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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. THOMAS ALEC KIDWELL, Petitioner.	2 CA-CR 2011-0211-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20042407

Honorable Hector E. Campoy, Judge

REVIEW GRANTED; RELIEF DENIED

Law Offices of John William Lovell, P.C.
By John William Lovell
Tucson
Attorney for Petitioner

E S P I N O S A, Judge.

¶1 After a jury trial, petitioner Thomas Kidwell was convicted of one count of child molestation, a dangerous crime against children, and sentenced to a presumptive, seventeen-year prison term. We affirmed his conviction and sentence on appeal. *State v. Kidwell*, No. 2 CA-CR 2006-0416 (memorandum decision filed July 31, 2008). Kidwell

now seeks review of the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.

¶2 Specifically, Kidwell maintains the trial court abused its discretion in concluding he had not been prejudiced by the omissions of trial counsel.[1] We find no abuse of discretion here. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006) (appellate court will not disturb denial of post-conviction relief absent an abuse of trial court's discretion).

Insufficient Objection to Amended Indictment

¶3 Kidwell first argues his trial counsel was ineffective in "fail[ing] to properly argue" against the state's trial request to amend count one of the indictment to expand the date range for the charged molestation. Kidwell originally had been charged with two counts of dangerous crimes against children; count one alleged he had molested T., a child under the age of fifteen, between October 1, 2003, and December 31, 2003, and count two alleged he had committed continuous sexual abuse of a child by engaging

[1]In October 2010, the trial court granted Kidwell an evidentiary hearing on the issue of whether trial counsel had been ineffective in failing to argue the molestation charge against him was duplicitous, but the court found his remaining claims "either precluded, waived on appeal or . . . [failed to] present a material issue of fact or law" that would entitle him to relief. In February 2011, Kidwell filed a motion to amend his petition for post-conviction relief to add allegations that appellate counsel had been ineffective in "failing to raise those issues in the Appeal . . . that Trial Counsel initially failed to address." The court appears to have granted the motion only with respect to the claim related to duplicitous charging, which the court had found colorable. *See* Ariz. R. Crim. P. 32.6(d) (no amendments of Rule 32 petition permitted "except by leave of court upon a showing of good cause"). In any event, on review, Kidwell does not challenge the court's denial of any claim for ineffective assistance of appellate counsel and has thus waived our review of that issue. *See* Ariz. R. Crim. P. 32.9(c)(1).

in three or more acts of sexual conduct, also with T., during the period of January 5, 2004, through May 20, 2004.

¶4 After the close of the state's case, the trial court granted Kidwell's motion for a directed verdict with respect to count two, finding a "paucity of evidence dealing with the number of the events that occurred or the nature of the events that occurred." But, over Kidwell's objection, the court also granted the state's request to modify the date range alleged for molestation in count one of the indictment to extend from October 1, 2003, through May 20, 2004. In opposing the state's request, trial counsel argued,

> [Kidwell] was indicted based on the Grand Jury's finding of a certain time frame. And on or about was one thing but adding another four months is way beyond what the evidence was presented to the Grand Jury and what they found to issue an indictment on.

The court rejected Kidwell's argument at trial, stating that it saw no "due process notice deprivation" and explaining, "Certainly the defense was well noticed in terms of the span of events. The events were basically the same. There was no factual distinction between the events. I'm just reducing it down to one solitary event that has to be proven. So I see no prejudice."

¶5 Similarly, the trial court rejected Kidwell's argument that he was entitled to post-conviction relief because trial counsel's objection to the amendment had been deficient and, as a result, he had been denied adequate notice of allegations that he had molested T. by engaging in sexual conduct with her between October 1, 2003, and May 20, 2004. Kidwell appears to have argued that count two of the indictment, which had alleged continuous sexual abuse between January 5 and May 20, 2004, was based on

sexual conduct, which he asserted was "a distinct and separate offense, of a different nature" than the molestation charged in count one. Based on this assertion, he maintained, "This amendment did more than expand the date range. It effectively changed the nature of the offense," and he argued trial counsel had been deficient in failing to raise this issue in objecting to the amendment.

¶6 But, as the trial court pointed out in its ruling, this court has held a person "cannot commit sexual conduct with a minor under fifteen without also committing molestation of a child." *State v. Ortega*, 220 Ariz. 320, ¶ 25, 206 P.3d 769, 777 (App. 2008). The trial court thus reasoned that the original indictment had given Kidwell notice of the relevant time span of October 1, 2003, through May 20, 2004; the court therefore found his "claim of prejudice and inability to prepare [wa]s unfounded."

¶7 On review, Kidwell asserts he was entitled to relief because trial counsel "fail[ed] to properly argue" against amending the indictment to effect a "five month variance" from the original indictment for count one and because, as a result of counsel's alleged deficiency, "his Fifth Amendment notice rights were violated by the amendment." But trial counsel did object, on this very ground, to the state's request to modify the indictment. Kidwell appears to have abandoned his argument that trial counsel was deficient because he did not argue the amendment "change[d] . . . the nature of the offense," but he fails to posit any other reason we should find counsel's objection deficient. Moreover, he fails to address the trial court's specific finding that he suffered no prejudice because the original indictment afforded sufficient notice of the nature of the

charges and the relevant time frame of October 1, 2003, through May 20, 2004. Kidwell has failed to establish the trial court abused its discretion in denying this claim.

Failure to Assert Duplicitous Charge

¶8 Kidwell next argues that trial counsel's failure to challenge a general verdict form exposed him to a nonunanimous verdict, that "prejudice is inherent when a jury determination *may* have been other than unanimous," and that, therefore, the trial court erred in finding Kidwell had failed to establish the prejudice required to prevail on a claim of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984) (defendant must establish both deficient performance and resulting prejudice to prevail on ineffective assistance claim; prejudice requires showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

¶9 A duplicitous charge occurs "[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). The potential problems posed by such a charge include the risk of a nonunanimous jury verdict. *See id.* "This is because . . . it is possible for the jury to unanimously agree that the defendant committed the offense charged without unanimously agreeing as to which of the alleged criminal acts the defendant committed to complete the offense." *Id.* ¶ 32.

¶10 Accordingly, when, as here, multiple criminal acts have been introduced to prove a single charge, "the trial court is normally obliged to take one of two remedial measures to insure that the defendant receives a unanimous jury verdict"; the court may

either require the state to elect a specific act alleged to constitute the crime or instruct the jury that all of its members must agree unanimously on which specific act constituted the crime in order to find the defendant guilty. *Id.* ¶ 14. Neither occurred in this case and, in addressing Kidwell's petition for post-conviction relief, the court found both trial and appellate counsel "fell below prevailing norms of professional conduct" for failing to raise the issue.

¶11 But the trial court also found Kidwell had failed to demonstrate a reasonable probability that, but for this error by trial counsel, the outcome of his trial would have been different. The court wrote, "The case devolved to a simple matter of credibility: did the jury believe the victim in her statements that [Kidwell] had molested her? Trial and appellate counsels' failure to object to the forms of instructions or verdict did not affect or relate to this issue of credibility."

¶12 Relying on *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003), Kidwell suggests that "prejudice need [not] be demonstrated when deciding a duplicity issue." Instead, he argues, "prejudice is inherent when a jury determination *may* have been other than unanimous." He maintains the trial court erred because "[t]he issue in this case is not whether the outcome of the trial would have been different," but "whether the charge of Molestation of [a] Child was duplicitous." We disagree.

¶13 The trial court expressed its decision in the context appropriate for a post-conviction claim of ineffective assistance of trial counsel. *See Strickland*, 466 U.S. at 694. And the court in *Davis*, which reviewed a duplicity claim for fundamental error on direct appeal, did not suggest that prejudice may be presumed whenever a charge is

duplicitous. *Davis*, 206 Ariz. 377, ¶¶ 65-66, 79 P.3d at 77; *see also Klokic*, 219 Ariz. 241, ¶ 25, 196 P.3d at 849-50 ("*Davis* acknowledges that it is not reversible error for a trial court to fail to take curative action in circumstances in which there is no reasonable basis for distinguishing between the acts admitted into evidence to establish a single charge.").

¶14 Moreover, in its ruling, the trial court considered and distinguished the *Davis* case, concluding Kidwell's claim was more like the claim raised by the defendant—and rejected by the court—in *State v. Schroeder*, 167 Ariz. 47, 804 P.2d 776 (App. 1990). In that case, the court concluded that, although the single charge of sexual abuse against Shroeder was rendered duplicitous by evidence of multiple offenses, he had not been prejudiced and reversal was not required because he had presented the same defense to each of the sexual acts. *See id.* at 53, 804 P.2d at 782. The court in *Schroeder* reasoned,

> All of the acts were basically the same. . . . Defendant's only defense was that the acts did not occur. Thus, the jury was left with only one issue—who was the more credible of the only two witnesses . . . ? [T]he jury's verdict here implies that it did not believe the only defense offered.

Id.

¶15 Kidwell does not challenge or even address the trial court's reliance on *Schroeder* in his petition for review. He thus provides no basis to conclude that the court's reasoning was flawed or that its ruling on this claim was an abuse of discretion.

Failure to Assert Confrontation Clause Violation

¶16 Kidwell also maintains the trial court erred in denying his claim that trial counsel had been ineffective in failing to argue that the admission of T.'s spontaneous statement to a forensic physician violated the Sixth Amendment's Confrontation Clause. Trial counsel did object to the statement's admission on the ground that it was hearsay, and we addressed Kidwell's challenge to the court's ruling on that issue on direct appeal. *Kidwell*, No. 2 CA-CR 2006-0416, ¶¶ 6-11. In denying post-conviction relief on this issue, the court found Kidwell had failed to demonstrate either deficient performance by trial counsel or resulting prejudice.

¶17 On review, Kidwell raises the same arguments he raised below and notes the importance of cross-examination.[2] He also argues admission of the statement was "extremely prejudicial" to his case. He does not, however, present any meaningful analysis relevant to an alleged violation of the Confrontation Clause. Specifically, he fails to address whether T.'s statement could even be considered "testimonial" in nature, as required to implicate that constitutional protection. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004) (Confrontation Clause applies only to "testimonial" evidence, including, "at a minimum[,] . . . prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations"). Accordingly, Kidwell has failed to establish the trial court abused its discretion in denying this claim.

[2]Because Kidwell does not appear to have raised a claim of ineffective assistance of appellate counsel with respect to a Confrontation Clause violation, *see supra* note 1, the basis for this claim appears to have been waived on appeal.

Conclusion

¶18 For the foregoing reasons, although we grant review, relief is denied.

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

CONCURRING:

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

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