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

---

STATE OF ARIZONA, *Appellee*,

*v.*

WILLIE JAMES MCELROY, *Appellant*.

No. 1 CA-CR 21-0526
FILED 6-6-2023

---

Appeal from the Superior Court in Maricopa County
No. CR2018-002562-001
The Honorable Glenn A. Allen, Judge

**AFFIRMED**

---

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joshua C. Smith
*Counsel for Appellee*

Maricopa County Public Defender's Office, Phoenix
By Robert W. Doyle
*Counsel for Appellant*

---

**MEMORANDUM DECISION**

Judge D. Steven Williams delivered the decision of the court, in which Presiding Judge Jennifer M. Perkins and Judge Angela K. Paton joined.

---

**W I L L I A M S**, Judge:

**¶1** Willie McElroy appeals his convictions and sentences for child sex trafficking, pandering, receiving the earnings of a prostitute, sexual conduct with a minor, sexual assault, sexual abuse, kidnapping, and assault. For the following reasons, we affirm.

**FACTUAL AND PROCEDURAL HISTORY**

**¶2** We recite the facts based on the evidence presented at trial but use pseudonyms to protect the victims' privacy.

**¶3** McElroy's 22-year-old niece, Brittany, moved into his apartment in December 2017 after Brittany's mother asked her to leave the mother's apartment, which was in the same complex as McElroy's. Brittany stayed with McElroy for about two and one-half weeks.

**¶4** The apartment complex was close to an area of heavy street prostitution known as the "track" or the "blade." Brittany worked as a prostitute on the track. After she asked McElroy if he would "watch [her] back" while she was working, he began to control her prostitution activities, including by directing her what to wear and how much to charge, and demanding that she give him all the money she earned. McElroy also took sexual liberties with Brittany including, among other things, once having nonconsensual intercourse with her. When Brittany told him she did not want to prostitute one day, he restrained her in the bathroom, hit her face and body with a belt, and told her she had no choice. When she later told him she wanted to go home, he placed a knife to her stomach and threatened to kill her if she did not "shut up." Brittany "eventually got away," "ran to [her] mom's," and "called the police." Officers responded, and Brittany told them that McElroy had threatened her with a knife, prostituted her, and had inappropriate sexual contact with her. Police did not act further on Brittany's report at that time.

**¶5** About two weeks after Brittany left McElroy's apartment, a 16-year-old runaway, Angela, was introduced to McElroy. When Angela

lost a place to stay, McElroy allowed her to stay at his apartment. Over the next several days, McElroy repeatedly had sex with Angela, forced her to work as a prostitute on the track, and took all the money she earned.

**¶6** On the fourth day that Angela was working on the track, police officers in a unit that investigated sex trafficking saw her aimlessly "walking back and forth" in a short, tight dress unsuitable for the January weather. Officers thought Angela looked "young" and observed the following pattern: she would speak with a driver of a stopped vehicle; walk over to talk to McElroy, who was watching her from one street over; then return to the track after seeming to receive direction from him. One of the officers photographed them. Another officer who arrived later said he had seen Angela and McElroy engaging in similar behavior the day before.

**¶7** Officers decided to approach Angela and McElroy separately. After Angela disclosed her age, that she was a runaway, and that she was being trafficked, McElroy was taken into custody. He and Angela were both carrying the same brand and style of condoms with matching lot numbers.

**¶8** Officers executed a search warrant at McElroy's apartment where they found items belonging to Angela, as well as several used condoms. When Brittany, who was staying at her mother's nearby apartment, saw officers at McElroy's apartment, she approached them and said she had made an earlier report against McElroy and that her belongings were in the apartment as well. Police found Brittany's birth certificate and social security card in McElroy's apartment and returned them to her. After interviewing her a few days later, officers obtained another search warrant and found more items belonging to Brittany. The used condoms found in the first search contained DNA matching Angela and McElroy. Angela's DNA was also present on swabs of McElroy's penis.

**¶9** The State tried McElroy on 39 charges: as to Angela—15 counts of child sex trafficking and 8 counts of sexual conduct with a minor; as to Brittany—3 counts each of pandering, receiving the earnings of a prostitute and sexual assault, 2 counts each of sexual abuse, kidnapping and misdemeanor assault, and 1 count of aggravated assault. Jurors found him guilty of 28 crimes—11 counts of child sex trafficking, 6 counts of sexual conduct with a minor, 3 counts of receiving the earnings of a prostitute, 2 counts each of pandering and sexual abuse, and 1 count each of sexual assault, aggravated assault, misdemeanor assault, and kidnapping. The trial court sentenced him to presumptive consecutive and concurrent prison terms totaling 135 years.

**¶10** McElroy appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A).

## DISCUSSION

**¶11** McElroy raises four claims challenging the admission of evidence. We review the trial court's evidentiary rulings for an abuse of discretion but consider its interpretation of the Arizona Rules of Evidence *de novo*. *State v. Johnson*, 247 Ariz. 166, 199–200, ¶ 127 (2019).

### *I. Expert Testimony on Pimp Behavior*

**¶12** The State offered testimony from a cold expert—who did not know the facts of the case—on prostitution and sex trafficking. McElroy contends that the expert's testimony included inadmissible profile evidence about pimps. Because McElroy did not object to such evidence when offered, he must establish that its admission was fundamental, prejudicial error. *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018).

**¶13** "Profile evidence" generally refers to an "informal compilation of characteristics" typically displayed by persons engaged in a particular type of criminal activity. *State v. Lee*, 191 Ariz. 542, 544, ¶ 10 (1998) (citation and internal quotation marks omitted). Such evidence is inadmissible when offered solely to show that because the defendant had characteristics consistent with a "profile" for known offenders, he must be guilty of the same offense. *Lee*, 191 Ariz. at 545–46, ¶¶ 14, 18; *see also State v. Haskie*, 242 Ariz. 582, 585, ¶ 14 (2017) ("Describing evidence as 'profile' evidence is a shorthand way of saying that the evidence is offered to implicitly or explicitly suggest that *because* the defendant has those characteristics, a jury should conclude that the defendant must have committed the crime charged."); *State v. Ketchner*, 236 Ariz. 262, 264–65, ¶ 15 (2014) ("[P]rofile evidence may not be used as substantive proof of guilt because of the risk that a defendant will be convicted not for what he did but for what others are doing.") (citations and internal quotation marks omitted). In *Lee*, the Arizona Supreme Court held that evidence that drug couriers tend to be a certain age and gender, carry hard-sided luggage without identification, and fly at particular times to particular cities, was improperly admitted because its "only purpose" was to show that the defendants—whose characteristics were consistent with that profile—knew they were carrying illegal drugs. *Lee*, 191 Ariz. at 545–46, ¶¶ 13–18. In *Escalante*, our supreme court held that evidence that drug traffickers have home surveillance cameras, drive in ways to avoid police scrutiny, and

travel to areas of high drug activity, was improperly admitted because it "was only relevant to demonstrate" that the defendant's similar behavior meant he was a drug trafficker. *Escalante*, 245 Ariz. at 139, 142–43, ¶¶ 8, 23–24.

**¶14** But evidence about typical offender behaviors is not always inadmissible. "Expert testimony about general behaviors is permitted if helpful to a jury's understanding of the evidence." *Id.* at 143, ¶ 25. Such testimony may be offered to educate jurors on the *modus operandi* of a criminal operation, *id.* at 142, ¶ 22, or to explain a victim's behavior "that otherwise might be misunderstood by a jury," *Ketchner*, 236 Ariz. at 265, ¶ 19.

**¶15** McElroy argues that the State relied on impermissible profile evidence by eliciting testimony from its expert that pimps "absolutely control[ ]" their prostitutes' lives by often (1) forbidding them from keeping any money they earn and "strip search[ing]" them to enforce that rule, (2) directing them "not to talk to any other pimps" and not to go on "dates" with black males because they might be pimps, (3) requiring them to use condoms, (4) instructing them to recruit other girls, (5) telling them not to reveal they are working for a pimp if contacted by law enforcement, (6) setting a daily quota or minimum amounts they must charge, (7) dictating what they wear, and (8) requiring that they communicate with the pimp before and after each "date." The State offered evidence that McElroy employed many of those rules with Angela and Brittany—taking their earnings and directing them what to wear, how much to charge, to use condoms, and not to accept black men as customers. McElroy asserts that the expert's testimony about not taking dates with black males was especially egregious because the expert referred to "other black males" so as to suggest that all pimps are black—as is McElroy.[1]

**¶16** The challenged testimony was properly admitted. As *Lee* and *Escalante* show, profile evidence is problematic when it implies that the defendant is guilty based on behavioral characteristics that could be "innocent and commonplace," *Lee*, 191 Ariz. at 545, ¶ 14, and that are "only relevant to demonstrate that [the defendant's] behaviors were consistent with" criminal activity, *Escalante*, 245 Ariz. at 142, ¶ 24. The challenged testimony here did not meet such criteria.

---

[1] According to the transcript, the expert said, "[t]hey often are told not to go on any dates because of other black males because they might be pimps."

**¶17** Testimony that pimps take money from their prostitutes; instruct them not to talk to other pimps or disclose the pimp to law enforcement; ask them to recruit others to work for the pimp; and tell them how much to charge, what to wear, and how to communicate with the pimp while prostituting, describes non-commonplace acts integral to pimping —in other words, how the crime of pimping is performed. Such testimony was relevant to educate jurors on how pimps operate. *See Lee*, 191 Ariz. at 545, ¶ 11 (observing that profile testimony may be admitted "to explain a method of operation"); *State v. Gonzalez*, 229 Ariz. 550, 554, ¶ 16 (App. 2012) (holding that expert testimony was properly admitted where it was "limited to the general practices of [a type of criminal operation]" and did not include an opinion about the defendant's guilt).

**¶18** Testimony about the rules pimps impose on their prostitutes was also relevant to explain the victims' behavior in this case and to rebut McElroy's argument that Angela and Brittany were independently prostituting themselves and could have left his apartment at any time. *See Haskie*, 242 Ariz. at 586, ¶¶ 16–17 (holding that expert testimony about a perpetrator's characteristics is not "categorically inadmissible" if it is relevant, and not unduly prejudicial, to "explain[ ] a victim's seemingly inconsistent behavior" and "aid jurors in evaluating the victim's credibility"); *Lee*, 191 Ariz. at 545, ¶ 11 (observing that profile testimony may be admitted as rebuttal evidence).

**¶19** Nor are we persuaded by McElroy's argument that testimony about pimps instructing their prostitutes not to speak to "other black males" because they "might be pimps" reflected unlawful "racial profiling" that implied all pimps are black and "use[d] ethnicity to prove [McElroy's] guilt." *See State v. Cifuentes*, 171 Ariz. 257, 258 (App. 1991). The expert's testimony referred to an opinion promulgated by pimps themselves, and the expert did not comment on, or in any way confirm, the accuracy of that opinion. In addition, the expert testified on cross-examination that a black man who lived near the track and walked up and down the street in that area would not be considered a potential pimp based solely on that behavior. McElroy fails to show that the expert's testimony was an error that went to the foundation of the case, took away an essential right of the defense, or was of such magnitude that he could not possibly have received a fair trial. *Escalante*, 245 Ariz. at 138, ¶ 1.

*II. Photographs from Search*

**¶20** When a police officer drafted the second search warrant after interviewing Brittany, the officer included items that Brittany described as

having left in McElroy's apartment. When police conducted the search, they found and photographed those items, which included envelopes addressed to Brittany, medical and tax records, and a prescription bottle in her name. The trial court admitted the photographs over McElroy's objection, and he now reiterates his argument that doing so violated the rule against hearsay.

**¶21** Hearsay is an out-of-court "statement" that is "offer[ed] in evidence to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c). A "statement" is "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Ariz. R. Evid. 801(a). Hearsay is inadmissible unless it comes within an exception to the hearsay rule. Ariz. R. Evid. 802. McElroy contends that the photographs were inadmissible hearsay because they were offered to prove that Brittany was staying at McElroy's apartment and to bolster her credibility generally.

**¶22** The photographs' admission did not violate the rule against hearsay because the photographs did not fall within the definition of hearsay. The photographs were not oral or written assertions, nor did they depict nonverbal conduct intended as an assertion "of the fact sought to be proved." *State v. Steinle*, 239 Ariz. 415, 420, ¶ 22 (2016). The fact that the photographs of Brittany's belongings, combined with testimony about where they were found, provided circumstantial evidence that she had been staying at McElroy's apartment, does not make the photographs hearsay.

*III. Demonstrative Aid*

**¶23** Angela and Brittany did not provide precise calendar dates of when they stayed at McElroy's apartment or when specific acts of prostitution and assaults took place. When the prosecutor questioned the case agent—who had interviewed both victims not long after their interactions with McElroy—about the case agent's understanding of the timeline of events, the prosecutor summarized that testimony on a calendar for the month of January 2018. The trial court admitted the calendar as an evidentiary exhibit over McElroy's objection, which enabled the jury to consider it during deliberations.

**¶24** The calendar exhibit provides that Angela first went to McElroy's apartment on January 18 to January 19, that she went back to McElroy's apartment on January 19 to January 20, and that she returned a third time on January 22. The exhibit also provides that McElroy had sex with Angela once a day on January 22 through January 25 and that he

"traffick[ed]" her daily from January 23 through January 26, which was the day officers made contact and took McElroy into custody. As to Brittany, the calendar notes that officers responded to her initial call about McElroy on January 6 and that she approached them at McElroy's apartment on January 27.

**¶25** McElroy contends that the calendar prepared by the prosecutor was a demonstrative aid that should not have been admitted as an exhibit and given to jurors during deliberations.

**¶26** McElroy is correct that the calendar was demonstrative, or pedagogical, rather than substantive, because it was "meant only to illustrate a witness's testimony" and "carrie[d] no independent probative value in and of itself." *State v. Perea*, 322 P.3d 624, 636, ¶¶ 45–46 (Utah 2013) (citing Steven C. Marks, *The Admissibility and Use of Demonstrative Aids*, 32 A.B.A. THE BRIEF 24, 25 (2003)); *United States v. Wood*, 943 F.2d 1048, 1053 (9th Cir. 1991) ("[C]harts or summaries of testimony or documents already admitted into evidence are merely pedagogical devices, and are not evidence themselves."). We conclude, however, that any error in the calendar's admission was harmless.

**¶27** The State has established beyond a reasonable doubt that the calendar's admission as an exhibit "did not contribute to or affect the verdict or sentence." *Escalante*, 245 Ariz. at 144, ¶ 30 (citation and internal quotation marks omitted). Much of the information in the exhibit was undisputed. Although there was some ambiguity about when Angela went to McElroy's apartment the second and third times, that uncertainty involved no more than a day or two and it did not impact the properly admitted evidence of McElroy's guilt—which included DNA evidence showing sexual acts between Angela and McElroy and evidence of specific acts of prostitution Angela committed at McElroy's direction.

*IV. Prior Consistent Statement*

**¶28** After Brittany testified, the State called one of the officers who responded to her initial call to police. McElroy sought to preclude the officer from testifying about what Brittany reported, arguing that the testimony would be hearsay because it did not qualify as a prior consistent statement. *See* Ariz. R. Evid. 801(d)(1)(B)(i) (treating as non-hearsay, if the declarant testifies and is subject to cross-examination, a prior statement of the declarant that is consistent with the declarant's testimony and offered "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying"). The

trial court rejected McElroy's argument, and the officer testified that Brittany said McElroy had sex with her, made her prostitute for him, and held a knife to her stomach.

**¶29** McElroy contends that the trial court's ruling was improper because he never suggested that Brittany's trial testimony was a recent fabrication. His defense at trial, rather, was that Brittany's account of McElroy's conduct was always not credible, both when she first called police and when she testified at trial. *See State v. Tucker*, 165 Ariz. 340, 343 (App. 1990) (holding that a victim's prior consistent statements should not have been admitted where the "defense was that any accusation [by the victim], *whenever made*, was a fabrication").

**¶30** Even if McElroy is correct that there was no evidence Brittany developed a motive to fabricate after making the prior statement to police, any error in admitting the statement was harmless. The officer's testimony was "entirely cumulative" of Brittany's account on the stand, *State v. Williams*, 133 Ariz. 220, 226 (1982), and McElroy thoroughly cross-examined Brittany about the prior statement. *See State v. Hoskins*, 199 Ariz. 127, 144, ¶¶ 66–67 (2000) (holding that the improper admission of a prior consistent statement was harmless where the prior statement was cumulative of other testimony and the declarant was thoroughly cross-examined about the statement). Furthermore, McElroy tested the prior statement through other evidence. He elicited testimony from other officers that Brittany "changed her story" when she first spoke to police and that there was "no probable cause for the domestic violence allegations that were being made." We are satisfied beyond a reasonable doubt that any error in admitting the prior statement "did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588 (1993).

## CONCLUSION

**¶31** We affirm McElroy's convictions and sentences.


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