariz. 321, ¶ 11. Where structural error occurs, reversal is required because the error "deprive[s] defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . ." *State v. Ring*, 204 Ariz. 534, ¶ 45 (2003) (quoting *Neder v. United States*, 527 U.S. 1, 8-9 (1999)). However, not all instances of judicial bias constitute structural error. *See Granados*, 235 Ariz. 321, ¶ 11. Rather, we must examine whether the asserted bias poses a risk of actual bias such that it infringes on Clements's due process rights. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009); *Granados*, 235 Ariz. 321, ¶ 11. This can occur when a judge has a financial stake in the case or a conflict from a prior proceeding that suggests a strong interest in the case's outcome. *Granados*, 235 Ariz. 321, ¶ 10. It does not occur simply due to "[p]ersonal bias or prejudice." *Id.* ¶ 11 (alteration in *Granados*) (quoting *Caperton*, 556 U.S. at 877).

¶85 No structural error occurred here. At most, the judge's letter suggests she was personally biased in favor of the former prosecutor and potentially biased against the county attorney. Clements has not argued that she had a financial or personal interest in the outcome of his case. He has cited no authority suggesting that her bias was so egregious that it deprived him of a fair trial. Nor has he developed an argument on appeal that her recusal required the new judge to reconsider her rulings—a view that other courts have rejected. *See, e.g.*, *People v. Byrd*, 225 A.D.3d 1168, 1168 (N.Y. App. Div. 2024); *In re Conservatorship of Tedesco*, 308 Cal. Rptr. 3d 296, 313-15 (Ct. App. 2023). We therefore reject Clements's judicial-bias argument.

DISPOSITION

¶86 We affirm Clements's convictions and sentences.