

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

DAVID MARTIN TREVINO, *Appellant*.

No. 1 CA-CR 14-0840
FILED 8-4-2016

Appeal from the Superior Court in Maricopa County
No. CR2013-429965-001
The Honorable Robert E. Miles, Judge (Retired)

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Jeffrey L. Force
Counsel for Appellant

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MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Peter B. Swann joined.

T H U M M A, Judge:

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297 (1969). Counsel for defendant David Martin Trevino has advised the court that, after searching the entire record, counsel has found no arguable question of law and asks this court to conduct an *Anders* review of the record. Trevino was given the opportunity to file a supplemental brief pro se, but has not done so. Pursuant to *State v. Thompson*, 229 Ariz. 43 (App. 2012), and without expressing any opinion on the merits of the issue, the court afforded the parties the opportunity to file briefs addressing the admissibility of a video of an interview of the victim in evidence. This court has now reviewed that supplemental briefing and the record and has found no reversible error. Accordingly, Trevino's convictions and resulting sentences are affirmed.

FACTS¹ AND PROCEDURAL HISTORY

¶2 Trevino had a contentious relationship with his wife and her children from a prior marriage. One night in June 2013, while Trevino and his wife were arguing, his wife thought she heard someone say Trevino had raped her eight-year-old daughter, L.P.² His wife then asked Trevino "Did you just tell me that you raped" L.P.? His wife later testified Trevino did not say anything, but his mouth opened. When L.P. came to the doorway, Trevino's wife asked her if Trevino had "touched her cookie" -- the word they would use for private parts -- and L.P. shook her head yes. Trevino's wife later testified that L.P. made other statements incriminating Trevino.

¹ This court views the facts "in the light most favorable to sustaining the verdict, and resolve[s] all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89 (1997).

² Initials are used to protect the identity of the victims. See *State v. Maldonado*, 206 Ariz. 339, 341 n.1 ¶ 2 (App. 2003).

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¶3 Trevino's wife asked a friend to call the police, and Phoenix Police officers soon arrived. Officer Hernandez spoke with Trevino alone and much of the conversation was recorded on Officer Hernandez' body camera. During that conversation, Trevino told Officer Hernandez that, during the argument, his wife said she was going to call police and say Trevino hit her. Trevino said he responded to his wife by saying, "since she was going to lie to the police that he had hit her . . . 'go ahead and tell her I raped your daughter.'" Trevino denied sexually assaulting L.P., claiming he only said it as part of the argument.

¶4 Officers took Trevino to the police station for questioning, and directed his wife to take L.P. to Childhelp. At Childhelp, Detective Krynsky and others conducted video-recorded interviews of L.P. and asked L.P. to write her experience down in a journal. In this journal, L.P. wrote in part that Trevino "pulled me into the storage [shed] and put me on my knees and he stuck his finger in my bottom. And I was tryin to get out. But he was holding me by the belly. And when he was done I ran inside." A nurse examined L.P. and found a bruise and laceration on or in L.P.'s genitals. The nurse also took samples for DNA testing.

¶5 Trevino was charged with kidnapping and sexual conduct with a minor, Class two felonies and dangerous crimes against children.

¶6 At trial, the nurse testified that the bruise and laceration were consistent with blunt force, penetrating trauma. A Phoenix Police Crime Laboratory technician testified to having tested DNA samples taken from L.P.'s external genitalia and finding sperm cells on two samples. A technician performed a DNA analysis on the samples, which revealed male DNA that matched Trevino. The technician added that, based on a statistical analysis, the male DNA would statistically be expected to match one in 300 random males.

¶7 L.P., who was nine years old when she testified, was a reluctant witness who, at times, answered questions with "yes" or "no;" at times did so by shaking her head; at times indicated she did not want to answer questions, look at exhibits handed to her, and at times indicated she did not remember. The prosecutor asked L.P. if something happened a long time ago with Trevino. L.P. answered "yes," adding "I don't want to talk about it." After two breaks during L.P.'s direct testimony, Trevino's counsel moved for a mistrial, claiming "I do not understand how at this point, even though she has answered some questions, how I could even possibly cross-examine her, when she's clearly unresponsive to anything." The court denied the motion.

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¶8 During cross-examination, Trevino's counsel asked L.P. about her journal entries. Trevino's counsel then completed cross-examination and the State completed redirect. During Trevino's case in chief, his attorney read to the jury the journal entry L.P. wrote at Childhelp.

¶9 The State's witnesses included L.P., L.P.'s mother, Wendy Dutton and various police officers. Detective Krynsky testified about the interviews he conducted or observed, including of L.P. at Childhelp. Cross-examination of Detective Krynsky largely focused on his questions when interviewing L.P. at Childhelp. Trevino's counsel started the cross-examination by asking "Would you agree that you used leading questions during your interview with" L.P.? When Detective Krynsky responded that he used information L.P. had provided earlier in the interview to get additional information, Trevino's counsel next asked "And you'd also agree that you used questions that suggested answers and facts to her?" [Id.] Much of the rest of the cross-examination involved Trevino's counsel asking Detective Krynsky whether he had asked L.P. specific questions during the interview:

Q. Okay. Do you remember asking [L.P.] if something had happened to Mr. Trevino's clothes?

A. Correct.

Q. Had she mentioned Mr. Trevino's clothes yet?

A. Well, in the context of the conversation --

Q. Yes or no, had she mentioned Mr. Trevino's clothes, specifically?

A. No.

Q. Okay. Now you asked her what she saw when his shorts came down, correct?

A. Correct.

Q. She hadn't mentioned seeing anything, had she?

A. Once again, it's the context of what the conversation we were having.

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Q. Had she looked at [you and] said, "I saw something"?

A. No.

Q. Okay. In fact, later in the interview, didn't you ask her, "Did you see Mr. Trevino's weenie?" Do you recall asking her that?

A. She had already said "weenie."

Q. What was her response the second time you asked her?

A. I don't have it in front of me. I don't know.

....

Q. The question again, just so the record is clear, is do you remember asking [L.P.] if she had ever seen Mr. Trevino's weenie?

A. Yes.

After a portion of the recorded interview was then shown to Detective Krynsky outside of the presence of the jury in an attempt to refresh his recollection, the cross-examination continued:

Q. Did you hear the part where you asked [L.P.] whether or not she saw Mr. Trevino's weenie?

A. Yeah, at least [a] portion of it.

Q. Were you able to hear her response?

A. I mean at that portion it transitioned to as far as movement and locations.

Q. So you didn't -- so you're saying you do not recall her saying no, that she didn't see it?

A. She said that she did not see the weenie.

Q. Okay. Thank you. And that was the second time you had asked, correct?

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A. I believe it was, yes.

Q. And that was, I guess for lack of a better term, a direct question?

A. Correct.

Q. Now I'd like to talk for a minute about questions you didn't ask during the interview. Okay?

A. Okay.

....

Q. So you were aware of the arguments between [Trevino and his wife]?

A. Correct.

Q. You didn't ask [L.P.] about those, did you?

A. No, we were not supposed to.

Q. Now [Trevino] had told you about [his wife] hitting children in the home?

A. Correct.

Q. You didn't ask [L.P.] about that, did you?

A. No.

Q. You didn't -- you were aware that she had supposedly made the disclosure first to her mom, correct?

A. Correct.

Q. Did you ask her what she told her mom?

A. No.

Q. And when we're talking about shorts, did you ask her follow-up questions like what color were his shorts?

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A. No.

Q. Did you ask if they were like basketball shorts or cargo shorts?

A. No.

Q. So you didn't do any follow-up on the facts she did give you?

A. No.

On redirect, without objection, Detective Krynsky agreed with Wendy Dutton's prior testimony "[t]hat you need to watch the entire forensic interview to determine whether or not it was, in fact, suggestive." Without objection, the following exchange followed:

Q. The defense attorney also asked you about various questions you asked [L.P.] during the interview, correct?

A. Yes.

Q. And also about some of the answers that [L.P.] gave you?

A. Yes.

Q. And when you were answering her, you said, "Well, the context," and you didn't really get to finish that answer; is that right?

A. That's correct.

The State then moved the admission of the recording of Detective Krynsky's interview of L.P. at Childhelp and asked to show the recording to the jury. The State argued the recording was admissible because Trevino's cross-examination of Detective Krynsky put the forensic interview at issue by accusing him of providing information to L.P. and conducting a suggestive interview. Trevino objected and, outside of the presence of the jury, the following exchange took place:

[Trevino's Counsel]: Two things. One is that I don't believe it's appropriate for the disk to actually go back [to the] jury. I believe it's under

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State vs. Martin or Martinsen that if he's going to be playing it for the jury, they get to listen to it, they get to watch it, but that's it. It doesn't get to go back there with them.

Also, I object to it being entered because the exception that would be coming under is whether or not a person remembers something. And although there is case law that it can be admissible if a person feigns forgetting, what [L.P.] actually said to begin with yesterday was "I don't want to do this. I don't want to do this. I don't want to do this," and yet the State still pushed her to the point where she was saying, "I don't remember and I don't remember."

I don't believe it's appropriate for the State to be able to take advantage of an exception within case law to hearsay to allow that forensic interview to be played when they are the ones that pushed her to the point of saying, "I don't remember," rather than just dropping it then.

[Prosecutor]: The defense put the forensic interview at issue, questioned the detective that he -- and I have it written down -- but introduced facts and suggested facts to [L.P.] during the forensic interview. That was the question from the defense.

Wendy Dutton, who has conducted over 8,500 of these interviews, specifically said you can't determine whether a forensic interview is suggestive or not by pulling one or two questions out of it, which is exactly what the defendant tried to do. They put it at issue. They accused him of providing information to [L.P.] and conducting a suggestive interview. They have opened the door to allowing the jury to see this interview so the jury can determine for itself whether or not the interview was in fact suggestive.

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THE COURT: What about her objection that the disk should not go back?

[Prosecutor]: It depends upon why the disk comes in. So if the disk were to come in under past recollection recorded, then I agree it doesn't go back. In this case the reason that it's admissible is because the defense attacked the forensic interview. They opened the door. And therefore, they opened the door to this evidence. I believe that it is admissible and it should go back.

I think that if there's a question about that, we can save that for another time and at least show it to the jury now and then we can have a discussion about whether or not it's actually admissible. I don't know the case which [Trevino's counsel] refers. But given that they attacked the forensic interview, I believe that it is admissible and should go back.

When asked if she had anything else, Trevino's counsel said "No, your Honor." The court then allowed the interview to be played for the jury. The recorded interview played for the jury includes Detective Krynsky's questions of L.P. at Childhelp and her answers, including her description of being grabbed by Trevino, taken into a storage shed and Trevino placing his "private" in her "bottom." In this respect, L.P.'s testimony was substantially similar to her mother's testimony, received without objection, about what L.P. had told her.

¶10 The State later moved to admit the recording, arguing Trevino "put the integrity of the interview at issue," and because "the defense opened the door, it is admissible as evidence and it should go back with the jury for their deliberations." Trevino's counsel objected that it was not admissible under Ariz. R. Evid. 803(5) ("Recorded Recollection") because there was no finding L.P. "feigned her forgetfulness." Addressing Ariz. R. Evid. 106, Trevino's counsel was "unclear why the entire interview had to be played, considering that there were portions of it that don't involve those questions" addressed in cross-examination, such as "portions where she was talking about going to a swim park, playing Nintendo DS, going to school and what she was studying." Trevino's counsel added "I also don't think under 106 it should . . . go back to the jury," stating Rule 106 "doesn't

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say it's being admitted into evidence. It specifically uses the word 'introduces.'" Trevino also objected "on the ground I stated before that I believe admitting it would violate the rules of evidence, as well as State vs. King, as well as my client's right to a fair trial." The court admitted the exhibit over Trevino's objection.

¶11 After deliberation, the jury convicted Trevino on both counts. The court sentenced Trevino to the required life in prison without the possibility of parole for 35 years on count 2, with 524 days of presentence incarceration credit, and a slightly mitigated sentence of 14 years in prison on count 1 to run consecutive to count 2.

¶12 This court has jurisdiction over Trevino's timely appeal pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031, and -4033(A)(1) (2015).³

DISCUSSION

¶13 This court has reviewed and considered counsels' briefs and has searched the entire record for reversible error. *See State v. Clark*, 196 Ariz. 530, 537 ¶ 30 (App. 1999). Searching the record and briefs reveals no reversible error. The record shows that Trevino was represented by counsel at all stages of the proceedings and counsel was present at all critical stages. The evidence received at trial constitutes substantial evidence supporting Trevino's convictions.

¶14 From the record, all proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. The jury was properly comprised of 12 members. The court properly instructed the jury, including on the elements of the charges, the State's burden of proof and the necessity of reaching a unanimous verdict. The jury returned unanimous verdicts that were confirmed by juror polling. The court received and considered a presentence report and imposed sentences within statutory limits and permissible ranges.

¶15 Trevino alleges the superior court abused its direction in allowing Detective Krynsky's interview of L.P. to be played for the jury and admitted in evidence. Trevino's cross-examination of Detective Krynsky, however, attempted to show that he improperly used leading questions and suggested facts and answers during his interview of L.P. To the extent it was not relevant previously, by emphasizing Detective Krynsky's conduct

³ Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

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during the interview, Trevino's counsel clearly made that conduct relevant. *See* Ariz. R. Evid. 401. By making that conduct relevant, evidence of the interview became admissible unless otherwise excluded. *See* Ariz. R. Evid. 402.⁴

¶16 By quoting and closely paraphrasing questions Detective Krynsky asked during his interview of L.P. at Childhelp, Trevino introduced portions of that recording at trial during his cross-examination of Detective Krynsky. That allowed the State to seek "the introduction, at that time, of any other part" of the "recorded statement . . . that in fairness ought to be considered at the same time." Ariz. R. Evid. 106; *see also State v. Superior Court (Moran)*, CV-15-0263-PR, 2016 WL 3232897 at *2 ¶ 8 (Ariz. June 13, 2016) ("A 'recorded statement' may include electronic recordings of conduct.").

Rule 106 . . . is a rule of inclusion rather than exclusion. The rule provides that if one party introduces part of a recorded statement, an adverse party may require the concurrent introduction of other parts when fairness demands, thereby "secur[ing] for the tribunal a complete understanding of the total tenor and effect of the utterance."

Moran, CV-15-0263-PR, 2016 WL 3232897 at *2 ¶ 10. Introduction of a portion of a document does not automatically allow the admission of the remainder of the document. Instead, it is only the "other part . . . that in fairness ought to be considered at the same time" that is admissible. Ariz. R. Evid. 106. Thus, the superior court had the discretion to admit relevant

⁴ Although the parties, and as a result the superior court, focused on the concept of "opening the door," classically, that concept describes what occurs after improper evidence is admitted. *State v. Lindsey*, 149 Ariz. 472, 477 (1986) ("It is the general rule that when a party procures the admission of improper evidence, the 'door is open' and the opposing party may then respond or retaliate with evidence on the same subject."). Because there was no claim that Trevino's cross-examination of Detective Krynsky was improper, the analysis here does not turn on whether, and to what extent, any evidentiary door was opened by the admission of improper evidence. *See State v. Perez*, 141 Ariz. 459, 464 (1984) (noting superior court ruling can be affirmed if correct for any reason).

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portions of the interview at the State's request in response to the cross-examination of Detective Krynsky.

¶17 As applied, the superior court admitted the entire interview. Trevino's trial objection on this point was that the interview included "portions where [L.P.] was talking about going to a swim park, playing Nintendo DS, going to school and what she was studying." Although the superior court had the discretion to preclude such portions of the interview, those questions reasonably could be seen as addressing whether Detective Krynsky's questions were suggestive and, accordingly, responsive to the issue raised by Trevino in cross-examination. As a result, Trevino has not shown the superior court abused its discretion in allowing those portions of the interview to be received in evidence. *See* Ariz. R. Evid. 402, 403.

¶18 Trevino's other trial objections to the admission of the interview were that L.P.'s statements in the interview -- the substance of which had been received in evidence without objection through other witnesses, including testimony from L.P.'s mother and during Trevino's cross-examination of Detective Krynsky -- did not constitute prior inconsistent statements under Ariz. R. Evid. 801(d)(1)(A) or recorded recollections admissible under Ariz. R. Evid. 803(5).⁵ But these objections do not respond to why the State was offering the recording in evidence: to provide evidence of Detective Krynsky's conduct in the interview to assess whether his questions were suggestive. *See* Ariz. R. Evid. 106. Trevino's counsel made no request to the superior court that Detective Krynsky's questions (but not L.P.'s answers) should be admitted. *See* Ariz. R. Evid. 106. Nor did Trevino's counsel request a limiting instruction when the recording was played for the jury, in closing instructions or otherwise. *See* Ariz. R. Evid. 105.

¶19 On appeal, the parties assert various other theories about why the recording should or should not have been admitted. Trevino's Confrontation Clause objection is not well taken because both Detective Krynsky and L.P. testified at trial. *See State v. Real*, 214 Ariz. 232, 234 ¶ 10 (App. 2007) (citing cases). For Trevino's remaining theories, because he failed to make timely trial objections asserting those theories, review is limited to fundamental error. *See* Ariz. R. Crim. P. 21.3(c); *State v. Henderson*,

⁵ The cases Trevino's counsel cited to the superior court construe these same rules. *See State v. Martin*, 225 Ariz. 162, 164-66 ¶¶ 8-15 (App. 2010) (construing Ariz. R. Evid. 803(5)); *State v. King*, 180 Ariz. 268, 275 (1994) (construing Ariz. R. Evid. 801(d)(1)(A) for a witness "feigning his memory loss").

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210 Ariz. 561, 567 ¶¶ 19–20 (2005). “Accordingly, [Trevino] ‘bears the burden to establish that “(1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice.”” *State v. James*, 231 Ariz. 490, 493 ¶ 11 (App. 2013) (citations omitted). Among other things, Trevino does not claim fundamental error, let alone demonstrate resulting prejudice. Nor, on this record, does the admission of the recording constitute fundamental error resulting in prejudice. *Cf. State v. Martin*, 225 Ariz. 162, 164-66 ¶¶ 8-15 (App. 2010). Accordingly, given the unique facts and procedural background presented, Trevino has shown no reversible error in allowing Detective Krynsky’s interview of L.P. to be played for the jury and admitted in evidence.

CONCLUSION

¶20 This court has read and considered the briefs, including the supplemental briefing, and has searched the record provided for reversible error and has found none. *Leon*, 104 Ariz. at 300; *Clark*, 196 Ariz. at 537 ¶ 30. Accordingly, Trevino’s convictions and resulting sentences are affirmed.

¶21 Upon filing of this decision, defense counsel is directed to inform Trevino of the status of his appeal and of his future options. Defense counsel has no further obligations unless, upon review, counsel identifies an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Trevino shall have 30 days from the date of the decision to proceed, if he desires, with a pro se motion for reconsideration or petition for review.



Ruth A. Willingham · Clerk of the Court
FILED: AA