IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ROGER LYNN HUBBARD,
Appellant.

No. 2 CA-CR 2019-0240
Filed February 3, 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NOT FOR PUBLICATION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
No. CR20170617001
The Honorable Christopher C. Browning, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Richard C. Bock, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

S T A R I N G, Vice Chief Judge:

¶1 Roger Hubbard appeals from his convictions and sentences for one count of molestation of a child and two counts of contributing to the delinquency of a minor, as well as the restitution order. 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 and resolve all reasonable inferences against Hubbard. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). One night in January 2017, seven-year-old E.L. was at Hubbard's house along with two of Hubbard's grandchildren. At some point, Hubbard entered the bedroom where E.L. was sleeping alone. He proceeded to put his hand down E.L.'s pants on two separate occasions, touching her "girl part." Hubbard also touched E.L.'s thighs with his penis. The next day, E.L. reported the incident to her mother, who subsequently contacted the police.

¶3 Hubbard was initially charged with five counts of molesting a child, but two of the charges were dismissed at the state's request. The jury ultimately acquitted Hubbard of two of the remaining molestation charges, but was unable to reach a verdict on the last charge or its lesser-included offense of contributing to the delinquency of a minor. A second trial resulted in a mistrial based on an improper remark by the state during its opening statement.

¶4 At a third trial, Hubbard was convicted as noted above. He was sentenced to twelve years of imprisonment for the molestation count and time served for the remaining counts. The trial court also entered a restitution order compensating E.L.'s family, and, in turn, the Crime Victim Compensation Fund (CVCF), for lost wages and travel costs resulting from Hubbard's crimes. This appeal followed.[1] We have jurisdiction pursuant

[1]The state correctly observes in its answering brief that Hubbard initially failed to file a timely notice of appeal as to the restitution order.

to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1), (3). *See also State v. Grijalva*, 242 Ariz. 72, ¶ 11 (App. 2017) ("A restitution order made after sentencing does not impair appeal rights because such orders are separately appealable.").

Third-Party-Culpability Defense

¶5 Hubbard first argues the trial court erred "by denying [his] request to present his defense and evidence of third-party culpability." We review a ruling on the admissibility of third-party-culpability evidence for an abuse of discretion, *see State v. Prion*, 203 Ariz. 157, ¶ 21 (2002), but review evidentiary rulings that implicate a defendant's constitutional rights de novo, *see State v. Goudeau*, 239 Ariz. 421, ¶ 35 (2016).

¶6 Like all evidence, the admissibility of third-party-culpability evidence is governed by Rules 401 through 403 of the Arizona Rules of Evidence. *See Goudeau*, 239 Ariz. 421, ¶ 163. Thus, to be admissible, evidence must: (1) be relevant, meaning "it has any tendency to make a [material] fact more or less probable than it would be without the evidence," Ariz. R. Evid. 401; (2) be admissible under other applicable rules, statutes, or constitutional provisions, Ariz. R. Evid. 402; and (3) not have a probative value that is "substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence," Ariz. R. Evid. 403. *See Goudeau*, 239 Ariz. 421, ¶ 163. Third-party-culpability evidence is relevant if it "tend[s] to create a reasonable doubt as to the defendant's guilt." *Id.* (emphasis omitted) (quoting *State v. Gibson*, 202 Ariz. 321, ¶ 16 (2002)).

¶7 Still, a defendant is not entitled "to throw strands of speculation on the wall and see if any of them will stick." *State v. Machado*, 224 Ariz. 343, n.11 (App. 2010) (quoting David McCord, "*But Perry Mason Made It Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else is Guilty*, 63 Tenn. L. Rev. 917, 984 (1996)), *aff'd*, 226 Ariz. 281 (2011); *Goudeau*, 239 Ariz. 421, ¶ 165. And, excluding evidence based on its lack of relevance does not violate any "right

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Nonetheless, the trial court ultimately allowed him to file a delayed notice of appeal pursuant to his motion under Rule 32.1(f), Ariz. R. Crim. P., and stipulation between the state and defense. Because he filed a timely notice of delayed appeal from the restitution order and a timely notice of appeal from his convictions and sentences, we address both in this decision. *See* Ariz. R. Crim. P. 31.2(a).

to present a defense under the United States and Arizona constitutions." *State v. Alvarez*, 228 Ariz. 579, n.2 (App. 2012); *see also State v. Oliver*, 158 Ariz. 22, 30 (1988) ("[T]he Sixth Amendment right to present evidence in one's defense is limited to evidence which is relevant and not unduly prejudicial.").

¶8 Hubbard listed third-party culpability in his initial disclosure statement and subsequently filed a memorandum supporting that defense, claiming evidence that E.L.'s father had touched her inappropriately in August or September 2017 "represent[ed] sufficient information for the presentation of a third party culpability defense." At the motions hearing, Hubbard proposed introducing evidence that, in addition to touching her inappropriately during the incident in question, E.L.'s father had tickled her inappropriately before January 2017, and that E.L. had stated in 2016 that she did not wear underwear to bed because she was sore.

¶9 In sum, Hubbard argued this evidence, taken together, would show that E.L.'s motive for participating in the investigation and testifying against him had come from "something [else that] had happened to her in the past." The trial court declined to admit the proposed evidence, ruling:

> Well, with all due respect I fail to see any third party culpability defense or any nexus that something that may or may not have happened between the victim and her father has to the events that are the basis of the indictment in this case. So I will grant the State's—sustain the State's objection to that, and order that you not go into that.

At Hubbard's first trial, the court reinforced its ruling, stating that such evidence was "too far afield . . . [and] not relevant" and that any "relevance [was] minimal compared to [its] prejudicial value." The court further explained there was not "any real foundation" to tie the alleged acts of E.L.'s father to the charges against Hubbard.

¶10 On appeal, Hubbard first argues the trial court improperly applied an "inherent tendency . . . test" in reaching this conclusion. *See State v. Fulminante*, 161 Ariz. 237, 252 (1988) ("Before a defendant may introduce evidence that another person may have committed the crime, the defendant must show that the evidence has an inherent tendency to connect such other person with the actual commission of the crime."). Supporting his proposed defense, Hubbard asserts E.L.'s accusations against her father

nearly "parallel[] her accusations against" him. He also claims E.L.'s father, his neighbor, would sometimes "walk a[] short distance away and . . . urinate in the yard with children either running around, playing or in the pool." Thus, Hubbard concludes "[t]he conduct of E.L.'s father would have created a reasonable doubt as to [Hubbard]'s guilt" and argues precluding such evidence "violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 2 § 24 of the Arizona Constitution."[2]

¶11 The state responds that Hubbard's proposed third-party-culpability evidence "did not tend to create a reasonable doubt as to [his] guilt." Specifically, it claims that even if E.L. stated that her father had committed similar acts, those acts were alleged to have occurred months after the acts Hubbard committed, and points out that E.L.'s father was out of town when Hubbard assaulted her. The state further argues "[t]here is 'simply no evidence connecting' [E.L.]'s father" to the January 2017 incident that formed the basis for Hubbard's charges. Thus, the state concludes Hubbard's proposed evidence "was irrelevant to [E.L.'s] knowledge and/or motive in this case," and, regardless, was inadmissible under Rule 403. Finally, the state asserts its exclusion did not deny Hubbard his right to present a complete defense.

¶12 The trial court correctly concluded Hubbard's proposed third-party-culpability evidence was irrelevant. *See* Ariz. R. Evid. 401. The state aptly points out that the charged acts occurred while E.L.'s father was in California for work. And, the alleged acts by E.L.'s father were reported to have taken place between August and September 2017, at least seven months after Hubbard had molested E.L., who plainly testified Hubbard had committed the charged acts and reported as much to her mother. Thus, the evidence purportedly showing that E.L.'s father also abused her was not relevant insofar as creating a reasonable doubt that Hubbard had committed the charged acts.[3] *See Goudeau*, 239 Ariz. 421, ¶ 163.

¶13 Further, even if Hubbard's proposed evidence demonstrated at any level that E.L.'s father had "opportunity, inclination and propensity" to commit the charged acts, its probative value would nonetheless have

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[2]His argument is clarified on reply: "[T]he fact that E.L.'s father molested her sometime after her claims made against [Hubbard] is indicative of her father's opportunity, inclination and propensity to molest, clouding the allegations relating to [Hubbard]."

[3]The allegations that E.L.'s father urinated outside with children nearby are also irrelevant.

been substantially outweighed by the danger of misleading the jury or confusing the issues. *See* Ariz. R. Evid. 403. The jury was not tasked with determining whether E.L.'s father had ever abused her. Rather, the jury's duty was to determine, beyond a reasonable doubt, whether Hubbard had molested her and twice contributed to her delinquency in January 2017. And, even if E.L.'s father committed the alleged abuse, those acts—along with any other possible instances of abuse by him—and Hubbard's crimes are not mutually exclusive. Thus, Hubbard's third-party-culpability evidence would have only served to lead the jury astray.

¶14 Moreover, the trial court's precluding this evidence did not deprive Hubbard of his right to present a complete defense. *See Alvarez*, 228 Ariz. 579, n.2; *Oliver*, 158 Ariz. at 30. And, finally, we acknowledge that even if the court applied an improper standard in deciding to preclude Hubbard's third-party-culpability defense, we may nonetheless uphold its ruling if it is "legally correct for any reason supported by the record." *State v. Moreno*, 236 Ariz. 347, ¶ 5 (App. 2014). Because this evidence would have been irrelevant and misleading, we find no error. *See* Ariz. R. Evid. 401; Ariz. R. Evid. 403.

Prosecutorial Error

¶15 Hubbard raises what are essentially two claims of prosecutorial error[4] involving the state's cross-examination of one of his character witnesses[5] and its closing argument. To prevail on this claim, Hubbard must show: "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [him] a fair trial." *State v. Smith*, 250 Ariz. 69, ¶ 138 (2020) (quoting *State v. Anderson*, 210 Ariz. 327, ¶ 45 (2005)).

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[4]We use the term "prosecutorial error" to refer to instances of alleged prosecutorial impropriety that do not implicate ethical rule violations. *In re Martinez*, 248 Ariz. 458, ¶ 47 (2020). Hubbard has not alleged any ethical violations here. *See State v. Bolton*, 182 Ariz. 290, 298 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim.").

[5] Hubbard does not characterize this claim as prosecutorial misconduct or error, and instead only argues the questioning resulted in constitutional violations and fundamental error. Nonetheless, we consider this claim as one of prosecutorial error. *See In re Martinez*, 248 Ariz. 458, ¶ 45 ("The term 'prosecutorial misconduct' broadly encompasses any conduct that infringes a defendant's constitutional rights.").

¶16 If the alleged instances of error were properly preserved below, we review for harmless error; otherwise, we only review for fundamental error. *See State v. Martinez*, 230 Ariz. 208, ¶ 25 (2012). "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." *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018) (emphasis omitted). Fundamental error under the first or second prong requires the defendant to demonstrate prejudice, meaning he "must show that absent the prosecutorial error, 'a reasonable jury could have [plausibly and intelligently] reached a different verdict.'" *Smith*, 250 Ariz. 69, ¶ 138 (alteration in *Smith*) (quoting *Escalante*, 245 Ariz. 135, ¶¶ 29, 31).

Cross-Examination of Character Witness

¶17 At trial, Hubbard called L.M. as a character witness. On cross-examination, the state asked him, "[A]re you aware of a time when Mr. Hubbard took a plane without authorization to fly?" After L.M. replied in the negative, the state asked, "Are you aware of a time when doing that he flew it with the lights off so that other people wouldn't know that he was flying the plane?" Again, L.M. indicated that he was not aware of any such incident. Hubbard did not object to this questioning.

¶18 On appeal, Hubbard claims "the State did not demonstrate a good faith belief" that he had committed the acts described.[6] He also contends these questions were "extremely inflammatory and prejudicial" and "may have effectively negated" his proffered testimony. Finally, Hubbard asserts the questions implied the state's "personal knowledge" of the alleged acts. Thus, he argues the cross-examination "deprive[d him of] a fair trial under the Fifth and Fourteenth Amendments [to] the United States Constitution and Article 2 § 24 of the Arizona Constitution."

¶19 The state counters that its questions were not improper and did not prejudice Hubbard. Specifically, citing Rule 405(a), Ariz. R. Evid., it claims it "was permitted to cross-examine [Hubbard's] character witnesses about their knowledge of 'relevant specific instances' of his conduct" for the purpose of demonstrating "that the witness was not sufficiently qualified to speak on Hubbard's character." Further, the state

[6]Hubbard does not mention Rule 42, ER 3.1, Ariz. R. Sup. Ct., which prohibits lawyers from making assertions without a good-faith basis in fact. *See In re Zawada*, 208 Ariz. 232, ¶ 6 (2004). Instead, to support this assertion, he relies on federal-circuit case law.

argues that because Hubbard did not object at trial, it did not have a chance to explain the basis for its questions, and thus any claim that they lacked sufficient support is "mere speculation." Lastly, the state posits that even if the questioning amounted to error, it was not fundamental error requiring reversal.

¶20 We need not decide whether Hubbard's lack of objection at trial makes determining the presence of the alleged error—that the state's questions lacked a sufficient basis—mere speculation. Even if Hubbard established prosecutorial error had occurred in these instances, it would not rise to the level of fundamental error. The alleged error here did not go to the foundation of Hubbard's case or take away "a right essential to his defense." *Escalante*, 245 Ariz. 135, ¶ 21. He had opportunities to examine at least five character witnesses in addition to L.M. Moreover, any error would not have been so egregious as to deprive Hubbard of a fair trial. *See id.* In both instances, L.M. denied knowledge of the alleged acts, and the state then shifted to a different subject. Finally, Hubbard has not established the jury could have reached a different verdict absent the alleged error. *See Smith*, 250 Ariz. 69, ¶ 138. Given L.M.'s answers, the state did not introduce evidence related to Hubbard's acts involving an airplane, and the jury was instructed to "find the facts from the evidence," which "consists of testimony of witnesses and exhibits." *See State v. Prince*, 204 Ariz. 156, ¶ 9 (2003) (jurors presumed to follow instructions).

Closing Argument

¶21 Hubbard also urges "the state's improper closing argument requires a reversal of [his] conviction." We consider two factors in deciding whether an argument constitutes prosecutorial error or misconduct: "(1) whether the prosecutor's statements called to the jury's attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks." *Goudeau*, 239 Ariz. 421, ¶ 196 (quoting *State v. Nelson*, 229 Ariz. 180, ¶ 39 (2012)). To properly preserve a claim of such impropriety, a defendant must bring it "to the attention of the trial court in a manner sufficient to advise the court that the [issue] was not waived." *State v. Briggs*, 112 Ariz. 379, 382 (1975). However, such an objection must have been specific to the issue raised on appeal. *See State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) ("[A]n objection on one ground does not preserve [an] issue on another ground.").

¶22 Below, Hubbard moved to preclude the state from introducing evidence of "an insufficient amount" of DNA found on victim E.L.'s right thigh. He argued that, under Rule 403, such evidence would be

unduly prejudicial, given the "great emphasis" jurors would likely place on it. At the motions hearing, the trial court denied Hubbard's motion, "subject to the discussion [the] Court and counsel had on the record . . . with regard to the limits of the testimony." Thus, the court effectively ruled that the state could not assert that because "there was male DNA on [E.L.'s] thigh, that [the jury], therefore, must conclude that . . . it was Mr. Hubbard's."

¶23 During closing, the state argued:

> [L]ook at the drawing that [E.L.] circled that was up here for you. Where [E.L.] circled on her thighs is exactly where the defendant's penis touched her. Then look at the part of the nurse's report where she circled where she took the swabs from. Exactly the same spot. And on that spot that [E.L.] said the defendant's slimy penis touched her, slightly damp, is where [the DNA analyst] found . . . exactly in that spot where [he] found male DNA.

Hubbard objected following the word "found," and the trial court overruled his objection. On rebuttal, the state further argued, "You have [E.L.'s] testimony[,] . . . [y]ou have corroboration from [other witnesses,] . . . [y]ou have it from [the DNA analyst]. Proof beyond a reasonable doubt. You have way more than that."

¶24 On appeal, Hubbard claims the state's argument, as recounted above, "was what the trial court had previously precluded." Specifically, he argues that "coupling" the DNA analyst's testimony "with the State's assertion of 'proof beyond a reasonable doubt'" left the jurors with the sole conclusion that the analyst's testimony was "proof beyond a reasonable doubt . . . that there was male DNA and that it was" Hubbard's. Further, Hubbard claims he preserved this issue for appeal. And, at any rate, he asserts the state's argument merits reversal under both harmless and fundamental error review. In response, the state claims its "statement was not improper," urging its assertions related to the DNA analyst's testimony and "proof beyond a reasonable doubt" were part of a larger argument showing that E.L.'s testimony had been corroborated and did not suggest that the DNA evidence was dispositive. Moreover, the state asserts Hubbard did not preserve this argument for appeal.

¶25 Assuming Hubbard properly preserved this issue for review, we nonetheless conclude that no prosecutorial error occurred in this instance. Primarily, misconduct was not present; that is, the prosecutor did not influence the jury with a precluded matter. *See Smith*, 250 Ariz. 69, ¶ 138; *Goudeau*, 239 Ariz. 421, ¶ 196. Taken in context, the state's assertion—"[p]roof beyond a reasonable doubt . . . [y]ou have way more than that"—refers to the purported cumulative effect of E.L.'s testimony and corroboration from other witnesses, including the DNA analyst. Thus, in conformance with the trial court's order, the state did not imply that the jury must conclude the DNA on E.L.'s thigh belonged to Hubbard.

Denial of Special Order

¶26 Hubbard also argues the trial court erred by denying his request for a special order allowing him to petition for commutation of his sentence. *See generally* A.R.S. § 13-603(L) (trial court at sentencing may, if it "is of the opinion that a sentence that the law requires the court to impose is clearly excessive," "enter a special order allowing the person sentenced to petition the board of executive clemency for a commutation of sentence"). We review this decision for an abuse of discretion.[7]

[7]The state claims the court's order is "essentially unreviewable on appeal" and urges us to determine if it was "arbitrary or capricious." We agree that there is a paucity of case law regarding the applicable standard of review for this issue. However, subsection (L) affords a trial court substantial discretion in whether to issue a special order, *see* § 13-603(L) (if court is "of the opinion that" sentence is excessive, it "may enter a special order"), and we generally review such decisions for an abuse of discretion, *see, e.g.*, *State v. Stanley*, 123 Ariz. 95, 107 (App. 1979) ("[S]entencing is within the sound discretion of the trial court, and a sentence will be upheld if it is within the statutory limits, unless there is a clear abuse of discretion."). In any event, based on our discussion below, we nonetheless also conclude the court did not act arbitrarily or capriciously in denying the request for a special order. *See generally Compassionate Care Dispensary, Inc. v. Ariz. Dep't of Health Servs.*, 244 Ariz. 205, ¶ 25 (App. 2018) (adjudicator acts arbitrarily and capriciously when it fails to inspect "the relevant [information] and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983))).

¶27 Following his guilty verdicts, Hubbard faced a total sentence of imprisonment between ten and twenty-five years. *See* A.R.S. §§ 13-1410(B), 13-705(D), 13-3613(A), 13-707(A). Before sentencing, he requested a special order under § 13-603(L). In his motion, Hubbard asserted he: had been offered a plea to one misdemeanor count with acknowledgment of sexual motivation; was nearing seventy-two years of age; had served in the armed forces; had no criminal record; suffered from high blood pressure; had family support, a stable residence, and a marriage of over fifty years; and had an "exemplary" work record. He also claimed the trial court had "heard testimony from [his] character witnesses as to his character traits of truthfulness, law-abidingness, and appropriate conduct around prepubescent girls."

¶28 At sentencing, the trial court denied Hubbard's motion. It then issued a ruling emphasizing § 13-603(L)'s language limiting it to sentences determined to be "clearly excessive." The court reasoned "[t]he nature of [Hubbard's] crime together with the potentially life-long effects on the victim, are so significant and so compelling that they preclude a finding by this Court that the sentence is 'clearly excessive.'" It also stated it was "unaware of a single successful argument that [Hubbard's] statutory penalty is 'clearly excessive' or otherwise violates the 8th Amendment [to] the United States' Constitution."

¶29 On appeal, Hubbard argues "the trial court should have applied a subjective rather than an objective analysis," focusing more on his "particulars" as an individual. Specifically, he reiterates many of the attributes that, below, he argued entitled him to a petition for clemency. The state, however, underscores the nature and effects of Hubbard's offenses—including "molestation of a 7-year-old child by a trusted adult"—and argues the ruling "was wholly within the court's discretion and fully supported by the record." We agree.

¶30 Here, the trial court presided over the entire trial that led to Hubbard's convictions, which resulted from his sexual abuse of his seven-year-old neighbor, before ruling on his motion for a special order. And, as stated above, Hubbard provided the court with the reasons he believed he was entitled to a clemency petition. Nonetheless, given its stated reasoning, the court did not abuse its discretion in concluding the required punishment was not "clearly excessive" and denying Hubbard's motion for a special order pursuant to § 13-603(L). *See State v. Riley*, 248 Ariz. 154, ¶ 7 (2020) ("An abuse of discretion occurs when 'the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice.'" (quoting *State v. Chapple*, 135 Ariz. 281, 297 n.18 (1983))).

Restitution

¶31 Finally, Hubbard challenges the trial court's award of restitution. We review this order for an abuse of discretion and "view the evidence bearing on a restitution claim in the light most favorable to sustaining the court's order." *State v. Lewis*, 222 Ariz. 321, ¶ 5 (App. 2009).

¶32 Following a conviction, a trial court "may order that all or any portion of the fine imposed be allocated as restitution to be paid by the defendant to any person who suffered an economic loss caused by the defendant's conduct." A.R.S. § 13-804(A). Economic loss "is defined as 'any loss incurred by a person as a result of the commission of an offense,' including 'losses that would not have been incurred but for the offense.'" *State v. Leal*, 248 Ariz. 1, ¶ 12 (App. 2019) (quoting A.R.S. § 13-105(16)). Accordingly, to be recoverable, "the [economic] loss must be one that the [claimant] would not have incurred but for the criminal conduct, and . . . the criminal conduct must [have] directly cause[d] the economic loss." *Id.* (quoting *State v. Madrid*, 207 Ariz. 296, ¶ 5 (App. 2004)). Nonetheless, restitution cannot reimburse "consequential damages that are too attenuated from the crime." *Id.* (quoting *State v. Linares*, 241 Ariz. 416, ¶ 9 (App. 2017)). "The state has the burden of proving a restitution claim by a preponderance of the evidence." *Lewis*, 222 Ariz. 321, ¶ 7.

¶33 After Hubbard's sentencing, the state filed a motion and supplemental motion for restitution, requesting reimbursement of E.L.'s parents and the CVCF for lost wages and travel costs for attending court proceedings and transporting E.L. to counseling and interviews related to the investigation, as well as realtor costs for selling the family's home. Hubbard, in response, argued any restitution should be "limited to [the] economic losses incurred as a result of [his] third trial" in this case in order to avoid reimbursement for costs related to the mistrials. He also implied the state had not met its burden of proof because it failed to show the counseling costs were not "directed to the trauma suffer[ed] by E.L. as a result of her father's untoward conduct." The trial court granted the requested restitution except for the realtor's fees.

¶34 On appeal, Hubbard essentially restates his claims in protest of the restitution award.[8] In response, the state asserts that whether some

[8]This includes Hubbard's plain statements: "No documentation had been provided . . . to support whether or not overtime hours were needed or why. No prior employment or pay records had been provided to determine if [the employer of E.L.'s father] routinely approves overtime

of the expenses were related to the first two trials is immaterial because each trial itself was a "direct result" of Hubbard's criminal activity. The state also claims "the fact that [E.L.] was in counseling at all was because of Hubbard's crime, and the expenses were caused by his conduct."

¶35 Again, § 13-804(A) gives the trial court broad authority to order restitution for "economic loss caused by the defendant's conduct." Accordingly, the requested costs in this case fit the encompassing definition of "economic loss." Moreover, E.L. and her family members would not have attended *any* such court proceedings but for Hubbard's criminal conduct. And, as this court has observed, E.L.'s, and therefore her parents', attendance at these court proceedings is a compensable and "direct result" of the underlying criminal activity. *State v. Lindsley*, 191 Ariz. 195, 199 (App. 1997); *see In re Erika V.*, 194 Ariz. 399, ¶¶ 7-8 (App. 1999) (victim's parents entitled to restitution for lost wages incurred while accompanying victim to medical appointments and court proceedings); *Madrid*, 207 Ariz. 296, ¶¶ 3, 10. Thus, on its face, the economic loss at issue was compensable. Further, we agree that the loss's relation to the first, second, or third trial is immaterial. Hubbard has not cited, and we are not aware of, binding authority providing otherwise.

¶36 Hubbard's claim that the costs related to E.L.'s counseling did not arise from his crime, but instead arose from the alleged misconduct of E.L.'s father, is similarly unpersuasive. Viewing the evidence "in the light most favorable to sustaining the court's order," we decline to assume E.L.'s counseling resulted from conduct other than Hubbard's crimes. *Lewis*, 222 Ariz. 321, ¶ 5. Therefore, we find no error in the restitution order.

Disposition

¶37 For the foregoing reasons, we affirm Hubbard's convictions and sentences, as well as the restitution order.

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hours." To the extent he claims these factors contributed to the trial court's alleged error in granting restitution, any such argument is waived for lack of development. *See* Ariz. R. Crim. P. 31.10(a)(7)(A); *Bolton*, 182 Ariz. 290, 298.