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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MATTHEW GARRETT CORBITT, *Appellant*.

No. 1 CA-CR 17-0120
FILED 3-20-2018

Appeal from the Superior Court in Maricopa County
No. CR2015-101587-001
The Honorable Gregory Como, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eric Knobloch
Counsel for Appellee

Bain and Lauritano, Glendale
By Amy Bain
Counsel for Appellant

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Jennifer B. Campbell joined.

M c M U R D I E, Judge:

¶1 Matthew Corbitt appeals his convictions and sentences for two counts of sexual conduct with a minor, two counts of sexual abuse, and one count of child molestation. Corbitt argues the superior court erred by: (1) imposing multiplicitous sentences; (2) sentencing him to life in prison without specific notice of the statute subsection under which he would be sentenced; and (3) finding his mandatory consecutive life sentences did not violate his Eighth Amendment protection against cruel and unusual punishment. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 In January 2015, Corbitt attended a party at a relative's house. Although Corbitt was 20-years-old the night of the party, he drank so much alcohol he decided to sleep at the relative's house instead of returning home. Later that night, Corbitt woke up and entered his 12-year-old cousin's bedroom. Corbitt closed the door behind him, placed his hand over his cousin's mouth, and forced her to participate in several sexual acts. Afterwards, the victim ran to her parent's room and told them what happened. The victim's mother called 9-1-1, and after the police arrived, they arrested Corbitt.

¶3 Corbitt was charged with: five counts of sexual conduct with a minor (Counts 1, 5, 6, 8, 9), Class 2 felonies and dangerous crimes against children; two counts of sexual abuse (Counts 2, 3), Class 3 felonies and dangerous crimes against children; one count of child molestation (Count 7), a Class 2 felony and dangerous crime against children; and assault

¹ We view the facts in the light most favorable to upholding the verdicts and resolve all reasonable inferences against Corbitt. *State v. Harm*, 236 Ariz. 402, 404, ¶ 2, n.2 (App. 2015) (citing *State v. Valencia*, 186 Ariz. 493, 495 (App. 1996)).

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(Count 4), a Class 3 misdemeanor. After an 8-day jury trial, Corbitt was found guilty of two counts of sexual conduct with a minor, two counts of sexual abuse, and one count of child molestation (Counts 1, 2, 3, 5, 7). Corbitt was acquitted of the other charges. Corbitt was sentenced to consecutive prison terms of 10 years' imprisonment on the child molestation charge and life (with the possibility of parole after 35 years) imprisonment on both counts for sexual conduct with a minor. Additionally, Corbitt's sentences for both sexual abuse charges were suspended and he was placed on lifetime supervised probation, consecutive to the prison sentences for Counts 1, 5, and 7. Corbitt timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

A. The Superior Court Did Not Impose a Multiplicitous Sentence.

¶4 Corbitt first argues his convictions for both Counts 1 and 5, and Counts 2 and 3, were multiplicitous, and therefore violate double jeopardy. The Double Jeopardy Clause of the Fifth and Fourteenth Amendments "protects against multiple punishments for the same offense." *Ohio v. Johnson*, 467 U.S. 493, 498 (1984); *Lemke v. Rayes*, 213 Ariz. 232, 236, ¶ 10 (App. 2006). "[I]f multiple violations of the same statute are based on the same conduct, there can be only one conviction." *State v. Jurden*, 239 Ariz. 526, 529, ¶ 11 (2016). "We review de novo whether double jeopardy applies." *State v. Powers*, 200 Ariz. 123, 125, ¶ 5 (App. 2001).

¶5 Corbitt claims Counts 1 and 5, both convictions for sexual conduct with a minor, were "indistinguishable" and therefore arose from a single offense. We disagree. Count 1 was charged as "oral sexual contact with victim's vulva," and Count 5 was charged as "oral sexual contact." In closing argument, the State explained the separate charges to the jury. For Count 1, the State explained Corbitt "placed his mouth on the victim's vulva." For Count 5, the State explained Corbitt "forced his penis into [the victim's] mouth." See *State v. Bible*, 175 Ariz. 549, 602 (1993) ("[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions."). The court then instructed the jurors that "[e]ach count charges a separate and distinct offense. You must decide each count separately on the evidence with the law applicable to it, uninfluenced by your decision on any other count."

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¶6 To determine whether error has occurred, we may consider the jury instructions as given, the evidence at trial, the parties' theories, and the parties' arguments to the jury. *State v. Felix*, 237 Ariz. 280, 285, ¶ 16 (App. 2015); *State v. Dickinson*, 233 Ariz. 527, 531, ¶ 13 (App. 2013). We presume that jurors follow the instructions provided to them. *State v. Payne*, 233 Ariz. 484, 518, ¶ 151 (2013). The acts supporting Counts 1 and 5 were separate and distinct from one another, and the State properly explained to the jurors that the separate acts had to be found to convict on the respective counts. Arizona law allows a conviction for each sexual act, even if they occur in rapid succession. *State v. Williams*, 182 Ariz. 548, 562-64 (1995), *superseded in part on other grounds by rule*, Ariz. R. Evid. 104; *see also State v. Griffin*, 148 Ariz. 82, 85-86 (1986) (defendant's four convictions of sexual assault did not violate double jeopardy principles when based on "four separate and distinct acts"). Accordingly, Corbitt's convictions and sentences for Counts 1 and 5 did not constitute multiplicitous sentences.

¶7 Corbitt's convictions and sentences for Counts 2 and 3 also did not constitute multiplicitous sentences. While both convictions were for sexual abuse, Count 2 was charged for touching the victim's breast, and Count 3 was charged for licking the victim's breast. Again, the State's closing argument to the jury specifically advised them that two separate acts were being charged, one count for touching the victim's breast and one count for licking the victim's breast. Corbitt argues "it is impossible to lick a breast without touching it," however, this argument ignores the evidence and argument presented at trial. In the victim's interview with police about the incident, she stated both that Corbitt licked her breast, and that he touched her breast with his hand. Because the victim clarified that Corbitt touched her breast with his hand, the act was separate and distinct from the act of licking her breast. Therefore, we find no multiplicity. *See Williams*, 182 Ariz. at 562; *Griffin*, 148 Ariz. at 85.

B. The Superior Court Did Not Abuse Its Discretion by Sentencing Corbitt under A.R.S. § 13-705(A).

¶8 Corbitt next contends the superior court abused its discretion by sentencing him under A.R.S. § 13-705(A), instead of § 13-705(C), because the State failed to list either subsection in the indictment. Corbitt claims this failure deprived him of notice that the State was seeking a mandatory life sentence. We review the superior court's sentencing determinations for an abuse of discretion. *State v. Hollenback*, 212 Ariz. 12, 15, ¶ 9 (App. 2005).

¶9 In Corbitt's indictment, the State alleged the Dangerous Crimes Against Children sentencing provisions by referencing A.R.S.

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§ 13-705 without specifically citing a subsection. Citing *State v. Castaneda*, 111 Ariz. 264 (1974), Corbitt argues that where two different sentencing subsections could apply within the same section, the State must allege the specific subsection to provide adequate notice to the defendant of the sentence he faces if convicted. In *Castaneda*, the defendant could have been convicted of offenses under either of two subsections in the same section of the Arizona Revised Statutes. 111 Ariz. at 267 (assault with a knife could have been charged under either § 13-249(A) or (B)). However, the present case is distinguishable from *Castaneda*, because only one subsection of § 13-705 could be applied to Corbitt's indictment and convictions.

¶10 Section 13-705(A) states:

A person who is at least eighteen years of age and who is convicted of a dangerous crime against children in the first degree involving . . . sexual conduct with a minor who is twelve years of age or younger shall be sentenced to life imprisonment *This subsection does not apply to masturbatory contact.*

(emphasis added). Section 13-705(C) states:

Except as otherwise provided in this section, a person who is at least eighteen years of age . . . and who is convicted of a dangerous crime against children in the first degree involving . . . sexual conduct with a minor who is twelve, thirteen, or fourteen years of age . . . shall be sentenced to a term of imprisonment as follows: [13–27 years, 20 years presumptive].

(emphasis added). Therefore, if the victim is 12-years-old or younger at the time of the offense, and the sexual conduct alleged involves masturbatory contact, § 13-705(C) applies. However, if the sexual conduct alleged does not involve masturbatory contact, § 13-705(A) applies. In the instant case, Corbitt's indictment did not allege any masturbatory contact for Counts 1 and 5. Accordingly, because the victim was 12-years-old or younger, and the indictment charged sexual conduct with a minor while referencing § 13-705, only § 13-705(A) could apply.

¶11 Furthermore, this court has previously held that a general reference to the Dangerous Crimes Against Children statute in an indictment is sufficient notice to the defendant of the State's intent to enhance their sentence. *Hollenback*, 212 Ariz. at 16 (citing *State v. Waggoner*, 144 Ariz. 237, 239 (1985)). Moreover, Corbitt also received actual notice of

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the sentencing enhancement at multiple hearings during the pretrial proceedings. *See State v. Noriega*, 142 Ariz. 474, 482-83 (1984) (actual notice of state's intent to enhance cures accidental citation to wrong subsection in state's allegation of enhancement), *overruled in part on other grounds by State v. Burge*, 167 Ariz. 25 (1990). Accordingly, the superior court did not err by sentencing Corbitt under § 13-705(A).

C. The Sentence Imposed by the Superior Court Did Not Violate Corbitt's Eighth Amendment Protection Against Cruel and Unusual Punishment.

¶12 Corbitt argues A.R.S. § 13-705(A), as applied to his sentences, violates the Eighth Amendment of the United States Constitution. The Eighth Amendment protects against "cruel and unusual punishments." U.S. Const. amend. VIII. Constitutional claims are reviewed *de novo*. *State v. Randles*, 235 Ariz. 547, 549, ¶ 4 (App. 2014). We are "extremely circumspect" in our review of Eighth Amendment claims and only in "exceedingly rare" circumstances will a sentence to a term of years be held to violate the Eighth Amendment. *State v. Berger*, 212 Ariz. 473, 475, 477, ¶¶ 10, 17 (2006).

¶13 Corbitt contends the length of his sentences constitutes cruel and unusual punishment. We disagree. "[A] court first determines if there is a threshold showing of gross disproportionality by comparing 'the gravity of the offense [and] the harshness of the penalty.'" *Berger*, 212 Ariz. at 476, ¶ 12 (quoting *Ewing v. California*, 538 U.S. 11, 28 (2003)). If the court finds a gross disproportionality, it then "tests that inference by considering the sentences the state imposes on other crimes and the sentences other states impose for the same crime." *Id.* We have repeatedly found dangerous crimes against children to be "serious offenses" and have upheld life sentences imposed under the sentencing provisions. *See Berger*, 212 Ariz. at 483, ¶ 51; *State v. Taylor*, 160 Ariz. 415, 423 (1989); *State v. Gulli*, 242 Ariz. 18, 22, ¶ 21 (App. 2017); *State v. Florez*, 241 Ariz. 121, 130, ¶ 31 (App. 2016); *State v. Welch*, 236 Ariz. 308, 317, ¶ 35 (App. 2014). Citing *State v. Davis*, 206 Ariz. 377 (2003), Corbitt argues his sentences are disproportionate. In *Davis*, the Arizona Supreme Court found a defendant's sentence under the dangerous crimes against children sentencing provisions to be disproportionate where the case involved voluntary sex, without actual or threatened violence, with a post-pubescent teenage girl. 206 Ariz. at 384-85, ¶ 36. Unlike *Davis*, Corbitt forced his twelve-year-old cousin to perform multiple sex acts against her will. Under the facts of this case, we hold Corbitt's sentences are not disproportionate, cruel, or unusual.

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CONCLUSION

¶14 Affirmed.



AMY M. WOOD • Clerk of the Court
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