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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE DAVID W.	2 CA-JV 2011-0129 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. JV11110

Honorable Kimberly A. Corsaro, Judge Pro Tempore

AFFIRMED

George Silva, Santa Cruz County Attorney
By Matthew A. Jasper
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Attorneys for State

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By Charles A. Thomas
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Attorney for Minor

V Á S Q U E Z, Presiding Judge.

¶1 David W. was adjudicated delinquent following a hearing, based on the juvenile court's finding that he had committed the following offenses charged in an amended delinquency petition: second-degree burglary, two counts of criminal damage, and unlawful possession of marijuana. On appeal he contends the court erred when it admitted evidence of prior acts; there was insufficient evidence to support the charge that he had used or possessed marijuana; and there was insufficient evidence that he had caused over $2,000 in damage to the home he had entered illegally, as alleged in count two of the delinquency petition. We affirm for the reasons stated below.

¶2 We view the evidence that was presented to the juvenile court at the adjudication hearing in the light most favorable to sustaining the adjudication. *See In re John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d 772, 774 (App. 2001). So viewed, the record established that V.L. was watching over a home in Rio Rico that belonged to his sister, M.J., and her husband, California residents. On the morning of April 21, 2011, he was checking on the home and noticed a screen was lying down sideways and the sliding door was cracked; he saw two young males inside the house as he looked through the glass door. He tapped on the glass door to alert them and called 9-1-1. The two individuals fled and V.L. pursued them unsuccessfully, falling down and losing his eyeglasses in the process.

¶3 Santa Cruz County Sheriff's Department Corporal Carlos Clark responded to the 9-1-1 call, went to the home, observed it had been damaged, and took photographs of the damage. He noted the smell of burnt marijuana in the house. Juvenile Martin R. testified at the adjudication hearing that on the morning of April 21, 2011, he had invited

David to go to the house before 7:00 to smoke marijuana, that David had met him there, and that the two of them had smoked marijuana. He also testified that he had been to the house about fifteen times in the few weeks before and that David had been with him ten or twelve of these times. He described being observed by V.L. and running away from him, stating he had hidden separately from David. Sometime after the incident, V.L. saw David jogging in the neighborhood and recognized him as the person he had pursued. And V.L. identified David at the adjudication hearing as one of the two individuals he had chased from the home.

¶4 David was charged by amended delinquency petition as described above, and in an under-advisement ruling following a two-day hearing, the juvenile court found David had committed the charged offenses, summarized the evidence, entered detailed factual findings related to the charges, and adjudicated him delinquent. The court placed David on probation and ordered him to pay $3,809.49 in restitution to M.J. and $495 to V.L. This appeal followed.

¶5 David first contends the juvenile court erred when it permitted the state to elicit through his mother evidence about prior acts David and Martin had committed together. First, she testified that about a week before this incident, David had told her Martin had invited him to the house, claiming it belonged to his grandmother. David's mother testified David had told her he had been around the house and Martin's father had told him to leave because he was trespassing.

¶6 She also testified that she had a close relationship with David and they talk frequently and "about . . . everything." The prosecutor asked the mother if she recalled

an incident about two or three years earlier during which "David got in trouble along with Martin for being on the roof of that house." Martin objected on the ground that the testimony being elicited was impermissible evidence of other acts, under Rule 404(b), Ariz. R. Evid. The court permitted the mother to answer after the prosecutor argued he was not seeking to admit the evidence for any of the exceptions under the rule to the admission of prior acts evidence under Rule 404(b) but "to establish how much her little David . . . really tells his mom about different things." The mother answered "no."

¶7 A little later the prosecutor asked the mother, "Wasn't there an earlier incident where both Martin and David got in trouble for being involved in tagging the outside of a house?" Again David objected to the admission of "prior bad act evidence." The prosecutor explained that the question was intended to impeach the mother's previous statement that she had no concerns about David and Martin spending time together or whether Martin was a bad influence on David. The court overruled the objection and permitted the mother to answer; she responded that there had been such an incident and David was able to resolve the matter and avoid the filing of formal charges by completing a certain number of hours of community service.

¶8 David argues all of this evidence related to other acts was erroneously admitted and did not fall within any of the exceptions specified in Rule 404(b), noting the state has conceded as much with respect to the first question. He contends that, with respect to the second statement, the state was attempting to impeach the mother by using other-act evidence about a collateral matter, in violation of Rule 608(b), Ariz. R. Evid., to show that she did actually have a basis for questioning whether it was good for David and

Martin to be together because, when they were, they got into trouble as they had on that specific occasion.

¶9 "We will not disturb a trial court's ruling on the admission or exclusion of evidence unless a clear abuse of discretion is present and prejudice resulted therefrom." *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, ¶ 11, 178 P.3d 511, 514 (App. 2008). Thus, "[w]e review the admission of other act evidence for abuse of discretion." *State v. Dickens*, 187 Ariz. 1, 18, 926 P.2d 468, 485 (1996), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). Rule 404, Ariz. R. Evid., permits the admission of evidence of prior acts if relevant and admitted for a proper purpose, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*; *State v. Van Adams*, 194 Ariz. 408, ¶ 20, 984 P.2d 16, 23 (1999). We find no abuse of discretion here.

¶10 First, the mother did not testify about a previous incident during which David and Martin had been on the roof of the house because her response to the prosecutor's question about it was, "no." Second, the prosecutor stated that he was attempting to impeach the mother's statements that David tells her everything and would have told her about the incident that morning when David was chased from the house by V.L. And "'[e]vidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible,' even if it refers to a defendant's prior bad acts." *State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995), *quoting State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983). In addition, although the prosecutor stated he was not attempting to elicit this evidence under any of the exceptions in Rule 404(b),

any such evidence would have been admissible to show David's knowledge that he was not supposed to be at the house, his intent, and his lack of mistake.

¶11 With respect to the second question and the mother's response, the evidence about the "tagging" incident was introduced to impeach the mother's statements that she had no reason to believe David and Martin should not be permitted to associate because they engage in improper conduct when together. David argues this was improper impeachment of the mother with extrinsic evidence about a collateral matter and violated Rule 608, Ariz. R. Evid. But, as the state correctly points out, the other-act evidence related to David, not the mother. The rule prevents the impeachment of a witness with "specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Ariz. R. Evid. 608(b). Moreover, to the extent David also intended to argue that the admission against him of other-act evidence violated Rule 404, the evidence nevertheless was admissible to impeach his mother's credibility. *See Williams*, 183 Ariz. at 376, 904 P.2d at 445.

¶12 Moreover, even assuming arguendo the prosecutor's questions and the mother's response to the second question did result in the admission of improper other-act evidence, to show reversible error, David must "establish a reasonable probability that the [adjudication] would have been different had the evidence not been admitted." *State v. Mills*, 196 Ariz. 269, ¶ 28, 995 P.3d 705, 712 (App. 1999). He has not done so here. There was abundant evidence to support the adjudication on all charges, given Martin's testimony and the other evidence presented, some of which is discussed below. Additionally, given that Martin testified about other acts without objection when he said

he and David had been in the home together as many as twelve times before, evidence of other bad conduct David and Martin had engaged in together essentially was cumulative, further establishing the harmlessness of any arguable error. *See State v. Fulminante*, 161 Ariz. 237, 245-46, 778 P.2d 602, 610-11 (1988).

¶13 David next contends there was insufficient evidence to support the juvenile court's finding that he had possessed or used marijuana, as alleged in count four of the amended petition. He points out no marijuana was introduced and chemically tested. In reviewing a challenge to the sufficiency of the evidence, "we consider whether the evidence sufficed to permit a rational trier of fact to find the essential elements of [each] offense beyond a reasonable doubt." *In re Dayvid S.*, 199 Ariz. 169, ¶ 4, 15 P.3d 771, 772 (App. 2000). "[W]e will not re-weigh the evidence, and we will only reverse on the grounds of insufficient evidence if there is a complete absence of probative facts to support the judgment or if the judgment is contrary to any substantial evidence." *John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d at 774. It is for the juvenile court as the trier of fact, not this court, to assess the credibility of witnesses and weigh the evidence. *In re James P.*, 214 Ariz. 420, ¶ 24, 153 P.3d 1049, 1054 (App. 2007). Similarly, when there are conflicts in the evidence, the juvenile court, as the trier of fact, must resolve them. *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 16, 107 P.3d 923, 928 (App. 2005).

¶14 The juvenile court found that the state had relied "heavily" on Martin's testimony in presenting its case, and that Martin had testified he and David had gone to the house many times between April 1 and through and including April 21, 2011, for "the

main purpose" of entering without permission to smoke marijuana. The court expressly found that Martin was a credible witness and that his testimony supported the charges of burglary and possession or use of marijuana. Although Martin's testimony alone supported the conviction on count four, there was additional testimony as well.

¶15 V.L. initially had identified another juvenile as one of the two he had found inside the house and had chased. But, he later saw David jogging in the neighborhood and recognized him as one of the two boys he had seen and chased the day of the incident. V.L. also identified David in court as one of the perpetrators. He identified Martin as well, testifying at the adjudication hearing that he knew Martin by name and that Martin, who was sitting in the hallway outside the courtroom at the time, was the other juvenile V.L. had seen inside the home. Corporal Clark's testimony provided additional evidence. He testified that when he entered the house after V.L. had called 9-1-1 he smelled burnt marijuana.

¶16 That no marijuana was introduced and chemically tested does not render the evidence insufficient. Given Martin's testimony, which included his experience with smoking marijuana and his admission that he and David had smoked it that day and numerous other times, as well as the other evidence, there was sufficient evidence to support the juvenile court's conclusion that David had committed the offense. *See State v. Ampey*, 125 Ariz. 281, 282, 609 P.2d 96, 97 (App. 1980) (evidence sufficient in absence of chemical testing in light of police report and defendant's admission substance was marijuana); *see also State v. Jonas*, 162 Ariz. 32, 33, 780 P.2d 1080, 1081 (App.

1988) (circumstantial evidence and admissions sufficient to establish defendant sold juvenile marijuana cigarettes), *aff'd as modified*, 164 Ariz. 242, 792 P.2d 705 (1990).

¶17 David next contends there was insufficient evidence that he had caused over $2,000 worth of damage in connection with count two of the delinquency petition, which alleged he had committed criminal damage by causing over $2,000 but less than $10,000 of damage to the house. The juvenile court found M.J.'s testimony and exhibits established there had been extensive damage throughout the home, including damage to the walls, countertops, a screen, and the door. The court noted Martin had testified he and David had smoked in the house numerous times and careless smoking had caused burn marks on the floor. The court added that Martin had testified David had not participated in "tagging" the walls "but suggested that he might have been responsible for the knives in the walls. While there is not sufficient direct evidence that [David] caused specific damage, there is sufficient circumstantial evidence that his conduct in frequenting the premises to smoke marijuana with others over the three week period contributed to the causing of the damages."

¶18 There was sufficient, albeit circumstantial, evidence to support the juvenile court's ruling. As the court noted, that evidence was provided by M.J.'s testimony about the damage and Martin's testimony reporting he and David had been together in the house as many as twelve times, and describing the conduct they had engaged in while there. According to Martin, this conduct had included smoking marijuana each time they went, which resulted in burns to the counters and the floor. Martin denied that David had done the "tagging" of the walls, but Martin's testimony provided a sufficient basis for the

court's conclusion that Martin had caused or contributed to at least over $2,000 worth of damage. We agree with the state that, given the evidence and permissible inferences from that evidence, David was responsible either individually or as Martin's accomplice pursuant to A.R.S. §§ 13-301 and 13-303.

¶19 For the reasons stated, the adjudication order and disposition are affirmed.

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

CONCURRING:

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

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