IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 01/26/2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA,	)	1 CA-CR 08-0594
	)	1 CA-CR 09-0179 PRPC
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT A
	)	
ROY DORADO,	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
	)	
	)	

Appeal from the Superior Court in Coconino County

Cause No. CR 2007-0931

The Honorable Charles D. Adams, Judge

CONVICTIONS AND SENTENCES AFFIRMED

PCR PETITION FOR REVIEW GRANTED; RELIEF DENIED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and William S. Simon, Assistant Attorney General
Attorneys for Appellee

H. Allen Gerhardt, Coconino County Public Defender — Flagstaff
Attorney for Appellant

P O R T L E Y, Judge

¶1 Roy Dorado ("Dorado") challenges his convictions and sentences for four counts of sexual conduct with a minor and, in a consolidated matter, seeks review of the dismissal of his petition for post-conviction relief filed in the same case.

FACTUAL AND PROCEDURAL HISTORY

¶2 The victim lived with Dorado before he was appointed her legal guardian on May 8, 2006. He was subsequently indicted for four counts of sexual conduct with a minor at least fifteen years of age that allegedly occurred on or between September 21, 2005, and June 21, 2006. The indictment was amended to reflect that Dorado was the victim's legal guardian when he committed two of the acts. As a result, counts 1 and 2 were class 6 felonies and counts 3 and 4 were class 2 felonies. *See* Ariz. Rev. Stat. ("A.R.S") § 13-1405(B) (2001).

¶3 Dorado pled not guilty, but was convicted as charged after a three-day jury trial. He was sentenced to concurrent, mitigated prison terms: ten months for counts 1 and 2, and eight years for counts 3 and 4. Dorado filed a notice of appeal. He also filed a petition for post-conviction relief which was summarily dismissed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21 (2003), 13-4031 (2001), -4033(A) (Supp. 2008).

DISCUSSION

I. Appeal

A. Denial of the Motion to Suppress

¶4 Dorado contends the trial court erred when it denied his motion to suppress inculpatory statements made to the police.[1] He argues his statements were involuntary because the investigating officers threatened to put him in jail if he did not change his story.

¶5 A confession can only be admitted if it was voluntarily given. *See State v. Hall,* 120 Ariz. 454, 457, 586 P.2d 1266, 1269 (1978). If it was induced by a threat or promise it cannot be used at trial. *State v. Amaya-Ruiz*, 166 Ariz. 152, 165, 800 P.2d 1260, 1273 (1990). To determine whether the statement was voluntary, we have to inquire "whether, under the totality of the circumstances, the statement was the product of coercive police tactics." *State v. Lee*, 189 Ariz. 590, 601, 944 P.2d 1204, 1215 (1997). Moreover, if the defendant's will was overborne, the statement is involuntary. *See Dickerson v. United States*, 530 U.S. 428, 434 (2000). In fact, there must be a causal relationship between the coercive action and the defendant's will being overborne. *State v. Boggs*, 218 Ariz. 325, 336, ¶ 44, 185 P.3d 111, 122 (2008).

---

[1] Dorado also admitted that he committed the offenses in a written statement. Because he does not refer to the written statement in his opening brief, we will not address it.

¶6 In deciding the issue, we confine our review to the facts presented at the suppression hearing. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996). We review the facts in the light most favorable to sustaining the ruling on a motion to suppress. *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (1996). We give deference to the trial court's factual findings, *State v. Adams*, 197 Ariz. 569, 572, ¶ 16, 5 P.3d 903, 906 (App. 2000), and we will not disturb a trial court's ruling on a motion to suppress absent clear and manifest error, *Hyde*, 186 Ariz. at 265, 921 P.2d at 668.

¶7 Here, Child Protective Services ("CPS") gave the police a report which indicated that Dorado was involved in a consensual sexual relationship with his ward. The police subsequently contacted Dorado at his apartment and, later that day, he voluntarily went to the police department.

¶8 Once there, Dorado was not handcuffed or arrested, and was free to leave. He was advised of his *Miranda*[2] rights, and waived his rights in writing. He then participated in a pre-polygraph interview and a polygraph examination.

¶9 After the polygraph, he was interviewed in a detective's office. He made incriminating statements and ultimately admitted that he had engaged in sexual intercourse with his teenage ward on four separate occasions. After the

---

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

interview, he wrote a statement confirming his admissions. He was arrested shortly thereafter.

¶10 Dorado argues that two statements made to him during the second interview constituted threats. The first occurred after Dorado was informed of the CPS report, confronted with the portion of the report that stated that one of the two bedrooms in his apartment was used solely for storage and could not have been occupied, and read the portion of the report which stated Dorado and the minor had engaged in sexual intercourse. The detective refused to reveal the identity of the speaker but said, "I'm going to tell you this":

> There are nice things that can be done and there's not nice things that can be done and at this point, I'm to the point I don't want to be nice anymore because I got a – (unintelligible, two people talking at once.)

¶11 According to Dorado, the second threat occurred after the detective continued to accuse him of lying and asked him if he knew how many years in prison he could receive as a result of his actions. The detective then stated:

> If you want to do the lying thing, we got a place where you can do that effectively, Coconino County Jail. That's what it's called. Is that where you want to be?

¶12 Dorado did not, however, make inculpatory statements immediately after the detective's statements. In fact, after the Coconino County Jail statement, the detective implored him to tell the truth and reminded him that he had rated the minor's

honesty as a nine on a scale of one to ten. The detective then told Dorado that the minor had admitted the sex to CPS. Shortly thereafter, Dorado confessed he had sexual intercourse with the victim on four separate occasions.

¶13 Dorado never claimed at the suppression hearing that he confessed because of any threat or intimidation, and only testified that he admitted to the offenses because he was "very tired," decided to "just give it up," and tell the detectives what they wanted to hear.

¶14 The trial court, after considering the testimony, the interview audiotape, and transcript, found that Dorado exhibited "a fair amount of energy" during the interview, and that nothing indicated that Dorado was tired or withdrawn. The court then stated:

> He actively engaged the officers in the dialogue, sometimes responding to questions and sometimes initiating dialogue. He didn't just go along with what they were saying. He disagreed with much of what they said, and in fact, explained himself to them on numerous occasions.

¶15 The court then found that, under the totality of the circumstances, the detective's statement did not induce Dorado to make an inculpatory statement.[3] The court stated:

[3] The court did not address the Coconino County Jail statement.

> So in conclusion, the statement given by Mr. Dorado, the postpolygraph statement, and his handwritten statement were voluntarily given, they were certainly not the product of any promise, not the product of coercion or pressure or improper influence.

¶16 Although the "nice things" statement in the words of the trial court was "pushing it," under the totality of the circumstances, the statement did not coerce Dorado into confessing. He confessed only after learning that the minor told CPS about their sexual relationship. Consequently, the trial court did not abuse its discretion when it denied the motion to suppress.

B. Denial of Unanimous Verdicts

¶17 Dorado next asserts he was denied the right to unanimous verdicts on counts 3 and 4. Specifically, he argues the dates of the offenses were not clarified; the jury was not told that counts 3 and 4 required a finding that they were committed "*when* [Dorado] was the alleged victim's guardian"; and the State told the jurors in closing that they could choose different acts to support the convictions for counts 3 and 4.

1. The Failure to Clarify the Dates of the Offenses

¶18 The indictment alleged counts 3 and 4 occurred on or between September 21, 2005, and June 21, 2006. Dorado argues that because nothing was done to "clarify" the dates of the alleged offenses, he was denied the right to a unanimous verdict on counts 3 and 4. He, however, did not raise the issue below

and has waived any challenge to the sufficiency of the indictment. Ariz. R. Crim. P. 13.5(e); *see State v. Anderson*, 210 Ariz. 327, 335-36, ¶¶ 14-18, 111 P.3d 369, 377-78 (2005).

¶19 Even if the issue had not been waived, we find no error. An indictment is legally sufficient if it informs the defendant of the essential elements of the charge, is definite enough to permit the defendant to prepare to defend against the charge, and affords the defendant protection from subsequent prosecution for the same offense. *See State v. Rickard-Hughes*, 182 Ariz. 273, 275, 895 P.2d 1036, 1038 (App. 1995). "[N]othing more is required than that the indictment [] be a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged." *State v. Magana*, 178 Ariz. 416, 418, 874 P.2d 973, 975 (App. 1994); *see also* Ariz. R. Crim. P. 13.2(a). More specifically, "exact dates are not required so long as they are within the statute of limitation and no prejudice is shown." *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996) (quoting *United States v. Austin*, 448 F.2d 399, 401 (9th Cir. 1971)). The exact date of an offense is not material unless the failure to identify an exact date deprives a defendant of an alibi defense. *State v. Verdugo*, 109 Ariz. 391, 392, 510 P.2d 37, 38 (1973).

¶20 Here, because Dorado's only defense was that the offenses never occurred, it was unnecessary to allege a more

specific range of dates in the indictment. The victim, however, significantly narrowed the time period when she testified that count 3 occurred approximately one week after Dorado was appointed her legal guardian on May 8, 2006, and count 4 occurred approximately one week before he was arrested on June 20, 2006. Therefore, even absent waiver, Dorado suffered no prejudice from the failure to allege more specific dates in the indictment.

2. Jury Instructions Regarding Guardianship

¶21 Dorado next argues he was denied the right to a unanimous verdict because the jury was not advised that counts 3 and 4 required a finding that they were committed "*when* Appellant was the alleged victim's guardian." Because he did not raise this issue below, we limit our review to fundamental error. *See State v. Cordova*, 198 Ariz. 242, 244-45, ¶¶ 10-12, 8 P.3d 1156, 1158-59 (App. 1999) (holding that we review jury instructions only for fundamental error when the defendant failed to timely object). Fundamental error requires the defendant to establish: (1) an error; (2) that the error was fundamental; and (3) that the error resulted in prejudice. *See State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶22 Here, in closing argument, the State noted that counts 3 and 4 were different from counts 1 and 2 because the jury had

to determine if Dorado was the victim's legal guardian at the time of the offenses. *See State v. Johnson*, 205 Ariz. 413, 417, ¶ 11, 72 P.3d 343, 347 (App. 2003) ("[I]n evaluating the jury instructions, we consider the instructions in context and in conjunction with the closing arguments of counsel."). The jury was provided with an instruction defining "legal guardian." The verdict forms for counts 3 and 4 also required the jury to decide whether Dorado "was" or "was not" "the legal guardian . . . at the time of the crime." On each verdict form, the jury checked "was" and, therefore, expressly found Dorado was the minor's legal guardian at the time he committed counts 3 and 4. Thus, the trial court did not err when it instructed the jury on counts 3 and 4.

3. The State's Closing Argument

¶23 Dorado also claims he was denied the right to a unanimous verdict because the State's closing argument told the jurors that they could choose between different acts to convict Dorado of counts 3 and 4.[4] Again, because he did not raise the issue below, our review is limited to fundamental error. *See State v. Stielow*, 14 Ariz. App. 445, 449-50, 484 P.2d 214, 218-

[4] The State argued: "So even though she did describe two separate, entirely separate incidents after the guardianship, if you're at all unsure whether she knew whether the guardianship was in place, you can focus simply on the very last time they had sexual intercourse, and that time she described two separate penetrations."

19 (1971) (holding that we will review an error in the form of the verdict and judgment of guilt for fundamental error when raised for the first time on appeal).

¶24 We addressed a similar issue in *State v. Schroeder,* 167 Ariz. 47, 804 P.2d 776 (App. 1990). In *Schroeder*, the defendant was charged with and convicted of one count of sexual abuse. *Id.* at 51, 804 P.2d at 780. The victim testified about seven separate acts of sexual abuse during the relevant time period. *Id.* On appeal, the defendant argued there was no way to know if the jury reached a unanimous verdict because there was no way to determine on which incident each juror based his or her verdict. *Id.* We found that he suffered no prejudice because his only defense was that the acts never occurred, and the only decision for the jury was whom to believe. *Id.* at 52-53, 804 P.2d at 781-82. We also found that whether the jury found different acts occurred was irrelevant so long as they unanimously agreed the defendant sexually abused the victim. *Id*. at 53, 804 P.2d at 782.

¶25 Likewise, we find Dorado was not prejudiced by the State's argument. First, the victim testified counts 3 and 4 were two separate incidents which occurred nearly a month apart. Further, because Dorado's only defense was the incidents never

occurred, the jury only had to decide whom to believe.[5] As a result, the fact that the jury could have found him guilty of count 3 based on different acts is irrelevant because the jury unanimously agreed Dorado committed two separate acts of sexual conduct with a minor within the relevant time period while he was the victim's guardian. Therefore, we find no error.

C. The Imposition of Sentence

¶26 Dorado argues he was not properly sentenced pursuant to A.R.S. § 13-702.02 (2001)[6] because the trial court did not determine which offenses constituted the first, second or subsequent offenses for sentencing purposes. Because Dorado failed to raise the issue below, our review is limited to fundamental error. *See Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶27 During sentencing, the trial court acknowledged that Dorado was to be sentenced pursuant to § 13-702.02 and identified count 1 as the first offense, count 2 as the second offense, count 3 as the third offense, and count 4 as a subsequent offense. The court then imposed mitigated sentences

---

[5] Dorado did not contest that he was the victim's guardian, nor did he contest when he became her guardian.

[6] The statute provides in general that a person convicted of two or more felony offenses, not committed on the same occasion, but which were consolidated for trial shall be sentenced for the second and subsequent offenses pursuant to § 13-702.02. A.R.S. § 13-702.02(A). This statute was effectively repealed on January 1, 2009. 2008 Ariz. Sess. Laws, ch. 301, § 25 (1st Reg. Sess.).

for each count. Because the court properly sentenced Dorado, we find no error.

D. The Failure to Disqualify Defense Counsel

¶28 Dorado's trial counsel had also represented him in the guardianship proceedings. He now contends that because her name was on the guardianship pleadings, she was a "de facto" trial witness. As a result, he argues the trial court erred when it failed to sua sponte disqualify her pursuant to Arizona Rules of Professional Conduct 3.7(a).

¶29 Rule 3.7(a) provides:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

Ariz. R. Sup. Ct. 42, ER 3.7(a).

¶30 When the issue was brought to the trial court's attention, Dorado's lawyer explained that she had discussed the issue with Dorado and he would waive any potential conflict because he wanted her to continue to represent him. Dorado agreed and acknowledged he and counsel had discussed the issue "quite a bit."

¶31 Based on the record, Dorado waived any potential conflict. *See State v. Islas*, 132 Ariz. 590, 592, 647 P.2d 1188, 1190 (App. 1982) (“a party who participates in or contributes to an error cannot complain of it [on appeal]”).[7] Thus, there was no error.

II. Petition for Review

¶32 Dorado also challenges the dismissal of his petition for post-conviction relief. His petition presented four ineffective assistance of counsel issues.

¶33 To prove a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To demonstrate prejudice, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* A colorable claim must be based on provable reality, not mere speculation. *See State v. Rosario*, 195 Ariz. 264, 268, ¶ 23, 987 P.2d 226, 230

[7] Additionally, Ethical Rule 3.7(a) prohibits a lawyer from representing a party at trial only when “the lawyer is likely to be a necessary witness,” and there was nothing to indicate before or during trial that counsel was “a necessary witness.”

(App. 1999). An evidentiary hearing is unnecessary if the claim is based on mere generalizations. *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985).

A. The Failure to Withdraw

¶34 Dorado first argues counsel was ineffective because she failed to withdraw for the same alleged conflict of interest addressed in ¶ 28. Because he specifically waived any potential conflict, there is no colorable claim of ineffective assistance of counsel.

B. The Chronological Order of the Offenses

¶35 Dorado next argues that his lawyer was ineffective because she failed to have the jury determine the chronological order of the offenses. He cites no authority which would require a jury to determine the chronological order of offenses or which would require defense counsel to seek such a determination. The argument is essentially the one we addressed in earlier ¶¶ 26-27. Because the trial court determined which offenses were the first, second and subsequent offenses for sentencing pursuant to A.R.S. § 13-702.02, Dorado has failed to present a colorable claim of ineffective assistance of counsel.

C. Jury Instructions Regarding Dates Related to Guardianship

¶36 Dorado next contends his lawyer was ineffective because she failed to have the jury instructed about "the importance of dates as related to guardianship." He again argues that the jury was not instructed that they must determine if Dorado was the minor's guardian when counts 3 and 4 were committed and not simply that he was her guardian at some undesignated time. However, because the jury specifically decided that he was the guardian "at the time" counts 3 and 4 were committed, he has failed to present a colorable claim of ineffective assistance of counsel.

D. The Additional Argument on the Motion to Suppress

¶37 Dorado finally argues that his lawyer was ineffective because she failed to argue that his inculpatory statements to the police should also be suppressed because of the Coconino County Jail statement. *See supra* ¶ 11.

¶38 The lawyer's decision to challenge one, but not both statements in the motion to suppress was a matter of trial strategy. Questions of strategy and tactics rest with counsel, *State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984), and strategic choices of counsel "are virtually unchallengeable," *Strickland*, 466 U.S. at 690-91. Moreover, Dorado has failed to show there is a "reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

¶39 Here, the judge who considered the motion to suppress presided over the trial and dismissed Dorado's Rule 32 petition. In fact, in dismissing the petition, the court stated that while counsel did not present the specific argument, "the statement was in evidence for consideration" because it was in both the audiotape and written transcript of the interview and was addressed by defense counsel in her cross-examination. Because the court considered the entire interview in denying the motion, there is nothing to indicate that the trial court ignored the detective's reference to jail in its consideration simply because defense counsel did not raise it as an argument. Accordingly, the court did not err by finding that there was no colorable claim of ineffective assistance of counsel.

CONCLUSION

¶40 Because we find no reversible error, we affirm Dorado's convictions and sentences. We review the dismissal of Dorado's petition for post-conviction relief, but deny relief.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge