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 12-0026
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
MICHAEL HADLEY,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR201000879

The Honorable Cele Hancock, Judge

AFFIRMED

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

David Goldberg — Ft.Collins
Attorney for Appellant

T H O M P S O N, Judge

¶1 Michael Hadley appeals his convictions on one count of attempted child molestation (under age fifteen), a class 3 felony and dangerous crime against children; two counts of

sexual conduct with a minor (under age fifteen), a class 2 felony and dangerous crime against children; one count of sexual conduct with a minor (age fifteen, sixteen or seventeen), a class 2 felony; one count of sexual abuse (under age fifteen), a class 2 felony and dangerous crime against children; and one count of continuous sexual abuse (under age fourteen), a class 2 felony and dangerous crime against children. The convictions are based on various acts of sexual misconduct by Hadley with a stepdaughter over a period of nearly three years.

¶2 On appeal, Hadley argues: (1) the trial court erred by precluding evidence regarding the victim's sexual history; (2) the trial court erred by admitting inflammatory other act evidence; (3) the evidence was insufficient to support the conviction for attempted child molestation; and (4) the prosecutor engaged in misconduct during closing argument. For reasons that follow, we affirm.

DISCUSSION

1. Evidence of Victim's Prior Sexual Conduct

¶3 Prior to trial, the State filed a motion *in limine*, pursuant to the Arizona Rape Shield Law, Arizona Revised Statutes (A.R.S) section 13-1421 (2010), to preclude evidence of any prior sexual conduct by the victim. Hadley opposed the motion and also moved for admission of evidence of sexually graphic telephone calls and alleged false accusations against

others by the victim, arguing the evidence was relevant to proving the victim's motive for her accusations in the instant case.

¶4 The parties stipulated to the trial court deciding the admissibility of the contested evidence based on the pleadings together with a joint submission of child protective services records, police reports, and recordings of the phone calls. After considering the evidence presented, the trial court precluded admission of evidence of the prior accusations and the phone calls, ruling that Hadley had failed to prove by clear and convincing evidence that the prior accusations were false, and that the phone calls were irrelevant, inflammatory and prejudicial, and that any probative value was outweighed by such prejudice.

¶5 Defendant further made a motion *in limine* that he be permitted to refer to the victim's "promiscuity" in explaining why he instructed the victim to masturbate. The trial court denied this request and also a subsequent motion for reconsideration based on the Arizona Rape Shield Law.

¶6 Hadley contends the trial court's rulings precluding evidence regarding the victim's prior sexual conduct based on the Arizona Rape Shield Law erroneously deprived him of his rights under the Sixth and Fourteenth Amendment to present a complete defense. We review a trial court's rulings regarding

the admissibility of evidence under the Arizona Rape Shield Law for abuse of discretion. *State v. Gilfillan*, 196 Ariz. 396, 405, ¶ 29, 998 P.2d 1069, 1078 (App. 2000).

¶7 "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). The right to present a defense, however, "is limited to the presentation of matters admissible under ordinary evidentiary rules, including relevance." *State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996), *abrogated in part on other grounds by State v. Ferrero*, 229 Ariz. 239, 243, ¶ 20, 274 P.3d 509, 513 (2012); *see also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (holding "the accused must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence").

¶8 The Arizona Rape Shield Law, which is applicable to all prosecutions for sexual offenses, categorically prohibits evidence of "a victim's reputation for chastity," and allows evidence of "instances of the victim's prior sexual conduct" only in limited circumstances. A.R.S. § 13–1421(A). This statute provides, in pertinent part:

> Evidence of specific instances of the victim's prior sexual conduct may be admitted only if a judge finds the evidence

> is relevant and is material to a fact in issue in the case and that the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence, and if the evidence is one of the following:
>
> . . . .
>
> 3. Evidence that supports a claim that the victim has a motive in accusing the defendant of the crime.
>
> . . . .
>
> 5. Evidence of false allegations of sexual misconduct made by the victim against others.

Id. The "standard for admissibility of [such] evidence . . . is by clear and convincing evidence." A.R.S. § 13-1421(B); *see also Gilfillan*, 196 Ariz. at 404, ¶ 27, 998 P.2d at 1077.

¶9 We find no abuse of discretion by the trial court in precluding the evidence proffered by Hadley for admission under exceptions to the Arizona Rape Shield Law. The trial court could reasonably conclude from the materials presented by the parties regarding the prior allegations of sexual misconduct made by the victim against others that Hadley had failed to establish that the allegations were false. The trial court could also reasonably conclude from the context of the sexually graphic telephone calls that they did not evidence a motive to lie on the part of the victim in the present case and that their

prejudicial and inflammatory nature outweighed any possible probative value.

¶10 We further find no merit to the claim that the trial court improperly precluded Hadley from presenting a defense that he was not motivated by a sexual interest in instructing the victim to engage in masturbation. *See* A.R.S. § 13-1407(E) (2010) (providing a defense to prosecution on a charge of child molestation that the defendant's conduct was not motivated by a sexual interest). The trial court did not preclude Hadley from presenting evidence regarding his motivation, only that he would not be permitted to label the victim as "promiscuous" as part of his explanation. Indeed, Hadley testified at trial that he did not have a sexual motivation in instructing the victim to masturbate and that he did it to offer the victim an alternative to having sex with a partner. There was no violation by the trial court of Hadley's right to present a complete defense.

2. Admission of Other Act Evidence

¶11 Hadley next argues that the trial court erred by admitting other act evidence consisting of him "French-kissing" the victim and her younger sister, measuring their breast size and keeping a "boob chart" of their breast growth, and taking provocative photographs of the victim. After considering the stipulated record presented regarding the other act evidence, the trial court ruled the evidence was intrinsic and that it was

also admissible pursuant to Arizona Rules of Evidence 404(b) and 404(c). We review admission of other act evidence for abuse of discretion. *State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996). Because we hold that the other act evidence was properly admissible under Rule 404(c), we need not address defendant's arguments challenging the trial court's rulings that the evidence was also admissible as intrinsic[1] or pursuant to Rule 404(b). *See State v. Varela*, 178 Ariz. 319, 323, 873 P.2d 657, 661 (App. 1993) (holding appellate court will uphold admission of other act evidence if it is sustainable on any ground).

¶12 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.'" *State v. Garcia*, 200 Ariz. 471, 475, ¶ 26, 28 P.3d 327, 331 (App. 2001) (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).

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[1] The trial court found the evidence admissible because it was "inextricably intertwined with the charged crimes," employing a standard from *State v. Herrera*, 226 Ariz. 59, 64, ¶ 12, 243 P.3d 1041, 1046 (App. 2010), which was later rejected by *Ferrero*, 229 Ariz. at 243, ¶ 20, 274 P.3d at 513.

¶13 Before admitting propensity evidence under Rule 404(c), the trial court must make three findings: (1) that clear and convincing evidence exists to show that the defendant committed the other act; (2) that 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 charged offense; and (3) that the probative value of the other-act evidence is not substantially outweighed by the danger of unfair prejudice or confusion of the issues under Rule 403. *State v. Aguilar*, 209 Ariz. 40, 49, ¶ 30, 97 P.3d 865, 874 (2004); Ariz. R. Evid. 404(c)(1). In weighing probative value and unfair prejudice, the court shall consider factors such as the remoteness of the other act, the similarity or dissimilarity of the other act, frequency of the other act, surrounding circumstances, relevant intervening events and other similarities or differences. Ariz. R. Evid. 404(c)(1)(C). In addition, the trial court is to "instruct the jury as to the proper use of such evidence." Ariz. R. Evid. 404(c)(2).

¶14 Here, the trial court made detailed findings that met the requirements of Rules 403 and Rule 404(c) for admitting the other act evidence. Hadley does not contest that there was clear and convincing evidence of the prior acts. The sole issue raised by Hadley with respect to the trial court's ruling that the other act evidence was admissible pursuant to Rule 404(c) is

the lack of expert testimony that the acts were indicative of an abnormal sexual propensity in light of their dissimilarity to the charged offenses. In making this argument, however, Hadley relies primarily on case law pre-dating the enactment of Rule 404(c).

¶15 Prior to Rule 404(c), expert testimony was generally required for admission of sexual propensity evidence involving remote or dissimilar acts. *See State v. Treadaway*, 116 Ariz. 163, 167, 568 P.2d 1061, 1065 (1977) (reversing conviction based on lack of expert testimony to support admission of temporally remote evidence of continuing sexual propensity). However, "under Rule 404(c) of the Arizona Rules of Evidence, expert testimony is no longer required to establish relevancy in all cases of dissimilar or remote acts." *Arner*, 195 Ariz. at 396, ¶ 5, 988 P.2d at 1122; *accord Aguilar*, 209 Ariz. at 48, ¶ 26, 97 P.2d at 873; *see also* Ariz. R. Evid. 404(c) cmt. to 1997 Amendment ("The *Treadaway* requirement that there be expert testimony in all cases of remote or dissimilar acts is hereby eliminated" by Subsection (1)(B), which permits courts "to admit evidence of remote or dissimilar other acts providing there is a 'reasonable' basis, by way of expert testimony *or otherwise*, to support relevancy, i.e., that the commission of the other act permits an inference that defendant had an aberrant sexual

propensity that makes it more probable that he or she committed the sexual offense charged.") (emphasis added).

¶16 Although "French-kissing" the victim and her younger sister, measuring their breast growth, and taking provocative photographs of the victim are dissimilar to the charged sex offense, the trial court could reasonably find that these acts were indicative of a sexual propensity on the part of Hadley for young girls, particularly in light of the fact that they were not untypical of grooming behavior.[2] *See State v. Bailey*, 125 Ariz. 263, 265, 609 P.2d 78, 80 (App. 1980) (holding other act evidence fifty-four-year-old defendant "French-kissed" fifth-grade girls properly admitted as sexual propensity evidence). Whether each of the acts considered apart necessarily involves abnormal or aberrant conduct does not preclude the trial court from finding from the entirety of the evidence that they permit a reasonable inference of aberrant sexual propensity on the part of Hadley. *See Aguilar*, 209 Ariz. at 48, ¶ 27, 97 P.2d at 873 (holding "question is not whether the other act per se involves abnormal or aberrant conduct," but whether the other act evidence leads to a "reasonable inference that the defendant had

[2] "Grooming" is "the process of cultivating trust with a victim and gradually introducing sexual behaviors until" victimization is possible. *United States v. Johnson*, 132 F.3d 1279, 1283 n.2 (9th Cir. 1997).

a character trait that gives rise to an aberrant sexual propensity to commit the charged sexual offense".

¶17 The trial court also properly weighed the probative value of the other act evidence against the risk of unfair prejudice and explained the reasons supporting admission. "Because '[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice,' the trial court has broad discretion in this decision." *State v. Connor*, 215 Ariz. 553, 564, ¶ 39, 161 Ariz. 596, 607 (App. 2007) (quoting *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21, 985 P.2d 513, 518 (App. 1998)). On this record, the trial court did not abuse its discretion in ruling the other act evidence admissible under Rule 404(c).

¶18 Although it was not raised below, defendant argues that the absence of a limiting instruction compounded the prejudicial effect of the prior bad act evidence. Defendant did not request such an instruction or object to its absence. The failure to *sua sponte* give a limiting instruction under these circumstances does not rise to the level of fundamental error. *Roscoe*, 184 Ariz. at 491, 910 P.2d at 642. Defendant's argument that the jury might use the character evidence to improperly conclude that the defendant is a bad person is unpersuasive because an appropriate instruction would have permitted the jury's consideration of defendant's bad character with regard to

sexual conduct. Character evidence is specifically allowed under the rule to show "defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Ariz. R. Evid. 404(c).

3. Attempted Child Molestation

¶19 Hadley also argues that the evidence was insufficient to support his conviction for attempted child molestation. The conviction was based on evidence, including his own testimony at trial, that he instructed the victim to go into a bedroom and masturbate. Hadley was originally charged with the completed offense, but the charge was reduced to attempted child molestation after the victim testified she did not actually masturbate when instructed to by Hadley. We review claims of insufficient evidence *de novo*. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶20 The offense of child molestation is defined in A.R.S. § 13-1410(A) (2010) as follows:

> A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age.

"Sexual Contact," in turn, is defined as "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object

or causing a person to engage in such conduct." A.R.S. § 13-1401(2) (2010).

¶21 Hadley maintains the evidence is insufficient to support his conviction for attempted child molestation because A.R.S. § 13-1410 does not encompass the act of self-masturbation by the victim. Specifically, Hadley asserts the term "person," as used in this statute, refers only to a third person, not the victim. We rejected this argument in *State v. Marshall*, 197 Ariz. 496, 503-04, ¶¶ 26-29, 4 P.3d 1039, 1946-47 (App. 2000), and Hadley fails to present any rationale for reconsideration of that decision. Contrary to Hadley's contention, nothing in our decision in *In re James P.*, 214 Ariz. 420, 153 P.3d 1049 (App. 2007), contradicts the holding in *Marshall*.

4. Prosecutorial Misconduct

¶22 Finally, Hadley argues that the prosecutor engaged in misconduct during closing argument. In deciding whether an attorney's closing remarks are unduly prejudicial, we consider whether "the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the case, probably influenced by the remarks." *State v. Gonzales*, 105 Ariz. 434, 437, 466 P.2d 388, 391 (1970) (quoting *Sullivan v. State*, 47 Ariz. 224, 238, 55 P.2d 312, 317 (1936)). Because no objection was raised at trial, Hadley has forfeited this

claim of error save for fundamental error. *State v. Speer*, 221 Ariz. 449, 458, ¶ 42, 212 P.3d 787, 796 (2009). Prosecutorial misconduct constitutes fundamental error only when it is "so egregious as to deprive the defendant of a fair trial." *State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991). In reviewing for fundamental error, our initial inquiry is whether there has been any error. *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991).

¶23 The State presented expert testimony from Wendy Dutton regarding general characteristics of child sexual abuse victims, including the different ways victims react to and disclose abuse. Specifically, Dutton testified about the phenomena of delayed disclosure, piecemeal disclosure, shared responsibility, false allegations, and the stages of victimization. During closing argument, the prosecutor referred to Dutton's testimony in arguing that the jury should believe the victim's testimony. Hadley asserts the prosecutor's use of Dutton's testimony to support the victim's credibility was improper as it suggested that the jury should convict based on the conduct of other child victims and other sexual offenders.

¶24 An expert may properly testify about the "general characteristics and behavior of sex offenders and victims if the information imparted is not likely to be within the knowledge of most lay persons." *State v. Tucker*, 165 Ariz. 340, 346, 798

P.2d 1349, 1355 (App. 1990). The purpose of allowing this type of behavioral evidence "is to give the jury information which it may use in weighing the evidence to determine accuracy or credibility of a witness." *State v. Lindsey*, 149 Ariz. 472, 474, 720 P.2d 73, 75 (1986). An expert witness, however, may not express an opinion about the veracity of a witness or type of witness, nor may an expert testify that a person's conduct is consistent or inconsistent with committing the charged offense. *Tucker*, 165 Ariz. at 346, 798 P.2d at 1355.

¶25 No claim is raised on appeal that Dutton's testimony was in any manner improper or inadmissible. Instead, Hadley's allegation of prosecutorial misconduct is summarized by him in his opening brief with a one-sentence statement: "It therefore logically follows that if an expert is precluded from testifying as to the veracity of a child sex crime victim[,] a prosecutor is similarly precluded from arguing that shared characteristics to other child victims makes the complaining witness as a result of the expert's testimony truthful."

¶26 We find the logic of Hadley's argument to be entirely lacking given the difference between evidence and argument of counsel. Experts are not permitted to offer testimony on credibility in cases such as this because "this is nothing more than the expert's opinion on how the case should be decided." *Lindsey*, 149 Ariz. at 475, 720 P.2d at 76. "[S]uch testimony is

inadmissible, both because it usurps the jury's traditional functions and roles and because, when given insight into the behavioral sciences, the jury needs nothing further from the expert." *Id.*

¶27 Unlike expert testimony, argument is not evidence. *State v. Freeman*, 114 Ariz. 32, 45, 559 P.2d 152, 165 (1976). As a result, attorneys, including prosecutors, are given "wide latitude" in their closing arguments to the jury and permitted to comment on the evidence presented and to argue all reasonable inferences therefrom. *Id.* Thus, while experts are precluded from testifying as to which witness is credible, counsel are completely free to argue witness credibility and suggest who the jury should believe based on the evidence presented. *See Bible*, 175 Ariz. at 602, 858 P.2d at 1205 ("[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions."). That is precisely what occurred here; the prosecutor argued the jury should find the victim's testimony credible based on the evidence, including Dutton's testimony. There was no misconduct by the prosecutor during closing argument.

¶28 Furthermore, even if the prosecutor's argument could somehow be construed as improper, Hadley would not be entitled to reversal. To qualify for relief under fundamental error

review, the defendant must establish that the error caused prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). The trial court instructed the jurors that the arguments of counsel are not evidence and that they were to decide the case based solely on the evidence. We presume that jurors follow their instructions. *State v. Herrera*, 174 Ariz. 387, 395, 850 P.2d 100, 108 (1993). Further, the fact Hadley was acquitted by the jury on two counts of sexual conduct with a minor undercuts any claim that the prosecutor's closing argument meant "defendant could not possibly have received a fair trial." *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Accordingly, Hadley has failed to meet his burden of establishing that the prosecutor's argument resulted in fundamental, prejudicial error, entitling him to relief.

CONCLUSION

¶29 For the forgoing reasons, we affirm the convictions and sentences.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding Judge

/s/
DIANE M. JOHNSEN, Judge