IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JONATHAN RUSSELL JOHNSON,
Appellant.

No. 2 CA-CR 2021-0078
Filed July 21, 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NOT FOR PUBLICATION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 Gila County
No. S0400CR201900171
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 Alexander M. Taber, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

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

¶1 Jonathan Johnson appeals from his convictions and sentences for child molestation, attempted child molestation, sexual conduct with a minor, and attempted sexual conduct with a minor. He raises four claims of error by the trial court, but none merit reversal. We therefore affirm.

Factual and Procedural History

¶2 "We view the evidence in the light most favorable to affirming the jury's verdicts." *State v. Ortiz*, 238 Ariz. 329, ¶ 2 (App. 2015). A.G., who was born in September 2003, has known Johnson since she was a small child and considered him to be her uncle. Between 2013 and 2015, when A.G. was under the age of fifteen and living with her mother, she saw Johnson regularly as a member of her family.

¶3 During that time, Johnson involved A.G. in several sexual situations. In particular, he: (1) caused her to touch his exposed penis with her hand while they were in the bedroom she shared with her brothers at her mother's apartment; (2) awoke her one night while she was sleeping on the couch at her grandmother's house by pulling down her underwear and attempting to touch her vagina as he inspected her genitals with a flashlight; (3) exposed his penis and tried to force her to touch it while they were in his car in a secluded cul-de-sac near her grandmother's residence; (4) tried to pressure her to perform oral sex on him during a different incident in his car in the same cul-de-sac, insisting she had previously promised to do so; and (5) caused her to perform oral sex on him in a bedroom with bunk beds, during an incident in which he also pressured her to wear another person's underwear. Johnson threatened A.G. that, if she told anyone about the abuse, he would hurt her grandmother, "do something" to A.G. to "make it worse for [her] next time," or hurt her when he got out of jail.

¶4 The abuse stopped in the fall of 2015 when A.G. moved in with her father at the start of seventh grade. In April 2018, A.G. directly confronted Johnson in a series of text messages stating he had "molested

[her] for years," it was still negatively affecting her, and she wished she had disclosed the abuse sooner because she feared "nobody is gonna believe [her] now." In response, Johnson repeatedly apologized, admitted he should not have "done that to [her]" and wished he had not, and twice urged A.G. to delete the text conversation. A few months later, in July 2018, A.G. disclosed the abuse to her father, and her parents called the police. With police assistance, A.G. confronted Johnson again in a one-party consent call, during which he again acknowledged abusing her and apologized.

¶5 A grand jury charged Johnson with one count of child molestation, two counts of attempted child molestation, one count of attempted sexual conduct with a minor, and one count of sexual conduct with a minor, all dangerous crimes against children. At the conclusion of a four-day trial, a jury found Johnson guilty on all five counts. The trial court sentenced him to the statutorily mandated term of life in prison without the possibility of parole for thirty-five years for the sexual conduct with a minor (count five), to be followed by aggravated, consecutive prison terms totaling sixty-nine years on the other four counts. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Cold Expert Testimony

¶6 Johnson contends the trial court abused its discretion by permitting a cold expert, a forensic interviewer with the child protection team at Phoenix Children's Hospital, to provide "a detailed profile of typical abusers and allowing the State to use that profile as substantive proof of guilt." As Johnson acknowledges, because he did not object below, we review this claim only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). "The first step in fundamental error review is determining whether trial error exists." *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). Because Johnson has not established any error in the court's admission of the challenged expert testimony or the prosecutor's reference to that testimony in summation, this claim fails. *See id.* (defendant bears burden of persuasion at each step of fundamental error review).

¶7 Our rules of evidence permit the admission of "cold" expert testimony to educate a jury regarding general principles without applying those principles to the facts of the particular case. *State v. Salazar-Mercado*, 234 Ariz. 590, ¶ 1 (2014). The state is not permitted to offer "profile"

evidence[1] as substantive proof of a defendant's guilt because defendants must be convicted for only their own actions, not the actions of others. *State v. Haskie*, 242 Ariz. 582, ¶ 15 (2017). But "expert testimony that explains a victim's seemingly inconsistent behavior is admissible to aid jurors in evaluating the victim's credibility." *Id.* ¶ 16; *see also State v. Lujan*, 192 Ariz. 448, ¶ 12 (1998) ("When the facts of the case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like the reactions of child victims of sexual abuse—expert testimony on the general behavioral characteristics of such victims should be admitted."). This may include "evidence of offender characteristics" if such evidence "is relevant for a reason other than to suggest that the defendant possesses some of those characteristics and therefore may have committed the charged crimes." *Haskie*, 242 Ariz. 582, ¶ 17. The admissibility of such evidence must be determined through a case-by-case analysis of whether the expert's testimony will assist the jury, balancing the usefulness of the testimony against the danger of unfair prejudice—"generally fact-bound inquiries uniquely within the competence of the trial court." *Id.* ¶ 18 (quoting *State v. Moran*, 151 Ariz. 378, 381 (1986)).

¶8 The state argues that the cold expert's testimony in this case "did not amount to impermissible profile evidence." We agree.

¶9 As an initial matter, the state ensured the cold expert's role was clear to the jury. The expert established that she had not read any of the police reports in this case, had not conducted or watched any of the interviews, had not talked to any of the witnesses or parties, and was not even aware how many victims were involved or what their genders might be. She confirmed she did not have "any bit of knowledge" that would enable her to tailor her testimony to the particular facts of this case. And she explained that she preferred not to know any of those facts because she wanted her testimony to be "unbiased" and based only on her "education, training, and experience." *See Ortiz*, 238 Ariz. 329, ¶ 20. She explained that

[1]"Describing evidence as 'profile' evidence is a shorthand way of saying that the evidence is offered to implicitly or explicitly suggest that *because* the defendant" has "'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,'" the jury "should conclude that the defendant must have committed the crime charged." *State v. Haskie*, 242 Ariz. 582, ¶ 14 (2017) (quoting *State v. Ketchner*, 236 Ariz. 262, ¶ 15 (2014)).

her role was to "educate" the jury on what is seen "in the field"—"[s]ome of the more common characteristics that we see by victims, when there have been allegations like this." Later, she reiterated that all the information she had provided was to help the jury "make an educated decision" free from the "misconceptions" that members of the general population sometimes "assume occur or don't occur in these situations."

¶10 The prosecutor reminded the jury of this limited role during summation, reiterating that the cold expert had "no knowledge of this case, whatsoever." The prosecutor then explained that the purpose of the expert's testimony had been to provide "perspective and knowledge about the process of victimization in cases like this, and what's going on with the victim"—"what's common with victims, to help [the jury] understand how family [might miss] things that could be going on right under their noses" and "why victims of these crime[s], can take a long time, even years, to come forward and say anything."

¶11 Johnson is correct that the expert's testimony regarding the process of victimization covered common behavior patterns exhibited by child sexual abusers. But those discussions were exceedingly broad, often describing opposite ends of the spectrum. For example, the expert explained that perpetrators may be: family members or non-family members; financial, emotional, or physical supporters; coaches, babysitters, handymen, or others helping the family "in one way or another"; people who provide special gifts, affection, or attention to the child victim, or people who treat the child differently in a negative way, including becoming abusive; people who originally engage in neutral or benign behaviors with the child such as tickling or tucking them in at night, and people who introduce the child to nudity, sexual topics, pornography, alcohol, or drugs; and people who subtly encourage concealment of the abuse, or people who implicitly or explicitly threaten the child to stay quiet, with varying levels of aggression. *See Haskie*, 242 Ariz. 582, ¶ 18 ("The more 'general' the proffered testimony, the more likely it will be admissible."). The expert never focused on specific traits of abusers within these spectrums, and many of the characteristics and behaviors she described were in no way echoed in the evidence later presented in this case. *See id.* ¶ 22 (expert "neither explicitly nor implicitly invited the jury to infer criminal conduct based on the described conduct" and never made comparisons between general characteristics of abusive relationships and facts of case before jury). Indeed, Johnson himself stressed this lack of connection between the expert's testimony and the specific facts of his case during his closing argument.

¶12 Moreover, every time the expert touched upon commonalities among sex abusers, the prosecutor carefully directed the focus of the testimony back to the impact the particular stage of victimization may have on victims. In response to these questions, the expert explained that the abuser characteristics and behaviors in question can encourage child victims to feel "like they cannot tell when the abuse actually starts" and that "they are responsible or at fault for allowing the abuse to occur," such that they "might not tell right away once the abuse occurs," and can result in victims "not telling right away, or ever." We therefore disagree with Johnson that the challenged testimony bore "no real connection to the behavior pattern of victims." To the contrary, as the state explains, the testimony "served the important purpose of educating [the] jury about the process of victimization and how it can cause a child to either never disclose the abuse or delay disclosure." *See id.* ¶ 20 (general statements referring to abuser characteristics may be relevant when primarily explaining victim behavior to jury).

¶13 In his reply brief, Johnson responds that, while the expert's testimony may have been broad and did not all relate to the specific facts of this case, the prosecutor used that testimony in summation, arguing that specific facts of this case match the expert's description of each phase of the process of victimization. But the prosecutor referred in summation to the expert testimony to explain A.G.'s delayed disclosure of the abuse—why A.G. "ke[pt] this a secret for so long," why it "took [her] three years to tell her parents what her uncle did to her." At no point did the prosecutor argue that the expert testimony amounted to substantive evidence of Johnson's guilt, only that it helped to explain A.G.'s behavior. *See id.* ¶¶ 16-17.

¶14 For all these reasons, Johnson has failed to establish that the challenged cold expert testimony amounted to inadmissible profile evidence. He has thus failed to establish any trial error—much less fundamental error—in the trial court's admission of, or the prosecutor's use of, the challenged evidence. *See Escalante*, 245 Ariz. 135, ¶ 21.

Sufficiency of the Evidence

¶15 At trial, pursuant to Rule 20(a)(1), Ariz. R. Crim. P., Johnson sought a judgment of acquittal on all counts, both at the close of the state's case and at the close of all evidence. Both times, finding substantial evidence to support a conviction on each of the five counts, the trial court denied the Rule 20 motion. On appeal, Johnson challenges only the sufficiency of the evidence on count five: sexual conduct with a minor

when Johnson caused A.G. "to have oral sexual contact with his penis, in a bedroom at [her] residence." *See* A.R.S. §§ 13-1405 (sexual conduct with minor), 13-1401(A)(1) (defining "oral sexual contact").

¶16 Sufficiency of the evidence is a question of law requiring *de novo* review. *State v. West*, 226 Ariz. 559, ¶ 15 (2011). Viewing the evidence in the light most favorable to sustaining the verdict, and resolving all inferences against the defendant, we must determine whether the state presented evidence that "reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290 (1996). In so doing, we may not "reweigh evidence or reassess the witnesses' credibility." *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38 (App. 2013). If jurors could reasonably differ as to whether the evidence establishes the necessary facts, that evidence is sufficient as a matter of law. *See State v. Davolt*, 207 Ariz. 191, ¶ 87 (2004).

¶17 Johnson claims there is "no evidence on the record to support the conviction for oral sexual contact" during the incident when Johnson asked A.G. to wear another person's underwear. He argues that, when she testified about this incident, A.G. "never claimed to have touched [him]." Johnson mischaracterizes the evidence.

¶18 During A.G.'s direct examination, she twice provided testimony demonstrating an accurate understanding of what "oral sexual contact" entails. *See* A.R.S. §13-1401(A)(1). The prosecutor then asked A.G. directly, "[W]as there a time where you had oral contact with his penis, in the bedroom with the bunk beds?" She answered unequivocally: "Yes." The fact that she then described the circumstances surrounding the incident without detailing that oral sexual contact is a matter of the weight of the evidence, which we leave to the jury. *See Davolt*, 207 Ariz. 191, ¶ 87; *Buccheri-Bianca*, 233 Ariz. 324, ¶ 38.

¶19 Johnson also points to A.G.'s cross-examination, where the following exchange occurred:

> Q: . . . [Y]ou testified here today that the time that he asked you—that you say he asked you to put on somebody else's underwear, was the time in which he wanted oral sex from you?
> A: Yeah.
> Q: And you just walked out and said I'm not doing it, and you left?

A: Yes.

Johnson claims this testimony "is clear that at no point during that incident did she perform oral sex on [him]," such that the jury "clearly made an error" when convicting Johnson on count five. But the jury could (and apparently did) reasonably interpret the foregoing testimony to mean that, although A.G. refused to wear the underwear, the oral contact she expressly confirmed to the prosecutor on direct examination did occur during this incident. *See State v. Cox*, 217 Ariz. 353, ¶ 22 (2007) ("relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))); *State v. Butler*, 230 Ariz. 465, ¶ 9 (App.2012) (if reasonable minds could differ on inferences to be drawn from evidence presented, it "is substantial and the conviction must be upheld").

¶20 A.G. never retracted her unequivocal testimony that Johnson had her perform oral sex on him in the bedroom with the bunk beds. When the prosecutor later asked A.G. whether Johnson had asked her to remove her shirt "the time that he had [her] give him oral sex," she did not dispute that such an event had occurred, only that she did not remember whether she had removed her shirt. Even when defense counsel challenged her on cross-examination regarding the consistency of her testimony surrounding the "time he asked [her] to put on somebody else's underwear," A.G. affirmatively confirmed that the incident involved "oral sex," not "a hand job situation." And, on redirect, A.G. confirmed that she had reported to a forensic interviewer that the incident involving someone else's underwear also involved A.G. "doing oral things to [Johnson]."

¶21 "No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *Cox*, 217 Ariz. 353, ¶ 27 (quoting *State v. Clemons*, 110 Ariz. 555, 556-57 (1974)). Any inconsistencies "were matters for the jury's consideration in making its credibility determinations and weighing the evidence." *Buccheri-Bianca*, 233 Ariz. 324, ¶ 39. The evidence on count five was sufficient.

Amended Indictment

¶22 On May 12, 2021, several weeks before trial was set to begin in June, the state filed a motion to amend the indictment to conform to the evidence pursuant to Rule 13.5(b), Ariz. R. Crim. P. In particular, the state sought an amendment to reflect that all five counts involved conduct

alleged to have occurred between 2013 and 2015, rather than between 2014 and 2016. Johnson did not file a response to the state's motion.

¶23 On the second day of trial, shortly before the jury was sworn in, the trial court heard arguments on the issue. The prosecutor contended the incorrect dates in the indictment were "a mistake of fact or just a clerical error," such that correction should be permitted. It explained that Johnson "should have been aware of this from the very beginning based on the discovery and the grand jury transcript," all of which revealed that 2013-2015 was the correct date range. Johnson objected to the amendment, arguing primarily that it had been the state's responsibility to prepare the documents properly but also that the date change would constitute a substantive change to the indictment.

¶24 Noting that it had previously reviewed the grand jury transcript, the trial court found it "clear" that the grand jury had relied on testimony regarding offenses alleged to have taken place "between 2013 and 2015, not 2014 and 2016." The court thus granted the motion to amend the indictment pursuant to Rule 13.5(b) "to correct a mistake of fact and to remedy the technical defect in the indictment."

¶25 Johnson challenges this ruling, claiming that "the change of the date range was a substantive change to the indictment under the circumstances of this case." He further contends that he was prejudiced by the "last-minute alteration" to the indictment because "he did not have ample opportunity to prepare his defense." He claims violations of both Rule 13.5(b) and his right to notice under the Sixth Amendment to the United States Constitution.

¶26 "We review for an abuse of discretion a court's decision to permit the amendment of an indictment." *Buccheri-Bianca*, 233 Ariz. 324, ¶ 16. Under Rule 13.5(b), where a defendant has not consented to the amendment, an indictment may be amended "only to correct mistakes of fact or remedy formal or technical defects." A defect is "formal or technical when its amendment does not change the nature of the offense or otherwise prejudice the defendant." *Buccheri-Bianca*, 233 Ariz. 324, ¶ 17.

¶27 Here, amending the dates in the indictment from 2014-2016 to 2013-2015 did not alter the elements of the charged offenses. A.G. was a minor under the age of fifteen during all those years, and the offenses in question do not otherwise include date-related elements. *See* A.R.S. §§ 13-1410 (child molestation), 13-1405 (sexual conduct with minor), 13-1001 (attempt); *see also State v. Jones*, 188 Ariz. 534, 544 (App. 1996) (error

as to date of offense alleged in indictment does not change nature of offense and may therefore be remedied by amendment), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239 (2012).

¶28 Johnson claims he was "actually prejudiced" by the amendment of the indictment because it required him "to account for all of 2013." But we cannot agree that he was "denied the opportunity to prepare that defense" or that he "had no other way of knowing he would be required to account for his actions and whereabouts during 2013." He has not disputed that documents he received during discovery, long before trial—including A.G.'s disclosure in her forensic interview and the grand jury transcript—revealed that the events in question were alleged to have occurred when A.G. was in fifth and sixth grades, before she moved in with her father in 2015. And, at minimum, Johnson was placed on notice of the state's desire to amend the dates in the indictment to conform to that evidence when it filed the motion to do so several weeks before trial. *See State v. Bruce*, 125 Ariz. 421, 423 (1980) (rejecting prejudice-based challenge to amendment of date in indictment when "defense counsel had notice of the discrepancies in the dates well before trial"); *cf. State v. Johnson*, 198 Ariz. 245, ¶¶ 11-13 (App. 2000) (finding prejudice when state did not seek amendment until after testimony of victim at trial, as adequate preparation of defense generally requires amendment "before the state has rested its case").

¶29 For these reasons, Johnson has not established any violation of Rule 13.5(b). Nor has he established a Sixth Amendment violation, because he received actual notice before trial of what the state intended to prove and therefore suffered no prejudice. *See State v. Montes Flores*, 245 Ariz. 303, ¶¶ 17-19 (App. 2018); *see also State v. Freeney*, 223 Ariz. 110, ¶ 29 (2009) ("touchstone" of Sixth Amendment notice requirement is whether defendant "had actual notice of the charge, from either the indictment or other sources"). The trial court did not abuse its discretion in permitting the amendment of the indictment.

Excluded Testimony

¶30 Near the beginning of A.G.'s direct examination, she stated that she wanted to be present to testify that day, and the prosecutor asked her why that was so. She responded, "Even though something may not come from it, like sentencing wise, I am here speaking up for what happened to me." On cross-examination, the defense asked A.G. what she had meant by that statement, and the following exchange ensued:

A: I meant that it doesn't matter what the outcome is, as long as I'm here saying something.
Q: Okay. A recognition that Jon might be found not guilty of these things?
A: Yeah.
Q: That there might not be enough evidence, enough convincing evidence, for this jury to convict him of anything?
Q: Yeah.

The prosecutor then objected and moved to strike the final question on the ground that it called for A.G. to form an opinion on the weight of the evidence, "which is entirely the jury's purview." The defense countered that the state had opened the door to the issue, making cross-examination appropriate. The trial court sustained the objection and struck the challenged question.

¶31 Johnson concedes on appeal that the stricken "evidence may have been improper." Nevertheless, he contends that "the trial court abused its discretion when limiting the scope of cross-examination of A.G." in this way because the state had invited the testimony.

¶32 Although the right to cross-examine witnesses is "vital to the right of confrontation," a trial court retains "considerable discretion" to determine the proper scope of cross-examination and curtail it within reasonable limits. *State v. Doody*, 187 Ariz. 363, 374 (App. 1996). We review rulings restricting cross-examination on a case-by-case basis, and we will not disturb them absent a "clear showing" that a defendant was prejudiced. *Id.* Such prejudice occurs when the ruling denied the defendant "the opportunity of presenting to the trier of fact information which bears either on the issues in the case or on the credibility of the witness." *State v. Fleming*, 117 Ariz. 122, 125 (1977). No such denial occurred here, and Johnson suffered no prejudice.

¶33 Most importantly, unlike the prosecutor's question regarding A.G.'s motivation for testifying,[2] whether she thought there was "enough

[2]"[A]s the finder of fact, a jury is free to weigh and assess witness credibility, which includes a testifying defendant's motivation." *State v. Trammell*, 245 Ariz. 607, ¶ 9 (App. 2018). Moreover, even assuming *arguendo* that the prosecutor had "inject[ed] improper or irrelevant evidence or

convincing evidence" for the jury to "convict [Johnson] of anything" did not bear on any issue in the case or her credibility. Rather, the question went only to the weight of the evidence against Johnson, and "it is the jury's exclusive province to assess the weight and credibility of evidence." *State v. Bernstein*, 237 Ariz. 226, ¶ 18 (2015); *see also Pool v. Superior Court*, 13 Ariz. 98, 103 (1984) (questions "asking the witness for his view of evidence received or his expectations of evidence that will be given are not designed to produce admissible facts but only to invite speculation and argument from the witness" and are "argumentative and improper").

¶34 Regardless, Johnson was permitted ample latitude to cross-examine A.G. and comment on her statement regarding her motivation for testifying. As his counsel expressly confirmed during trial, the court struck "[j]ust the very last" of the three questions posed to A.G. on this point during cross-examination. The first two questions Johnson asked A.G. about her earlier statement, and A.G.'s answers thereto, remained on the record. And, during summation, Johnson argued that A.G. "wasn't sure" the case was worth pursuing and that her initial statement meant "she d[id]n't know if anybody will ever convict him of this stuff, because there's no evidence of it and she acknowledged that." The prosecutor's objection to this argument was overruled. In this context, the trial court's ruling was well within its broad discretion to impose reasonable limits on the scope of cross-examination. *See Doody*, 187 Ariz. at 374.

Disposition

¶35 For all the foregoing reasons, we affirm Johnson's convictions and sentences.

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argument" and thus opened the door in some fashion, the one case Johnson cites on this issue only establishes that "the other party *may* have a right to retaliate by responding with comments or evidence on the same subject," *Pool v. Superior Court*, 139 Ariz. 98, 103 (1984) (emphasis added), not that such a right always exists or cannot be reasonably limited by the trial court.