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

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0008
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RAYMOND WILLIAM NIELSEN,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-106567-001 SE

The Honorable Silvia R. Arellano, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Raymond William Nielsen ("Defendant") appeals from his conviction of one count of Sexual Abuse, a class three felony pursuant to A.R.S. § 13-1404 and a dangerous crime against children. This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969).

¶2 Counsel for Defendant has advised us that he has searched the record on appeal and finds no arguable question of law that is not frivolous. *See Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Defendant was given the opportunity to file a supplemental brief *in propria persona*, but did not do so. At Defendant's request, however, his counsel asks this court to search the record for error with regard to seven issues: (1) insufficiency of evidence; (2) actual innocence; (3) police bias; (4) judicial bias; (5) violations of orders granting motions in limine that precluded prior act evidence; (6) submission of poorly written jury instructions; and (7) tainting of the jury. After reviewing the entire record, we find no error and affirm Defendant's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶3 In June 2007, Defendant's thirteen-year-old step-daughter ("victim") was swimming in the family's pool in her bikini when she decided to go inside the house. She entered

the kitchen and encountered Defendant, who was standing by the refrigerator. Defendant walked over to the victim and lifted up her bikini top and put his hands on her breasts and squeezed them.

¶4 In January 2008, while visiting with her maternal grandmother, the victim gave the grandmother a letter in which the victim discussed, generally, Defendant's conduct. The following morning, the victim and her maternal grandmother went to the Center Against Family Violence, where a detective interviewed the victim and the grandmother. After the interview, the grandmother made a recorded confrontation call to Defendant, where she questioned him about the victim's allegations of sexual abuse. The next day, a second detective conducted an additional interview with the victim because there were inconsistencies between what the victim reported to the police and what she had previously told her friends.

¶5 On February 7, 2008, Defendant was charged by indictment with three counts of Sexual Abuse.

¶6 On September 30, 2008, a seven-day trial commenced. That same day, defense counsel filed several motions in limine in an attempt to exclude evidence of prior bad acts. One such motion pertained to precluding "other act" evidence discussed during the confrontation call:

> Defendant . . . moves this Court to order the State and all witnesses not to introduce any testimony regarding any alleged sexual misconduct by defendant that is not charged in this indictment. Specifically, during the investigation in this case a confrontation call was conducted using [the grandmother]; during that call [the grandmother] brought up several accusations that are not charged in the indictment. *Those parts of the confrontation call must be redacted or deleted as they are nothing more than unsubstantiated 404 acts*. The State has not filed an Arizona Rules of Evidence Rule 404 motion and therefore any evidence of prior acts is irrelevant and thus inadmissible.

(Emphasis added.)

¶7 A hearing on Defendant's motions was held and the following exchange occurred:

> THE COURT: Then the next one is no testimony regarding alleged sexual misconduct by the defendant not charged by the indictment.
>
> THE STATE: No objection.
>
> THE COURT: And more specifically – I'm sorry?
>
> THE STATE: No objection, Judge.
>
> THE COURT: *This is the one using [the grandmother] in a confrontation call, Mr. Beatty*.
>
> THE STATE: Oh.
>
> THE COURT: *There were accusations brought up in that confrontation call by [the grandmother] that are not charged in the indictment*.
>
> THE STATE: Yeah. We're not objecting, Judge.
>
> . . . .
>
> THE COURT: Okay. That's granted.

(Emphases added.)

¶8 The next morning before the jury was brought in, the State moved to admit a recording of the confrontation call:

> THE STATE: First of all, there was a confrontation call in this case. I gave a copy of that a couple days ago to defense counsel, and I've made copies of that transcript [for] demonstrative purposes for when we play the confrontation call, one copy for each of the jurors. I'd like to be able to do that for demonstrative purposes only.
>
> DEFENSE COUNSEL: I believe there's [sic] several instances in that confrontation call that would be contradictory to yesterday's rulings by the judge about prior contact, prior incidents. So I don't think they should have the whole thing or hear the whole thing.
>
> THE COURT: Have you redacted it?
>
> THE STATE: I'm sorry. *This is just the first objection I've heard to the confrontation call or to the transcript*, Judge. So I'm not quite sure – do you want a copy of the transcript?
>
> THE COURT: I don't have my – *did you redact this in accordance with the rulings I made yesterday?*
>
> THE STATE: *I did not, Judge. I didn't hear any objections to it I guess is.* [sic] *I thought we were talking about witness testimony not about the confrontation call.* In the confrontation call, the defendant makes many statements.
>
> DEFENSE COUNSEL: Well, I believe some of it is against the ruling. I would agree with that.
>
> THE COURT: Well, what in here is objectionable, Mr. Nermyr, what in the transcript? Tell me. I disallowed – do you need to mention this right now? I need to, unless Mr. Nermyr can tell me – probably the best way. [sic] This is four-and-a-half pages. What in here is inconsistent with the rulings I made yesterday on the admission of evidence?

> DEFENSE COUNSEL: Well, I don't believe this was handled by the motions yesterday, but there is inadmissible hearsay in here in that my client talks about what his psychological counselors talked to him about, and that's on page 4 and page 5. So that would be inadmissible hearsay.
>
> THE COURT: Your objection is overruled. You may play the call and hand this to the jury for demonstrative purposes only.

(Emphases added.) Later that same day, the State moved to admit all prior bad act evidence, arguing that defense counsel opened the door during his cross-examination of the victim. Over Defendant's objection, the court found that defense counsel's questioning opened the door and permitted the State to introduce evidence of prior bad acts.

¶9 On the third day of trial, while defense counsel continued to cross-examine the victim, he moved to admit the videos of the victim's police interviews, which contained references to Defendant's prior bad acts. Later that day, the State moved to admit and publish to the jury an un-redacted copy of the confrontation call. After defense counsel affirmatively stated it had no objection, the court admitted the DVD of the confrontation call and allowed the State to play it for the jury.

¶10 After the State presented its case-in-chief, Defendant moved for a directed verdict pursuant to Ariz. R. Crim. P. 20. The court summarily denied the motion.

Thereafter, a jury found Defendant guilty of the first count of Sexual Abuse, but found him not guilty as to the remaining two counts. The trial court suspended imposition of sentence and placed Defendant on lifetime probation. Defendant timely appeals, and we have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1).

DISCUSSION

1. Sufficiency of the Evidence

¶11 In his Opening Brief, Defendant contends that there was insufficient evidence presented at trial to support the verdict.

¶12 When reviewing a denial of a motion for judgment of acquittal pursuant to Ariz. R. Crim. P. 20, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction. Substantial evidence . . . is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Pena*, 209 Ariz. 503, 505, ¶ 7, 104 P.3d 873, 875 (App. 2005) (citations omitted) (internal quotation marks omitted).

¶13 Pursuant to A.R.S. § 13-1404(A), "[a] person commits sexual abuse by intentionally or knowingly engaging in sexual

contact . . . with any person who is under fifteen years of age if the sexual contact involves only the female breast." The evidence presented at trial demonstrated that Defendant lifted the bikini top of the victim, who was thirteen at the time, and squeezed her breasts. Accordingly, there was sufficient evidence such that a reasonable jury could find that Defendant at least knowingly engaged in sexual contact with the victim's breasts as required by A.R.S. § 13-1404(A).[1]

2. Police Bias

¶14 Defendant also raises the issue of police bias. Because Defendant did not elaborate on this issue, it may be construed in two ways: (1) whether there was evidence of an officer's bias or lack of credibility; or (2) whether during jury selection, there was evidence that a juror was biased in favor of the police. We address both possible interpretations of the issue in turn.

a. Officer Bias or Lack of Credibility

¶15 There were three instances in which evidence of bias on the part of Detective Verdugo could have been material to

[1] Defendant requests that we review the record for fundamental error with respect to actual innocence. To the extent that this request can be construed as a challenge to the sufficiency of the evidence, we address it at ¶¶ 11-13 *supra*. If, however, Defendant intended to challenge his conviction on the basis of actual innocence pursuant to Ariz. R. Crim. P. 32.1(h), he must do so in a petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.2(b).

this case: the forensic interview of the victim, the confrontation call, and the failure to conduct a forensic medical examination of the victim. On direct examination, Detective Verdugo explained that as an officer trained to conduct a forensic interview – an interview with children under the age of seventeen – he is required to explain to the child the difference between the truth and making up stories, to avoid asking the child leading questions, and to mimic the child's vocabulary during the interview. And while some officers may write out a script to assist someone when they make a confrontation call, Detective Verdugo testified that he did not do so in this case. The detective also testified that a forensic medical examination was not conducted on the victim, nor was she examined by a nurse or a doctor. He explained that he did not feel that it was necessary because he "didn't feel that there was any evidence to be gathered as far as any type of sexual assault."

¶16 In our review of the record, there was no evidence of bias. "A police officer is not per se 'interested' merely by virtue of his involvement in the criminal investigation, absent evidence of some personal connection with the participants or personal stake in the outcome of the case." *State v. Nevarez*, 178 Ariz. 525, 527, 875 P.2d 184, 186 (App. 1993) (citations omitted). Moreover, Defendant availed himself of his right

under the Confrontation Clause to cross-examine Detective Verdugo regarding his bias or motive. *See* U.S. Const. amend. VI. Defense counsel questioned the detective about the techniques of a forensic interview, as well as about the fact that the investigation did not include a forensic medical examination. When defense counsel attempted to elicit evidence concerning the detective's supposed biased interviewing techniques, Detective Verdugo denied treating the subject of an interview differently, depending on whether he was conducting a forensic interview or a suspect interview. He stated that regardless of whom he interviews, he uses "[t]he same tone and same demeanor." Our review of the police videos did not reveal a disparity of treatment between the victim and Defendant during the interviews.

¶17 We also conclude that it was not reversible error for the detective to make a single reference to Defendant's thirteen-year-old step-daughter as "the victim" during his testimony – particularly when the trial court sustained defense counsel's objection to the use of that term.

b. Juror Bias In Favor Of Police

¶18 We find no evidence that any jurors empaneled were biased in favor of the police. During voir dire, when defense counsel asked whether any of the jurors would be more likely to trust an officer's testimony over that of a lay witness, a

juror responded that he would. When further questioned whether he could follow instructions that prohibited him from elevating the credibility of a witness's testimony merely because he was a member of law enforcement, the juror responded, "I don't think I could. I know under oath they're to be honest. I think they're [sic] word would be more credible than anybody else['s word]." Thereafter, the court rehabilitated the witness:

> THE COURT: What the lawyers and I would like for you to do – and by [you, I mean] all of you[;] I'm not just talking about you, sir – is keep an open mind.
>
> PROSPECTIVE JUROR: Okay.
>
> THE COURT: Hear everything everybody has to say, and then after I give you the instructions, make your decisions based on the evidence as you find it, and after you hear what everybody says, make your decisions on who's more believable or less believable, and don't just let their status, that is that they're a police officer, or that they're a child, or that they're a mother or what have you, be the deciding factor in your decision making.
>
> It's after you hear everything, put everything together, discuss the case with your fellow jurors in the jury room, and then make a decision about credibility and how much weight to give to the testimony.
>
> Do you believe you could do that, sir?
>
> PROSPECTIVE JUROR: I believe I could.

¶19 Outside of the presence of the jury, defense counsel moved to strike the juror for cause. The court found the request moot because even after allocating each side six

preemptory strikes, there was no possibility that the juror would be empaneled. Although the juror may have been predisposed to find an officer more credible than a lay witness, because there was no risk that the juror would be seated on the jury, defense counsel's strategy for selecting jurors was not prejudiced. Accordingly, we find no error, fundamental or otherwise.

3. Judicial Bias

¶20 Although he does not cite to specific acts of bias, Defendant also raises judicial bias as an issue on appeal. We presume a trial judge is free from prejudice and bias. *State v. Hurley*, 197 Ariz. 400, 404, ¶ 24, 4 P.3d 455, 459 (App. 2000). Our review of the record did not reveal any conduct or words that suggest bias.

4. Motions In Limine

¶21 Defendant also raises the issue of error with respect to motions in limine. We understand Defendant to contend that the trial court erred when it permitted the State to introduce "other act" evidence after it granted Defendant's motion in limine to preclude such evidence. To decide this issue, we must determine whether the court correctly found that defense

counsel opened the door during his cross-examination of the victim to allow the State to admit "other act" evidence.[2]

¶22 Generally, admission of evidence of other acts or crimes is prohibited "to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). But such character evidence may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). With respect to character evidence in sexual misconduct cases, "evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Ariz. R. Evid. 404(c).

¶23 Before such character evidence can be admitted, however, the trial court must make specific findings that (1) there is sufficient evidence for the trier of fact to find that the defendant committed the other act; (2) "[t]he commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged"; and (3) the

[2] Because Defendant raised objections to this evidence at trial, we review the trial court's evidentiary rulings for an abuse of discretion. *State v. McGill*, 213 Ariz. 147, 156, ¶ 40, 140 P.3d 930, 939 (2006).

probative value of the "other act" evidence is not substantially outweighed by the danger of unfair prejudice. Ariz. R. Evid. 404(c)(1)(A)-(C). Additionally, before the state may present evidence of a defendant's prior bad acts, it must "make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause." Ariz. R. Evid. 404(c)(3).

¶24 Here, the State failed to properly disclose its intent to introduce "other act" evidence as required by Rule 404(c).[3] The State does not contend that its failure to timely disclose was excusable for good cause; the record is silent in this regard. Moreover, when the court ruled that the State could play the confrontation call, which contained "other act" evidence,[4] it did not make findings as required by Rule 404(b).

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[3] Pursuant to Ariz. R. Crim. P. 15.1(b)(7), the prosecutor is required to make available to the defendant "[a] list of all prior acts of the defendant which the prosecutor intends to use to prove motive, intent, or knowledge or otherwise use at trial." While the State did provide a general notice that it intended to use 404(b) evidence, because the prosecutor failed to supplement this notice with a list of the specific prior acts, the State did not comply with the requirements of Ariz. R. Crim. P. 15.1(b)(7).

[4] During the confrontation call between the victim's grandmother and Defendant, there were references to other episodes that constitute "other act" evidence. The victim's grandmother questioned Defendant about "the pimple incident" where

This, however, does not end our inquiry – if the court was correct that Defendant opened the door to the admission of this evidence, then there was no error.

a. The Towel-snapping Incident

¶25 A defendant cannot complain about the admission of "other act" evidence when he himself opens the door by introducing the subject. *State v. Mincey*, 130 Ariz. 389, 405, 636 P.2d 637, 653 (1981). During his cross-examination of the victim, defense counsel asked her if she told Detective Verdugo that Defendant "has not touched me in my bathing suit." The evident purpose of this question was to suggest that the victim made inconsistent statements, as two of the three charges allegedly occurred when the victim was in a bathing suit. But the full context of this statement reveals that the victim was referring to a separate episode – "the towel-snapping incident" – that was not charged in the indictment.

¶26 During her interview with Detective Verdugo, the victim clarified that she had previously told her mother about "the towel-snapping incident," which occurred when she was

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Defendant examined a sore near the victim's vagina. She also elicited statements from Defendant about "the towel-snapping incident," where he came out of the shower wrapped in a towel and encountered the victim, who was nine at the time. When he pretended to snap her with a second towel, she grabbed the towel and fell back on the bed. She kicked at Defendant, knocking his legs out from under him, and caused him to fall on top of her, with his penis touching her body.

nine. And the victim explained to the detective that her mother was confused when she said the incident involved a bathing suit. The detective then asked if there were any episodes involving bathing suits and the victim said no. Two minutes later, while discussing more recent episodes, the victim stated that the first time Defendant licked her breasts was when she was wearing a bathing suit. Defense counsel's cross-examination opened the door to permit the State to introduce evidence of "the towel-snapping incident" in its effort to explain the apparent inconsistencies in the victim's answers. With respect to this episode, therefore, there was no error in permitting the State to play the confrontation call.

b. The Pimple Incident

¶27 During argument on whether his examination of the victim opened the door, defense counsel conceded that he opened the door to the introduction of prior act evidence that occurred within the past year-and-a-half to two years. During her statement to the police, the victim stated that "the pimple incident" occurred during the summer a year-and-a-half before. Accordingly, we conclude that defense counsel waived his argument with respect to this episode. Having waived this issue at trial, Defendant cannot benefit from it on appeal. *See State v. Logan*, 200 Ariz. 564, 566, ¶ 11, 30 P.3d 631, 633 (2001).

5. Jury Instructions

¶28 Defendant contends that the submission of "poorly written jury instructions to the jury" constituted fundamental error. Of the twenty-one instructions, over half were taken verbatim from the Revised Arizona Jury Instructions. The others accurately summarized statutory provisions and case law. Accordingly, we find no reversible error.

6. Jury Tainting

¶29 Defendant also contends that the jury was tainted because (1) jurors may have heard conversations between the State and its witnesses; (2) jurors may have heard arguments on motions; and (3) there was a laptop computer in the jury room.

a. Overheard Communications

¶30 Without pointing to specific instances, Defendant speculates that the jury may have been tainted if (1) it overheard communications between the State and its witnesses and (2) it heard arguments made by the parties on various motions. On this record we find no evidence that the jury overheard such communications. We do not speculate that such events occurred. *See State v. Campbell*, 146 Ariz. 415, 418, 706 P.2d 741, 744 (App. 1985) ("The appellant made no record concerning the incident and, absent any showing of prejudice, this court cannot speculate. The mere assertion here is not sufficient to show any error.").

b. Laptop Computer

¶31 A defendant is entitled to a new trial if during deliberations, the jury received extrinsic evidence and it cannot be found beyond a reasonable doubt that such evidence did not contribute to the verdict. *State v. Hall*, 204 Ariz. 442, 447, ¶ 16, 65 P.3d 90, 95 (2003). While a laptop might theoretically furnish means by which a juror could obtain extrinsic material, Defendant provides no specific allegations that this occurred, and our review of the record reveals no such instances. We cannot hold that the mere presence of a computer in the jury room supports an inference of jury misconduct. Accordingly, Defendant has no remedy under fundamental error review.

CONCLUSION

¶32 All of the remaining proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. We have reviewed the entire record for reversible error and find none. *See State v. Leon*, 104 Ariz. 297, 300, 451 P.2d 878, 881 (1969). Counsel must inform Defendant of the status of this appeal and his future options. Unless, upon review, she finds an issue appropriate for submission to our Supreme Court by petition for review, counsel has no further obligations. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant has thirty days from the date of this

decision to file a petition for review *in propria persona*. *See* Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Appellant has thirty days from the date of this decision in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge