IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GARY E. STARKS,
Appellant.

No. 2 CA-CR 2019-0288
Filed May 27, 2021

Appeal from the Superior Court in Pima County
No. CR20161983001
The Honorable Deborah Bernini, Judge

REVERSED AND REMANDED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Rosenstein Law Group PLLC, Scottsdale
By Craig Jacob Rosenstein, David Joseph Maletta, and Steven George Scharboneau
Counsel for Appellant

OPINION

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

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Gary Starks was convicted of child molestation and indecent exposure to a minor under fifteen. The trial court sentenced him to a fifteen-year term of imprisonment followed by lifetime probation. On appeal, Starks contends (1) the state improperly elicited testimony from a "cold" expert that quantified the likelihood that a victim would falsely report abuse; (2) the state improperly elicited profile evidence from the cold expert; (3) the court erred by granting the state's motion to amend the indictment to conform to the evidence; and (4) the prosecutor engaged in improper vouching. Although we conclude there was no improper vouching or improper amendment of the indictment and any error regarding the likelihood of false reports by the victim was waived, Starks's convictions must be reversed because the expert's profiling testimony constitutes reversible error.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the convictions. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999). Starks, a friend of A.W.'s mother since childhood, first entered A.W.'s life when she was about eight years old. A.W. lived with her mother and siblings at the time, and Starks would visit their apartment two or three times a week. A.W. and her siblings called him "Uncle Gary." When A.W. was nearing the end of fourth grade, the family moved into Starks's mother's house and Starks continued to visit A.W. and her family frequently. When A.W. was in sixth grade, the family moved to another apartment and Starks did not see A.W. for about a year because she and her siblings had been placed in a group home. Starks resumed frequent contact with the children once the family was reunited. A.W.'s mother was in poor health, and Starks served as a "parental figure" to A.W.

¶3 When A.W. was in eighth grade, she told a friend at school that Starks had engaged in sexual acts with her. The friend reported the account to a school counselor, who reported it to police. A grand jury

indicted Starks for sexual abuse, sexual conduct with a minor, sexual assault, indecent exposure, and child molestation, all of a child under fifteen.

¶4 Starks's first trial ended in a mistrial when the jury was unable to reach unanimous verdicts. In his second trial, Starks was tried for sexual conduct, sexual abuse, and indecent exposure. The jury found Starks guilty of indecent exposure, the lesser-included offense of child molestation on the sexual conduct count, and not guilty of sexual abuse. He was sentenced as described above. Starks timely appealed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Cold Expert Testimony

¶5 Starks argues the trial court erred by admitting the state's cold expert testimony, which he contends improperly quantified the likelihood of a victim falsely reporting sexual abuse and provided a profile of an offender that "invite[d] the jury to find that Appellant's actions matched those of a typical perpetrator of child sexual abuse." We review a trial court's decision to admit evidence for abuse of discretion. *State v. Haskie*, 242 Ariz. 582, ¶ 11 (2017).

¶6 As an initial matter, we agree with the state that Starks has waived any claim of error regarding testimony that quantified the likelihood of a false report by a victim. In ruling on Starks's pretrial motion to preclude the expert's testimony, the trial court ruled that the expert must testify "consistent with the ruling in *State v. Lindsey*," the case that Starks now argues precludes the challenged testimony. *See State v. Lindsey*, 149 Ariz. 472, 474 (1986) (expert may not "give specific opinions with regard to her view of credibility" of a victim). The court therefore effectively granted Starks's motion as to any testimony violating *Lindsey*, even though it had generally denied it otherwise. Because the trial court's ruling expressly allowed only testimony "consistent with . . . *Lindsey*"—and thus the court likely would have granted relief from testimony violating *Lindsey*—Starks was required to contemporaneously object to the testimony to preserve a claim of error under *Lindsey*. *See State v. Tovar*, 128 Ariz. 551, 554 (App. 1980) (objection to evidence waived where motion in limine granted but no objection raised at trial); *see also State v. Briggs*, 112 Ariz. 379, 382 (1975) (objectionable matter must be "brought to the attention of the trial court in a manner sufficient to advise the court that the error was not waived"); *State v. Lichon*, 163 Ariz. 186, 189 (App. 1989) ("Counsel may not sit back and allow error to occur when a prompt objection might have allowed the court to cure the problem."). Although motions in limine generally preserve

issues for appellate review, Starks's pretrial motion did not specifically urge the preclusion of testimony quantifying the likelihood of a false accusation. He therefore was required to contemporaneously object if he wished to preserve that claim. The issue has thus been forfeited for all but fundamental error review. *See State v. Escalante*, 245 Ariz. 135, ¶¶ 12, 21 (2018). And because Starks has not meaningfully argued fundamental error on appeal, he has waived all review. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008).[1]

¶7 As the state concedes, however, Starks preserved a claim of error regarding profile evidence. In his motion in limine filings, Starks expressly sought to preclude the state's expert, Dr. Wendy Dutton, from testifying about "the process of victimization" and "the behaviors of perpetrators" to "create a profile of a perpetrator," which could then be used to "implicitly show that [Starks] has the character of a child abuse perpetrator."[2] In support of his contention that such testimony should be precluded, he cited *Haskie*, 242 Ariz. 582, and *State v. Ketchner*, 236 Ariz. 262 (2014), the same cases he relies upon in his appeal. Because the trial court denied the motion in limine, Starks did not need to renew his objection at trial to preserve this issue for appeal. *See Briggs*, 112 Ariz. at 382 ("A properly made motion in limine will preserve appellant's objection on

[1] At oral argument, Starks argued that *Moreno-Medrano* was "overruled and repudiated" by our supreme court in *State v. Vargas*, 249 Ariz. 186 (2020). We disagree. Although the supreme court disapproved of applying *Moreno-Medrano* in an "overly formulaic" way to require a defendant to explicitly argue fundamental error for each instance of error within a claim of cumulative prosecutorial error, *see id.* ¶ 21, it did not reject *Moreno-Medrano* generally. Rather, it concluded that because the defendant had acknowledged that he had not objected at trial and had cited the proper fundamental error standard of review for the cumulative error claim, *Moreno-Medrano* did not apply. *See id.* ¶¶ 20-21.

[2] The state previously disclosed that Dutton might testify about, among other things, stranger versus intimate abuse, and Starks had asked Dutton in a pretrial interview about what she knew of this topic. Dutton talked about "the strategies that perpetrators use to build a relationship with the victim," including entering a relationship with the parent; offering help to the parent; becoming verbally, emotionally, or physically abusive to the parent; taking over discipline of the child; and becoming overly harsh. Starks attached a transcript of the interview to his motion in limine.

appeal without need for further objection if it contains specific grounds for the objection."). We thus address the challenged "profile" evidence.

¶8 Dutton testified as a cold expert, meaning she had not reviewed the case or talked to anyone about its details. During its direct examination, the state asked her, "Do you know based on your research what strategies perpetrators use to build a relationship with a victim?" Dutton replied that some victims reported that their abusers would "do or say things to gain power and control over them and over their primary caretakers," such as "enter[ing] into the family," "tak[ing] over discipline of the children," and "becoming overly harsh or abusive," including toward the parent.

¶9 Later, the state asked Dutton, "How common is it that a perpetrator may try to commit a sexual act on a sleeping child?" Dutton replied that children "fairly commonly" reported that abuse occurred at night while asleep in their bed, and that perpetrators do this to take advantage of the child's confusion upon awakening—including possible uncertainty about whether the abuse occurred in a dream—to conceal the abuse.

¶10 The state then asked, "Is it common for abuse to happen in a home where other family members are?" Dutton replied that children "quite often" reported that abuse occurred "with someone else in the same house, sometimes in the same room or even the same bed." She explained the other people present "don't necessarily realize what's going on" because "[t]hey may be sleeping" or distracted by other activities.

¶11 Testimony by a cold expert—an expert who testifies "to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case"—is generally permitted under Rule 702, Ariz. R. Evid. *State v. Salazar-Mercado*, 234 Ariz. 590, ¶¶ 9, 11 (2014) (quoting Fed. R. Evid. 702, Advisory Committee Notes, 2000 amend.). A cold expert may testify about "general patterns of behavior" of child sexual abuse victims. *Lindsey*, 149 Ariz. at 473. Thus, testimony by a cold expert about "how children perceive sexual abuse," "behaviors involving disclosure of abuse," and "circumstances in which children may make false allegations" is generally admissible, subject to the trial court's discretion to exclude it under Rules 702 and 403. *See Salazar-Mercado*, 234 Ariz. 590, ¶¶ 2, 20 (rejecting challenge to Dutton's testimony about "Child Sexual Abuse Accommodation Syndrome" to "explain[] behaviors commonly exhibited by child sexual abuse victims"). Such testimony may "help[] the jury to understand possible reasons for . . .

delayed and inconsistent reporting." *Id.* ¶ 15; *see Haskie*, 242 Ariz. 582, ¶ 16 ("[E]xpert testimony that explains a victim's seemingly inconsistent behavior is admissible . . . .").

¶12 However, our supreme court has concluded that "[t]he state may not offer 'profile' evidence as substantive proof of the defendant's guilt." *Haskie*, 242 Ariz. 582, ¶ 15. "Profile evidence tends to show that a defendant possesses one or more of an informal compilation of characteristics or an abstract of characteristics typically displayed by persons engaged in a particular kind of activity." *Id.* ¶ 14 (quoting *Ketchner*, 236 Ariz. 262, ¶ 15). It is "offered to implicitly or explicitly suggest that because the defendant has those characteristics, a jury should conclude that the defendant must have committed the crime charged." *Id.* (emphasis omitted). But "[a]lthough expert testimony about victim behavior that also describes or refers to a perpetrator's characteristics has the potential to be 'profile' evidence, it is not categorically inadmissible." *Id.* ¶ 16. Such evidence may be admitted, subject to Rule 403, Ariz. R. Evid., if "it is relevant for a reason other than to suggest that the defendant possesses some of those characteristics and therefore may have committed the charged crimes." *Id.* ¶ 17. The factual differences in *Ketchner* and *Haskie* illustrate the distinction between improper profile testimony and testimony that permissibly refers to offender characteristics to explain victim behavior.

¶13 In *Ketchner*, a homicide case, the state's cold expert testified about common characteristics of domestic violence victims and their abusers. She testified that "separation assault" may occur when a victim "decides to leave a violent relationship" and the abuser feels they have "lost their control." *Ketchner*, 236 Ariz. 262, ¶ 14. She explained that when the victim leaves, "[i]t's a very high risk period for homicide," and "another aspect of why people go back again, because they're not safe just because they leave the relationship." *Id.* The expert then listed risk factors for "lethality" in an abusive relationship, including a gun in the home, stepchildren, prior threats to kill, drug and alcohol use, forced sex, and strangulation. *Id.*

¶14 In *Ketchner*, the court stated the expert's testimony "about separation violence and lethality factors was inadmissible profile evidence." *Id.* ¶ 19. In reversing Ketchner's murder and burglary convictions, the court reasoned that such profile testimony "may not be used as substantive proof of guilt because of the 'risk that a defendant will be convicted not for what he did but for what others are doing.'" *Id.* ¶ 15 (quoting *State v. Lee*, 191 Ariz. 542, ¶ 12 (1998)). It rejected the state's

argument that the testimony was admissible to "show that the relationship between [the victim] and [the defendant] was in many ways typical of relationships involving abuse." *Id.* ¶¶ 16, 19. The court concluded that the testimony "did not explain behavior by [the victim] that otherwise might be misunderstood by a jury" and "[t]here was no reason to elicit this testimony except to invite the jury to find that [the defendant's] character matched that of a domestic abuser." *Id.*

¶15 But in *Haskie*, a domestic violence case, our supreme court ruled there was no error where "a few of [the expert's] general statements referred to an abuser's characteristics, such as, 'the abusive partner will turn the violence around and say that if you hadn't done this or you had done that as I told you to do, this never would have happened, so it's your fault.'" *Haskie*, 242 Ariz. 582, ¶ 20. The court reasoned that the statements, unlike those in *Ketchner*, "primarily served the purpose of explaining victim behavior" and were relevant to help the jury understand that behavior in circumstances where such explanation was relevant to explain, among other things, the victim's inconsistent statements. *Id.* ¶¶ 19-20.

¶16 In this case, the state elicited the kind of profile testimony that was deemed inadmissible by the court in *Ketchner*. Dutton's response to the prosecutor's question about perpetrator strategies described a profile of a sexual abuser: someone who enters a family, takes over discipline of the children, and treats the existing parent and the children harshly. In her response, Dutton did not attempt to explain any victim behavior, unlike the testimony found to be proper in *Haskie*; she simply listed things that sexual abusers commonly do to establish a relationship with the victim to enable the sexual abuse. Indeed, the question did not call for Dutton to relate the strategies of perpetrators to any conduct of victims that might have needed to be explained. We see no purpose for the question or the information it elicited other than to improperly invite the jury to conclude that Starks was guilty because his actions matched those that the expert reported to be common to perpetrators.

¶17 The prosecutor further developed the profile evidence by asking Dutton how common it was for perpetrators to abuse victims while sleeping, and Dutton responded that it was "fairly common." There was no purpose to elicit the prevalence of this manner of abuse other than to invite the jury to conclude that Starks was guilty because he had been reported to do what other offenders commonly do. Dutton went on to relate how this manner of abuse might affect a victim's perception, which may have served the permissible purpose of "explaining victim behavior." *Haskie*, 242 Ariz. 582, ¶ 20. But the sole focus of the prosecutor's question

on perpetrator conduct without any reference to its effect on the victim demonstrates a primary purpose of showing Starks's guilt by establishing a profile of common offender conduct that matched what Starks had allegedly done.

¶18 The prosecutor similarly developed the profile by eliciting from Dutton how common it is for perpetrators to abuse victims with others present in the residence. The answer—that this happened "quite often"—once again invited the jury to find Starks guilty because he had been reported to abuse his victim with another person present, and perpetrators commonly do the same. Again, nothing in the question invited Dutton to relate how this circumstance might "explain behavior by [the victim] that otherwise might be misunderstood by a jury," *Ketchner*, 236 Ariz. 262, ¶ 19, and indeed Dutton did not provide any such information in response to the question.

¶19 In short, we reject the state's contention that Dutton "never provided a profile of an offender." Her testimony created a profile of an offender as someone who enters the family, takes over discipline from the existing parent, is harsh to the child or the existing parent, and eventually sexually abuses the child, "fairly commonly" while the child is sleeping or "quite often" with others present. And, unlike her testimony in *State v. Ortiz*, 238 Ariz. 329 (App. 2015), in which this court affirmed the admission of Dutton's testimony against a profiling challenge, her explanation of her role as a cold expert in this case was minimal. As described above, she noted that she did not know the facts of the case and stated she was testifying "about the research in the field of child sexual abuse" and her experience therein. But she did not explain, as she did in *Ortiz*, that "she did not wish to know the facts in order to prevent her from 'purposely or inadvertently tailor[ing her] testimony to fit the facts of the case' [or] that her testimony was not meant to be an opinion on whether or not the victim had been abused in this case." 238 Ariz. 329, ¶ 20.

¶20 The state cites a Michigan case, *People v. Murray*, 593 N.W.2d 690, 694 (Mich. Ct. App. 1999), for the proposition that there is no error when profile evidence is elicited from a cold expert. But in *Ketchner*, our supreme court ruled such profile evidence was improper without any indication that the expert ever applied the profile to the facts of that case. 236 Ariz. 262. Under Arizona law we must decide each case based on the specific testimony presented and "consider the prejudicial effect of the expert's testimony as a whole, as well as that of each individual statement offered." *See Haskie*, 242 Ariz. 582, ¶¶ 18, 24. Thus, to the extent *Murray*

supports the state's viewpoint, it is contrary to binding precedent here and is inapposite.

¶21 The state also contends that the testimony was "introduced only to explain how a sexual perpetrator from outside the immediate family may establish a relationship with his victim" and argues that this is permissible, citing *Ortiz*. But there is no indication that in *Ortiz*, Dutton testified as to perpetrator strategies establishing a profile like the one created here. Although Dutton testified about "the 'grooming' process," which necessarily referred to perpetrator conduct, the testimony related how that conduct affected a child-victim by acquainting him or her with physical contact and sexuality. *Id.* ¶ 7. Her testimony about grooming was part of a broader line of questioning about the stages of victimization generally. We concluded that the information did not merely help the jury understand the behavior of perpetrators, but also victims. *See id.* ¶ 24. Because the questioning and testimony in this case focused on the behavior of perpetrators and lacked the larger context of victimization, we do not reach the same conclusion here. We conclude that the trial court erred in admitting the challenged profile testimony.

¶22 Our dissenting colleague argues that "the objected-to testimony is not profile evidence at all," contending that "it did not amount to profile evidence" because it merely "implicated perpetrator behavior." We disagree. The challenged testimony clearly establishes a set of behavioral characteristics typically displayed by perpetrators that matches the behaviors of the defendant. Our supreme court has identified such evidence as impermissible profile evidence. *See Escalante*, 245 Ariz. 135, ¶ 22. We thus have analyzed it as such.

¶23 Our dissenting colleague also is "at a loss" to understand what is "suddenly objectionable" about Dutton's testimony here when, according to him, "[w]e have repeatedly held that her testimony regarding the 'process of victimization' and other observations of child sex abuse victims is perfectly acceptable." Indeed, in other cases we have found Dutton's testimony acceptable, but that does not relieve us of the responsibility of reviewing challenges to her testimony on a case-by-case basis when it is challenged. As our supreme court has cautioned, "The danger of 'cold' evidence describing the interaction between offenders and victims is that it may stray into prejudicial and potentially improper profile evidence." *Haskie*, 242 Ariz. 582, ¶ 19. That danger has materialized here.

¶24 Our colleague next contends that the state needed Dutton's testimony "to develop . . . a credible basis" for the facts introduced in its

case in chief. Given that the state's case was based on the disputed testimony of a single victim, we do not disagree that the state had a substantial need to explain her testimony to the extent it was inconsistent or counterintuitive. But this could have been achieved solely through testimony focusing on why a victim may respond in certain ways to what a perpetrator may do. The challenged testimony here instead focused on establishing certain conduct as common or typical among perpetrators. The challenged testimony was not essential to explaining the victim's behavior and created the risk that jurors might convict Starks for what others have done. Our colleague does not recognize any distinction, but we do.

¶25 We do not find persuasive our colleague's justifications for challenged portions of testimony. According to the dissent, Dutton's testimony that it is "fairly common[]" for a perpetrator to "try to commit a sexual act on a sleeping child" properly rebutted Starks's claim that the victim's account of the abuse was "not realistic"—an argument Starks had made in his first trial and did again here. But Starks did not argue that it was unrealistic that an offender might approach and abuse a child who had been sleeping. Rather, he argued that the victim's testimony that she had pretended to remain asleep during the abuse was not realistic. Before the challenged question was asked, Dutton had already addressed, via testimony properly focused on the victim, whether such testimony was realistic: she testified that a victim might "pretend to be asleep" during abuse to "distance themselves from the discomfort or the distress of what's going on."

¶26 Here and elsewhere, the dissent attempts to salvage profile testimony by analyzing it together with other, proper testimony that Starks has not challenged. For example, the dissent combines Dutton's unchallenged testimony that children often freeze during sexual assaults with challenged testimony establishing that perpetrators commonly target sleeping children for abuse. Without distinguishing the unchallenged testimony from that which was challenged, he concludes that the testimony was helpful to jurors because they "might not understand a child pretending to be asleep rather than waking up and fighting off an attacker as they either would do now or believe they would have done as a child." We agree that the unchallenged portion of the testimony he mentions was helpful in this regard because it relates to a victim's conduct; the same is not true concerning the challenged portion.

¶27 Similarly, our colleague analyzes challenged testimony establishing common perpetrator strategies together with prior, unchallenged testimony explaining why children may delay in reporting

abuse. He asserts that although the testimony "implicated the conduct of the perpetrator, it was calculated to explain the conduct of the victim." Only the unchallenged portion, in which Dutton explained why certain perpetrator behavior could cause a victim to delay reporting, focused on explaining the conduct of the victim. Neither here nor in any other instance does our colleague establish a proper purpose for further inquiry focused on establishing particular conduct as common in or typical of perpetrators. We evaluate Dutton's statements as a whole as well as individually, *see Haskie*, 242 Ariz. 582, ¶ 19, but here and elsewhere, the challenged testimony was not integral to Dutton's proper explanations of victim behavior and should have been precluded. We do not read *Haskie* to give the state a license to develop an offender profile matching the defendant once other, proper testimony has been admitted.

¶28 By citing various proper portions of Dutton's testimony, our colleague is able to conclude that "Dutton's testimony described facially counterintuitive behaviors of this victim, such as her unwillingness or inability to timely report or resist the abuse." Again, this conclusion relies heavily on the unchallenged testimony our colleague liberally weaves into his analysis. The challenged portions of the testimony were directed at perpetrator behavior, not the counterintuitive behaviors of the victim.

¶29 Perhaps because he does not detect any profile testimony in the first place, our colleague's analysis effectively ends once he concludes the challenged testimony was relevant to support or bolster the victim's credibility. To be sure, profile testimony is inadmissible if it is "simply not relevant to explaining the victim's behavior." *Id.* (citing *Ketchner*, 236 Ariz. 262, ¶ 19). But it does not follow that profile testimony is admissible merely because it is relevant. We observe that a profile matching what a victim says a defendant has done will always provide some support to the victim's testimony and thus is relevant in that sense. The relevance in that circumstance, however, generally derives from the inference that the defendant has done "what others are doing." *Ketchner*, 236 Ariz. 262, ¶ 15 (quoting *Lee*, 191 Ariz. 542, ¶ 12). Profile evidence is generally inadmissible when its relevance arises only from this inference. *See Haskie*, 242 Ariz. 582, ¶¶ 17-19. We do not share our colleague's apparent conclusion that an expert's testimony is admissible as long as it can be said to "support" or "bolster" a victim's testimony through this inference.

¶30 Indeed, the dissent fails to acknowledge any limit on offender profile testimony as long as it can be said to support the victim's testimony in some sense. But profile testimony must be "relevant for a reason other than to suggest that the defendant possesses some of those characteristics

and therefore may have committed the charged crimes." *Id.* ¶ 17. Thus, profile testimony is improper if it supports a victim's testimony only by suggesting that the described conduct occurred because it was common in or typical of other offenders. At bottom, there was no other purpose for the challenged testimony here.[3]

¶31 We disagree with our colleague's contention that we have approved of indistinguishable testimony in *Salazar-Mercado*, *Haskie*, *Ortiz*, and "countless other cases." In none of the three published cases he mentions, nor any other of which we are aware, did we or our supreme court approve of inquiry so explicitly directed at establishing a set of common or typical behaviors or characteristics of offenders. In *Salazar-Mercado*, Dutton testified about "how children perceive sexual abuse, describing behaviors involving disclosure of abuse, and relating circumstances in which children may make false allegations." 234 Ariz. 590, ¶ 2. There is no indication that Dutton offered any testimony in *Salazar-Mercado* that certain behaviors or characteristics are common in or typical of perpetrators.

¶32 In *Haskie*, although a few of the expert's answers included "general statements refer[ing] to an abuser's characteristics," "each statement primarily served the purpose of explaining victim behavior." 242 Ariz. 582, ¶ 20. Here, Dutton provided a set of typical or common perpetrator behaviors after being prompted to provide exactly that information. There is no indication in *Haskie* of a similar inquiry into common perpetrator behaviors or characteristics.

¶33 Our colleague suggests only Dutton's answers matter to the analysis and the prosecutor's questions do not. But the questions mattered in *Haskie*; our supreme court took into consideration that the testimony there "was limited to questions designed to help the jury understand the sometimes counterintuitive behaviors of domestic violence victims." *Id.* The questions here did not merely show the focus of the inquiry; they created implications that certain behavior was common among

[3]Even were we to accept one of our colleague's articulations of proper purpose for the challenged testimony, it would be admissible only if its probative value were not substantially outweighed by the danger of unfair prejudice. *Id.* Because this case hinged on the testimony of a single victim, there was a heightened risk that jurors could have been unduly swayed by learning that Starks's conduct matched that commonly found in offenders.

perpetrators even without Dutton expressly saying so. For example, in the context of answering a question about certain victim behavior, an expert's statement that a perpetrator "may" engage in particular conduct would not necessarily suggest that the conduct is common in or typical of perpetrators. But here, when Dutton was asked "what strategies perpetrators use to build a relationship with a victim," an implication was created that the strategies she provided, even those couched in terms such as "may," were among the most common.

¶34 And we reject our colleague's contention that "Dutton's testimony here is substantially indistinguishable from her permitted testimony in *Ortiz*." He points to her testimony in *Ortiz* about the grooming process and her statement that children are more likely to be abused by someone they know. *See* 238 Ariz. 329, ¶¶ 6-7. But grooming testimony, like any other testimony that necessarily refers to perpetrator behavior in the process of explaining victim behavior, will generally be admissible as long as it focuses on explaining victim behavior. Indeed, Dutton also testified about the grooming process in Starks's trial and Starks has not challenged that portion of her testimony, presumably because it permissibly focuses on explaining victim behavior. The challenged portion, on the other hand, is focused on describing perpetrator behavior, explaining its motivations, and characterizing it as typical or common.

¶35 Additionally, the testimony in *Ortiz* that children are most commonly abused by someone they know is far more general than the list of perpetrator characteristics elicited here. Our supreme court has established that "expert testimony about victim behavior that also describes or refers to a perpetrator's characteristics has the potential to be 'profile' evidence . . . is not categorically inadmissible," and "[t]he more 'general' the proffered testimony, the more likely it will be admissible." *Haskie*, 242 Ariz. 582, ¶¶ 16, 18. Again, we have no difficulty distinguishing a single, general perpetrator characteristic from the challenged testimony here, which included several specific characteristics.[4]

[4]Our colleague also cites *State v. Najar*, No. 2 CA-CR 2019-0052 (Ariz. App. Nov. 24, 2020), as an instance where we have approved of indistinguishable testimony. In that memorandum decision, we concluded that Dutton's testimony, although it included discussion of various perpetrator characteristics, "discussed the conduct of abusers . . . from the reporting victim's perspective." *Id.* ¶ 23. We do not reach the same conclusion about the challenged testimony here.

¶36 In sum, our colleague's permissive view of profile testimony would swallow the general rule that "[t]he state may not offer 'profile' evidence as substantive proof of the defendant's guilt." *Id.* ¶ 15. We reject his conclusion that the testimony here does not amount to profile evidence. We do not share his belief that the challenged testimony is indistinguishable from testimony we have approved on many occasions. Nor are we persuaded by his arguments that there were proper purposes for the challenged testimony. To the extent our colleague has attempted to legitimize the challenged testimony by marrying it to other, proper testimony that has not been challenged, we reject his analysis and conclude that the challenged testimony was unnecessary to explain the victim's behavior. It therefore should have been omitted.

Harmless Error

¶37 When a defendant raises an appropriate challenge, as Starks did in this case, and thereby preserves an issue for appeal, we review the alleged error for harmlessness. *State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005). "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Id.*

¶38 The state contends that Starks's conduct did not match the profile, and suggests to the extent it did, Starks elicited the testimony himself. It thus argues that any error was harmless, or, to the extent Starks elicited harmful testimony, that he invited it. First, we observe, contrary to the state's argument, that Starks's conduct as reported by the victim matched the profile in nearly every respect. The victim testified that Starks entered the family as "Uncle Gary" and became a "parental figure" to her. She testified that Starks was mostly responsible for disciplining her and provided examples, including instances where Starks lectured her, "t[ook] away [her] electronics" and on another occasion a knife, and paddled her on more than one occasion. And she testified that Starks sexually abused her in her bed while she pretended to be asleep, with her sister present in the room.

¶39 Although the state elicited many of Starks's characteristics that matched the profile, the state asserts that Starks elicited most of the testimony about his disciplinary role. The state suggests that Starks thereby invited any error, citing *State v. Anderson*, 210 Ariz. 327, ¶ 44 (2005), *State v. Moody*, 208 Ariz. 424, ¶ 111 (2004), and *State v. Lawrence*, 123 Ariz. 301, 304-05 (1979), all cases in which our supreme court ruled any error in testimony was invited because the defendant had elicited it. But in each of

these cases, the defendant simply elicited testimony and later claimed it to be unfairly prejudicial. The difference here is that the discipline evidence elicited by Starks would not have been unfairly prejudicial to him but for the improper profile the state had elicited. Thus, unlike *Anderson*, *Moody*, and *Lawrence*, the state was the party that "inject[ed] error in the record" in this case. *See State v. Logan*, 200 Ariz. 564, ¶ 11 (2001) (quoting *State v. Tassler*, 159 Ariz. 183, 185 (App. 1988)).

¶40 And as the state acknowledges, the discipline evidence was relevant to Starks's defense: to show the victim had a motive to falsely report to "get away from somebody who [was] disciplin[ing her]." The profile testimony thus forced Starks to either refrain from offering evidence of the victim's motive to falsely report, or elicit it even though it unfairly prejudiced him by matching the profile. Starks therefore may have elicited the testimony because it was the least damaging option. The invited error doctrine does not apply when the defendant "tr[ies] to minimize the damage" from error created by the state. *State v. Keeley*, 178 Ariz. 233, 236 (App. 1994). Starks did not invite error here.

¶41 The state further contends that any error was harmless because the victim's testimony "alone established Starks's overwhelming guilt beyond a reasonable doubt." In reviewing for harmless error, we examine whether properly admitted evidence of guilt was overwhelming. *See State v. Zaid*, 249 Ariz. 154, ¶ 22 (App. 2020). Here, as the state acknowledges, the case against Starks rested entirely on the victim's testimony. We cannot say evidence that is entirely testimonial, where the defendant has denied the charge, and credibility is plainly at issue, constitutes overwhelming evidence of guilt. *See State v. Green*, 200 Ariz. 496, ¶ 22 (2001) (error not harmless where evidence "entirely testimonial," consisting primarily of testimony of victim). The cases cited by the state establish that a single witness's testimony may be sufficient to sustain a conviction, not that such testimony is overwhelming evidence. *See, e.g.*, *State v. Munoz*, 114 Ariz. 466, 469 (App. 1976).

¶42 The state points out that the jury convicted Starks of a lesser-included offense and suggests we should therefore "conclude that the jurors did not convict Starks on an improper basis." Our supreme court has indeed mentioned similar verdicts as an indication that a jury "made reasoned decisions," *State v. Jones*, 203 Ariz. 1, ¶ 33 (2002), and we may consider such verdicts in analyzing prejudice from error, *see State v. Stuard*, 176 Ariz. 589, 600 (1993). We have also considered other conflicting factors, including that the state relied on the improper profile during its closing

argument[5] and that Starks's previous trial ended in a hung jury. *See State v. Romero*, 240 Ariz. 503, ¶¶ 8, 13 (App. 2016) (in harmless-error analysis, court may consider references to tainted evidence in closing argument and hung jury in previous trial). While we consider all relevant factors, we need not give them equal weight. *See id.* ¶ 8. After considering these and other factors in light of the nature of the error and the relative strength of the evidence, we cannot conclude beyond a reasonable doubt that the error did not affect the verdict and must reverse Starks's convictions and sentences. We nonetheless address the remaining issues he raises, as they could arise in a new trial.

Amendment to Indictment

¶43 Starks contends that the trial court "abused its discretion by allowing the state to amend the dates on the indictment to conform with the evidence presented at trial." We review a court's decision to allow an indictment to be amended for abuse of discretion. *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 16 (App. 2013).

¶44 In general, "[t]he charging document is deemed amended to conform to the evidence admitted during any court proceeding." Ariz. R. Crim. P. 13.5(b). But "[u]nless the defendant consents, a charge may be amended only to correct mistakes of fact or remedy formal or technical defects." *Id.* "A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *State v. Bruce*, 125 Ariz. 421, 423 (1980). Absent prejudice to the defendant, "[a]n error as to the date of the offense alleged in the indictment does not change the nature of the offense, and therefore may be remedied by amendment." *State v. Jones*, 188 Ariz.

---

[5]Notably, the state argued:

> The one person who knew [the victim's] vulnerabilities, the one person that she should have been able to trust is the one who violated that trust. And he did it in a really horrible way. And he did it thinking that because of her upbringing, because of what she'd been through, because of who she was that no one would believe her. And that stops today. It stops with your verdict.

534, 544 (App. 1996), *abrogated on other grounds*, *State v. Ferrero*, 229 Ariz. 239 (2012).

¶45 Starks acknowledges that in *Bruce*, our supreme court upheld an amendment to the indictment at trial to reflect the dates of the offense as shown by the evidence. *See* 125 Ariz. at 423. But he claims *Bruce* is distinguishable because the dates were changed by only a "couple of days" in that case, whereas they were changed a full year here. He asserts that the amendment in this case "amounts to a significant, material difference." But in *Jones*, we upheld an amendment that broadened the date range of offenses by several months. 188 Ariz. at 543-44 (indictment alleged some offenses to have occurred within particular month; dates deemed amended to seven-month range to conform to evidence at trial). Although the dates in this case differed by a year, we see no meaningful distinction.

¶46 Starks maintains the amendment "depriv[ed him] of his right to notice of the charges against him and the ability to properly prepare his case for trial." But beyond this conclusory assertion, he makes no effort to explain how the change prejudiced his ability to prepare. And we see no apparent prejudice. Starks had been put on notice of the offenses in 2016 from testimony in his first trial. Moreover, Starks's sole defense was that A.W. had falsely reported the abuse; he presented no defense that would hinge on the timing of the offenses. *See id.* at 544 (no prejudice from amendment to dates in indictment where defendant did not present alibi or third party culpability defense and "his sole defense was that [the victim] was lying"). Because the date change did not alter "the nature of the offense" and Starks has not meaningfully shown prejudice, he has not demonstrated that the trial court abused its discretion. *See Bruce*, 125 Ariz. at 423.

Vouching

¶47 Starks contends that the state improperly engaged in prosecutorial vouching by "refer[ring] to evidence [he] could have introduced during trial" and "put[ting] the prestige of the government behind their primary witness." Starks maintains the trial court abused its discretion in denying his motion for a mistrial based on the prosecutor's comments. Because the trial court is in the best position to evaluate the effect of a prosecutor's comments on a jury, we review a denial of a motion for mistrial on that basis for an abuse of discretion. *See State v. Newell*, 212 Ariz. 389, ¶ 61 (2006).

¶48 In his closing argument, Starks suggested that the state had not presented evidence it should have, telling the jury at one point, "You should have information to decide this case and you were not given it." In rebuttal, the prosecutor stated that "if there was other evidence I could present to you I would have, as the government. There isn't any." Then, after the trial court overruled Starks's objection, the prosecutor remarked that "if there was something that he thought was important," Starks could have obtained it via subpoena and presented it.

¶49 Impermissible vouching occurs "(1) where the prosecutor places the prestige of the government behind its witness; [and] (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. Vincent*, 159 Ariz. 418, 423 (1989). "Placing the prestige of the state behind its witness 'involves personal assurances of a witness's veracity,' while '[t]he second type of vouching involves prosecutorial remarks that bolster a witness's credibility by reference to matters outside the record.'" *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 75 (2018) (alteration in original) (quoting *State v. King*, 180 Ariz. 268, 277 (1994)).

¶50 Although Starks contends that the prosecutor's remarks constituted both kinds of vouching, they were neither. Nothing in the challenged statements personally assured a witness's veracity. And the prosecutor's remarks about the lack of evidence generally—and the lack of evidence presented by Starks in particular—were permissible to rebut Starks's implication that there was other evidence the state should have presented. *See State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160 (1987) (prosecutor's reference to lack of evidence presented by defendant proper to rebut defendant's attacks on validity of state's evidence). No error occurred here.

Disposition

¶51 Because the trial court erred in allowing the state to provide improper profile evidence of a sex offender of child victims, and we cannot conclude that the error was harmless, we reverse Starks's convictions and sentences and remand for a new trial.

B R E A R C L I F F E, Judge, concurring in part and dissenting in part:

¶52 I concur in the decision but for its treatment of the "cold-expert" testimony as impermissible profile evidence. Starks asserts that Dr. Dutton's testimony served to "invite the jury to find that [Starks's] actions matched those of a typical perpetrator of child sexual abuse." And

the majority agrees. But the cases in which Dutton has provided testimony of the sort given here are numerous. We have repeatedly held that her testimony regarding the "process of victimization" and other observations of child sex abuse victims is perfectly acceptable, relevant, and helpful to a jury to understand the child-victim mindset. I am at a loss to see what is suddenly objectionable about the testimony she provides here, and the majority does not adequately explain it. Because the objected-to testimony is not profile evidence at all, and is otherwise perfectly admissible, I respectfully dissent in part and from the disposition.

¶53 Fundamentally, this case depended on the victim's testimony; there was no physical evidence or other corroboration, and Starks's defense was that he did not commit the acts alleged by the victim. Consequently, and in support of his defense, Starks's strategy in both his first and second trials, was to undermine the victim's credibility. He did so, in part, by raising suspicion as to how the charges were reported (through a friend), pointing to the delay between the first claim of abuse and the report of it (over a year), identifying inconsistencies in the victim's story, and highlighting the victim's incomplete recollection of the circumstances of the abuse. By the time of Dr. Dutton's testimony in the second trial, the state knew precisely how Starks would attack the allegations and its evidence. The state needed to develop, through Dutton, a credible basis for the application of the facts it would adduce in its case in chief. Dutton's testimony allowed the state to give rational explanations for the questions Starks would raise as to the victim's credibility and to dispel reasonable doubt.

¶54 During Starks's opening statement in his first trial, he alluded to the victim's mental health issues and implied that she had been seeking revenge against Starks because he was frequently the one to discipline her. He asserted that the abuse at night in the victim's bedroom could not have happened because her sister was sleeping in the same room only a few feet away. He also claimed the sexual act as described by the victim could not physically have occurred, that the victim's response to the assault was "unrealistic," and that the way in which the assault was first reported showed the accusation to be false.

¶55 He then attempted to develop the facts supporting his defense through cross-examination of the victim and her sister. At the end of the state's case, in his Rule 20 motion, Starks argued that the case should be dismissed because the victim was "unreliable."

¶56 Starks then built on this theme through his own testimony, claiming that the victim was angry with him for confronting her about her self-harm and describing numerous occasions when he had to step in and discipline the victim and her sister. And he testified that the victim was "jealous" of his relationship with her sister.

¶57 In closing, Starks argued that the final act of abuse alleged, as described, would be "virtually impossible." He suggested that the victim had a motive to "make it up"—because she was angry at him and had mental health issues. He again characterized the victim's recounting of how the abuse occurred as "not realistic." In the end, the jury was unable to reach a verdict in Starks's first trial, and the court declared a mistrial. But, notwithstanding the mistrial, the state now knew the breadth of the defense Starks would likely put on again at any retrial.

¶58 The three areas of Dr. Dutton's testimony that the majority concludes were impermissible profile evidence are: Dutton's testimony about "strategies perpetrators use to build relationships with a victim," her testimony as to the commonness of a perpetrator "commit[ting] a sexual act on a sleeping child," and the commonness of abuse happening "in a home where other family members are." While each of these areas of her testimony implicated perpetrator behavior, it did not amount to profile evidence. All of it was key to explaining the victim's behavior and supporting her credibility—the target of the defense's case—which we have time and again said is perfectly acceptable.

Strategies in Developing Relationship

¶59 There was a delay in reporting the first abuse—nearly a year—and the abuse, when first reported, was indirectly reported through a friend of the victim. Dr. Dutton's testimony on how relationships are formed between abusers and their victims and the effect of those relationships on the manner and timing of reporting was important for a jury to understand.

¶60 One of the possible explanations, Dr. Dutton told the jury, for both delay and indirect reporting, was that the victim and the assailant had developed a relationship that made both immediate reporting and calling the police less likely. Dutton testified that when an abuser and victim have a certain type of relationship, the victim can feel guilty and responsible for the abuse and fear the consequences of turning in the abuser. This testimony then begged the question as to how such a relationship is

established and whether one was established here sufficient to explain the victim's late and indirect reporting of the abuse.

¶61 It may be counterintuitive for members of the jury—who are neither children nor likely to have been victims of childhood sexual assault—to understand that, as Dr. Dutton explained, such relationships may be developed when an adult "gain[s] power and control over" the child "and over their primary caretakers," and when an adult "enter[s] into the family," "take[s] over discipline" and becomes harsh and abusive to the child's parent. A jury would need such information to later understand the evidence offered by the state that just such things happened between Starks and the victim and determine for itself whether such a relationship arose.

¶62 Although laying this groundwork of explanation for the jury implicated the conduct of the perpetrator, it was calculated to explain the conduct of the victim. It was not ultimately important at all that Starks did certain things to develop the relationship with the victim, but whether indeed such a relationship had been developed and why it mattered. The fact of that relationship, if it existed, and its effect on the victim, explained two things that needed explanation: the victim's late and indirect reporting. The majority's statement that "[w]e see no purpose for the question or the information it elicited other than" an improper one, is puzzling at best. The purpose was to show that the victim's relationship with Starks may have caused her to delay her reporting of the crime committed against her, and caused her to report that crime, not to police, but to another young girl.

Acts Committed on a Sleeping Child

¶63 The victim testified that Starks sexually assaulted her while she was in bed, at night, at a time when she should have been asleep. She stated that she woke up, but pretended to be asleep. Notwithstanding that the victim appeared to be asleep, she testified that Starks continued the abuse, forcing his penis in and out of her mouth.

¶64 In the first trial, and again in his re-trial, Starks claimed that the victim's description of how the assault occurred was "not realistic." In Starks's closing argument in his retrial, he argued that "there is no way on earth that anyone could think" that the assault as the victim described could happen or that the perpetrator "would think anyone would ever sleep through that. That's not going to happen." He went on that "if somebody was doing this behavior," "they would never believe, never, ever, ever believe that anyone could sleep through that happening to them. So the

physical act I would submit can't—doesn't work." Clearly this feature of the crime as described by the victim was ripe for attack.

¶65 Dr. Dutton told the jury that children often "freeze" during sexual assaults, and do not know what to do; indeed, that many imagine they are elsewhere as a means of psychologically avoiding what is happening. Dutton was then asked by the state how common it is for a sexual assault to be committed on a sleeping child. She responded that it was not uncommon. The majority again, equally as puzzling, asserts that "[t]here was no purpose to elicit the prevalence of this manner of abuse" other than to match these allegations to Starks's actions. But adult jurors, who were never sexually assaulted as children, might not understand a child pretending to be asleep rather than waking up and fighting off an attacker as they either would do now or believe they would have done as a child. Dutton's testimony on this question was helpful to a jury to understand this victim's behavior and to support her credibility.

¶66 Additionally, a jury might not believe that the act of sexual assault could even be perpetrated on a sleeping child—the very notion Starks raised during his closing argument. The jurors might assume that a child would wake up and the abuse would stop or that the assailant might not continue the assault if the child did not wake up and respond to it. In either case, Dr. Dutton's testimony aided the jury in understanding the victim's behavior, and Dutton's experiences with other child sex abuse victims supported the victim's credibility. Dutton's testimony—strictly from the standpoint of explaining the victim's conduct—was necessary and proper to address Starks's claim that the victim's report was " not realistic."

Abuse with Others in the Home

¶67 The majority similarly sees no purpose to Dr. Dutton's testimony that it is not uncommon for abuse to happen while other family members are in the home. It criticizes this testimony though, by faulting the question it was answering. The majority, quoting *Ketchner*, asserts that "nothing in the question invited Dutton to relate how this circumstance"—others being in the home at the time of the abuse—"might 'explain behavior by [the victim] that otherwise might be misunderstood by a jury.'" 236 Ariz. 262, ¶ 19 (alteration in majority). Perhaps the question did not explicitly invite Dutton's response, but that was because the relevance and need for the testimony was self-evident.

¶68 The victim testified that both incidences of abuse by Starks had happened with her sister sleeping just a few feet away in the same

room. The victim did not cry out during the abuse. Instead she stayed silent. Any victim, the jury might think, would certainly cry out for help given that help is so close. That is, a jury composed of adults who had not been victims themselves of childhood abuse. "Certainly that could not be common?," one might think. "Children don't simply stay silent and let themselves be abused? Do they?," some jurors might surmise. Well, seemingly, they do, because as Dr. Dutton testified, it is not uncommon for child victims to be abused with others in the home, and, as Dutton also testified, child victims often do not report their abuse for fear of repercussions either to them or their abuser on whom they, or a loved one, might depend. Dutton's testimony was therefore directly relevant to explaining this victim's behavior by way of explaining the behavior of other observed victims.

Case Law Supports Admissibility

¶69 The majority relies heavily on *Ketchner* in identifying this evidence as impermissible profile evidence. *Ketchner* was a different case and involved different evidence. In *Ketchner*, our supreme court held that the expert's testimony relating to domestic abusers—specifically, "separation violence" and "lethality factors"—was inadmissible profile evidence because the "evidence did not explain behavior by [the victim] that otherwise might be misunderstood by a jury; indeed, the nature of her abusive relationship with Ketchner was uncontested." 236 Ariz. 262, ¶ 19. Here, each of these pieces of evidence was needed to explain the allegations made by the victim. The abusive nature of the relationship was *the* contested issue at trial and, as explained above, Dr. Dutton's testimony was relevant to explaining to the jury how child abuse occurs within a family or when someone is present in the home and to assessing witness credibility.

¶70 This case is more comparable to *Salazar-Mercado*, *Haskie*, *Ortiz*, and countless other cases than it is to *Ketchner*. In *Salazar-Mercado*, the child victims "delayed reporting alleged sexual abuse by a relative and had trouble pinpointing when events occurred. One child victim changed her version of events between the time of reporting and trial." 234 Ariz. 590, ¶ 15. As here, in that case, Dr. Dutton served as an expert witness "explaining generally how children perceive sexual abuse, describing behaviors involving disclosure of abuse, and relating circumstances in which children may make false allegations." *Id.* ¶ 2. The supreme court stated that "[i]n other cases involving behaviors affecting a child victim's credibility, we have held that expert testimony about general behavior patterns of child sexual abuse victims may help the jury understand the evidence." *Id.* ¶ 15. And "[b]ecause Dutton's testimony might have helped

the jury to understand possible reasons for the delayed and inconsistent reporting in this case," it was admissible. *Id.* Here, the victim did not report the first incident at all until the second was reported by a third party, and she was accused of making a false accusation as revenge for discipline. As in *Salazar-Mercado*, Dutton's testimony explained the conduct of the victim, not any particular characteristic of the abuser.

¶71 In *Haskie*, in holding that the expert's testimony relative to a domestic violence perpetrator was admissible, our supreme court emphasized that the "testimony was limited to questions designed to help the jury understand the sometimes counterintuitive behaviors of domestic violence victims." 242 Ariz. 582, ¶ 20. The court reasoned that, although a few of the expert's statements referred to abuser characteristics, "each statement primarily served the purpose of explaining victim behavior." *Id.* Likewise, here, Dr. Dutton's testimony described facially counterintuitive behaviors of this victim, such as her unwillingness or inability to timely report or resist the abuse.

¶72 And, contrary to the majority's conclusion, Dr. Dutton's testimony here is substantially indistinguishable from her permitted testimony in *Ortiz*, 238 Ariz. 329. In *Ortiz*, Dutton also testified as a cold expert and generally explained how children perceive sexual abuse and described behaviors surrounding disclosure. *Id.* ¶ 6. She testified more specifically that children are more likely to be abused by someone they know and described the "grooming" process in which the abuser will acquaint the child with physical contact or sexuality. *Id.* ¶ 7. We held that Dutton's testimony, that most child abusers know their victims, was relevant to the victim's credibility, a central issue in the case, and that her testimony regarding grooming helped the jury understand the general behavior of child abuse perpetrators and their victims. *Id.* ¶¶ 12, 24.

¶73 Similarly, in an unreported decision from a few months ago, *State v. Najar*, No. 2 CA-CR 2019-0052 (Ariz. App. Nov. 24, 2020) (mem. decision), Dr. Dutton "testified as to how, why, and when child abuse victims report abuse; why children delay disclosure of sexual abuse; and how children's memories work. She also testified to the general process by which sex offenders target, approach, and engage with their child victims." *Id.* ¶ 17. In citing to *Haskie*, we recognized that "[e]vidence of a perpetrator's characteristics may be admissible if 'relevant for a reason other than to suggest that the defendant possesses some of those characteristics and therefore may have committed the charged crimes' and if its probative value is not substantially outweighed by unfair prejudice." *Id.* ¶ 21 (quoting *Haskie*, 242 Ariz. 582, ¶ 17).

¶74 Although Dr. Dutton's testimony in *Najar*, like here, focused on explaining the victim's behavior, it touched also on the behaviors of the perpetrators: "Dutton described a number of circumstances that constitute 'engagement'—including that a perpetrator may enter into the family and 'establish a relationship of power and control' by physically or emotionally abusing the child's primary caretaker or taking over discipline of the child and becoming physically or verbally abusive." *Id*. ¶ 18. She also testified that "other children report that they have a familial relationship with the perpetrator before the abuse begins, and other times, when the perpetrator is outside the family, the perpetrator may develop a relationship of trust with the parents and establish a 'special relationship' with the child by giving gifts." *Id.* This court concluded that Dutton's testimony in *Najar*, not substantively different from that given here, was admissible.

¶75 Ultimately, although Dr. Dutton's testimony here also bore on conduct of the perpetrator, it appears principally calculated to bear on and explain the conduct of the victim. Given that two persons were involved in the crime—Starks and the victim—conduct of the actor may, not surprisingly, also explain the reaction of the victim who was acted upon. As stated in *Ketchner*, "profile evidence," can be admitted if offered for another purpose. 236 Ariz. 262, ¶ 15. Starks's defense was that the victim was lying, and he sought to show that by pointing to the delay in and manner of her reporting and the inaccuracies and inconsistencies in her reports. The purpose of Dutton's testimony was to help the jury evaluate the credibility of the child victim in a he-said, she-said case with no physical evidence and one witness—the victim herself. Such a purpose has repeatedly been held sufficient to justify this type of testimony.

¶76 The majority's criticism of the evidence challenged here is misplaced. I would affirm the lower court in full.