

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JUSTIN WAY,
Appellant.

No. 2 CA-CR 2023-0211
Filed November 29, 2024

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NOT FOR PUBLICATION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. CR20170691001
The Honorable Richard E. Gordon, Judge

AFFIRMED

COUNSEL

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

Mulembo Law PLLC, Tucson
By Tamara Mulembo
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge O’Neil authored the decision of the Court, in which Judge Vásquez and Judge Kelly concurred.

O’NEIL, Presiding Judge:

¶1 Appealing from his convictions and sentences for three counts of sexual conduct with a minor, Justin Way asserts the trial court committed structural error when it did not sua sponte strike a prospective juror for cause. Exercising our jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A), we affirm.

¶2 During jury selection, the trial court asked the panel of prospective jurors whether “you, or any members of your family or close friends[, have] ever been involved in any case such as this” or whether “the nature of the case . . . would make it difficult for you to be fair and impartial.” After several prospective jurors identified relevant incidents from their past and were excused, a replacement juror disclosed that he “was abused when [he] was a child by a baby sitter.” The court asked the juror whether that experience “would make it difficult . . . to be fair and impartial.” The juror answered, “I would have to say no, because I feel I can be impartial.”

¶3 The sole issue on appeal primarily concerns the trial court’s follow-up questions to the juror’s answer. The court asked whether the juror could “be fair to the state” and “be fair to the defendant.” The juror answered both questions affirmatively. The court also asked, “What about anything about the nature of this case that would make it difficult for you to be fair and impartial?” The juror said, “There is memory, but honestly, I was so young that I believe I have dealt with it myself.” Finally, the court asked whether the juror could “be fair and impartial.” The juror replied, “I could be fair and impartial, yes.”

¶4 Way did not move to strike the juror for cause. On appeal, Way asserts the trial court erred when it did not sua sponte strike the juror and violated the comment to Rule 18.5(f), Ariz. R. Crim. P., by “asking a series of leading, conclusory questions” while “rehabilitating” the juror. He further contends the purported error is structural.

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¶5 Way cites no authority identifying the failure to strike a purportedly biased juror as one of the “relatively few instances in which we should regard error as structural.” *State v. Ring*, 204 Ariz. 534, ¶ 46 (2003). To the contrary, our supreme court has refused to treat similar alleged errors as structural. See *State v. Sanders*, 245 Ariz. 113, ¶¶ 33-34 (2018) (concluding alleged error was not structural where seated juror was purportedly ineligible due to felony conviction and supposedly lied about having civil rights restored). Absent a showing of structural error, and without an objection at trial, our review is limited to fundamental, prejudicial error. *Id.* ¶ 36.

¶6 Way, however, did not argue in his opening brief that the failure to sua sponte strike the juror in this case amounted to fundamental error.¹ He has therefore waived his argument. See Ariz. R. Crim. P. 31.10(a)(7)(B); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (failure to argue fundamental error waives claim on appeal), *disapproved on other grounds by State v. Vargas*, 249 Ariz. 186, ¶¶ 1, 6, 18-21 (2020).

¶7 Even absent waiver, the use of leading questions during jury selection does not automatically suggest error. We have previously explained that Rule 18.5(f) “does not forbid leading questions, by parties or the court, including those addressing rehabilitation,” “even when the question touches on a juror’s fairness and impartiality.” *State v. Fournier*, 256 Ariz. 33, ¶ 14 (App. 2023), *depublished in part on other grounds*, ___ Ariz. ___, 543 P.3d 1034 (2024) (mem. decision). The comment to Rule 18.5(f) offers a helpful warning that answers to leading, conclusory questions may be insufficient to rehabilitate a biased juror. See *Fournier*, 256 Ariz. 33, ¶ 14.

¹In his reply brief, Way asserts that “improper use of leading questions is error – even under the fundamental error standard of review.” Aside from that broad assertion, accompanied only by an inapplicable citation to a case involving a claim of prosecutorial error for leading questions during a witness examination, see *State v. Romero*, ___ Ariz. ___, ¶ 49, 556 P.3d 305, 319 (App. 2024), Way does not develop this argument. We deem it waived. See Ariz. R. Crim. P. 31.10(a)(7); see also *State v. Bolton*, 182 Ariz. 290, 298 (1995) (insufficient argument waives claim on appeal). In any event, we generally do not address arguments raised for the first time in a reply brief. See *State v. Cohen*, 191 Ariz. 471, ¶ 13 (App. 1998) (reply brief limited to matters raised by appellee’s brief); *State v. Cannon*, 148 Ariz. 72, 79 (1985) (appellate court “can disregard substantive issues raised for the first time in the reply brief”).

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It does not, however, alter the provisions of the rule or the standard for challenging a juror for cause. *Id.* ¶ 13; Ariz. R. Crim. P. 18.5(h).

¶8 A challenge for cause requires “a reasonable ground to believe that the juror . . . cannot render a fair and impartial verdict.” Ariz. R. Crim. P. 18.4(b); *see also* Ariz. R. Crim. P. 18.5(h); *Fournier*, 256 Ariz. 33, ¶ 9. We review a trial court’s decision not to strike a juror for abuse of discretion. *See Fournier*, 256 Ariz. 33, ¶ 9. Here, none of the juror’s answers indicated any difficulty in being fair and impartial, much less that he was incapable of doing so. The court’s questions, leading or not, were merely an exercise of its “authority to conduct voir dire” via thorough oral examination of the juror. *State v. Jimenez*, 255 Ariz. 550, ¶ 8 (App. 2023); Ariz. R. Crim. P. 18.5(f). There was no need to “rehabilitate” a juror who, in the court’s sound discretion, had demonstrated no reasonable grounds to believe he could not render a fair and impartial verdict.

¶9 We affirm Way’s convictions and sentences.