IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WILLIAM DEAN SCHIRMER,
Appellant.

No. 2 CA-CR 2015-0038
Filed August 31, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20132405001
The Honorable Kenneth Lee, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
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Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

E C K E R S T R O M, Chief Judge:

¶1 William Schirmer appeals from his convictions and sentences for kidnapping, three counts of attempted sexual abuse, and three counts of aggravated assault. For the following reasons, we affirm his convictions and sentences for kidnapping and aggravated assault, but we vacate his convictions and sentences for attempted sexual abuse.

Factual and Procedural Background

¶2 In May 2013, nine-year-old L.G. was shopping with her mother and sister. Schirmer, a complete stranger to L.G., approached her from behind, grabbed her sides, tickled her, and pulled her back. L.G. grabbed onto the store shelves while Schirmer continued trying to pull her back. She kicked Schirmer and he let her go.

¶3 In March 2013, eight-year-old E.C. was attending church with her family. While she spoke with other children outside the church, Schirmer approached from behind and put his arms around her. He tickled her under her arms on her bare skin. When another adult who attended the church saw him, he "walked away real fast."

¶4 Moments later, Schirmer approached G.C., E.C.'s four year old sister. Schirmer tickled her on her armpits and her stomach. Neither G.C. nor E.C. knew Schirmer, but they had seen him before and he had given them candy.

¶5 Schirmer was charged with kidnapping L.G. and a single count of aggravated assault and attempted sexual abuse for each girl. The state specially alleged sexual motivation pursuant to

A.R.S. § 13-118 on the kidnapping and aggravated assault counts. After a jury trial he was convicted of all seven counts, and the jury found the special allegations of sexual motivation proven beyond a reasonable doubt. He was sentenced to a combination of concurrent and consecutive enhanced, maximum prison terms totaling seventy-one years and ordered to register as a sex offender upon release. This appeal followed.

Sufficiency of the Evidence

¶6 Schirmer claims the evidence was insufficient to find him guilty of any of the counts charged. We review the sufficiency of the evidence de novo, and in our review, we determine only whether a conviction is supported by substantial evidence. *State v. Pena*, 235 Ariz. 277, ¶ 5, 331 P.3d 412, 414 (2014). Substantial evidence is evidence that reasonable jurors could accept as sufficient to find the defendant guilty beyond a reasonable doubt. *State v. Miller*, 234 Ariz. 31, ¶ 33, 316 P.3d 1219, 1229 (2013). In making this determination, we view the evidence in the light most favorable to upholding the jury's verdicts. *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007).

Attempted Sexual Abuse

¶7 We address first Schirmer's contention that the evidence was insufficient to find him guilty of attempted sexual abuse. "A person commits sexual abuse by intentionally or knowingly engaging in sexual contact . . . with any person who is under fifteen years of age if the sexual contact involves only the female breast." A.R.S. § 13-1404(A). "'Sexual contact' means any direct or indirect touching, fondling or manipulating of any part of the . . . female breast by any part of the body . . . ." A.R.S. § 13-1401(A)(3). A person commits "attempt" if he "[i]ntentionally does . . . anything which . . . is any step in a course of conduct planned to culminate in commission of an offense." A.R.S. § 13-1001(A)(2).

¶8 The state asserts two possible bases for finding that Schirmer intended to touch the breasts of L.G., E.C., and G.C., and that tickling the girls was a step toward that goal. First, the state claims the other-act evidence admitted demonstrates that Schirmer

had a motive to touch prepubescent female breasts. Second, the state claims that "[a]dult male hands holding onto a small . . . female's torso via her armpits will invariably cause a man's fingers to touch at least the sides of her chest/breast."

¶9 The state introduced several pieces of other-act evidence under Rule 404(c), Ariz. R. Evid., to demonstrate an aberrant sexual propensity. In incidents occurring in 2007 and 2009, Schirmer approached four young girls in public places and tickled them. Other acts were admitted under Rule 404(b) to demonstrate motive and intent. In 1999, at a fast-food restaurant, he reached toward a young girl and made "a motion towards [her], . . . as if he was going to unbutton" her dress. In 1996, he reached into the bedroom window of a sleeping young girl and attempted to fondle her breast. In 2013, he was asked to leave the property of a church because he had passed out lollipops to children and "[h]e would sit near families, and follow children within worship services." Schirmer refused to leave and a church employee called the police. Police found Schirmer at a nearby bus stop, tearing up a paper. Police recovered the paper, which turned out to be a picture of a topless young girl combing her hair.

¶10 For an action to constitute a step toward committing an offense, it must be a "step in a course of conduct 'planned to culminate' in" the actual offense. *State v. Ontiveros*, 206 Ariz. 539, ¶ 9, 81 P.3d 330, 332 (App. 2003), *quoting* § 13-1001(A)(2). These acts demonstrated that Schirmer had a sexual motivation for tickling the victims in this case and went to proving the state's special allegations of sexual motivation. One incident, the one that occurred twenty years ago in 1996, also demonstrated that Schirmer had at one time touched a young girl on the breast. But together, the prior acts did not demonstrate that, on these particular occasions from which the charged offenses arose, Schirmer acted with the ultimate intent of touching these girls on their breasts.[1] *See State v. Moore*, 218

[1]We also observe that although this evidence supported the state's special allegation of sexual motivation pursuant to § 13-118, sexual motivation for conduct constituting aggravated assault does

Ariz. 534, ¶ 9, 189 P.3d 1107, 1109 (App. 2008) ("Our attempt statute . . . requires that a defendant have the intent to perform acts and to achieve a result which . . . would constitute the crime."); *see also Walters v. Maass*, 45 F.3d 1355, 1359-60 (9th Cir. 1995) (where defendant tried to lure thirteen-year-old girl into truck, but only evidence of defendant's intention to rape and sodomize her was past conviction for rape and sodomy of another thirteen-year-old girl under similar circumstances, evidence of intent insufficient for attempted rape and sodomy); *United States v. Plenty Arrows*, 946 F.2d 62, 66 (8th Cir. 1991) (defendant placing penis against victim's back or buttocks did not demonstrate intent to commit anal sodomy).[2]

¶11 The state argues that Schirmer could have used the tickling as a means to "distract[] and confus[e]" his victims so that he could touch their breasts. But there is simply no evidence to support this theory—Schirmer's prior acts of tickling all culminated in tickling, with no progression to touching a breast. "The State may present circumstantial as well as direct evidence in proving the elements of an offense; however, it may not rely on pure speculation." *State v. Sanchez*, 181 Ariz. 492, 494, 892 P.2d 212, 214 (App. 1995).

¶12 Nor are we persuaded that Schirmer's hands would necessarily have caused his "fingers to touch at least the sides of [the victims'] chest/breast." To the extent the state suggests Schirmer may have inadvertently touched the girls' chests while tickling them, that does not meet the elements of the offense, which requires

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not, by itself, show intent to commit a sexual offense such as § 13-1404.

[2]Although the courts in *Walters*, 45 F.3d at 1358, and *Plenty Arrows*, 946 F.2d at 66, were applying laws that required a "substantial step" rather than Arizona's requirement of "any step," § 13-1001(A)(2), this is not a substantive difference. *See State v. Fristoe*, 135 Ariz. 25, 29-30, 658 P.2d 825, 829-30 (App. 1982); *see also State v. Superior Court*, 190 Ariz. 203, 206, 945 P.2d 1334, 1337 (App. 1997) ("An action must be beyond mere preparation to constitute an attempt.").

that a defendant's actions be "knowing[]" or "intentional[]." § 13-1404(A). To the extent the state speculates that Schirmer used the act of tickling to disguise the fact that he was intentionally placing the sides of his hands on the girls' chests, this theory of the case was not argued at trial, has not been developed on appeal, and, at any rate, would constitute a completed offense rather than an attempt.

¶13 For all of these reasons, we conclude the evidence was insufficient to sustain Schirmer's convictions for attempted sexual abuse. We vacate his convictions and sentences on these charges.

Aggravated Assault

¶14 Schirmer next contends the evidence was insufficient to support his convictions for aggravated assault because there was no evidence that he acted with intent "to injure, insult, or provoke" the victims. *See* A.R.S. §§ 13-1203(A)(3); 13-1204(A)(6). The state contends the issue is moot because Schirmer admitted this offense in his closing argument. Schirmer responds that he admitted that the victims were offended by the touch, but not that he intended the touch to be offensive. Schirmer's actual statement was, "So, did he touch these girls? Yes, he did. Was it an offensive touching? Yes, it was. . . . There's no doubt about that. No one wants to be touched in that manner, in that way, without consent."

¶15 "The rule is well established in this jurisdiction that a defendant is bound by courtroom concessions made by his counsel in his presence." *State v. Hughes*, 22 Ariz. App. 19, 22, 522 P.2d 780, 783 (1974). And, in general, a defendant is bound by the strategic decisions of his counsel. *See State v. Medina*, 232 Ariz. 391, ¶ 34, 306 P.3d 48, 60 (2013). Here, Schirmer's counsel conceded that the touching was "offensive."

¶16 The concession that the touch was "offensive" is ambiguous, in that it could mean that the touch was intended to offend, that the touch did in fact offend, or both. But Schirmer conceded, in his motion for acquittal on the counts of kidnapping and attempted sexual assault pursuant to Rule 20, Ariz. R. Crim. P., that the evidence of aggravated assault was sufficient. Schirmer further conceded in his closing argument that the state had proven

the three counts of aggravated assault "beyond a reasonable doubt." Thus, the record demonstrates that Schirmer's counsel admitted the aggravated assault charges in the hopes of winning credibility for his arguments as to the other counts. We therefore conclude Schirmer is bound by his counsel's concession and cannot now complain of error.

Kidnapping

¶17 Schirmer also claims the evidence was insufficient to support his conviction for kidnapping because he did not restrain L.G. To "'[r]estrain' means to restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person." A.R.S. § 13-1301(2). Schirmer claims the evidence did not show a "substantial" interference with L.G.'s liberty.

¶18 Schirmer argues that, because L.G. was only moved a very short distance, any interference with her liberty was not substantial. Schirmer cites the dictionary definition of "substantial" in support of his claim that such a small movement cannot be considered substantial interference. Words in statutes are given their plain and ordinary meaning unless the legislature has clearly expressed an intent to give a term a special meaning. *State v. Cotton*, 197 Ariz. 584, ¶ 6, 5 P.3d 918, 920 (App. 2000). Here, the legislature has defined "interfer[ing] substantially with [a] person's liberty" as either moving or confining that person. § 13-1301(2); *see State v. Latham*, 223 Ariz. 70, ¶ 11, 219 P.3d 280, 283 (App. 2009). We do not address whether the evidence is sufficient to show that Schirmer moved L.G. "from one place to another" because we believe the evidence is sufficient to show Schirmer substantially interfered with L.G.'s liberty by confining her. § 13-1301(2).

¶19 Here, L.G. testified that she thought Schirmer was going to take her. She explained that Schirmer "tried to grab" her, "pulled [her] just a little bit" and "pulled [her] back." She also stated that "both of his hands [were] on [her] when he was pulling [her] back." L.G. told him "No" and tried to reach for a shelf to get away, but Schirmer did not let her go until after she kicked him. This was

sufficient evidence to support a finding that Schirmer confined L.G., thereby substantially interfering with her liberty.

¶20 Schirmer also challenges the sufficiency of the evidence on the element of intent. A conviction for kidnapping requires proof that a defendant, having had one of the intentions listed in A.R.S. § 13-1304(A), "knowingly restrain[ed] another person." *Id.* Schirmer claims there was not sufficient evidence to show he intended to commit any of the enumerated acts. As discussed above, we agree that the evidence was insufficient to show that Schirmer had the intent to "[i]nflict . . . a sexual offense on the victim." § 13-1304(A)(3). However, as we have also discussed above, the evidence was sufficient to show that Schirmer restrained L.G. "to . . . aid in . . . commi[tting] a felony," namely aggravated assault. § 13-1304(A)(3); *see* § 13-1204(D).[3]

Other-Act Evidence

¶21 Schirmer asserts the other-act evidence should not have been admitted because, under Rule 403, Ariz. R. Evid., "the numerous incidents were cumulative and the risk of unfair prejudice outweighed their probative value."[4] Schirmer did not object on this basis in the trial court, and so our review is limited to fundamental,

[3]In the section of his brief discussing the sufficiency of the evidence of kidnapping, Schirmer briefly states that "the jury could not use the other-act evidence to determine whether there was sexual intent" on the kidnapping charge. But he does not raise this as an independent claim, nor claim that the evidence was insufficient to support the special allegation that the offense was sexually motivated. We therefore do not consider any such claim.

[4] Although Schirmer's opening brief suggests the jury instructions were deficient with regard to the other-act evidence, he did not preserve the issue at trial and does not present an argument that the instructions constituted fundamental error. He acknowledges this in his reply brief and withdraws the contention.

prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).[5]

¶22 Although Schirmer claims the other-act evidence was unnecessarily cumulative, he does not specify which incidents he considers to be cumulative nor cite any case law supporting this point. We therefore consider this claim waived for lack of sufficient argument. *See State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004).

¶23 Schirmer also claims the probative value of the evidence was outweighed by the danger of unfair prejudice. At the outset, we note that, at least as to the Rule 404(c) evidence, the trial court made a finding that the evidence was admissible under Rule 403. The trial court is in the best position to determine the balance of probative value and prejudice and thus is accorded wide deference in such rulings. *State v. Via*, 146 Ariz. 108, 122, 704 P.2d 238, 252 (1985).

¶24 Schirmer maintained at trial that the tickling was not sexually motivated. The other-act evidence went directly to disproving that theory and therefore was not unfairly prejudicial. *See State v. Roscoe*, 184 Ariz. 484, 492-94, 910 P.2d 635, 643-45 (1996) ("extremely probative" evidence admissible despite "inflammatory" nature). We conclude the trial court did not err in admitting the other-act evidence.

Hearsay

¶25 Schirmer next claims the court erred in allowing a police officer to testify about L.G.'s description of the perpetrator because this testimony was hearsay. Schirmer objected on this basis at trial. The state argued the testimony was not hearsay because it was a statement of identification. The trial court ruled it was

[5]The state maintains Schirmer has not sufficiently argued fundamental error. At least as to the claim that the evidence was unfairly prejudicial, Schirmer has asserted the error was fundamental, has explained why he believes the error was fundamental and prejudicial, and has included appropriate citations of law and record. *See* Ariz. R. Crim. P. 31.13(c)(vi).

admissible for its effect on the hearer, specifically, to show why the police took the actions that they did. Schirmer now argues that both of these contentions were incorrect.[6]

¶26 Schirmer is correct that the testimony was not admissible for its effect on the hearer. In *State v. Romanosky*, our supreme court concluded that testimony to show why police officers acted in a given way is only admissible if the officers' conduct is at issue. 162 Ariz. 217, 221-22, 782 P.2d 693, 697-98 (1989); *see also State v. Rivers*, 190 Ariz. 56, 60, 945 P.2d 367, 371 (App. 1997) (out-of-court statement admissible to show effect on parole officer whose conduct was placed at issue). Here, the conduct of the officers was not at issue, and thus the testimony was not admissible for this purpose.

¶27 Schirmer also argues that a description is not admissible as a statement of identification under Rule 801(d)(1)(C), Ariz. R. Evid. The state has not substantively responded to this argument and has only provided a bald assertion that the statements "were admissible as identification statements."

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[6]The state contends that Schirmer's claim is forfeited because he did not challenge the trial court's basis for admitting the statement. We disagree. "The purpose of the rule requiring that specific grounds of objection be stated is to allow the adverse party to address the objection and to permit the trial court to intelligently rule on the objection and avoid error." *State v. Granados*, 235 Ariz. 321, ¶ 19, 332 P.3d 68, 74 (App. 2014). Finding the issue forfeited in this context would not support this purpose. The state also claims the issue is moot because the challenged testimony went to identity, and Schirmer conceded that issue in his closing argument. But at the time Schirmer conceded the issue of identity, the trial court had already allowed the admission of this testimony. Schirmer was entitled to adjust his strategy in response to this ruling without forfeiting the issue on appeal. *See State v. Lindsey*, 149 Ariz. 472, 476-77, 720 P.2d 73, 77-78 (1986) (defendant does not invite error or waive challenge to admission of evidence when he adjusts his strategy in response to trial court ruling).

¶28 This court cannot find, and neither party has cited, any controlling authority that addresses whether a description may be considered a statement of identification for purposes of the hearsay rule.[7] *See* Ariz. R. Evid. 801(d)(1)(C). But we need not resolve the issue, because even assuming arguendo that the court erred in admitting the testimony, the error was harmless. Schirmer contends the police officer's testimony concerning L.G.'s description of the perpetrator was the only evidence of identity in the counts relating to her. Though L.G. did testify at trial, she stated that she did not get a good look at the man who touched her, did not see his face, and could not remember what clothes he was wearing.

¶29 Other evidence, however, demonstrated that Schirmer was the man who touched L.G. The store's surveillance camera captured footage of Schirmer entering and exiting the store on the same day as the incident. A DNA[8] sample taken from L.G. matched Schirmer to a possibility of 1 out of 2,300 Caucasian males. And the other-act evidence showing that Schirmer had done almost exactly the same thing to four other young girls demonstrated a modus operandi. *See Roscoe*, 184 Ariz. at 491 n.2, 910 P.2d at 642 n.2 ("[A]n unrelated act with a significantly similar modus operandi may identify the defendant as the person who committed the crime charged."). Any error in the admission of the description testimony was harmless because overwhelming evidence established Schirmer's identity. *See State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004).

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[7]Schirmer points to *State v. Koch*, 138 Ariz. 99, 103-04, 673 P.2d 297, 301-02 (1983), but that case is not directly on point because the court resolved the hearsay issue on other grounds. Other jurisdictions are split on this issue. *Compare Puryear v. State*, 810 So. 2d 901, 903-04 (Fla. 2002), *and State v. Hester*, 746 So. 2d 95, 108 (La. Ct. App. 1999), *with People v. Newbill*, 873 N.E.2d 408, 412-13 (Ill. App. Ct. 2007), *and State v. Johnson*, 524 A.2d 826, 832 (N.J. Super. Ct. App. Div. 1987).

[8]Deoxyribonucleic acid.

Interpreter Bias

¶30 Schirmer claims the court interpreter used "a baby voice and gestures of sympathy" when interpreting for L.G. and interacting with her, thereby demonstrating bias and denying him a fair trial. Based on the authorities Schirmer cites in his opening brief, we treat this as a claim that the interpreter was deficient. In such a claim, the burden is on the appellant to show both that the interpreter was deficient, *State v. Rios*, 112 Ariz. 143, 144, 539 P.2d 900, 901 (1975), and that the deficiency denied him a fair trial. *State v. Mendoza*, 181 Ariz. 472, 475, 891 P.2d 939, 942 (App. 1995).

¶31 The state has not responded to Schirmer's claim that the interpreter's conduct in mimicking L.G.'s voice and gestures was improper, which we treat as a confession of error. *See In re $26,980 U.S. Currency*, 199 Ariz. 291, ¶ 20, 18 P.3d 85, 91 (App. 2000). But the interpreter's conduct did not deprive Schirmer of a fair trial. Schirmer analogizes the interpreter's conduct to one witness vouching for the credibility of another. The interpreter used a baby voice and consoled L.G. when she became upset. These gestures demonstrated sympathy, but did not equate to a statement about L.G.'s credibility. *Cf. State v. Cruz*, 218 Ariz. 149, ¶¶ 84-85, 181 P.3d 196, 211 (2008) (witness hugging victim's family did not unduly prejudice defendant). Although we do not condone any conduct by an interpreter that suggests the interpreter's attitude toward a witness, Schirmer has not met his burden of demonstrating that the conduct here denied him a fair trial.

Judicial Bias

¶32 Schirmer's final claim is that the judge was biased against him.[9] In support of this claim, Schirmer notes four incidents. First, the trial judge apologized to the jurors at the conclusion of the case, saying, "It's a very hard thing that we ask of you to come down

[9]Although Schirmer mentions that he filed a motion pursuant to Rule 10.1, Ariz. R. Crim. P., for change of judge after the verdict but prior to sentencing, he acknowledges the request was untimely and does not now claim the denial of this motion was error.

to the courthouse to serve on juries like this, particularly on cases like this. It's a disturbing subject matter . . . ." Second, Schirmer maintains that, when Schirmer objected to the interpreter's use of a baby voice, the judge responded with "a raised voice, aggressive body language, and scowling looks." Third, Schirmer notes that, during the discussion of the interpreter's conduct and the effect of L.G.'s demeanor, the judge told Schirmer, "That's what you asked for when you asked for a trial." (Schirmer had not actually asked for a trial; the state did not offer a plea agreement.) Fourth, Schirmer points out the court's response, during a conference on a juror's question about whether Schirmer had been advised of *Miranda*[10] rights, to Schirmer's statement that he did not want to "go down th[at] road." The court told Schirmer he had already started down that road, but in fact, Schirmer had not raised any issue related to *Miranda*.

¶33 Schirmer alleges that judicial bias is structural error under which reversal is mandated. However, this court has clarified that not all claims of judicial bias constitute structural error. In order to demonstrate structural error, "the defendant must allege a type of bias that would implicate his due process rights, such as bias based on a 'direct, personal, substantial pecuniary interest.'" *State v. Granados*, 235 Ariz. 321, ¶ 11, 332 P.3d 68, 72 (App. 2014), *quoting Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Claims of personal bias or prejudice "do not require structural error review." *Id.*

¶34 Schirmer has not alleged the type of judicial bias that would constitute structural error. Assuming arguendo that his untimely motion for change of judge pursuant to Rule 10.1, Ariz. R. Crim. P., was sufficient to preserve the issue, "'[a] trial judge is presumed to be free of bias and prejudice,' and a defendant must show by a preponderance of the evidence that the trial judge was, in fact, biased." *State v. Ramsey*, 211 Ariz. 529, ¶ 38, 124 P.3d 756, 768 (App. 2005), *quoting State v. Hurley*, 197 Ariz. 400, ¶ 24, 4 P.3d 455, 459 (App. 2000). Expressions of "impatience, dissatisfaction, annoyance, and even anger . . . within the bounds of what imperfect men and women . . . sometimes display" do not establish judicial

[10]*Miranda v. Arizona*, 384 U.S. 436 (1966).

bias, and Schirmer has not pointed to anything beyond such expressions. *Liteky v. United States*, 510 U.S. 540, 555-56 (1994). He has therefore not overcome the presumption that the trial judge was free of bias. *See Ramsey*, 211 Ariz. 529, ¶ 38, 124 P.3d at 768.

Disposition

¶35 For the foregoing reasons, we vacate Schirmer's convictions and sentences for attempted sexual abuse on counts three, five, and seven. His convictions and sentences for kidnapping and aggravated assault are affirmed.