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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LUIS NOLBERTO FELIX-GRADILLAS, Appellant.	2 CA-CR 2008-0126 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064628

Honorable Michael Cruikshank, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

Wanda K. Day
Tucson
Attorney for Appellant

P E L A N D E R, Chief Judge.

¶1 After a jury trial, appellant Luis Felix-Gradillas (Gradillas) was convicted of five counts of child molestation. The victim was his stepdaughter, A., who was under twelve years old at the time of the offenses. Gradillas was sentenced to presumptive, consecutive and concurrent prison terms totaling fifty-one years. He contends the trial court erred by denying his request for new counsel, refusing to allow him to represent himself, admitting certain expert testimony, and instructing the jury on the subject of reasonable doubt. He also claims the prosecutor committed misconduct by vouching for the veracity of the charges. Finding no error, we affirm.

Background

¶2 Before trial, Gradillas accepted a plea offer. The trial court reserved acceptance of the plea until sentencing in order to allow Gradillas time to discuss it with his family. Two months later, Gradillas filed a pro se motion to withdraw his plea and requested new counsel, stating he was "dissatisfied with the services of [his] present attorney." His counsel also moved to withdraw. At the first hearing on the motions, defense counsel explained Gradillas had felt pressured into accepting the plea agreement and wanted to discuss his case with another attorney. The court denied counsel's motion to withdraw but reserved ruling on withdrawal of the plea.

¶3 At a second hearing eleven days later, Gradillas's counsel informed the trial court another attorney from her office had spoken with Gradillas about the plea agreement, but Gradillas had decided to withdraw from it and request new counsel. Gradillas explained, "I do not feel comfortable with her being my lawyer" because "I do not agree with nothing

[sic] that she says" and "I feel like I need a lawyer that I feel is trying to defend me." The court denied counsel's motion to withdraw. About a week later, the court granted Gradillas's motion to withdraw from the plea agreement but again denied his motion for new counsel. Gradillas filed a pro se notice of appeal, which this court later dismissed.

¶4 At a suppression hearing a month before trial, Gradillas's counsel again moved to withdraw. Gradillas had refused to be transported from jail to attend the hearing and had filed a motion to represent himself. His attorney explained that, when she had gone to meet with him about the suppression hearing, he had refused to "participate in preparing for [the] hearing" and that their communication had broken down.

¶5 The next day, the trial court questioned Gradillas about representing himself. He expressed his desire to proceed pro se but also said he would prefer a new lawyer if the court would appoint one for him. The court denied Gradillas's motion, determining that his request to represent himself was involuntary because his "real preference" was to have new counsel appointed. In so ruling, the court also noted "the amount of time [defense counsel had] spent working on the case so far," her qualifications and years of experience, the rapidly approaching trial date a month away, the seriousness of the charges, the age of the case, and the alleged victim's right to a speedy trial. Although Gradillas's counsel said her relationship with Gradillas was "irretrievably broken" and they were "unable to communicate," the court nonetheless denied Gradillas's motion for new counsel "because of the delay that would accrue to the case by the granting of it and the insubstantial . . . nature or basis of the request."

¶6 Several weeks later, at a status conference a few days before trial, the court asked Gradillas about his relationship with his attorney. He acknowledged they had "reached an agreement" and had "communication." Gradillas also stated he believed that she would "do a good job" on his case. At that time, Gradillas neither expressed any dissatisfaction with his counsel nor asked to represent himself.

Discussion

I. Motion for new counsel

¶7 On appeal, Gradillas challenges the trial court's denial of his motion for new counsel and, at least implicitly, the denial of his counsel's motion to withdraw. We review those rulings for a clear abuse of discretion. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 8, 154 P.3d 1046, 1050 (App. 2007); *see also State v. Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d 578, 580 (1998); *State v. Lee*, 142 Ariz. 210, 220, 689 P.2d 153, 163 (1984).

¶8 Although a defendant has a Sixth Amendment right to counsel, he or she is not "entitled to counsel of choice, or to a meaningful relationship with his or her attorney." *Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d at 580; *see also State v. Torres*, 208 Ariz. 340, ¶ 6, 93 P.3d 1056, 1058 (2004). A trial court must evaluate several factors when considering a motion for new counsel, including:

> whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel.

State v. LaGrand, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987); *see also Torres*, 208 Ariz. 340, ¶ 15, 93 P.3d at 1060. "Conflict that is less than irreconcilable, however, is only one factor for a court to consider in deciding whether to appoint substitute counsel." *State v. Cromwell*, 211 Ariz. 181, ¶ 29, 119 P.3d 448, 453 (2005).

¶9 Gradillas first requested new counsel in November 2007, eleven months after he had been indicted. That request arose from and related to the proposed plea agreement from which the trial court later allowed Gradillas to withdraw. His renewed request for new counsel occurred in January 2008, less than a month before his scheduled trial. Although Gradillas had had only one attorney and requested only one change of counsel, as the trial court noted, the alleged victim was a child witness who would be inconvenienced by delay and needed closure, and Gradillas's attorney had thirty-two years' legal experience. On this record, the court acted well within its discretion in finding that Gradillas's discomfort with his counsel and lack of communication with her did not amount to an irreconcilable conflict, particularly when it was Gradillas who had refused to help his attorney prepare for his motion to suppress. *See State v. Peralta*, No. 1 CA-CR 07-0970, 2009 WL 400607, ¶ 5 (Ariz. Ct. App. Feb. 19, 2009) (defendant "must show more than mere animosity causing loss of trust or confidence"); *Paris-Sheldon*, 214 Ariz. 500, ¶ 14, 154 P.3d at 1051.

¶10 The record reflects that the court adequately probed and duly considered the *LaGrand* factors in ruling on Gradillas's motions. *See Cromwell*, 211 Ariz. 181, ¶¶ 31-35, 119 P.3d at 454. The court's "denial of new counsel was based on a proper balancing of relevant interests." *Id.* ¶ 35. And Gradillas's successful reconciliation with his attorney and

their establishment of an effective working relationship are borne out by his statement shortly before trial that he had reached an agreement and begun communicating with her. Under these circumstances, we cannot say the trial court abused its discretion in denying Gradillas's motion for new counsel.

II. Denial of motion to represent himself

¶11 In a related argument, Gradillas contends the trial court erred by denying his motion to represent himself. The standard of review applied to waiver-of-counsel issues has not been settled in Arizona. *See State v. Djerf*, 191 Ariz. 583, n.2, 959 P.2d 1274, 1283 n.2 (1998); *State v. Cornell*, 179 Ariz. 314, 321, 878 P.2d 1352, 1359 (1994). Gradillas asks us to review the issue de novo because it implicates his Sixth Amendment rights. Even under that standard, however, we conclude the court did not err in finding Gradillas's attempted waiver of counsel involuntary and, therefore, denying his motion to represent himself.

¶12 A defendant has a federal and state constitutional right to represent himself if he waives his right to counsel voluntarily, knowingly, and intelligently. U.S. Const. amends. VI, XIV; Ariz. Const. art. II, § 24; *see Faretta v. California*, 422 U.S. 806, 834-35 (1975); *State v. Lamar*, 205 Ariz. 431, ¶ 22, 72 P.3d 831, 835-36 (2003); *see also* Ariz. R. Crim. P. 6.1(c) ("A defendant may waive his or her rights to counsel . . . in writing, after the court has ascertained that he or she knowingly, intelligently and voluntarily desires to forego them."). The defendant's request must be both unequivocal and timely made. *Lamar*, 205 Ariz. 431, ¶ 22, 72 P.3d at 835-36; *see also State v. De Nistor*, 143 Ariz. 407, 412-13, 694 P.2d 237,

242-43 (1985). "If a defendant complies with these requirements, the trial court should grant the defendant's request to represent himself." *Lamar*, 205 Ariz. 431, ¶ 22, 72 P.3d at 836.

¶13 Gradillas maintains the trial court erroneously denied his motion because his request was timely made a month before trial, was in writing, and unequivocally stated he wished to waive counsel and proceed pro se. In response, the state contends Gradillas "did not want to waive counsel, but simply wanted counsel of his own choosing—something to which he was not constitutionally entitled." *See Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d at 580 (no constitutional right to counsel of choice). We agree and find no error or abuse of discretion in the court's denial of Gradillas's request to represent himself.

¶14 After Gradillas filed his motion, the trial court inquired, "[E]ven if I appointed a new lawyer for you today, you would still rather be your own lawyer; right?" Gradillas responded that he "would take the new lawyer." He also clarified that his request to represent himself was a second choice and that his real preference was to have new counsel. Referring to *Moody*, the court was concerned about whether its denial of his request to change counsel would essentially force Gradillas to represent himself. The court concluded, without contradiction by Gradillas, "It's clear to me . . . that your real preference is [to] have another lawyer represent you here, and you indicated that this morning. What that amounts to is an involuntary waiver of counsel."

¶15 Gradillas contends the court "misconstrued" *Moody* and forced him "to go to trial with counsel he did not want." In *Moody*, "[t]he record . . . [was] replete with examples of a deep and irreconcilable conflict." 192 Ariz. 505, ¶ 13, 968 P.2d at 580. When the court

denied Moody's request for new counsel, he moved to represent himself because "he was being forced to accept the lawyer against his will." *Id*. ¶ 9. Our supreme court concluded the trial court's granting of his motion to represent himself violated the Sixth Amendment because Moody's waiver of counsel was involuntary in light of his irreconcilable conflict with his existing counsel. *Id*. ¶¶ 22-23.

¶16 But unlike the trial court in *Moody*, the court here did not abuse its discretion in denying Gradillas's motion for new counsel, because Gradillas's dissatisfaction with his attorney did not amount to an irreconcilable conflict. Thus, in contrast to Moody and the Hobson's choice he was forced to make, no such illusory choice was foisted on Gradillas here. And Gradillas expressly acknowledged that his "preference" and "first request" were to have "a new lawyer."

¶17 Under those circumstances, even assuming Gradillas's request to represent himself was not only timely but also made knowingly, intelligently, and voluntarily, the record reflects it was not unequivocal. *See Lamar*, 205 Ariz. 431, ¶ 22, 72 P.3d at 835-36. Rather, the request was conditional or qualified by a clear preference for new counsel to which he was not entitled. Even if Gradillas's attempted waiver of counsel was not involuntary, as the trial court suggested, we may affirm the court's ruling on any basis supported by the record and do so for the reasons noted above. *See State v. Robinson*, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987); *State v. Salazar*, 216 Ariz. 316, ¶ 14, 166 P.3d 107, 110 (App. 2007).

¶18 Moreover, as the state contends, Gradillas's acknowledgments a few days before trial that he and his counsel were communicating well and that he was pleased with her services reflect an implicit withdrawal of his earlier, attempted waiver of his right to counsel. *See* Ariz. R. Crim. P. 6.1(e); *cf. State v. DeLuna*, 110 Ariz. 497, 502, 520 P.2d 1121, 1126 (1974) ("Once a defendant has waived the right to counsel, that waiver continues throughout the trial unless he clearly indicates a change of mind."). Nothing in the record suggests that implicit withdrawal was involuntary or otherwise invalid. And Gradillas neither argues nor cites any authority to suggest that such a withdrawal is valid only if the court ensures on the record it is made knowingly, intelligently, and voluntarily. *Cf. De Nistor*, 143 Ariz. at 411, 694 P.2d at 241 (trial court need not find withdrawal of guilty plea knowingly, intelligently, and voluntarily made). In sum, the trial court did not err or violate Gradillas's constitutional rights in denying his motion to represent himself.

III. Expert testimony

¶19 Gradillas next contends the trial court erred by allowing the child victim's therapist to testify. We review a trial court's ruling on admissibility of evidence for an abuse of discretion. *State v. McGill*, 213 Ariz. 147, ¶ 30, 140 P.3d 930, 937 (2006); *State v. McCurdy*, 216 Ariz. 567, ¶ 6, 169 P.3d 931, 935 (App. 2007). We find none here.

¶20 Before trial, Gradillas had moved to preclude the victim's therapist from testifying because her proffered testimony was highly prejudicial and would essentially allow an expert to vouch for the victim's credibility. After several discussions, the trial court limited the therapist's testimony and precluded her from testifying about "[t]he percentage

of the alleged victim[s] who either tell the truth or lie," "[w]hether the behavior of the victim in this case is consistent with being molested," whether hypothetically the victim's behavior was consistent with being molested, and anything "[n]ot case specific."

¶21 On the third day of trial, the therapist testified as follows:

> Q [D]o you work with children who have been molested?
>
> A Yes, I do.
>
> Q What general issues do those children present themselves with when you first make contact with that child?
>
> A Are you talking in general?
>
> Q Yes.
>
> A Well, there's a wide variety of ways they can present. Oftentimes depressed mood. Mood swings. Troubles with fears, nightmares, not being able to sleep. Some—many of them have symptoms of self-harming behaviors like cutting themselves and some have suicidal ideations.
>
> Q Is it fair to say it spans across the—spans across the board, meaning, that—there's some—children you see who have been molested that don't exhibit such severe signs and there are some who have the either homicidal or suicidal behaviors?
>
> A Yes.

The therapist continued by testifying about the symptoms she had observed in A. and the treatment she had provided.

¶22 Gradillas contends the aforementioned evidence was more prejudicial than probative because the therapist's testimony that she worked with children who had been

molested led the jury to assume that, because A. was in treatment, she had been molested. He maintains the therapist's testimony, combined with the state's other expert's testimony, ensured his conviction.

¶23 Under Rule 403, Ariz. R. Evid., a trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The trial court is in the best position to "balanc[e] the usefulness of expert testimony against the danger of unfair prejudice" because it is a fact-intensive inquiry. *State v. Moran*, 151 Ariz. 378, 381, 728 P.2d 248, 251 (1986). Experts may opine about general behavioral characteristics because it aids a jury in weighing the evidence and determining credibility, but the purpose is "not to 'tell the jury' who is correct or incorrect, who is lying and who is truthful." *State v. Lindsey*, 149 Ariz. 472, 474, 720 P.2d 73, 75 (1986); *see also State v. Chapple*, 135 Ariz. 281, 292, 660 P.2d 1208, 1219 (1983) (generality of testimony is factor favoring admission). Nor may an expert testify the victim's behavior is consistent with the crime's having occurred. *Moran*, 151 Ariz. at 385, 728 P.2d at 255.

¶24 Here, the therapist testified about general behavioral characteristics of children who have been molested. She also testified A. had been depressed and experienced fears, nightmares, mood swings, and suicidal thoughts. These general characteristics were outside the jurors' common experience, and testimony on those topics could help the jury in weighing the evidence and evaluating the victim's credibility. *See id*. at 384, 728 P.2d at 254; *see also State v. Lujan*, 192 Ariz. 448, ¶ 12, 967 P.2d 123, 127 (1998) ("When the facts

of the case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like the reactions of child victims of sexual abuse—expert testimony on the general behavioral characteristics of such victims should be admitted."). Although the prosecutor's initial questions could have led into an inappropriate area, unlike the expert in *Moran*, the therapist in this case did not opine about A.'s veracity or whether A.'s behavior was consistent with that of a child who had been molested. *See* 151 Ariz. at 385, 728 P.2d at 255; *cf. State v. Tucker*, 165 Ariz. 340, 350, 798 P.2d 1349, 1359 (App. 1990) (expert's testimony inadmissible when it linked credibility factors to specific facts of case).

¶25 In addition, before the therapist testified, the court warned her to refrain from giving "any impression in [her] testimony that there was any assumption or belief on [her] part about the validity of the allegations." On cross-examination, the therapist admitted A.'s depression and other behaviors were "not necessarily indicative of abuse." Therefore, contrary to Gradillas's argument that the therapist improperly vouched for A.'s truthfulness, she instead kept her testimony general and did not imply she believed A. was telling the truth. Thus, we cannot say the court abused its discretion by finding the testimony's probative value was not substantially outweighed by its prejudicial effect. *See* Ariz. R. Evid. 403; *McGill*, 213 Ariz. 147, ¶ 30, 140 P.3d at 937; *cf. Moran*, 151 Ariz. at 384, 728 P.2d at 254 ("just because expert testimony about behavioral characteristics is exceedingly persuasive does not mean it is *unfairly* prejudicial").

¶26 Gradillas also argues the therapist's testimony was cumulative because other witnesses testified A. was in therapy and the state's other expert described the general characteristics of sexual abuse victims. But the therapist was the only witness who discussed the types of treatment A. had received to help her cope with her mood swings, depression, and temper tantrums. As the prosecutor explained, the therapist had a unique, educated view on A.'s therapy, and A.'s behavior and symptoms bore on her credibility as a witness. Because the therapist's testimony was not clearly a "needless presentation of cumulative evidence," Ariz. R. Evid. 403, the trial court did not abuse its discretion by admitting it. *See McGill*, 213 Ariz. 147, ¶ 30, 140 P.3d at 937.

IV. Prosecutorial vouching

¶27 Gradillas also claims the prosecutor committed misconduct "by vouching for the veracity of the charges." The two types of improper prosecutorial vouching are: "(1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989); *see also State v. Newell*, 212 Ariz. 389, ¶ 62, 132 P.3d 833, 846 (2006). "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, which [s]he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-

09, 677 P.2d 261, 271-72 (1984). To prevail on a claim of prosecutorial misconduct, "[t]he defendant must show that the offending statements, in the context of the entire proceeding, 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d at 846, *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). Gradillas fails to make such a showing here.

¶28 Gradillas contends the prosecutor committed misconduct in two instances, by twice claiming the molestation charges were substantiated by employees of Child Protective Services (CPS). First, during her opening statement, the prosecutor said, "You will also hear from the CPS workers. The CPS workers that investigated this case, substantiated the claims and found it [sic] not to be—" When Gradillas immediately objected, the trial court sustained his objection and instructed the jury to "disregard the last sentence uttered by the prosecutor as far as substantiated claims."

¶29 Second, while questioning a CPS case manager, the prosecutor asked if the agency remained involved and continued to check on A.'s home environment after the allegations had been made. The witness responded, "The allegations were substantiated." Gradillas again objected. The trial court sustained the objection, noted the witness's answer to the prosecutor's question was unresponsive, and instructed the jury to disregard the statement.

¶30 Gradillas maintains the "prosecutor placed the prestige of the government behind its witness by eliciting testimony that the state, through CPS, believed the charges were substantiated." Although we are disturbed by the prosecutor's inappropriate comment

during opening statement, the CPS case manager's nonresponsive answer to an otherwise proper question does not imply prosecutorial misconduct. Nor does it appear from the record that the two isolated statements were made or elicited in pursuit of an improper purpose. *See Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27. In addition, the trial court sustained both of Gradillas's objections, immediately ordering the jury to disregard the statements. Similarly, the court later instructed the jury, "If an objection to a lawyer's question was sustained, you should disregard that question and any answer given." "We presume that the jurors followed the court's instructions." *Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d at 847. In sum, we cannot say the two statements in question here so infected the trial as to render Gradillas's convictions a denial of due process. *See Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191.

V. *Portillo* instruction

¶31 Gradillas contends the trial court's reasonable-doubt jury instruction, taken from *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995), improperly reduced the burden of proof and violated his right to due process. Our supreme court, however, has repeatedly confirmed the validity of that instruction. *See State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Glassel*, 211 Ariz. 33, ¶ 58, 116 P.3d 1193, 1210 (2005); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003). We are bound by our supreme court's decisions. *See State v. Stanley*, 217 Ariz. 253, ¶ 28, 172 P.3d 848, 854 (App. 2007). Therefore, no error occurred.

Disposition

¶32 Gradillas's convictions and sentences are affirmed.

_____
JOHN PELANDER, Chief Judge

CONCURRING:

_____
JOSEPH W. HOWARD, Presiding Judge

_____
PHILIP G. ESPINOSA, Judge