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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



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FILED: 01/11/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

STATE OF ARIZONA,) 1 CA-CR 09-0600
)
Appellee/Cross-Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
) (Not for Publication -
JESSE W. MAGANA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant/Cross-Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-006749-001 DT

The Honorable Joseph C. Welty, Judge

CONVICTIONS AFFIRMED; SENTENCES VACATED

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I R V I N E, Judge

¶1 Jesse W. Magana ("Magana") appeals his convictions for
one count of molestation of a child and three counts of sexual

conduct with a minor, all dangerous crimes against children. He argues that the trial court erred in allowing a witness to take the stand and in allowing the prosecutor to ask him leading questions, knowing that the witness would refuse to testify, and also erred in allowing another prosecution witness to testify despite his late disclosure. The State filed a cross-appeal, arguing that the trial court erred in sentencing Magana to concurrent terms. For the reasons that follow, we affirm Magana's convictions, but vacate his sentences and remand for resentencing.

FACTS AND PROCEDURAL HISTORY

¶2 The facts, viewed in the light most favorable to sustaining the conviction,¹ are as follows. K.Z. testified that when she was thirteen years old, Magana showed her his penis, and she touched it. She testified that when she was fourteen years old, she had sexual intercourse twice with Magana, once in a van and another time in her bedroom. She also testified that she performed oral sex on him when she was fourteen, after she refused to have intercourse. She testified that after the first time she had sex with Magana, she told one of her friends and Clint R., one of Magana's friends. She told her mother some time later only because she was concerned that her mother would hear

¹ See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

it from another person. K.Z.'s mother called police.

¶13 When a detective informed Magana she had evidence that he had penetrated K.Z., he responded with the question, "From a year-and-a-half ago?" The detective testified as a rebuttal witness that, before Magana made this statement, she had not told him when the incidents had allegedly occurred, contrary to Magana's testimony. A former cellmate of Magana's testified that Magana had tattooed his penis before trial, and Magana told him at the time that he did it to cast doubt on the victim's credibility. This witness also testified that Magana had admitted to him that he had sex with K.Z.

¶14 Magana testified in his own defense that he never engaged in any sexual conduct with K.Z., and that he tattooed his penis when he was sixteen years old on a dare. He testified that his penis was uncircumcised, contrary to the victim's testimony.

¶15 The jury convicted Magana of the charged crimes. The court sentenced him to mitigated terms of sixteen years on each count, to be served concurrently. Magana filed a timely appeal and the State filed a timely cross-appeal.

DISCUSSION

Refusal of Witness To Testify

¶16 Magana argues that the trial court erred by permitting a witness for the prosecution, Clint R., to take the stand in

the presence of the jury, knowing that he was refusing to testify. Magana additionally argues that the trial court erred by permitting the prosecutor to ask leading questions of Clint R. when he took the stand after reiterating that he would refuse to answer questions. He argues that the trial court's actions violated his right under the Confrontation Clause to confront the witness by cross-examination.

¶17 The State called Clint R. as a witness in its case-in-chief. Clint R. testified that he was in prison for aggravated assault. He testified that he knew K.Z. through his friendship with her older brother, and was good friends with Magana. He denied that he knew about any sexual relationship between K.Z. and Magana.

¶18 Clint R. testified that he had been mistaken if he had told a detective before trial that K.Z. had told him of a sexual relationship; he testified that he had overheard K.Z. and a friend talking "or something like that." He denied he and Magana had had a conversation about Magana having sex with K.Z. After looking at a transcription of his interview with the detective to refresh his recollection, Clint R. refused to respond, saying, "I prefer to answer no more questions." When pressed, he said, "I don't feel like answering."

¶19 Outside the presence of the jury, Clint R. reiterated that he refused to answer the question because he did not "feel

like answering it." After consulting with appointed counsel, Clint R. repeated his intention to refuse to answer any questions, explaining that he did not want to incriminate himself. After consulting with her client, however, Clint R.'s counsel told the court she did not believe that her client was invoking his Fifth Amendment privilege, or had any basis to do so, but rather was "just refusing to testify." When the judge asked Clint R. a final time why he was refusing to answer the prosecutor's questions, he responded, "I just don't want to testify."

¶10 The court implicitly found that Clint R. was not invoking his Fifth Amendment privilege, ordered him to answer all questions posed to him by the prosecutor in the matter, and advised him that if he failed to answer the questions, he may be held in contempt. After the jury returned, without objection, the prosecutor asked Clint R. two leading questions seeking confirmation that Magana had admitted to him that he had had sex with K.Z. He asked first, "Did you not in fact tell Detective P.[] with regards to the relationship between the defendant and [K.Z.], that the defendant, in your words, he said that he had sex with [K.Z.]? Did you not tell that to the Detective?" Clint R. responded at first, "No questions, please," and then when the court directed him to answer, he said, "I am refusing to answer his question." After the court directed the prosecutor to ask the

next question, the prosecutor asked the following question, again without objection:

Further along in this interview, did you not in fact tell Detective P.[], again, with regard to this relationship between the defendant and the victim, did you not in fact tell him, when I asked him, you know, why, why would you do something like that, man, I mean, that is R[]'s little sister, and she's only 14.

He said, she is old enough to know what she is doing.

I said, man, she is fricking 13-years-old.

And he just tried to keep it secretive as possible. That is all I remember. I don't remember the exact conversation, but that is the words that we exchanged.

Did you not in fact say that to Detective P.[]?

Clint R. responded, "Refusing to answer that question," and after being directed by the court to answer, responded, "I'm refusing it." The court ordered a short recess, and outside the presence of the jury, found Clint R. in contempt.

¶11 Immediately after the jury returned, the trial court struck Clint R.'s testimony and ordered the jury "not to consider any of Mr. R[]'s testimony in making any determination in this case." During deliberations, the jury asked the following question: "The testimony of Clint R.[] was stricken. Was the initial reading of the detective's report by the prosecutor also stricken[?]" With the express agreement of

defense counsel, the trial court responded: "All questions and answers to and of Clint R.[] were ordered stricken. You are reminded that the questions of counsel are not evidence. A question can only be used to give meaning to a witness's answer."

¶12 Magana subsequently filed a motion for new trial, in which he argued for the first time that his inability to cross-examine Clint R. violated his confrontation rights, and that the prosecutor engaged in misconduct by posing leading questions, knowing the witness would refuse to answer. The court denied the motion, noting that defense counsel did not object to striking the testimony, or request a mistrial. The trial court explained it allowed the prosecutor to question Clint R. in front of the jury because it was concerned that if Clint R. "simply disappeared as a witness, that the jury would potentially hold that against one or the other party." The court concluded that because Clint R. had "provided no explanation whatsoever for his ceasing testifying," it believed it was in the best interest of both parties and justice for the jury to understand that Clint R.'s refusal to answer questions was purely his decision and his responsibility.

¶13 The trial court also explained that the prosecutor had not engaged in misconduct by posing the leading questions, explaining, he was given permission from the court to ask two

specific questions. The court explained the questions "were clearly claimed, as [the prosecutor] believed to be, the most relevant questions to the case. Mr. R[]'s refusal to answer those were at the core of his refusal to provide information and form the basis of him being held in contempt." The court stated the instruction that it gave the jury to disregard Clint R.'s testimony, and the instruction during deliberations not to consider the prosecutor's questions, appropriately resolved the issue.

¶14 We review evidentiary rulings that implicate the Confrontation Clause de novo. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42, 140 P.3d 899, 912 (2006). Because the record fails to reflect that Magana timely objected to the prosecutor asking questions of this witness after he had announced he would refuse to answer, or timely objected to the leading questions at issue on appeal, we review these issues for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Magana thus bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608.

¶15 As an initial matter, we find no error in the court's ruling directing the witness to re-take the stand notwithstanding the witness's insistence that he would refuse to answer questions. Under analogous circumstances, our supreme court held

that such a decision is "ordinarily discretionary with the trial court, which must determine whether the interest of the person calling the witness outweighs the possible prejudice resulting from the inferences the jury may draw from the witness' exercise of the privilege." *State v. Corrales*, 138 Ariz. 583, 588, 676 P.2d 615, 620 (1983). We decline to find that the trial court abused its discretion when it ordered the witness to take the stand a final time to obtain his full testimony or his refusal to testify after having been warned of the risk of a contempt citation. The court reasoned that Clint R. was recalled, in part, to avoid the prejudice to one of the parties that might arise if Clint R. "simply disappeared."

¶16 We do find, however, that it was error for the trial court to allow the prosecutor to ask the specific leading questions posed to Clint R. after this witness had insisted he would refuse to testify. The prosecutor's recitation of Clint R.'s prior statements to police, in light of the witness's insistence that he would refuse to answer was improper and may have added critical weight to the prosecutor's case. Because the jury could have inferred that the witness had made these prior statements and that the prior statements were true, this deprived Magana of his confrontation rights. *State v. Blankinship*, 127 Ariz. 507, 511, 622 P.2d 66, 70 (1980). The record fails to support a finding, however, that the prosecutor was deliberately

trying to build his case on the inferences arising from these leading questions. Significantly, the record indicates that the trial court approved the prosecutor's two leading questions in advance. See *Namet v. United States*, 373 U.S. 179, 186-87 (1963) (describing two factors for finding reversible error from such questioning when no curative instruction is given).

¶17 Even more significantly, by striking Clint R.'s testimony and directing the jury to consider neither his testimony nor the prosecutor's questions in its deliberations, the court effectively negated any improper inference. See *id.* The trial court's curative instructions to the jury distinguish this case from *Corrales*, on which Magana relies. In *Corrales*, our supreme court held that a prosecutor's leading questions of a witness who claimed privilege provided significant evidence in support of the defendant's conviction, in the absence of any meaningful instruction to the jury to disregard the inferences, and thus required reversal. 138 Ariz. at 591-95, 676 P.2d at 623-27; cf. *Namet*, 373 U.S. at 187 (noting that "even when the objectionable inferences might have been found prejudicial, it has been held that instructions to the jury to disregard them sufficiently cured the error.")

¶18 Magana has failed to meet his burden to show and cannot show that the error was prejudicial, as necessary for reversal on fundamental error review. Again, the court gave

appropriate curative instructions to disregard Clint R.'s testimony and the information from the detective's report embedded in the prosecutor's questions. We presume that the jury followed these instructions. See *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). The trial court also instructed the jury generally in preliminary instructions not to consider "for any purpose" testimony that it ordered "stricken from the record,"² and that the jury was "to determine the facts only from the testimony of witnesses and from exhibits received in evidence." The jury was instructed that "statements or arguments made by the lawyers in the case are not evidence" absent a stipulation, and that "[b]y itself, a question is not evidence." The court instructed the jury again in the final instructions that "[a]ny testimony stricken from the court record must not be considered," and that "[w]hat the lawyers say is not evidence." It also reminded counsel that they were not to refer to Clint R. or his testimony during closing arguments.

¶19 The jury's question during deliberations indicated that it understood that it could not consider Clint R.'s testimony because it had been stricken, but was not certain whether it could consider as evidence the information in the detective's report, as reported in the prosecutor's question.

² This instruction appeared twice in the preliminary instructions.

The court appropriately responded to that question, with the agreement of defense counsel, by instructing the jury that the prosecutor's questions had also been stricken, and the jury could not consider that information as evidence. We presume the jury followed these instructions, and ultimately did not consider any of this testimony or information in its deliberations. See *LeBlanc*, 186 Ariz. at 439, 924 P.2d at 443. On this record, Magana cannot show the necessary prejudice for reversal. See *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006) (noting that a defendant may not rely on speculation to meet his burden to show prejudice on fundamental error review).

Late-Disclosed Witness for Prosecution

¶20 Magana also argues that the trial court erred by allowing a witness for the prosecution to testify who had not been timely disclosed. The witness, Benjamin M., a former cell mate of Magana's, testified that Magana had tattooed his penis a month or two before trial with the intention of discrediting the victim's testimony. Benjamin M. also testified that Magana had admitted to him that he had sex with K.Z. Benjamin M. testified the State had not offered him any deal for his testimony.

¶21 On the fourth day of trial, a Monday, the prosecutor informed the court that Benjamin M. had approached detention officers the week prior indicating he had information relating

to Magana's case. Police interviewed Benjamin M. on Thursday, and the prosecutor notified defense counsel on Friday of this new development, the same day he learned of it. That afternoon, the prosecutor's office sent an e-mail to defense counsel disclosing the witness's statement, and the audio tape of the police interview. By Monday, defense counsel had a copy of the report, but had not yet received the audio tape. Magana argued that the witness should be precluded for late disclosure.

¶122 The trial court found the prosecutor had not violated any discovery rules, but rather had exercised due diligence with respect to the matter and had disclosed the witness and his testimony immediately after learning of it. Mindful that defense counsel needed more time to prepare for this witness, the court proposed that it excuse the jury until the following day to allow Magana to obtain background information and interview the witness. The court allowed Magana to re-urge preclusion of the witness the following day "when you have had a little more time to look into it." Magana opted to call a brief witness out of order that afternoon, and the court recessed at about 2:30 p.m. and instructed the jury to return at 10:30 a.m. the following day.

¶123 The following morning, Magana filed a motion to preclude the witness, in part, for late disclosure. Defense counsel argued that he did not have the time to fully

investigate and rebut the witness's claims.³ After defense counsel acknowledged that, beyond speculation, he did not know what further investigation might reveal, the court released the jury until 1:30 p.m. to allow defense counsel to interview the witness. The prosecutor called the witness to the stand that afternoon and conducted brief examination, and defense counsel cross-examined him.

¶24 We review a trial court's ruling on discovery issues, and its imposition of sanctions for discovery violations, for an abuse of discretion. *State v. Roque*, 213 Ariz. 193, 205, ¶ 21, 141 P.3d 368, 380 (2006). We will not find an abuse of discretion in a discovery ruling unless a defendant shows that he suffered prejudice as a result of the nondisclosure. *State v. Martinez-Villareal*, 145 Ariz. 441, 448, 702 P.2d 670, 677 (1985). Finally, we will not find that a trial court has abused its discretion "unless no reasonable judge would have reached the same result under the circumstances." *State v. Armstrong*, 208 Ariz. 345, 354, ¶ 40, 93 P.3d 1061, 1070 (2004).

³ In a hearing on his motion for new trial, defense counsel reiterated that he did not have sufficient time to investigate this witness's story during trial, but told the judge that he had learned, as the jury was deliberating, the names of two individuals who would be willing to testify that the witness had lied. Defense counsel, however, subsequently informed the court that he was unable to furnish the court with affidavits or testimony from these two individuals, as the court requested.

¶25 We find no such abuse of the court's discretion in its finding that the State had not violated the discovery rules, or in taking the measures it did to remedy the mid-trial disclosure of a prosecution witness. Rule 15 of the Arizona Rules of Criminal Procedure requires the State to disclose its witnesses no later than thirty days after arraignment, and obtain leave of the court to use any witnesses not disclosed at least a week before trial. Ariz.R.Crim.P. 15.1(c), 15.6(d). "If the court finds that the material or information could not have been discovered or disclosed earlier even with due diligence" and also finds that "the material or information was disclosed immediately upon its discovery, the court shall grant a reasonable extension to complete the disclosure and grant leave to use the material or information." Ariz.R.Crim.P. 15.6(d).⁴

¶26 The court found that the prosecutor had exercised due diligence in finding the witness, and had made the disclosure as soon as he learned of the potential witness, and accordingly did not violate any discovery rules. The record supports the court's finding. That finding in turn requires the court to allow the

⁴ If the court finds that a prosecutor violated the discovery rules, it may impose a remedy or sanction that it finds just under the circumstances. Ariz.R.Crim.P. 15.7(a), 15.6(d). "A witness should be precluded only where a less stringent sanction is not applicable." *State v. Tyler*, 149 Ariz. 312, 315, 718 P.2d 214, 217 (App. 1986). "[S]ome discovery violations can be easily solved . . . by allowing a witness to be interviewed during trial." *State v. Krone*, 182 Ariz. 319, 322, 897 P.2d 621, 624 (1995).

prosecutor to use the witness and grant a "reasonable extension" to complete the disclosure. See Ariz.R.Crim.P. 15.6(d). It was within the court's discretion to deny the motion to preclude, and instead remedy the mid-trial disclosure of the witness by recessing the jury for one day to allow defense counsel to interview the witness and prepare his defense. See *State v. Tucker*, 157 Ariz. 433, 440-41, 759 P.2d 579, 586-87 (1988) (holding that trial court did not abuse its discretion in refusing to preclude a witness interviewed by defendant briefly immediately prior to her testimony). Defense counsel in fact cross-examined this witness at length on his prior convictions and other issues affecting his credibility. On this record, we cannot say that the court abused its discretion in finding the absence of any discovery violation, continuing trial to allow defense counsel additional time to prepare, or declining to preclude the witness.

State's Cross-Appeal of Sentence

¶127 In its cross-appeal, the State argues that the trial court imposed an illegal sentence under Arizona Revised Statutes ("A.R.S.") section 13-604.01(L)(2008)⁵ when it sentenced Magana

⁵ Significant portions of the Arizona criminal sentencing code have been renumbered, 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective January 1, 2009. 2008 Ariz. Sess. Laws, ch. 301, § 120. Subsection (L), the provision Magana was sentenced under, was subsection (K) at the time the offenses were committed in 2005 and 2006, see A.R.S. § 13-604.01(K) (2005 & 2006), and has

to concurrent terms. Magana concedes that he has no good faith basis to argue to the contrary. Whether the trial court correctly construed the sentencing statute is a question of law, which we review de novo. *See State v. Hollenback*, 212 Ariz. 12, 16, ¶ 12, 126 P.3d 159, 163 (App. 2005). The imposition of an illegal sentence is fundamental error. *State v. Lewandowski*, 220 Ariz. 531, 533, ¶ 4, 207 P.3d 784, 786 (App. 2009).

¶28 We agree with the State that the trial court imposed an illegal sentence under the applicable sentencing provision, requiring that we vacate Magana's sentences. Based on the jury's verdicts, the trial court found that the jury found beyond a reasonable doubt that K.Z. was under fifteen years of age, and accordingly each of the four offenses constituted dangerous crimes against children. The State argued that because the crimes were dangerous crimes against children, they were subject to sentencing pursuant to A.R.S. § 13-604.01(L), and accordingly, the terms must run consecutively. Magana argued that the terms could run concurrently under the statute. The trial court concluded that pursuant to A.R.S. § 13-604.01(L), it had "the discretion to run these sentences concurrent, because they involve a common victim." The court subsequently sentenced Magana

now been renumbered as A.R.S. § 13-705(M)(2010). We cite the 2008 version as no revisions material to this decision have since occurred.

to a mitigated term of sixteen years in prison on each conviction, to be served concurrently.

¶129 Section 13-604.01(L) provides:

The sentence imposed on a person by the court for a dangerous crime against children . . . involving child molestation or sexual abuse . . . may be served concurrently with other sentences if the offense involved only one victim. The sentence imposed on a person for any other dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time, including child molestation and sexual abuse of the same victim.

We have repeatedly interpreted this provision as requiring that sentences for convictions for sexual conduct with a minor must be served consecutively to each other, and consecutively to any sentence for a conviction for child molestation, even one involving the same victim, because the sexual conduct convictions do not fall within the identified exception. See *State v. Tsinnijinnie*, 206 Ariz. 477, 479-80, 80 P.2d 284, 286-87 (App. 2003) (interpreting A.R.S. § 13-604.01(K)(1998)); *State v. Supinger*, 190 Ariz. 326, 330, 947 P.2d 900, 904 (App. 1997) (interpreting A.R.S. § 13-604.01(I)(1996)). The trial court imposed an illegal sentence when it ordered that Magana serve concurrent terms of imprisonment for each of the three convictions for sexual conduct with a minor, and for the one conviction of child molestation. Accordingly, we vacate Magana's

