

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 07/10/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

STATE OF ARIZONA,) 1 CA-CR 11-0202
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
KEVIN NORRIS MITCHELL,) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-142884-001-DT

The Honorable Arthur T. Anderson, Judge

AFFIRMED

Thomas Horne, Arizona Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Section Chief Counsel
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Terry Reid, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Kevin Norris Mitchell challenges his convictions and sentences. Mitchell argues that reversible error occurred when

the jury twice heard that he was in jail when he made certain telephone calls. We disagree, and affirm.

FACTS¹ AND PROCEDURAL BACKGROUND

¶2 Mitchell was charged with seventeen offenses involving his wife's younger sisters, Michelle and Melanie, when they were between thirteen and seventeen years old. The charges included: kidnapping; three counts of involving a minor in a drug offense; three counts of sexual abuse of a minor; and ten counts of sexual conduct with a minor.

¶3 Despite his testimony denying the offenses, the jury convicted Mitchell of twelve crimes: sexual abuse, a class 3 felony and dangerous crime against children (count 2/Michelle); three counts of sexual conduct with a minor, each a class 2 felony and dangerous crime against children (counts 4, 5, and 6/Michelle); three counts of sexual conduct with a minor, each a class 6 felony (counts 7, 8, and 9/Michelle); two counts of sexual abuse of a minor, each a class 3 felony and dangerous crime against children (counts 11 and 15/Melanie); and three counts of sexual conduct with a minor, each a class 2 felony and

¹ We view the facts in the light most favorable to sustaining the verdicts, and resolve all reasonable inferences against the defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, ¶ 2, 119 P.3d 473, 474 n.2 (App. 2005) (citation omitted).

dangerous crime against children (counts 12, 13, and 17/Melanie).²

¶14 Mitchell was subsequently sentenced to: consecutive terms of fifteen years in prison for counts 4, 5, 6, 12, 13, and 17; concurrent one-year prison terms on counts 8 and 9, to be served consecutively to count 17; and concurrent terms of lifetime probation for counts 2 and 7. We have jurisdiction over his appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033 (West 2012).

DISCUSSION

¶15 Mitchell argues that reversible error occurred when the jury twice heard that he was in jail. The first instance occurred when the investigating detective testified about recorded telephone conversations between Mitchell and his brother, during which Mitchell indicated that he could get out of jail if the victims stopped talking. He did not object to the detective's account of the phone calls.

¶16 The second time occurred at the end of the detective's testimony after a juror submitted the following questions:

How were Kevin's phone calls documented?
Was his phone tapped or was he just
overheard? Was Kevin aware?

² The jury did not convict Mitchell of counts 1, 3, 10, 14, and 16.

Even though Mitchell's counsel expressed reluctance to having the court ask the questions, the court proceeded to do so. As a result, the jury heard the following:

[Detective]: Any inmate that is in custody at the jail, the phones that they have access to, there are signs posted notifying them that all the calls are recorded. I had actually received a contact from another agency about some concerns in phone calls, and so . . . I was able to get those recordings of the phone calls for a specific time period and listen to them.

THE COURT: Okay. And how do you know if the defendant was aware that his phone calls were being monitored?

[Detective]: All the phones at the jails have signs posted notifying them that . . . all calls are recorded. They can't take any incoming calls. But all the calls they make are recorded.

¶7 Mitchell now argues that he was denied a fair trial because the jury heard about his custodial status. In general, we review a decision to admit or exclude evidence for an abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56, 796 P.2d 853, 858 (1990) (citations omitted). We "will not reverse the trial court's rulings on issues of the relevance and admissibility of evidence absent a clear abuse of its considerable discretion." *State v. Davis*, 205 Ariz. 174, 178, ¶ 23, 68 P.3d 127, 131 (App. 2002) (citation and internal quotation marks omitted).

A.

¶18 Mitchell concedes that he did not object to the detective's testimony recounting the telephone calls he had made to his brother. When a defendant fails to object, he forfeits his right to obtain appellate relief except in those rare cases involving fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (citation omitted). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* (citations and internal quotation marks omitted). The burden of proof in a fundamental error review lies with the defendant, who must show both that fundamental error occurred and that it caused him prejudice. *Id.* at ¶ 20, 115 P.3d at 607 (citations omitted).

¶19 Mitchell argues that the evidence had no probative value and was also highly prejudicial. We disagree. The statements he made in the recorded calls tended to demonstrate that he was involved in the crimes. See Ariz. R. Evid. 801(d)(2). As a result, the statements were relevant, had probative value, and were therefore admissible. Ariz. R. Evid. 401(a), 801(d)(2).

¶10 Moreover, the jury had heard earlier testimony that Mitchell had been arrested. And, they knew he had been in

custody because another officer testified that Mrs. Mitchell refused to take her husband's personal effects for safekeeping. Therefore, the detective's testimony that Mitchell was in jail during the telephone calls was not unduly prejudicial and did not "impinge[] on his right to be presumed innocent by the jury." The court twice told the jury that Mitchell was presumed to be innocent, and we presume that the jury followed the court's instructions. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006). Therefore, we find no error, fundamental or otherwise. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607 (citation omitted).

B.

¶11 Mitchell maintains that he objected to the juror questions posed to the detective. The State challenges that assertion and contends that his lawyer's statement that "I would rather not go down that road" was not sufficiently specific to constitute an objection. *See State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 992 (App. 1993) (citations omitted) (only timely and specific objection to admission of evidence preserves issue for appeal). We agree.

¶12 Arizona Rule of Evidence 103(a)(1)(B) provides that a party preserves a claim of error if it "states the specific ground" for its objection. The failure to object with specificity deprives a trial court of the opportunity to cure

any possible error or misuse of the evidence. *State v. Moody*, 208 Ariz. 424, 463, ¶ 167, 94 P.3d 1119, 1158 (2004). Here, "I would rather not go down that road" is not a specific objection. Accordingly, we find no error.

C.

¶13 Despite the fact that there is no specific objection to the juror's questions in the record, a handwritten note on the page containing the juror's questions is in the record and indicates that the questions were asked over defense counsel's objection. We will, as a result, assume that an objection was made that the court recognized, and consider whether the admission of the detective's answers was harmless error. See *Henderson*, 201 Ariz. at 567, ¶ 18, 115 P.3d at 607 (citations omitted). "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Id.* (citation omitted).

¶14 Despite Mitchell's arguments that the testimony that he was in jail when the phone calls were made cast him in a bad light and suggested that he was a danger to the community, the testimony was relevant to whether he committed any of the crimes. He was calling his wife and brother to attempt to convince them to tell the victims to stop talking to the police so that he could get out of jail. The recorded information was

relevant and admissible because, as noted, it was a statement against interest, and it helped the jurors assess Mitchell's credibility when he testified and denied any involvement in the crimes.

¶15 Moreover, neither the questions nor the answers suggested that Mitchell was a danger to the community. Instead, and as the trial court surmised, the juror's questions were the result of earlier testimony about a confrontation call between Mitchell and one of the victims, during which only the victim knew that the phone call was being recorded. Nothing in the record suggests that Mitchell was a threat or continuing threat because he was "still in custody."³ Therefore, there is no factual basis for his contention that the evidence presented the equivalent prejudice of "forcing [him] to appear in shackles and prison garb and violated his right to a fair trial and an impartial jury." As a result, the cases he cites on appeal in which jurors might have seen a defendant in shackles or prison garb do not support his argument. Consequently, the record convinces us beyond a reasonable doubt that any error was harmless. See *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) (citation omitted).

³ According to the record, Mitchell appeared at his trial in civilian clothing.

¶16 Mitchell also maintains that the detective's reference to another agency's "'concerns' regarding the phone calls" suggested that he was a danger to the community. The comment, however, explained why the detective was monitoring inmates' phone calls in general and did not indicate any specific concerns about Mitchell in particular.

¶17 Mitchell also notes that a juror asked the court if the deputy was in the courtroom to escort Mitchell in and out of the courtroom, and argues that the question indicated that the jury knew that he was still in custody because he was a danger. The question was asked at the outset of the trial, and the experienced trial judge explained to the jury that a deputy was assigned to him, along with other court staff, in part because the court had "morning calendars" where it had "people in custody," and the deputies "assigned to this floor" would routinely "stick their head in courtrooms." The defense agreed to the explanation. Consequently, the court's explanation eliminated any undue concern that the jury may have had at the outset of the case regarding the deputy's presence, and does not support the inference that Mitchell was in custody or was a danger. Accordingly, we find no error.

CONCLUSION

¶18 For the foregoing reasons, we affirm Mitchell's convictions and sentences.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

PHILIP HALL, Judge

/s/

DIANE M. JOHNSEN, Judge