IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CHRISTOPHER-JOHN KALAE ELLIS,
Appellant.

No. 2 CA-CR 2022-0139
Filed December 18, 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NOT FOR PUBLICATION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. CR20195373001
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

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

Megan Page, Pima County Public Defender
By Erin K. Sutherland, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Gard concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Christopher-John Ellis was convicted of three counts of child molestation. The trial court sentenced him to consecutive, maximum prison terms totaling seventy-two years. On appeal, Ellis argues the court erred by failing to sua sponte strike a juror for cause, overruling his objection to testimony constituting inadmissible other-acts evidence, refusing to ask questions submitted by jurors, and instructing the jury in a manner that relieved the state of its burden of proving he had acted knowingly. He also argues the prosecutor committed misconduct by eliciting irrelevant testimony to show "[he] had an aberrant sexual propensity" and misstating the law during closing argument thereby relieving the state of its burden of proof. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *See State v. Simpson*, 217 Ariz. 326, ¶ 2 (App. 2007). On Christmas Eve 2018, C.S., who is Ellis's niece, went to the Ellis house to spend the night with her cousins. Ellis, his wife, their children, and C.S. watched a movie together on the couch. At some point, everyone went to bed, leaving Ellis and C.S. on opposite ends of the couch. At Ellis's request, C.S. moved closer and he put his hands down the back of her shorts, penetrating her vagina with his fingers.

¶3 At trial, C.S. testified that "the same exact thing" happened three more times between that Christmas Eve and June 2019. In October 2019, she told her father's close friend, who she views as an uncle, that "Ellis had touched [her] in a way that an adult should not touch a child." The friend informed C.S.'s parents what he had learned, and the next morning her mother contacted law enforcement.

¶4 The police conducted a forensic interview with C.S. and arranged a confrontation call between C.S.'s mother and Ellis. During the

confrontation call, Ellis admitted to touching C.S. on Christmas Eve, claiming it was an accident and that he thought he was touching his wife. Ellis denied that the other three incidents had occurred but, when pressed, stated, "Well, let's put it this way, if she said I did, then I did." Ellis was charged with four counts of molestation of a child.

¶5 The jury found Ellis guilty of three counts of molestation of a child under the age of fifteen but was unable to reach a verdict on the remaining count. That count was later dismissed by stipulation of the parties. Ellis was sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

I. Juror 9

¶6 Ellis argues the trial court committed reversible error by failing to strike Juror 9 for cause after she stated during voir dire that she had a traumatic sexual assault experience as a teenager and that she did not "want to inadvertently bias" the trial based on her experience.[1] "[E]xcusing jurors is committed to the sound discretion of the trial court," and we will not set aside a court's decision whether to strike a juror for cause "absent clear and prejudicial abuse of that discretion." *State v. Milke*, 177 Ariz. 118, 122 (1993); *see also State v. Colorado*, 256 Ariz. 97, ¶ 23 (App. 2023).

¶7 In a series of questions to the entire panel of prospective jurors during voir dire, the trial court asked if anyone could not "embrace" that Ellis was presumed innocent, did not have to testify at trial, and was not

[1]Ellis argues that as a result of our supreme court's recent elimination of preemptory strikes, *see* Ariz. Sup. Ct. Order R-21-0020 (Aug. 30, 2021), a trial court's failure to strike a biased juror for cause amounts to structural error because "the defendant has no way to rectify" this error. The state argues that we should review for fundamental error because Ellis failed to move to strike the juror for cause, but the state notes "it is likely that seating a juror who is *actually* biased would constitute structural error." Because we conclude the trial court acted within its discretion by not sua sponte striking Juror 9 for cause, we also conclude no error occurred. *See State v. Diaz*, 223 Ariz. 358, ¶ 11 (2010) ("Regardless of how an alleged error ultimately is characterized, . . . a defendant on appeal must first establish that some error occurred.").

required to present evidence; hold the state to the "highest burden of proof," beyond a reasonable doubt; and set aside any biases. Juror 9 did not respond to any of those questions. She did so later, however, when the court asked the panel to "think about it and make sure that you are comfortable that you can serve on this jury, that there is no other reason that we haven't talked about; or even if I have talked about it, to raise your hand." Juror 9 mentioned her sexual assault as a teenager and stated that she did not "know how much bearing it w[ould] have" on her serving as a juror. She assured the court and the parties that she would "let [them] know" if during trial she "were starting to bring some of [her] personal experience[s] into the courtroom."

¶8 The prosecutor asked if she could "kind of set aside what happened" when she was younger and decide the case solely by "listen[ing] to the testimony from the stand and the law that the Judge gives." She answered, "Yeah. I don't carry—I would hope I would not carry what happened to me, apply it to someone else." The state then asked, "Do you think you can do that? Just make a decision based on the evidence and the law the Judge gives you?" Juror 9 answered affirmatively, adding that "if it comes up, I'll let whoever needs to know." Ellis similarly asked Juror 9 if she could set aside "the idea of maybe getting justice now" for what happened when she was a teenager and asked, "Do you feel like that motivation might be any part of your deliberations?" She responded, "No, I don't think so. I would be more concerned about the emotional factor." When the court noted that Juror 9 appeared "calm, collected" and did not "seem very emotional," she agreed, stating that she "just didn't want to not bring it up and felt that [she] should have. That's all." Neither Ellis nor the state moved to strike Juror 9, and she never raised any further concern while serving as a juror during the trial.

¶9 The Arizona and United States constitutions afford a criminal defendant the right to be tried by a fair and impartial jury. *See* Ariz. Const. art. II, § 24 ("In criminal prosecutions, the accused shall have the right to . . . an impartial jury . . . ."); *Morgan v. Illinois*, 504 U.S. 719, 726 (1992) (Sixth Amendment and Fourteenth Amendment due process clause of United States Constitution independently guarantee trial by impartial jury). As we discussed in *State v. Jimenez*, 255 Ariz. 550, ¶¶ 6-8 & 6 (App. 2023), our supreme court's elimination of peremptory strikes in criminal trials delegates to our trial courts the responsibility to "exclusively determine the final composition of juries in criminal cases." We further explained that because the defendant's right to a fair and impartial jury is integral to the public's confidence in the judicial system, under certain circumstances,

"[t]he potential for an appearance of bias suffice[s] to require disqualification regardless of any juror-specific finding of actual bias." *Id.* ¶ 7 (alterations in *Jimenez*) (quoting *State v. Eddington*, 228 Ariz. 361, ¶ 10 (2011)).

¶10 A trial court must excuse prospective jurors for cause "if there is a reasonable ground to believe" they "cannot render a fair and impartial verdict." Ariz. R. Crim. P. 18.4(b). In making this determination, the court has broad discretion to excuse or retain a potential juror. *Jimenez*, 255 Ariz. 550, ¶ 8. The court is in the best position "to assess whether prospective jurors should be allowed to sit," *State v. Blackman*, 201 Ariz. 527, ¶ 13 (App. 2002), because "[o]nly the trial judge has the opportunity to observe the juror's demeanor and the tenor of his or her answers first hand," *State v. Cook*, 170 Ariz. 40, 54 (1991). Moreover, "[a] juror's assurance of impartiality need not be couched in absolute terms." *State v. Trostle*, 191 Ariz. 4, 13 (1997). As the party challenging the court's failure to strike a juror for cause, Ellis bears the burden of establishing that Juror 9 could not be fair and impartial. *See id.*

¶11 By not excusing Juror 9, the trial court implicitly determined she could serve as a fair and impartial juror. Although her assurances of fairness and impartiality were not couched in absolute terms, that is not what the law requires. *See id.* Even in the face of the concerns Juror 9 did express, the court conducted the proper inquiry, including allowing counsel to further question Juror 9 in a manner that allowed the court and the parties to assess whether she should have been dismissed for cause. *See Colorado*, 256 Ariz. 97, ¶¶ 28-29.

¶12 Ellis nonetheless argues that Juror 9's written questions submitted to the court about the evidence during trial demonstrate her "probable bias" because they indicated she was "allowing her own experience to color her reception of the evidence and taint her deliberations."[2] We disagree. The questions that Juror 9 submitted asked

[2]Rule 18.6(e), Ariz. R. Crim. P., provides that the trial court must instruct the jurors that they are "permitted to submit to the court written questions directed to witnesses or to the court." The comment to this rule further explains that "any questions directed to witnesses or the court must be in writing, *unsigned* and given to a designated court officer." Ariz. R. Crim. P. 18.6(e) cmt. (emphasis added). We note that although the court properly instructed the jurors not to sign their questions, the juror question forms included a signature line and several jurors signed their names or

for clarification about certain witness relationships and about why C.S. had "stay[ed] in the room alone with [Ellis] when others went to bed" and whether she was "afraid [Ellis] was going to touch [her] again." The questions concerning witness relationships aided in clearing up confusion that was shared among other jurors, and the questions directed to C.S. helped evaluate C.S.'s credibility—two issues that were relevant to the ultimate determination of guilt. *See* Ariz. R. Evid. 401 (evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and the fact "is of consequence in determining the action"). Notably, during closing arguments, Ellis invited the jury to consider a similar question, asking, "Why did [C.S.] stay in that room with [Ellis]" when everyone else went to bed.

¶13 And to the extent the evidence may have reminded Juror 9 of a negative personal experience, the trial court was not required to strike her unless it found reasonable grounds to believe she could not be fair and impartial. *See* Ariz. R. Crim. P. 18.4(b); *see also State v. Aguilar*, 169 Ariz. 180, 182 (App. 1991) (recognizing jurors may draw from common sense and experience in deciding case). At oral argument in this court, Ellis argued the trial court improperly provided Juror 9 with an "out" as a substitute for striking her. After Juror 9 raised her "concern," the court asked if she "would . . . be comfortable letting us know" whether she "start[ed] to bring some of [her] personal experience[s] into the courtroom" if she found that she was not doing okay during trial. However, considering the court's discussion with Juror 9 as a whole, it is apparent the court did not find reasonable grounds to believe she would be biased. Juror 9 raised her concern, the court considered it and understood she "might have feelings come up" and asked how she was "doing right now," to which Juror 9 answered she was "okay." The court then gave counsel the opportunity to ask follow up questions, during which Juror 9 again assured the court and counsel that she would inform them if any concern arose during trial. And she never raised any concerns during trial that her personal experiences were interfering with her duties as a juror. There is nothing in the record to suggest Juror 9 would not have raised a concern if one arose. We therefore reject Ellis's argument that the court's invitation to inform the court and counsel if something changed during trial amounted to an "out"

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included their juror numbers. We caution the use of such juror question forms because it degrades juror anonymity and improperly allows the parties to speculate and question a specific juror's mental process.

that was based on a finding of reasonable grounds that she could not be fair and impartial. The record supports the court's determination that Juror 9 could be fair and impartial, a determination to which we defer because the court was ideally situated to observe Juror 9's responses and demeanor. *See Jimenez*, 255 Ariz. 550, ¶¶ 8-10.

II. Testimony About Witness's Age

¶14 Ellis argues the trial court abused its discretion by overruling his objection to testimony about his wife's age on relevancy grounds, presumably asserted under Rules 401 and 402, Ariz. R. Evid. During cross-examination of Ellis's wife, the state elicited testimony over Ellis's objection that she was twenty-eight years old. The day before, C.S.'s mother testified that the Ellis family had lived in the same "general area" in Tucson "since [she] started dating [her] husband over 12 years ago." Ellis maintains that this testimony, in combination with Ellis's testimony that he was forty-eight years old, "encouraged the jury to figure out through simple math that [Ellis] and [his wife] were living together when [she] was still a minor." Specifically, he argues that this testimony "had no relevance" to any matter at issue "other than to tell the jury, in a roundabout way, that [he] was attracted to young girls."

¶15 Generally, all relevant evidence is admissible. Ariz. R. Evid. 402. Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Ariz. R. Evid. 401. The threshold for relevance "is not particularly high," *State v. Oliver*, 158 Ariz. 22, 28 (1988), and requires "only a modicum of rationally probative force," *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 499 (1987). We review rulings on the relevancy and admissibility of evidence for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, ¶ 15 (2003).

¶16 Here, the state was required to prove that Ellis intentionally or knowingly engaged in any direct or indirect touching, fondling, or manipulation of any part of the genitals or anus by any part of the body with a child under fifteen years of age. *See* A.R.S. §§ 13-1401(A)(3)(a), 13-1410(A). In his opening statement, Ellis argued only one incident occurred and the evidence would show "that he was asleep; that he was cuddling with his wife, so he thought; and that when he reached down the pants, he then immediately knew this was not his wife." Ellis testified that although he "inten[ded] to take [his] hand and put it into the pants of a person," the intended person was his wife. Therefore, evidence of the physical differences between Ellis's wife and C.S., who was ten years old at

the time, was relevant to state's case against him. Accordingly, the trial court did not abuse its discretion in admitting the evidence of his wife's age.

¶17 Ellis additionally argues that the testimony should have been precluded under Rules 403 and 404(b), Ariz. R. Evid., because it was impermissible other-acts evidence and unduly prejudicial, serving "no purpose other than to imply that [he] had previously engaged in a sexual relationship with a minor." However, Ellis's objection below on relevance grounds did not preserve the issue on another ground on appeal. *See State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008). Accordingly, Ellis's Rules 403 and 404(b) arguments are forfeited for all but fundamental, prejudicial error. *See id.* ¶¶ 4, 6; *see also State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). Under this standard, the defendant must show error and, if it exists, that the error is fundamental. *Escalante*, 245 Ariz. 135, ¶ 21. "A defendant establishes fundamental error by showing that (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." *Id.* Additionally, the defendant must make a separate showing of prejudice if alleging error under the first two prongs. *Id.*

¶18 "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). But other-acts evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* This list is not exhaustive. *State v. Via*, 146 Ariz. 108, 122 (1985). However, relevant evidence or evidence of an act otherwise admissible under Rule 404(b) may be excluded if "its probative value is substantially outweighed by a danger of," among other things, "unfair prejudice." Ariz. R. Evid. 403.

¶19 Ellis maintains that the state introduced evidence of his wife's age to show he "has an attraction to young girls—an aberrant sexual propensity to commit the charged offenses." We disagree. Evidence of Ellis's wife's age cannot fairly be characterized as inadmissible other-acts evidence because it did not refer to any specific other crime, wrong, or act committed by Ellis. We also disagree that the testimony was improper sexual propensity evidence. Contrary to Ellis's argument, the introduction of his wife's age allowed the jury to reasonably infer that Ellis knew C.S. was next to him on the couch and could not reasonably have mistaken C.S. for his wife because of their age difference, which is suggestive of a difference in physical characteristics.

¶20 And although a trial court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice," *id.*, evidence is not unfairly prejudicial simply because it is "adversely probative," *State v. Schurz*, 176 Ariz. 46, 52 (1993). Rather, "unfair prejudice" is an "undue tendency to suggest decision on an improper basis, such as emotion, sympathy or horror." *State v. Escalante-Orozco*, 241 Ariz. 254, ¶ 48 (2017) (quoting *State v. Mott*, 187 Ariz. 536, 545 (1997), *abrogated on other grounds by Escalante*, 245 Ariz. 135, ¶ 15. Ellis's argument that the evidence was "unfairly prejudicial" because the state introduced his wife's age to "distract the jury from the real issue" rests on his claims that her age was admitted for an improper purpose and was irrelevant—arguments with which we have already disagreed. Moreover, any discussion of his wife's age was brief and, when read in context of the surrounding testimony, was seemingly introduced to draw a contrast between her age and the age of C.S. The state asked Ellis's wife her age three questions after asking her about C.S.'s age at the time of the incidents and once she answered, the state never brought it up again. We therefore find no error, fundamental or otherwise.

III. Prosecutorial Misconduct

¶21 Ellis argues that the prosecutor committed error during cross-examination of his wife and during closing argument, requiring reversal. Specifically, he contends the prosecutor's questions about his wife's age amounted to improper other-acts evidence and the prosecutor misstated the law in a manner that relieved the state of its burden of proof. "The term 'prosecutorial misconduct' broadly encompasses any conduct that infringes a defendant's constitutional rights," including "prosecutorial conduct ranging from inadvertent error or innocent mistake to intentional misconduct." *In re Martinez*, 248 Ariz. 458, ¶ 45 (2020). While it makes no difference to our analysis, prosecutorial error—rather than prosecutorial misconduct—is the correct terminology when, as here, there is no ethical rule violation. *See State v. Murray*, 250 Ariz. 543, ¶ 12 (2021).

¶22 To prevail on his claims, Ellis must show that the prosecutor's errors "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* ¶ 13 (quoting *State v. Morris*, 215 Ariz. 324, ¶ 46 (2007)). It is the defendant's burden to establish prosecutorial error. *See State v. Vargas*, 249 Ariz. 186, ¶¶ 14-15 (2020). Because Ellis did not object on the basis of prosecutorial error at trial, we review only for fundamental, prejudicial error. *See Murray*, 250 Ariz. 543, ¶¶ 14-16.

A. Testimony About Wife's Age

¶23 Ellis contends the prosecutor erred when it "snuck" testimony of his wife's age in at the conclusion of the presentation of evidence, thereby depriving him of the opportunity to challenge the evidence before trial or rebut the evidence at trial. He specifically contends this evidence "considered in light of all of the other testimony, had no relevant purpose other than to show that [he] had an aberrant sexual propensity" to molest young girls. However, as previously discussed, evidence of his wife's age was properly admitted and cannot fairly be characterized as other-acts or propensity evidence. Therefore, no error occurred.

B. Misstatement of Law

¶24 Ellis argues the prosecutor misstated the law during closing argument by stating that a "knowing or intentional touch is all that is needed to convict a person for molestation, and that it does not matter who the defendant believed he was touching," thereby relieving the state of its burden of proof. Although prosecutors have wide latitude when presenting closing arguments, "their prerogative to argue their version of the evidence does not sanction a misstatement of law." *Murray*, 250 Ariz. 543, ¶ 18. We review issues of statutory interpretation de novo. *State v. Luviano*, 255 Ariz. 225, ¶ 7 (2023).

¶25 During closing, the prosecutor pointed to Ellis's testimony that he "intended to put [his] hand down someone's pants" and that he "intended it to be [his] wife." The prosecutor argued:

> [Ellis] wants you to believe it wasn't the person he intended to, that he put it down the wrong person's pants, but the voluntariness, folks, that is already there. It is not a defense that it was the wrong person's pants. If you touch a 14-year-old on their vagina, that's molest. You don't get to say, oh, but I thought she was 16. Oh, but I thought. No. You do that, you're guilty. He did that, he told you he did that, he's guilty.

The prosecutor reiterated during rebuttal that "[i]n this case he can't touch [C.S.] and say, oh, but I thought it was my wife who's of age, and make it not a crime. It's still a crime." Ellis argues this was a misstatement of the

law that "wholly relieved the prosecution of its burden to prove an essential element of the offense—that [Ellis] knowingly or intentionally touched C.S."

¶26 "A person commits molestation of a child 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." § 13-1410(A). Ellis argues that the mens rea of "intentionally" or "knowingly" for a child molestation charge applies to both elements of the statute, asserting the state must prove "that 1) the person knowingly or intentionally engaged in sexual contact *and* 2) knowingly or intentionally did so with a person who is a child." He further maintains where a "defendant intends to touch one person (who happens to be an adult) but ends up mistakenly touching a different person (who happens to be a child), the defendant has not committed . . . [child] molestation because the child was not the targeted recipient of the touch." We disagree.

¶27 The plain language of the statute requires the state to prove (1) that a defendant "knowingly and intentionally" engaged in sexual contact and (2) that C.S. was "under fifteen years of age." *See id.* Indeed, we already rejected a species of Ellis's argument in relation to a similarly structured statute, explaining that "[w]hen the legislature intends that the *mens rea* apply to the status of the victim, it says so explicitly." *State v. Gamez*, 227 Ariz. 445, ¶ 30 (App. 2011). In that case, the defendant was charged with sexual conduct with a minor, *id.* ¶ 18, which requires proof that the defendant "intentionally or knowingly engag[ed] in sexual intercourse or oral sexual contact with any person who is under eighteen years of age," A.R.S. § 13-1405(A). The defendant believed the victim was older than fifteen at the time he engaged in sexual intercourse with her. *Gamez*, 227 Ariz. 445, ¶¶ 4, 8-9 & n.4. The defendant argued, similar to Ellis, that the knowing and intentional mens rea language in the statute "applies to the fact that the person was under the age of 18 as well as to the sexual act." *Id.* ¶ 28. We disagreed, concluding that the state had met its burden by establishing the defendant "knowingly and intentionally engaged in sexual intercourse with [the victim] when she was under the age of 15," thereby proving every element of the crime. *Id.* ¶¶ 28-37 & 37.

¶28 The question before us is whether the principles in *Gamez* apply to the situation here, where the defendant argues he intended to touch his wife but mistakenly touched the victim who was a minor. The parties have not cited, and we have not found, any Arizona cases

addressing the specific issue before us. We therefore look to decisions from other states for guidance. The only case we have found that addresses this issue is *State v. Brand*, 209 N.E.3d 762 (Ohio Ct. App. 2023). The defendant in that case testified he had mistakenly entered his daughter's room after getting up to use the bathroom during the night. *Id.* ¶¶ 45-46. He believed he was getting into his bed with his wife and, while he was searching for her hand, he touched his daughter's breast over her clothing. *Id.* ¶ 46. He then realized he was in the wrong bed, left his daughter's room, and returned to his own bed. *Id.* He was charged with two counts of gross sexual imposition. *Id.* ¶ 2.

¶29 After a trial, the jury convicted him under a subsection of the relevant statute that required a showing that he had "sexual contact with another, not the spouse of the offender" when the other person is "less than thirteen years of age, whether or not the offender knows the age of that person." *Id.* ¶ 57 (quoting Ohio Rev. Code Ann. § 2907.05(A)(4)). Before jury deliberations, the defendant requested jury instructions on mistake of fact and accident, arguing that "getting into his daughter's bed negated a guilty mental state."[3] *Id.* ¶ 52. The defendant's proposed mistake of fact instruction stated in part that if he had an "honest belief" he engaged in sexual contact with his wife then "he is not guilty of the crime of gross sexual imposition, as a purpose to engage in sexual contact with a person less than thirteen years of age [is] an essential element of that offense." *Id.* ¶ 93. Similarly, his proposed accident instruction stated that he "denies any purpose to have sexual contact with a person less than thirteen years of age." *Id.* The trial court denied his request, reasoning that his proposed instructions concerned the age of the victim, which the Ohio Supreme Court had previously held was a strict-liability element of the relevant statute. *Id.* ¶¶ 84, 89-90.

¶30 On appeal, the defendant argued the trial court abused its discretion by denying his requested jury instructions because they concerned the identity of the victim and not the victim's age. *Id.* ¶¶ 84, 89. He contended that the mens rea attached to the phrase "not the spouse of the offender," which he referred to as the "'identity' element." *Id.* ¶ 92. The Ohio Court of Appeals rejected his argument, concluding that the statute

[3]A "'mistake of fact' negates a specific intent element of a crime when a defendant acted intentionally but acted based on mistaken information or belief, while 'accident' negates a specific intent element of a crime when a defendant acted unintentionally." *Brand*, 209 N.E.3d 762, ¶ 87.

"plainly indicates a purpose to impose strict criminal liability with respect to that element of the offense" because "a person either is or is not another's spouse." *Id.* The court went on to say that "[t]o hold, as [the defendant] argues we should, that the identity element of [the statute] requires the mens rea of 'purpose' would mean that strict liability applies to the age of the offender, *except* when the offender claims to have incorrectly believed that the victim was the offender's spouse," which "makes no sense in the context of the full statutory text" and has "no lawful basis." *Id.* The court concluded that the trial court had not abused its discretion because the defendant's proposed instructions were "about the age element" and "misstate[d] the law" with respect to that element. *Id.* ¶ 93.

¶31 Although Ohio's statutory language differs from Arizona's, we nonetheless find its reasoning persuasive because the plain language of § 13-1410(A), like the Ohio statute, does not attach a mens rea element to the victim's age. And we "assum[e] that the legislature has said what it means." *State v. Gomez*, 246 Ariz. 237, ¶ 15 (App. 2019) (alteration in *Gomez*) (quoting *State v. Ross*, 214 Ariz. 280, ¶ 22 (App. 2007)). Notably, the legislature has required the state to prove the defendant knew the victim was a minor in other statutes involving crimes with a child victim. *See, e.g.*, A.R.S. § 13-3212(B)(2) ("A person who is at least eighteen years of age commits child sex trafficking by knowingly . . . [e]ngaging in prostitution with a minor who the person knows or should have known is fifteen, sixteen or seventeen years of age."). Moreover, in interpreting the statute at issue in *Gamez* with similar statutory construction to § 13-1410(A), we rejected a defendant's argument that his ignorance or mistake of fact as to the victim's age disproved criminal intent, stating that

> by reason of an unbroken line of judicial holdings, it can be said that the [sexual conduct of a minor] statute denounces the mere doing of the act as criminal, regardless of whether the perpetrator had a bad mind, [requiring only] the generalized intent to engage in a course of criminal conduct.

State v. Falcone, 228 Ariz. 168, ¶ 15 (App. 2011) (first alteration added, second alteration in *Superior Court*) (quoting *State v. Superior Court*, 104 Ariz. 440, 442-43 (1969)). For these reasons, we apply the principles in *Gamez* here and conclude that the state was not required to prove Ellis intended or knew that the person he was engaging in sexual contact with was a child under the age of fifteen. *See Spitz v. Mun. Ct. of Phx.*, 127 Ariz. 405, 407 (1980)

(guilt without mens rea "is allowed in certain cases, frequently involving the protection of children").

¶32 In sum, and consistent with the prosecutor's closing argument, the state was required to prove Ellis intentionally or knowingly engaged in sexual contact and the victim was a child under fifteen years old.[4] Accordingly, the prosecutor did not misstate the law.[5]

IV. Juror Questions

¶33 Ellis argues the trial court erred by not asking four questions submitted by the jury concerning a witness's opinion that C.S. was untrustworthy. He maintains this error violated his right to a fair trial because he was denied the ability to present a complete defense, as protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and article II, §§ 4 and 24 of the Arizona Constitution. The trial court has discretion to determine whether jury questions are appropriate, *see* Ariz. R. Crim. P. 18.6(e), and we will not disturb its ruling absent a clear abuse of that discretion, *State v. LeMaster*, 137 Ariz. 159, 163-64 (App. 1983).

¶34 Ellis called a close friend, who also knew C.S. well, to testify on his behalf. The witness testified that C.S. had a reputation among family members for being untruthful, stating, "My opinion is I can't trust her any further than I can see her." Near the conclusion of the friend's testimony, the court received four juror questions that it characterized as "want[ing]

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[4]Ellis also contends that the prosecutor's statements "led the jurors to read the instruction in an unintended way." The trial court properly instructed the jury that the state was required to prove the following: "One, the defendant intentionally or knowingly engaged in any direct or indirect touching, fondling, or manipulation of any part of the genitals or anus by any part of the body; and, two, the child was under 15 years of age." Ellis maintains that the state's argument "told the jurors that there was no mental culpability required regarding the victim" because section two did not include the mens rea. However, as discussed, the mens rea does not attach to the status of the victim. *See Gamez*, 227 Ariz. 445, ¶ 30; *see also State v. Mendoza*, 234 Ariz. 259, ¶¶ 14-15 (App. 2014) (identical jury instruction to this case was not misstatement of law).

[5]Because Ellis fails to establish the existence of prosecutorial error, we need not consider his claim of cumulative prosecutorial error. *See State v. Vargas*, 251 Ariz. 157, ¶ 86 (App. 2021).

to go into the specifics of the opinion of reputation of untrustworthiness." The state objected to asking the witness these questions, presumably under Rule 608(b), Ariz. R. Evid., and the court sustained its objection.

¶35 First, we note that Ellis did not make an offer of proof regarding the exclusion of this testimony. *Cf. State v. Towery*, 186 Ariz. 168, 179 (1996) (in context of cross-examination, "an offer of proof stating with reasonable specificity what the evidence would have shown is required" for appellate review). Although Ellis acknowledges there was no offer of proof, he argues this is not "detrimental to the claim" because letters and emails provided to the court for sentencing by the witness and other family members "shed light on what she likely would have said." But under Rule 103(a)(2), Ariz. R. Evid., to preserve a claim of error on a ruling to exclude evidence, a contemporaneous offer of proof is required unless the substance of the evidence is apparent from the context. Because the letters and emails were not provided to the court until after the trial, they were untimely, and the trial record does not establish what, if any, bearing the letters and emails would have had on the witness's testimony. Ellis nevertheless maintains that "[e]veryone knew what the answer would be if the question were asked in open court" because the defense had the emails in 2021 and the state "presumably interviewed [the witness] and was therefore aware of her opinions regarding C.S.'s truthfulness." This, however, is speculative at best. Accordingly, we are limited to fundamental-error review. *See Escalante*, 245 Ariz. 135, ¶ 12.

¶36 We cannot say the trial court erred in sustaining the state's objection and not asking the juror questions. Generally, extrinsic evidence is inadmissible to prove specific instances of a witness's conduct to attack the witness's character for truthfulness. Ariz. R. Evid. 608(b). However, on cross-examination, the court may "allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of . . . another witness whose character the witness being cross-examined has testified about." Ariz. R. Evid. 608(b)(2).

¶37 Ellis argues that the "jury's questions constituted cross-examination as it was questioning a witness who had already testified in order to check the validity of the testimony." But Ellis cites to no authority, and we are aware of none, suggesting juror questions are "designed to achieve the same goal as traditional cross-examination." *Compare Vargas*, 251 Ariz. 157, ¶ 44 ("[C]asting doubt on the credibility of witness testimony is a proper purpose of cross-examination."), *and Zier v. Shamrock Dairy of Phx., Inc.*, 4 Ariz. App. 382, 383-84 (1966) ("The purpose of

cross-examination is primarily to test the truth and reliability of what has been said on direct."), *with LeMaster*, 137 Ariz. at 165 (jury questions help ensure that "jurors be well-informed with an opportunity to clarify matters they either did not hear or did not comprehend").

¶38 We recognize that "[a] defendant in a criminal prosecution has an absolute right to cross-examine an adverse witness, and if at all within the proper bounds, such right may not be unduly restrained or interfered with by the trial court." *State v. Holden*, 88 Ariz. 43, 56 (1960); *but see State v. Hardy*, 230 Ariz. 281, ¶ 49 (2012) (defendant's constitutional right to present complete defense is limited by evidentiary rules), *abrogated on other grounds by Cruz v. Arizona*, 598 U.S. 17 (2023). It does not follow, as Ellis suggests, that his right to present a complete defense includes directing the state's cross-examination of its adverse witnesses. And the ability of jurors to submit questions directed to witnesses, Rule 18.6(e), does not transform their role in a criminal trial from one of factfinder to that of an advocate, *compare Pfeiffer v. State*, 35 Ariz. 321, 325 (1929) ("The jury's province under our system of laws is to judge and determine the facts . . . ."), *with State ex rel. Romley v. Superior Court*, 181 Ariz. 378, 382 (App. 1995) (defense counsel's obligation is "preventing the conviction of the innocent" while prosecutor's obligation is "present[ing] the evidence" (quoting *United States v. Wade*, 388 U.S. 218, 256-57 (1967) (White, J., concurring and dissenting in part)). Because the trial court properly sustained the state's objection based on Rule 608(b), we find no error, fundamental or otherwise.

V. Jury Instruction

¶39 Ellis argues the trial court erred by "combining the law on voluntary intoxication with the definition of 'knowingly,'" thereby "creat[ing] a presumption that once evidence of voluntary intoxication was admitted" the state was relieved of its burden of proof. "We consider the jury instructions as a whole to determine whether the jury received the information necessary to arrive at a legally correct decision." *State v. Dann*, 220 Ariz. 351, ¶ 51 (2009). "The sole purpose of jury instructions is to correctly inform jurors of the applicable law." *State v. Rix*, ___ Ariz. ___, ¶ 38, 536 P.3d 253, 265 (App. 2023). Because Ellis did not object below to the jury instructions, we review only for fundamental, prejudicial error. *See Dann*, 220 Ariz. 351, ¶ 51.

¶40 The trial court instructed the jury regarding the definition of "knowingly" as follows:

> Knowingly means a defendant acted with awareness of or belief in the existence of conduct or circumstances constituting an offense. It does not mean that a defendant must have known the conduct is forbidden by law. It is no defense that the defendant was not aware of or could not believe in the existence of conduct or circumstances solely because of voluntarily intoxication.

¶41 Ellis argues that "[a] reasonable juror could easily have understood the instruction to mean that proof of voluntary intoxication negates the need to prove knowing action because knowledge is presumptively attributed to a voluntarily intoxicated defendant." We disagree. The instruction simply informed the jury that a voluntary intoxication defense was not available to dispute his awareness of or belief in the existence of his conduct or the surrounding circumstances. This accurately states the law. *See* A.R.S. § 13-503 (voluntary intoxication "is not a defense for any criminal act or requisite state of mind"). Moreover, our supreme court approved identical language in *State v. Gallegos*, 178 Ariz. 1, 11-12 (1994), noting that "a voluntary intoxication defense is not available to a defendant charged with an offense for which the culpable mental state is 'knowingly'" and concluding that "the trial judge committed no error when instructing the jury as to the effect of defendant's alleged voluntary intoxication on his culpability." Ellis nonetheless maintains that combining the voluntary-intoxication instruction with the definition of knowingly somehow rendered the instruction improper. He however provides no authority, and we are aware of none, supporting his contention that the order in which otherwise proper jury instructions are given can cause them to be improper. We therefore find no error, fundamental or otherwise.

Disposition

¶42 For the foregoing reasons, we affirm Ellis's convictions and sentences.