IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LEO M. MARTINEZ JR.,
Appellant.

No. 2 CA-CR 2018-0361
Filed August 11, 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NOT FOR PUBLICATION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. CR20162338001
The Honorable Christopher C. Browning, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Karen Moody, 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

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

E P P I C H, Presiding Judge:

¶1 Leo Martinez appeals from his convictions and sentences for sexual assault and kidnapping. He argues that the trial court erred by refusing to preclude irrelevant and unduly prejudicial evidence of the victim's mental illness before trial. We affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against the defendant." *State v. Felix*, 237 Ariz. 280, ¶ 2 (App. 2015). In February 2016, Martinez, a maintenance worker at a local church, visited J.D.'s family and offered to take J.D. out to get a donut. At the time of the offenses, Martinez was an acquaintance of J.D.'s family and J.D. was a sixty-six-year-old woman diagnosed with schizoaffective disorder. While they were out, Martinez took J.D. to a house owned by the church and they went inside. Martinez and J.D. went to a back room where he had her lean over a table, pulled up her dress, pulled down her diaper, and inserted his penis inside her even though she told him "no." Martinez took J.D. back to her home after he was finished.

¶3 J.D.'s daughter noticed she looked nervous and scared after she returned home, and J.D. eventually told her Martinez had raped her. J.D. was then taken to the hospital where she underwent a sexual-assault examination. At the hospital, J.D. told police what had happened, and police interviewed Martinez later that night. Martinez initially told police that J.D. heard voices and insisted she was making up her claim. Later, however, he admitted to police he had lied and claimed he had consensual sex with J.D. Martinez told them J.D. had asked him to have sex with her in order to help her sleep because the voices in her head were making sleep difficult.

¶4 After Martinez was arrested, a grand jury indicted him on one count of sexual assault and one count of kidnapping. After a six-day trial, a jury found Martinez guilty on both counts. The trial court sentenced

Martinez to concurrent prison terms, the longest of which is 5.75 years. Martinez appealed, and we have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Evidence of Victim's Mental Illness

¶5 Before trial, Martinez filed a motion seeking an evidentiary hearing to determine whether the state had sufficient evidence to pursue the theory that J.D. was incapable of consenting to sex.[1] Martinez essentially argued that if the state did not provide sufficient evidence to support a lack-of-capacity theory before trial, the trial court should preclude evidence of J.D.'s mental illness because it would be irrelevant and unduly prejudicial to allow the jury to hear this information. He also moved to preclude the state's medical experts from providing expert opinions on whether J.D. had the capacity to consent to sex. The court heard argument on these motions to determine, among other things, whether an evidentiary hearing should be granted, whether evidence of J.D.'s mental condition was admissible at trial, and whether the experts should be allowed to testify.

¶6 The state argued there was no legal authority requiring the trial court to determine before trial whether a lack-of-capacity theory was supported by the evidence. It claimed the proper remedy for insufficient evidence of a theory was for the court to grant a motion for acquittal under Rule 20, Ariz. R. Crim. P., after the state presented its case at trial. The state clarified that it was not planning on asking any expert to opine on the ultimate issue—whether the victim was capable of consenting to sex. Instead, it planned on asking Dr. Newhouse, J.D.'s psychiatric nurse practitioner, and Dr. Nicoletti, J.D.'s primary-care physician, questions to help the jurors understand J.D.'s physical and cognitive impairments near the time of the offense; it claimed these impairments would be readily noticeable when J.D. testified and this information would assist the jury in determining whether J.D. had a mental defect rendering her incapable of consenting to sex. The state also claimed it was not limited to expert testimony to prove a mental defect existed; it could also rely on other evidence to prove this, such as J.D.'s testimony.

¶7 Martinez replied that the state should not be able to pursue its lack-of-capacity theory because there was nothing in J.D.'s medical

[1]The state sought to prove its case under two alternate theories: either J.D. lacked the capacity to consent to sex or she was capable of consenting to sex but she told Martinez "no."

records showing she did not have the capacity to consent to sex and the state would not be providing expert testimony linking her mental illness to an inability to consent. Without this support, Martinez claimed his due process rights would be violated because the state would be presenting irrelevant and unduly prejudicial evidence at trial related to J.D.'s schizoaffective disorder and "childlike" mannerisms.

¶8 After taking this matter under advisement, the trial court ruled that the state could pursue its lack-of-capacity theory because, as Martinez conceded, there was "no statute, rule of criminal procedure, or applicable case law" requiring a pretrial determination as to whether the state had sufficient evidence to proceed on that theory at trial. The court also ruled that the expert testimony was admissible and that whether J.D. had the capacity to consent to sex was an issue reserved for the trier of fact. The court effectively ruled that the probative value of evidence of J.D.'s mental illness was not substantially outweighed by unfair prejudice, and it informed Martinez that if the state failed to present sufficient evidence to support the lack-of-capacity theory at trial, his remedy was to file a motion for acquittal under Rule 20. The court indicated it would be "inclined to give" a curative instruction if it granted the motion.

¶9 At trial, various witnesses testified about J.D.'s mental capacity.[2] Dr. Newhouse testified that J.D. did not have a legal guardian and that she was able to communicate effectively but she had schizoaffective disorder and some of its outward manifestations included auditory hallucinations, mild paranoid thinking, flat affect, and childlike mannerisms in her speech and activities. J.D. testified that she has three children, a fifth-grade education, and "mind problems," including that she "hear[s] voices." J.D.'s daughter testified that J.D. lived with her and that she walked, bathed, fed, and clothed her mother because she has "mental issues, mental difficulties, [and] mental illness," and "hears voices, or hallucinations."

¶10 However, the nurse who conducted J.D.'s sexual-assault examination testified that J.D.'s medical issues did not interfere with her "ability to understand what was happening" and that she consented to treatment. Two police officers testified that when they had talked to J.D., although she answered slowly and gave simple answers, she seemed to understand what was going on and was able to communicate effectively.

[2]Although the state originally intended on calling Dr. Nicoletti, she did not testify at trial.

One of the officers testified that he thought J.D. was capable of consenting to the release of her medical records.

¶11 Toward the end of the state's case, the trial court granted Martinez's Rule 20 motion on the lack-of-capacity theory, finding there was insufficient evidence for the jury to conclude that J.D. was incapable of consenting to sex. Martinez proposed a curative instruction but the court denied it, stating it was an improper comment on the evidence and an incorrect statement of law. The court also denied the state's request to instruct the jurors on the statutory definition of "without consent." During deliberations, the jurors asked, "If the jurors think [the victim] does not have full capacity to consent to sex, and if [the victim] agreed to sex that day, is the agreement considered valid or effective consent in terms of sexual assault?" After consulting with counsel, the court instructed the jury that J.D.'s "'full capacity to consent to sex' is not an issue for the jury's determination."

¶12 On appeal, Martinez does not challenge the state's ability to simultaneously argue a lack-of-capacity theory and a no-consent theory at trial, the expert's qualifications, or the denial of the curative instruction. He only argues the trial court erred in refusing to preclude evidence of J.D.'s mental illness before trial because this evidence was irrelevant and unfairly prejudicial.

¶13 We review a trial court's evidentiary rulings for an abuse of discretion, and we will not reverse a relevancy or other admissibility ruling absent a clear abuse of discretion. *State v. Davis*, 205 Ariz. 174, ¶ 23 (App. 2002). Evidence that has any tendency to make a fact of consequence more or less probable is relevant and generally admissible. Ariz. R. Evid. 401. However, relevant evidence may be precluded pursuant to Rule 403, Ariz. R. Evid., if "its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury." We view the evidence in the "light most favorable to its proponent, maximizing its probative value, and minimizing its prejudicial effect." *State v. Castro*, 163 Ariz. 465, 473 (App. 1989) (emphasis omitted) (quoting *United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983)).

¶14 "A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse . . . with any person without consent of such person." A.R.S. § 13-1406(A). "'Without consent' includes" situations where "[t]he victim is incapable of consent by reason of mental disorder, mental defect . . . or any other similar impairment of cognition and such condition is known or should have reasonably been known to the

defendant." A.R.S. § 13-1401(A)(7)(b). "Mental defect" means that "the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another." *Id.* "The word 'includes' [in the without consent definition] is a term of enlargement which conveys the idea that conduct which does not fall within the listed behavior may also violate the statute." *State v. Witwer*, 175 Ariz. 305, 308 (App. 1993).

¶15 Here, Martinez admitted having had sexual intercourse with J.D. in his interview with police. Therefore, the sole issue at trial was whether J.D. consented to the act of sexual intercourse. As the state argued below, evidence of J.D.'s mental illness was relevant to prove J.D. was incapable of consenting to sex due to a mental defect. Dr. Newhouse's testimony was offered to describe J.D.'s schizoaffective disorder and some of the outward manifestations of her mental illness such as her childlike demeanor and difficulty communicating. This evidence had a tendency to make it more probable that J.D. was incapable of consenting to sex because she was incapable of understanding or exercising the right to refuse sex; it was also relevant to the issue of whether Martinez should have reasonably known of her condition. § 13-1401(A)(7)(b). And, although the trial court ultimately granted a Rule 20 motion in Martinez's favor on this point, such testimony was certainly relevant and probative until it did so.

¶16 Furthermore, the evidence of J.D.'s mental defects would have been relevant even if the state had been precluded from arguing lack of capacity to consent at the outset. The jury needed to understand her mental state in order to understand her demeanor while testifying and place her testimony about the charges into context. And, J.D.'s mental illness was relevant to the state's theory that Martinez chose J.D. because her mental illness would make her less believable.[3] *See State v. Webb*, 164 Ariz. 348, 352 (App. 1990) (evidence furthering the state's theory of a case and rebutting defendant's theory is relevant); *State v. Miller*, 135 Ariz. 8, 16 (App. 1982) (evidence of defendant's opportunity to commit crime relevant). Therefore, the trial court did not abuse its discretion in finding this evidence relevant.

[3]Martinez argues we should not consider this argument on appeal because the state did not make it at the hearing below. However, we will affirm evidentiary rulings on any ground supported by the record. *State v. Salazar*, 216 Ariz. 316, ¶ 14 (App. 2007).

¶17 We are not persuaded by Martinez's argument that evidence relating to J.D.'s mental illness became irrelevant without "expert testimony linking [J.D.]'s mental disorder to her ability to consent." "[T]he . . . victim's capacity to understand and consent to . . . sexual conduct must be considered in the context of all of the surrounding circumstances in which it occurred." *State v. Inzunza*, 234 Ariz. 78, ¶ 19 (App. 2014) (quoting *State v. Olivio*, 589 A.2d 597, 606 (N.J. 1991)). Martinez cites no authority, nor are we aware of any, requiring expert testimony under circumstances similar to these, and authority from other jurisdictions suggests otherwise. *See, e.g.*, *In re Interest of K.M.*, 910 N.W.2d 82, 90 (Neb. 2018) (expert testimony on victim's mental incapacity may be probative but not required in every case); *State v. Hunt*, 722 S.E.2d 484, 491 (N.C. 2012) (finding "expert testimony is not necessarily required to establish the extent of a victim's mental capacity to consent to sexual acts"); *State v. Wallin*, 366 P.3d 651, 657 (Kan. Ct. App. 2016) (although expert testimony may be helpful, it is not necessarily required to prove victim was incapable of consent).

¶18 Martinez also argues that, even if relevant, evidence of J.D.'s mental illness should have been precluded under Rule 403 due to its low probative value and high risk of unfair prejudice. Martinez claims this evidence was unfairly prejudicial because it was used to unduly elicit sympathy for J.D. and encourage a decision based on emotion by portraying a vulnerable victim. But not all harmful evidence is considered unfairly prejudicial. *State v. Mott*, 187 Ariz. 536, 545-46 (1997). Unfair prejudice results when "the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *Id.* at 545. Although evidence of J.D.'s mental illness might have engendered emotion or sympathy, we cannot say the trial court clearly abused its broad discretion in balancing the evidence's probative value against its prejudicial effect. *See State v. Cooperman*, 230 Ariz. 245, ¶ 20 (App. 2012) ("We are mindful that a trial court has broad discretion to determine the admissibility of evidence and is best suited to conduct any balancing of probative value and prejudicial effect . . . ."). Accordingly, the court did not err by not precluding the evidence under Rule 403.

¶19 Martinez also argues that his kidnapping conviction should be reversed because it "was based entirely on the alleged nonconsensual sex" and "[w]ithout the prejudicial effect" of the evidence discussed above, the jury might not have found the requisite intent to support the conviction. But in light of our concluding the trial court did not err in admitting that evidence, Martinez's argument on this point also fails.

Disposition

¶20 We affirm Martinez's convictions and sentences.