

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

JEFFREY AARON MOORE, *Appellant*.

No. 1 CA-CR 19-0444
FILED 9-3-2020

Appeal from the Superior Court in Mohave County
No. S8015CR201600896
The Honorable Rick Lambert, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Casey D. Ball
Counsel for Appellee

The Stavris Law Firm, PLLC, Scottsdale
By Christopher Stavris
Counsel for Appellant

STATE v. MOORE
Decision of the Court

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge James B. Morse Jr. and Judge Maria Elena Cruz joined.

M c M U R D I E, Judge:

¶1 Jeffrey Moore appeals his conviction and sentence for molestation of a child. For the following reasons, we affirm.

FACTS¹ AND PROCEDURAL BACKGROUND

¶2 In June 2016, eleven-year-old D.N. was sleeping in an Amtrak train returning to Arizona from a volleyball tournament in California when she awoke to Moore touching her vagina over her jeans. Moore asked D.N. to come with him to the back of the train, but D.N. did not follow him and instead went back to sleep. She awoke a short while later to Moore again touching her vagina. During these incidents, D.N. observed Moore's size, facial hair, skin color, and clothing, which included a "big black cross on his shirt." Moore left, and D.N. texted her mother to tell her what happened. Her mother told her to tell her coach, who was also on the train sitting near D.N.

¶3 D.N. texted her coach about what happened. The coach was sleeping and did not respond, so D.N. woke him and gave him a detailed description of Moore. While D.N. talked with her coach, Moore walked by them, first going towards the front of the train, and then returning to go to the back of the train. D.N. told the coach that Moore was the man who molested her.

¶4 An assistant train conductor was summoned, and D.N. described Moore to him. The assistant conductor searched the coach cars and located Moore, who fit D.N.'s description "spot on." The assistant conductor brought D.N. to the back of the train, pointed to Moore, and asked her if it was the man who touched her. D.N. said it was.

¹ We view the facts in the light most favorable to upholding the verdict and resolve all reasonable inferences against the defendant. *State v. Mendoza*, 248 Ariz. 6, 11, ¶ 1, n.1 (App. 2019).

STATE v. MOORE
Decision of the Court

¶5 When the train arrived at its destination in Flagstaff, the assistant conductor led police officers to Moore. After they removed Moore from the train, the officers showed Moore to D.N. and asked her if he was the man who had touched her. D.N. affirmed that Moore was the man.

¶6 Grand jurors indicted Moore for two counts of molestation of a child under Arizona Revised Statutes (“A.R.S.”) sections 13-1410(A) and -705 (dangerous crimes against children), both class 2 felonies. The State alleged physical, emotional, or financial harm to the victim under A.R.S. § 13-701(D)(9) as an aggravating circumstance.

¶7 Defense counsel filed a motion to suppress the pretrial identifications. The court conducted an evidentiary hearing and denied the motion.

¶8 At the trial, the State offered the testimony regarding D.N.’s pretrial identifications. After the State’s case, Moore moved for a judgment of acquittal alleging inadequate evidence, which the court denied. The jury found Moore guilty of the second child-molestation count. The jury also found the State had proven the aggravating circumstance under A.R.S. § 13-701(D) beyond a reasonable doubt. The court sentenced Moore to an aggravated sentence of 20 years’ imprisonment as a dangerous crime against children (“DCAC”) offender under A.R.S. § 13-705(D), with 1121 days’ presentence incarceration credit. Moore appealed, and we have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

¶9 Moore argues the superior court erred by denying his motion to suppress D.N.’s pretrial identifications; his motion for judgment of acquittal; and by sentencing him as a DCAC offender under A.R.S. § 13-705 without separately submitting the issue to the jury.

A. The Superior Court Did Not Abuse Its Discretion by Refusing to Suppress D.N.’s Pretrial Identifications.

¶10 Moore argues the superior court violated Moore’s due-process rights by allowing the State to submit evidence regarding D.N.’s pretrial identifications because they resulted from suggestive identification procedures conducted by both the assistant conductor and the officers. The State argues the identification procedure undertaken by the associate conductor is not subject to a due-process analysis because the assistant conductor was not a law-enforcement officer, *State v. Goudeau*, 239

STATE v. MOORE
Decision of the Court

Ariz. 421, 457, ¶¶ 139–41 (2016) (due process is not violated by identification procedures procured by non-law enforcement), and regardless, both of the pretrial identifications were sufficiently reliable to satisfy due-process requirements.

¶11 We review the superior court’s rulings on the admissibility of pretrial identifications for abuse of discretion. *State v. Moore*, 222 Ariz. 1, 7, ¶ 17 (2009). “We defer to the court’s factual findings unless they are clearly erroneous, but we review the court’s ruling on the constitutionality of a pretrial identification de novo as a mixed question of law and fact.” *State v. Forde*, 233 Ariz. 543, 556, ¶ 28 (2014). We consider only the evidence presented at the suppression hearing. *Goudeau*, 239 Ariz. at 451, ¶ 103.

¶12 The Due Process Clause of the Fourteenth Amendment precludes the admission of pretrial identifications conducted in a fundamentally unfair manner. *State v. Lehr*, 201 Ariz. 509, 520, ¶ 46 (2002) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)). The admission of testimony concerning an out-of-court identification violates due process if, under the totality of the circumstances, the identification procedure was unduly suggestive and created a substantial likelihood of misidentification. *Neil v. Biggers*, 409 U.S. 188, 198–99 (1972); *Lehr*, 201 Ariz. at 520, ¶ 46.

[T]he factors to be considered [in evaluating the likelihood of misidentification] include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Lehr, 201 Ariz. at 521, ¶ 48 (alterations in original) (quoting *Brathwaite*, 432 U.S. at 114).

¶13 From the evidence presented at the suppression hearing, D.N. provided her coach with a detailed description of Moore shortly after he molested her. When Moore walked by D.N. and her coach, she stated she was sure Moore was the culprit. The assistant conductor, after searching the train, soon found a man who (1) matched D.N.’s description “spot on” with a large, identifiable black cross on his shirt and (2) was seated in the back of the train where D.N. described her assailant had gone. These facts provided substantial evidence for the court to determine D.N.’s identification of Moore to the assistant conductor was sufficiently reliable,

STATE v. MOORE
Decision of the Court

regardless of the suggestiveness of the identification procedure and whether it was subject to due-process analysis.

¶14 Furthermore, substantial evidence supported the court's finding that D.N.'s identification of Moore to the officers was sufficiently reliable because she made the identification after already viewing Moore clearly during the times he touched her and as he walked by her and her coach afterward. She said she was sure the man who walked by her was the man who touched her. She had also already identified him in-person with the assistant conductor. Therefore, the court did not abuse its discretion by admitting the identification made to the officers.

B. The Superior Court Did Not Err by Denying Moore's Motion for Judgment of Acquittal.

¶15 We review *de novo* the superior court's ruling on a motion for judgment of acquittal. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011). The question before us is whether, viewing the evidence in the light most favorable to the State, the jury could have reasonably found the elements of the crime proven beyond a reasonable doubt. *Id.* at ¶ 16.

¶16 "A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact . . . with a child who is under fifteen years of age." A.R.S. § 13-1410(A). "[A] jury is free to credit or discredit testimony. . . ." *State v. Bass*, 198 Ariz. 571, 582, ¶ 46 (2000). If found credible by the jury, one witness's testimony is sufficient to support a conviction. *State v. Montano*, 121 Ariz. 147, 149 (App. 1978). A defendant's conduct is evidence of his criminal intent. *State v. Routhier*, 137 Ariz. 90, 99 (1983).

¶17 Jurors could reasonably credit D.N.'s testimony regarding her age and that Moore touched her vagina and find Moore intentionally or knowingly engaged in sexual contact with D.N. while she was under fifteen. Therefore, the court did not err by denying Moore's motion for judgment of acquittal.

C. The Court Did Not Err by Sentencing Moore as a Dangerous Offender.

¶18 A jury implicitly finds an offense is a DCAC when it finds a defendant guilty of molestation of a child. *Cf. State v. Coghill*, 216 Ariz. 578, 590, ¶ 49 (App. 2007) (sexual exploitation of a minor is an enumerated crime under the dangerous crimes against children statute – A.R.S. § 13-705); *State v. Fernandez*, 216 Ariz. 545, 553, ¶ 27 (App. 2007) ("the finding of a

STATE v. MOORE
Decision of the Court

'dangerous crime against a child' was inherent in the jury verdict" that the defendant was guilty of attempted murder of a minor). Further, the statute defining molestation of a child, A.R.S. § 13-1410, explicitly states the crime is "punishable pursuant to § 13-705," and A.R.S. § 13-705(D) enumerates molestation of a child as a dangerous crime against children.

¶19 Here, jurors convicted Moore of molestation of a minor, thereby finding he knowingly or intentionally engaged in sexual contact with a person under 15 years of age. Thus, the jury implicitly found the DCAC charge. The court correctly sentenced Moore as a DCAC offender.

CONCLUSION

¶20 We affirm Moore's conviction and sentence.



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