IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JULIO PEDROZA-PEREZ,
Appellant.

No. 2 CA-CR 2014-0168
Filed August 12, 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NOT FOR PUBLICATION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 Pima County
No. CR20132784001
The Honorable Christopher C. Browning, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Interim Pima County Public Defender
By Rebecca A. McLean, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Kelly[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Julio Pedroza-Perez was convicted of transportation of marijuana for sale and possession of drug paraphernalia. The trial court sentenced him to concurrent prison terms, the longest of which is 50 months. On appeal, Pedroza-Perez argues the court erred by "refus[ing] to permit the defense to present the facts of [his] duress defense in opening statement." He also argues the court erred by precluding relevant evidence "in violation of his Fifth and Sixth Amendment rights to present a defense." For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Pedroza-Perez's convictions. *See State v. Brown*, 233 Ariz. 153, ¶ 2, 310 P.3d 29, 32 (App. 2013). In June 2013, two smugglers guided Pedroza-Perez and two other immigrants through the desert and into the United States from Mexico. After their first night walking, the group met with two other smugglers, who gave the group several bales of marijuana to carry.

¶3 On the third night of the crossing, a joint operation consisting of Border Patrol officials and Pima County Sheriff's Department deputies spotted the group. When the deputies approached, however, they found Pedroza-Perez sitting alone under a tree with six bales of marijuana made into backpacks weighing 134.4 pounds. Efforts to find the other members of the group failed. Sergeant Jeremy Olsen conducted a post-arrest interview with

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

Pedroza-Perez, who stated he had carried the marijuana in order to pay for the smugglers' services.

¶4 A grand jury indicted Pedroza-Perez for importation of marijuana, transportation of marijuana for sale, and possession of drug paraphernalia, to wit, a twine and burlap sack. Before trial, Pedroza-Perez filed a motion to exclude his statements to law enforcement and gave notice that he intended to raise duress as a defense. The state filed a motion in limine to preclude the defense because it was "not supported by the facts."

¶5 During a pretrial hearing on these and other issues, the trial court warned that it would "need to hear some testimony from [Pedroza-Perez]" before ruling on the state's motion to preclude the duress defense. The court explained:

> Whether or not you choose to put it on at the time of the motion or time of trial is up to you, I guess. But I'm not going to rule definitively one way or another until I hear from the defendant.
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> Furthermore, . . . the defense will not be permitted in opening statement . . . to make any reference at all to this duress defense unless either the [c]ourt allows it in a pretrial setting or, if the defendant does testify at trial . . . .

Defense counsel agreed and stated she "would prefer" to wait until trial to raise the issue of duress. Therefore, during the pretrial hearing, Pedroza-Perez limited his testimony to a discussion of his statements to law enforcement, asserting they were involuntary because, he claimed, deputies had denied his requests for food and water until after the interview.

¶6 The trial court ultimately determined it would treat the state's motion in limine to preclude the duress defense "as withdrawn subject to being re-urged," that is, if Pedroza-Perez testified on the subject or "elicited information adequate to give rise

to [the] duress defense." The court also denied Pedroza-Perez's motion to suppress the post-arrest statements, finding his "credibility as to these issues . . . suspect, at best."

¶7 Less than a month before trial, Pedroza-Perez filed a motion for clarification of the trial court's ruling on the scope of his opening statement. As an "offer of proof," he included an affidavit, explaining the smugglers had threatened to leave him in the desert or shoot him if he did not carry the marijuana. In its ruling, and again on the first day of trial, the court concluded it would "not modify its earlier ruling" because Pedroza-Perez still could choose not to testify at trial.

¶8 Accordingly, defense counsel did not mention the defense of duress until closing arguments, and only after Pedroza-Perez had testified. The jury found Pedroza-Perez guilty of transportation of two pounds or more of marijuana for sale and possession of drug paraphernalia, but not guilty of importation. The trial court sentenced Pedroza-Perez as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Opening Statement

¶9 Pedroza-Perez argues the trial court erred when it prohibited him from discussing "the facts of [his] duress defense in opening statement." He also maintains the ruling violated his right to present a defense and his right to counsel. A court "'has full discretion in the conduct of the trial, and that discretion will not be overturned on appeal absent a clear showing of an abuse of discretion.'" *State v. Sucharew*, 205 Ariz. 16, ¶ 6, 66 P.3d 59, 64 (App. 2003), *quoting State v. Just*, 138 Ariz. 534, 550, 675 P.2d 1353, 1369 (App. 1983); *see State v. Islas*, 119 Ariz. 559, 561, 582 P.2d 649, 651 (App. 1978). To the extent Pedroza-Perez's argument raises constitutional issues, however, our review is de novo. *See State v. Armstrong*, 218 Ariz. 451, ¶ 20, 189 P.3d 378, 385 (2008).

¶10 Rule 19.1(a), Ariz. R. Crim. P., provides that a criminal defendant is entitled to make an opening statement either at the start of trial or at the end of the prosecution's case-in-chief. During the

opening statement, the defendant can "'advise the jury of the facts relied upon and of the questions and issues involved, which the jury will have to determine, and . . . give them a general picture of the facts and the situations, so that they will be able to understand the evidence.'" *State v. Waller*, 235 Ariz. 479, ¶ 24, 333 P.3d 806, 814 (App. 2014), *quoting State v. Burruell*, 98 Ariz. 37, 40, 401 P.2d 733, 735-36 (1965). The defendant enjoys "'considerable latitude'" in this context, but the scope of an opening statement is not without limit. *Id.*, *quoting Burruell*, 98 Ariz. at 40, 401 P.2d at 736. Opening statements should not include argument, *see State v. King*, 180 Ariz. 268, 278, 883 P.2d 1024, 1034 (1994), or "statements which will not or cannot be supported by proof," *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring); *see State v. Bible*, 175 Ariz. 549, 601-02, 858 P.2d 1152, 1204-05 (1993).

¶11 Here, the trial court apparently relied on the latter limitation in ruling Pedroza-Perez could not mention duress in his opening statement. The court noted "[t]he only evidence to support the . . . claim of 'duress' comes from [Pedroza-Perez] himself."[2]

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[2]The trial court also noted that, during the pretrial hearing, it had "found [his] testimony to be substantially lacking credibility." In doing so, however, the court conflated the pretrial hearing testimony with Pedroza-Perez's anticipated testimony at trial. Pedroza-Perez had testified about his physical well-being during his allegedly involuntary post-arrest statements, but did not testify about his well-being when the smugglers allegedly forced him to carry the marijuana.

Moreover, to the extent the court relied on its earlier credibility finding, the court erred. *See State v. Lehr*, 201 Ariz. 509, ¶ 29, 38 P.3d 1172, 1180 (2002) ("'[A]dmissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge.'"), *quoting State v. Sanchez*, 400 S.E.2d 421, 424 (N.C. 1991); *King*, 180 Ariz. at 278, 883 P.2d at 1034 (party may discuss in opening statement "what the party expects to prove" at trial). Nevertheless, the court used this finding to bolster its reasoning, not as an independent basis to

And, although he submitted an affidavit laying out his anticipated testimony and defense counsel avowed he would testify, the court concluded "such assertion lacks significance . . . because [he] can change his mind at any time and decide not to testify."

¶12 Unlike other witnesses, a criminal defendant has "an absolute right not to testify." *State v. Whitaker*, 112 Ariz. 537, 542, 544 P.2d 219, 224 (1975); *see* U.S. Const. amend. V; A.R.S. § 13-117. And, prosecutors are constitutionally prohibited from commenting, directly or indirectly, on a defendant's failure to testify. *State v. Ramos*, 235 Ariz. 230, ¶ 10, 330 P.3d 987, 991 (App. 2014). Consequently, when "it appears that the defendant is the only one who could explain or contradict the state's evidence," as is the case here, a prosecutor also is prohibited from commenting on "the defendant's failure to present [any] exculpatory evidence." *State v. Bracy*, 145 Ariz. 520, 535, 703 P.2d 464, 479 (1985). It necessarily follows that, if Pedroza-Perez had discussed duress in his opening statement and later exercised his right to not testify, the state would have been unable to respond to his assertion. Because of these unique circumstances, the trial court acted within its discretion when limiting the scope of Pedroza-Perez's opening statement. *See Sucharew*, 205 Ariz. 16, ¶ 6, 66 P.3d at 64; *Islas*, 119 Ariz. at 561, 582 P.2d at 651.

¶13 Pedroza-Perez nevertheless argues he "effectively was denied the opportunity to present any opening statement at all." However, in his opening, defense counsel explained to the jury:

> [Y]ou'll hear testimony that this is more than 100 pounds of marijuana. Much more than Julio could carry. There is no doubt [there were] other fellows out there, and they all got away. No dispute Julio sat down on the ground. He didn't try and run off. That's what you'll hear from the [deputies].

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support its ruling regarding the opening statement. In turn, the error does not affect our analysis.

> . . . .
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> . . . [T]he [deputies] will tell you what happened halfway through the story when they got on the scene and found him sitting on the ground, not running off. But the [deputies] weren't present for the other half of the story. It was just Julio and the other fellows.
>
> And I think that he is going to take the stand and I think he is going to tell you about that.

Thus, despite the trial court's restriction, defense counsel's opening statement prepared the jury to hear Pedroza-Perez's testimony and to question what had happened before the deputies arrived. *See Waller*, 235 Ariz. 479, ¶ 24, 333 P.3d at 814.

¶14 Pedroza-Perez also maintains the trial court's ruling affected his right to present a defense and his right to counsel. However, a criminal defendant's right to present a defense "'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Rock v. Arkansas*, 483 U.S. 44, 55 (1987), *quoting Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *see also State v. Paxson*, 203 Ariz. 38, ¶ 13, 49 P.3d 310, 313 (App. 2002). In this case, the court's ruling was not an absolute bar against the duress defense. Instead, the court explained:

> [S]hould . . . Pedroza-Perez choose to testify and should that testimony indicate that he felt he was under "duress" during and after the events giving rise to the charges the [s]tate has brought against him, then of course counsel will be free to argue such in her closing argument. The [c]ourt will also give an appropriate instruction or instructions on the effect of "duress", assuming counsel request such instructions . . . .

¶15 During his testimony at trial, Pedroza-Perez explained that he had not planned on carrying marijuana through the desert. He testified that, after the first night of the crossing, the smugglers had taken "all [his] belongings away" and threatened to "leave [him] in the desert without water or food." He stated, "They showed us their weapons," and he agreed that he believed he "would die if [he] didn't carry that backpack." Moreover, defense counsel addressed the duress theory in great detail during closing argument, and the court properly instructed the jury on that defense. Thus, although the trial court placed some restriction on the manner in which defense counsel introduced Pedroza-Perez's defense, that restriction did not deny him representation or prevent him from presenting a defense. *See Armstrong*, 218 Ariz. 451, ¶ 20, 189 P.3d at 385.

Relevant Evidence

¶16 Pedroza-Perez argues the trial court erred by precluding "testimony regarding his journey to the United States in violation of his Fifth and Sixth Amendment rights to present a defense." "[W]e review the trial court's determination of the relevancy and admissibility of evidence for [an] abuse of discretion." *State v. Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53 (2003). However, "[w]hen the alleged error is based on a constitutional or legal issue, we review the issue de novo." *State v. Boggs*, 218 Ariz. 325, ¶ 38, 185 P.3d 111, 120 (2008).

¶17 A criminal defendant has the constitutional right to present a complete defense at trial. *See State v. Abdi*, 226 Ariz. 361, ¶ 27, 248 P.3d 209, 215 (App. 2011). This right, however, is nonetheless subject to our evidentiary rules. *See id.* Pursuant to Rule 402, Ariz. R. Evid., evidence generally is admissible if it is relevant. "Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence . . . and . . . the fact is of consequence in determining the action." Ariz. R. Evid. 401. A court may, however, "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403.

¶18 Pedroza-Perez sought to prove he had carried the marijuana under duress by presenting evidence that he was tired and thirsty. Section 13-412(A), A.R.S., provides:

> Conduct which would otherwise constitute an offense is justified if a reasonable person would believe that he was compelled to engage in the proscribed conduct by the threat or use of immediate physical force against his person or the person of another which resulted or could result in serious physical injury which a reasonable person in the situation would not have resisted.

At trial, defense counsel asked Pedroza-Perez during direct examination, "How did you get from Chiapas to the border?" The state objected on relevance grounds, and the trial court sustained the objection. Defense counsel resumed the questioning, first asking Pedroza-Perez whether he was rested when he arrived at the border, and then, "How long ha[d he] been traveling?" The state objected to this second question, and the court again sustained the objection. Defense counsel argued "the trip from Chiapas" left Pedroza-Perez tired and thirsty, which reflected on "whether he was able to resist being able to carry a backpack of marijuana [and] whether he was able to properly answer questions" during the post-arrest interview. The court nevertheless rejected the argument. It later clarified that the details of "his journey" from Mexico to the United States border were not relevant and would amount to a "waste of time."

¶19 Pedroza-Perez raises the same argument on appeal. He argues "[t]he events leading up to his arrival at the border were certainly relevant, as they detailed the effect the journey's events had on [his] mental and physical state." And, he maintains his state of being was "part of the cause of his actions at the border" and affected "his understanding of . . . Olsen's questions, and his ability to answer those questions."

¶20 "Duress envisions a third person compelling a person by the threat of immediate physical violence to commit a crime

against another person or the property of another person." *State v. Lamar*, 144 Ariz. 490, 497, 698 P.2d 735, 742 (App. 1984). It must be "present, imminent and impending." *State v. Jones*, 119 Ariz. 555, 558, 582 P.2d 645, 648 (App. 1978). But details regarding Pedroza-Perez's journey from the southern reaches of Mexico to the United States border would not make it more or less probable that this type of coercion had occurred. *See Lamar*, 144 Ariz. at 497, 698 P.2d at 742. Nor would these additional details reflect on his ability to understand and respond to law enforcement questioning after his arrest. Therefore, we cannot say the court erred when it precluded evidence of the journey on relevance grounds. *See Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d at 53; *Boggs*, 218 Ariz. 325, ¶ 38, 185 P.3d at 120.

¶21 And, even assuming evidence of the journey may have been relevant, we cannot say the trial court abused its discretion by precluding it under Rule 403, as a waste of time. Pedroza-Perez testified at trial that, after the first night of his crossing, he was already tired, hungry, and thirsty. And, he explained, after three nights of walking in the desert heat, he was "very hungry," "very thirsty," "dehydrated," and "couldn't put up with the weight of the backpack." Thus, the trial court did not deny Pedroza-Perez the opportunity to discuss his "mental and physical state" during the crossing or after his arrest. The additional evidence of the entire journey was cumulative and thus not critical to his duress defense. *See State v. Payne*, 233 Ariz. 484, ¶ 52, 314 P.3d 1239, 1258 (2013); *see also State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) ("We are obliged to affirm the trial court's ruling if the result was legally correct for any reason.").

Disposition

¶22 For the foregoing reasons, we affirm Pedroza-Perez's convictions and sentences.