IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ALBERTO DAVID MORENO,
Appellant.

Nos. 2 CA-CR 2019-0167 and 2 CA-CR 2019-0168 (Consolidated)
Filed March 4, 2021

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NOT FOR PUBLICATION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
Nos. CR20181874001 and CR20154713001
The Honorable Casey F. McGinley, Judge
The Honorable Danelle B. Liwski, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
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Counsel for Appellee

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MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Espinosa and Vice Chief Judge Staring concurred.

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

¶1 Alberto Moreno appeals from his convictions and sentences for sexual abuse and molestation of a minor age fifteen or younger. We affirm.

Factual and Procedural Background

¶2 "We view the evidence and all reasonable inferences in the light most favorable to sustaining the jury's verdicts." *State v. Holle*, 240 Ariz. 300, ¶ 2 (2016). In the summer of 2011, when A.L. was twelve years old, Moreno—her aunt's boyfriend—touched one of her bare breasts after she prevented him from touching her genitals. Several months later, when A.L. was still twelve, she and Moreno were playing video games together. Moreno paused the game and asked A.L. if she had discussed "sexual kind of stuff" with her parents, telling her she could talk to him about such matters. Moreno then "poked" A.L. "in [her] vaginal area," causing her to jump in surprise and pain. He then placed A.L.'s hand on his inner thigh and attempted twice to move it toward his genitals. A.L. pulled her hand away, and Moreno finally stopped. After A.L. reported the abuse to police in 2015, Moreno admitted to a longtime friend that, while playing a video game with a "young girl," he had touched "her private parts."

¶3 Moreno was charged with sexual abuse and molestation of A.L., a minor under fifteen years old.[1] During a first trial in 2018, the jury could not reach a unanimous decision, and the trial court declared a mistrial. The state then charged Moreno with abuse of a minor in the second degree and molestation of a child, based on essentially the same conduct alleged in the first indictment.[2] The state alleged the crimes were

[1]Moreno was also charged with three counts of molesting A.L.'s younger sister, E.L.

[2]The second indictment also included one charge of continuous sexual abuse of a child, E.L., but the jury failed to reach a verdict on that

domestic violence offenses, not committed on the same occasion, dangerous crimes against a child, and committed with sexual motivation.

¶4 Moreno was tried on the second indictment in 2019. At the conclusion of a five-day trial, the jury found him guilty of the sexual abuse and molestation of A.L., a minor fifteen years old or younger at the time of the offense. The trial court sentenced him to minimum, concurrent prison terms, the longer of which is ten years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Sufficiency of the Evidence

¶5 Moreno contends the state failed to present sufficient evidence at either trial to support the charge of molestation. He argues that the evidence, which was consistent across both trials, was insufficient as a matter of law, such that both trial courts erred in denying his motions for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P.

¶6 Sufficiency of the evidence is a question of law we review *de novo*. *State v. West*, 226 Ariz. 559, ¶ 15 (2011). Viewing the evidence in the light most favorable to sustaining the verdict, and resolving all inferences against the defendant, we must determine whether the state presented evidence that "reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290 (1996). "[W]e do not weigh the evidence; that is the function of the jury." *State v. Williams*, 209 Ariz. 228, ¶ 6 (App. 2004). And, if jurors could reasonably differ as to whether the evidence establishes the necessary facts, that evidence is sufficient as a matter of law. *See State v. Davolt*, 207 Ariz. 191, ¶ 87 (2004).

¶7 Here, the state bore the burden of presenting sufficient evidence to allow reasonable jurors to conclude that Moreno intentionally or knowingly had engaged in "sexual contact" with A.L. when she was under the age of fifteen. A.R.S. § 13-1410(A) (defining child molestation). Sexual conduct is defined by statute to include "any direct or indirect touching, fondling or manipulating of any part of the genitals." A.R.S. § 13-1401(A)(3)(a).

¶8 Emphasizing that the word "genitals" is not defined by statute, Moreno contends the state failed to present any evidence in either

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charge and it is not at issue on appeal. The trial court dismissed with prejudice all counts as to E.L. charged in both indictments.

trial that he "had direct or indirect contact with A.L.'s 'genitals,'" on the ground that "'vaginal area' does not meet this definition." He argues that, when A.L. consistently testified that Moreno poked her "in [her] vaginal area," she may actually have been testifying that he touched her "on her inner thigh, outer thigh, stomach, or pubic area." We are unpersuaded.

¶9 Reasonable jurors could certainly have concluded that by "in my vaginal area," A.L. meant that Moreno touched the area around her vagina—*i.e.*, her vulva—which Moreno himself concedes is part of the female genitalia. *See State v. Cox*, 217 Ariz. 353, ¶ 22 (2007) ("relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

¶10 Moreno argues that "[t]he only implication that [he] had any contact with A.L.'s genitals was injected by the State" in the first trial, through questions more specifically referencing her "vagina." Indeed, the prosecutor repeatedly referenced Moreno touching her vagina. But A.L.—who, as Moreno emphasizes, was nineteen years old at the time of the first trial—was fully capable of correcting the prosecutor if Moreno only ever actually touched her stomach or her thigh. A.L. demonstrated this capacity when testifying that Moreno had placed her hand "on the inside of his thigh" twice. Moreover, as the state points out, contact with A.L.'s "vagina"—an internal organ—would have constituted the greater offense of sexual conduct with a minor, not molestation, which required the state to prove only contact with A.L.'s "external genitalia, i.e., her vaginal *area*." *Compare* § 13-1410(A) (molestation), with A.R.S. §§ 13-1405(A) (sexual conduct with a minor includes "sexual intercourse" with someone under eighteen), 13-1401(A)(4) (establishing digital penetration into vulva is one form of "sexual intercourse").

¶11 A.L.'s testimony in both trials was, on its own, sufficient to allow reasonable jurors to conclude that Moreno had touched her genitals, as required for the crime of child molestation. *See State v. Williams*, 111 Ariz. 175, 177-78 (1974) ("A conviction may be had on the basis of the uncorroborated testimony of the [victim] unless the story is physically impossible or so incredible that no reasonable person could believe it."). The sufficiency of the evidence in the second trial is even clearer. There, the jury heard additional testimony that Moreno had admitted touching a young girl's "private parts" while playing video games.

¶12 Viewed in the light most favorable to the prosecution, the evidence in this case was sufficient for a reasonable jury to conclude that Moreno had touched A.L.'s genitals. And, the jury could infer that he did so knowingly and intentionally from the context in which the touching had occurred: immediately after Moreno offered to discuss "sexual kind of stuff" with A.L. and immediately before he twice attempted to move her hand toward his own genitals. *See State v. Garcia*, 105 Ariz. 469, 471 (1970) ("Intent is determined by the circumstances of the case."). Thus, the evidence was sufficient to support the charge of child molestation, and both trial courts correctly denied Moreno's Rule 20 motions.[3]

Precluded Evidence

¶13 Before Moreno's first trial, the state moved, pursuant to Rule 609, Ariz. R. Evid., to preclude the defense from attempting to impeach A.L.'s father with any of his three prior convictions in Maricopa County.[4] At the hearing on the motion, Moreno asked that all three convictions "be permitted to be fair game," not to attack the father's credibility, but because of the "inconsistency" that his "history of convictions and history of incarceration . . . produced within his family life and that of his children's lives." Moreno contended the convictions were "important and . . . relevant in terms of assessing the circumstances surrounding the accusations in this case."

¶14 The trial court requested clarification as to how her father's convictions in 2005, 2007, and 2009 might have impacted A.L.'s allegations regarding events in 2011, which she first disclosed to her mother in late 2011 or early 2012 and reported to police in 2015. Moreno responded that the father's lack of "consistency" in the home "may have something to do with [A.L.'s] motivations surrounding accusations of what was going on in the home," and that "the circumstances" in her life "might have led [her] to make these accusations," such that the father's convictions were "relevant and fair game."

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[3]Because we reject Moreno's argument that the state failed to present sufficient evidence of molestation at the first trial, we need not reach his dependent double jeopardy argument.

[4]The convictions in question were a 2005 conviction for attempted possession of a narcotic drug for sale, a 2007 conviction for resisting arrest, and a 2009 conviction for misdemeanor shoplifting.

¶15 The trial court granted the state's motion and precluded the prior convictions. As grounds, the court first explained that nothing had been presented to indicate that A.L.'s father had ever been taken into custody, served a prison term, or been removed from the home as a result of the convictions. The court further explained that the two "very old" convictions from 2005 and 2007—over ten years before—had "very little probative value" on the issue of "anything that was going on in the home life in 2011," but risked "significant prejudicial effect." Because no specific facts or circumstances had been presented to support a contrary finding, the court concluded they were inadmissible pursuant to Rule 609(b)(1). As to the 2009 misdemeanor shoplifting conviction, the court found that it had not necessarily required a finding of dishonesty or false statement and was thus not automatically admissible under Rule 609(a)(2). The court then concluded that, as with the two older convictions, there was "very little probative value given the proffered reason that it would be offered into evidence" and precluded it as well.

¶16 Moreno then requested clarification, asking: "can we address with the witness, when he is on the stand, whether he has time away from [A.L.] and in prison?" The trial court responded in the negative, explaining that whether the father had been in prison earlier was "irrelevant to what was occurring in 2011" and "highly prejudicial."

¶17 A.L.'s father did not testify at either trial, rendering moot the trial court's order precluding "any testimony relating to *the witness* having served time in prison" (emphasis added). Moreno did not raise the issue during the second trial and never requested permission to admit the fact of the father's prior convictions when questioning any other trial witnesses.[5]

¶18 On appeal, Moreno contends the trial court erred in precluding the prior convictions because Rule 609 was inapplicable and the convictions were admissible under Rules 401 and 403, Ariz. R. Evid. "We review a trial court's determination of relevance and admissibility for an

[5] Moreno is incorrect that the trial court "made clear that the convictions, or resulting incarceration, could not be addressed for any reason, as doing so would be '[going] around the Court's ruling.'" The court was responding to a specific clarifying question from Moreno about whether he would be permitted to ask A.L.'s father—not other witnesses—whether he had spent time away from his children due to his convictions. The court's order was equally specific, precluding "any testimony relating to *the witness* having served time in prison." (Emphasis added.)

abuse of discretion." *State v. Hardy*, 230 Ariz. 281, ¶ 49 (2012). At trial, as on appeal, Moreno's arguments for the relevance of the father's prior convictions hinged on their having resulted in some absence from the family home. As the court expressly found, Moreno failed to provide any basis for concluding that A.L.'s father was, in fact, ever actually held in custody or incarcerated as a result of his convictions. Thus, the trial court did not abuse its discretion in finding those convictions irrelevant. *See* Ariz. R. Evid. 401.[6]

¶19 Moreno further contends, for the first time on appeal, that the preclusion ruling violated his constitutional right to due process.[7] *See State v. Hamilton*, 177 Ariz. 403, 408-09 (App. 1993) (objection on one ground does not preserve objections on other grounds). Because Moreno failed to raise these constitutional claims at trial, we review only for fundamental, prejudicial error.[8] *State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). "[T]he first step in fundamental error review is determining whether trial error exists." *Id.* ¶ 21. The trial court correctly concluded the convictions were irrelevant, given Moreno's failure to establish the premise for their purported relevance. Thus, there was no error, much less fundamental error.

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[6] Even if the convictions had been relevant for their proffered purpose, a trial court's decision to preclude evidence after an explicit balancing of probative value and prejudice, as occurred here, is within its sound discretion and will not be reversed absent a clear abuse of discretion. *See State v. Taylor*, 169 Ariz. 121, 126 (1991).

[7] In particular, Moreno argues the preclusion: (a) prevented him from presenting a complete defense to counter the state's evidence that A.L. exhibited behaviors that are common in child victims of sexual abuse, which he contends could also have been attributable to her father's time in custody; and (b) denied him the opportunity to effectively cross-examine and impeach A.L.'s mother on the dynamics of A.L.'s home life.

[8] Moreno contends that, although he "did not use the words 'confront witnesses' or 'complete defense,'" he nonetheless preserved his constitutional claims for appeal. We disagree. Moreno did not make sufficient argument to alert the trial court to—much less allow the court to rule on—the constitutional claims he now raises. *See State v. Kinney*, 225 Ariz. 550, ¶ 7 (App. 2010) ("To preserve an argument for review, the defendant must make a sufficient argument to allow a trial court to rule on the issue.").

Cold Expert Testimony

¶20 Dr. Wendy Dutton testified at the first trial for the prosecution. After the trial court declared a mistrial, Moreno filed a motion asking that Dutton be precluded from testifying at the second trial, on the ground that her testimony would not meet the standards set forth in Rules 702 and 401-403, Ariz. R. Evid., and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. He based his motion on the testimony already provided by A.L. and Dutton during the first trial. After an evidentiary hearing at which both parties examined Dutton, the trial court denied Moreno's motion. It found that Dutton met all requirements of Rule 702 and was permitted to testify, without restriction, as a cold expert witness at the second trial.

¶21 On appeal, Moreno contends "the trial court commit[ted] reversible error" by allowing Dutton to provide what he characterizes as "inadmissible" expert testimony regarding child sexual abuse. We review a trial court's ruling on the admission of expert testimony for abuse of discretion. *State v. Salazar-Mercado*, 234 Ariz. 590, ¶ 13 (2014). Moreno has demonstrated no such abuse here.

¶22 Moreno contends Dutton's testimony was "not helpful to the jury, as required by Rule 702(a),"[9] for a number or reasons. He first argues that Dutton's "all-inclusive testimony," regarding symptomatic and behavioral patterns in children who have endured sexual abuse, could not help the jury understand the evidence or determine a fact at issue in *this* case. He further contends Dutton's testimony "formed a basis for the State to argue that any behavior displayed at any time by a child who alleged sexual abuse was consistent with sexual abuse, thereby inappropriately vouching for [A.L.'s] testimony." And he proceeds to argue that the only purpose for Dutton's testimony regarding behavioral changes was "to plant the inference in each juror's mind that consistent behavior means a crime must have been committed," thus "[p]resupposing abuse." This, he contends, "invade[d] the province of the jury in determining innocence or guilt."

¶23 Our supreme court has rejected these arguments. It determined that Rule 702 and *Daubert* do not bar admission of testimony from cold experts like Dutton when that testimony "educates the fact-finder

[9]Rule 702(a) requires that an "expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."

about general principles without considering the particular facts of the case." *Salazar-Mercado*, 234 Ariz. 590, ¶ 1. Here, Dutton provided generalized testimony regarding behavioral patterns among child sexual abuse victims. She made no comment on the accuracy, reliability, or credibility of the particular child in question, A.L. *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 27 (App. 2013). Indeed, Dutton explained that she had not reviewed any information about the case and knew nothing about Moreno, A.L., or any of the facts at issue. She also expressly admonished that the behaviors in question can also "certainly" stem from causes not involving sexual abuse. Moreno's citation to *State v. Moran* is therefore inapposite, because the problematic expert testimony in that case "went far beyond describing general principles of behavior" and spoke instead to the specific case before the jury. 151 Ariz. 378, 384-86 (1986).

¶24 In this case, as in *Salazar-Mercado*, 234 Ariz. 590, ¶ 15, the victim delayed in reporting her sexual abuse by a relative. "Because Dutton's testimony might have helped the jury to understand possible reasons for the delayed . . . reporting in this case, her testimony satisfied Rule 702(a)." *Id.*

¶25 Moreno further contends that Dutton's cold expert testimony was unhelpful because A.L.'s own testimony was sufficient for explaining her behavior. He argues: "Expert testimony is not necessary when a child is able to give an explanation about why they delayed disclosure or demonstrated other seemingly inconsistent behavior." But A.L.'s explanations do not negate the helpfulness of Dutton's testimony, which was "admissible to aid jurors in evaluating the victim's credibility" regarding those explanations. *State v. Haskie*, 242 Ariz. 582, ¶ 16 (2017).

¶26 Finally, Moreno contends Dutton's testimony regarding the "process of victimization" was inadmissible. He argues, in particular, that the testimony went beyond the common behaviors of victims, "created a profile of abusers that was meant to fit [Moreno]," and should have been excluded as unduly prejudicial pursuant to Rule 403.[10] Although Moreno is correct that the state raised the topic during its direct examination of Dutton, nothing in her generalized response to the state's questions contained the slightest reference to the particular facts of this case or

[10]Rule 403 allows a trial court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice."

pointed implicitly to Moreno.[11] *See Haskie*, 242 Ariz. 582, ¶ 14 (only evidence offered to suggest that "*because* the defendant has [certain] characteristics . . . he must have committed the crime charged" qualifies as "profile evidence"). It was only on cross-examination that the "special relationship" and "playing games" elements of the process of victimization were emphasized. It was defense counsel—not Dutton—who focused on those aspects in a manner that echoed the facts in this case. Defendants may not complain on appeal of testimony they invited at trial, much less their own questions to experts. *See State v. Rushing*, 243 Ariz. 212, ¶ 14 (2017) ("The invited error doctrine prevents a party from injecting error into the record and then profiting from it on appeal.").

Disposition

¶27 For all the foregoing reasons, we affirm Moreno's convictions and sentences.

[11]In his reply brief, Moreno contends the lack of connection between Dutton's testimony on the process of victimization and the particular facts of this case "highlights why this testimony should have been excluded" as irrelevant. But he waived this argument by failing to raise it in his opening brief. *State v. Lopez*, 217 Ariz. 433, n.4 (App. 2008).