IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

NICHOLAUS CRAIG SCHREIBER,
Appellant.

No. 2 CA-CR 2016-0287
Filed August 30, 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NOT FOR PUBLICATION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. CR20135223001
The Honorable Carmine Cornelio, Judge

AFFIRMED

COUNSEL

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

Mark R. Resnick, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Kelly[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Nicholaus Schreiber was convicted of four counts of sexual conduct with a minor, special relationship; one count of furnishing harmful items to a minor; and one count of public sexual indecency. The trial court sentenced him to concurrent and consecutive terms totaling ten years' imprisonment, to be followed by four years' supervised probation. On appeal, Schreiber argues the court abused its discretion by admitting at trial what he characterizes as other-acts evidence and denying his motion for a mistrial based on that evidence. He also contends the court abused its discretion by denying his motion for a mistrial after a witness volunteered testimony about the witness's religious affiliation. We affirm for the reasons that follow.

Factual and Procedural Background

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the jury's verdict." *State v. Causbie*, 241 Ariz. 173, ¶ 2, 384 P.3d 1253, 1255 (App. 2016). The evidence presented at trial showed that Schreiber had engaged in multiple acts with his minor stepdaughter C.A. in separate incidents over the course of several months in 2012. Those acts included showing C.A. a pornographic video on his smartphone, masturbating and ejaculating while C.A. was present, touching C.A.'s vagina over her clothing, digitally penetrating C.A.'s vulva, forcing C.A. to manually masturbate his penis, and forcing C.A. to put his penis in her mouth. Schreiber was convicted and sentenced as described

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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.

above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A)(1).

Mistrial Motion and Rule 404(b), Ariz. R. Evid.

¶3 During direct examination, C.A. testified Schreiber had shown her a pornographic video. After several questions about the video, the prosecutor asked, "Did he show it to you again?" C.A. replied, "I am not sure. I don't know." The prosecutor then asked, "Did he ever show it to you again after that time?" Schreiber then objected pursuant to Rule 404(b), Ariz. R. Evid., and also moved for a mistrial "because of what [C.A.] said in response to the State's question." The trial court sustained the Rule 404(b) objection but denied the motion for a mistrial. The court offered to provide a limiting instruction, and defense counsel said he would "think about it." Schreiber did not request a limiting instruction.

¶4 Schreiber argues the trial court abused its discretion by denying his motion for a mistrial. The decision to grant a mistrial lies within the court's sound discretion, and we will not disturb that decision absent an abuse of discretion. *See State v. Hansen*, 237 Ariz. 61, ¶ 14, 345 P.3d 116, 121-22 (App. 2015).

¶5 Here, C.A. offered no testimony about "[an]other crime[], wrong[], or act[]" under Rule 404(b)—she stated only that she did not know whether Schreiber had ever shown her the video again, not that he had done so. To the extent the prosecutor's follow-up question sought to elicit evidence that would have been improper under Rule 404(b), Schreiber's objection to that question was sustained, and C.A. did not answer it. And the trial court did not abuse its discretion in determining that a remedy short of a mistrial—a limiting instruction—could cure any arguable prejudice from C.A.'s answer. *See State v. Doty*, 232 Ariz. 502, ¶ 17, 307 P.3d 69, 73 (App. 2013). The court reasonably could have concluded that C.A.'s noncommittal answer did not necessitate the "dramatic remedy" of a mistrial.[2] *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983).

[2]Schreiber also appears to argue the trial court abused its discretion by not providing a limiting instruction, but he did not

¶6 Schreiber also argues there were several subsequent incidents of C.A. allegedly volunteering improper testimony in violation of Rule 404(b), although he did not move for a mistrial after any of those incidents. And on appeal, he has not cited the relevant "authorities . . . and parts of the record relied on" to support these contentions in the argument section of his opening brief. Ariz. R. Crim. P. 31.13(c)(1)(iv). His failure to develop a legal argument on these issues renders them waived. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim.").[3]

Evidence of Witness's Religious Affiliation

¶7 Schreiber argues the trial court abused its discretion by denying his motion for a mistrial after the deputy who had interviewed C.A. testified about his background as a member of the Church of Jesus Christ of Latter-day Saints (LDS). Schreiber argues the testimony violated article II, § 12 of the Arizona Constitution and Rule 610, Ariz. R. Evid. We give great deference to a trial court's ruling on a motion for a mistrial based on volunteered, inadmissible testimony because that court is in the best position to determine whether the testimony will affect the outcome of the trial. *Doty*, 232 Ariz. 502, ¶ 17, 307 P.3d at 73.

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request one, and he does not argue the court's failure to provide one sua sponte was fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). He has therefore waived the argument. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

[3]Furthermore, because Schreiber failed to produce a transcript of the closing arguments as part of the record on appeal, *see* Ariz. R. Crim. P. 31.8(b)(2)(ii), (4); *State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990), there is nothing to suggest that the prosecutor mentioned, much less emphasized, any improper evidence in closing argument, *see State v. Romero*, 240 Ariz. 503, ¶¶ 7-8, 20, 381 P.3d 297, 301-02, 305 (App. 2016) (whether party refers to improper evidence in closing argument relevant to harmless-error analysis).

¶8 C.A. is deaf and communicates using American Sign Language (ASL). In his case-in-chief, Schreiber called R.P., the deputy who had interviewed C.A. using ASL during the investigation. On direct examination, Schreiber elicited testimony from R.P. that he is not a certified ASL interpreter. Then, on cross-examination, the prosecutor asked R.P., "So how is it that you know sign language?" R.P. replied:

> When I was young, I was a member of the LDS Church and I got called to serve on a mission to New York City. If you are familiar with the Mormon Church, they have the young boys go out for two years. My older brothers went to Peru and Brazil. I was assigned to New York City with American Sign Language. It was a two-year service. During that time, I spent I would say the majority of my time with deaf companions and also deaf roommates. I spent two years of my life immersed in the deaf culture in New York City. After I came back from New York, I met my wife.[4] It was a summer camp for children. It was a youth camp. I was a counselor.

Schreiber objected and moved for a mistrial, arguing at a sidebar conference that R.P.'s religious affiliation or background was "completely irrelevant" and could cause the jury improperly to credit his testimony on religious grounds. The trial court overruled the objection and denied the motion for a mistrial.

¶9 Testimony regarding religious beliefs or lack thereof is not admissible for the purpose of bolstering or assailing a witness's credibility. Ariz. R. Evid. 610; *see State v. Marvin*, 124 Ariz. 555, 558, 606 P.2d 406, 409 (1980); *State v. Crum*, 150 Ariz. 244, 245-46, 722 P.2d 971, 972-73 (App. 1986); *see also State v. Thomas*, 130 Ariz. 432, 437, 636

[4]R.P. later explained that his wife of twenty-one years is deaf and that he communicates with her using ASL.

P.2d 1214, 1219 (1981) (such testimony admitted for impermissible purpose may constitute fundamental error). "However, if [religious] information is probative of something other than veracity, it is not inadmissible simply because it may also involve a religious subject as well." *State v. Stone*, 151 Ariz. 455, 458, 728 P.2d 674, 677 (App. 1986); *see also State v. West*, 168 Ariz. 292, 294-96, 812 P.2d 1110, 1112-14 (App. 1991). For instance, in *Stone*, the victim had awakened to find an intruder lying in her bed. 151 Ariz. at 456, 728 P.2d at 675. This court determined that evidence the intruder had been wearing the "endowment garments" worn by LDS practitioners was probative on the issue of identification. *Id.* at 456, 459, 728 P.2d at 675, 678. Likewise, in *Crum*, evidence that two victims had served as altar boys in a chapel at the defendant's home was probative to show the defendant had a modus operandi of grooming children to molest. 150 Ariz. at 246, 722 P.2d at 973.[5]

¶10 Here, Schreiber elicited testimony tending to show R.P. was not qualified to act as an ASL interpreter. R.P.'s testimony that he had learned ASL by immersion for two years while on an LDS mission therefore was relevant to rebut the inference that R.P. was not qualified in ASL. Unlike the situation in *Thomas*, the prosecutor did not elicit R.P.'s religious affiliation in order to improperly bolster his credibility. *Cf. Thomas*, 130 Ariz. at 437, 636 P.2d at 1219 (fundamental error where prosecutor "resorted to bolstering the credibility of the victim's testimony by making repeated and deliberate references to the religious nature of the victim and her grandmother"). Indeed, it appears the prosecutor did not intend to elicit religious information at all—she asked only how R.P. had learned ASL, and R.P. volunteered the religious information in the course of his explanation. *See also* Ariz. Const. art II, § 12 (prohibiting "*question[ing]*" of witness "touching his religious belief . . . to affect the weight of his testimony") (emphasis added). The trial court did not abuse its discretion in finding R.P.'s testimony relevant to the issue of his ability to

[5]Schreiber cites *Kelley v. Abdo*, 209 Ariz. 521, 105 P.3d 167 (App. 2005), as authoritative, but our supreme court ordered that case depublished, 211 Ariz. 255, 120 P.3d 210 (2005), rendering such citation improper, *see* Ariz. R. Sup. Ct. 111(c)(1)(C), (g).

communicate in ASL. It therefore also did not abuse its discretion in denying Schreiber's motion for a mistrial. *See Hansen*, 237 Ariz. 61, ¶ 14, 345 P.3d at 121-22; *Stone*, 151 Ariz. at 459, 728 P.2d at 678.

Disposition

¶11 For the foregoing reasons, we affirm Schreiber's convictions and sentences.