DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ROBERT PATRICK MONAHAN, Appellant.	)	1 CA-CR 10-1011 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. CR 2008-1323

The Honorable Rick A. Williams, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Linley Wilson, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
Attorney for Appellant

S W A N N, Judge

¶1 Defendant Robert Patrick Monahan appeals from his convictions and sentences for three counts of sexual conduct

with a minor and one count of attempted sexual conduct with a minor. He challenges three of the trial court's evidentiary rulings and raises claims of prosecutorial misconduct. We affirm.

FACTS AND PROCEDURAL HISTORY

¶2 From February 2002 to May 2002, Defendant engaged in sexual intercourse numerous times with his step-daughter, C.S.[1] At the time, C.S. was twelve years old and confined to a wheelchair because she was paralyzed from the chest down as a result of injuries she sustained in a vehicle accident in 2000. According to C.S.'s testimony, Defendant would carry her to his bed, play a pornographic movie and undress C.S. and himself before engaging in sex. When he was finished, Defendant would carry C.S. back to her bedroom. This routine began in the summer of 2001 after Defendant first introduced C.S. to pornographic videos and inappropriate touching.

¶3 The intercourse occurred approximately twice a month while P.M. (C.S.'s mother and Defendant's wife) worked nights

[1] Defendant does not challenge the sufficiency of evidence supporting his convictions. In any event, we view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Defendant. *State v. Manzanedo,* 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

and C.S.'s brothers were asleep or away from home.[2] In May 2002, when Defendant tried to have sex with C.S., she refused and Defendant backed away. Defendant threatened that he would hurt C.S. and other family members if C.S. disclosed the sexual abuse. After P.M. and Defendant separated in October 2008, C.S. finally reported the crimes to P.M. and police.[3] When confronted by P.M., Defendant responded, "I don't remember doing that, but if I did, I'm sorry."

¶4 The evidence also established that Defendant engaged in sexual acts with three of C.S.'s girlfriends (A., C. and N.) during a sleepover in August 2002. While the girls were sitting on his lap, he put his hand up A.'s shirt and touched her breast over her bra. He also invited C. to watch a pornographic movie with him, and he asked her to do "something" with him "that grownups do" before requesting that she take off her shorts. Defendant asked C.S. if she and N. would watch a pornographic movie with him.[4]

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[2] The intercourse ceased for some time when the family moved to Kingman in December 2001 and C.S. had a cast on her leg. When the cast was removed in February 2002, the sex recommenced.

[3] C.S. had previously told a cousin and a family friend that Defendant had engaged in inappropriate sexual acts with her, but she swore them to secrecy based on her fear of Defendant's threats and her concern for P.M.'s marriage to Defendant.

[4] The girls did not accede to Defendant's requests, and C.S.'s friends told a local pastor about the incidents the following day. Defendant eventually pled guilty to charges

¶5 In connection with the sexual incidents involving C.S. in 2002, the state charged Defendant on November 26, 2008, with three counts of sexual conduct with a minor and one count of attempted sexual conduct with a minor based on the May 2002 incident, in violation of A.R.S. §§ 13-1001 and -1405(A).[5] At trial, Defendant argued the allegations were falsified and urged by P.M. as revenge against Defendant for leaving her for another woman. Before the verdicts were returned, Defendant unsuccessfully moved for a mistrial based on prosecutorial misconduct, arguing that the prosecutor engaged in improper nonverbal communication with testifying witnesses and made disparaging audible responses to defense counsel's examination of witnesses and during his closing arguments. The jury found Defendant guilty as charged.

¶6 Before sentencing, Defendant moved for a new trial, raising again, among other issues, the prosecutorial misconduct allegations addressed in his motion for mistrial. The court held an evidentiary hearing on the misconduct allegations before denying the new trial motion. The court proceeded to sentencing and imposed consecutive life sentences for each of the sexual

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stemming from the breast-touching incident with A. The record indicates Defendant served five years probation for that conviction.

[5] We cite a statute's current version when it has undergone no material revisions since the date of the underlying events.

conduct with a minor offenses and a consecutive term of ten years for the attempted sexual conduct with a minor offense. Defendant appeals. We have jurisdiction pursuant to A.R.S. § 12-120.21(A)(1), § 13-4031, and § 13-4033(A)(1).

DISCUSSION

I. EVIDENTIARY ORDERS

¶7 Defendant challenges three of the trial court's evidentiary rulings. He first asserts that the court erred in granting the state's request to preclude evidence of P.M.'s allegations of sexual misconduct against her first husband, C.S.'s biological father. Second, Defendant contends that evidence of his sexual acts committed against C.S.'s girlfriends in August 2002 was inadmissible. Finally, he argues that evidence of sexual assault allegations against C.S.'s brother should have been admitted. We address these issues in turn, and in doing so, we review for an abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 208, ¶ 60, 84 P.3d 456, 473 (2004); *State v. Garcia,* 200 Ariz. 471, 475, ¶ 25, 28 P.3d 327, 331 (App. 2001).

A. P.M.'s Allegations Against Former Husband

¶8 During a pre-trial interview, P.M. stated that she divorced Ben, C.S.'s biological father, because he was having sex with a fifteen-year-old family babysitter. P.M. reported

the sexual conduct to law enforcement, and Ben pled guilty to the charged offense.

¶9 Based on statements Defendant made in his "mini opening" during voir dire, the state orally moved to preclude evidence that P.M. made the allegations against Ben, arguing that the evidence was irrelevant to the charges against Defendant. Defendant objected, contending the evidence illustrated P.M.'s bias and motive in urging C.S. to report the "false" allegations against Defendant -- i.e., that P.M. was motivated by revenge in response to Defendant's leaving her for another woman, just as she arguably was motivated to turn in Ben because he had sex with the babysitter. The court granted the state's motion, finding P.M.'s allegations against Ben were irrelevant to Defendant's defense because the former allegations were true -- Ben had pled guilty to them.

¶10 To be admissible, evidence must be relevant, and all relevant evidence is admissible except as otherwise provided by law. Ariz. R. Evid. 402.[6] Evidence is relevant "if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence." *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988) (citing Ariz. R. Evid. 401).

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[6] The Arizona Rules of Evidence have been revised effective January 1, 2012. All references to the Rules in this decision are to those in effect at the time of trial.

¶11 Here, the fact that P.M. truthfully reported to law enforcement that Ben was having improper sexual contact with a minor does not make it more probable that she implored C.S. to fabricate the allegations against Defendant in this case. Accordingly, the evidence of P.M.'s prior allegations was not relevant to this case, and the court did not abuse its discretion in ruling the evidence inadmissible. Moreover, we note, as did the trial court, that the court's ruling did not preclude Defendant from arguing that C.S.'s allegations were falsified at P.M.'s behest as revenge for Defendant's infidelity.

B. Arizona Rule of Evidence 404(c)

¶12 Before trial, Defendant moved under Ariz. R. Evid. 404 to suppress evidence that he had engaged in inappropriate sexual conduct with C.S.'s three girlfriends when they slept over at Defendant's home in August 2002. In response, the state asserted Defendant's conduct vis-à-vis the three friends was admissible pursuant to Rule 404(c) to show his propensity to engage in aberrant sexual activity with children. The court held an evidentiary hearing on the matter at which C.S.'s three friends, A., C. and N., testified about the alleged incidents, and a psychologist specializing in sex crimes opined that after reviewing the allegations and the case materials, Defendant's "behaviors . . . meet the criteria for characteristics that

suggest aberrant behaviors that are consistent with the crime charged." The court denied Defendant's motion to suppress.

¶13 Rule 404(c) "permits the admission of evidence of uncharged acts to establish 'that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.'" *Garcia,* 200 Ariz. at 475, ¶ 26, 28 P.3d at 331 (quoting Ariz. R. Evid. 404(c)). "Evidence of an emotional propensity to commit aberrant sexual acts is admissible to prove that an accused acted in conformity therewith." *State v. Arner,* 195 Ariz. 394, 395, ¶ 3, 988 P.2d 1120, 1121 (App. 1999). Before admitting evidence pursuant to Rule 404(c), the court must specifically find that:

> (A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.
>
> (B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.
>
> (C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403.[7] In making that determination under Rule 403 the court shall also take into

[7] Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

> consideration the following factors, among others:
>
> (i) remoteness of the other act;
> (ii) similarity or dissimilarity of the other act;
> (iii) the strength of the evidence that defendant committed the other act;
> (iv) frequency of the other acts;
> (v) surrounding circumstances;
> (vi) relevant intervening events;
> (vii) other similarities or differences;
> (viii) other relevant factors.

Ariz. R. Evid. 404(c)(1). Finally, the court must give a limiting instruction as to the proper use of such evidence. Ariz. R. Evid. 404(c)(2); *Garcia,* 200 Ariz. at 475, ¶ 27, 28 P.3d at 331.

¶14 Here, Defendant concedes that the court made the requisite findings under Rule 404(c), and he does not challenge the evidentiary basis for those findings. Rather, he claims the disparity in frequency and similarity between the charged and uncharged acts renders the probative value of the uncharged acts substantially outweighed by unfair prejudice.[8]

¶15 We disagree. An uncharged prior act need not exactly replicate the charged act in order to be admissible. *State v. Lopez,* 170 Ariz. 112, 117, 822 P.2d 465, 470 (App. 1991); *see also State v. Williams,* 209 Ariz. 228, 233-34, ¶¶ 18-21, 99 P.3d

[8] We summarily reject Defendant's arguments addressing "surrounding circumstances" and "other relevant factors" because those arguments inappropriately focus on C.S.'s credibility rather than the credibility of A., C. or N.

43, 48-49 (App. 2004) (pursuant to Ariz. R. Evid. 404(b), evidence of conduct by defendant with adult woman was admissible on the charge that defendant committed a similar act with a child). Here, the uncharged acts occurred approximately three months after Defendant stopped having intercourse with C.S., and the victims were C.S.'s female friends of her approximate age. The uncharged acts, similar to the charged acts, occurred in Defendant's home when no one except he and the victims were present, and the acts were similar to the grooming behavior Defendant used with C.S. before he started having intercourse with her. Although the uncharged acts occurred only once, as opposed to the repeated frequency of the charged acts, this disparity is explained by the victims' immediate reporting of the uncharged acts.

¶16 We agree with the trial court's implicit determination that any disparity in similarity and frequency between the charged and uncharged acts did not render the latter unfairly prejudicial relative to their significant probative value of Defendant's aberrant sexual propensity to commit the charged crimes. Under the foregoing circumstances, the trial court's order finding the evidence admissible was not "manifestly unreasonable" and therefore not an abuse of discretion. *State v. Woody,* 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992) (noting that abuse of discretion is "an exercise of discretion

which is manifestly unreasonable, exercised on untenable grounds or for untenable reasons") (internal quotations and citations omitted).

¶17 Moreover, we note that the court instructed the jury about the proper limited use of the other-act evidence. The jurors were instructed that they could not consider evidence of the other acts unless they found by clear and convincing evidence that (1) Defendant committed those acts, and (2) the evidence of those acts showed Defendant had a character trait that predisposed him to commit the crimes charged. More importantly, the court instructed:

> You may not convict the defendant of the crimes charged simply because you find that he committed these [uncharged] acts or that he had a character trait that predisposed him to commit the crimes charged. Evidence of these acts does not lessen the State's burden to prove the defendant's guilt beyond a reasonable doubt.

In addition the state argued in closing that the jurors could not assume Defendant was guilty simply because they heard evidence of other acts, and it reiterated that the jurors had to find that Defendant committed the other acts before they could consider those acts as evidence. Our supreme court has repeatedly stated that we will presume jurors follow a court's instructions. *See, e.g.*, *State v. Kuhs*, 223 Ariz. 376, 387, ¶ 55, 224 P.3d 192, 203 (2010); *State v. Velazquez*, 216 Ariz. 300,

312, ¶ 50, 166 P.3d 91, 103 (2007); *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006). Consequently, even if the trial court had erred in admitting the other-act evidence, Defendant has failed to establish any prejudice resulting from that error.

C. Third-Party Suspect Evidence

¶18 The state moved in limine to preclude evidence of C.S.'s brother's sexual misconduct.[9] Specifically, the state referred to pending criminal charges against nineteen-year-old B.S. stemming from allegations that he sexually assaulted women who were approximately his age. According to those allegations, B.S. would physically restrain women whom he was dating or have sex with them after they became intoxicated and passed out. In response to the state's argument that the evidence was irrelevant, Defendant argued that the evidence was necessary for his defense because B.S. could have committed the acts underlying the charges against Defendant. The court granted the state's motion, finding the allegations against B.S. irrelevant to the charged offenses in this case.

¶19 Before a defendant can introduce evidence of third-party culpability, he or she "must show that the evidence has an

[9] The state's motion also referred to allegations regarding C.S.'s other brother, who allegedly touched other children when he was young. Defendant did not address these incidents in his reply to the state's motion, and no evidence relating to them was introduced at trial.

inherent tendency to connect such other person with the actual commission of the crime. Vague grounds of suspicion are not sufficient." *State v. Fulminante*, 161 Ariz. 237, 252, 778 P.2d 602, 617 (1988). A defendant is not entitled to raise an unfounded suspicion or to simply "throw strands of speculation on the wall and see if any of them will stick." *State v. Machado*, 224 Ariz. 343, 357 n.11, ¶ 33, 230 P.3d 1158, 1172 n.11 (App. 2010) (quoting David McCord, *"But Perry Mason Made It Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else is Guilty,* 63 Tenn. L. Rev. 917, 984 (1996)).

¶20 Here, beyond Defendant's mere speculation, nothing underlying the charges against B.S. connects him to the crimes committed against C.S. The allegations against B.S. related to events that occurred years after the sexual acts alleged in this case, involved victims much older than C.S., and the circumstances of B.S.'s alleged crimes are not similar to the circumstances in this case. The court did not abuse its discretion in granting the state's motion in limine.

II. PROSECUTORIAL MISCONDUCT

¶21 Finally, Defendant asserts his convictions should be reversed because of prosecutorial misconduct. The specific allegations of misconduct include instances where the prosecutor allegedly nodded or shook her head during defense counsel's

examination of a detective in an apparent attempt to influence the testimony. The prosecutor also allegedly "laughed" and "scoffed" at defense counsel's questioning and at comments he made during closing arguments.

¶22 We will not reverse for prosecutorial misconduct unless "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *State v. Martinez*, 218 Ariz. 421, 426, ¶ 15, 189 P.3d 348, 353 (2008) (citation omitted). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

¶23 At the hearing on the misconduct allegations, Defendant presented testimony from his girlfriend and defense counsel's colleagues, all of whom observed the trial. The prosecutor presented testimony of the detective whom she allegedly influenced by her nonverbal communications. The court found none of the testimony showed that the detective observed the prosecutor's alleged conduct or that his testimony was affected by the conduct. The court further found no evidence

showed that the jury was affected by any of the alleged conduct. It noted that if the jurors were affected by the prosecutor's conduct, then, based on the court's experience, "they likely would have held it against the state and not the defense." Finally, the court recounted that it had noticed one instance of the prosecutor shaking her head during trial, which appeared to the court to indicate frustration, not the prosecutor's attempt to influence testimony. Accordingly, the court found no prosecutorial misconduct and denied Defendant's motion for a new trial.

¶24 We find no error. The court's findings are supported by the record and, most importantly, the judge personally observed at least one instance of alleged misconduct by the prosecutor and noted that the conduct was not improper. *See Kuhs*, 223 Ariz. at 380, ¶ 18, 224 P.3d at 196 (allowing trial judges to rely on their observations of courtroom behavior in making decisions). Because the trial court was in the best position to evaluate what effect, if any, the prosecutor's actions had on the jury, we do not find an abuse of discretion in the court's orders denying Defendant a mistrial or a new trial on the basis of prosecutorial misconduct. *State v. Bailey*, 160 Ariz. 277, 279, 772 P.2d 1130, 1132 (1989) (noting trial court has broad discretion in ruling on motions for mistrial "because the trial judge is in the best position 'to

sense . . . the possible effect . . . [the prosecutor's objectionable statement] had on the jury and the trial.'") (citation omitted).

CONCLUSION

¶25 Defendant's convictions and sentences are affirmed.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge