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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THE STATE OF ARIZONA, Appellee, v. OLIVER MICHAEL PRYOR, Appellant.	2 CA-CR 2008-0375 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20062087

Honorable Richard Nichols, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson
Tucson
Attorneys for Appellee

R. Lamar Couser
Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 Appellant Oliver Pryor was charged with two counts of continuous sexual abuse of a child, dangerous crimes against children, and two counts of furnishing obscene

or harmful items to minors. A jury found him guilty of all charges, and the trial court sentenced him to presumptive prison terms as follows: twenty years on counts one and two and 2.5 years on counts three and four. The terms on counts one and two are to be served consecutively, and the terms on the remaining two counts are to be served concurrently with each other but consecutively to the terms on counts one and two. On appeal, Pryor contends the court abused its discretion in denying his motion in limine to preclude the state from introducing evidence about his arrest in Mexico, instructing the jury it may infer Pryor was guilty from the fact that he fled, denying his motion for judgment of acquittal, and admitting hearsay evidence. We affirm.

¶2 We view the evidence and all reasonable inferences arising from that evidence in the light most favorable to sustaining the jury's verdicts. *See State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). So viewed, the evidence established the following. The victims, M. and K., were the granddaughters of Pryor's wife, Gail. Gail often watched the girls for her daughter Michelle while Michelle worked. Gail also worked, and at times, Pryor took care of the girls when both Gail and Michelle were working. During the summer of 2004, when school was not in session, the girls would spend a few days each week at Pryor and Gail's home, sleeping there some of the nights. Once school started in August, the girls would spend the night with Pryor and Gail if Michelle was on call at work and they could not stay with their father. Michelle testified that at one point during the summer, the girls no longer wanted to go to Gail's home. Over Pryor's objection, Michelle testified that in February 2006, the children had told her Pryor had touched them without their clothes on.

The girls had told two of their cousins what had happened, and the cousins urged the girls to tell their mother. Michelle called the Pima County Sheriff's office, and Tucson Police Department Detective Katherine Kragnes subsequently responded. The girls were interviewed by a person qualified to conduct a forensic interview of children.

¶3 K. testified she had been eight or nine years old when the detective had interviewed her. She stated her grandpa more than once had put his mouth on her vagina. A drawing she had provided police was admitted as an exhibit; she explained the drawing depicted M. and Pryor in bed and showed his penis, which she explained had some "[l]ittle hairs." She also admitted telling the detective Pryor had "rubb[ed]" her "butt" with his hand. She recalled telling the detective about one incident in which Pryor had kissed her and her sister "in the wrong places" and about how she had seen "white stuff c[o]me out" of his penis. She admitted telling the prosecutor and defense counsel during an interview that "white stuff . . . went in [her] mouth sometimes." She also testified she and her sister had seen a videotape at Pryor's house that showed a man putting his mouth on and rubbing a girl's private parts and a woman putting her mouth on a man's private parts.

¶4 M. testified about a number of incidents during which Pryor had touched her on her "chest, . . . bottom, . . . [and] private area." She described how Pryor squeezed her breasts under her clothes and how, on many occasions, he had gone into the room where she and her sister K. were sleeping and told her to lick his penis. He also made her "[p]ut [her] mouth around it." She and K. licked his penis and "white stuff" came out. He also twice touched her inside her private parts with his hand. She described a game in which she and

K. would take turns to see who could make him "happy fastest," which she said meant ejaculate. Pryor once paid K. $20 for making him happy fastest.

¶5 Michelle's husband Jeff, the children's stepfather, confronted Pryor at Gail's house after the children told Michelle what had been happening. Pryor denied molesting them. Detective Kragnes confronted Pryor and asked him if he would talk to her. She met with him and took a statement from him, which she recorded.

¶6 After the state rested, Pryor moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., arguing the state had failed to prove three acts had occurred within a ninety-day period; therefore, it had not established Pryor had committed the offense of continuous sexual abuse. The trial court denied the motion. Pryor then testified and denied the charges. He contended then ten- or eleven-year-old M. had been angry at him because he had reprimanded her for hurting his dog. She had denied shoving the dog off the couch, which had hurt his leg and, according to Pryor, had caused the dog to howl. He was angry at her for lying. Pryor testified Jeff had accused him of molesting the girls. He denied it, but Jeff told him to leave Gail's house. He also testified Detective Kragnes had interviewed him in May at the police station. He claimed he had left for Mexico after the interview because his relationship with Gail was destroyed and that he took some money from the sale of one of the houses he and Gail had owned, intending to start a limousine service in Mexico. Gail had visited him there and had told him she thought there might be a warrant for his arrest. Ultimately, Gail told him he was on television as "Tucson's Most Wanted." Pryor was

arrested in Mexico about five days later and returned to the United States after he waived extradition.

¶7 Pryor first contends the trial court abused its discretion by denying his motion in limine to preclude the state from introducing evidence that he had left the country and gone to Mexico, where he was arrested. He argues the evidence was irrelevant and unduly prejudicial. *See* Ariz. R. Evid. 401, 403. Pryor also contends the court erred when it instructed the jury as follows: "In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider evidence of the defendant's running away, hiding, or concealing evidence together with all the other evidence in the case."

¶8 During her interview with Pryor on May 4, 2006, Kragnes had told Pryor she did not believe there was sufficient evidence at that point to charge him with any crime but that she would refer the matter to the county attorney and she would evaluate the matter and might disagree. Shortly after that interview, Pryor left for Mexico and was arrested there in August 2007.

¶9 Before trial, the state filed a motion in limine seeking to preclude Pryor from introducing Detective Kragnes's comment that she did not believe she had enough evidence to file charges against him but that she would refer the matter to the county attorney. Pryor filed a motion in limine seeking to preclude the state from introducing evidence that he had gone to Mexico shortly after the May 4 interview. At a hearing on the first day of trial, Pryor's counsel explained Pryor had legitimate reasons for going to Mexico. He stated Pryor had believed he would not be charged and explained that, after the girls had accused Pryor

of molesting them, Pryor's "relationship with [his] wife was pretty much at an end," leaving him no reason to remain in the United States. Counsel argued that, if the trial court ruled evidence that Pryor had gone to Mexico would be admitted, then so, too, should Kragnes's statement about her evaluation of the case. The court found the evidence was relevant and ruled: "I intend to allow the State to introduce evidence that he went to Mexico. I'm finding that . . . that's probative."

¶10 After defense counsel and the prosecutor further explained their positions, defense counsel agreed that, if the issue of Pryor's having gone to Mexico was elicited from Kragnes and Pryor subsequently were to testify, counsel would ask Pryor whether he had a conversation with Kragnes that lead him to believe he was "not going to be charged if [he] went to Mexico." The court clarified, "[s]o unless he testifies, her comments will not be in evidence." During opening statement, the prosecutor mentioned that Pryor had gone to Mexico shortly after he had discussed the girls' allegations with the detective. During his opening statement, defense counsel explained the evidence would show Pryor had gone to Mexico, not because charges had been filed, but because at that point none had been filed. Counsel explained Pryor "was scared. . . . [E]verbody had turned against him"; he wanted to start a limousine service there. And, counsel added, although Pryor's wife was confused by the charges, she visited him in Mexico and gave Pryor $100,000 to start that business. Consistent with counsel's opening statements, evidence was elicited at trial about Pryor's trip to Mexico.

¶11 We review the trial court's ruling on the admission of evidence for an abuse of discretion. *State v. Montano*, 204 Ariz. 413, ¶ 55, 65 P.3d 61, 73 (2003). In general, "[a]ll relevant evidence is admissible." Ariz. R. Evid. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. That a person fled or hid from law enforcement can be regarded as evidence of guilt. *See State v. Thompson*, 108 Ariz. 423, 424, 501 P.2d 7, 8 (1972) ("Flight is relevant to show consciousness of guilt."). Here, reasonable jurors could have viewed the fact that Pryor left the United States for Mexico shortly after he learned what the victims claimed he had done to them as evidence of his consciousness of guilt. The evidence was relevant.

¶12 The mere fact that Pryor had an explanation for why he left the country did not render the evidence irrelevant. *See State v. Hunter*, 136 Ariz. 45, 49, 664 P.2d 195, 199 (1983) (alternative explanation for flight goes to weight not admissibility of evidence and does not preclude instruction); *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004) (jury must "weigh the evidence and determine the credibility of the witnesses"). And if the jury did not believe him, it was the jury's prerogative to find he had fled and to infer from his flight that he had intended to avoid being apprehended and that he was criminally culpable. As Division One of this court concluded in *State v. Speers*, 209 Ariz. 125, ¶ 30, 98 P.3d 560, 568 (App. 2004), "given the very minimal standard that evidence must satisfy in order to be 'relevant' and therefore admissible, . . . there was no abuse of discretion by the trial court in denying Defendant's motion to preclude this 'flight' evidence at trial."

¶13 Nor did the trial court err in refusing to preclude the evidence on the ground that it was unduly prejudicial. "[T]he balancing of factors under Rule 403[, Ariz. R. Evid.] is peculiarly a function of trial courts, not appellate courts." *Yauch v. S. Pac. Transp. Co*., 198 Ariz. 394, ¶ 26, 10 P.3d 1181, 1190 (App. 2000). The court did not abuse its discretion here in rejecting Pryor's suggestion that admission of the evidence was unfairly prejudicial. *See State v. Edwards*, 136 Ariz. 177, 184, 665 P.2d 59, 66 (1983) (finding flight instruction appropriately given and rejecting defendant's claim that "weak probative value of the evidence was outweighed by the danger of unfair prejudice").

¶14 We also reject Pryor's related contention that the trial court erred when it instructed the jury it could infer guilt from evidence of flight. The mere fact that evidence of flight properly was found to be relevant and therefore admissible does not necessarily mean "a flight instruction . . . is appropriate. Flight instructions go beyond an argument by counsel and "'point out to jurors that they may consider the defendant's behavior . . . as bearing on guilt or innocence.'" *Speers*, 209 Ariz. 125, ¶ 30, 98 P.3d at 568, *quoting State v. Weible*, 142 Ariz. 113, 116, 688 P.2d 1005, 1008 (1984) (omission in *Speers*). "[I]t is only when the evidence 'obviously invites suspicion or announces guilt' that such an instruction should be given." *Id*. The evidence must "support[] a reasonable inference that the flight or attempted flight was open, such as the result of an immediate pursuit." *State v. Smith*, 113 Ariz. 298, 300, 552 P.2d 1192, 1194 (1976). But as the state points out, Pryor did not object to the instruction. The state also contends Pryor has failed to develop this issue adequately on appeal. Thus, the state insists, Pryor has waived this issue.

¶15 Even assuming Pryor's summary argument on appeal is sufficient to warrant our review, we find no fundamental, reversible error. Pryor concedes he did not expressly object to the instruction but insists he did so inferentially when he challenged the admission of any evidence that he had fled to Mexico. The objection to the evidence, however, did not preserve an objection to the instruction. "[A]n objection on one ground does not preserve the issue on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008); *see also* Ariz. R. Crim. P. 21.3(c) (grounds of objection to instruction must be stated distinctly). Consequently, Pryor forfeited the right to seek relief for all but fundamental error. *See State v. Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d 604, 617 (2009). "Fundamental error goes to the foundation of the case [and is] 'error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). "To obtain relief under the fundamental error standard of review, [a defendant] must first prove error." *Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608.

¶16 The circumstances surrounding Pryor's departure were sufficient to arouse suspicion about his motives for leaving; therefore, the trial court did not err, much less commit fundamental error by giving the instruction. As we discussed above, the jury reasonably could have rejected Pryor's explanation for why he left the country just after he was told the victims' accusations would be referred to the county attorney. The jury reasonably could have believed instead that Pryor had fled. And that evidence supported the flight instruction. It was for the jury to determine whether Pryor had been attempting to

evade prosecution. And if the jury did reject Pryor's explanation, it was instructed properly that it could consider such evidence, together with other evidence, in deciding whether he had committed the charged offenses. *See State v. Earby*, 136 Ariz. 246, 248-49, 665 P.2d 590, 592-93 (App. 1983) ("jury was free to disbelieve" defendant's explanation for leaving; evidence "could reasonably support a conclusion . . . [defendant] fled" because he was afraid he would be arrested for killing victim, not because he was afraid of victim's family; therefore, flight instruction proper).

¶17 Moreover, even assuming arguendo the trial court erred in giving the instruction and assuming, too, such error could be characterized as fundamental, Pryor has not sustained his burden of establishing he was thereby prejudiced. *See Henderson*, 210 Ariz. 561, ¶¶ 20, 26, 115 P.3d at 607, 609. Pryor had the burden of establishing a reasonable jury could have reached a different result in the absence of the allegedly erroneous instruction. *Id*. ¶¶ 26-27. Given the strong evidence against him, particularly the victims' statements and testimony, Pryor has not established, and cannot establish, that a reasonable jury would have reached a different result had it not been told it could consider evidence of flight or concealment together with other evidence in deciding Pryor's guilt.

¶18 Pryor also contends the trial court abused its discretion by denying his motion for judgment of acquittal pursuant to Rule 20(a), Ariz. R. Crim. P., on the charges of continuous sexual abuse of a child. A Rule 20 motion should only be granted if there is no substantial evidence to support the conviction. Ariz. R. Crim. P. 20(a). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept

as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). We will not disturb the court's ruling absent an abuse of discretion. *State v. Carlos*, 199 Ariz. 273, ¶ 7, 17 P.3d 118, 121 (App. 2001).

¶19 Pryor was charged with one count of continuous sexual abuse of a child as to each of the two victims. Thus, the state was required to prove that "over a period of three months or more in duration" he had "engage[d] in three or more acts in violation of [A.R.S. §]§ 13-1405, 13-1406 or 13-1410 with a child who is under fourteen years of age." A.R.S § 13-1417(A). Section 13-1405 defines the offense of sexual conduct with a minor, § 13-1406 defines sexual assault, and § 13-1410 defines molestation of a child. Pryor contends there was insufficient evidence he had engaged in three or more acts during at least a three-month period. We disagree.

¶20 Evidence presented at trial established that, between May 2004 and February 2006, M. and K. spent significant amounts of time, including "sleepovers," at the house Pryor shared with Gail, the girls' grandmother and Pryor's wife. When interviewed by the forensic interviewer, K. said Pryor had abused her the previous summer and that the first time had occurred when she was six years old. Through the girls' statements to the detective and their testimony at trial, the state established they were last abused by Pryor in August 2005 and had been abused many times during the summer of 2004. M. said Pryor would wake her and her sister in the middle of the night about "every night" they were there. She testified the abuse

stopped in August 2005 and that she told her mother in February 2006. From this and other evidence, reasonable jurors readily could find beyond a reasonable doubt that Pryor had engaged in at least three sexual acts with the victims for a period of three months or longer. The trial court therefore did not abuse its discretion by denying his Rule 20 motion on these charges.

¶21 Finally, Pryor contends the trial court erred in admitting the statements the victims had made to their mother over his objection. Michelle was asked at trial about what her daughters had said to her in February 2006. She responded that they had said Pryor had "touched them," and defense counsel objected on the ground of hearsay. The court overruled the objection, finding the statement was not "being offered for the truth." Michelle then added, "I asked them what they meant. . . . They just said they were uncomfortable, that he had touched them without their clothes on."

¶22 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). The girls' statements about what Pryor had done to them were introduced for the purpose of proving the truth of precisely what the statements related to: that Pryor had touched them in a sexual manner, thereby committing one of the enumerated sexual offenses and the charged offense of continuous sexual abuse of a child. But there was abundant other, properly admitted evidence to support the verdicts, including the in-court testimony of the children. We need not reverse the conviction based on the erroneous admission of hearsay evidence if we can determine beyond a reasonable doubt that the error did not affect the

verdict. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). To the extent the testimony here was presented for the truth of the matter asserted, it was cumulative. Any error in its admission was therefore harmless beyond a reasonable doubt. *See State v. Dickens*, 187 Ariz. 1, 19, 926 P.2d 468, 486 (1996) (erroneous admission of hearsay harmless because cumulative to other evidence); *State v. Eastlack*, 180 Ariz. 243, 256-57, 883 P.2d 999, 1012-13 (1994) (when hearsay evidence admitted erroneously but admission of hearsay evidence harmless, conviction need not be reversed).

¶23 We affirm the convictions and the sentences imposed.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge