DIVISION ONE
FILED: 04-13-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. RUSSELL LEE GARCIA, Appellant.	)	No. 1 CA-CR 09-0468 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. CR20081442

The Honorable Thomas B. Lindberg, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

John Napper — Prescott
Attorney for Appellant

Russell Lee Garcia — San Luis
Appellant *In Propria Persona*

B R O W N, Judge

¶1 Russell Lee Garcia appeals his convictions and sentences for one count of aggravated assault on a child less than fifteen years of age, one count of disorderly conduct, and one count of criminal damage.[1] Counsel for Garcia filed a brief in accordance with *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Finding no arguable issues to raise, counsel requests that this court search the record for fundamental error. Garcia was granted the opportunity to file a supplemental brief *in propria persona*, and he has done so.

¶2 Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We view the facts in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Garcia. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Finding no reversible error, we affirm.

BACKGROUND

¶3 Garcia was charged with one count of aggravated assault on a child less than fifteen years of age, a class 6

[1] Garcia was also charged by indictment with one count of child abuse, a class 4 felony, three additional counts of disorderly conduct, class 1 misdemeanors, and two counts of disobeying a court order, class 2 misdemeanors. He was found not guilty of these charges.

felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1204(A) (2010),[2] one count of disorderly conduct, a class 1 misdemeanor, in violation of A.R.S. § 13-2904 (2010), and one count of criminal damage, a class 2 misdemeanor, in violation of A.R.S. § 13-1602 (2010). The following evidence was presented at trial.

¶4 In November 2008, Garcia was living with his wife ("Wife") and her children. Wife's twelve-year-old son, S.S., overslept and was late for school. Upon learning that S.S. had overslept, Garcia entered S.S.'s bedroom and began to yell. Garcia then grabbed S.S. by the throat, lifted him off the ground, and pushed him against the wall. Wife entered the room, heard Garcia cursing at S.S. and saw Garcia had him pinned against the wall. Wife pulled Garcia off S.S. and tried to push Garcia out of the room. Garcia then swung around, raised his arm over his head and swung at S.S. as he sat on the floor next to the nightstand holding his head in his hands. Garcia struck the nightstand, smashing it.

¶5 A jury found Garcia guilty of aggravated assault. In a separate bench trial for the misdemeanor charges, the trial court found Garcia guilty of one count of disorderly conduct and one count of criminal damage. He was sentenced to 3.75 years

[2] We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

imprisonment and granted 119 days of presentence incarceration credit. He filed a timely notice of appeal.

DISCUSSION

¶6 Garcia raises a number of issues in his supplemental brief. We address each in turn. We consider alleged trial error under the harmless error standard when a defendant objects at trial and thereby preserves an issue for appeal. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005). "Fundamental error review, in contrast, applies when a defendant fails to object to alleged trial error." *Id*. at ¶ 19 (citing *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993)). 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*. at ¶ 19 (citations omitted). Garcia objected only to the admission of verbal and email statements he made during and after the incident with S.S.; thus, we review the admission of that evidence under the harmless error standard. None of the remaining arguments in Garcia's supplemental brief were raised in the trial court, therefore we review those only for fundamental error.

¶7 Garcia first argues that he was unfairly prejudiced by the testimony of the family therapist. He asserts the therapist

should not have been permitted to testify because she was not a licensed psychologist and because she was serving as S.S.'s therapist at the time of trial. We construe Garcia's assertion as a challenge to the family therapist's qualification as an expert witness and as an objection to the admission of privileged information.

¶8 Under Arizona Rule of Evidence 702, an expert is one who has "specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue" and may be qualified as an expert based on "knowledge, skill, experience, training, or education[.]" Before admitting expert testimony, the trial court must determine that the subject matter on which the expert will testify is not one which would fall within the common knowledge of the average juror, will be helpful or necessary to the trier of fact in understanding the issues, and that the witness possesses the necessary qualifications to provide the opinion in question. *See Pipher v. Loo*, 221 Ariz. 399, 403-04, ¶ 16, 212 P.3d 91, 95-96 (App. 2009).

¶9 Here, the family therapist testified about S.S.'s emotional state following the incident at issue, her opinion as to whether he was being truthful in reporting the allegations, her observations regarding S.S. and other family members' physical and emotional state following the incident, as well as

whether the behaviors exhibited by Garcia during that incident were harmful to S.S. and the family structure. Those factors require specialized knowledge of emotional and behavioral principles and would be helpful to the jury in understanding the impact of Garcia's actions on S.S. and the rest of the family. Prior to eliciting the therapist's opinions on these matters, the State offered evidence, through direct testimony, that the therapist held a bachelor's degree in criminal justice, was a credentialed behavioral health professional, a family and home specialist, therapeutic mentor, and case manager. She also had over thirty years experience working with children on behavioral health issues. Based on the information presented at trial, we find that there was no error in qualifying the family therapist as an expert or in admitting her testimony in that regard.

¶10 We likewise find no error based on privilege. Victims may protect confidential communications with their therapists by asserting a privilege created by statute. A.R.S. § 32-3283(A) (2008); *P.M. v. Gould*, 212 Ariz. 541, 545, ¶ 15, 136 P.3d 223, 227 (App. 2006). Such a privilege may be waived by the victim either in writing or in court testimony. A.R.S. § 32-3283(A). Here, the family therapist was called as a State witness, presumably with the knowledge and acquiescence of Wife on behalf of herself and her children. In addition, Wife testified as to her conversations with the family therapist regarding the

incident at issue; thus, any privilege regarding confidential communications was waived. Further, because only the client may assert or waive the privilege, Garcia lacks any basis to object to such testimony. *See Gordon v. Indus. Comm'n*, 23 Ariz. App. 457, 459, 533 P.2d 1194, 1196 (1975) (privilege regarding confidential communication belong to the client, patient, or person making the communication).

¶11 Garcia next argues that the trial court erred in admitting verbal statements made by him during the incident with S.S. He also contends that the trial court erred in admitting email communications he sent to Wife after his arrest and release from jail. He further asserts that neither the verbal statements nor the emails were relevant and both were unduly prejudicial.

¶12 The State filed a motion *in limine* requesting a determination by the trial court that the State could admit the verbal statements and emails as admissions of a party opponent and as evidence of Garcia's state of mind, among other things. The court held a hearing on the motion *in limine* in which it concluded the emails and verbal statements were admissible. Garcia contends the trial court failed to properly weigh the probative value of the statements against their prejudicial effect before accepting them into evidence. He also asserts

that the verbal statements constituted impermissible character evidence. Our review of the record reveals otherwise.

¶13 Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. Ariz. R. Evid. 401. In general, all relevant evidence is admissible. Ariz. R. Evid. 402. Relevant evidence may be excluded, however, if it is substantially outweighed by the danger of unfair prejudice. Ariz. R. Evid. 403. Because "the trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice," we grant the trial court broad discretion in making such determinations. *State v. Connor*, 215 Ariz. 553, 564, ¶ 39, 161 P.3d 596, 607 (App. 2007) (citation omitted). Furthermore, although evidence that is relevant and not unduly prejudicial is generally admissible, evidence of other crimes, wrongs, or acts is not admissible to prove character in conformity with those acts, but may be admitted to prove motive, opportunity, or intent, among other things. Ariz. R. Evid. 404(b); *State v. Fish*, 222 Ariz. 109, 117, ¶ 20, 213 P.3d 258, 266 (App. 2009).

¶14 The verbal statements made by Garcia during the incident with S.S. were relevant to show Garcia's state of mind and did not unduly prejudice Garcia. During the incident with S.S. Garcia embarked on a tirade of name-calling. He called

S.S. a "worthless piece of sh*t," a "f***ing retard," and a "pussy," among other things. He also stated that he was going to "beat [S.S.'s] ass." The State argued that these statements were admissions of a party opponent, showed Garcia's emotional state at the time of the incident (such as motive, intent, design, mental feeling), and constituted statements against interest. The defense countered that the verbal statements were purely hearsay and as such were inadmissible.

¶15 The State also argued that the emails sent to Wife were relevant to show that Garcia intended to influence Wife's testimony. The emails were sent in violation of a no-contact order and included a long communication in which Garcia referenced bible passages about truthfulness and false witness. Wife testified that she is a religious person and she believed the emails were sent in an attempt to use her faith against her. The defense countered that the emails could be interpreted in more than one way and could not necessarily support a conclusion that Garcia was attempting to influence any testimony.

¶16 The transcript shows that during the hearing on the motion *in limine*, the court heard from both parties regarding the relevance and admissibility of the statements and concluded that the verbal statements were "relevant and admissible and not unduly prejudicial." The court further determined that because "mental state is one of the elements of each of the crimes" the

verbal statements were relevant and admissible to show mental state. In addition, the court determined "the emails are admissible. They are somewhat probative about the issue of trying to influence the testimony of one of the witnesses[.] So, I would find that they are relevant to that issue and admissible." Based on the record, we find that the trial court properly weighed the probative value of the statements against any unfair prejudice to Garcia prior to their admission and there was no error in admitting those statements.

¶17 Garcia further argues that the State improperly used leading questions during direct examination of S.S.'s younger brother J.S., who was eight years old at the time of trial. It is within the trial court's discretion to permit direct examination of a child witness through leading questions. *State v. Jerousek*, 121 Ariz. 420, 426, 590 P.2d 1366, 1372 (1979) (citations omitted). Where the questions are not too suggestive or unfair and the evidence is compelling, the use of leading questions with child witnesses is permissible. *Id*. Here, although some leading questions were used during direct examination of J.S., the State asked non-leading questions for many critical inquiries. Thus, the trial court did not abuse its discretion in permitting leading questions during direct examination of J.S.

¶18 Garcia also argues that statements made during the State's closing argument were both an attempt to bolster the credibility of the State's witnesses and "designed to show [Garcia's] propensity for being a bad person" thereby constituting impermissible character evidence. He contends that the statements at issue materially affected the verdict and therefore denied him due process and a fair trial. We disagree.

¶19 "It is black letter law that it is improper for a prosecutor to vouch for a witness." *Bible*, 175 Ariz. at 601, 858 P.2d at 1204 (citation omitted). "Two forms of impermissible prosecutorial vouching exist: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony. In addition, a lawyer is prohibited from asserting personal knowledge of facts in issue before the tribunal unless he testifies as a witness." *Id*. However, "[w]ide latitude . . . is given in closing arguments, and counsel may comment on evidence and argue all reasonable inferences therefrom." *State v. Dumaine*, 162 Ariz. 392, 402, 783 P.2d 1184, 1194 (1989) (citation omitted).

¶20 Garcia contends that several statements made by the State during closing arguments constitute improper personal expressions of the prosecutor's opinion regarding witnesses, including:

> [F]orgive [Wife] for not grabbing a camera[.] Forgive her for not noticing what shape [S.S.] was in, with red marks on him . . . as she is in shock—as she testified and as her counselor testified about what had just happened to her family.
>
> . . .
>
> Was [S.S.] lying? Is [S.S.] lying to you? [The family therapist] said that that boy was in such a state of trauma when he came in, that she could see he wasn't thinking about anything but what happened to him.
>
> . . .
>
> [S.S.] wasn't lying that morning. And [the family therapist] testified that [S.S.] is just not one of these kids that is a habitual liar.
>
> . . .
>
> [T]he basic story remains the same—it's the story that was relayed to [the family therapist] in the office[.]
>
> . . .
>
> [B]ut what rings loud and clear is what both of these boys said happened that morning[.]
>
> . . .
>
> There is sufficient evidence in this case. There is no reasonable doubt. There is sufficient evidence for you to be firmly convinced that [Garcia] committed child abuse and aggravated assault[.]

We are not persuaded that the State was vouching for any of its witnesses with these comments. Neither the prestige of the government nor any suggestion that information not presented

would support the witnesses' testimony is reflected in the statements Garcia finds objectionable.

¶21 Our review of the transcript likewise reveals that nothing was said by the State that could be construed as an improper comment regarding Garcia's character. The State reiterated Garcia's admission that "he'd gone over the boundary" with S.S. and commented that "the common theme in all of [Garcia's] discussions . . . about this little boy[] [is that S.S.] needs a good beating[.] He wanted to hit that kid. There's no question about it." These comments do not amount to character evidence. Moreover, the trial court instructed the jury what the lawyers say in closing arguments is not evidence. We presume jurors follow the trial court's instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Thus, we find no error in permitting the statements made by the State during closing arguments and reject Garcia's claim that the inclusion of such statements denied him due process or a fair trial.

¶22 Garcia also asserts that he was denied a fair trial due to the cumulative effect of the State's misconduct. "In order to constitute fundamental error, the prosecutor's comment had to be so egregious as to deprive the defendant of a fair trial, and to render the resulting conviction a denial of due process." *State v. Van Den Berg,* 164 Ariz. 192, 196, 791 P.2d

1075, 1079 (App. 1990) (citation omitted); *see also State v. Hughes,* 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (prosecutorial misconduct must "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process") (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)).

¶23 Garcia fails to point to any specific conduct on the part of the State to support his contention of cumulative effect of misconduct. We assume he intended to assert that the cumulative effect of the State's use of leading questions, statements made during closing arguments, and alleged vouching for witnesses credibility underlie his contentions here. Because we have found nothing improper regarding the State's conduct with respect to these matters, we cannot find that Garcia was denied a fair trial on this basis.

¶24 The final arguments Garcia makes are based on his claim of ineffective assistance of counsel, which must be filed under Arizona Rule of Criminal Procedure 32. "Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of their merit." *State v. Spreitz,* 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Therefore, we do not address them here.

CONCLUSION

¶25 We have read and considered counsel's and Garcia's briefs, and we have reviewed the entire record for fundamental error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Garcia was represented by counsel at all stages of the proceedings, the jury was properly instructed, and the evidence supports the conviction. He was given the opportunity to speak before sentencing, and the sentence imposed was within statutory limits.

¶26 Upon filing this decision, counsel shall inform Garcia 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). Garcia 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.

¶27 Accordingly, we affirm Garcia's convictions and sentences.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PATRICK IRVINE, Presiding Judge

/s/
_____
DONN KESSLER, Judge