IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SERGIO ALFREDO BERNAL,
Appellant.

No. 2 CA-CR 2020-0037
Filed June 21, 2021

Appeal from the Superior Court in Santa Cruz County
No. CR19003
The Honorable Thomas Fink, Judge

AFFIRMED

COUNSEL

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

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E S P I N O S A, Presiding Judge:

¶1 Sergio Bernal appeals from his convictions and sentences for sexual abuse and sexual assault. He argues the trial court erred by asking the victim a juror's question and permitting the state's follow-up, denying his motion for judgment of acquittal, and denying his request for presentence psychological and psychosexual evaluations. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Gunches*, 225 Ariz. 22, n.1 (2010). On December 15, 2018, Tina[1] crossed the border between Mexico and the United States with the help of paid smugglers, "coyotes," and was taken to a trailer in Nogales, Arizona. Tina was instructed not to leave the trailer and to answer only to a specific nickname. Around 2:00 a.m., Bernal entered the trailer, addressed Tina by the nickname, and grabbed her breasts. He then, and over the course of two days at the trailer, twice "force[d] [her] to perform oral sex on him," twice "raped" her by forcing "[h]is penis into [her] vagina," and "raped [her] on the back" by sticking "his penis in [her] anus."

¶3 After being transported in a vehicle that was detained at an immigration checkpoint, Tina was questioned about some visible bruising and reported the sexual assaults to a border patrol agent and then a Nogales Police Department detective. She had injuries to her right cheek, both breasts, "acute tenderness and pain to palpations to the anus" and vulva, "consistent with blunt-force trauma." Bernal's DNA was found on Tina's right breast and underwear, but DNA testing was inconclusive as to vaginal and anal swabs.

[1]In this decision, we use the same pseudonym as the state has in its answering brief. *See* Ariz. R. Crim. P. 31.10(f) (requiring substitute victim identifier when defendant charged with certain offenses).

¶4 At trial, following opening statements, but before the presentation of testimony, Tina disclosed that on the morning before she first encountered Bernal, she had been sexually assaulted in Mexico. Tina briefly testified about this event, explaining that while waiting in a vehicle to meet with someone about crossing the border, she was "raped" at gunpoint by a man related to the coyote who had arranged for her crossing. She explained she did not report it sooner because she had been afraid for her family's safety.

¶5 Following the jury trial, Bernal was convicted of one count of sexual abuse and five counts of sexual assault. The jury also found statutory aggravators proven. The trial court sentenced Bernal to a combination of consecutive and concurrent sentences totaling 140 years' imprisonment. We have jurisdiction over Bernal's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Admission of Jury Question

¶6 Bernal first contends the trial court erred by "allowing an irrelevant and prejudicial juror question and follow up question" from the jury and prosecutor respectively. At the end of Tina's testimony, a juror submitted the question, "Since December 2018, when the formal investigation of this case began, has anyone from either the coyote or the mafia group contacted you, your son or members of your family, including your barber relative?" Bernal did not object, and Tina answered, "Yes, they have tried to get a hold of me. One day they followed us and we had to move to a different home. And they always wanted me to talk to them." The state then asked, "The juror asked you if you'd had any other contact with the coyotes. Could you tell us what happened when you crossed the border last night?" The court overruled Bernal's objection that the question was "not a follow-up question to a juror question," and Tina answered,

> When I go every night, when I go back, I send the location to my son because he waits for me one block before the coyotes—one block before where the coyotes are located. And then last night . . . . I bumped into [the coyote]. I didn't know what to do, I froze. He didn't tell me anything either, he just kind of tried to recognize me, sort of. And I looked for my son. I got a taxi cab and then we immediately left the place.

Bernal subsequently asked whether she thought "it was just an accidental meeting when you bumped into the coyote," and Tina responded, "Yes, as a matter of fact, they knew that I was no longer in Nogales because I told my relative to tell them that I had already left, and he was also surprised to see me."

¶7 First, as Bernal acknowledges, he failed to object to the juror question, and our review is therefore limited to fundamental error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). In such a review, if trial error exists, we must determine, based on the totality of the circumstances, whether the error was fundamental. *Id.* ¶ 21. "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.* If the defendant establishes fundamental error under prongs one or two, he must make an additional showing of prejudice. *Id.*

¶8 Bernal asserts the question "tended only to show that [he] was involved with an illegal organization" engaged in human smuggling, which was fundamental error because "it relieved the [state] of its burden and violated [his] right to have a trial by an impartial jury," and deprived his right to a fair trial by focusing the jury "on a prejudicial fact not relevant to [his] guilt or innocence." The state argues the question was relevant to Tina's credibility "by tending to show that she was legitimately frightened of [the coyotes or mafia] which went to the reasons behind why she kept her initial sexual assault in Mexico a secret until the beginning of trial," a point with which Bernal attacked Tina's credibility. The state further contends that "any hypothetical error cannot be characterized as 'fundamental' because it did not go to the heart of Bernal's defense or deprive him of a fair trial."

¶9 We agree with the state that the juror question was relevant and not unduly prejudicial. *See State v. Mosley*, 119 Ariz. 393, 401 (1978) ("Generally, any evidence that substantiates the credibility of a prosecuting witness on the question of guilt is material and relevant, and may properly be admitted."); *see also* Ariz. R. Evid. 401 (Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and the fact "is of consequence in determining the action."); Ariz. R. Evid. 403 (court may exclude relevant evidence if probative value is substantially outweighed by danger of unfair prejudice, confusing the

issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence).

¶10 Notably, and contrary to Bernal's suggestion, the question and Tina's answer did not call the jury's attention to information it did not already have. Before the question was asked, jurors had already heard both that Bernal was involved with those who transported Tina into the United States and that she had subsequent contact with them. The state, without objection, explained in its opening statement that Bernal was "working for the people who had brought [Tina] across the border and smuggled her into the United States," and Bernal agreed that the state's "narrative of the evidence" was "by and large" true, except that he denied committing the assaults. Tina testified that Bernal had used the nickname she was told by the coyotes to answer to and told her he was there "to take care of" her. And, before the juror's question, Bernal asked Tina at trial if she had had further contact from the people who smuggled her, and Tina answered that "they were looking for" her. *See State v. Williams*, 133 Ariz. 220, 226, 229 (1982) (erroneous admission of "merely cumulative" evidence harmless, particularly if point not in dispute).

¶11 Moreover, the state never suggested or argued Bernal was guilty of the charged offenses because of his involvement with any illegal organization, nor did it mention any connection between Bernal and the smugglers in closing argument; rather, the prosecutor highlighted the evidence concerning the sexual assaults, primarily Tina's credibility and the DNA evidence. *Cf. State v. Romero*, 240 Ariz. 503, ¶ 8 (App. 2016) (courts consider whether evidence is cumulative of similar evidence already received and whether evidence is relied on in closing argument in harmless-error analysis). On this record, we cannot say the trial court committed any error, let alone fundamental error, by posing the jury question.[2]

¶12 Bernal also claims the state's follow-up question was "irrelevant" and "confused the issues in the case." Although he contends our review of this claim should be for harmless error because he objected at

[2] We reject Bernal's claim that allowing jurors to ask questions violated his "right to be tried by an impartial jury." Juror questions are permitted pursuant to Rule 18.6(e), Ariz. R. Crim. P., and the procedure has long been held constitutional in Arizona. *See State v. Greer*, 190 Ariz. 378, 380 (App. 1997) ("Rule 18.6(e) does not offend a defendant's constitutional right to an impartial jury.").

trial, his objection was not on the grounds he now raises on appeal. *See State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) (objection on one ground does not preserve issue on another ground). Accordingly, we review this question for fundamental error as well. *See Escalante*, 245 Ariz. 135, ¶ 12.

¶13 Bernal contends the state's follow-up question "only reflected on [his] bad character" and "was targeted directly at a specific recent event with the clear intention of highlighting the victim's current circumstances to elicit the sympathy of the jury." The state counters that "any theoretical error by the trial court in permitting [its] follow-up was rendered harmless by the defense's follow-up question," which asked whether Tina believed running into the coyote was an accident, to which Tina responded, "Yes." Thus, to the extent the state's question elicited sympathy for Tina or reflected on Bernal's bad character, we agree it was ameliorated by the defense's follow-up question and Tina's answer, indicating that the occurrence was purely coincidental. For that reason and the reasons stated above regarding the initial jury question, Bernal has not met his burden of demonstrating fundamental error. *See id.* ¶ 21.

Denial of Motion for Judgment of Acquittal

¶14 Bernal next argues the trial court erred by denying his motion for judgment of acquittal on counts three, four, and six made at the close of the state's case-in-chief. We review the court's ruling de novo. *State v. West*, 226 Ariz. 559, ¶ 15 (2011). Rule 20(a)(1), Ariz. R. Crim. P., provides that after the close of evidence, "the court must enter a judgment of acquittal on any offense charged in an indictment . . . if there is no substantial evidence to support a conviction." Substantial evidence is that which a reasonable juror could accept as sufficient to support a conclusion of guilt beyond a reasonable doubt. *State v. Fulminante*, 193 Ariz. 485, ¶ 24 (1999). On appeal, "the 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." *State v. Cox*, 214 Ariz. 518, ¶ 8 (App. 2007) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶15 Counts three, four, and six alleged that Bernal committed sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact without Tina's consent by inserting his penis in Tina's vagina (counts three and six) and inserting his penis in Tina's anus (count four). *See* A.R.S. § 13-1406(A). Bernal maintains the evidence was insufficient "because the DNA evidence collected from the victim's vagina and anus did not match" him and "[n]o proof was presented that [he]

penetrated the victim's vulva or anus." Tina testified in some detail, however, that on consecutive nights, Bernal did both.

¶16 It is well established that a victim's testimony alone may be sufficient to support a conviction for sexual assault. *See State v. Williams*, 111 Ariz. 175, 177-78 (1974) (uncorroborated testimony of victim is sufficient to sustain sexual abuse conviction "unless the story is physically impossible or so incredible that no reasonable person could believe it"); *State v. Verdugo*, 109 Ariz. 391, 393 (1973); *State v. Navarro*, 90 Ariz. 185, 189 (1961) ("conviction may be had under the law of Arizona upon the testimony of the prosecuting witness alone, and the truth of her story is for the jury" (quoting *Zavala v. State*, 39 Ariz. 123, 126 (1931))). Tina's account of the assaults was not impossible, and the nurse who had treated Tina testified that her injuries were consistent with her description of being sexually assaulted by Bernal. The nurse also explained why Bernal's DNA might not be found on the vaginal or anal swabs. And, significantly, Bernal's DNA *was* found on Tina's breast and in her underwear.

¶17 Bernal further claims the evidence was insufficient because Tina "was only able to see her assailant briefly by the light of his cell phone or cigarette lighter." But Tina positively identified Bernal, and his argument goes to the weight of Tina's testimony and her credibility, both areas outside our purview and firmly within the province of the jury. *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38 (App. 2013) ("It is not the province of an appellate court to reweigh evidence or reassess the witnesses' credibility."); *see also State v. Lee*, 189 Ariz. 590, 603 (1997) ("When the evidence supporting a verdict is challenged on appeal, an appellate court will not reweigh the evidence."). The state presented sufficient evidence that Bernal committed the sexual assaults as charged in counts three, four, and six of the indictment. *See* § 13-1406(A). Accordingly, the trial court did not err in denying Bernal's motion for judgment of acquittal.

Denial of Presentence Evaluation

¶18 Lastly, Bernal claims the trial court erred by denying his requests for psychological and psychosexual evaluations in advance of sentencing to determine the presence of mitigating conditions. Rule 26.5, Ariz. R. Crim. P., provides that before sentencing, the trial court "may order the defendant to undergo a mental health examination or diagnostic evaluation." Bernal requested both evaluations because his pretrial competency evaluation pursuant to Rule 11.2, Ariz. R. Crim. P., had revealed "his overall intellectual functioning is very possibly at a level that would be a mitigating factor when it comes to sentencing." The court

denied the request, noting that two independent Rule 11 reports "are available to the court and parties for sentencing purposes," Bernal had not alleged that his condition "has materially changed since the prior psychological examinations," no basis was provided for the psychosexual evaluation, and the victim's right to a speedy resolution outweighed "the marginal benefit of ordering another round of psychological assessments." We review the court's ruling for an abuse of discretion resulting in substantial prejudice to the defendant. *See State v. Williams*, 183 Ariz. 368, 381 (1995).

¶19 "In cases presenting this issue, we have found an abuse of discretion only when the record before the trial court indicated that a presentence mental health exam may well have produced additional evidence supporting mitigation." *Id.* Bernal has not demonstrated he was substantially prejudiced by the trial court's denial of his request. Although he claims further evaluations would produce mitigation, he does not explain how that mitigation would differ from or add to what was contained in his sentencing memorandum and previous evaluations. Bernal asserts that *State v. Eastlack*, 180 Ariz. 243 (1994), "in which the [Arizona Supreme] Court ruled failing to allow an expert to report on potentially mitigating psychological conditions was an abuse of discretion, is factually similar to this case." We disagree. In *Eastlack*, our supreme court remanded for resentencing because the record contained many "red flags" suggesting that further examination might have produced mitigating evidence, including that the defendant used cocaine hours before he committed double murder, had symptoms of antisocial personality disorder, and the defendant's mother—a practicing psychologist—testified that her son was psychologically impaired and might have brain lesions or neurological problems. 180 Ariz. 243, 263-64.

¶20 In contrast to *Eastlack*, the record here lacks any such "red flags" and contains only evidence that Bernal in the past had suffered a traumatic head injury and is in the low range for IQ and intellectual function, and no evidence that he was impaired by other substances when committing the offenses. That information was contained in the Rule 11 reports, and because Bernal had not claimed that his condition or any circumstances had changed since the Rule 11 evaluations, those reports were adequate and additional examination was not reasonably required. *See Williams*, 183 Ariz. at 381 ("court should exercise its discretion in favor of an examination when it finds that it needs more information to determine whether a mitigating factor might exist"). Moreover, in making its discretionary sentencing determination, the trial court explicitly considered Bernal's prior evaluations and "all of the contents of the file" before finding

that the aggravating factors substantially outweighed "any mitigating factors in this case."

¶21 Bernal also argues the trial court improperly considered the victim's right to a speedy trial in denying his request for further evaluations. But he provides no support for his contention that the court may not consider the impact on the victim when deciding whether to grant such requests. Neither Rule 26.5, Ariz. R. Crim. P., nor the case law interpreting the rule defines or limits the trial court's considerations in determining whether an evaluation is warranted. *See, e.g.*, *Williams*, 183 Ariz. at 381; *State v. Clabourne*, 142 Ariz. 335, 346-47 (1984). Rather, whether to order an evaluation is discretionary with the trial court. *Williams*, 183 Ariz. at 381. But even if such a consideration were improper, we note it was only one factor in the court's rationale. The court also determined that Bernal had not provided "any particular basis for psychosexual evaluation," the record already detailed Bernal's "past medical and behavioral histories," and Bernal had not alleged any material change in his condition. Under these circumstances, we see no abuse of the court's discretion.

Disposition

¶22 For all of the above reasons, Bernal's convictions and sentences are affirmed.