IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ARTHUR L. VITASEK, *Appellant*.

No. 1 CA-CR 12-0050
FILED 2-9-2017

Appeal from the Superior Court in Maricopa County
No. CR2005-030514-001
The Honorable Peter C. Reinstein, Judge

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

The Hopkins Law Office, PC, Tucson
By Cedric Martin Hopkins
Counsel for Appellant

Arthur L. Vitasek, Florence
Appellant

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Lawrence F. Winthrop joined.

C A T T A N I, Judge:

¶1 Arthur Vitasek appeals his convictions and sentences for three counts of public sexual indecency to a minor, three counts of molestation of a child, one count of attempted molestation of a child, one count of continuous sexual abuse of a child, and fifteen counts of sexual conduct with a minor. Vitasek's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), certifying that, after a diligent search of the record, he found no arguable question of law that was not frivolous. Counsel asks this court to search the record for reversible error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30 (App. 1999).

¶2 Vitasek filed a *pro se* supplemental brief raising the following issues: (1) an alleged speedy trial violation, (2) the propriety of the superior court's ruling under Arizona Rule of Evidence 404(b) and (c) allowing evidence of Vitasek's other, uncharged sex acts with the victims and others, (3) a challenge to the constitutionality of Arizona Rule of Evidence 404(c), (4) a challenge to the constitutionality of the provision of the Victims' Bill of Rights allowing victims to decline pretrial interviews, (5) the propriety of the court's denial of a pretrial *Dessurault*[1] hearing regarding victim C.S.'s anticipated in-court identification of Vitasek, (6) a challenge to the constitutionality of the offense of continuous sexual abuse under Arizona Revised Statutes ("A.R.S.") § 13-1417,[2] (7) the propriety of the court's ruling under A.R.S. § 13-1421 precluding evidence of the victims' prior sexual conduct, (8) the propriety of the court's ruling allowing the State to play the victims' recorded pretrial interviews for the jury and use the victims' statements in those interviews as substantive evidence, (9) the propriety of the court's ruling granting the State's mid-trial request to amend the dates of the indictment as to one charge, and (10) prosecutorial misconduct.

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1 *State v. Dessureault*, 104 Ariz. 380 (1969).

2 Absent material revisions after the relevant date, we cite a statute's current version.

¶3 After an exhaustive review of the record, and for reasons that follow, we affirm Vitasek's convictions and sentences as modified to reflect credit for 1651 days of presentence incarceration and to vacate the portion of the sentencing order requiring Vitasek to pay for his DNA testing.

FACTS AND PROCEDURAL BACKGROUND

¶4 In 1999, Vitasek lived in an apartment near Pinnacle Peak where he met 9-year-old brothers C.K. and Ch.K. (and their older brother S.K.), whose father lived in the same complex. Vitasek became a father figure to them, and they would often visit him and stay at his apartment overnight. Almost immediately, Vitasek began to have sexual contact with the boys. Vitasek masturbated C.K. on several occasions over the next two years, and had oral sexual contact with C.K. at least once. Over the same period, Vitasek and Ch.K. masturbated together between 15 and 25 times, while Ch.K. was between 9 and 11 years old.

¶5 Vitasek then moved to Las Vegas for about two years, where he met M.E.'s mother through work and eventually began to sexually abuse M.E. M.E. nevertheless viewed Vitasek as a father figure, and other children would refer to him as M.E.'s dad.

¶6 In the fall of 2003, Vitasek moved back to the Phoenix area with M.E. and M.E.'s mother and sister, and the four lived together. Over the next approximately nine months, Vitasek perpetrated multiple sexual acts on 9- and 10-year-old M.E., including simultaneous masturbation, Vitasek masturbating M.E., Vitasek having oral contact with M.E.'s penis, and M.E. penetrating Vitasek's anus with his penis.

¶7 During this period from September 2003 to June 2004, Vitasek met other children through M.E., and he began to sexually abuse the other boys as well. Seven-year-old C.A. knew M.E. from school, and when C.A. visited M.E. at home, Vitasek attempted to reach up C.A.'s shorts to touch his penis on one occasion and reached under a towel to rub C.A.'s penis another time. When 10- or 11-year-old C.S. came over to the house to see M.E., Vitasek had him pull down his pants and proceeded to have oral contact with C.S.'s penis.

¶8 Vitasek and M.E.'s family moved out of the house to separate residences in the summer of 2004. In the fall of 2004, Vitasek continued to visit M.E. and his family at their new home, where he met brothers B.M. (12 years old) and C.M. (11 years old) who lived in the same apartment complex. Vitasek had further sexual contact with the boys at M.E.'s

apartment, including masturbating himself in front of M.E. and C.M. and having M.E. put his penis in Vitasek's anus.

¶9 Through the fall of 2004, Vitasek also continued to have sexual contact with the boys at his own new apartment/condominium, including oral contact with C.A.'s penis, oral contact with B.M.'s penis, and penile penetration of M.E.'s anus. The sexual conduct continued after Vitasek moved into a different apartment in December 2004, including multiple instances of oral contact with C.A.'s penis (at least once with M.E. present) and an instance in which Vitasek masturbated himself while being anally penetrated by M.E. in mid-January 2005.

¶10 In January 2005, C.M. told school officials that M.E.'s "dad" (Vitasek) was a child molester. Investigators interviewed, among others, M.E., Ch.K., C.K., S.K., B.M., C.M., C.A., and C.S. After M.E.'s first interview, M.E.'s mother agreed to a safety plan that included preventing Vitasek from having contact with M.E. The next day, however, M.E.'s mother allowed Vitasek to pick up M.E. and another boy to spend the night. Vitasek learned that the police were looking for him and dropped the other boy off in a public place and, after an Amber Alert issued for M.E., dropped M.E. off with another adult. Meanwhile, Vitasek hurriedly packed some belongings and attempted to sell his car "for really cheap," and he left Phoenix immediately.

¶11 Vitasek remained on the run for the next year and a half until he was found living in Texas under an assumed name. In September 2006, a 16-year-old boy in Texas told police that "Rich Loper" had manually touched the boy's penis and later penetrated the boy's anus with his penis. Investigating officers discovered that "Rich Loper" was Vitasek, and he was arrested and returned to Arizona to face criminal charges.

¶12 The State charged Vitasek with 3 counts of public sexual indecency to a minor, 3 counts of molestation of a child, 1 count of attempted molestation of a child, 1 count of continuous sexual abuse of a child, and 19 counts of sexual conduct with a minor, with C.S., C.A., B.M., C.M., M.E., Ch.K., C.K., and S.K. as the alleged victims.[3] At Vitasek's request, the case was designated complex. After a substantial period of pretrial proceedings, Vitasek requested to waive counsel and represent himself. The court, finding that his waiver of the right to counsel was

[3] At the State's request during trial, the superior court dismissed with prejudice the four counts (all of which alleged sexual conduct with a minor) in which S.K. was the alleged victim.

knowing, intelligent, and voluntary, granted Vitasek's request to represent himself, and appointed advisory counsel to assist him. After further, extensive pretrial proceedings (largely involving Vitasek's numerous pretrial motions), the court allowed Vitasek to withdraw his waiver and proceed with retained counsel.

¶13 After a 27-day trial, the jury found Vitasek guilty as charged, found each victim of the sexual conduct with a minor counts had been under the age of 12, and further found multiple aggravating factors relating to 12 of the offenses. The court sentenced Vitasek to aggravated terms of imprisonment totaling 199.5 years, to be followed by 11 consecutive life sentences, and further ordered that Vitasek submit to and pay the cost of DNA testing. Vitasek timely appealed.

DISCUSSION

I. Vitasek's Pro Se Supplemental Brief.

1. Speedy Trial.

¶14 Vitasek argues that a four-year delay before trial violated his right to a speedy trial. First, he claims that the delay exceeded the time limits of Rule 8 of the Arizona Rules of Criminal Procedure, and thus required dismissal. We review for an abuse of discretion the superior court's denial of Vitasek's July 2010 motion to dismiss based on an alleged speedy trial violation. *See State v. Spreitz*, 190 Ariz. 129, 136 (1997). To the extent Vitasek asserts a Rule 8 challenge to delay after resolution of his July 2010 motion, he has waived the issue by failing to raise it before the superior court, *see id.* at 138, and we thus review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19–20 (2005).

¶15 As relevant here, Rule 8.2(a)(3) provides that a defendant in a case designated complex must be tried within one year after arraignment. Certain periods are excluded from calculation of that one-year time limit, however, including "[d]elays occasioned by or on behalf of the defendant." Ariz. R. Crim. P. 8.4(a).

¶16 Vitasek was initially arraigned on July 13, 2007, and he moved to dismiss on Rule 8 grounds three years later in July 2010. During that time, however, the court expressly excluded 352 days stemming from continuances either requested by Vitasek or jointly, and an additional 42 days for Rule 11 competency proceedings. A further delay (around 175 days) resulted when, in July 2009, defense counsel was unavailable for the anticipated four-week trial until January 2010. Although the court set trial

for January 5, 2010 when Vitasek waived counsel and began to represent himself, the court later vacated the January trial date at Vitasek's request and reset trial for October 2010, with Vitasek's agreement to exclude "all" time (272 days).

¶17 All of the time requested by Vitasek himself or through counsel—just under two years and four months (approximately 841 days)—was properly excludable as delay occasioned on behalf of the defendant. *See* Ariz. R. Crim. P. 8.4(a). Although Vitasek argued that a large portion of the delay was caused by ineffective assistance of defense counsel, "delays sought by defense counsel bind the client," *State v. Henry*, 176 Ariz. 569, 579 n.4 (1993), and any claim of ineffective assistance of counsel may only be raised in a Rule 32 proceeding for post-conviction relief, not on direct appeal, *see State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20 (2007). Accordingly, the superior court did not err by denying Vitasek's Rule 8 motion to dismiss.

¶18 Overall, the time between arraignment and trial was four years, one and a half months (1509 days). After the court denied his Rule 8 motion to dismiss, Vitasek requested five more continuances, totaling 10 months (306 days) of excludable time. *See* Ariz. R. Crim. P. 8.4(a). Excluding the approximately 1147 days set forth above, trial commenced within the one-year period specified by Rule 8.2(a)(3). Accordingly, Vitasek's Rule 8 claim fails.

¶19 Vitasek further argues that the delay deprived him of his Sixth Amendment right to a speedy trial. We review this constitutional question de novo, but defer to any relevant factual determinations. *State v. Parker*, 231 Ariz. 391, 398, ¶ 8 (2013). In assessing a constitutional speedy trial claim, we consider "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) the prejudice to the defendant." *Id.* at ¶ 9 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972), and *Spreitz*, 190 Ariz. at 139). "[T]he length of the delay is the least important, while the prejudice to defendant is the most significant." *Spreitz*, 190 Ariz. at 139–40.

¶20 The delay in this case was considerable. Vitasek did raise the issue of speedy trial, but did not do so until three years after arraignment. Moreover, the vast majority of the delay was directly attributable to Vitasek. For the period between indictment and arraignment, Vitasek had fled the state and was living in Texas under an assumed name. After arraignment, as outlined above, Vitasek requested nearly all of the continuances delaying trial.

¶21 Vitasek asserts, however, that he is not at fault for the delay. He argues that part of the delay resulted from defense counsel's inaction, but he is nevertheless bound by his attorney's continuance requests, and in any event, ineffective assistance of counsel claims may not be raised on direct appeal. *Rayes*, 214 Ariz. at 415, ¶ 20; *Henry*, 176 Ariz. at 579 n.4. Vitasek further argues that the State's intransigence in response to disclosure and discovery requests necessitated his requests for continuances, and thus caused the delay. The record reflects, however, that many of Vitasek's requests sought information outside of the State's possession, *see* Ariz. R. Crim. P. 15.1(a), (b) (noting the State's disclosure obligation as to "material and information within the prosecutor's possession or control"), the State had in other instances already disclosed the material requested, and that the State made further inquiries and disclosed further material as the court directed. The court repeatedly found that the State had complied with its disclosure and discovery obligations, and Vitasek voluntarily withdrew his motion to dismiss based on alleged disclosure violations. Under these circumstances, the delay in proceedings is fairly attributable to Vitasek, not the State.

¶22 In assessing prejudice, the most important facet is "'the possibility that the defense will be impaired' by diminishing memories and loss of exculpatory evidence," although "anxiety and concern of the accused" and "oppressive pretrial incarceration" are relevant considerations as well. *Parker*, 231 Ariz. at 399, ¶ 16 (quoting *Barker*, 407 U.S. at 532). Vitasek briefly mentions prolonged confinement and anxiety, but does not develop any argument in that regard.

¶23 Vitasek asserts that the victims' memories were diminished by the delay and that the delay gave the victims time to coordinate their versions of the events. But, as witnesses for the State, the victims' uncertainty and any differences between their pretrial interviews and trial testimony would form a basis for impeachment prejudicial to the State's case, not the defense. Vitasek asserts that the delay prevented him from acquiring a copy of his lease to the apartment where he met C.K., Ch.K., and S.K., which he claims would undermine the State's timeline (i.e., he met them during the winter when they were wearing pants, not swimming suits as presented at trial). Setting aside the marginal relevance of this evidence, even based on Vitasek's assertion, the lease was available through at least 2010, giving him several years after arraignment to secure it. He further claims that one witness for the defense was unable to testify because he had joined the military, but Vitasek did not name this man as a witness until mid-trial, and the record does not show that the witness's unavailability was due to pretrial delay. Finally, Vitasek suggests the delay caused loss of

potentially exculpatory evidence because the neighborhood around the house he lived in with M.E. and M.E.'s family had been destroyed to build a freeway. But the freeway went through soon after Vitasek and M.E.'s family moved out, long before Vitasek was charged, much less arrested for these offenses. Any such prejudice did not result from pretrial delay.

¶24 Accordingly, Vitasek has not established a violation of his Sixth Amendment right to a speedy trial.

2. Rule 404(b), (c) Ruling.

¶25 Vitasek next argues the superior court erred by admitting sexual propensity other act evidence—specifically evidence of uncharged sexual contact by Vitasek with charged victims and with other children. We review the superior court's ruling on admissibility of other act evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, 49, ¶ 29 (2004).

¶26 Rule 404(c) of the Arizona Rules of Evidence allows admission of other act evidence in sexual misconduct cases "if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Before allowing this other act evidence, the court must expressly make three specific findings: that the evidence shows the defendant committed the other act, that the other act shows the defendant's aberrant sexual propensity to commit the charged offense, and that the other act's probative value is not substantially outweighed by the danger of unfair prejudice. Ariz. R. Evid. 404(c)(1).

¶27 Vitasek argues that the superior court erred by failing to review the interview recordings containing the 404(c) evidence, instead relying on a summary included in the State's motion. But defense counsel expressly stipulated to the accuracy of the summary and agreed to a ruling based on the summary. Moreover, any procedural error in the court's initial ruling is irrelevant because, after Vitasek moved for reconsideration, the court in fact reviewed the recorded interviews and affirmed the Rule 404 ruling, finding that the recordings supported the factual findings in the initial ruling.

¶28 Vitasek also challenges the substance of the court's other act ruling, asserting that the witnesses' statements were untrustworthy and unreliable and thus should not have been admitted. But the superior court found the offered evidence to be reliable by expressly finding under Rule 404(c)(1)(A) that "[t]he evidence [was] sufficient to permit the trier of fact to find that the Defendant committed the other act" based on the "graphic detail" provided and corroboration among diverse witnesses (including

Vitasek's own statements as recounted by the witnesses). The court expressly distinguished the reliable other act evidence from a portion of the proffered information involving bestiality, which the court found to be unreliable and precluded. "[V]eracity-reliability-credibility questions" beyond this baseline assessment are generally reserved for the jury, not pretrial admissibility rulings. *See State v. LaGrand*, 153 Ariz. 21, 28 (1987).

¶29 The superior court's additional findings under Rule 404(c) were similarly reasonable. The court considered the pattern of behavior demonstrated by the other act evidence—Vitasek targeting young boys (often starting with pre-pubescent boys, but continuing into teenage years) for frequent sexual contact (often starting with simultaneous or mutual masturbation, extending to oral sex, and some anal sex), often for an extended period of time, in Vitasek's or one of the boys' residences. Because the pattern evidenced by the other acts was consistent with the pattern underlying the charged offenses, the court reasonably concluded that the other acts showed that "the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged." *See* Ariz. R. Evid. 404(c)(1)(B).

¶30 And the court properly assessed the probative value of the other act evidence against its risk of unfair prejudice. *See* Ariz. R. Evid. 404(c)(1)(C). Although the other acts spanned a period of years, the evidence showed a pattern of consistent, frequent sexual conduct with particular victims, and thus were not too remote in time. *See* Ariz. R. Evid. 404(c)(1)(C)(i), (iv). The types of victims (young boys) and types of sexual contact (generally self-masturbation, progressing to mutual masturbation, then oral or anal sexual contact) were consistent as between the other acts and the charged offenses. *See* Ariz. R. Evid. 404(c)(1)(C)(ii), (vii). And Vitasek's pattern of meeting new boys through other victims and of building a relationship of trust by providing recreational activities was consistent as between the other acts and the charged offenses. *See* Ariz. R. Evid. 404(c)(1)(C)(v), (vii). Additionally, the court found the proof of the other acts to be compelling, including several specific acts disclosed by multiple witnesses, detailed descriptions, and other corroboration. *See* Ariz. R. Evid. 404(c)(1)(C)(iii), (viii). Accordingly, the superior court did not err by allowing the other act evidence under Rule 404(c).

3. Constitutionality of Rule 404(c).

¶31 Vitasek argues that Rule 404(c) is unconstitutional because it subjects him to trial on out-of-state charges. Specifically, he argues that Rule 404(c): (1) impermissibly permits trial on charges beyond those stated

in the indictment in violation of Arizona Rule of Criminal Procedure 13.5(b), (2) violates the Sixth Amendment's guarantee of trial "by an impartial jury of the State and district wherein the crime shall have been committed," and impermissibly reduces the standard of guilt to clear and convincing evidence rather than beyond a reasonable doubt.

¶32 Vitasek misapprehends the role of Rule 404(c) evidence. Rule 404(c) evidence does not establish new criminal charges; rather, it simply represents evidence of character (aberrant sexual propensity) relevant to the Arizona charges. Moreover, as required by Rule 404(c)(3), the court here properly instructed the jury regarding the proper purpose of sexual propensity evidence—"that the defendant had a character trait that predisposed him to commit the crimes charged"—and properly informed the jury that commission of the other acts does not establish guilt of the charged offenses, and that the other act evidence did not reduce the State's burden of proof to show guilt of the charged offenses. Accordingly, Vitasek has not shown any constitutional deficiency in the application of Rule 404(c).

4. Constitutionality of Victims' Bill of Rights.

¶33 Vitasek next argues that the Victims' Bill of Rights is unconstitutional to the extent it allows a victim to refuse a pretrial interview. Arizona's Victims' Bill of Rights provides that crime victims have a right "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." Ariz. Const. art. II, § 2.1(A)(5).

¶34 Vitasek claims that this provision violates due process by restricting his right to pretrial discovery, which inhibits his confrontation right by requiring him to "interview" the victims only during cross-examination at trial and thereby undermines his right to effective assistance of counsel. But, with limited exceptions, there is no general federal or state right to pretrial discovery. *See, e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 52–53 (1987); *cf. State v. Tucker*, 157 Ariz. 433, 438 (1988) (noting that even though there is no general federal constitutional right to discovery, the State has a constitutional due process obligation to disclose material exculpatory evidence) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). And we have previously upheld a victim's right to refuse a pretrial interview over a defendant's assertion of a right to pretrial discovery. *Norgord v. State ex rel. Berning*, 201 Ariz. 228, 233, ¶ 21 (App. 2001). Similarly, confrontation is a trial right securing cross-examination at trial, and "does not include the power to require the pretrial disclosure of any and all information that

might be useful in contradicting unfavorable testimony." *Ritchie*, 480 U.S. at 53 & n.9. Accordingly, Vitasek's claim of constitutional infirmity fails.

5. *Dessureault* Hearing Regarding C.S.'s Identification.

¶35 Vitasek argues the superior court erred by denying his request for a pretrial *Dessureault* hearing to challenge C.S.'s anticipated in-court identification. *Dessureault* provides a mechanism for assessing whether a pretrial identification procedure was unduly suggestive, and if so, whether the suggestive pretrial identification so taints the anticipated in-court identification as to require exclusion. 104 Ariz. at 384; *see also Neil v. Biggers*, 409 U.S. 188, 199–200 (1972) (setting forth factors to assess reliability in spite of a suggestive pretrial identification procedure).

¶36 Here, however, *Dessureault* is inapposite because C.S. did not participate in a pretrial identification procedure at all. C.S. did not visually identify Vitasek from a photograph or a lineup, but rather simply stated that the perpetrator was M.E.'s dad. Moreover, the issue is moot because the appropriate remedy would have been exclusion of C.S.'s identification, *see Perry v. New Hampshire*, 565 U.S. 228, 232 (2012), and C.S. did not in fact identify Vitasek at trial. Vitasek therefore is not entitled to relief on this basis.

6. Constitutionality of A.R.S. § 13-1417.

¶37 Vitasek argues that A.R.S. § 13-1417—which defines the offense of continuous sexual abuse of a child—is unconstitutional. He claims the statute is duplicitous and fails to give constitutionally adequate notice of the acts alleged, allowing the State to change the allegations without amending the indictment and raising double jeopardy concerns. He specifically argues that here, although the charge was premised on alleged simultaneous self-masturbation, Ch.K.'s trial testimony changed to assert that Vitasek had masturbated him as well.

¶38 A.R.S. § 13-1417(A) defines continuous sexual abuse of a child as "over a period of three months or more in duration engag[ing] in three or more acts in violation of § 13-1405 [sexual conduct with a minor], 13-1406 [sexual assault] or 13-1410 [molestation of a child] with a child who is under fourteen years of age." In *State v. Ramsey*, 211 Ariz. 529 (App. 2005), this court upheld the constitutionality of A.R.S. § 13-1417 over identical arguments. Acknowledging the holding of *Ramsey*, Vitasek argues that his case is distinguishable because Ch.K.'s changed testimony deprived him of notice of the acts underlying the offense. But, consistent with the simultaneous masturbation alleged in the indictment, the jury's guilty

verdict specified that the offense "refers to defendant engaging victim in 20-25 incidents of mutual masturbation, each masturbating himself in the presence of the other." Accordingly, Vitasek has not shown a constitutional violation related to the continuous sexual abuse charge.

¶39 Vitasek further argues that the indictment on this count was procedurally deficient. But, subject to one exception not implicated here, a challenge to the grand jury's probable cause determination must be made by special action before trial, and is not reviewable on direct appeal. *State v. Moody*, 208 Ariz. 424, 439–40, ¶ 31 (2004).

7. A.R.S. § 13-1421 Ruling.

¶40 Vitasek next challenges the superior court's rulings under Arizona's rape shield law, A.R.S. § 13-1421, precluding evidence of the victims' prior sexual conduct. We review the superior court's exclusion of evidence relating to a victim's chastity for an abuse of discretion. *State v. Gilfillan*, 196 Ariz. 396, 405, ¶ 29 (App. 2000).

¶41 Under A.R.S. § 13-1421, evidence of the victim's prior sexual conduct is generally not admissible in sexual offense prosecutions. Specific instances of prior sexual conduct may be admitted, however, if the court finds by clear and convincing evidence that the evidence is "relevant and [] material to a fact in issue," the evidence's "inflammatory or prejudicial nature" does not outweigh its probative value, and (as relevant here) the evidence "supports a claim that the victim has a motive in accusing the defendant of the crime." A.R.S. § 13-1421(A)(3), (B).

¶42 Here, Vitasek claims that the § 13-1421 ruling impermissibly restricted his due process right to present evidence in his own defense and to cross-examine the victims. But these rights are subject to reasonable limitation based on evidentiary rules. *See Holmes v. South Carolina*, 547 U.S. 319, 326 (2006); *State v. Canez*, 202 Ariz. 133, 153, ¶ 62 (2002), *abrogated in part on other grounds by State v. Valenzuela*, 239 Ariz. 299, 303 n.1, ¶ 11 (2016). And this court has previously rejected the same constitutional challenges to § 13-1421. *Gilfillan*, 196 Ariz. at 403, ¶ 23.

¶43 Vitasek further asserts that the evidence of the victims' prior sexual conduct was relevant to establish their motive to falsely accuse him because investigators threatened them with prosecution, which induced the allegations. *See* A.R.S. § 13-1421(A)(3). But, as the superior court noted, Vitasek failed to show (by clear and convincing evidence or otherwise) any link establishing that the allegations against him were motivated by particular prior acts by the victims. Moreover, even under Vitasek's theory,

it was the alleged threats by the detectives, not the underlying prior acts, that arguably could bear on motive to fabricate. Vitasek was in fact permitted to point out perceived inadequacies in the detectives' interview techniques—including the so-called "threats"—to attempt to undermine the integrity of the interviews.

¶44 Accordingly, the superior court did not abuse its discretion by precluding evidence of the victims' prior sexual conduct. And preclusion of this evidence rendered irrelevant Vitasek's requested evidence of some victims' ADHD medications and expert testimony regarding potential sexual side effects (allegedly "creat[ing] propensity for these boy[s] to sexually molest one another"). Accordingly, his argument that the court erred by disallowing the ADHD evidence fails.

8. Use of Victims' Recorded Pretrial Interviews at Trial.

¶45 Vitasek argues the superior court erred by allowing the State to play the victims' recorded interviews for the jury and use the interviews as substantive evidence. We review this evidentiary ruling for an abuse of discretion. *See State v. Alatorre*, 191 Ariz. 208, 211, ¶ 7 (App. 1998), *abrogated in part on other grounds by State v. Ferrero*, 229 Ariz. 239, 241–42, ¶¶ 8–13 (2012).

¶46 Rule 803(5) of the Arizona Rules of Evidence provides a hearsay exception for recorded recollections. To qualify, the recorded recollection must be:

> A record that: (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge.

Ariz. R. Evid. 803(5); *see also Alatorre*, 191 Ariz. at 211–12, ¶¶ 9–10 (noting the requirements for admissibility of a recorded recollection). A video or audio recording may qualify as a "record" for these purposes. *See State v. Martin*, 225 Ariz. 162, 165, ¶ 11 (App. 2010). The record may only be read into evidence, not received as an exhibit for the jury to consider during deliberations, unless offered by an adverse party. *See* Ariz. R. Evid. 803(5); *see also Martin*, 225 Ariz. at 165, ¶ 13.

¶47 Here, the court did not abuse its discretion by admitting the recordings and allowing the State to play them for the jury. Although the victims were able to testify to the offenses in part, they indicated that they

could not remember everything, that they remembered better at the time of the pretrial interviews, and that they had been truthful during the interviews. *See* Ariz. R. Evid. 803(5)(A)–(C); *see also Alatorre*, 191 Ariz. at 212, ¶ 10. Defense counsel acknowledged in the motion for new trial that these foundational requirements for admission under Rule 803(5) were met.

¶48 Vitasek argues that this procedure was improper to refresh the victims' recollections. *See* Ariz. R. Evid. 612 ("Writing Used to Refresh a Witness's Memory"). But the recordings were not used to refresh the victims' memory under Rule 612, but rather were admitted as recorded recollections under Rule 803(5). And although Vitasek asserts that the court only allowed the recordings as rebuttal to the defense claim of improper interview technique and not as substantive evidence, the court's statement on which he relies was made in the context of deferring ruling on admissibility, and the court subsequently issued a written ruling finding the recorded statements to be admissible under Rule 803(5) and *Alatorre*.

¶49 Vitasek also argues that allowing the recorded interviews as substantive evidence violated the Confrontation Clause of the Sixth Amendment. But the victims testified at trial and were subject to cross-examination, so Vitasek's confrontation rights were preserved. *See State v. Salazar*, 216 Ariz. 316, 318–19, ¶¶ 7–10 (App. 2007) (as amended).

9. Amendment of the Indictment.

¶50 Vitasek argues that the court erred by granting the State's mid-trial request to amend the dates of the indictment as to the single count involving C.S. to conform to the evidence at trial. We review the court's order allowing amendment for an abuse of discretion, and because Vitasek objected to the amendment, we determine whether the error (if any) was harmless. *See State v. Freeney*, 223 Ariz. 110, 114, ¶ 26 (2009); *State v. Buccheri-Bianca*, 233 Ariz. 324, 329, ¶ 16 (App. 2013).

¶51 Two trial days before resting its case in chief, the State sought to amend the dates of the C.S. count from between August 1, 2004 and October 31, 2004 to between September 2, 2003 and June 10, 2004. C.S.'s statements in his pretrial interview as well as at trial indicated that the offense occurred at the freeway house when M.E. and Vitasek were living there, in the fall of his sixth grade year. M.E.'s statements in a recorded interview confirmed that the offense occurred at that house.

¶52 The August to October 2004 dates alleged in the indictment were consistent with C.S. being in sixth grade, but the trial evidence showed that M.E. moved out of the house in the summer of 2004 and that the house

was then torn down to make way for a freeway. The State's proposed amendment of September 2003 to June 2004 tracked the dates M.E. lived in the freeway house, and thus conformed to the evidence that the offense occurred there.

¶53 Under Arizona Rule of Criminal Procedure 13.5(b), the indictment is deemed amended to conform to the evidence presented at trial, but if the defendant does not consent to the amendment, the charges may be amended "only to correct mistakes of fact or remedy formal or technical defects." A defect is "formal or technical" if the amendment does not change the nature of the offense or otherwise prejudice the defendant. *State v. Bruce*, 125 Ariz. 421, 423 (1980). A defendant is "necessarily and actually prejudiced" if the amendment results in deprivation of constitutionally adequate notice of the amended charges. *Freeney*, 223 Ariz. at 114, ¶ 26.

¶54 The court did not abuse its discretion by allowing this amendment to conform to the trial evidence. The amendment did not alter the elements of the offense, *see id.* at 113, ¶ 17, and did not modify the nature of the specific acts alleged, *see State v. Johnson*, 198 Ariz. 245, 248–49, ¶¶ 11–12 (App. 2000) (as corrected). Nor did the amendment impermissibly prejudice Vitasek. Vitasek had notice of C.S.'s allegations, including that the sexual contact occurred at the freeway house, giving him ample opportunity to prepare a defense. He had a full opportunity to cross-examine C.S. as well as M.E. about the apparent discrepancy between presence at the freeway house and C.S.'s sixth grade year, and he did in fact press C.S. regarding the dates. *See State v. Barber*, 133 Ariz. 572, 577 (App.), *approved by* 133 Ariz. 549 (1982). And even after amendment, he could still use the date discrepancy to undermine C.S.'s and M.E.'s credibility regarding this offense (just as he could have if the State had not amended the dates). Accordingly, as the amendment did not change the nature of the offense and did not impermissibly prejudice Vitasek, the court did not err by granting the State's request to amend the dates of the indictment to conform to the evidence presented at trial.

10. Prosecutorial Misconduct.

¶55 Vitasek further alleges that the proceedings were marked by "enormous prosecutorial misconduct." Prosecutorial misconduct warrants reversal only if "(1) misconduct is indeed present[,] and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *Moody*, 208 Ariz. at 459, ¶ 145 (citation omitted). A defendant is not entitled to relief based on an assertion

of prosecutorial misconduct unless the misconduct is "so pronounced and persistent that it permeates the entire atmosphere of the trial," rendering "the resulting conviction a denial of due process." *State v. Morris*, 215 Ariz. 324, 335, ¶ 46 (2007) (citations omitted).

¶56 Vitasek claims the State improperly extended the proceedings through alleged intransigence in responding to his repeated discovery requests. But the superior court repeatedly found that the State had complied with its disclosure and discovery obligations. He further asserts that the State improperly used the Victims' Bill of Rights to secure a tactical advantage by preventing pretrial defense interviews with the victims, and then wrongfully failed to disclose that the victims' testimony had changed since their recorded interviews. But he provides only speculation to support his claim, and the prosecutor flatly denied withholding such information. *Cf. State v. Marshall*, 197 Ariz. 496, 500, ¶ 12 (App. 2000) ("Barring willful ignorance or other bad faith, a prosecutor cannot reasonably be required to disclose in advance information the victim unexpectedly reveals for the first time during trial.").

¶57 Vitasek also claims that the State took advantage of newly assigned judges to undermine previous rulings and reargue motions that had been resolved in Vitasek's favor, particularly the admissibility of victims' prior sexual conduct under A.R.S. § 13-1421. The court had not, however, previously granted Vitasek's request to admit this evidence, and had in fact denied his "Motion to Allow Evidence of Complainant's Prior Sexual Conduct." Although he asserts that the State improperly redacted the recordings of the interviews to remove references to the victims' prior sexual conduct, redaction was appropriate given the court's order precluding this material under § 13-1421. To the extent Vitasek argues that these redactions unfairly undermined his defense by removing significant portions of the allegedly improper interview techniques, he offered only two examples for the superior court's consideration, which the court reasonably found insufficient to warrant admission. And Vitasek was in fact permitted to point out perceived inadequacies in the interview techniques to support his argument.

¶58 Vitasek's other examples of alleged misconduct are premised on the alleged impropriety of the rulings we have affirmed above. Accordingly, Vitasek has not shown misconduct, much less pervasive misconduct warranting relief.

II. Fundamental Error Review.

¶59 We have further reviewed the record for reversible error. *See Leon*, 104 Ariz. at 300. Vitasek was present for all stages of the proceedings, and the court properly reset two pretrial hearings and one trial day when he was not present. He was represented by counsel (or assisted by advisory counsel) at all proceedings.

¶60 The record reflects that the superior court afforded Vitasek all his constitutional and statutory rights, and that the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The court conducted appropriate pretrial hearings and made appropriate pretrial rulings on Vitasek's numerous filings, and the evidence presented at trial was sufficient to support the jury's verdicts. Vitasek's sentences fall within the range prescribed by law.

¶61 The superior court did not, however, award presentence incarceration credit to which Vitasek was entitled. A defendant is entitled to credit for all days spent in custody, and a failure to award full credit for time served is fundamental error. *See* A.R.S. § 13-712(B); *State v. Cofield*, 210 Ariz. 84, 86, ¶ 10 (App. 2005). Here, Vitasek was arrested on July 7, 2007, and he was sentenced 1651 days later on January 13, 2012. Vitasek was thus entitled to 1651 days of presentence incarceration credit, and we modify his sentences accordingly.

¶62 Additionally, the superior court ordered at sentencing that Vitasek "submit to DNA testing for law enforcement identification purposes and pay the applicable fee for the cost of that testing in accordance with A.R.S. § 13-610." Although A.R.S. § 13-610 authorizes an order for DNA testing, it does not authorize the sentencing court to require the convicted person to *pay* for the DNA testing. *See State v. Reyes*, 232 Ariz. 468, 472, ¶ 14 (App. 2013). We therefore vacate the portion of the sentencing order requiring Vitasek to pay the cost of his DNA testing. We affirm Vitasek's convictions and sentences in all other respects.

CONCLUSION

¶63 Vitasek's convictions and sentences are affirmed as modified to reflect 1651 days of presentence incarceration credit and to vacate the order that Vitasek pay for his DNA testing.

¶64 After the filing of this decision, defense counsel's obligations pertaining to Vitasek's representation in this appeal will end after informing Vitasek of the outcome of this appeal and his future options,

unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584–85 (1984). On the court's own motion, Vitasek shall have 30 days from the date of this decision to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

AMY M. WOOD • Clerk of the Court
FILED: AA