IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SAMANTHA FAYE OSTERAAS,
Appellant.

No. 2 CA-CR 2018-0353
Filed February 13, 2020

Appeal from the Superior Court in Pima County
No. CR20170221001
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Amy Pignatella Cain, 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 Samantha Osteraas appeals her convictions and sentences for one count of reckless child abuse and one count of intentional or knowing child abuse under circumstances likely to produce death or serious physical injury for failure to seek prompt medical attention. Osteraas argues she was denied due process when the trial court allowed the state's witness to testify on the ultimate issue of whether the victim was accidentally or intentionally burned. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the jury's verdicts." *State v. Gunches*, 225 Ariz. 22, n.1 (2010). Osteraas and her husband adopted M.O. in 2015 after becoming her foster parents in 2014. One night in December 2016, Osteraas telephoned 9-1-1, reporting that then five-year-old M.O. was burned in the bathtub "just now," "the bath was too hot." Pima County Sheriff's Deputy Jeremy Butcher responded, and Osteraas led him to the master bedroom where M.O. was lying on the floor. She had a "dark reddish almost purplish hue" to "[a]lmost her entire body," and Butcher observed that M.O.'s "upper lip appeared to be swollen," it looked like there was "blood on her front teeth," and she had "skin coming off" around her chest, arms, and hands. Her breathing was "very labored," and she was "staring straight up and didn't make a sound." When Butcher looked in the bathroom, he saw "clumps" of skin near the tub, the sink, the toilet, the trash, and the rug. Fire department paramedics arrived a few minutes later; they observed M.O.'s skin to be "cherry red" and noted that she was not wet and the bathroom "was dry" and there was no water on the floor.

¶3 Osteraas told the responders she had left M.O. in the bathroom with the water running for fifteen or twenty minutes. At trial, however, she testified she left M.O. for about "five or six minutes." Osteraas then had phoned her husband as well as a paramedic's wife whom

she knew. Osteraas's husband told her to call 9-1-1 and she then did so. Detectives subsequently determined that the water heater was turned up "all of the way to the . . . very hot position." The maximum position was labeled 150 degrees Fahrenheit, and water in the bathroom measured as high as 137 degrees.

¶4 M.O. was taken to the hospital, where she received treatment for second and third-degree burns on 70 to 80 percent of her body. Pima County Sheriff's Deputy Manuel Rios interviewed Osteraas at the hospital. She stated that after drawing the bathwater for M.O., she went to her bedroom to watch a television show. She then went back to the bathroom to shut off the water and found M.O. "on the ledge of the tub with . . . her face over her hands," and she pulled M.O. out of the water. At trial, Osteraas stated she took M.O. to the master bedroom, telephoned her husband and a friend, and then called 9-1-1. Two treating physicians testified that M.O.'s severe injuries and condition when received at the hospital suggested a delay of one to several hours before medical help was sought.

¶5 M.O.'s burns "went through all the layers of her skin [and] her fat," and required amputation of her toes and part of her foot. She was hospitalized for approximately four months and at the beginning was often heavily sedated because the burns were, according to one of her doctors, "extraordinarily painful." M.O. was classified as "critically ill" based on her need for "ventilator management," "continuous sedation medicines," "fluid and electrolyte management," and her "risk of infection." She underwent physical, occupational, and speech therapy in the hospital and was expected to require continued medical treatment, including "ongoing therapy" and possibly additional surgeries.

¶6 A grand jury charged Osteraas with two counts of child abuse under circumstances likely to produce death or serious physical injury for the third-degree scalding burns and failing to seek prompt medical attention. At trial, Dr. Gary Vercruysse testified that for burns as severe as M.O.'s, she would have had to spend "[m]ore than a couple minutes" in the hot water and that the sparing under her arms and in her groin area indicated she was likely conscious during that time.[1] M.O. was seven years

[1]At trial, the doctors explained that "sparing" refers to "areas which are not burned" and "where the person has tried to protect areas" of her body. *See also* U.S. Dep't of Justice, *Burn Injuries in Child Abuse* 6 (2001),

old by the time of trial, and she testified that Osteraas had thrown her in a hot bath and held her there. Dr. Arpana Jain stated she believed M.O. was brought to the hospital "several hours" after the injury "because she was extremely dehydrated to the point that her heart and lungs were failing. And dehydration happens over time."

¶7 Osteraas was convicted on the lesser-included offense of reckless child abuse for causing the burns and one count of child abuse for failing to seek prompt medical attention. The jury also found as aggravating factors that M.O. suffered emotional harm, she was five years old at the time, and Osteraas held a position of trust with respect to the victim. The trial court sentenced Osteraas to fifteen years' imprisonment on the child abuse count followed by fifteen years' probation on the reckless child abuse count. We have jurisdiction over Osteraas's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶8 In the sole issue raised on appeal, Osteraas argues her convictions must be reversed because "she was denied due process" when the trial court allowed Dr. Rachel Cramton, a pediatric hospitalist, to "testify on the ultimate issue of whether the victim was accidentally or intentionally burned." We review a trial court's ruling regarding the admission of expert testimony for an abuse of discretion. *State v. Salazar-Mercado*, 234 Ariz. 590, ¶ 13 (2014).

¶9 Before trial, Osteraas had filed a motion in limine to preclude any expert testimony by Dr. Cramton that M.O.'s injuries "were either knowing and/or intentional or were child abuse." The trial court determined Cramton could testify as an expert about her opinions regarding the nature of M.O.'s burns and how the types of injuries M.O. suffered could occur, but that she could not share her opinion "that the incident was not accidental but rather intentional." On the third day of trial, however, the court modified its ruling and permitted the state to ask the physician witnesses, including Cramton, "if they have an opinion as to whether the cause of the injuries suffered by [M.O.] were accidental." Osteraas objected on the ground that testimony about the ultimate issue in the case was improper.

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https://www.ncjrs.gov/pdffiles/91190-6.pdf (defining "sparing" as "areas within or immediately around the burn that were spared").

¶10 During Dr. Cramton's testimony, the state asked, "What is your opinion regarding whether [M.O.'s] injuries, her burns are explained by accidental scalding?" Over Osteraas's objection, Cramton stated, "I believe that her injuries were non-accidental." She explained that based on the "uniformity of burn," the "splash marks" on M.O.'s face, the severity of M.O.'s injury, and the sparing areas on M.O.'s body, she believed M.O. did not voluntarily immerse herself in water hot enough to cause her injuries, and was conscious during the event. Cramton further testified that in her opinion any "freezing up" M.O. had displayed, as related by Osteraas, would likely be overcome by "protective pain responses" demonstrated by the sparing in "the crease[s] between [M.O.'s] hip joint and her groin." The next day, Osteraas renewed her objection to Cramton's testimony, which the trial court implicitly overruled.

¶11 As noted, we review the trial court's ruling on the admission of expert testimony for an abuse of discretion, *Salazar-Mercado*, 234 Ariz. 590, ¶ 13, and will reverse "only upon a finding of clear prejudice." *State v. Granados*, 235 Ariz. 321, ¶ 30 (App. 2014). Rule 704, Ariz. R. Evid., permits expert testimony that "embraces an ultimate issue," if the opinion "assist[s] the trier of fact to understand the evidence or to determine a fact in issue." Ariz. R. Evid. 704(a) & cmt. However, "[w]itnesses are not permitted as experts on how juries should decide cases." Ariz. R. Evid. 704 cmt. And no witness may "usurp the jury's role by offering opinions concerning the accuracy, reliability, or credibility of a particular witness." *State v. Forde*, 233 Ariz. 543, ¶ 68 (2014). An expert may offer opinion testimony if her expertise, obtained "by knowledge, skill, experience, training, or education," will help the trier of fact understand the evidence or to determine a fact in issue. Ariz. R. Evid. 702(a). Finally, even relevant evidence should be excluded if "its probative value is substantially outweighed" by the danger of unfair prejudice. Ariz. R. Evid. 403.

¶12 Citing *State v. Sosnowicz*, 229 Ariz. 90 (App. 2012), Osteraas argues the trial court "should have sustained [her] objection to the doctor's testimony regarding whether she thought the victim's injuries were accidentally caused." In *Sosnowicz*, a medical examiner testified that the "manner of death" of the victim who had been run over by a vehicle was a "homicide" based not on "specialized knowledge" but on "the circumstances reported to him by the police." *Id.* ¶¶ 16, 20. This court found that testimony erroneously admitted because the opinion was based on the reports of witnesses at the scene, and the medical examiner "was in no better position to determine the manner of death than was the jury who heard the actual trial testimony of witnesses and had the opportunity to evaluate their credibility." *Id.* ¶ 20.

¶13 Dr. Cramton, however, was in a better position than the jury to determine the nature of M.O.'s injuries. Cramton's testimony was based on medical evidence regarding the severity of M.O.'s injuries, expert evaluation of the uniformity of her burns, the splash marks on her face, the sparing areas, and that "a five-year-old would not put themselves in a body of water hot enough to do that injury voluntarily and cover that much of her body." Cramton's opinions and conclusions, grounded upon her specialized training and experience, served to "help the trier of fact to understand the evidence or to determine a fact in issue." Ariz. R. Evid. 702(a). In contrast, the medical examiner's opinion in *Sosnowicz* was based on statements of lay persons and inferences from the evidence that the jury was equally capable of making. *See Sosnowicz*, 229 Ariz. 90, ¶¶ 20, 26. Thus, the trial court did not abuse its discretion by admitting Cramton's testimony. *See State v. Delgado*, 232 Ariz. 182, ¶¶ 13-14 (App. 2013) ("Although a layperson may have the capacity to listen to patient histories, an ordinary juror does not have the same ability to assess injuries and histories as a physician . . . ."); *State v. Lindsey*, 149 Ariz. 472, 475 (1986) ("The rules of evidence do permit expert testimony on ultimate issues . . . on subjects that are beyond the common sense, experience and education of the average juror." (citations omitted)).

¶14 Even assuming, however, that the trial court erred in allowing Dr. Cramton's opinion on the cause of M.O.'s injuries, any such error would be harmless. Error may be found harmless if in light of all of the evidence, it is clear "beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *Sosnowicz*, 229 Ariz. 98, ¶ 27. Here, the jury heard Osteraas's testimony regarding the event and ultimately found her guilty of a lesser-included offense on count one, which required only a reckless mens rea, demonstrating the jury rejected Cramton's suggestion that M.O.'s burns had been intentionally inflicted. *Cf. State v. Stuard*, 176 Ariz. 589, 600 (1993) (jury's decision to acquit defendant of certain charges helped "demonstrate the jury's careful and proper consideration of the evidence").

¶15 Osteraas additionally contends Dr. Cramton's testimony should have been precluded under Rule 403 of the Arizona Rules of Evidence because "it was highly prejudicial." Osteraas has argued this constituted fundamental error only in her reply brief, conceding she did not raise this argument below, either at pre-trial hearings or during Cramton's testimony at trial. *See State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) ("[A]n objection on one ground does not preserve the issue on another ground."). By failing to object on this ground below, and raising fundamental error for the first time in her reply brief, she has waived review of this issue unless such error is patent. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App.

2008) (defendant's failure to argue fundamental error results in waiver); *State v. Fernandez*, 216 Ariz. 545, ¶ 32 (App. 2007) (we will not ignore fundamental error if obvious in the record); *see also Lopez*, 217 Ariz. 433, n.4 (recognizing that issues raised for the first time in a reply brief are generally waived). Seeing no fundamental error, and the issue otherwise having been waived on appeal, we do not address it further.

Disposition

¶16 Osteraas's convictions and sentences are affirmed.