IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ERIC CHRISTOPHER ADAMS,
Appellant.

No. 2 CA-CR 2014-0412
Filed December 22, 2015

Appeal from the Superior Court in Pima County
No. CR20122719001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Stephen R. Sonenberg, Pima County Public Defender
By Frank P. Leto, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

M I L L E R, Presiding Judge:

¶1 A jury found Eric Adams guilty of aggravated assault causing serious physical injury, disorderly conduct, and kidnapping, and he pled guilty to aggravated assault causing temporary substantial disfigurement. He received concurrent and consecutive sentences totaling 15.75 years. Adams alleges various evidentiary errors and contends the trial court improperly set his kidnapping sentence consecutive to his other sentences. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts, and we resolve all reasonable inferences against the defendant. *State v. Almaguer*, 232 Ariz. 190, ¶ 2, 303 P.3d 84, 86 (App. 2013). In July 2012, Adams and C.V., who were dating, went to dinner and then to a bar. After they argued, Adams left C.V. at the bar and she took a taxi back to her apartment.

¶3 When she arrived at the apartment, C.V. was approached by an unknown man, E.W., who asked if she had a lighter. Adams, who had been waiting outside C.V.'s apartment, confronted E.W. near the edge of the apartment complex, asking him, "[H]ow do you know my girl?" Adams later acknowledged he was jealous when he saw C.V. "with another guy." C.V. tried to stop Adams and E.W. from fighting, and then ran toward the street, but stopped at the white line of the bike lane. As she attempted to flag down passing motorists, she repeatedly yelled things like "help," "somebody call the cops," and "call the police." A witness testified, "She seemed like she was begging for help." Another witness heard her say, "He is going to kill me."

¶4 Adams came over to C.V. and put her in what an eyewitness described as a "restraining hold" or "bear hug . . . [n]ot a loving hug, [but] kind of like a control hug," and walked her back to the sidewalk. Then Adams picked C.V. up, put her over his shoulder, and carried her toward her second-floor apartment.

¶5 F.S., a second-floor neighbor who had been watching the commotion from his window, went over to look through the peephole in his front door which looked out on the second-floor hallway. F.S. saw Adams dragging a motionless C.V. by her arms down the second-floor hallway toward her apartment door and heard the door close. Then F.S. and his girlfriend heard screaming and crashing noises coming from inside C.V.'s apartment, and F.S. called 9-1-1.

¶6 When police arrived, they too heard yelling and crashing inside C.V.'s apartment. One officer heard a male voice inside say, "Have you had enough yet, [b]itch?" He then heard "the sound of flesh being struck, punched, hit with something." After knocking and announcing their presence with no response, police broke the door down, and found the apartment in disarray with blood spatter throughout, and saw C.V. lying face up on the floor in a pool of blood. Her face and head were covered with blood, and she had two black eyes, a large laceration on her cheek and head, and bruises all over her face, head, and upper chest. Testing revealed she had suffered a traumatic subarachnoid hemorrhage from a blow to the left side of her head. Adams is right-handed.

¶7 When police entered the apartment, Adams had C.V.'s blood all over his clothing. At trial he admitted he had been "physical" and "rough with her." In an interview with a detective on the night of the incident, C.V. said, "He beat me up." And as paramedics took her away from the apartment that night, C.V. told a police officer, "He tried to kill me."

¶8 Adams was charged with aggravated assault causing serious physical injury (brain bleed), aggravated assault causing temporary but substantial disfigurement (head and facial lacerations), disorderly conduct, and kidnapping. During trial, he

pled guilty to the charge of aggravated assault causing temporary but substantial disfigurement. The jury returned guilty verdicts on the remaining three counts. All the offenses except disorderly conduct were found to be domestic violence offenses committed while Adams was on probation. He received a 9.25-year sentence for kidnapping, to be served consecutively to concurrent sentences on the other three counts totaling 6.5 years. He timely appealed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Preclusion of Testimony About C.V.'s Children

¶9 Adams first contends the trial court erred by precluding evidence that C.V. had lost custody of her children, finding it "more prejudicial than relevant." He maintains, as he did below, that evidence that the state had removed C.V.'s children would have corroborated his theory that C.V. had run toward or into the street that evening because she was despondent and was attempting suicide. He argues the court's ruling violated not only Rules 401 to 403, Ariz. R. Evid., but also his federal and state constitutional rights to a fair trial, to present a defense, and to cross-examine witnesses. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion, *State v. Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d 456, 473 (2004), but we review constitutional issues de novo, *State v. Carlson*, 237 Ariz. 381, ¶ 57, 351 P.3d 1079, 1095 (2015).

¶10 As a threshold matter, the state argues Adams has not properly preserved the issue for appeal because he failed to make an offer of proof detailing what the evidence would have shown. *See* Ariz. R. Evid. 103(a)(2). An offer of proof showing the relevance and admissibility of excluded evidence is ordinarily required to preserve trial error, unless the substance of the evidence was apparent from the context. *Id.*; *State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996). Here, defense counsel's argument outside the presence of the jury on the first day of trial clarified the substance of the excluded evidence—Adams wanted to argue the common sense effect that removal of C.V.'s children would have had on her. There was no corroborating evidence supporting Adams's theory; however, after defense counsel argued the issue, the trial court stated, "You have made your record." Because the substance of the proffered evidence

was clear to counsel and the court, an offer of proof was unnecessary to preserve the issue. *See* Ariz. R. Evid. 103(a)(2).

¶11 The state contends evidence that C.V.'s children were removed was irrelevant. Evidence is relevant if it has any tendency to make any fact of consequence to the action more or less probable. Ariz. R. Evid. 401; *see also* Ariz. R. Evid. 402 (relevant evidence admissible unless otherwise prohibited by law). We agree that the evidence was of minimal relevance at best. For instance, Adams did not proffer evidence about *when* C.V.'s children had been removed, her initial or subsequent reaction to the removal, or even circumstantial evidence about her reaction. Absent a proffer of evidence about the removal, her response, or any other evidence tending to demonstrate a causal link between the removal and C.V. running toward the street or into the street that night, Adams's theory of relevance was speculative.

¶12 In his reply brief, Adams cites an unspecified "internet commentator" who opines that depression and suicidal ideation is "normal for anyone going through [Child Protective Services] hell." This message board comment was not admitted into evidence below. Inasmuch as Adams's citation may be construed as a request for judicial notice of the commentator's opinion, we decline, because it is not a proper subject for judicial notice. *See* Ariz. R. Evid. 201(b).

¶13 Without causation, the evidence of removal served more as a comment on C.V.'s character than an explanation of her behavior. *See* Ariz. R. Evid. 404(b) ("[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). Further, Adams was permitted to introduce other evidence to support his suicide attempt theory. He testified C.V. was prone to "sporadic abnormal outbursts"; had financial problems; struggled with alcohol and had been through rehab; and had, on the night of the incident, "told [him] that she didn't want to live anymore and . . . r[u]n out into the street." In view of all of the other evidence, the probative value of the evidence that C.V.'s children had been removed was marginal as to the issue of C.V.'s state of mind that night.

¶14 Even assuming that the evidence was of some relevance, we disagree with Adams's argument that the trial court's ruling excluding the evidence was an abuse of discretion. The court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, Ariz. R. Evid. 403, and the court's discretion in this area is broad, *State v. Cooperman*, 232 Ariz. 347, ¶ 17, 306 P.3d 4, 8 (2013). "'Unfair prejudice means an undue tendency to suggest decision on an improper basis . . . such as emotion, sympathy, or horror.'" *State v. Hardy*, 230 Ariz. 281, ¶ 40, 283 P.3d 12, 21 (2012), *quoting State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993). Whatever minimal probative value this evidence may have had, the trial court's conclusion that evidence of the removal of C.V.'s children could tend to lead the jury to decide the case based on disgust or an emotional reaction to C.V.'s supposedly poor character, rather than on the evidence of Adams's guilt or innocence, was not unreasonable. The trial court did not abuse its discretion in its conclusion that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

¶15 Adams's argument that the trial court's evidentiary ruling unreasonably restricted the scope of his cross-examination of C.V. and denied him a fair trial is also unconvincing. "[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). For instance, a trial court has discretion under Rule 403 to reasonably limit the scope of cross-examination. *See Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) (exclusion under "well-established rules of evidence" such as Fed. R. Evid. 403 not unconstitutional); *State v. Abdi*, 226 Ariz. 361, ¶¶ 24-27, 248 P.3d 209, 215-16 (App. 2011) (excluding evidence of victim's immigration status did not violate due process or confrontation clauses). Adams was not denied his right to cross-examine C.V. on the issue of whether and why she had run near or into the street that night. Indeed, on cross-examination of C.V., he explored her treatment for alcohol abuse, drinking on the day of these events, employment history, and financial status. The court only prevented Adams from eliciting

testimony about the removal of C.V.'s children, a collateral and personal matter with a high risk of unfair prejudice and little additional probative value absent evidence of C.V.'s reaction to the removal. *See Abdi*, 226 Ariz. 361, ¶ 27, 248 P.3d at 215-16; *see also State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982) ("The court may prevent cross-examination into collateral matters of a personal nature having minor probative value . . . ."). Its ruling was not an abuse of discretion.

¶16 Even assuming for the sake of argument that some error occurred, it was harmless. In harmless error review, the state must prove beyond a reasonable doubt that the error did not contribute to or affect the verdicts or sentences. *State v. Ketchner*, 236 Ariz. 262, ¶ 20, 339 P.3d 645, 648-49 (2014). As discussed above, Adams was permitted to argue his suicide-attempt theory and introduce other evidence tending to support it. That the trial court precluded him from offering a speculative rationale for her alleged attempt to commit suicide would not have added to his testimony that he was trying to stop her from self-injury. Additionally, his testimony had to be weighed by the jury against the conflicting testimony as to whether C.V. had run into the street at all: multiple witnesses testified that she was yelling for help and asking people to call the police as she ran toward or into the street, which does not support running from him to commit suicide.

¶17 Finally, the evidence of guilt in this case was overwhelming on all counts notwithstanding what happened when C.V. ran near or into the street. *See State v. Anthony*, 218 Ariz. 439, ¶ 41, 189 P.3d 366, 373 (2008) (error harmless where evidence against defendant "so overwhelming that any reasonable jury could only have reached one conclusion"). After trying to start a fight with E.W. out of jealousy, Adams was seen dragging C.V.'s limp body toward the apartment, and then multiple witnesses heard crashing and screaming from inside the apartment. A police officer heard Adams say, "Have you had enough yet, [b]itch?" together with the sound of flesh being hit, and found C.V.'s blood all over Adams's clothing. Police found C.V. lying in a pool of her own blood, having suffered serious injuries consistent with Adams having beaten her.

C.V. said multiple times that night that Adams was "going to kill" her or had in fact "tried to kill" her, and Adams even admitted at trial he had been "physical" and "rough with her." Thus, even if error occurred, it would not have affected the verdicts or sentences. *See* A.R.S. §§ 13-1204(A)(1), (3); 13-1304(A)(3); 13-2904; *cf. State v. Trostle*, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997) (error harmless in light of overwhelming evidence of guilt).

Volunteered Testimony

¶18 Adams argues the trial court erred by denying two different motions for a mistrial he made based on what he characterizes as volunteered testimony. We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *See Almaguer*, 232 Ariz. 190, ¶ 29, 303 P.3d at 93. 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. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983).

Testimonial Analogy to the Movie *Rocky*

¶19 Adams argues the trial court abused its discretion by denying his motion for a mistrial after testimony by one of the responding police officers, and that in so doing, denied him his constitutional right to a fair trial.[1] He further contends the officer's testimony ran afoul of the rules of evidence. The testimony in question was as follows:

> [Prosecutor:] How can you describe some of the noises that you heard [when you approached C.V.'s apartment door]?

[1]The state contends Adams's constitutional claims were not properly preserved. We disagree. Counsel below argued the officer's testimony was so inflammatory that it prevented Adams from receiving a "fair trial." The issue was properly presented to the trial court and preserved for appeal.

> [Officer:] Initially it was just yelling, I couldn't make anything out. As I got closer, closer to the door, I could hear it was more his yelling. I heard a male voice say, "Have you had enough yet, [b]itch?" And then the sound of flesh being struck, punched, hit with something.
>
> [Prosecutor:] Can you describe what that sounds like?
>
> [Officer:] When I was standing there and I heard it, the first thing that I thought of was it sounded just like in the film Rocky. It's a little silly, but i[n] the film Rocky, with Sylvester [Stallone], he was in the meat locker and punching a side of beef. And it sounded just like that. It's that sound of flesh being struck.

In his mistrial motion at a sidebar conference, Adams argued it was prejudicial for the officer to make a graphic movie analogy "given all the other circumstances around this case." The prosecutor claimed surprise at the testimony about *Rocky*, noting that the witness had not responded that way in a pretrial interview, and argued that in any event, the witness was merely "describing what he heard firsthand." The court denied Adams's mistrial motion, explaining, "I find the officer's comments are not unfairly prejudicial. I think he is just trying to describe what the sound was that he heard, and I don't think there's anything inappropriate about it." The court also implicitly denied Adams's motion to strike the testimony.

¶20 We construe the various evidentiary objections to the *Rocky* testimony in Adams's briefs as allegations that the trial court erred by denying his motion to strike the testimony. Adams argues the testimony was inadmissible under Rule 404(b), Ariz. R. Evid., and several cases dealing with other-acts issues, such as *State v. Smith*, 123 Ariz. 243, 250-51, 599 P.2d 199, 206-07 (1979), and *State v.*

Jacobs, 94 Ariz. 211, 213-14, 382 P.2d 683, 685 (1963). He did not object on this basis below, and in any event, the testimony in question here does not pertain to Adams's "*other* crimes, wrongs, or acts" from which the jury might improperly infer propensity under Rule 404(b)—it pertains to the very crimes charged in this case. (Emphasis added). Rule 404(b) does not apply here.

¶21 Adams also appears to argue the testimony was inadmissible because the officer was not in fact testifying about what he *heard*—rather, by likening the sound to a scene from a well-known movie, he was in effect testifying to what was occurring *visually* in the apartment, a matter of which he had no personal knowledge. But the question, "Can you describe what that sounds like?" calls only for a description of the sound the officer heard, a matter within his personal knowledge and relevant to the issue of whether and how Adams was hitting C.V. on the other side of the door. Ariz. R. Evid. 401, 602. The officer's response that what he heard "sounded just like" the sound of flesh being struck in the *Rocky* scene was responsive to the question and did not venture outside the scope of his personal knowledge. Ariz. R. Evid. 602.

¶22 The state maintains the testimony was admissible as lay witness opinion under Rule 701, Ariz. R. Evid. That rule provides that a lay witness may testify in the form of an opinion if the testimony is rationally based on his perception, helpful to a clear understanding of his testimony, and not based on scientific, technical, or other specialized knowledge. *See id*. The officer's analogy was rationally based on his auditory perception, and Adams does not suggest that it was based on specialized knowledge. To the extent Adams now argues the *Rocky* analogy was not helpful to the jury in clearly understanding the officer's testimony, he did not object on that basis at trial, nor did he object to the form of the question, "Can you describe what that sounds like?"

¶23 We note that it is inherently difficult to describe a sound in the abstract. When a person is asked to describe what something sounds like, the ordinary response is a simile—that it sounds *like some other* familiar sound. *Accord Asplundh Mfg. Div., a Div. of Asplundh Tree Expert Co. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196-98

(3d Cir. 1995) ("sound" a "prototypical example" of appropriate lay opinion evidence under Fed. R. Evid. 701, together with "an endless number of [other] items that cannot be described factually in words apart from inferences"), *superseded by rule on other grounds as recognized in Applera Corp. v. MJ Research Inc.*, 389 F. Supp. 2d 344, 353 (D. Conn. 2005); *see also* Ariz. R. Evid. 701 cmt. (Ariz. R. Evid. 701 as amended adopts restyled Fed. R. Evid. 701). The trial court's ruling that the officer was just trying to describe what he heard in a manner that would be helpful to the jury was not error.

¶24 Adams maintains that even if the *Rocky* reference was based on personal knowledge, relevant, helpful to the jury, and otherwise admissible, it was so unfairly prejudicial as to deny him a fair trial pursuant to Rule 403 and the Due Process Clause. He contends the testimony "had an undue tendency to suggest the jury decide the case based on sympathy for [C.V.] and horror against Eric Adams." But this argument is undercut by Adams's own cross-examination. He twice referenced the *Rocky* analogy, thus refocusing the jury's attention on what he alleges was unfairly prejudicial subject matter. The testimony was probative on the issue of whether and how Adams had hit C.V., and helpful to the jury's understanding of what the officer heard. Adams failed to show that any risk of unfair prejudice that an allusion to *Rocky* might bring substantially outweighed that probative value. The trial court did not abuse its discretion in ruling that the risk of unfair prejudice from the testimony did not substantially outweigh its probative value.

¶25 In any event, even if error occurred, "[w]e will not reverse a conviction based on the erroneous admission of evidence without a 'reasonable probability' that the verdict would have been different had the evidence not been admitted." *State v. Hoskins*, 199 Ariz. 127, ¶ 57, 14 P.3d 997, 1012-13 (2000). In view of the overwhelming evidence of Adams's guilt on all counts, as outlined above, there is no reasonable probability that the verdict would have been different but for the officer's comparison to the sound from *Rocky*. *Anthony*, 218 Ariz. 439, ¶ 41, 189 P.3d at 373. Thus, even assuming for the sake of argument that the trial court should have

stricken the *Rocky* testimony under Rule 403 or for some other reason, or that the testimony was improperly volunteered, any error was harmless.

Testimony Referring to Prior Assaults

¶26 Adams next argues the trial court erred by denying his motion for a mistrial after the prosecutor elicited testimony suggesting Adams had assaulted C.V. on previous occasions. Outside the presence of the jury before she testified, C.V. acknowledged she understood she was not to testify about any prior alleged assaults against her by Adams. When she later took the stand, the following exchange occurred at the close of redirect examination:

> [Prosecutor:] When you talked with [a detective on the night of the incident], you were asked on cross that you had said you fell down the stairs. Did you later tell him in that same interview that [Adams] beat you up?
>
> [C.V.:] Probably. I mean, I just got tired of—I knew this time around it was, like, pretty bad.

Adams promptly moved for a mistrial, arguing that the evidence impermissibly invited the jury to convict based upon an inference of propensity. *See* Ariz. R. Evid. 404(b); *State v. Bible*, 175 Ariz. 549, 575, 858 P.2d 1152, 1178 (1993). The prosecutor said she did not expect the witness to answer that way, and maintained it was unintentional on C.V.'s part. The court denied defendant's motion for a mistrial, and instructed the jury to disregard the witness's answer.

¶27 A related issue arose when jurors submitted written questions at the conclusion of C.V.'s testimony that queried whether Adams had "ever been violent prior to this," "[h]ow many times [he had] hurt her," and whether C.V. was "afraid when [Adams] met her coming home in the cab." Upon hearing these proposed

questions, defense counsel renewed his motion for a mistrial, arguing that the questions left no doubt that "the jury got exactly what she just said." The judge again denied the mistrial motion, but refused to ask C.V. any of the questions.

¶28 In support of his contention that the trial court was required to grant the motion for a mistrial because of the improper testimony and the jurors' proposed questions, Adams relies on *United States v. Daniels* for an overarching proposition that evidence of a defendant's prior crimes reaching the jury can be like a "'drop of ink [which] cannot be removed from a glass of milk.'" 770 F.2d 1111, 1118 (D.C. Cir. 1985), *quoting Gov't of the V.I. v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976). But *Daniels* stands for a different principle and differs markedly in the use of prior crimes. In that case, Daniels was tried for armed bank robbery, carrying a firearm without a license, and two counts of prohibited possession by a felon. *Id*. at 1113-14. The prohibited possessor charges required evidence of his prior felony conviction. *Id*. at 1114. Daniels requested to sever the prohibited possessor counts from the others; the trial court granted the motion as to one count but denied it as to the other. *Id*. Although it affirmed Daniels's conviction, the appellate court cautioned against rote denial of severance motions because the evidence of a prior conviction could easily impute bad character traits to a defendant. *Id*. at 1118-19; *see also Toto*, 529 F.2d at 281, 284 (defendant improperly impeached with evidence of misdemeanor). In this trial, there was no evidence of a prior conviction by Adams; rather, it was limited to the victim's suggestion that he had been violent toward her previously.

¶29 Adams also relies on several Arizona cases in which reversal was required because evidence of bad character was improperly admitted. *See Anthony*, 218 Ariz. 439, ¶ 40, 189 P.3d at 373; *State v. Hughes*, 189 Ariz. 62, 65-72, 938 P.2d 457, 460-67 (1997); *State v. Grannis*, 183 Ariz. 52, 57, 900 P.2d 1, 6 (1995), *overruled in part on other grounds by State v. King*, 225 Ariz. 87, ¶¶ 9-12, 235 P.3d 240, 242-43 (2010); *State v. Ballantyne*, 128 Ariz. 68, 70-71, 623 P.2d 857, 859-60 (App. 1981). As with *Daniels*, each of these cases involved significant and repeated intrusion of improper bad character

testimony that became intertwined with the factual issues properly before the jury. For instance, in *Anthony* the state was permitted to use circumstantial evidence of sexual molestation to argue a cover-up motive for why defendant would have murdered his daughter. 218 Ariz. 439, ¶¶ 32, 34-37, 189 P.3d at 371-72. After deciding that the evidence was improper, the court concluded that, because the repeated testimony occupied much of the trial and supported a repeated state's theme, there could be no assurance the evidence did not affect the verdict. *Id*. ¶¶ 37, 40-42, 189 P.3d at 372-73. In each of the remaining cases the role of the improper evidence was similar in scope or effect. *Hughes*, 189 Ariz. at 69, 938 P.2d at 464 (evidence of arsons, drug dealing, threats, and intimidating behavior involving other victims improper in strangulation murder charge); *Grannis*, 183 Ariz. at 54, 57, 900 P.2d at 3, 6 (photographs of male sexual activity in possession of defendant largely irrelevant to issues in robbery/murder charge); *Ballantyne*, 128 Ariz. at 70-71, 623 P.2d at 859-60 (tattoo evidence suggesting association with Hell's Angels improper in resisting arrest and assault on officer charges).

¶30 Although Adams relies on inapposite cases, we agree with him that where a witness's testimony exceeds the permissible scope of a trial court's limiting order, a motion for a mistrial testing the adequacy of corrective measures is appropriate. The motion requires the court to consider "(1) whether the testimony called to the jury's attention matters that it would not have been justified in considering in reaching the verdict, and (2) the probability that the testimony influenced the jury" such that the improper testimony might have affected the jury's verdict. *State v. Gulbrandson*, 184 Ariz. 46, 62, 906 P.2d 579, 595 (1995); *State v. Marshall*, 197 Ariz. 496, ¶ 13, 4 P.3d 1039, 1043 (App. 2000). Moreover, in determining the effect of the improper testimony on the jury, the trial court takes into account remedies short of a mistrial, such as an instruction to disregard the testimony. *See Adamson*, 136 Ariz. at 262, 665 P.2d at 984. Because the trial judge is in the best position to determine whether the evidence could affect the verdict, we review the denial of a motion for a mistrial under an abuse of discretion standard. *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000); *Gulbrandson*, 184 Ariz. at 62, 906 P.2d at 595.

¶31 We assume that C.V.'s brief, fragmentary testimony about "this time around" improperly suggested prior violence by Adams against her. It is also reasonable to assume the trial court's ruling instructing the jury to disregard the testimony did not inform some jurors that prior violence was irrelevant to whether the state proved the assault as charged in the indictment. We consider, however, whether the combined effect of the court's explicit and implicit[2] rulings were sufficient to cure prejudicial impact on the jury verdict. First, we note that after the court made its rulings, the topic was never again mentioned at trial and the jurors did not propose questions for Adams[3] about prior violence when he later testified. We presume, as we must, that the jury followed the court's instructions. *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006). Second, it is not unusual during trial for a witness to introduce inadmissible evidence in the course of attempting to answer a non-objectionable question. In those instances, the trial court must have tools less drastic than starting over to cure the witness's error. For example, in *State v. Wilson*, the victim was asked about the last time the defendant had permission to visit his apartment. 17 Ariz. App. 270, 271, 497 P.2d 90, 91 (1972). The victim could not give a specific date, but placed it as "'the second time he beat me up.'" *Id*. The improper portion of the response was struck and the jury was instructed to disregard it. *Id.* In affirming the denial of Wilson's motion for a mistrial, the court concluded that one isolated, inadvertent reference to a prior bad act that was not solicited by the state was sufficiently addressed by a curative

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[2]The trial judge instructed the jurors on the first day of trial that they were free to submit written questions for the judge to ask a witness. The judge said she would review any proposed question submitted to "decide if it is relevant and proper under our laws and rules of evidence." But the judge cautioned, "If I decide the question is not relevant or proper and do not ask it, you may not speculate as to what the answers might have been."

[3]As with C.V., at the conclusion of Adams's testimony the jury was offered the opportunity to propose written questions. Unlike C.V., no improper questions were propounded.

instruction. *Id*. at 271-72, 497 P.2d at 91-92. The judge's ruling here was not an abuse of discretion.

¶32 Even assuming Adams is correct that the jurors' proposed questions demonstrated C.V.'s statement had an improper effect that carried through to jury deliberations, any error was harmless. *Anthony*, 218 Ariz. 439, ¶ 41, 189 P.3d at 373. The evidence of guilt in this case was overwhelming notwithstanding the testimony in question, as discussed above, and there is not a reasonable probability that the verdicts would have been different but for that testimony. *Cf. Almaguer*, 232 Ariz. 190, ¶¶ 27, 29, 303 P.3d at 93 (witness's volunteered testimony, introduced in violation of court order and prosecutor's admonition, that "from what I heard, it wasn't the first time" defendant killed someone, did not require mistrial where no reasonable probability that statement affected verdict). The trial court did not abuse its discretion in denying Adams's motion for a mistrial.

Consecutive Sentences

¶33 Adams's final argument is that the trial court erred by ordering his sentence for kidnapping to run consecutively to his other sentences. "We review de novo whether consecutive sentences are permissible under A.R.S. § 13-116." *State v. Siddle*, 202 Ariz. 512, ¶ 16, 47 P.3d 1150, 1155 (App. 2002).

¶34 "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." § 13-116. To determine whether consecutive sentences are permissible under the statute the court first examines whether, after subtracting the facts necessary to convict on the "ultimate charge" which is "at the essence of the factual nexus," there remains sufficient evidence to satisfy the elements of the other charge. *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). If so, consecutive sentences may be permissible. *Id*. Next, the court determines whether it was factually impossible to commit the ultimate crime without also committing the other crime, thus making it more likely that the crimes are a single "act" under the

statute. *Id*. And finally, the court will consider whether the defendant's conduct in committing the other crime subjected the victim to an additional risk of harm beyond that inherent in the ultimate crime; if so, then consecutive sentences are typically appropriate. *Id*.

¶35 Applying the *Gordon* test to this case reveals no error. Adams was sentenced to 6.5 years for aggravated assault causing serious physical injury, a domestic violence offense committed while on probation.[4] He was sentenced to 9.25 years for kidnapping, a domestic violence offense committed while on probation. Although Adams's sentence for kidnapping is longer, the parties nevertheless agree that aggravated assault causing serious physical injury is the "ultimate crime" under *Gordon*, because the assault inside C.V.'s apartment was at the essence of the incident's factual nexus and resulted in C.V.'s most serious injuries. The conviction for aggravated assault causing serious physical injury rests upon Adams intentionally, knowingly, or recklessly causing C.V.'s brain bleed by hitting her while in her apartment. *See* § 13-1204(A)(1). After subtracting those facts, there is still a sufficient factual basis to underpin Adams's kidnapping conviction. The kidnapping conviction stems from knowingly restraining C.V. by placing her in a bear hug near the street, carrying her over his shoulder, and/or dragging her to her apartment, with the intent to inflict death or physical injury upon her once inside the apartment. *See* § 13-1304(A)(3).

¶36 It was not factually impossible for Adams to commit aggravated assault against C.V. without kidnapping her. For instance, the assault could have taken place in the street. Additionally, kidnapping subjected C.V. to an additional risk of

[4]Adams's six-month sentence for disorderly conduct and his 4.5-year sentence for aggravated assault causing temporary substantial disfigurement, a domestic violence offense committed while on probation, were set to run concurrently to the aggravated assault causing serious physical injury charge. He alleges no error in this respect.

harm beyond that inherent in aggravated assault: the risk of physical restraint. *Compare* § 13-1204(A)(1) (no element of physical restraint), *with* § 13-1304(A)(3) ("restraining" victim is element of offense). The trial court did not violate § 13-116 and *Gordon* by imposing the kidnapping sentence consecutive to the other sentences.

Disposition

¶37 For the foregoing reasons, we affirm Adams's convictions and sentences.