

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



DIVISION ONE  
FILED: 11/27/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 11-0375  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication - Rule  
JAMES PETRUZZI, ) 111, Rules of the Arizona  
) Supreme Court)  
Appellant. )  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2010-005929-001SE

The Honorable Joseph C. Welty, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
and Robert A. Walsh, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Thomas K. Baird, Deputy Public Defender  
Attorneys for Appellant

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**N O R R I S**, Judge

¶1 James Petruzzi timely appeals from his class two felony convictions on six counts of child molestation and one count of sexual conduct with a minor. On appeal, Petruzzi

argues the superior court should not have admitted evidence at trial showing he had sexually abused J.B. when he was a minor to demonstrate Petruzzi's "aberrant sexual propensity" under Arizona Rule of Evidence 404(c) because the value of this evidence was substantially outweighed by its "prejudicial effect on the jury." We disagree. The superior court did not abuse its discretion in finding to the contrary. *State v. Garcia*, 200 Ariz. 471, 475, ¶ 25, 28 P.3d 327, 331 (App. 2001) (appellate court reviews admission of sexual propensity evidence under Rule 404(c) for abuse of discretion) (citation omitted).

¶12 As an initial matter, we note Petruzzi does not challenge the court's finding -- required by Rule 404(c)(1)(A) and *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997) -- that the evidence was sufficient to find Petruzzi had sexually abused J.B. by clear and convincing evidence, nor does he argue this evidence failed to "provide[] a reasonable basis to infer" his "aberrant sexual propensity to commit the crime[s] charged" under Rule 404(c)(1)(B). Instead, he argues only the court should have excluded the evidence under Rule 404(c)(1)(C) because first, the uncharged allegations pertained to acts that had occurred at least ten years before the grand jury indicted him in this case; second, the evidence lacked specificity; and third, because the evidence lacked specificity, the court could not assess J.B.'s credibility, and thus, the admissibility of

his testimony, in the absence of an evidentiary hearing. We disagree with these arguments.

¶13 For the most part, Petruzzi's arguments are directed at the superior court's reliance on a 2000 police report documenting J.B.'s reporting of Petruzzi's sexual abuse. In determining the evidence was admissible under Rule 404(c), however, the superior court also considered a February 10, 2010 telephonic interview of J.B. by a Mesa police detective. In that interview, J.B. specifically described Petruzzi's inappropriate touching, which was strikingly similar to the abuse described by the victims in this case.

¶14 Specifically, J.B. told the Mesa detective he had known Petruzzi since he was five, which is "around" when Petruzzi began sexually abusing him; he called Petruzzi "Grandpa," though they were unrelated; Petruzzi's abuse continued "on a regular basis" until J.B. moved out of Petruzzi's home at age 15; the abuse always occurred in Petruzzi's bedroom; and the abuse progressed from Petruzzi touching J.B.'s penis over his clothes, then under his clothes, to inappropriate touching while sleeping naked in Petruzzi's bed, and finally to performing oral sex on each other.

¶15 Although Petruzzi's sexual abuse of J.B. occurred more than ten years before he was charged in this case, Rule 404(c) "does not contemplate any bright line test of remoteness" of the

prior act to the charged offense. Ariz. R. Evid. 404(c) cmt. to 1997 Amendment. Remoteness affects the weight to be given the testimony by the jury, but generally not its admissibility. *State v. Van Adams*, 194 Ariz. 408, 416, ¶ 24, 984 P.2d 16, 24 (1999). Also, prior cases have found other sexual acts admissible even though they occurred over 20 years before the current charges when other Rule 404(c) factors indicated the acts were sufficiently probative. See, e.g., *State v. Salazar*, 181 Ariz. 87, 92 n.5, 887 P.2d 617, 622 n.5 (App. 1994) (evidence of uncharged rape that occurred over 20 years earlier admissible in trial for attempted child molestation); *State v. Weatherbee*, 158 Ariz. 303, 304-05, 762 P.2d 590, 591-92 (App. 1988) (prior acts of child molestation that occurred 19 to 22 years before trial admissible to show sexual aberration).

¶16 As discussed, see *supra* ¶¶ 3-4, and as the superior court found, J.B. described specific and detailed sexual acts similar to the charged offenses in this case. J.B. was similarly aged and situated to the victims when the abuse started and the abuse occurred under similar circumstances, with similar frequency. Further, J.B. described a pattern of grooming behavior similar to Petruzzi's behavior vis-à-vis the victims. Although J.B. was reluctant to discuss Petruzzi's sexual abuse at trial and was less forthcoming than in the telephonic interview with the Mesa police detective, he

nevertheless acknowledged at trial his statements in the February 10, 2010 interview were truthful and that Petruzzi had frequently touched him inappropriately when he, J.B., was young.

¶7 Finally, in determining the admissibility of sexual propensity evidence under Rule 404(c), a court is not required to conduct an evidentiary hearing with live testimony. *State v. LeBrun*, 222 Ariz. 183, 186, ¶ 10, 187, ¶ 14, 213 P.3d 332, 335, 336 (App. 2009) (Rule 404(b) and (c) do not expressly require evidentiary hearings and 404(c) does not mention live testimony requirement). Based on the evidence presented by the State before trial, and given its specificity, the superior court was in a position to assess the factors specified in Rule 404(c)(1)(C). Further, after J.B. testified at trial, the court denied Petruzzi's motion to strike J.B.'s testimony, finding the State had presented clear and convincing evidence Petruzzi had sexually abused J.B. The court also found that though reluctant, J.B. "came to court, . . . identified [Petruzzi], and indicated that from the time he was 5 to 15, or a period of time within that time, . . . [Petruzzi] had touched his genitals inappropriately." Thus, having observed and heard J.B.'s trial testimony, the court certainly could evaluate the admissibility of J.B.'s testimony under Rule 404(c) and, more specifically, Rule 404(c)(1)(C).

¶8 For the foregoing reasons, we therefore affirm  
Petruzzi's convictions and sentences.

/s/  
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/  
DIANE M. JOHNSEN, Judge

/s/  
JON W. THOMPSON, Judge