IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

KYLE JORDAN DOBSON, *Appellant*.

No. 1 CA-CR 13-0285
FILED 12-26-2013

Appeal from the Superior Court in Coconino County
S0300CR201200648
The Honorable Cathleen Brown Nichols, Judge

AFFIRMED

COUNSEL

Office of the Attorney General, Phoenix
By Joseph T. Maziarz

Counsel for Appellee

Coconino County Public Defender, Flagstaff
By H. Allen Gerhardt

Counsel for Appellant

MEMORANDUM DECISION

Judge John C. Gemmill delivered the decision of the Court, in which Presiding Judge Maurice Portley and Judge Kent E. Cattani joined.

G E M M I L L, Judge:

¶1 Kyle Jordan Dobson appeals his conviction of one count of aggravated assault. Specifically, he appeals the trial court's denial of his motion for mistrial. We affirm Dobson's conviction and sentence.

BACKGROUND

¶2 In March 2013, a jury convicted Dobson of one count of aggravated assault, a class 4 felony. His conviction resulted from a 2011 incident in which he kicked his then-girlfriend, L.W., in the face during a camping trip near the Grand Canyon. The kick broke L.W.'s nose, causing bleeding and swelling, and required medical treatment.

¶3 The trial court held a pre-trial evidentiary hearing regarding three prior acts Dobson committed shortly before the assault. The State moved to present evidence that (1) Dobson burned L.W's arm with a cigarette the day before the assault, (2) Dobson threw a hat worn by L.W. over a cliff after threatening to push L.W. down the canyon, and (3) Dobson verbally fought and threatened L.W. during the trip prior to the assault. The State argued that evidence of all three instances was admissible to show that Dobson kicked L.W. intentionally. L.W. testified at the hearing that all three instances occurred and also that Dobson had physically abused her prior to the camping trip assault. Although the trial court sustained Dobson's objection to L.W's testimony about other past abuse, the court granted the State's motion to allow evidence about the three instances of Dobson's behavior leading up to the assault.

¶4 At trial, L.W. testified about the incident and her injuries. Her testimony included observations that prior to assaulting her, Dobson "was in a bad mood" before departing for the camping trip, that "[h]e was being aggressive towards everybody," and that "[i]t was almost like dealing with a child." The prosecutor then asked L.W. about Dobson's attitude during the trip and her reasons for continuing with the trip notwithstanding Dobson's conduct:

> STATE'S ATTORNEY (SA): So about what time did you actually leave [to go up to the Grand Canyon]?
>
> L.W.: Like I said, I'd say probably in the hours between ten and probably midnight.
>
> SA: All right. And how did you travel up to the Grand Canyon?
>
> L.W.: We took two vehicles up there. [We took a truck and a jeep. Dobson's brother was driving the jeep. Others were in the front passenger seat and behind the driver.] I was in the middle, and Kyle was to my right.
>
> SA: All right. And what was Kyle's mood like at that point?
>
> L.W.: Same. Quiet and passive towards everybody, wasn't really talking. He did mention one thing on the way up there which was that, "I [expletive] hate you," and that's about it. That's all he said the whole trip up there.
>
> SA: Who did he direct that to?
>
> L.W.: Me.
>
> SA: Now, you still obviously decided to go on this trip even after you got burned by a cigarette. And why is that?
>
> L.W.: *Because, I mean, this wasn't the first time that Kyle had put me through things in this matter*.

(Emphasis added.) Dobson's attorney immediately objected and asked to approach the bench. In a chambers discussion outside of the presence of the jury, Dobson's attorney moved for a mistrial on the grounds that L.W.'s testimony "suggests and tells the jury [that Dobson and L.W.] are in an abusive relationship" and that, "there is [no] possible way to cure [L.W.'s testimony] with a curative instruction or anything else."

¶5 The State responded that L.W.'s testimony "[did] not mention any prior bad acts," and that the comments were not "specific enough to warrant a mistrial." The court denied Dobson's motion, expressly disagreeing that the jury would "necessarily construe that

[L.W.'s comment] means there was violence in their relationship in the past." Before resuming L.W.'s testimony, the trial court told the jury that, "[a]s to [L.W.'s] last statement, I want to instruct the jury that is being stricken. You are not to consider her last statement in any manner."

¶6 Dobson was convicted and received a suspended sentence, with three years of probation. This timely appeal followed, and we have jurisdiction in accordance with Arizona Revised Statutes sections 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

ANALYSIS

¶7 The only issue Dobson raises on appeal is whether the trial court erred by not granting his motion for mistrial. We review the denial of a motion for mistrial for abuse of discretion. *State v. Cruz*, 218 Ariz. 149, 163, ¶ 67, 181 P.3d 196, 210 (2008). Dobson presents three arguments why the trial court should have granted his motion, and we analyze them in turn.

I. The State's Role in Eliciting L.W.'s Testimony

¶8 Dobson argues that the State "intentionally or recklessly" elicited the statement at issue. He asserts that because the same question was asked at the pre-trial evidentiary hearing that elicited L.W.'s testimony about past abuse, the State "knew or should have known that asking the exact same question at trial would elicit prejudicial prior bad act testimony."

¶9 During the in-chambers discussion in which Dobson moved for a mistrial, the State's attorney specifically noted that, "certainly I wasn't trying to elicit this past behavior," and "I've told her before we're not to get into anything that we talked about at the [pre-trial evidentiary] hearing[.]" Dobson provides no support for the proposition that asking a witness the same question at trial that produced an inadmissible answer in a pre-trial hearing, after the witness is advised of evidentiary limitations at trial, necessarily establishes the questioner's knowledge that a witness will offer the same inadmissible answer. Moreover, Dobson did not object to the State's line of questioning at trial, and Dobson's counsel essentially agreed that the response was unexpected, noting that "I expected the witness to answer just now as she did in our hearing that she had saved up a lot of money [for the trip] and even though [Dobson] was acting like a jerk she was going on the trip despite him anyway. She

saved up a lot of money. She was excited." Given these statements from the prosecutor and defense counsel, the trial court did not abuse its discretion by finding that L.W.'s statement was unexpected rather than intentionally or recklessly brought out by the State.

II. The Stricken Testimony and Arizona Rule of Evidence 404(b)

¶10 Dobson asserts that a mistrial was necessary because L.W.'s stricken statement "cast 'an irrevocable cloud over the jury's fairness and impartiality,'" (quoting this court's opinion in *State v. Reynolds*, 11 Ariz. App. 532, 535, 466 P.2d 405, 408 (App. 1970)). He argues that L.W.'s testimony that "this wasn't the first time that Kyle had put me through things in this matter" was clearly a reference to previous physical abuse and that it was "highly probable" that the statement "influenced the jurors." Dobson asserts that L.W.'s testimony violated Arizona Rule of Evidence 404(b) and, consequently, should have resulted in a mistrial.

¶11 We agree with the trial court's analysis that it was possible for the jury to view L.W.'s statement in multiple ways. The statement did not specifically refer to prior bad acts or conduct, and, in the context of L.W.'s overall testimony at trial, could have referred to what she perceived as Dobson's poor attitude, bad mood, and childish behavior prior to the camping trip – a topic discussed by L.W. just prior to making the statement at issue.

¶12 Granting a mistrial is a dramatic remedy that we consider under an abuse of discretion standard because trial courts are best positioned to assess how testimony impacts the jury. *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 46 74 P.3d 231, 244 (2003) (upholding the denial of a motion for mistrial after a witness made improper statements under oath despite instructions from the State not to make such statements); *See also State v. Marshall*, 197 Ariz. 496, 500, ¶ 10, 4 P.3d 1039, 1043 (App. 2000) (noting that the remedy for unexpected and inadmissible witness testimony "rests largely within the discretion of the trial court.").

¶13 Here, the trial court reasonably determined that the statement in question was not specific enough to warrant a mistrial. Moreover, in an effort to cure any defect caused by her statement, the court instructed the jury to disregard it. Our supreme court has explained that jurors are presumed to follow the trial court's instructions. *State v. Morris*, 215 Ariz. 324, 337, ¶ 55, 160 P.3d 203, 216 (2007). We find no abuse of discretion.

III. The Trial Court's Curative Instruction

¶14 Finally, Dobson argues that the trial court's curative instruction "clearly confused the jury" and "tipped the balance" in favor of the State; meaning that "it cannot be said beyond a reasonable doubt that the jury would have found [Dobson] guilty without the impermissible testimony." Although Dobson objected at trial to the curative instruction on the general ground that L.W.'s statements were not curable, he did not object to the specific language of the instruction or provide any alternative language to the trial court. A general objection to the court's discretionary decision — to strike the answer and instruct the jury to disregard it — is not sufficient to preserve Dobson's argument on appeal that the instruction was confusing. *See State v. Moody*, 208 Ariz. 424, 466 n. 15, ¶ 189, 94 P.3d 1119, 1161 n. 15 (2004) (noting that a general objection will not preserve a more specific objection that was not raised at trial on a related matter). We conclude, therefore, that Dobson's objection to the language of the curative instruction was waived. And, even if not waived, we find no abuse of discretion in either the giving of the instruction or the specific language thereof.

CONCLUSION

¶15 Because the trial court did not abuse its discretion in denying Dobson's motion for mistrial, we affirm Dobson's conviction and sentence.