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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
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BY: GH

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,) 1 CA-CR 08-0211
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
BRUCE CLARKE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-104982-001 DT

The Honorable John R. Ditsworth, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Julie A. Done, Assistant Attorney General
Attorneys for Appellee

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Attorneys for Appellant

I R V I N E, Presiding Judge

¶1 Appellant Bruce Clarke appeals the trial court's
denial of his motion for a mistrial on grounds that (1) the

prosecutor asked a witness if Clarke made statements about attempting suicide after the court precluded such questioning and (2) a Phoenix police detective commented during testimony that Clarke "invoked" his right to remain silent. Clarke also appeals his sentence as "excessive" under the Eighth Amendment of the United States Constitution and Article 2, section 15 of the Arizona Constitution. He asks this court to reduce the sentences pursuant to Arizona Revised Statutes ("A.R.S.") § 13-4037 (B) (2001). For the following reasons, we affirm Clarke's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶12 On February 2, 2007, Clarke was indicted by a grand jury on eight offenses involving his biological daughter, C.C. - counts one, three, seven: sexual abuse, a class 3 felony, and counts two, four - six, and eight: sexual conduct with a minor, a class 2 felony. The State alleged that all counts occurred when C.C. was thirteen years old.

¶13 On August 13, 2007, the parties participated in a settlement conference, during which the prosecutor offered Clarke twenty-seven years flat time in exchange for a plea to one count of sexual conduct with a minor and a consecutive eight year term for a plea to attempted child molestation. On the latter count, Clarke could be released after serving eighty-five percent of the sentence. At the conference, the judge informed

Clarke that if convicted of all charges, he faced up to 135 years in prison. Clarke rejected the plea deal.

¶14 Prior to trial, Clarke's attorney filed a motion in limine to preclude the State from arguing that when Clarke learned his daughter had disclosed allegations of sexual misconduct, he attempted suicide. The court granted the motion:

COURT: I was going to grant the motion in limine to preclude the State from mentioning the allegations of suicide.

PROSECUTOR: Judge, just to be very clear: It's that there can't be testimony from the witnesses that they believed the defendant was attempting to commit suicide, correct?

COURT: That's correct.

PROSECUTOR: And I anticipate that if the evidence comes out, as I believe that it will, I would ask the court for permission that I be allowed to argue the reasonable inference from the evidence that the defendant was -

COURT: We'll cross that bridge at a later time.

(Emphasis added.)

¶15 The jury trial began on January 29, 2008. During the State's direct examination of Detective M.R., the prosecutor asked: "[d]id the defendant mention anything about killing himself?" Defense counsel objected before the witness answered and the court sustained the objection. The prosecutor later asked the same witness whether Clarke denied or admitted that he

"touched his daughter," to which the detective responded "[n]o."
On cross-examination, defense counsel addressed that line of questioning in the following manner:

DEFENSE COUNSEL: You tried to get him to admit something to you because you wanted - Let me rephrase that. You were trying to make it seem that he should admit something to you so as not to put his daughter through testifying?

WITNESS: No. I just gave him a matter of fact what was going to happen.

DEFENSE COUNSEL: And in saying that, you're hoping that he would say, okay, I don't want to put her through that, here's what happened?

WITNESS: No. But by the time I had read him his rights, he had invoked.

DEFENSE COUNSEL: And you never got an admission?

WITNESS: Right.

(Emphasis added.)

¶16 At the end of the day, defense counsel moved for a mistrial on grounds that (1) the prosecutor violated the court's motion in limine ruling by asking Detective M.R. whether Clarke said anything about killing himself and (2) Detective M.R. testified that Clarke invoked his right to remain silent. As to the first ground, the prosecutor argued that:

it was the State's understanding, as far as [it] relates to the first motion for mistrial, I know the court denied it but it was my understanding that I was not allowed

to illicit [sic] testimony from either David K[.] or Linda C[.] about a belief that the defendant was trying to kill himself because it would be speculation. However, if the defendant is making statements about trying to kill himself, that's not speculation. That's the defendant's statement, and that's why I asked the question so I want the Court to know I wasn't trying to deliberately violate this Court's prior ruling.

(Emphasis added.)

¶7 The court denied Clarke's motion for a mistrial on this ground. On the second ground, Clarke's attorney argued that a mistrial based on Detective M.R.'s comment on Clarke's silence was warranted under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. The prosecutor responded to the second motion by arguing that the detective's statement was not "intentional" but simply a "mistake." The court denied the motion, finding that defense counsel had unintentionally "invited" the testimony and thus it was harmless error.

¶8 At the close of trial, the court gave the following jury instruction regarding Detective M.R.'s testimony that Clarke invoked his rights: "You have heard testimony that Mr. Clarke invoked. You are not to consider that testimony in any way during your deliberations or in determining Mr. Clarke's innocence or guilt." On February 7, 2008, the jury convicted Clarke of all charges. At sentencing, the trial court sentenced Clarke to the following: a mitigated term of 2.5 years in prison

for count one, with credit for 413 days of presentence incarceration; concurrent presumptive terms of five years for counts three and seven each, to run concurrently to count one. For counts two, four, five, six, and eight, Clarke received consecutive presumptive terms of twenty years, to run consecutive to counts one, three, and seven. The court found Clarke's health as a mitigator equal to the aggravator of violating his own daughter.

¶9 Clarke filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Constitution Article VI, Section 9, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A) (Supp. 2009).

DISCUSSION

I. Motion for Mistrial

¶10 Clarke argues that the trial court abused its discretion when it denied his motion for a mistrial based on (1) the prosecutor's question about Clarke killing himself after the court precluded questions regarding suicide and (2) Detective M.R.'s comment during cross-examination that Clarke invoked his right to remain silent during questioning. Clarke argues that he was denied his constitutional right to a fair trial when a mistrial was not declared in this case.

¶11 A mistrial is the "most dramatic remedy for trial error and should be granted only when it appears that justice

will be thwarted unless the jury is discharged and a new trial granted." *State v. Herrera*, 203 Ariz. 131, 134, ¶ 4, 51 P.3d 353, 356 (App. 2002) (citation omitted). When a witness "unexpectedly volunteers information, the trial court must decide whether a remedy short of mistrial will cure the error." *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). An appellate court gives great deference to the trial court's decision because the trial court "is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Id.* Therefore, a trial court's denial of a motion for mistrial will not be overturned absent an abuse of discretion. *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003).

A. Attempted Suicide

¶12 Prior to trial, the court granted defense counsel's motion in limine to preclude the State from asking witnesses if they believed Clarke attempted suicide. Clarke argues that the State's question about his possible attempted suicide "so infected the proceedings because [he] was denied a fair trial because the question naturally drew the jury's attention to proposed testimony that had been precluded by the trial court prior to trial." It was precluded, Clarke opines, because it could impermissibly affect the verdict. The trial court heard

defense counsel's arguments and summarily denied the motion for a mistrial on this ground.

¶13 An appellate court "will not reverse a conviction based on the erroneous admission of evidence without 'a reasonable probability' that the verdict would have been different had the evidence not been admitted." *State v. Hoskins*, 199 Ariz. 127, 142-43, ¶ 57, 14 P.3d 997, 1012-13 (2000) (citation omitted). Moreover, a court's curative instruction to disregard objectionable testimony can overcome any probability that the testimony influenced the jury verdict. *State v. Lamar*, 205 Ariz. 431, 439, ¶ 43, 72 P.3d 831, 839 (2003). "The trial court must consider two factors in determining whether to grant a motion for a mistrial based on a witness's testimony: (1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors." *Id.* at ¶ 40.

¶14 In *Lamar*, the Arizona Supreme Court held that the trial court did not abuse its discretion by denying a motion for mistrial based upon the witness offering a statement precluded by the court's pretrial order. *Id.* at 438, ¶ 38, 72 P.3d at 838. The court reasoned that although the statement brought an inappropriate matter to the jury's attention, several other factors made it improbable that the statement influenced the

jury. *Id.* at 439, ¶¶ 40-42, 72 P.3d at 839. These factors include: (1) the defense attorney "immediately objected," preventing the witness from finishing the statement; (2) the statement did not "necessarily implicate" the defendant in the kidnap and murder of the victim; and (3) the trial court instructed the jury to disregard the statement and that the "curative instruction sufficiently overcame any probability that the jury would conclude" that the defendant was involved in the particular threat the witness's statement referenced. *Id.* at ¶ 43.

¶15 In this case, the prosecutor's question was unanswered and thus no inadmissible evidence was introduced. Moreover, the record contains other properly introduced evidence from which the jury might infer that Clarke attempted suicide on January 2, 2007. Clarke's brother-in-law, D.K., testified that on that evening Clarke told him over the telephone he had consumed rum, blood pressure medication and had taken a "bunch" of Tylenol. Clarke told D.K. to tell everyone that Clarke loved them. D.K. testified that he tried to keep Clarke on the phone so that he would not consume more alcohol or pills. D.K. became concerned when the line went quiet and called local authorities to check on Clarke because he knew the combination of alcohol and drugs "could possibly be deadly." There was testimony that fire officials had to break down the door to get into Clarke's home

and he was transported to the hospital where he remained for three or four days. Detective M.R. testified that when she interviewed Clarke he told her he was drinking alcohol and taking Tylenol the evening of January 2, 2007. Clarke told her he was not coherent that night. Therefore, there was overwhelming testimony from which the jury could infer Clarke attempted suicide.

¶16 Moreover, the *Lamar* factors make it improbable that the prosecutor's question influenced the jury. First, Clarke's attorney "immediately objected" to the question and Detective M.R. did not provide an answer. Second, the question did not "necessarily implicate" Clarke's attempted suicide or that the attempted suicide was indicative that he was guilty of the charges against him. Finally, the trial court instructed the jury to disregard questions objected to by defense counsel and sustained by the court. Therefore, the trial court did not abuse its discretion by denying the motion for mistrial on the ground that the prosecutor asked a question about Clarke's attempted suicide.

B. Invoking *Miranda* Rights

¶17 Clarke argues that Detective M.R.'s comment on his post-arrest silence is fundamental error and the trial court erred by denying his motion for a mistrial on this ground. It is generally error for a witness to comment on a defendant's

invocation of the right to remain silent. *State v. Davis*, 119 Ariz. 529, 533, 582 P.2d 175, 179 (1978). It does not, however, always amount to reversible error. Instead, this kind of error is subject to harmless, not fundamental, error analysis. *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993).

¶18 Clarke argues that Detective M.R. was "an experienced 'long time' detective that should have known better" than to comment on Clarke's invocation. The Arizona Supreme Court, however, rejected that argument in *State v. Stuard*, 176 Ariz. 589, 601, 863 P.2d 881, 893 (1993). In *Stuard*, the court reasoned that "an able lawyer conducting cross-examination can usually avoid the injection of known inadmissible testimony by using narrow, leading questions." *Id.* The court held that defense counsel "invited" the error by asking a broad question that invited the detective to respond with precluded testimony. *Id.* at 600-01, 863 P.2d at 892-93. Therefore, the court concluded that the error was harmless. *Id.*

¶19 In this case, Detective M.R.'s comment on Clarke's invocation was invited by defense counsel. The prosecutor did not attempt to use Clarke's silence as an indication of guilt. See *State v. Sorrell*, 132 Ariz. 328, 330, 645 P.2d 1242, 1244 (1982) (holding that the prosecutor's comments on Defendant's post-arrest silence were a deliberate attempt to indicate guilt and therefore, were not harmless error). The trial court

instructed the jury to disregard the question after it was asked. Prior to their deliberations, the court specifically told jurors not to consider the testimony that Clarke invoked "in any way during [their] deliberations or in determining [Clarke's] innocence or guilt." It is presumed that jurors follow instructions. See *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996) ("Moreover, experience teaches us that they possess both common sense and a strong desire to properly perform their duties.").

¶20 Furthermore, given the overwhelming evidence of Clarke's guilt, there was "no reasonable probability that the evidence materially affected the outcome of the trial." *State v. Gilfillan*, 196 Ariz. 396, 406, ¶ 38, 998 P.2d 1069, 1079 (App. 2000). Therefore, the error was harmless and the court properly denied Clarke's motion for a mistrial.

II. Clarke's Sentences

¶21 Clarke argues that application of the mandated sentences for dangerous crimes against children pursuant to A.R.S. § 13-705 (Supp. 2009)¹ results in an "excessive" sentence in this case and violates federal and state constitutional requirements against cruel and unusual punishment. See U.S. Const. amend. XIII; Ariz. Const. art. 2, § 15. Clarke opines

¹ We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

that his age, health, lack of criminal history, and the prosecutor's offer that he plead guilty to one sexual conduct with a minor charge with a sentence of 27 years flat time and one attempted child molestation charge with a consecutive eight year sentence - with possible release after serving eighty-five percent of the latter sentence make his sentences excessive. Therefore, he argues, this court should reduce his sentence pursuant to A.R.S. § 13-4037(B), which gives this court the power to reduce punishment imposed if it determines the punishment is greater than the circumstances of the offense.

¶122 Clarke did not raise these constitutional arguments to the trial court. "On appeal we will consider a matter not raised below only if it is a matter of fundamental error." *State v. Bolton*, 182 Ariz. 290, 297-98, 896 P.2d 830, 837-38 (1995) (holding that this "waiver principle applies to alleged constitutional issues, as well as to nonconstitutional issues") (citations omitted). "Fundamental error is error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial." *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). No fundamental error occurred regarding the trial court's imposition of statutorily-mandated sentences. Therefore, Clarke's argument that his punishment is "excessive" is waived.

CONCLUSION

¶23 For the foregoing reasons, we affirm.

/s/

PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

DONN KESSLER, Judge