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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



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FILED: 07-13-2010
PHILIP G. URRY, CLERK
BY: DN

STATE OF ARIZONA,) 1 CA-CR 08-1058
)
Appellee,) DEPARTMENT D
)
v.) MEMORANDUM DECISION
)
GARY LAWRENCE THOMPSON,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CR-0020080255

The Honorable Thomas B. Lindberg, Judge

AFFIRMED

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

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Attorney for Appellant

T H O M P S O N, Judge

¶1 Gary Lawrence Thompson appeals his convictions for two counts of sexual conduct with a minor and one count of

molestation of a child. Thompson presents two issues on appeal. Thompson argues the trial court erred when it admitted evidence of other acts pursuant to Arizona Rule of Evidence 404(c) and when it denied his motion for mistrial after a witness referenced inadmissible hearsay during her testimony. For the reasons that follow, we affirm Thompson's convictions.

I. Factual and Procedural History

¶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). Thompson was charged with two counts of sexual conduct with a minor and five counts of molestation of a child. The victims were two young girls; "EB", who was four years old at the time of trial, and "NS", who was nine years old at the time of trial.¹ The evidence introduced at trial showed Thompson engaged in oral sexual contact with EB and NS and also made NS rub lotion on his penis. Additional details are discussed in the context of the issues addressed below.

¶3 At the close of the State's case, the trial court granted Thompson's motion for judgment of acquittal on one count of molestation of a child. The jury acquitted Thompson of a

¹ We use initials to preserve the privacy of the victims and witnesses.

second count of molestation of a child. While Thompson was found guilty of two other counts of molestation of a child, those counts were dismissed prior to sentencing. Thompson was ultimately convicted of sexual conduct with a minor for his conduct with EB and sexual conduct with a minor and molestation of a child for his conduct with NS. Thompson does not contest the sufficiency of the evidence to support his convictions.

¶4 Thompson was sentenced to mandatory terms of life imprisonment with a possibility of parole after thirty-five years for each count of sexual conduct with a minor, as well as a presumptive term of seventeen years' imprisonment for molestation of a child. See Ariz. Rev. Stat. ("A.R.S.") §§ 13-604.01 (A), (D)(2008). The sentences were ordered to be served consecutively as mandated by A.R.S. § 13-604.01(L)(2008). We have jurisdiction pursuant to Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(2003), 13-4031 (2010) and 13-4033 (2010).

II. The Admission of Evidence of Other Acts

¶5 As the first issue on appeal, Thompson asserts the trial court erred when it admitted evidence of prior sexual acts pursuant to Arizona Rule of Evidence 404(c). Thompson committed the acts with two prepubescent girls approximately thirteen to fourteen years before the charged incidents. Thompson argues evidence of the prior acts was inadmissible because the acts

were too remote, there was insufficient evidence to establish the prior acts occurred, and that the trial court failed to conduct a sufficient analysis of the probative value of the evidence versus the danger of unfair prejudice or other factors identified in Arizona Rule of Evidence 403.²

¶6 We review the admission of evidence pursuant to Rule 404(c) for an abuse of discretion. *State v. Garcia*, 200 Ariz. 471, 475, ¶ 25, 28 P.3d 327, 331 (App. 2001). "Evidence of an emotional propensity to commit aberrant sexual acts is admissible to prove that an accused acted in conformity therewith." *State v. Arner*, 195 Ariz. 394, 395 ¶ 3, 988 P.2d 1120, 1121 (App. 1999). Rule 404(c) "permits the admission of evidence of uncharged acts to establish 'that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.'" *Garcia*, 200 Ariz. at 475, ¶ 26, 28 P.3d at 331; Ariz. R. Evid. 404(c). Before admitting evidence pursuant to Rule 404(c), the trial court must specifically find:

(A) The evidence is sufficient to permit the trier of fact to find the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer the defendant had a

² Thompson raises no issue regarding the similarity of the prior acts to the charged acts or whether the prior acts provide a reasonable basis to infer Thompson had a character trait giving rise to an aberrant sexual propensity to commit the crimes charged. See Ariz. R. Evid. 404(c)(1)(B).

character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403.

Finally, the court must give a limiting instruction as to the proper use of such evidence. Ariz. R. Evid. 404(c)(2); *Garcia*, 200 Ariz. at 475-76, ¶ 27, 28 P.3d at 331-32.

¶7 The trial court held an evidentiary hearing prior to trial to determine the admissibility of the evidence. The first victim, "JP," was twenty-one years old at the time of the hearing. JP testified Thompson began molesting her when she was six and continued to do so until she was eight. During that time, Thompson digitally penetrated JP's vagina and engaged in oral sexual contact with her. He also made JP masturbate him with her hands. The incidents took place while JP was being babysat by Thompson's wife at the "daycare center" she operated from their home. JP testified similarly at trial. While these incidents were investigated, no charges were ever filed

¶8 The second victim, "JC," was nineteen years old at the time of the hearing. JC testified Thompson molested her when she was four or five years old. While JC also attended the daycare center operated by Thompson's wife, JC testified the incident occurred when she went to Thompson's home to play with other children. JC testified that while she was at Thompson's

home, Thompson opened his robe and "flashed" her. He later had JC sit on his lap, during which he digitally penetrated her vagina and made JC place her hand on his penis but over his robe. JC testified similarly at trial. While this incident was investigated, no charges were ever filed.

¶9 A psychologist also testified at the evidentiary hearing. Expert testimony is not required to establish relevancy for purposes of Rule 404(c). "As long as there is a 'reasonable basis,' by way of expert testimony or otherwise, to conclude that the commission of the other act permits an inference that a defendant's aberrant sexual propensity is probative, the evidence is admissible." *Arner*, 195 Ariz. at 396, ¶ 5, 988 P.2d at 1122. Even so, the psychologist testified in relevant part that the prior acts met the criteria to provide a reasonable basis to infer Thompson had a character trait giving rise to an aberrant sexual propensity to commit the charged offenses. The psychologist further testified the prior acts met this criteria despite the amount of time that had passed and were, therefore, not too remote to the charged offenses.

¶10 The trial court held the prior acts were admissible pursuant to Rule 404(c). The court held there was clear and convincing evidence Thompson committed the prior acts, the prior acts were sufficiently similar to the charged offenses and the

prior acts were not too remote. The court further held the commission of the other acts provided a reasonable basis to infer Thompson had a character trait giving rise to an aberrant sexual propensity to commit the charged offenses. The court further analyzed the evidence in the context of Rule 403 and found the probative value of the evidence substantially outweighed the danger of any unfair prejudice, confusion of any issues or any other factors addressed in Rule 403.

¶11 Finally, the trial court gave limiting instructions regarding the consideration of the other act evidence. The jury was instructed that they may consider the evidence only if they find the State had proven by clear and convincing evidence that Thompson had committed the other acts and only if they find those acts showed Thompson had a character trait that "predisposed him to commit abnormal sexual acts[;]" that they may not convict Thompson simply because they believe he committed the other acts; that they may not convict Thompson simply because they believe he has a character trait giving rise to an aberrant sexual propensity to commit the crime charged; and that the evidence of other acts does not lessen the State's burden to prove Thompson guilty of the charged offenses beyond a reasonable doubt.

¶12 We find no error. Regarding the sufficiency of the evidence that the other acts occurred, the testimony of a victim

regarding a prior act is sufficient to establish the prior act occurred. See *State v. Smyers*, 205 Ariz. 479, 481, ¶ 8, 73 P.3d 610, 612 (App. 2003), *vacated in part on other grounds*, 207 Ariz. 314, 86 P.3d 370 (2004). Regarding the remoteness of the prior acts, Rule 404(c) "does not contemplate any bright line test of remoteness" of the prior act to the charged offense. Ariz. R. Evid. 404(c) cmt. to 1997 Amendment. "Although remoteness between the two incidents affects the weight to be given the testimony by the jury, it generally does not determine its admissibility." *State v. Van Adams*, 194 Ariz. 408, 416, ¶ 24, 984 P.2d 16, 24 (1999). Acts which occurred much more than ten years prior to the charged offenses have been held not too remote. See *State v. Weatherbee*, 158 Ariz. 303, 304-305, 762 P.2d 590, 591-592 (App. 1988)(prior acts occurred nineteen years and twenty to twenty-two years before trial); *State v. Salazar*, 181 Ariz. 87, 92, n. 5, 887 P.2d 617, 622 (App. 1994)(prior act occurred twenty years before charged offense). The trial court did not abuse its discretion when it found the prior incidents were not too remote.

¶13 Regarding the alleged failure of the court to conduct a sufficient analysis pursuant to Rule 403, the court's initial analysis is not contained in the record on appeal. The first time the court explained its ruling on the admissibility of the evidence was "on the record" at a pretrial hearing on August 12,

2008. However, Thompson did not request a copy of the transcript of that hearing. As the party seeking relief, Thompson has the duty to see that all necessary documents are included in the record. See *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995)(citation omitted). "When matters are not included in the record on appeal, the missing portion of the record is presumed to support the decision of the trial court." *Id.* Therefore, we presume the missing transcript supported the trial court's decision to admit the evidence and contained a sufficient analysis pursuant to Rules 404(c) and 403.

¶14 Even so, the trial court explained its ruling on the admissibility of the other act evidence a second time at the close of the evidentiary phase of trial. In this second explanation the court reiterated that it had, in fact, analyzed the evidence in the context of Rule 403 and found the probative value of the evidence substantially outweighed the danger of any unfair prejudice, confusion of any issues or any other factor addressed in Rule 403. This alone was sufficient to establish the trial court conducted an analysis of the evidence pursuant to Rule 403 sufficient to comply with the mandates of Rule 404(c). Further, as noted above, the jury was given limiting instructions regarding its consideration of the other act evidence and Thompson does not raise any issue regarding the

sufficiency of those instructions. "Juries are presumed to follow their instructions." *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996). Finally, we also note that in closing argument, counsel for both parties made it clear the jury could not consider the evidence of other acts as evidence Thompson committed the charged offenses, but only as evidence of whether he possesses a character trait giving rise to an aberrant sexual propensity.

¶15 The trial court did not abuse its discretion when it admitted evidence of the other acts involving JP and JC.

III. Denial of the Motion for Mistrial

¶16 As the second issue on appeal, Thompson argues the trial court erred when it denied his motion for mistrial after NS's mother referenced inadmissible hearsay during her testimony. A friend of NS's mother learned of the incidents with Thompson and asked NS's mother to come to her home. NS's mother testified about what happened after she arrived:

Q. What happened at her house?

A. I went in and went into her bedroom, and she told me that [NS] -

Defense attorney - Objection, your Honor. Calls for hearsay.

Court - The question doesn't call for hearsay. It is just what happened. Leave out statements made, Miss [].

Q. Do you understand that?

Court - I will sustain the objection.

Q. Without testifying as to what Miss [] told you or you told her, what happened? I know this is very difficult, but if you could just do your best without having specifics of the conversation.

A. I was told that [NS] was molested by Gary Thompson.

Defense counsel - Can we approach?

Court - Yes. I will strike the comment. The jury is to disregard it.

¶17 Thompson moved for a mistrial which the trial court denied. The court noted the jury had been instructed to disregard the testimony and the court was confident the jury would follow its instructions. The court further noted that the jury had already heard NS testify regarding the incidents and her allegations against Thompson. When the jury returned to the courtroom, the trial court again instructed the jury the testimony had been stricken, that it must be disregarded and that they may not consider it.

¶18 The trial court has broad discretion on motions for mistrial. The "failure to grant a motion for mistrial is error only if it was a clear abuse of discretion." *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995). The trial court's decision will be reversed only if it is "palpably improper and clearly injurious." *Id.* (citing *State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989), *aff'd*, 497 U.S. 639 (1990)).

This is because the trial judge is in the best position to determine whether a particular incident calls for a mistrial. The trial judge is aware of the atmosphere of the trial, the circumstances surrounding the incident, the manner in which any objectionable statement was made, and its possible effect on the jury and the trial. See *State v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983); *State v. Brown*, 195 Ariz. 206, 209, 986 P.2d 239, 242 (App. 1999).

¶19 We find no error. "When a witness unexpectedly volunteers an inadmissible statement, the remedy rests largely within the discretion of the trial court." *State v. Marshall*, 197 Ariz. 496, 500, ¶ 10, 4 P.3d 1039, 1043 (App. 2000). The trial court did not abuse its discretion when it denied Thompson's motion for mistrial. The testimony at issue consisted of a single sentence made during six days of testimony. The jury had already heard NS testify Thompson made her rub lotion on his penis and that he had placed his mouth and/or tongue on her vagina, and that he had engaged in this conduct repeatedly over a period of several years. The jury heard nothing in the hearsay statement it had not heard before in far greater detail. Further, the jury was instructed twice that the statement had been stricken, that they must disregard the statement and that they must not consider it. The jury was also instructed in both the preliminary and final jury

instructions that stricken testimony may not be considered. Again, "[j]uries are presumed to follow their instructions." *Dunlap*, 187 Ariz. at 461, 930 P.2d at 538. That the jury followed the trial court's instructions is supported by the fact the jury acquitted Thompson of one count of molestation involving NS.

¶20 We find no abuse of discretion in the denial of the motion for mistrial.

IV. Conclusion

¶21 Because we find no error, we affirm Thompson's convictions and sentences.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Presiding Judge

/s/

SHELDON H. WIESBERG, Judge