

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

FILED BY CLERK

DEC 23 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0005
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
CHRISTIAN ALBERTO SANCHEZ,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094239001

Honorable Terry L. Chandler, Judge

AFFIRMED AS MODIFIED

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K E L L Y, Judge.

¶1 Following a jury trial, appellant Christian Sanchez was convicted of one count of molestation of a child, three counts of sexual abuse of a minor under fifteen, and

one count of sexual conduct with a minor under fifteen. He was sentenced to concurrent and consecutive terms of imprisonment totaling thirty-seven years. On appeal, he argues the trial court erred by admitting the testimony of one witness and by assessing a time payment fee at sentencing.¹ For the reasons that follow, we affirm his convictions and prison sentences, but we modify his sentence by vacating the time payment fee.

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). In October 2009, R. accused Sanchez, who was living in her home, of several incidents of sexual abuse. After she heard R.’s accusations, R.’s mother confronted Sanchez and then called the police. Sanchez subsequently was charged with seven counts of sexual offenses against a minor under fifteen.²

¶3 Prior to trial, another victim, E., also a minor, came forward with allegations of similar abuse by Sanchez. After the state filed a Notice of Intent to use E.’s videotaped interviews as character evidence pursuant to Rule 404(c), Ariz. R. Evid., Sanchez moved to preclude the interviews. The trial court ruled that specific acts described in E.’s initial interview at the Child Advocacy Center had been established by clear and convincing evidence and that E.’s statements about these acts would be

¹In his reply brief, Sanchez withdraws an additional argument that the trial court erred by allowing certain expert testimony. Because he withdrew the argument, we do not address it further.

²Sanchez was also indicted on one count of failure to give notice of change of address, but this charge was later severed.

permitted. The court precluded acts E. described in subsequent interviews. The jury found Sanchez guilty of the five counts described above and acquitted him of two others. Following his sentencing, Sanchez filed this appeal.

Discussion

¶4 Sanchez first argues the trial court “abused its discretion when it allowed other[-]act evidence from a witness it found not to be credible.” We review for an abuse of discretion the admissibility of other-act evidence. *See State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004).

¶5 Rule 404(c), Ariz. R. Evid., provides in part that when “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.” Each of the charges of which Sanchez was convicted qualifies as a “sexual offense” for the purposes of this rule. *See* A.R.S. § 13-1420(C)(1), (2), and (5); Ariz. R. Evid. 404(c)(4).

¶6 Before admitting other-act evidence under Rule 404(c), the trial court must make three specific 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 sexual 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, Ariz. R. Evid. *Aguilar*, 209 Ariz. 40, ¶ 30, 97 P.3d at 874; *see also* 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 acts, surrounding circumstances, relevant intervening events and other similarities or differences. Ariz. R. Evid. 404(c)(1)(C).

¶7 Here, the trial court held a hearing to determine the admissibility of the proffered other-act evidence involving Sanchez’s alleged sexual abuse of E. It heard testimony about E.’s four interviews at the Child Advocacy Center. The court considered the different accusations and the circumstances surrounding the interviews and made detailed findings that satisfied the requirements of Rule 403 and Rule 404(c). The court concluded that the allegations made in the subsequent interviews had not been established by clear and convincing evidence, and it precluded testimony about those interviews.³ For the same reason, it also precluded testimony about one of the incidents described in the first interview.

¶8 Sanchez asserts the trial court found the witness not to be credible and, thus, all of her testimony should have been excluded. 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. But Sanchez mischaracterizes the court’s ruling. The court did not find the witness to lack credibility generally. Instead, the court appropriately and carefully considered the numerous

³The trial court found E.’s allegations in the subsequent interviews were not sufficiently reliable in part because E.’s mother and brother had spoken with E. about her allegations on numerous occasions after the first interview. It further found at least one of the alleged acts “physically impossible.”

allegations, balanced the different factors, and concluded that the majority of E.'s first interview was admissible. Moreover, as the finder-of-fact at the hearing, the court was in the best position to determine the credibility and weight of E.'s testimony about the various incidents she described. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995).

¶9 Sanchez further contends the state “failed to provide clear and convincing evidence” that E.'s allegations were true. But, despite Sanchez's contention to the contrary, a victim's testimony alone can satisfy this burden. *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). Consequently, the trial court did not abuse its discretion in admitting the limited other-act evidence to show Sanchez's aberrant sexual propensity to commit the charged offenses. *See Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d at 874.

¶10 Sanchez also argues the trial court erred by assessing a twenty dollar time payment fee, and the state concedes the error. A court may assess a time payment fee only when a defendant has been assessed a “penalty, fine or sanction” pursuant to A.R.S. § 12-116(A). And neither attorney fees nor indigent administrative assessment fees, both of which Sanchez was assessed, fall under § 12-116. *State v. Connolly*, 216 Ariz. 132, ¶ 3, 163 P.3d 1082, 1082-83 (App. 2007). Although Sanchez did not object to the time payment fee below, an illegal sentence is fundamental error. *State v. Henderson*, 210

Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error); *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002) (illegal sentence is fundamental error). Therefore, we amend the sentencing order by vacating the imposition of this fee.

Disposition

¶11 We affirm Sanchez’s convictions and his sentences as modified.

/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