DIVISION ONE
FILED: 7/2/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0142
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
JOSEPH DOUGLAS WHALEY,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. S8015CR20080797

The Honorable Rick A. Williams, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
Attorneys for Appellee

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

T H O M P S O N, Judge

¶1 Joseph Douglas Whaley appeals his conviction and sentence for child molestation, a class two felony, on grounds of double jeopardy, prosecutorial vindictiveness, and evidentiary errors.

¶2 A grand jury indicted Whaley in 2008 for one count of sexual conduct with a minor for "intentionally or knowingly engag[ing] in sexual intercourse with A.M., a child under the age of twelve," and two counts of kidnapping. A jury convicted Whaley of child molestation as a lesser-included offense of the sexual conduct charge, and acquitted him of the kidnapping charges. On appeal, this court reversed the conviction for child molestation and remanded for a new trial, finding that the trial court had abused its discretion in refusing to instruct on attempted sexual conduct with a minor as an alternative lesser-included offense of the charged crime. *State v. Whaley*, 1 CA-CR 09-0558.

¶3 On remand, the State re-tried Whaley for child molestation. A.M., who was nine years old at the time of the charged conduct, testified that Whaley pulled her panties down, spit on his hand and wiped it on her "butt," held her down on the master bedroom bed, and pressed his penis "into my butt." The victim's mother testified that she walked in on them, saw Whaley bent over her daughter, and pulled Whaley's erect penis from her daughter's "butt."

¶4 Whaley did not deny the conduct in a series of calls to his wife from the jail the following day, but repeatedly responded, "I don't know," to questions as to why he did it. At one point, he admitted, "I know what I did was wrong. I don't

know why I did it but I know I did it." He testified at trial, however, that he did not engage in any of the charged conduct.

¶5 The jury convicted Whaley of molestation, and the judge sentenced him to seventeen years in prison. Whaley filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).

Double Jeopardy

¶6 Whaley argues that "the court erred in allowing newly charged conduct to support the verdict in violation of the double jeopardy bar against a successive prosecution of a new charge arising from the same conduct as the earlier prosecution." The procedural history of this issue is as follows. Because this court vacated the child molestation conviction on the ground the trial court erred in instructing the jury, we did not reach Whaley's "argument that the court created a risk of a non-unanimous verdict by refusing to instruct the jury on multiple acts." *State v. Whaley*, 1 CA-CR 09-0558, ¶ 22. On remand, to avoid the multiple acts/non-unanimous verdict problem raised during the first trial, and on appeal, the State re-indicted Whaley on two counts of child molestation: one for "directly or indirectly touching his genitals to the person of A.M." (Count One), and one for

"directly or indirectly touching, fondling, or manipulating the genitals or anus of A.M. with his hand" (Count Two).

¶7 The trial court dismissed Count Two, reasoning that it would be improper for Whaley to face two counts on re-trial when he had originally been convicted of only one count, and, on motion by the prosecutor, dismissed the new indictment in its entirety. Trial accordingly proceeded on the child molestation charge for which Whaley had previously been convicted. The judge did not preclude the prosecutor from relying on evidence that Whaley had touched the victim's genitals with his hand or her body with his penis, but instructed the jury that in order to find Whaley guilty, it must unanimously agree on the conduct that formed the basis of the conviction.

¶8 We review claims of double jeopardy de novo. *State v. Moody*, 208 Ariz. 424, 437, ¶ 18, 94 P.3d 1119, 1132 (2004). The double jeopardy clauses of the federal and state constitutions prohibit: 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)[1]; *Lemke v. Rayes*, 213 Ariz. 232, 236, ¶ 10, 141 P.3d 407, 411 (App. 2006).

¶9 The re-trial in this case did not violate double jeopardy. Whaley was simply re-tried for the same offense for

[1] *Overruled in part on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

which he was convicted, a lesser-included offense of the original non-specific charge of sexual conduct with a minor: child molestation. "[I]n all cases but those reversed on grounds of insufficient evidence, the Double Jeopardy Clause 'imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside.'" *Moody*, 208 Ariz. at 439, ¶ 26, 94 P.3d at 1134 (quoting *Pearce*, 395 U.S. at 719-20). Whaley's conviction for molestation was not reversed on grounds of insufficiency of the evidence, but for error in failing to instruct on a lesser-included offense. Whaley's argument that his double jeopardy rights were violated by his re-trial on the molestation charge accordingly fails.

¶10 For his argument that the re-trial on a molestation charge based in any part on Whaley's hand touching the victim's genitals was nevertheless impermissible, Whaley misplaces his reliance on *Quinton v. Superior Court*, 168 Ariz. 545, 815 P.2d 914 (App. 1991), which applies the "same-conduct" test for double jeopardy adopted in *Grady v. Corbin*, 495 U.S. 508 (1990). *See Quinton*, 168 Ariz. at 550-52, 815 P.2d at 919-21. The "same-conduct" test for double jeopardy, however, was overruled by the United States Supreme Court in *United States v. Dixon*, 509 U.S. 688 (1993), which held that the only test for deciding whether a defendant has been tried and punished twice for the

same offense is the *Blockburger*[2] "same-elements" test. *Dixon*, 509 U.S. at 696, 703-04, 711.

¶11 "The *Blockburger* same-elements test focuses on the statutory elements of the two crimes charged, not on the factual proof that is offered or relied upon to secure a conviction." *State v. Cook*, 185 Ariz. 358, 361, 916 P.2d 1074, 1077 (App. 1995). "Thus, in determining whether the offenses are the same under the *Blockburger* test, we need look only to the statutory elements of the offenses to see if each statute contains an element not contained in the other; we may not consider the particular facts of the case in making that determination." *Id.* Moreover, because the original conviction was considered a nullity on re-trial, the prosecutor would not have been prohibited from introducing additional evidence to support the molestation charge. *See Moody*, 208 Ariz. at 439, ¶ 26, 94 P.3d at 1134. Whaley's argument that the trial court violated his double jeopardy rights by allowing his prosecution for a "new charge arising from the same conduct as the earlier prosecution" accordingly fails on this basis as well.

Vindictive Prosecution

¶12 Whaley next argues that the prosecutor engaged in vindictive prosecution by re-indicting him on two counts of

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[2] *Blockburger v. United States*, 284 U.S. 299 (1932).

child molestation, thereby penalizing him for successfully appealing his conviction on one count of molestation. The trial court dismissed the new indictment, however, and re-trial proceeded solely upon the molestation charge from the original indictment. "Generally the mootness doctrine requires that judicial opinions not be rendered concerning issues which no longer exist because of changes in the factual circumstances." *Pointe Resorts, Inc. v. Culbertson*, 158 Ariz. 137, 140-41, 761 P.2d 1041, 1044-45 (1988). We find this issue moot, and accordingly, decline to consider it. *See id.*

Admission of Unfairly Prejudicial Evidence

¶13 Whaley next argues that the trial court abused its discretion in denying his motion in limine to exclude evidence of a poster from the rock group "Cradle of Filth" that Whaley had been given by a former girlfriend and had hung on the wall of the bedroom, which depicted a "demonic figure on his knees engaging in consensual 'doggie-style' sexual intercourse with an adult female," and the caption, "Get thee behind me, Satan." He argues that the evidence "was unfairly prejudicial, lacked any probative value, and should therefore have been precluded pursuant to Rule 404(b) of the Arizona Rules of Evidence."

¶14 Whaley filed a motion in limine to exclude the poster on the ground that it had no probative value, and thus, was irrelevant. The prosecutor responded that it was probative of

Whaley's "interest in taking a woman from behind." The court found that the probative value of the poster outweighed any potential prejudice, and denied the motion in limine. We ordinarily review claims of evidentiary error for abuse of discretion. *State v. Gulbrandson*, 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995).

¶15 Whaley failed to raise any claim that the evidence was unfairly prejudicial or violated Rule 404(B) before or during trial; accordingly, we review these claims for fundamental error only. *State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005); *State v. Davis*, 226 Ariz. 97, 100, ¶ 12, 244 P.3d 101, 104 (App. 2010) (issues raised for first time in motion for new trial are not preserved for appellate review). Whaley thus bears the burden of establishing that there was error, that the error was fundamental, and that the error caused him prejudice. *Henderson*, 210 Ariz. at 568, ¶¶ 23, 26, 115 P.3d at 608.

¶16 We are not persuaded on this record that the admission of the "Cradle of Filth" poster, even if error, was fundamental, prejudicial error. An image of this poster was not forwarded to this court on appeal, and accordingly we presume it supported the trial court's finding that it was relevant, and not unfairly prejudicial. *State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982). We further find no abuse of discretion in

the judge's finding that the poster had some minimal relevance, that is, to show Whaley's state of mind at the time. Whaley's wife testified, after all, that the poster could be seen from the bedroom door, and to her, it looked like what Whaley was trying to do to her daughter. The prosecutor made no further mention of the poster after eliciting the wife's testimony, and did not refer to it in closing argument. It was defense counsel who showed the poster to the jury during closing to argue that it was "purely inflammatory . . . just something ugly Joe had in the house that [his wife] didn't like, so [she] decided to use that as part of the screw to tighten the case on him." On this record, we are not persuaded that admission of the "Cradle of Filth" poster was unfairly prejudicial, or constituted improper character evidence, or that its admission deprived Whaley of a fair trial or of a right essential to his defense, as necessary to show that the error was fundamental. *Henderson*, 210 Ariz. at 568, ¶ 24, 115 P.3d at 608. Nor are we persuaded, in light of the overwhelming evidence at trial, that had the poster been excluded, the verdict could have been any different, as necessary to find it prejudicial on fundamental error review. *Henderson*, 210 Ariz. at 569, ¶ 27, 115 P.3d at 609. We accordingly find no reversible error on this ground.

Failure to Grant Mistrial Based on Jail Calls

¶17 Whaley next argues that the trial court abused its discretion in denying his request for a mistrial based on the admission of statements made during jail calls between Whaley and his wife (the victim's mother), that Whaley contended were "objectionable prior bad act evidence and/or hearsay." The prosecutor informed defense counsel and the trial court in advance of playing the jail calls that she believed that the compact disc of the jail calls that the clerk had given her was the redacted version that the same counsel had agreed upon playing during the first trial, because the CD was marked "Whaley Jail Phone Calls Edit," but she did not have a chance to listen to it. She suggested that "if anything is mentioned that starts to go into topics that we redacted, I assume that we will jump up and stop [the] tape."

¶18 Defense counsel did not object while the jail calls were being played, but sought a mistrial afterward because of statements made by the victim's mother referring to some prior discussion of "f-ing fourteen year-olds," and suggesting that Whaley was "rough with kids," had assaulted her before, had been in jail before, and that a judge had "supposedly said that [he] should never be around kids." The judge denied the motion for mistrial, finding that a remedial instruction would be sufficient to cure any prejudice. The judge subsequently

instructed the jury: "The defendant has no prior criminal record that is at all relevant to the elements of the crime alleged by the State. Any statements you may have heard during testimony which might infer some criminal record or prior misconduct should be disregarded entirely."

¶19 A declaration of mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (citation omitted). We review a trial court's denial of a motion for mistrial for abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). "The trial judge's discretion is broad, because he is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Id.* (citations omitted).

¶20 We find no abuse of discretion. The complained-of comments in the taped jail calls were isolated comments in the midst of a non-stop angry rant by Whaley's wife accusing him of raping her daughter. The judge was in the best position to determine if these isolated comments would actually affect the outcome of the trial, and he concluded that an instruction to the jury to ignore any prior misconduct referred to in the calls would be an adequate safeguard. We find no abuse of discretion.

Preclusion of Evidence of Bias and Motive

¶21 Whaley finally argues that the court abused its discretion and violated his "right to present a complete defense and effectively confront a crucial witness by precluding relevant evidence of bias and motive," specifically, that the victim's mother's motive in changing her testimony was "to avoid any future acquittals or another re-trial." The judge allowed defense counsel to impeach the victim's mother with her prior inconsistent statements, and to "explore her motives, such as wanting to see that the defendant gets convicted," but "without getting into the last trial and the outcome of the last trial."

¶22 A defendant has the right under the Confrontation Clause to cross-examine a witness concerning her bias, motive, and prejudice, and on issues that directly bear on her credibility. *See Davis v. Alaska*, 415 U.S. 308, 316-18 (1974); *see also State v. Gertz*, 186 Ariz. 38, 41-43, 918 P.2d 1056, 1059-61 (App. 1995). Trial judges retain wide latitude, however, to impose reasonable limits on cross-examination based on concerns about prejudice, confusion of the issues, marginal relevance, and misleading the jury. *State v. Canez*, 202 Ariz. 133, 153, ¶ 62, 42 P.3d 564, 584 (2002). We review evidentiary rulings that implicate the Confrontation Clause de novo. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42, 140 P.3d 899, 912 (2006).

¶23 We find no error. Although Whaley was acquitted of the charged offense of sexual conduct with a minor in the first trial, he was convicted of the lesser-included offense of molestation. Because Whaley was being tried for the very charge of which he had been convicted at the prior trial – molestation – it would have been misleading to suggest that this witness changed her testimony to avoid another "acquittal." Moreover, the judge did allow defense counsel to explore the witness's motive to change her testimony to obtain a conviction. We find the judge's decision to preclude Whaley from eliciting testimony and arguing that this witness changed her testimony to avoid another "acquittal" was reasonable under the circumstances, and we will not reverse on this basis.

Conclusion

¶24 For the foregoing reasons, we affirm Whaley's conviction and sentence.

/s/
JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
LAWRENCE F. WINTHROP, Judge