DIVISION ONE
FILED: 07/03/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0988
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
ROY GALINDO, JR.,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-006938-001DT

The Honorable Karen L. O'Connor, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

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By Theresa M. Armendarez
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Defendant Roy Galindo, Jr., (defendant) appeals from his convictions and sentences for three counts of molestation of

a child and one count each of attempted molestation of a child and sexual conduct with a minor, all dangerous crimes against children. He argues the court erred in admitting "other act" evidence in violation of Rule 404(b) and (c), Arizona Rules of Evidence. Defendant also contends the court erred in denying his motions for mistrial. As we explain below, we reject defendant's assignments of error and affirm.

BACKGROUND

¶2 On June 11, 2009, the state charged defendant with three counts of sexual conduct with a minor (Counts 1-3) and one count of attempted molestation of a child relating to victim JC (Count 4). The state also charged defendant with three counts of molestation of a child, two of which related to victim AaC (Counts 6, 7) and one to victim LC (Count 8), and one count of kidnapping relating to victim MC (Count 5), who was defendant's live-in girlfriend and the mother of the three female minor victims.[1] The offenses were alleged to have occurred between July 15, 2000 and June 15, 2004.

¶3 The jury found defendant not guilty of the two sexual conduct offenses that alleged defendant penetrated JC's vagina with his fingers (Counts 1, 3). The jury also found defendant

[1] MC had five children and was pregnant with her sixth child when she met defendant. After defendant began living with MC and her children, MC and defendant had six more children.

not guilty of the kidnapping charge. Defendant was found guilty of the sexual conduct offense that alleged penile/vaginal contact, and the jury returned guilty verdicts on the three molestation offenses and one attempted molestation count.

¶4 The court sentenced defendant to consecutive terms of imprisonment that total eighty-one years. Defendant appealed.

DISCUSSION

I. "Other Act" Evidence

¶5 Over defendant's objection on Rule 404(b) and (c) grounds, the court permitted the state to elicit testimony that JC and her sister AeC had a conversation in December 2006 with three-year-old R, one of defendant's and MC's biological daughters, which in turn caused JC and her older brother, DC, to go to police. Following the children's report, police commenced the investigation that resulted in the indictment in this case. The court found that evidence limited to the discussion itself was not a "prior act" for purposes of Rule 404 and was helpful for the jury to understand why the investigation in this case suddenly commenced after such a long time since the alleged criminal offenses occurred.[2] The court prohibited the state from

[2] Defendant was tried in 2006 on charges of sexual offenses against BC and JC arising from acts different from those in this case. The charges were dismissed when the victims testified at trial that they could not remember any of the acts underlying the alleged offenses. In this case, JC testified

introducing evidence of the substance of the discussion with R. – i.e., that defendant had apparently "licked" R –and the court order precluded any mention of an "incident" regarding R. Consistent with the court's rulings, AeC and JC each testified that they talked together with R, and they then telephoned their brother DC who went with JC to the police station.[3] AaC also testified that she remembered her sisters AeC and JC having a conversation with R before going to the police.

¶6 Defendant argues that the court erred in permitting the testimony regarding the conversation with R because "the court failed to consider whether the uncharged and unsubstantiated allegations involving R . . . were admissible pursuant to Rule 404(b) and/or (c)."[4] We review for an abuse of discretion. *State v. Beasley,* 205 Ariz. 334, 337, ¶ 14, 70 P.3d 463, 466 (App. 2003).

¶7 "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). Such

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that she had lied at the previous trial because of threats Defendant had made from jail while awaiting trial.

[3] Before the court prohibited mention of the word "incident," the state asked AeC whether "an incident . . . occurred involving your younger sister [R]?" Defendant did not object. AeC's response did not refer to defendant or any act committed by him.

[4] Defendant does not challenge the sufficiency of evidence supporting his convictions.

evidence may be admissible under Rule 404(b), however, if it is used for a purpose other than to prove a character trait such as proof of motive or opportunity.[5] *Id.* If the evidence is introduced at trial, the court must instruct the jury as to the proper use of the evidence. Ariz. R. Evid. 404(a)(2).

¶8 We find no abuse of discretion. As the trial court noted, the testimony did not specifically refer to a prior act of defendant that was used "to prove [his] character . . . in order to show action in conformity therewith." Ariz. R. Evid. 404(b). As one of his defenses, defendant argued the children were afraid of him based on his harsh physical discipline of them and MC, and the children therefore made false allegations of sexual misconduct in order to have him removed from the home. Evidence of the discussion was relevant and admissible to rebut this defense and to explain why JC suddenly went to police after enduring years of abuse. Trial evidence established that MC and her children did not earlier report defendant's physical and sexual abuse because they were afraid of further violence and

[5] In sexual misconduct cases, Rule 404(c) allows for the admissibility of prior act evidence that is "relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Ariz. R. Evid. 404(c). Before admitting such evidence under Rule 404(c), the court is required to make specific factual findings as delineated in the rule. Ariz. R. Evid. 404(c)(1). The evidence at issue in this case was not introduced to prove defendant's sexual propensity.

that the family would be "split up" as a result. The discussion with R apparently represented the "last straw" for JC.[6]

¶9 Finally, we find the court's instruction to the jury cured any possible prejudice resulting from the challenged evidence. The court instructed: "[defendant] has no prior convictions or pending charges with respect to child abuse or sexual assault, aside from the allegations in this case. The jury shall disregard any evidence or testimony concerning [defendant]'s past conduct or alleged criminal behavior that is not related to the victims in this trial." We presume the jury followed these instructions. *State v. McCurdy*, 216 Ariz. 567, 574, ¶ 17, 169 P.3d 931, 938 (App. 2007). Further, during closing arguments, the prosecutor did not mention the evidence of R's discussion with her sisters let alone the substance of that discussion. *State v. Johnson*, 205 Ariz. 413, 417, ¶ 11, 72

[6] To the extent defendant argues that the court reversibly erred by failing to conduct a Rule 404 analysis such an argument is unavailing. *See State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997) ("[B]efore admitting evidence of prior bad acts, trial judges must find that there is clear and convincing proof both as to the commission of the other bad act and that the defendant committed the act."). The court specifically noted that had it engaged in such an analysis and ruled in defendant's favor, the court's ruling would have been the same. That is, although the court would have precluded evidence of defendant's conduct vis-a-vis R, evidence that R made comments to her sisters resulting in a police investigation would nonetheless have been deemed admissible.

P.3d 343, 347 (App. 2003) (noting jury instructions are considered in conjunction with closing arguments).

II. Motions for Mistrial

¶10 Defendant unsuccessfully moved for mistrial on the basis of the other-act evidence discussed above and in response to additional other-act evidence presented at trial. He cursorily argues the court erred in denying his motions. We disagree.

¶11 Motions for new trial are disfavored and should be granted with great caution. *State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988). A trial court has broad discretion in deciding whether to grant a mistrial, and we will reverse a ruling on a mistrial motion only if the trial court's "conduct is palpably improper and clearly injurious." *State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989) (citation omitted). We give great deference to the trial court's decision because the trial court "is in the best position to determine whether the evidence will actually affect the outcome of the trial." *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000).

¶12 Regarding defendant's motion for mistrial on the basis of the testimony regarding R's discussion with her sister, we find, for the reasons already discussed *supra* ¶¶ 5-10, no abuse of discretion in the court's denial of the motion.

¶13 Defendant next refers to his unsuccessful motions for mistrial made after other-act testimony relating to the minor victims' sister B and testimony by MC that defendant had once "shot at her." According to defendant, the trial court sustained his objections to this testimony. Defendant does not meaningfully argue that the court's rulings and its curative instruction to the jury, *supra* ¶ 10, were "insufficient to remedy the error." In any event, the trial court was in the best position to determine what effect, if any, the testimony had on the jurors. The court apparently found little or no prejudice. We find no abuse of discretion.[7]

¶14 Defendant also refers to the unsuccessful mistrial motion he made after the one-minute video excerpt of JC's recorded interview with police was played for the jury. In the video, when explaining the digital/vaginal contact that occurred in the kitchen while she was washing dishes, JC stated that defendant would "always" stick his hand down her pants and stick his fingers inside of her. Assuming without deciding that admission of the "always" statement entitled defendant to a mistrial, his acquittal on the only two sexual conduct charges

[7] Moreover, MC's testimony about being shot by defendant was duplicative of AaC's testimony, to which defendant did not object.

that were based on digital/penile contact belies any prejudice. No reversible error occurred.

CONCLUSION

¶15 Defendant's convictions and sentences are affirmed.

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
DIANE M. JOHNSEN, Judge