NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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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. CHRISTOPHER SCOTT DECAIRE, Appellant.	2 CA-CR 2009-0308 DEPARTMENT A <u>MEMORANDUM DECISION</u> Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080316

Honorable Jane L. Eikleberry, Judge

AFFIRMED

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

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri — Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Christopher Decaire was convicted of two counts of sexual abuse of a minor under the age of fifteen, two counts of sexual conduct

with a minor under the age of fifteen, and two counts of child molestation. The trial court sentenced him to a combination of consecutive and concurrent prison terms totaling seventy-nine years. On appeal, Decaire claims the court erred when it permitted the state to introduce into evidence a recording of a telephone conversation between himself and the victim. He also claims the court erred in permitting the state's expert witness to testify about "profile evidence." For the following reasons, we affirm.

Admissibility of Telephone Conversation

¶2 Decaire argues the trial court erred by denying his pre-trial request to preclude the state from playing for the jury a recorded telephone conversation between himself and the victim. During that conversation, Decaire at least implicitly acknowledged an illegal, sexual relationship with the victim and implored her not to disclose it. We review the admission of Decaire's statements during the telephone call for an abuse of discretion. *See State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004) (reviewing trial court rulings on admissibility of evidence for abuse of discretion).

¶3 Decaire first asserts the trial court erred when it admitted the recording, contending that because he was not given *Miranda* warnings before he made the statements, they were inadmissible. However, "*Miranda*'s procedural safeguards apply only to custodial interrogation." *State v. Smith*, 193 Ariz. 452, ¶ 18, 974 P.2d 431, 436 (1999). And, although the court made this specific point in its ruling on his motion, Decaire does not argue on appeal that he was in custody at the time he made the statements. Therefore, his argument that the statements were made in violation of *Miranda* is without merit.

¶4 Decaire also appears to argue the trial court erred in permitting the jury to hear the recorded conversation because it violated his Sixth Amendment rights under the United States Constitution. In support of his argument, Decaire relies on *State v. Allen*, 157 Ariz. 165, 170, 171, 755 P.2d 1153, 1158, 1159 (1988), a case in which the defendant had argued the admission of an out-of-court statement was inadmissible hearsay, which the court noted could be a violation of the Confrontation Clause. Decaire asserts that his comments during the conversation were inadmissible because they were ambiguous and did not amount to admissions.

¶5 But in *Allen*, the court reviewed the admissibility of the victim's out-of-court statements under the residual hearsay exception. *Id.* at 173-74, 755 P.2d at 161-62. The court considered a comment made by the defendant only as possible corroboration of the victim's statement, whose trustworthiness was at issue. *Id.* at 176-78, 755 P.2d at 1164-66. Here, Decaire's statements were admitted as party admissions. Moreover, he cites no authority to support his suggestion that the *Allen* court's Confrontation Clause analysis pertaining to the residual hearsay exception should apply to his own admission. Because Decaire has failed to demonstrate otherwise, we conclude the trial court did not abuse its discretion in admitting his recorded telephone statements.

¶6 Finally, Decaire contends the entire contents of the call, or alternatively, portions thereof, were inadmissible under Rule 403, Ariz. R. Evid., because the statements were unduly prejudicial. Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid.

401. And relevant evidence is generally admissible, Ariz. R. Evid. 402, subject to limitations such as the one set forth in Rule 403, Ariz. R. Evid., which Decaire cites, permitting a trial court to exclude relevant evidence if its unfair prejudicial effect substantially outweighs its probative value. But, although relevant evidence generally will adversely affect the party against whom it is offered, Rule 403 is meant only to preclude evidence that "has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997).

¶7 Decaire's statements did not suggest that the jury would make its decision on such an improper basis. Rather, the statements he made during the telephone call are strong evidence of his guilt. Therefore, the trial court did not abuse its discretion in concluding that the probative value of the evidence was not "substantially outweighed by the danger of unfair prejudice." *See* Ariz. R. Evid. 403; *see also State v. Connor*, 215 Ariz. 553, ¶ 39, 161 P.3d 596, 607 (App. 2007) ("Because '[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice,' [it] has broad discretion in this decision."), *quoting State v. Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998) (alteration in *Connor*).

¶8 Alternatively, Decaire points to statements about his marriage and to his use of "the Lord's name" as being irrelevant and, therefore, "more prejudicial than probative." But these are not statements that would suggest a jury might decide Decaire's guilt on an improper basis. *See Mott*, 187 Ariz. at 545, 931 P.2d at 1055. Moreover, Decaire's repeated use of the phrase "Oh, God," in response to hearing that a

third party had learned of the illegal, sexual relationship, tends to show instead a culpable state of mind. Thus, the trial court did not abuse its discretion in admitting the entire call into evidence.

Expert Witness

¶9 Decaire also argues the trial court erred in denying his motion to preclude the testimony of Wendy Dutton, an expert witness on common characteristics of child victims of sex crimes.[1] "We review the trial court's ruling on expert testimony for a clear abuse of discretion." *State v. Hyde*, 186 Ariz. 252, 276, 921 P.2d 655, 679 (1996); *see also State v. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d 127, 131 (App. 2002) (reviewing trial court's decision to admit or preclude evidence for abuse of discretion).

¶10 Here, Dutton testified as a "cold expert," meaning she had no information about the facts of the case. In this capacity, Dutton testified that victims of sexual abuse often display several common characteristics. She also testified that children are more likely to be sexually abused by someone they know than a stranger and, when it occurs, such victims are more likely to delay revealing the abuse. Additionally, Dutton described the process of victimization—whereby sexual offenders manipulate or intimidate victims so as to keep the abuse secret—and explained typical situations in which a victim might be more likely to make a false allegation of sexual abuse.

¶11 Decaire first contends this testimony should have been precluded under the Fourth, Fifth, and Sixth Amendments of the United States Constitution, as well as article

[1]Decaire does not specify which portion of Dutton's testimony was allegedly impermissible. We therefore presume he is challenging the trial court's decision to permit Dutton to testify at all, rather than a singular portion of her ultimate testimony.

2 of the Arizona Constitution. But he does not explain why the testimony violated these constitutional provisions, apart from a brief statement that it "unfairly bolstered the state's case." Decaire has therefore failed to develop any argument as to this contention and has waived it on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall include an argument stating party's contentions, reasons therefor, and necessary supporting authority); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim.").

¶12 Characterizing Dutton's testimony as "profile evidence," Decaire also asserts that it violated our supreme court's holding in *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998). There, the defendant was charged with, inter alia, possession of marijuana for sale. *Id.* ¶¶ 3, 13. In order to prove that the defendant had knowingly possessed marijuana, the state presented testimony that he had exhibited behavior consistent with a drug courier profile. *Id.* ¶ 13. Our supreme court found this testimony impermissible to prove the defendant's guilt because it "'create[d] too high a risk that [the] defendant w[ould] be convicted not for what he did but for what others are doing.'" *Id.* ¶ 12, *quoting State v. Cifuentes*, 171 Ariz. 257, 257, 830 P.2d 469, 469 (App. 1991). The court also noted, however, that such evidence could be used for other purposes, such as foundation for expert opinions or to "'assist the jury in understanding modus operandi in a complex criminal case.'" *Id.* ¶ 11, *quoting United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1996).

¶13 Here, Decaire's defense was that the victim had invented her claims of sexual molestation. To counter that claim, the state presented, inter alia, Dutton's

testimony on topics outside of the normal knowledge of jurors, such as circumstances in which a victim might make a false allegation of sexual abuse, the process of victimization, and why a victim might delay reporting sexual abuse. This use was permissible. *See id.* (approving use of drug courier profile evidence to aid jury in understanding defendant's modus operandi); *see also State v. Moran*, 151 Ariz. 378, 381-82, 728 P.2d 248, 251-52 (1986) (expert testimony permissible to explain possible reasons for victims' behavior in molestation case).

¶14 And, although Decaire contends that Dutton's testimony did no more than invite "the faulty assumption or inference of guilt based on characteristics that were not probative of Decaire's actual guilt or innocence," his guilt was based on the victim's testimony.[2] Dutton explained she had reviewed no materials related to the case and had conducted no interviews with any witnesses. She did not "quantify" or "express an opinion about the veracity of a particular witness or type of witness," nor did she offer an opinion as to whether the victim's conduct was consistent with the alleged crimes' having occurred. *State v. Tucker*, 165 Ariz. 340, 346, 798 P.2d 1349, 1355 (App. 1990) (also holding that "an expert witness may testify about the general characteristics and behavior of . . . victims if the information is not likely to be within the knowledge of most lay persons"); *see also State v. Lindsey*, 149 Ariz. 472, 473, 720 P.2d 73, 74 (1986) (expert may testify about recognized principles of social or behavioral science which jury may apply to determine issues in case); *Moran*, 151 Ariz. at 381, 728 P.2d at 251 (same).

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[2]Because this case is controlled by Arizona law, we need not analyze the foreign law Decaire cites.

Dutton's testimony did not violate our supreme court's holding in *Lee*, and the trial court did not err in denying Decaire's motion to preclude it.

Conclusion

¶15 Based on the foregoing, we affirm Decaire's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge