IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

RAY ANTHONY JOHNSON, *Appellant*.

No. 1 CA-CR 16-0677
FILED 7-31-2018

Appeal from the Superior Court in Maricopa County
No. CR2013-416101-001
The Honorable Sherry K. Stephens, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jillian Francis
Counsel for Appellee

Ballecer & Segal LLP, Phoenix
By Natalee E. Segal
Counsel for Appellant

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge James B. Morse Jr. and Judge Lawrence F. Winthrop joined.

C A T T A N I, Judge:

¶1 Ray Anthony Johnson appeals his convictions and sentences for eleven crimes, including child molestation, sexual conduct with a minor, public sexual indecency with a minor, and kidnapping. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Johnson was in a romantic relationship and lived with the grandmother of victims K.G., H.G., B.D., and C.D. The victims later reported that, when they were less than 15 years old, Johnson had sexual contact with them during their visits to their grandmother's home.

¶3 After his relationship with the grandmother ended, Johnson began a romantic relationship with A.N.'s aunt. Johnson engaged in sexual conduct with A.N. when A.N. was under 15 years of age and was visiting her aunt's home.

¶4 Before trial, Johnson moved to sever the counts, requesting five separate trials. Finding the charges "strikingly related," the superior court denied the motion.

¶5 A jury found Johnson guilty as charged, and the superior court imposed consecutive terms including four life sentences as well as terms totaling 75.5 years. Johnson timely appealed, and we have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 13-4033(A).

DISCUSSION

¶6 Johnson argues that the superior court erred by declining to sever the counts for multiple trials. He also argues that evidence presented at trial rendered one of the charges duplicitous, and that several of the convictions were not supported by sufficient evidence.

I. Severance of the Charges.

¶7 Johnson asserts that the superior court should have severed the charges for separate trials on counts 1, 2, 3–8, and 9–11. Although Johnson moved to sever the counts before trial, he did not renew his motion to sever during trial. We thus review this claim only for fundamental, prejudicial error. Ariz. R. Crim. P. 13.4(c); *State v. Gutierrez*, 240 Ariz. 460, 464–65, ¶ 12 (App. 2016); *see also State v. Henderson*, 210 Ariz. 561, 567–68, ¶¶ 19–20 (2005).

¶8 Under Rule 13.3(a), offenses may be joined if they "(1) are of the same or similar character; (2) are based on the same conduct or are otherwise connected together in their commission; or (3) are alleged to have been a part of a common scheme or plan." Upon request, the court must sever offenses joined only under Rule 13.3(a)(1), "unless evidence of the other offense or offenses would be admissible if the offenses were tried separately." Ariz. R. Crim. P. 13.4(b).

¶9 Here, evidence of the other offenses would have been cross-admissible in separate trials. Under Arizona Rule of Evidence 404(c), evidence of other acts is admissible if relevant to show that the defendant in a case involving a sexual offense had an aberrant sexual propensity to commit the charged offense. Before admitting such evidence, the court must explicitly find that (1) clear and convincing evidence establishes that the defendant committed the other act, (2) the other act reasonably supports the inference that the defendant had a character trait showing an aberrant sexual propensity to commit the charged offense, and (3) the danger of unfair prejudice, *see* Ariz. R. Evid. 403, does not substantially outweigh the probative value of the other-act evidence. Ariz. R. Evid. 404(c)(1); *State v. Aguilar*, 209 Ariz. 40, 49, ¶ 30 (2004).

¶10 Although the superior court did not explicitly make findings under Rule 404(c), reversal is not warranted. *See State v. Vega*, 228 Ariz. 24, 28, ¶ 17 (App. 2011) (noting that admission of 404(c) evidence without explicit findings may be harmless error if the record supports admissibility). Each victim testified to the crimes, providing clear and convincing evidence to support each of the other crimes. *See id.* at 29, ¶ 19, n.4. The other crimes against children under age 15 provided a basis from which to conclude that Johnson had a "character trait giving rise to an aberrant sexual propensity" to commit the other sexual offenses. *See* Ariz. R. Evid. 404(c)(1)(B). And in light of the similarity of the conduct involved in all of the alleged acts, the record does not reflect any "unfair" prejudice that substantially outweighed the evidentiary value of the other crimes. *See* Ariz. R. Evid. 404(c)(1)(C).

¶11 Johnson also argues that the superior court's failure to conduct a pretrial evidentiary hearing rendered the other-act evidence inadmissible. But he cites no authority for this argument. Neither Rule 404 nor any relevant case law requires an evidentiary hearing before admitting other-act evidence. *See State v. LeBrun*, 222 Ariz. 183, 187, ¶ 14 (App. 2009). Accordingly, Johnson has not established fundamental error based on the denial of his pretrial motion to sever.

II. Duplicitous Charges.

¶12 Johnson argues that the State's charge in Count 2—sexual conduct with a minor for engaging in "sexual intercourse . . . with [H.G.], who was a minor under the age of fifteen years, (to wit: penile/vaginal intercourse)"—was duplicitous because the State presented evidence of multiple acts to prove one charge. Because he raises this issue for the first time on appeal, we review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. at 567–68, ¶¶ 19–20.

¶13 A duplicitous charge occurs when the indictment charges a single criminal act, but the State presents evidence of multiple acts to prove the single charge. *State v. Klokic*, 219 Ariz. 241, 244, ¶ 12 (App. 2008). Duplicitous charges can deprive the defendant of adequate notice of the charge, can result in a non-unanimous jury verdict if the jurors do not agree on the specific conduct supporting conviction, and can create double jeopardy concerns based on uncertainty regarding the conduct underlying the conviction. *Id.* Thus, the superior court must either require the State to specify which act constitutes the crime or instruct the jury that it must unanimously agree on the specific act that constitutes the crime. *Id.* at ¶ 14.

¶14 The presentation of evidence underlying Count 2 created a duplicitous charge concern because H.G. testified to both penile–vaginal intercourse and penile–anal intercourse, two separate acts that could each be the basis for sexual conduct with a minor. *See* A.R.S. §§ 13-1405(A), -1401(A)(4). But the State clarified that the charge was based on penile–vaginal intercourse, as specified in the indictment. During closing argument, the prosecutor exclusively argued for a guilty verdict based on penile–vaginal intercourse. Further, the signed verdict form specified that the jury found Johnson guilty based on penile–vaginal intercourse. Accordingly, Johnson has not established error, much less fundamental error.

III. Sufficiency of the Evidence.

¶15 Johnson argues that the evidence was not sufficient to convict him of child molestation as to K.G. and of three counts of sexual conduct with a minor. We review sufficiency of the evidence de novo. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011). Substantial evidence to support a conviction is evidence from which reasonable people could have found guilt beyond a reasonable doubt. *Id.* at ¶ 16.

A. Child Molestation.

¶16 Child molestation requires proof that the defendant intentionally or knowingly engaged in sexual contact with a child who is under 15 years of age. A.R.S. § 13-1410(A). Regarding his conviction for molesting K.G., Johnson argues there was insufficient evidence (1) that he acted intentionally or knowingly and (2) that K.G. was under 15 years of age. We disagree.

¶17 As to intent, K.G. testified that Johnson asked her if she wanted a mint, and when she answered affirmatively, he placed a box of mints on top of his erect, covered penis. Then, when she reached for the box, he moved backwards, causing her to touch his penis. Based on this evidence, a rational jury could have found Johnson acted intentionally or knowingly.

¶18 As for K.G.'s age, she was born in 1990, and she testified that the incident occurred a "long time" before her grandmother passed away in 2005. Moreover, K.G.'s mother testified that K.G. told her about the incident in 2002. Thus, there was substantial evidence supporting the jury's finding that K.G. was under 15 years of age at the time of the offense.

B. Sexual Conduct with a Minor.

¶19 Sexual conduct with a minor includes intentionally or knowingly engaging in sexual intercourse with any person under 18 years of age. A.R.S. § 13-1405(A). Sexual intercourse is statutorily defined to include digital penetration of and masturbatory contact with the vulva. A.R.S. § 13-1401(A)(4).

¶20 Johnson argues that the convictions of sexual conduct with a minor stemming from an incident in which he bathed the victims (Count 3 as to H.G. and Count 4 as to B.D.) were deficient because there was no evidence that he touched them sexually. But H.G. testified that Johnson used his fingers to penetrate her vagina, and B.D. testified that Johnson rubbed her vagina and H.G.'s vagina while he was washing them. Further, B.D. stated that Johnson touched her vagina in a sexual manner. Accordingly, sufficient evidence supports Johnson's convictions on Counts 3 and 4.[1]

[1] Johnson also challenges the sufficiency of the evidence to support his conviction of Count 5, an offense against C.D. stemming from the same

¶21 Johnson also argues that there was insufficient evidence to support his conviction of sexual conduct with a minor for digitally penetrating A.N.'s vagina. During her testimony, A.N. did not recall the alleged conduct. But the State, without objection, presented a recording of A.N.'s interview with a police detective in which A.N. told the detective that Johnson had digitally penetrated her, and the jury could consider A.N.'s statements to the detective in determining whether the State had met its burden of proof. Thus, although A.N. did not testify to Johnson committing this act, rational jurors could have found Johnson committed this act based on A.N.'s statements to the detective.

CONCLUSION

¶22 We affirm Johnson's convictions and sentences.

AMY M. WOOD • Clerk of the Court
FILED: AA

bathing incident, but he erroneously characterizes it as sexual conduct with a minor (rather than molestation as charged). In any event, the evidence similarly supported this molestation conviction for comparable conduct with C.D. *See* A.R.S. §§ 13-1410(A), -1401(A)(3) (defining sexual contact to include direct or indirect touching of any part of the genitals).