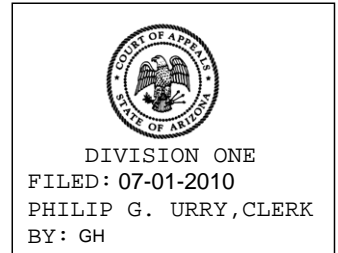


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 08-0962
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
RONALD DICK BUTTERFIELD) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Mohave County

Cause No. CR-2007-1455

The Honorable Lee F. Jantzen, Judge *Pro Tem*

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender Kingman
Attorney for Appellant

W I N T H R O P, Judge

¶1 Ronald Dick Butterfield was convicted of incest, a class 4 felony, and sentenced to the minimum term of 1.5 years' imprisonment. See Ariz. Rev. Stat. ("A.R.S.") §§ 13-3608

(2010), -702(A) (2010).¹ On appeal, Butterfield contends the trial court erred when it admitted hearsay statements the adult victim made to her sister ("Sister") and cousin ("Cousin"). Butterfield further argues that, in the absence of those statements, there was insufficient evidence independent of his own admissions to establish the corpus delicti of the offense. For the reasons that follow, we affirm Butterfield's conviction. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A) (2003), 13-4031 (2010), and -4033 (2010).

I. FACTUAL AND PROCEDURAL HISTORY²

¶12 The victim, who was forty years old at the time of trial, is Butterfield's daughter. The victim asserted her Fifth Amendment rights at a pretrial hearing and stated she would not testify because she did not want to incriminate herself.³ Even though the victim was granted use immunity and was subpoenaed to

¹ We cite the current version of the applicable statutes because no revisions material to our analysis have since occurred.

² "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998) (citation omitted). We do not weigh the evidence, however; that is the function of the jury. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

³ At a subsequent pretrial hearing, Butterfield suggested he and the victim had engaged in sexual acts in other states.

appear at trial, she could not be located at the time of trial and did not testify. Therefore, the only evidence regarding sexual conduct between her and Butterfield consisted of her description of the acts to Sister and Cousin, Butterfield's admissions to a detective, and Butterfield's testimony at trial.

¶13 Sister testified that, during a phone conversation in early 2007, the victim revealed to Sister "that she had sex with my father." Sister later met with the victim at their grandmother's house in February 2007. Sister testified that, while there, the victim "told us that she had sex" with Butterfield, but didn't get into any details until Sister and the victim discussed the incident again when they were together during Easter vacation that year. The victim told Sister that she and Butterfield had sex on the bed in the bedroom of Butterfield's home in Kingman after Butterfield helped her take a bath.

¶14 The victim also stayed with Cousin for a short time during the same trip to see her grandmother in February 2007. Cousin testified the victim informed her that the victim and Butterfield had engaged in sexual activity. Specifically, the victim told Cousin she had taken a bath, and Butterfield insisted on helping to dry her off; that they then went into his bedroom and had sex; that during the encounter Butterfield "went

inside" her; that he also engaged in oral sexual contact; and that the incident occurred in Kingman.

¶15 Butterfield admitted to Sister that he had sex with the victim, but told Sister he had sex with the victim for therapeutic medical purposes. He also admitted to a detective he had sex with the victim. Butterfield admitted he helped the victim take baths and that, at the victim's request, he sometimes masturbated the victim during her baths. He also admitted that, in January 2007 at his home in Kingman, he and the victim had consensual intercourse after they took a bath together. At trial, however, Butterfield testified that he and the victim "did have some sexual activity but it basically is defined as outercourse and never intercourse," and that they engaged in sexual activity only to help the victim's panic attacks. Butterfield also denied that any sexual activity took place in Arizona. Butterfield further testified he lied when he told the detective he and the victim engaged in sexual intercourse and when he told the detective some of the sexual activity took place in Kingman.

II. ANALYSIS

A. Admission of the Victim's Statements

¶16 Butterfield asserts that the trial court erred when it admitted the statements the victim made to Sister and Cousin. He argues the statements constituted hearsay and were not

admissible pursuant to any exception to the hearsay rule. See Ariz. R. Evid. ("Rule") 804.⁴ The trial court found the victim's statements were admissible pursuant to Rule 804(b)(3) as statements against penal interest. The court further found the statements were admissible pursuant to the "catchall" exception found in Rule 804(b)(5) because the statements had equivalent circumstantial guarantees of trustworthiness.

¶7 We review a trial court's evidentiary rulings for a clear abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). Abuse of discretion is "an exercise of discretion which is manifestly unreasonable, exercised on untenable grounds or for untenable reasons." *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992) (citation omitted). In reviewing an exercise of discretion, we must remember:

[T]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge.

Assoc'd Indem. Corp. v. Warner, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985) (quoting *Davis v. Davis*, 78 Ariz. 174, 179, 277 P.2d 261, 265 (1954) (Windes, J., specially concurring)).

⁴ Butterfield presents no issue regarding his right to confront the victim or the trial court's rulings regarding confrontation, and he does not contest that the victim was unavailable for purposes of Rule 804.

1. Admission Pursuant to Rule 804(b)(3)

¶18 Whether a person's statement is against his or her own interest is determined based on the totality of the circumstances. See *State v. Nieto*, 186 Ariz. 449, 455, 924 P.2d 453, 459 (App. 1996). For a statement to be admissible pursuant to Rule 804(b)(3) as a statement against interest, "the declarant must be unavailable, the statement must be against the declarant's interest, and there must be corroborating circumstances that 'clearly indicate the trustworthiness of the [] statement.'" *State v. Tankersley*, 191 Ariz. 359, 370, ¶ 45, 956 P.2d 486, 497 (1998) (citation omitted). Although Rule 804(b)(3) does not require a direct confession in order for a statement to be against penal interest, the statement must implicate the declarant in a crime. *State v. Fisher*, 141 Ariz. 227, 244, 686 P.2d 750, 767 (1984). This includes "disserving statements by a declarant that would have probative value in a trial against the declarant." *Tankersley*, 191 Ariz. at 370, ¶ 46, 956 P.2d at 497 (quoting *State v. LaGrand*, 153 Ariz. 21, 27, 734 P.2d 563, 569 (1987)). Further,

[t]he judge's inquiry should be limited to the question of "whether evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true." If the judge determines that a reasonable person could conclude that the statement could be true, the evidence comes in for the jury's consideration.

State v. Lopez, 159 Ariz. 52, 54-55, 764 P.2d 1111, 1113-14 (1988) (quoting *LaGrand*, 153 Ariz. at 28, 734 P.2d at 570 (internal citation omitted)).

¶9 We find no abuse of discretion in the admission of the victim's statements as statements against interest pursuant to Rule 804(b)(3). The trial court could reasonably have determined the victim's statements were against her penal interest. The victim, a woman over the age of eighteen, admitted she knowingly engaged in sexual intercourse and other proscribed sexual conduct with her father. There is no evidence this conduct was not consensual. She is presumed to know such conduct is illegal, *see, e.g., State v. Soltero*, 205 Ariz. 378, 380, ¶ 7, 71 P.3d 370, 372 (App. 2003), and her statements placed her at risk for prosecution for incest pursuant to A.R.S. § 13-3608 and possibly prosecution in other jurisdictions. The statements would have had probative value in a subsequent trial against the victim, and whether the victim would likely have ever been prosecuted is irrelevant.⁵

¶10 Further, there were corroborating circumstances that indicated the trustworthiness of the victim's statements. See Ariz. R. Evid. 804(b)(3). The victim's statements closely

⁵ There was evidence the victim made some of these statements while taking various prescription medications and/or in various states of mental alertness; however, such facts would go to the weight to be given the evidence by the jury, not its admissibility. See *Lopez*, 159 Ariz. at 55, 764 P.2d at 1114.

paralleled statements Butterfield later made to the detective; the statements were made to members of the victim's own family, thereby exposing her to familial stigma; the victim made the statements more than once to more than one person, and her statements were consistent; the statements were made soon after the event; and the victim would certainly not benefit from the statements due to the familial and social stigma associated with incest. See generally *Tankersley*, 191 Ariz. at 370, ¶ 45, 956 P.2d at 497 (stating that factors used to determine the trustworthiness of a statement against interest include "the existence of supporting and contradictory evidence, the relationship between the declarant and the listener, the relationship between the declarant and the defendant, the number of times the statement was made, the length of time between the event and the statement, the psychological and physical environment at the time of the statement, and whether the declarant would benefit from the statement"). Therefore, the trial court did not abuse its discretion when it held the statements were admissible as statements against interest.

2. *Admission Pursuant to Rule 804(b)(5)*

¶11 Even if we assume *arguendo* that the victim's statements were not admissible under Rule 804(b)(3), such evidence was admissible pursuant to Rule 804(b)(5), the "catchall" exception to the hearsay rule when the declarant is

unavailable. Rule 804(b)(5) permits admission of a statement not covered by one of the other exceptions found in Rule 804 as long as the statement has "equivalent circumstantial guarantees of trustworthiness." The statement must be offered as evidence of a material fact and be more probative on the point for which it is offered than other evidence that can be reasonably procured. Ariz. R. Evid. 804(b)(5). Further, "the general purposes of [the evidentiary] rules and the interests of justice" must be best served by admission of the statement into evidence. *Id.*

¶12 In evaluating the admissibility of evidence under Rule 804(b)(5), the trial court must again consider the totality of the circumstances. *State v. Valencia*, 186 Ariz. 493, 498, 924 P.2d 497, 502 (App. 1996). The court must "look at each case individually and determine the reliability of the particular evidence based on whatever circumstances exist in that situation. This approach requires that the evidence be reliable within the spirit rather than the letter of Rule 804(b)." *State v. Robles*, 135 Ariz. 92, 95, 659 P.2d 645, 648 (1983) (citation omitted). This "allows for judicial discretion to accommodate unusual situations not foreseen by the drafters of the rules when they enumerated the other [] exceptions [contained in Rule 804(b)]." *Id.*

¶13 We find that the trial court did not abuse its discretion when it admitted the victim's statements pursuant to Rule 804(b)(5). The statements of the victim were offered as evidence of a material fact and, with the exception of Butterfield's own admissions, were more probative of whether the incident occurred than any other evidence that could be reasonably procured. The same corroborating factors that indicated the trustworthiness of the victim's statements for purposes of Rule 804(b)(3) also provided the "equivalent circumstantial guarantees of trustworthiness" necessary for admission pursuant to Rule 804(b)(5). Again, the victim admitted to members of her family that she had engaged in consensual sex with her father. This is not something a person would ordinarily admit unless true, regardless whether they believed it was a criminal offense. Further, the victim's statements closely paralleled Butterfield's statements; the victim made the statements more than once to more than one person, and her statements were consistent; the statements were made soon after the event; and the victim would suffer the familial and social stigma associated with incest.

¶14 In summary, we find no abuse of discretion in the admission of the victim's statements pursuant to either Rule 804(b)(3) or Rule 804(b)(5).

B. The Corpus Delicti

¶15 Butterfield further argues that, absent the improperly admitted statements of the victim, there was insufficient evidence to establish the corpus delicti of the offense because the only other evidence of the crime consisted of his own statements. "A defendant may not be convicted of a crime based upon an uncorroborated confession without independent proof of the corpus delicti, or the 'body of the crime.'" *State v. Nieves*, 207 Ariz. 438, 440, ¶ 7, 87 P.3d 851, 853 (App. 2004) (quoting *State v. Morgan*, 204 Ariz. 166, 170, ¶ 15, 61 P.3d 460, 464 (App. 2002)). "The corpus delicti rule requires that, before a defendant's statements are admissible as evidence of a crime, the State must show both proof of a crime and that someone is responsible for that crime." *Id.* (citation omitted). The purpose of the corpus delicti rule is "to prevent a conviction based solely on an individual's uncorroborated confession, the concern being that such a confession could be false and the conviction thereby lack fundamental fairness." *Id.* (quoting *State v. Flores*, 202 Ariz. 221, 222, ¶ 5, 42 P.3d 1186, 1187 (App. 2002)).⁶

¶16 We find no error. We have already determined that the trial court did not abuse its discretion when it held the

⁶ Despite the State's contentions to the contrary, the corpus delicti rule remains valid and applicable in Arizona. *Nieves*, 207 Ariz. at 444, ¶ 29, 87 P.3d at 857.

victim's statements were admissible pursuant to Rule 804(b). Therefore, the State established the corpus delicti of the offense independent of Butterfield's extrajudicial statements and his trial testimony.

III. CONCLUSION

¶17 Finding no error, we affirm Butterfield's conviction.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PATRICIA A. OROZCO, Presiding Judge

_____/S/_____
DANIEL A. BARKER, Judge