

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, ) No. 1 CA-CR 11-0002  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
FRANCISCO JAVIER GALLEGOS, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )



DIVISION ONE  
FILED: 01/31/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200901536

The Honorable Lawrence C. Kenworthy, Judge

**AFFIRMED**

---

Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
Barbara A. Bailey, Assistant Attorney General  
Attorneys for Appellee

Michael Breeze, Yuma County Public Defender Yuma  
By Edward F. McGee, Deputy Public Defender  
Attorney for Appellant

---

**D O W N I E**, Judge

¶1 Francisco Javier Gallegos appeals his conviction for sexual conduct with a minor. For the following reasons, we affirm.

#### **FACTS AND PROCEDURAL HISTORY<sup>1</sup>**

¶2 In November 2009, 15-year-old I.T. told Detective Avenetti that she and 24-year-old Gallegos had sexual intercourse the preceding month. Gallegos admitted having intercourse with I.T., but claimed he "did not know [she] was 15."

¶3 Gallegos was charged with one count of sexual conduct with a minor at least 15 years old, a class 6 felony. "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." Ariz. Rev. Stat. ("A.R.S.") § 13-1405(A). Section 13-1407(B) establishes an affirmative defense when the victim is at least 15 years old and the defendant, at the time of the sexual conduct, "did not know and could not reasonably have known the age of the victim."

¶4 Gallegos admitted having sexual intercourse with I.T., but argued he did not know and could not reasonably have known she was not at least 18 years old. I.T. testified she was

---

<sup>1</sup> "We view the evidence in the light most favorable to sustaining the conviction[]." *State v. Real*, 214 Ariz. 232, 233, ¶ 2, 150 P.3d 805, 806 (App. 2007).

friends with Gallegos's 14-year-old sister and that before having intercourse with Gallegos, I.T. told him she was 15 years old and in the tenth grade (the "age conversation").

¶15 During cross-examination, defense counsel did not question I.T. about her claim that she told Gallegos her age before engaging in sexual conduct. However, counsel sought to "impeach" I.T. with "inconsistent statements" she purportedly made to Detective Avenetti regarding other topics.<sup>2</sup> I.T. could not recall what she had said regarding these topics, and defense counsel offered to refresh her recollection with a transcript of her first forensic interview.<sup>3</sup> When that proved unsuccessful in one instance, defense counsel asked I.T. to read aloud from the transcript. Counsel also moved to introduce the interview recordings into evidence to demonstrate "how [I.T.] answered to the detective with inconsistent statements." The court sustained the State's objections. The recordings were not admitted, and I.T. was not permitted to read aloud from the transcript.

¶16 During Gallegos's case-in-chief, defense counsel re-called Detective Avenetti to the stand and questioned him

---

<sup>2</sup> For example, defense counsel inquired about a pregnancy test, I.T.'s perceived reluctance to make a confrontation call to Gallegos, and whether Gallegos used a condom.

<sup>3</sup> I.T.'s two forensic interviews were videotaped, but only the first was transcribed.

about "inconsistencies" in I.T.'s statements. Detective Avenetti testified he could not recall whether I.T. told him about the age conversation during the recorded interviews, and admitted she may have done so during a later unrecorded interview. Defense counsel offered the recordings to refresh his recollection and "for proof" that I.T. never mentioned the age conversation during the recorded interviews. Later, defense counsel offered the recordings to show "this is a last-minute story that didn't exist any time in this case until maybe a few days before we went to trial." Once again, the court sustained the State's objections, and the recordings were not admitted. Gallegos introduced into evidence the recording of his own police interview, during which he stated that I.T. told him she was 18 years old.

¶7 Gallegos was convicted and sentenced to 1.75 years in prison. He timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033.

#### **DISCUSSION**

¶8 Gallegos contends the trial court violated his constitutional right to confront witnesses against him by refusing to admit the recordings of I.T.'s forensic interviews. We review alleged Confrontation Clause violations *de novo*. *Real*, 214 Ariz. at 234, ¶ 4, 150 P.3d at 807. We review rulings

on the admissibility of evidence for an abuse of discretion. *State v. Slover*, 220 Ariz. 239, 244, ¶ 15, 204 P.3d 1088, 1093 (App. 2009) (citation omitted).

### **I. Alleged Inconsistent Statements**

¶9 Gallegos first argues the interview recordings were admissible to contradict I.T.'s trial testimony. He cites Arizona Rule of Evidence ("Rule") 801(d)(1), which provides that a statement is not hearsay if the declarant testifies at trial, is subject to cross-examination about the statement, and the statement is "inconsistent with the declarant's testimony."

¶10 Gallegos, though, did not lay the foundation for the allegedly inconsistent statements by I.T. about the age conversation that would trigger the application of Rule 801(d)(1). Although I.T. testified that she told Gallegos her age before they engaged in sexual intercourse, defense counsel never asked her when (or if) she relayed this information to law enforcement. Nor did the defense identify any specific statements by I.T. in the recorded interviews that were inconsistent with her trial testimony about the age conversation. To the extent Gallegos claims that I.T.'s failure to mention the age conversation during the recorded interviews constitutes a prior inconsistent statement, he has not provided any foundation to demonstrate that I.T. was asked in the interviews about such a conversation or that she had any

affirmative duty to offer such information. See, e.g., *State v. Hines*, 130 Ariz. 68, 70, 633 P.2d 1384, 1386 (1981) ("Whether an omission to state a fact constitutes an inconsistency sufficient to discredit a witness depends at least in part upon the circumstances under which the prior statement was made. A prior omission will constitute an inconsistency only where it was made under circumstances rendering it incumbent upon the witness to, or be likely to, state such a fact.").<sup>4</sup> On this record, we find no abuse of discretion in excluding the recorded interviews.

¶11 Other allegedly inconsistent statements by I.T. related to collateral matters, not the age conversation. See *State v. Hill*, 174 Ariz. 313, 325, 848 P.2d 1375, 1387 (1993) ("Evidence is collateral if it could not properly be offered for any purpose independent of the contradiction."). The only disputed issue at trial was whether Gallegos knew or could reasonably have known I.T.'s age. When witnesses are impeached about "an inconsistent fact collateral to the trial issues, the impeaching party is bound by the witness' answer and cannot produce extrinsic evidence to contradict the witness." *Id.*

---

<sup>4</sup> Furthermore, Detective Avenetti testified that I.T. may have provided information about the age conversation during a subsequent unrecorded interview, and he also explained that he had reviewed the recorded interviews and did not recall the age conversation being mentioned in those interviews. To the extent Gallegos wanted to show that I.T. did not mention the age conversation in the two recorded interviews, he succeeded in establishing essentially that point through the detective.

Defense counsel cross-examined I.T. and explored perceived inconsistencies in her testimony about such collateral matters as pregnancy tests, condom use, and confrontation calls.<sup>5</sup> Gallegos was bound by I.T.'s responses regarding these collateral issues and could not use extrinsic evidence such as the recordings to contradict her testimony.

## **II. Alleged Recent Fabrication**

¶12 Twelve days before trial, Detective Avenetti submitted a supplemental report detailing a June or July 2010 unrecorded meeting during which I.T. reportedly discussed the age conversation. When Gallegos called the detective as a witness during his case-in-chief, Avenetti testified that the report reiterated "the same story" he had "originally understood," specifically that the age conversation occurred just before the sexual conduct. The detective further testified there was "no reason" why he waited so long to submit the report. The report was admitted as a defense exhibit. Defense counsel sought to admit the interview recordings to show that I.T.'s testimony about telling Gallegos her age was a recent fabrication, but the court denied the request.

¶13 Contrary to Gallegos's suggestion, Rule 801(d)(1)(B) has no application to these facts. That rule provides that a

---

<sup>5</sup> We also agree with the State that Gallegos failed to make an adequate offer of proof as to such matters.

prior statement made by a witness who testifies at trial is not hearsay if the statement "is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it." Ariz. R. Evid. 801(d)(1)(B). Gallegos, though, was not attempting to introduce I.T.'s interview recordings to "rebut an express or implied charge" that she had recently fabricated her claim. The supplemental report, which did include a statement consistent with I.T.'s trial testimony, was admitted as a defense exhibit, and the detective was fully cross-examined about the report. The State later recalled I.T., and defense counsel cross-examined her, but again never asked about the age conversation. The trial court did not err in refusing to admit the recordings under Rule 801(d)(1)(B).

### **III. Cross-Examination**

¶14 Finally, the record does not support Gallegos's claim that his cross-examination was "unreasonabl[y] curtailed." Defense counsel examined both Detective Avenetti and I.T. The record reflects that defense counsel often could not "figure" out how to lay foundation, rephrase questions, or otherwise respond to objections. During sidebar conferences, the court and opposing counsel often offered suggestions to help defense counsel frame appropriate questions. The court also granted defense counsel's request for three separate recesses to allow



her to prepare for the next stage of trial and allowed her to cross-examine I.T. with "anywhere between two to five minutes between questions."

¶15 The Confrontation Clause guarantees an opportunity for effective cross-examination, but "not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). "An effort to impeach on a collateral matter differs significantly from an effort to affirmatively prove motive or bias. Rule 608(b) restricts the former; the sixth amendment protects the latter." *State v. Gertz*, 186 Ariz. 38, 42, 918 P.2d 1056, 1060 (App. 1995). We find no improper curtailment of Gallegos's cross-examination.

#### CONCLUSION

¶16 For the reasons stated, we affirm Gallegos's conviction and sentence.

/s/

MARGARET H. DOWNIE, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

JOHN C. GEMMILL, Judge