IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GIANNI MICHAEL COLLINS-PERCIVAL,
Appellant.

No. 2 CA-CR 2022-0104
Filed May 23, 2023

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NOT FOR PUBLICATION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 Pima County
No. CR20202665001
The Honorable Catherine M. Woods, Judge

AFFIRMED

COUNSEL

Kristin K. Mayes, Arizona Attorney General
Alice M. Jones, Deputy Solicitor General/Section Chief of Criminal Appeals
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Megan Page, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

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

¶1 Gianni Collins-Percival appeals from his convictions and sentences for criminal trespass, stalking, and disorderly conduct. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts, resolving all reasonable inferences against Collins-Percival. *See State v. Payne*, 233 Ariz. 484, n.1 (2013). Collins-Percival and R.M. were in a romantic relationship from about August 2018 until November 2019. For some of that time, Collins-Percival lived with R.M. and her mother in the house they shared. After their relationship ended, R.M.'s mother forbade Collins-Percival from entering the house. However, R.M. and Collins-Percival continued to maintain a sexual relationship, in which R.M. sometimes helped Collins-Percival enter the house through an unlocked back door without her mother's knowledge. In June 2020, R.M. informed Collins-Percival that she wanted to end the ongoing sexual relationship as well. She informed him, repeatedly, that she wished to end the relationship.

¶3 Collins-Percival resisted R.M.'s efforts to terminate the relationship. Eventually, R.M. blocked his cell phone number and email account, but he continued to contact her using different numbers and accounts. Then, in late June, Collins-Percival sent R.M. a series of texts suggesting he was at her house, that he wanted ten minutes with her, and that he would "wait all night." When she arrived home late that night, she parked her car across the street from her house and was surprised to find Collins-Percival waiting for her. Although she did not want to speak with him, she remained outside of the house and did so anyway. R.M.'s mother exited the house and spoke with R.M. R.M. and Collins-Percival concealed his presence.

¶4 When R.M.'s mother came outside a second time, R.M. took the opportunity to go inside. She immediately went upstairs and into her

bedroom, then her bathroom. Upon exiting the bathroom, R.M. discovered Collins-Percival "standing in [her] closet." Although on previous occasions R.M. had helped Collins-Percival enter the house unbeknownst to her mother, she testified that she had not invited him into her bedroom, had been surprised to see him there, and had wanted him to leave.

¶5 Collins-Percival remained in R.M.'s room, talking, until she started to fall asleep. At that point, he asked her if he could stay the night, and she permitted him to sleep on her bed, but told him to "not touch [her] at all." However, eventually intercourse occurred. R.M. testified that she had not consented and that he had persisted even after she repeatedly told him to stop and physically resisted him. She also testified that she and Collins-Percival had a history of consensual "rough sex," including use of a "safe word" for when "things [were] going too far." R.M. testified that this encounter had been "far outside" the scope of their prior sexual relationship and that she had not considered using the safe word on this occasion. She also testified Collins-Percival had asked her afterward if he raped her and she had said yes. She could not remember what had happened afterward, because she felt dizzy and sick and fell asleep.

¶6 The following morning, R.M. awoke when her mother was leaving the house to go to work. R.M. ran downstairs and briefly spoke with her mother—not revealing what had happened the night before—and then went back upstairs to her bedroom. Collins-Percival followed R.M. to the bathroom and eventually downstairs, all the while complaining to her about how she had treated him. Collins-Percival went to the kitchen, retrieved a knife, and threatened to kill himself. R.M. disarmed Collins- Percival, who then retrieved a razor blade and again threatened to kill himself or, alternatively, to provoke R.M.'s mother into protecting R.M. by killing him.

¶7 When they heard R.M.'s mother returning home, both R.M. and Collins-Percival went back upstairs, with Collins-Percival still holding the razor blade. Eventually, R.M. managed to tell her mother to call 9-1-1, and—while doing so—her mother pulled her out of the house and to a neighbor's house. R.M. testified that, before involving her mother, she had not felt she could leave Collins-Percival's presence because she was afraid he would hurt her.

¶8 Police officers arrived and interviewed R.M. Eventually, R.M. went to the hospital, where she underwent a sexual assault examination. A grand jury charged Collins-Percival with sexual assault, two counts of

aggravated assault, kidnapping, second-degree burglary, stalking, and disorderly conduct.

¶9 At the conclusion of a four-day trial, a jury found Collins- Percival guilty of first-degree criminal trespass,[1] stalking, and disorderly conduct. It further found that the aggravating factor of lying in wait had been proven beyond a reasonable doubt. However, the jury acquitted on the sexual assault, aggravated assault, kidnapping, and burglary charges. It also found a second aggravating factor—that a victim had suffered emotional or physical harm—not proven. The trial court sentenced Collins-Percival to concurrent prison terms, the longest of which is two years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Denial of Mistrial

¶10 Collins-Percival argues the trial court abused its discretion by denying his motion for a mistrial, made in response to a statement the court made during an evidentiary ruling. During cross-examination, defense counsel asked R.M. to recount, "for the sake of completeness," what Collins-Percival had told her after she left the bed. In sustaining the state's hearsay objection, the court noted that Collins-Percival would "have the opportunity to give his testimony when the time comes if he wants to." Collins-Percival eventually moved for a mistrial, arguing the court had "made a comment" on his Fifth Amendment "right against self-incrimination." The court denied the motion, but left open the possibility of revisiting the ruling should either party identify a relevant case suggesting it had erred.

¶11 The following day, while reviewing final jury instructions, the trial court offered to consider modifying the language of the standard jury instruction regarding a defendant's decision whether to testify. Collins-Percival declined modification, and the court gave the standard instruction. *See* Rev. Ariz. Jury Instr. Stand. Crim. 18(a) (defendant need not testify) (5th ed. 2019). Specifically, the court instructed the jury that it "must not conclude that [Collins-Percival wa]s likely to be guilty" because he did not testify, that he was not required to testify, and that his choice of

[1] Criminal trespass was provided as a lesser-included offense of second-degree burglary, of which the jury found Collins-Percival not guilty.

whether or not to testify must not be allowed to affect its deliberations "in any way."

¶12 As at trial, Collins-Percival argues on appeal that the trial court's statement infringed on his constitutional right against self-incrimination because the jury would naturally and necessarily construe it as a comment on his silence. Thus, he argues, the court erred in refusing to declare a mistrial.

¶13 We will not disturb the denial of a motion for mistrial absent an abuse of the trial court's broad discretion. *State v. Jones*, 197 Ariz. 290, ¶ 32 (2000). Because Collins-Percival preserved the issue by raising it during trial, we review any error for harmlessness. *State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005). Under this standard, we will find trial error harmless if we are "confident beyond a reasonable doubt that the error had no influence on the jury's judgment." *State v. Bible*, 175 Ariz. 549, 588 (1993).

¶14 Both the Fifth Amendment to the United States Constitution and A.R.S. § 13-117(B) protect a defendant from improper comments on a failure to testify. *State v. Mata*, 125 Ariz. 233, 237 (1980). "Not all comments, however, are improper." *Id.* at 238. Rather, a comment is impermissible only if it supports an "unfavorable inference against the defendant." *Id.* This occurs when, for example, "the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." *State v. Fuller*, 143 Ariz. 571, 575 (1985) (quoting *United States v. Soulard*, 730 F.2d 1292, 1306 (9th Cir. 1984)). An unfavorable inference may also occur if a comment creates an expectation that the defendant will testify, calling attention to the defendant's silence if he or she later decides not to testify. *See Mata*, 125 Ariz. at 238; *see also State v. Schaaf*, 169 Ariz. 323, 333 (1991).

¶15 Assuming without deciding that the trial court's comment created an expectation that Collins-Percival would testify, we conclude that any error was nonetheless harmless in this case. The comment occurred during testimony relevant to whether Collins-Percival had committed sexual assault. The jury acquitted him of that crime. *See State v. Escalante*, 245 Ariz. 135, ¶ 30 (2018) (harmless error review requires state to prove error did not contribute to or affect verdict or sentence). And, although the comment may have unnecessarily drawn the jury's attention to Collins-Percival's decision whether to testify, it did so in a comparatively mitigated fashion: the court neither suggested that any negative inference should be drawn if Collins-Percival failed to testify nor indicated any expectation that he would testify. Importantly, the court provided

appropriate instructions on the burden of proof and Collins-Percival's protection against self-incrimination at stages in the trial both before and after the challenged comment. *See Mata*, 125 Ariz. at 238 (provision of "specific and clear instructions to the jury on burden of proof and failure to testify," in conjunction with other curative conduct of court, rendered court's inadvertent comments on defendant's failure to testify nonreversible).

¶16 Finally, the trial court uttered the comment in the context of an evidentiary ruling. The jury had been specifically instructed to not concern itself with the court's reasoning on evidentiary rulings. *See State v. Adamson*, 136 Ariz. 250, 263 (1983) (no abuse of discretion in denial of mistrial when, *inter alia*, preliminary instructions told jurors not to concern themselves with court's reasons for evidentiary rulings). We presume jurors follow the court's instructions. *State v. Gallardo*, 225 Ariz. 560, ¶ 40 (2010). Therefore, read in context of the statement's timing and the various instructions given to the jury, we conclude beyond a reasonable doubt that if the court's comment amounted to an erroneous comment on Collins-Percival's right to testify, it was harmless.[2]

Preclusion of DNA Evidence

¶17 We similarly identify no reversible error in the trial court's preclusion of DNA evidence, which Collins-Percival argues was necessary to his presentation of a complete defense. That evidence indicated that R.M. had been in an ongoing romantic relationship with a second man and that, in addition to Collins-Percival's semen, a second male's semen had been found on R.M.'s body during the sexual assault examination. We review a trial court's preclusion of evidence, including preclusion pursuant to Arizona's Rape Shield Law, A.R.S. § 13-1421, for abuse of discretion. *State v. Gilfillan*, 196 Ariz. 396, ¶ 29 (App. 2000) (court enjoys "considerable discretion in determining whether the probative value of the evidence is

[2]Collins-Percival correctly notes that the trial court did not give a curative instruction or withdraw its statements in the presence of the jury. However, the court offered to modify its instruction on this matter, an offer Collins-Percival declined. And Collins-Percival requested no cure for the allegedly improper comment short of a declaration of mistrial. *See State v. Williamson*, 236 Ariz. 550, ¶ 29 (App. 2015) (mistrial "one of the most dramatic remedies 'and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted'" (quoting *Adamson*, 136 Ariz. at 262)).

substantially outweighed by its unfairly prejudicial effect"), *abrogated on other grounds by State v. Carson*, 243 Ariz. 463, ¶ 10 (2018). We will not disturb such rulings "absent a clear abuse of the court's discretion." *Id.*

¶18 Before trial, Collins-Percival sought to admit evidence of the other relationship, including the DNA evidence, arguing that it was relevant (1) to proving that R.M. had a motive to lie about the sexual encounter with Collins-Percival, including about whether it had been consensual, and (2) to tracing the source of semen collected from her body.[3] The trial court precluded any evidence proving a relationship between R.M. and a second male, finding that its relevance was "substantially outweighed by the danger of unfair prejudice and confusion of the issues." The court reasoned that evidence indicating that R.M. had been sexually involved with another male would be not only "very tangential," but also "unfairly prejudicial" because it could "potentially cast [her] in a poor light" in the minds of any jurors who "would not approve of her having relations with more than one person at one time."

¶19 Central to this reasoning was the trial court's observation that, because there was "no dispute that there was intercourse or otherwise a sexual encounter" between R.M. and Collins-Percival on the dates in question as outlined in the police reports and admitted by Collins-Percival, DNA testimony was of little importance. The court concluded that DNA evidence R.M. "was involved with another man" was, alone, insufficient "to prove that she had a motive to lie or claim [the encounter with Collins- Percival] was un-consensual."

¶20 Collins-Percival contends the preclusion was erroneous because the evidence would have supported his defense theory that R.M. had a motive to fabricate a rape allegation against him in order to prevent her mother from discovering her secret relationship with the second sexual partner. He maintains the DNA evidence was admissible under § 13- 1421(A)(3), which permits the admission of evidence of "specific instances of the victim's prior sexual conduct" if it "supports a claim that the victim has a motive in accusing the defendant of the crime." By precluding the evidence, he argues, the trial court prevented him from attacking R.M.'s credibility, which violated his constitutional right to present a complete defense.

[3]Collins-Percival raised the preclusion of testimony regarding the second male DNA profile three times over the course of the trial.

¶21 Section 13-1421 "dictates the circumstances under which specific instances of a victim's prior sexual conduct may be admitted." *State v. Herrera*, 232 Ariz. 536, ¶ 39 (App. 2013). But even relevant, material evidence falling within one of the § 13-1421(A) subsections is not necessarily admissible as a matter of right. *See Herrera*, 232 Ariz. 536, ¶ 38. Rather, such evidence is admissible only if "the inflammatory or prejudicial nature of the evidence does not outweigh the probative value." § 13- 1421(A). [4]

¶22 We have recognized that § 13-1421 "clearly implicates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article 2, sections 4 and 24 of the Arizona Constitution to the extent that it operates to prevent a criminal defendant from presenting relevant evidence, confronting adverse witnesses and presenting a defense." *Gilfillan*, 196 Ariz. 396, ¶ 20. But even in light of those substantial constitutional protections, "a defendant's right to present relevant testimony is not limitless." *Id.* "Rather, the right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Id.* (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).

¶23 Collins-Percival highlights a non-trivial tension between his constitutional right to present a complete defense and the protections afforded victims by Arizona's Rape Shield Law. But, assuming without deciding that the trial court erred in precluding the evidence, any such error was harmless. *See Bible*, 175 Ariz. at 588. The precluded evidence was only relevant to the state's case against Collins-Percival to the extent it could have been used to challenge R.M.'s credibility, including by providing a possible motive for her to paint Collins-Percival's presence and behavior at her residence as unwelcome. But, Collins-Percival repeatedly raised at least the inference that R.M. may have fabricated the nature of the entire interaction to conceal that she had been allowing Collins-Percival to enter her bedroom against her mother's directive. Being prevented from offering evidence tending to show a second motive to lie did not wholly bar Collins- Percival from presenting this defense theory.

¶24 Further, the state presented overwhelming evidence to prove each charge of which Collins-Percival was convicted. *See* §§ 13-1504(A)(1)

[4]Similarly, Rule 403, Ariz. R. Evid., provides that a trial court may exclude even relevant evidence if "its probative value is substantially outweighed by a danger of . . . unfair prejudice" or "confusing the issues." The court here implicated both Rule 403 and § 13-1421 in its pretrial ruling.

(criminal trespass), 13-2923(A)(1) (stalking), 13-2904(A)(6) (disorderly conduct). Collins-Percival himself admitted during initial police questioning to the material conduct underlying those charges. Specifically, Collins-Percival told police that R.M. had been reluctant to speak with him and that, even after R.M.—who was crying and upset—had "said she was done talking" to him and gone inside, he had snuck into the house uninvited through the back door and entered her bedroom, startling her. He further stated that he had threatened committing suicide and had held a razor blade to his throat. And he told police that, even at the outset of the encounter outside R.M's home, he had known "it was going to end like shit." Also, the evidence demonstrated that, in the period leading up to the incident, Collins-Percival had sent R.M. multiple threatening text messages, despite her repeated requests that he leave her alone. Thus, any error in precluding the DNA evidence "did not contribute to or affect" the verdicts in this case. *Henderson*, 210 Ariz. 561, ¶ 18; *see also Bible*, 175 Ariz. at 588.

Aggravating Factors for Sentencing

¶25 Collins-Percival also argues there was insufficient evidence of lying in wait or ambush, such that the trial court erred in considering it as an aggravating factor offsetting mitigation at sentencing. In particular, he contends the court erred by failing to provide verdict forms that would have allowed the jury to specify which count or counts the state had proven to have involved an aggravator.

¶26 Because he raises this issue for the first time on appeal, we review only for fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶¶ 19-20. Error is fundamental if (1) it went to the foundation of the case, (2) it took from the defendant a right essential to his defense, or (3) it was so egregious that the defendant could not possibly have received a fair trial. *Escalante*, 245 Ariz. 135, ¶ 21. To establish prejudice, Collins-Percival must show that, under the unique facts of his case, the trial court "could have reached a different result" but for the error. *Henderson*, 210 Ariz. 561, ¶¶ 26-27.

¶27 Aggravators "are like elements of a crime, which the state must prove beyond a reasonable doubt" and "must be proven as to each conviction." *State v. Miller*, 234 Ariz. 31, ¶ 46 (2013). Upon a jury finding of an aggravating factor, the trial court at sentencing "shall consider" such factors, including, as relevant here, "[l]ying in wait for the victim or ambushing the victim during the commission of any felony." § 13- 701(D)(17).

¶28 The jury was instructed that it must find any specific aggravating circumstance had been proven beyond a reasonable doubt. It was not instructed that it must decide whether each aggravator applied to each conviction. And, the aggravating factor verdict form does not clarify to which count or counts the jury intended to attach the one aggravating factor it found proven.

¶29 However, the trial court imposed sentences at or below the presumptive term for each conviction. *See* A.R.S. §§ 13-1504(A)(1), (B) (criminal trespass), 13-2923(A)(1), (C) (stalking), 13-2904(A)(6), (B) (disorderly conduct), 13-702 (first-time felony sentencing ranges), 13-704 (dangerous felony sentencing ranges). "Under Arizona's noncapital sentencing statutes, the maximum punishment authorized by a jury verdict alone, without the finding of any additional facts, is the presumptive term." *State v. Johnson*, 210 Ariz. 438, ¶ 10 (App. 2005); *see also Blakely v. Washington*, 542 U.S. 296, 303-04 (2004). So long as a court imposes "a judgment *within the range* prescribed by statute," *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000), judges enjoy considerable discretion at sentencing, and "may freely consider other sentencing factors not found by a jury in choosing a specific punishment," *Johnson*, 210 Ariz. 438, ¶ 12; *see also State v. Olmstead*, 213 Ariz. 534, ¶ 6 (App. 2006) (presumptive sentence within sentencing court's "considerable discretion," even after finding only mitigating factors).

¶30 This is true even when a trial court considers "an aggravating circumstance not found by the jury" so long as it does not "rely on that circumstance to increase [the] punishment beyond the maximum authorized by the jury verdicts alone." *Johnson*, 210 Ariz. 438, ¶ 13. Because the court imposed only presumptive and mitigated sentences here, it acted within its discretion in sentencing Collins-Percival within the statutory range, even if it independently considered aggravating circumstances— here, "lying in wait"— not properly found by the jury as to each count. *See id.* ¶ 12 (Supreme Court has "repeatedly emphasized since deciding *Apprendi* that trial courts may freely consider other sentencing factors not found by a jury in choosing a specific punishment that does not exceed the statutory maximum as defined in *Apprendi*").

¶31 Collins-Percival also asserts he may have been entitled to a further mitigated sentence on the disorderly conduct conviction because the evidence did not support the aggravating factor of lying in wait as to that count. We agree with Collins-Percival that, on this record, no reasonable juror could find he had lain in wait or ambushed R.M. in committing disorderly conduct, for which the trial court imposed the

longest sentence of two years.[5] *See State v. Brooks*, 103 Ariz. 472, 473 (1968) (elements of lying in wait include watching, waiting, and concealment with intention to commit underlying crime).

¶32 However, the record lacks any support for Collins-Percival's speculation that the trial court in fact applied the lying-in-wait aggravator to the disorderly conduct sentence. Crucially, the court did not cite the aggravator when articulating its reasoning for imposing the slightly mitigated sentence for disorderly conduct. Rather, the court noted only the emotional harm suffered by the victims as balanced by the "several mitigating factors," which it reasoned weighed "very heavily against giving a maximum sentence for any of the offenses." It was not until the conclusion of the sentencing hearing that the state clarified that only lying in wait, not emotional harm, had been found by the jury as an aggravating factor. At that point, the court stated generally that it "did consider that as well," noting that on the night in question, Collins-Percival had waited across from R.M's house and had entered uninvited. But the court did not specify either how much weight it had given that factor or whether it had considered that factor as to each count. Rather, it reiterated that "all of the mitigation information" already noted on the record had "tipped the balance towards some slight amount of leniency in his favor below the presumptive."

¶33 We presume the trial court knows and correctly applies the law. *State v. Moody*, 208 Ariz. 424, ¶ 49 (2004). In the absence of any indication the court incorrectly gave sentencing weight to the jury's finding of lying in wait with respect to the disorderly conduct count, we presume it did not. *See State v. Munninger*, 213 Ariz. 393, ¶ 14 (App. 2006) (given lack of support in record, finding no prejudice caused by court's use of improper aggravating factor to impose aggravated sentence). In fact, the court's references to Collins-Percival waiting in the park on "the night in question" before "coming into her house uninvited" supports the inference that it applied the factor only to the criminal trespass and stalking convictions, as the acts underlying the disorderly conduct conviction occurred the following morning. We therefore find no error, much less fundamental, prejudicial error, in the court's imposition of presumptive and mitigated sentences. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20.

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[5]The trial court imposed presumptive, concurrent prison terms of one and 1.5 years, respectively, for the criminal trespass and stalking counts.

Disposition

¶34 For the foregoing reasons, we affirm Collins-Percival's convictions and sentences.