DIVISION ONE
FILED: 10/01/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0709
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
STEPHEN JAMES BRUNI,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Coconino County

Cause No. S0300CR201200242

The Honorable Mark R. Moran, Judge

AFFIRMED

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

H. Allen Gerhardt, Coconino County Public Defender — Flagstaff
by Brad Bransky, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Judge

¶1 Stephen James Bruni ("Appellant") appeals his conviction and sentence for sexual conduct with a minor under twelve years of age, a dangerous crime against a child.

¶2 A grand jury indicted Appellant on four counts of sexual conduct with a minor for acts that he committed against his eight-year-old nephew during a camping trip in the summer of 2008. The jury convicted Appellant of one count and found it was a dangerous crime against a child, and acquitted him of the three other counts. The trial court sentenced Appellant to life in prison without the possibility of release until he had served thirty-five years. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") 12-120.21(A)(2) (West 2013),[1] 13-4031, and 13-4033(A).

I. Admission of Confrontation Call at Trial

¶3 Appellant argues that the trial court erred in admitting the recording of a confrontation call made by the victim's father ("Father") because the court (1) erroneously found that the Father was not acting as a state agent during the call, (2) violated his due process rights and erred in applying A.R.S. § 13-3988 by finding that his statements during the call were not coerced by Father's prior assault of him, and (3) the court erred in failing to consider whether he had counsel present and whether he had been informed of his right to have

[1] We cite the current versions of the relevant statutes, unless otherwise noted, because no revisions material to this decision have since occurred.

counsel present and had waived such right pursuant to A.R.S. § 13-3988(3), (4), and (5).

¶4 "To be admissible, a [defendant's] statement must be voluntary, not obtained by coercion or improper inducement." *State v. Ellison,* 213 Ariz. 116, 127, ¶ 30, 140 P.3d 899, 910 (2006). The State has the burden of proving, by a preponderance of the evidence, that a statement was voluntary. *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990). We will not find a statement involuntary unless there exists (a) "coercive police behavior" and (b) "a causal relation between the coercive behavior and defendant's overborne will." *State v. Boggs*, 218 Ariz. 325, 336, ¶ 44, 185 P.3d 111, 122 (2008). "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." *Colorado v. Connelly*, 479 U.S. 157, 166 (1986). In evaluating voluntariness, "the trial court must look to the totality of the circumstances surrounding the confession and decide whether the will of the defendant has been overborne." *State v. Lopez,* 174 Ariz. 131, 137, 847 P.2d 1078, 1084 (1992). If the taint of illegal conduct is sufficiently attenuated because of intervening circumstances or the passage of time, a statement may be admitted as an otherwise voluntary confession. *See State v. Fulminante,* 161 Ariz. 237, 246, 778 P.2d 602, 611 (1989)

(citation omitted). Arizona Revised Statute section 13-3988 also identifies factors a judge should consider as a matter of state law in determining voluntariness of a defendant's confessions under the totality of the circumstances. *See* A.R.S. § 13-3988(B).

¶5 The criminal conduct in question occurred in June 2008. Approximately a week later, the victim disclosed the incident to his parents. The victim's father physically confronted Appellant, who made incriminating statements and apologized to the victim. Father and Appellant exchanged several punches, which led Appellant to seek medical treatment at an emergency room.

¶6 Several weeks later, the parents contacted the police and reported the sexual misconduct. Detective Larry Thomas of the Coconino County Sheriff's Office suggested Father participate in a taped phone call with Appellant and coached him on the proper techniques of such a confrontation call, including a neutral approach and proper demeanor. Detective Thomas was not aware of the earlier verbal and physical confrontation between Father and Appellant. At the time the call was placed, Appellant had not been arrested or otherwise detained. During the call, Appellant made arguably incriminating statements.

¶7 After formal charges were brought, Appellant moved to suppress the statements on the basis that the statements were

involuntary and therefore inadmissible. Following an evidentiary hearing, the trial court found the statements by Appellant during the earlier physical altercation to be involuntary, and suppressed them. That ruling is not at issue on appeal. The court further found the statements in the phone confrontation several weeks later to be voluntarily made.

¶8 On appeal, Appellant challenges the voluntariness of the phone statements, arguing primarily that the factors listed in A.R.S. § 13-3988(B) compel the conclusion that his statements were not voluntary. Appellant did not make this argument to the trial court and, therefore, we only review the court's decision for fundamental error. The factors listed in § 13-3988(B), however, only apply after the speaker has been arrested and/or detained. *See* A.R.S. § 13-3988(C). At the time of the phone call, Appellant had not been arrested or detained; accordingly, these statutory factors have no application here.

¶9 We agree, however, that at the time Father made the phone call he was acting as the State's agent, and certain constitutional safeguards, as noted above, do apply. Here, following the evidentiary hearing, the trial court determined the credibility of the witnesses on this issue, and concluded in part that (1) at the time the call was set up, Detective Thomas did not know of the prior physical altercation between Father and Appellant, (2) sufficient time had elapsed between that

altercation and the phone call so as to dissipate any taint or coercion attendant to the physical confrontation, and (3) that during the phone call, Father's demeanor was non-intimidating, and was neutral in content and affect. Accordingly, the court ruled that defendant's statements were not coerced or otherwise obtained in violation of his constitutional rights, and were therefore admissible.[2]

¶10 In reviewing a trial court's ruling admitting a defendant's statements, we view the evidence in the light most favorable to upholding the trial court's ruling. *Ellison,* 213 Ariz. at 126, ¶ 25, 140 P.3d at 909. We review the factual findings for abuse of discretion and the legal conclusions *de novo*. *State v. Newell*, 212 Ariz. 389, 397, ¶ 27, 132 P.3d 833, 841 (2006). If the ruling was legally correct for any reason, we are obliged to affirm the ruling. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶11 Based on this record, we find no abuse of the court's discretion and no error in admitting Appellant's statements from the phone call. Father was not acting as a state agent at the time of the earlier physical confrontation, and Detective Thomas

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[2] Appellant argues he had a constitutional right to be advised of entitlement to counsel and/or to have counsel present during the phone call under the Fifth or Sixth Amendments of the U.S. Constitution. These rights do not attach unless a defendant is in custody, *Edwards v. Arizona*, 451 U.S. 477, 485-86 (1981), or adversarial proceedings have been commenced. *Moran v. Burbine*, 475 U.S. 412, 431 (1986).

did not know it had taken place; accordingly, the police were not tarred with whatever coercive conduct occurred at that time. *See State v. Huerstel*, 206 Ariz. 93, 108-09, ¶ 73, 75 P.3d 698, 713-14. Further, the trial court's conclusion that any coercive effect from the first incident had dissipated by the time of the phone call was amply supported by the testimony of Detective Thomas and Father, and the court was in the best position to determine their credibility versus that of Appellant on this point.

¶12 In summary, we find no abuse of discretion in the court's finding that Appellant's statements during the confrontation call were neither coerced by police conduct nor tainted by the prior assault. Under the totality of the circumstances, the trial court did not err in concluding that Appellant's will was not overborne, and that his statements during the phone call were voluntary.

II. Admission of Minor's Interview at Rule 404(c) Hearing

¶13 Appellant argues next that, in determining whether evidence of other, uncharged conduct should be admitted at trial pursuant to Rule 404(c), the court erred in considering the victim's 2010 video recorded interview. Appellant contends that, absent strict compliance with the requirements of A.R.S. § 13-4252, the minor victim's prior statement should not have been considered. We generally review rulings on the

admissibility of evidence for abuse of discretion, *State v. Roscoe,* 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996); however, we review constitutional issues and questions of statutory interpretation *de novo*. *See Ellison,* 213 Ariz. at 129, ¶ 42, 140 P.3d at 903.

¶14 The trial court found A.R.S. § 13-4252 was not the exclusive method of admitting a minor's video recorded interview, and further, the statute was designed to facilitate admissibility of such statements, and not as a method of preclusion.

¶15 For several reasons, we find no error in the court's refusal to apply A.R.S. § 13-4252 to exclude the victim's 2010 video recorded interview at the Rule 404(c) hearing. First, § 13-4252 was previously determined to be unconstitutional. *See State v. Taylor*, 196 Ariz. 584, 588, ¶ 11, 2 P.3d 674, 678 (App. 2000). Second, the victim's statement, by video recording or otherwise, is exactly the type of evidence the trial court was entitled to review in determining whether clear and convincing evidence exists that the other act occurred. *See State v. LeBrun*, 222 Ariz. 183, 187, ¶ 13, 213 P.3d 332, 336 (App. 2009); Ariz. R. Evid. 104(a) (providing that in deciding "any preliminary question about whether . . . evidence is admissible . . . the court is not bound by evidence rules, except those on privilege."). Finally, even assuming any error associated with

either application or interpretation of § 13-4252 or in considering the victim's 2010 video recorded statements, such error was harmless. We note that the same "other act" evidence was considered and admitted at trial through the testimony of the victim.[3]

III. Denial of Fair Trial Due to Improper Testimony

¶16 Appellant finally argues that he was denied a fair trial by (1) the unsolicited comment from Father during direct examination that Appellant was seeing a therapist due to "his problems with children" and (2) the prosecutor's subsequent misconduct in asking Appellant whether he had talked to his counselor about "the problem with touching little boys." Because in each instance Appellant did not ask for a mistrial, or seek any remedy beyond what the trial court gave, we only review these issues for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Appellant accordingly bears the burden of showing that

[3] The trial court was also provided "other act" evidence at the Rule 404(c) hearing, without objection, through the victim's 2008 video recorded interview conducted by forensic interviewer Wendy Dutton. Because Appellant did not make that interview part of the record, we assume that it also supports the trial court's ruling. *State v. Zuck*, 134 Ariz. 509, 512-13, 568 P.2d 162, 165-66 (1982) ("It is the duty of counsel who raise objections on appeal to see that the record before us contains the material to which they take exception. Where matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court.").

the trial court erred by failing to *sua sponte* declare a mistrial, and that the error was both fundamental and prejudicial. *See id.* at ¶ 22.

¶17 At Appellant's request, the trial court immediately struck the unsolicited comment from Father that he was able to reach Appellant by phone "before he went to therapy, [] to discuss his problems with children with his therapist." The court further instructed the jury to completely ignore the answer. We find no error, much less fundamental error prejudicing Appellant and requiring reversal. The judge was in the best position to determine whether the unsolicited comment from Father would actually affect the outcome of trial, and we cannot say that the judge abused his discretion by simply instructing the jury to ignore it. We presume the jury followed this instruction. *See State v. LeBlanc,* 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). We are not persuaded that reversal is required on this basis.

¶18 Nor are we persuaded that Appellant was denied a fair trial by the prosecutor's question to Appellant on whether he had obtained therapy for "the problem with touching little boys."

> [P]rosectorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial and which he pursues for any

> improper purpose with indifference to a significant resulting danger of mistrial.'

State v. Aguilar, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (quoting *State v. Pool*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984)). "The misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Morris*, 215 Ariz. 324, 335, ¶ 46, 160 P.3d 203, 214 (2007) (citations and quotation omitted).

¶19 We are not persuaded that the prosecutor's single question about Appellant's problem with "little boys," a claim Appellant quickly denied, constituted misconduct so pronounced and persistent that it requires reversal. The question came as a result of a back-and-forth between the prosecutor and Appellant discussing whether the counseling services Appellant discussed in the confrontation call related to sexual misconduct with the victim. We are not convinced the prosecutor intended this question to flout the trial court's prior order striking the similar unsolicited comment from Father; rather, it appears that the prosecutor inadvertently used the term "little boys" as a stand-in for the single victim. *See State v. Dunlap*, 187 Ariz. 441, 462-63, 930 P.2d 518, 539-40 (App. 1997) (noting that appellate court would not assume the prosecutor intended the "sinister connotations" with use of ambiguous remark).

Moreover, the court specifically instructed the jury that it must determine the facts only from the testimony of the witnesses and the exhibits introduced in court. We presume the jury followed this instruction. *See LeBlanc,* 186 Ariz. at 439, 924 P.2d at 443. On this record, Appellant has failed to meet his burden to prove that this single question from the prosecutor constituted misconduct so pronounced or persistent that it requires reversal.

CONCLUSION

¶20 For the foregoing reasons, we affirm Appellant's conviction and sentence.

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

CONCURRING:

_____/S/_____
MARGARET H. DOWNIE, Judge

_____/S/_____
JON W. THOMPSON, Judge