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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OF ARIZONA, Appellee, v. FERNANDO ARNULFO TREJO, III, Appellant.	2 CA-CR 2008-0239 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20061450

Honorable Hector E. Campoy, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 After a third jury trial, Fernando Trejo, III, was convicted of sexual conduct with a minor under the age of fifteen and sentenced to a mitigated prison term of thirteen years. On appeal, he argues the trial court erred in denying his motions for a mistrial and for a new trial, which were based on the admission of testimony that had been precluded by an order entered before his first trial and references by the prosecutor to purported testimony that had not actually been given at trial. For the reasons discussed below, we affirm.

Factual and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the conviction. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). On the morning of March 30, 2006, Trejo's girlfriend, Crysta S., left her two-year-old daughter, N., in Trejo's care at their home. When she returned at lunchtime, N. began to cry, saying "owie, owie, owie." Crysta initially could not see anything wrong with N., but when she changed her diaper she noticed there was a spot of blood on the diaper and her vagina was tinged with blood. She took N. to urgent care, where the medical staff who examined her observed a large amount of fresh blood in her vaginal area. They concluded her injuries were likely the result of sexual abuse and referred her to Tucson Medical Center for a sexual assault examination, which revealed "obvious tearing to the [hymenal] region." Trejo was charged with sexual conduct with a minor under fifteen and molestation of a child. Trejo's first and second trials ended in mistrials when the jury was unable to reach a verdict on either of the counts. After a third trial, the jury found Trejo guilty on both charges and found the victim

was under the age of twelve at the time of the offense. The trial court dismissed the molestation conviction on double jeopardy grounds and sentenced Trejo as noted above. This appeal followed.

Discussion

Standard of review

¶3 "We review the denial of a motion for mistrial and a denial of a motion for new trial for an abuse of discretion." *State v. Mills*, 196 Ariz. 269, ¶ 6, 995 P.2d 705, 707 (App. 1999). "And because the trial judge is in the best position to assess the impact of . . . statements on the jury, we defer to the trial judge's discretionary determination." *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003). A mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). In determining whether a new trial is warranted when improper matters are brought to the jury's attention, a trial court should consider "the probability under the circumstances that the improper remarks influenced the jury's verdict." *State v. Roscoe*, 184 Ariz. 484, 496-97, 910 P.2d 635, 647-48 (1996). And this court "will not reverse a conviction based on the erroneous admission of evidence without a 'reasonable probability' that the verdict would have been different had the evidence not been admitted." *State v. Hoskins*, 199 Ariz. 127, ¶ 57, 14 P.3d 997, 1012-13 (2000).

Motion for a mistrial

¶4 Before his first trial, Trejo filed a motion "to preclude any expert from testifying concerning any alleged opinion of sexual assault." The trial court granted the motion, advising the state it could "have witnesses reference injuries consistent or inconsistent with intentional or accidental injury, or blunt force trauma; but not sexual abuse." However, during this trial, his third, one of the state's experts, Dr. Michael Aldous, testified that N.'s injury "was highly suspicious for sexual abuse." Trejo moved for a mistrial, and in a discussion outside the hearing of the jury, the court ascertained the prosecutor had failed to instruct Aldous "not to testify as to the issue of sexual abuse." Although the court found Aldous's testimony was "in clear violation of the [c]ourt's order," it denied Trejo's motion, instead striking the testimony from the record and instructing the jury to disregard it.

¶5 Relying on—but distinguishing—*Dann* and *Hoskins*, Trejo contends the trial court abused its discretion in striking Aldous's testimony and giving a limiting instruction, rather than granting a mistrial. In *Dann* and *Hoskins*, the defendant in each case requested a mistrial because a witness volunteered testimony alluding to the defendant's arrest or imprisonment for a prior offense. *Dann*, 205 Ariz. 557, ¶ 44, 74 P.3d at 244; *Hoskins*, 199 Ariz. 127, ¶ 54, 14 P.3d at 1012. "[E]vidence of prior crimes generally is not admissible." *Dann*, 205 Ariz. 557, ¶ 44, 74 P.3d at 244. In both cases, however, our supreme court concluded the trial court had not abused its discretion in denying a mistrial, noting in *Dann*

that the court had properly "viewed the improper statement in the context of the evidence in the case as a whole, assessed its effect on the jury, and, in light of all the circumstances, determined that a limiting instruction would cure the error." 205 Ariz. 557, ¶ 46, 74 P.3d at 244; *see Hoskins*, 199 Ariz. 127, ¶ 58, 14 P.3d at 1013.

¶6 Trejo argues that "the improper testimony in this case . . . is a more serious legal error" than the improper statements in *Dann* and *Hoskins* and thus could not be cured by the trial court's instruction. We disagree. Contrary to Trejo's assertion, Aldous's testimony was not "an impermissible expert opinion on ultimate issues in the case and [Trejo]'s guilt or innocence." Rather, it was testimony that "simply indicates that a child of tender years found with a certain type of injury has not suffered those injuries by accidental means, but . . . is the victim of . . . abuse." *State v. Moyer*, 151 Ariz. 253, 255, 727 P.2d 31, 33 (App. 1986). Such testimony is "not an opinion by a doctor as to whether any particular person has done anything" and is generally admissible.[1] *Id.*; *see State v. Gillies*, 135 Ariz. 500, 509, 662 P.2d 1007, 1016 (1983) (medical examiner's opinion injuries intentional and not accidental did not invade province of jury); *State v. Owens*, 112 Ariz. 223, 227, 540 P.2d 695, 699 (1975) (medical opinion laceration not caused accidentally by child falling on sharp

[1]The challenged testimony in the present case is distinguishable from testimony that "quantifies the probabilities of the credibility of another witness," *see State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986), or indicate[s] that the victim was "telling the truth" because her "behavior and personality were consistent with [the crime] having occurred," *see State v. Moran*, 151 Ariz. 378, 385, 385 n.9, 728 P.2d 248, 255, 255 n.9 (1986) (contrasting such evidence with "medical evidence of physical facts"). Trejo's reliance on these cases is therefore misplaced.

object "properly admissible"); *State v. Hernandez*, 167 Ariz. 236, 238-39, 805 P.2d 1057, 1059-60 (App. 1990) (upholding admission of expert testimony that "child's injuries most likely had been caused by violent shaking and were consistent with the battered child syndrome"); *State v. Poehnelt*, 150 Ariz. 136, 150, 722 P.2d 304, 318 (App. 1985) (expert witnesses' use of term "battered child syndrome" in describing injuries not improper); Ariz. R. Evid. 704. Thus, as these cases illustrate, the testimony here was far from being a more serious error than the statements in *Dann* and *Hoskins*. And even assuming the testimony was improper, any violation was cured by the court striking the statement from the record and giving a limiting instruction, which we presume the jury followed. *See Dann*, 205 Ariz. 557, ¶ 46, 74 P.3d at 244.

¶7 Nor are we persuaded by Trejo's contention that a mistrial was necessary because Aldous's statement was "extremely prejudicial." To the extent there was any substantive difference between repeated medical testimony that N.'s injuries were non-accidental, to which Trejo did not object, and Aldous's testimony they were "highly suspicious for sexual abuse," we believe it was too subtle to have any significant impact on the jurors' deliberations—especially after the court instructed them not to consider the latter testimony. *See* A.R.S. §§ 13-1401(3) (sexual intercourse includes "penetration into the . . . vulva . . . by any part of the body or by any object"), 13-1405 (sexual conduct with minor includes sexual intercourse with any person less than eighteen years old). Furthermore, N.'s mother previously had been permitted to testify that a doctor or nurse at urgent care had

"inform[ed her] that they believed the injuries that they saw on N[.] were suspicious for sexual abuse."[2] *See State v. Dunlap*, 187 Ariz. 441, 458, 930 P.2d 518, 535 (App. 1996) (finding no prejudice warranting new trial where erroneously introduced testimony "merely cumulative to other evidence"). The trial court therefore did not err in denying Trejo's motion for a mistrial.

Motion for a new trial

¶8 Second, Trejo argues the trial court erred in denying his motion for a new trial based on the prosecutor's references to the fact that a daycare worker testified she had observed on April 20 a "yellow tinge" to N.'s vaginal area.[3] The prosecutor made such references both in her questioning of two of the medical expert witnesses and in her closing argument. However, although the daycare worker had apparently given similar testimony at a previous trial, no such testimony was elicited during this trial. Thus, the state's "argument

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[2]Although Trejo challenged this testimony at trial, on appeal he does not argue it should have been precluded, stating only that "the prosecutor succeeded in getting prohibited 'sexual abuse' testimony in through a non-expert witness in hearsay form." He has therefore abandoned this issue. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (failure to argue claim constitutes abandonment).

[3]Trejo's motion alleged two further grounds for the granting of a new trial: Aldous's testimony in violation of the trial court's order, which we address above, and prosecutorial misconduct. Trejo does not argue prosecutorial misconduct on appeal, and has thus abandoned this argument. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004). In any event, with respect to the prosecutor's references to a "yellow tinge," her "improper argument [wa]s an easily understood inadvertence resulting from testimony that was admitted in a prior trial." *State v. Roscoe*, 184 Ariz. 484, 497 n.6, 910 P.2d 635, 648 n.6 (1996).

was clearly improper because it referred to matters not in evidence." *State v. Roscoe*, 184 Ariz. 484, 497, 910 P.2d 635, 648 (1996).

¶9 Trejo contends he was prejudiced by the prosecutor's references to a "yellow tinge" because they suggested N.'s injuries were in a state of healing and thus "created evidence . . . to argue that [Trejo]'s defense that the injuries occurred before March 30 w[as] unsound." But we cannot conceive how the suggestion that N.'s injuries were healing on April 20 supported an inference that she had sustained the injuries on March 30 rather than on March 29, when N. had been observed falling on a toy horse, or on any other earlier date. And in any event, a doctor who had examined N. on April 6 testified that on that date N.'s injuries were "in a stage of healing" and that some of the signs of healing would continue to be visible for "weeks." Thus, the state's remarks were "cumulative to other evidence, and the[ir] import . . . was not great." *See id.*

¶10 Furthermore, when Trejo objected to the prosecutor's reference to a "yellow tinge" while questioning one of the medical witnesses, the trial court instructed the jury that "I don't want you to assume anything that is asked by an attorney necessarily is what the testimony was." And, the court's final instructions included the admonition, "What the lawyers said . . . is not evidence." Because we assume the jury followed the court's instructions, *see Dann*, 205 Ariz. 557, ¶ 46, 74 P.3d at 244, we conclude "the trial court was within its discretion to conclude that the instruction[s] cured the error so that the remarks did not influence the verdict." *See Roscoe*, 184 Ariz. at 497, 910 P.2d at 648.

Disposition

¶11 For the reasons stated above, we affirm Trejo's conviction and sentence.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge