IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RUBEN BOLIVAR,
Appellant.

No. 2 CA-CR 2018-0088
Filed October 27, 2020

Appeal from the Superior Court in Santa Cruz County
No. CR17121
The Honorable Thomas Fink, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Acting Section Chief Counsel
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

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Counsel for Appellant

OPINION

Presiding Judge Staring authored the opinion of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Ruben Bolivar appeals from his convictions and sentences for one count of sexual conduct with a minor under fifteen, one count of molestation of a child, and three counts each of sexual assault and sexual abuse. We affirm Bolivar's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Bolivar. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). Bolivar is Becca's[1] stepfather, but she believed him to be her biological father until she was fifteen years old. From approximately 2005 to 2015, while Becca was between the ages of four and fifteen, Bolivar committed numerous sexual offenses against her, including touching her breasts and vagina, oral sex, and, after she had turned fifteen, three instances of intercourse.

¶3 Following a nine-day jury trial, Bolivar was convicted of sexual conduct with a minor as alleged in Count Two of the information, sexual assault as alleged in Counts Three, Five, and Six, sexual abuse as alleged in Counts Four, Seven, and Eight, and molestation of a child as alleged in Count Nine.[2] The trial court sentenced him to life imprisonment, plus a combination of concurrent and consecutive prison terms totaling 68.5 years. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶4 On appeal, Bolivar argues: (1) the trial court erred in denying his motion to preclude the state from referring to Becca as the "victim"; (2) the court erred in failing to individually question jurors as to whether they had seen a newspaper article related to his case; (3) Counts Two and Nine were invalid because they were not charged alternatively to Count One in the original information and the jury was improperly instructed on the law; (4) the evidence was insufficient to show he knew Becca did not consent to the sexual acts underlying Counts Four through Eight; and

[1]We use the pseudonym "Becca" to protect the victim's privacy.

[2]The jury acquitted Bolivar of Count One, continuous sexual abuse of a child, covering the periods for the offenses alleged in Counts Two and Nine.

(5) he was deprived of due process under the former version of A.R.S. § 13-1407(E).[3]

References to Becca as the "Victim"

¶5 Bolivar first argues the trial court abused its discretion by denying his motion to preclude the state and its witnesses from referring to Becca as the "victim." He asserts that "where the only evidence that a crime has been committed is the uncorroborated testimony of the complaining witness and the defendant maintains his innocence," referring to the complaining witness as the "victim" implies the "charged crimes had been committed before any evidence was taken or verdicts deliberated on."[4] Bolivar further contends this "resulted in improper vouching for the State's witnesses, depriving [him] of his 14th Amendment rights to a presumption of innocence and a unanimous jury verdict." We review the court's ruling on a motion to preclude evidence for an abuse of discretion. *State v. Gamez*, 227 Ariz. 445, ¶ 25 (App. 2011). However, we review related constitutional challenges de novo. *State v. Huerta*, 223 Ariz. 424, ¶ 4 (App. 2010) (addressing discretionary and constitutional issues related to evidence suppression).

¶6 Before trial, Bolivar moved to preclude the state and its witnesses from referring to Becca as the "victim," claiming it is "a term that denotes a certain status under the law," and "[o]nly the jury decides who is the victim of a crime and the use of this term by the State or any of its witnesses invades the province [of] the jury to make such a determination." Instead, Bolivar requested Becca be referred to by her name or as the "complaining witness." The state opposed Bolivar's motion, arguing Becca "is the victim under the Victims' Bill of Rights, that's the legal term we use to note who she is," and the trial court had clearly instructed the jury that the charges were "only allegations at [that] point and it's up to their determination whether or not they find there's evidence beyond a reasonable doubt as to whether or not these incidents occurred."

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[3] Bolivar also argued the court improperly commented on the evidence, but later withdrew this argument from consideration on appeal following correction of the trial transcript.

[4] Bolivar concedes that in cases where there is no question that a crime has been committed and the only issue is whether the defendant is responsible, it is not improper to refer to the complaining witness as the "victim."

¶7 The trial court ultimately denied Bolivar's motion, stating:

> So what I'll do in this case is I'm not going to preclude the State from using the word victim. I think that would probably be futile anyway, the prosec[u]tor[]s use that phrase so much, even if I ordered the prosecutor not to use it, she would probabl[y] slip up. I don't think it's inappropriate but when it comes up, I will give a limiting instruction to the jury referring to this person as the victim, victim is a legal term of art. As with all the facts in this case, you decide whether or not those acts occurred and whether or not under the law, she should be determined to be a victim. I will give a limiting instruction when it comes up, first time or second time. She is being referred to as the victim, but at the end of the case it's going to ultimately be the jury who decides what the facts are, you'll determine whether these acts occurred as alleged that would make her the victim of the case. But for right now that's how she's going to be referred to.

At trial, the court did not give a specific limiting instruction as to the term "victim," nor did Bolivar make any further requests for such an instruction.

¶8 Bolivar asserts this issue is one of first impression in Arizona and therefore relies on out-of-state authority to support the proposition that it is improper to describe the complaining witness as the "victim" when the issue is whether a crime has been committed. *See State v. Albino*, 24 A.3d 602 (Conn. App. Ct. 2011); *State v. Sperou*, 442 P.3d 581 (Or. 2019); *State v. Devey*, 138 P.3d 90 (Utah Ct. App. 2006). The state counters that pursuant to *Z.W. v. Foster*, the trial court maintains broad discretion in determining how to refer to crime victims in court proceedings. 244 Ariz. 478, ¶ 9 (App. 2018).

¶9 In *Z.W.*, the trial court denied Z.W.'s "request to preclude reference to her as the 'alleged victim,'" and she sought special-action review. *Id.* ¶ 1. We noted that while the Victims' Bill of Rights does not expressly specify how to refer to victims in court proceedings, it does impose the constitutional mandate "that every crime victim in Arizona . . . be treated throughout the criminal justice process with 'fairness, respect,

and dignity, . . . free from intimidation, harassment, or abuse.'" *Id.* ¶¶ 4-5 (quoting Ariz. Const. art. II, § 2.1(A)(1)). And, we ultimately concluded courts enjoy "discretion to assess—on a case-by-case basis—whether a particular reference to a victim undermines the victim's right to be treated with fairness, respect, and dignity under the particular circumstances presented," finding no abuse of discretion in the denial of Z.W.'s motion to preclude use of the term "alleged victim." *Id.* ¶ 7.

¶10 We conclude the trial court did not abuse its discretion by permitting Becca to be referred to as the "victim." Contrary to Bolivar's contention, *Z.W.* does not establish that the term "victim" is inappropriate when the defendant disputes whether a crime occurred. Rather, this court stressed that "trial courts should have flexibility in determining how to refer to crime victims during criminal proceedings." *Id.* ¶ 8. And, Bolivar has presented no binding authority, and we are aware of none, to support his argument that the use of the term "victim" is prohibited when, under circumstances similar to those in this case, the state's key evidence is the testimony of the alleged victim. *See State v. Dean*, 226 Ariz. 47, ¶ 19 (App. 2010) (legal precedent from other jurisdictions not controlling on this court).

¶11 Further, contrary to Bolivar's assertion that "the entirety of the State's case rests on the allegations [of] the accusing witness," Becca's brother testified that he had seen Bolivar touch her breast, and Becca's mother testified that Bolivar had asked Becca, "Did I force you?" when he was confronted with allegations of sexual abuse. Becca's brother also testified he had seen Bolivar go into Becca's room and lock the door on multiple occasions. And, her mother and a detective testified about the pornographic websites found in Bolivar's cell-phone and computer search history, corroborating Becca's claim that Bolivar had shown her pornography.

¶12 Moreover, even were we to assume the state's use of the term "victim" constituted error, any such error was harmless beyond a reasonable doubt. *See State v. Leteve*, 237 Ariz. 516, ¶ 25 (2015) (error not reversible if harmless); *State v. Romero*, 240 Ariz. 503, ¶ 7 (App. 2016) (in deciding whether error is harmless, question is whether guilty verdict actually rendered was surely unattributable to error). Errors may be cured by jury instructions. *See Romero*, 240 Ariz. 503, ¶ 19.

¶13 Here, the trial court instructed the jury that Becca's initials, B.Y.S., are the initials of the "alleged victim," "[e]very defendant is presumed by law to be innocent," and Bolivar had "pled not guilty . . . [which] means that the State must prove every part of the charge beyond a

reasonable doubt." Further, it instructed that "these are charges only at this point. [Bolivar] has entered pleas of not guilty to all these charges." And, the court informed the jury that "[i]n deciding the facts of this case, [it] should consider what testimony to accept, and what to reject" and that "[s]tatements or arguments by the lawyers in the case are not evidence." We presume the jurors followed their instructions. *See State v. Prince*, 204 Ariz. 156, ¶ 9 (2003). Therefore, any error with respect to the use of the term "victim" to describe Becca by the state and its witnesses was harmless. *Cf. State v. Payne*, 233 Ariz. 484, ¶ 113 (2013) (prosecutorial vouching harmless given instructions that lawyers' arguments not evidence and jury must consider witness's motive or prejudice).

¶14 To the extent Bolivar argues the trial court erred in failing to give a limiting instruction for the word "victim," we disagree. The instructions noted above generally informed the jury that it should view Becca as the "alleged" victim and that Bolivar was presumed innocent. Bolivar did not submit a more specific proposed limiting instruction for the term "victim," did not request a limiting instruction when the term was used at trial, and, when the court later reviewed instructions with the parties, did not object to the lack of an instruction. "If a party fails to object to an error or omission in a jury instruction . . . he waives the issue on appeal, absent a finding of fundamental error." *State v. Valenzuela*, 194 Ariz. 404, ¶ 2 (1999). In any event, no error occurs when, as here, a court does not give a limiting instruction a party fails to provide. *See State v. Miles*, 211 Ariz. 475, ¶ 31 (App. 2005). Accordingly, we conclude the court did not err by not providing a limiting instruction.[5]

¶15 Bolivar also argues the trial court's use of the term "victim" to describe Becca constituted an improper comment on the evidence in violation of article VI, § 27 of the Arizona Constitution,[6] which provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." But, to violate this prohibition, "the court must express an opinion as to what the evidence

[5]We do not conclude the trial court would have abused its discretion by giving a limiting instruction.

[6]Although Bolivar did not move to preclude the trial court's use of the term "victim" and did not object to its use of this term at trial, we assume his motion in limine was sufficient to preserve his objection to *any* references to Becca as the "victim," and we review for harmless error. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005).

proves." *State v. Rodriguez*, 192 Ariz. 58, ¶ 29 (1998). A case will not be reversed due to judicial comments on the evidence unless the comment prejudiced the party who opposed it. *Jones v. Munn*, 140 Ariz. 216, 221 (1984). Prejudice occurs in this context when "there is a reasonable probability a different verdict might have been reached if the error had not occurred." *Id.*

¶16 Bolivar relies on *State v. Nomura*, 903 P.2d 718, 722 (Haw. Ct. App. 1995), for the proposition that references to a "victim" in criminal jury instructions are misleading and an improper comment on the evidence where the jury has not yet determined from the evidence "whether the complaining witness was the object of the offense and whether the complaining witness was acted upon in the manner required under the statute to prove the offense charged." Bolivar argues that although the *Nomura* court ultimately found the error harmless, the same could not be said here because the reference to a "victim" had occurred only one time in *Nomura*. *Id.* at 722-23. In his case, however, "the trial court not only referred to [Becca] as the 'victim' to the jury in a written submission (a verdict form), [but] it also verbally referred to [her] as the 'victim' a total of ten times at six different junctures throughout the trial."

¶17 The state counters that "[b]ecause the jury instructions," taken as a whole, "clearly established that the burden of proof remained on the State and that Bolivar was innocent until proven guilty, any use of the term 'victim' to describe [Becca] by the trial judge was not error." We agree. In its preliminary instructions to the jury, the trial court stated, "You must not take anything I may say or do during the trial as indicating any opinion about the facts. You, and you alone, are the judges of the facts." And, as noted, the jury was instructed that Bolivar was presumed innocent and that the state had the burden of proving all elements of the charges beyond a reasonable doubt. *See Prince*, 204 Ariz. 156, ¶ 9 (we presume jurors followed instructions). Again, Bolivar cites no binding authority, and we find none, requiring reversal under these circumstances.

Newspaper Article

¶18 Bolivar next argues the trial court erred in denying his motions for change of venue, mistrial, and new trial after failing to individually question jurors as to whether they had seen a front-page story in a local newspaper related to his case. We review the court's decision concerning whether to investigate allegations of juror misconduct for an abuse of discretion. *State v. Miller*, 178 Ariz. 555, 556 (1994). And, we review its denial of Bolivar's motions for change of venue, mistrial, and new trial

for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, ¶ 124 (2004) (mistrial); *State v. Blakley*, 204 Ariz. 429, ¶ 13 (2003) (change of venue); *State v. Rojas*, 247 Ariz. 399, ¶ 11 (App. 2019) (new trial).

¶19 On the first day of trial, following jury selection, the court admonished the impaneled jurors not to do any independent research about the case and emphasized the need to evaluate the case based solely upon what happens at trial. The next morning, the court learned two armed men had attacked Becca's mother, Elizabeth,[7] who was scheduled to testify against Bolivar, pistol-whipping her and stabbing her in the face and neck. The men also attacked her boyfriend. The parties agreed to a short continuance, and the court informed the jury that trial would not be proceeding that day due to an unforeseen matter. Before excusing the jurors, the court again admonished them that they "must not be exposed to any information other than the evidence presented in the courtroom," including "any information about the issues or persons involved in this trial," and that they "must not read or listen to any news accounts of the case." The jurors were also instructed to immediately inform the court if they unintentionally came across information related to the case.

¶20 The state subsequently moved to revoke Bolivar's conditions of release, and the trial court concluded the attack "was a very deliberate attempt to intimidate the victim and . . . the victim's mother" because it had occurred on the day trial was set to begin, after Becca and Elizabeth were identified as the state's first two witnesses, and "the only person who . . . stood to benefit by that effort in this case" was Bolivar. After finding that the "presumption [was] great" and the "proof [was] eviden[t]" as to the charged sexual offenses and that Bolivar posed a substantial danger to Becca and her family, the court revoked Bolivar's release conditions pending trial and ordered that he be taken into custody.

¶21 The day before trial was scheduled to resume, Bolivar filed motions for change of venue and mistrial based on a newspaper article that had been published after the jury was impaneled, which reported the trial court's finding that Bolivar was responsible for the attacks on Elizabeth and her boyfriend. The article was entitled, "Defendant jailed without bond after attack against witness in Mexico" and featured a photograph of Bolivar being handcuffed. The caption underneath the photograph stated the court had "ordered that Bolivar, who is on trial for alleged sex crimes against a child, be sent to jail without bond after saying it was clear Bolivar

[7]We use the pseudonym "Elizabeth" to protect the mother's privacy.

ordered an attack on his alleged victim, the girl's mother and the mother's boyfriend."

¶22 The next day, the trial court began by giving preliminary instructions, during which it again admonished the jurors to avoid media coverage related to the trial. The court further instructed: "If you do encounter something about this case in the news media during the trial, end your exposure to it immediately and report to me as soon as you can." Bolivar then requested that the court ask if any of the jurors had been exposed to media coverage about the attack and, if so, to interview them at the bench. The court denied Bolivar's request, stating:

> That request is denied. I have just given the jury instructions that they are to report if they have received any such contact. The jury has been instructed now and that's been added before, they are not having any contact with anyone or reading any media reports about this case, social media. So they've been instructed in the admonition not to do that. They've also been instructed now to report whether or not that has happened. They were instructed to report whether that happened to them or believe anything like that happened to any other person. So they have those instructions. The law doesn't require or support a request that we specifically at this point in time ask them whether or not they've had any such contact. So given the admonitions, I think the law requires the jurors to come forward if they've violated the admonition or if they think someone has acted improperly. I think that's all the law requires I do. So your request is denied.

¶23 Later that day, the trial court heard argument on Bolivar's motions for change of venue and mistrial, during which Bolivar asserted the media coverage had prejudiced him and would "likely deprive[] him of a fair trial." Alternatively, Bolivar again asked the court to question the jurors as to whether they had been exposed to the newspaper article. The court denied Bolivar's motions, as well as his request to question the jurors, distinguishing between pretrial and midtrial publicity and finding it had adequately admonished the jurors to avoid information about the case outside of the courtroom. The court also noted questioning the jurors could

"potentially . . . provoke or cause someone to go and want to read that article. It's going to highlight it and bring it to their attention that it exists, when they might not have known about it before." At the end of the day, the court repeated its admonition instructing the jury not to read the news and to come forward if they encountered outside information about the case.

¶24 The following morning, the trial court questioned Juror Five after being informed that, at the end of the previous day's proceedings, he had asked the bailiff whether Bolivar's case would be dismissed based on a conversation he overheard at work. Juror Five indicated he had seen a picture of Bolivar being handcuffed by a police officer on the front page of a local newspaper and the headline "sounded like it said that [Bolivar] had perhaps sent his wife to have her killed so that she would not testify in court." Juror Five stated he had not communicated with any of the other jurors about the article, had spoken to the bailiff outside the presence of the other jurors, and did not think the article would influence him because he "still [had] to hear a lot of testimony or proof" and "the only thing [he] saw was the heading of the paper."

¶25 Bolivar moved to excuse or strike Juror Five for cause, and the trial court denied his motion. However, the court and both parties agreed that the process for identifying alternate jurors at the end of trial would be manipulated to ensure that Juror Five was designated an alternate. Bolivar also renewed his motions for change of venue and mistrial, and the court denied both, stating:

> [F]irst of all, your renewed motions are denied. Again, obviously it's a concern to the Court that there has been a great deal of publicity since the start of the trial about the events of last Wednesday. That obviously is a concern and I can't deny that. But so far that has been limited to one juror. There's no other evidence that any of the other jurors has been exposed to any of this other publicity. They've been given the admonition repeatedly, and part of the admonition is also that they should come forward if they were either intentionally or inadvertently exposed to anything improper, and none of the other ones have come forward. There's no indication that any of the other jurors have been exposed to this information through

> Juror Number 5 and he testified under oath that that was not the case.

The court cited *State v. Trostle*, 191 Ariz. 4 (1997), and *Stafford v. Burns*, 241 Ariz. 474 (App. 2017), in support of its decision.

¶26 After closing arguments and further instructions, Juror Five was designated an alternate and did not participate in deliberations. Once the jury returned its verdicts, Bolivar argued he was entitled to a new trial, again asserting it was possible other jurors had seen the article. The trial court denied the motion.

¶27 On appeal, Bolivar argues that under controlling United States Supreme Court case law, the trial court "was obligated to inquire whether the jurors had seen the Nogales International Newspaper front page story about the trial court finding Bolivar responsible for the brutal attack on [Elizabeth] and her boyfriend." Bolivar relies on *Mu'Min v. Virginia*, 500 U.S. 415 (1991), and *Skilling v. United States*, 561 U.S. 358 (2010), claiming that although this court can generally "defer to the trial court's finding that any juror who asserted their impartiality was not swayed by the article was believable, it cannot make such a deferential finding here because the trial court failed to identify any such juror and ask that question." Thus, he contends, the court erred in denying his motions for change of venue, mistrial, and new trial "because the denials were based on the trial court's failure to follow the required procedure."

¶28 In support of his argument, Bolivar asserts the trial court's decision not to individually question each juror was erroneously based on the difference between pretrial and midtrial publicity, a distinction he argues is "not warranted." He contends the proper procedure for both pretrial and midtrial publicity is "to ask each potential juror individually the simple yes-or-no question whether they have been exposed to pretrial publicity about the case." Bolivar also challenges the applicability of the case law the court cited in support of its ruling. Citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and *Marshall v. United States*, 360 U.S. 310 (1959), he argues established precedent treats pretrial and midtrial publicity the same when addressing due process and fair venue concerns. He further claims our recent decision in *Rojas*, 247 Ariz. 399, ¶¶ 5-6, "implicitly approved of the trial court's decision" to question jurors individually about their exposure to midtrial publicity.

¶29 The case law Bolivar cites is distinguishable. *Mu'Min* and *Skilling* both involve pretrial publicity and its effect on prospective jurors—

under no obligation imposed by taking an oath or by judicial admonition—and they are therefore inapplicable. And, as to Bolivar's claim that *Sheppard* implies questioning jurors about their exposure to midtrial publicity is the proper procedure, that case involved a "carnival atmosphere" and a "deluge of publicity" that undoubtedly "reached at least some of the jury." 384 U.S. at 347-48, 357-58. These circumstances were not present in Bolivar's case. Further, unlike in *Marshall*, where the trial court questioned jurors about their exposure to two newspaper articles published midtrial after "learning that [the] news accounts [about the case] had reached the jurors," 360 U.S. at 311-12, and *Rojas*, where the court questioned the jury after one juror admitted to telling several others about a midtrial social-media post related to the case, 247 Ariz. 399, ¶¶ 3-6, Bolivar does not allege that any jurors, aside from Juror Five, had been exposed to the article.

¶30 Absent an allegation that other jurors had read the newspaper, the trial court was not required to question them about exposure to the article. *See State v. Davolt*, 207 Ariz. 191, ¶ 56 (2004) ("alleged incidents of juror misconduct" in addition to publication of newspaper article related to case required to trigger court's duty to investigate). The standard Bolivar proposes—a duty to investigate even without an allegation of actual juror misconduct—would be unworkable in any trial subject to continuing press coverage and would no doubt heighten the very risk the trial court was attempting to mitigate—that jurors, upon being questioned about the article, would seek it out. Thus, although the court had discretion to question jurors as to whether they had been exposed to the midtrial publicity related to Bolivar's case, without an allegation of exposure, it was not required to do so. *See id.* ¶ 57; *State v. Salazar*, 173 Ariz. 399, 406 (1992) (court questioned jurors to determine if they had seen midtrial newspaper article absent specific allegations of misconduct).

¶31 Bolivar further contends the trial court's "confidence that its admonition would necessarily result in any jurors who saw the [newspaper] article voluntarily coming forward was unfounded." He maintains "[i]t was not even true of the one juror who was questioned" because Juror Five initially approached the bailiff to ask whether the trial had been canceled rather than to report that he had seen the article. However, during trial, Bolivar conceded, "I think that Juror Number 5 did what he needed to do . . . [and] brought to the court the fact that he read a very inflammatory headline." And, in any event, Juror Five's conduct does not defeat the presumption that the jurors followed their instructions—he informed the bailiff he had been exposed to extraneous information about the case in compliance with the court's admonition. *See Prince*, 204 Ariz. 156, ¶ 9.

Motion for Change of Venue

¶32 "A criminal defendant is entitled to a change of venue if there is a probability the dissemination of prejudicial information will deprive the defendant of a fair and impartial trial." *Davolt*, 207 Ariz. 191, ¶ 45 (citing Ariz. R. Crim. P. 10.3(b)). In judging the impact of publicity on a trial, "the relevant inquiry is the effect of the publicity on a juror's objectivity, not the mere fact of publicity." *State v. Bolton*, 182 Ariz. 290, 300-01 (1995) (quoting *State v. Bible*, 175 Ariz. 549, 566 (1993)) (addressing issue of actual prejudice from pretrial publicity). On appeal, we must determine whether "under the totality of the circumstances the publicity attendant to defendant's trial was so pervasive that it caused the proceeding to be fundamentally unfair." *Davolt*, 207 Ariz. 191, ¶ 45. We will not overturn the trial court's decision "absent a clear showing of abuse of discretion and resulting prejudice to defendant." *State v. Greenawalt*, 128 Ariz. 150, 161 (1981); *see also Davolt*, 207 Ariz. 191, ¶ 45 ("Prejudice may be presumed or actual.").

¶33 Bolivar claims the trial court abused its discretion in denying a change of venue because it failed to ask each juror whether they had seen the newspaper article.[8] Because, as discussed above, the court was not required to individually question the jurors as to whether they had seen the article, Bolivar's argument fails. *See Davolt*, 207 Ariz. 191, ¶¶ 56-57. Moreover, the court repeatedly admonished the jurors to avoid exposure to any media coverage and that, if exposed, they were to come forward and inform the court. *See Prince*, 204 Ariz. 156, ¶ 9 (we presume jurors followed instructions).[9] We conclude the court did not abuse its discretion.

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[8]The state asserts Bolivar's motion, filed after trial had started, was untimely under Rule 10.3(c), Ariz. R. Crim. P. Bolivar counters the state did not raise timeliness at the hearing below and instead addressed the merits of his motion, waiving and forfeiting any such argument. "Trial courts have discretion to extend the time for filing motions and, implicitly, to hear untimely motions." *State v. Colvin*, 231 Ariz. 269, ¶ 7 (App. 2013). Because the court had discretion to hear the motion and the state failed to object below, we consider Bolivar's argument.

[9]Although his argument centers on the trial court's failure to follow what he alleges is the "required procedure," Bolivar appears to claim he was prejudiced because the newspaper article focused on the court's determination that he had caused the attack on Elizabeth and her boyfriend with the intent to prevent Elizabeth from testifying. However, as noted, Bolivar did not allege any of the other jurors had been exposed to the article.

Motion for Mistrial

¶34 For the same reasons, Bolivar contends his motion for mistrial was improperly denied. When determining whether a mistrial was warranted, we look to "(1) whether the jury . . . heard what it should not hear, and (2) the probability that what it heard influenced [it]." *State v. Miller*, 234 Ariz. 31, ¶ 25 (2013) (second alteration in *Miller*) (quoting *State v. Laird*, 186 Ariz. 203, 207 (1996)). "[D]eclaration of a mistrial is the most dramatic remedy for a trial error and should be granted only if the interests of justice will be thwarted otherwise." *State v. Welch*, 236 Ariz. 308, ¶ 21 (App. 2014) (alteration in *Welch*) (quoting *State v. Roque*, 213 Ariz. 193, ¶ 131 (2006)). We will not disturb a court's denial of a mistrial "unless there is a 'reasonable probability that the verdict would have been different had the [improper] evidence not been admitted.'" *Id.* (alteration in *Welch*) (quoting *State v. Dann*, 205 Ariz. 557, ¶ 44 (2003)).

¶35 Here, Bolivar did not show the jury had "heard what it should not hear" with regard to the newspaper article. *Miller*, 234 Ariz. 31, ¶ 25 (quoting *Laird*, 186 Ariz. at 207). Only one juror came forward and indicated he had seen the article, and that juror stated he had not spoken to the other jurors about it; moreover, he was made an alternate and did not participate in the deliberations. *See State v. Eastlack*, 180 Ariz. 243, 256 (1994) (rejecting juror misconduct claim where complained-of juror "was excused as an alternate at the end of the evidence"). Bolivar fails to allege, much less demonstrate, that any other jurors were exposed to the article. In light of the trial court's repeated admonition to avoid and report any exposure to media coverage related to the case, it did not abuse its discretion in denying Bolivar's motion for mistrial. *See Moody*, 208 Ariz. 424, ¶ 124; *see also Prince*, 204 Ariz. 156, ¶ 9.

Motion for New Trial

¶36 Similarly, Bolivar contends the trial court erred in denying his motion for new trial without first asking each juror whether they had seen

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The only juror who indicated he had seen it stated he could remain fair and impartial and, notably, was later designated an alternate. *See Bolton*, 182 Ariz. at 301 (jurors able to be objective and decide case fairly); *see also State v. Eastlack*, 180 Ariz. 243, 256 (1994) (rejecting juror misconduct claim where complained-of juror "was excused as an alternate at the end of the evidence").

the newspaper article.[10] Rule 24.1(c)(3)(A), Ariz. R. Crim. P., provides that a court may grant a new trial if "one or more jurors . . . receiv[ed] evidence not admitted during the trial." Thus, the first step in determining whether extraneous information tainted a verdict is "[w]hether the material was actually received" by the jury. *Rojas*, 247 Ariz. 399, ¶ 12 (quoting *State v. Aguilar*, 224 Ariz. 299, ¶ 6 (App. 2010)). Bolivar neither alleged nor presented any evidence that any of the other jurors had seen the newspaper article or that Juror Five, who did not participate in deliberations, had communicated information about the article to the other jurors. Contrary to Bolivar's argument, the court was not required to separately ask each juror whether they had seen the article, *see Davolt*, 207 Ariz. 191, ¶ 57, and we find no abuse of discretion, *see Rojas*, 247 Ariz. 399, ¶ 11.

Alternative Counts

Validity of Counts Two and Nine

¶37 Bolivar argues his convictions for Counts Two and Nine "should be vacated because the two charges were invalid under A.R.S. § 13-1417(D) for not being charged as alternate counts [to Count One] in the Information." A trial court's application of a statute is reviewed de novo. *See State v. Carrasco*, 201 Ariz. 220, ¶ 4 (App. 2001).

¶38 Section 13-1417(A) provides that "[a] person who over a period of three months or more in duration engages in three or more acts in violation of § 13-1405[, sexual conduct with a minor], 13-1406[, sexual assault,] or 13-1410[, molestation,] with a child who is under fourteen years of age is guilty of continuous sexual abuse of a child." Subsection D provides that "[a]ny other felony sexual offense involving the victim shall not be charged in the same proceeding with a charge under this section unless the other charged felony sexual offense occurred outside the time period charged under this section or the other felony sexual offense is charged in the alternative." § 13-1417(D).

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[10] The state argues Bolivar's argument is waived and forfeited because he did not argue in his motion for new trial that the trial court should have individually polled the jurors and he failed to argue fundamental error in his opening brief. However, Bolivar argued in his motion for new trial that "each juror must be questioned as to their knowledge of the article." We conclude he adequately raised this issue below and therefore review for harmless error. *See Henderson*, 210 Ariz. 561, ¶ 18.

¶39 Here, Count One of the information charged Bolivar with continuous sexual abuse of a child under § 13-1417 committed between May 7, 2006, and May 6, 2014. Count Two charged him with sexual conduct with a minor committed between May 7, 2006, and May 6, 2010, and Count Nine charged him with molestation of a child committed between May 7, 2013, and May 6, 2014. During Bolivar's closing argument, the trial court excused the jury and stated it was concerned that Counts Two and Nine were included within the time period alleged in Count One, violating § 13-1417(D).

¶40 The state moved to amend the information, and eventually, to dismiss Count One without prejudice. The trial court proposed modifying the verdict forms and jury instructions to reflect the alternative nature of Counts One and Two and Counts One and Nine, and the state ultimately agreed to the modification. The court stated it believed:

> [T]he amendments to the verdict form cure any potential problem in the case. Clearly under the statute, these counts can be charged in the same information as long as they are charged in the alternative. The amendments to the verdict form . . . basically accomplish that task or that requirement by instructing the jury they can only find in the alternative. I think we cure the problem with the lack of being charged in the alternative with the amendments to the jury form, and instructing the jury that they can only find in the alternative.

¶41 Bolivar objected that the alternative instructions would lead to confusion because the jury would have "more options on one matter and then not on others." After returning to his closing argument, Bolivar told the jury it would be instructed "to either find Counts 1 or 2, or 1 or 9. So there's going to be alternatives. It's called alternative; 1 or 2, but you will be instructed you can't find both. You can't find 1 and 2, for example." During the state's rebuttal closing argument, it noted that there had been a change in Counts One, Two, and Nine and urged the jury to return a not guilty verdict on Count One and guilty verdicts on Counts Two and Nine.

¶42 In instructing the jury as to the verdict forms, the trial court stated: "Count 1, continuous sexual abuse of a child. This is the language on the charge, and then you are to put an 'x' next to one box or the other, guilty or not guilty." The court used similar language when discussing the

verdict form for Count Two, and explained the alternative nature of the charges as follows:

> You see the line in capital letters—and this is what [the state] was just referring to—we've just reviewed Count 1 and we've reviewed Count 2. Count 1 and 2 are charged in the alternative. If you find the defendant guilty of either count, you cannot find him guilty of the other count. All right, so what that means is you cannot find the defendant guilty of both Counts 1 and 2. He can be found guilty either of Count 1 or Count 2, he cannot be found guilty of both. And of course, it's possible you can find him not guilty of both counts. He cannot be convicted of both counts; he can be acquitted or found not guilty of both counts, but he cannot be found guilty of both counts.

The court gave a similar explanation as to Counts One and Nine, instructing the jurors to return verdicts on Counts One, Two, and Nine, but precluding them from returning guilty verdicts for either of the alternative counts along with Count One. The jury found Bolivar guilty of all counts except Count One.

¶43 Bolivar, relying on *State v. Larson*, 222 Ariz. 341 (App. 2009), claims the remedy employed by the trial court "did not comply with § 13-1417(D), which mandates that the counts be charged in the alternative in the original charging document." Bolivar contends that because the information "did not charge Counts Two and Nine as alternative counts to Count One," "[t]he jury did not evaluate the evidence in the context of alternative counts" and therefore he was prejudiced. He also claims he was "prejudiced by being convicted of and sentenced for two counts that never should have been included in the Information."

¶44 The state counters that because Counts Two and Nine were charged in the alternative to Count One before the jury began deliberating, the information was properly amended. The state further contends *Larson* does not support Bolivar's position because it does not state "that the *original* indictment or information must charge alternative offenses under § 13-1417(D) and that there can be no amendment to alter those charges to reflect the language of a statute." Further, the state asserts, any such amendments "were formal or technical because they did not change the

nature of the offense[s charged] or otherwise prejudice" Bolivar and had no impact on his defense.

¶45 Contrary to Bolivar's argument, *Larson* does not require that the original information charge in the alternative, nor does it state that an amendment to the information cannot remedy noncompliance with § 13-1417(D). Larson was charged with continuous sexual abuse of a minor but was convicted of sexual conduct with a minor after the trial court erroneously instructed the jury that sexual conduct was a lesser-included offense of continuous sexual abuse. *Larson*, 222 Ariz. 341, ¶¶ 2, 3, 17. Because the two counts were not charged in the alternative in the original indictment, and the indictment was not later amended to include the sexual-conduct charge, "the statute prohibited Larson from being convicted of sexual conduct with a minor for any of the acts alleged as part of the continuous sexual abuse of a minor," even though he was acquitted as to continuous sexual abuse. *Id.*

¶46 Under Rule 13.5(b), Ariz. R. Crim. P., charges may be amended "to correct mistakes of fact or remedy formal or technical defects." A defect in an indictment is formal or technical, and thus may be corrected through an amendment, "when its amendment does not change the nature of the offense[s] or otherwise prejudice the defendant." *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 17 (App. 2013). Generally, "a technical or formal defect in a charging document may be remedied," through amendment, "whenever such defect is presented." *State v. Bruce*, 125 Ariz. 421, 423 (1980); *see also State v. Delgado*, 174 Ariz. 252, 254-55 (App. 1993) (amending indictment after close of evidence with jury instruction to correct defective charge that alleged crime not recognized under Arizona law proper).

¶47 Although the information did not originally charge Counts One and Two and Counts One and Nine in the alternative, the jury was informed before deliberations that the information had been amended to charge those counts in the alternative in compliance with § 13-1417(D). This amendment did not change the nature of the underlying offenses; Bolivar was not convicted of an offense with which he had not been charged and he was on notice of all the charges against him. *See Delgado*, 174 Ariz. at 255 (amendment proper where defendant had adequate notice and opportunity to prepare to defend against charged act). And, to the extent Bolivar argues his defense was impaired or prejudiced in his opening brief, he does not properly develop or otherwise support this argument and we do not address it. *See* Ariz. R. Crim. P. 31.10(a)(7)(A) (appellant's opening brief must contain supporting reasons for contentions with citations of legal authorities); *Bolton*, 182 Ariz. at 298 ("Failure to argue a claim on appeal

constitutes waiver of that claim."); *see also State v. Lindner*, 227 Ariz. 69, n.1 (App. 2010) (arguments raised in reply brief but not advanced in opening brief waived).

¶48 Notably, Bolivar failed to address the charges' non-alternative nature until after the trial court brought attention to this issue during closing arguments. Bolivar could easily have discovered this defect by the exercise of reasonable diligence before trial. *Cf. State v. Puryear*, 121 Ariz. 359, 362 (App. 1979) (court did not err in denying relief based on untimely objection to indictment). Moreover, his conviction was consistent with the requirements of § 13-1417(D)—he was convicted of and sentenced for Counts Two and Nine but acquitted as to Count One—accordingly, we find no error.

Jury Instructions

¶49 Bolivar further argues that, "[a]ssuming the trial court's end-of-trial modification of the verdict forms to reflect 'alternative' charges properly complied with § 13-1417(D), the 'guilty' verdicts on Counts Two and Nine are invalid following the 'not guilty' verdict on Count One." Based on his assumption that the jury signed the verdict form for Count One first, Bolivar argues "the jury should not have rendered verdicts on Counts Two and Nine at all." Citing *State v. Montoya*, 125 Ariz. 155, 157 (App. 1980), he claims the court's instructions to the jury as to the alternative nature of the charges were flawed as a matter of law because the court did not "instruct[] the jurors on the difference between the two charges, and inform[] them that they [can] sign one form of verdict only." "We review de novo whether jury instructions correctly state the law . . . ." *State v. Prince*, 226 Ariz. 516, ¶ 77 (2011).

¶50 Although *Montoya* states that the trial court should instruct jurors on the alternative nature of greater and lesser-included charges and that they can sign only one form of verdict, it also provides that there is no error "as long as the jury is instructed that it may not convict on both counts." 125 Ariz. at 157. Here, the jury was properly instructed it could not convict Bolivar of both Counts One and Two or Counts One and Nine. Indeed, Bolivar was acquitted of Count One and convicted of Counts Two and Nine. Thus, the jury instructions correctly stated the law, and we find no error.

Sufficiency of Evidence

¶51 Bolivar asserts his convictions for Counts Four through Eight, the counts of sexual abuse and sexual assault related to the second and third

acts of sexual intercourse, should be vacated because the evidence was insufficient to show he had known Becca did not consent to the sexual contact. Sufficiency of the evidence is a question of law we review de novo. *Felix*, 237 Ariz. 280, ¶ 30. "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction," *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25 (1976)), that is, where it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the [fact-finder]," *State v. Arredondo*, 155 Ariz. 314, 316 (1987). "Sufficient evidence may be comprised of both direct and circumstantial evidence and be substantial enough for a reasonable person to determine that it supports a verdict of guilt beyond a reasonable doubt." *Felix*, 237 Ariz. 280, ¶ 30 (citation omitted).

¶52 As noted, Bolivar was charged with six felony offenses related to three acts of sexual intercourse. Count Three of the amended information charged Bolivar with sexual assault related to the first act of intercourse, "to wit: [Becca], [Bolivar's] penis in her vagina, in [Becca's] bedroom." Count Four charged Bolivar with sexual abuse, "to wit: [Bolivar's] hand on [Becca's] genital area, in parent's bedroom," and Count Five charged sexual assault, "to wit: [Bolivar's] penis in [Becca's] vagina, in parent's bedroom." Both Counts Four and Five were related to the second act of intercourse. As to the third act of intercourse: Count Six charged sexual assault, "to wit: [Bolivar's] penis in [Becca's] vagina, in parent's bathroom"; Count Seven charged sexual abuse, "to wit: [Bolivar's] hand on [Becca's] genital area, in parent's bathroom"; and Count Eight charged sexual abuse, "to wit: [Bolivar's] hand on [Becca's] breast, in parent's bathroom."

¶53 Pursuant to A.R.S. § 13-1404(A), "[a] person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person who is fifteen or more years of age without consent of that person." Under A.R.S. § 13-1406(A), "[a] person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person." Thus, as to both sexual abuse and sexual assault, the state must prove the defendant intentionally and knowingly engaged in sexual conduct and that the defendant knew such conduct was without the consent of the victim. *State v. Kemper*, 229 Ariz. 105, ¶ 5 (App. 2011) (sexual assault); *State v. Witwer*, 175 Ariz. 305, 308 (App. 1993) (sexual abuse).

¶54 Becca testified Bolivar began to touch her sexually when she was approximately four to five years old. When she was between six and eight years old, Bolivar forced her to perform oral sex on him, after which

he told her "it was a game" and she "didn't have to tell [her] mom." When asked how she felt after this incident, Becca responded, "I didn't feel anything. I didn't—I was very small, so I didn't exactly know what was going on. Plus, I mean, he's my dad. It was a game. I didn't really know, so I just went on." Becca testified Bolivar had subsequently forced her to perform oral sex on him "countless times," and Bolivar often initiated oral sex by telling Becca she "owed him" and asking her when she was "going to pay." She also stated she would sleep in her brothers' rooms "so nothing would happen" and Bolivar "would get mad."

¶55 Bolivar first started trying to have intercourse with Becca when she was between eleven and thirteen years old. She testified Bolivar would come into her room, lock the door, and "make [her] perform oral sex on him or try to have intercourse with [her]." Becca stated that when Bolivar had tried to have intercourse with her, she "wouldn't really say or like do anything. And then he would like tell me, like turn around and I would, and he always [tried] to get me to bend over, but I wouldn't."

¶56 Becca testified that when she was fifteen years old, Bolivar had sexual intercourse with her three times. As to the first act of intercourse, Becca testified she had been asleep in her room when she woke up to Bolivar touching her body. Bolivar began to have intercourse with her, and she told him to stop. He did not stop and "told [her] to shut up." When asked how she felt during the incident, Becca stated she had been in physical pain, and "[e]motionally . . . [her] mind was completely blank" and she was "speechless."

¶57 Becca testified the second act of intercourse had occurred while she was in her parent's room putting her younger brother to bed. Bolivar came into the room, locked the door, "pulled" her toward him, removed her pants and underwear, and had sexual intercourse with her. The state asked Becca how she had felt at the time of the second act of intercourse, and she stated that "it still hurt." When asked if she "want[ed] [Bolivar] to be having sex with [her]," she replied, "No."

¶58 As to the third act of intercourse, Becca testified she had been bathing her younger brother in her parent's bathroom when Bolivar came up behind her, held her "really tight," "started grasping [her] breasts," unbuttoned her pants, touched her vagina, and "made [her] bend over" before having intercourse with her. She also testified Bolivar kept "pushing [her] back down," preventing her from standing up. Again, the state asked Becca if she had wanted to have sexual intercourse with Bolivar, and she replied, "No."

¶59 Bolivar does not dispute that he intentionally and knowingly engaged in sexual contact with Becca as charged in Counts Four through Eight. Rather, he challenges only the sufficiency of the evidence that he knew Becca did not consent to this contact. Bolivar argues that although the state presented sufficient evidence to show he knew the contact related to the first act of intercourse occurred without her consent, "[t]he State simply presented no evidence that, as to the second and third alleged incidents of intercourse, [Becca] communicated to Bolivar that she did not consent to the alleged contact or that Bolivar otherwise knew that the alleged contact was without the consent of [Becca]." He also appears to rely on the fact that when he asked Becca, "Did I force you?" during a family confrontation, she did not affirmatively reply.

¶60 The state counters that the evidence was sufficient to show Bolivar had known Becca did not consent in those instances based on the ten-year history of abuse, and that it is "*unreasonable* to infer, as Bolivar suggests, that [Becca]'s failure to communicate 'stop' to him during the second and third incidents of sexual intercourse somehow indicated that she consented to his assaults when she was 15 years old and, thus, he did not know his actions were 'without consent.'" Further, the state argues, considering "the totality of the evidence, including the continuous nature of Bolivar's abuse of [Becca], [his] position as an authority figure, and the lack of any behavior on the part of [Becca] indicating that she consented to Bolivar's actions," the jurors could reasonably conclude "Bolivar knew . . . all of his sexual contact with [Becca] was without her consent." We agree.

¶61 The record reflects substantial evidence that Bolivar knew Becca did not consent to the sexual conduct charged in Counts Four through Eight. As to Counts Four and Five, Becca testified Bolivar came into the room and locked the door before "pull[ing]" her toward him. As to Counts Six, Seven, and Eight, she stated Bolivar came up behind her and held her "really tight" before forcing her to bend over and pushing her down so that she could not stand up. And, Becca testified she had not wanted to have sex with Bolivar as to both the second and third acts of intercourse.

¶62 Moreover, the credibility of Becca's testimony was a matter for the jury to determine. *See State v. Lucero*, 204 Ariz. 363, ¶ 20 (App. 2003); *see also State v. Williams*, 111 Ariz. 175, 177-78 (1974) (explaining "conviction may be had on the basis of the uncorroborated testimony of the [victim] unless the story is physically impossible or so incredible that no reasonable person could believe it" and jury must determine whether victim's testimony "credible or reasonable"). In light of Becca's testimony directly

related to the second and third acts of intercourse, as well as her testimony about the history of abuse and the measures she had taken to avoid sexual contact with Bolivar, the state presented sufficient evidence from which the jurors could reasonably have concluded Bolivar knew Becca did not consent to the sexual contact. *See State v. Hall*, 204 Ariz. 442, ¶ 49 (2003) (evidence sufficient where "the totality of the circumstances demonstrate[] guilt beyond a reasonable doubt").

Constitutionality of A.R.S. § 13-1407(E)

¶63 Finally, Bolivar claims he was deprived of due process by Arizona's statutory scheme under A.R.S. § 13-1407(E) because at the time of his trial, this statute, in providing for an affirmative defense, placed the burden of proving lack of sexual motivation on the defendant for sexual abuse and molestation of a child.[11] *See* 2018 Ariz. Sess. Laws, ch. 266, §§ 1, 2. Instead, he asserts, the state should have been required to prove sexual motivation because such motivation "should [have been] considered an element of the offense." As Bolivar concedes, our supreme court has already determined that this statutory scheme does not violate due process. *See State v. Holle*, 240 Ariz. 300, ¶ 40 (2016) ("Treating lack of sexual motivation under § 13-1407(E) as an affirmative defense which a defendant must prove does not offend due process."). We are not at liberty to overrule or disregard that court's rulings, *see State v. Foster*, 199 Ariz. 39, n.1 (App. 2000), and therefore we do not consider this argument further.

Disposition

¶64 For the foregoing reasons, we affirm Bolivar's convictions and sentences.

[11]A 2018 statutory amendment eliminated lack of sexual motivation as a defense and changed the definition of sexual contact. 2018 Ariz. Sess. Laws, ch. 266, §§ 1, 2. In relevant part, the former version of § 13-1407(E) provided: "It is a defense to a prosecution pursuant to section 13-1404 or 13-1410 that the defendant was not motivated by a sexual interest." *Id.*