IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 3/12/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN RE FRANCESCA R.	)	1 CA-JV 12-0251
	)	
	)	DEPARTMENT B
	)	
	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
	)	Rule 103(G), Ariz. R.P.
	)	Juv. Ct.; Rule 28 ARCAP)
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. JV179307

The Honorable Linda H. Miles, Judge

AFFIRMED

William G. Montgomery, Maricopa County Attorney — Phoenix
By Karen Kemper, Deputy County Attorney
Attorneys for Appellee

Christina Phillis, Maricopa County Public Advocate — Mesa
By Devra N. Ellexson, Deputy Public Advocate
Attorneys for Appellant

G O U L D, Judge

¶1 The juvenile court adjudicated Francesca R. delinquent for threatening or intimidating, in violation of Arizona Revised

Statutes ("A.R.S.") section 13-1202(a)(1) (2013)[1], a class one misdemeanor. Francesca appeals and argues the court erred in finding her delinquent because the State failed to disclose a possible impeachment witness.

BACKGROUND[2]

¶2 On April 21, 2012, S.W., president of the football booster club, was in charge of facilitating a lock-in event at Buckeye Union High School to raise funds for the football team. Buckeye Union High School students and upcoming freshmen were invited to stay overnight, play video games, and watch movies.

¶3 While walking around to monitor the students, S.W. observed Francesca lying underneath a blanket and cuddling with a young boy in violation of the rule prohibiting two students from lying under the same blanket. S.W. also observed that Francesca was wearing a sheer shirt and that she had removed her bra underneath. S.W. asked Francesca several times to put her bra on, but Francesca became angry and refused, saying "[b]itch, I don't have to go anywhere and I'm not putting my bra on" and "[b]itch please, I don't know you. You don't have a right to ask me to do anything." After this verbal exchange, S.W. told

[1] We cite to the current versions of the statutes discussed herein as no substantive changes have occurred.

[2] We view the facts in the light most favorable to upholding the juvenile court's order and resolve all reasonable inferences against Francesca. *In re John M.*, 201 Ariz. 424, 426, ¶ 7, 36 P.3d 772, 774 (App. 2001).

Francesca to get up and go to the bathroom to put on her bra, which caused Francesca to become even louder.

¶4 Eventually, Francesca got up, at which point she turned around and swung at S.W., striking S.W.'s forearm. Francesca then walked out of the room and S.W. told her she needed to sit down on the bleachers and have a ten minute timeout to collect herself. After the timeout, Francesca calmed down and went to the bathroom and put her bra back on.

¶5 Early the next morning, S.W. and Francesca crossed paths when Francesca was walking back from the bathroom area. Again, Francesca told S.W. "[b]itch, please, you don't even know me," and S.W. responded by asking Francesca her age. When Francesca replied that she was eighteen, S.W. told her that she was not allowed at the event, as it was only for students of the high school. Then, Francesca took what appeared to S.W. to be a pencil and swung it at her, saying "[b]itch, please, I'm going to stab you if you don't get out of my way."

¶6 Feeling threatened, S.W. stepped back and walked over to two "older people" and told them she felt very uncomfortable and overwhelmed. S.W. began to write down what occurred on a sheet of paper. After two or three minutes, S.W. called the police. Francesca and her sister tried to leave but they were stopped by the police. Francesca was detained for disorderly

conduct, cuffed, and transported to the Buckeye Police Station for questioning.

¶7 The juvenile court held a trial on September 12, 2012. A few minutes prior to the trial, the prosecutor met with S.W. and S.W.'s husband, Ken, who sat in on the meeting. During their conversation, S.W. mentioned to the prosecutor that Ken also had been present on the night of the incident.

¶8 During the trial, Francesca invoked the rule of exclusion before S.W. and Officer V. testified for the State. They were the only two witnesses to testify at the hearing. At the trial, S.W. testified that two other adults, Ken and Vicky, had been in the room during her first encounter with Francesca. S.W., however, did not mention that Ken was her husband or that he was present in the courtroom. S.W. also testified that she had spoken to Ken since the incident.

¶9 During a break in the trial, Francesca's counsel discovered, while speaking with the prosecutor, that Ken was married to S.W., and that Ken was present in the courtroom during S.W.'s testimony. Based on this information, counsel for Francesca made an oral motion for dismissal of the charges with prejudice or, in the alternative, that S.W.'s testimony be excluded. The court ordered counsel to file a written motion on this issue, and the trial continued.

¶10 Officer V. testified that he and Officer E. responded to the disturbance call at the high school on the night of the incident. When Officer V. asked the people present at the scene, which included Ken, to come forward if they had witnessed the incident, no one came forward. Other than this general question, Officer V. made no attempt to speak to Ken concerning the alleged threat.

¶11 One week after the trial, Francesca filed a motion to strike S.W.'s testimony because the State "failed to disclose the presence of a material witness that could be used for impeachment." Francesca argued that Ken's testimony could have "reinforced or created further inconsistencies" with S.W.'s testimony. The court denied the motion to strike and adjudicated Francesca delinquent on the charge of threatening or intimidating S.W. Francesca filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. section 8-235.

STANDARD OF REVIEW

¶12 We review the facts in the light most favorable to sustaining the juvenile court's orders. *See In re John M.*, 201 Ariz. 424, 426, ¶ 7, 36 P.3d 772, 774 (App. 2001). Questions of law, however, such as the interpretation of rules or statutes, are reviewed *de novo*. *See John M.*, 201 Ariz. at 426, ¶ 7, 36 P.3d at 774.

DISCUSSION

¶13 Francesca argues the juvenile court erred by adjudicating her delinquent because the State failed to disclose the identity of Ken as a possible impeachment witness until the day of trial.[3] Francesca asserts that Ken's testimony "would have damaged [S.W.'s] testimony" and that Ken "was in fact an impeachment witness." Thus, Francesca requests a reversal of the juvenile court's order and remand with instructions to strike S.W.'s testimony.

¶14 In cases involving nondisclosure of evidence, a constitutional violation requiring a new trial occurs when the state fails to disclose clearly exculpatory evidence, *e.g.*, evidence that would have created reasonable doubt if presented at trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *State v. Montano*, 204 Ariz. 413, 424, ¶ 52, 65 P.3d 61, 72 (App. 2003); *State v. O'Dell*, 202 Ariz. 453, 457, ¶ 13, 46 P.3d 1074, 1078 (App. 2002). However, evidence is considered material only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene,* 527 U.S. 263, 280, 119

[3] Arizona Rule of Juvenile Procedure 16(B)(1)(e) requires that, within ten (10) days of the advisory hearing, the prosecutor "shall make available to the juvenile for examination . . . material and information within the prosecutor's possession or control . . . which tends to mitigate or negate the juvenile's alleged delinquent conduct."

S.Ct. 1936, 1948 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985)) (internal quotation marks omitted). Moreover, "[T]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109–10, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

¶15 It is not clear from the record whether the State failed to timely disclose Ken as a witness. We note that to a great extent, the evidence was in the possession of S.W., and therefore beyond the control of the State. Nonetheless, even assuming the State failed to satisfy its disclosure duties, we conclude there are no grounds to reverse the trial court's judgment because Francesca failed to make any offer of proof as to Ken's testimony. As a result, there is no evidence Ken's testimony would have been material to the outcome of the trial. Indeed, the only evidence in the record concerning Ken's involvement in the lock-in indicates he was not a material witness. Officer V. testified that he asked the people present at the scene, including Ken, to come forward if they had seen anything, and no one stepped forward. Based on the record, we cannot speculate as to what prejudicial impact nondisclosure of Ken may have had on the trial.

CONCLUSION

¶16 For the foregoing reasons, we affirm the juvenile court's adjudication of delinquency and resulting disposition.

/S/_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/_____
PATRICIA K. NORRIS, Presiding Judge

/S/_____
RANDALL M. HOWE, Judge