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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. JAMES RANDALL HALSTEAD, Appellant.	)	2 CA-CR 2008-0228 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20063730

Honorable Richard Nichols, Judge
Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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

Robert J. Hirsh, Pima County Public Defender
By Kristine Maish
Tucson
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant James Halstead was convicted of three counts of sexual conduct with a minor under the age of twelve and one count of furnishing obscene or harmful items to a minor. He was sentenced to three consecutive terms of life imprisonment for the sexual conduct convictions and to a concurrent, 2.5-year prison term for furnishing obscene or harmful items to a minor. On appeal, Halstead argues the trial court erred in refusing to preclude three witnesses' testimony. For the following reasons, we affirm.

Facts

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Halstead lived with his girlfriend, S., and her two children, J. and D. When J. was ten years old, Halstead gave her pornographic magazines, sex toys, and a book with instructions on different sexual positions. Halstead also engaged in sexual conduct with J. on several occasions.

¶3 While cleaning the family's home, S. found a sex toy among J.'s belongings. J. informed S. that Halstead had given her the toy; J. also told her mother that she had engaged in "sex" with Halstead.

¶4 Halstead, who initially could not be located, was arrested several years later and charged with multiple counts of sexual conduct and sexual abuse of a minor, as well as one count of providing obscene material to a minor. He was convicted and sentenced as noted above, and this appeal followed.

Motion to Preclude Therapists from Testifying

¶5 Halstead argues the trial court erred in refusing to preclude two of J.'s former therapists—Diane Kazinski and Beth Banks—from testifying at trial. We review a court's decision to admit or preclude evidence for an abuse of discretion. *See State v. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d 127, 131 (App. 2002).

Impermissible Expert Testimony

¶6 Halstead first contends the "expert" testimony of Kazinski and Banks "improperly buttressed" J.'s credibility and therefore should have been precluded as unfairly prejudicial.[1] As a preliminary matter, we note that Halstead only objected on this ground below with regard to Kazinski's testimony.[2] Accordingly, his claims that Banks's testimony

[1]Because neither lay nor expert witnesses may testify about the credibility of another witness, we do not address whether Halstead properly characterizes the therapists' testimony as "expert" testimony. *See State v. Boggs*, 218 Ariz. 325, ¶ 39, 185 P.3d 111, 121, *cert. denied*, ___ U.S. ___, 129 S. Ct. 764 (2008); *State v. Lindsey*, 149 Ariz. 472, 474, 720 P.2d 73, 75 (1986) (Arizona does not permit "the admission of direct testimony on the question of credibility"). And Kazinski did not give any expert opinions.

[2]Halstead improperly attempts to use portions of the parties' discussion about the medical doctor's testimony as his objection to Banks's testimony below. But the trial court, not Halstead, raised the question whether Banks's testimony constituted an impermissible expression of an opinion on the credibility of a witness, and we have not found any objection on that ground by Halstead. Additionally, Halstead's subsequent motion for mistrial was untimely as a means to preserve any objection for appellate review. *See State v. Atwood*, 171 Ariz. 576, 641, 832 P.2d 593, 658 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001) (defendant waived objection to evidence by not objecting when evidence offered and instead moving for mistrial later); *see also State v. Roscoe*, 184 Ariz. 484, 497, 910 P.2d 635, 648 (1996) (waiting to object to improper remarks until after remarks complete waives "any objection except denial of . . . subsequent motion for a mistrial"). Halstead's objection to Banks's testimony on grounds other than improper witness "buttressing" similarly failed to preserve the issue for appeal. *See State v. Moody*,

improperly bolstered J.'s credibility are forfeited absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (fundamental error analysis applied when defendant fails to object below). The defendant has the "burden of persuasion in fundamental error review." *Id.* And Halstead does not argue any error in allowing Banks to testify was fundamental. Therefore, he has not sustained his burden in a fundamental error analysis, and we need only address his contention of improper witness buttressing as to Kazinski. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (forfeited argument waived on appeal if fundamental error not argued).

¶7 "Arizona prohibits lay and expert testimony concerning the veracity of a statement by another witness." *State v. Boggs*, 218 Ariz. 325, ¶ 39, 185 P.3d 111, 121, *cert. denied*, ___ U.S. ___, 129 S. Ct. 764 (2008). This is because the determination of 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 on how to decide the case.'" *Id.*, *quoting State v. Moran*, 151 Ariz. 378, 383, 728 P.2d 248, 253 (1986). Moreover, the admission of "particularized testimony about credibility" is not a "Rule 403[, Ariz. R. Evid.,] balancing situation" because there is "no reason to risk influencing the jury's credibility determination by allowing expert opinion testimony on a witness's believability." *Moran*, 151 Ariz. at 382, 728 P.2d at 252.

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208 Ariz. 424, ¶ 39, 94 P.3d 1119, 1136 (2004) (objection "must state specific grounds in order to preserve issue for appeal").

¶8 On direct examination, Kazinski explained that she had counseled J. "on a fairly regular basis . . . for maybe three to four months." Kazinski also testified she had worked with J. "on her emotions and concerns with respect to what happened to her." Kazinski did not, however, say "what happened to" J., discuss the truthfulness of J.'s claims of molestation, or indicate whether she believed J. had been abused. *See Moran*, 151 Ariz. at 386, 728 P.2d at 256 (expert may not testify he believed victim had not disclosed full extent of sexual abuse). Kazinski likewise did not discuss J.'s behavior during the therapy sessions and did not associate J.'s behavior with that typically exhibited by a victim of molestation.

¶9 Halstead claims, however, that, even though Kazinski did not specifically state that she believed J.'s claims of sexual abuse, Kazinski's testimony was nevertheless improper because it *implied* that she believed J.'s accusations. The record suggests otherwise. Kazinski's testimony, which as the trial court noted was largely irrelevant, did not convey an impression to the jury that Kazinski believed J. had been abused, and falls far short of the testimony found to be objectionable in *Moran* and in *State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73 (1986). *See Moran*, 151 Ariz. at 384, 385, 728 P.2d at 254, 255 (testimony that Child Protective Services had asked witness to "'do an evaluation to ascertain whether or not [the witness] *felt* [the victim] *ha[d] been sexually molested*'" and to help her deal "with *the fact that she had been molested*" improperly implied victim was telling truth); *Lindsey*, 149 Ariz. at 477, 720 P.2d at 78 (improper for witness to testify "likelihood [was] very strong"

that victim's testimony was consistent with crime's having occurred). Accordingly, the trial court did not err in admitting Kazinski's testimony.

¶10 Moreover, Kazinski's testimony was so vague and generalized that, even if it did create any erroneous implication regarding J.'s credibility, we can say beyond a reasonable doubt that it did not contribute to the jury's verdicts. *See Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607 (error that beyond reasonable doubt did not affect verdict is harmless). That is, we do not consider the balance of evidence to have been so close that Kazinski's fleeting, undetailed description of her services to J. affected the jury's determination of the victim's credibility and therefore contributed to the outcome in this case.

Inadmissible Hearsay

¶11 Halstead next argues that the testimony of Kazinski and Banks should have been precluded because it was inadmissible hearsay pursuant to Rule 801, Ariz. R. Evid. The only statements Halstead identifies as hearsay, however, were made by Banks. Accordingly, we examine only Banks's statements, and any argument that Kazinski's statements were hearsay is waived. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument on appeal waives claim).

¶12 Preliminarily, we note that the state argues Halstead did not object to Banks's testimony at trial and has therefore forfeited any objection absent fundamental error. But Halstead orally moved to preclude the testimony on hearsay grounds on the first day of trial, when the state first noticed its intent to call Banks as a witness. When a motion in limine is

made and ruled on, "the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial." *State v. Burton*, 144 Ariz. 248, 250, 697 P.2d 331, 333 (1985). Accordingly, we review Halstead's claim that Banks's testimony constituted impermissible hearsay for an abuse of discretion. *See State v. King*, 212 Ariz. 372, ¶ 16, 132 P.3d 311, 314 (App. 2006).

¶13 Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). Hearsay is generally inadmissible as evidence at trial. *See State v. Valencia*, 186 Ariz. 493, 497, 924 P.2d 497, 501 (App. 1996).

¶14 In his opening brief, Halstead challenges Banks's statements that J. informed her that more sexual conduct had occurred than J. originally disclosed to her mother. Halstead also challenges Banks's statements because, he claims, they were "based on J.'s mother's account of what . . . [had] happened." But Banks did not testify about J.'s mother's account of what happened; she testified about her therapy sessions with J. And Banks's statement that J. informed her that more sexual conduct had occurred than originally disclosed was not offered for its truth but rather to refute the defense's suggestion that J.'s mother had encouraged her to fabricate the charges. Accordingly, the statement was not hearsay. *See State v. Crane*, 166 Ariz. 3, 9, 799 P.2d 1380, 1386 (App. 1990) (victim's statements, presented by another witness, admissible under Rule 801(d)(1)(B) because they rebutted "defendant's implied charges of fabrication and improper motive").

¶15 Halstead also briefly mentions that the testimony of several other witnesses constituted hearsay and should have been precluded. Halstead's argument as to these witnesses, however, is insufficient and therefore waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838 (claim waived on appeal by insufficient argument).

Motion to Preclude Dr. Reisen

¶16 Halstead finally claims the testimony of Dr. Debra Reisen violated the Confrontation Clause and hearsay rules. Reisen testified to the contents of J.'s medical records, which had been prepared by another doctor not called to testify at trial. Although Halstead objected to Reisen's testimony below, it appears he later withdrew the objection.

¶17 During Reisen's testimony, the state moved to admit J.'s medical records in evidence. Halstead objected to their admission because Reisen had not prepared the records and the doctor who had prepared them, Dr. Anna Binkiewicz, was not called to testify to their authenticity. The state responded that Halstead had stipulated before trial to the authenticity of the records. Halstead's attorney then stated that he had "stipulated to the foundation [of J.'s medical records] so [that Reisen] could read the records and talk about what she's talking about." The attorney went on to state, "We have [Reisen's] testimony. That's all we need. The rest is hearsay."

¶18 Defense counsel's statement constitutes withdrawal of his previous objection to Reisen's testimony, and we therefore review the trial court's decision to permit Dr. Reisen

to testify for fundamental error only. *See State v. Cruz*, 218 Ariz. 149, ¶ 105, 181 P.3d 196, 213 (2008), *cert. denied*, ___ U.S. ___, 129 S. Ct. 900 (2009) (withdrawn objection waived and reviewed only for fundamental error). Halstead "bears the burden of demonstrating that error occurred, that it was fundamental, and that it prejudiced him." *Moreno-Medrano*, 218 Ariz. 349, ¶ 16, 185 P.3d at 140. Because Halstead does not contend the purported error here was fundamental, his argument as to Reisen's testimony is waived. *See id.* ¶ 17 (forfeited argument waived on appeal if fundamental error not argued).

Issues Waived

¶19 In addition to the foregoing issues, Halstead also contends that the state failed to timely disclose Banks as a witness, that Banks's testimony violated Rules 403 and 404, Ariz. R. Evid., and that Banks's and Kazinski's testimony violated his right to due process. He also disputes Kazinski's qualifications as an expert witness and argues that her testimony "was unfairly prejudicial in its religious overtones." But Halstead does not offer sufficient argument or cite sufficient authority for appellate review on any of these issues, and they are therefore waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(iv); *see also Bolton*, 182 Ariz. at 298, 896 P.2d at 838 (claim waived on appeal by insufficient argument); *State v. Felkins*, 156 Ariz. 37, 38 n.1, 749 P.2d 946, 947 n.1 (App. 1988) (claim abandoned when not supported by sufficient authority).

¶20 Halstead also apparently claims, for the first time in his reply brief, that the state made improper statements during closing argument. But issues raised for the first time

in a reply brief are also waived. *State v. Guytan*, 192 Ariz. 514, ¶ 15, 968 P.2d 587, 593 (App. 1998). Accordingly, we consider none of these contentions.

Conclusion

¶21 In light of the foregoing, we conclude the trial court did not err and therefore affirm Halstead's convictions and sentences.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge