IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JACOB BRANDON FIMBRES,
Appellant.

No. 2 CA-CR 2015-0283
Filed August 29, 2016

Appeal from the Superior Court in Pima County
No. CR20123981001
The Honorable Paul E. Tang, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Adele G. Ponce, Assistant Attorney General, Phoenix
Counsel for Appellee

Nicole Farnum, Phoenix
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Jacob Fimbres was convicted of three counts of reckless child abuse. The trial court imposed enhanced and aggravated prison terms totaling eighteen years, to commence upon completion of a sentence in an unrelated matter. On appeal, Fimbres contends the trial court reversibly erred by denying his motion for a continuance as a sanction for the state's improper disclosure, and further argues he is entitled to reversal of his convictions and a new trial because the judge was biased against him. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the underlying facts in the light most favorable to sustaining Fimbres's convictions. *See State v. Brown*, 233 Ariz. 153, ¶ 2, 310 P.3d 29, 32 (App. 2013). In October 2012, four-year-old N.L. underwent a routine circumcision related to a urinary tract infection. The surgery and N.L.'s recovery, at both the hospital and at home afterward, were uneventful, and by evening N.L. was up and engaging in normal activities such as talking and eating at his step-grandfather's house. After dinner, N.L.'s mother Jessica and he moved in with Fimbres, her boyfriend. Jessica had never left N.L. alone with Fimbres before, but she did that night for a "few hours" while she went out to fill a prescription. When she returned, N.L. had a bump on his head, and Fimbres said he did not know what had happened.

¶3 The following afternoon Jessica left N.L. with Fimbres again while she ran another errand. A couple of hours later, Jessica received a call from Fimbres stating she "needed to go to the emergency room." Fimbres had telephoned 9-1-1 to report that N.L.

appeared to have had "a seizure," and N.L. was transported to the hospital by ambulance.

¶4 At the emergency room, N.L. presented with abrasions and bruises over much of his body, burned areas on his hands, bleeding and tearing in his eyes, and life-threatening head trauma. He underwent immediate surgery to relieve active bleeding around his brain. Doctors removed a large piece of his skull to relieve pressure from the bleeding, but could not resolve it before parts of N.L.'s brain were permanently damaged. The attending physician diagnosed "nonaccidental trauma," and hospital staff contacted law enforcement. Over the next months, the long-term results of N.L.'s injuries became clear. He can no longer walk, and will never see or speak again. He is fed mostly through a tube and has lost his capacities for cognition and sustained memory. His family cares for him but cannot afford all the medical equipment that he needs.

¶5 Fimbres was indicted in October 2012 for child abuse, dangerous nature, based on head and eye injuries, A.R.S. §§ 13-3623(A)(1), 13-3601, and child abuse for burns and bruising, §§ 13-3623(B)(1), 13-3601. At trial, several treating physicians and other medical professionals testified that N.L.'s head and eye injuries could only have been caused by violent shaking or impact, the burns could not have been accidental, and the bruising could not have resulted from any restraint used during and after the circumcision procedure, or from properly administered cardiopulmonary resuscitation (CPR).

¶6 Fimbres maintained that N.L.'s head and eye injuries had been caused by an accidental fall into a coffee table the evening of the circumcision and that his other injuries were also accidentally caused: the bruises by N.L.'s being restrained when he regained consciousness after the circumcision and from CPR administered before Fimbres called 9-1-1 on the 16th, and the burns by N.L. having washed his hands in hot water. Fimbres presented testimony of two treating physicians, as well as an expert who testified at length to rebut the causation opinions of the state's witnesses. The jury found Fimbres guilty of the lesser-included offense of reckless child abuse on all three counts. It also found four aggravating factors: infliction of serious physical injury, emotional

or financial harm to the victim and his family, the young age of the victim, and the defendant's position of trust.

¶7 At a separate hearing, the trial court found Fimbres had one prior felony conviction. Before sentencing, Fimbres produced letters of support from his family in mitigation, and told the court he was innocent and he "pray[s] for [N.L.]'s recovery." The court found the mitigation evidence of little weight compared to the aggravating factors and described the offense as "despicable," noting the jury had found Fimbres responsible for the "severe and devastating" injuries to the "precious child," and the impact on his family. The court additionally referred to the offense as "depraved," and pointed out, "this boy suffered in unspeakable ways," before imposing the sentences described above. Fimbres appealed and we have jurisdiction pursuant to A.R.S. §§ 12–120.21(A)(1), 13-4031, and 13–4033(A).[1]

Disclosure of Treating Physician Witnesses

¶8 Fimbres first argues he was entitled to a continuance and then a new trial because the state failed to adequately disclose N.L.'s treating physicians as expert witnesses. *See* Ariz. R. Crim. P. 15.7(a)(3). We review the scope of disclosure required by Rule 15.1(a), Ariz. R. Crim. P., de novo, but a trial court's assessment of the adequacy of disclosure and its rulings regarding non-disclosure sanctions are reviewed for abuse of discretion. *See State v. Roque*, 213 Ariz. 193, ¶ 21, 141 P.3d 368, 380 (2006), *citing State v. Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d 1119, 1140 (2004); *State v. Armstrong*, 208 Ariz. 345, ¶ 40, 93 P.3d 1061, 1069–70 (2004).

¶9 Fimbres submitted two motions in limine to challenge causation testimony by N.L.'s treating physicians, claiming he was surprised to discover during pretrial interviews conducted just weeks before trial, that they had formed opinions about the cause of N.L.'s injuries. Fimbres asked the court to preclude their causation

[1]Fimbres has not indicated the basis of our jurisdiction, as required by Rule 31.13(c)(1)(iii), Ariz. R. Crim. P. We are not required to address a brief that does not substantially conform to the rules, but we do so in our discretion. Ariz. R. Crim. P. 31.13(e).

opinions, citing Rule 26(b)(4)(D), Ariz. R. Civ. P., which limits the number of experts parties may call in a civil case, or alternatively, to grant him a continuance to hire additional expert witnesses, citing Rule 8.5, Ariz. R. Crim. P. The state countered that it "should[not] be a surprise" that N.L.'s treating physicians had formed opinions about the cause of his injuries because doing so was "well within what [physicians] are expected to do in their profession."

¶10 The trial court denied the motions, concluding the civil one-expert-per-issue rule was inapplicable in a criminal case. The court additionally noted that sanctions were inappropriate because causation was properly part of a treating physician's factual testimony and because the state's disclosure was adequate to meet the legal requirements for either fact or expert witnesses. *See* Ariz. R. Crim. P. 15.1(b)(4) (describing state's expert disclosure duties); 15.7(a) (prescribing sanctions for disclosure failures).

¶11 After the treating physicians testified about the causes of N.L.'s injuries at trial, Fimbres moved for a new trial, citing Rule 24.1(c)(4), Ariz. R. Crim. P., and reiterating the arguments set forth in his motions in limine. He additionally claimed the state's disclosure of the treating physicians did not meet the disclosure standards for expert witnesses under the rules of procedure. The state maintained its previous response and emphasized the ubiquity of references to "nonaccidental trauma" in the disclosed treatment records. The trial court denied the motion on the same ground as before and the additional ground that the treating physicians had testified only as fact witnesses.

¶12 On appeal, Fimbres renews only his contention that the treating physicians were inadequately disclosed expert witnesses and argues the trial court abused its discretion and "denied [him] due process" by refusing his request for a continuance. Fimbres asserts he "was prejudiced at trial from the discovery violation because he did not have time to prepare and obtain additional experts," apparently assuming, without reasoning, that the treating physicians qualified as expert witnesses for purposes of his claims on appeal.

¶13 In regard to fact witnesses, the prosecution must disclose the names, addresses, and relevant written or recorded statements of all witnesses in its case-in-chief. Ariz. R. Crim. P. 15.1(b)(1). In this case, proper disclosure of this information is undisputed. Thus, if, as the state asserts, the treating doctors' causation testimony was appropriate within their role as fact witnesses, then the trial court rightfully declined to sanction the state for a disclosure violation. *See* Ariz. R. Crim. P. 15.7(a).

¶14 Treating doctors testify as fact witnesses, not experts, when they testify to opinions formed during treatment, including opinions on causation of injuries or medically-reasoned disbelief of accounts of the injury mechanism related by caretakers. *State ex rel. Montgomery v. Whitten*, 228 Ariz. 17, ¶¶ 14, 20, 262 P.3d 238, 242-43 (App. 2011). Such testimony may include conclusions and explanations based on professional training and background. *Id*. ¶¶ 20-21. In contrast, "[g]enerally speaking, a witness asked to form an opinion for purposes of testifying is providing expert testimony." *Id.* ¶ 17. If a treating physician makes additional investigations in preparation for litigation beyond reviewing her own treatment notes, "the physician steps into the shoes of an expert." *Id.* ¶ 14, *quoting Indem. Ins. Co. of N. Am. v. Am. Eurocopter L.L.C.*, 227 F.R.D. 421, 423–24 (M.D.N.C. 2005).

¶15 The state's disclosure of N.L.'s treating physicians included their treatment reports and police interviews. That evidence shows the treating physicians had formed causation opinions during treatment because their reports and interviews included the diagnosis of non-accidental trauma and comments reflecting disbelief of Fimbres's explanations for N.L.'s injuries. Fimbres does not suggest that any of the doctors based their causation opinions on additional studies or investigation conducted after treatment, which might have constituted expert testimony subject to additional disclosure. *See id.* ¶ 14. Accordingly, they were correctly regarded as fact witnesses. *Id.* ¶¶ 14, 20. The state properly and timely disclosed those witnesses under Rule 15.1(b)(1), and therefore the trial court did not abuse its discretion by denying

Fimbres's motions for sanctions or for a continuance on this basis.[2] Ariz. R. Crim. P. 15.7(a).

Judicial Bias

¶16 Fimbres next contends "his convictions must be reversed" because the trial judge was biased against him. In support, he points exclusively to the judge's comments at sentencing. Fimbres did not raise this issue below, *see* Ariz. R. Crim. P. 10.1; consequently, we review only for fundamental, prejudicial error.[3] *State v. Granados*, 235 Ariz. 321, ¶ 13, 332 P.3d 68, 73 (App. 2014). 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." *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (citations omitted); *see also State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991) (fundamental error that which is "clear, egregious and curable only via a new

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[2]We note that even had the treating physicians testified as experts, the state's disclosure was adequate, as noted by the trial court. The only additional disclosure required for experts is "the results of physical examinations and of scientific tests, experiments or comparisons that have been completed." Ariz. R. Crim. P. 15.1(b)(4). Absent evidence that any of the treating physicians conducted any studies for the case apart from those during treatment, disclosure of the treatment reports was all that was required. *See id.*

[3]Fimbres also suggests he is entitled to structural error review, but he has not alleged the necessary predicate or provided sufficient argument. *See State v. Granados*, 235 Ariz. 321, ¶¶ 8, 12, 332 P.3d 68, 71-72 (App. 2014) (structural error review not for all claims of bias, but only for judge's direct, substantial pecuniary interest or strong personal interest in case); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (App. 1989) (appellant must present significant arguments supported by authority; failure to do so generally constitutes waiver of the claim).

trial"). The burden of persuasion in fundamental error review is on the appellant. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶17 Necessarily included in the right to a fair trial is a judge "who is completely impartial and free of bias or prejudice." *State v. Neil*, 102 Ariz. 110, 112, 425 P.2d 842, 844 (1967). A trial judge is presumed free of bias, *State v. Hurley*, 197 Ariz. 400, ¶ 24, 4 P.3d 455, 459 (App. 2000), and "[t]o rebut this presumption, a party must set forth a specific basis for the claim of partiality and prove by a preponderance of the evidence that the judge is biased or prejudiced," *State v. Medina*, 193 Ariz. 504, ¶ 11, 975 P.2d 94, 100 (1999). Such may be shown by "a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants." *In re Guardianship of Styer*, 24 Ariz. App. 148, 151, 536 P.2d 717, 720 (1975). "The fact that a judge may have an opinion as to the merits of the cause or a strong feeling about the type of litigation involved, does not make the judge biased or prejudiced." *Id.*; *see also Liteky v. United States*, 510 U.S. 540, 550-51 (1994) (judge may be "exceedingly ill disposed towards the defendant" upon hearing evidence against him, without bias).

¶18 Further, judicial bias or prejudice ordinarily must "arise from an extrajudicial source and not from what the judge has done in his participation in the case." *Granados*, 235 Ariz. 321, ¶ 14, 332 P.3d at 73, *quoting State v. Emanuel*, 159 Ariz. 464, 469, 768 P.2d 196, 201 (App. 1989). A judge's outside knowledge of contested facts or initiation or consideration of ex parte communications can be strong indicators of bias, *Emanuel*, 159 Ariz. at 467-69, 768 P.2d at 199-201, but opinions formed "on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible," *State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997), *quoting Liteky*, 510 U.S. at 555.

¶19 It is evident the trial judge's opinion that Fimbres's actions were "despicable" and "depraved" was formed solely on the basis of facts introduced at trial, and Fimbres has failed to suggest, let alone demonstrate, any extrajudicial source for the court's remarks. *See id.; see also Granados*, 235 Ariz. 321, ¶ 14, 332 P.3d at 73.

And though the trial judge may have developed strong feelings about the case, Fimbres has not demonstrated that the judge held any "deep-seated . . . antagonism" towards him. *Henry*, 189 Ariz. at 546, 944 P.2d at 61. The judge's comments at sentencing were a justifiable expression of his opinions after hearing all the evidence. On this record, we cannot conclude any bias or prejudice towards Fimbres has been shown. *See Hurley*, 197 Ariz. 400, ¶ 24, 4 P.3d at 459-60.

¶20 Nor has Fimbres alleged his sentences were unfair. *See Medina*, 193 Ariz. 504, ¶ 11, 975 P.2d at 100; *State v. Curry*, 187 Ariz. 623, 631, 931 P.2d 1133, 1141 (App. 1996). The trial court properly imposed aggravated sentences in light of the four aggravating factors found by the jury, Fimbres's prior conviction, and the subjective mitigation evidence presented, consisting only of letters from Fimbres's friends and family disagreeing with the jury's verdicts, and Fimbres's continuing protestations of innocence. *See* A.R.S. § 13-701. Accordingly, Fimbres has failed to show any bias or related prejudice, and thus nothing amounting to fundamental error. *Granados*, 235 Ariz. 321, ¶ 28, 332 P.3d at 75.

Disposition

¶21 For the foregoing reasons, Fimbres's convictions and sentences are affirmed.