IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 12/27/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0423
	)	1 CA-CR 11-0426
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT B
	)	
OSCAR ROBLES REAL,	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-005605-001
CR2010-101722-001

The Honorable Roger E. Brodman, Judge

AFFIRMED AS MODIFIED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

Bruce Peterson, Office of the Legal Advocate — Phoenix
By Thomas J. Dennis, Deputy Legal Advocate
Attorneys for Appellant

K E S S L E R, Judge

¶1 Defendant-Appellant Oscar Robles Real ("Robles")[1] was tried and convicted of two counts of aggravated assault and a resulting automatic probation revocation. Counsel for Robles filed a brief in accordance with *Anders v. California,* 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Robles submitted a supplemental brief *in propia persona*, presenting issues of witness perjury, prosecutorial misconduct, improper denial of a mistrial, and erroneous evidentiary rulings. For the reasons that follow, we affirm Robles's conviction but modify his sentence to increase his presentence incarceration credit.

FACTUAL AND PROCEDURAL HISTORY

¶2 While on patrol in a fully marked police vehicle, two Phoenix Police Officers, J.M. and R.S., saw Robles driving a blue truck on Roosevelt Street, "yelling out the window" and "shaking his fist." They turned on their lights and sirens and pursued the truck, wanting to "[make] sure [Robles] was okay." Robles ignored the lights and siren at first, but eventually "stopped . . . abruptly."

[1] The defendant's legal last name is "Real" but throughout the proceedings in the court below he is referred to as "Robles."

¶3 Once pulled over, Robles started to walk towards R.S. with clenched fists. Robles then began "swinging at him and hit him . . . in the head area," and then "immediately turned around and started running." R.S. chased after Robles, and grabbed him by his jacket. Robles started "blindly" swinging at the officer and "hit him in the head a couple times." R.S. lost his grip on Robles, but J.M. was able to bring him to the ground. The fight continued with Robles continuing to strike the officers with what one officer testified was "uncanny strength."

¶4 After about five minutes, other police officers arrived. It took at least four officers to get Robles into custody. J.M. testified that, in total, Robles elbowed, punched, or kicked him approximately ten to fifteen times and that he was so sore, he "felt like somebody had hit [him] with a truck." Both J.M. and R.S. testified that just after the fight, R.S. clutched his side in pain and had trouble catching his breath. J.M. testified that after the fight, R.S. began "coughing all the time," and before the fight, he never knew R.S. "to become very fatigued by routine tasks" or "to clutch his . . . left or right side of his lungs." Sergeant M.T., R.S.'s supervisor at the time of the incident, testified that R.S. had good physical performance before the date of the fight, and after the fight, R.S.'s physical performance changed. R.S.

was eventually diagnosed with a paralyzed and elevated diaphragm.

¶5 The State's medical witness, Dr. R.B., testified that R.S. suffered from phrenic nerve damage that was caused by the blunt-force trauma he sustained in the fight. Robles called two of R.S.'s other treating physicians as witnesses who testified that R.S. reported his symptoms began four months before the fight with Robles. Robles introduced other evidence to establish that R.S.'s injured diaphragm could have been caused by incidents of trauma other than the fight with Robles. R.S., however, denied that the symptoms existed before the fight.

¶6 The jury found Robles guilty of aggravated assault against R.S. (Count 1) and J.M. (Count 2). The jury found as an additional aggravator that the assault caused physical, emotional, or financial harm to R.S., but did not make this finding as to J.M. The trial court sentenced Robles to an aggravated term of eight years on Count 1 and a presumptive term of 1.5 years on Count 2, to run consecutively and requiring absolute discharge of Count 1 before sentence on Count 2 began. The court also revoked Robles's probation and left the probation violation as an undesignated felony but did not assign prison time for that offense. This Court granted Robles's motion to

consolidate his appeal on the assault case with his appeal on his probation revocation.

DISCUSSION

¶7 In an *Anders* appeal, this Court must review the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an "error of such magnitude that the defendant could not possibly have received a fair trial." *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991).

¶8 After a thorough review of the record, we find no error warranting reversal of Robles's convictions. The record reflects Robles had a fair trial and all proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Robles was represented by counsel at all critical stages of trial, was given an opportunity to speak at sentencing, and the sentences imposed were within the range for Robles's offenses.

I. Sufficiency of the Evidence

¶9 In reviewing the sufficiency of evidence at trial, "[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences

against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶10 Robles was convicted of two counts of aggravated assault pursuant to Arizona Revised Statutes ("A.R.S.") section 13-1204(A) (Supp. 2012).[2] A person commits aggravated assault if he "commits assault as prescribed by [A.R.S.] § 13-1203 [and] . . . the person causes serious physical injury to another . . . [or] the person commits the assault knowing or having reason to know that the victim is . . . a peace officer . . . engaged in the execution of any official duties." A.R.S. § 13-1204(A)(1), (A)(8)(a). A person commits assault pursuant to A.R.S. § 13-1203(A) (2010) by "[i]ntentionally, knowingly or recklessly causing any physical injury to another person."

A. Aggravated Assault Against Officer R.S.

¶11 The State presented sufficient evidence to convict Robles of a class 2 felony for aggravated assault, which

[2] We cite to the most recent version of the statute where there are no relevant changes.

required the jury to find that R.S. suffered a "serious physical injury."[3] First, the evidence was sufficient for the jury to reasonably conclude that Robles acted intentionally, knowingly, or recklessly. The officers testified that they stopped Robles because he was shaking his fists and shouting at the officers while he was driving, and that upon opening the car door, Robles walked toward R.S. with clenched fists. Second, the jury could also reasonably conclude that Robles caused R.S. to suffer a serious physical injury. A "serious physical injury" is an injury that "creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-105(39) (Supp. 2012). Testimony established that R.S. suffered from phrenic nerve damage that caused him to experience severe shortness of breath and chronic coughing, and that his injury was consistent with a blunt-force trauma to the neck area. Witnesses testified that R.S.'s physical performance diminished after he was injured and that he frequently became very fatigued while engaged in routine

[3] To convict Robles of a class 2 felony, A.R.S. § 13-1204(E) requires that the jury find Robles guilty of aggravated assault under A.R.S. § 13-1204(A)(1) or (2) and that the assault was committed against a peace officer who was engaged in the execution of his official duties. Subsection (A)(1) provides that a person commits aggravated assault if the person "causes serious physical injury."

tasks. Testimony further established that R.S.'s symptoms began immediately after the fight with Robles, during which Robles hit him in the neck and head area several times. Finally, the jury could reasonably conclude that Robles knew or should have known that R.S. was a peace officer. It is undisputed that at the time of the assault, R.S. was on duty, wearing his uniform, and driving a fully-marked police vehicle.

B. Aggravated Assault Against Officer J.M.

¶12 For these same reasons, there was sufficient evidence for the jury to conclude that Robles acted intentionally, knowingly or recklessly and that Robles knew or should have known J.M. was a peace officer. Unlike the assault against R.S., the assault against J.M. was charged as a class 5 felony, and as such, the jury was only required to find that J.M. suffered "physical injury," not "serious physical injury."[4] A physical injury is defined as "the impairment of physical condition." A.R.S. § 13-105(33). While there was extensive testimony about the number of times Robles struck J.M.'s body with his fists and elbows and testimony regarding high-voltage

[4] A.R.S. § 13-1204(E) provides that a person can be convicted of a class 5 felony if the aggravated assault is committed in accordance with any circumstance in A.R.S. § 13-1203 and the victim is a peace officer. Although A.R.S. § 13-1203(A)(2) and (3) do not require a victim to actually suffer a physical injury, the jury was instructed pursuant to subsection (A)(1), which required the jury to find J.M. suffered a physical injury.

shocks J.M. received as a result of R.S.'s use of the Taser gun during the struggle, there is still an issue whether J.M. suffered a physical injury. The only evidence of J.M.'s injuries was his own testimony that Robles's blows to the chin "hurt"; that after the altercation with Robles, he "felt like somebody had hit [him] with a truck, [his] body hurt so bad"; and that he "was sore."

¶13 This Court ordered the parties to file briefs pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988), to address the issue of whether or not pain, standing alone, satisfies the statutory definition of "physical injury," and if not, whether the State presented evidence that Robles caused J.M. physical injury. After reviewing the parties' supplemental briefs, we conclude we need not decide whether pain alone constitutes a physical injury for these purposes because there was evidence that J.M. suffered an impairment of physical condition from the struggle.

¶14 A.R.S. § 13-105(33) defines "physical injury" as "impairment of physical condition." No statute, however, defines the terms "impairment" or "physical condition." "In the absence of statutory definitions, we give words their ordinary meaning." *State v. Cox*, 217 Ariz. 353, 356, ¶ 20, 174 P.3d 265, 268 (2007); *see also* A.R.S. § 1-213 (2002) ("Words and phrases shall be construed according to the common and approved use of

the language."). An "impairment" is something that causes a "decrease in strength, value, amount or quality"; "physical" refers to something that is "[o]f or relating to the body"; and a "condition" is a "[m]ode or state of being . . . [or] state of health." Webster's II, New Riverside University Dictionary 295, 612, 887 (1994). Construing analogous language, the Oregon Court of Appeals held that "impairment of physical condition" is any "harm to the body that results in a reduction in one's ability to use the body or bodily organ for less than a protracted period of time." *State v. Higgins*, 998 P.2d 222, 224 (Or. Ct. App. 2000).[5]

¶15 We agree with the State that sufficient evidence establishes J.M. suffered impairment to his physical condition that amounts to a physical injury. Evidence established that J.M. suffered more than just mere pain without impairment. J.M. testified that after the fight with Robles, he "felt like somebody had hit [him] with a truck," and that he was "sore." It was reasonable for the jury to conclude that the impact of Robles's blows caused a "decrease in [R.S.'s] strength," Webster's II, New Riverside University Dictionary 612 (1994), or

[5] Oregon Revised Statutes section 163.160(1) (2010) provides: "A person commits the crime of assault in the fourth degree if the person . . . [i]ntentionally, knowingly or recklessly causes physical injury to another."

a "reduction in [R.S.'s] ability to use his body," *Higgins*, 998 P.2d at 224. Thus, we need not determine whether pain alone necessarily constitutes impairment or whether pain can exist without decreased strength or reduction in ability.

II. Issues Raised in Supplemental Brief

¶16 Robles raises the following issues in his supplemental brief: (1) several of the State's witnesses committed perjury, (2) the prosecutor engaged in misconduct, (3) the trial court erroneously denied a motion for mistrial when the State's witness mentioned drugs, (4) the trial court improperly admitted medical testimony, and (5) the trial court improperly excluded pre-recorded witness interviews.

A. Perjury

¶17 A conviction obtained by the knowing use of perjured testimony is fundamental error and requires reversal. *United States v. Agurs*, 427 U.S. 97, 103 (1976). To establish a due process violation based on perjured testimony, however, the defendant must prove that the prosecution knew or should have known that the testimony was actually false. *Hayes v. Ayers*, 632 F.3d 500, 520 (9th Cir. 2011). Mere inconsistency in testimony by government witnesses does not establish the prosecutor knowingly used false testimony. *United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1989); *see also United*

States v. Bailey, 123 F.3d 1381, 1396 (11th Cir. 1997) (perjury is not established by the fact that a witness's "testimony is challenged by another witness or is inconsistent with prior statements" (citation omitted)).

¶18 At various points during trial, some of the State's witnesses testified inconsistently with police reports, prior witness interviews, prior depositions, and other witnesses. To the extent permitted by the rules of evidence, however, these inconsistencies were vigorously explored during cross-examination, allowing the jury to weigh the credibility of witnesses. The trier of fact is in the best position to judge the credibility of witnesses and as there is no evidence to suggest that any witness knowingly perjured himself or that the State suborned perjury, "we do not presume that the prosecutor used false testimony." *Sherlock*, 962 F.2d at 1364.

B. Prosecutorial Misconduct

¶19 Robles arguesthat prosecutorial misconduct permeated the proceedings, depriving him of a fair trial and affecting the result. Specifically, he contends the prosecutor committed misconduct by (1) instructing witnesses to give vague answers during pre-trial interviews with defense counsel, (2) making unfounded statements, (3) improperly appealing to emotion, and (4) vouching for the State's witnesses. Moreover, he argues

that jeopardy has attached and retrial is barred under the standard articulated in *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984).

¶20 "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Jeopardy attaches and retrial is barred when (1) the trial court grants a defendant's motion for mistrial based on prosecutorial misconduct, (2) the prosecutor's misconduct is intentional and not merely the result of legal error or negligence, and (3) the misconduct causes prejudice that cannot be cured by any other means than a mistrial. *Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72.

¶21 Although Robles moved for a mistrial based on a witness's testimony, he did not move for a mistrial with respect to any of the alleged prosecutorial misconduct of which he now complains on appeal. Moreover, Robles does not argue the State intentionally concealed any alleged misconduct. Thus, we review the record for fundamental error, but we need not reach the issue of double jeopardy.

1. Instructing Witnesses to Give Vague Answers

¶22 Robles alleges that the prosecutor committed misconduct by instructing State witnesses to be vague in their answers during defense interviews. He argues that this hindered the defense's ability to ascertain the facts of the case in preparation for trial. Contrary to Robles's claim, however, there is no evidence in the record to suggest that the State instructed any witness to be vague other than R.S., who was one of the victims.

¶23 The Victims' Bill of Rights in the Arizona Constitution permits a crime victim to refuse to submit to an interview or deposition request by the defense. Ariz. Const. art. 2, § 2.1(A)(5). Nevertheless, R.S., at the request of the State, granted defense counsel a limited interview to facilitate discovery regarding the nature of his injury. As a condition of the interview, the defense agreed to follow certain ground rules established by the State.[6] The State requested that the defense avoid particular areas of questioning and not delve into a "blow-by-blow" account of the fight. The State also advised

[6] A transcript of the recorded interview is absent from the record on appeal. All references to the specific ground rules and witness instructions are derived from statements the attorneys made during a bench conference.

R.S. to be vague in his account of the events to avoid impeachment during cross-examination.

¶24 Although we find it troubling that the State would instruct a witness to "be vague" in an interview, we find no error because the victim was under no obligation to submit to the interview, and the defense was apparently aware of and agreed to the State's instructions to the witness to be vague in his answers.

2. Unfounded Statements

¶25 Robles also complains that the prosecutor repeatedly misstated facts or referred to facts not in evidence. Further, he claims that in closing, the prosecutor unfairly impugned the credibility of defense witnesses. We find no error.

¶26 "An attorney may not refer to evidence which is not in the record or 'testify' regarding matters not in evidence." *State v. Bailey*, 132 Ariz. 472, 477-78, 647 P.2d 170, 175-76 (1982). Likewise, when attacking a witness's credibility, an attorney must rely solely on reasonable inferences drawn from the facts in evidence. *See id.* at 478-79, 647 P.2d at 176-77. However, "it is proper impeachment to inquire into the credentials and employment of an expert witness to show bias or motive." *Id.* at 478, 647 P.2d at 176. Moreover, we give

counsel wide latitude to comment on the evidence during opening and closing statements. *Id.* at 479, 647 P.2d at 177.

¶27 Robles argues that no testimony or evidence at trial supported the prosecutor's statements that Robles was "swinging for the neck" or that Robles tased both officers. He also contends that the prosecutor made unfounded comments regarding Robles's state of mind, intent, and level of control of the events. The evidence admitted at trial sufficiently justifies each of these comments.

¶28 First, R.S.'s testimony that the defendant punched him in "the neck area on both sides" justifies the prosecutor's comments that Robles was aiming for the neck. Second, the prosecutor stated during closing arguments: "Were the officers ever Tased? Officer [R.S.] and Officer [J.M.] both testified that they were."[7] Robles is correct that R.S. and J.M. testified that it was R.S., not Robles, who did the tasing, and the officers were shocked because they were on top of Robles. However, the prosecutor did not identify Robles as the one who administered the shocks. The prosecutor's statements did not directly contradict the facts in evidence. Thus, we find the

[7] The defense objected to this statement as a mischaracterization of the facts in evidence, but the court overruled the objection stating "[t]he jury will end up making the determination of what the evidence is."

prosecutor did not exceed the "wide latitude" afforded attorneys in commenting on the evidence.

¶29 Third, we disagree with Robles's claim that the prosecutor made unfounded statements about his state of mind. In both opening and closing arguments, the prosecutor characterized Robles's actions as premeditated, intentional, and knowing. He also said Robles "thought that he did attack these two officers senselessly." The *mens rea* required for a given crime can be inferred from evidence of the defendant's actions. *See State v. Lenahan*, 12 Ariz. App. 446, 450, 471 P.2d 748, 752 (1970), *overruled on other grounds by State v. Sample*, 107 Ariz. 407, 410, 489 P.2d 44, 47 (1971). Counsel may comment on a defendant's *mens rea* in argument, but their comments must be "based on the evidence or reasonable inferences which may be drawn from it." *Bailey*, 132 Ariz. at 478, 647 P.2d at 176.

¶30 The officers testified that before they stopped Robles, he shook his fists and shouted at them while he was driving, and that upon opening the car door, he walked toward R.S. clenching his fists. From this, the prosecutor could reasonably infer that Robles's actions were premeditated, intentional, and knowing.

¶31 Finally, Robles argued the prosecutor improperly implied that the doctors who testified for the defense lied

about R.S.'s patient history. Regarding the doctors' testimony about the onset of R.S.'s symptoms, the prosecutor said, "a doctor wrote down eight or nine months in his patient history, handed it over to another doctor, and they want to present that as two witnesses." We agree with Robles that this statement conflicted with the uncontradicted testimony of both doctors that they each took R.S.'s patient history directly. However, we find no reversible error.

¶32 A prosecutor may suggest that the evidence does not support a witness's testimony, provided there is foundation for this assertion. *See State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993) ("[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence and suggest ultimate conclusions."). R.S.'s testimony that his symptoms started on a different date than that recorded in the doctors' records, along with the doctors' testimony that they both referenced the same patient file, provided sufficient foundation for the prosecutor to argue that the witnesses were mistaken about the onset of R.S.'s symptoms. Accordingly, we find sufficient foundation for the prosecutor's statements.

3. Appeals to Emotion or Prejudice

¶33 Robles complains that the prosecutor's comments that Robles was "angry at the world," "looking for a fight with the cops," and in control of the entire course of events were improper emotional appeals. He also contends that it was an improper appeal to emotion to say that R.S. was "dying" at the scene.

¶34 During the State's rebuttal to the defense's closing argument, the judge admonished the prosecutor to "keep emotion out." The State then made remarks suggesting the defense had alleged a police conspiracy theory, and he criticized that defense strategy. The defense objected, and the court expressed concern that the prosecutor was improperly "appealing to sympathy or prejudice." The court, however, allowed the prosecutor to continue his argument.

¶35 Arizona law "permits wide latitude in presenting closing argument" and "emotional language is not only permissible, but is to be expected." *State v. Nelson*, 131 Ariz. 150, 152, 639 P.2d 340, 342 (App. 1981) (citations omitted). Emotional language is "the bread and butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury." *State*

v. Rainey, 137 Ariz. 523, 527, 672 P.2d 188, 192 (App. 1983). "[P]rosecutors may comment on the vicious and inhuman nature of the defendant's acts," but they "may not make arguments which appeal to the passions and fears of the jury." *Moody*, 208 Ariz. at 460, ¶ 154, 94 P.3d at 1155 (internal quotation marks omitted). A prosecutor's remarks are unduly prejudicial if they "call to the attention of the [jurors] matters which they would not be justified in considering in determining their verdict." *Sullivan v. State*, 47 Ariz. 224, 238, 55 P.2d 312, 317 (1936).

¶36 The State's characterization of Robles being "angry at the world" in no way resembles the sort of prejudicial comments that our courts have found to be improper. *Compare State v. Morris*, 215 Ariz. 324, 337, ¶¶ 57-58, 160 P.3d 203, 216 (2007) (finding misconduct when the prosecutor singled out specific jurors based on appearance and gender, inviting them personally to put themselves in the victims' shoes), *and State v. Comer,* 165 Ariz. 413, 426-27, 799 P.2d 333, 346-47 (1990) (finding misconduct in prosecutor's characterization of defendant as a "monster," "filth," and the "reincarnation of the devil"), *with Rainey*, 137 Ariz. at 526-27, 672 P.2d at 191-92 (finding no error in the prosecutor's characterization of some of the defense's evidence and arguments as "deceiving"), *and State v. Griffin*, 117 Ariz. 54, 57, 570 P.2d 1067, 1070 (1977) (finding

no error in the prosecutor's reference to the victims' hardship). The State's characterization of Robles's mental state had sufficient foundation and went to motive. Thus, we find no error.

¶37 Similarly, the State reasonably inferred from defense counsel's cross-examination and closing statements that that defense argued a conspiracy theory. Defense counsel highlighted eligibility for worker's compensation and other benefits as a possible motive for R.S. to identify Robles as the cause of his injury, and then repeatedly insinuated that various officers were working together to "help" one of their own. Therefore, the prosecutor's comments regarding a conspiracy theory were squarely within the realm of factors the jury could consider.

¶38 The prosecutor's statement that R.S. was "dying" on the scene went beyond the scope of a reasonable inference from the facts in evidence. The State presented no evidence supporting the assertion that R.S. was "dying." However, nothing in the record suggests that the prosecutor acted intentionally or recklessly, nor was the prosecutor's comments so egregious to require reversal. Furthermore, we find no prejudice because there was sufficient evidence for the jury to find that R.S. suffered a serious injury regardless of whether or not he was dying on the scene. Moreover, the jury was

instructed not to consider the attorneys' comments as evidence and we presume the jury followed the court's instructions. *See State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994). Therefore, we cannot say this comment altered the jury's verdict, and as such, we find no reversible error.

4. Vouching for Witnesses

¶39 Robles argues the prosecutor committed misconduct by improperly vouching for the State's witnesses. Impermissible prosecutorial vouching exists when (1) "the prosecutor places the prestige of the government behind its witness," (2) suggests that facts not presented to the jury support a witness's testimony, or (3) asserts personal knowledge of the facts at issue. *Bible*, 175 Ariz. at 601, 858 P.2d at 1204.

¶40 Robles contends that the prosecutor's comparison of the police officer's promise to "go into any situation, regardless of the cost" to the promise that jurors make to consider only the admitted evidence, suggested to the jurors that they should give greater credence to police officers "because they are police officers." The prosecutor's statement had nothing to do with the witnesses' credibility, and thus, we fail to see how the statement could constitute vouching. Furthermore, the court instructed the jury not to give greater

credence to officer testimony simply on the basis of their status as police officers.

¶41 Robles also argues that the prosecutor's reference to the defense's conspiracy theory constituted vouching. During redirect examination of R.S., the prosecutor asked, "Did you get together with [J.M.] . . . and conspire to pin this on . . . Robles so you could get your retirement?" Defense counsel objected on grounds of vouching, and the court overruled the objection. We agree with the court's ruling. Merely asking a witness if he engaged in a conspiracy is not equivalent to presenting personal knowledge or facts not in evidence to the jury. Reversible error exists only if the prosecutor's comments brought to the attention of the jurors "matters they could not properly consider." *State v. Snowden*, 138 Ariz. 402, 406, 675 P.2d 289, 293 (App. 1983). During defense counsel's cross-examination of R.S. and J.M., the defense implied the officers engaged in a conspiracy to falsely implicate Robles. *See supra* ¶ 33. Thus, the prosecutor's question regarding a conspiracy was a matter properly brought before the jury.

¶42 The court also overruled a defense objection that the State vouched for Dr. R.B. when the prosecutor stated that that Dr. R.B. was the only person who "actually opened [R.S.] up and looked inside of him," that his testimony constituted the "only

evidence" as to the cause of the injury, and that the defense only presented "conjecture" and "speculation." There was no error. The prosecutor argued that Dr. R.B.'s testimony should carry more weight than that of the other doctors because Dr. R.B. was the only doctor who performed surgery on the victim, not because the prosecutor put "the prestige of the government" behind Dr. R.B. *See Bible*, 175 Ariz. at 601, 858 P.2d at 1204. During closing arguments counsel may "urge the jury to draw reasonable inferences from the evidence and suggest ultimate conclusions." *Id.* at 602, 858 P.2d at 1205.

C. Violation of the *Motion In Limine*

¶43 Robles argues that a State's witness violated the court's order excluding evidence of Robles's cocaine possession and that the court erred in denying the defense's motion for a mistrial. We review the denial of a mistrial for abuse of discretion. *State v. Adamson*, 136 Ariz. 250, 260, 665 P.2d 972, 982 (1983). "When a witness unexpectedly volunteers an inadmissible statement, the action called for rests largely within the discretion of the trial court which must evaluate the situation and decide if some remedy short of mistrial will cure the error." *Id.* at 262, 665 P.2d at 984. A judge should only grant a mistrial "when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *Id.*

¶44 During the State's direct examination of the police sergeant, the sergeant made an unsolicited comment that she thought Robles "might be on . . . some kind of drug." Defense counsel objected and moved for a mistrial. The court noted, "[S]he never testified he was on drugs. I think the testimony was she was concerned whether he was on drugs." The court sustained the objection and instructed the jury to disregard the comment, but it denied defense's motion for mistrial.

¶45 Robles argues the sergeant's reference to drugs, when combined with pervasive testimony that Robles was abnormally strong, prejudiced him by leading the jury to conclude that his strength was fueled by drugs. Therefore, he argues, the judge abused his discretion in failing to grant a mistrial. We disagree.

¶46 The trial court correctly held that the witness's testimony did not violate the court's order as she never testified that Robles was on drugs or that he was in possession of drugs. Moreover, the jury was instructed prior to the trial not to consider any sustained objections, and was later instructed to specifically disregard the sergeant's comment. We presume the jury followed the court's instructions. *See Ramirez*, 178 Ariz. at 127, 871 P.2d at 248. Thus, we find no abuse of discretion.

D. The Medical Testimony

¶47 Robles next argues that the trial court abused its discretion when it allowed Dr. R.B. to opine that blunt-force trauma caused R.S.'s phrenic nerve injury because the doctor (1) was unqualified to give an expert opinion on the subject, (2) failed to present documentation that such causation was possible, and (3) was unable to determine when the injury occurred or rule out other causes.

1. The Expert's Qualifications

¶48 To qualify as an expert, a witness must possess the relevant "knowledge, skill, experience, training, or education." Ariz. R. Evid. 702. It is within the court's sound discretion to decide whether a witness is qualified to testify on a given subject. *State v. Rojas*, 177 Ariz. 454, 459, 868 P.2d 1037, 1042 (App. 1993). "[U]nder Rules 702, 703, and 403 of the Arizona Rules of Evidence, expert testimony must '(1) come from a qualified expert, (2) be reliable, (3) aid the trier of fact in evaluating and understanding matters not within their common experience, and (4) have probative value that outweighs its prejudicial effect.'" *Id.* (quoting *State v. Moran*, 151 Ariz. 378, 380–81, 728 P.2d 248, 250–51 (1986)). Doctors may testify based on their general medical knowledge and are not limited to testifying based only on their direct experiences. *See Gaston*

v. Hunter, 121 Ariz. 33, 44, 588 P.2d 326, 337 (App. 1978) (finding it unnecessary for an expert witness to personally use a drug on humans to testify on the subject of its effectiveness).

¶49 Robles argues that Dr. R.B. was unqualified to offer an expert opinion that blunt-force trauma caused the phrenic nerve damage because he had no personal experience with such a case and because his specialty was lung and esophageal cancer. While Dr. R.B. did say that his research focused mostly on lung and esophageal cancers, as well as esophageal physiology, he also testified to his broader expertise. He testified that he was board certified in thoracic surgery, and that the phrenic nerve and diaphragm were within his area of specialty. Dr. R.B. testified that he had performed between approximately one and five surgeries per year on patients suffering from phrenic nerve paralysis. Thus, the State established sufficient foundation to permit the doctor to testify as an expert on phrenic nerve damage.

2. Information Underlying the Expert Opinion

¶50 Robles argues that Dr. R.B. failed to disclose the documentation on which he relied in forming his opinion. In forming an opinion, an expert witness may use any information that "experts in the particular field would reasonably rely on."

Ariz. R. Evid. 703.[8] The law does not require expert witnesses to disclose the underlying facts or data they use in forming their opinions unless the court requires prior disclosure or they are required to disclose it during cross-examination. Ariz. R. Evid. 705.

¶51 Dr. R.B. testified that he keeps abreast of new developments in his field and that he had knowledge of documented cases in which blunt-force trauma caused phrenic nerve paralysis. Defense counsel did not move to compel disclosure of the documentation on which Dr. R.B. relied in forming his opinion, nor did they question him regarding those sources at trial. Therefore, it was the defense counsel's choice to deny the court and the jury the opportunity to assess the reliability of the information underlying the doctor's opinion.

3. Probability Versus Possibility

¶52 Robles also argues that Dr. R.B. could not testify to a reasonable medical certainty that the encounter with Robles caused the injury because the doctor could neither rule out other causes of the injury nor determine when the injury

[8] The quoted language is from the 2012 revision of Rule 703, rather than the version in effect at the time of the hearing. However, the revised language produced no substantive changes. Ariz. R. Evid. 703 cmt. to 2012 Amendment.

occurred. He contends that it was error to allow Dr. R.B.'s testimony because he relied solely on the patient history R.S. provided and could not have arrived at the cause without that history.

¶53 A doctor may form an opinion based "in part on the history as related to him by the patient." *Spector v. Spector*, 17 Ariz. App. 221, 226, 496 P.2d 864, 869 (1972). In the analogous context of medical malpractice, the plaintiff satisfies its burden to prove that medical error caused the plaintiff's injury by a preponderance of the evidence, generally, only if the plaintiff's expert "testif[ies] as to *probable* causes of the plaintiff's injury." *Benkendorf v. Advanced Cardiac Specialists Chartered*, 228 Ariz. 528, 530, ¶ 8, 269 P.3d 704, 706 (App. 2012). However, where the plaintiff presents sufficient additional evidence of causation, expert testimony that the causation is merely *possible* will suffice. *Id.* at n.4. Even under the heightened standard of proof used in a criminal trial, testimony as to possible causation has probative value and is admissible. *State v. Brierly*, 109 Ariz. 310, 324, 509 P.2d 203, 217 (1973).

¶54 Dr. R.B. testified that he could not determine the date or cause of the nerve damage without relying on the information R.S. supplied. The doctor testified only that he

"had no reason to suspect that [the phrenic nerve damage] wasn't related to the original injury as described by [R.S.]," and that, although he hadn't treated R.S. "in the early time after his injury . . . it was all consistent." Because it is permissible for doctors to rely on the patient history their patients supply, the court did not abuse its discretion in admitting the evidence.

4. Sufficiency of Medical Evidence

¶55 Robles further contends that the evidence is insufficient to prove the element of causation. He reads Dr. R.B's testimony to say that a person suffering phrenic nerve injury would only notice symptoms immediately if the nerve was cut, and otherwise, he or she would not experience symptoms until at least 24 hours later upon exercising. Thus, Robles contends that because R.S. testified that he suffered symptoms immediately after the altercation and the nerve was not cut, the altercation could not have caused the symptoms.

¶56 We disagree with Robles's assertion that the testimony precludes the possibility that a victim would suffer immediate symptoms. While Robles's theory is a reasonable interpretation of the evidence, it is not the only reasonable interpretation. Dr. R.B. testified that immediately after sustaining a phrenic nerve injury, a patient would notice symptoms when he or she

exercised or lay down. Thus, a reasonable jury could conclude that if R.S. sustained the nerve damage during the struggle, the exercise during the remainder of the struggle would cause symptoms. J.M. corroborated this interpretation when he testified that R.S. exhibited symptoms immediately after, but not before, the scuffle with Robles.

E. Prior Recorded Statements

¶57 Finally, Robles argues that the trial court violated "a right afforded to the defense" by failing to admit an audio recording of R.S.'s interview with defense counsel. The record does not reflect that defense counsel requested admission of the prior recorded statements of any witnesses. Even if the defense had make such a request, however, Arizona Rule of Criminal Procedure 19.3(b) prohibits admission of prior recorded statements "for the purpose of impeachment unless it varies materially from the witness' testimony at trial." Because there was no offer of proof, we have no record of the transcripts of the recording, we cannot assess whether the content varied materially from R.S.'s testimony. The appellant has the burden to preserve the record and we presume matters absent from the record support the trial court's decision. *State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990). Because we have

no evidence to suggest otherwise, we find that the prior recorded statements were properly excluded.

III. The Sentence

¶58 We find no error in the court's decision to impose the presumptive sentence for the assault against J.M. and the aggravated sentence for the assault against R.S. The State presented sufficient evidence of emotional harm to R.S as an aggravator to his sentence. A.R.S. § 13-701(D)(9) (Supp. 2012).

¶59 We do find, however, that the court awarded insufficient presentence incarceration credit. Arizona grants presentence incarceration credit for time spent in custody beginning on the day of booking, *State v. Carnegie*, 174 Ariz. 452, 454, 850 P.2d 690, 692 (App. 1993), and ending on the day before sentencing, *State v. Hamilton*, 153 Ariz. 244, 246, 735 P.2d 854, 856 (App. 1987). When a defendant, while on probation, is arrested and incarcerated on a new criminal charge, he is entitled to presentence incarceration credit for both the sentence imposed for the probation revocation and the sentence imposed for the criminal conviction, provided both sentences run concurrently. *See State v. Brooks*, 191 Ariz. 155, 156, 953 P.2d 547, 548 (App. 1997). An award of incorrect incarceration credit is fundamental error, *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989), and we have the

authority to correct an erroneous sentence, A.R.S. § 13-4037 (2010).

¶60 Robles was arrested on January 23, 2009 for cocaine possession and aggravated assault and was released on January 27, 2009. The possession charge led to an automatic probation violation. After failing to appear in court for the 2009 arrest for aggravated assault, he was arrested again on January 7, 2010. Robles began serving time for his probation violation on January 9, 2010. The probation violation report calculated his presentence incarceration credit to begin on January 9, 2010 even though nothing in the record indicates that he was released from custody between January 7, 2010 and January 9, 2010. Thus, Robles should receive two additional days of credit for January 7, 2010 and January 8, 2010. He remained in custody until sentencing on May 25, 2011, and the court granted 501 days of presentence incarceration credit beginning on January 9, 2010 through the day before sentencing. This number, however, does not include the five days of credit for the 2009 arrest or the two days credit for January 7, 2010 and January 8, 2010. Since his sentence for the probation revocation runs concurrently with his sentence for assault, he was entitled to have those five days of credit applied to one of his assault convictions. Thus, Robles is entitled to a total of seven additional days of

credit. We modify Robles's sentence to reflect 508 days presentence incarceration credit.

CONCLUSION

¶61 After careful review of the record, we find no meritorious grounds for reversal of Robles's conviction. However, we do find he was erroneously denied seven days of presentence incarceration credit. Accordingly, we modify his sentence to reflect this correction.

¶62 Upon the filing of this decision, counsel shall inform Robles of the status of the appeal and his options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Robles shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
JOHN C. GEMMILL, Presiding Judge

/S/
LAWRENCE F. WINTHROP, Chief Judge