

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

FILED BY CLERK

MAY 29 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0158
	)	DEPARTMENT A
	)	
Appellee,	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
v.	)	Rule 111, Rules of
	)	the Supreme Court
JOHN VICTOR MELCHER,	)	
	)	
	)	
Appellant.	)	
	)	

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APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094196001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant John Melcher was convicted of sexual conduct with a minor and two counts of molestation of a child. He was sentenced to life imprisonment without possibility of release for thirty-five years and two consecutive fourteen-year prison sentences. On appeal, he argues the trial court erred by refusing to admit testimony that one of the victims had been previously molested by someone else, precluding him from arguing a third-party liability theory in his closing argument; allowing him to represent himself; denying his motion to preclude further use of the word “disclose” by an expert witness or for a mistrial based on its use; and imposing an illegal sentence. For the following reasons, we affirm Melcher’s convictions and sentences.

### **Factual and Procedural Background**

¶2 We view the facts in the light most favorable to upholding the conviction. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). Throughout June 2009, two children, D.R. and F.R., who thought of Melcher as a grandfather, frequently visited Melcher’s home and stayed overnight. During one of the overnight visits, Melcher touched F.R.’s vagina. On a subsequent occasion, he touched her anus. F.R. was seven years old at the time. At another time, Melcher also touched F.R.’s sister, D.R., on her vagina. D.R. did not recall how old she was at the time of the incident but testified that she was in kindergarten. F.R. reported the incident to her aunt, K.M., who called the police. F.R. and D.R. were forensically interviewed regarding the events.

¶3 Melcher was charged with and convicted of sexual conduct with a minor and two counts of child molestation. He was sentenced to life in prison with the

possibility of release<sup>1</sup> after thirty-five years and two terms of fourteen years, all to run consecutively. Melcher appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1), (4).

### **Evidence of Prior Molestation**

¶4 Melcher first argues the trial court erred by not admitting evidence contained in police reports and a forensic interview that F.R. was molested by another person. He claims he would have used that evidence either to rebut the state’s closing argument that F.R. could not have had the knowledge necessary to testify about sexual acts unless Melcher had actually molested her<sup>2</sup> or to show that F.R. was likely to misinterpret innocent touches due to prior molestation. “We review a trial court’s determination of relevance and admissibility of evidence for an abuse of discretion.” *State v. Hardy*, 230 Ariz. 281, ¶ 49, 283 P.3d 12, 22 (2012).

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<sup>1</sup>The sentencing minute entry states Melcher was sentenced “with the possibility of parole after 35 years.” However, parole has been unavailable since 1994, A.R.S. § 41-1604.09(I), and the trial court sentenced Melcher under A.R.S. § 13-705, which does not refer to parole. We therefore presume the court’s use of “parole” was synonymous with the “suspension of sentence, probation, pardon or release from confinement” language actually found in the statute. § 13-705; *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (trial court presumed to know and apply law in making decisions); *cf. State v. Bruggeman*, 161 Ariz. 508, 511, 779 P.2d 823, 825 (App. 1989) (court commits no error by misstating type of defendant’s early release status when determining minimum sentence eligibility).

<sup>2</sup>Although he previously sought to introduce the evidence, Melcher did not ask the trial court to admit this evidence after the state’s closing on this ground. Therefore, this issue is forfeited absent fundamental error. *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) (objection on one ground does not preserve issue for appeal on another). But because he does not argue any error was fundamental, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

¶5 During the investigation of the case against Melcher, F.R. reported to her mother that her mother's former boyfriend, J.R., had molested her. Melcher moved for disclosure of all records related to this accusation. After in camera review, the trial court ordered the documents to be disclosed, but ultimately ruled against admissibility of the other accusations.

¶6 The state contends Melcher has waived his argument that this evidence should have been admitted under A.R.S. § 13-1421(A)(4), the codification of Arizona's rape shield law, because he did not make that argument to the trial court. Melcher counters that he did not argue the evidence was admissible under the statute, but rather under *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988) or *State v. Lujan*, 192 Ariz. 448, ¶¶ 11-13, 967 P.2d 123, 126-27 (1998).<sup>3</sup> However, we need not resolve Melcher's claim because he failed to make an offer of proof or mark the police reports or forensic interview for identification below and the record does not disclose what the evidence actually is.

¶7 Rule 103, Ariz. R. Evid., requires that, in order to preserve a claim of error from a ruling excluding evidence, the party must "inform[] the court of its substance by an offer of proof, unless the substance was apparent from the context." In particular, where a party objects to the exclusion of a document from evidence, an offer of proof is necessary because the record otherwise "does not disclose what the document actually

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<sup>3</sup>In his reply brief, Melcher points the court to an unpublished memorandum decision, but does not do so under any of the exceptions listed in Rule 111(c), Ariz. R. Sup. Ct., and accordingly we will not consider it.

says.” *State v. Dixon*, 226 Ariz. 545, ¶ 44, 250 P.3d 1174, 1183, *cert. denied*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 456 (2011). Here, the parties dispute the timing and similarity of the incidents, the issues critical to determining admissibility. Although Melcher discussed what he claimed was in the police reports and forensic interview, we have no basis for determining with “reasonable specificity” what was contained in them. *Id.*, quoting *State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996). Accordingly, this issue has not been properly preserved for appeal and we do not reach it.

### **Closing Argument**

¶8 Melcher next claims the trial court impermissibly restricted his closing argument by not allowing him to present a theory that F.R. was actually molested by her cousin, R.N. We review a trial court’s restrictions on closing argument for an abuse of discretion. *See State v. Tims*, 143 Ariz. 196, 199, 693 P.2d 333, 336 (1985).

¶9 In a closing argument, counsel may argue the reasonable inferences from the evidence presented at trial. *State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993). But the evidence adduced at trial must support counsel’s argument before counsel may “point[] the finger of suspicion at a particular individual.” *State v. Wooten*, 193 Ariz. 357, ¶ 33, 972 P.2d 993, 1000 (App. 1998).

¶10 To present evidence of third-party culpability, that evidence must have a probative value that is not substantially outweighed by the risk of confusion or unfair prejudice. *State v. Machado (Machado II)*, 226 Ariz. 281, ¶ 16, 246 P.3d 632, 635 (2011). The evidence is relevant only if it “tend[s] to create a reasonable doubt as to the

defendant's guilt." *State v. Gibson*, 202 Ariz. 321, ¶ 16, 44 P.3d 1001, 1004 (2002). "[A] defendant may not, in the guise of a third-party culpability defense, simply 'throw strands of speculation on the wall and see if any of them will stick.'" *Machado II*, 226 Ariz. 281, n.2, 246 P.3d at 635 n.2, quoting *State v. Machado (Machado I)*, 224 Ariz. 343, n.11, 230 P.3d 1158, 1172 n.11 (App. 2010).

¶11 The trial court refused to allow Melcher to suggest that R.N. was the actual culprit in his closing argument, noting that the third-party culpability defense would probably not be allowable under *Machado II* because there was no evidence that R.N. was the actual culprit. The court reasoned "there has got to be evidence presented a third party did it before . . . you can argue that a third party did it."

¶12 No one presented evidence that R.N. was the actual culprit. However, F.R. stated in the forensic interview that R.N. was in the room when she was molested, and an expert witness testified children sometimes identify the wrong person as their abuser because it is easier to "accus[e] somebody who is less feared or less loved than the actual perpetrator." Melcher argues that because F.R.'s family disliked him and he was a likely target of misattribution, this evidence was sufficient circumstantial evidence to warrant an argument in closing that R.N. was the true perpetrator.

¶13 The evidence Melcher relies on—that another of Melcher's alleged victims was in the room—amounts to mere "strands of speculation," and is insufficient to allow an argument on third-party liability. *Wooten*, 193 Ariz. 357, ¶ 33, 972 P.2d at 1000; *Machado II*, 226 Ariz. 281, n.2, 246 P.3d at 635, quoting *Machado I*, 224 Ariz. 343, n.11,

230 P.3d at 1172 n.11. Furthermore, because Melcher was allowed to infer in closing that someone else had committed the crime, even if the minimal limitation on his argument was erroneous, any error was harmless. *See State v. Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d 233, 236 (2009) (error harmless where verdict surely unattributable to it); *State v. Marshall*, 197 Ariz. 496, ¶¶ 21-24, 4 P.3d 1039, 1045-46 (App. 2000) (when counsel able to substantially argue theory of case despite erroneous limitation on closing argument, no reversible error).

### **Waiver of Right to Counsel**

¶14 Melcher argues the trial court erred in finding that he was competent to waive his right to counsel and represent himself. He argues that under *State v. Gunches*, 225 Ariz. 22, 234 P.3d 590 (2010), after the issue of competency to waive counsel was raised, the trial court should have “conduct[ed] a significant evaluation of Mr. Melcher’s abilities to represent himself,” or ordered an “expert evaluation.” We review a trial court’s ruling on whether a defendant is competent to waive his right to counsel for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, ¶ 25, 207 P.3d 604, 613 (2009).

¶15 A defendant is competent to waive counsel if he is competent to stand trial. *Gunches*, 225 Ariz. 22, ¶ 9, 234 P.3d at 592. “A defendant is competent to stand trial if he has ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding’ and a ‘rational as well as factual understanding of the proceedings against him.’” *Id.*, quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960). More particularly, the defendant seeking to represent himself “must understand (1) the nature

of the charges against him, (2) the dangers and disadvantages of self-representation, and (3) the possible punishment upon conviction.” *Dann*, 220 Ariz. 351, ¶ 24, 207 P.3d at 613.

¶16 Like the trial court in *Gunches*, the trial court here “engaged [Melcher] in several colloquies regarding his choice to represent himself.” 225 Ariz. 22, ¶ 12, 234 P.3d at 593. Melcher testified that he had completed extensive post-secondary education. The court thoroughly questioned Melcher on his understanding of the proceedings against him, the meaning of his right to counsel, and the potential consequences of his decision. Melcher demonstrated an understanding of the ramifications of his decision, acknowledging that he would “die in prison” if he was found guilty. Also as in *Gunches*, Melcher was assisted by advisory counsel. *Id.* Although Melcher’s attorney argued Melcher had a difficult time complying with court rules and responding to court orders, a defendant who is stubborn is not incompetent to waive his right to counsel. *See State v. Mott*, 162 Ariz. 452, 459-60, 784 P.2d 278, 285-86 (App. 1989) (defendant who purposefully delayed proceedings, refused to comply with court rulings, and threatened witnesses not incompetent to waive counsel). The court therefore did not abuse its discretion in finding that Melcher was competent to waive his right to counsel. *See Gunches*, 225 Ariz. 22, ¶¶ 9-12, 234 P.3d at 592-93; *Dann*, 220 Ariz. 351, ¶¶ 23-25, 207 P.3d at 613.

### Use of the Word “Disclose”

¶17 Melcher claims the trial court erred in denying his motion for mistrial based on the expert witness Amy Evans, who conducted the forensic interviews of F.R. and D.R., using the word “disclose” to describe their statements. We review a trial court’s denial of a motion for mistrial for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, ¶ 124, 94 P.3d 1119, 1151 (2004).

¶18 Melcher did not object to Evans’s use of this word during her testimony, instead filing the motion for mistrial three days later. The motion for mistrial therefore was untimely. *See* Ariz. R. Evid. 103(a)(1)(A) (timely objection required to preserve claim of evidentiary error); *State v. Atwood*, 171 Ariz. 576, 641, 832 P.2d 593, 658 (1992) (because defendant failed to object to evidence when admitted and instead moved for mistrial later, motion for mistrial not timely), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001); *State v. Harris*, 157 Ariz. 35, 36, 754 P.2d 1139, 1140 (1988) (contemporaneous objection required so court can remedy objectionable action; party cannot permit error to go unrectified and later seek mistrial). Although the state did not object to Melcher’s motion for mistrial on the basis of timeliness below, “we may consider issues presented for the first time on appeal if they are raised to uphold the lower court’s ruling” and “[w]e are required to affirm a trial court’s ruling if legally correct for any reason.” *State v. Boteo-Flores*, 230 Ariz. 551, ¶¶ 7, 9, 288 P.3d 111, 113-14 (App. 2012). We therefore conclude the trial court did not abuse its discretion in denying Melcher’s motion for mistrial based on Evans’s testimony.

¶19 Melcher further argues the trial court erred by not precluding Wendy Dutton, a licensed professional counselor, from using the word “disclose” in her testimony because “use of the word [disclose] implied that children tell the truth when they testify about alleged abuse,” and although the expert testified “children fabricate allegations . . . her testimony implied that otherwise they are ‘disclosing’ the truth.” “We review a trial court’s ruling on the admissibility of evidence for an abuse of discretion and will reverse such a ruling only upon a finding of clear prejudice.” *State v. Fischer*, 219 Ariz. 408, ¶ 24, 199 P.3d 663, 671 (App. 2008).

¶20 An expert witness may not testify as to the credibility of other witnesses. *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986). However, experts may testify about the behavioral characteristics of victims of child sexual abuse in general. *Id.* at 473, 720 P.2d at 74 (expert could testify regarding behavior patterns in victims of incest); *State v. Moran*, 151 Ariz. 378, 383-84, 728 P.2d 248, 253-54 (1986) (expert could testify that recantation was not inconsistent with abuse having occurred); *State v. Jackson*, 170 Ariz. 89, 92, 821 P.2d 1374, 1377 (App. 1991) (expert could testify that ten year old children cannot effectively maintain a lie).

¶21 Dutton was called for the sole purpose of testifying generally about child sex abuse victims. When read in context, her use of the word “disclose” was synonymous with “say” or “tell.” For example, when the prosecutor asked her to talk “a little bit about who children normally disclose abuse to,” she responded “Generally younger children are more likely to tell their mothers, but as children grow older . . . they may be more likely

to disclose to a close friend or another relative . . . .” Dutton had not interviewed the victims in the case, and as Melcher elicited on cross-examination, she was speaking only about “general principles”—permissible expert testimony on the behavioral characteristics of child victims of sexual abuse. *See Jackson*, 170 Ariz. at 92, 821 P.2d at 1377. We therefore cannot say the trial court erred in not precluding the continued use of the word “disclose.” Furthermore, because Dutton was speaking in generalities in this situation, no clear prejudice occurred.

### **Imposition of Sentence**

¶22 Finally, Melcher argues he was illegally sentenced under A.R.S. § 13-705(A) because the jury found he was under eighteen years of age, but that subsection applies only to those eighteen or older. A challenge to the legality of a sentence is a question of law, which we review de novo. *State v. Johnson*, 210 Ariz. 438, ¶ 8, 111 P.3d 1038, 1040 (App. 2005).

¶23 Melcher did not object below to the imposition of sentence. Because Melcher argues his sentence is illegal, not merely excessive, he could have challenged it under Rule 24.3, Ariz. R. Crim. P., but he did not. *See State v. Vermuele*, 226 Ariz. 339, ¶ 7, 249 P.3d 1099, 1102 (App. 2011). We therefore review only for fundamental error. *See State v. Cox*, 201 Ariz. 464, ¶ 11, 37 P.3d 437, 440 (App. 2002) (failure to object to sentence in trial court limits review to fundamental error). An illegal sentence always constitutes fundamental error. *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App.

2002). In our review, we presume trial courts know the law and apply it in their decisions. *See State v. Williams*, 220 Ariz. 331, ¶ 9, 206 P.3d 780, 783 (App. 2008).

¶24 A sentence is legal if “it was within the statutorily imposed p[a]rameters for the crime.” *State v. Thomas*, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984). Section 13-705 governs sentencing for those convicted of dangerous crimes against children, including sexual conduct with a minor under twelve. Subsection (A) applies to those offenders who are “at least eighteen years of age” and mandates life imprisonment with a thirty-five-year minimum. In contrast, the remaining subsections (B) through (F) apply to those offenders who are “eighteen years of age or [have] been tried as an adult” and give the trial court discretion to impose life imprisonment with the possibility of release after thirty-five years, or a term of years.

¶25 Melcher was tried as an adult, convicted of sexual conduct with a minor under twelve, and sentenced to a term of life imprisonment with the possibility of release after thirty-five years. The trial court did not state under which subsection it was imposing sentence, but noted that “even despite the jury verdict . . . I have discretion to impose the 35 years that the statute provides.” Section 13-705(A) provides no discretion to the court; it requires the court impose life imprisonment for anyone eighteen years of age or older. In contrast, § 13-705(B) provides the court with the discretion to which it referred because that subsection allows life imprisonment for anyone tried as an adult, which Melcher was. That the court imposed slightly mitigated terms of fourteen years for two other counts related to a different victim and different crimes does not rebut the

presumption the court knew and applied § 13-705(B) in imposing this sentence. *See Williams*, 220 Ariz. 331, ¶ 9, 206 P.3d at 783. Accordingly, the sentence imposed was within the limits of § 13-705(B) and therefore was not illegal. *See Thomas*, 142 Ariz. at 204, 688 P.2d at 1096; *State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002) (“[W]e are obliged to uphold the trial court’s ruling if legally correct for any reason.”); *State v. King*, 213 Ariz. 632, ¶ 8, 146 P.3d 1274, 1277 (App. 2006). We therefore do not reach Melcher’s other arguments.

### Conclusion

¶26 For the foregoing reasons, we affirm Melcher’s convictions and sentences.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Michael Miller

MICHAEL MILLER, Judge