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AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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STATE OF ARIZONA, *Appellee*,

*v.*

RAFAEL NADIM MENDOZA, *Appellant*.

No. 1 CA-CR 18-0847  
1 CA-CR 19-0200  
(Consolidated)  
FILED 5-28-2020

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Appeal from the Superior Court in Maricopa County  
No. CR2016-002288-001  
CR2016-002288-001  
The Honorable Geoffrey H. Fish, Judge

**VACATED AND REMANDED**

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COUNSEL

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**MEMORANDUM DECISION**

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Judge D. Steven Williams joined.

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**J O N E S**, Judge:

¶1 Rafael Mendoza appeals from his convictions and sentences for child molestation, sexual abuse, and aggravated assault, and the trial court's order denying his post-trial motion to vacate the judgment of guilt. For the following reasons, we vacate the convictions and remand for a new trial.

**FACTS AND PROCEDURAL HISTORY**

¶2 In October 2018, the State tried Mendoza on six counts of aggravated assault, four counts of sexual conduct with a minor, and one count each of sexual abuse and child molestation, all involving the ten-year-old daughter of Mendoza's former girlfriend (the victim).<sup>1</sup> The State presented evidence that Mendoza visited the victim's home on May 21, 2014. The victim testified that while her mother and sister were in another room, Mendoza touched, kissed, and/or licked the victim's toe, stomach, breast, vagina, and anus. The victim reported the contact to her mother, who called the police one hour later. The victim participated in a videotaped forensic interview the next day, and Mendoza's DNA was found on swabs taken from the victim's toe, navel, and breast. Over Mendoza's objections, the recorded interview was admitted into evidence at trial, played in its entirety, and made available to the jury during its deliberations.

¶3 Mendoza defended the charges upon the theory that the victim "confabulated" the incident – that is, that the victim genuinely, but

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<sup>1</sup> "We view the facts in the light most favorable to sustaining the convictions with all reasonable inferences resolved against the defendant." *State v. Harm*, 236 Ariz. 402, 404, ¶ 2 n.2 (App. 2015) (quoting *State v. Valencia*, 186 Ariz. 493, 495 (App. 1996)).

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mistakenly, believed the events occurred as described.<sup>2</sup> To support his theory, Mendoza presented evidence that the victim had been diagnosed with autoimmune encephalitis<sup>3</sup> and was experiencing a flare-up at the time. According to Mendoza's expert, this condition could cause the victim to hallucinate and rendered her extremely susceptible to suggestion from her mother, who was angry at Mendoza for seeing another woman. The defense also proposed that Mendoza's DNA was transferred onto the victim's body through innocent contact – when he rubbed her feet that evening and after the victim had lain in her mother's bed.

¶4 The jury convicted Mendoza of two counts of aggravated assault, one count of sexual abuse, and three counts of child molestation.<sup>4</sup> The trial court sentenced him to concurrent prison terms, the longest of which was thirteen years. After moving unsuccessfully to vacate the judgment, Mendoza timely appealed. We have jurisdiction pursuant to

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<sup>2</sup> In psychiatry, confabulation is “a filling in of gaps in memory through the creation of false memories by an individual who is affected with a memory disorder . . . and is unaware that the fabricated memories are inaccurate and false.” *Confabulation*, Merriam-Webster, <http://www.merriam-webster.com/medical/confabulation> (last visited May 16, 2020).

<sup>3</sup> According to the National Center for Advancing Translational Sciences (NCATS), autoimmune encephalitis occurs “when the body's immune system mistakenly attacks healthy brain cells, leading to inflammation of the brain.” *Autoimmune encephalitis*, U.S. Dep't of Health & Human Servs., Nat'l Insts. of Health, NCATS, Genetic & Rare Diseases Information Center, <https://rarediseases.info.nih.gov/diseases/11979/autoimmune-encephalitis> (last updated Oct. 26, 2017) (last visited May 16, 2020). “People with autoimmune encephalitis may have various neurologic and/or psychiatric symptoms . . . includ[ing] impaired memory and cognition, abnormal movements, seizures, and/or problems with balance, speech, or vision[,] . . . psychosis, aggression, inappropriate sexual behaviors, panic attacks, compulsive behaviors, euphoria or fear.” *Id.*

<sup>4</sup> The jury convicted Mendoza of child molestation as a lesser included offense of sexual conduct with a minor. The State dismissed four other charges after the close of evidence, and the jury acquitted Mendoza of another two.

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Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1),<sup>5</sup> 13-4031, and 13-4033(A)(1), (3).

DISCUSSION

I. Admission of Recorded Interview

¶5 Mendoza argues the recording of the forensic interview was hearsay, and the trial court erred in admitting it to bolster the victim's credibility and as substantive evidence of the offenses. The State argues the recorded interview constituted non-hearsay evidence of the victim's demeanor, and, to the extent the State "occasionally" relied upon the recording for its truth, it was admissible as a recorded recollection, and, to the extent the recording was not admissible, the evidence was cumulative. We review the interpretation and application of the Arizona Rules of Evidence *de novo*. *Johnson v. State, Dep't of Transp.*, 224 Ariz. 554, 556, ¶ 9 (2010) (citing *State v. Hansen*, 215 Ariz. 287, 289, ¶ 6 (2007)).

¶6 Hearsay is "a statement . . . the declarant does not make while testifying at the current trial or hearing . . . [and is] offer[ed] in evidence to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c). Hearsay is generally considered unreliable and inadmissible unless an exception applies. *See* Ariz. R. Evid. 802.

¶7 The State argues the trial court properly admitted the recording of the forensic interview as non-hearsay evidence to rebut Mendoza's suggestion that the victim was experiencing a flare-up of autoimmune encephalitis during the reported events. But even if symptoms of the victim's condition were observable on a video-recording, which is not altogether clear from this record,<sup>6</sup> the record reflects the State did not limit the evidentiary value of the recording to this purpose. To the contrary, the State elicited testimony from the victim that her memory was better at the time of the recorded interview than during her in-person testimony four years later, and then, on at least four occasions in its closing, referred the jury to what the victim "remembered in the video . . . when her memory was better." Both the trial court and the State referred directly to

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<sup>5</sup> Absent material changes from the relevant date, we cite the current version of rules and statutes.

<sup>6</sup> For example, the only symptoms the victim testified she experienced as a result of her medical condition were sneezing and becoming "OCD about things."

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the contents of the recording when evaluating whether the State had presented sufficient evidence to survive Mendoza's motion for judgment of acquittal, and the jury was not instructed to limit its consideration of the recording in any manner. Thus, the record does not support the State's assertion that the recording constituted nothing more than permissible, non-hearsay demeanor evidence.

¶8 The State did not offer the trial court any other basis to admit the recorded interview but suggests on appeal that some of the hearsay statements contained in the recording were nonetheless admissible as a recorded recollection under Arizona Rule of Evidence 803(5). A recorded recollection is:

A record that:

- (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
- (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
- (C) accurately reflects the witness's knowledge.

Ariz. R. Evid. 803(5).

¶9 Although a recording of a forensic interview may qualify as a recorded recollection, *see State v. Martin*, 225 Ariz. 162, 165, ¶ 11 (App. 2010), Rule 803(5) does not support the admission of the recording here. Of the twelve acts charged by the State, only two were described by the victim exclusively in the recording – and not in her in-person testimony. Moreover, the record is not clear whether the victim could not recall those two events at trial, or if the topics simply were not explored during her testimony. *See* Ariz. R. Evid. 803(5)(A) (allowing admission of a recorded recollection on matters “the witness once knew about but now cannot recall”); *cf. State v. Taylor*, 196 Ariz. 584, 589, ¶¶ 13-14 (App. 1999) (questioning, in the context of Arizona Rule of Evidence 803(24)'s catchall exception to the rule against hearsay, the evidentiary value of a victim's videotaped statement where the victim testified “fully, consistently, and in similar detail to the videotaped statement”) (citations omitted).

¶10 Moreover, Rule 803(5) specifies that “[i]f admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.” By its terms, Rule 803(5) does not authorize admission of a recording where, as here, it was offered by the State to

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supplement the testimony of its own witness. See *Martin*, 225 Ariz. at 164-65, ¶¶ 4, 6, 13 (concluding the trial court erred by accepting a recorded forensic interview, offered by the State to support a victim's testimony, into evidence and making it available to the jury during deliberations) (citing *DeForest v. DeForest*, 143 Ariz. 627, 633 (App. 1985)).

¶11 The State, offering no other basis upon which to admit the recording of the forensic interview, alternatively asserts its admission was harmless. Error is harmless only "if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Anthony*, 218 Ariz. 439, 446, ¶ 39 (2008) (citing *State v. Bible*, 175 Ariz. 549, 588 (1993), and *State v. Bolton*, 182 Ariz. 290, 303 (1995)). To meet its burden, the State must prove that "the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* "Applying the 'stringent concepts' of harmless error review," *id.* at ¶ 42 (quoting *Bible*, 175 Ariz. at 588), we are unable to conclude the State has discharged that burden here.

¶12 The State should not have used the recording as substantive evidence, and the recording should not have been permitted to accompany the jury during its deliberations. The State exacerbated the error by repeatedly referring to the recording and its contents in its closing, inviting the jury to review the recording in the course of its deliberations, and relying upon the statements contained therein to establish the substantive elements of the crimes charged. The error was further compounded by the State's reliance upon the inadmissible evidence to bolster the victim's credibility. Indeed, the State admitted the victim's credibility was key to the conviction, describing the jury's ultimate role "at the end of the day" as "to determine if the victim is telling the truth." Then, the State argued the non-verbal cues depicted and consistencies between the recorded statement and the victim's trial testimony were evidence that the victim was telling the truth at trial.

¶13 The State argues the statements on the recording were largely cumulative to the victim's trial testimony, and the fact that the jurors acquitted Mendoza of charges related to two acts the victim described in the recorded interview, but not during her trial testimony, demonstrates that the jury did not afford undue weight to the substance of the statements she made in the recording. These assertions do nothing to ameliorate the very real possibility that the jury did just as the State asked it to do in closing by re-watching the recorded interview during deliberations, and/or using its contents to assess the credibility of the testimony from the witness stand at trial. Given the importance of the victim's credibility in assessing Mendoza's guilt here, we cannot say the convictions were "surely

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unattributable to” the inadmissible evidence. *See Anthony*, 218 Ariz. at 446, ¶ 39; *see also Taylor*, 196 Ariz. at 586, 590, ¶¶ 2-3, 15-17, 21 (reversing the defendant’s conviction where “credibility was the primary issue” and “the prosecutor exacerbated the error [in the admission of the victim’s hearsay videotaped statement] when she invited the jury to view the hearsay videotaped statement and repeatedly referred to the statement as ‘corroboration’ of the victim’s version of the incident”); *State v. Lindsey*, 149 Ariz. 472, 477 (1986) (holding that error in admitting testimony relevant to the victim’s credibility was not harmless where “guilt or innocence . . . inherently turned on the question of the [victim]’s credibility”).

¶14 The recording should not have been admitted as substantive evidence, and its use to bolster the victim’s credibility prejudiced Mendoza. Accordingly, we must vacate the convictions and remand for a new trial. *See, e.g., Anthony*, 218 Ariz. at 446, ¶¶ 42-43.

## II. Issues Likely to Arise on Remand

¶15 Mendoza advances other arguments upon appeal regarding the admission of the recorded interview, which we address to avoid confusion following remand.<sup>7</sup>

### A. Confrontation Clause

¶16 Mendoza argues admission of the recorded interview violated his constitutional right to a fair trial. We review alleged constitutional violations *de novo*. *See State v. Damper*, 223 Ariz. 572, 575, ¶ 7 (App. 2010) (citing *State v. Real*, 214 Ariz. 232, 234, ¶ 4 (App. 2007)).

¶17 The U.S. Constitution guarantees a criminal defendant the right to confront his accuser. *See* U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”). However, “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (citing *California v. Green*, 399 U.S. 149, 162 (1970); *see also State v. Medina*, 232 Ariz. 391, 405, ¶ 54 (2013) (“The Confrontation Clause bars admission of out of court testimonial evidence unless the

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<sup>7</sup> Mendoza raises several other arguments that are unrelated to the recorded interview. These issues are not necessary to resolve this appeal, and we decline to address them.

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defense has had an opportunity to cross-examine the declarant.”) (quoting *State v. Parker*, 231 Ariz. 391, 402, ¶ 38 (2013)).

¶18 The record reflects Mendoza knew of the contents of the recording well in advance of trial, the victim testified at trial, and Mendoza had an opportunity to, and did, cross-examine the victim regarding the contents of the recording. On these facts, Mendoza has not shown any Confrontation Clause violation.

**B. Discovery Sanction**

¶19 Mendoza argues the trial court erred when it denied his motion to preclude the recorded interview as a discovery sanction after the State failed to produce a copy of the recording that properly “synced” the audio and video until after trial began.<sup>8</sup> We review a decision to deny discovery sanctions for an abuse of discretion. See *State v. Cota*, 229 Ariz. 136, 148, ¶ 48 (2012) (citing *State v. Kuhs*, 223 Ariz. 376, 380, ¶ 18 (2010)).

¶20 Arizona Rule of Criminal Procedure 15.7(c) authorizes the trial court to sanction a party who fails to timely disclose evidence. “[A]ny sanction must be proportional to the violation and must have ‘a minimal effect on the evidence and merits.’” *State v. Payne*, 233 Ariz. 484, 518, ¶ 155 (quoting *State v. Towery*, 186 Ariz. 168, 186 (1996)). Therefore:

In considering an appropriate sanction for nondisclosure or untimely disclosure, a court must determine the significance of the information not timely disclosed, the violation’s impact on the overall administration of the case, the sanction’s impact on the party and the victim, and the stage of the proceedings when the party ultimately made the disclosure.

Ariz. R. Crim. P. 15.7(c).

¶21 The trial court applied these factors here. Although the State’s use of the recorded interview after securing its admission was improper, the recording was potentially relevant as demeanor evidence to rebut Mendoza’s claim of confabulation. Additionally, the record reflects Mendoza had been aware of the video’s content for at least two years and had the opportunity to review the synced version in the six days that passed

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<sup>8</sup> During the pendency of this appeal, Mendoza moved to supplement the record with the parties’ pretrial communications regarding disclosure of the recorded interview. The State did not object, and, in our discretion, we grant the request. See Ariz. R. Crim. P. 31.8(g)(3).



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between when the State moved to admit the video and when it was played to the jury. Thus, the late disclosure of the properly synced video recording did not significantly impact the management of the case or Mendoza's ability to prepare his defense. We find no abuse of discretion in the court's decision not to impose a sanction for the State's late disclosure.

**CONCLUSION**

¶22 The trial court erred in admitting the recording of the forensic interview as substantive evidence and providing it to the jury during deliberations. The error deprived Mendoza of a fair trial. For this reason, we vacate Mendoza's convictions and sentences and remand for a new trial.



AMY M. WOOD • Clerk of the Court  
FILED: AA