

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**

**See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24**



DIVISION ONE  
FILED: 12-24-2009  
PHILIP G. URRY, CLERK  
BY: PJL

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**

STATE OF ARIZONA,	)	1 CA-CR 08-0817
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	<b>MEMORANDUM DECISION</b>
	)	(Not for Publication -
JESSE ALFREDO BACA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-182294-001 SE

The Honorable Silvia R. Arellano, Judge

**AFFIRMED**

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Attorneys for Appellee	

James J. Haas, Maricopa County Public Defender	Phoenix
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Attorneys for Appellant	

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**K E S S L E R**, Judge

¶1 Jesse Alfredo Baca ("Defendant") appeals from his convictions and sentences for two counts of molestation of a child under the age of 15, both class 2 felonies and dangerous crimes against children. Defendant contends the superior court

erred in finding he waived the clergyman-penitent privilege and for subsequently allowing his pastor ("Pastor") to testify about the parties' conversations. For the reasons stated below, we affirm the convictions and sentences.

#### **FACTUAL AND PROCEDURAL HISTORY<sup>1</sup>**

¶12 A.H. was Defendant's stepdaughter. A.H., her half-sister, Mother, and Defendant all lived in Defendant's mother's house where they shared one bedroom ("family's bedroom").

¶13 When A.H. was approximately eight years old and in the third grade, she was watching television and doing homework in the family's bedroom. Defendant entered the family's bedroom, laid down on the bed next to A.H., and rested while A.H. watched television. Defendant reached over and pulled A.H.'s pants down. Although A.H. tried pulling her pants up repeatedly, Defendant kept pulling them back down. Defendant then pulled A.H.'s pants and underwear halfway down her thighs and began touching her vagina with his finger. Defendant told A.H. he would "ground" her if she told anyone about the incident and he bribed A.H. with a Build-a-Bear or "anything [she] wanted." A.H. feared she would get in trouble if she reported the molestation.

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<sup>1</sup> We view the evidence in the light most favorable to sustaining the conviction. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981). Unless otherwise noted, the summary of the evidence is taken from testimony at trial.

¶14 On a different occasion, when A.H. was also eight years old, A.H. was drawing pictures in the family's bedroom. At that time, Defendant walked in, pulled his pants down, and placed A.H.'s hand on his penis while moving it back and forth. A.H. said she felt "uncomfortable" touching Defendant's penis. Again, Defendant warned A.H. that he would punish her if she told anyone about the incident.

¶15 On December 22, 2007, Mother spent time at her sister's house and took A.H. with her. After Defendant became upset with Mother for spending time with her sister instead of him, Mother left to see Defendant. A.H. stayed at her aunt's house and told her aunt about the molestations. After Mother returned to her sister's house later that evening, she learned A.H. had disclosed that Defendant molested her. Mother testified that A.H. was crying, scared, and hunched over when she told Mother about the molestations.

¶16 Mother returned to Defendant's mother's house to confront Defendant. Defendant denied the molestations, asserting A.H. was influenced by something she saw on television. During Mother's confrontation with Defendant, her sister called the police to report the molestations.

¶17 Thereafter, Mother spoke to Defendant about the molestations while she was visiting her father's house. Defendant admitted to Mother that he molested A.H. and he

apologized repeatedly for his actions. Defendant told Mother that he "forced himself" on A.H. and that he had "feelings and urges." A few days later, a detective from the Tempe Police Department called Mother to set up a forensic interview with A.H.

¶18 Defendant moved to exclude Pastor from testifying about statements Defendant made to him about sexual misconduct with A.H. The court held an evidentiary hearing outside the presence of the jury. The court ruled that while Defendant's statements to Pastor were privileged, Defendant had impliedly waived the privilege and permitted Pastor to testify.

¶19 The Pastor testified that on December 24, 2007, Defendant telephoned Pastor sounding distressed because Mother had left him. Two days later, Pastor picked up Defendant and brought him to the church office. There, Defendant told Pastor that adults forced him to engage in sexual activities when he was a teenager and he was doing the same thing to A.H. Defendant indicated he knew Pastor had to take him to the police station to report the molestation conversation. That same day, Pastor drove Defendant and Defendant's close friend ("B") to the police station.

¶10 Upon arriving at the police station, Defendant, B, and Pastor entered the lobby area where Pastor asked to speak to the police. Tempe Police Detective, L.B., of the sex crimes unit,

determined that her partner, Detective R.P., was investigating the molestation case against Defendant. Because Detective R.P. was not working that day, Detective L.B. went to the lobby to speak with Defendant who was sitting with Pastor and B.

¶11 After Detective L.B. escorted Defendant to the private internal lobby, Defendant said he wanted to "face it and not run." Because Detective L.B. was not involved with the case, she took Defendant's contact information so Detective R.P. could contact him for an interview the following day.

¶12 Meanwhile, Pastor waited in the car for Defendant and B. When Defendant and B emerged from the police station, Pastor was surprised that Defendant had not been taken into custody. With Defendant and B waiting outside, Pastor returned to the police station to confirm whether Defendant had to return the following the day.

¶13 On December 27, 2007, Pastor brought Defendant back to the police station to meet with Detective R.P. Detective L.B. conducted a separate interview with Pastor during which Pastor indicated Defendant admitted to molesting A.H. Defendant was taken into custody later that day.

¶14 Also on December 27, 2007, Mother took A.H. to the Tempe Police Department where Detective R.P. conducted a forensic interview of A.H. After the interview, Detective R.P. asked Mother to make a recorded confrontation call to Defendant.

¶15 During the confrontation call, Defendant repeatedly said he was sick, needed help, and that he planned on turning himself in to police. Defendant also indicated he wanted to be in trouble for his actions, which is why he told Pastor about the molestations. Defendant told Mother, referring to Pastor, "Don't you know that by law he's gotta go down and tell 'em what I told him?" During the call, Defendant admitted that A.H. was not lying about the molestations and that he forced A.H. to touch his penis. Further, Defendant admitted to touching A.H.'s bare vagina, and telling her he would buy her things if she kept the molestations a secret. Defendant said he hoped Mother was not recording the conversation and that he did not want her to repeat this information during trial.

¶16 At trial, Defendant testified that he told Pastor that A.H. was abused. Defendant, however, claimed he never admitted to molesting A.H. Instead, Defendant asserted that he merely told Pastor that he was accused of molesting A.H. Defendant also testified that while he was in the church office, Pastor called another clergyman to determine whether he was legally required to report Defendant's statements to police. After Pastor finished the phone call, he indicated he had to report Defendant's conduct to police to avoid losing his counseling license and ability to preach.

¶17 During cross-examination, Defendant admitted to telling Mother that he forced himself on A.H. Defendant claimed he said this because he thought it would save his marriage and keep his family from falling apart. Additionally, Defendant said he spoke to Mother on the telephone on a different occasion during which he repeatedly apologized for molesting A.H. When asked about Pastor, Defendant indicated Pastor was a very honest man who did not lie during his testimony. Defendant, however, did not interpret Pastor's testimony as stating that Defendant admitted to molesting A.H.

¶18 The jury found Defendant guilty of two counts of molestation of a child under the age of 15, both class 2 felonies and dangerous crimes against children, in violation of Arizona Revised Statutes ("A.R.S.") sections 13-1410 (Supp. 2009) and 13-705(P)(1)(d)<sup>2</sup> (Supp. 2009). After finding mitigating factors outweighed the aggravating factors as to both counts, the court sentenced Defendant to ten years' imprisonment on each count, running concurrently. Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the

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<sup>2</sup> We cite to the most current version of a statute when it has not been substantively revised since the date of the offense. For example, if the applicable statutory provision has merely been renumbered, we refer to the statute's current version. Otherwise, we cite to the version in effect on the date of the offense.

Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033 (A)(1) (Supp. 2009).

#### DISCUSSION

¶19 Defendant argues the superior court erred in allowing Pastor to testify about the parties' conversations after the court found Defendant waived the clergyman-penitent privilege. Defendant contends there was no waiver of the privilege because: (1) He never told police that he had molested A.H.; (2) He did not invite the police to speak to Pastor and did not ask Pastor to tell the police about any alleged confession; (3) He never disclosed his communications with Pastor to B; (4) While he thought Pastor had to report his alleged confession to the police, he only learned that from Pastor on the way to the police station; and (5) His admissions to Mother cannot be used to show he waived the clergyman-penitent privilege.

¶20 Generally, we review the question of whether a privilege exists de novo. *State v. Wilson*, 200 Ariz. 390, 393, ¶ 4, 26 P.3d 1161, 1164 (App. 2001) (citations omitted). We also review de novo the question of whether a party has waived a privilege unless that question hinges on resolution of conflicting facts or witness credibility issues. *Id.* (citations omitted). If waiver depends on conflicting facts or witness credibility, we review the superior court's determination for an abuse of discretion. *Flores v. Cooper Tire & Rubber Co.*, 218



Ariz. 52, 57, ¶ 20, 178 P.3d 1176, 1181 (App. 2008) (citation omitted). "An abuse of discretion occurs when 'the reasons given by the court for its action are clearly untenable, legally incorrect or amount to a denial of justice'" or a discretionary finding of fact is not supported by any evidence. *State v. Fish*, 222 Ariz. 109, 114, ¶ 8, 213 P.3d 258, 263 (App. 2009) (citation omitted).

¶21 Under Arizona's duty to report abuse statute, A.R.S. § 13-3620(A) (Supp. 2009), any person:

[W]ho reasonably believes that a minor is or has been the victim of physical injury, abuse, Child [sic] abuse, a reportable offense or neglect that appears to have been inflicted on the minor by other than accidental means . . . shall immediately report or cause reports to be made of this information to a peace officer or to child protective services in the department of economic security, . . . . A member of the clergy, . . . who has received a confidential communication or a confession in that person's role as a member of the clergy . . . *may withhold reporting of the communication or confession if the member of the clergy, . . . determines that it is reasonable and necessary within the concepts of the religion.* This exemption applies only to the communication or confession and not to personal observations the member of the clergy, . . . may otherwise make of the minor.

(emphasis added). Additionally, A.R.S. § 13-3620(L) (Supp. 2009) provides that a member of the clergy, "shall not, without his consent, be examined as a witness concerning any confession made to him in his role as a member of the clergy . . . ." Under A.R.S. § 13-4062(3) (Supp. 2009), a clergyman shall not be

examined as a witness "without consent of the person making the confession, as to any confession made to the clergyman . . . in his professional character in the course of discipline enjoined by the church to which the clergyman . . . belongs." Because the privilege afforded by A.R.S. § 13-4062(3) belongs to the communicant, the "clergyman may not disclose the communicant's confidences without the communicant's consent." *Waters v. O'Connor*, 209 Ariz. 380, 383, ¶ 12, 103 P.3d 292, 295 (App. 2004); see also *Church of Jesus Christ of Latter-Day Saints*, 159 Ariz. 24, 30-32, 764 P.2d 759, 765-67 (App. 1988).

¶22 The clergyman-penitent privilege, like other privileges, "is susceptible to implied waiver through conduct inconsistent with the maintenance of conversational privacy . . . ." *Latter-Day Saints*, 159 Ariz. at 29, 764 P.2d at 764. Waiver may occur through "any course of conduct inconsistent with observance of the privilege.'" *Id.* (citing *Bain v. Super. Ct.*, 148 Ariz. 331, 334, 714 P.2d 824, 827 (1986)). Thus, a minister may be allowed to testify as to the communications made to him when the one making the privileged conversation tells the facts and substance of his communications with the minister to third parties. *Id.* (citations omitted). Accord *State v. Archibeque*, 1 CA-CR 08-0048, slip op. at ¶ 23 (Ariz. App. December 15, 2009).

## I. Defendant Waived the Clergyman-Penitent Privilege<sup>3</sup>

¶23 We need not discuss Defendant's arguments that he did not waive the clergyman-penitent privilege by accompanying Pastor to the police station or disclosing his conduct to B because Defendant impliedly waived the privilege when he disclosed to Mother that he had told Pastor about the molestations. *Latter-Day Saints*, 159 Ariz. at 29, 764 P.2d at 764. Defendant first admitted that he sexually molested A.H. when he spoke to Mother while she was visiting her father's house. During this conversation, Defendant said he "forced himself" on A.H. and that he had "feelings and urges." After Defendant disclosed the molestations to Pastor, and during a

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<sup>3</sup> We disagree with the State's argument that Defendant's communications with Pastor were not privileged because they were not directed to Pastor in his capacity as a spiritual leader, and were not anchored in the ecclesiastical rules, customs and laws. First, the State conceded at trial that "the conversation [Defendant] had with [Pastor] at the church [was] . . . privileged." See *Kelley v. Ariz. Dep't of Corr.*, 154 Ariz. 476, 477, 744 P.2d 3, 5 (1987) (finding points are waived if they were not raised in the trial court). Second, there is evidence in the record indicating Defendant's confessions were directed to Pastor in his capacity as a spiritual leader. Pastor knew Defendant for eight years, married Defendant and Mother, and counseled the parties when they were experiencing troubles at the beginning of their marriage. Additionally, Defendant testified that he contacted Pastor after the molestation allegations because his family was falling apart and he did not know what to do. Consequently, because Defendant contacted Pastor in his capacity as a spiritual leader in the course of Pastor's obligations in the church, we agree the parties' conversation was privileged. A.R.S. § 13-4062(3); *Waters*, 209 Ariz. at 385, ¶ 22, 103 P.3d at 297 (holding A.R.S. § 13-4062(3) "requires [a] confession to be made to a clergyman 'in his professional character' and 'in the course of discipline enjoined by the church to which the clergyman or priest belongs.'").

recorded confrontation call, Defendant again admitted to sexually molesting A.H. Defendant said A.H. was not lying about the molestations because he forced her to touch his penis, admitted to touching A.H.'s bare vagina, and had told her he would buy her things if she kept the molestations a secret. Defendant said he said he was sick, needed help, and that he planned on turning himself in to police. Defendant told Mother that he told Pastor about the molestations because he wanted to be in trouble for his actions. Defendant also told Mother, referring to Pastor, "Don't you know that by law he's gotta go down and tell 'em what I told him?"

¶24 Defendant's conduct shows he did not intend for his communications with Pastor to be privileged because he told Mother that he had told Pastor about the molestations. *Latter-Day Saints*, 159 Ariz. at 29, 764 P.2d at 764 (holding privilege is waived when the person making the privileged conversation tells a third party the substance and the facts of the privileged communication). *Compare Archibeque*, 1 CA-CR 08-0048, slip op. at ¶ 23 (there is no implied waiver when a defendant did not disclose a confession with his clergyman to an individual not present during the confession). Defendant told Mother that he had told Pastor about the molestations. *Supra* ¶ 15. Defendant also acknowledged that Pastor had to report the molestations to authorities. Because Defendant's conduct was

inconsistent with the maintenance of confidentiality, we affirm the superior court's decision that Defendant waived the clergyman-penitent privilege.

¶25 We reject Defendant's argument that he did not waive the clergyman-penitent privilege by making statements to his spouse. Defendant concedes that under Arizona law, his statements to his spouse about his molestation of A.H. are admissible. See A.R.S. § 13-4062(1) (spouses are permitted to testify against one another in criminal prosecutions involving any offense listed under A.R.S. §§ 13-706(F)(1)(f) and (F)(2)(i)(k) (Supp. 2009), which include "any dangerous crime against children" and "sexual conduct with a minor under fifteen years of age."); *State v. Harrod*, 218 Ariz. 268, 274-75, ¶¶ 14-15, 183 P.3d 519, 525-26 (2008) (noting the legislature amended the marital privilege statute by adding an exception to allow spouses to testify against one another in the prosecution of certain offenses).<sup>4</sup> However, Defendant argues that even though his admissions to Mother were admissible, that does not mean such admissions could be used to show he waived the clergyman-penitent privilege.

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<sup>4</sup> Moreover, Defendant failed to assert the spousal privilege during trial, thus waiving the issue about Mother's testimony being privileged. *State v. Romar*, 221 Ariz. 342, 343 n.1, ¶ 1, 212 P.3d 34, 35 n.1 (App. 2009) (holding the appellate court will not consider issues that were not presented to the trial court).

¶126 As discussed above, *supra* ¶ 22, statements by a party to a third person revealing the content and fact of otherwise privileged communications can amount to an implied waiver of the privilege. The fact that A.R.S. § 13-4062(1) negates any privilege to statements made to a spouse about sexual conduct with a minor under fifteen only supports the implied waiver of the clergyman-penitent privilege because it renders the admission to a spouse admissible in court. In any event, Defendant provides no support for his argument that § 13-4062(1) somehow negates the common-law doctrine of implied waiver of a privileged communication.

## **II. Harmless Error**

¶127 Even assuming it was error for the superior court to admit Pastor's testimony, such error was harmless. *State v. Bass*, 198 Ariz. 571, 582, ¶ 45, 12 P.3d 796, 807 (2000). A.H. testified at trial and gave detailed accounts of the molestations. Mother also testified that on two separate occasions, Defendant admitted to molesting A.H. and apologized repeatedly for his actions. *Supra* ¶¶ 7, 15. One of these occasions included a recorded confrontation call made by Mother, which was played to the jury. During the call, Defendant admitted to forcing himself on A.H. and touching her inappropriately. Consequently, Pastor's testimony was merely cumulative of the other overwhelming evidence presented at trial

