IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RICHARD HERRERA,
Appellant.

No. 2 CA-CR 2013-0564
Filed May 28, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Greenlee County
No. CR201200046
The Honorable Nanette M. Warner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

Daniel R. Raynak, Phoenix
By Daniel R. Raynak
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Howard and Judge Vásquez concurred.

K E L L Y, Presiding Judge:

¶1 Following a jury trial, Richard Herrera was found guilty of six counts of aggravated assault, one count of kidnapping, and one count of attempted second-degree murder. The jury found the state had proven beyond a reasonable doubt that each offense was a domestic violence offense. The trial court sentenced him to a combination of consecutive and concurrent, presumptive and maximum terms of imprisonment totaling 31.75 years. Herrera argues the court abused its discretion by failing to authorize additional investigative funds for trial. He also contends the court erred by allowing the testimony of a criminologist who Herrera asserts offered inadmissible profile evidence. For the following reasons, we affirm Herrera's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Herrera's convictions and sentences. *State v. Sarullo*, 219 Ariz. 431, ¶ 2, 199 P.3d 686, 688 (App. 2008). Herrera and I.A. lived together in Clifton. Shortly after their relationship began, Herrera became extremely jealous and controlling. On May 30, 2012, Herrera drove I.A.'s car to pick her up at work. I.A., who had decided to end the relationship, drove Herrera to his friend's house near Duncan and told him to get out of the car.

¶3 Herrera then put I.A. in a headlock, held her next to his chest, and began punching her in the head, eventually "bust[ing] [her] head open" so that her "hair was soaking with blood." While Herrera still had in her a headlock, "choking [her] with all of his might," he began punching her in the left side of her face. I.A.

eventually "wiggled" out of the headlock, got out of the vehicle, and ran across the street.

¶4 Herrera then struck I.A. twice with her car, pushing her into a barbed wire fence, and she lost consciousness. I.A. sustained a fracture to her left eye socket, lacerations to her right lower leg, right arm, and scalp, and abrasions to her right shoulder, right arm, and right knee.

¶5 Herrera was charged with multiple counts of disorderly conduct, threatening and intimidating, aggravated assault, and attempted first-degree murder, as well as one count of kidnapping.[1] The jury found him guilty of the lesser-included offense of attempted second-degree murder and all of the remaining charges. The trial court sentenced him as described above. This appeal followed his successful request for a delayed appeal, made pursuant to Rule 32.1(f), Ariz. R. Crim. P.

Discussion

Investigative Fees

¶6 Before trial, Herrera filed several motions for investigative fees, which the trial court granted. Herrera then filed a motion for additional investigative funds "in order to assist counsel at trial for voir dire, jury selection, witness preparation, exhibit preparation, additional investigation during trial, etc." He requested $3,135 for the investigator to participate in the trial, which was expected to last four days. The trial court advised Herrera it would authorize and order payment at the rate of $25 per hour, plus expenses at the Arizona government rate.

¶7 After the investigator informed Herrera that he would not be able to attend the trial because of the court's ruling, Herrera filed a motion for reconsideration, arguing that "tak[ing] away defense's investigator after he has done all the investigation in the case is highly prejudicial to Mr. Herrera's defense as no one else on the defense team has this knowledge." In ruling on the motion for

[1]Some of the charges apparently were dismissed before trial.

reconsideration, the court noted that the investigator already had been paid $3,621 and observed that the investigator was seeking "over 50 percent more than the attorney is paid" to participate in the trial. The court acknowledged that the investigator was "somewhat familiar with the case" but concluded "the rate at which he demands to be paid is in excess of what the government can bear" and that "[d]efense counsel needs a paralegal type person to assist him in trial."

¶8 Section 13-4013(B), A.R.S., permits the court to "appoint investigators and expert witnesses as are reasonably necessary to adequately present a defense at trial and at any subsequent proceeding" upon a showing that a defendant charged with a felony offense cannot pay for such services. We review for an abuse of discretion the trial court's denial of Herrera's request for additional funds. *See State v. Murray*, 184 Ariz. 9, 29-30, 906 P.2d 542, 562-63 (1995). "'In order to find an abuse of discretion, we must determine that the denial or restriction of investigative funds substantially prejudiced the defendant.'" *Id.*, *quoting State v. Clabourne*, 142 Ariz. 335, 342, 690 P.2d 54, 61 (1984).

¶9 Herrera has not shown how he was prejudiced by the trial court's denial of his request for additional funds. He argues that he "explained the need for his investigator prior to trial and indicated that he would be substantially prejudiced by the trial court's failure to authorize the investigative fees," but he offers no further explanation as to the nature of the prejudice he claims he suffered. Accordingly, we conclude the court did not abuse its discretion by denying Herrera's request for additional investigative funds. *See id.*

Profile Evidence

¶10 Herrera argues the trial court erred by denying his motion to preclude the testimony of Dr. Neil Websdale, a criminologist. He contends Websdale's testimony was "propensity evidence couched under the guise of expert testimony." The state concedes that the admission of Websdale's testimony was error, but argues the error was harmless. "We review the trial court's ruling permitting this testimony for an abuse of discretion, which can

include an error of law." *State v. Ketchner*, 236 Ariz. 262, ¶ 13, 339 P.3d 645, 647 (2014) (citation omitted).

¶11 Before trial, Herrera objected to the state's disclosure of Websdale as an expert witness and asked the trial court to preclude his testimony, arguing it "would be irrelevant and any probative value would be substantially outweighed by the fear of unfair prejudice such that he should not be allowed to testify." The trial court overruled Herrera's objection.

¶12 Websdale was presented as a "blind" expert, meaning that he was unfamiliar with the facts of Herrera's case. *See State v. Salazar-Mercado*, 234 Ariz. 590, ¶ 2, 325 P.3d 996, 997-98 (2014). He testified regarding "markers," or "warning signals that [a] case statistically is more likely to end in homicide," including "a prior history of domestic violence," a "pending separation of a relationship," "obsessive possessiveness" or "morbid . . . or extremely unhealthy jealousy," and stalking. After the prosecutor concluded his direct examination of Websdale, Herrera moved to strike all of his testimony, arguing that it was irrelevant and highly prejudicial. The trial court denied the motion.

¶13 Herrera argues Websdale's testimony was inadmissible profile evidence. "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." *Ketchner*, 236 Ariz. 262, ¶ 15, 339 P.3d at 647, *quoting State v. Lee*, 191 Ariz. 542, ¶ 10, 959 P.2d 799, 801 (1998). Such evidence may not be used as substantive proof of guilt. *Id.*

¶14 In *Ketchner*, a sociologist testified about "characteristics common to domestic violence victims and their abusers, many of which matched the evidence" in the case. *Id.* ¶ 14. Specifically, the sociologist testified about "separation assault" and "described risk factors for 'lethality' in an abusive relationship." *Id.* The state argued the sociologist did not offer profile evidence, but instead "describe[d] patterns in abusive relationships rather than relating general characteristics of domestic abusers." *Id.* ¶ 16. Our supreme court concluded that the testimony was inadmissible profile

evidence because the evidence "did not explain behavior by [the victim] that otherwise might be misunderstood by a jury" but rather "predicted an abuser's reaction to loss of control in a relationship." *Id.* ¶ 19. The court stated, "[t]here was no reason to elicit this testimony except to invite the jury to find that Ketchner's character matched that of a domestic abuser who intended to kill or otherwise harm his partner in reaction to a loss of control over the relationship." *Id.*

¶15 Websdale's testimony was similar to the testimony of the expert in *Ketchner*. Websdale testified regarding "markers," or red flags, that indicate that an abuser might kill his victim. Several of those markers existed in this case, including the impending separation of the relationship, Herrera's obsessive possessiveness, and his extremely unhealthy jealousy. Websdale's testimony could have led the jury to "find that [Herrera's] character matched that of a domestic abuser." *Id.* Accordingly, we conclude the trial court erred by admitting Websdale's testimony. We next must consider whether the error was harmless.

¶16 "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." *State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005). Under that standard, "'[t]he inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'" *State v. Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d 233, 236 (2009), *quoting State v. Anthony*, 218 Ariz. 439, ¶ 39, 189 P.3d 366, 373 (2008) (alteration in *Anthony*). "We can find error harmless when the evidence against a defendant is so overwhelming that any reasonable jury could only have reached one conclusion." *Anthony*, 218 Ariz. 439, ¶ 41, 189 P.3d at 373.

¶17 The evidence presented at trial overwhelmingly established that Herrera, who lived with I.A., had physically assaulted her. I.A. testified Herrera had put her in a headlock and repeatedly punched her in the head and face until she bled. She further testified Herrera had twice hit her with her vehicle. Herrera's niece testified he had told her he had "put [I.A.] in a

headlock and he was punching her over and over, and then as that was happening, she opened the door and she fell out, and then somehow the car was still in Drive and it hit her." There was blood and hair on the outside passenger windshield of I.A.'s vehicle and blood on the hood on the passenger side, as well as damage to the hood of the vehicle.

¶18 A physician at the emergency room where I.A. was treated testified she had been "found unconscious on the ground . . . about fifteen feet from her car." Her "left face was extremely bruised and swollen with scrapes and abrasions, and . . . her eye was swollen shut." I.A. had suffered a "blowout fracture," or a "fracture of her left medial orbital wall" and had some bruising to her eye muscles. The defense did not argue that someone else had caused I.A.'s injuries. We conclude that "a reasonable jury could only have reached one conclusion"—that Herrera was guilty of the crimes of which he was convicted—and therefore the error in admitting Websdale's testimony was harmless.

Disposition

¶19 For the foregoing reasons, we affirm Herrera's convictions and sentences.