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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ERIC JASON HARMS, *Appellant*.

No. 1 CA-CR 17-0217
FILED 5-17-2018

Appeal from the Superior Court in Maricopa County
No. CR2016-001561-001
The Honorable Christopher A. Coury, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael T. O'Toole
Counsel for Appellee

Janelle A. McEachern, Attorney at Law, Chandler
By Janelle A. McEachern
Counsel for Appellant

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Jon W. Thompson and Judge James P. Beene joined.

S W A N N, Judge:

¶1 Eric Jason Harms appeals from his convictions and sentences for sexual conduct with a minor and sexual exploitation of a minor. Harms contends that he was prejudiced by the court's order authorizing amendment of the indictment to conform to the trial evidence. He also challenges the sufficiency of the evidence to support his convictions. We discern no prejudice with respect to the amended indictment, and we find sufficient evidence to support the convictions. We therefore affirm.

FACTS AND PROCEDURAL HISTORY

¶2 A grand jury indicted Harms for multiple counts of sexual conduct with a minor and sexual exploitation of a minor. Harms pled not guilty, and the matter proceeded to a jury trial.

¶3 At trial, the state presented evidence of the following relevant facts. Victim A was born in 1999, and Victim B in 2001. Starting in around 2002, when Victim A and Victim B were very young boys, Harms, an adult man, began living with the victims' family in Peoria, Arizona, first as a tenant and later as their mother's boyfriend. Harms and the victims' mother ended their romantic relationship in 2005, and Harms thereafter had no contact with the victims' family until 2011. In 2011, Harms and the victims' mother resumed their relationship and the family moved to northern Arizona to live with Harms. In 2012, the victims' family moved back to Peoria without Harms. But Harms continued to see the victims, traveling to visit them and sometimes staying at a hotel. Harms also took the victims on a camping trip. And by late 2013, Harms and the victims' mother had decided that Harms would resume living with the family in Peoria. In January 2014, after Harms and the victims' older sister engaged in an argument, Victim A disclosed in general terms to the sister and another relative that Harms had sexually abused him, and Victim B disclosed in general terms to his mother that he too had been victimized. The victims then made further disclosures to law enforcement.

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¶4 At trial, Victim A described several events, including the following. First, during the period when Harms first lived with the victims in Peoria, Harms “[m]asturbated [] and orally masturbated” Victim A’s penis in Harms and the victims’ mother’s bedroom after Victim A exited the shower adjacent to that bedroom. Victim A “was a lot younger” at the time of this incident, and he did not ejaculate. Second, during the period when Harms traveled to visit the children, Harms showed Victim A pornography in Harms’s hotel room and then again used his hand and mouth to “masturbat[e]” Victim A, this time causing Victim A to ejaculate. Third, during a separate hotel stay during the same period, Harms again “[m]asturbat[ed] [] and orally masturbat[ed]” Victim A and caused him to ejaculate. Fourth, during the camping trip, Harms directed Victim A and Victim B to assume certain poses with their pants down, and he then took photographs of them. That evening, Harms again “masturbated [] and orally masturbated” Victim A in a tent.

¶5 Victim B testified that he did not remember posing for photographs, but he did remember Harms teaching the victims about a masturbation technique during the camping trip. Victim B did not remember seeing anything happening to Victim A in the tent, but he did recall that Harms slept on the same air mattress as Victim A and the mattress shook that night. Victim B further testified that during the time he lived with Harms in northern Arizona, he and Harms took a trip to Peoria and stayed in the victims’ aunt’s guest bedroom. There, Harms performed oral sex on Victim B and caused him to ejaculate.

¶6 Victim A testified that his delayed disclosure regarding Harms’s conduct was caused by embarrassment and by the fact that nobody had ever asked him about sexual abuse before January 2014. Victim B testified that he delayed disclosing because of shame. The state presented expert testimony that sexually abused children commonly delay disclosing their abuse because of embarrassment and shame, and commonly disclose in piecemeal fashion. The expert further testified that maliciously false accusations of sexual abuse are rare, and that chronically abused children commonly have difficulty remembering abusive events and may report only general descriptions of the abuse. The expert also testified that it is not uncommon for the abuse to occur in the presence of others.

¶7 The victims’ mother had given several of Harms’s electronic devices, including a laptop computer, to law enforcement. On the laptop, law enforcement found indicia of Harms’s ownership and control, as well as March 2013 camping-trip photographs that included photographs of the victims displaying their naked buttocks and anuses.

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¶8 For his case, Harms denied ever touching either victim in an inappropriate manner. He admitted that the laptop was his, but he claimed that all family members had access to it. He also admitted that he took the relevant camping-trip photographs, but he stated that he never asked the victims to assume the poses shown therein. According to Harms, the victims assumed the poses on their own as a joke, and he did not view the photographs for sexual stimulation. Harms proposed that the charges against him were the result of a conspiracy orchestrated by the victims and their older sister, as retribution for Harms's attempts to curtail the victims' use of marijuana. Two of Harms's friends testified that they viewed Harms's relationships with the victims as positive and appropriate, and that Harms had told them he was concerned about the victims using drugs.

¶9 Over Harms's objection, the court permitted the state to amend the indictment to conform with the evidence. The amendments included alteration of the date for the sexual encounter underlying the sexual conduct charges of Counts 1 and 2. The original indictment had specified that the encounter in Harms's and the victims' mother's bedroom occurred within a date range that other testimony established as the year when Victim A was twelve years old. Based on Victim A's testimony regarding the timing of the event, the amended indictment specified that the encounter occurred much earlier, between 2003 and 2005.

¶10 The jury found Harms guilty of seven counts of sexual conduct with a minor:

- Count 1, based on Harms's masturbation of Victim A's penis in Harms's and the victims' mother's bedroom.
- Count 2, based on Harms putting his mouth on Victim A's penis in Harms's and the victims' mother's bedroom.
- Count 3, based on Harms's masturbation of Victim A's penis during the first hotel incident.
- Count 4, based on Harms putting his mouth on Victim A's penis during the first hotel incident.
- Count 5, based on Harms's masturbation of Victim A's penis during the second hotel incident.
- Count 6, based on Harms putting his mouth on Victim A's penis during the second hotel incident.

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- Count 7, based on Harms putting his mouth on Victim B's penis in the victims' aunt's house.

The jury found that Victim A was under twelve years old at the time of Counts 1 and 2, and that he was at least twelve years old but less than fifteen years old at the times of Counts 3 to 6. The jury further found that Victim B was under twelve years old at the time of Count 7. The jury also found Harms guilty of five counts of sexual exploitation of a minor, Counts 10 to 14, related to five camping-trip photographs. The jury found that the photographs depicted children less than fifteen years old.

¶11 The superior court entered judgment on the jury's verdicts and imposed consecutive life and term prison sentences, as follows: life for each of Counts 1, 2, and 7; nineteen calendar years for each of Counts 3, 4, 5, and 6; and sixteen years for each of Counts 10, 11, 12, 13, and 14. Harms timely appeals.

DISCUSSION

¶12 Harms raises two challenges on appeal. First, he contends that the superior court erred by permitting the state to amend the indictment with respect to Counts 1 and 2. Second, he challenges the sufficiency of the evidence to support his convictions. We reject both of Harms's arguments.

I. THE SUPERIOR COURT PROPERLY ORDERED THE AMENDMENTS TO COUNTS 1 AND 2.

¶13 Ariz. R. Crim. P. ("Rule") 13.5(b) provides, in relevant part: "Unless the defendant consents, a charge may be amended only to correct mistakes of fact or remedy formal or technical defects. The charging document is deemed amended to conform to the evidence admitted during any court proceedings." "A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *State v. Bruce*, 125 Ariz. 421, 423 (1980). The defendant bears the burden to show actual prejudice. *State v. Johnson*, 198 Ariz. 245, 248, ¶ 8 (App. 2000). We review an order granting amendment for abuse of discretion. *Id.* at 247, ¶ 4.

¶14 Harms contends that the amendments to Counts 1 and 2 prejudiced him because they increased his sentencing exposure under A.R.S. § 13-705, which creates a tiered, largely victim-age-based sentencing structure for sexual conduct with minors under the age of fifteen years. See A.R.S. §§ 13-1405(B), -705(A)-(C). To be sure, due process requires that the

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defendant have notice before trial that the state intends to seek an enhanced sentence. *State v. Waggoner*, 144 Ariz. 237, 239 (1985); *State v. Jobe*, 157 Ariz. 328, 330 (App. 1988). But the state need not identify which age-related subsection of § 13-705 applies for purposes of enhancement – it is enough if the indictment cites the statute generally and alleges the under-fifteen cutoff age. *State v. Hollenback*, 212 Ariz. 12, 15–16, ¶¶ 9–11 (App. 2005) (assessing sufficiency of indictment’s reference to § 13-705’s statutory predecessor). Here, the original indictment did just that for Counts 1 and 2. Accordingly, Harms was always on notice of the potential for enhancement under § 13-705.

¶15 We recognize that the amendment did alter Harms’s sentencing exposure within § 13-705.¹ But an amendment that exposes the defendant to a harsher sentencing range does not automatically create prejudice – even if, as here, the harshest penalty is ultimately imposed. Even in cases where an amendment changes the state’s theory of the case, we will not reverse if the amendment had no bearing on the defendant’s ability to prepare for trial or execute his litigation strategy.² *State v. Freney*, 223 Ariz. 110, 115, ¶ 28 (2009).

¹ That was the case, however, only with respect to Count 1. Count 2 implicated mandatory-life sentence enhancement under § 13-705(A) at all times. Section 13-705(A) applies to “sexual conduct with a minor who is twelve years of age or younger” that is not premised on “masturbatory contact.” Sexual conduct with a minor may take the form of: (1) oral contact with the penis, vulva, or anus; (2) penetration into the penis, vulva, or anus by any part of the body or by any object; or (3) masturbatory contact with the penis or vulva. A.R.S. §§ 13-1405(A), -1401(A)(1), (4). Because Count 2 always alleged oral contact with the penis at a time when the victim was less than fifteen years old, the amendment had no effect on Harms’s sentencing exposure. The amendment to Count 1, by contrast, shifted the sentencing range from § 13-705(C) to § 13-705(B). Both subsections (C) and (B) apply to sexual conduct premised on masturbatory conduct, as in Count 1. But subsection (C) establishes a sentencing range for such conduct if the victim “is twelve, thirteen or fourteen years of age,” whereas subsection (B) provides harsher sentencing options if the victim “is under twelve years of age.”

² Of course, prejudice may take other forms, such as double-jeopardy violations. See *Johnson*, 198 Ariz. at 248, ¶ 8. But such other forms of prejudice are not at issue here.

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¶16 Here, though Harms initially objected to the amendments by contending that his defense was “based on those [original] dates,” he later conceded that there was no “additional preparation that could have been conducted or that [he was] intending to conduct given those additional dates.” And the record confirms that Harms’s theory of defense was one of complete denial, on which the amendment’s revision to the Victim A’s age had no bearing. *See id.* (observing, in decision holding Rule 13.5(b) violation harmless, that defendant’s “‘all or nothing’ defense, based on his assertion that someone other than he was the perpetrator, did not change as a result of the amended charge”). On this record, the superior court acted well within its discretion by permitting the non-prejudicial amendments to the indictment.

II. HARMS’S CONVICTIONS WERE SUPPORTED BY SUFFICIENT EVIDENCE.

¶17 We review the sufficiency of the evidence *de novo*. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011). We view the evidence in the light most favorable to upholding the verdict. *See State v. Girdler*, 138 Ariz. 482, 488 (1983). We do not reweigh the evidence or determine the credibility of witnesses. *State v. Williams*, 209 Ariz. 228, 231, ¶ 6 (App. 2004). We will reverse only if “there is a complete absence of probative facts to support the conviction.” *State v. Scott*, 113 Ariz. 423, 424–25 (1976). “To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury.” *State v. Arredondo*, 155 Ariz. 314, 316 (1987). Sufficient evidence may be either direct or circumstantial, and may support differing reasonable inferences. *State v. Anaya*, 165 Ariz. 535, 543 (App. 1990).

¶18 The state presented sufficient evidence to support Harms’s convictions for sexual conduct with a minor. A person commits sexual conduct with a minor if he intentionally or knowingly engages in oral contact or masturbatory contact with the penis of a person who is under eighteen years old. A.R.S. §§ 13-1405(A), -1401(1), (4). The state presented evidence that Harms manually and orally manipulated Victim A’s penis on the three occasions underlying Counts 1 to 6: the encounter in Harms’s and the victims’ mother’s bedroom, the encounter during the earlier hotel stay, and the encounter during the later hotel stay. The state also presented evidence that Harms orally manipulated Victim B’s penis on the occasion underlying Count 7: the visit at the victims’ aunt’s house. Harms contends that the victims’ stories were patently incredible because they lacked detail and were disclosed in piecemeal fashion after a family disagreement. But the state presented expert testimony explaining the perceived deficiencies

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in the victims' testimony, and the victims' credibility was for the jury to decide. Further, the state presented sufficient evidence to support the jury's conclusions regarding the victims' ages at the times of the offenses.

¶19 The state also presented sufficient evidence to support Harms's convictions for sexual exploitation of a minor. A person commits sexual exploitation of a minor if he knowingly possesses any visual depiction in which a minor is engaged in the actual exhibition of "the genitals or pubic or rectal areas . . . for the purpose of sexual stimulation of the viewer." A.R.S. §§ 13-3553(A)(2), -3551(5). Harms admitted taking photographs of the victims' naked buttocks and anuses. And though Harms denied that he directed the victims to assume the poses, Victim A testified otherwise. Victim A further testified that Harms manually and orally manipulated his penis after taking the photographs, and Victim B confirmed that Victim A and Harms shared a mattress and it shook that night. The evidence was more than sufficient to allow the jury to find that Harms possessed the photographs for the purpose of sexual stimulation. Further, the state presented sufficient evidence to support the jury's conclusions regarding the victims' ages in the photographs.

CONCLUSION

¶20 We affirm Harms's convictions and sentences.



AMY M. WOOD • Clerk of the Court
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