IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MELVIN L. BURT, JR., *Appellant*.

No. 1 CA-CR 19-0455
FILED 10-29-2020

Appeal from the Superior Court in Maricopa County
Nos. CR2019-001390-001
The Honorable Jay R. Adleman, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jennifer L. Holder
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Mikel Steinfeld
Counsel for Appellant

MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge D. Steven Williams joined.

W E I N Z W E I G, Judge:

¶1 Melvin L. Burt, Jr., appeals his convictions and sentences. Because he shows no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 We view the evidence in the light most favorable to sustaining the jury's verdict and resolve reasonable inferences against Burt. *See State v. Stroud*, 209 Ariz. 410, 412, ¶ 6 (2005). The victims here are Burt's children, including A.B., born in 2009, and B.B., born in October 2006. The Department of Child Safety ("DCS") removed A.B. and B.B. from Burt's home in October 2015 and placed them with Leah, a family friend. Within months, A.B. and B.B. told Leah that Burt had sexually abused them. Leah told DCS and DCS told the police. A.B. and B.B. were interviewed by detectives and later forensically interviewed. Both children reported multiple instances of Burt sexually abusing them.

¶3 The State charged Burt with six counts of sexual conduct with a minor, one count of kidnapping and one count of child molestation; each a class 2 felony and dangerous crime against children. Before his trial, Burt timely moved for an evidentiary hearing under the rape-shield statute, A.R.S. § 13-1421(B), to admit evidence of A.B.'s and B.B.'s sexual history at the trial. The superior court denied his motion after the evidentiary hearing.

¶4 A.B. and B.B. testified about Burt's sexual misconduct at his trial. Burt offered two expert witnesses. The first, a forensic gynecologist, examined A.B. and found no medical evidence of penile-vaginal penetration. The second, a forensic psychologist, generally questioned whether the testimony of child victims is reliable when the victims have been subjected to repeat and direct questioning. The psychologist also testified that child victims are susceptible to altered memories, false beliefs and undue adult influence.

¶5 The jury convicted Burt on all counts. The court sentenced him to consecutive terms, including a life sentence with possible release after 35 years for six counts of sexual conduct with a minor, and a ten-year sentence for the kidnapping and child molestation counts. Burt timely appealed. We have jurisdiction. A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A)(1).

DISCUSSION

¶6 Arizona's rape-shield statute, A.R.S. § 13-1421, "generally prohibit[s] a criminal defendant from introducing at trial evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity," *State v. Gilfillan,* 196 Ariz. 396, 401, ¶ 16 (App. 2000), *abrogated on other grounds by State v. Carson*, 243 Ariz. 463 (2018). The statute "protect[s] victims of rape from being exposed at trial to harassing or irrelevant questions concerning any past sexual behavior." *Gilfillan,* 196 Ariz. at 400-01, ¶ 15. The statute identifies "five exceptions to this broad ban," which permit the admission of "[e]vidence of specific instances of the victim's prior sexual conduct." A.R.S. § 13-1421(A). A defendant must prove an exception applies by clear and convincing evidence and that "the evidence is relevant and is material to a fact in issue in the case and that the inflammatory or prejudicial nature of the evidence does not outweigh the probative value." A.R.S. § 13-1421(A), (B).

¶7 Burt raises three arguments on appeal. He contends the superior court should have admitted two statements at his trial from the victims about their sexual history under Arizona's rape-shield statute. A.R.S. § 13-1421. He also argues the evidence was admissible to show a different source of A.B.'s sexual knowledge. And last, he argues the rape-shield statute is unconstitutional as applied to him.

I. Evidentiary Arguments

¶8 Burt moved to introduce two statements under two exceptions in the rape-shield statute. He sought to introduce A.B.'s statement to Leah that six relatives had inappropriately touched her as "[e]vidence of false allegations of sexual misconduct made by the victim against others." A.R.S. § 13-1421(A)(5). He also sought to introduce B.B.'s admission to Leah that he sexually abused A.B. as showing that B.B. "had motive to falsely accuse Burt to minimize his own culpability of abusing [A.B.] and to lessen Leah's subsequent" measures to protect gender boundaries within the home. A.R.S. § 13-1421(A)(3).

¶9 The superior court denied Burt's motion to introduce A.B.'s statement because Burt did not offer clear and convincing evidence that A.B.'s allegations were "demonstrably false." The court likewise denied Burt's motion to introduce B.B.'s statement because Burt's argument conflicted with the timeline of events.

¶10 "The court has considerable discretion in determining whether the probative value of the evidence is substantially outweighed by its unfairly prejudicial effect," and "the court's determination of the relevance and admissibility of the evidence will not be disturbed on appeal absent a clear abuse of the court's discretion." *Gilfillan*, 196 Ariz. at 404-05, ¶ 29. An abuse of discretion occurs when "no reasonable judge would have reached the same result under the circumstances." *State v. Armstrong*, 208 Ariz. 345, 354, ¶ 40 (2004). Burt has shown no error on this record.

A. A.B.'s statement

¶11 The record supports the superior court's ruling that Burt never proved that A.B. made prior false accusations of sexual misconduct by clear and convincing evidence. First, A.B. never recanted the prior allegations. *Cf. State v. Hutchinson*, 141 Ariz. 583, 586 (App. 1984) (explaining claims may be "demonstrably false" when the accuser "admitted the falsity of the charges or they had been disproved."). Second, the court heard and considered Burt's evidence, including the testimony of two relatives who denied having sexual contact with A.B. The court rejected the relatives' testimony as unconvincing and not credible. "The trial court was in the best position to evaluate the evidence and judge the credibility of the witnesses," *Gilfillan*, 196 Ariz. at 405, ¶ 33, and this court will not reevaluate the evidence and reassess credibility on appeal. Third, the court recognized that Burt offered no testimony or evidence from several of the relatives A.B. accused. Fourth, B.B. confirmed the truth of A.B.'s allegation against him; indeed, Burt wanted to introduce his confession as evidence. Burt has shown no error.

B. B.B.'s statement

¶12 The record likewise supports the superior court's ruling that Burt never proved by clear and convincing evidence that B.B.'s confession of sexual conduct showed B.B.'s motivation to accuse Burt of sexual misconduct. The court found that Burt's argument conflicted with the timeline of events. The record indicated that B.B. reported Burt's sexual misconduct to Leah *before* B.B. learned about his sister's accusations against him. The superior court pursued this point with its own questions. The

court asked Burt's counsel to explain whether B.B. "had been put on notice that he was suspected of doing anything" before he accused Burt. Defense counsel conceded she could not "pinpoint the timing of things exactly."

¶13 The court also precluded B.B.'s confessions as "not nearly probative enough to outweigh the prejudice." We give great deference to the superior court's balancing of probative value against unfair prejudice because it is in the best position to make that assessment. *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21 (App. 1998). Burt provides no valid argument to overcome that deference. The superior court did not abuse its discretion.

C. An alternative source of A.B.'s sexual knowledge

¶14 Burt separately argues that evidence of A.B.'s sexual history should have been admitted to show an alternative source of A.B.'s sexual knowledge, citing *State v. Oliver*, 158 Ariz. 22 (1988). But Arizona's rape-shield statute was enacted in 1998, ten years after *Oliver*, and the legislature did not include an exception for alternative sources of sexual knowledge. *See Hughes v. Jorgenson*, 203 Ariz. 71, 73, ¶ 11 (2002) (stating that a reviewing court assumes "the legislature has said what it means"); *State v. Pennington*, 149 Ariz. 167, 168 (App. 1985) ("It is presumed the legislature is aware of existing case law when it passes a statute . . ."). To that end, this court has confirmed that a victim's sexual history evidence is only admissible under the five exceptions in Section 13-1421(A). *State ex rel. Montgomery v. Duncan*, 228 Ariz. 514, 516, ¶ 4 (App. 2011) ("It is conceded that the offered evidence does not fall into any of the five exceptions. Thus, the evidence is prohibited by the plain language of the statute."). We find no error.

II. As-Applied Constitutional Challenge

¶15 Burt next argues the rape-shield statute is unconstitutional as applied to him. He asserts the clear-and-convincing standard infringes on his constitutional rights to present a complete defense and to confront the witnesses against him because Burt's prosecution is "the rare case in which evidence of a prior accusation of sexual assault will be relevant regardless of truth." If A.B.'s statement about sexual contact with six relatives is true, Burt contends the statement is relevant to show an alternative source of A.B.'s sexual knowledge. And if A.B.'s statement is false, Burt contends the information is relevant to whether A.B. falsely reported prior abuse.

¶16 Our review is de novo. *Gilfillan*, 196 Ariz. at 403, ¶ 17. Because Burt did not raise the as-applied constitutional argument at trial,

he must show fundamental error resulting in prejudice. *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018).

¶17 This court previously held that the rape-shield statute was facially constitutional given the "legitimate state interest in protecting against the harassment of a victim," but recognized that "the constitutionality of such a law as applied to preclude particular exculpatory evidence remains subject to examination on a case by case basis." *Gilfillan*, 196 Ariz. at 403, ¶ 23 (quoting *Sandoval v. Acevedo*, 996 F.2d 145, 149 (7th Cir. 1993)). Meanwhile, the "law provides procedural safeguards to reduce inaccuracies and prejudicial evidence, rather than an arbitrary and unconstitutional per se exclusion." *Gilfillan*, 196 Ariz. at 403, ¶ 23. "The statute provides procedural safeguards to admit evidence of the victim's prior sexual activity when that evidence has substantial probative value and when alternative evidence tending to prove the issue is not reasonably available." *Id*. at ¶ 22. The State has a compelling interest to protect "minor victims of sex crimes from further trauma and embarrassment." *Maryland v. Craig*, 497 U.S. 836, 852 (1990) (quotation and quotation marks omitted); *see Gilfillan*, 196 Ariz. at 402-03, ¶¶ 19-23.

¶18 A criminal defendant has a constitutional right to present a complete defense, but not "in whatever manner and with whatever evidence [the defendant] chooses." *State v. Carlson*, 237 Ariz. 381, 393, ¶ 36 (2015) (alteration in original). "[A] defendant's right to present relevant testimony is not limitless," however, and may be balanced against the state's legitimate interests in criminal proceedings. *Gilfillan*, 196 Ariz. at 402, ¶ 20; *see also Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (providing that the right to present relevant testimony may be limited to accommodate legitimate state interests).

¶19 Burt's arguments miss the mark. Again, the rape-shield statute does not permit the admission of evidence to show an alternative source of sexual knowledge. *Duncan*, 228 Ariz. at 516, ¶ 4. Nor did the superior court make any findings on Burt's alternative-source theory. The court invited Burt to brief the matter, but he never did. Furthermore, Burt must show more than relevance to admit the victim's statements. *Id.* at 516, ¶ 7 ("A finding of relevancy alone does not act to trump victim's rights."); *see Carlson*, 237 Ariz. at 393, ¶ 34. To that end, the court concluded the evidence was indeterminate, equivocal and cumulative. *See State v. Davis*, 205 Ariz. 174, 179, ¶ 33 (App. 2002) ("[A] defendant's constitutional rights are not violated where, as here, evidence has been properly excluded.").

¶20 Beyond that, Burt presented ample evidence at his criminal trial to show A.B.'s alternative source of sexual knowledge and he challenged her testimony as unreliable. *See Duncan*, 228 Ariz. at 516, ¶ 5. For instance, B.B. testified that he watched pornography with A.B. and their older relatives. Burt's defense attorney told the jury that "[o]ne of the biggest questions in cases like this [is] [h]ow can a child talk about something like this if it didn't happen . . . [T]heir [relatives] exposed them to pornography. [B.B.] told you that." Both children were cross-examined about inconsistencies in their testimony and Burt offered expert testimony to question the reliability of child victim testimony. Burt was not deprived of his rights to present a defense or confront witnesses and the rape-shield statute was not unconstitutional as applied to him.

CONCLUSION

¶21 We affirm Burt's convictions and sentences.

AMY M. WOOD • Clerk of the Court
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