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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THE STATE OF ARIZONA, Appellee, v. RONALD JOHN BRUGGEMAN, Appellant.	2 CA-CR 2009-0082 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20071159

Honorable Howard Fell, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Appellant Ronald John Bruggeman appeals from his convictions and sentences for one misdemeanor count of indecent exposure and one felony count of indecent exposure to a minor under the age of fifteen. He argues the state "improperly used [jury] voir dire to condition the prospective jurors to the evidence that it would present" and the trial court improperly commented on the evidence during voir dire. We affirm.

Factual and Procedural Background

¶2 Viewed in the light most favorable to sustaining Bruggeman's convictions, *see State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008), the evidence established that, in March 2007, K. and her sister, T., along with T.'s seven-year-old daughter M. and eighteen-month-old daughter A., went to an arts and crafts store. There, K. saw Bruggeman staring at her and her family. When T. asked M. to select some merchandise, M. seemed hesitant and did so only after T. repeatedly had told her to do so. Both T. and K. testified Bruggeman had been standing nearby. As the family was leaving the aisle where that merchandise was located, M. seemed upset and began to cry. K. then saw Bruggeman with his pants unzipped and displaying his erect penis. T. did not see Bruggeman expose himself. K. testified M. had told her she had not seen Bruggeman's penis, and T. testified M. never told her she had seen Bruggeman's penis. After K. and T. reported the incident, the store manager confronted Bruggeman and asked him if he was "mentally unstable." He said he was not and left the store. Soon thereafter, a police

officer found Bruggeman a few blocks away. When the officer brought him back to the store, K. identified him as the man she had seen exposing himself.

¶3 A grand jury charged Bruggeman with indecent exposure to K. and indecent exposure to M., a minor under the age of fifteen. After a two-day trial, the jury found him guilty of both counts and found both "were committed with a sexual motivation." The trial court sentenced him to an aggravated, 1.75-year prison term for indecent exposure to a minor under fifteen and a consecutive six-month jail term for indecent exposure. This appeal followed.

Discussion

¶4 Bruggeman first argues the state improperly used jury voir dire to "condition the prospective jurors to the evidence that it would present." The scope of voir dire is left to the sound discretion of the trial court, and we will not find error absent a clear abuse of that discretion. *State v. Davolt*, 207 Ariz. 191, ¶ 52, 84 P.3d 456, 472 (2004). In the event the trial court abused its discretion, we will not grant relief on appeal unless Bruggeman demonstrates the error resulted in a jury that "was not fair, unbiased, and impartial."[1] *State v. Moody*, 208 Ariz. 424, ¶ 95, 94 P.3d 1119, 1146 (2004).

[1]Bruggeman asserts the error in this case was structural, therefore precluding harmless error review and requiring reversal. *See State v. Valverde*, 220 Ariz. 582, ¶¶ 10-11, 208 P.3d 233, 235-36 (2009). But Arizona law is clear that, in these circumstances, we will not presume a jury was biased. *See Moody*, 208 Ariz. 424, ¶ 95, 94 P.3d at 1146. Instead, an appellant must demonstrate jury bias before we will grant relief. *Id.* Similarly, when a prosecutor or prospective juror makes improper comments, a defendant must demonstrate the comments resulted in prejudice. *See State v. Schneider*, 148 Ariz. 441, 447, 715 P.2d 297, 303 (App. 1985) (prosecutorial misconduct must prejudice

¶5 During jury selection, the prosecutor explained the elements of indecent exposure and asked the prospective jurors if any of them "fe[lt] like the State shouldn't be involved in matters like this." The trial court overruled Bruggeman's objection that the prosecutor was "try[ing] her case in voir dire." The prosecutor then told the jurors that the state did not have to prove M. had actually seen Bruggeman's genitals for the jury to find him guilty of exposing himself to her. After the court overruled Bruggeman's objection that the prosecutor should not be "teaching [the jurors] what the law is," it instructed the jurors on the elements of indecent exposure. The prosecutor then asked the prospective jurors whether anyone "disagree[d] with the law" and felt the defendant should not be found guilty unless the child had seen the defendant's genitals. The court additionally explained it needed to know if any of the jurors would disagree with the law or would disregard its instructions, telling the jurors they would be "taking an oath" to follow the court's instructions.

¶6 The prosecutor informed the prospective jurors she would not call M. as a witness and asked if they could think of situations in which the state might not call a

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defendant and deny fair trial); *State v. Reasoner*, 154 Ariz. 377, 384, 742 P.3d 1363, 1370 (App. 1987) (appellant has burden of demonstrating comments of excused juror prejudiced other jurors). The only arguably analogous circumstance in which we will presume prejudice is when pervasive negative pretrial publicity was "'so extensive or outrageous that it permeated the proceedings or created a carnival-like atmosphere.'" *State v. Cruz*, 218 Ariz. 149, ¶ 15, 181 P.3d 196, 204 (2008), *quoting State v. Atwood*, 171 Ariz. 576, 631, 832 P.2d 593, 648 (1992). Despite Bruggeman's suggestion we should presume prejudice here because the "prejudicial matter was introduced by the prosecutor" and was therefore "pervasive," the prosecutor's comments and questions, some of which were improper, plainly did not permeate the proceedings and rise to the level required for us to presume prejudice.

victim to testify. A prospective juror, who was ultimately selected, stated, "To protect the victim." The court added that the state also would be unable to call a homicide victim as a witness, and the prosecutor commented that the state would not necessarily have to call as a witness a victim of a crime that had been "caught on video." The prosecutor subsequently asked whether any jurors believed the state had to call M. as a witness in order to prove its case. Another prospective juror, who was not selected, responded, "Why would you want to put a child through that?" The court then explained, "Sometimes it's required that you call certain witnesses in order to prove a case, other times it's not. So the State gets to make that election, whether they want to call a particular witness."

¶7 Rule 18.5(e), Ariz. R. Crim. P., provides that "[t]he examination of prospective jurors shall be limited to inquiries directed to bases for challenge for cause or to information to enable the parties to exercise intelligently their peremptory challenges." According to the comments to Rule 18.5, that subsection was added to "shift . . . *voir dire* responsibility to the court" and "remove entirely the practice of some attorneys of 'conditioning' the jury by means of questions and argument which amount to preliminary instructions on the law and facts of the case." Ariz. R. Crim. P. 18.5 cmt. "The trial court's duty is to ask the prospective jurors any questions it deems necessary to determine their qualifications and to enable the parties to exercise intelligently their peremptory challenges and challenges for cause." *State v. Melendez*, 121 Ariz. 1, 3, 588 P.2d 294, 296 (1978). Thus, we agree with Bruggeman that it was improper for the prosecutor

during voir dire to explain the law applicable to the case. Instead, the trial court should have done so to eliminate any risk the jurors might have been influenced improperly by the prosecutor's explanation.

¶8 The prosecutor's explanations here, however, do not warrant reversal. Because the trial court contemporaneously instructed the prospective jurors on the applicable law, we reject Bruggeman's assertion that the jurors might have perceived the prosecutor as "the authority on law in the courtroom." Moreover, the prosecutor's statements of the law were neither argumentative nor incorrect. *See* A.R.S. § 13-1402 (elements of indecent exposure). Thus, Bruggeman has not demonstrated prejudice. *See Moody*, 208 Ariz. 424, ¶ 95, 94 P.3d at 1146.

¶9 More troubling, however, is the prosecutor's question whether the prospective jurors could think of reasons the state would not call M. as a witness. Although it was plainly relevant to jury selection whether a prospective juror would be willing to find a defendant guilty absent a victim's testimony, the reason the state had chosen not to present M.'s testimony was irrelevant to that concern. The prosecutor's question plainly violated Rule 18.5 as it did not seek to elicit information relevant to revealing any prospective juror's biases. *See Melendez*, 121 Ariz. at 3, 588 P.2d at 296 (questions not "designed to uncover juror's prejudices" improper).

¶10 Indeed, we find scant authority suggesting a prosecutor may explain to jurors at any phase of the trial why the state decided not to call a particular witness—at least in the absence of a defense argument the state should have called that witness. *See*,

e.g., *State v. Sostre*, 809 A.2d 1141, 1144-45 (Conn. App. Ct. 2002) (not misconduct to comment, in rebuttal to defense argument, on reason witness not called); *People v. Jackson*, 551 N.E.2d 1025, 1031-32 (Ill. App. Ct. 1990) (offering reasons witness not called, in rebuttal to defense argument, not "plain error"); *Lopez v. State*, 527 N.E.2d 1119, 1125-26 (Ind. 1988) (giving reason for not calling witnesses appropriate when defendant's argument "repeatedly emphasized the absence of the witnesses"); *People v. Bogue*, 651 N.Y.S.2d 769, 770 (N.Y. App. Div. 1996) (stating reasons for not calling witness not "a flagrant and pervasive pattern of misconduct"); *State v. Kelly*, 306 A.2d 89, 91 (Vt. 1973) (improper to suggest witness not called due to danger of retaliation); *but see Lemus v. State*, 162 P.3d 497, ¶¶ 39-41 (Wyo. 2007) (no error in prosecutor's informing jury witnesses not called because state already had presented sufficient evidence for conviction). Moreover, for the prosecutor here to determine whether any jurors would be biased by the state's failure to call a victim, it was unnecessary to inform them the state did not intend to call M. as a witness; a more general question would have sufficed.

¶11 The question remains, however, whether Bruggeman has demonstrated the prosecutor's inappropriate question resulted in jury bias. *See Moody*, 208 Ariz. 424, ¶ 95, 94 P.3d at 1146. We conclude he has not. Bruggeman suggests that, by "turn[ing] voir dire into a question and answer period such as would occur in a class," the prosecutor caused the prospective jurors to "actively try[] to give the prosecutor the right answers" and contends the jurors "would continue to do so at trial." He asserts the prospective

juror's response, "Why would you want to put a child through [testifying]," demonstrates this occurred. We disagree.

¶12 First, the juror who gave that response was not selected for the jury, and we see little likelihood—and nothing in the record suggesting—the selected jurors were unduly influenced by that comment. *See State v. Reasoner*, 154 Ariz. 377, 384, 742 P.3d 1363, 1370 (App. 1987) (appellant's burden to demonstrate other jurors prejudiced by comments of excused juror). Second, Rule 18.5(d) permits limited questioning by the attorneys during voir dire. Any such questioning creates a theoretical risk that a prospective juror may attempt to give the attorney what the juror believes to be a "correct" answer. But, even assuming the responding jurors did so here, it does not necessarily follow that they would continue to do so during deliberations, thereby ignoring both the evidence presented and the trial court's instructions.[2] The court properly instructed the jury that it was required to follow the instructions given, that the attorneys' statements were not evidence, that the state had to prove its case beyond a reasonable doubt, and on the elements of the offenses with which Bruggeman had been charged. We presume the jury followed those instructions, *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006), and nothing in the record suggests it failed to do so here.

[2]We observe that Bruggeman also was given an opportunity to question the prospective jurors during voir dire and did so extensively.

¶13 The prosecutor asserted in closing argument that, because M. had been hesitant to select merchandise and had become upset, the jury could infer that M. had seen Bruggeman exposing himself. Bruggeman contends he was prejudiced by the prosecutor's questions and the prospective jurors' responses about whether M. would testify because the questions and answers "neutralized . . . the possibility that the jurors would wonder why [M.] really resisted" selecting merchandise in the store. He reasons the jury would conclude she did so because she could see Bruggeman exposing himself "rather than because of some momentary childish resistance."

¶14 Although a juror had answered that the state might not call a victim to testify in order to protect him or her, that does not necessarily mean the jury believed that was the sole reason the state did not call M. to testify. The prosecutor did not explain the state's reasons for not calling M., although, during voir dire, the prosecutor emphasized M.'s young age. The jury might have concluded the prosecutor did not wish to call her, at least in part, because of the difficulty of eliciting meaningful testimony from a young child. Additionally, there was evidence in the record suggesting M. had not seen Bruggeman expose himself—K. testified that M. told her she had not seen anything, and T. stated M. never told her she had seen Bruggeman's penis.[3] The jury was instructed to

[3]The jury need not have concluded that M. saw Bruggeman expose himself in order to find him guilty of indecent exposure to a minor under the age of fifteen—the statute requires only that the victim be present, not that he or she have observed the exposure. *See* § 13-1402(A). At most, M.'s testimony would have either weakened or supported K.'s testimony that K. had seen Bruggeman exposing himself.

consider the evidence presented and, again, we presume it followed that instruction. *Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d at 847.

¶15 Bruggeman also suggests he was prejudiced because the prosecutor's voir dire prevented him from calling M. as a witness without the jurors' "believ[ing] the defense was traumatizing the victim while the prosecution was protecting her." But that risk theoretically exists in any criminal trial in which the victim testifies. In any event, although one juror had suggested during voir dire that protecting a victim was a reason for not calling that victim to testify, as we noted above, the jury might have concluded there were other reasons the state did not call M. Moreover, we can only speculate about what M.'s testimony would have been. Even assuming prejudice occurred initially, M.'s testimony might have been sufficiently unequivocal—in Bruggeman's favor or not—to have overcome any jurors' preconceptions the prosecutor's comments might have created about her testimony. Although Bruggeman may have made a strategic choice not to call M. as a witness, his decision not to do so prevents us from evaluating his claim of prejudice properly. *Cf. State v. Smyers*, 207 Ariz. 314, ¶ 15, 86 P.3d 370, 374 (2004) (defendant must testify at trial to preserve challenge to trial court's ruling regarding admissibility of prior convictions for impeachment purposes).

¶16 Bruggeman next asserts the trial court improperly commented on the evidence in violation of article VI, § 27 of the Arizona Constitution. Although American judges historically have been permitted to comment on the evidence and its weight to aid the jury in reaching a verdict, the Arizona Constitution forbids Arizona judges from

doing so. *See* Ariz. Const. art. VI, § 27; *State v. Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d 368, 388 (2006). Our constitution directs that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Ariz. Const. art. VI, § 27. A trial court violates this provision when it expresses an opinion about what the evidence proves or "'interfere[s] with the jury's independent evaluation of th[e] evidence.'" *Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d at 388, *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998). We review such constitutional issues de novo. *See Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d at 1140.

¶17 During voir dire, the prosecutor asked the prospective jurors if they could find the defendant guilty based on the testimony of a single witness if they found that witness credible. After several jurors expressed reservations, the trial court gave the following example:

> Your sister is walking home and someone grabs her and pulls her into the alley and assaults her and there are no witnesses other than your sister, and your sister calls the police and the police investigate it and they find a man or a woman who did this and that person is on trial.
>
> Would you say to yourself, [w]ell, we might as well just let that person go now, because it's just one word against the other. You can't convict.
>
> See, the point is that whether there's one witness or a hundred, there could be a hundred witnesses and you can acquit someone. There could be one witness and you can acquit. There could be one witness and you convict. There could be a hundred witnesses and you convict.

> The point here is, is that you have to evaluate the testimony of whatever witness or witnesses are presented by either or both sides and make up your mind.

¶18 Bruggeman acknowledges he did not object to the trial court's example and we therefore review his claim solely for fundamental, prejudicial error.[4] *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). He also concedes that determining whether jurors would weigh properly the credibility of witnesses individually, rather than relying on the number of witnesses, is a proper topic for voir dire. But Bruggeman asserts the court's example interfered with the jury's assessment of the evidence because the court "introduced emotion into the way jurors were to evaluate witnesses" by using a family member in its example. He argues that, by making the hypothetical victim a family member, because a person is more likely to believe a family member than a stranger, the court improperly suggested "that alleged victims of sexual crimes should be believed."

¶19 We acknowledge the trial court's use of a family member as the hypothetical victim was unnecessary and arguably improper. We also recognize the hypothetical presupposed a guilty defendant and a truthful alleged victim, therefore making the portion of the explanation favoring the state more vivid than the portion favoring the defendant. But the purpose of the hypothetical was to educate the

[4]Although Bruggeman concedes we must review for fundamental error, we observe that, before the court presented the hypothetical to the jurors, it appeared to preclude Bruggeman from making further objections during voir dire. But even were we to review the court's hypothetical for harmless error, the result would be the same.

prospective jurors that they need not disregard the testimony of a single, credible witness, even if other witnesses gave conflicting testimony. The notion that the hypothetical victim was related to the jurors was stated only briefly at the beginning of the example, and the court repeatedly emphasized thereafter that assessment of the witnesses' credibility would be the jurors' sole domain and could lead to acquittal as readily as conviction. We therefore conclude reasonable jurors would have understood the purpose of the hypothetical and would not have understood the court as suggesting that victims should be believed irrespective of the evidence. "[E]xperience teaches us that [jurors] possess both common sense and a strong desire to properly perform their duties." *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Indeed, several of the prospective jurors continued to express some concern about the concept the court explained, clearly indicating they did not draw from the court's example that victims necessarily should be believed.

¶20 Finally, as noted above, the jurors were instructed properly on how to assess the evidence and reach a decision, as well as on the state's burden of proof, and we presume the jury followed those instructions. *See Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d at 847. Thus, we see no reasonable possibility the trial court's hypothetical "'interfere[d] with the jury's independent evaluation of th[e] evidence.'" *Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d at 388, *quoting Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d at 1011. There was no error, fundamental or otherwise. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608

("To obtain relief under the fundamental error standard of review, [a defendant] must first prove error.").

Disposition

¶21 For the reasons stated, we affirm Bruggeman's convictions and sentences.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge