DIVISION ONE
FILED: 5/30/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0625
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JAMES JOSEPH STARK,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-102892-001

The Honorable Carolyn K. Passamonte, Commissioner

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Joseph Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Myles Braccio, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 James Joseph Stark (Defendant) appeals his convictions and sentences on seven counts of sexual conduct with a minor,

three counts of child molestation, two counts of kidnapping, three counts of sexual abuse, one count of furnishing obscene or harmful items to a minor, one count of public sexual indecency to a minor, and one count of indecent exposure. Defendant contends that the trial court committed fundamental error in admitting the testimony of one of the witnesses. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Between January 2008 and January 2010, Defendant engaged in multiple acts of inappropriate sexual contact with his step-granddaughter, T.B.[2] On January 13, 2010, T.B. told her mother that Defendant had been touching her inappropriately, and the following day, T.B.'s mother contacted the police. During a forensic interview that was observed by Detective K., T.B. described to Officer E. all of Defendant's sexual contact with her. Defendant was subsequently arrested and indicted on twenty counts of various charges.

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[1] We view the trial evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

[2] At the time the inappropriate sexual contact took place, T.B. was not technically Defendant's family member because T.B.'s mother did not marry Defendant's son until after Defendant was arrested.

¶3 During the trial, the State called numerous witnesses, but only two of the witnesses, T.B. and Detective K., were able to provide detailed accounts of the sexual acts that Defendant performed on T.B. While testifying, T.B. recalled the events that led to Defendant's arrest. Also, a portion of Detective K.'s testimony focused on the statements he heard T.B. make to Officer E. during the forensic interview. Based on the evidence presented during trial, the jury convicted Defendant on eighteen of the twenty counts of sexual crimes.[3]

¶4 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 (2010), and -4033.A.1 (2010).

DISCUSSION

¶5 Defendant asserts that the trial court erred in admitting portions of Detective K.'s testimony that included inadmissible prior consistent statements made by T.B. to Officer E. Because Defendant failed to object to this alleged error during his trial, we review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is an error that goes "to the foundation of the case, error that takes from the defendant a

[3] One count of sexual conduct with a minor was dismissed with prejudice by the State during the trial, and Defendant was acquitted on another count of sexual conduct with a minor.

right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Under fundamental error review, the defendant must establish that the trial court erred, the error was fundamental, and the error caused him prejudice. *Henderson*, 210 Ariz. at 567-68, ¶ 20, 115 P.3d at 607-08.

¶6 Defendant contends that the trial court fundamentally erred in admitting Detective K.'s testimony regarding T.B.'s statements to Officer E. He further alleges that he was prejudiced by this error because T.B.'s prior statements were the only evidence of his guilt introduced by the State for Counts 11, 13, and 15. We discuss each count in detail below.

Count 11

¶7 Defendant was convicted of Count 11 for sexual conduct with a minor. "A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse[4] or oral sexual contact with any person who is under eighteen years of age." A.R.S. § 13-1405.A (Supp. 2012).[5] In addition to

[4] Sexual intercourse is defined as "penetration into the penis, vulva, or anus by any part of the body or by any object or masturbatory contact with the penis or vulva." A.R.S. § 13-1401.3 (2010).

[5] We cite to the current version of applicable statutes when no revisions material to this decision have occurred.

containing allegations that Defendant intentionally or knowingly engaged in sexual intercourse or oral sexual contact with T.B., Count 11 also contained the following language: "(to wit: [D]efendant penetrated victim's vulva with his penis while attempting to insert his penis in her vagina; same incident as Count 6)."[6]

¶8 At issue is the following testimony from T.B., which Defendant contends was insufficient to convict him of this count:

> **Q.** Okay. Do you remember telling [Officer E.] . . . about [Defendant] doing something with his private part while you were handcuffed to the bed?
> **A.** Yes.
> **Q.** Do you remember telling [Officer E.] that?
> **A.** Yeah.
> **Q.** Do you remember what it was that you told [Officer E.] about [Defendant] doing something with his private part?
> **A.** I remember sometimes [Defendant] would lay under me and he would turn me around.
> **Q.** And what would he do when he turned you around?
> **A.** My private part would meet his.
> **Q.** Okay. And when you say "meet his," what happened when his private part met your private part?
> **A.** What I mean by that is he, like, turned me around and my private part would be on his.
> **Q.** Were they touching?
> **A.** Yes.
> **Q.** And when they touched did his private part, was it on the outside of your private part or on the inside of your private part?

[6] In Count 6, Defendant was charged with, and subsequently convicted of, the crime of kidnapping because he handcuffed T.B. to his bed.

A. Outside.

¶9 After T.B. testified, the State called Detective K. to the stand, who testified as follows:

> **Q.** And also during that same incident, what if anything did [T.B.] say in regards to [Defendant's] penis or private part?
> **A.** She stated he handcuffed me to the bed and tried to put his private part in my vagina and he said it was too big.
> **Q.** Who did she indicate said it was too big?
> **A.** [Defendant].
> **Q.** So she indicated that he tried and it got to the point however that he said that it was too big, basically, and it wouldn't work?
> **A.** Correct.

¶10 Defendant asserts that the trial court erred in admitting this portion of Detective K.'s testimony because it was inadmissible hearsay. We find, however, that the statement was "not hearsay" pursuant to Arizona Rule of Evidence 801(d)(1)(A). Under Rule 801(d)(1)(A), a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony."[7]

¶11 In this case, T.B. appeared and testified at trial, and the record demonstrates that Defendant's counsel was not prevented from cross-examining T.B.; therefore, she was subject

[7] This rule was amended in 2012; however, we refer to the version of the rule that was in effect at the time of Defendant's trial.

to cross-examination regarding the prior statement. *See State v. Parris*, 144 Ariz. 219, 222, 696 P.2d 1368, 1371 (App. 1985). Additionally, while on the stand, T.B. stated that Defendant's penis only touched the outside of her private part; however, Detective K. testified that T.B. told Officer E. that Defendant "tried to put his private part in [her] vagina," but it was too big. We find that T.B.'s testimony about this incident was inconsistent with her prior statement that was offered by Detective K. Therefore, her prior inconsistent statement could have been admitted into evidence under Rule 801(d)(1)(A).

¶12 However, prior inconsistent statements may be excluded under Arizona Rule of Evidence 403 if they are overly prejudicial. The Arizona Supreme Court set forth a list of factors to be considered when impeaching testimony is being used substantively in order to ensure that evidence that is unfairly prejudicial is suppressed. *State v. Allred*, 134 Ariz. 274, 277, 655 P.2d 1326, 1329 (1982). The five factors among those to be considered are whether (1) the witness being impeached denies making the impeaching statement; (2) the witness who presents the impeaching statement has an interest in the outcome of the proceeding and there is no other corroboration that the statement was made; (3) there are other issues that affect the reliability of the impeaching witness, including age or mental incapacity; (4) the real reason that the statement is being offered into

evidence is for its substance, rather than to impeach the witness; and (5) the impeachment evidence is the only evidence of guilt that has been introduced. *Id.*

¶13 In this case, T.B. did not deny making the impeachment statement. However, this factor does not necessarily weigh in favor of or against admitting Detective K.'s testimony because she was never questioned about her prior inconsistent statement.

¶14 The second factor is whether the individual presenting the impeaching statement, Detective K., had an interest in the outcome of the proceeding. "A police officer is not per se 'interested' merely by virtue of his or her involvement in a criminal investigation, absent evidence of some personal connection with the participants or personal stake in the case's outcome." *State v. Miller*, 187 Ariz. 254, 258, 928 P.2d 678, 682 (App. 1996). There is no evidence in the record that Detective K. had a personal connection with any of the participants in the case or an interest in the case's outcome. Additionally, under factor three, there are no other issues in the record that affect the reliability of the impeaching witness, Detective K.

¶15 On the other hand, factor four -- whether the prior inconsistent statement is being offered substantively, rather than to impeach the witness -- weighs against admitting T.B.'s prior statement. This is not a case in which the victim feigned an inability to remember because of her fear of the defendant.

See State v. Salazar, 216 Ariz. 316, 320 & n.5, ¶ 16, 166 P.3d 107, 111 & n.5 (App. 2007) (admitting prior inconsistent statement based on court's belief that witness feigned an inability to remember at trial out of reluctance to set back her rehabilitation). T.B. testified against Defendant and provided sufficient evidence to convict him on almost all of the counts for which he was charged. Therefore, the impeachment could be seen as a pretense for the substantive use of the statement.

¶16 Finally, the prior inconsistent statement was the only evidence of guilt on this count. As Defendant asserts, there was no evidence to convict Defendant of Count 11 other than Detective K.'s testimony regarding T.B.'s prior inconsistent statement. During the trial, when asked whether Defendant's penis touched the outside or the inside of her private part, T.B. responded, "Outside." This is insufficient to prove that Defendant penetrated T.B.'s vulva during this incident, as is required to convict Defendant of sexual conduct with a minor. *See* A.R.S. §§ 13-1401.3, -1405.A. Although Detective K.'s testimony regarding T.B.'s prior statement to Officer E. provided the necessary proof to convict Defendant, "*Allred* does not state a per se rule of exclusion where inconsistent prior statements provide the sole basis of the state's case." *Miller*, 187 Ariz. at 258, 928 P.2d at 682; *see also State v. Beck*, 151 Ariz. 130, 132, 726 P.2d 227, 229 (App. 1986) ("The *Allred* decision does not stand for the

proposition . . . that when prior inconsistent statements are the sole basis of the state's case, they may not be permitted into evidence."). Thus, although T.B.'s prior statement may have been the only evidence of Defendant's guilt, this factor is not dispositive.

¶17 Although two of the five *Allred* factors were present, we find that the risk of unfair prejudice did not outweigh the probative value of the impeaching statement. Under these circumstances, we conclude there was no error, fundamental or otherwise, in permitting the use of T.B.'s prior inconsistent statement; therefore, we affirm Defendant's conviction as to Count 11.

Count 13

¶18 Defendant was convicted of Count 13 for sexual conduct with a minor. In addition to containing allegations that Defendant intentionally or knowingly engaged in sexual intercourse or oral sexual contact with T.B., Count 13 also contained the following language: "(to wit: [D]efendant inserted his finger into victim's vagina; the time when it went in almost up to his palm)." When questioned regarding this count, T.B. testified as follows:

> **Q.** Is there a time when [Defendant] put his finger in your private part that you remember most?
> **A.** No.

> **Q.** Was there a time that he put his finger in your private part that something happened that was different?
> **A.** Yes.
> **Q.** Can you tell us about that?
> **A.** When he would do it a lot of times he would get his middle finger or — and then one time he had his pinky and tried to put it in and he said he got farther.
> **Q.** Okay. Do you know how far his pinky went in?
> **A.** No.
> **Q.** Was there another time that he put his finger into your private part where something different happened?
> **A.** No.

¶19 After T.B. testified, Detective K. took the stand. When questioned about the events that gave rise to Count 13, he testified as follows:

> **Q.** Did [T.B.] talk to [Officer E.] — I'm sorry I'm confusing things — did she talk to [Officer E.] about a time when [Defendant] inserted his finger in her vagina and which it went up somewhat far? And I'm paraphrasing.
> **A.** Yes.
> **Q.** Okay. Can you tell us what [T.B.] said in regard to that[?]
> **A.** She stated there was an incident where he stuck his finger in my hole almost all the way up to his palm.

¶20 Defendant objects to the admission of this portion of Detective K.'s testimony because Defendant contends that it was inadmissible as a prior consistent statement.

¶21 Generally, prior consistent statements made by a witness are hearsay and not admissible. *State v. Tucker*, 165 Ariz. 340, 343, 798 P.2d 1349, 1352 (App. 1990). There is an

exception to the general rule, which is found in Rule 801(d)(1)(B). Under this exception, a statement is not hearsay if the declarant testifies and is subject to cross-examination about a prior statement, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Ariz. R. Evid. 801(d)(1)(B).

¶22 While T.B. may have told Officer E. that Defendant inserted his finger into her vagina "almost all the way up to his palm," T.B.'s statements at trial were not inconsistent. At trial, T.B. testified that although Defendant normally touched her private part with his middle finger, one time he used his pinky finger and "said he got farther." We find that these statements are, in fact, consistent.

¶23 T.B.'s prior consistent statement is not, however, admissible under the Rule 801(d)(1)(B) exception. Defendant did not claim that T.B.'s testimony was affected by an improper influence or motive; his contention was that T.B. was lying both on the stand and during the forensic interview when she made the prior consistent statement. *See Tucker*, 165 Ariz. at 343, 798 P.2d at 1352 (stating that because the defendant's defense was that any accusation, whenever made, was a fabrication, the case was not within the Rule 801(d)(1)(B) exception). Therefore,

Detective K.'s testimony regarding T.B.'s prior consistent statement was admitted in error.

¶24 However, even if the trial court erred in admitting T.B.'s prior consistent statement, Defendant failed to show how this error resulted in prejudice to him. While Defendant alleges that Detective K.'s testimony was the only evidence that the State introduced on Count 13, T.B.'s testimony provided sufficient evidence for the jury to convict Defendant on this count. The fact that T.B.'s testimony failed to demonstrate that Defendant inserted his finger into her vagina "almost up to his palm" is irrelevant. "Mere mention in the indictment of facts that the State intends to elicit in proving the crime does not transform those facts into elements of the offense." *State v. Marshall*, 197 Ariz. 496, 506, ¶ 39, 4 P.3d 1039, 1049 (App. 2000). T.B.'s testimony proved that Defendant penetrated her vulva with his finger and that this incident was distinguishable from the other times he had committed a similar act. This demonstrates that sexual intercourse occurred and was sufficient to convict Defendant of sexual conduct with a minor for this incident. *See* A.R.S. §§ 13-1401.3, -1405.A.

¶25 Because Defendant failed to demonstrate how he was prejudiced by the introduction of T.B.'s prior consistent statement to Officer E., we affirm Defendant's conviction on Count 13.

Count 15

¶26 Defendant was also convicted of Count 15 for child molestation.[8] Count 15 included the following description: "(to wit: first time [D]efendant touched victim's vagina with his hand; same incident as Count 14)." Count 15 allegedly occurred at the same time as Count 14, in which Defendant was charged with, and later convicted of, indecently exposing his penis to T.B. at the house in Glendale for the first time. When asked about this incident, T.B. stated:

> **A.** He — the first time is when I asked him 'cause I was little and I didn't know, if I could see his private part. And he told me to get my sister out to play in the backyard with my — one of the friends across the street. And he let me see his private part.
> . . .
> **Q.** And you said he pulled down his pants and showed it to you?
> **A.** Yes.
> **Q.** Did something else happen when he showed you his private part?
> **A.** No. Not then.
> **Q.** Not that time?
> **A.** Yeah, not that time.
> **Q.** That was the very first time something happened?
> **A.** Yes.

[8] Child molestation is defined as "intentionally or knowingly engaging in or causing a person to engage in sexual contact . . . with a child who is under fifteen years of age." A.R.S. § 13-1410 (2010). Sexual contact includes "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 contact." A.R.S. § 13-1401.2.

¶27 Apparently unsatisfied with T.B.'s response to its questions pertaining to the first incident with Defendant, the State later questioned T.B. as follows:

> **Q.** Now, [T.B.], going back to the time where you told me the very first thing happened where you asked to see [Defendant's] private part and he showed it to you at the house in Glendale, do you remember when we talked about that just now?
> **A.** Yes.
> **Q.** Back when you spoke to [Officer E.] last year, do you remember telling her that at the same time [Defendant] also touched your private part with his hand?
> **A.** I don't remember that.
> **Q.** You don't remember telling her that?
> **A.** No.

¶28 When Detective K. took the stand, the State asked him to recount the statements that T.B. had made to Officer E. during the forensic interview about the first incident. On appeal, Defendant contends the trial court erred in admitting the following testimony:

> **Q.** As well, did [T.B.] talk to [Officer E.] about the first time something happened with [Defendant] in this case?
> **A.** Yes.
> **Q.** What did she indicate happened that very first time?
> **A.** She had indicated that this incident had taken place in the house in Glendale, at which point during which she had asked [Defendant] if she could see his private parts.
>
> She indicated that he had said that she could once she got her sister out of the house. And after getting her sister into the backyard talking to the neighbor girl, she stated that he pulled down his pants and

> said, "This is what it looks like," at which point he asked her to show him hers.
>
> She went on to say that he then started touching her and said, "This is a vagina and this is a clitoris," this is this, this is that.
>
> **Q.** Okay. So did she specifically indicate to [Officer E.] that he did in fact touch her vagina that very first time or that very first incident?
>
> **A.** Yes.

¶29 While Defendant asserts that the testimony by Detective K. was inadmissible as a prior consistent statement, we find that that the testimony is actually a prior *inconsistent* statement. Because T.B. stated that Defendant exposing himself was the only thing that occurred during the first incident, the State introduced her prior statement to prove that Defendant had also touched her during that incident in order to satisfy the necessary elements for the child molestation charge. Although a prior inconsistent statement may be admitted as non-hearsay, *see State v. Sucharew*, 205 Ariz. 16, 23, ¶ 20, 66 P.3d 59, 66 (App. 2003) (noting that a prior inconsistent statement by a testifying witness is not hearsay), we must apply the *Allred* test to ensure that the prior inconsistent statement was not unduly prejudicial to Defendant. *See Allred*, 134 Ariz. at 277, 655 P.2d at 1329.

¶30 First, T.B. did not deny making the impeaching statement. When asked if she remembered telling Officer E. that Defendant had also touched her during the first incident, she merely stated that she did not remember telling Officer E. that.

"An answer by a witness that he does not remember whether an event occurred is not a denial . . . ." *State v. McFall*, 103 Ariz. 234, 236, 439 P.2d 805, 807 (1968).

¶31 As with Count 11, there is no allegation that Detective K. is an interested witness. Also, there are no other factors affecting Detective K.'s reliability, such as age or mental incapacity, in the record.

¶32 On the other hand, there was no need to impeach T.B.; as we discussed above with respect to Count 11, the real reason the statement was being offered into evidence was for its substantive use. Additionally, the prior statement was the only evidence of guilt introduced by the State for this count. Without Detective K.'s testimony on T.B.'s prior inconsistent statement, there was insufficient evidence to convict Defendant of Count 15. During the trial, T.B. testified that Defendant only exposed himself during the first incident. She later did not recall telling Officer E. that Defendant also touched her at that time. Her testimony was sufficient to convict Defendant of Count 14 (indecent exposure); it was not, however, sufficient to convict him of child molestation.

¶33 Again, only two of the five *Allred* factors were present: the statement was used substantively, rather than to impeach, and the impeaching statement was the only evidence of Defendant's guilt that was introduced by the State on this count.

We therefore find that the risk of unfair prejudice did not outweigh the probative value of the impeaching statement. Accordingly, we conclude the trial court did not err in permitting the use of T.B.'s prior inconsistent statement, and we affirm Defendant's conviction as to Count 15.

CONCLUSION

¶34 For the reasons stated above, we affirm Defendant's convictions and sentences.

/S/
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PATRICIA A. OROZCO, Judge

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MAURICE PORTLEY, Presiding Judge

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RANDALL M. HOWE, Judge