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

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FILED: 12/22/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

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| STATE OF ARIZONA, | ) | No. 1 CA-CR 10-0611 |
| | ) | No. 1 CA-CR 10-0612 |
| Appellee, | ) | (Consolidated) |
| | ) | |
| v. | ) | DEPARTMENT E |
| | ) | |
| HECTOR ALBERTO HERRERA, | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| Appellant. | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |

Appeal from the Superior Court in Maricopa County

Cause No. CR2004-136360-001 DT
No. CR2003-021742-001 DT

The Honorable John R. Hannah, Jr., Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
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Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

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

**¶1** Hector Alberto Herrera appeals his convictions and sentences in one case for aggravated assault and assault and the

resulting revocation of his probation and sentence in another case. For the reasons that follow, we affirm.

**FACTS AND PROCEDURAL BACKGROUND**

**¶2** On December 10, 2004, Reyna P., who lived with Herrera, told police Herrera pushed her, kicked her and poked her shoulder three times with a knife.[1] Her son, ten, told police Herrera had threatened him and his mother.

**¶3** At trial in 2010, contrary to what she had said the night of the incident, Reyna P. denied Herrera had threatened her with a knife and testified she asked her son to lie about the knife. She testified she regretted telling police about a knife "because he's been in jail for a while already," and she had not thought "that it was going to go this far." Contrary to his report to police on the night of the incident, her son testified Herrera had not threatened him or his mother with a knife. He testified that on the night of the incident, his mother had told him to lie to police.

**¶4** Reyna P. further testified she had not been Herrera's girlfriend since 2005 and had been dating another man for nine years. Although she initially testified she had visited Herrera in jail only two or three times, when confronted with records,

[1] Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Herrera. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

she admitted she had visited him more than 40 times over the five months before trial. She denied identifying herself to jail officials as Herrera's girlfriend, but jail records showed that she had done so on five randomly selected visits. Finally, she testified she could not say if she talked to Herrera in jail by phone more than 50 times, but after reviewing the records, she acknowledged she had talked to him on the phone more than 150 times in jail.

**¶5** Reyna P.'s friend testified she saw Herrera threaten Reyna P. on the night in question and point a knife at Reyna P. so that she could not move. The friend testified that Reyna P. approached her shortly before trial and tried to persuade her not to testify and to tell the prosecutor that there was no knife. The friend testified that Reyna P. told her that she had instructed her son to lie to the prosecutor. The friend testified that Reyna P. told her she lived with Herrera as recently as October 2009, and that if he were not released, she would have no home.

**¶6** The jury convicted Herrera of aggravated assault, a Class 3 dangerous felony and an act of domestic violence committed in the presence of a child, for the assault of Reyna P., and assault, a Class 2 misdemeanor, for the assault of Reyna P.'s son. The court sentenced Herrera to 7.5 years in prison for the aggravated assault and time served for the assault. It

revoked Herrera's probation in another case and imposed the presumptive term of 2.5 years, to run concurrently with his sentence on the aggravated assault conviction.

**¶7** Herrera filed timely notices of appeal, and this court ordered the cases consolidated. We have 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) (2011).

## DISCUSSION

### A. Use of Extrinsic Evidence to Prove Jail Visits.

**¶8** Herrera first argues the superior court abused its discretion in allowing the State to impeach Reyna P. with evidence of the number of visits she had made to him in jail, evidence that on some of these visits she had identified herself as his "girlfriend," and evidence of the numerous phone calls he made to her from jail. At issue are a summary showing that Reyna P. visited Herrera in jail more than 40 times in four and one-half months and five jail visitation slips in which Reyna P. had identified herself as Herrera's girlfriend, all of which were offered to show bias, over Herrera's objection that the evidence was unfairly prejudicial and collateral. Herrera also complains that the court allowed the prosecutor to ask Reyna P. about the telephone calls she received from him by showing her

the jail call summary, although the State did not offer extrinsic evidence of the phone calls.

**¶9** We review the superior court's evidentiary rulings for abuse of discretion. *State v. Amaya–Ruiz,* 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). A ruling constitutes an abuse of discretion when "the reasons given by the court . . . are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 (1983).

**¶10** Herrera argues the court erred in admitting extrinsic evidence of Reyna P.'s jail visits and her identification of herself as his girlfriend because the evidence violated "a long-standing prohibition on impeachment with specific conduct that fell short of a felony conviction" and a prohibition against "bringing in extrinsic evidence to prove the collateral matter." In support of that proposition, however, Herrera relies on cases addressing evidence offered for reasons other than to show bias. *See, e.g.*, *State v. Price*, 106 Ariz. 433, 434-35, 477 P.2d 523, 524-25 (1970) (improper to admit evidence of unrelated criminal conduct by defendant that did not result in a felony conviction); *State v. Harris*, 73 Ariz. 138, 141-42, 238 P.2d 957, 959 (1951) (court properly excluded evidence about witness's criminal activity offered to attack his credibility); *State v. Ballantyne*, 128 Ariz. 68, 71, 623 P.2d 857, 860 (App.

1981) (court improperly admitted evidence of a prior fight to impeach defendant's assertion that he had not been in a fight in 14 years).

**¶11** Arizona Rule of Evidence 608(b) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." We have held, however, that "Rule 608(b) neither blocks an inquiry about conduct which is probative of bias nor precludes introduction of extrinsic evidence to prove such conduct." *State v. Uriarte*, 194 Ariz. 275, 280, ¶ 23, 981 P.2d 575, 580 (App. 1998) (citing *State v. Gertz,* 186 Ariz. 38, 42, 918 P.2d 1056, 1060 (App. 1995); *United States v. Abel,* 469 U.S. 45, 51-52 (1984)).

**¶12** The State offered the evidence at issue in this case to show Reyna P. was biased in favor of Herrera and had a motive to lie for him, purposes that by definition are not "collateral." *See Gertz*, 186 Ariz. at 42, 918 P.2d at 1060 ("An effort to impeach on a collateral matter differs significantly from an effort to affirmatively prove motive or bias. Rule 608(b) restricts the former; the sixth amendment protects the latter."); *State v. Hill,* 174 Ariz. 313, 325, 848 P.2d 1375, 1387 (1993) ("Evidence is collateral if it could not properly be offered for any purpose independent of the contradiction.").

**¶13** Nor did the court abuse its discretion in overruling Herrera's objection that the evidence was unfairly prejudicial pursuant to Arizona Rule of Evidence 403. We view the challenged evidence on appeal in the "light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21, 985 P.2d 513, 518 (App. 1998), *aff'd*, 195 Ariz. 1, 985 P.2d 486 (1999). "Because the trial court is best situated to conduct the Rule 403 balance, we will reverse its ruling only for abuse of discretion." *State v. Canez*, 202 Ariz. 133, 153, ¶ 61, 42 P.3d 564, 584 (2002). Evidence of Reyna P.'s contacts with Herrera were significantly probative of bias in light of her testimony minimizing the number of visits and phone calls and stating she had not been Herrera's girlfriend since 2005. *See State v. Vidalez,* 89 Ariz. 215, 217, 360 P.2d 224, 225-26 (1961) (recognizing the "fundamental proposition of law that the jury is entitled to be apprised of any bias, prejudice or hostility which a particular witness may feel toward a party to a lawsuit or prosecution in order that the jury may better be able to evaluate the true worth of that witness' testimony"). Accordingly, we cannot conclude the court erred in finding that any prejudice from this evidence did not substantially outweigh its probative value.

**B. Alleged Prosecutorial Misconduct.**

**¶14** Herrera also argues the prosecutor engaged in misconduct by deliberately misleading the jury about when Reyna P. recanted her allegation that he assaulted her with a knife. He argues the prosecutor misled the jury by "repeatedly contrast[ing] what was said in 2004 with what was said in trial" without acknowledging "that Reyna had consistently recanted since the earliest opportunities."

**¶15** "[P]rosecutors have wide latitude in presenting their closing arguments to the jury." *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000). "[E]xcessive and emotional language is the bread and butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury." *Id.* (quotations omitted). To determine whether a prosecutor's remarks are improper, we consider whether the remarks called to the attention of jurors matters they would not be justified in considering, and the probability, under the circumstances, that the jurors were influenced by the remarks. *Id.* To require reversal, the misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee,* 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (quotations omitted).

**¶16** Because Herrera failed to object to the prosecutor's arguments, we review this contention only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). Prosecutorial misconduct constitutes fundamental error only when it is "so egregious as to deprive the defendant of a fair trial." *State v. Woody*, 173 Ariz. 561, 564, 845 P.2d 487, 490 (App. 1992) (quotations omitted). The defendant bears the burden of establishing error, that the error was fundamental, and that the error caused the defendant prejudice. *Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608.

**¶17** We have reviewed the prosecutor's closing and rebuttal arguments in their entirety. The key issue at trial was whether Reyna P. and her son had told the truth to police on the night of the incident in 2004 or whether they were testifying truthfully at trial in 2010 when they said they had made up what they said in 2004. We cannot conclude the prosecutor intended to mislead the jury by referring to Reyna P.'s trial testimony as a "recent" recantation. In context, the comment appears to have been aimed at distinguishing the witnesses' report the night of the incident from the testimony they gave at trial. The prosecutor's references were not inappropriate, but rather fair arguments based on the evidence. *See State v. Dunlap*, 187 Ariz. 441, 462, 930 P.2d 518, 539 (App. 1996) (prosecutor's remark in closing was not improper: "[w]e cannot ascribe to it

the sinister connotations that defendant does"). Herrera was free to argue, and did, that Reyna P. immediately regretted her lie to police and had tried since then to make up for it. He also argued that it was more likely for Renya P. and her son to lie to police than on the witness stand while under oath.

**¶18** On this record, no prosecutorial misconduct occurred, much less misconduct that permeated the trial, depriving Herrera of a fair trial.

**CONCLUSION**

**¶19** For the foregoing reasons, we affirm Herrera's convictions, the resulting revocation of his probation and his sentences.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
PATRICK IRVINE, Judge