DIVISION ONE
FILED: 05/31/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0097
	)	1 CA-CR 11-0495
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT A
	)	
DANIEL JOSEPH FELTON,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200700620

The Honorable Lawrence C. Kenworthy, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Division
and Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

Michael A. Breeze, Yuma County Public Defender — Yuma
By Edward F. McGee, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Daniel Joseph Felton appeals his convictions and sentences for sexually abusing his long-term girlfriend's daughter. On appeal, Felton first argues the superior court

abused its discretion by denying his motions to vacate its judgment on the basis of newly discovered evidence, including evidence that, after trial but before sentencing, the victim's brother gave a written statement to the police describing a conversation with the victim in which she purportedly told him she "[couldn't] believe they didn't catch on that [she] was lying." Felton also argues the evidence failed to support his conviction on two of the charges. For the reasons discussed below, the superior court did not abuse its discretion in denying Felton's motion and the evidence supports his convictions on the two challenged charges. We thus affirm his convictions and sentences.

DISCUSSION

I. The Victim's Brother's Statement

¶2 At the conclusion of a trial which centered on the victim's testimony, the jury found Felton guilty of one count of child molestation, one count of continuous sexual abuse, and one count of sexual conduct with a minor under the age of eighteen. Then, before the superior court entered judgment and sentenced him, Felton moved to vacate the judgment under Arizona Rule of Criminal Procedure 24.2. In his motion, Felton described "a document from the victim's brother . . . wherein he claimed that the victim told him after the Trial that she had been lying throughout the proceedings," and argued this document

constituted "newly discovered material facts," which warranted vacating the judgment. Felton attached to his motion a copy of a police department "Statement of Witness" form with the victim's brother's handwritten statement explaining that

> [he] went over to see how [his] sister [the victim] was doing after the trial and she told [him] to go to the room. When she came into the room she was smiling and said, "I can't believe they didn't catch on that I was lying." [He] asked, "What do you mean sis?" and she said "I mean I left the state, I ditched part of the trial, and didn't have any real proof." I said, "Ok let's change [the] subject." That was the end of the conversation.

(the "first statement"). The superior court denied Felton's motion without prejudice, finding it was premature because Felton "ha[d] not been sentenced, and thus no conviction ha[d] been entered."

¶3 After the court imposed sentence, Felton again moved to set the judgment aside on the basis of the first statement and a subsequent, more detailed statement given to the police by the victim's brother (the "second statement") in which he again reported the same conversation with his sister but gave additional details not contained in the first statement. Felton asked the court to hold an evidentiary hearing to determine "whether [the statements] would have likely resulted in a different jury verdict." Felton also argued the court should vacate the judgment on other grounds, as discussed below. The

superior court denied Felton's motion, finding he had "not raised a colorable claim that require[d] an evidentiary hearing."

¶4 On appeal, Felton argues he "had made out a sufficient claim of newly discovered evidence to entitle him to a new trial, or at the minimum, to an evidentiary hearing on the issue," and therefore the superior court "abused its discretion in denying his motion to vacate judgment based on newly discovered evidence that [the victim] had recanted." We disagree and hold the superior court did not abuse its discretion in denying his motion. *See State v. Orantez*, 183 Ariz. 218, 221, 902 P.2d 824, 827 (1995) (citation omitted) ("We analyze a trial court's decision on a motion for a new trial based on newly discovered evidence on an abuse of discretion standard.").

¶5 Arizona courts view third-party accounts of untruthful testimony with suspicion. *State v. Krum*, 183 Ariz. 288, 294, 903 P.2d 596, 602 (1995). Because third-party statements, like the victim's brother's statements, "show no personal knowledge, they are, at most, hearsay evidence rather than direct evidence of recantation." *Id*. at 293, 903 P.2d at 601 (footnote omitted). Our supreme court has explained that such statements are generally unreliable and "[s]tanding alone . . . will seldom entitle a . . . petitioner to relief." *Id*. (citations omitted).

Our supreme court has further instructed that a trial court should hold an evidentiary hearing if the third-party statement "appears particularly credible or reliable, or if other evidence tends to support the affidavit or the recantation." *Id*. at 294, 903 P.2d at 602. "[W]e give particular weight to the trial court's judgment in cases involving recanted testimony." *Id*. at 293, 903 P.2d at 601 (citation omitted).

¶6 Here, Felton presented the superior court with no indications the victim's brother's statements were "particularly credible or reliable." The victim's mother brought the statements to defense counsel's attention. Given her ongoing relationship with Felton, she was hardly an unbiased source. Indeed, at trial she testified she did not believe Felton, her live-in boyfriend, had sexually abused her daughter. The victim's brother did not report the conversation to the police until nearly three weeks after the date on which he said it had occurred. The first and second statements were also inconsistent; in the first statement, the victim's brother said he initiated the contact with the victim ("I went over to see how my sister . . . was doing after the trial"), while in the second statement he said the victim had initiated the contact ("I got a call from my sister . . . [and then went to see her]"). Further, in the second statement, he quoted the victim as saying "well at least I finally got my revenge with

[Felton],” while in the first statement he expressly indicated their conversation ended (“That was the end of the conversation”) without any mention of “revenge.”

¶7 In addition, there was a dearth of “other evidence tend[ing] to support the affidavit or the recantation.” *Krum*, 183 Ariz. at 294, 903 P.2d at 602. The prosecutor repeatedly informed the superior court the victim adamantly denied making any such statement, the victim testified convincingly at trial and described the abuse in detail, and the court noted in addressing mitigation that it believed the victim’s testimony at trial. On this record, we hold the superior court did not abuse its discretion in finding that the third-party witness statements did not create a colorable claim of recantation that would require an evidentiary hearing, much less vacating its judgment on the basis of newly discovered evidence. *See* Ariz. R. Crim. P. 24.2(a)(2), 32.1(e) (grounds for relief include newly discovered material facts that “probably would have changed the verdict or sentence”).

II. Witness’s Drug Use

¶8 Felton next argues the superior court abused its discretion in denying his motion to set aside the judgment in light of a newly discovered laboratory report showing the victim’s uncle -- who provided trial testimony corroborating the victim’s description of Felton’s abuse -- had tested positive

for methamphetamine two days before he testified he had been drug-free for 11 months. Although Felton made this argument in his motion to set aside the judgment, the superior court did not address it and therefore implicitly denied it. *See State v. Hill*, 174 Ariz. 313, 323, 848 P.2d 1375, 1385 (1993) (citation omitted). We hold the superior court did not abuse its discretion in denying Felton's motion to vacate the judgment based on this evidence.

¶9 The victim's uncle was a key witness as he was the only witness to corroborate the victim's testimony Felton had sexually abused her. Had the newly discovered laboratory report been available at the time of trial, Felton could have used it to impeach the uncle's credibility on cross-examination, given that he had testified he was "currently 11 months clean." The record does not reflect, however, this impeachment evidence would have "substantially undermine[d] testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32(e)(3). Under the evidentiary rules, if the uncle had denied testing positive for methamphetamine, Felton would have been unable to offer the report as an exhibit to contradict the denial. *See* Ariz. R. Evid. 608(b) ("[E]xtrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for

truthfulness."[1]); *Hill*, 174 Ariz. at 325, 848 P.2d at 1387 (citations omitted). In addition, the uncle admitted he had recently been released from prison after serving six months for methamphetamine possession, had been addicted to methamphetamine for "quite a number of years," and had gone to see Felton to purchase drugs when he surprised Felton in the act of abusing the victim. Under these circumstances, in light of the already substantial impeachment and questionable credibility of the uncle, Felton failed to show the laboratory report "probably would have" changed the verdict, and the superior court therefore did not abuse its discretion in denying Felton's motion to set aside the judgment on this basis.

III. Sufficiency of the Evidence

¶10 Felton also argues the evidence fails to support his convictions for molestation and sexual conduct with a minor, because the State failed to present any evidence the charged conduct occurred during the times alleged. We review de novo the sufficiency of the evidence to support a conviction. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011) (citation omitted). We view the facts in the light most favorable to upholding the jury's verdict, and resolve all

[1]Although the Arizona Supreme Court amended this rule effective after the date of Felton's trial, the revisions are immaterial here. Thus, we cite to the current version of the rule.

conflicts in the evidence against Felton. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983).

¶11 As Felton points out, he could not have been convicted of any other felony sexual offense during the 2001 – July 2004 "continuous sexual abuse" time period charged by the State. Ariz. Rev. Stat. ("A.R.S.") § 13-1417(D) (2010)[2] ("Any other felony sexual offense involving the victim shall not be charged in the same proceeding with a charge under this section unless the other charged felony sexual offense occurred outside the time period charged under this section or the other felony sexual offense is charged in the alternative."); *State v. Larson*, 222 Ariz. 341, 345, ¶¶ 16-18, 214 P.3d 429, 433 (App. 2009) (vacating conviction and sentence for sexual conduct with a minor as lesser-included offense of continuous sexual abuse). In addition to finding Felton guilty of continuous sexual abuse, the jury found him guilty of molesting the victim between August and September of 2004, as the State charged in its amended indictment. Felton argues on appeal the State presented insufficient evidence establishing he had molested the victim in that specific time period. The victim testified, however, that Felton continually touched her vagina and forced her to perform oral sex on him and engage in sexual intercourse between 2003

[2]Because any amendments to the statutes after the dates of the offenses are not material to the issues raised on appeal, we have cited to the current versions of the statutes.

and the fall of 2005, when she turned 15. This evidence was sufficient to support his conviction for molesting the victim in August through September 2004, as charged.

¶12 Finally, Felton argues the State failed to present sufficient evidence supporting his conviction for sexual conduct with a minor, which was based on an incident the State initially alleged occurred "on or about November 2005," but later amended to "November 2004." Felton essentially argues the victim's testimony at trial could only support a finding the incident occurred in November 2005, and therefore "the evidence was insufficient to establish that this offense occurred in November, 2004, as charged in the indictment."

¶13 We note that the age of the victim is an element of the offense of sexual conduct with a minor, but the date of the offense is not. *See* A.R.S. § 13-1405(A) (Supp. 2011) ("A person commits sexual conduct with a minor by intentionally or knowingly engaging in . . . oral sexual contact with any person who is under eighteen years of age."). Thus, because the victim was under 18 at the time of the incident, regardless of whether it occurred in November 2004 or November 2005, we agree with the State "the difference between the two dates cannot undermine the sufficiency of the evidence that the State presented to convict [Felton] of the charged crime." Further, Felton did not raise any objection to the date discrepancy at trial, and has failed

to demonstrate on appeal how the difference prejudiced his defense. *See State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 18-20, 115 P.3d 601, 607 (2005). Thus, we hold the State presented sufficient evidence supporting Felton's conviction for sexual conduct with a minor.

CONCLUSION

¶14 For the foregoing reasons, we affirm Felton's convictions and sentences.

/s/
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Presiding Judge

/s/
DONN KESSLER, Judge