IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JORGE LUIS LOMBANA, *Appellant*.

No. 1 CA-CR 19-0581
FILED 12-22-2020

Appeal from the Superior Court in Maricopa County
No. CR2017-002905-001
The Honorable Suzanne E. Cohen, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michelle L. Hogan
Counsel for Appellee

Tait & Hall PLLC, Phoenix
By Ryan Tait, Elizabeth Mullins
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge D. Steven Williams and Judge David D. Weinzweig joined.

T H U M M A, Judge:

¶1 Defendant Jorge Luis Lombana appeals from his convictions and resulting sentences for six counts of sexual conduct with a minor and one count each of furnishing an obscene item to a minor and molestation of a child. Lombana contends the superior court improperly rejected his change of plea on the first day of trial and made prejudicial evidentiary errors. Because Lombana has failed to demonstrate reversible error, his convictions and sentences are affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 In July 2009, just before she turned seven years old, the victim, A.P., moved to Arizona. She lived in a house with her mother, brother, Lombana and Lombana's two children. When she was nine or ten years old, A.P. accused Lombana of "putting [his] fingers somewhere that they [did not] belong." A.P. recanted after her mother said she would have her physically examined to determine if she was telling the truth. A.P. and her mother moved out of the house in April 2013, when A.P. was almost eleven.

¶3 When A.P. was fourteen, after running away from home because of issues with her mother, she told her school principal she had been sexually abused. During the police investigation that followed, A.P. reported Lombana repeatedly sexually assaulted her and showed her pornography during the years they lived in the same house. The State charged Lombana with six counts of sexual conduct with a minor, one count of furnishing an obscene item to a minor and one count of molestation of a child.

¶4 Lombana's defense at trial was that A.P. fabricated the allegations, arguing A.P.'s motive was to be removed from her living environment. He emphasized discrepancies and a lack of detail in her testimony, and the absence of eyewitness or medical evidence corroborating the allegations.

¶5 The jury found Lombana guilty as charged. The court sentenced him to six mandatory, consecutive prison terms of life without possibility of release until after 35 years for the six convictions of sexual conduct with a minor. The court sentenced him to presumptive terms of 2.5 years' and 17 years' imprisonment, to run concurrently with the first life term, for the convictions of furnishing an obscene item to a minor and molestation of a child, respectively.

¶6 Lombana timely appealed. Subject to the caveat set forth below, this court has appellate jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and -4033(A)(1) (2020).[1]

DISCUSSION

I. The Court Did Not Abuse Its Discretion by Terminating the Change-of-Plea Proceeding Without Accepting Lombana's Plea.

¶7 During jury selection, Lombana and the State appeared to reach an agreement under which Lombana would plead guilty to three amended counts of attempted sexual conduct with a minor and be placed on lifetime probation in exchange for the State dismissing the remaining counts. After describing the terms of the written plea agreement, the court asked Lombana whether he had received any promises in order to plead guilty. Lombana responded he was told he would be released that day. When he was informed the court could potentially impose additional jail time as a condition to probation — even if the State did not request it — Lombana stated, "I want to keep going with the trial then. Because if I'm not going to get released, I'm going to be in jail. It doesn't make sense. I'm innocent. I can prove it. And only God knows and they know, too, that I'm innocent." The court stated it would then "bring the jurors in" and no one would "force [him] in any way to take a plea," to which Lombana responded, "Yes, Your Honor. I'm innocent."

¶8 After off-the-record discussions between the court and counsel, and Lombana and his attorney, Lombana expressed a desire to plead guilty to the amended counts. His attorney then stated, as a factual basis for the plea, that Lombana made three attempts to have sexual conduct with A.P. between July 23, 2009 and July 22, 2013. After the prosecutor added, as a point of clarification, that "three separate acts

[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

occurred," i.e., "different acts on different dates," the court asked Lombana whether what the prosecutor described was, "in fact, what you did." At that point, Lombana responded, "It's hard for me because I haven't done it. I'm just accepting a plea because — what they told me before is I pretend, not try. I haven't — oh, attempted, tried to do it. That's what I was told the last time, pretend." The court stated it could not accept Lombana's plea if he could not "admit that that's, in fact, what [he] did—which [was] fine," in which case it would "continue on with jury selection." Lombana responded, "If I'm not going to have any more jail, I accept all of this but . . ." Again, the court told him, "Sir, you have to admit to the court that that's in fact what you did." After a pause (specifically noted in the transcript), Lombana said, "Because, you know, I have a chance to prove that I'm innocent." The court stated it was not "comfortable with this" and would therefore "continue with jury selection." Lombana offered no indication he disagreed with the court's decision to terminate the change-of-plea proceeding.

¶9 Lombana now asks this court to vacate his convictions and sentences and remand the case to the superior court for acceptance of his plea. He argues the court erroneously rejected his plea by insisting he admit to committing three *completed*, as opposed to *attempted*, acts of sexual conduct with a minor. Lombana suggests that because he was using an interpreter, there may have been some confusion and misinterpretation that the court should have resolved before terminating the plea colloquy. The State argues Lombana's claim of error is not reviewable on appeal and should have been brought in a petition for special action. The State also argues, in the alternative, that the court committed no error because Lombana refused to admit guilt.

¶10 No Arizona decision holds that challenges to a court's rejection of a plea must exclusively be brought in a petition for special action. This court has reviewed similar challenges both as special actions and on direct appeal. *Compare, e.g., Aragon v. Wilkinson*, 209 Ariz. 61 (App. 2004) (accepting special action jurisdiction to review superior court's decision allowing State to withdraw from plea after court's acceptance), *State v. Wing*, 190 Ariz. 203 (App. 1997) (accepting special action jurisdiction to review superior court's rejection of a plea agreement because it determined the defendant could not legally plead guilty to the offense at issue), *and State v. Wing*, 183 Ariz. 327 (App. 1995) (accepting special action jurisdiction to review the superior court's rejection of a plea agreement because it found the stipulated penalty unacceptable), *with State v. Rubio*, 219 Ariz. 177 (App. 2008) (reviewing on direct appeal superior court's rejection of proposed plea agreement), *State v. Felix*, 214 Ariz. 110 (App.

2006) (reviewing on direct appeal the defendant's double jeopardy claim based on conviction at trial after the superior court rejected his guilty plea), *and State v. Darelli*, 205 Ariz. 458 (App. 2003) (reviewing on direct appeal challenge to court's interference with plea negotiations while jury was awaiting *voir dire*); *see also State v. De Nistor*, 143 Ariz. 407 (1985) (Arizona Supreme Court reviewing challenges to superior court's rejection of proposed plea agreement and permission of defendant to withdraw therefrom on direct appeal). Even assuming Lombana's challenge may be heard on direct appeal, however, his contentions are without merit.[2]

¶11 "A judge may accept a plea of guilty only under certain conditions and may refuse to accept such plea if it is not knowingly, understandingly, and voluntarily made, or if there is no factual basis for the plea." *De Nistor*, 143 Ariz. at 411; *see also* Ariz. R. Crim. P. 17.1(b), 17.2, 17.3, 17.4(c). The superior court's determination whether a defendant has voluntarily, intelligently, and knowingly entered a guilty plea is reviewed for an abuse of discretion. *See State v. Djerf*, 191 Ariz. 583, 594 ¶ 35 (1998); *Rubio*, 219 Ariz. at 178 ¶ 2. Lombana has not shown the court's decision in this case was an abuse of discretion.

¶12 "Because of the importance of insuring that guilty pleas are a product of free and intelligent choice, when a plea of guilty is coupled with a statement by defendant as to his innocence, the trial court has a duty to inquire into and resolve the conflict between the waiver of trial and the claim of innocence." *State v. Reynolds*, 25 Ariz. App. 409, 413 (1976). The superior court stands in the "best position" to determine whether the defendant's statements, interpreted in light of "inflection, posture, attitude, and emphasis," show a knowing, intelligent and voluntary acknowledgement of guilt or "a protestation of innocence." *State v. Salinas*, 181 Ariz. 104, 108 (1994). In *Reynolds*, this court concluded the superior court failed to discharge its duty where it accepted the defendant's guilty plea despite statements by the defendant suggesting he "did not have an understanding of the nature of the offense." *Reynolds*, 25 Ariz. App. at 414.

¶13 The superior court's decision here is supported by the record and complies with *Reynolds*. The record shows Lombana repeatedly insisted he was innocent and there is no evidence there was an agreement that the plea could be entered pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). At sentencing, Lombana's attorney corroborated this

[2] Lombana did not timely object to the superior court's rejection of his plea, meaning he must now establish fundamental, prejudicial error to warrant relief. *State v. Escalante*, 245 Ariz. 135, 140 ¶ 12 (2018).

interpretation by describing Lombana as having "maintained his innocence throughout this process," including by "[r]ejecting even a probation plea because he would not say he was guilty." Considering the totality of Lombana's statements during the change-of-plea proceeding, combined with the lack of objection when the superior court terminated the proceeding, the record does not support Lombana's argument that he was asserting his innocence only as to completed, not merely attempted, acts of sexual conduct with a minor.

II. Admission of Expert Testimony Quantifying Witness Credibility Was Erroneous but Not Reversible.

¶14 The State called Dr. Wendy Dutton, a "cold" expert witness, who testified about general behaviors exhibited by child victims of sexual abuse. *See State v. Salazar-Mercado*, 234 Ariz. 590, 595 ¶ 21 (2014) ("Rule [of Evidence] 702(d) does not bar admission of 'cold' expert testimony that educates the trier of fact about general principles but is not tied to the particular facts of the case."). When asked during direct examination about instances of false allegations, Dutton testified there were two types — the "most common" being erroneous, i.e., mistaken reports of sexual abuse made in good faith, and the "more rare" being malicious or intentionally false reports "usually made for some ulterior motive." Dutton testified that malicious false reports tend to be made when the purported victim is involved in a high-conflict custody dispute or divorce proceeding between the victim's parents, or when the purported victim is a teenage girl who suffers from serious mental illness, or seeks to change her living situation or conceal a consensual sexual relationship.

¶15 After the parties finished questioning her, a juror submitted a question that, after consultation with the lawyers and without objection, the superior court asked: "Dr. Dutton, you said false reports were rare. Please quantify the rarity and distribution for the two types of false reports." Dutton asked if she was "allowed to do that," to which the court responded, "the lawyers didn't object to the question." Shen then testified as follows: "In general, the more common of the two are the erroneous reports that I mentioned and they run roughly about 33 percent of the cases. Malicious or intentional false reports, again, it depends on the research study that you read, but they tend to be under 10 percent of the cases."

¶16 The prosecutor then initiated a bench conference at which he expressed concern that Dutton's answer was potentially inadmissible and suggested the superior court consider striking it. Defense counsel did not appear to find the answer problematic but proposed the court issue a

curative instruction. The court asked the parties to fashion an instruction it would give at a later time, to which both parties assented.

¶17 One week later, with approval of both parties, the court gave the following instruction as part of the final jury instructions: "Limiting instruction. You may have heard testimony by the State's expert regarding percentages of false allegations. Please disregard her testimony about specific percentages of false allegations as it relates to the evidence in this case."

¶18 Lombana argues admission of the expert's testimony was erroneous. He acknowledges that because he did not object at trial, he must show the error was both fundamental and prejudicial to merit relief. *State v. Escalante*, 245 Ariz. 135, 140 ¶ 12 (2018). Lombana contends the error exceeds that bar because the verdicts turned on whether jurors believed A.P. intentionally fabricated the allegations and the curative instruction was inadequate to eliminate the prejudicial effect of the expert's testimony.

¶19 The testimony should not have been admitted. It is well established that "trial courts should not admit direct expert testimony that quantifies the probabilities of the credibility of another witness." *State v. Lindsey*, 149 Ariz. 472, 475 (1986). "Quantification of the percentage of witnesses who tell the truth is nothing more than the expert's overall impression of truthfulness," which "usurps the function of the jury." *Id.* at 476. Even though Dutton did not testify whether A.P.'s testimony specifically fell inside or outside the "under 10 percent" of cases involving intentionally false allegations, her testimony was improper because it constituted an "opinion[ ] with respect to the accuracy, reliability or truthfulness of witnesses of the type under consideration." *Id.* at 475; *see also State v. Herrera*, 232 Ariz. 536, 551 ¶ 46 (App. 2013) (expert testimony, in response to juror question, that false allegations occurred "less than [ten] percent of the time" was improper).

¶20 Considering the trial record as a whole, however, Lombana fails to demonstrate that "without the error, a reasonable jury could have plausibly and intelligently returned a different verdict." *Escalante*, 245 Ariz. at 144 ¶ 31. The superior court instructed jurors not to apply the expert's testimony about percentages of false allegations to the evidence. The jury is presumed to follow the court's instructions. *See id.* (noting objectively reasonable jury uses "common sense in considering the evidence presented in connection with the instructions given by the court") (internal quotation marks and citation omitted); *see also State v. Prince*, 204 Ariz. 156, 158 ¶ 9 (2003) (jurors are presumed to follow instructions).

¶21 While courts have occasionally found a curative instruction insufficient to remedy the erroneous admission of evidence, such decisions are limited to the rare instance where jurors would find it extremely difficult, if not impossible, to follow the instruction. *See, e.g.*, *State v. Jaramillo*, 248 Ariz. 329, 337–39 ¶¶ 27–30 (App. 2020) (instruction to consider evidence against codefendants separately held inadequate, and not harmless, where defendants offered antagonistic, mutually exclusive defenses); *State v. Hunt*, 2 Ariz. App. 6, 15 (1965) (finding it "highly questionable whether, after five days of trial and having heard nine witnesses, the jurors could completely expunge from their minds, as though it had never come before them, all of the testimony of two particular witnesses and portions of the testimony of two others").

¶22 This is not a case where admission of the expert's testimony was "beyond the curative powers of a cautionary instruction." *State v. Lawson*, 144 Ariz. 547, 555 (1985). The instruction given did not require, as in *Jaramillo*, jurors to separately apply the same evidence to codefendants with mutually exclusive defenses. Nor did the instruction require, as in *Hunt*, jurors to disregard a substantial portion of the evidence. Rather, the instruction here pointedly told jurors to disregard a single, targeted statement. *Cf. State v. Lee*, 191 Ariz. 542, 547 ¶ 20 (1998) (curative instruction ineffective where its generalized language "failed to specifically identify" the erroneously admitted testimony).

¶23 Two additional circumstances in this case appear to have further diminished the prejudicial impact of the improper testimony. First, Dutton did not, as in *Lindsey*, specifically opine on A.P.'s credibility. *See Lindsey*, 149 Ariz. at 477. The expert here acknowledged she knew nothing about the facts of the case or A.P. *See Herrera*, 232 Ariz. at 551 ¶ 46 (distinguishing testimony about the credibility of a particular witness from testimony that does not tell the jury whether a particular witness is lying or truthful). Second, because Dutton testified about the typical circumstances in which intentionally false allegations are made, jurors could determine for themselves whether such circumstances applied to A.P. Such testimony enabled jurors to assess the victim's credibility without relying on the testimony regarding percentages.

III. The Superior Court Did Not Abuse Its Discretion by Precluding Evidence A.P. Experienced Prior Sexual Abuse.

¶24 Before trial, the State moved to preclude evidence under A.R.S. section 13-1421 — commonly referred to as "the Rape Shield Law" — of A.P.'s past sexual conduct "while she was a little girl" before she

moved to Arizona. At a hearing on the motion, Lombana said he did not intend to elicit evidence on that topic unless the State opened the door to such evidence. The superior court granted the State's motion, subject to the condition the State not open the door.

¶25 After the State questioned its expert on direct examination, Lombana argued the expert's testimony opened the door to evidence A.P. was sexually abused between the ages of two and six, before she moved to Arizona. Specifically, Lombana referred to the expert's testimony (1) that female child sex abuse victims who suffered from "serious mental illnesses" or "severe posttraumatic stress disorder" might make false allegations as teenagers because "they [felt] like they [we]re reliving prior abuse in the current time"; and (2) that child sex abuse victims commonly experienced symptoms including depression and anxiety and, when older, engaged in risky behaviors such as running away from home. Lombana argued evidence of A.P.'s prior sexual abuse was necessary to rebut an inference her behavior as a teenager was attributable solely to Lombana's abuse.

¶26 The superior court ruled the expert's "generalized" testimony did not open the door to "specific" evidence of A.P.'s prior sexual abuse. The court, however, cautioned the State that if it sought to tie the expert's generalized discussion to A.P. specifically, the evidence of prior abuse might become relevant.

¶27 Lombana argues the superior court's refusal to admit the prior abuse evidence constitutes reversible error because the evidence was relevant to show (1) A.P.'s behaviors consistent with sexual victimization could have been caused by a perpetrator other than Lombana or (2) the earlier abuse could have led her to misinterpret Lombana's innocent acts. This court reviews the superior court's exclusion of evidence under A.R.S. section 13-1421 for an abuse of discretion. *Herrera*, 232 Ariz. at 549 ¶ 38.

¶28 The Rape Shield Law allows the superior court to admit evidence of "specific instances of the victim's prior sexual conduct" only if the court finds, by clear and convincing evidence, that (1) the prior sexual conduct is "relevant and [] material to a fact in issue in the case," (2) its probative value is not outweighed by "the inflammatory or prejudicial nature of the evidence" and (3) the evidence falls into one of five specified categories including "specific instances of sexual activity showing the source or origin of . . . disease or trauma" and evidence "support[ing] a claim that the victim has a motive in accusing the defendant of the crime." A.R.S. § 13-1421(A).

¶29 The superior court acted within its discretion in precluding evidence of A.P.'s alleged prior sexual abuse because the excluded evidence was not relevant to a fact at issue. The expert's testimony that teenage girls with "serious mental illnesses" or "severe posttraumatic stress disorder" might make false allegations based on earlier experiences of abuse was irrelevant to jurors' assessment of A.P. because there was no evidence she suffered from any mental illness or posttraumatic stress. Similarly, the expert's testimony about child sex abuse victims suffering from anxiety and depression was irrelevant given the absence of evidence A.P. exhibited those symptoms. Lombana's argument that the excluded evidence might provide a basis for the jury to find A.P.'s prior abuse caused her to be "hypersensitive" to Lombana's innocent acts was never raised at trial.

¶30 Although A.P. testified she ran away from home — which was one behavior the expert generally linked to prior sexual abuse — the superior court reasonably concluded that evidence of A.P. running away did not open the door to evidence she was sexually abused before she met Lombana. The record shows A.P. ran away just one time, for less than one night, years after suffering abuse at the hands of Lombana or anyone else. In A.P.'s own testimony, she did not connect her decision to run away with being sexually abused. On this record, any alleged abuse A.P. suffered from another person was not relevant and material to her running away more than seven years later.

¶31 Lombana also suggests that excluding evidence of prior sexual abuse might violate the Confrontation Clause. Challenges based on the Confrontation Clause are reviewed *de novo*, but because Lombana did not object on this ground at trial, he must show fundamental error. *State v. Boggs*, 218 Ariz. 325, 337 ¶ 55 (2008); *see also State v. Zuck*, 134 Ariz. 509, 513 (1982) (objection on one ground waives "other grounds not specified"). Assuming Lombana sufficiently raised and developed the issue on appeal, *see* Ariz. R. Crim. P. 31.10(a)(7), his argument lacks merit. The Rape Shield Law does not violate the Confrontation Clause on its face. *See State v. Gilfillan*, 196 Ariz. 396, 402–03 ¶¶ 20–23 (App. 2000), *abrogated on an unrelated ground in State v. Carson*, 243 Ariz. 463 (2018). Nor did exclusion of the prior sex abuse evidence violate the Confrontation Clause as applied because, for the reasons specified above, the evidence did not have "such substantial probative value that [Lombana's] constitutional rights would be impermissibly offended by the failure to permit [the] evidence." *State ex rel. Montgomery v. Duncan*, 228 Ariz. 514, 516–17 ¶¶ 5, 7 (App. 2011) (internal quotation marks omitted).

CONCLUSION

¶32 Lombana's convictions and resulting sentences are affirmed.

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