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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THE STATE OF ARIZONA, Appellee, v. RICHARD JOE GONZALEZ, Appellant.	2 CA-CR 2008-0225 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20072098

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant Richard Gonzalez was convicted of continuous sexual abuse of a child twelve years of age or younger. The trial court sentenced him to the presumptive prison term of twenty years. On appeal, Gonzalez contends the court erred by permitting one of the state's witnesses to testify as an expert or, alternatively, by not limiting the scope of her testimony, and by denying the defense the opportunity to interview the victim's representative. He also contends the prosecutor violated his Fifth Amendment right against self-incrimination and improperly impeached him. We affirm for the reasons stated below.

¶2 Viewed in the light most favorable to sustaining the jury's verdict, *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003), the evidence established that, between May 2003 and October 2004, Gonzalez engaged in a variety of sexual acts with his daughter, who was seven years old when the sexual abuse began. He forced her to perform oral sex on him and digitally penetrated her vagina.

¶3 Before trial, the state disclosed that Wendy Dutton, a master's level counselor and interviewer of children who have been sexually abused, would be its expert witness and that she was expected to testify about the general characteristics of child sexual-abuse victims. Gonzalez filed a motion to preclude Dutton from testifying, arguing she could not qualify as an expert and she has repeatedly, in other cases, misrepresented her background, including her progress toward a doctoral degree at Arizona State University. After a hearing, the trial court denied Gonzalez's motion, finding Dutton did qualify as an expert in this area.

¶4 We review a trial court's determination whether a witness is qualified as an expert for abuse of discretion. *State v. Lee*, 189 Ariz. 608, 613, 944 P.2d 1222, 1227 (1997). A witness may be qualified as an expert by "knowledge, skill, experience, training, or education." Ariz. R. Evid. 702. There was ample evidence to support the court's recognition of Dutton as an expert in the area of child sexual abuse, a determination reached by other courts. *See State v. Curry*, 187 Ariz. 623, 628-29, 931 P.2d 1133, 1138-39 (App. 1996) (finding Dutton qualified as expert on behavioral characteristics of child victims of sexual abuse even though not licensed psychiatrist or psychologist). Gonzalez had ample opportunity to challenge the extent of Dutton's qualifications and her reliability as an expert by cross-examining her at trial. *See State ex rel. Herman v. Saldamando*, 12 Ariz. App. 474, 475, 472 P.2d 85, 86 (1970). Such questions relate to the weight of her testimony, not its admissibility. *See State v. Davolt*, 207 Ariz. 191, ¶ 70, 84 P.3d 456, 475 (2004). As the state points out in its answering brief, Dutton admitted during cross-examination that she had testified in another case that she had expected to complete her doctorate within a year but that she had not accomplished that. This was brought to the attention of the jury, and it was the jury's prerogative to assess its significance in determining how much weight to give Dutton's testimony. Dutton testified about her extensive experience and qualifications. The court did not abuse its discretion in finding she was qualified to give expert testimony.

¶5 Gonzalez also contends that, having denied his request to preclude Dutton from testifying, the trial court erred further by failing adequately to limit the scope of her testimony

over his objections. Dutton had not examined the victim; therefore, her testimony did not relate to the victim specifically but rather to victims of child sexual abuse generally and methods for determining whether a child who claims to have been sexually abused is reporting truthfully and accurately. Gonzalez complains that, in responding to his motion to preclude Dutton from testifying, the prosecutor who then was assigned to the case stated Dutton would testify generally about child sexual abuse accommodation syndrome (CSAAS). But, after the hearing on the motion, a different prosecutor represented to the court that Dutton no longer would be testifying about CSAAS but rather about, as the court summarized, "things that she's familiar with through the literature that could indicate that the child has been abused." The court precluded Dutton from discussing or using the term CSAAS. Gonzalez contends the court permitted Dutton to vouch for the credibility of the victim and did not properly limit her testimony.

¶6 The prosecutor asked Dutton about common characteristics of child sexual-abuse victims, stranger abuse versus intimate abuse, disclosure when the perpetrator has left the victim's life, and a variety of other general matters relating to child victims of sexual abuse. Gonzalez asserts Dutton's testimony went beyond the limits approved by Arizona case law and that "[i]t was based on the literature and her experience, but was used to vouch for the credibility of the victim in this case." Gonzalez insists this court should reverse the conviction and grant him a new trial at which the testimony of any expert called by the state is limited "to appropriate uses."

¶7 Again, we will not disturb the trial court's admission of expert testimony absent an abuse of discretion. *State v. Rojas*, 177 Ariz. 454, 459, 868 P.2d 1037, 1042 (App. 1993). As our supreme court stated in *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986), on which Gonzalez relies, "trial courts should not admit direct expert testimony that quantifies the probabilities of the credibility of another witness." This includes experts "giv[ing] their opinion of the accuracy, reliability or credibility of a particular witness in the case being tried" as well as "witnesses of the type under consideration." *Id*. But Dutton did not "quantify the probabilities of [the victim's] credibility" here. *Id*. Rather, she discussed the various factors that might motivate a child to fabricate such allegations, staying away from individualized assessments of the victim's credibility. And, as the state points out, in *Curry*, 187 Ariz. at 628-29, 931 P.2d at 1138-39, Division One of this court determined that Dutton's testimony about common behaviors of child sexual-abuse victims was proper. Such testimony could "aid the jury in weighing" the victim's testimony. *Lindsey*, 149 Ariz. at 474, 720 P.2d at 75. On this record, we cannot say the trial court abused its discretion by not limiting further the testimony of the state's expert.

¶8 Gonzalez also contends the prosecutor improperly used Dutton's testimony during closing argument. But Gonzalez did not object to it and has therefore forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-22, 115 P.3d 601, 607-08 (2005). Gonzales has not established the prosecutor's argument resulted in error that could be characterized as fundamental. *See State*

v. Dann, 220 Ariz. 351, ¶ 51, 207 P.3d 604, 616-17 (2009). "Fundamental error goes to the foundation of the case [and is] 'error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Nor has he shown that the prosecutor's purportedly improper argument was prejudicial. As the jury was instructed, the prosecutor's argument was just that—argument, not evidence. We cannot say on this record that, even assuming error, the outcome of the case would have been different without the purported error.

¶9 We also reject Gonzalez's argument that the trial court erred when it denied his request to interview the victim's aunt. The aunt is the victim's legal guardian. Under the Victims' Bill of Rights, article II, § 2.1(A)(5) of the Arizona Constitution, and the enabling legislation, A.R.S. § 13-4433(H), "the parent or legal guardian of a minor child who exercises victims' rights on behalf of the minor child" has the right to refuse to be interviewed. In *Lincoln v. Holt*, 215 Ariz. 21, ¶¶ 14, 26, 156 P.3d 438, 443, 445 (App. 2007), Division One of this court held the statute is constitutional and stands for the proposition that a legal guardian is not obligated to submit to an interview. The case before us is not meaningfully distinguishable in that regard from *Lincoln*. Nor was Gonzalez deprived of his federal constitutional right to cross-examine the victim's guardian. He was given the opportunity to cross-examine her at trial. His suggestion that he has a federal constitutional right to conduct discovery that includes the right to interview the victim's guardian is without

merit and we reject the claim summarily. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (defendant has "no general constitutional right to discovery in a criminal case"). There is no such right anchored in due process. *Id*.

¶10 We also reject Gonzalez's claim that when the prosecutor questioned a police detective about the officer's telephone conversations with Gonzalez before Gonzalez was arrested, Gonzalez's right to remain silent was violated. Because Gonzalez did not raise this claim in the trial court, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-22, 115 P.3d at 607-08. The conversations took place over the telephone before Gonzalez was arrested. Those conversations were therefore, under these facts, not custodial interrogation, hence Gonzalez's *Miranda*[1] rights were not implicated. Nor was there any suggestion that any negative inference should be drawn because Gonzalez did not initially talk to the officer when he phoned. To the contrary, as to this call, the record suggests Gonzalez was willing to talk to the detective, but because he had recently obtained a new job, it was not a good time and he could not talk then. Perhaps more importantly, nothing in the subsequent statements was incriminating. Under such circumstances, we fail to see how the state violated Gonzalez's right to remain silent.

¶11 Finally, we reject Gonzalez's final claim that he was impeached improperly with a prior felony conviction for possession of marijuana with the intent to distribute.

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[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

Gonzalez and the prosecutor stipulated, however, that the jury would be told about the conviction if Gonzalez testified. He did testify, and we see no error or misconduct by the state in the use of the conviction. Not only did the parties stipulate that the felony could be admitted if Gonzalez testified, but its admission was proper under Rule 609, Ariz. R. Evid. And, as the state correctly points out, the argument Gonzalez is making on appeal is not the same objection he raised below, which was that the prosecutor erroneously had characterized the offense as a conviction involving the sale of drugs. Again, all but fundamental, prejudicial error has been waived. *See Henderson*, 210 Ariz. 561, ¶¶ 19-22, 115 P.3d at 607-08. We see no error here, much less error that could be characterized as fundamental. Given that the trial court instructed the jury to consider the evidence of Gonzalez's conviction only to the extent "it may affect [his] believability" as a witness, the jury was instructed properly. The court expressly told the jury not to consider the conviction as evidence of guilt.

¶12 For the reasons stated, we affirm the conviction and the sentence imposed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge