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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/25/2010
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0405
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
WILLIAM ELVIS HOLLAND,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant,)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-138427-001 DT

The Honorable Paul J. McMurdie, 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 Christopher Johns, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 William Elvis Holland (Defendant) appeals from his convictions of two counts of attempted sexual conduct with a minor, a class three felony, and one count of molestation of a child, a class two felony, and the sentences imposed.

¶12 Defendant's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this Court that after a search of the entire appellate record, he found no arguable question of law that was not frivolous. Defendant was afforded the opportunity to file a supplemental brief *in propria persona*, but he did not do so. Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶13 On June 26, 2008, a grand jury indicted Defendant on six felony counts for dangerous crimes against children: four counts of sexual conduct with a minor, a class two felony; one count of molestation of a child, a class two felony; and one count of sexual abuse, a class three felony.

¶14 At trial, Defendant's daughter (Victim)¹ testified that Defendant forced her to engage in sexual conduct with him while they were both living at the family's home. Victim testified to five separate incidents of abuse: (1) anal penetration by Defendant's penis; (2) oral sexual contact with Defendant's penis; (3) anal penetration by Defendant's penis

¹ Defendant is not Victim's biological father; however, Victim believed Defendant was her father and did not discover otherwise until after she made the allegations of abuse.

during which Victim hit her head on the wall; (4) oral sexual contact with Defendant's penis; and (5) that Defendant grabbed her crotch and breasts when she passed him in the hall. These incidents occurred when Victim was between nine and twelve years old.

¶15 The State presented testimony from forensic interviewer W.D. who testified about how children react to sexual abuse and the five stages of victimization. Prior to W.D.'s testimony, Defendant objected to any "profile evidence" offered by the witness pursuant to *State v. Lindsay*, 149 Ariz. 472, 720 P.2d 73 (1986). The trial court ruled that W.D. could testify to what criminal behaviors are, but could not relate it to the specific facts of the case.

¶16 W.D. testified that children may display a wide range of behavioral changes from depression and anxiety to problems paying attention in school. She also testified that perpetrators tend to approach their victims in stages: victim selection, engagement, grooming, assault, and concealment. Her testimony was made without reference to, or any knowledge of, the specific facts of this case.

¶17 Next, pediatric nurse practitioner C.N. testified that her first medical exam of Victim's anus on June 11, 2008 was indeterminate because although there was some dilation and unusual smoothing of the perineal skin folds, these symptoms

could be due to constipation, disease, or sexual trauma. Her second medical exam of Victim on June 25, 2008 was normal. She testified that a normal finding was not inconsistent with past sexual trauma because the anatomy of the anus allows it to flex easily and heal quickly.

¶18 Victim's mother, J.A., testified that on one occasion she found spots of blood in Victim's underwear, but she attributed the cause to Victim starting her first menstrual cycle. When she expressed a desire to take Victim to a doctor, Defendant did not allow it. J.A. testified that Defendant had always been strict with Victim, but prior to the alleged incidents of abuse Defendant began to treat Victim "special" by buying her everything she wanted even though the family did not have the money.

¶19 On cross-examination, Defendant asked J.A. why Victim did not tell her about the abuse. J.A. responded "because everything [Defendant] told her came true. We lost the house. He is in jail." Defendant moved for a mistrial on the ground that it was prejudicial for the jury to know Defendant was in custody. The trial court initially denied the motion, but later reconsidered the motion and found J.A.'s statement was partially responsive because it was one of the reasons Victim feared disclosing the incidents of abuse. The trial court reaffirmed its denial of the motion for mistrial reasoning that "[J.A.] may

have just stated the obvious . . . that [Defendant] was out of the house, that he was out of their life, and there [were] some ramifications at that point in time based on the question." Moreover, Defendant declined the trial court's offer to instruct the jury to disregard the statement.²

¶10 The trial proceeded and the State called Victim's cousin and friend, T.M., to testify. T.M. was the first person Victim confided in about the abuse. T.M. testified that when Victim told her about the abuse she went home and told her mother, M.M., Victim's aunt. M.M. testified that she noticed a change in Victim about three months prior to the allegations. Victim was frequently crying and her grades had dropped. M.M. testified that on June 3, 2008, she and Victim's mother spoke to Victim about the information she had confided to T.M., confronted Defendant, and contacted the police.

¶11 Deputy A.D. testified that when he arrived at the scene, he took everyone's statement and informed Defendant he needed to leave the house. Defendant gathered his personal belongings and went to his mother's home. Deputy J.W. interviewed Defendant on June 12, 2008. The videotape of the interview was played for the jury. During the interview and at trial, Defendant stated that on one occasion Victim asked him

² The trial court suggested that such an instruction may "make it worse if I tell them not to consider it."

about sex and Defendant agreed to show her by attempting to have sex with her. Although Defendant admitted his penis rubbed against Victim's thigh, he denied any form of penetration because he was unable to become fully erect. Defendant testified that he stopped because he "realized that it was [his] daughter and that it was wrong."

¶12 On cross-examination of Deputy J.W., Defendant asked Deputy J.W. why he used particular interrogation techniques during the interview, to which Deputy J.W. replied "I do that because it's my job to find out what happened, and the victim stated that she had been anally penetrated for the last six years of her life." Deputy J.W. was referring to allegations Victim made that she was also molested by Defendant in Alaska. Defendant again moved for a mistrial because Deputy J.W.'s statement was nonresponsive and "goes to the incidents that they talked about in Alaska that is not only out of this jurisdiction, but [not] the subject of this indictment." The trial court declined the motion for mistrial and instructed the jury to disregard Deputy J.W.'s answer.

¶13 A twelve-person jury convicted Defendant of two counts of attempted sexual conduct with a minor and one count of molestation of a child.³ The trial court sentenced Defendant to

³ The jury acquitted Defendant of the other two counts of sexual conduct with a minor and one count of sexual abuse.

the presumptive term of seventeen years for molestation of a child and lifetime probation for both counts of attempted sexual conduct with a minor. The trial court gave Defendant 334 days of presentence incarceration credit. Defendant timely appealed. 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.A.1 (Supp. 2009).

DISCUSSION

¶14 When reviewing the record, “we view the evidence in the light most favorable to supporting the verdict.” *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996). Because no issues were preserved, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude that it cannot possibly be said the defendant had a fair trial. *Id.* Moreover, the defendant must establish that the error caused him prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607.

Inadmissible Testimony

¶15 During our review of the record we examined whether Deputy J.W.’s statement made during cross-examination regarding Defendant’s alleged prior bad acts was so prejudicial that it

was fundamental error for the trial court to deny Defendant's motion for a mistrial.

¶16 A trial court's decision to deny a motion for a mistrial is largely discretionary especially when it instructs the jury to disregard the alleged error. See *State v. Wilson*, 17 Ariz. App. 270, 271-72, 497 P.2d 90, 91-92 (1972). A trial court deprives a defendant of his right to a fair trial by denying a motion for mistrial when "there was reasonable probability that the verdict may have been different had the jury not been exposed to the inadmissible testimony." *Id.* at 272, 497 P.2d at 92.

¶17 In this case, Deputy J.W.'s remark that "the victim stated that she had been anally penetrated for the last six years of her life" was inadmissible character evidence. Ariz. R. Evid. 404(b) ("[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). The trial court denied Defendant's motion for mistrial and instructed the jury to disregard Deputy J.W.'s statement. In light of Victim's testimony of the five incidents of sexual abuse, and Defendant's own admission that he attempted to have sex with Victim, we conclude that the verdict would not have been different had the jury not heard the testimony. We therefore hold the trial court

did not fundamentally err by denying Defendant's motion for a mistrial.

Sufficiency of the Evidence

¶18 "The finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses." *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995). We "will not disturb the jury's decision if there is substantial evidence to support its verdict." *Id.*

¶19 To uphold the conviction of two counts of attempted sexual conduct with a minor, we must find substantial evidence that Defendant intentionally or knowingly attempted to use a part of his body or masturbatory contact to penetrate the victim's anus or vulva and that the victim is under fifteen years of age.⁴ These two counts related to two separate incidents: the first incident of alleged anal penetration; and the incident of alleged anal penetration when Victim hit her head.

⁴ Pursuant to A.R.S. § 13-1405.A (Supp. 2009): "A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age." Section 13-1401.3 (2001) defines "[s]exual intercourse" 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." Section 13-1405.B states in pertinent part: "Sexual conduct with a minor who is under fifteen years of age is a class 2 felony and punishable pursuant to § 13-705."

¶20 The evidence presented supports the verdict. First, Victim testified that on or around February 2006, when she was nine years old, she and Defendant engaged in sexual intercourse by anal penetration. Victim reported that this was the first incident in Arizona. Victim also testified that on another occasion between February 2006 and June 3, 2008, Defendant anally penetrated her and caused her to hit her head on the wall. Victim was twelve years old at the time of trial.

¶21 Second, the State played a video recording of the interview between Defendant and Officer J.W. for the jury. Defendant volunteered during this interview and testified at trial that on one occasion Victim asked him about sex and Defendant agreed to show Victim by attempting to have sex with her. Defendant denied penetration, but did admit to touching his penis to Victim's thigh.

¶22 Third, the State presented expert witness testimony establishing how children respond to sexual abuse and the process of victimization. Testimony by Victim's mother, J.A., and Victim's aunt, M.M., described behavior by both Victim and Defendant consistent with the expert witness's testimony.

¶23 Thus, the State offered sufficient evidence to establish that Defendant intentionally or knowingly attempted to use a part of his body or masturbatory contact to penetrate Victim's anus when Victim was under the age of fifteen.

¶24 The State also provided sufficient evidence to uphold the conviction of one count of molestation of a child.⁵ This conviction related to Victim's allegation that Defendant grabbed her genital area. Victim testified that on one occasion Defendant grabbed her breasts and crotch as she was walking down the hallway of their home.

¶25 We conclude there was substantial evidence that Defendant intentionally or knowingly engaged in direct or indirect touching of any part of the genitals or anus by any part of the body with a child who was under fifteen years of age.

CONCLUSION

¶26 We have read and considered counsel's brief, carefully searched the entire record for reversible error and found none. *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the jury's finding of guilt. Defendant was present and represented

⁵ Pursuant to A.R.S. § 13-1410.A (Supp. 2009): "A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age." Section 13-1401.2 defines "[s]exual contact" as "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object causing a person to engage in such contact."

by counsel at all critical stages of the proceedings. At sentencing, Defendant and his counsel were given an opportunity to speak and the trial court imposed a legal sentence.

¶27 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.⁶

¶28 For the foregoing reasons, Defendant's convictions and sentences are affirmed.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

/S/

PHILIP HALL, Presiding Judge

DONN KESSLER, JUDGE

⁶ Pursuant to Arizona Rule of Criminal Procedure 31.18.b, Defendant or his counsel have fifteen days to file a motion for reconsideration. On the Court's own motion, we extend the time to file such a motion to thirty days from the date of this decision.