IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAMIAN CAMACHO IZGUERRA,
Appellant.

No. 2 CA-CR 2018-0228
Filed June 10, 2019

Appeal from the Superior Court in Pinal County
No. S1100CR201700602
The Honorable Jason R. Holmberg, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Rosemary Gordon Pánuco, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Damian Izguerra appeals from his convictions after a jury trial of two counts of sexual abuse of a victim under fifteen years of age, two counts of sexual abuse of a victim over fifteen years of age, three counts of child molestation, and one count of sexual assault. We affirm.

Factual and Procedural Background

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts." *State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999). In 2002, Izguerra met Nancy, whose daughter, C.D., was seven months old at the time. At some point thereafter, Izguerra moved in with Nancy and C.D. In 2003, Izguerra and Nancy had a son together. In 2013 or 2014, Izguerra and Nancy ended their romantic relationship, but Izguerra continued to visit with C.D. at both Nancy's house and at his new girlfriend's house where he was living.

¶3 When C.D. was eleven, Izguerra sexually abused her while at Nancy's house. When she was either twelve or thirteen years old, Izguerra molested C.D. while they drove to his girlfriend's house. When C.D. was twelve years old, Izguerra molested her while lying in bed with her at Nancy's house. When she was either thirteen or fourteen, Izguerra again molested and sexually abused her in Nancy's bedroom. When C.D. was fifteen years old, Izguerra came into her room late at night and sexually abused her. Finally, on February 9, 2017, when C.D. was fifteen years old, Izguerra sexually assaulted her in the bathroom at Nancy's house. A few days after the last incident, Nancy learned of the abuse and notified the police.

¶4 At trial, Izguerra asserted C.D. falsely claimed sexual abuse because he took her phone away as punishment. In explaining why he took the phone away, Izguerra testified that he was able to see C.D.'s "group

chats" with her friends sent through Snapchat.[1] He testified that C.D. used a second phone other than her iPhone—which Izguerra then had in his possession—to message friends. And, because C.D. had left the Snapchat application open on the iPhone, Izguerra could see the messages indicating that C.D. was not at home even while she was texting him that she was. He testified that it was "common for her to be discussing things with more than one person at a time." And that "she would be involved in group chats with friends of hers." This, he testified, led him to take her phone from her as punishment, which then led to what he claims were false allegations.

¶5 To rebut Izguerra's testimony about seeing those messages on Snapchat, the state elicited testimony from Detective Joseph Roethle who testified that Snapchat had no group chat, or "group snap," capability. Izguerra objected and requested a continuance to secure an expert witness because, he claimed, Snapchat "does have a group use" and that Roethle's statements "are completely not true." The trial court denied the request but permitted Izguerra to call a surrebuttal witness. Izguerra then cross-examined Roethle on the issue of whether Snapchat had group messaging capabilities but Roethle confirmed his earlier testimony. Finally, Izguerra's surrebuttal witness testified that Snapchat did have group message capabilities.

¶6 The next day, Izguerra moved for a mistrial because the prosecution should have known it was eliciting false testimony from Detective Roethle about Snapchat's group chat capabilities because publicly available information on Snapchat's website stated that it did. The trial court denied the motion. Izguerra was convicted and sentenced as described above. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, 13-4033(A).

Analysis

Venue

¶7 Izguerra first argues that there was insufficient evidence that the crime alleged in count two took place in Pinal County. Izguerra's argument is essentially that venue was improper. However, "[t]he failure to object to venue before trial waives the issue on appeal." *State v. Girdler*, 138 Ariz. 482, 490 (1983). Izguerra did not object to venue below, nor has he argued that improper venue would constitute fundamental error; therefore, he has waived this argument. *See id.; see also State v. Moreno-*

[1]Snapchat is a multimedia messaging application.

Medrano, 218 Ariz. 349, ¶ 17 (App. 2008) (failure to argue that error was fundamental waives fundamental error review).

Sufficiency of the Evidence

¶8 Izguerra argues that the state failed to prove beyond a reasonable doubt that C.D. was under the age of fifteen when he molested and sexually abused her as alleged in counts five and six. We review the sufficiency of the evidence *de novo, State v. West*, 226 Ariz. 559, ¶ 15 (2011), and "reverse only if no substantial evidence supports the conviction," *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005). "Substantial evidence . . . is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67 (1990) (quoting *State v. Jones*, 125 Ariz. 417, 419 (1980)). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316 (1987). We "view the evidence in the light most favorable to sustaining the conviction" and resolve "all reasonable inferences . . . against [the] defendant." *State v. Lee*, 189 Ariz. 590, 603 (1997).

¶9 In relevant part, count five alleged that sometime between October 1, 2015 and September 30, 2016,[2] Izguerra "committed [c]hild [m]olestation by intentionally or knowingly engaging in or causing a person, C.D., a child under fifteen (15) years of age, to engage in sexual contact . . . to wit: touching victim's vagina with his penis while in the victim's mom's room."[3] Count six alleged that sometime between October 1, 2015 and September 30, 2016,[4] Izguerra "committed sexual abuse by intentionally or knowingly engaging in sexual contact with the female breast of C.D., a person under fifteen (15) years of age, to wit: touching victim's breasts while in victim's mom's room."

[2]The state moved to amend the date range of count five, which the trial court granted.

[3]C.D. was born on October 1, 2001, so she would have been fourteen during the date range.

[4]The state moved to dismiss the original count six, and as a result, the original count seven was renumbered as count six. The state also moved to amend the date range of that count, which the trial court granted.

¶10 Testimony from a single witness, even if uncorroborated, is sufficient to support a criminal conviction. *State v. Manzanedo*, 210 Ariz. 292, ¶ 3 (App. 2005); *see State v. Jerousek*, 121 Ariz. 420, 427 (1979) ("In child molestation cases, the defendant can be convicted on the uncorroborated testimony of the victim."); *see also State v. Williams*, 111 Ariz. 175, 177-78 (1974) ("A [rape] conviction may be had on the basis of the uncorroborated testimony of the prosecutrix unless the story is physically impossible or so incredible that no reasonable person could believe it."). Here, C.D. testified that she was either thirteen or fourteen when Izguerra committed those acts while she was in her mother's bedroom. Consequently, substantial evidence supported Izguerra's convictions for the crimes stated in counts five and six.

Prosecutorial Misconduct

¶11 Izguerra argues that the trial court erred by failing to grant a mistrial due to the prosecutor's misconduct in presenting false testimony. Izguerra argues that the prosecutor committed misconduct by allowing Detective Roethle to testify falsely about Snapchat's "group message" or "group chat[]" features. We review a trial court's ruling on a motion for mistrial for an abuse of discretion, and we will only reverse if that discretion has been clearly abused. *See State v. Lee*, 189 Ariz. 608, 616 (1997).

¶12 The knowing use of perjured or false testimony to convict a defendant constitutes a denial of due process and is reversible error without a showing of prejudice.[5] *State v. Ferrari*, 112 Ariz. 324, 334 (1975). Although "[p]rosecutors have a duty to the court not to knowingly encourage or present false testimony," "[a]bsent a showing that the prosecution was aware of any false testimony, the credibility of witnesses is for the jury to determine." *State v. Rivera,* 210 Ariz. 188, ¶ 28 (2005).

¶13 Initially, it is far from clear that Detective Roethle's testimony about Snapchat's messaging features was false, let alone perjurious. *See* A.R.S. § 13-2702(A)(1) (a person commits perjury by making a false sworn statement and believing it to be false). Nonetheless, even if it was false, Izguerra makes no showing that the prosecutor was aware that Roethle's testimony was false. *Rivera*, 210 Ariz. 188, ¶ 28. Absent such a showing, Izguerra cannot show that the trial court abused its discretion in refusing to grant a mistrial. If a witness is wrong, and Roethle may have been wrong,

[5]The state asks this court to adopt the test used in federal courts for prosecutorial misconduct in eliciting false testimony; however, we need not adopt such a test in reaching our conclusion in the instant case.

the means to prove it is through cross-examination. *See id.* ¶ 11 (citations omitted) ("While prosecutors may not knowingly allow a witness to testify falsely, cross-examination is the appropriate tool for probing the truthfulness of a witness's statements."). Izguerra had a full and fair opportunity to do so. The court additionally permitted Izguerra to call a surrebuttal witness to refute Roethle's testimony.

Jury Instruction

¶14 Izguerra argues that the trial court erred in instructing the jury on other-acts evidence. He asserts that the instruction given, as recorded by the original transcript in the record on appeal, was: "Evidence of [other] acts *does* lessen the state's burden of proof—the burden to prove the defendant's guilt beyond a reasonable doubt." (Emphasis added.) This instruction was erroneous, he claims, because it misstated the law. However, after the filing of Izguerra's opening brief raising this issue, because the reading of the instruction recorded in the transcript did not match the written instruction preserved in the record, the state sought a stay and a clarification of the transcript pursuant to Rule 38.1, Ariz. R. Crim. P., and *State v. Diaz*, 223 Ariz. 358, ¶ 18 (2010) (once the state learns of a claim on appeal that appears to be founded on a transcription error in the record, "the State could and should . . . ask[] the appellate court . . . to clarify what actually occurred" at trial). A corrected transcript of the proceedings was ultimately filed as a supplement to the record. That corrected transcript reflected that the trial court's instruction actually given was in fact that "Evidence of [other] acts *does not* lessen the state's burden of proof—the burden to prove the defendant's guilt beyond a reasonable doubt." (Emphasis added.) The court properly instructed the jury, and there was no error.

Sexual Intent

¶15 Izguerra also argues, as to the child molestation charges, that the state should have borne the burden to prove that Izguerra touched C.D. with sexual intent as an element of the offense rather than requiring him to show lack of sexual intent as an affirmative defense under A.R.S. §§ 13-1407(E) and 13-1401. He argues that this unconstitutionally shifted the burden of proof to him, relying on a federal trial court decision, *May v. Ryan*, 245 F. Supp. 3d 1145 (D. Ariz. 2017), for the assertion that Arizona law is unconstitutional. Notwithstanding *May*, this issue was resolved by our supreme court in *State v. Holle*, where it held that A.R.S. §§ 13-1407(E) and 13-1401 do not unconstitutionally shift the burden to the defendant by making the lack of sexual motivation an affirmative defense. 240 Ariz. 300,

¶¶ 17-19, 38, 40, 50 (2016). We are, of course, bound by the decisions of our supreme court, not by federal trial courts, and thus, there was no error. *See State v. Smyers*, 207 Ariz. 314, n.4 (2004).

Disposition

¶16 For the above reasons, we affirm Izguerra's convictions and sentences.