FILED BY CLERK
APR 29 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROBERT RAY MATHIS, Appellant.	2 CA-CR 2010-0172 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091705001

Honorable José H. Robles, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri
Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, appellant Robert Mathis was convicted of one count of public sexual indecency to a minor and the trial court placed him on three years'

probation. On appeal, Mathis challenges the sufficiency of the evidence supporting the conviction. He also contends the court erred in admitting certain evidence, denying his motion for mistrial, limiting his cross-examination of a witness, and precluding a previously undisclosed witness from testifying at trial. For the following reasons, we affirm.

Facts and Procedural History

¶2 We view the facts in the light most favorable to sustaining the verdict, resolving all reasonable inferences against the defendant. *State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994). In early February 2009, eleven-year-old K.B. was bicycling along a path in an apartment complex and saw a man later identified as Mathis masturbating in the enclosed porch behind his apartment. K.B. notified both the assistant apartment manager and his mother, who reported the incident to the police.

¶3 The following day, February 12, K.B. was hiding in a bush during a game and again saw Mathis masturbating on his patio. K.B. again told the assistant manager, who investigated and found Mathis with his hand near his groin while "moaning noises" emanated from his computer. The police were called and Mathis was arrested and charged with two counts of public sexual indecency to a minor under the age of fifteen. Following a trial, a jury acquitted Mathis of the count based on the first incident but convicted him on the second count. Mathis has appealed and this court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033(A)(1).

Discussion

Sufficiency of Evidence

¶4 Mathis first contends there was insufficient evidence to support his conviction of public sexual indecency to a minor. We will not disturb a conviction so long as substantial evidence exists to support the verdict. *See State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913 (2005). "Substantial evidence is more than a 'mere scintilla'" and is that which reasonable persons could accept as sufficient to support a finding of guilt beyond a reasonable doubt. *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "'Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.'" *State v. Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d 693, 695 (App. 2007), *quoting State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996).

¶5 "A person commits public sexual indecency to a minor [by] intentionally or knowingly engag[ing] in [sexual contact] . . . and such person is reckless about whether a minor . . . under fifteen years of age is present." A.R.S. § 13-1403(B). "[S]exual contact" is "any direct or indirect touching, fondling, or manipulating of any part of the genitals, anus, or female breast by any part of the body or by any object or causing a person to engage in such conduct." A.R.S. § 13-1401(2). Mathis contends there was insufficient evidence both that he had engaged in sexual contact and that his actions had been reckless.

¶6 "When considering claims of insufficient evidence, 'we view the evidence in the light most favorable to sustaining the verdict . . . .'" *State v. Fimbres*, 222 Ariz. 293, ¶ 4, 213 P.3d 1020, 1024 (App. 2009), *quoting State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). So viewed, the record contains substantial evidence from which reasonable jurors could find Mathis had engaged in sexual contact. K.B. testified that prior to the February 12 incident, he had seen Mathis masturbating on his porch, describing Mathis's actions as "moving his hand and arm up and down," and demonstrating the movement for the jury. He testified he had immediately told the apartment manager what he had seen. K.B. further testified that on another occasion he had seen Mathis on his patio and his "weenie [was] hanging out" with his pants around his ankles.

¶7 According to the assistant manager, on February 12, K.B. reported that Mathis was "doing it again on his patio." When she investigated, she found Mathis with his hand near his groin while "moaning noises" emanated from his computer. K.B. also told his mother he had seen Mathis sitting in a chair moving his hand "[u]p and down, from the genital area up and down," and, at trial, she relayed this to the jury and demonstrated the action K.B. had reenacted.

¶8 Mathis argues the evidence was insufficient because of inconsistencies and discrepancies in K.B.'s testimony and a lack of corroboration from others. He contends K.B.'s testimony about Mathis's "weenie hanging out" was not credible and argues it was impossible for K.B. to have seen what he claimed. Determinations of witness credibility, however, are for the jury, not this court. *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43,

46 (App. 2004); *cf. State v. Jerousek*, 121 Ariz. 420, 427, 590 P.2d 1366, 1373 (1979) ("In child molestation cases, the defendant can be convicted on the uncorroborated testimony of the victim.").

¶9 Moreover, although Mathis contends that "being naked, watching pornography, and moving one's hand 'up and down[]' are not crimes," as set forth above, both K.B. and his mother demonstrated for the jury the "up and down" motion that K.B. had seen Mathis doing, which the jury could readily find was masturbation. As we previously noted, K.B. also told the apartment manager on February 12 that Mathis was "doing it again" after previously reporting he had seen Mathis masturbating, and that the manager then had found Mathis with his hand near his groin. *State v. Kinney*, 225 Ariz. 550, ¶ 28, 241 P.3d 914, 922 (App. 2010) ("Substantial evidence 'may be either circumstantial or direct.'"), *quoting State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). Accordingly, we conclude the record contains sufficient evidence to support the finding of sexual contact necessary for Mathis's conviction.[1]

¶10 Mathis also contends there was insufficient evidence his actions were "reckless" under § 13-1403(B) because "the evidence actually demonstrated that if [K.B.] saw Mathis, [K.B.] was criminally trespassing" and "invading Mathis's privacy." In support, he points to K.B.'s testimony as well as "actual measurements, photographs, and

[1]Mathis's reliance on *State v. Hardwick*, 183 Ariz. 649, 905 P.2d 1384 (App. 1995), is misplaced. In *Hardwick* the state had been unable to establish that two of seventeen counts of attempted child molestation were based on distinguishable events. *Id.* at 655, 905 P.2d at 1390. The minor witness who had testified did not specify the time frames in which the offenses had occurred in order to distinguish the counts in question from other, identical counts. *Id.* But Mathis was convicted of one count involving one incident on February 12. There was no confusion.

a video that were taken by [the] defense investigator," which he claims "support a more probable finding that [K.B.] was trespassing by peering over Mathis's wall." But the fact that Mathis disagrees with the jury's assessment of a witness's credibility and the inferences the jury apparently drew from the evidence does not render the evidence insufficient. And as we noted above, it is not the province of this court to weigh evidence. *See State v. Lehr*, 201 Ariz. 509, ¶ 24, 38 P.3d 1172, 1180 (2002); *see also State v. King*, 66 Ariz. 42, 45, 182 P.2d 915, 917 (1947) ("The weight and sufficiency of the evidence are matters for the jury, whose decision on disputed facts is final."). Accordingly, Mathis has failed to demonstrate there was insufficient evidence supporting his conviction on this basis as well.

Admission of Evidence Concerning Police Visit

¶11 Mathis next argues the trial court erred by failing to preclude evidence about a police visit to his apartment on February 11, arguing it was irrelevant and prejudicial. The visit was prompted by the call from K.B.'s mother who reported that K.B. had seen Mathis masturbating. Although K.B.'s mother also told police she could see a man walking around naked inside Mathis's apartment, this information was not presented to the jury. An officer responded to the call and was greeted by a woman in a towel who explained Mathis was not there; the officer warned her to close her blinds when walking around naked. The jury, however, was only informed the officer had spoken with a woman in a towel and had not spoken with Mathis.

¶12 Mathis contends "[e]vidence about the prior police contact had nothing to do with Mathis or [K.B.]'s observations of Mathis" and therefore the trial court erred in

"allowing the state to elicit . . . testimony that [an officer] responded to a call about someone walking nude in Mathis's apartment with the blinds open." As explained above, however, contrary to Mathis's characterization of the record, there was no evidence presented that the officer either had spoken to him during the visit or had admonished the woman who answered the door. In fact, during redirect examination, the state clarified this issue, asking the officer whether he had spoken with Mathis at that time, and the officer replied he had not. Accordingly, Mathis has failed to show how evidence of a police visit to his home when he was not there could have led to an improper inference by the jury or otherwise was prejudicial.

Motion for Mistrial

¶13 Mathis argues the trial court improperly denied his motion for mistrial based on testimony from the assistant apartment manager. During the prosecutor's direct examination, the assistant manager testified that K.B. had complained about seeing Mathis "walking around with blinds open, completely naked." Mathis's counsel moved for a mistrial, which the court denied. Responding to Mathis's motion, the state agreed this event was something K.B.'s mother, not K.B., had witnessed. In addition, Mathis notes he had filed a motion in limine to exclude prior police contact. The record shows the court had ruled that only prior complaints about Mathis made by K.B. were admissible.

¶14 Declaring a mistrial "is the most dramatic remedy for trial error" and should be granted "only when justice will be thwarted if the current jury is allowed to consider the case." *State v. Nordstrom*, 200 Ariz. 229, ¶ 68, 25 P.3d 717, 738 (2001).

We review the denial of a motion for mistrial for abuse of discretion. *See State v. Hoskins*, 199 Ariz. 127, ¶ 52, 14 P.3d 997, 1012 (2000). "This deferential standard of review applies because the trial judge is in the best position to evaluate 'the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial.'" *State v. Bible*, 175 Ariz. 549, 598, 858 P.2d 1152, 1201 (1993), *quoting State v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983). In determining whether to grant a motion for mistrial based on a witness's testimony, the trial court must consider "(1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors." *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003).

¶15 Mathis contends a mistrial was warranted because "the jury likely considered the improper testimony to determine that [he] was reckless after he received knowledge and a warning by the police about being seen walking nude with the blinds open[] just the day before." But this is not an accurate characterization of the assistant manager's testimony. Rather, she testified, albeit inaccurately, that her office had received the complaint from K.B. More importantly, neither she nor any other witness testified that Mathis or anyone else had received a police warning not to walk around his apartment nude.

¶16 In any event, Mathis did not raise this argument below as the basis for his motion for a mistrial. Instead, the motion was based on the fact that the testimony violated the trial court's order precluding any testimony of complaints about Mathis that

had originated from someone other than K.B. Accordingly, Mathis has forfeited the right to seek relief on this ground absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005) (fundamental error review applies when defendant fails to object to alleged trial error); *State v. Ruggiero*, 211 Ariz. 262, ¶ 24, 120 P.3d 690, 695 (App. 2005) (same). And by failing to assert or argue in his opening brief that the alleged error he now raises was fundamental and prejudicial, he has waived our review of this claim as well. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (concluding argument waived because defendant "d[id] not argue the alleged error was fundamental"); *see also Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08 (on review for fundamental error, defendant must show error goes to foundation of case, takes right essential to defense, denies him fair trial, and "caused him prejudice").

¶17 We will not ignore fundamental error if it is apparent. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650-51 (App. 2007). But we see no error here that can be so characterized and cannot conclude the court abused its discretion in denying Mathis's motion for a mistrial.

Preclusion of Cross-Examination Testimony

¶18 Mathis next contends the trial court erred in limiting his cross-examination of "the state's witnesses" about the details of the officer's visit to his apartment on February 11, arguing the ruling "allowed the state to present evidence with an inference that was not true" because "the jury discovered a person in Mathis's apartment answered the door," which "lent more credence to an improper inference that Mathis had been

viewed nude and warned by apartment staff and the police about being seen nude." We review the trial court's ruling for an abuse of discretion. *See State v. Machado*, 224 Ariz. 343, ¶ 57, 230 P.3d 1158, 1177 (App. 2010).

¶19 To the extent we understand this argument, Mathis appears to be claiming he was unfairly limited from eliciting testimony that would have informed the jury he was not home when the officer went to his apartment. As noted above, however, the officer testified he had not made contact with Mathis during his visit on February 11, nor was there any testimony that Mathis or any other individual had been warned about walking around nude in the apartment. Accordingly, Mathis has failed to demonstrate the court abused its discretion in limiting the scope of the officer's testimony.[2]

Preclusion of Additional Testimony Concerning Measurements

¶20 Mathis argues the trial court abused its discretion when it precluded him from recalling his investigator, Gene Reedy, and soliciting additional testimony from a previously undisclosed witness concerning measurements taken around his apartment. This court reviews both the denial of a request to recall a witness and the preclusion of an undisclosed witness for an abuse of discretion. *See State v. Fisher*, 141 Ariz. 227, 246, 686 P.2d 750, 769 (1984); *State v. Loftis*, 89 Ariz. 403, 406, 363 P.2d 585, 587 (1961).

[2]To the extent Mathis additionally argues the preclusion of this testimony "violated his rights to a fair trial, to present a defense, and to cross-examine and confront witnesses against him," because he has failed either to raise these arguments below or to brief them on appeal, we do not consider them. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08; *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140 (App. 2008).

¶21 Immediately before the parties were expected to present their closing arguments, Mathis moved to recall Reedy in order to present additional testimony about measurements he had taken around Mathis's apartment in response to the state's witness's testimony the previous day. That witness had testified Mathis's patio was ten feet from the bicycle path and forty feet from the playground; these measurements differed from those Reedy had obtained.

¶22 Reedy returned to the area and took measurements in an attempt to prove the state's witness had measured from the wrong apartment. In addition, in response to a question from the jury, Mathis sought to present an additional measurement Reedy had taken concerning the distance between a certain bush and Mathis's patio. Mathis also sought to introduce the testimony of a previously undisclosed witness, a "certified crime investigator," regarding an "elaborate math problem" resulting from the fact that Reedy had taken a measurement from an angle.

¶23 The trial court denied his motion regarding both witnesses, explaining there were "numerous . . . exhibits relating to the measurements that were taken and I'm sure there will be plenty of closing argument with respect to the view of this evidence." The court also pointed out that the defense had excused Reedy the day before. In addition, the prosecutor argued the state would be prejudiced by the proffered testimony because she was unable to have her witness return for rebuttal on such short notice, and pointed out it was the defense's own exhibit that contained the "math problem" it now claimed was the basis for calling a previously undisclosed witness.

¶24 As for the denial of Mathis's motion to recall Reedy, the record reflects Reedy already had testified on two separate occasions that he believed the state's witness's measurements were taken from the wrong apartment based on the ten-foot measurement from the patio to the bicycle path. Reedy also had testified about his own measurements from Mathis's apartment to the bicycle path and the playground and had introduced a video recording, a diagram, and numerous photographs of the area. The video and photographs included the bushes near Mathis's apartment, and Reedy used several of these photographs to explain to the jury the approximate distance of other landmarks around the bushes. *See* Ariz. R. Evid. 403 (relevant evidence may be excluded if cumulative). Because this evidence was in the record, Mathis's counsel was free to argue his version of the facts and measurements to the jury. Moreover, the trial court has discretion to control the order of witnesses and presentation of evidence. *See* Ariz. R. Evid. 611(a) (trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . avoid needless consumption of time"). We therefore cannot conclude the court abused its discretion in precluding Mathis from recalling Reedy.

¶25 As for the trial court's denial of Mathis's motion to present testimony from the previously undisclosed witness concerning the "math problem," assuming its denial was a discovery sanction for Mathis's failure to identify this witness, we likewise do not find an abuse of discretion. During the state's cross-examination, Reedy testified that in one of the photographs of the area, one end of the tape measure had been placed "about three feet" up a wall and the other end was on the ground, and thus the measurement was

taken at an angle instead of on flat ground. The next day, Mathis attempted to call a witness to explain the "elaborate math problem that goes on to figuring out the distance when something is at an angle."

¶26 Before precluding a witness from testifying as a discovery sanction, the trial court must consider whether less stringent sanctions are available as well as "how vital the precluded witness is to the proponent's case, whether the opposing party will be surprised and prejudiced by the witness'[s] testimony, whether the discovery violation was motivated by bad faith or willfulness, and any other relevant circumstances." *State v. Fisher*, 141 Ariz. at 246, 686 P.2d at 769. Applying these factors, we see no abuse of discretion. The proffered testimony cannot be described as vital because, as set forth above, Mathis presented testimony and numerous exhibits concerning the distances around his porch and therefore the information would have been cumulative. *Cf. State v. Delgado*, 174 Ariz. 252, 258, 848 P.2d 337, 343 (App. 1993) (precluded testimony vital because clearly relevant and not cumulative). And, although the record reflects the belated disclosure of the witness was not motivated by bad faith, Mathis's failure to timely disclose the witness apparently surprised and prejudiced the prosecutor, who explained she had learned of the defense's intent to call a new witness only that morning. Additionally, the witness's testimony was necessitated only after the state identified a flaw in Mathis's own exhibit, which he should have recognized in advance of trial. Finally, as the state points out, there is no evidence in the record demonstrating the witness was qualified to perform the calculations or that there was sufficient information

in the record to permit the witness to do so. Accordingly, we cannot conclude the trial court abused its discretion in precluding the witness.

Disposition

¶27 For the foregoing reasons, Mathis's conviction and sentence are affirmed.

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

CONCURRING:

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

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