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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STATE OF ARIZONA, Appellee, v. WILLIAM MICHAEL JACKSON, Appellant.	2 CA-CR 2011-0027 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20064488 and CR20070250

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED IN PART, MODIFIED IN PART,
AND REMANDED WITH INSTRUCTIONS

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, William Jackson was convicted of continuous sexual abuse of a child, sexual conduct with a minor under the age of fifteen, molestation of a child, and two counts of sexual conduct with a minor. He was sentenced to a combination of concurrent and consecutive, mitigated terms of imprisonment totaling thirty-six years. On appeal, Jackson contends the trial court made several erroneous and prejudicial evidentiary rulings and failed to give him presentence incarceration credit on all of the counts for which concurrent sentences were imposed. For the reasons set forth below, we affirm in part, modify in part, and remand with instructions.

Procedural Background

¶2 In December 2006 and January 2007, Jackson was charged in separate cause numbers with various sex and drug-related crimes against his biological daughters, A.H. and J.H. In Pima County cause number CR20064488, Jackson was charged with two counts of continuous sexual abuse of a child, one count of sexual conduct with a minor under the age of fifteen, two counts of sexual conduct with a minor, and two counts of involving or using a minor under fifteen in drug offenses, all involving A.H. In CR20070250, Jackson was charged with molestation of a child under the age of fifteen, involving J.H. Six of the eight offenses charged in the indictments were designated dangerous crimes against children.

¶3 The cause numbers were consolidated for trial, but the two drug-related counts were severed from the other charges and the state voluntarily dismissed one count

of continuous sexual abuse.[1] In late 2008, Jackson was tried on the sex-related charges but the jury was unable to reach a verdict, resulting in a mistrial. At a second trial, the jury found Jackson guilty of all counts, and he was sentenced as described above. This appeal followed.

Discussion

Videotape of Forensic Interview

¶4 Jackson first argues the trial court erred in permitting the state to play in its rebuttal case a muted video recording of A.H.'s forensic interview "which showed her crying for an extended period of time, purportedly to rebut the defense claim that she had made her claims because she was a lying vindictive drama queen."[2] He contends the probative value of the videotape for the purpose offered—to establish A.H.'s demeanor during the interview and to rebut the claim A.H. had fabricated her story—was substantially outweighed by the danger of unfair prejudice and therefore was inadmissible pursuant to Rule 403, Ariz. R. Evid. "'Rule 403 weighing is best left to the trial court and, absent an abuse of discretion, will not be disturbed on appeal.'" *State v. Fernane*, 185 Ariz. 222, 226, 914 P.2d 1314, 1318 (App. 1995), *quoting State v. Spencer*, 176 Ariz. 36, 41, 859 P.2d 146, 151 (1993). In conducting our review, we "'must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.'" *State v. Castro*, 163 Ariz. 465, 473, 788 P.2d

[1]Following a jury trial, Jackson was acquitted of both counts of involving or using a minor under fifteen in drug offenses.

[2]The portions of the videotape that were played for the jury lasted approximately three minutes and thirty seconds.

1216, 1224 (App. 1989), *quoting United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983).

¶5 To be admissible, evidence first must be relevant to an issue in the case. *State v. Chapple*, 135 Ariz. 281, 288, 660 P.2d 1208, 1215 (1983). "The trial court must then consider the probative value of the [evidence] and determine whether" it is substantially outweighed by the danger of unfair prejudice. *Id.*; *see also* Ariz. R. Evid. 403. Evidence is unfairly prejudicial if it "has an undue tendency to suggest [a] decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). But "[e]ven if evidence has an inflammatory nature, if there is a legitimate, rehabilitative purpose that outweighs the prejudicial effect, the evidence is admissible in the trial court's discretion." *State v. Ortiz*, 131 Ariz. 195, 204, 639 P.2d 1020, 1029 (1981), *disapproved on other grounds, State v. Gretzler*, 135 Ariz. 42, 57 n.2, 659 P.2d 1, 16 n.2 (1983).

¶6 Relying on *State v. Taylor*, 196 Ariz. 584, ¶¶ 12-17, 2 P.3d 674, 678-80 (App. 1999), Jackson contends the portions of the videotape played for the jury had little probative value for the purpose offered because the forensic interview was conducted three months after A.H. reported the sexual abuse. Thus, he argues A.H.'s demeanor when "she first reported the incident around Thanksgiving 2005 was more probative than was her demeanor when the forensic interview was conducted [o]n February 8, 2006."

¶7 Jackson's reliance on *Taylor* is misplaced. In *Taylor*, the court considered the admissibility of the victim's videotaped statement under Rule 803(24), Ariz. R. Evid., commonly referred to as the "catchall" hearsay exception. 196 Ariz. 584, ¶ 13, 2 P.3d at

679. For hearsay evidence to be admissible under the catchall exception, the trial court must determine that, among other things, "the [evidence] is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Ariz. R. Evid. 803(24); *see also Taylor*, 196 Ariz. 584, ¶¶ 13-14, 2 P.3d at 679. Here, Jackson neither argued below, nor does he on appeal, that the videotape constituted inadmissible hearsay, and the trial court did not admit the videotape pursuant to the catchall hearsay exception. "Failure to argue a claim usually constitutes abandonment and waiver of that claim." *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). "And an objection on one ground does not preserve the issue [for appeal] on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008).

¶8 Jackson nevertheless maintains that "[a]n extended video of a teenage girl crying . . . can only result in a decision based on sympathy and revulsion."[3] Thus, he contends the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under Rule 403. When applying Rule 403, we must bear in mind that "[n]ormally the probative force and prejudicial effect of evidence is viewed favorably toward the proponent of the evidence." *Fernane*, 185 Ariz. at 226, 914 P.2d at 1318. During his case-in-chief, Jackson elicited testimony from various witnesses who described A.H. as "not truthful," "manipulative," "a drama queen," and "melodramatic." And, in his testimony at trial, Jackson flatly denied any wrongdoing and suggested A.H.

[3]Conversely, the state argued the recording provided the jury "the best opportunity to evaluate [A.H.'s] sincerity during the key moment in the investigation where she made her specific allegations against the [d]efendant."

had fabricated her story because he and A.H. had a falling out regarding her relationship with a teenage boy and because he refused to buy her a car.

¶9 After reviewing the record, we conclude the video was both relevant and probative of A.H.'s demeanor and was permissible rebuttal in light of Jackson's attacks on A.H.'s character and his suggestion that she simply made up the entire story. Jackson repeatedly introduced evidence that challenged the victim's credibility, and we agree with the trial court that evidence of A.H.'s demeanor at the forensic interview, three months after she initially reported the abuse, was probative and admissible to rebut those claims. And, although Jackson may be correct that other evidence was more probative on that point, the state was not obligated to present only the most probative evidence to prove its case. *State v. Gibson*, 202 Ariz. 321, ¶ 17, 44 P.3d 1001, 1004 (2002) (availability of other evidence for the same purpose only one factor in Rule 403 balancing). The court was in the best position to weigh the facts relevant to a Rule 403 determination, and we therefore accord substantial deference to its findings. *Id.* We cannot say the court abused its discretion.

J.H.'s Letter to God

¶10 Jackson next argues "[t]he trial court erroneously permitted the state to introduce hearsay portions of [J.H.]'s 'letter to God.'" "We review a trial court's evidentiary rulings for a clear abuse of discretion." *State v. Abdi*, 226 Ariz. 361, ¶ 21, 248 P.3d 209, 214 (App. 2011).

¶11 Before trial, the state moved in limine to introduce into evidence a note, akin to a diary entry, that J.H. had written. It argued the circumstances under which the

note had been written and discovered made its contents very probative and reliable and therefore admissible pursuant to Rule 803(24). At a hearing on the motion, however, the trial court ruled the letter was not hearsay because J.H. would testify at trial and be subject to cross-examination. The court also concluded the letter was not hearsay because it was both a prior consistent statement and prior inconsistent statement under Rule 801(d)(1). The court ordered portions of the letter redacted, including all references to "God" and permitted J.H. to read the following portions to the jury:

> Don't dwell. Everything is going to be well. Every time I cry I stop and ask myself why. Maybe I should move on, and just hope there will be another dawn?
>
> My mom says I shouldn't let it ruin my future, but I can't[,] not when I think about it all the time.
>
> . . . They divorced. My life pretty much went to crap. I went to live with my father for two years. He molested me. When I finally told someone[,] the one person I thought I trusted the most (my sister), [she] called me a li[a]r. My life went way downhill from the[re]. Months or even a year went by. I found out my dad had been doing things to my sister for years. I was upset that she never said anything when I was trying to. Now I'm stuck in this horrible place and I'm not sure how to get out . . . .
>
> . . . .
>
> Some people say[,] "[d]on't always live life wondering what if, what if," but I'm not sure how to do that.
>
> . . . What if my dad never did my sister or I wrong? What if my aunt never got cancer? What if I never said anything? Maybe I'm looking at all the negative things, but I am not sure how not to . . . .
>
> Counseling? Nope. Writing? Nope. What can I do to make things better? What if I never said anything?

¶12 "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). Rule 801(d)(1) contains exceptions to this general rule and provides in pertinent part:

> (d) Statements which are not hearsay. A statement is not hearsay if—
>
> > (1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . .

¶13 Whether the state offered the letter to support J.H.'s allegations of abuse, to establish the emotional and psychological trauma caused by the abuse, or both, the letter was hearsay—a prior statement of the declarant offered into evidence to prove the truth of the matters asserted. *See* Rule 801(c); *State v. Tucker*, 165 Ariz. 340, 343, 798 P.2d 1349, 1352 (App. 1990). Otherwise inadmissible hearsay evidence does not change its character merely because the declarant testifies at trial. *See Tucker*, 165 Ariz. at 343, 798 P.2d at 1352 ("Generally, prior consistent statements made by a witness are hearsay and are therefore not admissible."). We therefore disagree with the trial court's ruling that because J.H. testified at trial and was subject to cross-examination, the letter was not hearsay.

¶14 Nor can we agree with the court's conclusion that the letter was not hearsay as a prior inconsistent and consistent statement pursuant to Rule 801(d)(1). To be

admissible as a prior inconsistent statement, the out-of-court statement must be inconsistent with the declarant's testimony at trial. Ariz. R. Evid. 801(d)(1)(A). However, there was no inconsistency between J.H.'s trial testimony and her letter. And, prior consistent statements are only admissible "to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Ariz. R. Evid. 801(d)(1)(B); *see also Tucker*, 165 Ariz. at 343, 798 P.2d at 1352 (requiring a recent fabrication, and not just a fabrication, to invoke Rule 801(d)(1)(B)). Here, although Jackson claimed J.H. had concocted her story of abuse in order to avoid returning to Tucson to live with him, J.H. wrote the letter well after this alleged motive arose. Thus, the letter was not admissible as a prior consistent statement. *Id.* Having also reviewed the other hearsay exceptions in Rule 803, Ariz. R. Evid., and having found no other basis for the letter to be admitted on the record before us, we conclude the court abused its discretion by allowing J.H. to read it to the jury.

¶15 However, we conclude the error was harmless because we are satisfied beyond a reasonable doubt that it did not contribute to or affect the verdict. *See State v. Fulminante*, 193 Ariz. 485, ¶ 49, 975 P.2d 75, 90 (1999). In reaching this conclusion, we have considered the likely effect of the letter on the jury "in light of the totality of properly admitted evidence." *See id.* ¶ 50. And we view the evidence in the light most favorable to sustaining the jury verdicts. *State v. Ortega*, 220 Ariz. 320, ¶ 2, 206 P.3d 769, 771 (App. 2008).

¶16 Prior to reading the letter, J.H. testified about an occasion when Jackson played a pornographic video for her and A.H. and how he placed her hand on his penis

during the video and again that night after she went to bed. J.H. also testified about how, when she first reported the abuse, A.H. accused her of being a liar and how that made her feel. The portions of the letter read into evidence were merely cumulative to other properly admitted evidence. *See State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982).

Marijuana Use

¶17 Jackson next argues the trial court erred in permitting the state to introduce evidence that, on one occasion prior to having sexual intercourse, he and A.H. smoked marijuana together. He contends not only that the evidence was improperly admitted, but that the court, having admitted the evidence, was required to admit evidence that he had been acquitted of the drug-related charges. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Lehr*, 227 Ariz. 140, ¶ 19, 254 P.3d 379, 386 (2011).

¶18 Prior to trial, Jackson moved to sever the two drug-related charges from the others, arguing severance was required by Rule 13, Ariz. R. Crim. P., and Rule 403, Ariz. R. Evid. The trial court granted the motion, noting the potential "prejudicial effect" the drug charges could have on the "extremely serious" sexual conduct charges. At trial, the prosecutor questioned A.H. about the first time Jackson had penetrated her vaginally and asked her, "Did he give you something, like some kind of substance?" to which she replied, "Yeah. We smoked a joint before . . . ." The prosecutor immediately stopped A.H. from elaborating and rephrased his question. He apparently was trying to elicit testimony from A.H. that Jackson had given her a lubricant before the sex act.

¶19 At a bench conference immediately after A.H.'s comment, Jackson argued "the jury is entitled to know [he] was found not guilty of these accusations." The trial court denied the request, but stated it would give a cautionary instruction, should Jackson request one. He did not request an instruction, and none was given.

¶20 Jackson contends the state "opened the door" to testimony regarding the alleged marijuana use, and, relying on *State v. Davis*, 127 Ariz. 285, 286, 619 P.2d 1062, 1063 (App. 1980), maintains evidence of his acquittal should have been admitted "to weaken and rebut the prosecution's evidence of the other crime." In *Davis*, the defendant initially had been charged with two counts of aggravated assault committed against a man and his wife during the same encounter. *Id.* at 286, 619 P.2d at 1063. At his trial, Davis was acquitted of assaulting the wife, and the jury was unable to reach a verdict on the other count. *Id*. On appeal after his retrial resulted in a conviction on the latter count, Davis argued the trial court should have allowed him to introduce evidence of his acquittal of assault against the wife. *Id.* This court agreed, noting contrary authority but concluding "the better rule allows proof of an acquittal to weaken and rebut the prosecution's evidence of the other crime." *Id*.

¶21 We find *Davis* distinguishable. In that case, testimony admitted without objection "showed that appellant shot [the husband] in the throat. He then grabbed [the wife] and held a pistol to her head. After [she] pleaded for her life, appellant dropped the pistol. [The wife] then ran and called the police." *Id.* Here, the jury was not exposed to such extensive evidence, and the trial court had granted Jackson's motion in limine, ruling that any evidence of the marijuana use would not be admitted at Jackson's trial on

the sexual conduct charges. Nothing in the record suggests the state purposefully elicited the testimony from A.H., and her isolated response appears in all respects to have been an unexpected, unsolicited answer to an imprecise question.[4] And, other than A.H.'s statement, no other evidence regarding marijuana use was presented. "When a witness unexpectedly volunteers an inadmissible statement," the remedy rests largely within the discretion of the trial court. *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983); *see also State v. Jones*, 197 Ariz. 290, ¶¶ 30-35, 4 P.3d 345, 359-60 (2000) (testimony about prior acts not necessarily reversible especially given unsolicited "vague" references to unproven crimes). In some instances, allowing the defendant to introduce evidence of an acquittal may be the only appropriate remedy. However, *Davis* does not support Jackson's broad proposition that, under the circumstances in this case, the court was required to allow evidence of his acquittal of the drug charges. We find no abuse of discretion.

Evidence of A.H.'s Prior Sexual Activity

¶22 Jackson next argues the trial court erred by excluding evidence of A.H.'s consensual sexual activity with other females. Specifically, he contends the court abused its discretion by determining the prejudicial value of the evidence outweighed its probative value and by determining the specific instances of conduct had not been proven by clear and convincing evidence. We review this evidentiary ruling for a clear abuse of discretion. *Abdi*, 226 Ariz. 361, ¶ 21, 248 P.3d at 214.

[4]After A.H. made the statement, Jackson neither moved to strike nor moved for a mistrial.

¶23 Section 13-1421(A), A.R.S., provides that evidence of specific instances of a victim's prior sexual conduct may be admitted only if a trial court finds it is "relevant and is material to a fact in issue in the case," the prejudicial nature of the evidence does not outweigh its probative value, and it is offered for one of the purposes allowed under the statute. Section 13-1421(B) provides that such evidence is admissible only upon written motion, after a hearing at which the court has found specific instances of sexual conduct proven by clear and convincing evidence.

¶24 Prior to Jackson's first trial, the state filed a motion in limine pursuant to § 13-1421, seeking to exclude "[a]ny mention of [A.H.]'s consensual sexual activity with other female friends." On the fourth day of that trial, outside the presence of the jury, the court heard testimony from A.H. regarding allegations that she had used a vibrator anally with a female friend.[5] After A.H. denied the allegations, the court disallowed the evidence "due to the lack of clear and convincing evidence" and its determination that the probative value was outweighed by the prejudicial effect. At Jackson's second trial, the court "affirm[ed]" these prior rulings.

¶25 Here, because we find it to be dispositive, we address only the latter contention—whether the trial court abused its discretion by finding the evidence had not been established by clear and convincing evidence. Jackson asserts "[t]he weight given

[5]The trial court previously had determined the matter appeared relevant to the extent the state introduced evidence A.H. had anal "folds." The court found A.H.'s use of a vibrator would have been relevant as one possible explanation for these "physical manifestations." However, the court deferred a formal ruling on the admissibility of the evidence "until the Court ha[d] examined the named victim outside the presence of the jury."

to [A.H.]'s testimony in determining whether there was clear and convincing evidence is an abuse of discretion because it in effect gives the victim veto power over the admission of the evidence." However, as Jackson acknowledges, "we do not impose our own determination as to the credibility of witnesses." *State v. Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007). Instead, "we will defer to the trial court's assessment . . . because [it] is in the best position to make that determination." *Id.* Here, the court heard conflicting testimony regarding A.H.'s alleged prior sexual activity and determined the clear and convincing evidence requirement in § 13-1421(B) had not been met. Because the court's determination is supported by the record, it did not abuse its discretion by excluding the evidence of A.H.'s prior sexual conduct.

¶26 Jackson also asserts, for the first time on appeal, that the clear and convincing evidence requirement in § 13-1421(B) unconstitutionally denies him "a meaningful opportunity to present a complete defense."[6] In *State v. Gilfillan*, 196 Ariz. 396, ¶ 23, 998 P.2d 1069, 1076 (App. 2000), this court found "the restrictions delineated in the [statute] are not disproportionate to the purpose[s] [it] serves" and it thus is constitutional. We reasoned that a defendant's right to present relevant evidence is not limitless, but "'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Id.* ¶ 20, *quoting Chambers v. Mississippi*, 410 U.S. 284,

[6]Because Jackson did not raise this issue below, we review it only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *see also Abdi*, 226 Ariz. 361, ¶ 26, 248 P.3d at 215 (reviewing constitutional claim for fundamental error).

295 (1973). *Gilfillan*'s reasoning and conclusion remain sound, and Jackson has provided no principled basis for deciding the issue differently.

Expert Witness Testimony

¶27 Before trial, the state disclosed its intent to call Wendy Dutton to testify as its expert about general characteristics of child sexual abuse victims. In his opening brief, Jackson argues the trial court erred in denying his motion, pursuant to A.R.S. § 12-2203, for a hearing on the admissibility of Dutton's expert opinion testimony. Jackson acknowledges that in *Lear v. Fields*, 226 Ariz. 226, ¶ 22, 245 P.3d 911, 918 (App. 2011), this court determined § 12-2203 violated the separation of powers doctrine and therefore is unconstitutional. But, he apparently believes we nevertheless should consider his argument because a petition for review has been filed in *Lear* and has not yet been ruled upon by the supreme court. In its answering brief the state points out that the supreme court has since denied review, and in his reply brief Jackson concedes that our decision in *Lear* is controlling. We therefore deem his argument waived and do not consider it further.

Credit for Presentence Incarceration

¶28 Jackson last argues the trial court erred in failing to give him credit for time served on all of the counts for which concurrent sentences were imposed. He maintains the court erred because, even though it gave him time-served credit for the longest of his three concurrent sentences, it failed to give him the same credit for the two shorter sentences. Jackson acknowledges he did not raise this issue below but, relying on *State v. Vermuele*, 226 Ariz. 399, ¶ 14, 249 P.3d 1099, 1103 (App. 2011), asserts his sentencing-

error claim has not been forfeited. We need not decide whether the issue was preserved for appellate review because, in any event, the imposition of an unlawful sentence constitutes fundamental error. *State v. Lewandowski*, 220 Ariz. 531, ¶ 4, 207 P.3d 784, 786 (App. 2009).

¶29 In *State v. De Passquallo*, 140 Ariz. 228, 229, 681 P.2d 380, 381 (1984), our supreme court addressed this issue and, relying on *State v. Cruz-Mata*, 138 Ariz. 370, 374-76, 674 P.2d 1368, 1372-74 (1983), held the defendant was entitled to presentence incarceration credit for each of his three concurrent sentences. "[W]e are constrained by the decisions of our supreme court and are not permitted 'to overrule, modify, or disregard them.'" *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003), *quoting City of Phx. v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993). We therefore modify the sentences imposed on counts three and four to reflect eighty-three days of time-served credit, and we remand to the trial court with directions to enter a sentencing order effectuating this modification.

Disposition

¶30 For the reasons set forth above, we affirm in part, modify in part, and remand with instructions.

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

CONCURRING:
/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge
/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge