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

STATE OF ARIZONA,	)	1 CA-CR 08-0874
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
LARRY EUGENE VARVEL,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-006430-001 DT

The Honorable Roland J. Steinle, Judge

AFFIRMED

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

Droban & Company, PC — Anthem
By Kerrie M. Droban
Attorney for Appellant

P O R T L E Y, Judge

¶1 Defendant, Larry Eugene Varvel, challenges his convictions and sentences. He argues that: (1) there was insufficient evidence to support his conviction for sexual conduct with a minor; and (2) the trial court erred when it admitted an unredacted report of a medical examination of the victim. For the reasons set forth below, we affirm.

FACTS[1] AND PROCEDURAL HISTORY

¶2 The victim is a child who is developmentally delayed, and is Defendant's step-granddaughter. The victim and her mother, Lisa, who is also developmentally delayed, previously lived with Defendant and his wife, Nancy, her maternal grandmother. Defendant and his wife were involved with overseeing the care of both Lisa and her daughter.

¶3 Nancy died on December 1, 2006, after a long illness. After she passed away, Defendant continued to do things with his step-granddaughter, including taking her to church and to the zoo. One night before Christmas in 2006, Lisa and the child spent the night at Defendant's house.

¶4 A few days later, Defendant called Lisa to ask if he could take the child to church. Lisa's son, Sam, who was

[1] We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against the defendant. *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

visiting at the time, answered the phone and asked the child whether she wanted to go to church with Defendant. The child looked at Sam with "fear in her eyes like . . . something had happened," and then told him that Defendant had touched her. This was the first time that Sam had ever seen such a look on the child's face, and the first time she had ever expressed a reluctance to go with Defendant. When he saw the look on her face, Sam told Defendant he would call him back and hung up.

¶5 Sam was confused and upset by his sister's declaration. He immediately took her to the home of Lisa's older sister, his Aunt Darci, to ask her advice on how to proceed. The child "provide[d] details" to Darci about what Defendant had done and why she did not want to go to church with him. The child was "very fearful, very scared, and very upset." Darci had never seen her niece "with the demeanor she had that day." Darci instructed Sam to call the police. Phoenix Police Officers responded and interviewed Sam and Darci separately.

¶6 The following day the child was taken to John C. Lincoln Hospital for an examination. The hospital reported the matter to the Maricopa County Sheriff's Office, and Detective Rodrigo Rojas contacted the family. After he talked to Sam, the detective made arrangements to have the child interviewed and examined at Child Help "because she needed to be interviewed by a more skilled or specially trained forensic interviewer."

¶7 The child was interviewed on January 3, 2007, by Michele Becker ("Becker"), an investigative interview specialist trained in interviewing developmentally delayed children, at the Phoenix Child Help Children's Center. Prior to the interview, Becker reviewed an initial police report, met with Rojas, and also spoke with Darci and Lisa. She then conducted her recorded forensic interview of the child.

¶8 During the interview, the child told Becker that Defendant had "touched her" while her grandmother was in heaven. She explained that the event had occurred at Defendant's house, while mommy was asleep on the couch. The child pointed between her legs and stated that he had put lotion down there, and took off her clothes and "kissed my titties." She also said that Defendant touched her "pee pees" and described Defendant's hand going into her "pee pees."

¶9 Jacqueline Hess ("Hess"), a family nurse practitioner for Child Help, conducted a thorough medical examination of the child. The results of the overall physical and genital examinations rendered "completely normal" results. Hess was not surprised because "more than 95 percent" of children that report sexual abuse have normal examinations. She testified that there were many reasons for the normal examination, including, for example, the amount of time between the event and the examination, the fact that genital tissue heals very rapidly, or

the fact that the type of sexual contact that occurred might not have created any type of injury.

¶10 The detective interviewed Defendant in February 2007, and he denied any wrongdoing. He was arrested in June 2007, and charged with sexual conduct with a minor under the age of fifteen, a Class 2 felony, and dangerous crime against children, and sexual abuse of a minor under the age of fifteen, a Class 3 felony, and dangerous crime against children.[2]

¶11 The jury convicted Defendant on both offenses. The jury also found that the victim was eleven years old at the time of the offenses. For the sexual conduct conviction, Defendant was subsequently sentenced to life without the possibility of parole before having served thirty-five years. He was sentenced to a consecutive five-year prison term for the sexual abuse conviction.

¶12 Defendant appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001) and 13-4033 (Supp. 2008).

DISCUSSION

A. Sufficiency of the Evidence/Sexual Conduct

¶13 Defendant maintains that the trial court erred in denying his motion for judgment of acquittal on the sexual

[2] At trial, the State dismissed with prejudice a third count alleging sexual abuse of the victim's sister.

conduct charge pursuant to Arizona Rule of Civil Procedure 20. He argues that there was insufficient evidence to convict him of the charge because, other than the victim's statements, there was "no physical corroboration of abuse, significant time lapse between reporting and examination (eight days and 120 hours later) sinister motive by relatives to implicate [defendant] in criminal conduct, and no evidence whatsoever of penetration."

¶14 A Rule 20 judgment of acquittal is appropriate only if there is a complete lack of substantial evidence to support a conviction. *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997). "Substantial evidence" is evidence that reasonable persons could accept as sufficient and adequate to support the conclusion that a defendant is guilty beyond a reasonable doubt. *Id*. The evidence may be either direct or circumstantial, and if reasonable minds could differ on the inferences to be drawn from the evidence, then the matter must be submitted to the jury. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). Furthermore, it is the jury's task to determine the credibility of witnesses, *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996), as well as to resolve any inconsistencies in the evidence. *State v. Lee*, 151 Ariz. 428, 429, 728 P.2d 298, 299 (App. 1986).

¶15 A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse with a person under the age of eighteen. A.R.S. § 13-1405(A) (2001). "Sexual intercourse" is defined as "penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva." A.R.S. § 13-1401(3) (2001).

¶16 We review a trial court's denial of a Rule 20 motion for an abuse of discretion and "will reverse only if there is a complete absence of probative facts to support a conviction." *State v. Paris-Sheldon*, 214 Ariz. 500, 510, ¶ 32, 154 P.3d 1046, 1056 (App. 2007) (internal quotations omitted).

¶17 It has long been established in child molestation cases that a defendant may be convicted on the uncorroborated testimony of the child. *State v. Jerousek*, 121 Ariz. 420, 427, 590 P.2d 1366, 1373 (1979) (citing *State v. McFarlin*, 110 Ariz, 225, 228, 517 P.2d 87, 90 (1973)). Because the victim testified that Defendant had touched her between her legs and also testified that his hand had gone "inside where [she went] pee," her testimony alone was sufficient to support the sexual conduct with a minor conviction. In addition, Defendant was able to present the inconsistencies in the victim's testimony and

introduced evidence that suggested that Sam[3] and Darci may have harbored animosities towards him that motivated their actions and tainted the child's testimony. Consequently, the State presented substantial evidence of penetration to warrant a conviction for sexual conduct with a minor. Therefore, the trial court did not abuse its discretion when it denied the Rule 20 motion.[4]

B. Admission of Unredacted Report

¶18 Defendant also maintains that the trial court erred when it admitted Hess's report without redacting certain statements in the report made by Lisa and Becker prior to the child's examination. Defendant contends those statements should have been redacted because they were hearsay and because their

[3] For example, the jury learned that Sam had forged checks in Defendant's name and made certain arrangements concerning Defendant's property for which he had no authority. Sam had not been charged with any offenses connected to that at the time of trial, and the jury learned that the State had agreed to grant Sam immunity against prosecution for any statements he made while under oath.

[4] Defendant also argues that the trial court erred in sentencing him to life imprisonment under A.R.S. § 13-604.01(A) (2006), which was renumbered in 2008 to § 13-705(A), because of the complete lack of "any" evidence of penetration. Based on our finding that there was sufficient evidence, we need not address this argument. Furthermore, subsection C of the statute, under which Defendant maintains he should have been sentenced, is inapplicable because its provisions apply to crimes against minors who are "twelve, thirteen or fourteen years of age" or to child prostitution, sex trafficking or "the continuous sexual abuse of a child," none of which were alleged in this case.

admission violated the Confrontation Clause. U.S. Const. amend. VI.

¶19 We review a trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *State v. Tankersley*, 191 Ariz. 359, 369, 956 P.2d 486, 496 (1998). We review an alleged Confrontation Clause violation de novo. *State v. Bronson*, 204 Ariz. 321, 324, ¶ 14, 63 P.3d 1058, 1061 (App. 2003). In reviewing a Confrontation Clause issue, we review the evidence in the light most favorable to sustaining the convictions. *State v. Alvarez*, 213 Ariz. 467, 468, ¶ 3, 143 P.3d 668, 669 (App. 2006).

1. Hearsay

¶20 In her report, Hess wrote that the child had told Lisa that: (1) during the night they had stayed at Defendant's house, he had taken her to his bedroom and "touched her private part" and (2) "[Defendant] took my clothes off, put lotion on my private part and kissed my titties." The report also noted that the child told Becker that Defendant "touched her pee pee with his finger and it went in her pee pee" and that "lotion had come out of his pee pee."

¶21 When the State sought to admit a copy of Hess's medical report, Defendant objected based on the hearsay rule and the Confrontation Clause. The report was admitted because the "foundation was clearly laid that the statements were taken in

order to render medical treatment and what she did in terms of medical treatment and for medical treatment only." Defendant now argues that the identity of an assailant and other statements attributing fault are not relevant to either diagnosis or treatment.

¶22 Hearsay is a statement, other than one made by a declarant while testifying at a trial or hearing, that is offered into evidence to prove the truth of the matter asserted. Ariz. R. Evid. 801(c). Hearsay is generally not admissible, but under Arizona Rule of Evidence 803(4) there is an exception to the hearsay rule for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history . . . or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

¶23 In *State v. Sullivan*, a doctor noticed lesions on a child's leg during a well-baby examination and asked the child how he got the "owees," to which he responded, "Jesse did it." 187 Ariz. 599, 600, 931 P.2d 1109, 1110 (App. 1996). The trial court admitted the doctor's testimony about the child's statements under Rule 803(4). *Id.* On appeal, we acknowledged "that the identity of the abuser and other statements of fault usually are not admissible under Rule 803(4)," but noted that "the general rule is 'inapplicable in many child abuse cases because the abuser's identity is critical to effective diagnosis

and treatment.'" *Id.* at 602, 931 P.2d at 1112 (quoting *State v. Robinson*, 153 Ariz. 191, 200, 735 P.2d 801, 810 (1987)). We held that whenever the abuser's identity is relevant to proper diagnosis and treatment, the statements fall within Rule 803(4). *Sullivan*, 187 Ariz. at 602, 931 P.2d at 1112. The doctor testified that "it was important for her to determine 'any history about these particular lesions' and that the 'the history is just as important as the physical examination in determining a diagnosis.'" *Id.* Thus, we found no abuse of discretion because the doctor's testimony provided sufficient foundation for admitting the child's statement. *Id.* at 602-03, 931 P.2d at 1112-13.

¶24 At trial, Hess testified that, prior to examining a child, she routinely gathers evidence from the child's guardians or parents to obtain the child's history, including the allegations, and any medical history. She testified that the purpose of the "medical history is for diagnosis and treatment." Here, like in *Sullivan*, the information Hess received informed both the type of physical examination she conducted and the type of biological or physical evidence sought. For example, Hess explained that she conducted a genital exam of the child because there was an allegation of penetration. Thus, because the history was important to the physical examination, the court did not abuse its discretion in admitting the unredacted report.

¶25 Furthermore, the statements contained in the report were not offered to prove that Defendant had molested the child in this case. Instead, as Hess's testimony acknowledged, and the trial court noted, the statements in the report were only intended to explain the information Hess had relied upon in embarking upon her medical examination. To underscore the limited purpose for which the information was to be used, here the court specifically instructed the jury that the statements were being "offered to you for the purposes [sic] for you to understand what information she had when she performed the examination . . . why she did certain things, and not as separate substantive evidence, and you should not consider them as separate, substantive evidence." Therefore, we do not find the court abused its discretion in admitting the statements for this limited purpose.

2. Confrontation Clause

¶26 Similarly, the Confrontation Clause does not bar the use of testimonial statements for purposes other than the truth of the matter asserted. *State v. Ruggiero*, 211 Ariz. 262, 266, ¶ 20, 120 P.3d 690, 694 (App. 2005) (citing *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004)). As noted above, because the statements were not admitted for the truth of the matter asserted, there is no Confrontation Clause violation.

¶27 On appeal, Defendant argues that he had no idea that the trial court would admit the report without redacting the statements. Therefore, according to Defendant, to cross-examine Lisa regarding her "inconsistent statements to Hess" before the report was in evidence would only have drawn unnecessary attention to her statements or had the "effect" of referencing the entire report. However, that was a tactical decision made by trial counsel, and, as such, Defendant is bound by that decision. *See State v. Mata*, 185 Ariz. 319, 335, 916 P.2d 1035, 1051 (1996).

¶28 Furthermore, Defendant does not indicate how the statements made to Hess by either Lisa or Becker were necessarily "inconsistent" with their testimony and we find no indication in the record as well. Both Lisa and Becker testified and there is no indication that they could not have been cross-examined about the statements attributed to them in Hess's report. *See Crawford*, 541 U.S. at 59 n.9 (holding that when a declarant appears for cross-examination at trial, the Confrontation Clause places no constraints on use of prior testimonial statements). Thus, "there was no Confrontation Clause issue because [declarant] testified at trial and was subject to cross-examination." *State v. Lopez*, 217 Ariz. 433, 438, ¶ 17, 175 P.3d 682, 687 (App. 2008).

3. Harmless Error

¶29 Finally, we agree with the State that, even assuming admission of the unredacted report was error, it was harmless beyond a reasonable doubt. The victim testified at trial that the incident occurred at Defendant's house, that Defendant "kissed [her] titties," that he touched her between her legs with his hand and his hand went "inside where [she went] pee." Furthermore, Becker's taped interview was shown to the jury. Therefore, any statements that Lisa or Becker gave Hess were cumulative and harmless. *See State v. Dickens*, 187 Ariz. 1, 19, 926 P.2d 468, 486 (1996) (stating that an admission of hearsay was harmless when it was cumulative to other evidence).

¶30 We conclude that the trial court's admission of the unredacted medical report was not an abuse of discretion.

CONCLUSION

¶31 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge