IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

STEVEN KEITH LUJAN MARUSICH, *Appellant*.

No. 1 CA-CR 18-0295
FILED 9-17-2019

Appeal from the Superior Court in Maricopa County
No. CR2014-152251-001
The Honorable Bradley H. Astrowsky, Judge

AFFIRMED

COUNSEL

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

Daniel R. Raynak PC, Phoenix
By Daniel R. Raynak
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Jennifer M. Perkins and Judge David D. Weinzweig joined.

H O W E, Judge:

¶1 Steven Keith Lujan Marusich appeals his convictions and sentences for two counts of sexual conduct with a minor. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Payne*, 233 Ariz. 484, 509 ¶ 93 (2013). In the summer of 2014, 25-year-old Marusich had sexual intercourse with 15-year-old A.R. on at least two occasions. Marusich learned of A.R.'s age beforehand and once revealed that the illegal nature of the conduct made it more enjoyable. Upon discovering the relationship, A.R.'s mother contacted police.

¶3 In a recorded confrontation call and various instant messages with A.R., Marusich expressed concern about potential criminal charges, referenced their sexual relationship, and admitted knowing her age. Marusich acknowledged he had "wipe[d]" his phone multiple times to delete items relating to A.R. Yet when interviewed by a detective, Marusich denied ever meeting A.R.

¶4 Marusich later reversed course and admitted that they had sexual intercourse but claimed that A.R. never directly told him her age and that he was led to believe she was at least 18 years old. He claimed he first learned A.R.'s true age shortly after they had sexual intercourse and immediately deleted any items related to her from his phone.

¶5 The State charged Marusich with two counts of sexual conduct with a minor, class 6 felonies. The jury convicted Marusich on both

counts. The court subsequently sentenced[1] Marusich to consecutive but presumptive terms of two years' imprisonment.

DISCUSSION

1. Nondisclosure of the Victim's Mental Health Records

¶6 Marusich argues the court erred in denying his motion to compel disclosure of A.R.'s mental health and school counseling records, asserting specifically that they were relevant to her credibility. We review the court's ruling on a discovery request for an abuse of discretion. *State v. Fields*, 196 Ariz. 580, 582 ¶ 4 (App. 1999). To the extent Marusich claims that nondisclosure of the records affected his constitutional right to present a defense, our review is de novo. *See State v. Connor*, 215 Ariz. 553, 557 ¶ 6 (App. 2007).

¶7 Although a victim's mental health records are generally protected by Arizona's Victims' Bill of Rights, this right cannot act as "a sword in the hands of victims to thwart a defendant's ability to effectively present a legitimate defense." *State ex rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232, 241 (App. 1992); *see also* Ariz. Const. art. 2, § 2.1(A)(5). When the State does not possess such records, the court may order *in camera* production of materials for its review if the defendant shows a substantial need for the information in presenting his defense and maintaining his right to a fair trial. Ariz. R. Crim. P. 15.1(g); *see also Connor*, 215 Ariz. at 561 ¶ 22. A defendant must demonstrate a sufficiently specific basis for the request and identify which portions of the record are needed, *State v. Sarullo*, 219 Ariz. 431, 437 ¶¶ 20–21 (App. 2008); unsupported speculation is not enough. *State v. Kellywood*, 246 Ariz. 45, 48 ¶ 9 (App. 2018).

¶8 As an offer of proof, Marusich claimed that a confidential "source" told him that A.R. suffered from mental health issues and, in an interview with a detective, A.R. admitted she had spent time in a treatment facility named "Aurora." But Marusich could not identify with any specificity what these records might reveal and did not even know where A.R. attended high school or whether she had met with the school

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[1] Marusich absconded after trial, delaying his sentencing for more than 90 days after conviction. Although his voluntary absence would normally forfeit his right to appeal his conviction under A.R.S. § 13–4033(C), nothing in the record shows he had been advised of this consequence of absenting himself, so the statute is inapplicable to him. *See State v. Bolding*, 227 Ariz. 82, 88 ¶ 20 (App. 2011).

counselor. The court denied the motion to compel, finding that Marusich "gave no reason other than speculation and innuendo that would suggest such a fishing expedition was likely to result in useful evidence being produced."

¶9 Marusich reasserted his claim that A.R.'s mental health records were relevant to her credibility and ability to perceive the charged acts when the State disclosed a forensic examination report of A.R.'s phone records. The report revealed that, during an unknown time period, A.R. was "off her meds," depressed, and self-mutilating. The court ordered the prosecutor to ask whether A.R. was taking prescribed medication during the time of the offenses. After speaking with A.R. outside of the courtroom, the prosecutor avowed that A.R. was taking her medications as prescribed during the time of the offenses. Marusich conceded that the mental health records would not reveal any new information and withdrew his motion to compel.

¶10 Marusich did not establish a substantial need for the records, nor did he sufficiently specify a basis for his pretrial motion to compel. As the trial court noted, the motion was nothing more than a "fishing expedition." *State ex rel. Corbin v. Superior Court In & For Maricopa Cty.*, 103 Ariz. 465, 468 (1968) (recognizing that a trial court may determine in its discretion that a discovery request is an unreasonable "fishing expedition"). Marusich never established which third parties held the requested records, which portions were of interest, or how they would be directly relevant to the charged acts. To the extent that A.R.'s phone records provided additional information about her medication use, the court allowed limited questioning of A.R. and Marusich conceded it was a "nonissue." Nothing in the record shows the court pressured Marusich to withdraw his request.

¶11 Under these circumstances, the nondisclosure of A.R.'s mental health and school counseling records did not prejudice Marusich. *See State v. Martinez-Villareal*, 145 Ariz. 441, 448 (1985) (a trial court does not abuse its discretion in denying disclosure unless defendant is prejudiced). The court acted well within its discretion in denying the motions to compel.

2. Late Disclosure of the Victim's Phone Records

¶12 Marusich argues the court erred in failing to declare a mistrial or order sanctions for the State's late disclosure of A.R.'s phone records. Because Marusich did not move for mistrial or sanctions at trial, we review this issue only for fundamental error. *See State v. Escalante*, 245 Ariz. 135, 140, 142 ¶¶ 12, 21 (2018). To establish fundamental error, a defendant must

show the court erred and that such error: (1) went to the foundation of the case, (2) took from the defendant a right essential to his defense, or (3) was so egregious that he could not possibly have received a fair trial. *Id*. at ¶ 21. "If the defendant establishes fundamental error under prongs one or two, he must make a separate showing of prejudice[.]" *Id*.

¶13 Under Rule 15.1(b), the State must disclose all supplemental law enforcement reports, the results of any expert examination or testing, and a list of electronically stored information to be used at trial. Ariz. R. Crim. P. 15.1 (b)(3)–(5). This must be done no later than 30 days after arraignment. Ariz. R. Crim. P. 15.1(c)(1). The court is authorized to impose sanctions for noncompliance, including, but not limited to, the preclusion of the evidence, a continuance, or declaration of a mistrial. Ariz. R. Crim. P. 15.7(c)(1), (3). "The trial court, however, should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible, since the Rules of Criminal Procedure are designed to implement, and not to impede, the fair and speedy determination of cases." *State v. Smith*, 123 Ariz. 243, 252 (1979).

¶14 On the second day of trial, the State disclosed the forensic examination report of A.R.'s phone records to Marusich. The State, however, avowed it had originally disclosed the report nearly two months before trial. Marusich claimed otherwise and requested a continuance. The court granted a one-day continuance to provide Marusich an opportunity to review the report. The next day, Marusich's counsel informed the court that he cursorily reviewed the report and confirmed that he was ready for trial. Although Marusich noted the report and correlating phone records were voluminous, he did not move for mistrial, preclusion, or an extended continuance.

¶15 On this record, Marusich has not met his burden under fundamental error review. Even assuming that the State did not disclose the report until the second day of trial, he does not explain how he was prejudiced by the alleged untimely disclosure. The record shows that the court gave him a short continuance, and he expressed no concern about going to trial. And his brief on appeal only complains that he had insufficient time to review the victim's phone records, which is inconsistent with the record. Without a showing of prejudice, the State's late disclosure is not fundamental error. *See State v. Lawrence*, 123 Ariz. 301, 303 (1979). The court's failure to *sua sponte* declare a mistrial or order sanctions did not constitute fundamental prejudicial error.

3. Preclusion of Evidence from the Victim's Social Media Account

¶16 Marusich argues the court erred in precluding evidence of A.R.'s social media account. We review a court's evidentiary ruling for an abuse of discretion. *State v. Ellison*, 213 Ariz. 116, 129 ¶ 42 (2006). "Absent a clear abuse of discretion, we will not second-guess a trial court's ruling on the admissibility or relevance of evidence." *State v. Rodriguez*, 186 Ariz. 240, 250 (1996).

¶17 Although a defendant has the constitutional right to present a defense, that right is not absolute and can be "limited to the presentation of matters admissible under ordinary evidentiary rules, including relevance." *State v. Dickens*, 187 Ariz. 1, 14 (1996), *abrogated in part on other grounds by State v. Ferrero*, 229 Ariz. 239, 243 ¶ 20 (2012). To be admissible, evidence must be both relevant and its probative value must not be "substantially outweighed" by a danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Ariz. R. Evid. 401–403. Evidence is unfairly prejudicial if it has "'an undue tendency to suggest decision on an improper basis,' . . . such as emotion, sympathy or horror." *State v. Schurz*, 176 Ariz. 46, 52 (1993) (quoting Fed. R. Evid. 403).

¶18 Marusich proffered evidence that A.R. had a social media account on a website titled, "Hot or Not." He located this evidence in A.R.'s phone records. He argued evidence from the adults-only website showed that A.R. portrayed herself to be over 18 years old. Marusich conceded he had never personally viewed the account before their sexual relationship. Outside the presence of the jury, the court allowed limited questioning of A.R. to determine admissibility of the evidence. A.R. confirmed she had multiple accounts on the website at various times in her life, all of which she eventually deleted. When Marusich showed A.R. the account information, she stated the information came from an account she created approximately two years after the time of the offenses and the website only recently added the minimum age requirement. The court found the evidence to be irrelevant and sustained the State's objection to its admission.

¶19 Because A.R. created the social media account at issue after the offenses and Marusich never personally viewed the account before the offenses, the court did not abuse its discretion in finding the evidence irrelevant on his state of mind. *See* Ariz. R. Evid. 402 ("Irrelevant evidence is inadmissible."). Moreover, even assuming *arguendo* the evidence was

marginally relevant to Marusich's defense that he lacked the requisite knowledge of A.R.'s age, the court could have reasonably found it to be inadmissible under Rule 403 because it was potentially unduly prejudicial or needlessly cumulative. Indeed, the adult nature of the website and inferences to be made from its title could easily cause unfair prejudice. Additionally, the evidence would have been largely cumulative to Marusich's testimony that he believed A.R. was "18 or 19" because his roommate told him that A.R. was a college student. Therefore, the court did not abuse its discretion in precluding evidence from A.R.'s social media account.

4. Admission of Other-Act Evidence

¶20 Marusich argues for the first time on appeal that the trial court erred in allowing the admission of other-act evidence without notice, namely testimony he had sexual intercourse with A.R. on more than two occasions. Because Marusich did not raise a direct objection to the admission of such evidence at trial—indeed, he stated that he did not believe the messages implicated Rule 403 or 404 and did not request a limiting jury instruction—we review only for fundamental error. *See Escalante*, 245 Ariz. at 140, 142 ¶¶ 12, 21; *see also State v. Bolton*, 182 Ariz. 290, 304 (1995) (holding that an objection on one ground does not preserve an issue on another ground).

¶21 Typically, evidence of any uncharged "crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). If offered for a non-character purpose, however, other-act evidence may be admissible to show that a defendant had a particular "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," Ariz. R. Evid. 404(b), or "a character trait giving rise to an aberrant sexual propensity to commit the offense charged," Ariz. R. Evid. 404(c). Before admitting evidence under either Rule 404(b) or (c), however, the court must make specific findings related to its accuracy and evidentiary value. *See* Ariz. R. Evid. 401, 403, 404(b), (c)(1)(A)–(C); *State v. Goudeau*, 239 Ariz. 421, 444 ¶ 59 (2016).

¶22 The State offered and the court admitted instant messages between Marusich and A.R., in which A.R. asked, "how many times did we go?" and Marusich replied, "in a single instance 5, each 13." A.R. then stated, "I thought it was like seven in total." Although sexual intercourse was not mentioned, this discussion occurred within the context of Marusich

asking whether A.R. was sexually aroused. Marusich did not object to the admission of this evidence.

¶23 Later, Marusich argued the implication he had sexual intercourse with A.R. on more than two occasions might cause "a duplicity issue." The court rejected this argument, noting the indictment specified that the two charged acts were for the first and last time Marusich had sexual intercourse with A.R. In both testimony and closing argument, Marusich did not deny having sexual intercourse with A.R., but claimed he lacked the requisite knowledge of her age at the time of the offenses. The State did not address the messages at issue in its closing argument.

¶24 Although the trial court did not determine whether evidence showing that Marusich had intercourse with A.R. on other occasions was admissible under Rule 404(b) or (c), Marusich has nonetheless failed to establish that admitting this evidence rose to the level of fundamental error. As previously noted, a claim of fundamental error requires the defendant to show that an error either went to the foundation of the case, deprived him of a right essential to his defense, or was so egregious that he could not have received a fair trial. *See Escalante*, 245 Ariz. at 140, 142 ¶¶ 12, 21. In the present case, however, admission of the evidence did not reach the foundation of the case or deprive Marusich of a right essential to his overall defense. Marusich's defense was not that he did not have sexual intercourse with A.R., but that he did not know her age. Indeed, the court did not commit fundamental error by admitting the evidence.

¶25 Nor has Marusich established that admitting the evidence of the uncharged acts prejudiced him. This case involves multiple charged acts and overwhelming evidence against the defendant. *See, e.g., State v. Cruz*, 218 Ariz. 149, 166 ¶ 102 (2008) (defendant "failed to show that the snippet of [other-act] testimony rendered his trial fundamentally unfair"). Moreover, in light of the fact that these uncharged acts were committed against the same victim, around the same time as the charged acts, and in a similar manner, the uncharged acts would likely have been admissible under Rule 404(c), had the judge properly screened them. *See* Ariz. R. Evid. 404(c)(1)(C); *see also State v. Garcia*, 200 Ariz. 471, 475 ¶ 27 n.2 (App. 2001). Thus, even assuming that the court erred in admitting statements regarding the number of sexual incidents between Marusich and his victim, this alleged error was not of such magnitude to constitute fundamental prejudicial error.

5. Juror Bias

¶26 Marusich argues the court erred in refusing to strike two biased jurors for cause, violating his Sixth Amendment right to a fair and impartial jury. We review the court's refusal to strike a juror for cause for abuse of discretion. *State v. Acuna Valenzuela*, 245 Ariz. 197, 209 ¶ 21 (2018). "[T]he party asserting that the trial court erred in denying a motion to strike a juror for cause has the burden of establishing that the juror is incapable of rendering a fair and impartial verdict." *State v. Davis*, 137 Ariz. 551, 559 (App. 1983).

¶27 Under Rule 18.4(b), potential jurors shall be excused when "there is a reasonable ground to believe that the juror or jurors cannot render a fair and impartial verdict." Ariz. R. Crim. P. 18.4(b). Typically, the court should excuse a potential juror who "expresses serious misgivings about the ability to be unbiased[.]" *State v. Purcell*, 199 Ariz. 319, 323 ¶ 8 (App. 2001). The court, however, may use *voir dire* to assure that a juror can set aside personal views and weigh the evidence as required by law. *State v. Martinez*, 196 Ariz. 451, 459 ¶ 28 (2000). It is enough that a potential juror indicates that they believe they could be fair and impartial—we do not require they "speak in absolutes." *Munson*, 129 Ariz. at 443 (citing *State v. Turrentine*, 122 Ariz. 39, 42 (App. 1979)).

¶28 During jury selection, Jurors No. 46 and 63 disclosed that they were sexually abused as young children. The jurors noted the nature of the case would make it emotionally difficult to sit on the jury and could potentially affect their ability to remain impartial. After the court provided further explanation of the process, both jurors avowed that they could follow the court's instructions and set aside their history. The court denied Marusich's motions to strike the jurors for cause. At the end of jury selection, the court noted that only the first twenty-two jurors, those remaining from the pool of Jurors No. 1 through 50, would be needed and excluded Juror No. 63 from the jury pool. The peremptory strikes were then conducted outside of the courtroom. The court did not list Juror No. 46 as a member of the jury.

¶29 Both jurors confirmed their ability to view the facts fairly, and such an avowal need not be absolute. *See, e.g., Martinez*, 196 Ariz. at 459 ¶ 27 (finding juror rehabilitated who responded to judge that "I think I can be fair"). The court removed Juror No. 63 from the final juror pool and Marusich presumably used a peremptory strike for Juror No. 46. Marusich has not shown that the jurors at issue could not render a fair and impartial

verdict, nor that the court prevented him from securing an impartial jury. *See Davis*, 137 Ariz. at 559.

¶30 Moreover, assuming Marusich used a peremptory strike for Juror No. 46, the mere possibility that expending a peremptory strike caused him harm does not establish prejudice. *See State v. Hickman*, 205 Ariz. 192, 198 ¶ 28 (2003) (holding curative use of a peremptory challenge subject to harmless error review). Thus, any error in passing Juror No. 46 for cause was harmless.

6. Judicial Bias

¶31 Marusich contends the trial judge demonstrated bias against the defense. Because Marusich raises this issue for the first time on appeal, he has forfeited review for all but fundamental prejudicial error. *See* Ariz. R. Crim. P. 10.1(b); *State v. Granados*, 235 Ariz. 321, 326 ¶ 13 (App. 2014).

¶32 A defendant has the constitutional right to a fair and impartial judge. *State v. Ellison*, 213 Ariz. 116, 128 ¶ 35 (2006). "A trial judge is presumed to be free of bias and prejudice." *State v. Hurley*, 197 Ariz. 400, 404 ¶ 24 (App. 2000) (citation omitted). To rebut the presumption, a party must "set forth a specific basis for the claim of partiality and prove by a preponderance of the evidence that the judge is biased or prejudiced." *State v. Medina*, 193 Ariz. 504, 510 ¶ 11 (1999) (citing *State v. Rossi*, 154 Ariz. 245, 247 (1987), and Ariz. R. Crim. P. 10.1). Unsupported allegations of bias are not sufficient to overcome the presumption of impartiality. *State v. Carver*, 160 Ariz. 167, 173 (1989).

¶33 Though the trial judge expressed a dislike of defenses that focus on a victim's clothing or appearance, he permitted Marusich to raise the defense and did not voice his opinion in the jury's presence. The judge treated Marusich's counsel and the prosecutor similarly, sustaining objections and limiting overly passionate behavior from both sides. Nothing in the record indicates the judge unfairly limited Marusich from admitting relevant evidence and presenting his defense.

¶34 Marusich has failed to overcome the presumption of judicial impartiality. *See Medina*, 193 Ariz. at 510 ¶ 11. The judge's conduct, albeit stern, did not impact his ability to remain impartial. *See Liteky v. United States*, 510 U.S. 540, 556 (1994). A judge may act *sua sponte* in controlling the courtroom without compromising neutrality. *Goudeau*, 239 Ariz. at 450 ¶ 93. As such, Marusich has failed to demonstrate error, fundamental or otherwise, due to judicial bias.

7. Concealment Instruction

¶35 Marusich argues the court erred in instructing the jury on concealment. We review the court's decision to give a jury instruction for abuse of discretion. *State v. Burbey*, 243 Ariz. 145, 146 ¶ 5 (2017). "A party is entitled to an instruction on any theory reasonably supported by the evidence." *State v. Johnson*, 205 Ariz. 413, 417 ¶ 10 (App. 2003).

¶36 The court may provide a concealment instruction "only when the defendant's conduct manifests a consciousness of guilt." *State v. Speers*, 209 Ariz. 125, 132–33 ¶¶ 27, 31 (App. 2004) (citation omitted). The decision whether such an instruction should be given depends on the facts of the case and whether evidence of concealment tends to prove the crime. *State v. Salazar*, 173 Ariz. 399, 409 (1992). The instruction is proper even when a defendant has an alternative explanation for the concealment. *See State v. Hunter*, 136 Ariz. 45, 49 (1983).

¶37 Here, the court granted the State's request for a flight or concealment jury instruction over Marusich's objection based on Marusich's admission that he had "wipe[d]" his phone to delete references to A.R. The court modified the instruction, however, at Marusich's request to fit the evidence of the case, removing any language related to flight. The final instruction provided to the jury read as follows:

> In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's concealing evidence, together with all the other evidence in the case. You may also consider the defendant's reasons for concealing evidence. Concealing evidence after a crime has been committed does not by itself prove guilt.

¶38 Here, Marusich admitted that he deleted items related to A.R. from his phone, his telephone contact with A.R. was important to the case against him, and concealment of such evidence went to his consciousness of guilt. *See Speers*, 209 Ariz. at 132–33 ¶¶ 27, 31. Marusich's alternative explanation for deleting the items did not, on its own, cause the instruction to be improper. *See Hunter*, 136 Ariz. at 49. The court did not abuse its discretion by instructing the jury on concealment.

CONCLUSION

¶39 For the foregoing reasons, we affirm.

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