BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA **THOMAS J. ZAWADA, Bar No. 005815** Respondent.	No. 98-2465 **HEARING OFFICER'S REPORT**

I. PROCEDURAL HISTORY.

This is a two count complaint arising out of respondent's prosecution of a first degree murder charge that was reversed by the Arizona Supreme Court due to respondent's prosecutorial misconduct. The second count alleges prior discipline arising out of prosecutorial misconduct in 1984.

The probable cause order was filed on February 17, 2000. The complaint was filed on January 30, 2001. It is not clear from the record why the complaint was filed almost one year after the probable cause order was issued. Respondent timely filed an answer on February 16, 2001. An unsuccessful settlement conference took place on May 18, 2001.

Early in the proceedings, respondent attempted to depose Justice Martone and Judge Noyes relating to their judicial conduct. The subpoenas were quashed upon objection by the judges through their attorney, the Arizona Attorney General. Respondent then noticed the depositions of Judges Espinosa, Pelander, and Druke of the Arizona Court of Appeals, Division 2. This hearing officer scheduled a conference to discuss the continuing effort to depose sitting judges, which respondent objected to on various grounds. *See* May 24, 2001, Order Continuing Proceedings and Directing Disciplinary Clerk to Transmit Rule 48(c)(1) Motion to Arizona Supreme Court. *Id.* Respondent thereafter declined to participate in further proceedings before this hearing officer. *Id.* Respondent also moved to dismiss the complaint against him in which he essentially argued that the hearing officer and others were biased against him. The proceedings were stayed until the

Arizona Supreme Court could rule on respondent's motion to remove. *Id.* On August 13, 2001, the Arizona Supreme Court denied "respondent's request for change of hearing officer, the Disciplinary Commission, and this court."

The Rule 53(c)(6) hearing occurred on October 26, 2001. Respondent represented himself. The State Bar was represented by John Furlong. The State Bar relied upon the testimony of respondent and the exhibits filed in the case. Respondent presented, in addition to his own testimony, the testimony of Judge Bernardo Velasco, who appeared voluntarily. The parties also offered deposition transcripts of Dr. Jack Potts and Pima Chief Deputy County Attorney Mary Judge Ryan.

The parties submitted post-hearing memoranda and the hearing was deemed concluded on November 30, 2001.

II. FINDINGS OF FACT.

This hearing officer makes the following findings of fact based on the pleadings, testimony, exhibits, and judicial notice of published opinions:

1. Respondent was admitted to the practice of law in Arizona on April 28, 1979. Answer at ¶1.

2. Respondent has no prior discipline, although there have been two miscellaneous matters that were not docketed as discipline charges. Disciplinary Clerk memo dated 10/29/01.

3. Respondent engaged in prosecutorial misconduct approximately twenty years earlier, which was reported in *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261(1984). *See also*, *Hughes*, ¶31. The *Pool* court found a pattern of misconduct on cross-examination that it characterized as irrelevant, argumentative, grossly improper, and intentionally made to create unfair prejudice against the defendant. *Pool*, 139 Ariz at 102 - 103.

4. In 1994, respondent was employed as a Pima County Deputy County Attorney. He prosecuted the criminal charges against Alex Vidal Hughes. *See Hughes v. State*, 193 Ariz. 72, 969 P.2d 1184 (1998). (attached as Ex. 1 and hereinafter referred to as ("*Hughes*").

5. Respondent obtained a conviction against Alex Hughes of first degree murder, attempted second degree murder, aggravated assault (eight counts), disorderly conduct (two counts), and felony fleeing. *Hughes*, ¶22. The Arizona Court of Appeals reversed one of the aggravated assault convictions and affirmed all other convictions. *Hughes*, ¶23; *State v. Hughes*, No. 2 CA-CR 94-0636 (Ariz. Ct. App. Dec. 24, 1996) (decision attached at Ex. 2 and hereinafter referenced "*Hughes Ct.App.*")

6. The Arizona Supreme Court determined that respondent had engaged in various acts of prosecutorial misconduct. *Hughes*, ¶¶60, 61, 62, 66, 71, and 73. The *Hughes* Court did not determine whether any single act of misconduct constituted reversible error, instead deciding that the "cumulative effect of the prosecutor's misconduct deprived defendant of a fair trial." *Hughes*, ¶74. The acts of prosecutorial misconduct included (a) appeals to fear by the jury if the defendant was not convicted, (b) unfavorable reference to the defendant's Fifth Amendment rights, and (c) prejudice against psychiatrists and psychologists that led to harassment during cross-examination and improper argument.

7. Respondent admits that his cross-examinations and arguments in the *Hughes* trial were accurately recorded. Hearing Transcript, 74:19 - 75:4 (hereinafter "H.T., page: line - page: line"). Stated another way, he does not disagree with the statements attributed to him by the *Hughes* court, but he disagrees with the court's conclusions both with respect to his conduct and the decision to reverse and to remand for a new trial.

III. CONCLUSIONS OF LAW.

The State Bar argues that this hearing officer is bound by the factual determinations made by the Arizona Supreme Court. It relies upon *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993), for the proposition that a prior court's ruling is definitive. *See* State Bar's Post Hearing Memorandum at 2. Respondent does not directly address this argument, but has consistently maintained that the

Arizona Supreme Court was in error and those involved in the discipline process[1] should ignore its opinion. *See* Respondent's Post Hearing Memorandum at 3 and 8 - 9.

The State Bar carries the burden of proof under the clear and convincing standard. Arizona Rules of Supreme Court, Rule 54(c). This standard is not directly analogous to the appellate standard when reviewing alleged prosecutorial misconduct. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) (prosecutorial misconduct is harmless error if court finds beyond a reasonable doubt that it did not contribute to or affect the verdict). The appellate focus concerns probable jury impact. *Cf., State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992). The difference in standards argues against a rote adoption of the appellate findings as proof of an ethical violation. The importance of an independent review by the hearing officer is all the more important where two appellate courts reach arguably different conclusions based on the same facts and case law.[2] *Compare Hughes*, ¶¶26 - 73 with *Hughes Ct.App.*, at 12-17. For these reasons, this hearing officer concludes that he must "independently determine under the proper standard, the existence of those facts salient to the disciplinary matter and whether those facts, even if identical to those established in the [appellate] proceedings, warrant discipline." *Wolfram, supra,* 174 Ariz. at 54.

This hearing officer concludes that respondent's examination and argument in *Hughes* violated the Ethical Rules as follows.

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[1] Respondent generally addresses his objections and arguments to the State Bar, this hearing officer, the Discipline Commission, and the Arizona Supreme Court. *See e.g.* August 18, 2001, Arizona Supreme Court Order.

[2] It is recognized that the Arizona Court of Appeals rejected application of the "cumulative error doctrine," whereas the Arizona Supreme Court clarified that a pattern of misconduct may require reversal even when any single act in the pattern, standing alone, does not require reversal. *See Hughes*, ¶¶25 and 74 - 75. This clarification could account for the different appellate results, although it appears that there were also true differences in opinion between the courts regarding the interpretation and significance of respondent's conduct. *Compare e.g., Hughes*, ¶¶62 - 66 with *Hughes Ct.App.*, at 14-15.

A. Invoking Personal Fear in the Jury to Create Unfair Prejudice.

Respondent admonished the jury to consider the possible future consequences of its decision by the following argument:

> You know, ***the next time*** you are out on a nice, pretty, sunny afternoon, perhaps with your family, and you are driving along the roads or maybe you are at a picnic, your radio is on and ***you hear about a murder*** or something like that, or an aggravated assault, you think back to this case you are going to have to be able to say right then and there that you were convinced that the evidence was clear and convincing that this man was insane. Not just paranoid schizophrenic, not mentally ill, not possibly mentally ill, but insane. Because you know, you go back there in your deliberation now and you're sitting there and you can't imagine that day, ladies and gentlemen, when you hear this on the report and you can't say, yes, I was clearly convinced, you know, that the defendant carried his burden.

Hughes, ¶56; State Bar Ex. 3(e), 162:61-163:21 (emphasis added). This argument improperly invoked personal fear in the jury that was wholly unrelated to a rational consideration of the evidence. In combination with the lack of credible evidence against the insanity defense, this argument substituted personal fear for a proper prosecution response to a legitimate defense, which violated ERs 3.1 (meritorious contentions), 3.4.(e) (trial tactics unsupported by admissible evidence), and 8.4(d) (misconduct that is prejudicial to the administration of justice).

B. Improper Insanity Cross-Examination and Argument.

The *Hughes* court detailed numerous problems constituting prosecutorial misconduct in respondent's attack on the defendant's insanity defense. *See e.g.*, *Hughes*, ¶¶ 34-61. The more significant problems from an ethics perspective involved the lack of evidence supporting respondent's position and the abusive, unfairly prejudicial tactics used during cross-examination and argument. *See e.g.*, *Hughes*, ¶¶51, 52, 53, 54, and 61; State Bar Ex. 3(e), 133:2-133:6, 152:17-153:23. The pattern of misconduct violates ERs 3.1 (meritorious contentions), 3.4.(e) (trial tactics unsupported by admissible evidence), and 8.4(d) (misconduct that is prejudicial to the administration of justice).

The *Hughes* court determined that respondent was "a prosecutor with an overpowering prejudice against psychiatrists and psychologists, among others." *Hughes*, ¶61. Respondent's negative views about psychiatric testimony have not changed. H.T., 175:20-183:5. More important, respondent refuses to present psychiatric or psychological testimony. H.T., 100:4-100:12. This is a very serious blind spot for a senior prosecutor who must confront claims of insanity and incompetency to stand trial.

As respondent properly notes, the role of mental health professionals in the courtroom is not without controversy. *See* JAY ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY, Chapter 1 (1995). Nonetheless, the United States Supreme Court, the Arizona Legislature, and the Arizona Supreme Court have all concluded that insanity is a defense to a criminal charge. *See e.g.*, *Shannon v. United States*, 512 U.S. 573, 575 (1994); *State v. Schantz*, 98 Ariz. 200, 403 P.2d 521 (1965); and A.R.S. §13-502. Moreover, the procedural rules prescribe a specific and detailed role for psychiatrists and psychologists to evaluate a criminal defendant's mental condition. *See* Arizona Rules of Criminal Procedure, Rule 11. A criminal law practitioner who refuses to use psychiatric or psychological testimony starts from such a serious disadvantage that his ability to persuade the court and a jury is severely compromised to such an extent that he is ineffective, or he must engage in tactics that violate substantive and procedural rules. Respondent's misconduct in the Hughes trial illustrates both problems. He attacked defendant's psychiatric expert without substantial evidence to support his contentions and he used improper methods to substitute unfair prejudice for a rational consideration of the available evidence. *Hughes*, ¶¶47 and 66.

Respondent is surely entitled to his own views about psychiatric and psychological testimony. When those views result in a personal *per se* ban against using such testimony, however, respondent's competency to handle cases that involve mental health issues is significantly

compromised.[3] It would be no different if respondent, because of religious views, refused to use any testimony from a physician.

Respondent represents the People of the State of Arizona when he prosecutes a crime. *Romley v. Superior Court,* 181 Ariz. 378, 382, 891 P.2d 246, 250 (App. 1995). He must use all admissible evidence to ensure that justice is served, which necessarily includes psychiatric and psychological testimony that will eliminate or mitigate testimony from a defendant's mental health experts. Respondent cannot competently represent his client, the citizenry of this state, if he foregoes admissible testimony because of his personal belief that all expert testimony from mental health professionals is "unreliable." This is not to say that respondent must always use such testimony. However, respondent's inflexible, truculent approach to psychiatric and psychological testimony is materially different from the tactical decision in an individual case not to present an expert.[4] Respondent will not use psychiatric and psychological testimony in any circumstance. H.T., 100:4-100:12. Moreover, respondent's trial decisions in the 1994 Hughes trial arose from the same personal biases he acknowledges in 2001. H.T., 175:20-183:5.

We do not know and we will never know[5] whether a proper criminal conviction could have been obtained against Alex Hughes if respondent had presented expert testimony on malingering and fabrication. Respondent never considered using an opposing expert. H.T., 181:11-17; 203:1-17. Alternatively, an appropriate plea bargain could have been arranged if mental health consultants for the State had been consulted and they advised that it would be better to negotiate

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[3] Respondent's personal beliefs may be expressed in another manner without running the risk of compromised representation: decline or transfer cases with a mental health component. Most cases, particularly outside the criminal law area, do not involve psychological or psychiatric testimony. Respondent could easily limit his practice to another area.

[4] Additionally, criminal defendants are not well served by a prosecutor who refuses to consider proffered, admissible psychiatric testimony that tends to negate the guilt of the accused or mitigates the offense. *Cf.*, E.R. 8.3(d).

[5] Double jeopardy barred the retrial of Alex Hughes. *State v. Jorgenson*, 198 Ariz. 390, 10 P.3d 1177 (2000).

an agreement rather than directly challenge the insanity defense. The central point is that significant, legitimate options were not considered because of respondent's personal bias against admissible psychiatric and psychological testimony. Accordingly, this hearing officer concludes that respondent's refusal to investigate and to obtain expert testimony, particularly when viewed in the context of a blanket refusal to use mental health testimony, also violates ER 1.1 (competence).

IV. ALLEGED VIOLATIONS NOT PROVEN.

The State Bar alleged that the misconduct described in § III (as well as other conduct) also violated ER's 3.4(c) (knowingly disobey an obligation under the rules), 3.8 (special responsibilities of a prosecutor), and 8.4(c) (conduct involving misrepresentation). Although respondent violated the spirit of the admonition in the Comment to ER 3.8 that a "prosecutor has the responsibility of a minister of justice and not simply that of an advocate," this hearing officer does not find by clear and convincing evidence that respondent violated that the specific restrictions in the body of the rule. The "knowing" component of 3.4(c) was not proven. Similarly, there was not sufficient proof of misrepresentation or fraud under 8.4(c).

V. SANCTIONS.

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz,* 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994). In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions ("Standards")* and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

Respondent declined to suggest an appropriate sanction if this hearing officer found a violation of the ethical rules. H.T., 200:17-201:13. The State Bar argued that censure was appropriate.

A. American Bar Association Standards.

ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state and (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

Respondent violated the duties to his client and to the legal system. The conduct was intentional, although respondent believed that his actions were well-founded and appropriate. The mistrial and the double-jeopardy bar against a retrial are significant injuries, although the impact is mitigated by the fact that four other judges did not find grounds for a mistrial.

This Hearing officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively. Two factors are present in aggravation: 9.22(c) - a pattern of misconduct and (i) substantial experience in the practice of law. There is one[6] factor in mitigation, 9.32(a) - absence of a prior disciplinary record. No other aggravating or mitigating factors are found.

This Hearing officer concludes that *Standards* 4.53 and 6.23 apply. These sections point to reprimand (censure in Arizona), if combined with probation.

B. Proportionality Analysis.

The parties did not present comparable discipline cases and this hearing officer could not find cases close to the facts presented in this matter. General principles provide some guidance. For instance, significant harm to a client from the attorney's incompetence may result in suspension. *In re Augenstein*, 178 Ariz. 133, 871 P.2d 254 (1994). Censure and probation is more appropriate

[6] Respondent believed that he was disciplined by the Pima County Attorney, although it was never clear if the proposed discipline was actually completed. H.T. 146:10 - 148:3. The testimony was equivocal and did not present sufficient evidence of prior discipline to support a second mitigating factor.

where the harm is more limited and the public can be protected by proactive measures. *In re Chard*, 180 Ariz. 1, 881 P.2d 333 (1994); *In re Kaplan*, 179 Ariz. 584, 870 P.2d 402 (1994). Censure without probation is rare, except in cases involving little or no injury to the client and significant mitigating factors. *In re Aaron*, DC No. 93-0312, DB-96-0068-D. Overall, these cases support the conclusion that censure and probation are appropriate.

VI. RECOMMENDATION.

Upon consideration of the facts, conclusions of law, the *Standards*, and the proportionality analysis, this hearing officer recommends the following:

1. Respondent should be sanctioned for violations of the Rules of Professional Conduct.

2. Respondent should be censured.

3 Respondent should be placed on probation for six months, effective the date of the order of probation, with the following terms and conditions:

(a) Respondent will enroll in a continuing education course for not less than fifteen hours that addresses the effective use of and response to psychiatric and psychological testimony.

(b) Respondent should not be involved in any cases with a significant mental health component until he completes the continuing education requirement.

4. Respondent should be assessed the costs and expenses of these disciplinary proceedings.

5. Count II should be dismissed.

Respondent may conclude that this hearing officer's findings and recommendations constitute an example of someone with different views saying, "we're just going to beat you up until you agree with us." H.T. 201:21-22. Such a conclusion would be unfortunate and counter-productive. Respondent should challenge the laws admitting expert mental health testimony as he believes necessary, but he must do so either in an appropriate policy venue, such as the legislature,

or in the courtroom without utilizing unfairly prejudicial tactics against the opposing party and his witnesses. Close study of materials by authors such as Ziskin, *supra* at ix-x, will aid respondent in that endeavor.

DATED this 31st day of December, 2001.

Michael Owen Miller
Hearing Officer 9F

ORIGINAL mailed
this 31st day of December, 2001, to:

Kendra A. Diegan, Disciplinary Clerk
SUPREME COURT OF ARIZONA
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and

COPIES mailed
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Sharon Ellison

Exhibit 1

193 Ariz. 72, *; 969 P.2d 1184, **;
1998 Ariz. LEXIS 645, ***; 282 Ariz. Adv. Rep. 31

LEXSEE 193 Ariz. 72,AT 78

THE STATE OF ARIZONA, Appellee, v. ALEX VIDAL HUGHES, Appellant.

Supreme Court No. CR-97-0238-PR

SUPREME COURT OF ARIZONA

193 Ariz. 72; 969 P.2d 1184; 1998 Ariz. LEXIS 645; 282 Ariz. Adv. Rep. 31

November 19, 1998, Filed

PRIOR HISTORY:
[*1]**

Court of Appeals. No. 2 CA-CR 94-0636. Pima County. Nos. CR-35338 and CR-35836. [Consolidated]. Appeal from the Superior Court in Pima County. The Honorable Bernardo P. Velasco, Judge. Memorandum Decision of the Court of Appeals, Division Two.

DISPOSITION:
Appeal from the Superior Court in Pima County. The Honorable Bernardo P. Velasco, Judge. REVERSED and REMANDED. Memorandum Decision of the Court of Appeals, Division Two VACATED.

COUNSEL:
Susan A. Kettlewell, Pima County Public Defender, By Brian X. Metcalf, Assistant Public Defender, Tucson, Attorneys for Appellant.

Grant Woods, Attorney General, By Paul J. McMurdie, Chief Counsel, Criminal Appeals Section and By Kent E. Cattani, Assistant Attorney General, Phoenix, Attorneys for Appellee.

JUDGES:
E. G. NOYES, Jr., Judge. *CONCURRING: THOMAS A. ZLAKET, Chief Justice, CHARLES E. JONES, Vice Chief Justice, STANLEY G. FELDMAN, Justice, FREDERICK J. MARTONE, Justice.

* Justice James Moeller did not participate in the determination of this matter; pursuant to Ariz. Const. art. VI, § 3, the Honorable E. G. Noyes, Jr., Vice Chief Judge of the Arizona Court of Appeals, Division One, was designated to sit in his stead.

OPINIONBY:
E. G. NOYES, **[***2]** Jr.

OPINION:

[*74]

[1186]** OPINION

En Banc

NOYES, Judge, *

* Justice James Moeller did not participate in the determination of this matter; pursuant to Ariz. Const. art. VI, § 3, the Honorable E. G. Noyes, Jr., Vice Chief Judge of the Arizona Court of Appeals, Division One, was designated to sit in his stead.

P1 The jury rejected Defendant's insanity defense and convicted him of murder and other felonies. We reverse and remand because the cumulative effect of the prosecutor's misconduct deprived Defendant of a fair trial.

Crimes

P2 On August 25, 1991, Defendant, who had been drinking, argued with his sister's boyfriend and said he would shoot him. Defendant then went to his car, got a shotgun, chambered a shell, returned, and shot and killed the boyfriend. Defendant drove away, **[**1187]** **[*75]** and then came back a while later, after police had arrived. When Defendant saw the police, he did a U-turn and sped away. During the ensuing high-speed chase, Defendant fired shots at officers and others, and he collided with a police car **[***3]** before surrendering. These events gave rise to the thirteen charges on which

Defendant was convicted. There was little doubt that Defendant had done what he was charged with doing; from day one in this case, the serious issues related to Defendant's state of mind and his mental health.

Lawyers

P3 At all relevant times, the State was represented by Mr. Thomas J. Zawada of the Pima County Attorney's Office, and Defendant was represented by Mr. Creighton W. Cornell of the Pima County Public Defender's Office. We granted review on prosecutorial misconduct issues only. The main theme of Mr. Zawada's misconduct was repeated, groundless assertions and insinuations that defense counsel and expert witnesses were fabricating an insanity defense.

Mental Illness

P4 As the prosecutor told the jury in opening statement, the State's theory of the case was this: "Alex is nothin' but a mean drunk, ... there is no insanity in this case, and ... there is no mental illness in this case." When the prosecutor said there was no mental illness in the case, he knew that every one of the six mental health experts who examined Defendant between arrest and trial found him to be mentally ill. [***4] When the prosecutor said there was no insanity in the case, he knew that Defendant would present expert testimony that he was insane, and the State would present no expert testimony that Defendant was sane.

P5 From the beginning, the State knew about the mental health issues in this case. Immediately after the shooting, Defendant's sister (the murder victim's girlfriend) told police that Defendant was mentally ill, that he would talk "off the wall" to the television and radio, that he believed doctors had implanted a monitoring device in his body, and that a doctor had said there was "something mentally wrong" with him. When Defendant was interrogated after his arrest, officers called in Dr. Kevin Gilmartin (at midnight on a Sunday) because he had given them some training in asking questions to rebut an insanity defense, and the officers wanted the doctor there to "review [Defendant's] capabilities" and to ask any questions the doctor wanted to ask. (The doctor did not testify at trial or in pretrial hearings.)

P6 When police interviewed Defendant's mother and brother a few days after his arrest, they said he was mentally ill and that the family had tried to get help for him. The [***5] mother said that Defendant's personality changed regardless of whether he had been drinking. The brother said that Defendant "always had a problem ... mentally. Always ... heard the TV, always heard the radio ... he was what they identify as one of those schizophrenic like that."

P7 After Defendant was indicted, defense counsel notified the State that the defenses would include insanity and self-defense and that the witnesses would include anyone who could testify to Defendant's paranoid schizophrenic behavior. n1

n1 For some sort of tactical reason, Defendant withdrew the insanity defense in January 1993, then realleged it in April 1993. Also, until late in the trial, Defendant raised only self-defense to the murder charge. But the State knew that Defendant would eventually move to raise the insanity defense to the murder charge. When Defendant made such a motion, the prosecutor stated, "Well, quite frankly, it's been my position all along that the defendant was going to do it, de facto, whether or not he was going to claim it, and I, as the Court, believe that he's already done it ...." But the prosecutor objected to the motion, stating, in part, "Had the situation become more apparent to me, I may have sought assistance of some type of psychiatric expert." In overruling the objection and allowing Defendant to raise the insanity defense to all charges, the court noted that the prosecutor had "already acknowledged the defendant ... raised the issue of insanity as much for the murder charge as ... for the other charges."

[***6]

P8 In January 1992, Dr. Larry Morris, a clinical psychologist, evaluated Defendant and concluded that he was "a seriously dysfunctional 36-year-old man who appears to [**1188] [*76] be suffering from a psychotic disorder. His clinical presentation suggests Schizophrenia, Paranoid Type, Chronic. In my opinion a formal Rule 11 evaluation and determination is warranted in this case." Defense counsel requested a competency determination pursuant to Rule 11, Arizona Rules of Criminal Procedure. The prosecutor accused Defendant of faking symptoms after being "primed" by the doctor. The court ordered a Rule 11 examination.

P9 The State refused to nominate a mental health expert. The court then ordered an evaluation by the Court Clinic, which assigned the matter to Dr. Todd Flynn, a clinical psychologist. Dr. Flynn's March 26, 1992, report concluded, "There is sufficient cause to believe that Mr. Hughes suffers from a Paranoid-Delusional Disorder or chronic Paranoid-Schizophrenia which includes grandiose delusions which might significantly detract from his ability to cooperate with counsel and meaningfully participate in a jury trial or other legal proceeding."

P10 In April 1992, on the basis of reports [***7] from Dr. Morris and Dr. Flynn, the court found Defendant incompetent to stand trial and ordered him committed until his competency was restored. In July 1992, Dr. Jack Potts, Associate Medical Director of Psychiatric Services of the Maricopa County Department of Health Services, wrote to the court that Defendant was now competent. Dr. Potts also wrote, "If at the time of the alleged offense [Defendant] was similarly paranoid as he was when he presented to us there may be an issue as to his intention and/or criminal culpability." The court found Defendant competent to stand trial.

P11 In October 1992, defense counsel requested another evaluation based on his own belief that Defendant had degenerated and was no longer competent. The court ordered an evaluation. At a February 5, 1993, hearing, Defendant called three expert witnesses and the State called no witnesses. Dr. Potts testified that Defendant's mental condition had deteriorated because he was back in the Pima County Jail and was not receiving Navane. On questioning from the court, Dr. Potts said that Defendant should receive five milligrams a day of Navane or similar medication. Dr. Flynn testified that Defendant had delusions [***8] of persecution that included Dr. Flynn, the prosecutor, and defense counsel, who Defendant believed was part of the prosecutorial system. Dr. Flynn testified that Defendant's mental illness was chronic, it was "not something that just popped up yesterday or last week or last month," and it provided "reasonable grounds to question [Defendant's] ability to cooperate with counsel in formulating a defense and in participating in a trial." Dr. Morris testified that Defendant was a paranoid schizophrenic who, without medication, had regressed to the point of present incompetence.

P12 The court made no finding of incompetence, but it ordered the Medical Director of the Pima County Jail to evaluate Defendant "for the administration of Navane at a dosage of five milligrams per day," and it ordered that the jail notify the court if it was unable or unwilling to so medicate Defendant.

P13 On March 26, 1993, Dr. Catherine Boyer, a clinical psychologist at the Court Clinic, became the fourth expert to testify that Defendant was presently incompetent. She said that Defendant believed he could hear people's thoughts and he was very suspicious of defense counsel. She saw no evidence of malingering; [***9] to the contrary, she thought that Defendant "seemed very intent on showing that he was not mentally ill and that he was able to proceed with his case." The State called no witnesses.

Finding of Competence Reversed

P14 The trial court rejected the undisputed evidence and found that Defendant was competent. The order provided, in part,

While the defendant may appear to have some signs of mental illness, his behavior in relation to defense counsel is not uncommon among defendants, in general, and with defense attorneys who have personality traits similar to lead defense counsel's.

....Much of the defendant's conduct amounts to malingering. The Court finds the defendant is competent to stand trial.

[**1189] [*77] P15 Defendant filed a petition for special action in Division Two of the Court of Appeals. n2 On May 12, 1993, the court of 2 appeals vacated the trial court's finding of competence because

The record before us contains no reasonable evidence to support the trial court's conclusion that [Defendant] was competent when the various experts last examined him. We recognize that in evaluating the evidence the trial court is not bound by the opinions of experts. However, [***10] there must be some basis for rejecting the testimony of experts, such as observations made by the court of the defendant or, perhaps, testimony of counsel. Here, the experts, including psychologist Catherine Boyer who testified on behalf of the court clinic, unanimously concluded that petitioner was unable to assist his counsel because of his paranoia. We can find no reasonable evidence to support a rejection of the opinions of four experts, the only experts who testified. There is no reasonable evidence to support the court's finding that petitioner is malingering. That defense counsel may have violated the court's orders in this matter or acted in an inappropriate, perhaps unethical manner, is not relevant to a determination under Rule 11.

(Citations omitted.) The court of appeals also noted that the State's response to the petition for special action "does not dispute petitioner's contention that the evidence unequivocally established petitioner's incompetency when last examined."

n2 Defense counsel also accused the trial court of bias and prejudice, and asked for a new judge. This motion was denied by the superior court presiding judge. Defense counsel was quite an accuser in this case. The trial court once wrote, "Defendant's motion practice continues to make scurrilous attacks upon State's counsel. ... Counsel's motion practice does not merit this much judicial consideration but for its outrageous nature."

> Although not all of defense counsel's accusations were unfounded, to fairly discuss how often the court and/or the prosecutor had reason to believe that defense counsel was himself guilty of impropriety would be a long story that will not be told in this opinion. Defense counsel misconduct can be the focus of other proceedings, but it warrants only a footnote in this opinion, which is focused on whether prosecutorial misconduct deprived Defendant of a fair trial. It suffices to say that the State does not argue, and we do not find, that the prosecutorial misconduct in this case can be excused on any sort of "invited error" theory.

[***11]

P16 On remand, the trial court committed Defendant to the Maricopa County Department of Health Services to be restored to competence. The court also ruled that, at trial, each side would be limited to one expert witness on the issue of sanity. In moving for reconsideration of this ruling, defense counsel argued,

> The need for more than one expert is especially true given the prosecution's apparent tactic. The prosecution will not retain, or call an expert, to contradict Dr. Potts. Rather, the prosecution , will "bash" psychiatry and psychology as not being a science, and as not being reliable evidence upon which to base an acquittal or a conviction for a lesser offense.

The trial court denied the motion, but later ordered that Defendant could call two experts, namely, "one mental health expert to testify about those matters involving psychiatric, psychological and malingering issues" and "a medical expert on physical trauma as it relates in general to organic brain disorders." The propriety of this order is not before us.

Competence Restored

P17 About a year later, by letter dated April 18, 1994, Dr. Potts advised the court that Defendant was presently competent, [***12] although in need of continued medication and psychiatric treatment. In response to the letter from Dr. Potts, defense counsel requested a competency hearing and nominated Dr. Boyer to evaluate Defendant. The prosecutor again refused to nominate a mental health expert. At the hearing, the prosecutor called six Pima County employees who had contact with Defendant after his arrest. These witnesses were a jail librarian, a sheriff's office clerk, three sheriff's office correctional specialists, and a superior court release specialist. In general, these witnesses testified that Defendant seemed fine to them, he exhibited no bizarre behavior, he made routine purchases, and he reviewed legal materials in the jail in September 1991.

[**1190] [*78] P18 On June 29, 1994, Defendant took the stand. He wanted to testify, he said, "to prove that I am competent." He said he was prepared to go to trial next week, he was not mentally ill, and he had never been mentally ill. When asked if he was schizophrenic, Defendant said, "Not personally, no." When Defendant stepped down, the court ordered that he continue to receive medication, and the court found that "defendant's own testimony removed any doubt in the Court's [***13] mind about his competency. Defendant did an excellent job of representing himself, did an excellent job of responding to questions. Finding of the court the Defendant is competent."

Mistrial and Retrial

P19 Trial began on July 6, 1994, but the court declared a mistrial on July 20, after a State's witness gave a non-responsive answer that included some information that the prosecutor had been ordered not to disclose to the jury. After defense counsel argued that Mr. Zawada had intentionally risked a mistrial to disclose this information to the jury, the court found that "the prosecution in this case has not in any way intentionally caused the result which leads to this mistrial." The court also stated, "It is the further order of the court that a mistrial is appropriate in view of the ribbons that were worn to court by some of the witnesses."

P20 Retrial began on July 21. During voir dire, the court asked the jury panel, "Is there anyone here who feels that, uh -- for any reason, that psychiatrists or psychiatry is not a -- field, uh, that should be permitted in a court of law? Anybody here who believes that they have any bias or prejudices towards psychiatry, the field of [***14] psychiatry?" No juror responded to either question, but the prosecutor did. He moved for a mistrial. After approaching the bench and making the motion, Mr. Zawada stated, "I know that the legal system -- a lot of people in the legal system think that these people have something to add to what's going on; I don't, and I think, here, those questions -- and I -- and I see -- see it as the legal system being supportive of psychiatrists and psychologists." The court did not bother to rule on this patently frivolous motion.

P21 To avoid redundancy, we discuss the trial evidence and the prosecutorial misconduct in later sections of the opinion.

P22 The jury found Defendant guilty of first degree murder, attempted second degree murder, aggravated assault (eight counts), disorderly conduct (two counts), and felony fleeing. Defendant was sentenced to life in

prison on the murder charge and a total of 184.25 years on the other charges. After calculating consecutive and concurrent terms, the total sentence was life plus 100 years.

P23 Defendant's appeal argued for reversal on eleven grounds. In a memorandum decision, the court of appeals reversed one of the aggravated assault convictions and [***15] affirmed all other convictions. *State v. Hughes,* No. 2 CA-CR 94-0636 (Ariz. Ct. App. Dec. 24, 1996). We granted review "as to those issues dealing with prosecutorial misconduct." We have jurisdiction pursuant to Arizona Constitution, article 6, section 5(3), and Arizona Revised Statutes Annotated ("A.R.S.") section 13-4031 (1989).

The Cumulative Error Doctrine

P24 Defendant argues that the prosecutor improperly asserted and insinuated that Defendant, defense counsel, and expert witnesses fabricated an insanity defense, improperly drew the jury's attention to Defendant's failure to testify, and improperly warned the jury to consider how they would feel if they found Defendant not guilty by reason of insanity and someone else was murdered in the future. Defendant alleges that this prosecutorial misconduct, individually and cumulatively, denied him a fair trial.

P25 At the outset, we need to clarify Arizona's position regarding the cumulative error doctrine in criminal cases. Our general rule has been stated several times over the years, and was recently stated in *State v. Dickens, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996),* as follows: "This court does not recognize the [***16] so-called cumulative error doctrine." *See also State v. Roscoe, 184 Ariz. 484, 497, 910 P.2d 635, 648 (1996); State v.* [**1191] [*79] *White, 168 Ariz. 500, 508, 815 P.2d 869, 877 (1991).* This lack of recognition is based on the theory that "something that is not prejudicial error in and of itself does not become such error when coupled with something else that is not prejudicial error." *Roscoe, 184 Ariz. at 497, 910 P.2d at 648.* In *Roscoe,* for example, each alleged error was either "no error at all or no prejudice to Roscoe." *Id.* We reiterate the general rule that several non-errors and harmless errors cannot add up to one reversible error. We also clarify the fact that this general rule does not apply when the court is evaluating a claim that prosecutorial misconduct deprived defendant of a fair trial.

Prosecutorial Misconduct

P26 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." *Donnelly v. DeChristoforo, 416 U.S. 637, 643, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974).* "Reversal on the basis of prosecutorial [***17] misconduct requires that the conduct be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Atwood, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992)* (quoting *United States v. Weinstein, 762 F.2d 1522, 1542 (11th Cir. 1985)* (quoting *United States v. Blevins, 555 F.2d 1236, 1240 (5th Cir. 1977))); see also State v. Lee, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997).* To determine whether prosecutorial misconduct permeates the entire atmosphere of the trial, the court necessarily has to recognize the cumulative effect of the misconduct.

P27 That Arizona recognizes the cumulative effect of prosecutorial misconduct is shown by the following passages from some Arizona cases (with our emphasis supplied):

> Any one of the improper statements taken alone might not have warranted a mistrial, but **the cumulative effect** was highly prejudicial with a strong probability that the statements influenced the jury verdict.
>
> *State v. Woodward, 21 Ariz. App. 133, 135, 516 P.2d 589, 591 (1973).*
>
> We believe that while any one of the improper statements taken alone might not warrant a mistrial, **the cumulative effect** [***18] of the argument was prejudicial and mandates a reversal.
>
> *State v. Filipov, 118 Ariz. 319, 323, 576 P.2d 507, 511 (App. 1977).*
>
> Although the one question and answer standing alone without objection and without further elaborating questions might not be prejudicial, we believe that **the question together with the comments thereon to the jury** was fundamental error. ...
>
> *State v. Anderson, 110 Ariz. 238, 241, 517 P.2d 508, 511 (1973).*
>
> From the record we have before us, we believe that the remarks of the county attorney were unsupported and **when considered with the other examples of misconduct,** constituted reversible error. A new trial should be granted.
>
> *State v. Bailey, 132 Ariz. 472, 479, 647 P.2d 170, 175 (1982).*
>
> The problem here is not some isolated result of loss of temper, but **the cumulative effect** of a line of

questioning in which the prosecutor posed numerous improper questions resulting in at least two bench conferences and one court admonishment.

Pool v. Superior Ct., 139 Ariz. 98, 106, 677 P.2d 261, 269 (1984).

After the jury began its deliberations, defense counsel moved for a mistrial [***19] based on the cumulative effect of the foregoing statements. ...

..... This misconduct was particularly egregious considering that the court had earlier excluded statements regarding a prior incident because they had not been formally disclosed in advance of trial.

State v. Leon, 190 Ariz. 159, 161-62, 945 P.2d 1290, 1292-93 (1997).

Dickens and Duzan

P28 Unfortunately, two recent cases refused to recognize the cumulative error doctrine while denying a claim of prosecutorial misconduct. *See State v. Dickens, 187 Ariz. at 21, 926 P.2d at 488; State v. Duzan, 176 Ariz. 463, 466,* [**1192] [*80] *862 P.2d 223, 226 (App. 1993).* The result was plainly correct in each case, but the analysis was partly incorrect because we do recognize the cumulative effect of prosecutorial misconduct. Perhaps the general rule was misapplied in *Dickens* and *Duzan* because neither appeal raised a strong "permeates the atmosphere" claim. The appeal in *Dickens* complained of seven instances of prosecutorial misconduct, but objection to six of them was waived by failure to object at trial. *Id.* at 20, 926 P.2d at 487. We found no error in the claim that was preserved and no [***20] fundamental error in those that were waived. *See id.* at 21, 926 P.2d at 488.

P29 In *Duzan,* the court stated, "We note preliminarily that the doctrine of cumulative error is not recognized in Arizona ... absent related errors." *Id.* at 466, 862 P.2d at 226 (citations omitted). Although multiple instances of prosecutorial misconduct are, in fact, related errors in a "permeates the atmosphere" claim, the *Duzan* defendant had a very weak claim in that regard; he alleged three instances of misconduct on appeal, but two of them were waived and were not fundamental error, and the third was not error at all. *See Duzan, 176 Ariz. at 466-68, 862 P.2d at 226-28.*

P30 *State v. Floyd, 120 Ariz. 358, 586 P.2d 203 (App. 1978),* involved a prosecutorial misconduct claim that was as weak as those in *Dickens* and *Duzan,* but *Floyd* implicitly recognized the cumulative error doctrine while denying the claim, as follows:

Ultimately, citing *State v. Filipov, 118 Ariz. 319, 576 P.2d 507 (App. 1978),* and *State v. Woodward, 21 Ariz. App. 133, 516 P.2d 589 (1973),* appellant urges that the cumulative effect of the prosecutor's statements requires reversal if the statements [***21] individually do not. We find no impropriety approaching the level in the cited cases.

Id. at 362, 586 P.2d at 207. The level of prosecutorial impropriety in *Dickens* and *Duzan* was similar to that in *Floyd* and warranted the same result, but the *Floyd* analysis was more precise.

Pool

P31 The level of impropriety by prosecutor Zawada in this case approximates that seen in *Pool.* There, the issue was whether the double jeopardy clause barred retrial after a mistrial had been declared because of pervasive misconduct by prosecutor Thomas J. Zawada (the same). *See Pool, 139 Ariz. at 100, 677 P.2d at 263.* In deciding that retrial was barred, we considered the cumulative effect of the prosecutor's misconduct, we cited many examples of it, and we concluded that "portions of the questioning are so egregiously improper that we are compelled to conclude that the prosecutor intentionally engaged in conduct which he knew to be improper, that he did so with indifference, if not a specific intent, to prejudice the defendant." *Id. at 109, 677 P.2d at 272.* We have the same opinion regarding Mr. Zawada's conduct and state of mind here. (Because Defendant [***22] was convicted and is seeking a new trial, the double jeopardy clause is not an issue in this case.)

P32 In reviewing prosecutorial misconduct, we focus on whether it affected the proceedings in such a way as to deny the defendant a fair trial. *See State v. Atwood, 171 Ariz. 576, 607, 832 P.2d 593, 624 (1992).* "We are not eager to reverse a conviction on grounds of prosecutorial misconduct as a method to deter such future conduct." *State v. Towery, 186 Ariz. 168, 185, 920 P.2d 290, 307 (1996).* Prosecutorial misconduct is harmless error if we can find beyond a reasonable doubt that it did not contribute to or affect the verdict. *See id.; State v. Bible, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).*

P33 The prosecutor has an obligation to seek justice, not merely a conviction, and must refrain from using improper methods to obtain a conviction. *See Bible, 175 Ariz. at 600, 858 P.2d at 1203; Pool, 139 Ariz. at 103, 677 P.2d at 266.* "We emphasize that the responsibilities of a prosecutor go beyond the duty to convict defendants. Pursuant to its role of 'minister of justice,' the prosecution has a duty to see that defendants receive a fair trial. Ariz. R. Sup. Ct. [***23] 42, E.R. 3.8,

comment; *State v. Cornell, 179 Ariz. 314, 331, 878 P.2d 1352, 1369 (1994)." State v. Rodriguez, 192 Ariz. 58, , 961 P.2d 1006, 1012 (1998).*

[1193] [*81] The Evidence**

P34 As previously stated, there was never much doubt that Defendant had done what he was charged with doing. Our discussion of the evidence focuses on prosecutorial misconduct in relation to the insanity defense. Most of that misconduct was committed in cross-examination of Dr. Potts and in rebuttal argument.

P35 The State's first witness was Defendant's sister. Her recently written statement differed in some respects from what she told police after the shooting. In questioning these discrepancies, the prosecutor asked her a question that was loaded with unfounded insinuations about defense counsel:

When Mr. Cornell demanded that you write this letter, did he indicate to you that you were supposed to say something about everybody else being drunk, or starting to drink around 12:00 that day? Were you supposed to explain and create the impression that everybody else was drunk on this day?

Mr. Cornell objected and the trial court told Mr. Zawada to rephrase the question. [***24]

P36 The State spent the next five days of trial proving the crimes. Witnesses included a medical examiner, four members of Defendant's family, six members of the victim's family, and more than twenty law enforcement officers. The prosecutor's questions of the family were intended to show that Defendant was intelligent, athletic, and competitive, could function in society, could become abusive and out of control when drunk, and so forth. Defense counsel's questions of the family were intended to show that Defendant was mentally ill, would ask that the television be turned off so the government could not hear him, would not get a tooth pulled because he was afraid the dentist "would put in something for the government or the police or something," and so forth.

P37 As per court order, Defendant called only two experts on the insanity defense. Dr. Andrew Belan, a psychologist who did "brain mapping," testified that Defendant's brain wave activity was like that of people with chronic schizophrenia, that Defendant's test results were not consistent with any other condition, and that his condition was not caused by long-term alcohol abuse. Mr. Zawada asked nothing remarkably improper of [***25] Dr. Belan.

P38 Dr. Potts was the only defense expert the trial court allowed to give an opinion on insanity; Dr. Potts was therefore the major witness on Defendant's primary defense, the insanity defense. Dr. Potts testified that he was board certified by the American Board of Psychiatry and Neurology, he was Chief of Forensic Psychiatry for Maricopa County Correctional Health Services, and he had been working in the Maricopa County Jail as a forensic psychiatrist since 1981. He had done hundreds of insanity evaluations on inmates over the years. He had testified on insanity in about ten trials; in most of those trials, he was called to testify by the State.

P39 Dr. Potts testified that he and his colleagues were concerned about possible malingering when Defendant first came into their care because the charges were serious and Defendant had no known history of institutionalization. However, after evaluating Defendant continuously on a 24-hour-a-day basis for some time, they concluded that he was not malingering. Dr. Potts noted that Dr. Osran, who treated Defendant in mid-1993, and Dr. Boyer, who treated him in May 1993, also concluded that he was not malingering. Dr. Potts testified [***26] that Defendant's "overwhelmingly positive" reaction to antipsychotic medication confirmed the diagnosis of schizophrenia because "one cannot feign the response to the medication." Dr. Potts said that his opinion was consistent with that of Dr. Flynn; they both noted that Defendant hallucinated and was extremely defensive about being viewed as mentally ill, symptoms that are characteristic of mental illness.

P40 Dr. Potts testified that when, in his July 1992 report, he raised an issue about Defendant's sanity at the time of the crimes, he had not been contacted by any attorney in the case. After he was retained by defense counsel in late 1992, Dr. Potts reviewed many documents, including medical reports, and statements from witnesses, police, and family. Dr. Potts testified that, in his opinion, [**1194] [*82] Defendant "unquestionably suffers from schizophrenia of a paranoid type," that because of this condition Defendant did not know that what he was doing on August 25, 1991, was wrong, and that he met the M'Naghten standard of insanity.

141 Dr. Potts testified that Defendant had been "extremely consistent" over the years when describing the crimes. In brief, Defendant's perception was that the [***27] victim was tougher than he was, and when they argued on August 25, 1991, Defendant became afraid that the victim would hit him in the jaw. Defendant thought that "a blow to his jaw might kill him." Defendant got the shotgun, the victim continued to taunt him, and the gun fired. Realizing what he had done, Defendant drove out to the desert to kill himself. After thinking about that for a while, Defendant decided that he had done nothing wrong, so he drove back to the house to see if the victim was all right. When he saw the

police and heard one of them say "machine gun" in Spanish, Defendant again became afraid for his life, made a U-turn, and sped away, with police chasing him.

Misconduct in Cross-Examination

P42 The prosecutor asked Dr. Potts if he had spoken to any defense witnesses or knew what the defense investigator had said to them. Dr. Potts answered, "No." The prosecutor then asked, "Do you know whether or not [the investigator] went out there and told him, hey, listen, we are trying to build an insanity defense, can you think of anything, ever, in the defendant's life that maybe you thought was a little strange or weird or odd?" Dr. Potts responded, "That would [***28] be pure conjecture, Mr. Zawada." On two occasions, Mr. Zawada asked questions that put before the jury information that earlier evaluations of Defendant were done after contact with the court system. The trial court had expressly precluded this information. Counsel's objections were sustained.

P43 Referring to Dr. Morris's opinion that he could not evaluate Defendant's state of mind because Defendant would not provide enough information, the prosecutor asked Dr. Potts, "So when does the issue of insanity arise in this case?" The court sustained the objection.

P44 One question to Dr. Potts was an improper rhetorical argument: "I mean, you pick up Mr. Hughes as a -- as a client for the court, initially, and you are not able to make any decision, and then what happens is after you are hired by the defense, you are able to come to a conclusion?" The objection was sustained.

P45 The prosecutor ended one argument with Dr. Potts by blurting, "Do you know that this Court found this defendant competent?" The court called counsel to the bench and said that competency was not an issue at this time. The prosecutor replied, "I don't think the competency ever was an issue, quite frankly." After [***29] denying Mr. Cornell's motion for a mistrial, the court instructed the jury that competency was not an issue and they were not to consider that issue or be concerned about it.

P46 The defense called nine other witnesses for brief testimony. An officer testified that, prior to Defendant's arrest, another officer radioed that Defendant had a "possible past psych history" and that "it would be something that we would have to deal with" after Defendant was arrested. A neighbor testified to strange behavior by Defendant. A jail records custodian testified that Defendant's sister was not one of his visitors after his arrest. Two public defenders testified that they did not give Defendant any police reports after his arrest. Four witnesses testified on various other matters. Defendant did not testify.

The State's Rebuttal Evidence

P47 In rebuttal, the State called the arresting officer and four County employees who had contact with Defendant after his arrest. These witnesses noticed nothing strange about Defendant, although the intake specialist did refer him for a mental health interview after he said he was hearing voices. The arresting officer thought that Defendant was intoxicated [***30] but not drunk. The jail librarian testified that, on September 11, 1991, Defendant asked for the Arizona criminal code and materials on murder, aggravated assault, and endangerment. The [**1195] [*83] State did not call a mental health expert. The State's rebuttal evidence was as ineffective as that in *State v. Overton, 114 Ariz. 553, 562 P.2d 726 (1977)*, where, "to establish sanity, the State introduced the testimony of police officers who based their opinions on observations and interrogations *after* the commission of the crime." *Id. at 556, 562 P.2d at 729*. We held that such testimony was not competent to rebut evidence of insanity because,

> if the State relies on lay testimony to establish sanity, there must have existed an intimacy between the witness and the defendant of such a character and duration that the witness' testimony is of probative value to establish that defendant knew the nature and quality of his act and that he knew it was wrong.

That Defendant was talking normally after he was in custody "does not negate the more subtle and insidious forms of insanity with which the mind may be possessed." *Id.* To be competent to offer an opinion on sanity, "a lay [***31] witness must have had an opportunity to observe the past conduct and history of a defendant." *State v. Zmich, 160 Ariz. 108, 111, 770 P.2d 776, 779 (1989)*. None of the State's rebuttal witnesses met that foundational requirement. (Some of the witnesses in the State's case-in-chief did meet it.)

Misconduct in Rebuttal Argument

P48 After both sides rested, the court advised counsel that the procedure for objecting during final argument was "to simply state objection, reserve the matter, and let it go. Then after the jury is gone, the record is made." The State's opening argument and Defendant's final argument contained no remarkable impropriety.

P49 The stage was set for the prosecutor's rebuttal argument. The prelude took place outside the jury's presence:

> MR. CORNELL: One final thing and it's this, Judge. I tried to comport myself within the rules of this Court and

the rules of the lawyers during my argument. If there's anyone, by reputation, that's known to step on the Constitution in rebuttal argument, it's Mr. Zawada. I move the Court to carefully listen to him because I'm very concerned. This is now the scariest part of the trial other than Alex having to testify, [***32] Mr. Zawada on rebuttal. Please try and control him.

MR. ZAWADA: Can the record reflect that I thought he was just going to jump over Detective O'Connor into my lap? He pointed his finger at me.

THE COURT: Could I have the verdict forms?

MR. ZAWADA: This has been going on throughout the entire trial.

MR. CORNELL: This is our copy to look at. Mr. Zawada's wife is also fearing for his safety from me as well.

MR. ZAWADA: And again, another gratuitous look at me, and a third.

THE COURT: Okay.

MR. CORNELL: It's rare that I get to see a sandbagger in such rare form, Judge.

THE COURT: Well, Thomas S. Murphy, the Federal District Court Judge in the Second District of California, often remarked, counsel, let's try and make this look like a lawsuit, and it needs no response.

P50 Mr. Zawada then delivered a rebuttal argument that covers about forty pages of transcript and is a masterpiece of misconduct. It contained proper argument, too. Early on, Mr. Zawada argued that the jury should look at Defendant's actions "shortly before, during, and shortly after the commission of the offense" because,

if you go like three days later, four days later, [***33] a month later ... they have had the opportunity to digest the criminal statutes, the case law, ... they've had the opportunity to sit around with the other inmates in the county jail, ... they have had the opportunity to think and reflect upon what they've done, ... they've had the opportunity to discuss matters with their sister or mother and everybody else involved in the case, and then they've decided to try to put a story together, if you don't look at people's actions at the relevant times, nobody would ever be convicted of anything.

The record contained facts from which the State could fairly make a "fabrication" argument about Defendant and his family. For [**1196] [*84] example, his sister did change her testimony, the change did favor Defendant, and Defendant did seem to know about this change before anyone else did.

P51 Then the prosecutor went out of bounds, and outside the record, to argue that psychiatrists create excuses for criminals:

How about the Judge back there in New York, was it, that was infatuated with the secretary or somebody else and he followed her around and sent her notes and sent her letters and all kinds of things and wouldn't leave her alone. I [***34] don't know if he stalked her or not, and ultimately they looked into the case a little bit. You know what they did, they created a syndrome for him to try to justify his action.

P52 Then the prosecutor, with no evidentiary support, argued that defense counsel paid Dr. Belan to fabricate a diagnosis:

[Dr. Belan] knows the result he's looking for, and that's it. He knows the result he is looking for. Subject comes in with schizophrenic -- potential schizophrenic diagnosis. He knows right there what he is looking for, and $ 950 later, yes, that's what he's got. ...

... He knows the result for he knows the result he wants.

....I mean he didn't see him, ladies and gentlemen, this defendant didn't walk off the street and say I am not feeling well, I have had this headache, I have got something wrong. I mean he comes to him in the most suspicious circumstances that you can ever have. He gets referred by his attorney. Just like he was in December of '91 for a psychiatric evaluation. Reportedly suffering from schizophrenia, and lo and behold, confirmed. Perfect.

P53 After proper argument on self-defense and other issues, the prosecutor returned to his improper [***35] "fabrication" argument:

This is December of '91. He was referred by his attorney for psychological evaluation. When he was asked if he was depressed or nervous, he thought for a while and he says he feels naturally depressed for being in jail. This is '91. See it kind of develops, ladies and gentlemen, as it gets along.

P54 A few moments later, the prosecutor argued that the mental health experts were "mouthpieces" for Defendant. "And what do you hear -- what are you hearing from these doctors? You are hearing the defendant. They are only telling you what the defendant

told them." A few moments later, the prosecutor returned to the "fabrication" argument again, stating, "So February '92, ladies and gentlemen, we get a request for Rule 11 proceeding, court proceedings, in this matter. Not August, September, October, November, December [of '91]." The objection was sustained.

P55 The prosecutor soon merged his "mouthpiece" argument into an improper comment on Defendant's failure to testify, after first suggesting that psychiatry was an impediment to truth and justice:

[Defense counsel] wants you to make your decision based on what Dr. Potts has to say and ignore the [***36] evidence in this case. He wants you to forego and to give up and to relinquish ... [your right] to pass judgment, for you to act as a member of this community and to decide, ladies and gentlemen.

Not Dr. Potts, not some $ 4,000 or $ 6,000 hired doctor who wants to come in here .... I mean you stand, ladies and gentlemen, between this great power of psychiatry and truth and justice here. I mean, ladies and gentlemen, Dr. Potts, Dr. Belan, they could no more tell you what was going on inside of that man's mind than they can tell you whether or not he was abducted by a UFO ....

The only way you know what is inside of a person's mind is to look at their words and actions at the relative times, shortly before, during, and shortly after the commission of the offense. And you do that job. I mean, after all, this is a jury trial, it is a search for the truth. You know, bring your witnesses in here, prove your case. You know, have them testify. Cross-examine them. Evaluate their demeanor when they are testifying, their manner while testifying. Any bias or prejudice they might have. And Mr. Cornell wants you to find [**1197] [*85] this defendant not guilty by reason of insanity based on what [***37] the defendant himself is saying. I mean that's it, that's it, that's what the defendant himself is saying because there is no other evidence here to justify a not guilty by reason of insanity verdict, other than what the defendant is saying and what he's told everybody else in this case. All these other psychiatrists or psychologists, or whoever they may have been.

And you know he lies. You know he's got a motive for lying. That's what you have seen here ladies and gentlemen. You've seen the defendant testifying, except it was in the form of a doctor, all suited up nice and neat, a tie, shirt, suit, nice and presentable, good credentials and everything else. But what was it that was being said? Who was speaking? He was a mouthpiece for the defendant. That's all you've seen here. This is not a science, it's an art. It's an art. It's guess-work.

He's related -- Dr. Potts has related to you only what the defendant told him, only the words the defendant uttered, and from that conclusion, he's decided he was insane. That he was suffering from paranoid schizophrenia.

A few moments later, the prosecutor rhetorically asked if the basis of the doctors' opinions was "what the defendant's [***38] been telling you all along?" He then answered the question by stating, "It's the defendant who's testified." Defendant had not testified.

P56 The prosecutor then got the jurors thinking about how guilty they would feel if they found Defendant not guilty by reason of insanity and heard about a murder in the future:

You know, the next time you are out on a nice, pretty, sunny afternoon, perhaps with your family, and you are driving along the roads or maybe you are at a picnic, your radio is on and you hear about a murder or something like that, or an aggravated assault, you think back to this case. You are going to have to be able to say right then and there that you were convinced ... that the evidence was clear and convincing that this man was insane. Not just paranoid schizophrenic, not mentally ill, not possibly mentally ill, but insane. Because you know, you go back there in your deliberation now and you are sitting there and you can't imagine that day, ladies and gentlemen, when you hear this on the report and you can't say, yes, I was clearly convinced, you know, that the defendant carried his burden.

The objection was overruled.

P57 After the prosecutor finished, [***39] Mr. Cornell requested ten minutes of surrebuttal on the insanity defense. The trial court, which had previously denied a similar request, again denied it. After the jury was instructed, Mr. Cornell moved for a mistrial, arguing that the prosecutor's reference to the Rule 11 evaluation in February 1992 was prejudicial error, as was the comment about jurors hearing about a future murder. The motion was denied.

Misconduct in the "Fabrication" Argument

P58 Defendant cites many incidents of prosecutorial misconduct on the "fabrication" issue. Defendant failed to object to many of these incidents at trial. Failure to object waives an issue on appeal absent fundamental error. *See State v. Gendron, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991).* However, when counsel has made the court aware of his objection through a previous motion, failure to object at trial does not then waive the issue on appeal. *See State v. Grannis, 183 Ariz. 52, 62, 900 P.2d*

1, 11 (1995); State v. Lindsey, 149 Ariz. 472, 476, 720 P.2d 73, 77 (1986). Although counsel did not object every time the prosecutor made an improper "fabrication" assertion or insinuation, he did make frequent objection on that [***40] subject at trial, and in pre-trial proceedings. We conclude that the issue was fully preserved.

P59 Counsel can argue all reasonable inferences from the evidence. *See State v. Dumaine, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989).* Counsel's questioning and argument, however, cannot make insinuations that are not supported by the evidence. *See Cornell, 179 Ariz. at 331, 878 P.2d at 1369; State v. Williams, 111 Ariz. 511, 515,* [**1198] [*86] *533 P.2d 1146, 1150 (1975).* It is improper for counsel to imply unethical conduct on the part of an expert witness without having evidence to support the accusation. *See Bailey, 132 Ariz. at 479, 647 P.2d at 177.* Jury argument that impugns the integrity or honesty of opposing counsel is also improper. *See State v. Denny, 119 Ariz. 131, 134, 579 P.2d 1101, 1104 (1978); State v. Gonzales, 105 Ariz. 434, 436, 466 P.2d 388, 390 (1970).*

P60 In *Cornell,* the prosecutor insinuated during cross-examination that counsel taught defendant how to fake epilepsy. *179 Ariz. at 330-31, 878 P.2d at 1368-69.* Because the record did not support the insinuation, the prosecutor had "unfairly cast aspersions on advisory counsel's integrity." *Id. at* [***41] *331, 878 P.2d at 1369.* The prosecutor was guilty of misconduct. *See id. at 332, 878 P.2d at 1370.* We did not reverse, however, because defendant failed to object, the misconduct was not fundamental error, and it did not undermine defendant's primary defense. *See id.* Here, however, Defendant objected, the prosecutor's misconduct was intended to undermine Defendant's primary defense, and it did so.

P61 This record reveals a prosecutor with an overpowering prejudice against psychiatrists and psychologists, among others. He told the court, "psychiatrists should be precluded entirely from testifying in criminal matters," and he repeatedly refused to retain a mental health expert for the State. The State has no obligation to retain a mental health expert in a case such as this, but the State has an obligation to be honest with the facts. The prosecutor's reason for not retaining a mental health expert in this case was obvious; doing so would impair his trial strategy of ignoring the facts he did not like, relying on prejudice, and arguing that all mental health experts are fools or frauds who say whatever they are paid to say. That is a dishonest way to represent the State in any [***42] case, and it was especially dishonest in this case, where the evidence of mental illness was overwhelming, where the evidence of insanity was substantial, and where the State had no evidence that defense counsel or expert witnesses had fabricated an insanity defense.

Misconduct in the "He Lies" Argument

P62 Defendant argues that the "You know he lies" argument, quoted in P55, was improper comment on the exercise of his Fifth Amendment right not to testify. Defendant did not object to this argument at trial, meaning that the claim is waived absent fundamental error. *See Gendron, 168 Ariz. at 154, 812 P.2d at 627.* Fundamental error is that which is "clear, egregious, and curable only via a new trial." *Id. at 155, 812 P.2d at 628.* Fundamental error is "'error going to the foundation of the case, error that takes from defendant a right essential to his defense, and error of such magnitude that defendant could not possibly have received a fair trial.'" *Bible, 175 Ariz. at 572, 858 P.2d at 1175* (quoting *State v. Hunter, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)).* In determining whether error is fundamental, we look to the entire record and to the totality of the [***43] circumstances. *See Bible, 175 Ariz. at 572, 858 P.2d at 1175; Gendron, 168 Ariz. at 155, 812 P.2d at 628.* Considering those matters, which is to say, considering the cumulative effect of the prosecutorial misconduct that permeated this trial, we conclude that the improper comment on Defendant's failure to testify was fundamental error.

P63 The prosecutor who comments on defendant's failure to testify violates both constitutional and statutory law. *See* Ariz. Const. art. 2, § 10; *A.R.S. § 13-117(B)* (1989); *State v. Schrock, 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986).* Although an improper comment on defendant's failure to testify can be harmless error in some cases, *see State v. Guerra, 161 Ariz. 289, 297, 778 P.2d 1185, 1193 (1989),* in other cases it can be fundamental error. *See State v. Smith, 101 Ariz. 407, 410, 420 P.2d 278, 281 (1966)* (citing *Rutledge v. State, 41 Ariz. 48, 15 P.2d 255 (1932),* for the proposition that fundamental error will be found if "the general conduct of the prosecuting counsel was such that it must be presumed to have resulted in a miscarriage of justice"). The error can be fundamental whether the comment is direct or indirect. [***44] *See State v. Jordan, 80 Ariz. 193, 199, 294 P.2d 677, 681 (1956).*

[**1199] [*87] P64 To be improper, "the prosecutor's comments must be calculated to direct the jurors' attention to the defendant's exercise of his fifth amendment privilege." *State v. McCutcheon, 159 Ariz. 44, 45, 764 P.2d 1103, 1104 (1988).* "The statements must be examined in context to determine whether the jury would naturally and necessarily perceive them to be a comment on the failure of the defendant to testify." *Schrock, 149 Ariz. at 438, 719 P.2d at 1054* (citing *State*

v. Christensen, 129 Ariz. 32, 39, 628 P.2d 580, 587 (1981)).

P65 The State argues that the "he lies" argument, when read in context, is proper comment on "the basis for the expert's opinion regarding [Defendant's] mental illness" and is not improper comment on Defendant's failure to testify. We doubt it. Just before the "he lies" argument, the prosecutor argued that you prove your case with witnesses who can be cross-examined, but all the jury had heard from Defendant was "what he's told everybody else":

I mean, after all, this is a jury trial, it is a search for the truth. You know, bring your witnesses in here, prove your case. You [***45] know, have them testify. Cross-examine them. Evaluate their demeanor when they are testifying, their manner while testifying. Any bias or prejudice they might have. And Mr. Cornell wants you to find this defendant not guilty by reason of insanity based on what the defendant himself is saying. I mean that's it, that's it, that's what the defendant himself is saying because there is no other evidence here to justify a not guilty by reason of insanity verdict, other than what the defendant is saying and what he's told everybody else in this case. All these other psychiatrists or psychologists, or whoever they may have been.

P66 The prosecutor's argument that Dr. Potts was Defendant's mouthpiece is similar to the improper argument in *State v. Trostle, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997)*. There, the prosecutor told the jury that only two people knew details about the crime: "'One is Jack Jewitt and the other one is sitting right here at the table asking you not to hold him accountable through his lawyer.'" *Id.* We held that the statement was an impermissible comment on defendant's failure to testify, but the error was harmless in light of the overwhelming evidence of guilt. [***46] *See id.* In the present case, the evidence of Defendant's guilt was overwhelming, but the evidence of his sanity was not. Here, the evidence of Defendant's mental illness was overwhelming, the evidence of his insanity was substantial, and the State called no experts. The State did overwhelm the insanity defense in this case, true, but it did not do so with evidence; it did so with prosecutorial misconduct.

Misconduct in the Appeal to Fear

P67 Defendant argued that the "you hear about a murder" argument, quoted in P56, "was a direct attempt to try and prejudice the jury, put the fear in them that if they acquit Mr. Hughes, that, number one, he'll probably get out of custody, and number two, he will be uncontrolled and he'll be violent." The trial court found no error; it remarked that this "is the same argument that is often used in defense cases of, ladies and gentlemen, this is the only time you will ever be able to vote on the defendant being not guilty. You don't get to do it twice, you don't get to, someday down the road, it is the similar argument." We disagree.

P68 The defense argument referred to by the trial court is a reminder to the jurors of the finality of their [***47] decision; it is not a suggestion that the jurors will feel responsible for future crimes unless they reject the insanity defense. Also, when defense counsel makes a "this is the only time" argument, the prosecutor gets the last word in rebuttal. Here, Defendant had the burden of proof on the insanity defense, but the State had the last word on it. Whether to allow defense counsel surrebuttal on the insanity defense is within the trial court's discretion. *See State v. Turrentine, 152 Ariz. 61, 65, 730 P.2d 238, 242 (App. 1986)* (holding that Rule 19.1(a), Arizona Rules of Criminal Procedure, gives the trial court discretion whether to allow surrebuttal by defendant on the insanity defense).

P69 Counsel have wide latitude in closing argument. *See Dumaine, 162 Ariz. at 401,* [**1200] [*88] *783 P.2d at 1193.* It is improper, however, for a prosecutor to draw the jury's attention to the potential disposition if defendant is found not guilty by reason of insanity. *See Cornell, 179 Ariz. at 327, 878 P.2d at 1365* ("A long line of our cases has held that this type of statement is improper."); *State v. Purcell, 117 Ariz. 305, 308, 572 P.2d 439, 442 (1977)* ("We have held that it is error for a [***48] prosecutor to initiate such an argument.").

P70 A prosecutor can certainly argue that Defendant has the burden of proving insanity by clear and convincing evidence, for that is the law. *See A.R.S. § 13-502* (1989). However, the comment about a future "murder or something like that" is an improper appeal to fear. In *State v. Makal, 104 Ariz. 476, 478, 455 P.2d 450, 452 (1969),* the prosecutor ended his rebuttal by imploring the jury, "Don't arrive at a verdict which will give Mr. Makal the opportunity to kill again," meaning that the jury should reject the insanity defense. In reversing, we noted, "Every jurisdiction which has passed upon a similar argument has held that it is erroneous misconduct on the part of the prosecuting attorney." *Id.*

P71 The State asserts that the prosecutor was referring to future crimes in general, not to future crimes by Defendant. We seriously doubt that this prosecutor was trying to walk that line. He referred to the same violent crimes that Defendant had committed, and he associated those future crimes with the consequence of finding Defendant not guilty by reason of insanity. The improper inference is clear, in a trial and an argument as [***49] permeated by prosecutorial misconduct as this one.

P72 The State argues that more direct commentary about future crimes has been found to be non-reversible. *See State v. McLoughlin, 133 Ariz. 458, 462-63, 652 P.2d 531, 535-36 (1982); State v. Marvin, 124 Ariz. 555, 557, 606 P.2d 406, 408 (1980); State v. Garrison, 120 Ariz. 255, 257, 585 P.2d 563, 565 (1978).* These cases are distinguishable. *McLoughlin* granted a new trial on other grounds and cautioned the prosecutor to "take care to choose words that cannot be construed to refer to future conduct." *Id.* at 463, 652 P.2d at 532. Neither *Marvin* nor *Garrison* involved an argument suggesting that defendant would be back on the street unless the jury rejected the insanity defense.

P73 In *Cornell,* where the prosecutor questioned an expert witness about defendant's possible release if found not guilty by reason of insanity, we concluded that the questioning raised an issue that was both irrelevant and prejudicial. *179 Ariz. at 327-28, 878 P.2d at 1365-66.* The error was harmless in *Cornell* because the evidence of insanity was sparse, it was based on a new theory in psychology, and the State's two experts **[***50]** testified that Defendant was sane and was probably malingering. *Id. at 330, 878 P.2d at 1368.* We cannot find harmless error here, where the evidence of mental illness was overwhelming, where the evidence of insanity was substantial, and where the State called no mental health expert.

P74 We hold that the cumulative effect of the prosecutor's misconduct deprived Defendant of a fair trial. We do not have to decide which of the prosecutor's misconduct would have been reversible error without the rest of the prosecutor's misconduct.

P75 Reversed and remanded for a new trial.

E. G. NOYES, Jr., Judge

CONCURRING:

THOMAS A. ZLAKET, Chief Justice

CHARLES E. JONES, Vice Chief Justice

STANLEY G. FELDMAN, Justice

FREDERICK J. MARTONE, Justice

Exhibit 2

FILED BY CLERK
DEC 2 4 1996
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,
v.
ALEX VIDAL HUGHES,
Appellant.

2 CA-CR 94-0639
Department A
MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-35338 and CR-35836 (Consolidated)

Honorable Bernardo P. Velasco, Judge

AFFIRMED IN PART; REVERSED IN PART

Grant Woods, The Attorney General
By: Paul J. McMurdie and Kent E. Cattani — Phoenix
Attorneys for Appellee

Susan A. Kettlewell, Pima County Public Defender
By: Brian X. Metcalf — Tucson
Attorneys for Appellant

P E L A N D E R, Presiding Judge.

Appellant Alex Hughes was convicted by a jury of one count of first-degree murder, one count of attempted second-degree murder, eight counts of aggravated assault and one count of felony fleeing. He was sentenced to life imprisonment without possibility of release for twenty-five years for the first-degree murder conviction and to terms totaling 184.25 years for the remaining offenses, to be served consecutively to the life sentence. Appellant raises numerous alleged errors in this appeal. We reverse the aggravated assault conviction on count 13 but affirm in all other respects.

FACTS

We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the convictions. *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989). On August 25, 1991, appellant went to a residence where his mother, two brothers, a sister, and the sister's boyfriend, Albert Borquez, lived. After drinking some beer and rum, appellant argued with his brother and then with Borquez, who told appellant to leave. Appellant refused and, after telling Borquez he was going to shoot him, went outside and retrieved a shotgun from his car. Appellant then shot Borquez in the chest at close range, killing him. When his sister followed appellant as he started to run away, he turned the gun on her and she returned to the house.

Appellant left in his vehicle but soon returned to the house, where police were questioning the witnesses. Appellant then took off and led officers on a high-speed chase, during which he shot at people in a van that was in his way and at pursuing police officers. After swerving his vehicle into a police car several times, appellant ran off the road. Police apprehended appellant in a wash after he had exited his car, raised a shotgun and fired a shot.

DISCUSSION

1. Competency to Stand Trial

After an evidentiary hearing in June 1994 at which appellant and one mental health

expert (Dr. Boyer) testified, the trial court found appellant competent to stand trial.[1] Appellant challenges that determination on several grounds, contending it was based on an unconstitutional standard and was not supported by reasonable evidence. We disagree.

In determining competency to stand trial, "[t]he inquiry is whether defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as a factual understanding of the proceedings against him." *Bishop v. Superior Court*, 150 Ariz. 404, 406, 724 P.2d 23, 25 (1986), quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 789, 4 L. Ed. 2d 824, 825 (1960). *See also* Ariz. R. Crim. P. 11.1, 17 A.R.S. The determination "is always and exclusively a question for the [trial] court," which is not bound by opinions of mental health experts and which acts not only as finder of fact but also as "a de facto witness who may take into consideration his own observations of the defendant." *Bishop*, 150 Ariz. at 409, 724 P.2d at 28. We will uphold the trial court's determination of competency if reasonable evidence supports it. *State v. Lara*, 179 Ariz. 578, 880 P.2d 1124 (App. 1994), *vacated in part on other grounds*, 183 Ariz. 233, 902 P.2d 1337 (1995); *State v. Brewer*, 170 Ariz. 486, 826 P.2d 783, *cert. denied*, 506 U.S. 872 (1992).

Reasonable evidence, particularly appellant's own lucid testimony at the Rule 11 hearing, supports the trial court's finding of competency. Dr. Potts, the psychiatrist whom appellant used to support his insanity defense at trial, believed that appellant's competency had been restored as of April 1994, resulting in his transfer back to Tucson from Phoenix. Several jail employees testified that appellant's behavior and activities were consistent with competency. Dr. Boyer, appellant's chosen mental health examiner who previously had evaluated appellant and who conducted another preliminary competency evaluation in June 1994, declined to recommend further evaluation. She could not say appellant was incompetent and deferred to the trial court on that determination. In addition to the foregoing testimony, we agree with the trial court that appellant's testimony was completely coherent, intelligible, and supported the court's finding of "no doubt about [his] competency."

Contrary to appellant's assertions, the trial court did not improperly evaluate the facts or unconstitutionally apply the governing standards for competency. Notwithstanding the court's prior dialogue with defense counsel in 1992 as to a hypothetical relationship between counsel and client in the criminal context, appellant's testimony in June 1994 indicated he had learned to trust his attorney. Other than expressing dissatisfaction with how long it had taken to get to trial, appellant did not suggest any inability or unwillingness to work with counsel. Nothing in the record indicates that at the time of trial, appellant's relationship or ability to meaningfully communicate with counsel was so bad as to mandate a finding of incompetency. That appellant had a misplaced and unrealistic confidence in his self-defense theory does not mean he was incompetent to stand trial. Similarly, that appellant's apparent memory of the victim's swinging a stool at him varied from the

[1]Based solely on psychological reports, the trial court initially found appellant incompetent to stand trial and ordered him sent to Phoenix for treatment in April 1992. After appellant was returned to Tucson in July 1992, the trial court held an evidentiary hearing and found him to be competent. This court reversed that determination in special action proceedings in May 1993, and appellant was referred for additional treatment. In May 1994 appellant was again returned to Tucson after his competency was deemed restored.

Appellant claims, *inter alia*, that the trial judge exhibited unacceptable bias by sometimes refusing to answer defense counsel's questions; periodically treating defense counsel in "a demeaning and intimidating manner" and making "intemperate statements and exhibit[ing] a hostile demeanor toward defense counsel"; engaging in *ex parte* activities; and acting as an advocate during the Rule 11 proceedings. Noticeably absent from appellant's allegations are any incidents of alleged bias or prejudice during the trial or in the jury's presence. As our supreme court has stated, "[R]emarks made outside the hearing of the jurors, even if prejudicial to the appellant, could not keep the jury from exercising an impartial judgment on the merits, and do not warrant a reversal." *Bible*, 175 Ariz. at 594 n.38, 858 P.2d at 1197 n.38, *quoting State v. Williams*, 110 Ariz. 14, 16, 545 P.2d 938, 940 (1976).

In addition, "[i]t is generally conceded that the bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source and not from what the judge has done in his participation in the case." *State v. Greenway*, 170 Ariz. 155, 162, 823 P.2d 22, 29 (1991), *quoting Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1255, 1270 (App. 1977). *See also State v. Hill*, 174 Ariz. 313, 848 P.2d 1375, *cert. denied*, 510 U.S. 898 (1993) (an erroneous ruling does not necessarily demonstrate a judge's bias toward a litigant). Most if not all of appellant's claims of bias related to the judge's rulings and actions in this case, including his finding of competency in April 1993 which this court overturned in a special action proceeding. We cannot say the presiding judge erred in determining that appellant had failed to prove the type of bias or prejudice necessary to disqualify a judge for cause.

Nor was appellant denied his right to a fair hearing before the presiding judge on his

Rule 10.1 motions. He was not automatically entitled to call the trial judge as a witness in those proceedings. In support of his motions, appellant filed extensive memoranda with voluminous exhibits, all of which the presiding judge considered in his rulings. We not only find no error in those rulings, but also concur with his observations that defense counsel's motions contain "verbiage [which was] both intemperate and unprofessional" and "are more illustrative of the temper tantrum of a non-disciplined child than the well reasoned arguments and research of a professional attorney."

As for defense counsel's complaints about *how* the trial judge periodically spoke to and treated him, our supreme court's statements are apropos:

> Even the best trial judge can run short on patience and turn from diplomacy to exasperation. While patience is a virtue, trial judges are human, and we recognize the difference between irritation and favoritism.

State v. Hill, 174 Ariz. 313, 322, 848 P.2d 1375, 1385 (1993). The presiding judge noted that the trial judge had "acted with admirable, if not actually herculean patience and restraint" in dealing with defense counsel's machinations. Based on our review of the record, we agree. There was no error in the presiding judge's refusal to remove the trial judge from the case.

5. Right to Present Evidence and Argument

Appellant next contends the trial court denied him due process and a fair trial by precluding four experts and two surrebuttal witnesses from testifying, precluding one of appellant's testifying experts from bringing his brain-mapping equipment into the courtroom to demonstrate it to the jury, and precluding any surrebuttal argument by appellant on his insanity defense. We disagree.

The trial court has broad discretion to limit the number of expert witnesses. *State v. Chaney*, 141 Ariz. 295, 686 P.2d 1295 (1984). The trial court did not abuse its discretion in limiting appellant to two mental health experts, when the state called none. Nor did the trial court err in prohibiting appellant from calling two attorneys from the Public Defender's Office as surrebuttal witnesses, since they were not timely disclosed. *State v. Scott*, 24 Ariz. App. 203, 537 P.2d 40 (1975). Similarly, the trial court did not abuse its discretion in prohibiting the brain-mapping equipment from being brought into the courtroom, when one of the defense experts fully testified about its use and when documents produced by the equipment and photographs of the system in operation were admitted. Finally, appellant was not automatically entitled to surrebuttal argument on his insanity defense, and the trial court did not err in precluding that. *State v. Zimmerman*, 188 Ariz. 225, 802 P.2d 1024 (App. 1990).

6. Evidentiary Rulings

The trial court has considerable discretion in determining the admissibility of evidence, and we will not disturb its decision to admit or exclude evidence absent an abuse of that discretion. *State v. Oliver*, 158 Ariz. 22, 760 P.2d 1071 (1988). The trial court did not err in admitting two hearsay statements that appellant previously had threatened the murder victim. The victim's brother was allowed to testify that the victim once had mentioned that appellant had threatened him. Even if that hearsay statement should not have been admitted under the residual hearsay exception, its admission was harmless beyond a reasonable doubt in view of the overwhelming evidence that appellant was the aggressor in arguing with and shooting the victim. *See State v. Wood*, 180 Ariz. 53, 881

P.2d 1158 (1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2588 (1995).

Appellant's mother testified that appellant and the victim "got along" and that she had never heard appellant threaten the victim before. Later, the victim's sister was allowed to testify that appellant's mother had told her that appellant had previously threatened the victim. That testimony was not hearsay under Rule 801(d)(1)(A), Ariz. R. Evid., 17A A.R.S., and even if it were inadmissible hearsay, its admission was harmless.

7. Alleged Prosecutorial Misconduct

Appellant next alleges that extensive prosecutorial misconduct before and during trial deprived him of a fair trial. To warrant reversal, the prosecutor's misconduct must call attention to a matter the jury is not entitled to consider, and it must have influenced the jury's verdict. *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992), *cert. denied*, 506 U.S. 1084 (1993); *State v. Hansen*, 156 Ariz. 291, 751 P.2d 957 (1988). The conduct must have been so pronounced that the entire trial was affected and the outcome probably influenced. *State v. Bolton*, 182 Ariz. 290, 896 P.2d 830 (1995). Moreover, we do not recognize the "so-called cumulative error doctrine," even for alleged prosecutorial misconduct. *State v. Dickens*, 228 Ariz. Adv. Rep. 44, 54 (October 31, 1996); *State v. Duzan*, 176 Ariz. 465, 862 P.2d 223 (App. 1993). The prosecutor's alleged acts of misconduct did not deprive appellant of a fair trial and, therefore, do not warrant reversal. *See Bible*, 175 Ariz. at 601-02, 858 P.2d at 1202-03.

That the prosecutor argued in Rule 11 proceedings that appellant was feigning mental illness, without any expert support for that claim, does not amount to misconduct and had no effect on the trial or verdict. The prosecutor once referred to appellant as a

"mean drunk" during opening statements and elicited testimony suggesting that appellant was violent and a bully. Appellant's brother and sister testified that he became obnoxious when he drank and tried to take advantage of people. To the extent the prosecutor's comment or questioning improperly introduced bad character evidence, it was minimal and inconsequential in the context of the entire trial. The trial court did not abuse its discretion in denying appellant's motion for mistrial.

Contrary to the trial court's prior order, the prosecutor once referred to appellant's evaluation at the Court Clinic. Appellant objected and the jury was instructed to disregard the reference. Later, the prosecutor asked Dr. Potts if he knew the court had found appellant to be competent, and the trial court *sua sponte* instructed the prosecutor to move to a different topic, noting that appellant's competency was no longer at issue. Although the prosecutor's questioning in these areas was improper, the trial court promptly addressed and corrected the impropriety and did not abuse its discretion in denying appellant's motion for mistrial on that basis. *Cf. State v. Smith*, 182 Ariz. 113, 116, 893 P.2d 764, 767 (App. 1995) (although prosecutor's remarks were "unprofessional," trial court's prompt intervention neutralized any prejudicial effects).

Appellant next contends the prosecutor insinuated during trial and argued to the jury that the insanity defense was fabricated by appellant, his counsel, and his witnesses. For example, the prosecutor suggested that appellant played a role in having his sister change her testimony, and implied that appellant, his counsel and doctors had collusively created a syndrome to justify his actions. While some of the prosecutor's remarks were questionable, *see State v. Cornell*, 179 Ariz. 314, 878 P.2d 1352 (1994), we cannot say

they were so far over the line as to mandate a mistrial, which the trial court denied, nor exceeded the "wide latitude afforded both parties in closing argument." *State v. West*, 176 Ariz. 432, 446, 862 P.2d 192, 196 (1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1835 (1994). *See also Bible*, 175 Ariz. at 602, 858 P.2d at 1203. We also note that some of the prosecutor's comments arguably were invited by defense counsel's closing argument and that here, as in *Cornell*, appellant "failed to object in a proper and timely manner" to most of the argument he now challenges, and "[h]ad he done so, the court could have sustained the objection, admonished the jurors to ignore the matter, and instructed them that the inference . . . had no factual basis." *Cornell*, 179 Ariz. at 331-32, 878 P.2d at 1369-70.

During closing argument, the prosecutor said:

> So when you are testing people, maybe you try to find who is it that's going to be more receptive to my story? And then all of a sudden you kind of like -- and if you are not very receptive to my story, then what happens is I incorporate you in my delusional system. Oh, well, Dr. Flynn, I incorporated him in my delusional system. He incorporated Dr. Flynn in the delusional system. What did Dr. Flynn just get done saying about him? He is going to test you. If you are receptive, he will continue talking to you.

According to appellant, that argument incorrectly implied that he had called only one psychiatrist as a witness because others were unwilling to say what the defense wanted them to say. We agree with the state, however, that an equally plausible view of this argument is that appellant was only willing to talk to people who were receptive to his story. At any rate, the argument is not a basis for reversal.

Appellant also now claims it was fundamental error for the prosecutor in closing argument to comment on appellant's failure to testify, as follows:

> And you know he lies. You know he's got a motive for lying. That's what you have seen here, ladies and gentlemen. You've seen the defendant

> testifying, except it was in the form of a doctor, all suited up nice and neat, a tie, shirt, suit, nice and presentable, good credentials and everything else. But what was it that was being said? Who was speaking? He was a mouthpiece for the defendant.

Although a prosecutor may not comment on a defendant's failure to testify, to be impermissible, "the prosecutor's comments must be calculated to direct the jurors' attention to the defendant's exercise of his fifth amendment privilege." *State v. McCutcheon*, 159 Ariz. 44, 45, 764 P.2d 1103, 1104 (1988). Viewed in the context of the prosecutor's surrounding argument, the unobjected to statement was not a comment on appellant's failure to testify, but rather a comment that the expert's opinions of insanity were based primarily on appellant's self-reporting of mental problems and, therefore, were unreliable. A prosecutor is permitted to comment on the evidentiary basis of a defendant's theory of defense, so long as the prosecutor does not comment on the defendant's silence. *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 735 P.2d 757 (1987). Although the prosecutor's further argument that "an innocent man doesn't run[, a]n innocent man doesn't hide[, a]n innocent man doesn't run and hide from the police, from the courts, from you" arguably was improper as tending to comment on appellant's refusal to testify, it could be characterized merely as comment on appellant's flight from the crime scene, and we cannot say it was so blatant or egregious that it deprived appellant of a fair trial. *Bible*; *State v. Woody*, 173 Ariz. 561, 845 P.2d 487 (App. 1992).

Appellant next argues the prosecutor improperly referred to portions of nontestifying doctors' reports as substantive evidence in closing argument. Appellant did not object on that basis at trial, but rather only urged that he should be allowed to call the other experts to testify, an argument we already have rejected. In any event, these aspects of the

prosecutor's closing argument were neither improper nor in violation of any court order. In cross-examining Dr. Potts, the prosecutor had referred extensively to the nontestifying doctors' reports which had been furnished to Dr. Potts. There was no reversible error in the prosecutor's referring to the reports again in closing argument to challenge Dr. Potts' opinion and appellant's insanity defense.

In his final closing argument to the jury, the prosecutor said, over appellant's objection:

> We talked about the Rosenhan study. We talked about the Leven and Hand studies and the other studies around here, about how easy it is to fool psychiatrists. You know, clear and convincing evidence. The Judge will tell you what that is, and I have to ask you, ladies and gentlemen, at this point, that, you know, the next time you are out on a nice, pretty, sunny afternoon, perhaps with your family, and you are driving along the roads or maybe you are at a picnic, your radio is on and you hear about a murder or something like that, or an aggravated assault, you think back to this case. You are going to have to be able to say right then and there that you were convinced . . . that the evidence was clear and convincing that this man was insane. Not just paranoid schizophrenic, not mentally ill, not possibly mentally ill, but insane. Because you know, you go back there in your deliberation now and you are sitting there and you can't imagine that day, ladies and gentlemen, when you hear this on the report and you can't say, yes, I was clearly convinced, you know, that the defendant carried his burden. Ladies and gentlemen, with all the power and resources of the Public Defender's Office to hire these experts, bring people in, testify, if you can't say it, he hasn't carried his burden of proof, save your money, you know, save your money, don't bring psychologists and psychiatrists in here. Where's his friends? Where's his roommates? Where are the people he worked with?

According to appellant, that argument improperly appealed to the jurors' fear by warning them that if they acquitted appellant and he committed another murder, they would have to live with the consequences of their decision. The prosecutor's argument, however, did not specifically relate to appellant committing a future crime if he were acquitted, but rather was more general and urged the jury to carefully consider whether appellant had proven

his insanity by clear and convincing evidence. As the trial court noted in denying appellant's motion for mistrial, the prosecutor's argument was similar to the "only day in court" type of argument frequently used by defense attorneys. We find no error. *Cf. State v. Garrison*, 120 Ariz. 255, 585 P.2d 563 (1978).

Appellant's final contention of misconduct is frivolous. Appellant's first trial was mistried not because the prosecutor failed to control a witness, but rather because the witness volunteered improper testimony of a prior bad act. The trial court specifically found that the prosecutor had not "in any way intentionally caused" the mistrial.

8. Jury Instructions

Appellant challenges two jury instructions dealing with his self-defense and insanity defenses. He did not specifically object to those instructions on the bases he now urges, and, therefore, we review only for fundamental error. *State v. Gendron*, 168 Ariz. 153, 812 P.2d 625 (1991); *State v. White*, 160 Ariz. 24, 770 P.2d 328 (1989); Ariz. R. Crim. P. 21.3(c).

The trial court instructed the jury that "[i]f you find that the defendant has presented evidence sufficient to raise the issue of justification, the State must then prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find – if you decide that the defendant's conduct was justified, you must find the defendant not guilty." The use of the word "if" in the first part of that instruction, according to appellant, improperly shifted the burden of proof to him, since the trial court already had decided there was sufficient evidence of self- defense by giving the instruction. We disagree. The prosecutor never argued that appellant bore the burden of proving any aspect of his self-defense claim, and

the instruction was not confusing or improper. *See State v. Duarte*, 165 Ariz. 230, 798 P.2d 368 (1990); *State v. Cruz*, 228 Ariz. Adv. Rep. 32 (Ct. App. Oct. 29, 1996); Recommended Arizona Jury Instruction (RAJI) 4.13.

Appellant also contends the trial court improperly instructed the jury on his insanity defense by stating that "[k]nowledge that the act was wrong means knowledge that the act was wrong according to generally accepted moral standards of the community and not the defendant's own individual moral standards." According to appellant, that instruction foreclosed his insanity defense because he understood the community standard for self-defense but, because of his mental illness, mistakenly believed he was acting in conformity with it. Appellant claims the reasonableness of his perceptions should have been measured by a paranoid schizophrenic standard, not a reasonable person standard. When viewed as a whole, the insanity instruction was proper. *See* A.R.S. § 13-502; RAJI 5.02, and simply explained, correctly in our view, that whether a particular act is "wrong" is defined by community standards rather than an individual's personal moral code.

9. Sufficiency of the Evidence

Appellant contends there was insufficient evidence to support conviction on three of the aggravated assault charges. Two of those charges arose from appellant's shooting at a van on Interstate 10 as he fled from pursuing police. The driver of the van heard a shot and felt an explosion just before the rear driver's side window was shattered. The driver's brother in the back seat was hit by glass fragments and said the shooting affected his hearing. The shot grazed the scalp of another passenger in the van.

Although there was no direct evidence that the driver or back seat passenger was

injured or reasonably apprehensive of imminent physical injury, A.R.S. § 13-1203(2), there was sufficient circumstantial evidence to establish that element. *State v. Wood*, 180 Ariz. 53, 86, 881 P.2d 1158, 1171 (1994) *quoting State v. Valdez*, 160 Ariz. 9, 11, 770 P.2d 313, 315 (1989) ("[E]ither direct or circumstantial evidence may prove the victim's apprehension. There is no requirement that the victim testify to actual fright."); *State v. Spencer*, 109 Ariz. 500, 513 P.2d 140 (1973).

We will not reverse unless "there is a complete absence of probative facts to support a conviction." *State v. Mathers*, 165 Ariz. 64, 65, 796 P.2d 866, 868 (1990). All evidence and inferences therefrom are viewed in the light most favorable to sustaining the verdict. *State v. Amaiondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). Considering the facts in their totality, there was sufficient circumstantial evidence to support the aggravated assault convictions concerning the van occupants.

We reach a different conclusion as to the deputy who participated in the chase following Borquez's shooting. In the foot chase after appellant exited his vehicle, he stopped, turned toward the deputy and raised his shotgun which discharged into the ground as he brought it up. The deputy testified that at that point, he did not feel threatened that appellant was going to shoot him. Thus, there was insufficient evidence to support a conviction on Count 13.

10. Jury Selection Issues

Appellant broadly challenged the jury selection process in Pima County, alleging a systematic underrepresentation of minorities and poor people in violation of the federal and state constitutions. The trial court rejected that challenge and denied appellant's request

for a hearing. We find no error.

A jury must be selected from a fair cross-section of the community. U.S. Const. Amend. VI; Ariz. Const. art. II, § 24; *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). To establish a violation of the fair cross-section requirement, appellant had to show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 665, 668, 58 L. Ed. 2d 579, 587 (1979). *See also Atwood*, 171 Ariz. at 621-22, 832 P.2d at 638-39.[*] While appellant may have fulfilled the first two prongs of the *Duren* test, his proffered evidence did not establish that any distinctive group was systematically excluded from Pima County's jury selection process. In addition, our supreme court has upheld the use of motor vehicle division and voter registration lists to randomly select jury pools under A.R.S. § 21-301. *See State v. Bernal*, 137 Ariz. 421, 671 P.2d 399 (1983). *See also United States v. Garcia*, 991 F.2d 489 (8th Cir. 1993); *State v. Dogan*, 150 Ariz. 595, 724 P.2d 1254 (App. 1986).

As for appellant's equal protection challenge, he failed to demonstrate that the alleged exclusion of any distinctive group from Pima County's jury selection process was purposeful or motivated by invalid considerations. *Castaneda v. Partida*, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977). The trial court did not err in rejecting, without a

[*] Although appellant also raises an Arizona's constitution, he does not indicate how or why it should be interpreted differently than its federal counterpart, and we decline to do so.