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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STATE OF ARIZONA, Appellee, v. PATRICIO ENRIQUE MARTINEZ, Appellant.	2 CA-CR 2011-0148 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091124001

Honorable Jane L. Eikleberry, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Patricio Martinez was convicted of molestation of a child under twelve years of age, and sentenced to a presumptive prison term of seventeen years. On appeal, he maintains the trial court erred in giving a lesser-included offense instruction over his objection. We find no error and consequently affirm.

Factual and Procedural Background

¶2 We view the evidence presented at trial in the light most favorable to sustaining the conviction. *State v. Thompson*, 167 Ariz. 230, 231, 805 P.2d 1051, 1052 (App. 1990). Martinez was charged with one count of sexual conduct with a minor based on his having "digitally penetrat[ed] the . . . vulva" of a seven-year-old girl on December 8, 2008. At the time, Martinez was a thirty-one-year-old acquaintance of the victim's family, and he had spent the day socializing and playing video games at the victim's house. That night, the victim's aunt awoke, found the victim missing, and searched for her outside. The aunt soon discovered the victim and Martinez together in a parked, inoperable automobile. The victim's pants were down and she was crying. Upon being confronted by the aunt, Martinez jumped into the front seat of the vehicle and held the door shut so the aunt couldn't open it while he attempted to zip up his pants.

¶3 The victim initially denied anything had happened, but she later stated Martinez had "hurt her private" and had "touched [her] private part with his finger." She testified at trial that Martinez had pushed her into the vehicle, held her down, pulled down her pants and underwear, and "stuck his finger in [her] private part."

¶4 A nurse who performed a forensic examination of the victim after the incident "noticed an injury during the genital exam to the labia majora" and discovered a small, tender red spot on the victim's labia minora that had been caused by either internal or external pressure. As the nurse touched various parts of the victim's body, the victim specifically identified those areas that Martinez had touched. By this method, the victim indicated he had made contact with her labia majora, her labia minora, and he had "put his finger inside" her.

¶5 As part of the examination, the nurse also collected DNA[1] samples from the victim's body and clothing. Tests showed a DNA profile of a male on the victim's underwear, as well as on the victim's labia majora—the outer portion of the vulva. Martinez could not be excluded as the donor of that profile. A sample taken from the victim's labia minora did not contain any male DNA.

¶6 The state maintained at trial that Martinez had digitally penetrated the victim's vulva. But after the trial court raised the issue of lesser-included offenses when settling verdict forms, the state requested and obtained an instruction on the lesser-included offense of molestation over Martinez's objection. The jury then returned a verdict only on the lesser offense, finding Martinez guilty of molestation of a child under the age of twelve. Martinez filed a motion for a new trial based on the trial court's provision of the jury instruction. The court denied the motion, and this timely appeal followed the imposition of sentence.

[1]Deoxyribonucleic acid.

Discussion

¶7 Preliminarily, we note that both parties acknowledge child molestation is a lesser-included offense of sexual conduct with a minor. *State v. Ortega*, 220 Ariz. 320, ¶ 25, 206 P.3d 769, 777 (App. 2008). As it was charged in this case, Martinez could not accomplish the digital penetration necessary to commit sexual conduct with a minor without also engaging in the touching necessary for child molestation; hence, the latter was a lesser-included offense of the former, with the distinguishing element being penetration of the victim's vulva. *See* A.R.S. §§ 13-1401(2), (3), 13-1405(A), 13-1410(A). Martinez maintains, however, that the trial court abused its discretion by providing an instruction on the lesser-included offense because "the state's evidence and theory of the case was that [he] committed the greater offense of sexual conduct with a minor," and he presented "an 'all or nothing' defense that he never touched the alleged victim at all."

¶8 As our supreme court recently clarified in *State v. Gipson*, a defendant does not have an absolute right to an all-or-nothing defense. 229 Ariz. 484, ¶¶ 7-9, 11, 277 P.3d 189, 190-91 (2012). Under Rules 13.2 and 23.3, Ariz. R. Crim. P., the state is "entitled to lesser included instructions when the evidence so warrants." *Gipson*, 229 Ariz. 484, ¶ 11, 277 P.3d at 191. But even when a trial court provides a lesser-included offense instruction sua sponte, over the objections of both the state and the defendant, "if the instruction is given and supported by the evidence, a resultant conviction for the lesser included offense does not violate the defendant's constitutional rights or contravene any Arizona statute or rule," and it will not be disturbed on appeal. *Id.* ¶ 17.

¶9 Neither of the parties has cited or discussed *Gipson*. In light of that case, it is unclear if the evidentiary test for determining whether a court must provide a lesser-included offense instruction is relevant to cases such as this one, where a lesser-included offense instruction has been given over a party's objection.[2] For the purposes of deciding this appeal, however, we simply may assume the same test applies.

¶10 A party is entitled to an instruction and verdict form under Rule 23.3 if the lesser offense is "necessarily included" in the greater offense. "An offense is necessarily included 'when it is lesser included' and 'the facts of the case as presented at trial are such that a jury could reasonably find that only the elements of a lesser offense have been proved.'" *Gipson*, 229 Ariz. 484, n.2, 277 P.3d at 191 n.2, *quoting State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006). "'To determine whether there is sufficient evidence to require the giving of a lesser included offense instruction, the test is whether

[2]So long as a conviction is supported by the minimum evidence the constitution requires, as measured by the sufficiency test set forth in *State v. West*, 226 Ariz. 559, ¶¶ 15-16, 250 P.3d 1188, 1191 (2011), this could be the full extent of an appellate evidentiary inquiry, even though a trial court must undertake a different analysis when ruling on a requested instruction as a threshold matter. Once a jury has rendered a verdict on a lesser-included offense supported by constitutionally sufficient evidence, it makes little sense to question whether a rational jury in fact could do so. *See State v. Bass*, 198 Ariz. 571, ¶ 46, 12 P.3d 796, 807 (2000) ("Because a jury is free to credit or discredit testimony, we cannot guess what they believed, nor can we determine what a reasonable jury should have believed."); *State v. Zakhar*, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969) (consistent verdicts not required); *State v. Washington*, 132 Ariz. 429, 433, 646 P.2d 314, 318 (App. 1982) (appellate court does not inquire into jury's reasons for verdict). As *Gipson* pointed out, a defendant generally will not suffer prejudice from a lesser-included offense instruction being given unless "the defendant was surprised by or unable to prepare a defense to the necessarily included charge." 229 Ariz. 484, n.3, 277 P.3d at 192 n.3. And *Gipson* emphasized there is a "societal interest in 'avoiding the unjustified exoneration of wrongdoers and in punishing a defendant only to the extent of his crime.'" *Gipson*, 229 Ariz. 484, ¶ 16, 277 P.3d at 192, *quoting People v. Garcia*, 721 N.E.2d 574, 583 (Ill. 1999).

the jury could rationally fail to find the distinguishing element of the greater offense.'" *State v. Jackson*, 186 Ariz. 20, 27, 918 P.2d 1038, 1045 (1996), *quoting State v. Krone*, 182 Ariz. 319, 323, 897 P.2d 621, 625 (1995). "It is not enough that, as a theoretical matter, 'the jury might simply disbelieve the state's evidence on one element of the crime' . . . ." *Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151, *quoting State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984).

¶11 Here, the jury rationally could have found Martinez had touched the victim's vulva without also penetrating it. The victim described the touching in different ways, and medical evidence did not unequivocally support a finding that digital penetration had occurred. At minimum, the DNA evidence corroborated the victim's statements that Martinez had touched the exterior of her vulva, as the trial court noted in its ruling from the bench. Given the victim's young age, the jury reasonably could have questioned the detail of her memory, the accuracy of her account, and the extent of the touching that had occurred. *See State v. Moran*, 151 Ariz. 378, 382-83, 384-85, 728 P.2d 248, 252-53, 254-55 (1986) (observing jury must determine ultimate questions in case, including extent of touching); *State v. Williams*, 111 Ariz. 175, 178, 526 P.2d 714, 717 (1974) ("It is the function of the jury to determine whether the testimony of the prosecutrix is such as to make the story credible or reasonable . . . ."). The court, therefore, did not err by providing a child molestation instruction over Martinez's objection or by denying the motion for a new trial based upon the same objection.

¶12 In support of his appellate argument, Martinez primarily relies on our recent decision in *State v. Sprang*, 227 Ariz. 10, 251 P.3d 389 (App. 2011), which he

discussed below in his supplemental motion for a new trial. In *Sprang*, we considered the propriety of a trial court providing a second-degree murder instruction in a first-degree murder case. *Id.* ¶ 3. We noted there that the evidence showed only premeditation; there was "no evidence" of any sudden quarrel or heat of passion justifying a conviction of second-degree murder. *Id.* ¶¶ 8, 11-12. This case is unlike *Sprang* because here there was evidence necessary to support the conviction of the lesser-included offense. A reasonable jury could have partially accepted the victim's testimony along with the medical evidence corroborating her claim that some touching of the vulva's exterior had occurred. But "it is difficult to conceive of a jury placing an innocent construction on the acts testified to," *State v. Roberts*, 126 Ariz. 92, 95, 612 P.2d 1055, 1058 (1980), and the jury's verdict reflects that it considered, weighed, and largely credited the testimony of the victim and her aunt, rejecting Martinez's defense. Rather than showing the jury to be irrational, the verdict here indicates the jurors instead were attentive to the burden of proof and the evidence presented. *See Jackson*, 186 Ariz. at 27, 918 P.2d at 1045.

Disposition

¶13 For the foregoing reasons, Martinez's conviction and sentence are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge