IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MARIO ORDONO FIGUEROA,
Appellant.

No. 2 CA-CR 2014-0128
Filed May 14, 2015

Appeal from the Superior Court in Pima County
No. CR20123572001
The Honorable Richard D. Nichols, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Richard C. Bock, Tucson
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 Mario Figueroa appeals from his convictions and sentences for attempted molestation of a child and sexual abuse of a minor under the age of fifteen. He argues the trial court erred by denying his motions to preclude evidence, for mistrial, and for a directed verdict. He further contends that the court erred by refusing to instruct the jury regarding a lesser-included offense and that prosecutorial misconduct violated his right to a fair trial. For the following reasons, we affirm Figueroa's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Figueroa's convictions and sentences. *See State v. Welch*, 236 Ariz. 308, ¶ 2, 340 P.3d 387, 389 (App. 2014). In September 2012, fourteen-year-old A.H. stopped at Figueroa's ice cream truck while walking home from school with her friend T.B. Figueroa had operated the truck in A.H.'s neighborhood for many years and often talked to A.H. about her personal life. A.H. told Figueroa—whom she called "Uncle Mario"—that she was in trouble with her parents over a large cellular telephone bill and "needed to find a job." Figueroa told A.H. she could work at his ice cream truck on weekends to earn money.

¶3 Over the next two weeks, A.H. twice stopped at Figueroa's truck when she was walking home with T.B. The first time, Figueroa slipped $100 into her jacket sleeve, saying they would "work it out later" but A.H. should "not tell people because they might get the wrong impression." A.H. told her stepfather she "had babysat and pulled weeds around the corner with [T.B.]" to earn the money. The following week, Figueroa slipped an additional $200

into A.H.'s jacket sleeve when she was walking past his truck. He told A.H. they would "meet the next day and discuss . . . what [A.H.] was going to do to pay him back for the money that he had given [her]."

¶4 Early the next morning, A.H. met Figueroa in a parking lot and got into his truck; he drove to a hardware store and parked in the back. After telling A.H. "that it was going to be okay," Figueroa kissed her on the cheek, lips, neck, and chest with his mouth and tongue and kissed and licked her breast. He also squeezed A.H.'s breast "really hard" and grabbed her inner thigh "really close to [her] crotch area" in a "moving motion" while "nibbling on [her] neck."

¶5 Figueroa then "started to play with [her] button which was under [her] belt," trying to unbutton her pants. He repeatedly asked A.H. to kiss him and asked her "why [she] didn't wear shorts that day." When A.H. told Figueroa school was starting in a few minutes, he stopped and took her to school.

¶6 As soon as she arrived at school, A.H. told T.B. what had happened in Figueroa's truck. Then, before her first class, A.H. "patted" her face and chest area with a tissue and water. Shortly thereafter, T.B. told the school principal what A.H. had told her. A.H. was called to the principal's office, where she spoke with the school counselor and a law enforcement officer. The officer then took A.H. to the Child Advocacy Center for a forensic interview. Further investigation matched Figueroa's DNA[1] with DNA found on A.H.'s left breast.

¶7 Figueroa was charged with sexual abuse of a minor under fifteen and attempted molestation of a child, both dangerous crimes against children. He was convicted on both counts and placed on concurrent ten-year terms of probation. Figueroa timely appealed.

[1]Deoxyribonucleic acid.

Admission of Expert Testimony

¶8 Figueroa argues that his convictions should be reversed because the trial court improperly allowed the state to introduce profile evidence of child sexual abusers through a "cold" expert witness. Such evidence, he claims, "is not admissible for determining guilt" and was "inherently prejudicial." We review a trial court's admission of expert testimony for an abuse of discretion. *State v. Boyston*, 231 Ariz. 539, ¶ 14, 298 P.3d 887, 892 (2013).

¶9 Before trial, Figueroa filed a motion in limine to preclude the state from calling Dr. Wendy Dutton, a forensic interviewer, as an expert on general principles pertaining to child sexual abuse victims and forensic interviewing. Dutton was to testify as a "cold" or "blind" expert, meaning she had no knowledge about the victim in this case and would offer no opinions specific to the case. *See State v. Salazar-Mercado*, 234 Ariz. 590, ¶ 1, 325 P.3d 996, 997 (2014). Figueroa asserted that "typical behavior and characteristics of sex offenders constitutes profile evidence that is generally inadmissible to prove [a defendant's] guilt." The trial court, noting that "the Court of Appeals has repeatedly affirmed cases in which Wendy Dutton has testified and has generally approved of her testimony as an expert witness who is not familiar with the facts of the case," denied Figueroa's motion.

¶10 At trial, Dutton stated that as a forensic interviewer, her job was to conduct "investigative or fact-finding interviews of alleged child victims of abuse or children who have witnessed other types of crimes." She explained that her testimony was intended to educate the jurors "about the general characteristics of child sexual abuse victims and the issues related to forensic interviewing." Dutton then testified about the process of victimization, how a child may disclose sexual abuse, a child's emotional response to abuse, and common characteristics of child sexual abuse victims.

¶11 With respect to the process of victimization, Dutton stated that it is "not uncommon for children to report that perpetrators will do things or say things to gain their trust or make them feel special like giving gifts or offering money." Figueroa's objection to this testimony was overruled. After the close of

evidence, Figueroa moved for a mistrial based on Dutton's testimony, claiming she was "profiling the case." The court concluded Dutton's testimony was "sufficiently generic to be admissible" and denied the motion.

¶12 On appeal, Figueroa maintains the trial court erred by allowing the state to introduce Dutton's testimony. He claims that "[t]estimony describing the behavioral patterns of sex offenders invites the faulty assumption or inference of guilt based on characteristics that are not probative of the defendant's actual guilt or innocence." He insists Dutton's testimony "was designed to and did impermissibly match evidence against [Figueroa] with the profile" established by her testimony. Figueroa argues that Dutton's testimony "was inadmissible and deprived [him] of a fair trial."

¶13 Rule 702, Ariz. R. Evid., which governs the admissibility of expert witness testimony, "does not bar 'cold' experts from offering general, educative testimony to help the trier of fact understand evidence or resolve fact issues." *Salazar-Mercado*, 234 Ariz. 590, ¶ 6, 325 P.3d at 998. "When the facts of the case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like the reactions of child victims of sexual abuse—expert testimony on the general behavioral characteristics of such victims should be admitted." *State v. Lujan*, 192 Ariz. 448, ¶ 12, 967 P.2d 123, 127 (1998); *see also State v. Tucker*, 165 Ariz. 340, 346, 798 P.2d 1349, 1355 (App. 1990) ("[A]n expert witness may testify about the general characteristics and behavior of sex offenders and victims if the information imparted is not likely to be within the knowledge of most lay persons" so long as expert does not "quantify nor express an opinion about the veracity of a particular witness or type of witness.").

¶14 When determining whether to admit such evidence, a trial court nonetheless may "conclude that proffered expert testimony . . . should be excluded under Rule 403." *Salazar-Mercado*, 234 Ariz. 590, ¶ 20, 325 P.3d at 1001. Rule 403, Ariz. R. Evid., states that evidence may be excluded if its "probative value is substantially outweighed by a danger of . . . unfair prejudice."

¶15 Figueroa does not challenge the admissibility of Dutton's testimony under Rule 702. Instead, he maintains that Dutton's testimony was inherently prejudicial because it risked the jury finding him guilty based on the conduct and common characteristics of other criminal defendants. In support of his argument, Figueroa relies in part on *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998), where our supreme court reversed a conviction for possession and transportation of marijuana because drug courier profile evidence had been used to prove the defendant knew he was transporting marijuana. The court criticized the assumption that "because someone shares characteristics—many of them innocent and commonplace—with a certain type of offender, that individual must also possess the same criminal culpability." *Id.* ¶ 14. The court concluded the profile evidence should not have been admitted because its only purpose was "to suggest that because the accuseds' behavior was consistent with that of known drug couriers, they likewise must have been couriers." *Id.* ¶ 18. The court stated the evidence had permeated the trial and the jurors had been encouraged "to mentally compare the defendant's actions with the profile being discussed." *Id.* ¶¶ 16, 17.

¶16 But in *Lee* the court also recognized that "there may be situations in which . . . profile evidence has significance beyond the mere suggestion that because an accused's conduct is similar to that of other proven violators, he too must be guilty." *Id.* ¶ 19. Our supreme court in *State v. Lindsey* indicated that such a situation existed with respect to molestation victims and concluded that the trial court has the discretion to admit expert testimony where "it may assist the jury in deciding a contested issue, including issues pertaining to accuracy or credibility of a witness' recollection or testimony." 149 Ariz. 472, 473, 720 P.2d 73, 74 (1986).

¶17 When Dutton testified, she did not compare Figueroa's actions to a child abuser profile. Nor did she discuss any facts or evidence presented at trial. Her testimony was helpful to the jurors in assessing the credibility of the witnesses and determining the facts, and is exactly the type of testimony permitted by our supreme court. *See, e.g., Lindsey*, 149 Ariz. at 475, 720 P.2d at 76 ("Certainly, the behavioral patterns of young victims of . . . child molestation fall

into th[e] category" of subjects "beyond the common sense, experience and education of the average juror."); *State v. Hamilton*, 177 Ariz. 403, 409, 868 P.2d 986, 992 (App. 1993) ("testimony regarding the general behavioral characteristics of child molesters and their victims is virtually the identical type of testimony that is consistently upheld by both this court and the supreme court as being helpful to jurors and, thus, a proper subject for expert testimony").

¶18 That Dutton's description of common child sexual abuse scenarios and victim responses aligned with the evidence presented at trial does not render her testimony unduly prejudicial. *See State v. Martinez*, 230 Ariz. 208, ¶ 21, 282 P.3d 409, 414 (2012) (noting not all harmful evidence unfairly prejudicial); *accord State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) ("not all harmful evidence is unfairly prejudicial" so as to require exclusion since any relevant and material evidence generally will be adverse to opponent). Her testimony educated the jurors about common characteristics of victims in sexual abuse cases and helped them understand the evidence and resolve factual issues, *Salazar-Mercado*, 234 Ariz. 590, ¶ 6, 325 P.3d at 998, and its probative value was not "substantially outweighed" by the danger of unfair prejudice, Ariz. R. Evid. 403; *see also Hamilton*, 177 Ariz. at 409, 868 P.2d at 992 (that child abuse profile testimony is "persuasive" does not render it "'unfairly' prejudicial"). The trial court did not err by admitting Dutton's testimony.

Judgment of Acquittal

¶19 Figueroa argues the trial court erred by denying his motion for judgment of acquittal, claiming there was insufficient evidence to support his conviction for attempted molestation. We review de novo a trial court's denial of a motion for a judgment of acquittal, "viewing the evidence in a light most favorable to sustaining the verdict." *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). In so doing, we "resolve all inferences against the defendant." *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004).

¶20 At the close of the state's evidence, Figueroa moved for judgment of acquittal on the attempted molestation charge. *See* Ariz. R. Crim. P. 20. He asserted that because the testimony indicated Figueroa had only "fiddled with" the button of A.H.'s pants, which was "above any area that is suggestive of the crotch area," the state had not provided "sufficient or substantial evidence" of attempted molestation. He further argued there was no evidence suggesting A.H. physically had prevented Figueroa from touching her crotch area or genitals. The trial court denied Figueroa's motion, finding there was "sufficient evidence to submit both counts to the jury."

¶21 On appeal, Figueroa maintains that the facts supporting the molestation charge show "at most 'preparation' which is not sufficient to constitute criminal attempted molestation of a child." He states he "never touched her private part; . . . never tried to pull her pants off; [and] . . . never tried to unzip her zipper." He also argues that when requested, "he stopped without further urging on [A.H.'s] part." Figueroa maintains that his alleged "contact with A.H.'s clothed thigh and button area of her pants" supported a theory of preparation, rather than attempted molestation, and the court erred by denying his Rule 20 motion as to the attempted molestation charge.

¶22 A judgment of acquittal is warranted only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a); *Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477. "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). On review, we must decide "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* at 66, 796 P.2d at 868, *quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We will reverse "only if there is 'a complete absence of probative facts to support a conviction.'" *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007),

quoting State v. Alvarez, 210 Ariz. 24, ¶ 10, 107 P.3d 350, 353 (App. 2005). If reasonable people "could differ on the inferences to be drawn from the evidence, the motion for judgment of acquittal must be denied." *State v. Sullivan*, 205 Ariz. 285, ¶ 6, 69 P.3d 1006, 1008 (App. 2003).

¶23 "A person commits molestation of a child by intentionally or knowingly engaging in . . . sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age." A.R.S. § 13-1410. "Sexual contact" in this context "means any direct or indirect touching, fondling or manipulating of any part of the genitals . . . by any part of the body or by any object." A.R.S. § 13-1401(2). To convict Figueroa of attempted molestation of a child, the state was required to prove that Figueroa intentionally had committed any act that was a "step in a course of conduct planned to culminate in [the] commission of" child molestation. *See* A.R.S. § 13-1001(A)(2); *see also Mejak v. Granville*, 212 Ariz. 555, ¶ 20, 136 P.3d 874, 878 (2006) ("Attempt requires only that the defendant intend to engage in illegal conduct and that he take a step to further that conduct."). The jury was instructed that "'[i]ntentionally' or 'with the intent to' means, with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct."

¶24 At trial, A.H. testified that Figueroa—while kissing her on the cheek, neck, chest, breast, and lips with his mouth and tongue—had squeezed her "inner thigh which was really close to [her] crotch area." She stated that Figueroa's index finger had been "close" to "touching [her] crotch" and that he had "used all of his fingers to . . . forcibly grab [her] thighs." A.H. testified that Figueroa had "started to play with [her] button" in a "pulling" motion, as though he was trying to unbutton her pants, and had asked her "why [she] didn't wear shorts that day."

¶25 Figueroa suggests that these actions unequivocally demonstrated "at most 'preparation,'" rather than an "overt act for purposes of 'attempt,'" and the trial court therefore was required to grant his motion for judgment of acquittal. We disagree. The evidence presented at trial was sufficient to allow a rational trier of

fact to conclude that Figueroa intended to or knowingly attempted to make sexual contact with A.H.'s genitals. *See* §§ 13-1001(A)(2), 13-1410; *State v. Johnson*, 210 Ariz. 438, ¶ 7, 111 P.3d 1038, 1040 (App. 2005) (testimony that defendant, while on top of sleeping victim, kissed her thigh while trying to pull down her underwear, along with other evidence, constituted "substantial step toward engaging in sexual contact"); *State v. Fristoe*, 135 Ariz. 25, 30-31, 658 P.2d 825, 830-31 (App. 1982) (verbal request for oral sexual contact from multiple minor victims, coupled with other circumstances, sufficient to constitute attempt; that defendant did not use force, and that one minor victim consented, did not affect defendant's culpability). Figueroa's argument that he stopped when requested does not affect this analysis—the act of attempted molestation already had been completed. Ample evidence supported Figueroa's convictions, and the trial court did not err by denying his motion for a judgment of acquittal.

Jury Instruction

¶26 Figueroa argues the trial court erred by denying his request to instruct the jury regarding the lesser-included offense of contributing to the delinquency of a minor. "We review a court's denial of a requested jury instruction for an abuse of discretion." *State v. Musgrove*, 223 Ariz. 164, ¶ 5, 221 P.3d 43, 46 (App. 2009). We will not reverse the court's decision "absent a clear abuse of that discretion and resulting prejudice." *State v. Larin*, 233 Ariz. 202, ¶ 6, 310 P.3d 990, 994 (App. 2013).

¶27 After the close of evidence, Figueroa requested that the jury be instructed on the offense of contributing to the delinquency of a minor as a lesser-included offense of attempted child molestation. The trial court denied this request, stating that "by charging the attempt and not the completed offense, [the state] charges the crime in such a way that contributing is no longer a necessarily lesser included offense." Specifically, the court noted that "the State could prove a step in the course of conduct"—such as touching A.H.'s pants button—"that does not constitute molestation and, therefore, doesn't support a lesser included offense of contributing [to the delinquency of a minor]."

¶28 "A criminal defendant is entitled to a jury instruction on any theory of the case reasonably supported by competent evidence." *State v. Hummer*, 184 Ariz. 603, 606, 911 P.2d 609, 612 (App. 1995). A trial court also must instruct the jury on "all offenses necessarily included in the offense charged." Ariz. R. Crim. P. 23.3. An offense is necessarily included only when it is a "lesser included offense" of the crime charged and the evidence in the record is sufficient to support a conviction on the lesser offense alone. *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006). The evidence is sufficient when a rational jury could "find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *Id.* ¶ 18.

¶29 On appeal, Figueroa claims that A.H.'s testimony "supported a lesser-included offense of contributing to the delinquency of a minor, as [his] claimed acts tended to debase or injur[e] her morals, health or welfare." He maintains the trial court erred by denying his request and requests that we reverse his conviction for attempted child molestation.[2]

¶30 As noted above, attempted molestation of a child occurs when a person "intentionally or knowingly engag[es] in" an action that constitutes a "step in a course of conduct planned to culminate in" the "direct or indirect touching, fondling or manipulating of any part of the genitals" of a child who is under fifteen years of age. §§ 13-1001(A)(2), 13-1401(2), 13-1410. A person is guilty of contributing to the delinquency of a minor when that person "by any act, causes, encourages or contributes to the . . . delinquency of a child." A.R.S. § 13-3613(A). "Delinquency" is defined as "any act that tends to debase or injure the morals, health or welfare of a child." A.R.S. § 13-3612(1). "[C]ontributing to the delinquency of a minor is a lesser included offense of child molesting" because "a person who molests a child necessarily performs an act which 'tends to debase or injure the morals, health or welfare of a child.'" *State v. Sutton*, 104 Ariz. 317, 318-19, 452 P.2d 110, 111-12 (1969).

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[2]Figueroa requested and was granted this instruction as to the charge of sexual abuse.

¶31 In considering the evidence, the jury could not have convicted Figueroa for contributing to the delinquency of a child while finding that the state had failed to prove an element of attempted child molestation. Evidence presented at trial showed that Figueroa had, among other things, "play[ed] with" A.H.'s button. As the trial court pointed out, such an act could be considered a "step in the course of conduct" that would support a conviction for attempted molestation of a child without "debas[ing] or injur[ing] the morals, health or welfare of a child." § 13-3612(1). Figueroa has failed to specify which element of child molestation the state might have failed to prove that could support a charge of contributing to the delinquency of a minor, and we can discern none. *See Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151. The evidence did not support the requested instruction and the trial court did not err by declining to give it.

Motions for Mistrial

¶32 Figueroa argues the trial court erred by denying the motions for mistrial he made after two witnesses testified during direct examination by the prosecutor as to the "issue of truthfulness" and the prosecutor "made an impermissible comment on [Figueroa's] failure to testify." We review the denial of a mistrial based on prosecutorial misconduct for an abuse of discretion. *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997).

¶33 To determine if a prosecutor's conduct constituted misconduct that warrants a mistrial, a trial court should consider (1) whether the prosecutor's statements called to the jury's attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks. *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992), *disapproved on other grounds by State v. Nordstrom,* 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001). Because the trial court is in the best position to determine the effects of a prosecutor's conduct on a jury, *State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006), we will not reverse its decision on a motion for mistrial unless the cumulative effect of the misconduct "so permeated the entire atmosphere of the trial with unfairness that it denied [Figueroa] due process," *State v. Roque*, 213 Ariz. 193, ¶ 165, 141 P.3d 368, 405 (2006). The declaration

of a mistrial is "'the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.'" *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003), *quoting State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983).

Testimony on Truthfulness

¶34 Figueroa first claims the trial court should have declared a mistrial when "[b]oth the prosecutor and [a witness] impermissibly introduced A.H.'s truthfulness to establish" Figueroa's guilt. At trial, A.H. testified she had been interviewed by a "lady" at the Child Advocacy Center after meeting with her school principal, mother, and guidance counselor. The prosecutor asked, "And is everything you told the lady that day, was it the truth?" to which A.H. responded, "Yes." Figueroa objected and moved for a mistrial, arguing that the state was "putting the prestige of the [County Attorney's] office . . . that this witness is a truthful witness," which he claimed was "an impermissible form of vouching." The court found the question to be "impermissible," but did not find it to be "vouching or prejudicial" and denied Figueroa's motion.

¶35 The state later questioned Glenda Rivas, the interviewer from the Child Advocacy Center. Rivas testified that her job as a forensic interviewer was to "conduct[] interviews with children" by "ask[ing] questions in [a] nonleading or suggestive manner." When the state asked Rivas to describe the protocols for conducting such interviews, Rivas testified that she lets the child know she is not law enforcement, she will keep his or her statements confidential, and the child can correct her if she has gotten something wrong. She further stated that she lets the child "know that we're only going to talk about the truth." The trial court sustained Figueroa's objection to this statement. Rivas apologized, stating it was "the script of the rules." The state then asked Rivas "when you start to ask [a child interviewee] questions, how do you get them onto that subject? How do you move from the rules to the substantive questions?" Rivas replied, "Well, before I ask them that, I do let them know that we're only going to talk about truth." Figueroa again objected, and the court sustained his objection.

¶36 Later, Figueroa moved for a mistrial, stating he was "very concerned about" the "situation . . . where we have [a] witness[] testifying about the alleged victim being truthful." He urged that Rivas's statements "prejudice[d] [him]" and amounted to "vouching or improper" examination by the prosecutor. The trial court denied the motion, but noted it did not want to "leave the jury with the impression that the allegations by the victim have any more validity because they were processed through the Child Advocacy Center." The prosecutor later asked if the judge "would like [the state] to clarify with [Rivas that] her role is not to determine whether or not a child is telling the truth" and to "clear that up" but the court said no.

¶37 On appeal, Figueroa maintains these two instances amounted to prosecutorial misconduct by vouching because "[b]oth the prosecutor and [Rivas] impermissibly introduced A.H.'s truthfulness to establish" Figueroa's guilt. He argues that the question of his guilt or innocence "inherently turned on the question of A.H.'s credibility," and the improper testimony regarding truthfulness requires us to reverse his convictions. Prosecutorial misconduct by vouching occurs in two circumstances: when the state places governmental prestige behind its evidence or witnesses, and when a prosecutor suggests that its evidence is supported by information not presented to the jury. *Newell*, 212 Ariz. 389, ¶ 62, 132 P.3d at 846, *citing State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989). We conclude the prosecutor did neither.

¶38 Assuming the prosecutor's question to A.H. was "impermissible," the question itself did not constitute prosecutorial vouching. Rather than placing the prestige of the government behind A.H., the state asked A.H. to testify about her own truthfulness. This did not so infect the trial with unfairness that it made Figueroa's conviction a denial of due process. *See Roque*, 213 Ariz. 193, ¶ 165, 141 P.3d at 405. This is particularly true in light of the other evidence supporting Figueroa's convictions, including testimony from other witnesses and the DNA found on A.H.'s breast.

¶39 As to Rivas's statements, we agree that "trial courts should not admit direct expert testimony that quantifies the

probabilities of the credibility of another witness." *See Lindsey*, 149 Ariz. at 475, 720 P.2d at 76. We conclude, however, that Rivas's testimony did not quantify A.H.'s credibility. Rather, Rivas stated only that when conducting forensic interviews at the Child Advocacy Center, it was her general practice to instruct interviewees to tell the truth. That does not, by itself, lead to an inference that A.H. was telling the truth. It simply provided the jury with information it could utilize to help understand the process of interviewing child sexual abuse victims. This is the proper function of expert testimony. *See id.* (expert's function "to provide testimony on subjects . . . beyond the common sense, experience and education of the average juror"). The trial court did not err by declining to grant a mistrial on this basis.

Comment on Failure to Testify

¶40 Figueroa next argues the trial court erred by denying his motion for a mistrial after the prosecutor commented on his failure to present a plausible defense, which Figueroa argues is a comment on his failure to testify at trial. During the state's rebuttal closing argument, the prosecutor told the jury, "The defense is doing an interesting thing where they're not really providing you with an explanation as to why . . . [Figueroa's] DNA is on [A.H.]." Figueroa objected to this statement, which the court overruled, and then reserved a motion. The trial court later denied his motion for a mistrial.

¶41 On appeal, Figueroa argues that "no one but [Figueroa] could have contradicted the prosecutor's [DNA] witness." He therefore claims the prosecutor's statement regarding his failure to provide an alternative explanation for the presence of Figueroa's DNA on A.H.'s breast "drew the jurors' attention to the fact that [Figueroa] did not testify," and violated the prohibition against compelling a defendant to incriminate himself. *See* A.R.S. § 13-117; *State v. Schrock*, 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986) ("In Arizona, a prosecutor is prohibited . . . from bringing to the jury's attention either directly or indirectly the fact a defendant did not testify.").

¶42 A prosecutor's comments may be "improper" if they are "'calculated to direct the jurors' attention to the defendant's exercise of his fifth amendment privilege.'" *State v. Hughes*, 193 Ariz. 72, ¶ 64, 969 P.2d 1184, 1199 (1998), *quoting State v. McCutcheon*, 159 Ariz. 44, 45, 764 P.2d 1103, 1104 (1988). But our courts have long held that a prosecutor's general comments that the state's evidence is uncontroverted are not improper comments on a defendant's failure to testify. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) ("The prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify" and "it [does not] appear[] that the defendant is the only one who could explain or contradict the state's evidence."); S*tate v. Flynn*, 109 Ariz. 545, 548, 514 P.2d 466, 469 (1973) (prosecutor's statement that defendant did not bring witnesses to rebut state's evidence not improper comment on failure to testify); *State v. Byrd*, 109 Ariz. 10, 11, 503 P.2d 958, 959 (1972) ("The prosecution has a right to argue to the jury that the State's case has not been contradicted, even though the defendant is one of the persons who might have done so."); *see also State v. Sarullo*, 219 Ariz. 431, ¶ 24, 199 P.3d 686, 692 (App. 2008) ("When a prosecutor comments on a defendant's failure to present evidence to support his or her theory of the case, it is neither improper nor shifts the burden of proof to the defendant.").

¶43 The prosecutor's statement that Figueroa had not provided an explanation for the presence of his DNA on A.H.'s breast was incorrect; Figueroa did, in fact, suggest the DNA was transferred when A.H. wiped herself with a tissue before class. He supported this contention with the DNA expert's testimony that it was possible to transfer DNA from one part of the body to another. This explanation demonstrates that Figueroa's testimony was not the only possible means of explaining the presence of his DNA on A.H.'s breast and, accordingly, the jury did not "naturally and necessarily perceive" the prosecutor's statements to be a comment on Figueroa's failure to testify. *See Schrock*, 149 Ariz. at 438, 719 P.2d at 1054; *Fuller*, 143 Ariz. at 575, 694 P.2d at 1189. To the extent the prosecutor's statement could have been perceived as such, the comment was isolated, and likely did not influence the jurors. *See*

Atwood, 171 Ariz. at 611, 832 P.2d at 628. The court did not err by declining to grant a mistrial on this basis.

Prosecutorial Misconduct

¶44 Figueroa asserts that prosecutorial misconduct violated his right to a fair trial. Specifically, he claims the state improperly solicited testimony "on the issue of truthfulness," improperly commented on his failure to testify, "vouch[ed]" for A.H.'s truthfulness in its closing argument, and impermissibly profiled its case through Dutton's testimony. He contends that the "cumulative effect" of this conduct "deprived him of a fair trial" and requests that we reverse his convictions and order a new trial only on the sexual abuse of a minor charge.

¶45 "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that '(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Moody*, 208 Ariz. 424, ¶ 145, 94 P.3d 1119, 1154 (2004), *quoting Atwood,* 171 Ariz. at 606, 832 P.2d at 623. "For each alleged incident [of prosecutorial misconduct], our standard of review depends on whether [Figueroa] objected at trial. If he objected, the issue was preserved. If he failed to object, we review only for fundamental error." *Roque*, 213 Ariz. 193, ¶ 154, 141 P.3d at 403 (citation omitted); *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Fundamental error is that "'going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Figueroa has the burden of showing both that the error was fundamental and that it caused him prejudice. *See id.* ¶¶ 19-20.

Testimony on Truthfulness and Comment on Failure to Testify

¶46 Figueroa "incorporate[s] by reference" his arguments that the state impermissibly solicited testimony on the issue of truthfulness and commented on his failure to testify. Although Figueroa objected to the prosecutor's questioning of A.H. and Rivas

and to the prosecutor's comment on his failure to present a plausible defense below, he did not argue that these acts amounted to prosecutorial misconduct. Rather, the basis for his objection was that the jury had been "impermissibly introduced [to] A.H.'s truthfulness to establish" Figueroa's guilt. In other words, Figueroa argued the jury's attention had been called to matters it should not have considered in reaching its decision, *see Atwood*, 171 Ariz. at 611, 832 P.2d at 628, not that the prosecutor had acted intentionally or with an improper purpose, *see State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007).

¶47 Figueroa does not provide any additional argument or authority to establish that the prosecutor's questioning and comment constituted misconduct. Thus even were we to conclude that Figueroa had preserved his prosecutorial misconduct objection to A.H. and Rivas's testimony and the prosecutor's statements, he has failed to demonstrate that the conduct deprived him of a fair trial. Because we already have concluded the conduct was not error meriting relief on appeal, we do not consider his arguments further. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument on appeal).

Vouching During Rebuttal Closing

¶48 Figueroa argues that during the state's rebuttal closing arguments, "the prosecutor explicitly vouched for the alleged victim" by informing the jury that A.H. had told the truth. He insists this constituted prosecutorial vouching because the prosecutor put the prestige of the state behind A.H. and expressed an opinion as to Figueroa's guilt or innocence,[3] which he contends is fundamental, prejudicial error.

[3]Figueroa admits he did not object to this statement at trial but argues that his objections to the earlier questioning about truthfulness preserved the issue for harmless error analysis. We disagree. *See State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683-84 (App. 2008) (general objection insufficient to preserve issue for appeal); Ariz. R. Evid. 103(a)(1) (to preserve error, party must timely object stating specific ground).

¶49 As noted above, improper vouching occurs when the state places governmental prestige behind its evidence or witnesses and when a prosecutor suggests that the state's evidence is supported by information not presented to the jury. *Newell*, 212 Ariz. 389, ¶ 62, 132 P.3d at 846, *citing Vincent*, 159 Ariz. at 423, 768 P.2d at 155. Counsel is given wide latitude in closing argument, however, and may comment on evidence and argue all reasonable inferences therefrom. *See State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000) (prosecutors afforded wide latitude in presenting closing arguments to jury); *State v. Gonzales*, 105 Ariz. 434, 437, 466 P.2d 388, 391 (1970) (closing arguments "not evidentiary in nature"; counsel permitted to comment on evidence already introduced and argue reasonable inferences). For prosecutorial misconduct to qualify as fundamental, prejudicial error, the error must be "'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Harrod*, 218 Ariz. 268, ¶ 35, 183 P.3d 519, 529 (2008), *quoting Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191.

¶50 During the state's rebuttal closing argument, the prosecutor reminded the jurors of their duty to convict Figueroa if "firmly convinced" of his guilt. She stated,

> That's the instruction, firmly convinced, firmly convinced that [A.H.] has no motive to lie.
>
> And [A.H.] told you the truth about what happened in that truck. You're firmly convinced—and you should be if you consider all of the evidence where it needs to be focused on—you will find the defendant guilty.

Figueroa argues this statement amounted to fundamental error of a "prejudicial nature" when viewed in light of the entire record. We do not agree.

¶51 First, it is not clear from the written transcript whether the prosecutor was stating that A.H. had told the truth or instructing the jurors they must be "firmly convinced" that A.H. had

told them the truth.[4] Figueroa's counsel's failure to object to the prosecutor's remark suggests that he, too, understood the comment to be part of a broader discussion about the jury's duty, and therefore not unfairly prejudicial. *See, e.g., James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999) (noting "[t]he absence of a timely objection is particularly significant to a claim of prosecutor misconduct in closing argument" because both defense counsel and trial court heard remarks and were in better position to determine significance to trial). But, even assuming arguendo that the prosecutor did vouch for A.H.'s truthfulness, Figueroa has failed to persuade us that this error so "'permeate[d] the entire atmosphere of the trial'" that he was denied a fair trial. *See Harrod*, 218 Ariz. 268, ¶ 35, 183 P.3d at 529, *quoting Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191.

¶52 In his closing arguments, Figueroa attacked A.H.'s credibility by insinuating she had lied about how she obtained the initial one hundred dollars he had given her, suggesting she had a poor memory, pointing out the lack of bruises or marks or additional DNA on her body, and implying she may have fabricated the story "to take pressure off her from what she caused at the family level . . . because of what she did with her cell phone." He suggested A.H.'s demeanor following the incident diminished her credibility and argued that the state had not proven its claims beyond a reasonable doubt.

¶53 The state pointed out that Figueroa had provided "no evidence of any motive to fabricate these allegations" and provided "no evidence whatsoever that makes sense as to why a 14-year-old girl would make up these allegations against a man that she cared about and trusted." The state discussed each piece of evidence presented, including Figueroa's DNA found on A.H., "[A.H.'s] cell phone, the money, [Figueroa's] silver truck, [A.H.] and what she's wearing that day, the crime lab report," and A.H.'s statements to her counselor, and concluded that the only "reasonable [conclusion] to reach based on the totality of the circumstances" was to find

[4]It is the court reporter—not the speaker—who determines punctuation and paragraph breaks in the transcript.

Figueroa guilty. The state also discussed the lack of evidence supporting the defense theory and noted that while the "defense has absolutely no obligation whatsoever to provide any evidence," and that "[t]he burden is completely on the State," if the defense was going to "suggest a different theory or ask you to believe in their version of the facts . . . they need to be able to point to some evidence that supports their theory of the case."

¶54 Thus throughout the trial, both the state and the defense sought, respectively, to establish or diminish A.H.'s credibility. Even if the transcript could be read as Figueroa proposes, the statement was isolated and, within the context of the parties' broader arguments, did not so permeate and infect the trial with unfairness as to deny Figueroa due process, and therefore did not amount to fundamental, prejudicial error. *See Harrod*, 218 Ariz. 268, ¶ 35, 183 P.3d at 529, *quoting Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191.

Profile Evidence

¶55 Figueroa next argues that the state committed prosecutorial misconduct by "impermissibly profil[ing its] case through the testimony of [its] 'cold witness' [Dutton]." Because Figueroa did not object to Dutton's testimony on this basis below, we review only for fundamental, prejudicial error. *Roque*, 213 Ariz. 193, ¶ 154, 141 P.3d at 403. But Figueroa does not argue this error was fundamental, and therefore has waived this argument on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). Further, even had he preserved this claim, we cannot construe the presentation of evidence that was properly admitted to be an instance of prosecutorial misconduct. *See Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27 (prosecutorial misconduct occurs when prosecutor intentionally acts in improper and prejudicial manner, without regard to danger of mistrial).

Cumulative Error

¶56 Finally, Figueroa argues "that the cumulative effect of the prosecutor's misconduct deprived him of a fair trial." To find reversible error, we must find that the cumulative effect of the

misconduct "so permeated the entire atmosphere of the trial with unfairness that it denied [Figueroa] due process." *Roque*, 213 Ariz. 193, ¶ 165, 141 P.3d at 405; *Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191. Because this claim was not raised below, Figueroa has the burden to establish that the error was both fundamental and prejudicial. *See Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d at 608.

¶57 As discussed above, Figueroa has failed to show that any of the alleged instances of prosecutorial misconduct was error, let alone fundamental error. Although incidents that themselves are not reversible error can contribute to reversible cumulative error, *Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d at 403, we cannot say that cumulative error exists when none of the objectionable incidents has been shown to be error. We therefore do not agree that Figueroa's trial was so infected with unfairness that he was denied due process. *See Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191.

Disposition

¶58 For the foregoing reasons, we affirm Figueroa's convictions and sentences.