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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DAVID AUSTIN CRUM, *Appellant*.

No. 1 CA-CR 16-0014
FILED 3-28-2017

Appeal from the Superior Court in Maricopa County
No. CR2013-440987-001
The Honorable Margaret R. Mahoney, Judge

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael Valenzuela
Counsel for Appellee

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

MEMORANDUM DECISION

Judge Maurice Portley delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Patricia A. Orozco joined.[1]

P O R T L E Y, Judge:

¶1 David Austin Crum appeals his convictions and sentences for kidnapping, sexual assault, sexual abuse, and assault. We affirm his convictions and sentences, but vacate the aggravating circumstance of "infliction or threatened infliction of serious physical injury" with respect to Counts 7, 9, and 10, and modify his presentence incarceration credit by increasing it by one day.

FACTS AND PROCEDURAL BACKGROUND

¶2 The trial evidence[2] demonstrated that Crum, who was then 17-years-old, jumped on the back of the victim, a caregiver at his group home. He then choked her, threw her to the floor, and wrestled with her before removing her pants, and tying her wrists and ankles with cable cords. During this time, he kept saying, "I told you, and you wouldn't listen. I told you I would get you. You know, I told you that I didn't like you." He touched her breasts and vagina, and inserted the handle of a bathroom plunger into her vagina. Crum then untied the victim and let her go, but only after he used her phone and sent a text message to her supervisor stating that she was leaving and could not work at the group home anymore, and warned, "Do not text me, or I will call the police."

¶3 A forensic sexual assault nurse found injuries on the victim's body consistent with being strangled and dragged, and extreme swelling of the genitals and bleeding consistent with penetration. The nurse testified that the genital injuries were "new, fresh." The State also produced evidence taken from swabs: a swab of the victim's breast showed a partial

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[1] The Honorable Maurice Portley and the Honorable Patricia A. Orozco, Retired Judges of the Court of Appeals, Division One, have been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

[2] We review the evidence in the light most favorable to sustaining the conviction. *State v. Boozer*, 221 Ariz. 601, 601, ¶2 (App. 2009).

Y-STR profile that matched Crum; a swab from the "plunger handle extension" showed Crum was the major contributor; and a swab from the "plunger handle" showed the victim was the major contributor.

¶4 Moreover, the night of the attack and after he was arrested, Crum told police that he was so "furious" at the victim that he blacked out, and remembered only that he touched her breast outside her clothes while he wrestled with her on the bedroom floor. He said when he came to, she was tied up and naked.

¶5 Crum testified at trial. He told the jury that he had lied to police that night, and that he and the victim had engaged in a "mutually desired sexual encounter," including tying her up, whipping her with a whip she had brought with her, and inserting her dildo into her vagina. Crum testified he became upset when she was leaving, put her in a chokehold from behind, shoved her to the floor, and wrestled with her before letting her go.

¶6 After closing arguments, jury instructions and deliberation, the jury convicted Crum of one count of sexual assault and one count of kidnapping, both class 2 felonies, three counts of sexual abuse, class 5 felonies, and one count of misdemeanor assault, but found him not guilty of four other counts of sexual assault. The jury found several aggravating circumstances related to the felony convictions. Crum was subsequently sentenced as follows: aggravated terms of ten years' imprisonment on the sexual assault and kidnapping convictions, to be served concurrently, with credit for 843 days' presentence incarceration; six months' imprisonment on the misdemeanor assault conviction, with credit for the six months he had served; and he received a suspended sentence on the sexual abuse convictions, and imposed lifetime supervised probation. The court also ordered Crum to register as a sex offender. Crum filed a timely notice of appeal, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

DISCUSSION

I. Preclusion under Rape Shield Law

¶7 Crum argues that the court erred by ruling that the Arizona Rape Shield Law, A.R.S. § 13-1421, precluded him from presenting evidence of the victim's recent sexual activity with another person, which violated his constitutional rights to an opportunity to present a complete defense, and to confront the witnesses against him. Crum sought to admit evidence of semen on the victim's underwear and in her vagina from an unidentified

male, to provide an alternative explanation for the source of the victim's vaginal trauma, given that the forensic nurse was expected to testify the trauma could have been caused by consensual sexual intercourse.[3]

¶8 The court, after a pretrial conference, precluded the evidence "for the reasons cited by the State;" that is, that the victim's prior sexual conduct had only minimal relevance to any permissible purpose under A.R.S. § 13-1421, which was more than outweighed by its inflammatory or prejudicial effect, including the risk that it would distract the jury on an irrelevant collateral issue. We review the decision to preclude evidence under A.R.S. § 13-1421 for an abuse of discretion. *State v. Gilfillan*, 196 Ariz. 396, 404-05, ¶ 29 (App. 2000). But, we review a ruling that implicates a defendant's constitutional rights de novo. *See State v. Ellison*, 213 Ariz. 116, 129, ¶ 42 (2006). And this court "may affirm a court's evidentiary ruling on any basis supported by the record." *State v. Inzunza*, 234 Ariz. 78, 83, ¶ 18 (App. 2014).

¶9 The court did not abuse its discretion, nor did it violate Crum's constitutional rights to confront witnesses against him or the opportunity to present a complete defense. Although the Confrontation Clause of the Sixth Amendment gives a criminal defendant the right to cross-examine the witnesses against him, *Davis v. Alaska*, 415 U.S. 308, 315 (1974), and the Sixth and Fourteenth Amendments guarantee a criminal defendant "a meaningful opportunity to present a complete defense," *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotations and citation omitted), a defendant's right to present evidence is limited to evidence that is relevant and not unduly prejudicial consistent with the applicable rules of evidence, *see Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Section 13-1421 provides that prior sexual conduct is admissible only if the defendant proves by clear and convincing evidence in a hearing after a written motion that (1) "the evidence is relevant and is material to a fact in issue in the case;" (2) the evidence is in pertinent part "of specific instances of sexual activity showing the source or origin of . . . trauma;" and (3) "the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence." A.R.S. § 13-1421(A), (A)(3), and (B); *see*

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[3] In his written motion, Crum sought to introduce evidence only of the semen on the victim's underwear. At the hearing for the first time, he also orally sought to introduce evidence of semen in the victim's vagina. The court was not asked to, and did not, deny the request to introduce evidence of semen in the victim's vagina on the ground it was not included in the written motion required by A.R.S. § 13-1421. Because the court addressed the merits without reference to the procedural impediment, so do we.

State ex rel. Montgomery v. Padilla, 238 Ariz. 560, 564, ¶ 13 (App. 2015). The purpose of A.R.S. § 13–1421 is "to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning any past sexual behavior." *Gilfillan*, 196 Ariz. at 400-01, ¶ 15.

¶10 Here, the fact that the victim had consensual sex with someone else has marginal relevance to Crum's claim that another person could have been the source of the victim's vaginal trauma. The probative value of this evidence, however, depended on how long the sperm might have existed on the underwear or in the victim's vagina *vis a vis* the age of the trauma to the victim's vagina. Crum offered no evidence at the pretrial hearing to link the age of the trauma to the age of the sperm, leaving the court to speculate on whether the semen was deposited at the same time the trauma (which the forensic nurse later described as "new, fresh") was inflicted. The State noted that the lab technician had described the crotch of the underwear as "crusty and stained," and the underwear itself as "fairly worn and dirty," containing traces of hair, dirt, and plant fibers, suggesting that the victim had sex with her consensual partner before this incident, his semen leaked onto her underwear, and she had put the underwear back on without washing it. Crum argued, on the other hand, without any supporting evidence, that the presence of semen on the underwear and on the vaginal swab suggested "recent" sexual activity, which contradicted the victim's report the night of the incident that she had last had consensual sex with her boyfriend two weeks earlier.

¶11 Crum had the burden to show by clear and convincing evidence that the relevance of the prior sexual conduct was not outweighed by the inflammatory or prejudicial nature of the evidence. He failed to offer any evidence in support of his argument. *See State v. Grounds*, 128 Ariz. 14, 15 (1981) ("Argument of counsel is not evidence."). Under these circumstances, Crum has not shown the court abused its discretion in precluding the evidence.

¶12 Nor did the court's preclusion of the evidence violate Crum's constitutional rights. We have held that A.R.S. § 13-1421 is not unconstitutional on its face because the statute "provides procedural safeguards to admit evidence of the victim's prior sexual activity when that evidence has substantial probative value and when alternative evidence tending to prove the issue is not reasonably available." *Gilfillan*, 196 Ariz. at 402-03, ¶¶22-23 (rejecting due process and confrontation challenges to the statute on its face, and as applied to the facts of that case). We have noted, however, that the defendant's constitutional rights might require admission of such evidence notwithstanding the statutory bar. *State ex rel.*

Montgomery v. Duncan, 228 Ariz. 514, 516, ¶ 5 (App. 2011). And as examples of cases where courts held that constitutional rights required admission of evidence of the victim's prior sexual activity because it had "substantial probative value and when alternative evidence tending to prove the issue is not reasonably available," the *Gilfillan* court cited *Olden v. Kentucky*, 488 US. 227 (1988), and *United States v. Bear Stops*, 997 F.2d 451 (8th Cir. 1993). *See Gilfillan*, 196 Ariz. at 403, ¶ 22.

¶13 Although Crum relies on *Olden* and *Bear Stops* for his argument that his constitutional rights were violated by preclusion of the evidence of the victim's prior sexual conduct, those cases are distinguishable because the evidence in those cases indisputably had "substantial probative value." *See Olden*, 488 U.S. at 232-33 (holding that defendant's confrontation rights were violated by preclusion of evidence that victim had an ongoing relationship with a key witness, giving her motive to lie about the sexual encounter out of fear of jeopardizing that relationship); *Bear Stops*, 997 F.2d at 457 (holding that the defendant's right to a fair trial and to confront witnesses was violated by preclusion of the "basic information of the undisputed assault by . . . three boys," to provide an alternative explanation for the victim's behavioral manifestations of a sexually abused child). Here, Crum failed to demonstrate that the evidence had more than minimal relevance, given the lack of evidence regarding when the semen was deposited. Under these circumstances, we cannot say that the court violated Crum's constitutional right to an opportunity to present a complete defense and to confront witnesses against him.

II. Prosecutorial Misconduct

¶14 Crum also argues that the prosecutor engaged in misconduct by arguing that Crum's DNA was on the middle of the plunger handle and the victim's DNA was on the top, when no evidence showed where the DNA had been deposited. To determine whether a prosecutor's remarks are improper, we consider "(1) whether the remarks call to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks." *State v. Jones*, 197 Ariz. 290, 305, ¶ 37 (2000) (internal quotations and citation omitted). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Morris*, 215 Ariz. 324, 335, ¶ 46 (2007) (internal quotations and citation omitted). Because Crum did not object to the argument at trial, we

review this claim of prosecutorial misconduct for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 568, ¶ 22 (2005).

¶15 The prosecutor did not commit misconduct in the closing argument because the argument about the placement of the DNA on the plunger was based on reasonable inferences from the evidence introduced at trial. We have "long recognized that wide latitude is given in closing argument, and that counsel may comment on and argue all inferences which can reasonably be drawn from the evidence adduced at trial." *State v. Woods*, 141 Ariz. 446, 454 (1984). The forensic scientist explained at trial that two swabs were taken from the plunger, one from the "plunger handle," and the other from the "plunger handle extension." Photos of the plunger were admitted into evidence, clearly showing a handle, and what could be described as a "handle extension," the part connecting the handle with the plunger head. The prosecutor's argument that the victim's DNA was on the "top" and Crum's DNA was on the "middle" of the plunger was a reasonable inference from the evidence, and within the wide latitude afforded counsel in closing argument.

¶16 Crum also argues that the prosecutor improperly exploited the preclusion of evidence of prior sexual conduct by arguing that defense counsel's theory -- that the injury to her vagina "could have been caused by something else" and "there should be more injuries" if the victim "was telling the truth about what happened" -- was "unlikely." Because Crum did not object to the argument at trial, we review this claim of prosecutorial misconduct for fundamental error only. *See Henderson*, 210 Ariz. at 568, ¶ 22.

¶17 In the context of the argument, we find no misconduct. The prosecutor's explanation of why the defense theory was "unlikely" was linked to the forensic nurse examiner's testimony that the victim's injuries were consistent with her description of the sexual assault; the adult female's vagina has the ability to stretch significantly without injury, even during childbirth; and the forensic nurse found a fiber in the victim's vagina consistent with the fiber of the carpet in the bedroom in which the victim claimed she had been assaulted. The prosecutor's comments were reasonable inferences from the evidence introduced at trial and, consequently, the court did not abuse its discretion or violate Crum's constitutional rights in precluding the evidence of the victim's prior sexual conduct. Accordingly, we find no fundamental prejudicial error warranting reversal.

III. Aggravating Circumstance

¶18 Crum argues that insufficient evidence supported the jury's finding of infliction or threatened infliction of serious physical injury as an aggravating circumstance with respect to the sexual assault and sexual abuse convictions, and, accordingly, the sexual assault conviction should be remanded for resentencing.

¶19 In aggravation proceedings, the prosecutor informed the court and the jury that he was seeking infliction of or threatened infliction of serious physical injury, as an aggravating circumstance only on the conviction for Count 2, kidnapping. The verdict forms, however, also allowed the jury to find this aggravating circumstance on the sexual assault and sexual abuse convictions, Counts 7-10. In response to the jury's question, "Does 'Aggravator # 1' apply to all counts or just Count 2 as stated by the lawyers?" the court responded without objection, "Yes." The jury found the presence of this aggravator for Counts 2, 7, 9, and 10, but not on Count 8. The court found three other aggravating circumstances on Counts 7, 9, and 10, including physical, emotional, or financial harm to the victim. The court suspended imposition of sentence on Counts 8, 9 and 10, but sentenced Crum to an aggravated term on Count 7, the sexual assault conviction. Crum did not raise any objection to the jury's finding of the aggravating circumstances, or to the sentence imposed on Count 7, limiting us to review his claim for fundamental error only. *See Henderson*, 210 Ariz. at 568, ¶ 22.

¶20 The State agrees that the jury erred in finding infliction of or threatened infliction of serious physical injury as an aggravating circumstance associated with the sexual assault and sexual abuse convictions, and we should amend the sentencing order to dismiss infliction of or threatened infliction of serious physical injury as an aggravator on those counts. We agree. The prosecutor argued that evidence that Crum choked the victim and told her, "I'm going to put you to sleep," demonstrated that during the kidnapping, he threatened to inflict serious physical injury. The evidence, however, was not intended to, and did not, support the finding of this aggravator on the sexual assault and sexual abuse counts.

¶21 Despite the agreement on appeal that the court should not have applied the aggravator for any conviction other than for kidnapping, Crum has failed to demonstrate, on fundamental error review, that his sentence on the sexual assault conviction, Count 7, would not have been aggravated but for the use of this one improper aggravator. In imposing

the aggravated sentence, the court rejected Crum's age and family history as mitigating factors. Although the court noted that it considered "each of those aggravating factors" found by the jury, it explained that imposition of sentence was not a simple "numbers game." The court found that "the aggravation substantially outweighs the mitigation," and placed significant weight on the "profound harm to the victim" as the "most obvious" aggravating factor. Because Crum did not object to the jury's finding or the aggravated sentence on Count 7, he bears the burden of demonstrating prejudice; that is, if the improper factor not been considered, the court would not have imposed an aggravated sentence. Crum argues only that "[g]iven the complexity of the factors affecting sentencing, the record does not support a finding that removal of a circumstance going directly to the harm suffered by the victim would not affect the sentence imposed if the court had not considered that improper factor." The argument relies on speculation, an insufficient basis for prejudice on fundamental error review. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14 (App. 2006).

IV. Presentence Incarceration Credit

¶22 Crum argues that the court short-changed him two days of presentence incarceration credit. The State concedes that Crum should have been given one additional day of credit.

¶23 A defendant is statutorily entitled to credit for "[a]ll time actually spent in custody pursuant to an offense" for which he is being sentenced. A.R.S. § 13-712(B). "Time actually spent in custody refers to actual incarceration in a prison or jail, not simply a restraint on one's freedom." *State v. Carnegie*, 174 Ariz. 452, 453 (App. 1993) (internal quotations and citation omitted). "[F]or purposes of presentence incarceration credit, 'custody' begins when a defendant is booked into a detention facility." *Id.* at 453-54. We exclude from presentence incarceration credit the day the sentence is imposed. *See State v. Hamilton*, 153 Ariz. 244, 245-46 (App. 1987). Failure to grant full credit for presentence incarceration is fundamental error. *State v. Cofield*, 210 Ariz. 84, 86, ¶ 10 (App. 2005).

¶24 Crum was arrested shortly before midnight on August 25, 2013. During the early hours of August 26, 2013, he was taken to a police station and interrogated. There is nothing in the record that suggests he was released at any time prior to trial. The court sentenced Crum on December 18, 2015, and awarded him 843 days of presentence incarceration credit. There were 844 days between August 26, 2013, and the sentencing

hearing on December 18, 2015. Crum accordingly was entitled to 844 days of presentence incarceration credit, one more than he was awarded.

CONCLUSION

¶25 Based on the foregoing, we affirm Crum's convictions and sentences, but dismiss the finding of the aggravating circumstance of infliction or threatened infliction of serious physical injury from Counts 7, 9, and 10, and add one day of presentence incarceration credit to ensure he is credited for 844 days of presentence incarceration credit.

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