IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JESUS CARRIZOZA-QUIJADA,
Appellant.

No. 2 CA-CR 2017-0051
Filed July 11, 2018

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20154484001
The Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Erin K. Sutherland, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Jesus Carrizoza-Quijada was convicted of sexual assault. The trial court sentenced him to a mitigated prison term of 5.25 years. On appeal, he argues the court violated his Confrontation Clause rights by precluding evidence directly related to the victim's veracity. Because we find no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdict. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999). In December 2014, sixteen-year-old K.F. was at her grandmother's home attending a wake for her grandfather. Around 5 p.m., Carrizoza-Quijada—K.F.'s uncle by marriage—had "passed out" in the guestroom after drinking several alcoholic beverages. Later that evening, K.F. was sitting on the same bed as Carrizoza-Quijada using her cell phone while it was charging. At some point, Carrizoza-Quijada "pulled [K.F.] down on [her] back," got on top of her, and began kissing her. He then unbuttoned her pants and digitally penetrated her vagina. K.F. felt a "sharp pain" and pushed Carrizoza-Quijada off and ran to the bathroom, where she saw blood on her genitals. K.F. immediately reported the incident to her aunt, I.F., who called 9-1-1.

¶3 I.F. took K.F. to the hospital, where doctors performed an "external genital exam."[1] The doctors noted blood inside K.F.'s underwear, which they could not attribute to any visible external injuries. A DNA[2] analyst later found a partial male DNA profile matching that of Carrizoza-Quijada on a swab taken from the crotch area inside K.F.'s underwear.

[1]The doctors did not perform a forensic exam because the police did not request one.

[2]Deoxyribonucleic acid.

¶4 A grand jury indicted Carrizoza-Quijada for one count of sexual assault, a jury found him guilty as charged, and the trial court sentenced him as described above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶5 Carrizoza-Quijada argues the trial court erred by granting the state's motion in limine to preclude various items of evidence bearing on the victim's truthfulness. He contends this limited his ability to cross-examine K.F., thereby violating his Confrontation Clause rights. He did not object to the rulings below on any of the grounds he now raises and concedes he has forfeited review for all but fundamental, prejudicial error. Carrizoza-Quijada bears the burden of demonstrating that error occurred, that the error was fundamental, and that he was prejudiced. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005). We review evidentiary rulings that implicate the Confrontation Clause de novo. *State v. Boggs*, 218 Ariz. 325, ¶ 31 (2008).

¶6 Carrizoza-Quijada first contends the trial court impermissibly limited his cross-examination of K.F. by precluding evidence related to an "iPad incident." The state's motion in limine described an incident in which K.F.'s father had seen text messages of a "romantic/sexual nature" on K.F.'s iPad, "expressed his anger over the[m] and broke the computer tablet." The state sought to preclude the text messages and the father's reaction. At the hearing on the motion, Carrizoza-Quijada stated he had no objection, and the court ruled "that area [was] precluded." On the first day of trial, however, the state objected to two of Carrizoza-Quijada's witnesses—K.F.'s grandmother and aunt—being called to testify about K.F.'s character for truthfulness. According to the state, their opinions were based on K.F.'s denial that she had sent the messages from her iPad, and defense counsel added that K.F. claimed she did not know the iPad's password. The court denied the state's objection, clarifying that, on direct examination, Carrizoza-Quijada was limited to asking about K.F.'s reputation for truthfulness generally. *See* Ariz. R. Evid. 608(a). The court pointed out, however, that "the rule does then allow [the state] to get into specifics acts on cross-examination." *See* Ariz. R. Evid. 608(b). The state did not question either witness about the iPad incident during its cross-examination.

¶7 Carrizoza-Quijada argues "the trial court erred by wholly precluding evidence of the [iPad] incident" because it was a specific instance of untruthful conduct and thus admissible during his cross-examination of K.F. under Rule 608(b)(1). This argument, however,

mischaracterizes the court's ruling. The court precluded Carrizoza-Quijada from asking K.F.'s grandmother and aunt about the actual text messages and her father's reaction. However, nothing in the court's ruling prohibited Carrizoza-Quijada from cross-examining K.F. about her denials as specific instances of untruthfulness on cross-examination. Carrizoza-Quijada has therefore not established error occurred, much less fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20.

¶8 Carrizoza-Quijada also contends the trial court erred by precluding three other items of evidence. First, that several months before the sexual assault, K.F. had "made superficial cuts on her legs because she wanted attention." Second, that K.F. "was never cared for, nor wanted by her parents as a child." And, third, that two days before this incident, K.F. had "bump[ed] her buttocks on [Carrizoza-Quijada's] groin area in a crowded aisle of [Wal-Mart] on a family shopping trip." Carrizoza-Quijada now maintains this evidence "should have been admitted under Rule 404(b), Ariz. R. Evid., to prove K.F.'s motive for fabrication and to show her potential bias against [him] in particular."

¶9 Pursuant to Rule 404(b), "evidence of other crimes, wrongs, or acts . . . may . . . be admissible for other purposes, such as proof of motive." To be admissible, however, the evidence must actually tend to demonstrate the purported motive. *See State v. Riley*, 141 Ariz. 15, 20 (App. 1984).

¶10 A defendant's right under the Confrontation Clause to cross-examine witnesses about their motives or biases is not absolute. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). "[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, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.*; *see also State v. Dickens*, 187 Ariz. 1, 14 (1996) (constitutional right to confront witnesses limited to "matters admissible under ordinary evidentiary rules, including relevance"), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, ¶¶ 15, 20 (2012); *State v. Oliver*, 158 Ariz. 22, 30 (1988) (Confrontation Clause rights "limited to evidence which is relevant and not unduly prejudicial").

¶11 Carrizoza-Quijada asserts the evidence that K.F. was unloved and unwanted by her parents and had cut her legs several months before the incident at issue here "proves her motive for fabrication." Although he now argues that because "[t]he cutting . . . did not garner the attention [K.F.]

craved" from her parents, "she upped the ante to a claim of sexual assault," he did not advance this theory below. Nevertheless, the trial court did not err in finding that this evidence was irrelevant, *see Oliver*, 158 Ariz. at 30, or in concluding that any probative value was outweighed by the danger of unfair prejudice and confusing the issues, *see* Ariz. R. Evid. 403. Accordingly, Carrizoza-Quijada has not shown that the court erred. *See Boggs*, 218 Ariz. 325, ¶ 31; *Henderson*, 210 Ariz. 561, ¶¶ 19-20.

¶12 As to the Wal-Mart incident, Carrizoza-Quijada claims that "it show[ed] a potential bias against [him], a person with whom [K.F.] had tried to flirt with and was apparently rebuffed by." The record, however, does not support this argument. The state's motion stated only that "witnesses claim [K.F.] was bumping her buttocks on defendant's groin area in a crowded aisle." At the hearing on the motion, Carrizoza-Quijada asserted that K.F.'s grandmother and aunt had said they were "offended" by the behavior, but did not elaborate further. Carrizoza-Quijada did not make an offer of proof and argued only that the evidence was admissible to explain how his DNA may have gotten on K.F.'s underwear. *See* Ariz. R. Evid. 103(a)(2); *see also State v. Hernandez*, 232 Ariz. 313, ¶¶ 42-43 (2013) ("An offer of proof is critical because it permits 'the trial judge to reevaluate his decision in light of the actual evidence to be offered, . . . and to permit the reviewing court to determine if the exclusion affected the substantial rights of the party offering it.'"), *quoting Fortunato v. Ford Motor Co.*, 464 F.2d 962, 967 (2d Cir. 1972) (omission in *Hernandez*). Without more information, for example, about the circumstances surrounding the incident, particularly whether K.F. had bumped Carrizoza-Quijada intentionally, in a sexually suggestive manner, or what his reaction was, this evidence simply does not support Carrizoza-Quijada's assertion on appeal that it demonstrated K.F.'s motive or bias towards him. *See* Ariz. R. Evid. 404(b); *see also Riley*, 141 Ariz. at 20.

¶13 We agree with the trial court that this evidence may have been relevant had Carrizoza-Quijada asserted a consent defense. But because he denied committing the act for which he was charged, the Wal-Mart incident was not relevant to whether Carrizoza-Quijada sexually assaulted K.F. the night of her grandfather's wake or whether K.F. fabricated the incident. *See* Ariz. R. Evid. 401, 402; *see also Oliver*, 158 Ariz. at 30. Carrizoza-Quijada has therefore not met his burden of showing that error occurred. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20.

¶14 Further, during cross-examination, Carrizoza-Quijada asked K.F. whether she had "raised [her] voice" to him during the incident, whether she had called out for help, what she had done with the tissues she

used to clean up the blood, and if she could remember what he was wearing at the time. Although Carrizoza-Quijada did not delve into K.F.'s version of the incident, the record shows that he was not precluded or limited from doing so. And as noted above, the trial court did not preclude him from confronting K.F. about the iPad incident with her father. Consequently, the court did not violate his rights under the Confrontation Clause. *See Dickens*, 187 Ariz. at 14.

¶15 Additionally, Carrizoza-Quijada cannot show he was prejudiced or, put another way, that the outcome likely would have been different. *See State v. Salazar*, 216 Ariz. 316, ¶ 12 (App. 2007). He was permitted to present evidence and arguments relating to K.F.'s credibility, and claim that the state had failed to meet its burden of proof. During trial, he elicited testimony from K.F.'s grandmother and aunt that K.F. was not a truthful person, thus bringing her credibility into question. Consequently, the precluded evidence would have been cumulative to other properly admitted evidence and any further impact it would have had on K.F.'s credibility is, at best, speculative, particularly because the record does not show what K.F.'s answers likely would have been. *See* Ariz. R. Evid. 403; *see also State v. Martin*, 225 Ariz. 162, ¶ 15 (App. 2010) ("Speculative prejudice is insufficient under fundamental error review.").

¶16 Furthermore, when the parties were discussing the evidence of K.F. being unloved by her parents, Carrizoza-Quijada's counsel stated that although he intended to elicit her grandmother's and aunt's opinions as to K.F.'s character for truthfulness, he did not intend to ask for "their opinions about why [K.F.] may be the way she is." The record thus suggests that, had the trial court not precluded this evidence on other grounds, Carrizoza-Quijada would not have cross-examined K.F. in the manner in which he now contends had been precluded.[3] He has therefore not established that he was prejudiced by the preclusion of this evidence. *See State v. Valverde*, 220 Ariz. 582, ¶ 12 (2009) ("Because fundamental error review is a fact-intensive inquiry, the showing necessary to demonstrate prejudice will vary on a case-by-case basis.").

[3]To the extent Carrizoza-Quijada is raising an ineffective-assistance-of-counsel claim by asserting his attorney failed to make an argument as to K.F.'s motives, we note that such a claim is not cognizable on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9 (2002). Rather, it must be brought in a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. *See Spreitz*, 202 Ariz. 1, ¶ 9.

Disposition

¶17 For the foregoing reasons, we affirm Carrizoza-Quijada's conviction and sentence.