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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THE STATE OF ARIZONA, Appellee, v. JUSTIN BOWMAN, Appellant.	2 CA-CR 2010-0229 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200901544

Honorable Boyd T. Johnson, Judge

AFFIRMED

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

Harriette P. Levitt — Tucson
Attorney for Appellant

B R A M M E R, Presiding Judge.

¶1 Justin Bowman appeals from his convictions for five counts of furnishing obscene materials to a minor, six counts of child molestation, fifteen counts of sexual

conduct with a minor twelve years of age or under, three counts of public sexual indecency to a minor, and three counts of sexual exploitation of a minor. He argues the trial court committed reversible error by admitting testimony summarizing sexually explicit stories found on his computer and letters he wrote while incarcerated to his wife, L. He also argues the court violated his constitutional right to confront and cross-examine witnesses by precluding evidence of methamphetamines found in his and L.'s master bedroom and by precluding cross-examination of L. regarding previous accusations of sexual misconduct. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining the verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Bowman was charged with numerous counts of sexual offenses involving his 9-year-old stepdaughter K. and his 10-year-old son J. At trial, over Bowman's objection, the court allowed testimony summarizing two stories found on Bowman's computer that described sexual episodes between adults and minors. The court also admitted letters exchanged between Bowman and L. in which Bowman discussed whether he might be offered a plea agreement, and whether he should accept one if offered. The court did not allow Bowman to present evidence that methamphetamines had been found in the master bedroom of his house, nor did it allow him to cross-examine L. about previous accusations of sexual misconduct she had made against her former husband.

¶3 After an eight-day jury trial, Bowman was convicted of five counts of furnishing obscene materials to a minor, six counts of child molestation, fifteen counts of

sexual conduct with a minor twelve years of age or under, three counts of public sexual indecency to a minor, and three counts of sexual exploitation of a minor. He was sentenced to a combination of concurrent and consecutive sentences totaling 682 years. This appeal followed.

Discussion

Admission of Narrative Summaries

¶4 Bowman argues the trial court committed reversible error in allowing testimony summarizing the two stories found on his computer that described sexual episodes with minors. He suggests the evidence was not admissible because its prejudicial effect "far outweighed any probative value."[1] The court agreed that the prejudicial effect of admitting the stories in their entirety would have outweighed their probative value, but found that, if the stories were "generalized and described," their relevance outweighed any undue prejudice. "The trial court has considerable discretion in determining the relevance and admissibility of evidence, and we will not disturb its ruling absent a clear abuse of that discretion." *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990).

¶5 Rule 404(c), Ariz. R. Evid., provides in relevant part as follows:

> In a criminal case in which a defendant is charged with having committed a sexual offense, . . . evidence of other

[1]Although Bowman argues the evidence was inadmissible under Rule 404(b), Ariz. R. Evid., the court appears to have found the evidence admissible under Rule 404(c). However, because evidence is not admissible under either rule if its probative value is substantially outweighed by the danger of unfair prejudice, we address Bowman's argument regarding prejudice. *See* Ariz. R. Evid. 404(c)(1)(C).

> crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.

To be admissible, the "evidentiary value" of the evidence must not be "substantially outweighed by danger of unfair prejudice . . . or other factors mentioned in Rule 403."[2] Ariz. R. Evid. 404(c)(1)(C); *see also* Ariz. R. Evid. 403 (relevant evidence excludable if probative value substantially outweighed by danger of unfair prejudice).

¶6 Bowman contends the stories were so factually dissimilar to his alleged offenses that "there was no probative value to the introduction of these stories." However, the trial court found the evidence "probative of a character trait giving rise to an aberrant sexual propensity to commit the acts herein charged," *see* Ariz. R. Evid. 404(c), because the stories' topics were "adult/child aberrant sexual behavior." Both stories described oral and vaginal intercourse between adult males and prepubescent girls, including, in one story, the narrator and his daughter. Bowman was charged with, inter alia, engaging in oral and vaginal intercourse with his stepdaughter when she was 8 or 9 years old. Therefore, the trial court did not err in finding the evidence was probative of Bowman's propensity to commit the acts charged. *See State v. Ramsey*, 211 Ariz. 529, ¶¶ 2, 34, 124 P.3d 756, 759, 767 (App. 2005) (possession of pornographic incestuous stories relevant to defendant's intent and motive to have sexual relationship with minor

[2]Rule 404(c) imposes additional requirements for admissibility. However, Bowman has not challenged the admission of this evidence for any reason other than that it was unduly prejudicial. Accordingly we do not address whether the other conditions of Rule 404(c) were met.

daughter). The court was in the best position to assess the danger of unfair prejudice posed by the evidence, *see State v. Connor*, 215 Ariz. 553, ¶ 39, 161 P.3d 596, 607 (App. 2007), and we conclude it did not abuse its discretion in finding that, once it had limited the admission of the stories to their summaries, their probative value outweighed any danger of undue prejudice.

Admission of Letters

¶7 Bowman argues the letters discussing his "willingness to engage in a plea bargain [were] so prejudicial that the [trial] court's [limiting] instruction could not possibly have cured the prejudicial effect." Because Bowman concedes he did not preserve this issue below, he has forfeited the right to seek relief for all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, 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. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Such error "'must be clear, egregious, and curable only via a new trial.'" *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993), *quoting State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). To obtain relief on appeal under fundamental error review, "a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶8 Rule 403, Ariz. R. Evid., provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Balancing the factors contemplated by Rule 403 "'is peculiarly a function of trial courts, not appellate courts,'" and we review a trial court's decision to admit or reject such evidence for an abuse of discretion. *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, ¶ 53, 92 P.3d 882, 896 (App. 2004), *quoting Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, ¶ 26, 10 P.3d 1181, 1190 (App. 2000).

¶9 In a letter Bowman had written to L., he stated he "[saw] no reason why [he] wouldn't get a plea offer of probation if the State loses the evidence and testimony," and he asked: "If I'm offered a plea, do you think I should take it? If so, what is the maximum time I should accept?" At trial, Bowman argued "the mere fact that he was considering taking a plea may in [the jury's] mind already condemn him to guilt and is effectively a confession on his part." He contends the prejudicial impact of the evidence was demonstrated by a juror's inquiry during the recess after that portion of the letter was read, recounted to the court as follows: "[W]hy are we doing this if he's already talked about pleading guilty?" He also argues the statements about the plea process were not probative of consciousness of guilt, but rather showed the "mutual manipulation which went on between husband and wife."

¶10 The trial court found the comments in the letters relevant to rebut Bowman's suggestion that L. was a "vindictive victim," and noted his statements to L. were "not part of the plea negotiations." *See* Ariz. R. Crim. P. 17.4(f) (when no

agreement reached, plea discussion inadmissible against defendant). The court instructed the jury as follows:

> [Y]ou are not to draw any conclusions at this stage from conversations . . . between [L.] and . . . Bowman as to the topics of their conversations. It is still the State's burden to prove beyond a reasonable doubt each element of each offense with their own evidence.

¶11 We find no fundamental error in the trial court's determination that the evidence was relevant and that a limiting instruction would clarify its proper use. *See Amaya-Ruiz*, 166 Ariz. at 167, 800 P.2d at 1275 (court has considerable discretion determining admissibility of evidence). Moreover, Bowman has not shown that he "could not possibly have received a fair trial" or that any alleged error caused him prejudice; other statements in his letters arguably were more probative of his consciousness of guilt. *See Henderson*, 210 Ariz. 561, ¶¶ 19, 20, 115 P.3d at 607, *quoting Hunter*, 142 Ariz. at 90, 688 P.2d at 982. For example, he made such statements as: "I will not reoffend"; "I made a big mistake, a mistake I will regret for the rest of my life"; "What I did was wrong"; "what I did" was "sick"; and "I wish I could take it all back." Therefore, we cannot say the court's admission of the evidence was a clear and egregious error that would constitute reversible, fundamental error. *See Bible*, 175 Ariz. at 572, 858 P.2d at 1175.

Right to Confrontation

¶12 Bowman alleges the trial court violated his constitutional right to confront and cross-examine witnesses under the Sixth Amendment by precluding evidence of methamphetamines found in his and L.'s master bedroom and by precluding cross-

examination of L. regarding her previous accusations of sexual misconduct against her former husband. Bowman argues the evidence should have been permitted to prove L.'s drug use "clouded her mind and made her truthfulness questionable." Bowman also argues the alleged drug possession and prior allegations would have been probative of L.'s "manipulative and deceptive behavior," which supported his theory that she had "manipulated the children into making their revelations."

¶13 "Although the right to cross-examine a witness is vital to the right of confrontation, the trial court reserves discretion to curtail the scope of cross-examination to within 'reasonable' limits." *State v. Doody*, 187 Ariz. 363, 374, 930 P.2d 440, 451 (App. 1996). We review restrictions on cross-examination "on a case-by-case basis to determine whether the court unduly inhibited the defendant's ability to present information bearing on issues or on the credibility of witnesses." *Id.* "A trial court's decision to limit cross-examination is reviewed for a clear abuse of discretion." *State v. Cox*, 201 Ariz. 464, ¶ 5, 37 P.3d 437, 439 (App. 2002). "[W]e will not disturb the court's ruling absent a clear showing of prejudice," *Doody*, 187 Ariz. at 374, 930 P.2d at 451, and violations of the Confrontation Clause are reviewed for harmless error, *see State v. Armstrong*, 218 Ariz. 451, ¶ 20, 189 P.3d 378, 385 (2008). "Error is harmless if we can conclude, beyond a reasonable doubt, that the error did not contribute to or affect the jury's verdict." *State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004).

¶14 The right to confront and cross-examine witnesses is "'limited to the presentation of matters admissible under ordinary evidentiary rules, including relevance.'" *State v. Riggs*, 189 Ariz. 327, 333, 942 P.2d 1159, 1165 (1997), *quoting*

State v. Dickens, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996). The trial court "may reasonably limit cross-examination if concerned that the examination is only 'marginally relevant.'" *Riggs*, 189 Ariz. at 333, 942 P.2d at 1165, *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). "As evidence of the witness' condition becomes more remote in time, it has proportionately less bearing on the credibility of the witness." *State v. Fleming*, 117 Ariz. 122, 125-26, 571 P.2d 268, 271-72 (1977). Additionally, the court can restrict cross-examination on subject matter of a personal nature with only minimal probative value and that tends to bring up collateral matters. *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982).

¶15 To the extent the trial court ruled evidence about L.'s alleged drug possession was irrelevant and inadmissible, it did not abuse its discretion.[3] There was no evidence before it showing the drugs belonged to L., that L. actually had used drugs or, as the court noted, that any such use could be "linked to her ability to both perceive and retain and relate information." Bowman conceded he did not know if he could confirm L. had used drugs at the time the allegations of sexual misconduct were made against him, only that "she possessed them, only that they were in the house." The court did not abuse its discretion in determining this speculative information was irrelevant and

[3]It is unclear whether Bowman actually sought to introduce evidence of L.'s drug use. In referring to possible presentation of such evidence, Bowman's counsel stated, "it is at this point . . . a little early to make a final determination; but it has at least crossed our mind that we will intend to bring in evidence that . . . [L.] was in possession of methamphetamines." The court determined the evidence was irrelevant but told Bowman that "if something changes, let me know." The issue was not raised again.

inadmissible. *See Amaya-Ruiz*, 166 Ariz. at 167, 800 P.2d at 1275 (court has considerable discretion determining relevance).

¶16 Nor did the trial court abuse its discretion by refusing to allow Bowman to present evidence L. previously had made allegations of sexual misconduct against her former husband. The court determined the evidence was irrelevant, noting in this case the accusations against Bowman had come from the children, not L., and to permit the evidence would open the door to "a lot of collateral, irrelevant material" necessary to establish whether the allegations were true. *See Zuck*, 134 Ariz. at 513, 658 P.2d at 166 (court can restrict cross-examination into "collateral matters of a personal nature having minor probative value and tending to bring up collateral matters"); *Amaya-Ruiz*, 166 Ariz. at 167, 800 P.2d at 1275 (court has considerable discretion determining relevance). Moreover, excluding this information did not "unduly inhibit[]" Bowman's ability to impeach L.'s credibility. *See Doody*, 187 Ariz. at 374, 930 P.2d at 451 (test "whether the court unduly inhibited the defendant's ability to present information bearing on issues or on the credibility of witnesses"). The court permitted Bowman's counsel to ask L. if she was lying or if she had told the children to lie, and the Confrontation Clause does not confer the right to impeach a witness by referring to specific events not relevant to issues at trial. *See State v. Munguia*, 137 Ariz. 69, 71, 668 P.2d 912, 914 (App. 1983). Finally, any error in limiting impeachment of L.'s testimony was harmless in light of the children's testimony and the admissions contained in Bowman's letters.

Sentencing Minute Entry

¶17 Bowman alleges the trial court's sentencing minute entry "should be corrected" because "all of the sentences involving the convictions for sexual conduct with a minor refer to a minor under the age of thirteen" but the indictment charged him with sexual conduct with minors under the age of fifteen. To the extent Bowman argues this is a clerical error, the trial court is the proper forum in which to seek a correction. *See* Ariz. R. Crim. P. 24.4 ("Clerical mistakes in judgments, orders, or other parts of the record . . . may be corrected by the court at any time after such notice, if any, as the court orders."). To the extent Bowman contends the error is substantive, we do not address his argument; he concedes any error is harmless because "the sentences . . . are in accordance with the respective statutes." *See Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607 (error harmless if sentence imposed unaffected).

Disposition

¶18 For the reasons stated, we affirm Bowman's convictions and sentences.

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

CONCURRING:

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

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