IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LEE CUELLAR, *Appellant*.

No. 1 CA-CR 13-0593

FILED 07-15-2014

Appeal from the Superior Court in Maricopa County
No. CR 2011-154423-001
The Honorable Daniel G. Martin, Judge
The Honorable Peter C. Reinstein, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Andrew Reilly
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Jeffrey L. Force
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Margaret H. Downie delivered the decision of the Court, in which Judge Patricia K. Norris and Chief Judge Diane M. Johnsen joined.

D O W N I E, Judge:

¶1 Lee Cuellar appeals his convictions and sentences, contending the superior court erroneously precluded a defense witness from testifying at trial. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 S.C. lived with her daughters and Cuellar (her then-husband) at times relevant to these proceedings. Upon returning home from work one day, S.C. discovered Cuellar behind closed doors in the bedroom on top of daughter "A." Cuellar and S.C. later divorced, but S.C. permitted her youngest daughter, A.C., to visit Cuellar. Those visits continued until A. told her mother Cuellar "used to do things to me. He used to touch me." S.C. called the police.

¶3 Cuellar was indicted on seven counts of sexual conduct with a minor, one count of attempted sexual conduct with a minor, and one count of child molestation. He was arraigned on November 7, 2011. Trial was originally set for March 5, 2012. In November 2011, the State disclosed Wendy Dutton as an expert who would testify regarding "the Behavioral Characteristics of Child Abuse Victims."

¶4 Cuellar moved to continue the March trial date to allow time for interviews and a settlement conference and because the defense "recently obtained new evidence that has yet to be disclosed to the State." The court granted the motion, resetting trial for May 2. Cuellar again moved to continue, stating the defense needed additional time to produce discovery. Trial was reset for July 10. Cuellar sought a third continuance because witness interviews were not complete and the defense had "gathered information regarding both new witnesses and documents which need to be disclosed to the State." The superior court reset trial for September 18 and ordered the defense to disclose all witnesses by July 31, 2012.

¶5 Cuellar filed a "Notice of Defenses and List of Witnesses and Exhibits" on August 14. He listed "Terrence Campbell, Expert Witness," but offered no further information about that individual. The prosecutor emailed defense counsel on September 5, seeking information about Campbell.

¶6 On September 12, Cuellar filed his fourth continuance request, stating, *inter alia*, that he was "awaiting OPDS approval for . . . expert witness Terr[e]nce Campbell," who was "necessary to refute the State expert witness, Wendy Dutton."[1] The court reset trial for November 27. The prosecutor wrote Cuellar's counsel on October 25, asking if he had "made any progress on this case re: your expert?" The prosecutor again wrote to defense counsel on November 8, requesting Campbell's report so she could determine whether a rebuttal expert was necessary and reiterating the need for witness interviews, including Campbell. Cuellar requested his fifth trial continuance on November 15, stating he was awaiting Campbell's "final report" and that "the State would need a rebuttal expert witness once Dr. Campbell completes his report." The court set a status conference for December 20.

¶7 On December 20, Cuellar filed a document captioned, "Status of Case," stating, in pertinent part:

> Counsel has spoken with his expert, Dr. Terrence Campbell, who is in receipt of the discovery from Counsel. Dr. Campbell also informed counsel that he needs no additional discovery and the information he received is sufficient to make his report. Dr. Campbell has made findings and counsel is awaiting receipt of the report which was mailed on December 18, 2012.

The court reset trial for February 20, 2013.

¶8 The lawyers communicated by email about Campbell in January 2013, beginning with defense counsel stating: "Attached is

[1] Cuellar later advised the court that the Maricopa County Office of Public Defense Services ("OPDS") had approved retention of Campbell, a Michigan psychologist, on September 27, 2012.

Dr. Campbell's report. Please let me know if you require any additional information." The prosecutor promptly responded: "I thought he reviewed the discovery in this case. His 'report' references nothing related to THIS case, nor does it actually provide HIS opinion. Am I missing something? Are you actually planning to call him as a witness?" Defense counsel replied: "He did review the discovery. What do you need him to write in his report? It['s] [his] opinion that the victim is lying and that's what he would testify to. I still plan to call him as a witness." The prosecutor responded: "Sorry, am I missing something? Where in his report does he say anything about this case or this victim?" Defense counsel replied: "He doesn't. I will call him. What exactly do you need from him?" The prosecutor replied: "His opinion, what he plans to testify about. All that was provided is general research." The email string concluded with defense counsel saying, "Ok, I will relay that information."

¶9 On February 4, defense counsel emailed the prosecutor, stating he had spoken with Campbell, who "indicated that he would testify on the following: 1) issues with the delay in reporting the case; 2) peer literature regarding fabricated reports; 3) what would motivate people to fabricate reports; 4) what percentage of people fabricate reports; and 5) characteristics of those who fabricate reports." The prosecutor responded: "Is he testifying about the facts of THIS case? [I.e.]: issues with the delay that occurred etc? Or issues in general based on literature? It is my understanding that he has read the reports etc. in this case, so I'm confused." On February 6, the prosecutor emailed defense counsel to say she was confused "about what Dr. Campbell intends to testify about" and reminding him she needed Campbell's curriculum vitae and the literature upon which he relied. She again asked to interview all defense witnesses.

¶10 On February 7, 2013, the State requested a trial continuance, stating, in pertinent part:

> Defense counsel has recently provided materials to the State regarding their expert witness, Dr. Campbell. Those materials consisted solely of the American Counseling Association's Code of Ethics and a packet containing quotes and synopsis from various written articles and publications. Said articles have not been provided for review. The State has requested clarification and additional materials as they relate to Dr. Campbell and his testimony. He has not written a report that is specific to this case; instead he has merely provided general research after purportedly reviewing the

> discovery in this matter. The State has also yet to receive his curriculum vitae. Such additional information and clarification will determine if a motion to preclude is appropriate or whether a rebuttal expert will be needed.

The State also noted that its requested interviews had not been scheduled. The court reset trial for April 2 and ordered Cuellar to disclose, by February 22, 2013, "any relevant materials regarding Dr. Campbell" and to disclose by February 15 "whether Dr. Campbell will be called as a blind expert."

¶11 On February 15, defense counsel advised the prosecutor Campbell was not a blind expert because he had "read the police report and would be rebutting Wendy Dutton's testimony." The record reveals no additional disclosures regarding Campbell by the February 22 deadline.

¶12 The State again moved to continue trial on March 22, stating, in relevant part:

> Defendant has not scheduled an interview with their expert witness, Dr. Campbell. As the State has indicated on numerous occasions we would like to interview Dr. Campbell and will need sufficient time to prepare for trial after that interview is complete. The State does not know if motions will need to be filed after determining what Dr. Campbell intends to testify to, or if a rebuttal witness will be required. As well, the articles that Dr. Campbell intends to rely on have not been provided to the State as requested. Said materials are needed prior to conducting an interview of Dr. Campbell.

The court reset trial for June 3 and again ordered Cuellar to "disclose all materials regarding Dr. Campbell's testimony" — this time, by April 9.

¶13 On May 7, the prosecutor wrote to defense counsel asking what he had decided "re: Campbell?" Counsel replied that he was "still calling him" and asked when the prosecutor was available for interviews. The prosecutor provided several dates and times. On May 15, defense counsel emailed the prosecutor to say Campbell had not "gotten back" to him, even though counsel had left several messages and emailed Campbell.

¶14 The State filed a motion to preclude Campbell's testimony on May 16, 2013. Cuellar responded in opposition. After hearing argument on the date set for trial, the superior court granted the State's motion, stating:

> Even standing here today, it's not at all clear what it is that this expert is going to testify to. And part of my job is to ensure fairness on both sides. And I have been tracking this issue with Dr. Campbell for months now, trying to move it along with enough disclosure and enough time that both parties can fairly prepare for trial in this case. Where we find ourselves at this point is that . . . in my judgment, there has not been sufficient disclosure. There has not been sufficient timely disclosure.
>
> And it is my judgment on that basis the motion to preclude should and is granted. And that is a difficult decision for me, Mr. Cuellar, because that directly affects you. I don't often preclude evidence. But this is a case where it is absolutely warranted, and this case needs to go to trial. And that trial is going to be tomorrow.

¶15 A jury trial ensued. The jury found Cuellar guilty on all counts. Cuellar timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

DISCUSSION

¶16 Whether to impose a sanction for disclosure violations, and the sanction to impose, are discretionary matters left to the trial court. *State v. Moody,* 208 Ariz. 424, 454, ¶ 114, 94 P.3d 1119, 1149 (2004). An appellate court will not disturb such decisions absent an abuse of discretion. *Id.* Rule 15.7(a) states, in pertinent part:

> The court shall order disclosure and shall impose any sanction it finds appropriate, unless the court finds that the failure to comply was harmless or that the information could not have been disclosed earlier even with due diligence and the information was disclosed immediately upon its discovery. All orders imposing sanctions shall take into account the significance of the information not timely disclosed, the impact of the sanction on the party and the

> victim and the stage of the proceedings at which the disclosure is ultimately made.

¶17 Authorized sanctions for disclosure violations include witness preclusion. Rule 15.7(a)(1). Preclusion, though, "should be used only as a last resort." *State v. Valencia*, 186 Ariz. 493, 502, 924 P.2d 497, 506 (App. 1996). "The right to offer the testimony of witnesses . . . and present a defense is guaranteed by the Sixth Amendment to the United States Constitution and is a fundamental element of due process of law." *State v. Delgado*, 174 Ariz. 252, 257, 848 P.2d 337, 342 (App. 1993). However, "[i]n exercising the right to present witnesses, a defendant must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *State v. Naranjo*, 234 Ariz. 233, 245, ¶ 55, 321 P.3d 398, 410 (2014) (internal quotation marks omitted). In addition to the standards articulated in Rule 15.7, courts consider whether the opposing party will be surprised by the witness's testimony, the witness's importance to the case, and whether the disclosure violation was "motivated by bad faith or willfulness." *State v. Smith*, 123 Ariz. 243, 252, 599 P.2d 199, 208 (1979).

¶18 The superior court clearly understood the gravity of the requested sanction, and determined that preclusion was the only viable remedy. Cuellar was quite dilatory in disclosing information about his expert. Even when he made disclosures, they were cursory and sometimes conflicting, and despite the prosecutor's numerous requests, the defense never made Campbell available for an interview. The underlying principle of our disclosure rules "is to give full notification of each side's case-in-chief so as to avoid unnecessary delay and surprise." *State v. Roque*, 213 Ariz. 193, 207, ¶ 32, 141 P.3d 368, 382 (2006) (internal quotation marks omitted)*; accord Wells v. Fell*, 231 Ariz. 525, 528, ¶ 13, 297 P.3d 931, 934 (App. 2013). Cuellar's disclosures were inadequate to allow the State to assess Campbell's testimony to determine whether rebuttal evidence would be necessary. *See Roque*, 213 Ariz. at 209, ¶ 40, 141 P.3d at 384. The State repeatedly and diligently pressed for more information and for an interview of Campbell.

¶19 Moreover, Cuellar has not established that the precluded testimony was material to his defense. *See Delgado*, 174 Ariz. at 260, 848 P.2d at 345 ("To establish a sixth amendment violation, the defendant must show that the evidence was material to the defense."). The record includes nothing more than generalities about the testimony Campbell might offer.

¶20 "[T]he absence of bad faith is not alone sufficient to avoid preclusion where there is willful misconduct, such as an unexplained failure to do what the rules require." *State v. Killean*, 185 Ariz. 270, 271, 915 P.2d 1225, 1226 (1996). The record here clearly reveals a "pervasive lack of diligence." *Naranjo*, 234 Ariz. at 243, ¶ 35, 321 P.3d at 408. The superior court granted seven continuances, and trial was delayed by more than a year, largely due to the uncertainty about Campbell's opinions and his unavailability for an interview. Nothing in the record suggests an eighth trial continuance or yet another extension of the court-ordered disclosure deadline would have ameliorated the long-standing disclosure deficiencies. Under these circumstances, the superior court could reasonably conclude that no lesser sanction would suffice.

CONCLUSION[2]

¶21 For the reasons stated, we affirm Cuellar's convictions and sentences.

[2] We disagree with Cuellar's contention the court could not consider the preclusion motion because the State did not comply with Rule 15.7(b) (court will not consider motion for discovery sanctions "unless a separate statement of moving counsel is attached certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter."). The State filed a "supplemental motion to preclude," appending email communications establishing attempts to resolve the matter.