IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JORGE ALAN LOPEZ,
Appellant.

No. 2 CA-CR 2016-0042
Filed November 21, 2017

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NOT FOR PUBLICATION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. CR20144701001
The Honorable Paul E. Tang, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

S T A R I N G, Presiding Judge:

¶1 After a jury trial, Jorge Alan Lopez was convicted of aggravated assault, domestic violence. On appeal, he contends the trial court erred by precluding him from introducing evidence of his mental illness, and by allowing the introduction of certain expert testimony that did not assist the jury, impermissibly vouched for the victim's testimony, and amounted to profile evidence. Because we conclude the court did not err, we affirm Lopez's conviction and sentence.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining Lopez's conviction. *State v. Foshay*, 239 Ariz. 271, ¶ 2 (App. 2016). On November 6, 2014, during an argument with his wife, J.P., Lopez kicked her in the stomach, grabbed her by the throat and choked her. The next morning, Lopez slapped J.P.'s face during another argument.

¶3 After Lopez left for work, J.P. called 9-1-1. Police officers responded and Detective Scott Paglinawan interviewed her. Lopez returned while the police were still at the house. Officer Matthew Golden handcuffed and placed Lopez in the back of a police vehicle. Soon thereafter, Paglinawan interrogated Lopez, who admitted choking J.P.

¶4 Lopez was indicted on one count of aggravated assault, domestic violence. While in jail, he telephoned his mother and asked her to have J.P. drop the charges against him. At trial, J.P. recanted her previous accusations, claiming she had lied to the police in an attempt to punish Lopez for cheating on her. In response, the state called Melissa Brickhouse-Thomas to testify as an expert about behaviors exhibited by victims of domestic violence, including recantation. After a four-day trial, Lopez was found guilty as described above and after finding he had previously been convicted of a felony, the trial court sentenced him to a partially mitigated term of 3.5 years' imprisonment.

¶5 This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Preclusion of Evidence

¶6 During questioning by Paglinawan, Lopez made passing reference to his belief that he suffered from bipolar disorder.[1] On appeal, he argues the "court erred in precluding evidence of [his] mental illness," because it was relevant to whether or not his confession was voluntary. We disagree.

¶7 "[I]nquiries into the state of mind of a criminal defendant who has confessed . . . [are] to be resolved by state laws governing the admission of evidence." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Thus, contrary to Lopez's contention, the issue raised is neither constitutional nor one of statutory interpretation,[2] and we review the trial court's "evidentiary rulings for abuse of discretion and defer to [its] determination of relevance." *State v. Chappell*, 225 Ariz. 229, ¶ 28 (2010).

¶8 Under A.R.S. § 13-3988(A), if the court "determines that [a] confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness." Relevant evidence is that which "has any tendency to make a fact more or less probable" and involves a fact "of consequence in determining the action." Ariz. R. Evid. 401. Relevant evidence is admissible unless otherwise provided by the rules of evidence or other authority. Ariz. R. Evid. 402.

---

[1]Lopez told the detective, "I'm pretty sure I'm bipolar. I got some . . . problems in my head." In the same interview, Lopez said, "She, she, she didn't even say that but then I read all the messages and I'm bipolar and that . . . fired me up, man."

[2]To the extent Lopez raises a constitutional or statutory interpretation issue on appeal, he did not raise it below, and we therefore review any such claims only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005). However, because he has failed to allege such error was fundamental, we find these arguments waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008).

¶9 Lopez argued below that the statements should be admitted as declarations of his state-of-mind. *See* Ariz. R. Evid. 803(3). According to Lopez, his alleged "mental health issues" were "very relevant to his state of mind when he was . . . interrogated by the police." The state countered that admission of the evidence would run afoul of *State v. Mott*, in which our supreme court concluded expert testimony that "was not offered as a defense to excuse [the defendant's] crimes but rather as evidence to negate the *mens rea* element of the crime," thereby advancing a "diminished capacity" defense, was inadmissible. 187 Ariz. 536, 540 (1997). The trial court agreed with the state, in part relying on *Mott*.[3] In *Mott*, however, the court did not consider the admissibility of evidence concerning a confessor's mental health for purposes of challenging the voluntariness of the confession at trial.

¶10 However, although the trial court mistakenly relied on *Mott* to preclude the admission of Lopez's statements about his mental health, we are obligated to affirm its ruling if legally correct for any reason. *See State v. Perez*, 141 Ariz. 459, 464 (1984). On appeal, the only argument Lopez makes about the admissibility of his unsworn, out-of-court statements is that they were relevant to his state of mind. Relevancy, however, is merely the preliminary bar for the admission of evidence. Rule 802, Ariz. R. Evid., prohibits the introduction of hearsay evidence, unless an exception provides otherwise. Hearsay is defined as a statement "not [made] while testifying at the current trial or hearing" offered "to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c). In the context of this matter, Lopez's statements to Paglinawan constitute hearsay; they were made out-of-court, and offered to prove the truth of the matter asserted within them, namely that Lopez suffered from mental illness, and, therefore, his confession was not voluntary. And, Lopez makes no argument that his statements would fall under any hearsay exception.[4]

---

[3]In *Mott*, our supreme court concluded that because neither it nor the trial court "[had] the authority to adopt the diminished capacity defense," including because the Arizona legislature had not adopted the specific defense, "evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime," is inadmissible. 187 Ariz. at 541.

[4]In his reply brief, Lopez makes passing reference to Rules 106 and 803(3), Ariz. R. Evid., to argue the statements were admissible. "Arguments raised for the first time in a reply brief, however, are waived . . . ." *State v. Brown*, 233 Ariz. 153, ¶ 28 (App. 2013).

See State v. Nirschel, 155 Ariz. 206, 208 (1987) ("Failure to argue a claim constitutes abandonment and waiver of that issue."). Thus, we find the court correctly precluded the statements.

¶11 Moreover, while Rule 803(3) excepts statements "of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)" from the rule against hearsay, statements "of memory or belief to prove the fact remembered or believed" are not admissible. Lopez's statements about his alleged mental illness were not a declaration of a "then-existing state of mind," but, rather, a "belief" being offered "to prove the fact . . . believed," which is not permitted by Rule 803(3).

> [T]he state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind. If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition—"I'm scared"—and not belief—"I'm scared because Galkin threatened me."

State v. Fulminante, 193 Ariz. 485, ¶ 40 (1999), *quoting United States v. Liu*, 960 F.2d 449, 452 (5th Cir. 1992). Here, Lopez sought to have the statements admitted for two purposes: (1) to prove he in fact had a mental illness and (2) to prove he involuntarily confessed as a result. But "[s]uch testimony reflects the declarant's state of mind only if the facts asserted in the statement are taken as true, which is what the rule forbids." *Id.* ¶ 42. Accordingly, the trial court did not err.

Expert Testimony

¶12 Lopez also argues the trial court erred by allowing the state to introduce "cold" expert testimony from a domestic violence counselor, Brickhouse-Thomas. He makes three arguments on this point: (1) the expert's testimony did not assist the jury; (2) the testimony impermissibly vouched for the victim's allegation of abuse; and (3) the testimony amounted to profile evidence. We review a trial court's ruling on the admission of evidence for an abuse of discretion. *State v. Haskie*, 242 Ariz. 582, ¶ 11 (2017). And we review claims raised for the first time on appeal

for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005).

Helpfulness

¶13 Below, Lopez moved to preclude the testimony, arguing domestic violence "is [a] very familiar issue that does not require special education for jurors" because "even the United States president recognized the [domestic violence] epidemic," and October is National Domestic Violence Awareness Month, which "is followed by thousands [of] people on several social media websites." The state refuted this contention, arguing the "[r]ecognition of domestic violence issues throughout the media does not necessitate a jury's understanding of the intricacies and behaviors of victims of domestic violence." The state proffered Brickhouse-Thomas's testimony would "aid the jurors in their overall assessment of J.P.'s testimony in light of [the] patterns of behaviors observed in domestic violence victims." The state further asserted the testimony would "explain factors and circumstances that could lead a domestic violence victim to recant—information that the jury is not likely to know without [Brickhouse-Thomas's] testimony." The trial court denied Lopez's motion to preclude.

¶14 On appeal, Lopez maintains the state failed to meet its burden below to demonstrate Brickhouse-Thomas's testimony was beyond the common experience of potential jurors. He argues none of her testimony was "outside the ken of the jury pool" and "gave nothing to the jurors that they did not already have." The state contends the court correctly allowed the testimony because "[w]hile some jurors may have some basic or passing knowledge regarding domestic violence, most are not intimately familiar with recognized principles of social or behavioral sciences regarding the seemingly illogical, inconsistent, [or] self-destructive behavior by victims."

¶15 The proponent of challenged evidence bears the burden of establishing its admissibility by a preponderance of the evidence. *State v. Salazar-Mercado*, 234 Ariz. 590, ¶ 13 (2014). "The preponderance of the evidence standard requires that the fact-finder determine whether a fact sought to be proved is more probable than not." *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 25 (2005).

¶16 Rule 702(a), Ariz. R. Evid., permits expert testimony if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." The testimony must concern a subject "beyond the common experience of most persons" and "assist the trier of fact." *State v. Williams*, 132 Ariz. 153, 160

(1982). "If the matter, however, is of such common knowledge that persons of ordinary education and background could reach as intelligent a conclusion as an expert, the testimony should be precluded." *Id.*

¶17 We agree with the trial court that the behavioral patterns of victims of domestic violence are beyond the common experience of most jurors. Even were we to assume most jurors are aware that domestic violence affects victim behavior differently than other acts of violence, that would not lead to the conclusion that "persons of ordinary education and background could reach *as intelligent a conclusion*" about the patterns victims exhibit as the expert in this case. *See id.* (emphasis added). We are particularly mindful that our supreme court has recently expressed that "expert testimony that explains a victim's seemingly inconsistent behavior is admissible to aid jurors in evaluating the victim's credibility." *Haskie*, 242 Ariz. 582, ¶ 16; *see also Salazar-Mercado*, 234 Ariz. 590, ¶ 15 (testimony helping jury to understand possible reasons for victim's inconsistent reporting satisfies Rule 702(a)); *State v. Moran*, 151 Ariz. 378, 381 (1986) ("'Jurors, most of whom are unfamiliar with the behavioral sciences, may well benefit from expert testimony' explaining behavior they might otherwise 'attribute to inaccuracy or prevarication.'"), *quoting State v. Lindsey*, 149 Ariz. 472, 474 (1986). The trial court, therefore, did not abuse its discretion in concluding Brickhouse-Thomas's testimony would assist the jury.[5]

Vouching

¶18 Lopez next argues "the manner in which Brickhouse-Thomas's testimony was used was to vouch for J.P.'s initial accusation and to undercut her recantation." He does not claim that Brickhouse-Thomas's testimony was improper, but, rather, that the "*Lindsey*/*Moran* framework" is inappropriate and that "Arizona should credit jurors with having enough common sense to figure out" that cold expert testimony like Brickhouse-Thomas's "is impliedly vouching for the witness's credibility."

---

[5]In his reply brief, and again in his supplemental brief, Lopez argues for the first time that Brickhouse-Thomas lacked sufficient education and professional qualifications to testify as an expert under Rule 702. He claims he raised this argument in his opening brief, but our review has led to the contrary conclusion. Arguments raised for the first time in a reply brief or supplemental brief are waived, and we therefore do not consider them. *See Estate of DeSela v. Prescott Unified Sch. Dist. No. 1*, 226 Ariz. 387, ¶ 8 (2011); *State v. Brown*, 233 Ariz. 153, ¶ 28 (App. 2013).

¶19 Preliminarily, we are "bound by decisions of the Arizona Supreme Court and [have] no authority to overturn or refuse to follow its decisions." *State v. McPherson*, 228 Ariz. 557, ¶ 13 (App. 2012), *quoting State v. Long*, 207 Ariz. 140, ¶ 23 (App. 2004). Accordingly, any argument that we should disregard our supreme court's precedent merits no discussion here.

¶20 Under *Lindsey* and *Moran*, the state may provide cold experts to explain "why recantation is not necessarily inconsistent with the crime having occurred" as long as that expert testimony does not express an opinion as to the veracity of the witness or "quantify the percentage of victims who are truthful in their initial reports despite subsequent recantation." *Moran*, 151 Ariz. at 382, 384; *see also Lindsey*, 149 Ariz. at 473-75. Lopez makes no argument that Brickhouse-Thomas testified as to the veracity of a witness or that she quantified the percentage of victims who are truthful in their initial reports. Indeed, she offered no such testimony, only stating that victim recantation in domestic violence cases was "not uncommon." *See Lindsey*, 149 Ariz. at 474 ("We believe that the 'generality' of the testimony is a factor which favors admission."), *quoting State v. Chapple*, 135 Ariz. 281, 292 (1983). Accordingly, the trial court did not err.

Profile Evidence

¶21 Lastly, Lopez argues Brickhouse-Thomas "offered substantial testimony about the dynamics of the relationship between the abuser and the abused," which "created a profile of abusers that was meant to fit" him. Because he concedes he did not raise this objection below, but asserts the error was "egregious and went to the foundation of the case," we review for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20.

¶22 In *Haskie*, our supreme court confirmed that Rule 702 "permits the admission of 'cold' expert testimony that educates the fact-finder about general principles without applying those principles to the particular facts of the case" for both child and adult victims. 242 Ariz. 582, ¶ 12. The state may not offer, however, "'profile' evidence as substantive proof of the defendant's guilt." *Id.* ¶ 15. "[P]rofile evidence tends to show that a defendant possesses one or more of an 'informal compilation of characteristics or an abstract of characteristics typically displayed by persons' engaged in a particular kind of activity." *State v. Ketchner*, 236 Ariz. 262, ¶ 15 (2014), *quoting State v. Lee*, 191 Ariz. 542, ¶ 10 (1998). "[E]xpert testimony about victim behavior that also describes or refers to a perpetrator's characteristics has the potential to be 'profile' evidence, [but] it is not categorically inadmissible." *Haskie*, 242 Ariz. 582, ¶ 16.

¶23 In *Ketchner*, the expert "testified about characteristics common to domestic violence victims and their abusers," describing in particular "an abuser's reaction to loss of control in a relationship." 236 Ariz. 262, ¶¶ 14, 19. The court found the testimony inadmissible because it "invite[d] the jury to find that Ketchner's character matched that of a domestic abuser who intended to kill or otherwise harm his partner in reaction to a loss of control over the relationship." *Id.* ¶ 19.

¶24 The expert's testimony in *Haskie*, however, "was limited to questions designed to help the jury understand the sometimes counterintuitive behaviors of domestic violence victims." 242 Ariz. 582, ¶ 20. While some of the expert's testimony "referred to an abuser's characteristics . . . each statement primarily served the purpose of explaining victim behavior." *Id.* Our supreme court found this testimony admissible. *Id.* ¶ 22.

¶25 In this case, Brickhouse-Thomas's testimony focused on the general characteristics of a domestic violence relationship, describing in particular the factors that might lead victims to remain in those relationships and possibly recant their initial allegations. Although her testimony described domestic violence relationships as "related [to] power [or] control . . . where one partner either seeks to gain or maintain control over their intimate partner or other related party . . . where one partner has all of the decision-making and has more of the power in the relationship," none of that testimony "explicitly []or implicitly invited the jury to infer criminal conduct based on the described conduct." *Id.* And, none of Brickhouse-Thomas's testimony was "directed at establishing that [Lopez] possessed 'one or more of an informal compilation of characteristics' typically displayed by domestic violence abusers; rather, it was introduced to explain the impetus for [J.P.'s] counterintuitive behavior." *Id.*, *quoting Ketchner*, 236 Ariz. 262, ¶ 15. Accordingly, we find no error, fundamental or otherwise.

Disposition

¶26 For the foregoing reasons, we affirm Lopez's conviction and sentence.