

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

EPIFANIO PALMA-MOSQUEDA,
Appellant.

No. 2 CA-CR 2014-0227
Filed October 29, 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NOT FOR PUBLICATION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. CR20121126001

The Honorable Paul E. Tang, Judge

The Honorable Kenneth Lee, 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

STATE v. PALMA-MOSQUEDA
Decision of the Court

Dean Brault, Pima County Legal Defender
By Scott A. Martin, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Judge Espinosa and Judge Kelly¹ concurred.

ECKERSTROM, Chief Judge:

¶1 Epifanio Palma-Mosqueda appeals from his convictions and sentences following a jury trial for three counts of sexual offenses. For the following reasons, we affirm.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the jury’s verdicts.” *State v. Forde*, 233 Ariz. 543, n.2, 315 P.3d 1200, 1209 n.2 (2014). In late spring of 2007, V.V., then eleven years old, was staying at the apartment of her uncle, Palma-Mosqueda. During the night, he touched V.V. on her breasts and vagina. When V.V. pleaded for him to stop, he threatened to kill her. He then raped V.V. by putting his penis into her vagina.

¶3 The next day, Palma-Mosqueda reminded V.V. not to tell anyone about what had happened. V.V. eventually told her aunt, B.P., but B.P. did nothing. In 2009, V.V. went to live with J.M., her aunt by marriage. V.V. told J.M. what Palma-Mosqueda had done. J.M. did not immediately report it to the police because V.V. asked her not to tell anyone. Furthermore, V.V. was not in the United States legally, and J.M. feared she would be sent back to Mexico.

¹The 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 our supreme court.

STATE v. PALMA-MOSQUEDA
Decision of the Court

¶4 In January 2010, J.M. became V.V.'s legal guardian and consulted with several attorneys about the possibility of adopting her. One of the attorneys asked if V.V. had "ever been victimized." The attorney told J.M. about a "U Visa," which would authorize the victim of a crime to be in the country legally. J.M. brought V.V. to meet with the attorney and the attorney explained the U Visa process. V.V. agreed to contact the police and report what had happened.

¶5 The jury convicted Palma-Mosqueda of sexual abuse of a minor under fifteen, molestation of a child, and sexual conduct with a minor under fifteen. He was sentenced to concurrent prison terms of five and seventeen years, followed by a consecutive life sentence with the possibility of parole after thirty-five years.² This appeal followed.

Prosecutorial Misconduct

¶6 Palma-Mosqueda's defense at trial was that V.V. and her guardian fabricated the molestation story so that V.V. could get a U Visa. During the trial, Palma-Mosqueda's sister, B.P., testified that he could not have molested V.V. because V.V. was at home with her on the night in question. B.P. also testified that V.V.'s guardian had told her they were "passing [V.V.] off as a victim of [Palma-Mosqueda]" to get V.V. a U Visa.

¶7 On cross-examination, the prosecutor asked B.P. why she had not provided this information when she was interviewed by the state. The prosecutor then read her two excerpts from a transcript of an interview of B.P. conducted by defense counsel and an investigator working for defense counsel. In those excerpts, defense counsel and the investigator respectively said:

²This was the language used by the trial court; however, the language in the relevant statute states a person convicted as Palma-Mosqueda has been "shall be sentenced to life imprisonment and is not eligible for suspension of sentence, probation, pardon or release from confinement . . . until the person has served thirty-five years." A.R.S. § 13-705(A).

STATE v. PALMA-MOSQUEDA
Decision of the Court

Because what—the problem that we have right now is that the judge is not going to allow us, uh—the, uh—the information about the visa if we don't have proof that that is—well, that it's a lie, a story that they invented simply to get a visa.

....

Yes, but that doesn't—that doesn't help. That doesn't help [Palma-Mosqueda]. He needs something that—he needs something that declares that it is false.

On redirect, defense counsel asked B.P. if either she or the investigator had ever asked B.P. to lie or invent a story. B.P. said no, and stated the only instruction the investigator had given her about testifying was “to say the truth and only the truth.”

¶8 During Palma-Mosqueda's closing argument, counsel, reminding the jury of this testimony, said “[a]nd then I asked [B.P.]: Did I ever ask you to lie on the stand? Because that's what the implication was. . . . And she said no.” In rebuttal, the state argued, “Defense counsel brought up the fact that . . . she told B[P.] that she was to tell the truth, at no point did they tell her to lie. But they told her what they needed. And I'll leave that to you. They told you—told her what they needed.”

¶9 On appeal, Palma-Mosqueda argues the prosecutor's cross-examination and closing argument constituted prosecutorial misconduct because she “insinuate[d] that defense counsel had coached the witness.” He claims the trial court erred in denying his motion for mistrial and motion for new trial, both of which were based on this alleged misconduct.

¶10 “Because the trial court is in the best position to determine the effect of a prosecutor's comments on a jury, we will not disturb [its] denial of a mistrial for prosecutorial misconduct in the absence of a clear abuse of discretion.” *State v. Newell*, 212 Ariz.

STATE v. PALMA-MOSQUEDA
Decision of the Court

389, ¶ 61, 132 P.3d 833, 846 (2006). We likewise review for an abuse of discretion a court's denial of a motion for new trial. *State v. Waller*, 235 Ariz. 479, ¶ 22, 333 P.3d 806, 813 (App. 2014).³

¶11 It is improper for a prosecutor to impugn the honesty or integrity of defense counsel. *State v. Hughes*, 193 Ariz. 72, ¶ 59, 969 P.2d 1184, 1198 (1998). However, it is not improper for a prosecutor to criticize "'defense theories and tactics.'" *State v. Lynch*, ___ Ariz. ___, ¶ 28, 357 P.3d 119 (2015), quoting *State v. Ramos*, 235 Ariz. 230, ¶ 25, 330 P.3d 987, 995 (App. 2014). Nor is it improper for a prosecutor to "elicit[] what motives a witness of perhaps questionable credibility might have for telling the truth." *State v. Perez*, 233 Ariz. 38, ¶ 14, 308 P.3d 1189, 1193 (App. 2013); see also *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶¶ 14-15, 312 P.3d 123, 128 (App. 2013). Although the prosecutor's comments here could be taken as an attack on defense counsel's honesty, they also could be interpreted as a suggestion that B.P. was inventing a story to give the defense team "what they needed." The trial court could reasonably conclude these remarks were intended as an attack on the credibility of B.P., and not defense counsel. Cf. *State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988) (noting trial court has opportunity to judge conduct of prosecutor based on "tone of voice . . . [and] facial expressions"). We therefore conclude the court did not abuse its discretion in denying Palma-Mosqueda's motions for mistrial and new trial.

Sentencing

¶12 Palma-Mosqueda contends the evidence was insufficient for the jury to find that his crimes were "dangerous crimes against children" pursuant to A.R.S. § 13-604.01,⁴ which

³The state argues Palma-Mosqueda's motion for mistrial was untimely, the error could not be cured by his subsequent motion for new trial, and our review therefore should be limited to fundamental error. Because we find no error occurred, we need not consider this issue.

⁴We cite to the version of the statute in effect in 2007 at the time of Palma-Mosqueda's offenses. Regardless of the precise date

STATE v. PALMA-MOSQUEDA
Decision of the Court

provided sentence enhancement for certain crimes committed by “a person who is at least eighteen years of age.” According to Palma-Mosqueda, the only evidence he was over eighteen at the time of the crimes was hearsay.

¶13 The only testimony provided as to his date of birth was indeed hearsay, but Palma-Mosqueda did not object, and thus it was competent evidence of his age. *See State v. McGann*, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982). Although hearsay evidence cannot provide the “sole proof of an essential element of the state’s case,” *id.*, other circumstantial evidence supported a finding that Palma-Mosqueda was over the age of eighteen. *See State v. Borquez*, 232 Ariz. 484, ¶ 11, 307 P.3d 51, 54 (App. 2013) (court does not distinguish between direct and circumstantial evidence in reviewing sufficiency of evidence).

¶14 For example, the jury had the opportunity to observe Palma-Mosqueda’s appearance and heard testimony that he was married, had his own apartment, and drank alcohol. Because this circumstantial evidence, as well as testimony admitted without objection, all supported a finding that Palma-Mosqueda was over the age of eighteen at the time of the crime, we conclude the evidence supporting the enhanced sentence was not insufficient.⁵

of those offenses, the sentencing enhancement statute remained the same in relevant part. *See* 2007 Ariz. Sess. Laws, ch. 248, § 2; 2006 Ariz. Sess. Laws, ch. 295, § 2.

⁵Palma-Mosqueda also claims the trial court erred in basing its reasonable doubt instruction to the jury on language from *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), over his objection. Our supreme court has considered and rejected such challenges to the *Portillo* instruction, repeatedly affirming its preference that the instruction be given. *See, e.g., State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Lamar*, 205 Ariz. 431, ¶¶ 48-49, 72 P.3d 831, 840-41 (2003). We are bound by the decisions of our supreme court and have no authority to modify or disregard them. *State v. Smyers*, 207 Ariz. 314, n.4, 86 P.3d 370, 374 n.4 (2004).

STATE v. PALMA-MOSQUEDA
Decision of the Court

Disposition

¶15 For the foregoing reasons, Palma-Mosqueda's convictions and sentences are affirmed.