IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ALFRED CHAVEZ, *Appellant*.

No. 1 CA-CR 15-0527
FILED 3-16-2017

Appeal from the Superior Court in Maricopa County
No. CR2013-116176-001
The Honorable Dean M. Fink, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Linley Wilson
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Terry Reid
Counsel for Appellant

MEMORANDUM DECISION

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

H O W E, Judge:

¶1 Alfred Chavez appeals his convictions and sentences for child molestation. Chavez argues that the trial court erred by allowing other act evidence and by denying his motion to compel the disclosure of a victim's counseling records. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 In 2012, A.S.'s three daughters, S.C., A.C., and A.M. (the "Children"), were taken into State custody. A.S. contacted her cousin, E.C., and asked her to care for the Children until the State returned them to A.S.'s custody. In June 2012, E.C. agreed to care for the Children. At the time, E.C. lived with her husband, five children, and her father, Chavez. Six months later, while the Children were visiting their mother, A.M. and S.C. told their mother that they had been inappropriately touched at E.C.'s home. A.M. and S.C. disclosed that Chavez had molested them, but A.C. denied that any inappropriate touching had occurred. A.S. told E.C. what the Children had said and reported the allegations to the police.

¶3 When a detective from the crimes against children task force initially confronted Chavez with the allegations, Chavez responded by discussing his military service and his experience as a minister, including recounting an incident when he levitated 15 to 20 feet in the air while talking to God. During a second interview, Chavez again relayed war stories and religious experiences rather than directly addressing the allegations.

¶4 The detective also interviewed many of Chavez's family members and several neighbors. E.C.'s daughters denied any sexual abuse, but several other family members and neighbors alleged that Chavez had previously committed acts of sexual abuse, some dating as far back as the

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[1] We view the facts in the light most favorable to sustaining the verdicts. *State v. Payne*, 233 Ariz. 484, 509 ¶ 93, 314 P.3d 1239, 1264 (2013).

1960's. Two victims, A.G.V. and A.N.V., told the detective that Chavez had inappropriately touched them when they were children. After speaking with many victims, the State charged Chavez with one count of sexual abuse and five counts of child molestation. In addition to the Children, the charged victims included A.G.V. and A.N.V.

¶5 The State filed its notice of intent to introduce other act evidence at trial through the testimony of several "uncharged victims" who were interviewed as part of the police investigation. The State disclosed P.R., A.N., D.S., L.M., and A.S. as the "uncharged victims." Chavez did not respond or otherwise object. The trial court held a hearing on the other act evidence. A psychologist who treats sex offenders testified that the other act evidence suggested that Chavez has a character trait of a continuing propensity to commit violent sexual acts. The psychologist then discussed all the similarities between the various acts. After hearing the expert testimony and reviewing the audio recordings of the victims' interviews, the court found that the other acts were admissible pursuant to Arizona Rule of Evidence ("Rule") 404(b) and (c). The trial court found that Rule 403 was satisfied because the probative value was not substantially outweighed by the danger of unfair prejudice. The trial court dismissed the count with A.G.V. as the victim, however, because the State discovered the underlying allegations more than seven years before filing charges, which was beyond the statute of limitations period.

¶6 P.R., A.N., D.S., L.M., and A.S. all testified at trial. When P.R. was 11 years old she attended a family gathering at a lake where Chavez, her former uncle, slid his hand under her bathing suit and digitally penetrated her vagina. When she screamed for him to stop and attempted to create "a scene," Chavez held her underwater with his foot and then told her that he would hurt her mother if she told anyone. Approximately one year later, when P.R. was 12 years old, she spent the night at her aunt and Chavez's house. Chavez woke P.R. up, carried her outside, removed her panties, held her down with one arm, and sexually assaulted her. Although P.R. was injured and bleeding afterward, she never told her parents of the attack. P.R.'s sister A.N. testified that she also spent the night at Chavez's house when she was ten years old. Having been warned by P.R. to stay away from Chavez, A.N. screamed when Chavez woke her by touching her abdomen under her shirt.

¶7 Chavez's former niece D.S. testified that at age 12 or 13 she was babysitting her cousins at Chavez's house when Chavez approached her from behind, fondled her breasts, and rubbed his genitals against her. D.S. became frightened and asked Chavez to stop. A second incident

occurred when D.S. visited her grandmother's house and Chavez grabbed her breasts when she exited the bathroom. She said "[s]top it. I'm going to tell," and then told her mother and grandmother what had happened.

¶8 L.M. testified that Chavez married her much older sister when she was a young child. When L.M. was between 10 and 12 years old, Chavez pulled down her panties and spanked her bare bottom. On another occasion, he touched her genitals while she swam at his house.

¶9 A.S. lived next to Chavez as a child. At age 11 or 12, Chavez drove A.S. on an errand as a favor to her mother and told her that "he had talked to God and God told him that he had to have sex with [her]." A.S. responded that she was only a child and Chavez told her that she "would grow into a beautiful young lady" and "God told [him that she] was the one for [him]." On another occasion, Chavez smacked A.S.'s bottom while she was wearing a bathing suit.

¶10 A.N.V.'s father lived next to Chavez when she was eight to ten years old. While visiting her father, A.N.V. would often swim with other neighborhood children at Chavez's house. On one such occasion, A.N.V. went inside Chavez's house to use the bathroom and Chavez cornered her, touched her genitals over her swimsuit, and asked her whether "it felt good." A.N.V. responded "no" and immediately went outside and told her brother that they needed to leave. When A.N.V.'s father learned of the molestation from his ex-wife, he confronted Chavez and Chavez denied any inappropriate touching.

¶11 S.C. testified that Chavez repeatedly touched her private parts with his hand while she and her sisters lived in his home. She specifically testified to an incident that occurred while she and Chavez were on a couch. She also stated that she saw Chavez touch A.M.'s private parts with his hand. A.M. testified that Chavez was mean, but not that he had inappropriately touched her. A.C. did not respond to questioning at trial.

¶12 On the trial's fifth day, the State disclosed caseworker notes and court reports from the Children's juvenile dependency case. One of the court reports noted that the Children had been in therapy "as a result of the alleged molestations." The following day, Chavez moved to produce the Children's counseling records, arguing that "[d]ue process mandates that [he] be permitted to examine the statements the children have made in counseling regarding these allegations." Specifically, Chavez argued that the counseling records might contain contradictions, identify another

person as the perpetrator of sexual misconduct, or reveal that an adult had encouraged the Children to make false allegations.

¶13 At a hearing on the motion, defense counsel argued that the counseling records might "give rise to any number of impeachment type statements." He further argued that "if there is a single statement, just one comment from any one of these girls to their counselors that differs from their testimony that we anticipate they're going to make, then we have exculpatory information, exculpatory evidence that can be used to impeach them." Defense counsel noted that the Children's accounts of the sexual abuse had varied to some extent between forensic interviews. In S.C.'s first forensic interview she denied seeing Chavez molest her sisters and then claimed that she saw Chavez molest A.M. during the second interview. Likewise, S.C. also initially denied that Chavez had warned her not to speak of the molestation, but then reported in the second interview that Chavez had threatened to hurt her mother if she disclosed the abuse. Defense counsel argued that those variations demonstrated a reasonable probability that the counseling records would contain impeachment material. The prosecutor explained that the State did not have the counseling records and that the victims had invoked their constitutional right to decline to produce them. The trial court found that the State did not have the counseling records and they therefore were not subject to mandatory disclosure. The court also found that Chavez had failed to set forth "a sufficient basis to conclude that there is impeachment material to be found in any counseling records[.]"

¶14 After the State presented its case-in-chief, Chavez moved for judgment of acquittal under Arizona Rule of Criminal Procedure 20. The State, in turn, moved to amend the counts involving S.C., A.C., and A.M. to conform to the evidence, expanding the relevant time period. The trial court granted the State's motion to conform those counts and dismissed the count involving A.C. and one of the counts involving S.C. for lack of evidence. The trial court then instructed the jury that that they could not "convict [Chavez] of the crimes charged simply because [they found] he committed these [other] acts, or that he had a character trait that predisposed him to commit the crimes charged."

¶15 During jury deliberations, the jury submitted a question about the proper use of the other act evidence. The trial court again told the jury that they could use the other act evidence only "to find that [Chavez] had a character trait that predisposed him to commit the crimes charged," and clarified that the propensity evidence did "not lessen the State's burden to prove [Chavez's] guilt beyond a reasonable doubt." The jury found

Chavez guilty of the two counts involving A.N.V. and S.C., but not guilty of the count involving A.M. The trial court sentenced Chavez to a mitigated term of 15 years' imprisonment on one count and a consecutive mitigated term of 15 years' imprisonment on the other. Chavez timely appealed.

DISCUSSION

1. Other Act Evidence

¶16 Chavez argues that the trial court erred by allowing (1) L.M.'s testimony that he spanked her bare bottom, (2) A.N.'s testimony that he touched her abdomen under her shirt, (3) A.S.'s testimony that he told her that God wanted him to have sex with her, and (4) P.R.'s testimony that he had raped her because the testimonies were unduly prejudicial and not probative of an aberrant sexual propensity to commit child molestation. Specifically, Chavez asserts that the trial testimony of L.M., A.N., and A.S. was "needlessly cumulative to other testimony" and that P.R.'s testimony was inflammatory and served only to "cement[] in jurors' minds that [Chavez] was an evil man who deserved to be punished." We review the admission of aberrant sexual propensity evidence for an abuse of discretion. *State v. Garcia*, 200 Ariz. 471, 475 ¶ 25, 28 P.3d 327, 331 (App. 2001). Because Chavez did not object to the admission of any of the propensity evidence, however, we review only for fundamental prejudicial error. *State v. Henderson*, 210 Ariz. 561, 567 ¶¶ 19–20, 115 P.3d 601, 607 (2005).

¶17 In general, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person[.]" Ariz. R. Evid. 404(b). An exception to this prohibition is outlined in Rule 404(c), permitting other act evidence when the defendant is charged with committing a sexual offense and the evidence is "relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Before admitting such evidence, the trial court must find that: (1) sufficient evidence permits the trier of fact to find the defendant committed the other act; (2) the other act evidence provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged; and (3) the probative value of the other act is not substantially outweighed by a danger of unfair prejudice or confusion of the issues under Rule 403. Ariz. R. Evid. 404(c). When conducting the Rule 403 analysis, the court shall consider, among other things, the remoteness of the other act, the similarity or dissimilarity of the other act, the frequency of the other act, the surrounding

circumstances, and any relevant intervening events. Ariz. R. Evid. 404(c)(1)(C).

¶18 In this case, Chavez does not dispute that sufficient evidence supports the trial court's finding that he committed the challenged other acts. He claims without explanation, however, that "[n]one of these incidents were probative of an aberrant sexual propensity to commit molestation of a child[.]" But the record supports the trial court's finding that the other acts were probative of an aberrant propensity to molest children. At the hearing on the admissibility of this evidence, the psychologist testified that the other acts suggest a character trait of a continuing propensity to commit violent sexual acts. The psychologist based his opinion, in part, on Chavez's continued victimization of girls every decade from the 1960's to the present. He also detailed the similarities between the various acts: (1) the victims were all female, (2) the victims were all under 13 years old, the cutoff age for pedophilia, (3) the acts were all direct touchings, (4) the same strategies were used to isolate the victims, and (5) the victims were all Chavez's relatives or neighbors. Given the expert testimony, the similarities between the crimes, the lack of any refutation that the alleged "propensity" acts occurred, and the fact that sexual activity with children is considered aberrant sexual behavior, the trial court did not abuse its discretion by determining that the other act evidence was probative of an aberrant sexual propensity to molest children. *See State v. Dixon*, 226 Ariz. 545, 550 ¶ 15, 250 P.3d 1174, 1179 (2011) (citing Ariz. R. Evid. 404(c)(1)(B), cmt. to 1997 Amend. (finding can be based on "expert testimony" or other facts)); *see also State v. Aguilar*, 209 Ariz. 40, 43 ¶ 11, 97 P.3d 865, 868 (2004).

¶19 Next, relying primarily on *State v. Salazar*, 181 Ariz. 87, 887 P.2d 617 (App. 1994), Chavez contends that the challenged other act evidence was inflammatory and therefore inadmissible. In *Salazar*, the defendant was charged with attempting to molest his 13-year-old niece. *Id.* at 88, 887 P.2d at 618. At trial, the court permitted the State to call three witnesses who testified that Salazar had previously raped them. *Id.* On appeal, this Court concluded that the evidence that Salazar previously raped a 12-year-old girl and a 14-year-old girl was admissible under Rule 404(c), but the details of those rapes that involved other criminal activity (assault, use of a deadly weapon, and repeated rapes) should have been precluded to limit the potential for unfair prejudice. *Id.* at 92, 887 P.2d at 622. This Court further held that the evidence that Salazar raped a 19-year-old woman was "vastly dissimilar" to the act charged, and therefore should have been excluded in its entirety. *Id.*

¶20 Unlike the circumstances in *Salazar*, however, all the other acts in this case were substantially similar, not vastly dissimilar, providing a reasonable basis to infer that Chavez had a character trait giving rise to an aberrant sexual propensity to molest children. Also contrary to *Salazar*, the victims' accounts of child molestation here did not include details of other violent crimes. *Salazar* is therefore inapposite. Indeed, in this case, the record reflects that the trial court carefully analyzed the relevant factors and found that: (1) "the frequency and continuity of the acts renders them not remote as to time," (2) the surrounding circumstances of the acts were quite similar, (3) "the acts themselves were similar in nature," and (4) "[t]here are no relevant intervening circumstances." Thus, the trial court did not abuse its discretion by concluding that their probative value was not substantially outweighed by a danger of unfair prejudice.

¶21 Furthermore, the trial court ameliorated any prejudice that the admission of the other acts could have caused by instructing the jurors on the proper use of the other act evidence before their deliberation. Later, in response to a jury question regarding the permissible use of propensity evidence, the trial court again admonished the jurors on the proper use of the propensity evidence and reaffirmed that the evidence did not change the State's burden to prove Chavez's guilt beyond a reasonable doubt. The jury is presumed to have followed the trial court's instructions, and Chavez has not presented any evidence to overcome this presumption. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Indeed, the jury's acquittal on the count involving A.M. demonstrates that the jurors carefully considered the evidence, and belies Chavez's claim that the jurors simply convicted him because he was an "evil man" deserving of punishment. Therefore, the trial court did not err, much less commit fundamental error, by admitting the propensity evidence.

2. Counseling Records

¶22 Chavez contends that the trial court infringed on his constitutional right to present a complete defense by denying his discovery request for S.C.'s counseling records. We review discovery rulings for an abuse of discretion. *State v. Connor*, 215 Ariz. 553, 557 ¶ 6, 161 P.3d 596, 600 (App. 2007). To the extent a defendant asserts a constitutional claim that the information is critical to his defense, however, we review de novo. *Id.*

¶23 Under the Victim's Bill of Rights, a victim may refuse "discovery request[s] by the defendant." Ariz. Const. art. 2, § 2.1(A); *see also State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 239, 836 P.2d 445, 452 (App. 1992). "[T]his right is not absolute, [however], and in some cases a

victim may be required to produce his or her medical records for *in camera* inspection by the trial court." *State v. Sarullo*, 219 Ariz. 431, 437 ¶ 20, 199 P.3d 686, 692 (App. 2008); *Connor*, 215 Ariz. at 558 ¶ 11, 161 P.3d at 601. In evaluating whether *in camera* inspection is warranted, a trial court must carefully balance a defendant's "constitutional rights to a fair trial with the victim's constitutional right to be free" from "discovery initiated by the defendant." *Connor*, 215 Ariz. at 558 ¶ 9, 161 P.3d at 601. That is, when a "defendant's constitutional right to due process conflicts with the Victim's Bill of Rights in a direct manner," such that the defendant would be precluded "from presenting a theory or defense" if the victim's right to refuse disclosure were upheld, "then due process is the superior right." *Romley*, 172 Ariz. at 236, 836 P.2d at 449.

¶24 Before the defendant is entitled to an *in camera* inspection, however, he must first demonstrate a reasonable probability that the records sought contain information that the defendant needs to fully present his defense or cross-examine witnesses. *Connor*, 215 Ariz. at 558 ¶ 11, 161 P.3d at 601 (upholding the denial of a motion to produce because the defendant failed to present a "sufficiently specific basis" to believe the records contained information that was exculpatory or otherwise essential to his defense); *see also Romley*, 172 Ariz. at 239, 836 P.2d at 452 (explaining that the defendant's due process rights to a fair trial overcome the Victim's Bill of Rights and mandate disclosure when the court determines the victim's medical records are either exculpatory or essential to the presentation of the defense). In the absence of such a showing, a trial court will not err by declining to order production of the requested documents. *Connor*, 215 Ariz. at 558 ¶ 11, 161 P.3d at 601. Finally, we will uphold the trial court's ruling if legally correct for any reason supported by the record. *State v. Canez*, 202 Ariz. 133, 151 ¶ 51, 42 P.3d 564, 582 (2002).

¶25 Applying these principles here, Chavez has failed to demonstrate that his due process rights were violated and evidence essential to his defense was precluded. Defense counsel argued that the counseling records might contain some exculpatory information that would assist the defense. As support for this claim, defense counsel noted that the Children had not been entirely consistent in their forensic interviews. Thus, the forensic interviews provided Chavez with the precise impeachment material he claimed *might* be contained in the counseling records, and he therefore had the full opportunity to present his defense and impeach S.C.'s testimony on cross-examination with her forensic interview statements.

¶26 Moreover, notwithstanding S.C.'s forensic interview inconsistencies, the record reflects that she consistently told her mother,

E.C., and the forensic interviewer, during both interviews, that Chavez had touched her genitals. Because S.C. reported this incident of molestation before beginning counseling, and never wavered from that account, no basis existed to believe that she made contradictory statements regarding that event to her counselor. Therefore, the trial court did not abuse its discretion by denying Chavez's discovery request, finding that he had failed to present a "sufficiently specific basis" to believe the counseling records contained information that was essential to his defense. *See Connor*, 215 Ariz. at 558 ¶ 11, 161 P.3d at 601.

CONCLUSION

¶27 For the foregoing reasons, we affirm Chavez's convictions and sentences.

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