DIVISION ONE
FILED: 10/30/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0152
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CHARLES FREDERICK MOORE,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200100428

The Honorable John N. Nelson, Judge

AFFIRMED

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

Michael A. Breeze, Yuma County Public Defender — Yuma
By Edward F. McGee, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Chief Judge

¶1 After a second trial, a jury convicted Charles Frederick Moore ("Appellant") of sexual conduct with a minor and sexual assault for engaging in sexual intercourse with his

mildly mentally challenged daughter when she was fifteen years old. Appellant appeals his convictions and sentences, arguing the trial court erred in (1) denying his motion to dismiss the indictment, (2) instructing the jury on the crime of sexual assault, (3) denying his motion for judgment of acquittal on the sexual assault charge, and (4) imposing a sentence for the sexual assault conviction greater than that imposed after his first trial. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 In 2001, a grand jury issued an indictment, charging Appellant with four counts each of sexual conduct with a minor and sexual assault arising from several alleged instances of sexual misconduct with his daughter when she was between fifteen and seventeen years of age. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 13-1405 (West 2012),[2] -1406. A jury convicted Appellant of all eight charged counts in 2002. In 2008, following a successful petition for post-conviction relief, Appellant obtained a new trial.

¶3 At the second trial in 2011, the jury convicted Appellant of one count of sexual conduct with a minor and one

[1] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

[2] We cite the current Westlaw version of the statutes unless changes material to our analysis have since occurred.

count of sexual assault, each a class two felony, for engaging in sexual intercourse with his daughter during the 1997-1998 school year, and acquitted him of the other six counts. The court sentenced Appellant to concurrent, aggravated terms of 6.25 years' imprisonment for sexual conduct with a minor and 8.25 years' imprisonment for sexual assault. The court also credited Appellant for 3,568 days of presentence incarceration, which resulted in his immediate release from confinement.

¶4 Appellant filed a timely notice of appeal. We have jurisdiction over Appellant's appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

ANALYSIS

I. Alleged Grand Jury Perjury

¶5 Appellant argues the trial court committed reversible error when it denied his motion to dismiss the indictment based on alleged perjured testimony to the grand jury. *See United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974) ("[T]he Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached.").

¶6 Appellant's argument stems from the following events:

In May 2001, Yuma Police Detective Christian Segura testified before the grand jury in an effort to obtain the indictment by which Appellant was charged. A grand juror questioned whether the victim had undergone a physical examination, and Detective Segura responded, "I did not want to see her through that trauma." The detective, however, had previously referred the victim to a nurse practitioner for a physical examination in 1999. Later, at Appellant's first trial, the nurse practitioner testified that the detective had referred the victim to her, but her examination of the victim yielded no conclusive results.[3]

¶7 In May 2009, before the second trial, Appellant filed a *pro per* motion to dismiss, charging *inter alia* that Detective Segura had lied to the grand jury in May 2001. Appellant attached as exhibits to his motion the grand jury testimony and a cover sheet for the report on the medical examination for sexual assault dated October 1999, which referenced Detective Segura's police report. Appellant argued that the detective had lied about the exam "to hide the fact that the Dr[.]'s report showed negative for sexual ass[a]ult, or sexual abuse[,] and to secure the indictment." Appellant further argued that the exam, conducted more than a year after the last alleged sexual activity, showed that the victim's hymen was intact. The

[3] The detective also testified, but the subject of his referral of the victim was not addressed.

prosecutor did not dispute this characterization, but argued that the exam would not have made any difference in the grand jury deliberations because, as the nurse practitioner had explained at Appellant's first trial, "[Y]ou can't tell from the condition of the hymen whether someone has had sex before." The prosecutor also told the court he had not known at the time that the grand jury testimony was in error, and he argued Detective Segura may have "simply confused" the facts of this case with one of several other cases he was investigating.

¶8 The court found Appellant's motion to dismiss was not a motion to remand for a new finding of probable cause, *see* Ariz. R. Crim. P. ("Rule") 12.9, but if it were, it would have been untimely. In further addressing the substance of Appellant's claim of prosecutorial misconduct and vindictiveness, the court stated it was unclear why Detective Segura had testified before the grand jury that no exam had been performed, but the court was not going to speculate about the reasons. Instead, the court found that "any error in failing to present this evidence to the grand jury was harmless," especially in light of the nurse practitioner's testimony at trial that the results of the exam were inconclusive.

¶9 We review for an abuse of discretion the court's decision whether to dismiss an indictment. *State v. Pecard*, 196 Ariz. 371, 376, ¶ 24, 998 P.2d 453, 458 (App. 1999). "[W]ith

one exception, all challenges to a grand jury's findings of probable cause must be made by motion followed by special action before trial; they are not reviewable on appeal." *State v. Moody*, 208 Ariz. 424, 439-40, ¶ 31, 94 P.3d 1119, 1134-35 (2004) (citation omitted). The one exception is "when a defendant has had to stand trial on an indictment which the government knew was based partially on perjured, material testimony." *Id*. at 440, ¶ 31, 94 P.3d at 1135 (quoting *State v. Gortarez*, 141 Ariz. 254, 258, 686 P.2d 1224, 1228 (1984) (citing *Basurto*)). Appellate review of such a claim is limited to determining whether the indictment was based on perjured, material testimony. *Id*.

¶10 On appeal, the State argues that we may not consider the issue because Appellant did not file a timely motion pursuant to Rule 12.9, which provides that a defendant must challenge a grand jury proceeding no later than twenty-five days after the certified transcript of the grand jury proceeding is filed or twenty-five days after arraignment, whichever is later. *See* Ariz. R. Crim. P. 12.9(b); *see also State v. Merolle*, 227 Ariz. 51, 53–54, ¶¶ 9–15, 251 P.3d 430, 432–33 (App. 2011) (holding that Rule 12.9 is the only procedural method for challenging grand jury proceedings in Arizona, and the failure to file a timely motion waives the right to challenge the proceedings). Appellant argues, however, that a claim based on

material perjury, as identified in *Basurto*, need only be made before jeopardy attaches, as it was in this case, because it was made before (his second) trial began.

¶11 No case has directly addressed whether a *Basurto* claim must be made within the time limits of Rule 12.9.[4] We need not resolve the issue, however, because Appellant has failed to demonstrate that the detective, although he testified falsely, did so deliberately and thus committed perjury before the grand jury. As relevant here, a person commits perjury by making "[a] false sworn statement in regard to a material issue, believing it to be false." A.R.S. § 13-2702(A)(1). Appellant argues it is self-evident that Detective Segura deliberately lied about the exam because the detective himself had requested the exam, and because of the evasive manner in which he responded to the grand juror's question. The trial court did not find it self-evident, however, and we decline to conclude that the court abused its discretion in finding it "unclear" why the detective made the misstatement. *See generally State v. Estrada*, 209 Ariz. 287, 292, ¶ 22, 100 P.3d 452, 457 (App. 2004) (recognizing that the trial court is in the best position to assess a

[4] The State cites *State v. West*, 173 Ariz. 602, 845 P.2d 1097 (App. 1992), for this proposition. In *West*, this court stated that such a claim was not an appealable issue, *see id*. at 607, 845 P.2d at 1102, but in doing so failed to recognize the material perjury exception previously adopted by our supreme court in *Gortarez*. *See* 141 Ariz. at 258, 686 P.2d at 1228.

witness's credibility and motives). Moreover, the detective explained at the subsequent trial that he normally did not want victims to submit to a physical examination because it was too intrusive. He also testified he was investigating numerous other cases at the time, and by the time he testified before the grand jury in May 2001, he likely did not remember that he had referred the victim for a physical examination more than a year before. On this record, we conclude that Appellant has failed to demonstrate the detective's inaccurate statement constituted perjury before the grand jury; accordingly, the trial court did not abuse its discretion in denying Appellant's motion to dismiss the indictment.

II. Jury Instruction

¶12 Appellant argues the trial court committed fundamental error in instructing the jury on the crime of sexual assault by failing to explain the *mens rea* applicable to the "without consent" element of the offense. We review jury instructions in their entirety to determine if they accurately and adequately reflect the law. *See State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000), *opinion supplemented by* 204 Ariz. 572, 65 P.3d 953 (2003). We will not reverse "unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors." *State v. Sucharew*, 205 Ariz. 16, 26, ¶ 33, 66 P.3d 59, 69 (App. 2003) (citation omitted).

¶13 Because Appellant concededly failed to object to the instruction at trial, he bears the burden of establishing that the court erred, the error was fundamental, and the error caused him prejudice.[5] *See State v. Henderson*, 210 Ariz. 561, 568, ¶¶ 21-26, 115 P.3d 601, 608 (2005). Error is fundamental when it goes to the foundation of a defendant's case, takes from him a right essential to his defense, and is error of such magnitude that he could not have received a fair trial. *Id*. at 567, ¶ 19, 115 P.3d at 607 (citations omitted). To prove prejudice, Appellant must show that a reasonable jury could have reached a different result absent the error. *See id*. at 569, ¶ 27, 115 P.3d at 609.

¶14 In a prosecution for sexual abuse, the State must prove the defendant intentionally or knowingly engaged in the defined sexual contact, and the defendant knew such contact was without the victim's consent. *State v. Witwer*, 175 Ariz. 305, 308, 856 P.2d 1183, 1186 (App. 1993). In this case, the court instructed the jury without objection that it could convict Appellant of sexual assault on proof that he:

> 1. intentionally or knowingly engaged in sexual intercourse or oral sexual contact with another person; *and*

[5] At the suggestion of the court, both the prosecutor and defense counsel waived the right to require the court reporter to record the court's reading of the final jury instructions. The instructions are nonetheless preserved in the instruments appearing in the record on appeal.

2. engaged in the act without the consent of the other person.

¶15 Appellant asserts that reversal is required because the court's instruction, like the defective instruction in *State v. Kemper*, 229 Ariz. 105, 271 P.3d 484 (App. 2011), omitted the *mens rea* from the "without consent" portion of the instruction. *See id.* at 106-07, ¶¶ 5-7, 271 P.3d at 485-86. Nevertheless, this case is distinguishable from *Kemper*.

¶16 In *Kemper*, we noted that no one requested a definition of "without consent" under A.R.S. § 13-1401(5); consequently, we found it unnecessary to consider whether such an instruction would have cured the deficiency in the sexual assault instruction. *Id*. at 107 n.2, ¶ 5, 271 P.3d at 486 n.2. In this case, however, the court advised the jury that the term "without consent" means the following:

> The victim is incapable of consent by reason of a mental defect, or any other similar impairment of cognition *and such condition is known or should have reasonably been known to the defendant*.[6]

(Emphasis added.) Thus, the jury was instructed that "without consent" meant Appellant knew or should have known the victim's

[6] At the time of the sexual assault, A.R.S. § 13-1401(5)(b) provided that a victim could be considered "incapable of consent by reason of mental disorder . . . or any other similar impairment of cognition," but the statute did not define "mental disorder."

mental deficiencies rendered her incapable of consent.[7]

¶17 Coupled with the additional "without consent" instruction provided the jury in this case, the sexual assault instruction was not erroneous. Appellant fails to persuade us that the sexual assault instruction, when read with the "without consent" instruction, could have misled the jury on the *mens rea* for a sexual assault offense committed against a victim who was incapable of consent by virtue of a mental defect. *See* A.R.S. § 13-1401(5)(b); *cf. Kemper*, 229 Ariz. at 107 n.2, ¶ 5, 271 P.3d at 486 n.2. Accordingly, Appellant has not demonstrated that the trial court erred in instructing the jury, much less that he was deprived of a fair trial by the claimed error.

III. Denial of Judgment of Acquittal

¶18 At the close of the State's case-in-chief and following the defense's presentation of evidence, Appellant

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[7] The court also provided the jury with the following definitions for the terms "mental defect" and "knowingly":

> "Mental defect" means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.
>
> . . . .
>
> "Knowingly" means that a defendant acted with awareness of [or belief in] the existence of conduct or circumstances constituting an offense. It does not mean that a defendant must have known the conduct is forbidden by law.

moved for judgment of acquittal[8] on the sexual assault charges, arguing the State had presented insufficient evidence to establish the victim was incapable of consent because of her mental deficiencies. Relying on our supreme court's opinion in *State v. Johnson*, 155 Ariz. 23, 745 P.2d 81 (1987), Appellant argued that the evidence of the victim's mental disorder in this case was "remarkably similar" to that found insufficient by the court in *Johnson* to demonstrate the necessary inability to "understand[] the act of intercourse and its possible consequences." *Id*. at 26, 745 P.2d at 84. Appellant further argued that the victim had demonstrated she was capable of exercising her right to refuse to engage in sex with her father by saying "stop." The trial court denied Appellant's motion for judgment of acquittal, finding that the victim's conduct on the witness stand, as well as the expert's testimony regarding the victim's limitations with respect to judgment and common sense, raised a fact issue with respect to her capability of consenting to sex.

¶19 Appellant argues on appeal that the trial court erred in denying his Rule 20 motion because insufficient evidence established the victim was incapable of consent due to her mild mental retardation and cerebral palsy. Appellant maintains the evidence at trial was similar to that held insufficient in

[8] *See* Ariz. R. Crim. P. 20.

Johnson because it demonstrated that the victim "took a modicum of 'mainstream' classes and did moderately well in them," including "health classes where she had sex education," and "obtained a driver's license and had maintained employment, off and on."

¶20 We review *de novo* the denial of a motion for judgment of acquittal and the sufficiency of the evidence to support a conviction. *See State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). Also, as we have noted, we view the facts in the light most favorable to upholding the jury's verdict and resolve all conflicts in the evidence against the defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). Further, we do not distinguish between direct and circumstantial evidence. *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993).

¶21 Viewed in the light most favorable to upholding Appellant's conviction, the evidence in this case was sufficient to support the conclusion that the victim was incapable of consent to sexual intercourse with Appellant because of her mental deficiencies. The evidence demonstrated that during the victim's freshman year of high school, when the sexual assault occurred, she was enrolled in four special education classes and only two mainstream courses - physical education and culinary arts - during the first semester. In the second semester, she

was enrolled in three special education classes, health, and culinary arts, and she assisted as a teacher's aide for another special education class. By the time she was a senior in high school, the victim was reading at only the level of a second or third grader, and to the extent she was enrolled in mainstream classes, her work was "much easier" than that for the regular students, and she was "failing the regular ed[ucation] classes." Also, although the victim took a driver's education class in high school and ultimately obtained her driver's license, she engaged in very limited driving. In fact, the victim's mother testified that the victim did not begin driving until she was twenty-eight years old.

¶22 The victim's mother also testified she had never explained sex to the victim before or during high school, and the victim testified she never had any sex education in health class. The victim further testified that she did not know anything about sex, or what sex was, at the time of the sexual assault. An expert testified that the records indicated that, because of her mental handicap, the victim had impaired judgment, and accordingly, she might not have understood the consequences of sexual activity. Although a high school teacher testified that the health class the victim took would have included sex education, no evidence demonstrated the extensiveness of the education, much less that the victim

understood the subject or was present when the subject was introduced. Furthermore, in denying the motion for judgment of acquittal, the court also relied on the victim's conduct on the witness stand. Under these circumstances, the evidence was sufficient to survive a Rule 20 motion and to support the conviction.

IV. Increased Sentence After Re-Trial

¶23 Appellant also argues that the trial court violated Rule 26.14, Ariz. R. Crim. P., and his due process rights as recognized under *North Carolina v. Pearce*, 395 U.S. 711 (1969), when the court imposed a sentence for the sexual assault conviction greater than that imposed after his first trial. We disagree.

¶24 At sentencing following the first trial, the court found that "the aggravating factors substantially outweigh the mitigating factors," and sentenced Appellant to what the court designated an "aggravated" sentence of 6.25 years' imprisonment for the sexual assault conviction. Before sentencing after the second trial in front of a different judge, Appellant argued that Rule 26.14 and *Pearce* precluded the court from imposing a sentence greater than 6.25 years. The court noted, however, that under the applicable statute in effect at the time the conduct occurred, A.R.S. § 13-1406 (Supp. 1997), "[t]he sentencing range [wa]s between 5.25 years minimum, presumptive

7, and maximum 14." The court concluded that, although the first sentencing judge had indicated he intended to impose an aggravated sentence, he had failed to do so, and thus Appellant's original sentence for sexual assault was "incorrectly imposed," rendering it "null and void." The court subsequently found that the aggravating factors again outweighed the mitigating factors, and sentenced Appellant to an aggravated term of 8.25 years' imprisonment for sexual assault.

¶25 As an initial matter, the case of *State v. Dawson*, 164 Ariz. 278, 792 P.2d 741 (1990), on which Appellant relies, has no applicability to the sentencing in this case. *Dawson* held only that "[i]n the absence of a timely appeal or cross-appeal by the state seeking to correct an illegally lenient sentence, an appellate court has no subject matter jurisdiction to consider that issue." *Id*. at 286, 792 P.2d at 749. The holding in *Dawson* does not prevent a different judge from exercising his or her discretion in imposing a greater sentence after re-trial, or this court from considering whether the sentence after re-trial comports with the dictates of Rule 26.14 and due process. *See id*.

¶26 Further, on this record, the court did not err in imposing the 8.25-year term of imprisonment for sexual assault. "Due process of law [] requires that vindictiveness against a defendant for having successfully attacked his first conviction

must play no part in the sentence he receives after a new trial." *Pearce*, 395 U.S. at 725. Additionally, Rule 26.14 provides that where a judgment or sentence has been set aside, the court may not impose a more severe sentence than originally imposed. Rule 26.14 contains a caveat, however, indicating that the court may impose a more severe sentence if:

> (1) it concludes, on the basis of evidence concerning conduct by the defendant occurring after the original sentencing proceeding, that the prior sentence is inappropriate, or (2) the original sentence was unlawful and on remand it is corrected and a lawful sentence imposed, or (3) other circumstances exist under which there is no reasonable likelihood that the increase in the sentence is the product of actual vindictiveness by the sentencing judge.

Moreover, the United States Supreme Court has clarified since *Pearce* that "due process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights." *Wasman v. United States*, 468 U.S. 559, 568 (1984); *see also Alabama v. Smith*, 490 U.S. 794, 799 (1989) (explaining that a presumption of vindictiveness arises only when there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness). Accordingly, "[i]f the trial court details the non-vindictive rationale underlying the increased sentence and that rationale supports the increase, no due process violation has occurred." *State v. Thomas*, 142 Ariz. 201, 203, 688 P.2d 1093, 1095 (App. 1984).

¶27 In sentencing Appellant to a greater sentence than imposed initially, the court in this case articulated a non-vindictive reason for doing so - that the original sentence had been incorrectly imposed. The court also noted that it was "not influenced by the fact that there was an earlier conviction as to the other counts in this case," and specifically found that an aggravated sentence was appropriate. The increased sentence thus did not violate Appellant's due process rights. *See id*. Moreover, because on this record there is no reasonable likelihood that the increase in the sentence was the product of actual vindictiveness on the part of the sentencing judge, the increased sentence fell within the exception outlined in Rule 26.14(3). Consequently, the trial court did not err in imposing a sentence for the sexual assault conviction greater than that imposed after Appellant's first trial.

CONCLUSION

¶28 For the foregoing reasons, we affirm Appellant's convictions and sentences.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
PHILIP HALL, Presiding Judge

_____/S/_____
PETER B. SWANN, Judge