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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/04/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0510
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
KORY TULL GREENFIELD,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Mohave County

Cause No. S8015CR201001021

The Honorable Derek C. Carlisle, Judge *Pro Tempore*

AFFIRMED

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T I M M E R, Presiding Judge

¶1 Kory Tull Greenfield appeals his convictions and
resulting sentences imposed after a jury found him guilty of two

counts of aggravated assault by domestic violence and one count of aggravated domestic violence. For the reasons that follow, we affirm.

BACKGROUND¹

¶12 On the night of September 24, 2010, Greenfield was at a bar in Lake Havasu City with his girlfriend, the victim. Greenfield became upset when she did not want to leave when he did. He took the victim's purse, and when she followed him to get it, he grabbed her by the throat. When the victim continued to try to get her purse, Greenfield pushed her to the ground. Each time she tried to get up, Greenfield shoved her down face-first. He then grabbed her by the hair and dragged her up the street.

¶13 A witness drove by and saw the victim sitting on the curb telling Greenfield, "Stop it. Leave me alone." The victim had blood all over her face. The witness then saw Greenfield grab the victim by her hair and pull her up the street with her face against the pavement. When the witness honked and yelled at Greenfield to leave her alone, the victim got up and ran away.

¶14 The State charged Greenfield with aggravated assault by domestic violence, a Class 4 felony (Count 1); aggravated

¹ We view the evidence in the light most favorable to upholding the jury's verdict. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983).

domestic violence, a Class 5 felony (Count 2); and aggravated assault by domestic violence, a Class 6 felony (Count 3). The victim testified at trial but recanted all statements she had made previously to law enforcement, an emergency room doctor, her family, and under oath at a Lake Havasu Justice Court about how Greenfield beat, strangled, and dragged her that night. The jury returned guilty verdicts on all counts. On July 14, 2011, the court found that Greenfield had two historical prior felony convictions and sentenced him to concurrent mitigated terms of imprisonment on all counts. This timely appeal followed.

DISCUSSION

I. Testimony by the State's domestic violence expert

¶15 Greenfield argues the trial court erred by permitting a domestic violence expert to testify about (1) characteristics displayed by domestic violence victims in the "honeymoon phase" of the domestic violence cycle, and (2) statistics concerning violations of orders of protection. Because Greenfield failed to raise these arguments to the trial court, he has waived them absent fundamental error. *State v. Schaaf*, 169 Ariz. 323, 327, 819 P.2d 909, 913 (1991). To gain relief, Greenfield must prove error occurred, the error was fundamental, and he was prejudiced by the error. *State v. Henderson*, 210 Ariz. 561, 568, ¶¶ 23-24, 26, 115 P.3d 601, 608 (2005). Error is considered fundamental if it reaches the foundation of the defendant's case or removes

a right essential to the defense. *State v. McGann*, 132 Ariz. 296, 298, 645 P.2d 811, 813 (1982). With these principles in mind, we evaluate Greenfield's claims.

A. Honeymoon phase testimony

¶16 The trial court denied Greenfield's pre-trial motion to exclude the State's domestic violence expert, ruling the expert could testify about the general characteristics and behavior of domestic violence victims but could not comment on the veracity of the victim or give an opinion on specific facts of the case. After the victim testified and recanted her previous accusations against Greenfield, the State called its expert and elicited the following testimony:

Q: During this honeymoon phase are there studies with regards to the commonality of abuse [] and to recant or minimize what was initially reported. . . . Can you discuss some of those other statements?

A: Well, recanting happens in the majority of victims. It is minimizing of the violence phase. Identify what we call barriers to safety which is isolation, minimization of the violence, relentless behavior of the batterer. It could be financial, lack of resources. So they stay in the relationship. And what happens is they minimize the violence as a psychological tool because it's very difficult to admit the person you love is abusing you.

* * *

Q: Now you were discussing isolation. Isolation could be both geographic and emotional. . . . Can you explain that?

A: Geographics is when they move them away from family and friends, any kind of support they have. Emotional isolation is even when the family is in town or living in the area.

* * *

Q: Now generally in ways that you based on your training and experience, ways that you see a victim withdraw cooperation can you give us an example of what you have seen?

A: Well, usually they are very fearful the first - the night that law enforcement shows up because the abuse has just occurred. So they cooperate and they want to get restraining orders. But then that comes with the relentless behavior of the batterer. Either he continues to contact her . . . so therefore she is being wooed basically with the honeymoon phase. And then she is also fearful of what happens if it doesn't work. . . .

Q: Okay. And ways that you have seen if you have seen victims of abuse minimize what they initially reported to law enforcement?

A: Yes.

Q: Okay. You have seen them deny what's happened?

A: Yes.

¶17 Greenfield argues it was fundamental error to admit this evidence because the general behavior described by the

expert matched the victim's actions here and therefore constituted an improper comment on the victim's credibility.²

¶18 An expert witness is permitted to testify about the general characteristics and behavior of victims if the information is "not likely to be within the knowledge of most lay persons." *State v. Tucker*, 165 Ariz. 340, 346, 798 P.2d 1349, 1355 (App. 1990). Expert testimony explaining recantation by abuse victims can aid the jury in evaluating a victim's credibility because it explains the victim's inconsistent statements. *State v. Lindsey*, 149 Ariz. 472, 473-74, 720 P.2d 73, 74-75 (1986); see also *State v. Moran*, 151 Ariz. 378, 384, 728 P.2d 248, 254 (1986) ("[E]vidence explaining why recantation is not necessarily inconsistent with the crime having occurred aided the jury in evaluating the victim's credibility."). The expert is restricted, however, from giving a particularized opinion on the credibility of a witness in the case being tried or applying the general characteristics of victims to a specific witness. *Moran*, 151 Ariz. at 382, 728 P.2d at 252; *Lindsey*, 149 Ariz. at 475, 720 P.2d at 76 ("It is not the expert's function . . . to substitute himself or herself for the jury and advise

² The victim initially cooperated with law enforcement by reporting the incident and testifying at a Lake Havasu Justice Court. She then returned to her relationship with Greenfield and became distant from her family in town. And finally, she recanted at trial by disputing or claiming she did not recall the statements she previously made concerning the assaults.

them with regard to the ultimate disposition of the case.”). For example, “[t]he expert may not explain that, based upon the characteristics and behavior he has described, a person’s conduct is consistent or inconsistent with the crime having occurred.” *Tucker*, 165 Ariz. at 346, 798 P.2d at 1355.

¶19 We reject Greenfield’s argument that admission of the above-described expert testimony constituted fundamental error. Unlike situations in which an expert erroneously provided a particularized opinion explaining why a victim recanted or showed how the witness’s behavior matched the general characteristics of abuse victims, the testimony here was generalized and did not offer an opinion on the victim’s behavior in this case. We reject Greenfield’s assertion that because the expert described the characteristics the victim exhibited it was akin to telling the jury she had been abused and recanted because she was in the honeymoon phase. The fact her behavior fit the expert’s testimony regarding the general behavior of victims in the honeymoon phase does not render the evidence unfairly prejudicial. *See Moran*, 151 Ariz. at 384, 728 P.2d at 254 (stating that simply because evidence is exceedingly persuasive for the state’s case and harmful to the defendant’s does not mean it is unfairly prejudicial under Arizona Rule of Evidence 403). In sum, the court did not commit fundamental error by permitting the expert testimony because it was not

unfairly prejudicial to provide a general behavioral science explanation helpful to the jury in understanding why abuse victims often recant.³

B. Mention of statistics

¶10 Greenfield next argues that admitting the expert's testimony quantifying how often abusers re-offend and violate orders of protection was fundamental error because it inspired fear in the jurors and was highly prejudicial. The testimony at issue arose in a lengthy answer to the prosecutor's question whether victims of abuse are typically cooperative with law enforcement:

A: Yes, depending on how severe the assaults are. They are scared in the beginning and they, you know, they are hoping to be saved basically. And so when law enforcement comes in they are hoping it's going to change. . . . And he says: If you call the police when I get out you are going to get it. You are going to be sorry. . . . So they withdraw their cooperation and they sometimes lie and because it's still in

³ Even assuming error, we do not detect prejudicial error in light of the overwhelming evidence establishing Greenfield's guilt. Though the victim recanted at trial, she made several statements shortly after the assaults to law enforcement, a physician, and her grandfather about the acts Greenfield committed against her that night, including choking her and dragging her by her hair. She also admitted to testifying under oath at Lake Havasu Justice Court three days after the incident that Greenfield "beat," "strangled," and "hit" her, and to writing in a petition that Greenfield attacked and beat her. Finally, a witness testified to seeing the final assault charged in Count 3 when Greenfield dragged the victim by her hair down the street.

the honeymoon phase. . . . 69 percent of offenders after being released from incarceration continued to abuse. And two thirds of restraining orders are violated. So the criminal justice system doesn't always protect them.

Q: And that's not necessarily always the case. Generally if there is a honeymoon phase, even if the offender is released from custody, the honeymoon phase could still go on for a certain period of time?

A: Yes. Yes.

(Emphasis added.)

¶11 We reject Greenfield's argument that it was fundamental error to admit this evidence because it appealed to the jurors' fears by telling them to convict Greenfield so he does not assault the victim again. Even if it was error to permit the testimony, we do not detect prejudicial error. First, the prosecutor neither elicited the testimony nor commented on it to prey on the jury's fears. See *State v. Morris*, 215 Ariz. 324, 337, ¶ 58, 160 P.3d 203, 216 (2007) (citing *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990)) (holding prosecutor cannot make arguments that appeal to the fears or passions of the jury); *State v. Hughes*, 193 Ariz. 72, 88, ¶ 70, 969 P.2d 1184, 1200 (1998) (holding it improper for the prosecutor to reference a future murder to emphasize the potential consequences of the defendant being found not guilty by reason of insanity). Second, the prosecutor's follow-up

question minimized any prejudicial impact of the testimony by explicitly pointing out that recidivism does not occur in every case. Third, and finally, in light of the strong evidence of guilt, *see supra* note 3, it is unlikely the challenged testimony induced the jury to return a guilty verdict. For these reasons, the court did not commit fundamental error by permitting the expert's testimony concerning statistics.

II. Sufficiency of the evidence on Count 3

¶12 Lastly, Greenfield argues the trial court erred when it denied his motion for judgment of acquittal because insufficient evidence supported a conclusion that the victim's capacity to resist was substantially impaired when Greenfield committed the final assault charged in Count 3. Ariz. Rev. Stat. ("A.R.S.") § 13-1204(A)(4) (West 2012).⁴

¶13 In reviewing the sufficiency of the evidence, we review the facts in the light most favorable to upholding the verdict and resolve all conflicts in the evidence against the defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). Evidence is sufficient when it is more than a mere scintilla and is such proof as could convince reasonable persons of the defendant's guilt beyond a reasonable doubt. *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981).

⁴ Absent material revisions after the date of an alleged offense, we cite a statute's current version.

"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) (citation omitted).

¶14 The State charged Greenfield in Count 3 with aggravated assault under A.R.S. § 13-1204(A)(4) for dragging the victim down the street by her hair. That section provides that a person commits aggravated assault "if the person commits the assault while the victim is bound or otherwise physically restrained or while the victim's capacity to resist is substantially impaired." § 13-1204(A)(4). The State conceded in closing argument that there was no evidence the victim was restrained. Therefore, the issue is whether there was sufficient evidence to support the jury's finding that the victim's capacity to resist was substantially impaired.⁵

¶15 This court has held that there was insufficient evidence to support a verdict under A.R.S. § 13-1204(A)(4) when the victim's capacity to resist was substantially impaired by the assault itself and did not exist before the assault began. *Maricopa County Juv. Action No. JV-123196*, 172 Ariz. 74, 75, 834 P.2d 160, 161 (App. 1992). Though the victim in that case was sprayed twice in the eyes with a stinging substance, such

⁵ The court ruled that the victim's voluntary intoxication could not be a basis for substantial impairment.

impairment did not aggravate the assault because only the second spray substantially impaired the victim and the assault was essentially over by that point. *Id.* at 78, 834 P.2d at 164. When the assaultive acts interfere with the victim's ability to resist, "the statute necessarily contemplates that other assaultive conduct must follow." *Id.* When such conduct does follow, the assault is an aggravated one. *Id.*

¶16 Greenfield argues this case involves a situation similar to the one in *JV-123196*, and we should reach the same result. We disagree. Greenfield asserts there was no evidence the victim's ability to resist was substantially impaired at the time he dragged her by the hair because she fought back against the prior assaults by getting up each time he pushed her down, and she was able to run away after he dragged her. We rejected a similar argument in *JV-123196*: though the victim escaped, "we do not believe that the juvenile commissioner abused her discretion in finding that the victim's capacity to resist was substantially impaired The fact that he did escape may bear on the degree of impairment, but it is not determinative." *Id.* at 77-78, 834 P.2d at 163-34 (internal citations omitted). We reach the same conclusion here. At the time Greenfield commenced dragging the victim, she had been choked sufficiently to cause bruising, her face was bloodied, and she had repeatedly fought to stand, finally remaining seated on the ground. A

reasonable juror could have concluded that the victim's injuries and fatigue from the prior assaults substantially impaired her ability to defend herself from the final assault. For this reason, the trial court did not abuse its discretion by denying the motion for acquittal.

CONCLUSION

¶17 For the foregoing reasons, we affirm Greenfield's convictions and sentences.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
John C. Gemmill, Judge

/s/
Margaret H. Downie, Judge