DIVISION ONE
FILED: 10/15/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA, | ) | No. 1 CA-CR 12-0529 |
| | ) | |
| Appellee, | ) | DEPARTMENT C |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| JOHN JOSEPH RUSHINSKY, JR., | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-142060-001

The Honorable Warren J. Granville, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General — Phoenix
by Joseph T. Maziarz, Chief Counsel
Criminal Appeals Section
and Alice Jones, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

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**H O W E**, Presiding Judge

**¶1** John Joseph Rushinsky, Jr., appeals his convictions and sentences on two counts of child molestation. For the following reasons, we find no error and affirm.

## FACTS & PROCEDURAL HISTORY

**¶2** Allegations of child molestation prompted a Child Protective Services ("CPS") caseworker to investigate Rushinsky. Accompanied by two police officers, the caseworker arrived at Rushinsky's home to interview him. Rushinsky and his wife invited the caseworker and officers inside after the caseworker told him, "we received a CPS child abuse allegation [and] . . . my job is just to talk to [you] and see, you know, what is going on." Neither Rushinsky nor his wife expressed concern about——or appeared surprised by——the caseworker's statement.

**¶3** The CPS caseworker sat in the living room to speak with Rushinsky and his wife while the officers stood in the entryway near the front door, but not blocking it. The CPS caseworker told Rushinsky that "as a parent you do not have to talk to me." Approximately ten minutes into the interview, Rushinsky volunteered that he had an erection on an occasion when his seven-year-old daughter sat on his lap. Rushinsky said that he pushed her down on himself and rubbed against her.

**¶4** After overhearing Rushinsky make these admissions, an officer went outside and called her sergeant about the situation. After completing the call, the officer re-entered the home and approached Rushinsky to ask him for his identification. Rushinsky stood up and patted his pockets to locate his

identification but was unable to do so. Without drawing a weapon, the officer then arrested Rushinsky.

**¶5** A grand jury indicted Rushinsky on three counts of child molestation and one count of aggravated assault. Before trial, Rushinsky moved to suppress his statements to the CPS caseworker, arguing that his admissions were made in violation of his *Miranda*[1] rights. The trial court conducted a suppression hearing and denied the motion. The court found that no *Miranda* violation occurred because Rushinsky was not in custody at the time that he made the challenged statements.

**¶6** At trial, the State offered in evidence testimony that Rushinsky touched the vagina of the victim's sister, "B.," during a camping trip before the charged offenses. The trial court found the evidence relevant under Arizona Rule of Evidence ("Rule") 404(c) to show aberrant sexual propensity and under Rule 404(b) to show intent and absence of mistake or accident. The trial court also found that admission of the other act would not be unfairly prejudicial under Rule 404(c)(1)(C) because the act involving B. was not too remote and occurred under similar circumstances; occurred within a year or two of the charged offense; occurred during a family event; and the victims were relatively close in age, the same gender, and were both Rushinsky's biological children.

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

**¶7** The jury convicted Rushinsky of two counts of child molestation, but acquitted him of the remaining charges. The trial court sentenced him to concurrent terms, the longest of which was fourteen years.

**DISCUSSION**

**¶8** Rushinsky first argues that the trial court erred in admitting the inculpatory statements that he made to the CPS caseworker at his home in the presence of police officers because no one had advised him of his *Miranda* rights. We review the trial court's admission of Rushinsky's statements for an abuse of discretion, based on the evidence presented at the suppression hearing, viewed in the light most favorable to upholding the trial court's ruling. *State v. Ellison,* 213 Ariz. 116, 126 ¶ 25, 140 P.3d 899, 909 (2006); *State v. Newell*, 212 Ariz. 389, 396 ¶ 22, 132 P.3d 833, 840 (2006). We review the factual findings underlying the determination for an abuse of discretion, but review the court's legal conclusions de novo. *Newell*, 213 Ariz. at 397 ¶ 27, 132 P.3d at 841.

**¶9** We find no error. The procedural safeguards of *Miranda* apply only "where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). An individual is considered "in custody" when he is "deprived of his freedom of action in any significant way." *Mathiason*, 429 U.S. at 495 (quoting

*Miranda*, 384 U.S. at 444) (holding that defendant was not in custody during interrogation behind closed doors at police station, when he came voluntarily and was informed immediately that he was not under arrest). The following factors determine whether a suspect was "in custody" for *Miranda* purposes: (1) the site of the interrogation; (2) the length and form of the interrogation; and (3) the objective indicia of arrest. *State v. Thompson*, 146 Ariz. 552, 557, 707 P.2d 956, 961 (App. 1985) (citing *State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368 (1983)).

**¶10** The application of these factors shows that Rushinsky was not in custody. First, the interview occurred not at a police station or a place under the control of law enforcement, but in Rushinsky's own home. Second, unlike custodial interrogation, the CPS caseworker's interview lasted only between twenty minutes and an hour, and the caseworker was far from confrontational. She told Rushinsky at his front door that CPS had received a child abuse allegation and that her "job is just to talk to [you] and see, you know, what is going on." Rushinsky and his wife were not surprised to see the CPS caseworker and the officers, and Rushinsky invited them into his home. Although the CPS caseworker sat with the Rushinskys in their living room, the police remained in the entryway near the front door but did not block it. The caseworker told Rushinsky

that he was not required to participate in the interview. Had Rushinsky not wanted to answer questions, he could have refused to let the CPS workers and police into his home, or left the living room or the house through multiple available exits.

**¶11** Finally, the interview had no "objective indicia of arrest." The officers testified that they understood their role was to only "support the CPS worker" and "keep the peace," and they neither hovered over Rushinsky nor reacted to his statements. Before Rushinsky made his admissions, police did not draw their weapons, handcuff him, search him, tell him he was not free to leave, or inform him that he was under arrest. Only some time after Rushinsky admitted to molesting his daughter did the officer step outside to call her sergeant, ask Rushinsky for identification, and arrest him. Under the totality of these circumstances, Rushinsky was not in custody and thus *Miranda* warnings were not required.

**¶12** Rushinsky also argues that the trial court erred in admitting the evidence that he had inappropriately touched B. when she was four or five years old. He does not challenge the court's finding that clear and convincing evidence demonstrated that he engaged in the prior conduct, nor that it was admissible to show aberrant sexual propensity or lack of mistake under Rules 404(c)(1)(A) and (B); he argues only that the court erred in evaluating unfair prejudice under Rule 404(c)(1)(C). He

contends that the evidence was unfairly prejudicial because the timing of the uncharged act was "vague" and the act was of a different nature (over and under, rather than simply over her clothing), and occurred in a different setting (a tent as opposed to the living room) than the charged acts.

**¶13** Under Rule 404(c)(1)(C), evidence otherwise admissible under Rule 404(c) will nevertheless be excluded if its evidentiary value is substantially outweighed by the danger of unfair prejudice. We review the trial court's ruling on unfair prejudice for an abuse of discretion. *State v. Villalobos*, 225 Ariz. 74, 80 ¶ 20, 235 P.3d 227, 233 (2010). We defer to the judge's findings and to his balancing of the factors. *See State v. Connor*, 215 Ariz. 553, 564 ¶ 39, 161 P.3d 596, 607 (App. 2007) ("Because the 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.") (internal punctuation omitted).

**¶14** Considering the factors identified in Rule 404(c)(1)(C), the trial court did not abuse its discretion in admitting the evidence. The act was not too remote because it occurred within the last two years of the charged offense. The act was similar in nature to the charged offense because both involved digital-vaginal contact and occurred under similar circumstances. The victims were also relatively close in age,

the same gender, and both Rushinsky's biological children. And the trial court found by clear and convincing evidence that the act occurred. Moreover, the trial court's limiting instruction on the jury's use of the evidence in determining Rushinsky's guilt minimized whatever unfair prejudice could have occurred with its admission. *See Villalobos*, 225 Ariz. at 80 ¶ 20, 235 P.3d at 233. The trial court thus committed no error.

**¶15** For the foregoing reasons, we affirm Rushinsky's convictions and sentences.

/s/
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RANDALL M. HOWE, Presiding Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Judge

/s/
_____
KENT E. CATTANI, Judge