

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAVID PRISE PARKER,
Appellant.

No. 2 CA-CR 2022-0126
Filed June 27, 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NOT FOR PUBLICATION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. CR201921420001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

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

James Fullin, Pima County Legal Defender
By Alex Heveri, Assistant Legal Defender, Tucson
Counsel for Appellant

STATE v. PARKER
Decision of the Court

MEMORANDUM DECISION

Judge O'Neil authored the decision of the Court, in which Vice Chief Judge Staring and Judge Sklar concurred.

O'NEIL, Judge:

¶1 David Parker appeals from his convictions and sentences for multiple sexual offenses. Parker argues that fundamental, prejudicial error occurred when the state elicited testimony from four witnesses concerning the victim's credibility. We affirm.

BACKGROUND

¶2 We view the facts and all reasonable inferences in the light most favorable to affirming Parker's convictions. *See State v. Molina*, 211 Ariz. 130, ¶ 2 (App. 2005). Parker and his former wife adopted A.O. in 2007 when she was thirteen years old. Within five months of the adoption, Parker began forcing A.O. to touch his genitals, having A.O. perform oral sex on him, and touching A.O.'s breasts. During the first of these encounters, Parker began to take off A.O.'s "pajama bottoms," but stopped when he realized she was menstruating. For eight years, he continued to sexually abuse A.O. on a weekly basis. A.O. disclosed the abuse for the first time in 2017 to her boyfriend, who later became her husband. A.O. then disclosed the abuse to a counselor, who informed the police.

¶3 Parker was charged with one count of molestation of a child, one count of sexual abuse of a minor, three counts of sexual conduct with a minor under fifteen, and three counts of sexual conduct with a minor. The jury found him guilty on all counts, and the trial court sentenced him to consecutive prison terms totaling ninety-seven years. Parker timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

DISCUSSION

¶4 Parker contends the state improperly elicited opinion testimony concerning the truthfulness of A.O.'s allegations from her biological sister, adoptive mother, counselor, and husband. Parker's defense at trial primarily challenged A.O.'s credibility and character for truthfulness. The state introduced evidence to corroborate A.O.'s account,

STATE v. PARKER
Decision of the Court

including A.O.'s memory of specific dates, times, and locations where the abuse occurred, her knowledge about a freckle near the shaft of Parker's penis, sexual text messages that Parker sent to A.O. while she was a minor, and evidence of "regular opportunities" when Parker and A.O. were alone. The state also introduced evidence of several instances of Parker's unusual behavior towards A.O., such as when A.O.'s mother found them "spooning" on the couch under a blanket; multiple occasions when her mother came home to Parker lying in bed, sometimes naked; when her mother awakened at night to find Parker out of bed and walking down the hall from the children's side of the house or lying on top of the covers in A.O.'s bed and stroking her hair; and when her mother came home to find Parker sitting in a chair with his legs spread open while A.O. sat facing his genitals with her hands on his thighs. In addition, the state elicited testimony describing the context and circumstances of A.O.'s initial disclosures of the abuse to other witnesses. This is the testimony that Parker now challenges on appeal.

¶5 Parker either did not object or objected on different grounds to the challenged testimony at trial. Therefore, as Parker concedes, our review is limited to fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018); *State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) ("[A]n objection on one ground does not preserve the issue on another ground."). Parker bears the burden to establish fundamental error by showing "(1) the error went to the foundation of the case, (2) the error took from the defendant 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. If Parker establishes error under either the first or second definition, he must also demonstrate prejudice. *See id.* Whether prejudice occurred is a fact-intensive question that depends on the nature of the error and the unique facts of the case. *Id.* ¶ 29. To demonstrate prejudice, a defendant must show that without the error, "a reasonable jury . . . could have reached a different [verdict]." *State v. Murray*, 250 Ariz. 543, ¶ 14 (2021) (quoting *Escalante*, 245 Ariz. 135, ¶ 29).

¶6 The credibility of a witness is always relevant, *State v. Lopez*, 234 Ariz. 465, ¶ 25 (App. 2014), and "any evidence that substantiates the credibility of a prosecution witness on the question of guilt is material and relevant," *State v. McCall*, 139 Ariz. 147, 158 (1983). However, Arizona prohibits opinion testimony concerning the truthfulness of a statement made by another witness. *State v. Reimer*, 189 Ariz. 239, 241 (App. 1997). A witness's "veracity and credibility lies within the province of the jury, and opinions about witness credibility are 'nothing more than advice to jurors

STATE v. PARKER
Decision of the Court

on how to decide the case.” *State v. Boggs*, 218 Ariz. 325, ¶ 39 (2008) (quoting *State v. Moran*, 151 Ariz. 378, 383 (1986)).

I. A.O.’s Sister

¶7 A.O.’s sister testified at trial about a phone call during which A.O. disclosed the sexual abuse to her. During her redirect examination, without objection, the state asked whether she believed A.O. She responded, “Yes.” Assuming without deciding the trial court erred by permitting this testimony in the absence of an objection, Parker was not prejudiced.

¶8 The state elicited the challenged testimony only after Parker had already elicited substantively identical testimony. During cross examination of A.O.’s sister, Parker asked, “[Y]ou didn’t believe [A.O.] at first, did you?” She responded, “That’s incorrect.” To the extent the testimony was improper, Parker invited any error. *See State v. Moody*, 208 Ariz. 424, ¶¶ 109-11 (2004) (finding no grounds for reversal even if testimony was erroneous where defendant first invited the error by eliciting the same testimony). Nor can Parker demonstrate prejudice from testimony that was merely cumulative to the testimony his own attorney had already elicited during cross examination. *State v. Williams*, 133 Ariz. 220, 227-29 (1982) (concerning admission of a witness’s diary entry expressing belief in defendant’s confession, where defendant placed the witness’s belief in issue, “no prejudice occurred because the evidence was merely cumulative to other testimony”).

¶9 Additionally, although the prosecutor’s closing argument mentioned in passing that A.O.’s sister was “angry and upset with [A.O.], but believe[d] her right away,” the closing argument did not otherwise emphasize A.O.’s sister’s belief. The trial court properly instructed the jury that the lawyers’ comments were not evidence, which was sufficient to dispel any prejudice from this passing statement. *Cf. State v. Payne*, 233 Ariz. 484, ¶ 109 (2013) (instruction cures error from improper prosecutorial vouching). The court also adequately instructed the jury that it must decide the believability of witnesses. *See State v. Schroeder*, 167 Ariz. 47, 51 (App. 1990). We presume the jury followed its instructions. *See State v. Newell*, 212 Ariz. 389, ¶ 68 (2006).

¶10 To the extent Parker separately challenges the sister’s testimony on direct examination, in which she described her urging A.O. to “tell [her] that this is 100 percent the truth” and A.O.’s fear that she would not be believed, nothing in that testimony expressed any opinion about the

STATE v. PARKER
Decision of the Court

truthfulness of A.O.'s allegations. Parker did not object to this testimony at trial and neither identifies nor develops any other argument on appeal. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009) (arguments not developed on appeal deemed waived). Parker challenged A.O.'s credibility and character for truthfulness during his opening statement and through other evidence throughout the trial. The trial court had discretion to permit evidence of A.O.'s prior consistent statements to rehabilitate her credibility, *see* Ariz. R. Evid. 801(d)(1)(B), her character for truthfulness in the form of an opinion or testimony about her reputation, *see* Ariz. R. Evid. 608(a), her state of mind and demeanor while disclosing the abuse, *see State v. Peeler*, 126 Ariz. 254, 257 (App. 1980) (finding no error where court admitted evidence of "the victim's mental condition, responsiveness, and competence" while making an out-of-court statement), and her motive to tell the truth, *see State v. Perez*, 233 Ariz. 38, ¶ 14 (App. 2013) (finding no error where prosecutor elicited testimony that lying could cause adverse consequences for a witness).

II. A.O.'s Adoptive Mother

¶11 A.O.'s mother testified about a meeting she set up to hear the allegations "directly from [A.O.]" She described A.O.'s demeanor and body language and testified that she told A.O. that "[i]f any part of this is not true, I need you to tell me right now." The prosecutor later asked, "And you said that when you asked [A.O.] that question or you made that statement, like I need to know that this is a hundred percent true, essentially, this is a big deal, you said that that wasn't because you didn't believe her —." Before the prosecutor finished the question, Parker objected on grounds not relevant here. The court overruled the objection. A.O.'s mother then described the reasons for her statement to A.O. based on her experience as a caseworker and as a foster parent, and volunteered that she "already knew that it was true."

¶12 The prosecutor did not ask A.O.'s mother for her opinion about the truth of the allegations, and Parker did not object on that basis. Nor did Parker move to strike the testimony after A.O.'s mother volunteered it. Parker cites no authority to suggest a trial court has a duty to sua sponte strike allegedly improper testimony absent an objection. *See* Ariz. R. Crim. P. 31.10(a)(7)(A). "It is unreasonable to require reversal when the trial court does not perform a function which properly belongs to defendant's counsel." *State v. Lee*, 25 Ariz. App. 220, 224 (1975) (court not required to "search out possible time violations"); *see also* Ariz. R. Evid. 103(a)(1); *United States v. Critton*, 43 F.3d 1089, 1093 (6th Cir. 1995) (court not obligated "to suppress evidence sua sponte").

STATE v. PARKER
Decision of the Court

¶13 Regardless, Parker was not prejudiced. The prosecutor never mentioned this comment again, and during closing argument referred only to the witness's opinion testimony, not challenged on appeal, that A.O. was a truthful person. Again, the jury was properly instructed in its duty to determine the credibility of witnesses and presumably followed that instruction. *See Schroeder*, 167 Ariz. at 51; *Newell*, 212 Ariz. 389, ¶ 68.

¶14 To the extent Parker challenges other portions of this witness's testimony, including her insistence to A.O. that she tell the truth, nowhere else in her testimony did A.O.'s mother offer an opinion as to the truthfulness of A.O.'s allegations. Again, Parker did not raise any other relevant objection at trial and does not identify or develop any other argument on appeal. *See Ritchie*, 221 Ariz. 288, ¶ 62.

III. Other Witnesses

¶15 Finally, the state elicited testimony from the counselor and A.O.'s husband regarding her demeanor when she disclosed the allegations to them. The counselor testified that A.O.'s reaction was the worst he had seen in thirty years of practice. A.O.'s husband testified regarding how and when A.O. disclosed the allegations against Parker to him. He also described the time and effort it took A.O. to disclose the abuse and his perception of her emotions when revealing the abuse. Parker did not object to the testimony of either witness.

¶16 The trial court did not err, much less fundamentally so, by permitting these witnesses to testify concerning their observations of A.O.'s demeanor and the relevant circumstances of her disclosure. *See Peeler*, 126 Ariz. at 257; *State v. Sanders*, 245 Ariz. 113, ¶ 95 (2018) (a prosecutor may properly elicit testimony concerning a defendant's demeanor during a police interview). At the very least, this evidence was relevant to the victim's state of mind when making the disclosures. *See State v. Supinger*, 190 Ariz. 326, 329 (App. 1997) (trial court did not err by admitting evidence that a child victim's parent disbelieved her to explain the victim's later recantations). Neither witness offered an opinion as to the truthfulness of A.O.'s allegations.

DISPOSITION

¶17 For the foregoing reasons, we affirm Parker's convictions and sentences.