IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GILBERTO PACHECO EVORA,
Appellant.

No. 2 CA-CR 2015-0457
Filed July 14, 2017

Appeal from the Superior Court in Pinal County
No. S1100CR201200633
The Honorable Joseph R. Georgini, Judge

AFFIRMED

COUNSEL

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

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 After a jury trial, Gilberto Evora was convicted of one count of first-degree murder and one count of abandonment or concealment of a dead body, and sentenced to concurrent prison terms, the longer of which was natural life. Evora argues the trial court erred by restricting his right to confront and cross-examine witnesses against him, admitting other-acts testimony, and denying his motion for mistrial. 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." *State v. Wright*, 239 Ariz. 284, ¶ 2, 370 P.3d 1122, 1123 (App. 2016). In January 2011, a hunter discovered a badly decomposed human body in a toolbox in the desert near Kearny, Arizona.[2] The subsequent investigation led police to interview J.M. who informed them he had witnessed Evora commit the murder and had been an unwilling participant in the disposal of the body. J.M. was charged with a felony for his involvement in the disposal, but accepted a favorable plea in exchange for agreeing to testify against Evora.

¶3 Police investigators later learned that Evora, while in jail on an unrelated matter, had told his fellow inmate D.A. about his

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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 our supreme court.

[2]The victim was never identified.

participation in several murders, including the toolbox murder. D.A. too received a favorable plea bargain in exchange for agreeing to testify against Evora. Investigators subsequently interviewed A.R., a longtime acquaintance of Evora, and learned that in April 2011, while still in custody on the unrelated matter, Evora had called a bar in Kearny, presumably knowing that some acquaintances of his were there at the time. The telephone was passed to A.R. who knew Evora had been arrested and, aware of a rumor that he had committed the toolbox murder, asked whether the police had "questioned [him] on anything else?" Evora responded, "No, I haven't been questioned on no f---ing murder," and told A.R. to tell everybody in town "to shut the f--- up before I get out of here and kill everybody." Evora was indicted for first-degree murder and abandonment or concealment of a dead body in March of 2012.

¶4 This appeal followed Evora's conviction and sentencing. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A)(1).

Confrontation Clause

¶5 Evora argues the trial court violated his right to confront and cross-examine witnesses against him by precluding impeachment evidence against J.M. and D.A. Evora contends the trial court should have permitted him to confront J.M. with a prior felony conviction that had been reduced to misdemeanor burglary under an unrelated testimonial agreement. And he argues the court erred when it precluded him from introducing a number of D.A.'s prior felony convictions.

¶6 Both the United States and Arizona Constitutions guarantee the right of a criminal defendant to confront and cross-examine witnesses against him. U.S. Const. amend. VI; Ariz. Const. art. II, § 24; *Pointer v. Texas*, 380 U.S. 400, 404 (1965). The Confrontation Clause is violated when a criminal defendant is "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the

reliability of the witness." *Olden v. Kentucky*, 488 U.S. 227, 231 (1988), *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).

¶7 "The criminal defendant's right to cross-examine, however, is not without limitation." *State v. Riggs*, 189 Ariz. 327, 331, 942 P.2d 1159, 1163 (1997). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about . . . interrogation that is repetitive or only marginally relevant." *Id.*, *quoting Van Arsdall*, 475 U.S. at 679. The test of such reasonable limits is whether the jury otherwise has sufficient information to assess the bias and motives of the witness. *State v. Bracy*, 145 Ariz. 520, 533, 703 P.2d 464, 477 (1985), *citing Skinner v. Cardwell*, 564 F.2d 1381, 1389 (9th Cir. 1977). "Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

¶8 Likewise, the Arizona Rules of Evidence place limits on the scope and content of cross-examination. Rule 609(a)(1), Ariz. R. Evid., provides that a witness's character for truthfulness may be impeached by evidence of a prior criminal conviction that is a felony. However, Rule 609(a)(1)(A) specifically notes that evidence of a witness's prior conviction is subject to analysis under Rule 403, Ariz. R. Evid., and may be excluded if "its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.* Rule 609(a)(2) allows the impeachment of a witness's character for truthfulness with a conviction for any crime which required proving that the witness committed a dishonest act or made a false statement. We review a court's decision to admit evidence of a witness's prior conviction for an abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 302-03, 896 P.2d 830, 842-43 (1995).

¶9 As for J.M.'s prior conviction, Arizona courts have consistently held that open-ended felony offenses designated as misdemeanors are not admissible as impeachment evidence under Rule 609(a)(1). *See State v. Malloy*, 131 Ariz. 125, 126-27, 639 P.2d 315,

316-17 (1981); *State v. Carpenter*, 141 Ariz. 29, 31, 684 P.2d 910, 912 (App. 1984); *cf. State v. Raffaele*, 113 Ariz. 259, 262, 550 P.2d 1060, 1064 (1976) (under former statute, such offenses shall be deemed misdemeanors for all purposes); *Ex parte Gutierrez*, 82 Ariz. 21, 23, 307 P.2d 914, 915 (1957) (same). Additionally, "[t]he crime of burglary does not necessarily involve an element of deceit or falsification and, consequently, is not admissible under Rule 609(a)(2)." *Malloy*, 131 Ariz. at 128, 639 P.2d at 318. Thus, J.M.'s prior conviction for misdemeanor burglary was not admissible as impeachment evidence under Rule 609, and Evora has not established the rule violates the constitutional standard. The trial court's preclusion of the evidence was proper.[3]

¶10 Evora also argues the trial court abused its discretion by precluding him from impeaching D.A. with all nine of his prior felony convictions. While D.A.'s testimonial agreement stated he had "no more than nine" prior felony convictions, the court ruled that Evora would be limited to eliciting that D.A. had two prior felonies, plus the conviction which was the subject of his testimonial agreement, and that those felonies should be sanitized under Rule 403, finding that a discussion of his entire criminal history would be a waste of time and unnecessarily cumulative. "Rule 403 weighing is best left to the trial court and, absent an abuse of discretion, will not be disturbed on appeal." *State v. Fernane*, 185 Ariz. 222, 226, 914 P.2d 1314, 1318 (App. 1995), *quoting State v. Spencer*, 176 Ariz. 36, 41, 859 P.2d 146, 151 (1993).

¶11 The trial court did not abuse its discretion in limiting the number of D.A.'s prior felony convictions under Rule 403. *See*

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[3]Evora additionally argues the trial court abused its discretion by precluding him from calling as a witness M.K., J.M.'s co-defendant in the misdemeanor burglary case, who would have testified that J.M.'s conviction was reduced to a misdemeanor as a result of an earlier testimonial agreement against him, thus establishing a pattern of "'ratting out people' in exchange for favorable plea agreements on his own criminal cases." Because we conclude the misdemeanor conviction was inadmissible, we need not address this argument.

United States v. Howell, 285 F.3d 1263, 1270 (10th Cir. 2002) ("After conducting the Rule 403 balancing, the court may determine that evidence of the conviction, or certain aspects of evidence of the conviction, are properly excluded."); *see also Goy v. Jones*, 205 Ariz. 421, ¶7, 72 P.3d 351, 352-53 (App. 2003) (federal-court interpretations of comparable Federal Rules of Evidence persuasive authority). The jury heard that D.A. was a convicted felon; that he was a "career criminal"; that he had considered meeting Evora and hearing the confession "a godsend"; that he had been offered a deal in exchange for his testimony which reduced his exposure from the range of 10.5 to 35 years in prison to the range of 2 to 8.75 years, with probation available; and that he had been given use of a hotel room and a cash stipend as part of the testimonial agreement, which money he had used to buy alcohol and cigarettes. We cannot say the court abused its discretion in determining that in view of this evidence, the fact of other convictions was a "waste of time and unduly cumulative." And, because the jury had sufficient information to assess D.A.'s bias and motives, Evora has not established a constitutional violation. *Bracy*, 145 Ariz. at 533, 703 P.2d at 477, *citing Skinner*, 564 F.2d at 1389.

Other-Acts and Threat Evidence

¶12 Evora next argues the trial court improperly admitted other-acts evidence by allowing the jury to hear testimony that he had been in jail when he spoke to A.R. and D.A. In pretrial motions, Evora had sought to exclude all testimony from those two witnesses. The court ruled that A.R. would be permitted to testify about Evora's statements during the call to the bar, finding the exchange to be "clearly . . . a statement of consciousness of guilt." But it directed the state to omit any reference to Evora's having been in jail when the conversation occurred. The court also ruled that D.A. would be permitted to testify, but precluded reference to other murders Evora had mentioned to D.A. Evora initially had asked that the state be precluded from eliciting that his conversations with D.A. occurred while they were in jail together, but subsequently withdrew his request.

¶13 During her testimony at trial, A.R. volunteered that Evora had been in custody at the time of the telephone call. Evora

did not object, but the state immediately asked for a sidebar. Given that D.A. was going to testify about conversations he had with Evora while they were in jail together, Evora withdrew his pretrial objection to A.R. testifying that he was in custody when he made the call, and the trial court then allowed the state to elicit that information directly from A.R.

¶14 "An objection that is withdrawn is waived, and we thus review only for fundamental error." *State v. Cruz*, 218 Ariz. 149, ¶ 105, 181 P.3d 196, 213 (2008) (citation omitted). Because Evora does not argue that the alleged errors were fundamental, he has waived the arguments on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

¶15 Evora also argues the trial court erred in overruling his objection that A.R.'s testimony was irrelevant. He contends he intended his statement to her to convey his annoyance with the "rumor mongering" in Kearny; further, he asserts A.R. did not believe the statement was proof of his guilt. Alternatively, he argues the statement should have been precluded under Rule 403 because it suggested to the jury that he was volatile and violent.

¶16 Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "th[at] fact is of consequence in determining the action." Ariz. R. Evid. 401. Threatening statements directed toward potential witnesses tend to prove a defendant's consciousness of guilt. *See State v. Carter*, 16 Ariz. App. 380, 382, 493 P.2d 926, 928 (1972). Not only did Evora threaten to "kill" the people who were spreading rumors about his involvement, but he also mentioned murder when A.R. had asked whether he had been questioned "on anything else." The statement was thus relevant. As the state correctly notes, Evora's argument about contrary interpretations and that A.R. did not take his threat seriously goes to the weight of the evidence, not its admissibility. *See State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995) (possible alternative explanations for shooting went to weight, not admissibility). And assessing the weight and credibility of evidence is the exclusive province of the jury. *State v. Bernstein*, 237 Ariz. 226, ¶ 18, 349 P.3d 200, 204 (2015).

¶17 Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ariz. R. Evid. 403. Unfair prejudice "means an undue tendency to suggest decision on an improper basis." *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993), *quoting* Fed. R. Evid. 403 advisory committee note. Given the nature of the charges and the context of A.R.'s testimony, the trial court did not abuse its discretion in determining that evidence of Evora's threat against people who discussed his role in the murder was not unfairly prejudicial. *See id.*; *Carter*, 16 Ariz. App. at 382, 493 P.2d at 928. The statement was properly admitted.

Denial of Motion for Mistrial

¶18 Evora next argues the trial court abused its discretion in denying his motion for a mistrial after D.A. violated the court's pretrial ruling by referring to "several other" murders Evora had apparently discussed with him. Evora's motion was made after the state asked D.A., "Tell us everything that [Evora] told you about the murder in Kearney." He responded, "He told me about--well, am I allowed to say he told me about several or other ones?"

¶19 Evora immediately objected and requested a mistrial. The trial court dismissed the jury for the day and took the issue under advisement. After briefing and argument, the court denied the request for a mistrial, finding that the brief reference to "other ones" had been "ambiguous," "innocuous," and "subject to interpretation," that D.A. "did not say that [Evora had] committed other murders," and that it was "clearly plausible . . . that the statement merely suggested that [Evora] had an awareness or knowledge of other murders." To ameliorate possible misunderstanding of the statement, the court instructed the jury: "[D.A.] may have referenced that Mr. Evora has knowledge of other events not related to this investigation. You must disregard this testimony, and you must not consider that in this case." The state does not argue that the statement was admissible, but rather that the court's use of a curative instruction was sufficient, and its denial of the motion for mistrial proper.

¶20 "When unsolicited prejudicial testimony has been admitted, the trial court must decide whether the remarks call attention to information that the jurors would not be justified in considering for their verdict, and whether the jurors in a particular case were influenced by the remarks."[4] *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). "When the witness unexpectedly volunteers information, the trial court must decide whether a remedy short of mistrial will cure the error." *Id.* (emphasis omitted). We will not overturn the trial court's denial of a motion for mistrial absent an abuse of discretion. *Id.* "The trial judge's discretion is broad because he is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Id.* (citation omitted).

¶21 In *Jones*, a capital murder case, a witness offered unsolicited testimony that Jones was a paroled felon at the time of the murders, that after the murders he borrowed duct tape to use in a robbery, and that he was incarcerated. *Id.* ¶¶ 1, 30. Jones moved for a mistrial, but the trial court denied his request and instead read the jury a curative instruction. *Id.* ¶¶ 31, 33. Our supreme court affirmed, determining that the testimony had been vague, had referenced only unproven crimes and incarcerations, and the judge had given an appropriate limiting instruction. *Id.* ¶¶ 34-35.

¶22 "A declaration of 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). "A trial is 'fair' when, according to legal principles and

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[4]In three brief sentences Evora also contends that, because the trial court gave a single admonition to the two prosecutors for "smirking and gesturing back and forth," on the first day of trial, and because two witnesses inadvertently disclosed precluded information, the state must have deliberately sought to elicit the precluded information. This argument is not sufficiently developed and is therefore waived. *See State v. Moody*, 208 Ariz. 424, n.11, 94 P.3d 1119, 1154 n.11 (2004); *State v. Fernandez*, 216 Ariz. 545, n.2, 169 P.3d 641, 643 n.2 (App. 2007).

requirements, a jury's determination is based on the evidence admitted and the instructions given." *State v. Bible*, 175 Ariz. 549, 603, 858 P.2d 1152, 1206 (1993). It is presumed that a jury follows the trial court's curative instructions. *State v. Dann*, 205 Ariz. 557, ¶ 48, 74 P.3d 231, 245 (2003). In light of the other abundant evidence of Evora's guilt, which had already been presented at the time of the statement, its relatively vague nature, the credibility issues of the witness, the fact that the parties never mentioned "the other ones" thereafter, and the trial court's curative instruction, we conclude the comment did not cause justice to be thwarted, and the court did not abuse its discretion in denying a mistrial. *See State v. Hoskins*, 199 Ariz. 127, ¶¶ 57-58, 14 P.3d 997, 1012-13 (2000) ("strong circumstantial evidence of defendant's guilt" rendered improper other-act evidence harmless); *Jones*, 197 Ariz. 290, ¶¶ 30-34, 4 P.3d at 359-60 (vague references to other-acts less serious; credibility of witness a factor); *State v. Almaguer*, 232 Ariz. 190, ¶ 29, 303 P.3d 84, 93 (App. 2013) (isolated statement that violated court order did not warrant mistrial in view of curative instruction and abundant evidence of guilt).

Disposition

¶23 For the foregoing reasons, Evora's convictions and sentences are affirmed.