

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ROBERT JOE QUIMBY,
Appellant.

No. 2 CA-CR 2014-0349
Filed May 1, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Cochise County
No. CR201300464
The Honorable James L. Conlogue, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

ECKERSTROM, Chief Judge:

¶1 Robert Quimby appeals from his convictions and sentences for multiple counts of sexual offenses. His single contention on appeal is that the state engaged in prosecutorial misconduct by impermissibly vouching for the credibility of the state's witnesses. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Quimby was charged with numerous counts of sexual offenses against his daughter, M., and his stepdaughter, A. During the jury trial, M. testified that she had lied about her father mistreating her in the past. Specifically, she told school officials that her parents did not feed her in order to get the school's hot lunch.

¶3 In her closing argument, the prosecutor called M.'s lie about her parents not feeding her "a little kid fibbing about something" and claimed that "if [M.] were making all of this up, this would be a who[p]per." She later stated, "[A.] is not a child. She is 19 years old. She is a religious missionary. She is lying about this? They haven't put forth any reason as to why she would do that."

¶4 Quimby was convicted of nineteen sexual offenses and sentenced to a combination of concurrent and consecutive prison sentences, the longest of which were life terms. This appeal followed.

Discussion

¶5 Quimby asserts the state committed prosecutorial misconduct by impermissibly vouching for the credibility of both M. and A. Because Quimby did not object on this basis to the trial

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court, our review is limited to fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶6 Vouching occurs in two forms: “(1) where the prosecutor places the prestige of the government behind its witness; (2) where the prosecutor suggests that information not presented to the jury supports the witness’s testimony.” *State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989). Quimby asserts the prosecutor engaged in the former when she characterized M.’s “lie about the school lunches” as a “fib.” Quimby also takes issue with the prosecutor’s statements about A., claiming the state “told the jury that A. wouldn’t lie, because she was a religious missionary.”

¶7 “A prosecutor must not convey [her] personal belief about the credibility of a witness.” *State v. Lamar*, 205 Ariz. 431, ¶ 54, 72 P.3d 831, 841 (2003); *see also State v. Forde*, 233 Ariz. 543, ¶¶ 71-72, 315 P.3d 1200, 1220 (2014) (prosecutor improperly vouched for witness by claiming she had testified “honestly”); *Vincent*, 159 Ariz. at 423, 768 P.2d at 155 (impermissible vouching occurred when prosecutor stated “the State wouldn’t have put [the witness] on the witness stand if they didn’t believe every word out of his mouth”) (emphasis omitted). But prosecutors may introduce otherwise proper evidence, or comment on properly admitted evidence, from which a jury might infer that a witness is credible. *See, e.g., United States v. Wellington*, 754 F.2d 1457, 1468 (9th Cir. 1985) (prosecutor does not engage in vouching by reminding jury witnesses had no motive to lie); *State v. McCall*, 139 Ariz. 147, 158-59, 677 P.2d 920, 931-32 (1983) (state may introduce evidence that witness promised to testify truthfully in plea bargain); *see also* Jacob A. Stein, *Closing Arguments* § 1:49 (2014) (“[I]f counsel’s argument on the credibility of witnesses has support in the evidence adduced at trial . . . and . . . does not sound of his or her personal knowledge, these comments, if otherwise reasonable, will be held proper.”).

¶8 Here, the prosecutor characterized M.’s lie about the school lunch as a “fib,” and claimed that, if M. were lying about the case, it would be a “who[p]per.” In so doing, she did not state any personal belief about whether M. was lying. She merely commented on what the evidence introduced at trial had demonstrated about

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M.'s credibility – M. had lied in the past about small things, but the evidence did not show that M. was lying about her father's abuse.

¶9 Nor did the comments about A. constitute vouching. The prosecutor told the jury, “[A.] is a religious missionary. She is lying about this?” Out of context, this appears to be, as Quimby suggests, a statement that A. would not lie because of her religion, which would be improper. A. testified without objection on direct examination that she had a job as a religious missionary. It was a true fact in response to a preliminary question about employment asked of many witnesses. As such, it was not admitted for an improper purpose. *See* Ariz. R. Evid. 610 (“Evidence of a witness’s religious beliefs or opinions is not admissible *to attack or support the witness’s credibility.*”) (emphasis added). Although the prosecutor may have also intended for the jury to find A. more credible because of her religious faith, Rule 610 is not so broad as to prevent any mention of a person’s vocation just because that vocation happens to be religious. *See State v. Stone*, 151 Ariz. 455, 458, 728 P.2d 674, 677 (App. 1986) (“[I]f [religious] information is probative of something other than veracity, it is not inadmissible simply because it may also involve a religious subject . . .”). If A. happened to be a waitress, a sales clerk, or a mechanic, the statement would not have been objectionable; there is no reason for a different result because A. was, in fact, a religious missionary. Accordingly, we conclude no impermissible vouching occurred.

¶10 But even assuming *arguendo* that the prosecutor’s comments were improper, “[w]hen improper vouching occurs, the trial court can cure the error by instructing the jury not to consider attorneys’ arguments as evidence.” *State v. Payne*, 233 Ariz. 484, ¶ 109, 314 P.3d 1239, 1267 (2013). Here, the jury was so instructed; therefore, Quimby cannot demonstrate that prejudicial error occurred. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607; *see also Lamar*, 205 Ariz. 431, ¶ 54, 72 P.3d at 841-42.

Disposition

¶11 For the foregoing reasons, Quimby’s convictions and sentences are affirmed.