

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

CHRIS THOMAS GOMEZ,  
*Appellant.*

No. 2 CA-CR 2018-0052  
Filed April 20, 2021

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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NOT FOR PUBLICATION  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).*

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Appeal from the Superior Court in Pima County  
No. CR20163385001  
The Honorable Bryan B. Chambers, Judge

**AFFIRMED**

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COUNSEL

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**MEMORANDUM DECISION**

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

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V Á S Q U E Z, Chief Judge:

¶1 This appeal returns to us on remand from the Arizona Supreme Court to consider whether a detective’s testimony about the credibility of another witness constitutes fundamental, prejudicial error. For the following reasons, we conclude appellant Chris Gomez has failed to establish that fundamental, prejudicial error occurred and, thus, affirm his conviction and sentence for sexual assault.

**Factual and Procedural History**

¶2 The underlying facts of this case are detailed in *State v. Gomez*, \_\_\_ Ariz. \_\_\_, 482 P.3d 397 (2021). We repeat only those that are pertinent to this decision. Gomez was indicted on one count of sexual assault of J.B. At trial, the following exchange occurred between the prosecutor and the detective who investigated the case:

Q. Do you in talking with [J.B.], were you able to determine if sexual assault occurred?

A. Yes.

Q. Yes? Where was that?

A. 7050 East Sunrise.

Q. Is that in Pima County?

A. Yes, it is.

¶3 Gomez was convicted as charged, and the trial court sentenced him to 5.75 years’ imprisonment. On appeal, we reversed Gomez’s conviction based on the admission of DNA evidence at trial, but the supreme court vacated our memorandum decision and remanded to us to consider an issue we left unresolved. *Gomez*, \_\_\_ Ariz. \_\_\_, ¶¶ 1, 36, 482 P.3d 397. We now address that issue.

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**Discussion**

¶4 Gomez argues that the detective's "affirmative response" to the prosecutor's question whether she was "able to determine if sexual assault occurred" constitutes fundamental, prejudicial error requiring reversal. He reasons that the detective's response was "improper opinion" testimony because it "clearly communicated that [J.B.'s] statements were credible in establishing a sexual assault."

¶5 As Gomez acknowledges, because he did not object to this testimony below, our review is limited to fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). Under this standard, "the first step . . . is determining whether trial error exists." *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). If it does, the next step is to consider whether the error is fundamental. *Id.* "A defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, or (3) the error was so egregious that he could not possibly have received a fair trial." *Id.* Under prongs one and two, the defendant must then "make a separate showing of prejudice." *Id.* However, "[i]f the defendant establishes the third prong, he has shown both fundamental error and prejudice, and a new trial must be granted." *Id.*

¶6 The state concedes trial error occurred to the extent the detective vouched for J.B.'s truthfulness. We agree that such would be trial error and, for the purposes of this decision, we will assume that the detective was doing just that. *See State v. Moran*, 151 Ariz. 378, 383 (1986) (opinion testimony on whether crime occurred "is not admissible" and "is nothing more than advice to jurors on how to decide the case"); *State v. Lindsey*, 149 Ariz. 472, 475 (1986) ("[E]xperts should not be allowed to give their opinion of the accuracy, reliability or credibility of a particular witness in the case being tried. Nor should such experts be allowed to give opinions with respect to the accuracy, reliability or truthfulness of witnesses of the type under consideration.").

¶7 The question then becomes whether Gomez has established the error was fundamental. In his opening brief, Gomez makes nothing more than a conclusory statement that the "improper opinion went to the foundation of the case, . . . took a right essential to his defense, [and] was of such magnitude that 'the defendant could not possibly receive a fair trial.'" This is insufficient to meet his burden. *See Escalante*, 245 Ariz. 135, ¶ 21 ("The defendant bears the burden of persuasion at each step.").

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¶8 Even assuming Gomez had established the error was fundamental, he has not established prejudice. As evidence of prejudice, Gomez points to his “harmless error” analysis earlier in his opening brief pertaining to the admission of DNA evidence. But prejudice “involves a fact-intensive inquiry.” *Escalante*, 245 Ariz. 135, ¶ 21 (quoting *Henderson*, 210 Ariz. 561, ¶ 26). And the supreme court concluded that the DNA evidence “was neither unfairly prejudicial to Gomez nor confusing to the jury.” *Gomez*, \_\_\_ Ariz. \_\_\_, ¶ 33, 482 P.3d 397. His harmless error analysis regarding the DNA evidence therefore has little bearing on his claim of prejudice relating to the detective’s testimony. See *Henderson*, 210 Ariz. 561, ¶ 26 (“The showing a defendant must make varies, depending upon the type of error that occurred . . .”). Moreover, the trial court instructed the jury about its duty to determine the credibility of witnesses, and we presume the jury followed its instructions. See *State v. Newell*, 212 Ariz. 389, ¶ 68 (2006).

¶9 Although prong three requires no separate showing of prejudice, it does require error that “so profoundly distort[s] the trial that injustice is obvious.” *Escalante*, 245 Ariz. 135, ¶ 20. That is not the case here, where the detective’s testimony was a single, isolated statement in the middle of a four-day trial, it appears to have been the result of a poorly worded question, the prosecutor moved on immediately afterward, and the statement was not mentioned in closing. Notably, our case law indicates that improper opinion testimony on the credibility of another witness “might be harmless.” *Moran*, 151 Ariz. at 386; cf. *State v. Morales*, 198 Ariz. 372, ¶ 15 (App. 2000) (“‘Were they lying’ questions alone will rarely amount to fundamental error.”). In sum, Gomez has not met his burden of establishing fundamental, prejudicial error. See *Henderson*, 210 Ariz. 561, ¶ 19.

**Disposition**

¶10 For the foregoing reasons, we affirm Gomez’s conviction and sentence.