IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LUCIO PERALTA, *Appellant*.

No. 1 CA-CR 16-0266
FILED 4-25-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-132129-001

The Honorable Mark H. Brain, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Lawrence H. Blieden
Counsel for Appellant

MEMORANDUM DECISION

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Paul J. McMurdie joined.

N O R R I S, Judge:

¶1 Appellant, Lucio Peralta, appeals from his convictions and sentences for sexual conduct with a minor, class two felonies, and sexual abuse, a class three felony, arguing the superior court should have granted a new trial because the court prematurely gave the Revised Arizona Jury Instructions ("RAJI") Standard Criminal 42 (Impasse Instruction) to the jury when it had not indicated it needed help.[1] Peralta also argues the superior court abused its discretion by allowing the State to introduce "evidence of uncharged sexual offenses" contained in a police interview. We disagree with both arguments and affirm Peralta's convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND

¶2 At trial, the State sought to introduce a transcript of Peralta's interview with police detectives. In the interview, Peralta initially acknowledged incidents of "touching," not involving intercourse, when the victim was "a little" girl. He later made statements to the detectives, such as expressing a concern for impregnating the victim and attributing the incident to the "heat" between a man and woman, consistent with having intercourse with the victim when she was a much older minor.

¶3 Peralta objected to the admission of a portion of the transcript in which a detective told him the victim had revealed that, between the ages of five and 16, "it [sexual intercourse] happened ten times, encounters when you put your penis insider her, her vagina. Ten times, she – she said." Peralta responded by denying the victim's allegation in part, stating, "I'm . . . penetrating ten times, no. It's just one time." The superior court overruled Peralta's objection and admitted the exchange between the detectives and Peralta ("the contested exchange"). The court instructed the jury, however, that the detective's questions "are not themselves evidence. They only give

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[1]The jury also convicted Peralta of sexual conduct with a minor, a class six felony. Peralta does not challenge this conviction on appeal.

meaning to the witness' answers," and the jury should not take the statements "for the truth of the matter as they assert as opposed to simply asking the defendant what happened'' and "fram[ing] his testimony."

¶4 After the jury began to deliberate, the court received a question from the jury asking it to "clarify the definition of reasonable doubt." The court spoke to counsel telephonically and together they agreed the court would not offer any additional instruction beyond the final "instruction labeled, Presumption of Innocence Reasonable Doubt." Given the jury's question, the court informed counsel it expected "to be reading them the [impasse instruction] sooner rather than later," and asked counsel to make their way to court before recessing.

¶5 During the recess but, "before the interpreter showed up," the bailiff gave the court what she thought were questions from the jury. The "questions" turned out to be a form of verdict which appeared to be completed and a "jury questionnaire" which, the court later explained to counsel, "set forth that they were having difficulty with [the verdict]." The court also explained to counsel the jury questionnaire "appeared to set forth how they were broken down" on the count it was having difficulty with although the court "didn't look at it closely enough" to determine the exact breakdown. The court returned the papers to the jury "so they could write down something different." The court "mentioned [what had happened] to the attorneys when [they] were off the record and *before the interpreter showed up*." (Emphasis added.)

¶6 After the court interpreter arrived, the court questioned the jury as to whether it had reached verdicts on the charges. The foreperson affirmed the jury had reached a verdict "on one" count but was "hung on the remaining" counts and had "reached an impasse" such that he did not believe the jury could proceed further. The court and counsel held a brief bench conference and agreed the court should read to the jury RAJI Standard Criminal 42 (Impasse Instruction).

DISCUSSION

I. The Impasse Instruction Was Appropriate

¶7 On appeal, Peralta argues the superior court "prematurely" gave the impasse instruction because the jury had not indicated "it was in need of help." Because he raises this issue for the first time on appeal, we review his argument for fundamental error. *State v. Fernandez*, 216 Ariz. 545, 554, ¶ 28, 169 P.3d 641, 650 (App. 2007) (when no objection to jury

instruction raised at trial, appellate court reviews for fundamental error) (citation omitted).

¶8 Rule 22.4 of the Arizona Rules of Criminal Procedure permits the court to assist a jury in the event of an impasse. Under Rule 22.4

> If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the presence of counsel, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the judge may direct that further proceedings occur as appropriate.

Although the rule requires an "affirmative indication" that the jury is at an impasse, it does not require the jury to "unequivocally state" that it cannot reach a verdict, and the trial judge is given broad discretion in dealing with an impasse. *State v. Andriano*, 215 Ariz. 497, 509, ¶¶ 55-56, 161 P.3d 540, 552 (2007) (quotations and citations omitted).

¶9 Here, the record shows that the superior court's instruction was not premature. After the foreman explained to the court and counsel the jury had "hung" on certain counts, the court, with counsels' approval, gave the impasse instruction. That instruction asked the jury how the court and counsel could assist it. The superior court's instruction was, thus, timely and appropriate. *State v. Huerstel*, 206 Ariz. 93, 97, ¶ 5, 75 P.3d 689, 702 (2003) (appellate court views alleged coercive actions of judge and comments made to jury based on totality of circumstances).

¶10 Peralta further argues the superior court should not have read the impasse instruction without first telling the parties about the jury questionnaire the bailiff gave to the court. As a general matter, however, it would have been inappropriate for the court to share with the parties the jury questionnaire with its breakdown of the jurors' votes. *State v. McCrimmon*, 187 Ariz. 169, 172, 927 P.2d 1298, 1301 (1996) (condemning inquiry into the numerical division of a reportedly deadlocked jury). Further, the record does not support Peralta's argument that the court gave the impasse instruction before informing the parties about the jury questionnaire. In fact, the record shows the opposite—the superior court informed counsel and Peralta about the jury questionnaire before the court interpreter arrived and read the impasse instruction only after the interpreter had arrived.

II. The Uncharged Sexual Offenses

¶11 Peralta next argues the superior court violated Arizona Rule of Evidence 404(c) and Arizona Rule of Evidence 801 by allowing the State to introduce the contested exchange into evidence. We disagree. *See State v. Payne*, 233 Ariz. 484, 503, ¶ 56, 314 P.3d 1239, 1258 (2013) (appellate court reviews evidentiary ruling for abuse of discretion) (citation omitted).

¶12 Rule 404(b) generally prohibits a court from admitting evidence of other crimes, wrongs, or acts to prove the defendant's character if used to show the defendant acted in conformity therewith. Rule 404(b), however, provides an exception to the general rule when, as stated in Rule 404(c), a defendant is charged with committing a sexual offense. When a defendant is alleged to have committed a sexual offense, Rule 404(c) permits a court to admit evidence of other acts to show the defendant has a character trait giving rise to an aberrant sexual propensity to commit the offense charged, provided the court first makes certain findings. Ariz. R. Evid. 404(c)(1)(A)-(D). Hearsay, as defined by Rule 801(c), is an out-of-court statement offered in evidence to prove the truth of the matter asserted, and is not admissible absent an exception.

¶13 Here, the contested exchange did not constitute other sexual act evidence under Rule 404(c) or hearsay under Rule 801 because the detective's statements were used to provide context to other statements made by Peralta during the interview and were not offered by the State for their truth. *State v. Roque*, 213 Ariz. 193, 214, ¶ 70, 141 P.3d 368, 389 (2006) (detectives' statements and interrogative techniques not introduced for their truth and did not constitute hearsay); *State v. Cornman*, 237 Ariz. 350, 354-55, ¶¶ 12-15, 351 P.3d 357, 361-62 (App. 2015) (detective's statements in transcript of police interview providing context was not restricted by Rule 404 which allows "evidence relevant for any purpose other than showing propensities to act in a certain way") (quotations and citations omitted).

¶14 In *Roque*, the State introduced at trial a videotaped interview of the defendant. 213 Ariz. at 213, ¶ 69, 141 P.3d at 388. During the interview, detectives confronted the defendant with statements they told him his wife had made to them and which incriminated him. *Id*. As it turned out, the State presented no evidence the defendant's wife had ever made the statements. *Id*. at 214, ¶ 70, 141 P.3d at 389. On appeal, the defendant argued the court's admission of the statements violated his Confrontation Clause rights because the statements were "testimonial" and he had not had a chance to cross-examine his wife. *Id*. at 213-14, ¶ 69, 141 P.3d at 388-89. Our supreme court rejected the argument, explaining the detectives' statements concerning what the defendant's wife had allegedly said were

not being offered for the truth of the matters allegedly asserted by the wife and were not, therefore, hearsay. *Id*. at 214, ¶ 70, 141 P.3d at 389. Instead, the detectives were using an interrogation technique to elicit a confession from the defendant. *Id*. The court also noted the superior court had instructed the jury it was not to consider the detectives' statements for their truth. *Id*.

¶15 Similarly, in *Cornman* the defendant argued the superior court should not have allowed the State to introduce into evidence part of a taped interview with a detective in which the detective told the defendant he had evidence of other drug "buys" made by a confidential informant. 237 Ariz. at 361, ¶ 12, 351 P.3d at 354. The defendant argued introduction of the detective's statements violated the Confrontation Clause and Rule 404(b)'s prohibition on the admission of evidence of other acts to prove the defendant acted in conformity with his character. *Id*. at 354-55, ¶¶ 12, 15, 351 P.3d at 361-62. This court rejected both arguments, explaining the taped interview had been admitted to provide context for other statements made by the defendant to the detective regarding drug buys, and not for the truth of the matter asserted, and thus was admissible for a purpose other than showing a propensity to act in a certain way. *Id*. at 355, ¶ 15, 351 P.3d at 362. We also noted that the court had instructed the jury that it "must not consider any statements of a law enforcement officer during that questioning unless substantiated by other evidence." *Id*. at 362, ¶ 13, 351 P.3d at 355.

¶16 Here, during the interview with the detectives, Peralta made statements to them consistent with "touching'' the victim when she was very young and having intercourse with her when she was a much older minor. The detectives' questions in the contested exchange provided context for what Peralta told the detective he did or did not do to the victim. Because the detective's statements were admissible for the purpose of providing context to other statements Peralta made to them and were not, therefore, introduced for the truth of the matters asserted, the superior court did not abuse its discretion in admitting the contested exchange. Further, as in *Roque* and *Cornman*, the superior court instructed the jury it was not to consider the detective's statements for their truth.

CONCLUSION

¶17 For the foregoing reasons, we affirm Peralta's convictions and sentences.

AMY M. WOOD • Clerk of the Court
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