IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MARK DEAN MORGAN, *Appellant*.

No. 1 CA-CR 15-0737
FILED 4-11-2017

Appeal from the Superior Court in Yavapai County
No. P1300CR201300970
The Honorable Jennifer B. Campbell, Judge

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General's Office, Phoenix
By William Scott Simon
Counsel for Appellee

C. Kenneth Ray II, PLLC, Prescott
By C. Kenneth Ray, II
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Kent E. Cattani and Judge Donn Kessler joined.

S W A N N, Judge:

¶1 Mark Dean Morgan appeals his convictions and sentences for two counts of continuous sexual abuse of a child, two counts of luring a minor for sexual exploitation, and one count of misconduct involving weapons. For the following reasons, we affirm Morgan's convictions but, consistent with the State's concession of error, amend the sentence imposed.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to upholding the verdicts and resolve all reasonable inferences against the defendant. *State v. Tison*, 129 Ariz. 546, 552 (1981). The evidence at trial showed that over a period of one to two years, Morgan engaged in sexual conduct "most of the time" and "a lot" with two minor girls. After the girls disclosed that Morgan would ask to "hump" them, Morgan's former wife contacted police who then conducted an investigation. When officers executed a search warrant at Morgan's home, they found on a computer pornography of a type the girls described being shown as well as a shotgun modified unlawfully to be less than 26 inches long.

¶3 The State charged Morgan with two counts of continuous sexual abuse of a child, class 2 felonies and dangerous crimes against children; two counts of aggravated luring a minor for sexual exploitation, class 2 felonies and dangerous crimes against children; two counts of luring a minor for sexual exploitation, class 3 felonies and dangerous crimes against children; and one count of misconduct involving weapons, a class 4 felony ("Count 7"). At trial, the court granted Morgan's motion for judgment of acquittal regarding the two charges of aggravated luring a minor for sexual exploitation.

¶4 The jury found Morgan guilty of the remaining counts. Relating to the continuous sexual abuse offenses, the jury found the State proved two of the four aggravating factors alleged, and the court imposed presumptive 20-year consecutive prison terms. Regarding the remaining

counts, the court suspended imposition of sentence and placed Morgan on lifetime sex offender probation to begin upon his release from prison. Morgan appealed.

DISCUSSION[1]

I. PLAYING OF A PORNOGRAPHIC VIDEO

¶5 During a police interview conducted as part of the investigation, one of the victims disclosed that Morgan had shown her a pornographic video on his computer. She described the video as depicting a man picking up a teenager who was walking home from school before driving to a home where the two engaged in intercourse. Before trial, and under Arizona Rule of Evidence 404(b) and (c), the State moved in limine to admit the video and other pornographic images and videos found on Morgan's computer. The parties eventually agreed that the State could use at trial only the video described by the victim.

¶6 At trial, the victim testified about the video, describing the male character for the first time as a police officer, and she explained that the man and girl "parked and then had sex." The State played for the jury the beginning portion of the video that the victim had described during her police interview, which depicted a man who was not a police officer picking up someone who appeared to be a teenager who was walking home from school.[2] The State's expert, who had viewed the entire video, explained for the jury that the couple in the video did not "have relations in a vehicle[,]" but rather, "[t]hey go back to a home and ultimately engage in sex." The expert also agreed "that in that video there is no character playing a police officer[.]" The video was not admitted into evidence.

¶7 On appeal, Morgan argues the court erred "in failing to reverse its decision to permit admission [of the video]" because the victim's description of the video before trial differed from her trial testimony. But at trial, Morgan agreed that the State could play a portion of the video for the jury conditioned on the State's expert explaining that the couple in the video "went to a house or an apartment and had sex in a room, not a car." We therefore review the court's failure to deny the State's request to play

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[1] We do not address the issue regarding lack of counsel that Morgan raises for the first time in his reply brief. *See State v. Cohen*, 191 Ariz. 471, 474, ¶ 13 (App. 1998).

[2] The "teenager" was actually an adult actress.

the beginning of the video for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). Under this standard, Defendant "bears the burden to establish that (1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice." *State v. James*, 231 Ariz. 490, 493, ¶ 11 (App. 2013) (internal quotation marks and citations omitted).

¶8 The court was not required *sua sponte* to preclude the State from playing the scene from the video. The scene corroborated the victim's testimony regarding Morgan showing her a pornographic video on his computer, which the victim testified Morgan "sometimes" would do before engaging in sexual conduct with her. The video was properly presented to the jury under Rule 404(b).[3] Although the victim inaccurately testified that the video depicted a male police officer, such a discrepancy goes to the weight and credibility of the conflicting evidence, not its admissibility. *See State v. King*, 213 Ariz. 632, 640, ¶ 34 (App. 2006). We also note that Morgan was able to impeach the victim's testimony on the basis that the male actor was not portraying an officer — which was consistent with the approach Morgan sought to take when he stipulated before trial, and then affirmatively agreed at trial, that the State could play the video. Morgan cites no authority that would, under the circumstances present here, require the trial court *sua sponte* to ignore the parties' stipulation and deny the State the opportunity to play the beginning of the video for the jury. No error occurred, much less fundamental error that prejudiced Morgan.[4] *See State*

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[3] Although Rule 404(b) prohibits the admission of prior-act evidence that is used "to prove the character of a person in order to show action in conformity therewith[,]" the rule allows such evidence to be used for "other purposes[.]" Ariz. R. Evid. 404(b); *see State v. Jeffers*, 135 Ariz. 404, 417 (1983) ("The list of 'other purposes' in [R]ule 404(b) . . . is not exclusive; if evidence is relevant for any purpose other than that of showing the defendant's criminal propensities, it is admissible even though it refers to his prior bad acts.").

[4] Morgan asserts cursorily that the State improperly referred to other pornographic images discovered on his computer. We discern no prejudice. The evidence at trial established that Morgan frequently viewed adult pornography on his computer, and the court instructed the jury that viewing pornographic images depicting consenting adults over the age of eighteen was lawful. None of the images or other videos were admitted into evidence or otherwise shown to the jury.

v. Fulminante, 161 Ariz. 237, 248–49 (1989), *aff'd* 449 U.S. 279 (1991) (finding "no error" where defense counsel strategically stipulated to admission of the defendant's prior convictions).

II. JUROR MISCONDUCT

¶9 Morgan argues that Juror 7 slept during the trial, resulting in structural error that requires reversal of his convictions. We disagree.

¶10 During the trial's seventh day, defense counsel expressed concern regarding two jurors who appeared to have fallen asleep at times. Neither the court nor defense counsel were certain that they were sleeping. Defense counsel said Juror 7 may have been taking notes. In any event, the discussion between the court and counsel ended without any request for mistrial or other relief. The court did not commit error, much less structural error.

III. TRIAL JUDGE'S ABSENCE

¶11 During jury deliberations, the trial judge proposed having a different judge accept the verdicts and conduct the aggravation hearing because she was going to be travelling for her honeymoon later in the week. Morgan responded, "That seems fine." Six days later, a different trial judge accepted the verdicts and, the day after that, presided over the aggravation hearing.[5] Morgan argues the trial judge's absence constitutes structural error, requiring automatic reversal.

¶12 Morgan provides no authority for the proposition that structural error occurs when a judge different than the one who presided at trial accepts the jury's verdict and then proceeds to the aggravation phase. We note that the trial judge in this case was present at sentencing and did not impose aggravated sentences. Structural error is error that unfairly "deprive[s] defendants of basic protections," and "infected the entire trial process from beginning to end." *State v. Garza*, 216 Ariz. 56, 63 n.6, ¶ 20 (2007) (*quoting State v. Ring,* 204 Ariz. 534, 552–53 ¶¶ 45–46 (2003)). Examples of structural error include denial of counsel or a biased trial judge. *Id.* The proceedings in this case that occurred in front of a judge

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Morgan also argues in passing that the video *should* have been admitted into evidence as he simultaneously challenges the video's admissibility. We consider these arguments waived.

[5] The aggravation hearing consisted solely of argument; no new evidence was presented.

other than the trial judge did not deprive Morgan of "basic protections" nor did they infect the entire trial. Accordingly, we review for fundamental error. *State v. Soliz*, 223 Ariz. 116, 119, ¶ 11 (2009).

¶13 We find no error occurred, let alone fundamental and prejudicial error. Morgan provides no authority that prohibits the procedure that occurred in this case, and we are aware of none. In the absence of such authority, we decline to find error.

IV. MISCONDUCT INVOLVING WEAPONS: SUFFICIENCY OF EVIDENCE

¶14 As relevant in this case, "A person commits misconduct involving weapons by knowingly . . . possessing . . . any firearm that is made from a rifle or shotgun and that, as modified, has an overall length of less than twenty-six inches." A.R.S. §§ 13-3101(A)(8)(a)(iv), -3102(A)(3). Morgan argues insufficient evidence supports his conviction for misconduct involving weapons because the State failed to prove he knew the shotgun found in his home was less than 26 inches long. Morgan relies on his trial testimony that he, in fact, did not know the firearm's length was less than 26 inches.

¶15 We review a claim of insufficient evidence de novo. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011). Evidence is sufficient when a rational trier of fact could find that it supports defendant's guilt beyond a reasonable doubt. *Tison*, 129 Ariz. at 553.

¶16 We reject Morgan's argument. To convict Morgan on Count 7, the State was not required to prove that he knew the shotgun was less than 26 inches in length, only that he knowingly possessed the firearm. *See State v. Young*, 192 Ariz. 303, 311–12, ¶ 32 (App. 1998) ("[The State] was not obliged to prove [defendant] knew the specific barrel or overall length . . . made it a statutorily prohibited weapon[.]"). Morgan testified that a friend had given him the "small . . . shotgun[, and] I put it in my gun cabinet in the safe and that's where it stayed for 15 years." This testimony establishes that Morgan knowingly possessed a short shotgun. Consequently, sufficient evidence supports his conviction for misconduct involving weapons. *See id.* at 312, ¶ 33.

V. MISCONDUCT INVOLVING WEAPONS: SENTENCE

¶17 Morgan argues lifetime sex offender probation for his misconduct involving weapons conviction constitutes an illegal sentence. The State concedes error, and we agree.

¶18 A court has no jurisdiction to impose probationary terms except as authorized by the legislature. *Coy v. Fields*, 200 Ariz. 442, 444, ¶ 4 (App. 2001). A first conviction for misconduct involving weapons, a class 4 felony, can result in a maximum four-year term of probation. A.R.S. § 13-902(A)(3). The lifetime sex offender probation for Morgan's conviction on Count 7 was therefore fundamental error. *See State v. Bouchier*, 159 Ariz. 346, 347 (App. 1989) (probationary term exceeding that permitted by statute is fundamental error, equivalent to illegal prison sentence).

¶19 Remand for resentencing is unnecessary, however, because the record indicates that the superior court intended to impose the maximum terms of probation. *See State v. Contreras*, 180 Ariz. 450, 453 n.2 (App. 1994) ("When we are able to ascertain the trial court's intention by reference to the record, remand for clarification is unnecessary."). We therefore amend the sentence dated October 27, 2015, to reflect that Morgan's probation for Count 7 is a four-year term commencing upon his discharge from the Arizona Department of Corrections. The sex offender condition of Morgan's probation for Count 7 is removed. The sex offender conditions on the other convictions remain.

CONCLUSION

¶20 The sentence for Morgan's misconduct involving weapons conviction is affirmed as modified. In all other respects, Morgan's convictions and sentences are affirmed.

AMY M. WOOD • Clerk of the Court
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