DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS STATE OF ARIZONA DIVISION ONE

STATE OF ARIZONA, Appellee, v. DARRELL D. DECKER, Appellant.	1 CA-CR 09-0910 DEPARTMENT E MEMORANDUM DECISION (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Maricopa County

Cause No. CR 2007-030288-001-SE

The Honorable Emmet J. Ronan, Judge

AFFIRMED

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

James Haas, Maricopa County Public Defender
by Joel M. Glynn, Deputy Public Defender
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W E I S B E R G, Judge

¶1 Darrell D. Decker ("Defendant") appeals from his convictions following a jury trial and from the sentences imposed. Defendant's counsel has filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 744 (1967), and *State v. Leon,* 104 Ariz.

297, 299, 451 P.2d 878, 880 (1969), advising this court that after a search of the entire record on appeal, counsel finds no arguable ground for reversal. This court granted Defendant an opportunity to file a supplemental brief and he has done so. Counsel requests that we search the record for fundamental error. *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). Having done so and finding no reversible error, we affirm.

¶2 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(2010).

FACTS AND PROCEDURAL HISTORY

¶3 We view the facts in the light most favorable to sustaining the convictions. *State v. Stroud,* 209 Ariz. 410, 412, ¶ 6, 103 P.3d 912, 914 (2005). Defendant was indicted on three counts of sexual abuse involving one victim (E.), class 5 felonies, and two counts of sexual abuse involving another victim (B.), a class 2 and class 5 felony. The State filed an allegation of aggravating circumstances other than prior convictions. It also filed notices of intent to use character evidence of the Defendant pursuant to Rules 404(b) and 404(c), Arizona Rules of Evidence ("Rule") involving two other victims. After a pretrial hearing, the court found that the other-act evidence as to a third victim

(L.) was admissible pursuant to Rules 404 and 403. The following evidence was presented at trial.

¶4 In 2006, Defendant worked as a massage therapist at Massage Envy, a therapeutic massage business. Massage Envy has written policies for its employees regarding private areas of the body that may never be touched or exposed during a massage. B. testified that on September 25, 2006, while Defendant was giving her a massage, he began to rub her vagina and then inserted his finger into her vagina a few times. He also rubbed her breast. Defendant then took B.'s hand and put it on his penis (Counts 3-5).

¶5 Defendant told B. not to tell anyone. Wanting to leave quickly, B. left a tip and went to her car. Defendant followed her and asked for her telephone number. Although she was afraid, B. "just wanted to get out of there," and gave Defendant her number. On the way home, she called her best friend and told her what had happened. B. reported the incident to Massage Envy and the police. B.'s friend testified that B. had called her after the massage and was very upset. She also testified about what B. had told her.

¶6 E. testified that on the same day, September 25, 2006, Defendant gave her a massage at Massage Envy. During the massage, Defendant rubbed her genitals and her breasts (Counts 1 and 2). Not wanting to create a scene in the reception area, E. gave a tip and left. E. was in shock and did not know what to do. An hour or two later, a friend called E. and asked her about the massage.

Because E. "wanted to pretend like nothing had happened," she was initially reluctant to tell her friend what had occurred. Eventually, however, E. told her friend what Defendant had done. E. then reported the incident to Massage Envy. E.'s friend testified that when she talked to E. after the massage, E. sounded upset and distracted. She also testified about the conversation she had with E.

¶7 L. testified that on September 19, 2006, Defendant gave her a massage at Massage Envy. During the massage, Defendant rubbed her breasts and around her vaginal area (uncharged acts). After investigating the complaints of B. and E., Officer Verdugo of the Mesa Police Department learned that Defendant had left Arizona and located him in New York.

¶8 The jury found Defendant guilty as charged. The jury also found as aggravating factors on counts 1 and 4 that the offenses caused emotional or financial harm to the victims; that the offenses involved betrayal of trust; and that Defendant has poor moral character. The court considered those aggravating factors and found two mitigating factors. The court imposed a presumptive prison term of 1.5 years on count 1 and a presumptive, consecutive prison term of 7 years on count 4 with 321 days of presentence incarceration credit. As to counts 2, 3 and 5, the court placed Defendant on lifetime probation. Defendant timely appealed.

¶9 Defendant filed a supplemental brief raising several issues.

Admission of Hearsay as Excited Utterance

¶10 Defendant complains on a number of grounds that the court erred in allowing B.'s friend and E.'s friend to testify about what each victim had told them concerning Defendant's conduct. Over Defendant's objections, the court admitted the testimony under the excited utterance exception to the hearsay rule. Although hearsay is generally not admissible, under Rule 803(2), an exception to the hearsay rule exists for "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

¶11 In analyzing the exception, we apply a three part test: (1) there must be a startling event; (2) the words spoken must be spoken soon after the event so as not to give the declarant time to fabricate or reflect; and (3) the words spoken must relate to the event. *State v. Cruz,* 218 Ariz. 149, 161, ¶ 54, 181 P.3d 196, 208 (2008). The statements need not be made immediately after the event or at the place where the event occurred if the declarant is still under the stress of excitement caused by the event. *State v. Rivera,* 139 Ariz. 409, 411, 678 P.2d 1373, 1375 (1984). "Testimony that the declarant still appeared 'nervous' or 'distraught' and there was a reasonable basis for continuing emotional upset will often suffice." *Id.* (citation omitted).

"Although the opportunity for reflection increases as the length of time between the event and the statement increases," the most important consideration is the physical and emotional condition of the declarant. *See State v. Taylor,* 196 Ariz. 584, 590, ¶ 19, 2 P.3d 674, 680 (App. 1999)(victim's statement to stepmother that defendant molested her made forty-five minutes after event admissible as excited utterance because victim still under stress of incident).

¶12 Here, B. and E. experienced a startling event when Defendant sexually abused them and both were very upset after it occurred. In B.'s case, she immediately called her friend on her way home from Massage Envy. In E.'s case, although she spoke to her friend about an hour or two later, she was still in shock over what happened. Both B. and E. reported to their friends what Defendant had done to them. All the requirements of Rule 803(2) were met, and the court did not err in admitting the statements.

¶13 We reject Defendant's argument that admission of the excited utterances violated the Confrontation Clause of the Sixth Amendment as interpreted by *Crawford v. Washington,* 541 U.S. 36 (2004). Neither statement was testimonial, i.e., it was not made to establish a fact that the declarant would reasonably expect to be used in a prosecution. *State v. Parks,* 211 Ariz. 19, 26, ¶ 31, 116 P.3d 631, 638 (App. 2005), *supp. op.,* 213 Ariz. 412, 142 P.3d 720 (App. 2006). We also reject Defendant's related arguments that

the trial court lacked subject matter jurisdiction to admit the statements because neither counsel filed a pretrial motion in limine or that the prosecutor engaged in misconduct by offering this evidence at trial.

Sufficiency of the Evidence

¶14 Defendant claims that he is not guilty of the offenses for which he was convicted, but may be guilty of some "lesser" offenses. He also asserts a claim of "actual innocence." *See* Ariz. R. Crim. 32.1(h). However, we have reviewed the record and conclude that the State presented sufficient evidence from which a reasonable juror could find beyond a reasonable doubt that Defendant committed the offenses of sexual abuse. *State v. Guerra,* 161 Ariz. 289, 291, 778 P.2d 1185, 1187 (1989).

Fourth Amendment Violation

¶15 Defendant complains because the police investigated allegedly false accusations made by B. and E. and by B.'s mother, which resulted in his prosecution and convictions. Defendant claims that this violated his fourth-amendment right to be free from unreasonable searches and seizures and his right to privacy. Defendant has not indicated what "stop," "search" or "seizure" is purportedly unlawful under the Fourth Amendment. *See State v. Watkins,* 207 Ariz. 562, 564, ¶ 12, 88 P.3d 1174, 1176 (App. 2004) (considering separate fourth-amendment challenges to legality of stop of defendant by police, search of his person and vehicle, and

seizure of evidence). We fail to see how investigating an accusation made by a possible victim or a victim's family member implicates the Fourth Amendment.

Sexual Propensity Evidence

¶16 Defendant alleges that the trial court erred in granting the State's request to admit evidence that Defendant sexually abused L. (uncharged act). Ariz. R. Evid. 404(b),(c). Evidence Rule 404(b) permits admission of other-act evidence for a non-character purpose, such as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." At the Rule 404 hearing, the State submitted police reports indicating that when interviewed, Defendant denied touching any of the victims inappropriately. Thus, the other-act evidence was properly admitted to show Defendant's intent, knowledge and the absence of mistake or accident.

¶17 Rule 404(c) provides in part that "[i]n a criminal case in which a defendant is charged with having committed a sexual offense . . . 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." *State v. Williams,* 209 Ariz. 228, 235, ¶ 27, 99 P.3d 43, 50 (App. 2004). For purposes of Rule 404(c), sexual abuse is a sexual offense. Rule 404(c)(4); A.R.S. § 13-1420(1)(2010).

¶18 Before admitting propensity evidence under Rule 404(c), the court must make three findings: (1) that clear and convincing evidence exists to show that the defendant committed the other act; (2) that 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 charged offense; and (3) that the probative value of the other-act evidence is not substantially outweighed by the danger of unfair prejudice or confusion of the issues under Rule 403. *State v. Aquilar,* 209 Ariz. 40, 49, ¶ 30, 97 P.3d 865, 874 (2004); Ariz. R. Evid. 404(c)(1). In weighing probative value and unfair prejudice, the court shall consider factors such as the remoteness of the other act, the similarity or dissimilarity of the other act, frequency of the other act, surrounding circumstances, relevant intervening events and other similarities or differences. Ariz. R. Evid. 404(c)(1)(C). In all cases where other-act evidence is admitted, the court shall give a limiting instruction as to its use. Ariz. R. Evid. 404(c)(2).

¶19 Here, the trial court held a hearing to determine the admissibility of other-act evidence involving Defendant's sexual abuse of L. The court made detailed findings that met the requirements of Rules 403 and Rule 404(c). The court gave a limiting jury instruction as to the proper use of the evidence. The trial court did not abuse its discretion in admitting the other-act evidence to show Defendant's aberrant sexual propensity

to commit the charged offenses. *State v. Roscoe,* 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996).

Joinder and Severance of Offenses

¶20 Defendant claims that the offenses relating to B. should have been severed from the offenses relating to E. We disagree. First, the offenses were properly joined in the indictment. Ariz. R. Crim. P. 13(a)(1) (offenses may be joined if they "are of the same or similar character"). Second, counsel did not file a motion to sever the offenses and advised the court that he did not intend to do so. Severance is waived if a motion to sever is not made within twenty days prior to trial and thereafter renewed at or before the close of the evidence. Ariz. R. Crim. P. 13.4(b),(c). Finally, because evidence of the offenses relating to each victim would have been cross-admissible in separate trials, it would not be reversible error to refuse to sever the offenses. *Aquilar,* 209 Ariz. at 50-51, ¶ 38, 97 P.3d at 875-76. There was no error.

Cruel and Unusual Punishment

¶21 Defendant argues that his sentences violate the Eighth-Amendment's prohibition against cruel and unusual punishment. Defendant's consecutive sentences of 1.5 years and 7 years, followed by lifetime probation, are not so grossly disproportionate to Defendant's conduct as to constitute cruel and unusual punishment under the Eighth Amendment. *State v. Berger,* 212 Ariz. 473, 483, ¶ 51, 134 P.3d 378, 388 (2006).

Juror Misconduct

¶22 Defendant claims that there was juror misconduct when a group of jurors had contact with a witness. During a trial recess, the prosecutor informed the bailiff that there was some possible contact between a group of jurors and a witness. He indicated that they were discussing something about winter in Pennsylvania and that he did not believe the witness knew they were jurors and the jurors did not know she was a witness. He advised them that they should not be talking to one another.

¶23 The court examined the witness who confirmed that she had a brief conversation with a few jurors about visiting Philadelphia in the winter months and building architecture in Pennsylvania and "that was the extent of it." After discussion with the judge, neither counsel believed there was a problem. The court advised counsel to keep the witnesses away from the jurors to avoid "any possible contamination." Nothing in the record suggests that the jurors were improperly influenced by a conversation some of them had with the witness or that the verdicts were tainted as a result of the conversation. *State v. Hall,* 204 Ariz. 442, 449, ¶ 23, 65 P.2d 90, 97 (2003). There was no error.

Violation of Due Process and Right Against Self-incrimination

¶24 Defendant claims his due process rights and fifth-amendment right against self-incrimination were violated (1) when the State introduced a manual of Massage Envy's policies and

procedures, which allegedly created an irrebuttable presumption of guilt; and (2) the State introduced evidence that Defendant left for New York after he was accused of the crimes. Defendant objected to introduction of the manual on the ground of lack of foundation. Defendant made a general objection to introduction of evidence that Defendant had been located in New York. These objections were not sufficient to preserve Defendant's objections on appeal. Ariz. R. Evid. 103(a)(1); *State v. Lopez,* 217 Ariz. 433, ¶ 4, 175 P.3d 682 (2008) (general objection insufficient to preserve issue for appeal and objection on one ground does not preserve issue on another ground). In any event, evidence of Massage Envy's policies and procedures was relevant and admissible to show Defendant's knowledge and lack of consent by the victims. *See* Ariz. R. Evid. 401, 402. Nothing in the record indicates that use of this evidence created an irrebutable presumption of guilt. Evidence that Defendant had left Arizona and was located in New York was relevant and admissible to show Defendant's consciousness of guilt.[1] *Id.* Introduction of this evidence did not violate Defendant's due process rights or right against self-incrimination.

Jury Instructions

¶25 Defendant claims the jury instructions were erroneous because they did not properly define the elements of the offenses,

[1]The State requested a flight instruction. The court refused the instruction, but allowed counsel to argue inferences from the fact that Defendant left Arizona after being accused of the crimes.

improperly shifted the burden of proof, contained an "unlawful presumption," an "uncharged theory" and "diluted" the reasonable doubt standard of proof. Defendant failed to object to the instructions on the grounds alleged by him on appeal and we review only for fundamental error. *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); Ariz. R. Crim. P. 21.3(c).Ariz. R. Crim. P. 21.3(c). "With regard to jury instructions, fundamental error occurs 'when the trial judge fails to instruct upon matters vital to a proper consideration of the evidence.'" *State v. Edmisten,* 220 Ariz. 517, 522, ¶ 11, 207 P.3d 770, 775 (App. 2009) (citation omitted).

¶26 "The purpose of jury instructions is to inform the jury of the applicable law." *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996). Although the "instructions need not be faultless," they must not mislead the jury and must provide an understanding of the issues. *Id.* Jury instructions must be viewed as a whole to determine if they adequately reflect the law and are substantially free from error or whether the jury would be confused or misled by them. *State v. Gallegos,* 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994). We have reviewed the jury instructions given in this case. We conclude that the instructions, taken as a whole, correctly state the law regarding the elements of the offenses, the State's burden of proof, the reasonable doubt standard and the proper use of other-act evidence. There was no error.

Ineffective Assistance of Counsel

¶27 Defendant claims his counsel was ineffective because he failed to file a pretrial motion in limine to exclude the hearsay statements of the victims' friends. This court will not consider claims of ineffective assistance on direct appeal. *State v. Spreitz,* 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Such claims must first be presented to the trial court in a petition for post-conviction relief. *Id.*; Ariz. R. Crim. P. 32.

Use of Perjured Testimony

¶28 Defendant claims the State used perjured testimony to obtain the convictions. Defendant does not provide any evidence to support this claim. "Absent a showing that the prosecution was aware of any false testimony, the credibility of witnesses is for the jury to determine." *State v. Rivera,* 210 Ariz. 188, 194, ¶ 28, 109 P.3d 83, 89 (2005)(citation omitted). There was no error.

CONCLUSION

¶29 We have read and considered counsel's brief and have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Defendant was represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits and that there was

sufficient evidence for the jury to find that the offenses were committed by Defendant.

¶30 After the filing of this decision, counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do no more than inform defendant of the status of the appeal and of Defendant's future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Defendant has thirty days from the date of this decision to proceed, if he desires, with a motion for reconsideration or petition for review *in propria persona.*

¶31 Accordingly, we affirm Defendant's convictions and sentences.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
PHILIP HALL, Presiding Judge

/s/_____
PETER B. SWANN, Judge