IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RAUL OTTO GONZALEZ,
Appellant.

No. 2 CA-CR 2018-0201
Filed April 13, 2020

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NOT FOR PUBLICATION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. CR20163549001
The Honorable Gus Aragón, Judge

AFFIRMED

COUNSEL

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

Joel Feinman, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E C K E R S T R O M, Judge:

¶1 Raul Gonzalez appeals from his convictions and sentences for three counts of child molestation. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the evidence presented at trial in the light most favorable to upholding the verdict, drawing all reasonable inferences against the defendant." *State v. Mendoza*, 234 Ariz. 259, ¶ 2 (App. 2014). The victim in this case is Gonzalez's granddaughter, B.G., who was six and seven years old at the time of the events charged in the indictment.

¶3 B.G. was adopted by her grandmother, Gonzalez's wife, when B.G. was one year old. In October 2015, Gonzalez left B.G.'s grandmother and moved to Las Vegas with his girlfriend.

¶4 In April 2016, when B.G. was seven years old, Gonzalez returned to Tucson and stayed with her for two days while her grandmother was in the hospital for knee surgery. B.G. testified that, during that time, Gonzalez did "some inappropriate stuff" to her, including "putting his private part inside [her] bottom."

¶5 Gonzalez visited Tucson again around the Fourth of July holiday in 2016, when B.G. was still seven. She testified at trial that, during this visit, Gonzalez had her sit on his lap in the garage and made her feel uncomfortable, although she had some difficulty remembering the details. After the state refreshed her recollection using the transcripts of her forensic interviews at the Children's Advocacy Center, B.G. testified that, while she sat on his lap, Gonzalez used his fingers to "dig" in or rub her "private part," under her underwear, which made her feel "gross."

¶6 B.G. also testified that when she was six years old, Gonzalez "did something inappropriate" to her, but she did not recall the details. The video recordings of B.G.'s forensic interviews were then played for the jury. In those videos, B.G. told the interviewer that, when she was six years old and sleeping in her grandmother's bed, Gonzalez had rubbed his private

part on her bottom, making her "butthole" feel "slimy." During the recorded interview, B.G. also stated that she had asked Gonzalez to stop without success, and that he had warned her not to tell anyone because the police would "get him."

¶7 At the end of an eight-day trial, a jury found Gonzalez guilty of three counts of molestation of a child twelve years of age or younger. The trial court sentenced him to concurrent twenty-year prison terms. We have jurisdiction over Gonzalez's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Hearsay Rulings

¶8 At trial, Gonzalez argued his wife encouraged B.G. to fabricate the claims against him in retaliation for his infidelity. In support of that claim, Gonzalez repeatedly sought to elicit testimony that his wife had called their son (B.G.'s uncle) on July 2—a number of days before B.G. was said to have reported the abuse—to tell him "something bad or horrible had happened." Each time, the state objected on hearsay grounds. Gonzalez explained he was "not trying to bring it out for the truth of the matter asserted" (that something horrible had happened), "but rather to impeach what [his wife] had said during her testimony regarding the contact." Nevertheless, the trial court sustained the hearsay objections. Gonzalez now challenges those rulings, arguing the statements were being introduced not for their truth, but to show that Gonzalez's wife "had a plan" to harm him by fabricating abuse and influencing B.G. to report it.[1]

¶9 We review hearsay rulings on grounds raised at trial for an abuse of discretion, but the meaning of the rules of evidence is a legal question we review de novo. *See State v. Payne*, 233 Ariz. 484, ¶ 49 (2013). Out-of-court statements are hearsay only if they are offered "to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c)(1), (2). The statements of Gonzalez's wife at issue here were not being offered for their truth; indeed, Gonzalez's entire defense was that any statements claiming "something horrible" had happened to B.G. were not true. The trial court erred in excluding those statements on hearsay grounds.

¶10 We acknowledge that these rulings prevented Gonzalez from presenting evidence to support his theory of the case with as much vigor as might otherwise have been possible. However, other evidence

[1]Gonzalez's opening brief challenged other evidentiary rulings as well, but he has since withdrawn those arguments.

demonstrating that the phone calls occurred on July 2 was properly admitted. This allowed Gonzalez to argue the issue in summation, which he did. In light of the substantial evidence of guilt, we find this modest constraint on the defense case harmless. *See State v. Granados*, 235 Ariz. 321, ¶ 30 (App. 2014) (only clear prejudice justifies reversal due to erroneous hearsay ruling).

Prosecutorial Misconduct

¶11 In its rebuttal closing argument, the prosecution stated the following to the jury:

> Well, ladies and gentlemen, the defense in this case has no burden. That all rests with the State. But you can bet that if there was an expert witness out there that could describe the behavior that [B.G.] was exhibiting as her hiding something, they would have brought that person in here and you would have heard from them.

Defense counsel objected on the ground of burden shifting. The trial court overruled the objection but warned the state: "[T]read very lightly here because there is a line that you are not permitted to cross. You haven't crossed it yet, but please be careful." The state then proceeded to argue to the jury: "[I]n this case you did not hear from any expert that said anything like that. That's because there's no evidence to support it."

¶12 On appeal, Gonzalez contends the state's argument constituted prosecutorial misconduct because it involved burden shifting, reference to facts not in evidence, and vouching. We review the trial court's ruling on Gonzalez's burden-shifting objection for an abuse of discretion. *State v. Pandeli*, 215 Ariz. 514, ¶ 30 (2007); *see also State v. Zaragoza*, 135 Ariz. 63, 68 (1983) (counsel given wide latitude in closing argument). However, because Gonzalez did not argue below that the prosecutor argued facts not in evidence or vouched, we review those claims only for fundamental error. *State v. Hulsey*, 243 Ariz. 367, ¶ 88 (2018).

¶13 Gonzalez had argued at length during his closing argument that B.G. was lying during her forensic interviews and on the stand. The challenged statements from the prosecution responded to those arguments. The state was entitled to respond, and we find no burden shifting, particularly given that Gonzalez took the stand in his own defense such that the state's comments could not have been understood as a comment on his

right to remain silent. *See State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160 (1987) ("[T]he prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not constitute a comment on defendant's silence.").

¶14 However, parties must avoid making arguments from which a jury could draw an incorrect inference, and they "cannot make insinuations that have no evidentiary support." *Hulsey*, 243 Ariz. 367, ¶ 97. The prosecution's statement at issue here implied that expert testimony regarding B.G.'s credibility would have been admissible,[2] and that the defense had necessarily explored with potential experts whether B.G.'s statements bore the hallmarks of truthfulness—an inference with no basis in the record. *See State v. Corona*, 188 Ariz. 85, 89-90 (App. 1997) (improper for prosecutor to comment on defendant's failure to call expert when there had been "no mention during the trial that the defendant had retained or even consulted an expert").

¶15 Indeed, the prosecution's statement also could be understood by a jury to imply: (a) that such experts are commonly called by defendants to give an opinion contrary to a child victim;[3] (b) that, if such an expert exists, Gonzalez or the public defender had the resources necessary to

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[2]As Gonzalez correctly points out, expert testimony regarding the credibility of a witness's allegations of sexual abuse is limited. *State v. Lindsey*, 149 Ariz. 472, 475 (1986) ("[E]ven where expert testimony on behavioral characteristics that affect credibility or accuracy of observation is allowed, experts should not be allowed to give their opinion of the accuracy, reliability or credibility of a particular witness in the case being tried" or "witnesses of the type under consideration."). Although, as the state contends, "[a] cold expert on child sexual abuse victim[s'] behavior could have theoretically testified about the meaning of behavior similar to that which [B.G.] displayed during her interview[s]" and testimony, we cannot assume the jury understood that nuance.

[3]Our jurisprudence suggests that such experts are more commonly called by the state to bolster a child victim's credibility. *E.g.*, *State v. Salazar-Mercado*, 234 Ariz. 590, ¶ 2 (2014); *State v. Moran*, 151 Ariz. 378, 380 (1986); *State v. Ortiz*, 238 Ariz. 329, ¶¶ 5-26 (App. 2015); *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶¶ 26-30 (App. 2013); *State v. Rojas*, 177 Ariz. 454, 459 (App. 1993); *State v. Tucker*, 165 Ariz. 340, 345-49 (App. 1990). The state did not call such a witness here.

retain him or her; (c) that, as a matter of strategy, a defendant would necessarily call such an expert regardless of other considerations (e.g., that such expert testimony might be perceived as demeaning to or invasive of the jury's role to determine credibility); and (d) that an expert, if called, would not have provided testimony favorable to Gonzalez. None of these potential inferences was supported by any evidence presented in the case. *See Hulsey*, 243 Ariz. 367, ¶ 97.

¶16 When a prosecutor suggests in argument that it possesses information bearing on a witness's credibility that the jury has not received in evidence, the prosecutor engages in improper vouching. *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 75 (2018) (quoting *State v. Vincent*, 159 Ariz. 418, 423 (1989)). Here, the state's argument suggested it possessed knowledge, not presented in evidence, about how an expert would assess the victim's credibility and how the defense team had assembled its case in light of that information. In so doing, it bolstered B.G.'s credibility by reference to matters not in evidence. *See id.* (quoting *State v. King*, 180 Ariz. 268, 277 (1994)). In short, this argument was improper both because it suggested facts not in evidence and constituted improper vouching.

¶17 However, because Gonzalez did not object to the prosecution's argument at trial on these grounds, he "must establish both that fundamental error exists and that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, ¶ 20 (2005). Here, the parties vigorously contested B.G.'s credibility. Indeed, the verdict arguably depended on the jury believing her testimony beyond a reasonable doubt. For this reason, the improper comments did "directly impact[] a key factual dispute," thus "go[ing] to the 'foundation of [the] case'"—the first prong of the *Henderson* test for fundamental error. *State v. Escalante*, 245 Ariz. 135, ¶¶ 13-14, 16, 18 (2018) (quoting *Henderson*, 210 Ariz. 561, ¶ 19).

¶18 We must therefore grant relief if that error was sufficiently substantial in the context of the case to have affected its outcome. *See id.* ¶¶ 1, 12, 21, 43. In assessing that question, we emphasize that the jury had the opportunity to directly assess the victim's demeanor on the witness stand, subject to comprehensive cross-examination. And, the trial court's instructions substantially mitigated any prejudice arising from the improper argument. Those instructions alerted the jurors that they alone judged witness credibility and that the lawyers' statements in summation were not evidence. *See Hulsey*, 243 Ariz. 367, ¶ 107 (prosecution's improper statement in summation involving reference to facts not in evidence and vouching not fundamental error given trial court's instruction, which jurors presumed to follow); *see also Payne*, 233 Ariz. 484, ¶ 109 ("When improper

vouching occurs, the trial court can cure the error by instructing the jury not to consider attorneys' arguments as evidence."). Moreover, other evidence corroborated B.G.'s testimony. That evidence included a DNA sample taken from B.G.'s panties, which did not exclude the defendant as the source, as well as the defendant's failure to squarely deny he had committed the offenses when accused by his wife. Therefore, Gonzalez has not met his burden of demonstrating that the error affected the outcome of his case. *See Escalante*, 245 Ariz. 135, ¶¶ 1, 12, 21 (defendant establishing fundamental error under prong one must also establish prejudice to obtain relief).

Batson **Challenge**

¶19 On day two of trial, Gonzalez argued that the state's use of its six peremptory challenges to strike only male members of the jury pool violated his right to equal protection under the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129, 140-45 (1994) (*Batson* applies to discrimination based on gender, which "like race, is an unconstitutional proxy for juror competence and impartiality"). The state then explained its strikes, providing gender-neutral reasons for them, and the trial court found there had been "sufficient rebuttal of the prima facie showing of the gender-based motion that the burden of proof passe[d] back to [Gonzalez]." After Gonzalez contested the sufficiency of the state's explanations, the court ruled, based on counsel's arguments and its own memory of the events, that Gonzalez had not "shown a violation of [his] constitutional rights" or "that the [state's] strikes were based upon gender."

¶20 On appeal, Gonzalez contends the trial court erred in denying his *Batson* challenge. In particular, he contends the court abused its discretion by taking "the prosecution's pretextual reasons at face value" and failing to "balance them against similar jurors who were not struck" or "compare the prosecution[']s representations to what the prospective jurors actually said." We review a court's *Batson* rulings for an abuse of discretion, *State v. Urrea*, 244 Ariz. 443, ¶ 6 (2018), and we will not disturb them absent "clear error," *State v. Gentry*, 247 Ariz. 381, ¶ 8 (App. 2019).

¶21 Gonzalez challenges only the third step of the trial court's *Batson* analysis.[4] This step—determining whether the defendant has

[4]"A *Batson* challenge involves a three-step analysis." *State v. Newell*, 212 Ariz. 389, ¶ 53 (2006). First, the defendant must make a prima facie showing that the strike or strikes were discriminatory, *id.*, which the trial

established purposeful discrimination—requires a court to "consider[] factors such as 'the prosecutor's demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy.'" *State v. Gay*, 214 Ariz. 214, ¶ 17 (App. 2007) (first alteration added, remaining alterations in *Gay*) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003)). As our supreme court has explained, this analysis "is fact intensive and will turn on issues of credibility, which the trial court is in a better position to assess than is this Court." *State v. Newell*, 212 Ariz. 389, ¶ 54 (2006). For this reason, a trial court's finding at step three of a *Batson* analysis "is due much deference." *Id.*

¶22 Here, the prosecution stated it "didn't realize that they were all male strikes" and that the strikes "had nothing to do with their gender." The gender-neutral reasons provided for the strikes were lack of life experience (as evidenced by limited employment history and a lack of spouse, children, or jury experience), relationships with attorneys or people in "defendant-type" roles, professional experience with DNA, arrest history, and tendencies to make gestures or speak frequently during court. "[D]etermining the validity of those explanations required the court to evaluate the sincerity of the prosecutor as well as the behavior of the jurors," which were "credibility determinations that the court was in the best position to make." *Gay*, 214 Ariz. 214, ¶ 19. The record before us provides no basis to second-guess the trial court's conclusion that Gonzalez failed to prove purposeful gender-based discrimination.[5]

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court agreed Gonzalez had achieved. Once such a showing is made, "the burden then switches to the prosecutor to give a [gender]-neutral explanation for the strike." *Id.* A facially valid explanation will satisfy this burden; it "need not be 'persuasive, or even plausible.'" *Id.* ¶ 54 (quoting *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995)). Third, "if the prosecution offers a facially neutral basis for the strike, the trial court must determine whether 'the defendant has established purposeful discrimination.'" *Id.* ¶ 53 (quoting *Batson*, 476 U.S. at 98). It is the defendant's burden to "persuade the trial court that the proponent's reason is pretextual and that the strike is actually based on . . . gender." *State v. Lucas*, 199 Ariz. 366, ¶ 7 (App. 2001).

[5]We note, further, that the empaneled jury contained eight male jurors compared to six female jurors.

Motion for Mistrial Based on Tainted Jury

¶23 During voir dire, one prospective juror—who was later excused for cause—stated in open court that she and her husband had adopted their granddaughter at age seven because the child had been molested. The prospective juror requested to be excused because, although the victim became a "sheriff's officer" and is "doing fine today," the family had experienced court cases, "struggles," and "the financial expense of counselors to treat her for what she had been through." She was excused without objection from either party. The following day, Gonzalez moved for a mistrial, arguing the jury had been tainted. The trial court denied the motion, and Gonzalez now appeals that ruling.

¶24 We review the denial of a motion for mistrial on the ground of a tainted jury for an abuse of discretion, *see State v. Blakley*, 204 Ariz. 429, ¶¶ 21-22 (2003), bearing in mind that a trial court is in "the best position to assess [the] impact" of the challenged remarks on jurors, *State v. Doerr*, 193 Ariz. 56, ¶ 23 (1998).

¶25 Gonzalez "merely speculates" that the comments in question tainted the jury pool, which is insufficient. *Id.* ¶¶ 18, 24 (refusing to "indulge in such guesswork"); *see also State v. Tison*, 129 Ariz. 526, 535 (1981) ("Unless there are objective indications of jurors' prejudice, we will not presume its existence."). Nor can we agree with Gonzalez that the prospective juror's brief statements regarding the impact of child molestation on her particular family carried the "authority of an expert." *See Doerr*, 193 Ariz. 56, ¶¶ 19-20. At most, her statements underscored that child molestation has a negative impact on a child and family—questions that few people find debatable and were not debated during the trial. And any risk that her statements might have encouraged the jury to "make their decisions based in part on emotion" was mitigated by the trial court's repeated instruction that the jurors were required to render a verdict based solely on their impartial consideration of the evidence presented at trial. *See id.* ¶ 22 (instruction provided). We therefore find no abuse of discretion in the trial court's determination that a mistrial was not warranted in these circumstances. *See Blakley*, 204 Ariz. 429, ¶¶ 21-22; *see also State v. Adamson*, 136 Ariz. 250, 262 (1983) (mistrial "the most dramatic remedy for trial error," which "should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted," and denial of mistrial inappropriate absent abuse of discretion).

Recorded Recollections

¶26 During the first day of B.G.'s direct examination, when she testified she did not remember certain facts, the trial court permitted the state to read portions of the transcript from her first forensic interview aloud to her as recorded recollections under Rule 803(5), Ariz. R. Evid. The next day, when B.G. was again on the stand and had again established that she could not recall certain facts, the court permitted the state to play the video recordings of both forensic interviews for the jury, also pursuant to Rule 803(5). On appeal, Gonzalez—who objected below on hearsay and confrontation grounds—contends both these evidentiary rulings were an abuse of discretion. We disagree.

¶27 Rule 803(5) provides that certain records are "recorded recollections" that are excluded from the rule against hearsay and may be read into evidence.[6] To qualify, the record in question must: (A) be on "a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;" (B) have been "made or adopted by the witness when the matter was fresh in the witness's memory;" and (C) "accurately reflect[] the witness's knowledge." *Id*. We have previously held that videotapes may qualify as a "record" for purposes of the rule. *State v. Martin*, 225 Ariz. 162, ¶ 11 (App. 2010).

¶28 Gonzalez challenges the interview transcript and videos as failing to satisfy prong (B) of Rule 803(5). In particular, he argues that B.G. herself did not make or adopt the videos or transcripts. He also contends that the interviews, which occurred in mid-July 2016, did not occur while the matter was fresh in B.G.'s mind, emphasizing that even at the time of the interviews, B.G. was having trouble remembering what had happened.

¶29 We are not persuaded. A record "need not be made by or at the direction of the witness" in order to qualify as a recorded recollection under Rule 803(5).[7] *State v. Smith*, 215 Ariz. 221, ¶ 29 & n.8 (2007).

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[6]Such records may also be received as exhibits "if offered by an adverse party," Ariz. R. Evid. 803(5), but the records in question here were neither offered by Gonzalez nor provided as exhibits to the jury.

[7]In his reply brief, Gonzalez argues that, without testimony from a third party regarding "the accuracy of the recording[s]," there was insufficient foundation laid for the playing of the interview videos as recorded recollections. However, before allowing the recordings to be played for the jury, the trial court confirmed with the parties that there was no dispute that they accurately depicted B.G.'s interviews and expressly

Moreover, B.G. testified that, when she gave the recorded, transcribed interviews in July 2016—approximately two weeks after the final incident charged in the indictment—her memory was better about what Gonzalez had done to her and that she had told the interviewer the truth. This was sufficient to support the trial court's decision to allow the transcript to be read and the video recordings to be played during B.G.'s testimony as recorded recollections under Rule 803(5). *See Martin*, 225 Ariz. 162, ¶ 12 (finding foundational requirements for admitting videotape as recorded recollection satisfied when victim testified she did not remember incident for which videotape was being admitted and stated "she remembered talking to 'a lady' to whom she told 'the truth' at a time when she could better remember 'some other stuff that happened'" with defendant); *see also State v. Alatorre*, 191 Ariz. 208, ¶¶ 2, 8, 10 (App. 1998) (upholding trial court's admission of tape-recorded interview as recorded recollection when eight-year-old molestation victim had been interviewed one to five months after offenses), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, ¶¶ 8-13 (2012).

Disposition

¶30 We therefore affirm Gonzalez's convictions and sentences.

confirmed with Gonzalez that he did not believe it was necessary for the interviewer to testify first in order to "lay additional foundation."