IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSEPH TROY ALEXANDER ARMENTA,
Appellant.

No. 2 CA-CR 2021-0024
Filed August 31, 2022

Appeal from the Superior Court in Gila County
No. S0400CR201900375
The Honorable David E. Wolak, Judge Pro Tempore

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

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa[1] authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

E S P I N O S A, Judge:

¶1 Joseph Troy Alexander Armenta appeals from his convictions and sentences for two counts of child molestation and four counts of sexual conduct with a minor. Armenta challenges the trial court's denial of "his request for a continuance to substitute private counsel for appointed counsel," the preclusion of certain evidence, the denial of his motion for a judgment of acquittal, and the denial of his motion for a new trial. For the following reasons, we affirm Armenta's convictions and sentences.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the jury's verdicts, resolving all reasonable inferences against Armenta. *See State v. Gill*, 248 Ariz. 274, ¶ 2 (App. 2020). When S.A. was around ten years old, Armenta began engaging in various sexual acts with her. In July 2019, Tanya, Armenta's then spouse, reported to police that Armenta had sexually abused S.A. The next day, officers interviewed Armenta, and he made numerous admissions regarding sexual acts with S.A., beginning when she was ten years old. At the conclusion of the interview, officers arrested Armenta, and he was subsequently indicted for two counts of child molestation and four counts of sexual conduct with a minor.[2]

¶3 Following a four-day jury trial, Armenta was found guilty on all six counts, and the trial court sentenced him to two concurrent twenty-four-year terms of imprisonment, to be followed by four consecutive life

[1]The Hon. Philip G. Espinosa, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

[2]At trial, count one—which initially stated Armenta had engaged in sexual contact with S.A.'s genitals and caused S.A.'s hand to rub his penis over his clothes—was amended to clarify that the charged conduct was only the latter allegation.

sentences. Armenta appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Right to Counsel of Choice

¶4 Armenta first contends the trial court violated his right to counsel under the Sixth Amendment to the United States Constitution and article II, § 24 of the Arizona Constitution by denying his request for a continuance to substitute counsel. Armenta appears to simultaneously challenge the court's denial of his appointed counsel's motion to withdraw and the denial of his request to substitute counsel, each of which we review for an abuse of discretion. *See Coconino Cnty. Pub. Def. v. Adams*, 184 Ariz. 273, 275 (App. 1995) (motion to withdraw); *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 8 (App. 2007) (denial of motion to substitute).

¶5 "It is axiomatic that an accused enjoys the right to assistance of counsel for his defense," including the right to be represented by counsel of his choice. *State v. Hein*, 138 Ariz. 360, 368 (1983). However, "the right to choice of counsel is not absolute nor is there a right to repeated continuances to hire new counsel." *State v. West*, 168 Ariz. 292, 296 (App. 1991). As such, a trial court has "wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar." *State v. Aragon*, 221 Ariz. 88, ¶ 5 (App. 2009) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006)). In contrast, a court's "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to counsel of one's choice. *Id.* (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)).

¶6 Whether the denial of a continuance to substitute counsel violates a criminal defendant's Sixth Amendment right to counsel depends on the circumstances of the case. *Id.* To determine whether the court erred, we consider:

> whether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory.

Id. (quoting *Hein*, 138 Ariz. at 369). If a defendant's right to be represented by counsel of their choice is wrongfully denied, "it is unnecessary to

conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation" because "[d]eprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." *Gonzalez-Lopez*, 548 U.S. at 148.

¶7 Shortly after the grand jury had indicted Armenta, the trial court appointed counsel to represent him. Almost fourteen months later, an attorney Armenta had privately retained filed a notice of appearance and a request to substitute for Armenta's appointed counsel. The state opposed the request, noting that appointed counsel had not moved to withdraw in compliance with Rule 6.3(c)(2)(A), Ariz. R. Crim. P.[3] The state argued that Armenta's proffered counsel could not be prepared for trial and was intending to file numerous motions as a "ruse" to continue the trial date.

¶8 On November 2, 2020, Armenta's appointed counsel moved to withdraw, stating that Armenta had apparently lost trust in her ability to defend him and that if she was required to continue representing him, she was requesting a continuance because she was also unprepared for the scheduled trial date. At a hearing that day, Armenta's privately retained counsel acknowledged he was not prepared for the scheduled trial date, nor could he be prepared if he was granted a short continuance, and requested that the trial be continued until "no earlier than February" 2021. The state again opposed Armenta's request for a continuance, as did the victim's attorney, citing the victim's right to a speedy trial under article II, § 2.1(A)(10) of the Arizona Constitution and A.R.S. § 13-4435. The trial court ultimately denied appointed counsel's motion to withdraw and ruled that the motion to substitute was moot. At a subsequent hearing, the court granted a short continuance until December 15, 2020, to give Armenta's appointed counsel more time to prepare for trial.

[3]The trial date had been set when the notice and request to substitute was filed, which avowed only that privately retained counsel would be "prepared for the next scheduled Court date," but was silent as to whether counsel would be prepared for trial. Rule 6.3(c)(2)(A) provides that appointed counsel may not withdraw after a case has been set for trial unless she files a motion with "a signed statement from the new counsel that acknowledges the trial date and avows that the new counsel will be prepared for trial." When appointed counsel subsequently moved to withdraw, her motion did not include that avowal.

¶9 On November 12, 2020, Armenta filed a pro se motion, again requesting to substitute counsel. He asserted that his appointed counsel had "not been able to fully and fairly represent" him and had failed to "adequately and in a timely manner" communicate with him regarding his defense. He further argued that his counsel was too busy with her caseload to adequately represent him. Armenta's motion emphasized that he faced significant penalties if convicted and felt that his counsel was "overworked and overwhelmed," such that she was unable to provide the "individualized representation" required for his case.

¶10 At a hearing on December 3, 2020, the trial court denied Armenta's pro se motion, pointing out that "almost a year and a half" had elapsed since Armenta was indicted, the trial had already been continued four times, and Armenta's privately retained counsel had twice said he would not be prepared for trial. The court further stated that Armenta's appointed counsel, who had represented him essentially since his indictment, was "extremely experienced," "ha[d] done considerable work on this case," and "ha[d] never indicated to this Court that she [wa]s so overworked that she c[ould]n't adequately represent [him]."

¶11 On appeal, Armenta contends the trial court erred in denying his motions because he had "legitimate reasons" for seeking substitution and it was not an effort to delay the proceedings. He argues the court's denial was based solely upon "procedural rules and apparent trial readiness of appointed counsel" and his right to counsel was violated when "he was erroneously prevented from being represented by the counsel he wanted." We disagree.

¶12 As previously noted, the right to be represented by counsel of choice is not absolute, and the trial court has broad discretion in balancing that right against the needs of fairness and the demands of its calendar. *Gonzalez-Lopez*, 548 U.S. at 152; *Aragon*, 221 Ariz. 88, ¶ 5. Here, as noted by the trial court, Armenta's trial date had already been reset four times and fifteen months had elapsed between his indictment and appointed counsel's motion to withdraw. Further, the court's and the attorneys' calendars were busy, and Armenta's counsel of choice had repeatedly stated he was unprepared for trial. On the other hand, Armenta's appointed attorney had represented him for sixteen months, had done considerable work on his case, was prepared for trial, was found by the court to be an experienced lawyer, and had never stated that she was too busy to provide adequate representation. Additionally, the victim opposed any further continuances and invoked her right to a speedy trial. Thus, the court's denial of Armenta's motions was well justified, rather than an

"'unreasoning and arbitrary' adherence to its schedule without due regard" for Armenta's right to counsel of his choosing.[4] *See Aragon*, 221 Ariz. 88, ¶ 9 (quoting *Morris*, 461 U.S. at 11-12); *West*, 168 Ariz. at 296-97 (no error in denial of continuance to substitute counsel when several previous continuances, defendant in jail for eight months, and preferred attorney could not assure preparedness for trial).

Preclusion of Evidence

¶13 Armenta next asserts the trial court erred by precluding evidence "of S.A.'s independent knowledge of sexual matters under A.R.S. § 13-1421 and . . . when it failed to engage in a balancing test to determine whether there would be . . . constitutional violation[s] if the evidence were precluded." He maintains the court erred by disallowing evidence that S.A. had been "previously shown pornographic images [by someone else] and witnessed her natural parents engaging in sexual acts."[5] Armenta contends that such evidence does not fall within the purview of § 13-1421 and that the court's error in excluding it was prejudicial because it would have permitted the jury "to conclude the basis for S.A.'s knowledge of sexual matters was not because . . . Armenta committed the crimes charged, but because of her prior exposure to pornographic images and sexual acts." Armenta argues the preclusion of this evidence violated his right to present a complete defense. He further contends it eliminated his ability to argue

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[4]Armenta also contends the four continuances of his trial date were "primarily due to the COVID-19 pandemic" rather than attributable to him or his attorneys. However, which party the prior continuances were attributable to is not a component of the test to determine whether a defendant's right to counsel of their choice was violated. *See Aragon*, 221 Ariz. 88, ¶ 5. The test only considers, among other factors, "whether other continuances were granted." *See id.* (quoting *Hein*, 138 Ariz. at 369). Moreover, he does not cite to the record or provide authority supporting the proposition that this would entitle him to the relief he seeks. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (opening brief must contain citations to authority and the record to support contentions). We therefore find this issue waived.

[5]On appeal, Armenta does not challenge the trial court's ruling precluding evidence that S.A. was previously molested by another person other than Armenta pursuant to § 13-1421. As such, any claim of error has been waived. *See State v. Vargas*, 249 Ariz. 186, ¶ 22 (2020) (when appellant fails to properly develop argument, court may consider it abandoned and waived).

that S.A. fabricated her allegations and that he had disclosed fabrication as a defense.

¶14 "We review the trial court's decision to exclude evidence for abuse of discretion." *State v. Burns*, 237 Ariz. 1, ¶ 91 (2015) (quoting *State v. Villalobos*, 225 Ariz. 74, ¶ 33 (2010)). In this instance, however, even were we to assume the court abused its discretion, any error would be harmless. *See, e.g.*, *State v. Poyson*, 198 Ariz. 70, ¶¶ 21-22, 60 (2000) (objected to error not reversible if harmless). Error is harmless if we can say, beyond a reasonable doubt, that it did not contribute to or affect the verdict. *Id.* ¶ 21. "Whether an error is harmless is a fact-specific inquiry which must be evaluated in light of the totality of properly admitted evidence." *State v. Copeland*, 253 Ariz. 104, ¶ 26 (App. 2022). Evidentiary errors are harmless when the properly admitted evidence of the defendant's guilt is "overwhelming." *State v. Davolt*, 207 Ariz. 191, ¶ 64 (2004).

¶15 Here, the evidence of Armenta's guilt was indeed overwhelming. First, the state introduced Armenta's videotaped confession in which he described the offenses he committed against S.A., and his admissions were corroborated by her testimony, that of Tanya, and the sexual assault nurse examiner who conducted S.A.'s medical forensic examination. In his interview, Armenta initially denied the allegations, but after further questioning, he began disclosing the acts committed against S.A. in detail, including that: it was S.A.'s idea to touch his penis, but "like an idiot [he] allowed it"; he attempted to penetrate S.A.'s anus with his penis twice; Tanya caught him while he was attempting to do so on July 6, 2019; S.A. performed oral sex on his genitals "maybe three or four times"; and that he performed oral sex on S.A.'s genitals "two times . . . maybe three." Armenta eventually asked, "so am I going to jail now," and stated that people who did these types of things should be "taken out and shot."

¶16 As noted, Armenta's confession was corroborated by the testimony of several witnesses. During her testimony, S.A. described or acknowledged numerous sexual acts that Armenta had described, including that he had her rub his penis over his clothing; touched her anus with his penis; had anal intercourse with her "once or twice"; put his mouth on her genitals; and his penis "went in [her] mouth."

¶17 Tanya testified she became suspicious of Armenta when she discovered him in S.A.'s bedroom late at night, and on another occasion when she got home and saw him run out of S.A.'s bedroom naked, and he "seemed really scared, like you know, when you do something wrong." When Tanya confronted Armenta, he "admitted trying to put his penis in

[S.A.'s] rectum," but he blamed S.A., saying she had been leading him on. Finally, a sexual assault nurse who examined S.A. after Tanya had reported the abuse testified that S.A. had stated "her dad had been raping her," he had "put[] his private in her butt," and he "had done this many times." Accordingly, because Armenta's videotaped confession was corroborated by the testimony of multiple witnesses, we conclude that any error in excluding the proffered evidence was harmless beyond a reasonable doubt. *See Davolt*, 207 Ariz. 191, ¶ 64.

Motion for Judgment of Acquittal

¶18 Armenta further contends the trial court erred by denying his motion for a judgment of acquittal as to all counts, raised after the state's case-in-chief. We review the court's ruling on a motion for a judgment of acquittal de novo, viewing the evidence in the light most favorable to sustaining the verdicts. *See West*, 226 Ariz. 559, ¶ 15.

¶19 A judgment of acquittal must be entered "if there is no substantial evidence to support a conviction." Ariz. R. Crim. P. 20(a)(1). "Substantial evidence" "is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *West*, 226 Ariz. 559, ¶ 16 (quoting *State v. Mathers*, 165 Ariz. 64, 67 (1990)). 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." *Mathers*, 165 Ariz. at 66 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction." *West*, 226 Ariz. 559, ¶ 16.

Count One

¶20 Count one alleged that Armenta had committed child molestation by using S.A.'s hand to rub his penis over his clothing. A person commits child molestation "by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age." A.R.S. § 13-1410(A). Sexual contact is defined as "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body." A.R.S. § 13-1401(A)(3)(a).

¶21 Here, despite Armenta's claim to the contrary, there was substantial evidence that Armenta had intentionally caused S.A., who was a child under the age of fifteen, to indirectly touch his genitals through his

clothing with her hand. Armenta asserts he was entitled to an acquittal on count one because "S.A. explicitly denied that [he] ever touched her genitals." But this contention misses the mark because it ignores that count one was amended to allege that Armenta had used S.A.'s hand to rub his penis through his clothing; thus, whether Armenta had touched S.A.'s genitals is irrelevant as to count one.

¶22 Armenta also asserts that his "confession as to Count One, arguably coerced, without corroboration, does not constitute substantial evidence." This argument also fails because Armenta's admission to this incident, even assuming it was not sufficient in itself, was in fact corroborated by S.A.'s testimony.[6] When S.A. was asked if Armenta would be correct in stating "he had you touch his penis over his clothes," she responded "yes." And in his police interview, Armenta described S.A. rubbing his genitals over his clothing and getting an erection. Thus, the state introduced ample evidence for a reasonable person to find Armenta guilty of count one beyond any reasonable doubt.

Count Two

¶23 Count two alleged that Armenta had committed child molestation by making penile contact with S.A.'s anus. Armenta asserts the state "failed to present evidence as to Count Two that the alleged sexual contact ever occurred" because "S.A. never stated that . . . Armenta made contact with her anus." Again, this assertion is contradicted by the evidence. On direct examination, S.A. acknowledged that Armenta had touched her anus with his penis and "then as soon as it started touching, my mom walked in and then my dad ran out." And Armenta's confession corroborated S.A.'s testimony. He said, "that's exactly what happened," when police described S.A.'s allegation that he had attempted to penetrate "her butt" with his penis, using lotion as a lubricant, but he was unable to

[6] After officers read Armenta his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and told him he was free to leave, Armenta initially denied S.A.'s accusations, but ultimately admitted engaging in various sexual acts with her. While Armenta maintains his confession was "arguably coerced," he has cited no evidence nor legal authority supporting that notion. Moreover, besides his conclusory claim of coercion, Armenta has not developed this argument with citations to the record and legal authority. As such, this argument is waived. *See Vargas*, 249 Ariz. 186, ¶ 22 (when appellant fails to properly develop argument, court may consider it abandoned and waived).

achieve penetration on that occasion. Therefore, the state presented substantial evidence that Armenta intentionally touched S.A.'s anus with his penis when she was under fifteen years of age.

Counts Three and Four

¶24 Counts three and four alleged that Armenta had committed sexual conduct with a minor under fifteen years of age, by engaging in anal intercourse with S.A. Section 13-1405(A), A.R.S., provides that a "person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age." Sexual intercourse "means penetration into the . . . vulva or anus by any part of the body or by any object." § 13-1401(A)(4). Under § 13-1405(B), a person who commits sexual conduct with a minor under fifteen is subject to greater penalties.

¶25 Armenta asserts the evidence showed he was "not able to maintain an erection or perform sexually, such that penetration was impossible for him." He thus contends, "the most [he] could have committed was attempted sexual intercourse or molestation, as he was not capable of penetrative anal sex." This claim, too, is unavailing. While there was evidence Armenta had difficulty maintaining an erection and he told officers he "never penetrate[d] her," there was also evidence that he was able to briefly achieve an erection and at least some penetration. S.A. testified "one time" "more happened between his penis and [her] anus, more than touching" and it was "[e]ither once or twice" that his penis "actually [went] in." She also responded affirmatively when asked if Armenta had been "able to put his penis in [her] butt." Further, the sexual assault nurse examiner testified that S.A had described Armenta "putting his private in [her] butt" "lots of times." And finally, Armenta's confession tended to corroborate S.A.'s statements, admitting he had attempted to penetrate S.A.'s anus on three occasions. Thus, the state had presented ample evidence to defeat Armenta's motion for a judgment of acquittal with respect to counts three and four.

Count Five

¶26 Count five alleged that Armenta had committed sexual conduct with a minor by having "oral contact with S.A.'s vulva." Armenta asserts, again without a citation to the record, "the State failed to present proof that a reasonable person could accept as adequate to support [his] guilt because S.A. explicitly denied that [he] ever . . . performed oral sex on her." However, while S.A. initially testified Armenta had not put his mouth

on her genitals, she later stated that Armenta had in fact done so, and she described a particular instance when it had occurred. And, significantly, Armenta admitted during his police interview that he had performed oral sex on S.A. "two times . . . maybe three." *See State v. Guerra*, 161 Ariz. 289, 293 (1989) (appellate court resolves conflicting evidence in favor of sustaining the verdict). The state therefore introduced substantial evidence that Armenta had committed the offense alleged in count five.

Count Six

¶27 Count six charged Armenta with sexual conduct with a minor based on S.A.'s oral sexual contact with Armenta's penis. Armenta asserts, "as to Count Six, the only evidence that [he] forced S.A. to perform oral sex on him was the result of leading questions by the State on redirect examination." This argument, once again, is refuted by the evidence. First, Armenta confessed that S.A. had performed oral sex on him "maybe three or four times," thus S.A.'s testimony was not the only evidence supporting count six. Second, S.A's testimony was not elicited by leading questions. *See State v. Payne*, 233 Ariz. 484, ¶ 119 (2013) ("Leading questions suggest an answer."). S.A was asked, "Did he have you do anything to his penis with your mouth," and she responded, "Yeah." S.A. was then asked, "So what happened between his penis and your mouth," to which she replied, "It went in my mouth." Neither question suggested an answer, and therefore neither was leading. Third, S.A. testified on both direct and redirect examination that Armenta had her perform oral sex on him. Finally, even were Armenta's erroneous assertions true, he fails to cite any authority indicating that such testimony would not constitute substantial evidence such as to require a judgment of acquittal. *See State v. Vargas*, 249 Ariz. 186, ¶ 22 (2020) (appellant waives argument by failing to properly develop it). Therefore, Armenta was not entitled to a judgment of acquittal on count six.

Motion for a New Trial

¶28 We lastly address Armenta's conclusory contention that the trial court erred by denying his motion for a new trial "without comment." However, because he has failed to adequately develop this argument, he has waived appellate review. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (contentions must be supported by citations to legal authority and the record); *State v. Bolton*, 182 Ariz. 290, 298 (1995) (insufficient argument constitutes waiver of that claim on appeal).

Disposition

¶29 For the foregoing reasons, Armenta's convictions and sentences are affirmed.