IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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THE STATE OF ARIZONA
*Appellee*,

*v.*

TERRELL D. BROWN
*Appellant*.

No. 2 CA-CR 2021-0099
Filed November 8, 2022

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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NOT FOR PUBLICATION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).

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Appeal from the Superior Court in Pinal County
No. S1100CR202001397
The Honorable Christopher J. O'Neil, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Diane Leigh Hunt, Assistant Attorney General, Tucson
*Counsel for Appellee*

Rosemary Gordon Pánuco, Tucson
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**MEMORANDUM DECISION**

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

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

**¶1** Terrell Brown appeals from his convictions and sentences for aggravated assault and aggravated domestic violence. For the reasons that follow, we affirm.

**Factual and Procedural Background**

**¶2** We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Brown. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). Early one morning in May 2020, Brown entered T.D.'s apartment by climbing through a window while she was sleeping. T.D. is the mother of two of Brown's children. Waking to find Brown in her apartment, T.D. ordered him to leave, but he refused to do so. Instead, Brown, who had two prior convictions for domestic violence, seized T.D. by the back of her head, forcing her head toward his groin area and causing her to suffer scratches and bruises. He next grabbed her by the arms, causing additional scratching and bruising, and threw her on her bed. Brown climbed on top of T.D. and wrapped his hands around her neck, cutting off her ability to breathe and, among other things, causing a brief loss of consciousness.

**¶3** Brown was indicted for two counts of aggravated domestic violence—one related to grabbing T.D. by the back of her head and the other related to the scratching and bruising on T.D.'s arms—and one count of aggravated assault by strangulation, also a domestic violence offense. At a jury trial, most of which Brown failed to attend, T.D. recanted her accusations against him, testifying that Brown had "not put his hands on [her] or hit [her]," the strangulation "was a misunderstanding," and the marks observed on her body were rashes or bruises incurred while moving to a new apartment.

**¶4** Brown was convicted of all three charges. The trial court sentenced him as a category-three repetitive offender to concurrent terms of imprisonment, the longest of which was twelve years. This appeal

followed. We have jurisdiction 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).

**Admissibility of Nurse's Testimony**

**¶5** Brown first argues the trial court erred by allowing a Sexual Assault Nurse Examiner (SANE) to testify concerning statements T.D. made to her, contending they were inadmissible hearsay. We review the court's evidentiary rulings, including those involving hearsay and related exceptions, for an abuse of discretion. *State v. Copeland*, 253 Ariz. 104, ¶ 21 (App. 2022). "A trial court abuses its discretion when it commits an error of law." *State v. Miller,* 226 Ariz. 202, ¶ 7 (App. 2010).

**¶6** Hearsay is a statement that "the declarant does not make while testifying at the current trial or hearing" and is "offer[ed] in evidence to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c). Hearsay is inadmissible unless an exception applies. *State v. Bass*, 198 Ariz. 571, ¶ 20 (2000). Rule 803(4) provides for one such exception, allowing the admission of statements (A) "made for . . . medical diagnosis or treatment; and (B) describ[ing] medical history; past or present symptoms or sensations; their inception; or their general cause."

**¶7** After the attack, investigating officers referred T.D. to Sarah Neal, a SANE who works as a forensic nurse examiner for Pinal County. Neal's caseload is not limited to cases involving sexual assault and, among others, she also meets with victims of domestic violence. Before trial, the state filed a motion in limine seeking to admit T.D.'s statements during the examination. The trial court granted the motion over Brown's objection, concluding the statements had been made for the purpose of medical treatment. Neal testified concerning the characteristics of strangulation, including that it is uncommon to see visible marks indicating a person has been strangled. She also testified concerning what T.D. had told her about the attack, including that Brown (1) "grabbed [her] head, then tried to make [her] smell his crotch," (2) "grabbed [her] arms and got on top of [her]," and (3) "put his hands on [her] throat."

**¶8** Brown argues Neal's testimony about T.D.'s statements during the examination was inadmissible hearsay. The state contends the statements were made for the purpose of medical treatment and, therefore, were admissible pursuant to Rule 803(4).

**¶9** However, we need not reach the issue of whether T.D.'s statements to Neal were admissible under Rule 803(4). We agree with the

state that, as a result of T.D.'s trial testimony recanting the allegations against Brown, her statements to Neal were admissible as prior inconsistent statements under Rule 801(d)(1)(A), which provides that when a "declarant testifies and is subject to cross-examination about a prior statement," a statement "inconsistent with the declarant's testimony" is not hearsay. *See State v. Moran*, 151 Ariz. 373, 374-75 (App. 1985), *vacated in part on other grounds*, 151 Ariz. 378, 380 (1986).

**¶10** T.D. testified at trial, and the record demonstrates Brown was not prevented from cross-examining her; therefore, she was subject to cross-examination regarding her prior statements. *See State v. Parris*, 144 Ariz. 219, 221-22 (App. 1985). And, as discussed, while on the stand, T.D. maintained that Brown had not "put his hands on [her]." Thus, T.D.'s testimony about this incident was inconsistent with her prior statements offered by Neal. Moreover, Brown conceded before trial that if T.D. "denie[d] that the choking or scratching ever happened," her statements to Neal would be admissible as prior inconsistent statements for impeachment purposes.[1] Prior inconsistent statements properly admitted for impeachment may also be used as substantive evidence. *State v. Skinner*, 110 Ariz. 135, 142 (1973) ("[W]e believe that the better rule is to allow the substantive use of such statements, when properly admitted, and not limit them for impeachment only."). We cannot say the trial court abused its discretion in allowing Neal to testify regarding T.D.'s prior statements. *See State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7 (App. 2012) (we must affirm trial court's ruling if legally correct for any reason).

**Sufficiency of the Evidence**

**¶11** Brown also argues the evidence presented at trial was insufficient to support his conviction for aggravated assault. In support of his argument, Brown points to T.D.'s trial testimony denying he had strangled her, as well as evidence showing insignificant markings on her

[1] Although evidence admissible pursuant to Rule 801(d)(1)(A) is subject to scrutiny under Rule 403, Ariz. R. Evid., Brown did not object to T.D.'s prior statements on that ground. *See State v. Allred*, 134 Ariz. 274, 277-78 (1982) (setting forth factors to determine if prior inconsistent statement's probative value is "substantially outweighed by the danger of prejudice, confusion or misleading the jury" under Rule 403, including witness denying having made the statement, lack of corroboration that statement was made, impeachment testimony as only evidence of guilt, and true purpose being substantive rather than impeaching).

neck and the absence of petechiae in her eyes.[2] We review the sufficiency of the evidence de novo, considering all facts and resolving all evidentiary conflicts in the light most favorable to sustaining the jury's verdict. *State v. Pena*, 235 Ariz. 277, ¶ 5 (2014). We will not disturb a verdict if it is supported by substantial evidence. *Id.* "Substantial evidence is evidence that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *Id.* (quoting *State v. Hausner*, 230 Ariz. 60, ¶ 50 (2012).

**¶12** A person commits aggravated assault by "intentionally or knowingly imped[ing] the normal breathing or circulation of blood of another person by [among other things] applying pressure to the throat or neck," under a circumstance that constitutes domestic violence as defined by A.R.S. § 13-3601(A). A.R.S. § 13-1204(B). The state presented evidence that T.D. had told officers and Neal that Brown choked her and restricted her breathing. Although T.D. recanted those statements at trial, instead testifying that Brown had not "aggressively or forcefully grab[bed her] by the neck," witness credibility is an issue properly left to the province of the jury. *State v. Gallagher*, 169 Ariz. 202, 203 (App. 1991) ("[T]he credibility of a witness is for the trier-of-fact, not an appellate court.").

**¶13** And, contrary to Brown's suggestion on appeal that the lack of "sufficient" markings on T.D.'s neck and petechiae in her eyes renders the evidence insufficient to support his conviction, an officer and Neal both testified that T.D.'s signs and symptoms—including bruising and abrasions on her neck, reddened uvula, and reported loss of consciousness, throat pain, and trouble swallowing—were consistent with T.D.'s initial description of events. Moreover, as the state contends, T.D. expressly testified that she could "breathe a little" during the attack, thereby "confirming that her normal breathing pattern had been impeded to at least some degree." *See* § 13-1204(B). The evidence was sufficient to support Brown's conviction for aggravated assault by strangulation. *See id.*

**Disposition**

**¶14** For the foregoing reasons, we affirm Brown's convictions and sentences.

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[2]Neal testified petechiae—"little pinpoint dots," often in the white of the eye—occur "when pressure causes blood vessels to burst in the eye" and can indicate that someone has been strangled.