

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

---

STATE OF ARIZONA, *Appellee*,

*v.*

JEROMY LEE GILFILLAN, *Appellant*.

No. 1 CA-CR 15-0637  
FILED 9-20-2016

---

Appeal from the Superior Court in Maricopa County  
No. CR2013-447340-001  
The Honorable Bradley H. Astrowsky, Judge

**AFFIRMED**

---

COUNSEL

Arizona Attorney General's Office, Phoenix  
By Myles A. Braccio  
*Counsel for Appellee*

The Hopkins Law Office, PC, Tucson  
By Cedric Martin Hopkins  
*Counsel for Appellant*

**MEMORANDUM DECISION**

Presiding Judge Patricia K. Norris delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Margaret H. Downie joined.

---

**NORRIS**, Judge:

¶1 Jeromy Lee Gilfillan appeals his conviction and sentence on one count of child abuse under Arizona Revised Statutes (“A.R.S.”) section 13-3623 (2010) (a class 2 felony).<sup>1</sup> Gilfillan argues the superior court should have granted a mistrial or a new trial after a physician called by the State recalled being told that Gilfillan “had a felony.” We disagree with Gilfillan’s argument and affirm his conviction and sentence.

**FACTS AND PROCEDURAL BACKGROUND<sup>2</sup>**

¶2 On September 29, 2013, B.B. went to work while Gilfillan stayed home to supervise B.B.’s five-month-old daughter, V.B., and another child. When B.B. returned home, she found V.B. lying in her crib with a severely swollen head and eyes focused intently on the ceiling. B.B. immediately took V.B. to the emergency room at the nearest hospital. At the hospital, the medical team discovered V.B. had fractures including a life-threateningly severe depressed skull fracture exceeding the hospital’s capability to treat. The hospital transferred V.B. to another hospital where she was placed under the care of pediatric emergency specialist Dr. O., M.D., and admitted into the Pediatric Intensive Care Unit. Dr. O. questioned B.B. about V.B.’s medical and social history. Based on that history and the severity of V.B.’s injuries, Dr. O., along with the police, began to suspect V.B. had sustained non-accidental trauma. A grand jury subsequently indicted Gilfillan for child abuse, a class 2 felony, a domestic violence offense, and a dangerous crime against children. *See* A.R.S. § 13-3601 (Supp. 2013) (domestic violence); A.R.S. § 13-3623 (child abuse).

---

<sup>1</sup>We cite to the current version of the statutes unless materially amended since the date of the offense giving rise to this action.

<sup>2</sup>We view all facts and reasonable inferences in the light most favorable to sustaining the verdicts. *Stave v. Bon*, 236 Ariz. 249, 251, ¶ 2, 338 P.3d 989, 991 (App. 2014) (quotations and citation omitted).

**DISCUSSION**

I. Denial of Mistrial and Motion for New Trial

¶3 The State called Dr. O. as a witness in its case-in-chief. Dr. O. explained that in the course of asking B.B. about V.B.'s history, he "asked her if the father had any criminal record, and she said I guess he had a felony." Defense counsel objected, and the court excused the jury from the courtroom. Defense counsel moved to strike Dr. O.'s comment, asked for a curative instruction, and moved for a mistrial. In response, the prosecutor explained she had overlooked a notation made by Dr. O. in his preliminary report about Gilfillan's criminal record and had not anticipated Dr. O. would mention it in discussing the history he had obtained from B.B. about V.B.

¶4 The court ruled Dr. O.'s comment was improper, sustained defense counsel's objection, and granted defense counsel's motion to strike Dr. O.'s comment. However, the court denied defense counsel's motion for a mistrial because, at that juncture in the trial, Gilfillan had not yet decided whether to testify and, if he did testify, any "chance" of prejudice would "go away" because the State would impeach him with a prior felony conviction. *See* Ariz. R. Evid. 609(a) (impeachment by evidence of prior criminal conviction). The court explained that if, however, Gilfillan elected not to testify, then it would give an additional curative instruction at the close of the case. Consistent with these rulings, when the jury returned to the courtroom, the court instructed the jury as follows:

[T]he statement that Dr. [O.] made about mother's statement to him about M[r]. Gilfillan may have some type of criminal history is stricken. You are not to consider that for any purpose for any – in any way, shape, or form in this case, and the Court is going to trust that you'll do that and follow the Court's instruction.

¶5 Gilfillan elected not to testify. Without objection from either party, in its final instructions, the court instructed the jury as follows:

A portion of Dr. [O.]'s testimony was ordered stricken from the record. This pertained to a statement made to him by [B.B.]. The statement pertained to [B.B.]'s belief concerning an issue pertaining to defendant's background. As this

GILFILLAN v. STATE

Decision of the Court

testimony was stricken from the record, you are not to consider it for any purpose at any time during your deliberations.

¶6 On appeal, Gilfillan argues the superior court should have granted his request for a mistrial and his subsequent request for a new trial because the State knew Dr. O. would testify regarding his criminal record and the evidence of his guilt was not “overwhelming.”

¶7 The superior court was in the best position to determine whether Dr. O.’s comment actually affected the outcome of the trial, *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000) (citation omitted), and, based on our review of the record, it did not abuse its discretion in refusing to grant a mistrial and in denying Gilfillan’s request for a new trial. See *State v. Hardy*, 230 Ariz. 281, 292, ¶ 52, 283 P.3d 12, 23 (2012) (appellate court reviews superior court’s denial of a motion for a mistrial for an abuse of discretion) (citation omitted); *State v. Jeffrey*, 203 Ariz. 111, 115, ¶ 17, 50 P.3d 861, 865 (App. 2002) (decision whether to grant a new trial is within the sound discretion of the trial court, and appellate court will not disturb ruling absent an abuse of discretion).

¶8 First, the State did not know in advance of Dr. O.’s trial testimony that he would mention Gilfillan’s criminal record. Instead, although the prosecutor was generally aware of the comment in Dr. O.’s records, she did not appreciate that Dr. O. would mention it in discussing V.B.’s history as disclosed to him by B.B. Albeit improper, see *supra* ¶ 4, the record fails to show the State intentionally elicited Dr. O.’s comment concerning Gilfillan’s criminal record.

¶9 Second, the court determined that striking the testimony and instructing the jury to disregard it would cure the error. After Gilfillan elected not to testify, the court further instructed the jury to disregard Dr. O.’s statement. Based on our review of the record, the superior court did not abuse its discretion in determining Dr. O.’s comment could be remedied through curative instructions. See *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983) (when a witness unexpectedly volunteers an inadmissible statement, appropriate remedial action “rests largely within” the trial court’s discretion) (citation omitted).

¶10 Third, the state presented overwhelming evidence of Gilfillan’s guilt—contrary to his argument on appeal. At trial, Gilfillan argued he had accidentally injured V.B. by lifting her into a ceiling fan. Expert witnesses called by both the State and Gilfillan agreed, however, Gilfillan’s explanation was inconsistent with V.B.’s fractures. In addition to Dr. O., in

GILFILLAN v. STATE

Decision of the Court

its case-in-chief, the State called Dr. Q., M.D., a board certified “child abuse pediatrician.” Dr. Q. explained that the “physics behind fractures” showed that V.B.’s injuries were consistent with injuries suffered by children who had been observed to fall from a third story balcony. Dr. Q. further testified V.B.’s fractures had not been caused by a ceiling fan, explaining that “the laws of physics would tell us that it doesn’t happen this way” and fan speed could not have affected V.B.’s fractures. Gilfillan’s own expert also testified, “I don’t think that the fractures were caused by the fan.” Finally, Gilfillan undercut his explanation by telling a police detective that V.B. could have been injured in other ways. After the detective told him he did not believe Gilfillan’s explanation, Gilfillan told the police detective his three-year-old son could have injured V.B. by hitting V.B. with a tractor toy spinning on a string. Gilfillan then suggested he could have injured V.B. when he failed to support V.B.’s head and her head hit the floor when he was changing her.

**CONCLUSION**

¶11 Given the foregoing evidence and the superior court’s curative instructions, the superior court did not abuse its discretion in denying Gilfillan’s motions for mistrial and new trial. Therefore, we affirm Gilfillan’s conviction and sentence.



AMY M. WOOD • Clerk of the Court  
FILED: AA