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 December 15, 2016

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, 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. He appealed his convictions, arguing the trial court erred when it precluded him from "present[ing] the facts of [his] duress defense in opening statement." We determined the court did not err by limiting Pedroza-Perez's opening statement. The supreme court disagreed, vacating our decision and remanding the appeal to this court to determine whether the trial court's erroneous limitation on Pedroza-Perez's opening statement was harmless. *State v. Pedroza-Perez*, 240 Ariz. 114, ¶ 17, 377 P.3d 311, 314-15 (2016). Because we conclude it was, we affirm.

Factual and Procedural Background

¶2 A detailed factual history is provided in our supreme court's opinion. *Id.* ¶¶ 2-7. We restate only those facts relevant to the issue before us.

¶3 In June 2013, as part of a joint operation, Border Patrol agents and sheriff's deputies arrested Pedroza-Perez after they found him sitting under a tree in the southern Arizona desert with several backpacks containing bales of marijuana. Before trial, Pedroza-Perez 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." After a hearing, the trial court precluded Pedroza-Perez from making "any reference at all to th[e] duress defense" during his opening statement. However,

[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.

the court provided that if Pedroza-Perez testified in support of the defense, counsel could argue duress during his closing argument. Pedroza-Perez later asked the court to reconsider; as an offer of proof of his anticipated testimony, he provided an affidavit avowing that the smugglers who had helped him cross the Mexico-Arizona border forced him to carry the marijuana or else they "would leave [him] alone in the desert to die." The court reaffirmed its prior ruling.

¶4 During opening statements, defense counsel complied with the trial court's ruling and did not address duress, instead asserting that the state's version of events was "only half the story" and suggesting that Pedroza-Perez would tell "his story." Later that day, Pedroza-Perez testified. He explained that the smugglers, who were carrying weapons, had taken his belongings and forced him to carry the marijuana, and that everyone else in the group had run off when the officers approached. The court instructed the jury on duress, and Pedroza-Perez's counsel argued the defense in closing.

¶5 This court affirmed the convictions, rejecting Pedroza-Perez's argument that the trial court had erred when it prohibited him from discussing his duress defense in the opening statement. *State v. Pedroza-Perez*, 2 CA-CR 2014-0168, ¶¶ 12, 22 (Ariz. App. Aug. 12, 2015) (mem. decision). However, the Arizona Supreme Court disagreed and vacated that decision, finding that "[s]pecific evidence may be referenced in the opening statement as long as the proponent has a good faith basis for believing the proposed evidence exists and will be admissible." *Pedroza-Perez*, 240 Ariz. 114, ¶¶ 12, 18, 377 P.3d at 313, 315. Because Pedroza-Perez provided an affidavit detailing his anticipated testimony, the supreme court concluded the trial court had erred in limiting his opening statement. *Id.* ¶ 14. However, the supreme court remanded the case to this court to determine whether the error was harmless. *Id.* ¶ 17. In turn, we ordered the parties to submit supplemental briefs. Having considered those briefs, we turn to the issue before us.

Discussion

¶6 The Arizona Supreme Court instructed this court "to determine whether, 'in light of all of the evidence,' the State 'can

establish beyond a reasonable doubt that the error [in limiting Pedroza-Perez's opening statement] did not contribute to or affect the verdict.'" *Id.*, *quoting State v. Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d 233, 236 (2009).[2] The harmless-error analysis "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d at 236, *quoting State v. Anthony*, 218 Ariz. 439, ¶ 39, 189 P.3d 366, 373 (2008). "The determination must be made on a case-by-case basis." *State v. Sanchez-Equihua*, 235 Ariz. 54, ¶ 26, 326 P.3d 321, 327 (App. 2014).

¶7 The state maintains the error was harmless because "the trial court did not limit [Pedroza-Perez from] presenting evidence to support his duress defense, the trial court instructed the jury on the defense, and defense counsel fully argued the defense in closing argument." We agree. *Cf. State v. Dunn*, 786 S.E.2d 174, 185-86 (W. Va. 2016) (limitation on defendant's opening statement not prejudicial when defendant testified as to precluded issue and defense counsel raised it in closing argument).

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[2]In its supplemental brief, the state notes that "the Arizona Supreme Court has not been clear about the harmless error standard to apply in instances when the error is non-constitutional error, like in the instant case." The state points out that some cases have indicated error is harmless "unless there is a 'reasonable probability that the verdict would have been different.'" *State v. Dann*, 205 Ariz. 557, ¶ 44, 74 P.3d 231, 244 (2003), *quoting State v. Hoskins*, 199 Ariz. 127, ¶ 57, 14 P.3d 997, 1012-13 (2000). And the state encourages this court to "hold that non-constitutional errors, like the error here, are reviewed for a reasonable probability of a different verdict." We decline to do so. Our supreme court explicitly remanded this case to us to consider whether the error was harmless under the beyond-a-reasonable-doubt standard articulated in *Valverde*. And *Valverde* quoted that standard from *State v. Bible*, which by its terms applies to "[e]rror, be it constitutional or otherwise." 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

¶8 As our supreme court pointed out, "Pedroza-Perez was not completely barred from presenting his duress defense to the jury." *Pedroza-Perez*, 240 Ariz. 114, ¶ 16, 377 P.3d at 314. Pedroza-Perez testified thoroughly in support of his defense. *See State v. Romero*, 240 Ariz. 504, ¶ 15, 381 P.3d 297, 304 (App. 2016) ("Whether an error is harmless may . . . be considered in the context of a party's ability to present the substance of his claim or defense."). He explained that his agreement with the smugglers was for him to pay them a fee after arriving in Phoenix and "all [he] would carry was water and food." However, after they crossed the border and continued walking through the desert, two other people arrived with backpacks of marijuana. The smugglers, who had weapons, took Pedroza-Perez's belongings and forced him to carry a backpack. He stated that "the other option was that they would leave [him] in the desert without water or food" and that he thought he "would die if [he] didn't carry that backpack." Pedroza-Perez also expressed concern for his family, whom he thought the smugglers would threaten or extort.

¶9 In addition, the trial court instructed the jury on the duress defense, consistent with Revised Arizona Jury Instructions ("RAJI") Statutory Criminal 4.12. *See id.* ¶ 19 ("Errors also may be vitiated . . . by jury instructions."). And Pedroza-Perez's counsel fully argued the defense in her closing argument. *Cf. State v. Almaguer*, 232 Ariz. 190, ¶¶ 12, 15, 303 P.3d 84, 89-90 (App. 2013) (error in jury instruction harmless when closing arguments of counsel presented jury with legally correct instruction). Specifically, defense counsel asserted:

> Pedroza[-Perez] . . . is not disputing that he carried marijuana in the desert. What's at dispute, what's at the heart of today's decision that you all have to make, is why. Did he carry this marijuana voluntarily? Did he carry it because he wanted to? Or did he carry it because he was forced to? That's what you all have to decide here today.

> Because if he carried it voluntar[il]y, if this was something that he voluntar[il]y did to pay for his passage, he should take responsibility for that. But if this was something that he was forced to do under duress, in the desert, in the middle of the night, with a gun pointed to his head, if this was something that [the smugglers] forced him to do or he would die, the law excuses his conduct. He is excused and you have to find him not guilty.

¶10 The state also previously pointed out that Pedroza-Perez was aware from the outset that he was carrying marijuana in exchange for his passage into the United States. At trial, an officer testified that, in a post-arrest interview, Pedroza-Perez admitted to conducting a "trade off," whereby he transported "backpacks contain[ing] marijuana . . . rather than having to pay money" to the smugglers. Such testimony undercut Pedroza-Perez's duress defense and makes it less likely that the preclusion of any mention of the defense from opening statement affected the verdict.

¶11 Pedroza-Perez nevertheless maintains the trial court's error was not harmless because of "[t]he importance of an opening statement." He reasons that "[f]ailing to allow the defense to present a coherent argument from the start of a trial establishes a bad first impression."

¶12 However, "opening statements and arguments of counsel are not evidence." *Pedroza-Perez*, 240 Ariz. 114, ¶ 13, 377 P.3d at 314. Instead, evidence—upon which the verdict must be based—consists of testimony, exhibits, and stipulations about the evidence. *See id.* The trial court so instructed the jury in the case. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) ("We presume that the jurors followed the court's instructions."). We thus disagree with Pedroza-Perez as to the direct impact and importance of the opening statement on the jury's verdict. *See Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d at 236; *cf. Jackson v. State*, 654 S.E.2d 137, 142 (Ga. Ct. App. 2007) (limitation of defendant's opening statement harmless when counsel addressed issue during cross-examination,

thereby "plac[ing] substantive evidence as opposed to mere supposition before the jury").

¶13 Pedroza-Perez's reliance on *McGowen v. State*, 25 S.W.3d 741 (Tex. App. 2000), is also misplaced. In that case, the appellate court concluded that the trial court's ruling, which wholly precluded the defendant from making an opening statement, was not harmless. *Id.* at 748. Given the "overall complexity" of the defense, the appellate court believed that "the presentation of an opening statement by [the defendant] could have aided the jurors' understanding of the defensive theory and allowed them to better assimilate and integrate the defense evidence as it unfolded." *Id.* The court observed that "an opening statement is particularly valuable in a case where the defensive theory may strongly conflict with the State's case and may not be easily understood by the jury without the assistance of a prior outline or explanation." *Id.* at 747.

¶14 In this case, unlike *McGowen*, Pedroza-Perez was not precluded from making an opening statement. Nor was his defense so complex that the jury needed "a prior outline or explanation" to understand it. *Id.* Defense counsel gave an opening statement that set the stage for the defense, albeit imprecisely. Counsel emphasized that the state's version of events was "only half the story." She explained that Pedroza-Perez had "an absolute right not to speak against himself," but she thought he was "going to tell [the jury] his story." She also encouraged the jurors to "stay tuned." Thus, in light of all the evidence, we are satisfied beyond a reasonable doubt that the trial court's erroneous limitation on Pedroza-Perez's opening statement did not contribute to or affect the verdict. *See Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d at 236.

Disposition

¶15 For the reasons stated above, we affirm Pedroza-Perez's convictions and sentences.