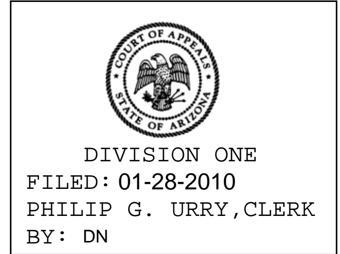
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA, Appellee, v. JON SIDNEY SOLNICKA, Appellant.	1 CA-CR 08-1102 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-137104-001 DT

The Honorable Larry Grant, Judge

AFFIRMED

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by Kent E. Cattani, Chief Counsel,
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and Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

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P O R T L E Y, Judge

¶1 Defendant John Sidney Solnicka appeals his convictions and sentences. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 In November 1978, Defendant was approximately twenty-two years old and lived in the garage of his father's girlfriend's house in Oregon. He became friends with his father's girlfriend's child, who saw him as a brother-figure. When the child was approximately nine years old, Defendant began sneaking into her bed and fondling her. The abuse continued until the child was nearly eleven, it ended when the mother caught Defendant trying to have sex with her child.[2]

¶3 Defendant was convicted of first-degree rape in Oregon on August 27, 1990. He was sentenced to prison for a term of five to twenty years, but was released on parole on August 24, 1994. He subsequently married and had a daughter. He absconded from parole in 2000 or 2001 and moved his family to Arizona. Oregon issued a warrant for Defendant's arrest.

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

[2] Defendant climbed into the top bunk next to the child, while her sister slept in the bunk below. He touched the child's breasts underneath her pajama top and rubbed the child's vagina manually both over and under her pajamas. He attempted sexual intercourse with the child, but she closed her legs and screamed, which prompted her mother to enter the bedroom.

¶4 Defendant moved his family to Youngtown, Arizona, in 2005. He became friendly with some of his neighbors, bringing them chili peppers and tomatoes, gifting appliances, and helping with household repairs. Defendant, who had a son in 2003, introduced his children to the neighbors and extended invitations to the neighborhood children to use his above-ground swimming pool.

¶5 The local children began spending time in Defendant's backyard which, in addition to the pool, included a tree house, video games, a VCR, as well as treats. Defendant developed a close relationship with one girl's family, and bought the child a two-piece bathing suit for her birthday. Defendant's wife complained about the visits, especially since the neighborhood children were not friendly with Defendant's daughter.

¶6 During a summer visit, Defendant molested three girls in the swimming pool, including the girl with whom he had developed a close relationship. The first girl felt Defendant move his hand up and down her vagina on top of her bathing suit. She told him to stop, but Defendant responded, "No," and continued the rubbing. The other two girls, and the younger brother of one of them, testified they saw Defendant touch the child "in her middle spot."

¶7 The second girl, who had a hole in the bottom of her swimsuit that she concealed by wearing shorts over her suit,

testified Defendant digitally penetrated the hole in her swimsuit and had skin-to-skin contact with her vagina. The girl's little brother and the other two girls testified to seeing Defendant stick his finger in the hole of the girl's swimsuit.

¶8 The third girl testified Defendant placed her on his lap and with one hand began rubbing her vagina in an up and down motion over her swimsuit. The child told the Defendant to stop, but he replied that, "he wasn't going to stop." In an attempt to rescue the girls, the little brother of one of them jumped on Defendant's back and told the girls to run.

¶9 The girls reported the touching to their parents, and the police were called. After one of the mothers confronted Defendant at his home, he went to the home of the mother of the girl with whom he had developed a close relationship, and denied any wrongdoing. He returned to his house, informed his wife he was going for a walk and did not return or call his wife that night. He eventually met up with his family at his mother's residence in Sun City.

¶10 The police arrested Defendant in Sun City. They obtained a search warrant and searched his home and backyard shed. Inside Defendant's shed, they discovered: (1) a peephole in the southeast corner of the shed; (2) three pornographic magazines (entitled "Barely Legal," "Eighteen," and "Babyface");

(3) adult pornography DVDs; and (4) hair ties, a headband, a girl's watch, and a pair of fur boots belonging to the three neighborhood girls. Defendant was subsequently indicted on three counts of child molestation.

¶11 Before trial, there was an evidentiary hearing to determine whether Defendant's Oregon rape conviction would be admissible. The court ruled that the prior conviction was evidence of an aberrant sexual propensity pursuant to Arizona Rule of Evidence 404(c). The jury convicted Defendant as charged on September 4, 2008, and he was sentenced to three consecutive seventeen-year presumptive prison terms. Defendant appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001) and -4033 (Supp. 2008).

DISCUSSION

¶12 Defendant argues that the trial court erred by admitting his prior rape conviction as aberrant sexual propensity evidence pursuant to Rule 404(c)(1)(B). Specifically, Defendant argues that the prior bad act was too dissimilar and remote in time for the probative value of the evidence to outweigh the danger of unfair prejudice. We review the admission of evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, 49, ¶ 29, 97 P.3d 865, 874 (2004).

¶13 Generally, prior bad acts are inadmissible "to show a defendant's bad character." *Id.* at 42, ¶ 9, 97 P.3d at 867. There is a common law exception to the exclusion rule for sexual misconduct charges. *See id.* at 43, ¶ 10, 97 P.3d 868 *(*citing *State v. McFarlin*, 110 Ariz. 225, 228, 517 P.2d 87, 90 (1973)). The exception was added to Rule 404(c) in 1997. *See Aguilar*, 209 Ariz. at 42 n.6, ¶ 9, 97 P.3d at 867 n.6. Under Rule 404(c), to be admissible the prior bad act evidence must show that the defendant committed the prior offense, that the act "provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the [charged sexual offense]," and the court must determine, pursuant to Rule 403, that the probative value is not outweighed by unfair prejudice. Ariz. R. Evid. 404(c)(1)(A), (B), (C). Rule 404(c) also requires the court, in performing the Rule 403 analysis, to consider the "remoteness of the other act" and the "similarity or dissimilarity of the other act." Ariz. R. Evid. 404(c)(1)(C)(i), (ii).

¶14 Here, the trial court found there was clear and convincing evidence of Defendant's Oregon conviction. The court then compared the two occurrences and stated, "[i]n both cases, the court finds that, although the acts are not identical, they're certainly in nature and such that the court finds that [Defendant] has engaged in aberrant sexual behavior with

prepubescent girls." Lastly, the court found that, "[i]n this particular case, . . . the probative value of this prior activity by the Defendant is not outweighed by the prejudicial impact." We agree.

A. Similarity of Prior Act Evidence

¶15 The facts underlying the Oregon conviction and this conviction are sufficiently similar to permit admission of the prior acts. *See State v. Lopez*, 170 Ariz. 112, 117, 822 P.2d 465, 470 (App. 1991) ("[T]he exception requires only that the uncharged acts be similar to the charged acts.") In both instances, Defendant's victims were girls of similar age and Defendant manually rubbed their vaginas on top of their clothing. Additionally, with one victim, Defendant digitally penetrated and had skin-to-skin contact with the vagina, which is similar to his Oregon act where he had skin-to-skin contact with the victim's vagina and tried to penetrate her with his penis.

¶16 Defendant argues the two incidents differ because there were witnesses present during the charged offenses and a lack of witnesses present during the prior bad act. He omits, however, that the victim's sister was in the bottom bunk during the Oregon molestation and the victim's mother was close enough to hear her child's screams and catch Defendant trying to rape her child.

¶17 Defendant also argues, unlike the prior offense, there was a lack of relationship between him and the Arizona victims. We disagree. Just as Defendant became friends with the Oregon victim, he also crafted a relationship with the Arizona girls, over his wife's objection. He became close to the family of one of the victims. He went to the hospital to lend support to the girl's mother when her father was in the hospital, fixed things in their home, gave the mother a microwave, bought the victim a swimsuit for her birthday, was acquainted with the family, and spent a great deal of time with the victim's eldest sister. His relationship with the family was so strong that the girl's mother initially did not believe the accusations.

¶18 Because of the similarities between the Oregon rape and Arizona molestations, the court did not abuse its discretion when it found the acts were similar enough to be admitted. *See State v. Roscoe*, 145 Ariz. 212, 218, 700 P.2d 1312, 1318 (1984) ("Absolute identity in every detail cannot be expected. Where an overwhelming number of significant similarities exist, the evidence of the prior act may be admitted; the major dissimilarity, and others here present, go to the weight of the evidence.")

B. Remoteness in Time of Prior Act Evidence

¶19 Defendant also argues the twenty-two-year-old Oregon rape conviction is too remote in time to be admissible. During

the pretrial hearing, Defendant acknowledged that he was incarcerated for approximately four years and was out of custody for fifteen or sixteen years. In determining remoteness, we do not count the years that Defendant was incarcerated. *See State v. Superior Court of Cochise County*, 129 Ariz. 360, 362, 631 P.2d 142, 144 (App. 1981) ("defendant should not be allowed to rely on the fact that from 1977 when he was incarcerated for a sex offense until 1981, no aberrant sexual acts were shown to have occurred"); *State v. Bible*, 175 Ariz. 549, 575, 858 P.2d 1152, 1178 (1993) (discounting the time defendant spent in prison for remoteness assessment).

¶20 Similarly, we do not consider the time Defendant was on parole.[3] *See State v. Whitlow*, 949 P.2d 239, 245 (Mont. 1997) (not including the time the defendant spent on parole and in prison in the remoteness assessment). Thus, if we deduct prison time and parole time, the Oregon conviction is only approximately six years old. The trial court would have known that "remoteness between incidents affects the weight to be given testimony by the jury, [but] it generally does not determine its admissibility." *State v. Williams*, 209 Ariz. 228,

[3] His supervised parole conditions prohibited him from being alone with children, required him to register as a sex offender, and he was subject to polygraph tests. His parole officer made visits to his Oregon home. He also received counseling after the birth of his daughter.

233, ¶ 17, 99 P.3d 43, 48 (App. 2004) (citing *State v. Van Adams*, 194 Ariz. 408, 416, ¶ 24, 984 P.2d 16, 24 (1999)).

¶21 Moreover, the trial court was free to consider the fact that Defendant had never been released from parole and was on absconder status during the six year time period. *Cf. e.g.*, *State v. Sharma*, 216 Ariz. 292, 298, ¶ 17, 165 P.2d 693, 699 (App. 2007) (holding that in determining the time period for a historical prior, the court excludes time spent while absconding from probation). Therefore, the Oregon act was not too remote to be admitted. *See State v. Weatherbee*, 158 Ariz. 303, 304-05, 762 P.2d 590, 591-92 (App. 1988) (holding that a twenty-year-old conviction was not too remote).

C. Probative Value Analysis

¶22 In addition, Defendant argued at trial, in his defense, that any touching was accidental touching and that intent is required for a finding of molestation. As a result, Defendant's Oregon conviction was probative because whether Defendant had an aberrant sexual character trait is relevant to the intent of Defendant and outweighed any prejudicial effect. Thus, the trial court did not abuse its discretion when it found that the probative value of the Oregon conviction was not outweighed by any prejudicial impact.

¶23 Furthermore, the jury was instructed that the prior bad act evidence was only to be used to establish that Defendant

had a character trait for aberrant sexual acts. We presume the jury followed the instruction. *See State v. Prince*, 204 Ariz. 156, 158-59, ¶¶ 9-10, 61 P.3d 450, 452-53 (2003) (holding the jury was instructed on their limited consideration of the evidence and we presume jurors follow the jury instructions). Thus, we agree with the trial court that the admission of the prior conviction was not unfairly prejudicial, and the court did not err in admitting the conviction as aberrant sexual propensity evidence pursuant to Rule 404(c)(1)(B).

CONCLUSION

¶24 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