IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

SCOTT DOYLE BARRETT, *Appellant*.

No. 1 CA-CR 17-0220
FILED 1-30-2018

Appeal from the Superior Court in Coconino County
No. S0300CR201600324
The Honorable Dan R. Slayton, Judge

AFFIRMED AS MODIFIED; VACATED IN PART

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eliza Ybarra
Counsel for Appellee

Coconino County Public Defender's Office, Flagstaff
By Brad Bransky
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 Scott Doyle Barrett appeals from the judgment of guilt and the sentences imposed after a jury found him guilty of five counts of child molestation. He argues the court erred by admitting witness testimony under Arizona Rule of Evidence 404(c). Barrett also contends the court improperly precluded him from testifying at the pre-trial 404(c) hearing, and the court erred by limiting his cross-examination of a witness at trial. Finally, Barrett argues the court erred by instructing the jury on the elements of child molestation. For the following reasons, we affirm Barrett's convictions and sentences for Counts 1 through 5. We vacate a conviction for a sixth count of child molestation and, accordingly, modify the sentencing minute entry and commitment order.

FACTS[1] AND PROCEDURAL HISTORY

¶2 While living with his adult stepdaughter and her eight-year-old daughter, T., Barrett manually touched the girl's vagina while she slept, placed her hand on his penis, and touched her stomach with his penis. Based on three separate occasions of this and similar alleged sexual activity, the State charged Barrett with six counts of child molestation, Class 2 felonies and dangerous crimes against children. Because insufficient evidence supported the allegation in Count 6, the superior court dismissed it at the close of evidence.

¶3 The jury found Barrett guilty of the remaining charges. The court imposed a combination of concurrent and consecutive prison terms totaling 30 years. Barrett timely appealed, and we have jurisdiction

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

pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

I. The Court Did Not Abuse Its Discretion by Admitting Evidence of Barrett's Previous Acts of Molestation Under Rule 404(c).

¶4 Barrett contends the superior court abused its discretion by permitting S., Barrett's niece, to testify that approximately 40 years earlier Barrett had molested her on three occasions. *See State v. Garcia*, 200 Ariz. 471, 475, ¶ 25 (App. 2001) (admission of evidence under Rule 404(c) reviewed for abuse of discretion). Specifically, S. testified Barrett had once forced her to touch his penis during a family gathering; he had touched her vagina with his fingers while they were swimming; and, while on a family trip to Disneyland, she woke up to Barrett touching her vagina and forcing her to rub his penis until he ejaculated. At the time of the molestations, S. was between five and nine years old, seven years younger than Barrett.

¶5 Evidence of a defendant's uncharged acts is not admissible to prove the defendant's character "for the purpose of proving action in conformity therewith on a particular occasion[.]" Ariz. R. Evid. 404(a). Rule 404(c), however, provides an exception to this rule of inadmissibility and "permits the admission of evidence of uncharged acts to establish 'that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.'" *Garcia,* 200 Ariz. at 475, ¶ 26 (quoting Ariz. R. Evid. 404(c)). "Evidence of an emotional propensity to commit aberrant sexual acts is admissible to prove that an accused acted in conformity therewith." *State v. Arner,* 195 Ariz. 394, 395, ¶ 3 (App. 1999). Before admitting evidence pursuant to Rule 404(c), the court must specifically find that:

> (A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.
>
> (B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.
>
> (C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403.

Ariz. R. Evid. 404(c). Finally, the court must give a limiting instruction "as to the proper use of such evidence." Ariz. R. Evid. 404(c)(2); *Garcia,* 200 Ariz. at 475−76, ¶ 27.

¶6 Based on S.'s testimony at the pre-trial evidentiary hearing to determine the admissibility of the prior act evidence, the court found sufficient evidence to permit the jury to determine Barrett molested S. The court found those molestations provided a reasonable basis to infer Barrett had a character trait giving rise to an aberrant sexual propensity to commit the charged molestations regarding T. The court also found the evidentiary value of proof of the other acts was not substantially outweighed by a danger of unfair prejudice.

¶7 Barrett does not challenge the sufficiency of evidence supporting the superior court's finding he committed the prior acts. Instead, he argues "the remoteness and/or dissimilarity of the alleged bad acts" did not provide a reasonable basis to infer he had a sexual propensity to molest T. *See* Ariz. R. Evid. 404(c)(1)(C)(i), (ii). Barrett asserts the prior acts were irrelevant because he was a "pre-teen/teenager" when he molested S. and an adult when the current offenses occurred. Additionally, Barrett contends the dissimilarity and remoteness of the prior molestations resulted in unfair prejudice, which substantially outweighed the prior molestations' relevance.

¶8 We find no abuse of discretion. Although 40 years is admittedly a lengthy period between the molestations of S. and T., such a delay is but one factor to consider in determining whether the probative value of such evidence is outweighed by the danger of unfair prejudice or confusion of the issues. *See* Ariz. R. Evid. 404(c)(1)(C)(i). With respect to both young female victims, Barrett touched their vaginas with his fingers and forced the girls to touch his penis.[2] In addition to the similarity between the molestations of the two girls, the frequency, with which Barrett molested S., supports the court's conclusion regarding Barrett's propensity to molest young girls. *See* Ariz. R. Evid. 404(c)(1)(C)(iv). In addition to describing the incidents she recounted at trial, S. testified at the evidentiary hearing that Barrett molested her:

> lots of times . . . [m]ore than 30 [times] . . . literally any time that I was in [Barrett's] proximity, he would take me in a room

[2] Before the 404(c) hearing, the State provided the court with transcripts of T.'s forensic interview, in which she described the circumstances of Barrett molesting her.

> and violate me in one way or another . . . . This is something that happened . . . every time he got a chance. . . . [W]hen he lived with my parents, . . . [i]t was most nights, I would wake up to him doing things to me[.]

¶9 No evidence at the hearing indicated a "relevant intervening event[]" occurred between S.'s and T.'s molestations that would diminish the significance of the prior acts in demonstrating Barrett's propensity to commit the charged offenses. *See* Ariz. R. Evid. 404(c)(1)(C)(vi). For example, Barrett had recently communicated with S. via Facebook. In response to S. stating she had "a lot of issues with you and the things you did to me as a kid[,]" Barrett apologized for "injur[ing]" S., but, notably, he did not indicate anything had transpired since he molested S. that would mitigate his sexual propensity to molest young girls.

¶10 Based on the foregoing evidence, the superior court was within its discretion to conclude Barrett's aberrant sexual propensity continued from the time he molested S. *See State v. Aguilar*, 209 Ariz. 40, 43, 48−49, ¶¶ 11, 28 (2004) (aberrant sexual propensity includes child molestation).

¶11 Finally, the superior court properly instructed the jury—and the State properly argued to the jury—that the evidence of S.'s molestations could not be used to find Barrett guilty of the charged offenses but only to determine whether he possessed a character trait that predisposed him to molest T. Accordingly, the court did not abuse its discretion by finding the evidence of S.'s molestations was not unfairly prejudicial. *See State v. Gulbrandson*, 184 Ariz. 46, 61 (1995) (unfair prejudice means "an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy or horror."); *see also State v. Herrera,* 174 Ariz. 387, 395 (1993) (noting jurors are presumed to follow instructions).

II. Barrett Was Not Denied His Right to Present Testimony at the 404(c) Hearing.

¶12 At the 404(c) hearing, Barrett informed the court he wanted to testify. The court explained that should Barrett do so, the State would be allowed to cross-examine him regarding the present charges. In response, Barrett chose not to testify.

¶13 Characterizing the court as improperly "chilling [his] right to present a pre-trial defense against the 404(c) allegations[,]" Barrett argues the court "abused its discretion in ruling the state could cross-examine [Barrett] on the substance of the case during the 404(c) hearing."

¶14 We reject this argument because Barrett does not support it with controlling, relevant authority. *See State v. Moody,* 208 Ariz. 424, 452, ¶ 101, n.9 (2004) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised.") (quoting *State v. Carver*, 160 Ariz. 167, 175 (1989)); *State v. Sanchez*, 200 Ariz. 163, 166, ¶ 8 (App. 2001) (issue was waived because defendant failed to develop argument in his brief).

¶15 Similarly, Barrett waived his argument relying on Arizona Rule of Evidence 104(d), which states: "By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case." Barrett did not argue to the superior court that questions posed during his anticipated cross-examination concerning the charged offenses would improperly implicate, for Rule 104 purposes, "other issues in the case[,]" and Barrett does not argue fundamental error occurred. *See State v. Montano*, 204 Ariz. 413, 426 (2003) (failure to raise Rule 403 objection at trial waives issue on appeal); *State v. Lopez*, 217 Ariz. 433, 434−35, ¶ 4 (App. 2008) (when party fails to specify grounds for objection at trial, this court reviews for fundamental error only); *see also State v. Moreno-Medrano*, 218 Ariz. 349, 354, ¶¶ 16−17 (App. 2008) (declining to review for fundamental error when appellant failed to raise claim in the superior court and failed to address on appeal whether alleged error was fundamental).

III. The Court Did Not Abuse Its Discretion by Limiting Cross-Examination of a Witness.

¶16 At trial, the court sustained the State's objection when Barrett asked S. whether people—presumably other than Barrett—had molested her mother, grandmother, and other family members. Barrett argues the court's ruling improperly limited the scope of his cross-examination. He contends the precluded evidence was relevant to explore the possibility S. was confusing her molestation by Barrett with family members' molestations by others.[3] We review for an abuse of discretion. *See State v.*

[3] Barrett based this theory on the opinion of Wendy Dutton who testified that, when children experience more than one incident of abuse, they may rely on "script memory," which "blend[s] the memories from the different incidents together. And they're describing the general pattern." The court correctly noted Dutton's testimony did not apply to molestations suffered by people other than the victim. Accordingly, the court allowed Barrett to elicit testimony from S. regarding her father and cousin molesting her.

Amaya-Ruiz, 166 Ariz. 152, 167 (1990) (the superior court "has considerable discretion in determining the relevance and admissibility of evidence").

¶17 We find no abuse of discretion because the proffered evidence was not relevant. Whether S. was aware of other family members having been molested was not "of consequence in determining" whether Barrett molested T. *See* Ariz. R. Evid. 401(b) (declaring test for relevant evidence).

IV. The Jury Instructions Properly Set Forth the Law Regarding Molestation.

¶18 Barrett argues the superior court fundamentally erred by failing to instruct the jury that sexual motivation is a required element of molestation. We disagree. As Barrett properly concedes, Arizona law does not recognize sexual motivation to be an element of molestation. *State v. Holle*, 240 Ariz. 300, 301, ¶ 1 (2016); *State v. Simpson*, 217 Ariz. 326, 328, ¶ 15 (App. 2007).

V. The Sentencing Minute Entry Erroneously Shows a Conviction and Sentence for Dismissed Count 6.

¶19 In the sentencing minute entry, the superior court inexplicably entered a judgment of guilt for Count 6, which, as noted, the court had dismissed at trial. *Supra,* ¶ 2. For that count, the minute entry and order of confinement refer to a 15-year prison term to run concurrently with the sentences imposed for Counts 4 and 5. At oral pronouncement of sentence, however, the court properly did not enter a judgment of guilt on Count 6, nor did it impose a sentence for the dismissed count. Therefore, we vacate the conviction and resulting sentence for Count 6, and amend the sentencing minute entry and order of confinement accordingly. *See State v. Ovante*, 231 Ariz. 180, 188, ¶ 38 (2013) ("When a discrepancy between the trial court's oral pronouncement of a sentence and the written minute entry can be clearly resolved by looking at the record, the '[o]ral pronouncement in open court controls over the minute entry.'") (internal citation omitted).

CONCLUSION

¶20 Barrett's convictions and sentences for Counts 1 through 5 are affirmed. The conviction for Count 6 is vacated.

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