IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RONALD WAYNE BRAGONIER,
Appellant.

No. 2 CA-CR 2020-0242
Filed February 9, 2022

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201703343
The Honorable Jason R. Holmberg, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Michael F. Valenzuela, Assistant Attorney General, Phoenix
Counsel for Appellee

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Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Chief Judge Vásquez concurred and Judge Brearcliffe specially concurred.

E P P I C H, Presiding Judge:

¶1 Ronald Bragonier appeals from his convictions and sentences for four counts of child molestation and one count of sexual conduct with a minor. On appeal, he asserts that the trial court erred in admitting other-act evidence and cold expert testimony, and that cumulative prosecutorial error denied him the right to a fair trial. For the following reasons, we affirm Bragonier's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts, resolving all reasonable inferences against Bragonier. *State v. Felix*, 237 Ariz. 280, ¶ 2 (App. 2015). When E.J. was thirteen years old, Bragonier, a close family friend, molested him during a sleepover at Bragonier's home. At another sleepover at Bragonier's home, he masturbated E.J. During a third sleepover, Bragonier brought E.J. to an unoccupied house and engaged in sexual conduct with him. He was charged with four counts of molestation of a child and one count of sexual conduct with a minor. The jury found Bragonier guilty of all charges, and the trial court subsequently sentenced him to consecutive sentences totaling eighty-eight years. This appeal followed. We have jurisdiction over Bragonier's appeal pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Other-Acts Evidence

¶3 Bragonier first argues that the trial court erred by admitting evidence of his other uncharged acts committed against E.J., pursuant to Rule 404(c), Ariz. R. Evid. We review a ruling on the admissibility of other-act evidence for an abuse of discretion, which occurs if the trial court makes an error of law in reaching its decision. *State v. Vega*, 228 Ariz. 24, ¶¶ 6, 8 (App. 2011).

¶4 Before trial, the state moved to admit evidence of other acts of sexual abuse it alleged Bragonier had committed against E.J. outside of the prosecuting county. Bragonier objected, and at his request, the court held an evidentiary hearing. The state relied on three pieces of evidence: a recording of E.J.'s forensic interview in which he disclosed both the charged conduct and the uncharged acts; a series of text messages between E.J. and Bragonier; and DNA test results. In response, Bragonier argued the trial court could not properly weigh E.J.'s credibility because the state had not offered E.J. as a witness subject to cross-examination at the hearing. He further argued it would be unfairly prejudicial and confusing for the jury to hear both charged and uncharged conduct occurring within a six-month time frame, forcing him to defend against uncharged conduct at trial.

¶5 The trial court found the other-acts evidence to be admissible because (1) the state had presented sufficient evidence for a jury to find the acts had occurred by clear and convincing evidence, (2) the other acts would "give a reasonable basis to infer the defendant had a character trait giving rise to sexual propensity . . . for [E.J.] in particular," and (3) the probative value was not substantially outweighed by unfair prejudice. In admitting the evidence, the court twice stated that it had found E.J.'s forensic interview to be "very compelling."

¶6 If a defendant is charged with a sexual offense, Rule 404(c) permits evidence of his other crimes, wrongs, or acts to be admitted "if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." This can include evidence of a "similar sex offense committed against the same child." *State v. Ferrero*, 229 Ariz. 239, ¶¶ 11-13, 24 (2012) (quoting *State v. Garner*, 116 Ariz. 443, 447 (1977)). Such evidence is only admissible if a trial court makes three determinations: first, "that clear and convincing evidence supports a finding that the defendant committed the other act"; second, that the other act "provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the charged sexual offense"; and third, that the evidentiary value of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403, Ariz. R. Evid. *State v. Aguilar*, 209 Ariz. 40, ¶ 30 (2004); *see* Ariz. R. Evid. 404(c)(1). In making the third determination, a court must also "take into consideration" additional, non-exhaustive factors enumerated under Rule 404(c)(1)(C). Finally, the court must make "*specific* findings" with respect to each of the three determinations; this "mandates some specific indication of why the trial

court found those elements satisfied." *Aguilar*, 209 Ariz. 40, ¶¶ 30, 36; *see* Ariz. R. Evid. 404(c)(1)(D).

¶7 On appeal, Bragonier contends the trial court abused its discretion by failing to make adequate findings as to its third determination: that the probative value was not substantially outweighed by "undue prejudice and confusion." "The trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice" and therefore has broad discretion in its decision. *State v. Harrison*, 195 Ariz. 28, ¶ 21 (App. 1998). We view evidence in the "light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *Id.* (quoting *State v. Castro*, 163 Ariz. 465, 473 (App. 1989)).

¶8 The record here reflects the trial court made specific findings that the probative value of the evidence was not substantially outweighed by a danger of unfair prejudice. The court stated it found the forensic interview "very compelling" regarding Bragonier's "sexual propensity not just for every child but for [E.J.] in particular" and the evidence was "not substantially outweighed by unfair prejudice."

¶9 Even assuming, without deciding, that the trial court needed to make an additional finding that the probative value of the evidence was not substantially outweighed by confusion of issues, and failed to do so, such an error could be harmless if the record contains "substantial evidence that the requirements of admissibility were met." *Aguilar*, 209 Ariz. 40, ¶ 37. At the evidentiary hearing, the court considered whether there was a danger of the jury confusing the issues if the state presented other uncharged acts that allegedly occurred in the same time period. It ultimately disagreed with Bragonier's assertion that the other-act evidence would result in confusion of the issues because Rule 404(c) permits the jury to consider such evidence to show a defendant's propensity to commit the charged offenses. The court further considered whether jurors would be confused by the standards of proof. Although the court did not return to the issue of juror confusion in making its findings at the conclusion of the hearing, it is clear from this record that the other-acts evidence "did not pose a substantial danger of . . . confusion of the issues," and therefore any failure to make a specific finding was harmless error. *Vega*, 228 Ariz. 24, ¶¶ 17, 21, 24.

¶10 The trial court also made findings on relevant Rule 404(c)(1)(C) considerations. Specifically, it found: the acts had occurred within a six-month time period, "very close in time with the charged acts,"

see Rule 404(c)(1)(C)(i) ("remoteness of the other act"); the acts were similar to the charged acts, *see* Rule 404(c)(1)(C)(ii) ("similarity or dissimilarity of the other act"); the number or frequency of the other acts was "not overwhelming," *see* Rule 404(c)(1)(C)(iv) ("frequency of the other acts"); there were no relevant intervening events, *see* Rule 404(c)(1)(C)(vi) ("relevant intervening events"); and E.J.'s disclosure was "very compelling," *see* Rule 404(c)(1)(C)(iii) ("the strength of the evidence that defendant committed the other act"). The court's determination that the probative value of the other-acts evidence was not substantially outweighed by Rule 403 considerations is supported by specific findings and the record, and, thus, no reversible error occurred.

¶11 To the extent Bragonier argues the trial court erred by "almost exclusively [relying] on [E.J.'s] forensic interview," he cites no authority to suggest that Rule 404(c) requires the court to hear live testimony. It "is not this court's place to read such a requirement into the rule."[1] *State v. LeBrun*, 222 Ariz. 183, ¶ 14 (App. 2009).

Prosecutorial Error

¶12 Bragonier next contends his convictions should be reversed because several instances of prosecutorial error cumulatively resulted in an unfair trial. Prosecutorial misconduct "broadly encompasses any conduct that infringes a defendant's constitutional rights," from inadvertent error to intentional misconduct.[2] *In re Martinez*, 248 Ariz. 458, ¶ 45 (2020). In a cumulative error claim, we first assess each individual claim of prosecutorial error, reviewing objected-to claims for harmless error and

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[1]Bragonier had the opportunity to challenge the reliability of forensic interviews at the evidentiary hearing but did not. *Cf. State v. Speers*, 209 Ariz. 125, ¶¶ 11-12, 25 (App. 2004) (expert testimony regarding suggestive interviewing techniques admissible at trial to rebut victim testimony). The trial court observed that Bragonier did not present expert testimony despite the hearing being "on the books for a long time," telling him, "[Y]ou didn't subpoena anyone. You didn't subpoena your own expert."

[2] Our supreme court recently instructed courts to distinguish between "error" and "misconduct." *In re Martinez*, 248 Ariz. 458, ¶ 47 (2020). Prosecutorial error describes conduct that infringes on a defendant's constitutional rights but does not necessarily implicate "a prosecutor's ethical culpability." *Id.* ¶¶ 45, 47. Bragonier does not allege, nor do we reach, the issue of whether the prosecutor's conduct is ethically culpable.

unobjected-to claims for fundamental error. *State v. Hulsey*, 243 Ariz. 367, ¶ 88 (2018). Because we conclude that there was only one instance of improper prosecutorial argument, and that it was harmless error, we need not reach Bragonier's cumulative error claim. *See State v. Thompson*, No. CR-19-0141-AP, ¶ 85, 2022 WL 165928 (Ariz. Jan. 19, 2022).

Irrelevant Questioning

¶13 During the prosecutor's direct examination of A.S., Bragonier's long-time girlfriend, she asked about forensic interviews conducted with A.S. and Bragonier's two children. Bragonier objected twice on relevance grounds. The trial court sustained the objections, cautioning the prosecutor that given the earlier expert testimony on forensic interviews, the jury could think "there might have been some other allegation." The prosecutor then clarified with A.S., "there were no allegations that [Bragonier] did anything to [his children], correct," and asked, "[w]as it just done with the purpose of finding out what [they] knew about [Bragonier's] relationship with [E.J.]?" A.S. confirmed that this was correct. Shortly after, the prosecutor asked A.S. how her life had changed following Bragonier's indictment. Bragonier again objected on relevance grounds, and the court sustained the objection.

¶14 On appeal, Bragonier argues these lines of questioning were irrelevant and solely intended to bring out "highly prejudicial evidence." A prosecutor should not raise irrelevant and prejudicial matters in her questioning, but "[d]etermination of whether a particular action is [error] depends . . . on the circumstances of the particular case." *Pool v. Superior Court*, 139 Ariz. 98, 102-03 (1984) ("[s]uggestion by question or innuendo of unfavorable matter" that is irrelevant and not in evidence can constitute prosecutorial error).

¶15 Here, the trial court sustained Bragonier's objections. The prosecutor promptly responded to the court's concerns regarding any misapprehensions the jury might have held by eliciting testimony from A.S. that the children had been interviewed solely regarding E.J.'s allegations. Later in the trial, during her examination of the lead detective, the prosecutor again confirmed that "there is nothing about this investigation involv[ing] [Bragonier] doing something to his own children." This questioning is distinguishable from prosecutorial misconduct that arises if a prosecutor intentionally disregards a court by re-asking questions after proper objections are sustained. *See id.* at 102 (prosecutor's immediate repetition of irrelevant and prejudicial questions after sustained objections

was improper). Here, the prosecutor's questioning was not prosecutorial error.

Improper Comment in Rebuttal Argument

¶16 During trial, Bragonier testified he had a leg deformity resulting from an injury. In closing argument, Bragonier's counsel questioned why E.J. had not described the leg deformity if he had seen Bragonier naked, arguing that "[E.J.] had no knowledge of the leg deformity." The prosecutor then argued in rebuttal that Bragonier had not presented sufficient evidence of the leg deformity.[3]

¶17 The prosecutor, again in rebuttal, also addressed Bragonier's explanation for his sperm being found in two locations corresponding to where E.J. had testified abuse occurred. Bragonier had explained that he had sexual encounters with a woman, other than A.S., who had performed oral sex on him. The prosecutor argued that if Bragonier had received oral sex from a woman, as he had testified, her DNA would likely have been found. He suggested to the jury that Bragonier had denied having vaginal intercourse with the woman because the DNA results would not have supported that claim. In making this argument, the prosecutor said Bragonier had testified the affair consisted of seven or eight sexual encounters.

¶18 On appeal, Bragonier asserts the prosecutor "manufactured" and argued facts not in evidence in his rebuttal argument. During closing arguments, "[p]rosecutors are given 'wide latitude,'" *State v. Murray*, 250 Ariz. 543, ¶ 18 (2021) (quoting *State v. Goudeau*, 239 Ariz. 421, ¶ 196 (2016)), and they may "summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions," *State v. Bible*, 175 Ariz. 549, 602 (1993). "It is well settled that a 'prosecutor may properly comment upon the defendant's failure to present exculpatory evidence,'" as long as it is not improper comment on a failure to testify. *State v. Edmisten*, 220 Ariz. 517, ¶ 26 (App. 2009) (quoting *State v. Herrera*, 203 Ariz. 131, ¶ 19 (App. 2002)). But counsel may not refer to evidence not in the record. *State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 71 (2018). To determine if this has occurred, we

[3]The state was represented by two prosecutors; the prosecutor who presented the rebuttal closing argument was not the same prosecutor who gave the closing argument and conducted the cross-examination of Bragonier.

analyze "whether the remarks called improper matters to the jury's attention," and must determine, "the probability under the circumstances that the improper remarks influenced the jury's verdict." *Id.* (quoting *State v. Roscoe*, 184 Ariz. 484, 496-97 (1996)).

¶19 Here, the prosecutor's comments did not call improper matters to the jury's attention. The comment on Bragonier's leg deformity suggested to the jury that Bragonier had not adequately proven the deformity. It was not improper for the prosecutor to comment on the weight of the evidence supporting Bragonier's argument. *See Edmisten*, 220 Ariz. 517, ¶ 26 (state allowed to comment on defense's failure to present potentially exculpatory evidence to which defendant had access). And expert testimony established that only one DNA profile had been found, Bragonier's. Therefore, the prosecutor could urge the jury to draw the reasonable inference that Bragonier's sexual partner's DNA should also have been present if his story was true, and that he had tailored his story to fit the evidence. *See Bible*, 175 Ariz. at 602.

¶20 Although the prosecutor may have misstated the number of sexual encounters Bragonier testified to, seven or eight, instead of five or six, this did not draw the jury's attention to an improper matter. Furthermore, during rebuttal, both the prosecutor and the trial court reminded the jury that what lawyers say is not evidence. In sum, we do not identify prosecutorial error in these instances.

Improper Comment on the Right to Remain Silent

¶21 Following E.J.'s disclosure of the sexual abuse, Bragonier was arrested and interviewed by detectives. At some point, he invoked his right to remain silent, although the record is not developed specifically as to when. As described above, at trial, Bragonier testified he had engaged in a sexual affair with a woman other than A.S., who had performed oral sex on him, resulting in the presence of his sperm in two locations corresponding to where E.J. had disclosed abuse occurred. Bragonier's sperm DNA was found on a bedspread in an unoccupied house where he had acted as caretaker and on a towel that had been stored in his car—Bragonier testified that he had cleaned up after ejaculation using the towel. On cross-examination, Bragonier stated the woman had the same first name as A.S., but he did not know her last name, her phone number, or how to get a hold of her, and he could not identify a call from her in his phone records. During closing arguments, the prosecutor stated,

> [Prosecutor:] [Bragonier's] defense changed a couple of times too, but it was mystery A[ ] number 2.
>
> He doesn't know her last name. He doesn't know her phone number. He never told anyone about her. And he never told [E.J.]. That is the most important person. He never told [E.J.] about her. He couldn't tell us, he didn't describe to us what she looked like. All we know is that he met her like something to do with a tire and they then started hooking up and she always initiated that call, but doesn't know her last name, he knows that [the lead detective] is capable of finding people, but we heard publically for the first time—
>
> [Defense counsel:] Objection, that was sustained.
>
> [Court:] That is sustained.
>
> [Prosecutor:] It was.
>
> [Court:] Go ahead. Continue.
>
> [Prosecutor:] We heard publically for the first time about A[ ], mystery lady number 2 here in court. It never came out before that. It makes no sense.

¶22 On appeal, Bragonier contends that this argument was an improper comment on his silence.[4] If an arrested person has received a

[4]During her cross-examination of Bragonier, the prosecutor questioned him on whether he had told police about the affair. On appeal, Bragonier does not assert that the cross-examination was erroneous, and we therefore only review the closing argument for error. *See State v. Vargas*, 249 Ariz. 186, ¶¶ 13, 14 (2020) (when raising a claim of cumulative prosecutorial misconduct, appellant must "cite to the record where the alleged instances of misconduct occurred"); *see also* Ariz. R. Crim. P. 31.10(a)(7) ("for each issue," opening brief must include "references to the record on appeal where the issue was raised and ruled on"). We discuss the cross-

Miranda warning and chooses to remain silent,[5] it is a violation of due process to use that silence to "impeach an explanation subsequently offered at trial." *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976). "[S]ilence at the time of arrest is not an inconsistent or contradictory statement," but rather the exercise of a constitutional right that all defendants "must enjoy without qualification." *State v. Anderson*, 110 Ariz. 238, 241 (1973).

¶23 The state does not claim Bragonier did not receive the *Miranda* warnings. Instead, it argues the prosecutor's comments might have referred to Bragonier's post-arrest but pre-*Miranda* silence and therefore were proper under *Fletcher v. Weir*, 455 U.S. 603, 607 (1982). But the lead detective testified that police had placed Bragonier under arrest and transported him to the station and that she had interviewed him there. *See State v. Zamora*, 220 Ariz. 63, ¶ 10 (App. 2009) (if state wishes to admit statement made by defendant in response to its custodial questioning, police are required to provide *Miranda* warning of constitutional right to remain silent). The prosecutor referred to the lead detective by name when referring to Bragonier's silence, and it was therefore unambiguous that her comment referred to the post-arrest, custodial interrogation. Moreover, in sustaining Bragonier's objection, the trial court ruled the prosecutor's argument was improper comment on his post-arrest silence, explicitly noting outside of the presence of the jury that the argument was "on the invocation of silence . . . and we are not going to have anymore arguments like that." *See State v. Williams*, 220 Ariz. 331, ¶ 9 (App. 2008) (we presume the court knows and follows the law). Given that he was arrested and subject to custodial interrogation, Bragonier had a constitutional right that his silence would not be used against him at trial. *See Doyle*, 426 U.S. at 617-18.

¶24 A prosecutor should refrain from repeating an argument if it has been the subject of a sustained objection. *State v. Gallardo*, 225 Ariz. 560, ¶ 44 (2010). The prosecutor previously drew three sustained objections for improper comment on Bragonier's right to remain silent during her cross-examination:

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examination below only to the extent that it informs our analysis as to the context of the offending argument.

[5]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[Prosecutor:] [T]he first time we heard about this mystery woman that you had an affair with publically is here today in court, correct?

[Defense counsel:] Objection, Your Honor, implies a—

[Court:] Rephrase.

[Prosecutor:] Have you publically told anyone about this affair before today?

[Bragonier:] My lawyers from day one.

[Prosecutor:] Aside from her, have you out in the open talked about the affair?

[Bragonier:] No, ma'am.

[Prosecutor:] You know [the lead detective], she is a detective who works at the police station, correct?

[Bragonier:] Yes, ma'am.

[Prosecutor:] Did you ever ask her?

[Defense counsel:] Objection Your Honor.

[Court:] Sustained.

[Prosecutor:] She works at the police department, correct?

[Bragonier:] Yes, ma'am.

[Prosecutor:] Would you believe that she would have the ability to look for people?

[Bragonier:] Yes, ma'am.

. . . .

[Prosecutor:] Your attorney could have provided me with information on who the—

[Bragonier:] Objection, Your Honor?

[Prosecutor:] Mystery woman was, correct?

[Court:] Sustained.

The prosecutor's closing argument thus both disregarded earlier rulings and violated Bragonier's constitutional right that his silence would not be used against him.

Harmless Error

¶25 Bragonier objected to this error, stating "that was sustained." Because he did not state the grounds of his objection, and as explained above, the trial court understood the prosecutor's comments to be improper comment on invocation of silence, it is not clear that his objection adequately preserved his claim of prosecutorial error on appeal. *See State v. Rutledge*, 205 Ariz. 7, ¶ 30 (2003) (objection on burden shifting grounds did not preserve claim for prosecutorial misconduct). However, even assuming, without deciding, that Bragonier adequately preserved this claim, the error here was harmless. *See State v. Hamilton*, 177 Ariz. 403, 409 (App. 1993) (assuming without deciding that an issue was preserved).

¶26 It is the state's burden in harmless-error review to demonstrate beyond a reasonable doubt that a particular error did not contribute to or affect the verdicts. *State v. Escalante*, 245 Ariz. 135, ¶ 30 (2018). The state contends the error was harmless because it was "a brief part" of the closing argument and, following the objection, the prosecutor "moved away from the argument." Bragonier counters that the error was not harmless because the case was a "credibility contest" between him and E.J.

¶27 Use of a defendant's post-arrest silence at trial is "clearly proscribed by the law." *State v. Downing*, 171 Ariz. 431, 434-35 (App. 1992). "[A] prosecutor's remarks carry special prestige," *State v. Dansdill*, 246 Ariz. 593, ¶ 31 (App. 2019), and our supreme court has exhorted prosecutors to "refrain from venturing even close to commenting on a defendant's exercise of the significant rights protected by the Fifth Amendment," *State v. Parker*, 231 Ariz. 391, ¶ 68 (2013). Our courts are reluctant to conclude error is harmless in cases of explicit and intentional remarks on a defendant's silence, *State v. Sorrell*, 132 Ariz. 328, 330 (1982), and where the error is repeated in closing argument, it can contribute to a finding that the error

was not harmless, *see Dansdill*, 246 Ariz. 593, ¶¶ 60, 62.[6] But we consider, in context, how the prosecution uses a defendant's post-arrest silence. *See id.* ¶ 61. We will not reverse a conviction only to deter future prosecutorial misconduct. *State v. Cornell*, 179 Ariz. 314, 328 (1994).

¶28 We are mindful that it is not our role to render judgment about witness credibility. *See State v. Cid*, 181 Ariz. 496, 500 (App. 1995). Nevertheless, our assessment of whether this error is likely to have affected the verdicts requires us to consider the relative strength of the evidence absent error. *See Bible*, 175 Ariz. at 588 ("we consider the error in light of all of the evidence"). Here, the state's evidence included E.J.'s testimony of the abuse, which contained graphic detail; DNA evidence of Bragonier's sperm; "angry" and profane text messages from Bragonier to E.J. persistently asking to spend time with E.J. and to know of his whereabouts; evidence that Bragonier had engaged in excessive gift-giving and spent significant time with E.J. while excluding his own children; and cold expert testimony educating the jury on the behavioral characteristics of sexually abused children. The DNA evidence corroborated E.J.'s testimony to the extent it showed that Bragonier had engaged in sexual conduct in two places where E.J. described abuse occurring: on a bed in an unoccupied house, as well as in Bragonier's car, where E.J. testified Bragonier had used a towel to clean himself after ejaculation.

¶29 Although Bragonier's explanation for the discovery of his DNA—the result of illicit trysts with a woman who he had no way of contacting, who has the same first name as his long-time girlfriend but whose last name is unknown to him, and who initiated their rendezvous by phoning him—is not entirely beyond the realm of possibility, we have no doubt that the typical juror would find it implausible, especially given the absence of any corroborating records of phone calls between the two. The prosecutor effectively and thoroughly impeached Bragonier's story through proper means, such that her improper closing argument could not have affected the verdicts.

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[6]Because the prosecutor specifically referred to Bragonier's failure to tell police about the affair, her improper argument was an explicit reference to his decision to invoke his right to remain silent during police questioning. It was also repetitive, as it followed three sustained objections on the same grounds. We therefore disagree with the state's categorization of the comment as "brief" and isolated.

¶30 More importantly, the state argued that there was no way E.J. could have known Bragonier's sperm would be on the towel and bedspread unless E.J. was truthful. Bragonier testified that he never told E.J. about the affair with the other woman. It strains credulity to conclude that E.J., if fabricating his allegations, would happen to identify the two locations, including a towel in Bragonier's car, as the very same places where Bragonier's sperm DNA would be found.

¶31 The state additionally asserts the error was harmless, in part, due to the trial court's instructions to the jury. We assume jurors follow their instructions. *State v. Newell*, 212 Ariz. 389, ¶ 68 (2006). Here, the court provided the jury with instructions including that lawyers' statements in opening and closing arguments are "not evidence, but . . . may help you understand the law and the evidence." The court also instructed the jurors to disregard questions to which objections had been sustained and refrain from guessing what the answer might have been. These instructions further helped mitigate any potential harm from the prosecutor's improper comments. *See id.* ¶¶ 67-69.

¶32 The state also argues that any harm was reduced because Bragonier responded to the improper comment during his closing argument. We agree that Bragonier's counsel attempted to rehabilitate him, explaining he had told her about the affair and it was normal not to "publically advertise" an affair. But we need not estimate the effectiveness of his counsel's rehabilitation in curing any negative inference the jury may have drawn from the prosecutor's improper comments because the state's thorough impeachment of Bragonier's explanation for his DNA and the implausibility of his defense make the error harmless. We are convinced beyond a reasonable doubt that the prosecutor's comments on Bragonier's post-arrest silence did not contribute to or affect the jury's verdicts.

Cold Expert Testimony

¶33 Lastly, Bragonier contends the trial court erred by admitting testimony of the state's cold expert, Dr. Wendy Dutton.[7] We review a court's decision to admit expert testimony for an abuse of discretion. *See State v. Haskie*, 242 Ariz. 582, ¶¶ 11-12 (2017).

[7] A "cold" expert is an expert witness who testifies without any knowledge of the facts in the case at hand. *See State v. Haskie*, 242 Ariz. 582, ¶ 5 (2017).

¶34 Before trial, Bragonier filed a motion to suppress or limit testimony by Dutton, who he anticipated would testify on "the general characteristics of sexual abuse victims, the symptoms exhibited by sexual abuse victims and the process of victimization." He argued that Dutton's testimony would "indirectly, and improperly" comment on E.J.'s credibility. The court ruled the testimony was admissible as long as Dutton did not say "this person acted that way and therefore they are a victim."

¶35 At trial, the state called Dutton as its first witness, immediately preceding testimony from E.J. Consistent with her role as a cold expert, Dutton testified that she had not reviewed the case file, did not know who the victim was, and had never read or discussed the facts of the case. She testified generally about the range of children's biological reactions to abuse, how children's developing brains remember and cope with the trauma of sexual abuse, and "victimization," which she described as "the events that lead up to sexual abuse and its aftermath."

¶36 On appeal, Bragonier contends the trial court's denial of his motion to suppress was error because cold expert testimony regarding child sexual abuse victims improperly bolsters a victim's credibility, and that Dutton's testimony in fact improperly bolstered E.J.'s credibility. He also asserts, for the first time, that Dutton's testimony improperly provided perpetrator profile evidence that the jury could have relied on as substantive evidence of guilt.

Victim Credibility

¶37 Bragonier argues that Dutton bolstered E.J.'s credibility because her testimony "prepared" the jury to "ignore inconsistencies and contradictions in his testimony." He also argues the state further bolstered E.J.'s credibility when it connected Dutton's testimony about the general, common patterns of abuse, to the specific facts of his case.

¶38 Direct expert testimony on the question of a particular witness's credibility is not permitted. *State v. Lindsey*, 149 Ariz. 472, 474-75, 477 (1986). However, courts "cannot assume the average juror is familiar with the behavioral characteristics of victims of child molesting." *Id.* at 473-74. Thus, Rule 702, Ariz. R. Evid., generally permits the admission of cold expert testimony in order to educate the fact-finder about the "behavioral characteristics of child sexual abuse victims without offering opinions about the particular children in the case." *State v. Salazar-Mercado*, 234 Ariz. 590, ¶ 19 (2014). Such testimony may be excluded under Rule 403

if its probative value is substantially outweighed by a danger of unfair prejudice. *Id.* ¶ 20.

¶39 Bragonier relies on *State v. Lindsey* to argue that cold expert testimony on this subject can improperly bolster a child victim's credibility. 149 Ariz. at 475. There, the supreme court concluded trial courts should not admit expert testimony that directly opines on the accuracy, reliability, or credibility of a witness or that quantifies the probabilities of the credibility of a witness, which equates to "expert testimony on how the jury should decide the case." *Id.* at 474-75, 477. But the expert in *Lindsey* was not a cold expert and directly opined on the credibility of the victim in that case. *Id.* at 474. Thus, *Lindsey* is inapposite to this case because Dutton did not offer direct testimony as to E.J.'s credibility. Our supreme court has repeatedly held that cold expert testimony such as Dutton's is permitted.[8] *See, e.g.*, *Haskie*, 242 Ariz. 582, ¶ 16 (cold expert testimony explaining victim's inconsistent behavior is admissible "to aid jurors in evaluating the victim's credibility"); *see also Lindsey*, 149 Ariz. at 474 (knowledge of behavioral characteristics of child sexual molestation victims may aid jury in weighing credibility); *State v. Moran*, 151 Ariz. 378, 382 (1986) (expert testimony on general behavioral characteristics admissible even if it may "harm [a] defendant's interests" because it allows the jury to "fairly judge credibility").

¶40 Bragonier identifies numerous instances in Dutton's testimony that he alleges were improper because they aligned with E.J.'s behavior and his delayed and piecemeal disclosure of the abuse, but cold expert testimony on the range of behavioral characteristics of sexually abused children is permissible. *See Salazar-Mercado*, 234 Ariz. 590, ¶ 19. That elements of Dutton's testimony fit precisely with E.J.'s conduct reflects the testimony's relevance to explaining victim behavior. *See State v. Ortiz*, 238 Ariz. 329, ¶ 16 (App. 2015) (that facts of disclosure fit precisely what Dutton described "aided the jury in understanding" why victim behaved

[8]Bragonier relies extensively on case law from other jurisdictions. To the extent he cites these cases to assert that cold expert testimony should be wholly inadmissible as a matter of policy in Arizona, we cannot reach that conclusion. *See State v. Healer*, 246 Ariz. 441, ¶ 12 (App. 2019) ("This court is bound by decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions." (quoting *State v. McPherson*, 228 Ariz. 557, ¶ 13 (App. 2012))).

as she did). Because Dutton did not opine directly on E.J.'s credibility, her testimony on victim behavior was properly admitted.

¶41 Some of the statements in Dutton's testimony that Bragonier alleges improperly bolstered E.J.'s credibility, instead concern perpetrator behavior, an issue he separately raises on appeal. We therefore review those statements for improper perpetrator profile testimony.

Perpetrator Profile Testimony

¶42 Bragonier contends the state used Dutton's testimony to develop a perpetrator profile, which it then used to "argue [he] was guilty" of the charged offenses. We conclude this testimony was not admitted in error, with one limited exception that we review for fundamental, prejudicial error because he did not object below.

¶43 At trial, Dutton described victimization as a five-stage process of victim selection, engagement, grooming, assault, and concealment. On appeal, Bragonier observes that his conduct aligned with significant portions of Dutton's testimony as to how perpetrators engage and groom child victims, and conceal abuse. He further argues the state improperly used the testimony on victimization as a framework for describing his conduct in its closing argument, thereby arguing that he fit the profile of a perpetrator.

¶44 Cold expert testimony may not offer perpetrator "'profile' evidence as substantive proof of the defendant's guilt." *Haskie*, 242 Ariz. 582, ¶¶ 12, 15. "Profile evidence tends to show that a defendant possesses one or more of an 'informal compilation of characteristics or an abstract of characteristics typically displayed by persons' engaged in a particular kind of activity." *State v. Ketchner*, 236 Ariz. 262, ¶ 15 (2014) (quoting *State v. Lee*, 191 Ariz. 542, ¶ 10 (1998)). It presents the "risk that a defendant will be convicted not for what he did but for what others are doing." *Id.* (quoting *Lee*, 191 Ariz. 542, ¶ 12).

¶45 Expert testimony that describes typical perpetrator behaviors or characteristics, but is also relevant to assisting jurors understand victim behavior, "is not categorically inadmissible." *Haskie*, 242 Ariz. 582, ¶¶ 20, 26. It may be admitted, subject to Rule 403, if it primarily serves the purpose of explaining victim behavior that is at issue. *Id.*; *State v. Starks*, 251 Ariz. 383, ¶ 12 (App. 2021) (testimony must be "relevant for a reason other than to suggest that the defendant . . . may have committed the charged crimes" (quoting *Haskie*, 242 Ariz. 582, ¶ 17)). A trial court should "consider the

prejudicial effect of the expert's testimony as a whole, as well as that of each individual statement," to determine whether the "[e]vidence describing the characteristics of offenders, even as part of a description of victim behavior," could imply that a particular defendant is guilty. *Haskie*, 242 Ariz. 582, ¶¶ 24-25.

Testimony on "Engagement" and "Grooming"

¶46 Bragonier contends that Dutton's testimony on "engagement" and "grooming" improperly described a perpetrator profile that matched his conduct. The state counters that Dutton's testimony appropriately "addressed how a child becomes a victim and the ways that the process impacts the child's behavior." At trial, the prosecutor asked Dutton to explain the stages of victimization, including "engagement,"

> [Dutton:] Engagement refers to how, quite often, perpetrators will develop a relationship with the victim before the abuse begins, either a special relationship, or relationship of power and control.
>
> . . . .
>
> But for children who are abused by somebody outside the immediate family, it's not unusual for children to report that the perpetrator did or said things to develop a relationship of trust with their parent or parents, and to develop a special relationship with the child.
>
> And, quite often, children report things like being given gifts, being complimented on how smart they are, how attractive they are, how they wished they had a son or daughter just like them.
>
> They might give the child extra privileges, or treat them more special, single them out. They might help the parent out with things like odd jobs, or financial assistance, or babysitting, or those kinds of things, to further develop a relationship with a parent as well.

> Now, other children report that perpetrators will engage by developing a relationship of power and control . . . . [M]ay be taking over discipline of the children in the home and becoming overly harsh or abusive in physical discipline. And the result for the child could be that they could be very intimidated or fearful of the perpetrator.
>
> [Prosecutor:] Other than being intimidated or fearful, how else might this engagement behavior by the offender affect the child?
>
> [Dutton:] Well, the more seductive type of . . . giving gifts, compliments, treating the child special, can certainly encourage the child to develop a bond or sense of loyalty and love to the perpetrator.

The prosecutor also asked, "What is grooming?" She responded in part:

> Grooming refers to how children often report that perpetrators will introduce physical contact and sexuality into the relationship . . . . Things like wrestling games, tickling, horseplay . . . . [F]or the child, this can certainly make them feel special, and loved, and cared for, and further strengthen that bond they feel with the perpetrator.
>
> . . . .
>
> Other children report that perpetrators introduce sexuality into the relationship by . . . exposing them to . . . pornography.

E.J. subsequently testified that Bragonier had made him feel special by singling him out for attention and buying him gifts,[9] had wrestled with him and engaged in other horseplay, and had exposed him to pornography.

¶47 Bragonier argues Dutton's testimony here was "substantially similar" to her testimony in *State v. Starks*. 251 Ariz. 383. In *Starks*, we concluded that Dutton's testimony was improper profile evidence because both the questioning and testimony "focused on the behavior of perpetrators and lacked the larger context of victimization." *Id.* ¶ 21. The state's questioning and the responses elicited "invited the jury to find [the defendant] guilty" because the defendant's alleged actions aligned with common perpetrator behavior. *Id.* ¶ 18.

¶48 However, Dutton's testimony here is distinguishable from that in *Starks*. Here, the prosecutor framed the questioning, contextualizing it in the process of victimization, asking Dutton to explain "engagement" and "grooming." The prosecutor then connected both back to victim behavior by asking how each affects a child victim. This connection was lacking in *Starks*, where the state asked Dutton what strategies perpetrators use to build relationships with a victim, without "attempt[ing] to explain any victim behavior." *Id.* ¶¶ 16, 22 (error where questioning and testimony lacked the context of victimization).

¶49 Further, in *Starks*, Dutton's explanation of her role as a cold expert was "minimal," and we therefore distinguished it from *Ortiz*, 238 Ariz. 329, another case from this court. 251 Ariz. 383, ¶ 19. Here, as in *Ortiz*, Dutton explained that she preferred not to know the facts of the case so that she did not "purpose[ly] or inadvertently, tailor [her] testimony to fit the facts of the case." *See* 238 Ariz. 329, ¶ 20. The prosecutor also subsequently reminded the jury in her closing argument that Dutton, "came in here and knew nothing about the facts of this case and talked to you about general concepts."

¶50 Dutton clearly testified as a cold expert, and her description of perpetrator behavior was relevant to explaining victim behaviors and properly placed in the context of victimization. *See Haskie*, 242 Ariz. 582, ¶¶ 20, 25; *Starks*, 251 Ariz. 383, ¶ 21. Accordingly, there was no error in her testimony on the engagement and grooming phases of victimization.

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[9]For example, the lead detective testified Bragonier had given E.J. gifts of diecast cars totaling an estimated $3,660 in value.

Testimony on Where Abuse Occurs

¶51 Bragonier also points to a series of questions in which the prosecutor asked Dutton if she was familiar with abuse occurring in certain situations—where other people were nearby or in the same room, in isolated areas away from others, and in "a variety of different places." He argues that Dutton's response was identical to her testimony in *Starks*, which we concluded was improper. *See* 251 Ariz. 383, ¶ 18 (state asked if perpetrators commonly abuse victims with others present in the home to which Dutton responded, "quite often"). However, here, the prosecutor did not inquire into how prevalent such situations are but instead asked Dutton if she was familiar with such scenarios. She then asked how abuse in that location can impact the child. This tethers the question and the testimony to the relevant subject of child-victim behaviors. *See Haskie*, 242 Ariz. 582, ¶¶ 19-20. It is only a short exchange at the end of this line of questioning that was unconnected to victim behavior—

> [Prosecutor:] Are you familiar with cases where the same child victim has been abused in a variety of different places?
>
> [Dutton:] It's not unusual for children to report that.
>
> [Prosecutor:] So some of the places could be isolated, some of them could be with others nearby?
>
> [Dutton:] It could. Yes.

The trial court erred in allowing this limited exchange of questioning and testimony because it was untethered to victim behavior.

¶52 Bragonier acknowledges that he did not object to the erroneously admitted testimony for improper perpetrator profiling, thereby forfeiting review for all but fundamental error. Accordingly, he must establish "both that fundamental error exists and that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005).

¶53 A defendant establishes fundamental error if he can show, "(1) the error went to the foundation of the case, (2) the error took from [him] a right essential to his defense, *or* (3) the error was so egregious that

he could not possibly have received a fair trial." *Escalante*, 245 Ariz. 135, ¶ 21. Error under the first two *Escalante* prongs requires a separate showing of prejudice; meaning Bragonier must show that absent the error, "a reasonable jury could have plausibly and intelligently returned a different verdict." *Id.* ¶¶ 21, 31. A defendant establishing the third prong has shown both error and prejudice. *Id.* ¶ 21.

¶54 Bragonier has not met his burden of showing fundamental, prejudicial error. The error was not so egregious that it precluded him from receiving a fair trial. *See id.* ¶ 20. (third prong requires "error must so profoundly distort the trial that injustice is obvious without the need to further consider prejudice"). Therefore, assuming, without deciding, there was fundamental error, Bragonier must show prejudice to establish reversible error, *see id.* ¶ 21, and he has failed to do so. The unspecific nature of the testimony rendered it of so little use to the jury that it could not have "plausibly and intelligently" changed the verdicts. *Id.* ¶ 31. The innocuous nature of Dutton's response did not tell the jury "how [it] should decide the case." *Lindsey*, 149 Ariz. at 475. We have also considered the strength of the other evidence, *see Escalante,* 245 Ariz. 135, ¶ 34, discussed thoroughly above. On this record, we find no prejudice, and therefore, no reversible error.

State's Closing Argument as Improper Profiling

¶55 Having concluded Dutton's testimony did not result in reversible error, we turn to Bragonier's assertion that the prosecutor's use of her testimony in the closing argument improperly suggested "that [he] fit the profile of someone who sexually abuses children." In closing argument, the prosecutor reminded the jury of the elements of Dutton's testimony that matched E.J.'s behavior and used her testimony on the stages of victimization as a narrative framework to describe Bragonier's conduct and the sexual abuse. But "counsel may comment on and argue all inferences which can reasonably be drawn from the evidence adduced at trial." *State v. Woods*, 141 Ariz. 446, 454 (1984). Because Dutton's testimony appropriately focused on explaining victim behavior and characteristics, the prosecutor could draw reasonable inferences to connect E.J.'s delayed, piecemeal disclosure of the abuse, and perhaps counterintuitive behavior, to Dutton's testimony to explain such behavior. We see no error in the state's use of Dutton's testimony in its closing argument.

Disposition

¶56 For the foregoing reasons, we affirm Bragonier's convictions and sentences.

B R E A R C L I F F E, Judge, specially concurring:

¶57 Although I fully concur in the reasoning and result above, I write separately to depart from the characterization of the facts of *State v. Starks*, 251 Ariz. 383 (App. 2021), as discussed in paragraph 48, and its conclusion as to portions of the expert testimony in paragraph 51, above.

¶58 In its discussion of the satisfactory connection between Dr. Dutton's testimony as to "engagement" and "grooming" and victim behavior, the decision states that "[t]his connection was lacking in *Starks*, where the state asked Dutton what strategies perpetrators use to build relationships with a victim, without 'attempt[ing] to explain any victim behavior.'" (alteration in original). As pointed out by the dissent in *Starks*, Dutton's testimony in that case all bore on victim behavior, namely that victim's delayed reporting and indirect means of reporting the abuse. *Id.* ¶¶ 59-62 (Brearcliffe, J., dissenting).

¶59 I further disagree with the conclusion in paragraph 51, above, that Dr. Dutton's testimony as to victims reporting abuse that occurs "in a variety of different places" was erroneously admitted, although I agree that no prejudice resulted from it. Dutton testified that child abuse victims may "freeze" if the abuse occurs in a public place for fear of public embarrassment or of creating "a scene." She further testified that, if the abuse occurs in an isolated place, child victims "might feel like they have no place to run or turn to for help." Finally, Dutton was asked if she was "familiar with cases where the same child victim has been abused in a variety of different places," and she responded that "[i]t's not unusual for children to report that." Each question was directed at how victims react to abuse in light of where the abuse occurs. Although the prosecutor did not wrap up this line of questioning by asking Dutton if the same child might react the same way—that is, by not screaming for help, for example—despite the abuse occurring in a variety of different locations, that was clearly the implication of the testimony. And it was certainly helpful to the jury to understand why this victim did not immediately report the abuse irrespective of where the abuse allegedly occurred. I disagree, therefore, with the conclusion above that this testimony was "profile evidence" or insufficiently tethered to an explanation of victim behavior.