IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DIEGO CARAVEO,
Appellant.

No. 2 CA-CR 2018-0204
Filed August 23, 2019

Appeal from the Superior Court in Pima County
No. CR20154735001
The Honorable Christopher C. Browning, Judge

AFFIRMED

COUNSEL

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

Law Offices of Thomas Jacobs, Tucson
By Thomas Jacobs
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Following a jury trial, Diego Caraveo was convicted of two counts of sexual conduct with a minor and one count each of sexual abuse of a minor and molestation of a child. The trial court sentenced him to two consecutive terms of life in prison without the possibility of release until he has served thirty-five years, followed by consecutive terms of imprisonment totaling twenty-two years.[1] On appeal, Caraveo argues the court erred by denying his request for indigent defense funds to retain an expert and by admitting "cold expert" testimony. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Caraveo's convictions. *State v. Wright*, 239 Ariz. 284, ¶ 2 (App. 2016). When K.R. was seven or eight years old, her mother began dating Caraveo and he thereafter moved in with them. K.R. was led to believe Caraveo was her biological father, although he was not. In November 2015, K.R. told her mother that Caraveo had been touching her "for several years." K.R.'s mother called the police and texted Caraveo, who responded, "I only touched her, I didn't put my [d]ick in her."

¶3 During a police interview, Caraveo initially denied touching K.R. and repeatedly denied "sticking [his] dick in her," but he later

[1]Although the sentencing minute entry suggests Caraveo received consecutive life terms "with the possibility of parole after 35 years," the applicable law provides that he "is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis" before the minimum thirty-five-year term is served, other than for temporary work release or compassionate leave. A.R.S. § 13-705(A); *see also* A.R.S. § 31-233(A), (B) (temporary release).

admitted touching her breasts over "the past two years," and said he had gone "to church and told [them he was] sorry for what [he'd] done." He further admitted rubbing K.R.'s breasts over her bra "four or five times" while the family was living at Caraveo's mother's house, but claimed she had "grabbed [his] hand" and directed his touch. He also said she had "blackmailed" him by saying "touch me or . . . I will tell my mom and tell the cops . . . that you raped me." Caraveo then admitted he started touching K.R.'s breasts when she was seven or eight years old, and it happened "over ninety, [or] over eighty" times in total. Caraveo also said K.R. had asked him to touch her vagina, but he did not do so. Caraveo later said that K.R. "made" him touch her vagina, beginning when she was ten years old and admitted to rubbing her vagina "twenty [or] twenty-five times," but insisted he did not have sexual intercourse with her. Caraveo was subsequently charged with two counts of sexual conduct with a minor and one count each of sexual abuse of a minor and molestation of a child.

¶4 At trial, K.R. testified that beginning when she was seven or eight years old, Caraveo engaged in "[s]exual acts" with her "[m]ultiple times." She testified that the first time it happened he started massaging her, suggested K.R. take her clothes off, and "tried to have sex with [her]." K.R. explained that Caraveo trying to penetrate her "was only the start" and estimated that when she was between seven and eleven years old, Caraveo "put his penis in [her] vagina" more than fifteen times. K.R. also testified that Caraveo would sometimes touch her genitals without penetration, and, when she developed breasts at around ten years old, he would touch and grab them. When K.R. was older, Caraveo sent her Facebook messages that made her uncomfortable, in one asking her how often she masturbated.

¶5 The jury found Caraveo guilty as charged, and he was sentenced as described above. He timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Denial of Indigent Defense Funds

¶6 Caraveo first contends the trial court erred in denying his request for funds to retain an expert who would investigate and potentially testify about the voluntariness of his confession. Before trial, Caraveo filed a motion seeking funds for a psychologist or psychiatrist to evaluate whether a head injury from a past car accident "affected his cognitive abilities," which "may have a bearing on his alleged conduct." The state opposed the motion, arguing the request "appears to be more suited for a Rule 11" evaluation. After a hearing on the motion, the court ordered a

preliminary competency examination pursuant to Rule 11.2(c), Ariz. R. Crim. P.

¶7 Following the preliminary examination, in May 2017, Caraveo asked the trial court for a "full Rule 11 evaluation" and to readdress his motion for expert fees, claiming that a traumatic head injury he sustained as a teenager had "caused mental defects which call into question the reliability of the admissions" he made. Finding no grounds for a full examination, the court denied Caraveo's request but granted his motion to continue trial to allow him time to locate an expert witness.

¶8 In December 2017, Caraveo again renewed his request for funds, repeating his argument that potential brain injuries could have affected his answers during the police interview. The trial court directed Caraveo to obtain information regarding the availability of potential experts, the amount they would charge, and whether the expert could be ready for the rescheduled trial. Caraveo thereafter reported finding an expert who would "evaluate the confession for voluntariness," but he requested another continuance so the expert could prepare. The court ultimately denied Caraveo's request, noting that absent any documentary evidence that a brain injury occurred, it was "highly, highly, unlikely that any competent psychologist or psychiatrist or other mental health professional could possibly opine to a reasonable degree of [scientific] probability that the defendant's report of [a past head injury] could result in his will being overcome by the stress of questioning."

¶9 Rule 15.9(a),[2] Ariz. R. Crim. P., provided that an indigent defendant "may apply for the appointment of an investigator and expert witness . . . to be paid at county expense if the defendant can show that such assistance is reasonably necessary to present a defense adequately at trial or sentencing." *See also Jacobson v. Anderson*, 203 Ariz. 543, ¶ 5 (App. 2002) ("Indeed, due process requires the appointment of expert witnesses for an indigent defendant when such testimony is reasonably necessary to present an adequate defense."). "Absent substantial prejudice, we will not disturb the trial court's refusal to appoint experts." *State v. Gonzales*, 181 Ariz. 502, 511 (1995).

¶10 Caraveo argues the trial court erred because an expert was reasonably necessary to challenge the voluntariness of his confession. "A

[2]We cite the rule as it existed at the time of Caraveo's initial request. It has since been rewritten and relocated. *See* Ariz. R. Crim. P. 6.7(a).

defendant's statement is presumed involuntary until the state meets its burden of proving that the statement was freely and voluntarily made and was not the product of coercion." *State v. Boggs*, 218 Ariz. 325, ¶ 44 (2008). To find a confession involuntary, however, there must be "both coercive police behavior and a causal relation between the coercive behavior and the defendant's overborne will." *Id.*

¶11 In concluding Caraveo's statement was voluntary, the trial court stated it had "reviewed both the transcript and the video recording" and "characterize[d] the interviews as relatively brief, not confrontational, and not coercive." Caraveo does not challenge these findings, but instead argues there was no evidence "regarding [the] possible impact his traumatic brain injury" might have had on the interrogation "because [he] was prevented from discovering such evidence." But regardless of whether a traumatic brain injury may have occurred and the extent to which it might have affected him, as noted above, coercive police behavior must have existed and caused his will to be overborne. *See id.* Caraveo has not asserted that the police were coercive, and he has failed to articulate how a mental health expert would establish that necessary prong. *See Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (although mental condition of defendant is a significant factor in voluntariness calculus, defendant's mental condition does not "by itself and apart from its relation to official coercion" dispose of the voluntariness inquiry). And without any evidence that police coercion occurred, an expert testifying as to Caraveo's mental health was not reasonably necessary to challenge the voluntariness of his confession. The court therefore did not abuse its discretion in denying his request.

¶12 Caraveo additionally argues expert funds were necessary to "otherwise assist i[n] preparation of a defense to address" the state's expert opinions, but he acknowledges he "did not present specific argument about the need for an expert to address [that expert's] testimony" to the trial court. Because he failed to raise this issue below, he has forfeited all but fundamental error review. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). And because he has not alleged fundamental, prejudicial error in his opening brief, he has waived this claim. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (argument waived where defendant does not argue unpreserved error was fundamental).[3]

[3]Caraveo also suggests expert funds were necessary to evaluate the impact of his "childhood traumatic brain injury" on "his conduct toward the victim." But because he has failed to support this claim with any

Admission of "Cold Expert" Testimony

¶13 Caraveo next contends the trial court erred by admitting the testimony of Wendy Dutton, a forensic interviewer specializing in child-abuse cases, claiming it constituted an improper comment on K.R.'s credibility and was irrelevant and unduly prejudicial. Although we generally review the admission of expert testimony for abuse of discretion, *State v. Chappell*, 225 Ariz. 229, ¶ 16 (2010), if an objection was not raised before the trial court, our review is limited to fundamental, prejudicial error, *Henderson*, 210 Ariz. 561, ¶ 19; *see also State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018).

¶14 After the state called Dutton to the stand, Caraveo asked to "do some voir dire" because Dutton had not spoken to K.R. But the trial court explained Dutton was being offered as a "cold witness," to "talk about general observations and things, as opposed to what actually did or didn't happen in this case." Caraveo responded, "Okay. Then let's go." Dutton then testified she had not received any information about the case or K.R. and generally described the protocol for a forensic interview, why children have difficulty remembering specific dates or times that an event occurred, patterns of child sexual abuse, how children disclose sexual abuse, and how often they tend to falsely report such abuse. After that testimony, Caraveo orally moved for a mistrial or to strike the testimony, claiming it simply "advocat[ed]" on "generalities" and "normal cases," but did not address "the specific evidence" of this case, which "lacks the typical use of an expert concerning explaining evidence." The court denied the motion, noting that Arizona courts allow this type of "cold" expert testimony and citing *State v. Salazar-Mercado*, 234 Ariz. 590 (2014). Caraveo subsequently filed a motion for new trial, arguing Dutton's testimony was not helpful to the jury and was used to "inflame the emotions of the jurors against" him. The court denied the motion.

¶15 Caraveo now contends Dutton's testimony was inadmissible as an improper comment on K.R.'s credibility, as prohibited by Rule 702, Ariz. R. Evid. Because this argument was not timely raised below,[4] we

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argument, we do not address it further. *State v. Moody*, 208 Ariz. 424, n.9 (2004) ("[M]erely mentioning an argument [in an opening brief] is not enough."); *State v. Carver*, 160 Ariz. 167, 175 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

[4]Caraveo asserts the issue was preserved by a "general objection to the admission of Dutton's testimony" and points out it was raised in his

review this issue only for fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶ 19. Rule 702 permits a witness "who is qualified as an expert by knowledge, skill, experience, training, or education" to "testify in the form of an opinion or otherwise," provided the expert's testimony is "based on sufficient facts or data," is "the product of reliable principles and methods," the expert "has reliably applied the principles and methods to the facts of the case," and the expert's knowledge "will help the trier of fact to understand the evidence or to determine a fact in issue." As noted by the trial court, our supreme court has determined that "the rule does not bar 'cold' experts from offering general, educative testimony to help the trier of fact understand evidence or resolve fact issues." *Salazar-Mercado*, 234 Ariz. 590, ¶ 6. However, while an expert may testify about general behavior patterns of child sexual abuse victims, she may not "'go beyond the description of general principles of social or behavioral science' to offer opinions about 'the accuracy, reliability or credibility of a particular witness in the case being tried . . . [or] of the type under consideration.'" *Id.* ¶ 15 (alterations in *Salazar-Mercado*) (quoting *State v. Lindsey*, 149 Ariz. 472, 474-75 (1986)); *see also State v. Moran*, 151 Ariz. 378, 382 (1986).

¶16 Caraveo claims all of Dutton's testimony about false reporting was impermissible and specifically emphasizes her statement that "[m]alicious false reports tend to be rare." He argues that testimony was directed at bolstering K.R.'s credibility and "[t]he only conclusion the jury might possibly draw from this statement is that K.R. is telling the truth because false accusations are rare." We disagree. Contrary to Caraveo's assertions, Dutton's testimony did not reference K.R.'s testimony. And, unlike in *Lindsey*, where the expert was asked whether he felt the alleged victim acted consistently with someone who was sexually abused, Dutton's testimony was based on "general principles of social or behavioral science" and did not venture into K.R.'s credibility. 149 Ariz. at 474. Indeed, during cross examination, Dutton acknowledged she was unaware of the facts of this case, had not examined K.R., and that "it would be inappropriate" for her "to offer an opinion as to whether or not the child is telling the truth." Because Dutton's testimony did not include her "opinion of the accuracy,

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motion for new trial. But an untimely objection first raised in a motion for new trial does not preserve the issue for appeal, *State v. Davis*, 226 Ariz. 97, ¶ 12 (App. 2010), and an objection to evidence on one ground does not preserve objections on other grounds for our review, *see State v. Hamilton*, 177 Ariz. 403, 408-09 (App. 1993).

reliability or credibility of a particular witness in the case being tried," as prohibited in *Lindsey*, Caraveo has not demonstrated error. *Id.* at 475.

¶17 Caraveo next argues Dutton's testimony was irrelevant and prejudicial because she "went beyond the permissible scope of 'cold case' testimony, creating unfair prejudice to [him] by impeding his ability to impeach the credibility of . . . K.R." Caraveo raised these objections to relevance and unfair prejudice for the first time in his motion for new trial. Again, the issues were not preserved for appeal, and we review only for fundamental, prejudicial error. *See State v. Davis*, 226 Ariz. 97, ¶¶ 11-12 (App. 2010).

¶18 On both claims, Caraveo has failed to show any error. "Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence" and that "fact is of consequence in determining the action." Ariz. R. Evid. 401. But otherwise relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of" either "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403.

¶19 Beyond broadly asserting Dutton's testimony was irrelevant, Caraveo does not substantiate this claim; and as our supreme court observed in *Salazar-Mercado*, Dutton's testimony about general patterns exhibited by child abuse victims "might have helped the jury to understand possible reasons" for delayed or inconsistent reporting in such cases. 234 Ariz. 590, ¶ 15. This information did not go beyond the permissible scope of expert testimony. *See id.*

¶20 Finally, even had the trial court erred in admitting Dutton's testimony, such error would not have risen to fundamental, prejudicial error in light of the overwhelming evidence of Caraveo's guilt, including K.R.'s testimony, Caraveo's incriminating text messages to K.R.'s mother, and Caraveo's explicit admissions to the police. *See State v. Ramos*, 235 Ariz. 230, ¶ 20 (App. 2014) (holding defendant failed to satisfy burden of establishing prejudicial error in light of "overwhelming evidence [of his guilt] presented at trial").

Disposition

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