IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MARGARITO C. ARAIZA, *Appellant*.

No. 1 CA-CR 15-0418
FILED 1-12-2017

Appeal from the Superior Court in Maricopa County
No. CR2013-001129-001
The Honorable Roland J. Steinle, III, Judge (Ret.)

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jillian Francis
Counsel for Appellee

Ballecer & Segal, LLP, Phoenix
By Natalee E. Segal
Counsel for Appellant

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Randall M. Howe joined.

K E S S L E R, Judge:

¶1 Margarito C. Araiza ("Defendant") appeals his convictions and sentences for one count of aggravated assault and twenty counts of various sexual offenses, all committed against minors. He argues the court improperly permitted two of the victims to explain their reasons for testifying at trial and to comment on Defendant's possible sentences. Defendant also contends insufficient evidence supports his conviction for aggravated assault, and he argues the court erred in admitting hearsay evidence that denied Defendant his constitutional right to confront witnesses. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Defendant and AA were married. At the home he shared with AA, Defendant regularly engaged in improper sexual activity with Victims 1 and 2, and on at least two occasions with Victim 3.

¶3 In December 2008, Defendant and AA had an argument about AA being romantically involved with Victim 3's father, and AA called police. Defendant was arrested for outstanding DUI charges, he pled guilty, and was incarcerated in June 2009.[1] Eventually, Victim 3 and his father moved in with AA and her children.

¶4 While Defendant was serving his sentence, Victims 1 and 2 disclosed the sexual abuse to AA, and AA eventually reported the allegations to police. The three victims were forensically interviewed at ChildHelp around March 30, 2009, and police executed a search warrant at the home where some of the abuse allegedly occurred. Based on the results of the investigation, the State charged Defendant with four counts of indecent exposure, class 6 felonies (Counts 1, 14, 15, and 21); six counts of child molestation, class 2 felonies (Counts 2, 3, 11, 13, 20, and 22); one count

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[1] Defendant also plead guilty to an additional charge of forgery.

of voyeurism, a class 5 felony (Count 4); six counts of furnishing obscene or harmful items to minors, class 4 felonies (Counts 5-7 and 16-18); one count of attempting to commit sexual conduct with a minor, a class 3 felony (Count 8); two counts of sexual conduct with a minor, class 2 felonies (Counts 9 and 10); and one count of aggravated assault, a class 6 felony (Count 19).

¶5 At the close of the State's case, the court granted the State's request to dismiss Count 4 due to insufficient evidence. Defendant testified and denied the remaining charges. He argued the victims fabricated the allegations to keep him separated from AA and Victim 3's father as they continued their relationship. The jury found Defendant guilty on all remaining counts. The court imposed a combination of concurrent and consecutive prison terms, the longest of which is life for Count 9. Defendant timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2016), 13-4031 (2010), and 13-4033(A)(1) (2010).[2]

DISCUSSION

I. Testimony of Victims 2 and 3

¶6 During the State's redirect examination of Victim 3, the following questioning transpired:

> Q. When the defense attorney asked you if you were being a team player today, and you said yes; what do you mean?
>
> A. I mean, I'm here to tell him the truth. I'm here to tell everybody the truth. So I'm here for my team to tell the truth.
>
> Q. What you testified about yesterday and today, did [AA] tell you to say those things?
>
> A. No, sir. Not at all.
>
> Q. Did your dad tell you to say those things?
>
> A. No, sir.

[2] Absent material changes from the relevant date, we cite a statute's current version.

> Q. If you had a choice in the matter, would you even really be here?
>
> A. No, not at all.
>
> Q. Are you in school this week?
>
> A. No sir.
>
> Q. How come?
>
> A. I'm on spring break.
>
> Q. Is this the way you want to spend your spring break?
>
> A. No, not at all. No, sir.
>
> Q. Why are you here to testify?
>
> A. *Because I want to see the defendant head to prison for the rest of his life.*

(emphasis added).

¶7 The State questioned Victim 2 on direct examination as follows:

> Q. [Victim 2], do you want to be here today?
>
> A. Not really, but it has to be done. I have to be here.
>
> Q. Why do you have to be here?
>
> A. *Because of him. Because petophilia* [sic] *and what he did to me, and I know it's wrong.*

(emphasis added).

¶8 Defendant argues the emphasized testimony was irrelevant, inflammatory, and improper. He contends the trial court erred by not giving a curative instruction or admonishment to the jury in response to the testimony.

¶9 Defendant did not object to the State's questions that elicited the challenged testimony, and he did not request any action by the court after Victims 2 and 3 testified. Therefore, we review for fundamental error.

State v. Henderson, 210 Ariz. 561, 567, ¶ 19 (2005). To prevail under this standard of review, Defendant must establish that error occurred, that the error was fundamental, and that the error resulted in prejudice. *See id*. at 567, ¶ 20. Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.* at ¶ 19 (quoting *State v. Hunter,* 142 Ariz. 88, 90 (1984)). "Before we may engage in a fundamental error analysis, however, we must first find that the trial court committed some error." *State v. Lavers*, 168 Ariz. 376, 385 (1991).

¶10 We find no error. Victim 3 did not comment on what the possible sentence would be if the jury found Defendant guilty of some or all of the charged offenses. Instead, Victim 3 merely expressed his desire for retribution and that Defendant receive a life sentence. Furthermore, Defendant himself put the victims' reasons for testifying at issue when Defendant asserted during his opening statement that the victims were making false allegations "to keep [Defendant] out of their parents' lives." Defendant also elicited testimony from Victim 3, who testified immediately before Victim 2, that suggested Victim 3 was "being a team player" and conspiring with his father, AA, and the other victims to fabricate the allegations in order to keep Defendant out of their lives. Under these circumstances, the trial court was not required to take corrective action sua sponte in response to the victims' testimony. No error, let alone fundamental error, occurred. *See State v. Boggs*, 218 Ariz. 325, 334, ¶ 36 (2008) (trial court's failure to provide a limiting instruction sua sponte was not fundamental error).

II. Sufficiency of Evidence: Aggravated Assault

¶11 Defendant argues insufficient evidence supports his conviction of aggravated assault, which the State alleged Defendant committed by touching Victim 1's hand, thigh, or buttocks with the intent to provoke him. *See* A.R.S. §§ 13-1203(A)(3) (2010), 13-1204(A)(6) (2016). We disagree.

¶12 The "question of sufficiency of evidence is one of law, subject to de novo review on appeal." *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011). Our review of the sufficiency of evidence is limited to whether substantial evidence exists to support the verdict. *State v. Scott*, 177 Ariz. 131, 138 (1993). Substantial evidence is such proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's

guilt beyond a reasonable doubt." *State v. Mathers*, 165 Ariz. 64, 67 (1990) (quoting *State v. Jones*, 125 Ariz. 417, 419 (1980)).

¶13 We view the record in the light most favorable to upholding the verdicts and resolve all reasonable inferences against the defendant. *State v. Harm*, 236 Ariz. 402, 404 n.2, ¶ 2 (App. 2015) (citations and quotations omitted). We "draw all reasonable inferences that support the verdict," *State v. Fulminante*, 193 Ariz. 485, 494, ¶ 27 (1999), and we resolve any conflict in the evidence in favor of sustaining the verdict, *State v. Guerra*, 161 Ariz. 289, 293 (1989). We will reverse only if a complete absence of probative facts supports the conviction. *State v. Scott*, 113 Ariz. 423, 424-25 (1976). We will not weigh the evidence as that is the function of the jury. *Guerra*, 161 Ariz. at 293. "The finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses." *State v. Cid*, 181 Ariz. 496, 500 (App. 1995). No distinction exists between circumstantial and direct evidence. *State v. Stuard*, 176 Ariz. 589, 603 (1993).

¶14 Victim 1 testified as follows:

> Q. Did he ever touch you on the leg or the hands or any other way?
>
> A. There was [sic] times when he would kind of rub my hands smoothly, but he would mostly touch my butt when I would pass him up or something.
>
> Q. Did you like it when he touched you like that?
>
> A. Of course not.
>
> Q. Did you say anything to him about it?
>
> A. Just, "What's wrong with you?" Usually like, "Hey." I'd just freak out.

¶15 This testimony demonstrates Defendant touched Victim 1 in a sexually suggestive manner, and in response, Victim 1 voiced his displeasure, all of which reasonably infers that Defendant—especially after the first such incident—touched Victim 1 intending to provoke him. *See State v. Murray*, 184 Ariz. 9, 31 (1995) ("The probative value of evidence is not reduced because it is circumstantial."); *State v. Lester*, 11 Ariz. App. 408, 410 (1970) ("[T]he requisite intent is a state of mind which is seldom, if ever, susceptible of proof by direct evidence and must ordinarily be proven by circumstantial evidence.") (citing *State v. Gammons*, 260 N.C. 753 (1963)).

Consequently, sufficient evidence supports the aggravated assault conviction.

III. Admissibility of Video Clips

¶16 Pursuant to Arizona Rule of Evidence ("Rule") 803(5) and over Defendant's objection, the trial court allowed the State to play three short video clips of Victim 2's recorded police interviews for the jury.[3] The State played the three clips during the testimony of the police officer who conducted the interviews.

¶17 Defendant challenges the trial court's decision admitting Victim 2's recorded statements into evidence, which he contends violated his constitutional confrontation rights.[4] *See* U.S. Const. amend. VI. We review the court's decision admitting the evidence for an abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167 (1990). However, we review de novo challenges to admissibility based on the Confrontation Clause. *State v. King*, 213 Ariz. 632, 636 ¶ 15 (App. 2006).

¶18 Rule 803(5) excepts evidence contained in recorded recollections from the general rule prohibiting the admission of hearsay evidence. Ariz. R. Evid. 803(5). The rule defines "recorded recollections" as: "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." *Id*.

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[3] Pursuant to Rule 803(5), the court did not permit admission of the physical recordings into evidence. *See* Ariz. R. Evid. 803(5) ("If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.").

[4] Defendant also argues the court erred in admitting Victim 1's recorded statements. However, the record reflects the court admitted only the video clips of Victim 2's police interview. Moreover, the only relief Defendant requests based on the purported inadmissibility of the recorded statements is to vacate his conviction on Count 9. Count 9 alleged Defendant committed sexual conduct with Victim 2 through digital-anal contact. For these reasons, we do not address any possible error relating to Victim 1's recorded interview, and we address only the evidence relating to Count 9.

¶19 At trial, Victim 2 denied that Defendant digitally penetrated him, and he testified that, during his police interview, he did not allege Defendant did so. Defendant contends these denials do not amount to a "lack of recollection" as is required for admissibility of Victim 2's recorded statement. Defendant also argues that the "recency" requirement was not satisfied for admissibility under Rule 803(5).

¶20 Although Victim 2 denied at trial that Defendant had digitally penetrated him, and he denied making that allegation during his forensic interview, his trial testimony could be construed as Victim 2 merely not remembering those events. Regarding Defendant's conduct that formed the basis of another charged offense, Victim 2 also denied the incident occurred and denied stating in his police interview that the incident occurred. The State immediately asked Victim 2, "Did you tell the police that when you saw that it was the summer of 2008, after 5th grade?" Victim 2 responded "I don't remember." Considering this response in conjunction with the interviewing officer's testimony that Victim 2 talked to him about digital penetration, one could reasonably infer that Victim 2's "denial" testimony was, in fact, a result of his forgetfulness at trial six years after his police interview.

¶21 As for the "recency" requirement Defendant mentions, Rule 803(5) does not have one. The rule merely requires "the matter [to be] fresh in the witness's memory." Rule 803(5)(B). The record reflects Defendant began abusing Victim 2 when the child was in fifth grade and ended in December of the following school year. Victim 2 testified that his memory was better when police interviewed him two to three months after he disclosed the allegations to AA and stated that he told police the truth. Defendant's challenge to the recorded statements based on their timeliness relative to when the underlying event occurred goes to the weight of the evidence, not its admissibility.

¶22 For the foregoing reasons, the State satisfied the foundational requirements of Rule 803(5) for introducing the video clip containing Victim 2's allegation of sexual conduct that supports Defendant's conviction on Count 9. Accordingly, the trial court did not abuse its discretion in finding the video clip admissible under Rule 803(5).

¶23 Regarding the purported violation of his confrontation rights, Defendant asserts that, by admitting the recorded statements after Victim 2 had completed his testimony, Defendant was unable to question Victim 2

about his statements made during the interview.[5] We disagree. Defendant had notice that the State might introduce the recorded interview at trial. Defendant cross-examined Victim 2 and declined to cross-examine the officer who conducted the interview. Thus, Defendant had the opportunity to question both witnesses about the contents of the video clip, and therefore, Defendant's confrontation rights were not violated.[6] *See Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) ("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.") (emphasis in original); *see also California v. Green*, 399 U.S. 149, 162 (1970) ("For where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem.").

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[5] Defendant also argues the prior statements were unduly prejudicial under Rule 403. *See* Ariz. R. Evid. 403 (providing that relevant evidence is subject to exclusion "if its probative value is substantially outweighed by the danger of unfair prejudice."). However, he makes this argument substantively only in the context of admission of prior inconsistent statements, a basis for admission that the trial court expressly did not consider. Defendant summarily asserts Rule 403 prohibited admission of the evidence under Rule 803(5). Accordingly, we do not address this issue. *See State v. Lindner*, 227 Ariz. 69, 70 n.1, ¶ 3 (App. 2010) (appellate court will not address arguments that are not developed in a defendant's opening brief).

[6] We note that the video clips could not be played for the jury until the police officer who conducted Victim 2's interview testified and provided the other foundational requirements for introducing the clips under Rule 803(5). *See United States v. Williams,* 951 F.2d 853, 858 (7th Cir. 1992) (holding that both the person making the statement and the person recording it must testify under Fed. R. Evid. 803(5)).

CONCLUSION

¶24 Defendant's convictions and sentences are affirmed.

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