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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAVID HILTON BRAMLETT, Appellant.	2 CA-CR 2010-0395 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091858001

Honorable Michael O. Miller, Judge
Honorable Richard D. Nichols, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Following a jury trial, appellant David Bramlett was convicted of two counts of child molestation. He was sentenced to two concurrent terms of seventeen

years in prison. Bramlett raises several issues on appeal. For the reasons that follow, we affirm.

Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). While Bramlett was babysitting the young children of his son's girlfriend, he twice touched J., who was then five years old, in her vaginal area. Bramlett was charged with two counts of molestation of a child. He was convicted and sentenced as described above. This appeal followed.

Discussion

Propensity Evidence

¶3 Bramlett first argues the trial court erred by admitting evidence of prior acts because the evidence was unduly prejudicial. He further asserts that in ruling on admissibility the court erroneously concluded that only live testimony could be presented at the evidentiary hearing. We review for an abuse of discretion the admission of other-act evidence. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004). If a particular issue raises a question of law, however, our review is de novo. *See State v. Guadagni*, 218 Ariz. 1, ¶ 13, 178 P.3d 473, 477 (App. 2008).

¶4 Generally, prior acts are inadmissible "to show a defendant's bad character." *Aguilar*, 209 Ariz. 40, ¶ 9, 97 P.3d at 867; *see also* Ariz. R. Evid. 404(b). But Rule 404(c) permits character evidence in sexual offense cases. Before admitting evidence of prior acts under Rule 404(c), the trial court must make three specific

findings: (1) clear and convincing evidence exists to show that the defendant committed the other act; (2) 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 sexual offense"; and (3) the probative value of the other-act evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other factors under Rule 403, Ariz. R. Evid. *Aguilar*, 209 Ariz. 40, ¶ 30, 97 P.3d at 874; *see also* Ariz. R. Evid. 404(c)(1).

¶5 Pursuant to Rule 404(c), the state sought to admit evidence of prior acts that it alleged demonstrated Bramlett's propensity for aberrant sexual behavior. To evaluate the admissibility of this evidence, the trial court held an evidentiary hearing at which M.C., the victim of the prior acts, testified. To rebut the allegations, Bramlett offered a transcript of a 1996 interview his former wife had given to a police detective. The state objected, and the court declined to consider the transcript, finding it was not testimony because "it was not given under oath and . . . was not subject to cross-examination." The court explained that "[i]f it had been a deposition or a preliminary hearing, I would find that sufficient, but for our purposes, I'm requiring live testimony as opposed to the statement given to the detectives."

¶6 Bramlett asserts the trial court erroneously precluded the transcript of his former wife's statements because live testimony is not required at evidentiary hearings on other-act evidence. He is correct that live testimony is not required. *See State v. LeBrun*, 222 Ariz. 183, ¶ 14, 213 P.3d 332, 336 (App. 2009). Therefore, to the extent the court precluded the transcript because it believed the parties were required to present live

testimony, it would have erred. But the court indicated that the rebuttal evidence would have been sufficient if it "had been [a transcript from] a deposition or a preliminary hearing," rather than an unsworn statement to police, thus recognizing correctly that live testimony was not required.[1]

¶7 Bramlett further contends the trial court erred because "any possible evidentiary value of [M.C.'s testimony] was substantially outweighed by the unfair prejudice and confusion of the issues."[2] In weighing probative value and unfair prejudice, the court considers factors such as the remoteness of the prior acts, the similarity or dissimilarity of the prior acts and charged offenses, the strength of the evidence, the frequency of the prior acts, the circumstances surrounding the prior acts, any relevant intervening events and other similarities or differences. Ariz. R. Evid. 404(c)(1)(C). Bramlett maintains the court "misapplied several of [these] factors to the facts of the case."

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[1]The state also contends presentation of rebuttal evidence at evidentiary hearings is improper because it would require the court to make a credibility determination that should be left to the jury. However, when witnesses are present, it is precisely this kind of credibility determination that the law requires of the court. *See LeBrun*, 222 Ariz. 183, ¶¶ 12, 15, 213 P.3d at 335-36 (court evaluates credibility of witnesses at hearing on admissibility of other-acts evidence; rebuttal evidence permitted).

[2]The trial court determined that the state proved by clear and convincing evidence that Bramlett had committed these other sexual acts. To the extent he challenges this finding on appeal, the testimony of the victim, which the trial court found credible, provided sufficient evidence that Bramlett had committed these other acts. *See* Ariz. R. Evid. 404(c)(1)(A); *State v. Herrera*, 226 Ariz. 59, ¶ 20, 243 P.3d 1041, 1047-48 (App. 2010); *cf. State v. Williams*, 111 Ariz. 175, 177-78, 526 P.2d 714, 716-17 (1974) (uncorroborated testimony sufficient to uphold sexual misconduct conviction unless "story is physically impossible or so incredible that no reasonable person could believe it"); *State v. Haston*, 64 Ariz. 72, 77, 166 P.2d 141, 144 (1946) (same).

¶8 Bramlett appears to argue that his prior acts should have been excluded simply by virtue of their "remoteness" or their remoteness combined with the absence of intervening acts. But if the supreme court had intended for there to be a bright line rule for remoteness, it would have so indicated. Instead, through a comment, it made clear that "the rule does not contemplate any bright line test of remoteness or similarity, which are solely factors to be considered." Ariz. R. Evid. 404 cmt. (1997). Furthermore, no single factor or combination of two factors is dispositive; the trial court must make its findings on each of the factors and weigh them all together to arrive at its decision. *See* Ariz. R. Evid. 404(c)(1)(C). And, contrary to Bramlett's assertions, we cannot know what weight the court allotted to any individual factor in arriving at its decision.

¶9 Additionally, Bramlett disputes several of the trial court's findings on the grounds that the court "may well have found [M.C.] less credible had it also considered the rebuttal evidence" of his former wife. Whether a defendant committed a prior sexual offense for the purposes of Rule 404(c) "turns largely on the credibility of the witnesses." *Aguilar*, 209 Ariz. 40, ¶ 35, 97 P.3d at 875. And, as the finder-of-fact at the hearing, the court was in the best position to determine the credibility and weight of witness testimony. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995). In its findings, the court indicated it found M.C.'s testimony to be "quite strong based on [her] overall presentation, including memory of detail, lack of a motive to fabricate, demeanor, etc," presumably based upon her live testimony. In contrast, presented with an unsworn statement to police, the court apparently concluded it could not properly evaluate the credibility of Bramlett's former wife. And, we have recognized that transcripts may not

allow the court to evaluate credibility. *See LeBrun*, 222 Ariz. 183, ¶¶ 12-13, 213 P.3d at 335-36. In any event, as discussed above, the court did not abuse its discretion in excluding the transcript of Bramlett's former wife's statement, and it therefore was not required to consider it in relation to M.C.'s credibility or otherwise. Because the court reasonably could have found that the probative value of the evidence was not outweighed by the danger of unfair prejudice to Bramlett, it did not abuse its discretion by admitting the propensity evidence.

Victim's Testimony

¶10 Bramlett contends the trial court abused its discretion by allowing the victim to testify because she was not a competent witness due to her young age. We review for an abuse of discretion a court's determination of competency for a child under ten. *State v. Schossow*, 145 Ariz. 504, 507-08, 703 P.2d 448, 451-52 (1985). The court's discretion in this matter is "practically unlimited." *State v. Jerousek*, 121 Ariz. 420, 425, 590 P.2d 1366, 1371 (1979).

¶11 In Arizona, "every person is competent to be a witness" in a criminal trial. A.R.S. § 13-4061. Nevertheless, witness competency still may be challenged. *State v. Superior Court*, 149 Ariz. 397, 400-01, 719 P.2d 283, 286-87 (App. 1986). When a party seeks to introduce the testimony of a young child whose competency is challenged, the trial court may first evaluate whether the child is competent to testify. *See id.* To find the child incompetent to testify, "the judge must be convinced that no trier of fact could reasonably believe that the prospective witness could have observed, communicated, remembered or told the truth with respect to the event in question." *Id.* at 401, 719 P.2d

at 287. A witness's age and discrepancies in her testimony, however, do not affect competency. *Id.* at 400, 719 P.2d at 286. Rather, "[t]he fact of the extreme youth of the witness and any inconsistencies in her testimony are matters to be considered by the jury in connection with her credibility and the weight which should be given to her testimony." *Id.*

¶12 The victim was six years old at the time of trial. Before she testified, the trial court briefly examined her and determined she was competent to testify. Bramlett contends the court's ruling was an abuse of discretion because, during the competency examination, the victim's responses did not demonstrate an understanding of the difference between the truth and a lie. But, although she initially had demonstrated some confusion with her answers, when asked by the court if a lie was "tell[ing] something that's not true," she said "[y]es."[3] And when the court asked her if she promised to "just tell the truth," she answered that she would. Bramlett further maintains that her testimony at trial was "nonresponsive, contradictive, and often fantastic." But, the contradictions and inconsistencies were issues of credibility and weight for the jury. *See id.* Because the court reasonably found the victim competent, it did not abuse its discretion by allowing her to testify.

Jury Instructions

¶13 Bramlett next argues the trial court erred by not sua sponte defining "preponderance of the evidence" for the jury. Having conceded this issue was not raised

[3]Further, the law recognizes that a young child may "not understand abstract concepts such as . . . truth or lie." *See Superior Court*, 149 Ariz. at 400, 719 P.2d at 286.

below, Bramlett now asserts that the omission was prejudicial, fundamental error.[4] *See* Ariz. R. Crim. P. 21.3(c) (failure to request or object to instruction is "[w]aiver of [e]rror"). "Error is fundamental when it reaches 'the foundation of the case or takes from the defendant a right essential to his defense,' or is an 'error of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial.'" *State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988), *quoting State v. Thomas*, 130 Ariz. 432, 435-36, 636 P.2d 1214, 1217-18 (1981). To obtain reversal under this standard of review, a defendant must show both fundamental error and prejudice. *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005).

¶14 At trial, Bramlett advanced the affirmative defense of lack of sexual motivation. He requested a jury instruction reading: "It is a defense to a prosecution pursuant to [A.R.S. § 13-1410][5] involving a victim under fifteen years of age that the defendant was not motivated by a sexual interest." The final jury instruction was more detailed, instructing the jury that Bramlett had the burden to prove this defense by a "preponderance of the evidence," but it did not define this term for them. Citing *Lakeside v. Oregon*, 435 U.S. 333, 340 (1978), and *State v. Denny*, 119 Ariz. 131, 134,

[4]Bramlett initially asserted that the omission was structural error, but, in his reply brief he concedes that *State v. Valverde*, 220 Ariz. 582, 208 P.3d 233 (2009), controls and requires a fundamental error analysis instead. Though he asserts that *Valverde* is wrongly decided, he correctly notes that this court must defer to our supreme court. *See State v. Stanley*, 217 Ariz. 253, ¶ 28, 172 P.3d 848, 854 (App. 2007) (this court bound by decisions of our supreme court; we have no authority to overturn, refuse to follow its decisions). Consequently, we review solely for prejudicial, fundamental error.

[5]The proposed instruction actually cited A.R.S. § 13-1404, but Bramlett was charged under § 13-1410, so we assume it intended to cite § 13-1410 instead.

579 P.2d 1101, 1104 (1978), Bramlett asserts that the court should have provided the definition to prevent confusion or misunderstanding on the part of the jury.

¶15 "We consider the jury instructions as a whole to determine whether the jury received the information necessary to arrive at a legally correct decision." *State v. Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d 604, 616 (2009). The instructions here made clear to the jury that the law involved different burdens of proof. The definition of beyond a reasonable doubt included an explanation of the lesser burden in civil cases: "In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable." Additionally, the jury was instructed that it could consider the other acts if it found that the state had proved them by clear and convincing evidence, which was not further defined. And in using the terms "preponderance of the evidence" and "clear and convincing evidence," the court also instructed the jury that the state's burden was not diminished; it still had to prove each of the elements of the crime beyond a reasonable doubt. Thus, the court made clear that the preponderance standard was something different, and lesser, than the standard for proof beyond a reasonable doubt, leaving little room for confusion of the standard Bramlett was required to meet in relation to his defense.

¶16 Further, the court is not required to instruct the jury on the meaning of every word. *See State v. Barnett*, 142 Ariz. 592, 594, 691 P.2d 683, 685 (1984). The state argues the common meaning of "preponderance" was sufficient here, and, in the context of the other instructions, we agree. The jury was instructed to ask questions of the court if it had them, so if the term was not understood, we presume the jury would

have followed the court's instructions and asked for clarification. *See State v. Prince*, 204 Ariz. 156, ¶ 9, 61 P.3d 450, 452 (2003). Though the jurors did not ask about the definition of preponderance of the evidence, they clearly were aware that they could have done so. In sum, viewing the instructions as a whole, we cannot say the court's failure to sua sponte provide an instruction defining preponderance was fundamental error.

¶17 Furthermore, Bramlett has not carried his burden to show prejudice. He contends the jury could have acquitted him had it been properly instructed on the burden.[6] But such speculation is insufficient to show prejudice. *See State v. Martin*, 225 Ariz. 162, ¶ 15, 235 P.3d 1045, 1049 (App. 2010) (speculative prejudice not sufficient to find reversible error); *State v. Munninger*, 213 Ariz. 393, ¶ 14, 142 P.3d 701, 705 (App. 2006) (same). In light of the evidence at trial, Bramlett has not shown how a reasonable jury could have reached a different conclusion as to his guilt if the court merely had defined the term preponderance. *See Henderson*, 210 Ariz. 561, ¶ 28, 115 P.3d at 609.

Motion to Vacate Judgment

¶18 Bramlett contends the trial court erred by denying his motion to vacate the judgment against him. He sought to vacate his convictions based on letters from his daughter-in-law, which he characterized as newly discovered evidence. In the letters, the daughter-in-law attested that, on three different prior occasions, she had witnessed the victim ask Bramlett to put a diaper on her. We review for an abuse of discretion a denial

[6]Bramlett asserts on appeal that he "did not meaningfully contest that he may have directly or indirectly touched any part of [the victim]'s genitals" and that, rather, "his sole defense was that such touching was not sexually motivated." But we note that, while Bramlett himself did not testify at trial, his counsel's closing argument clearly belies this assertion.

of a motion to vacate judgment based on newly discovered evidence. *See State v. Serna*, 167 Ariz. 373, 374, 807 P.2d 1109, 1110 (1991).

¶19 To merit relief based on newly discovered evidence, (1) the material presented must show that the evidence relied on is actually newly discovered; (2) the court must be able to infer due diligence from the facts submitted; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be relevant to the issue raised; and (5) it must be evidence that, if introduced at a new trial, would probably change the verdict. *Id*. Even assuming, arguendo, that the evidence was newly discovered and that Bramlett was unable to discover it despite his due diligence, the trial court did not abuse its discretion by denying Bramlett's motion.

¶20 To convict Bramlett of child molestation, the jury had to conclude that he had engaged in sexual contact with J. by touching her genital area as alleged. *See* A.R.S. § 13-1410. Whether J. previously had asked Bramlett to put a diaper on her is not relevant to that determination; nor is it relevant who had the idea that J. wear the diaper. The only relevant questions were whether Bramlett committed the alleged acts while diapering J. and whether the jury believed his asserted defense of lack of sexual motivation. *See* A.R.S. §§ 13-1407(E); 13-1410. Consequently, the information in the letters was not relevant to the issues before the jury.

¶21 Bramlett asserts that he wanted to introduce the letters to prove that the diapering was J.'s idea. But, even if this evidence had been relevant to defending the charges, it would have been cumulative. While there was testimony that it may have been Bramlett's idea, other evidence indicated it was J. who asked Bramlett to diaper her.

And, though not evidence, Bramlett's counsel repeatedly stated in closing argument that it was J.'s idea.

¶22 Bramlett further states, though briefly, that the evidence could have been used to impeach J.'s testimony. But this issue was not raised in his motion, and he does not argue fundamental error on appeal. It is, therefore, waived. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607 (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it). Because the evidence, even if newly discovered, did not satisfy the legal threshold to vacate the judgment, the trial court did not abuse its discretion by denying Bramlett's motion.

Sentencing

¶23 Bramlett last asserts the trial court erred by sentencing him to presumptive terms because it "found multiple valid mitigating factors balanced by multiple aggravating factors when there was, at most, only one valid aggravating factor." We review for an abuse of discretion a court's imposition of a sentence within the statutory limits. *State v. Olmstead*, 213 Ariz. 534, ¶ 4, 145 P.3d 631, 632 (App. 2006).

¶24 The trial court is not required to make its sentencing decision "based upon [the] mere numbers of aggravating or mitigating circumstances." *State v. Marquez*, 127 Ariz. 3, 7, 617 P.2d 787, 791 (App. 1980). And the imposition of a mitigated sentence is never mandated. *See Olmstead*, 213 Ariz. 534, ¶ 5, 145 P.3d at 632. In fact, "even when

only mitigating factors are found, the presumptive term remains the presumptive term unless the court, in its discretion, determines that the amount and nature of the mitigating circumstances justifies a lesser term." *Id.*; *see also* A.R.S. § 13-701(F) ("In determining what sentence to impose, the court shall take into account . . . whether the amount of mitigating circumstances is sufficiently substantial to justify the lesser term.").

¶25 Representing her minor daughter, the victim's mother gave a statement at sentencing. In pronouncing the sentence thereafter, the trial court stated that it "[took] into account the following aggravating factors of the victim's statement, particularly the victim being the victim's representative." Bramlett contends this statement demonstrates that the court failed to sufficiently "articulate[] its own findings in aggravation." But, because Bramlett was sentenced to presumptive terms, the court was not required to enumerate the aggravating factors, *see State v. Harrison*, 195 Ariz. 1, ¶¶ 11-16, 985 P.2d 486, 489-90 (1999); thus, we find no error with the court's "articulation" of its findings.

¶26 Bramlett also claims the trial court improperly considered the impact of his actions on the victim's mother and others as aggravating factors. But even assuming, without deciding, that this would have been error, the court properly considered the impact on the victim herself, a valid aggravating factor.[7] *See* A.R.S. § 13-701(D)(9). And, contrary to Bramlett's implication, the fact that the court enumerated the factors does not mean it necessarily would have imposed a different sentence if certain factors

[7]To the extent Bramlett argues the trial court improperly concluded the victim had been harmed, we disagree. The victim impact statement addressed that harm. J.'s mother explained that her daughter considered Bramlett to be a grandfather to her and was upset by what he had done. She further explained that, at the time of sentencing, J. had been "going to counseling" for some time.

had been omitted. The record reflects that the court considered Bramlett's individual circumstances and imposed a sentence well within its discretion for the two offenses. Accordingly, we find no merit to this claim of error.

Disposition

¶27 Bramlett's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge