FILED BY CLERK
MAR 23 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAVID LEE SANTY, JR., Appellant.	2 CA-CR 2010-0021 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090706-001

Honorable Teresa Godoy, Judge Pro Tempore

VACATED AND REMANDED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Joseph L. Parkhurst
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Lisa M. Hise
Tucson
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, David Santy, Jr., was convicted of one count of molestation of a child under fifteen years of age, a dangerous crime against children. The trial court sentenced him to a partially mitigated, twelve-year prison term, with consecutive community supervision. On appeal, Santy challenges a number of the court's evidentiary rulings and contends the court erred by imposing a probation surcharge in violation of A.R.S. § 12-114.01(A). For the reasons stated below, we vacate the conviction and sentence and remand for a new trial.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the conviction and sentence. *See State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). During the second half of 2007, Julia V., then nine years old, was living at her grandmother's house with her mother and brother. Santy, his wife, and their three children lived in the neighborhood, and Julia sometimes would go to Santy's house to play with his daughter. Occasionally, Santy was alone with the children while his wife was at work.

¶3 On one such occasion, while the other children were eating in the kitchen, Santy called Julia into the garage. He asked her if she "ever did a boy," and when she responded no, he asked her to tell him "if [she] would ever let him touch [her] and he would be more than happy to." Julia apparently did not respond but instead went back into the house with the other children. Later, Santy called to Julia from a shed in the backyard, saying he needed her. When she entered the shed, Santy knelt in front of her and asked if she could "button [her] pants real fast." When Julia did not answer, Santy

unbuttoned her pants, put his hand in her underwear, and touched her genital area. One of Santy's sons came out of the house and called to him. Santy told him to go back inside as he pulled his hand away and Julia buttoned her pants. As Julia and Santy walked to the house, Santy said, "[c]an you please not tell anybody? I don't want to get in trouble." Julia told her friend Samantha about the incident later that day and eventually told her mother Jacqueline, who confronted Santy and then reported the incident to the police. Santy was charged with one count of molestation of a child and one count of continuous sexual abuse of a child.[1] He was convicted and sentenced as described above. This appeal followed.

Discussion

I. Admissibility of Evidence

A. Prior Consistent Statements

¶4 Santy first contends the trial court erred in admitting Jacqueline's and Samantha's testimony recounting what Julia had told them about the incident. He maintains, as he did below, that it was inadmissible hearsay and "improperly bolstered [Julia]'s testimony." The state counters that the statements were admissible as prior consistent statements under Rule 801(d)(1)(B), Ariz. R. Evid., to rebut a charge of recent fabrication. "We review admissions of evidence under exceptions to the rule against hearsay for abuse of discretion." *State v. Tucker*, 205 Ariz. 157, ¶ 41, 68 P.3d 110, 118 (2003).

[1]The state dismissed the continuous sexual abuse charge before trial.

¶5 On appeal, Santy argues it was error for the trial court to admit the statements as prior consistent statements under Rule 801(d)(1)(B). Quoting *State v. Tucker*, 165 Ariz. 340, 798 P.2d 1349 (App. 1990), Santy argues Rule 801(d)(1)(B) was inapplicable because he never suggested that the statements made by Julia about the molestation were a "*recent* fabrication," but rather that her statements were false, "*whenever* they were made."

¶6 Under Rule 801(d)(1)(B),

> [a] statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . .

In *State v. Martin*, 135 Ariz. 552, 663 P.2d 236 (1983), our supreme court addressed whether, in evaluating the applicability of Rule 801(d)(1)(B), a trial court must determine when a motive to fabricate begins. In *Martin*, the defendant was accused of molesting his stepdaughter. *Id.* at 553, 663 P.2d at 237. On cross-examination, defense counsel suggested to the victim that she had "fabricated her testimony owing to improper motives relating to the defendant's disturbance of her relationship with her mother." *Id.* The state then called several other witnesses, including the victim's teacher, a police officer, a detective, a psychologist, and a pediatrician, all of whom recounted the victim's statements about the "abusive episodes." *Id.* at 553, 555, 663 P.2d at 237, 239. The trial court admitted the testimony as prior consistent statements under Rule 801(d)(1)(B). *Id.* at 553, 663 P.2d at 237.

¶7 To be admissible under that rule, "a prior consistent statement must precede an improper motive or influence." *Id*. at 554, 663 P.2d at 238. And in *Martin*, the court reasoned

> [t]he only way to be certain that a prior consistent statement in fact controverts a charge of "recent fabrication or improper influence or motive" is to require that the statement be made at a time when the possibility that the statement was made for the express purpose of corroborating or bolstering other testimony is minimized. In other words, to be admissible, the witness must make the prior consistent statement before the existence of facts that indicate a bias arises.

Id., *quoting* Rule 801(d)(1)(B). In that case, "the victim first told her mother about [Martin]'s conduct, with no result. The victim then recounted the abusive episodes to her teacher, and the teacher contacted the child protective service office. After that the victim told the same story to others connected with law enforcement." *Id.* at 554-55, 663 P.2d at 238-39. The court therefore concluded that the trial court erred in admitting the testimony because it failed to determine when the alleged motive to fabricate arose or whether the statements preceded such motive. *Id.* at 555, 663 P.2d at 239. In reversing Martin's convictions, the court stated that, because it could not say "beyond a reasonable doubt that the parade of corroborating witnesses had no influence on the jury's deliberations," the error was not harmless. *Id.*

¶8 Similarly, in *Tucker*, this court considered the application of Rule 801(d)(1)(B) in relation to trial testimony of a police officer, a detective, and a social worker, all of whom recounted the victim's statements to them about having been molested by the defendant. 165 Ariz. at 343, 798 P.2d at 1352. But we stated it was

unnecessary to determine precisely when any motive to fabricate had arisen, because "the crucial point [wa]s that the defendant never suggested that the statements made to the police and the social worker were a *recent* fabrication. The essence of this facet of his defense was that any accusation, *whenever made*, was a fabrication." *Id.* Thus, we concluded Rule 801(d)(1)(B) was inapplicable, and the testimony should not have been admitted. *Id.*

¶9 We disagree with the state's assertion that *Tucker* is "distinguishable on its facts."[2] Santy, like Tucker, never made a charge of recent fabrication. Instead, Santy's defense was that he never molested Julia and that her accusation was untrue whenever made. Thus, Rule 801(d)(1)(B) was inapplicable and Jacqueline's and Samantha's testimony should not have been admitted. And in any event, even under *Martin*'s rationale, any motive Julia may have had to fabricate arose *before* she told Samantha or Jacqueline her story. Thus, under *Martin*, neither Samantha's nor Jacqueline's statements were admissible as prior consistent statements because they were made *after* that motive arose. The trial court erred in admitting the statements.

[2]To the extent the state argues the statements were admissible because they constituted substantive evidence of guilt in addition to buttressing the credibility of the victim, we disagree. The statements are substantive evidence of guilt only if the rule applies in the first instance. "[T]he rule declares prior consistent statements to be non-hearsay. They are *then* admitted substantively and not just to buttress the credibility of the witness." *State v. Martin*, 135 Ariz. 552, 553, 663 P.2d at 236, 237 (1983) (emphasis added). Because we conclude Santy never made a claim of recent fabrication, the statements were not admissible at all under Rule 801(d)(1)(B). To the extent the jury considered the statements as substantive evidence of guilt, the testimony was even more prejudicial.

¶10 And because the state presented no physical evidence of Santy's guilt, instead basing its case solely on witness testimony, "it cannot be said beyond a reasonable doubt that the . . . corroborating witnesses had no influence on the jury's deliberations." *Martin*, 135 Ariz. at 555, 663 P.2d at 239. Because we cannot say the error was harmless, we must vacate Santy's conviction.[3]

B. Profiling Evidence

¶11 Santy next contends the trial court erred in allowing the state's expert witness, Wendy Dutton, to "include profiling evidence in her testimony." "We review the trial court's admission of expert testimony for an abuse of discretion." *State v. Davolt*, 207 Ariz. 191, ¶ 69, 84 P.3d 456, 475 (2004).

¶12 Before trial, Santy moved to preclude Dutton from testifying, and the trial court denied the motion. Dutton testified as a "cold expert," meaning she had no information about the facts of the case. During her testimony, she explained that she had reviewed no materials related to the case and had conducted no interviews with any witnesses. Her testimony included a general description of the phases a perpetrator goes through in selecting a victim and in committing molestation.

¶13 On appeal, Santy argues the testimony "as to how a perpetrator goes through a process of 'victim selection; engagement . . . ; grooming; assault; and concealment,'" coupled with testimony from Julia about the development of her relationship with Santy, constituted profile evidence, in violation of *State v. Lee*, 191

[3]We address the remaining issues on appeal because they are likely to arise at a new trial on remand. *See State v. May*, 210 Ariz. 452, ¶ 1, 112 P.3d 39, 40 (App. 2005).

Ariz. 542, 959 P.2d 799 (1998). In *Lee*, the defendant was charged with possession of marijuana for sale. *Id.* ¶ 3. In order to prove the defendant had knowingly possessed marijuana, the state presented expert testimony that he had exhibited behavior consistent with a drug courier profile. *Id.* ¶ 13. And, the expert directly compared the defendant's behavior to the profile. *Id.*

¶14 Our supreme court concluded the testimony was inadmissible because it "create[d] too high a risk that [the] defendant w[ould] be convicted not for what he did but for what others are doing." *Id.* ¶ 12. The court also noted, however, that such evidence could be used for other purposes, such as foundation for expert opinions or to "'assist the jury in understanding modus operandi in a complex criminal case.'" *Id.* ¶ 11, *quoting United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997). And in *Tucker*, we said "an expert witness may testify about the general characteristics and behavior of sex offenders . . . if the information imparted is not likely to be within the knowledge of most lay persons." 165 Ariz. at 346, 798 P.2d at 1355.

¶15 Here, the state presented Dutton's testimony on topics outside the common knowledge of jurors, including the process of victimization. Dutton did not mention Santy or compare his behavior to the phases of victimization. *See id.*; *Cordoba*, 104 F.3d at 230 (approving use of drug courier profile evidence to aid jury in understanding defendant's modus operandi). Nothing in *Lee* suggests her testimony was improper. And we disagree with Santy's argument that it is "within [the] common knowledge of everyone" that "people who molest children often attract children and have physical

contact with [them]" and that therefore the process of victimization was "not the proper subject of expert testimony."

¶16 We also disagree with Santy's contention that Dutton's testimony did no more than invite "the faulty assumption or inference of guilt based on characteristics that [we]re not probative of [Santy]'s actual guilt or innocence." As we have stated, Dutton did not compare Santy's behavior to any profile. Nor did she offer an opinion as to whether Santy's conduct was consistent with the alleged molestation having occurred. *See Lee*, 191 Ariz. 542, ¶¶ 13-14, 959 P.2d at 802 (expert testimony inadmissible when expert directly compares defendant's behavior to that of courier profile). Dutton's testimony did not violate our supreme court's holding in *Lee*, and the trial court did not err in denying Santy's motion to preclude it.

C. Curriculum Vitae

¶17 Santy contends the trial court erred in admitting Dutton's curriculum vitae into evidence after she had testified extensively as to her qualifications. Santy argues the curriculum vitae "was highly prejudicial, lacked probative value, and was improper hearsay." At trial, Santy objected only on the basis of relevancy and prejudice. Moreover, his prejudice argument at trial was based on the nature of some of the titles of Dutton's presentations, whereas he argues on appeal that the written document caused the jury to place greater weight on Dutton's testimony. Therefore, we review his prejudice and hearsay arguments for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (arguments raised for first time on appeal subject only to fundamental error review).

¶18 Under Rule 402, Ariz R. Evid., "[a]ll relevant evidence is admissible, except as otherwise provided by the . . . Constitution of Arizona or by applicable statutes or rules." "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. And, "[t]he threshold for relevance is a low one." *State v. Roque*, 213 Ariz. 193, ¶ 109, 141 P.3d 368, 396 (2006). Nevertheless, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Ariz. R. Evid. 403.

¶19 Here, Dutton's curriculum vitae plainly was relevant as to her qualifications as an expert—it demonstrated her "experience, training, [and] education" in her field. *See* Ariz. R. Evid. 702. And although Santy claims that "a physical document . . . containing the titles of seminars and articles about 'sex abuse and sex data . . . ' . . . doubtless caused the jury to put extra weight on . . . Dutton's testimony and unfairly prejudiced [him]," we disagree. Dutton testified extensively about her qualifications—she testified she had worked with sex offenders and victims for over twenty-five years, had conducted "close to seven thousand forensic interviews," and had written articles and "presented [at] numerous national conferences." Given this testimony, even assuming the curriculum vitae was improperly admitted into evidence, Santy has not shown that he was prejudiced by it, nor has he cited any authority to support his claim that somehow a

physical document is more likely to influence a jury than witness testimony.[4] *See State v. Fulminante*, 161 Ariz. 237, 245-46, 778 P.2d 602, 610-11 (1988) (error harmless when inadmissible evidence cumulative to properly admitted evidence).

Disposition

¶20 For the reasons stated, we vacate Santy's conviction and sentence and remand the case to the trial court for a new trial.[5]

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[4]Santy also argues for the first time on appeal that the curriculum vitae constituted inadmissible hearsay evidence. However, we need not decide whether it was fundamental error to admit the curriculum vitae on this basis, because as we stated above, Santy has not shown he was prejudiced by its admission.

[5]Santy also contends the trial court abused its discretion in imposing a twenty-dollar probation surcharge pursuant to A.R.S. § 12-114.01(A). He argues the court did not impose a "fine, penalty or forfeiture" against which the surcharge could be imposed. Because Santy did not object below, we typically review for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). And, "'[g]enerally, imposition of an illegal sentence constitutes fundamental error.'" *State v. Soria*, 217 Ariz. 101, ¶ 4, 170 P.3d 710, 711 (App. 2007), *quoting State v. Munninger*, 213 Ariz. 393, ¶ 11, 142 P.3d 701, 705 (App. 2006). Although the state concedes the court's imposition of the surcharge was error, given that we have vacated Santy's conviction and are remanding for a new trial, we decline to address an issue not raised below, which may not arise in the future.