IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

THOMAS JONATHAN CHANTRY, *Appellant*.

No. 1 CA-CR 19-0427
FILED 2-25-2021

Appeal from the Superior Court in Yavapai County
No. P1300CR201600966
The Honorable Bradley H. Astrowsky, Judge

REVERSED AND REMANDED

COUNSEL

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

Jones, Skelton & Hochuli, P.L.C., Phoenix
By Lori L. Voepel, Alejandro Barrientos
Counsel for Appellant

MEMORANDUM DECISION

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

W I L L I A M S, Judge:

¶1 Thomas Jonathan Chantry appeals his convictions and sentences for four counts of child molestation. Because Chantry's convictions were obtained with the use of impermissible "other act" evidence, we reverse and remand the matter for a new trial.

FACTUAL AND PROCEDURAL HISTORY

¶2 We recite the facts based on the presentation of evidence at trial. Chantry became the pastor of a Baptist church in Prescott in June 1995. Chantry's father was a founding member of the Association of Reformed Baptist Churches of America ("ARBCA"), to which the Prescott church belonged. The church had a small, closely knit congregation, and it was not uncommon for Chantry to socialize with the congregants. In the fall of 1995, Chantry proposed to the parents of M.J., who was then 10 years old, that Chantry tutor the boy. M.J.'s parents agreed Chantry would tutor M.J. on church property two days per week, and they gave Chantry permission to spank M.J., if necessary. Chantry picked M.J. and his older brother up from school on those days, and he tutored M.J. in his office while M.J.'s brother waited elsewhere on church grounds.

¶3 After the first or second tutoring session, Chantry spanked M.J. for allegedly showing disrespect. Not long after that, Chantry began spanking M.J. for minor mistakes in his lessons during most of their sessions. In addition to using his hand, Chantry struck M.J. with a belt, paddles, and switches, and the spankings became more forceful over time, causing M.J. to cry and to feel enduring pain. Chantry refused to let M.J. comfort himself after the spankings, telling him they were God's will and only the pastor, "like God," could give out punishments and take them away. A few weeks after the tutoring sessions began, Chantry began forcing M.J. to sit in his lap after spanking him. He would then rub M.J.'s bottom and genitals over his clothing, which caused M.J. to get an erection. M.J. complained of the spankings to his parents, but they did not perceive it to

be an issue. M.J. did not tell his parents about Chantry rubbing his bottom or genitals.

¶4 During Christmas break in the winter of 1995–96, M.J. spent the night at the parsonage where Chantry lived on church grounds so his parents would not have to drive him to his tutoring session the next day. That night, Chantry told M.J. he needed to spank him for sins M.J. had previously committed without being caught. Chantry then said he "always wanted to spank somebody and see their butt turn red," at which point he unclothed M.J.'s bottom half and spanked him with a paddle he had specially made for that purpose. Chantry directed M.J. at one point to bend over and touch his toes as he spanked him; he also spanked him over his knee. Chantry then placed M.J. on his lap and touched his unclothed bottom and genitals. Chantry told M.J. he did this because he "liked" him and M.J. was special. After Christmas break, Chantry continued to spank and fondle M.J. during their tutoring sessions, sometimes while M.J. was clothed and other times bare bottomed. M.J.'s older brother heard Chantry spanking him at times and, on one occasion, saw Chantry spanking M.J. bare bottomed through a window.

¶5 At some point M.J.'s parents learned Chantry had spanked him bare bottomed. When they asked M.J. about it, he confirmed Chantry had done so but said nothing about Chantry touching his bottom or genitals. M.J. later said he did not tell his parents about the fondling because he did not know whether they would believe him and he was most concerned about stopping the spanking.

¶6 M.J.'s father, who was a church elder, spoke with another elder, R.H., and they confronted Chantry. Chantry admitted to spanking M.J. but denied doing so bare bottomed or excessively. M.J.'s parents agreed Chantry could continue to tutor M.J. but only at their house when one of the parents was present. Chantry did not touch M.J. again. The tutoring ceased in the spring of 1996, and M.J.'s family moved out of the Prescott area in early 1997. Another congregant, E.O., succeeded M.J.'s father as a church elder.

¶7 In February 1998, Chantry approached another church member about tutoring her 10-year-old son, D.L. D.L.'s mother agreed Chantry would tutor D.L. twice a week at the parsonage and babysit on occasion. In the summer of 1999, while Chantry was still tutoring D.L., he agreed to babysit and tutor 10-year-old J.W. and her eight-year-old brother, W.W., at their parents' request.

¶8 That summer, Chantry spanked all three children. He spanked J.W. once for not placing a glass on a coaster. J.W. was clothed and Chantry used his hand, but he struck her multiple times, hard enough to "knock[] the wind out of [her]" and bring her to tears. Chantry spanked W.W. on multiple occasions using his hand, a belt, or a paddle—once for not using a coaster, other times for not participating in games, and sometimes "for things [W.W.] hadn't done yet." Sometimes Chantry spanked W.W. bare bottomed and then rubbed his bare bottom afterward. J.W. and W.W. also saw Chantry strike D.L., who received the worst of the spankings. At least once, Chantry forced J.W. and W.W. to watch him strike D.L. with a long paddle while D.L. "scream[ed] and cr[ied]."

¶9 After the first spanking, J.W. and W.W. told their father what Chantry had done. Their father told Chantry not to physically discipline the children again, and Chantry agreed—falsely as it turned out—he would no longer do so. Chantry told the children that if they reported the spankings, their parents and God would no longer love them and they would not get into heaven. J.W., W.W., and D.L. then made a pact not to tell anyone.

¶10 One day in September 2000, when D.L.'s mother picked him up from the parsonage, she could tell he "had been crying" and "could hardly walk or sit." When they arrived home, D.L.'s mother discovered he had fresh welts and bruises "four to five inches wide" from the top of his bottom along the back of his thighs almost to the knees, with consistent "line" marks diffused throughout the area. When word spread through the church community about what D.L.'s mother had observed, the parents of J.W. and W.W. asked their children about the spankings. J.W. and W.W. confirmed Chantry spanked them and D.L. Upon being confronted by the two church elders, R.H. and E.O., and the children's parents, Chantry admitted to spanking J.W., W.W., and D.L. but not to doing so bare bottomed or with excessive force. Disagreeing with the elders' proposals to resolve the matter, Chantry resigned as pastor and moved out of state.

¶11 Chantry's father sent a letter to the church elders criticizing their handling of the allegations. The elders responded with a letter emphasizing the seriousness of those allegations, and an agreement was reached that ARBCA would form a three-person council to investigate Chantry's conduct. As part of that investigation, the children and parents of the affected families—including M.J. and his parents—wrote letters to the council describing what they knew of Chantry's actions. The ARBCA council members also interviewed the children and their parents. In M.J.'s letter to the council, which he characterized as "the most complete and accurate account of what happened as [he] could [remember]," M.J. called

Chantry a "sick, twisted monster" and described how he spanked him with increasing severity for minor mistakes, "rubbed [his] ass" after doing so, and eventually spanked him bare bottomed after telling him he wanted to see M.J.'s bottom "turn red." M.J. said nothing in the letter or in his interview with the council about Chantry touching his genitals.

¶12 The council drafted a report and recommendations that it distributed only to Chantry, the church elders, and two members of ARBCA, including Chantry's father. The parents of M.J., J.W., W.W., and D.L. were assured Chantry would never pastor again. No one among the church leadership or affected families contacted the police.

¶13 In 2006, M.J. found Chantry through an Internet search, discovered he was working at a church again, and sent him a letter asking if they could speak. Chantry initially refused to speak with M.J. but eventually agreed, provided a third person was present on the call. During the call, M.J. confronted Chantry in general terms about what Chantry had done to him when he was a child. Chantry apologized for spanking him but went no further. A couple years later, M.J. attempted to contact Chantry again but Chantry did not respond. Around that same time, M.J. told his then-girlfriend, whom he later married, that a pastor had molested him, but he did not provide details. M.J. never spoke with J.W., W.W., or D.L. about their experiences with Chantry, and he never contacted law enforcement.

¶14 In 2015, police learned of an allegation that in 2000, Chantry molested four-year-old J.E., who had been a member of the Prescott congregation but was not part of the church's earlier investigation. When the current pastor and church elders became aware of the report to law enforcement, they provided information, including documents, to the police about the church's investigation of Chantry's conduct in 2000. In 2016, the police contacted the children—now grown—who had been involved in the church's investigation of Chantry. M.J., who was 31 or 32 years old at this point, told a detective Chantry had molested him.

¶15 The State indicted Chantry in 2016 on eight charges: one count of molesting J.E., four counts of molesting M.J., and one count each of committing an aggravated assault upon J.W., W.W., and M.J.'s older brother. The assault charges pertaining to J.W. and W.W. were based on the spankings; the charge pertaining to M.J.'s older brother was based on an alleged punch during a church picnic. The superior court denied Chantry's motion to sever the counts into four separate trials—one for each molestation victim, one for the punch, and one for the spankings of J.W. and W.W.

¶16 The State tried Chantry on the above eight counts in 2018. The jury found him guilty of the aggravated assaults of J.W. and W.W. but not guilty of the molestation of J.E. or the aggravated assault of M.J.'s older brother. The jury was unable to render verdicts on the four molestation charges pertaining to M.J., and the superior court declared a mistrial on those counts. For Chantry's convictions of aggravated assault, the superior court suspended imposition of sentence and placed him on three years' probation. Chantry did not appeal.

¶17 In 2019, the State retried Chantry on the molestation counts pertaining to M.J. The superior court ruled the State could impeach Chantry, if he chose to testify, with evidence of the assault convictions from the first trial. Chantry opted not to testify. The jury convicted him of all four counts as charged and found, as an aggravating factor, that he caused emotional harm to M.J. The superior court sentenced Chantry to the maximum term of 24 years' imprisonment for each conviction, to be served concurrently. Chantry timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A)(1).[1]

DISCUSSION

¶18 Chantry asserts numerous errors on appeal. He contends the superior court's evidentiary rulings resulted in the wrongful preclusion of impeachment evidence, the admission of prejudicial "other act" evidence, the admission of unqualified expert testimony, and the admission of hearsay and irrelevant speculation. He asserts his convictions were barred by the statute of limitations and unsupported by substantial evidence. He claims his trial was marred by prosecutorial and juror misconduct and that the superior court should have declared a mistrial or granted a new trial after the prosecutor violated the rule of witness exclusion. Chantry also argues the court committed several sentencing errors.

¶19 For the reasons set forth below, we reverse Chantry's convictions based on the improper admission of "other act" evidence. We address Chantry's other contentions of error only to the extent they are certain to recur on remand.

---

[1] Absent material revisions after the relevant dates, we cite the current version of statutes and rules unless otherwise indicated.

I. "Other Act" Evidence

¶20 Before the first trial, the State filed a notice of its intent to offer "other act" evidence under Rules 404(b) and 404(c) of the Arizona Rules of Evidence. *See* Ariz. R. Evid. 404(b) (evidence of other crimes, wrongs, or acts admissible for purposes other than to show defendant had a character propensity to commit a charged act), 404(c) (evidence of other crimes, wrongs, or acts admissible to show defendant had an aberrant sexual propensity to commit a charged sexual offense). Specifically, the State sought to introduce uncharged incidents of Chantry sexually molesting M.J. and physically abusing M.J., J.W., W.W., and D.L. for the purposes of showing Chantry's (1) lack of accident, lack of mistake, motive, and intent pursuant to Rule 404(b), and (2) sexually deviant propensity to molest young boys pursuant to Rule 404(c). The superior court ruled uncharged instances of Chantry physically and sexually abusing M.J. were admissible under Rules 404(b) and (c); the court ruled uncharged instances of Chantry physically abusing J.W., W.W., and D.L. were admissible under Rule 404(b) only.

¶21 Before Chantry's retrial on the molestation charges pertaining to M.J., the State filed a notice of its intent to offer other-act evidence of Chantry (1) physically abusing J.W., W.W., and D.L.; (2) assaulting M.J.'s older brother (i.e., the alleged punch); and (3) sexually molesting J.E. The State argued evidence of Chantry's conduct toward J.W., W.W., and D.L. was not only admissible for non-propensity purposes under Rule 404(b) but was also admissible as sexual propensity evidence under Rule 404(c). Chantry opposed admitting the other-act evidence in its entirety and argued, in particular, there was an insufficient basis to find the evidence admissible under Rule 404(c). The superior court ruled that evidence of Chantry's acts against J.W., W.W., and D.L. was not admissible to show an aberrant sexual propensity under Rule 404(c) but was admissible to show absence of mistake or accident, knowledge, and modus operandi under Rule 404(b).[2] The court ruled the State could not offer evidence of Chantry's alleged conduct against M.J.'s older brother or J.E., with the exception of limited testimony explaining that the police began investigating Chantry in 2015 because of a report involving someone who was not a charged victim—i.e., J.E.

---

[2] D.L. did not testify at trial. The superior court permitted the State to offer evidence of Chantry's conduct toward him through various testifying witnesses.

¶22 At Chantry's second trial, as described above, the State presented evidence of Chantry's conduct toward J.W., W.W., and D.L. When the parties discussed the other-act jury instruction, Chantry argued jurors should not be instructed they could consider whether the other acts showed his "motive" or "intent" because the only relevant motive or intent arguably shown by the evidence went to a Rule 404(c) sexual propensity purpose—which the superior court had previously ruled inadmissible. The court rejected Chantry's argument, stating it saw "motive and sexual propensity as two different things." The court subsequently instructed jurors they could consider Chantry's other acts to show "motive, opportunity, intent, preparation, plan, knowledge, identity and/or absence of mistake or accident." The court directed jurors not to consider the other acts as establishing a character trait or as showing Chantry committed a charged offense by acting in conformity with a character trait.

¶23 In the State's initial closing statement, the prosecutor argued evidence of Chantry's conduct toward J.W., W.W., and D.L. "corroborate[d]" M.J.'s account and showed Chantry had a "two-fold" motive—to inflict pain, which would give him an excuse to execute his "end game" of molesting little boys. The prosecutor emphasized that the fact Chantry only spanked J.W. one time, while she was clothed—in contrast to his spankings of W.W. and D.L.—showed girls were not "his thing" and that his true interest was "little boys." The prosecutor also argued that the fact Chantry's spankings lacked a valid, disciplinary purpose further indicated that "the reason [he] spanked" was "because it turned him on" and served as "the gateway into" his real "motive," which was to commit child molestation.

¶24 After the prosecutor concluded her initial closing argument, Chantry moved to strike the comments that Chantry's bare-bottomed spankings of W.W. showed a motive to commit child molestation, arguing those statements were "essentially a propensity argument" that violated the superior court's Rule 404(b) and 404(c) rulings. The court denied the motion. In the State's rebuttal closing argument, the prosecutor again argued the spanking evidence was relevant because it was the "gateway into the molestation." The prosecutor told jurors they could "all probably agree" that the reason Chantry admitted to spanking the children while denying he did so bare bottomed was because that behavior was "too creepy." The prosecutor also argued that Chantry's use of spankings as an excuse to execute his "motive" or "intent" to touch M.J. was "very brilliant in a sadistic and pedophilia way."

¶25 Chantry argues the superior court should have precluded the evidence of his conduct toward J.W., W.W., and D.L. because it was not relevant for a non-propensity purpose under Rule 404(b) and, even if it were, the risk of unfair prejudice substantially outweighed any probative value. The State disputes both of Chantry's contentions, arguing the evidence was properly admitted under Rules 403 and 404(b) for several non-propensity purposes, including to show Chantry's sexual motive or intent. We consider a challenge to the admission of other-act evidence for an abuse of discretion. *See State v. Coghill*, 216 Ariz. 578, 582, ¶ 13 (App. 2007).

¶26 In general, "evidence of other 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)(1). The rule has two major exceptions, however, where evidence of other crimes, wrongs or acts may be admissible, regardless of whether those other acts occurred before or after the charged offense. First, such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b)(2); *see also State v. Via*, 146 Ariz. 108, 122 (1985) ("The list of relevant purposes for which evidence of other crimes, wrongs or acts may be admitted is not exhaustive. If offered for a non-character purpose, the evidence is admissible."). Second, where a defendant is charged with a sexual offense, "evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Ariz. R. Evid. 404(c). To admit evidence under Rule 404(c), the superior court must make specific findings and instruct the jury on its consideration of the evidence. Ariz. R. Evid. 404(c)(1), (2). Evidence offered for a purpose permitted by Rule 404(b) or 404(c) remains subject to Rule 402's relevancy requirement and Rule 403's balancing test. *See State v. Leteve*, 237 Ariz. 516, 522, ¶ 11 (2015); Ariz. R. Evid. 404(c)(1)(C).

¶27 We agree with Chantry that the superior court abused its discretion by admitting, under Rule 404(b), evidence of Chantry's excessive, sometimes bare bottomed, spankings of J.W., W.W., and D.L. After prohibiting the State from offering the other-act evidence to show Chantry had an aberrant sexual propensity to commit the charged crimes, the court should not have permitted the State "to raise this same inference under the rubric of 'intent.'" *State v. Ives*, 187 Ariz. 102, 110 (1996).

¶28 The State asserts the challenged other-act evidence was admissible under Rule 404(b) to show Chantry's "sexual motive," but it fails

to explain how the "sexual motive" purportedly shown by the other-act evidence was in any way different from "a character trait giving rise to an aberrant sexual propensity to commit the offense charged." The prosecutor succinctly made the argument in her closing argument when she commented that the other-act evidence showed Chantry "likes little boys." *See State v. Prion*, 203 Ariz. 157, 164, ¶¶ 42–43 (2002) (holding the State's arguments that other-act evidence admitted under Rule 404(b)'s "motive" exception showed defendant's "sexual motivation" to "terrorize, rape, kill, and dismember women" was essentially "aberrant sexual propensity evidence" admissible only under Rule 404(c)). The State cites *State v. Ramsey*, 211 Ariz. 529 (App. 2005), in support of its position that other-act evidence of a sexual nature may be admissible under Rule 404(b) to show a motive to commit a sex crime, but *Ramsey* is distinct from this case in critical respects. First, the other-act evidence challenged in *Ramsey*—that the defendant gave his daughter pornographic literature about incest—involved the very same victim whom the defendant was charged with sexually abusing. Thus, the evidence showed the defendant's grooming behavior with the specific victim in the case—as opposed to a general propensity to commit the charged crime. *See State v. Vega*, 228 Ariz. 24, 32, ¶¶ 33–35 (App. 2011) (Thompson, J., concurring) (asserting that uncharged sexual behavior with the same victim is properly analyzed under Rule 404(b)). Second, the superior court in *Ramsey* not only admitted the pornographic literature under Rule 404(b) but also admitted the material for the purpose of showing the defendant's aberrant sexual propensity under Rule 404(c). *Ramsey*, 211 Ariz. at 540–41, ¶ 35.

¶29 The State also asserts the other-act evidence was properly admitted to show Chantry's "sexual motive" and "lack of mistake or accident" under Rule 404(b) because the molestation charges were subject to the affirmative defense "that the defendant was not motivated by a sexual interest." *See* A.R.S. § 13-1407(E) (1995).[3] But Chantry did not stake his defense on accidentally engaging in sexual contact with M.J. The defense theory, rather, was that Chantry never touched M.J.'s genitals, accidentally or otherwise. Thus, the other-act evidence did not tend to establish absence of mistake or accident. *See Ives*, 187 Ariz. at 109–11 (adopting rule that other-act evidence is not admissible to show lack of

[3] The legislature abolished the affirmative defense in 2018 and changed the definition of "sexual contact" so that it now excludes contact "during caretaking responsibilities" or "that an objective, reasonable person would recognize as normal and reasonable under the circumstances." 2018 Ariz. Sess. Laws, ch. 266, § 1 (2d Reg. Sess.) (H.B. 2283); A.R.S. § 13-1401(3)(b).

mistake where the defense is based on the defendant's denial of committing the charged act entirely, without placing at issue whether the defendant committed the act innocently or mistakenly). The State has also failed to show, in any event, how evidence that Chantry spanked other children bare bottomed—yet did not molest them—shows he did not mistakenly or accidentally molest M.J.

¶30 The State contends the other-act evidence was admissible for two non-propensity purposes that are not enumerated in Rule 404(b): (1) to bolster M.J.'s credibility by explaining why he waited so long to report the molestation, and (2) to provide context for M.J.'s involvement in the church's 2000 investigation of Chantry. We address each argument in turn.

¶31 Relying on *State v. Jeffers*, 135 Ariz. 404 (1983), and *State v. Torres*, 27 Ariz. App. 556 (1976), the State argues evidence of other acts are admissible if offered to show they caused a trial witness to delay reporting, or to lie about, the defendant's conduct based on fear of the defendant. We find the cases cited inapposite because there was no evidence here suggesting M.J. delayed disclosing the molestation out of fear shown by the other-act evidence. M.J. had no knowledge of Chantry's conduct with the other-act witnesses and therefore no basis to fear Chantry because of his acts toward J.W., W.W., or D.L. *Cf. Jeffers*, 135 Ariz. at 416–17 (admitting evidence the witness saw defendant assault others to explain why the witness delayed reporting the defendant's murder of victim); *State v. Williams*, 183 Ariz. 368, 376 (1995) (admitting evidence the witness knew defendant tried to kill another person to explain why the witness initially lied about the defendant murdering the victim).

¶32 Nor did M.J. ever indicate he delayed reporting the molestation because he feared Chantry. *See State v. Hughes*, 189 Ariz. 62, 70 (1997) (holding other-act evidence was not admissible to show the witness feared retaliation by the defendant where there was no evidence the witness delayed reporting the defendant's misconduct based on such fear); *cf. Torres*, 27 Ariz. App. at 559 (admitting evidence of the defendant's assaults and threats to the witness to explain why the witness initially corroborated defendant's false account). When asked why he did not disclose the molestation at the same time as the spanking, M.J. testified he did not know, he was not sure he would be believed, he mostly wanted the spanking to stop, and he felt embarrassed or complicit. M.J.'s mother testified that after M.J. spoke to Chantry in 2006, he told her he felt "good" because he was no longer a "scared little boy" and Chantry, rather, seemed afraid of him. Still, M.J. did not contact law enforcement.

¶33 As to the State's argument the other-act evidence was admissible to explain how M.J. became involved in the church's 2000 investigation of Chantry, we agree other-act evidence may be admissible to provide jurors background information critical to their evaluation of the charges. *See State v. Ferguson*, 120 Ariz. 345, 347–48 (1978) (holding evidence of defendant's other bad acts admissible where "jury could not have fully understood the circumstances surrounding the charges without such evidence"); *State v. Ferrero*, 229 Ariz. 239, 244, ¶ 23 (2012) (approving admission of other-act evidence to provide "background" information needed to avoid confusing the jury) (citing *United States v. Green*, 617 F.3d 233, 249 (3d Cir. 2010)).

¶34 That said, other-act evidence offered to show critical background information remains subject to Rule 402's relevancy test and Rule 403's balancing test. Here, the magnitude of the other-act evidence presented at trial went far beyond what was necessary to apprise jurors of how M.J. came to participate in the church's 2000 investigation of Chantry.

¶35 "As probative value diminishes, the potential increases that it will be substantially outweighed by the dangers identified in Rule 403." *State v. Hardy*, 230 Ariz. 281, 291, ¶ 49 (2012). Although the application of Rule 403 generally favors admissibility, "[w]hen the evidence concerns prior bad acts . . . the rules have a different thrust, and the suppositional balance no longer tilts toward admission." *State v. Salazar*, 181 Ariz. 87, 91 (App. 1994). Under those circumstances, the superior court has a particular obligation to screen each instance of uncharged conduct under Rule 403 and to consider "whether the evidence can be narrowed or limited to protect both parties by minimizing its potential for unfair prejudice while preserving its probative value." *Id.* at 92; *see also State v. Garcia*, 200 Ariz. 471, 477, ¶¶ 35–37 (App. 2001). Here, the risk of unfair prejudice—namely, that jurors would consider Chantry's acts against J.W., W.W., and D.L. to show his propensity to commit child molestation or general cruelty toward children—substantially outweighed the limited relevance of the evidence for background purposes. *See Hughes*, 189 Ariz. at 69 (concluding that where the other-act evidence admitted at trial "went far beyond that necessary" to demonstrate an admissible purpose, there was "a substantial risk that the jury considered this evidence for an improper purpose"). While a modicum of the other-act evidence in this case may have been admissible to provide context, the superior court should have limited the evidence "to its probative core" and "eliminat[ed] irrelevant or inflammatory detail." *Salazar*, 181 Ariz. at 92.

¶36 We now consider the prejudicial impact of the other-act evidence. Because Chantry objected to its admission, the State must "prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18 (2005). Considering the improper admission "in light of all of the evidence," *State v. Bible*, 175 Ariz. 549, 588 (1993), we conclude the State has failed to carry its burden.

¶37 While Chantry's conduct toward J.W., W.W., and D.L. may have been less criminally serious than the molestation charges for which he was being tried, the evidence was undoubtedly harmful to him. The detailed testimony about the severity of the spankings, their lack of justification, the children's belief that reporting the assaults would deprive them of their parents' affection and entry into heaven, and evidence of the long-lasting trauma that resulted, was substantial. Even M.J. himself testified he said nothing about being molested when he disclosed the spankings because he was "more concerned—[he] wanted to stop the spanking mostly."

¶38 Not only was the other-act evidence damaging to Chantry, it also formed much of the State's case. Of the State's 13 fact witnesses, only M.J. and the detective to whom he spoke in 2016 had any personal knowledge of the molestation allegations. Six witnesses—J.W., W.W., their mother and father, D.L.'s mother, and church elder E.O.—had little or no knowledge of M.J.'s contact with Chantry, and their testimony overwhelmingly pertained to Chantry's conduct toward J.W., W.W., and D.L. Four additional fact witnesses—M.J.'s family members and church elder R.H.—testified about M.J.'s spanking allegations and the ensuing church investigation but lacked any personal knowledge of the molestation allegations. One of the fact witnesses, the church pastor at the time of trial, did not even become aware of the allegations involving Chantry's conduct from 1995–2000 until 2012.

¶39 The State argues the other-act evidence was harmless because the superior court instructed jurors not to consider it to show a character trait. But by instructing jurors they could consider the evidence to establish Chantry's "motive" or "intent," and by then permitting the State to argue—repeatedly—the evidence showed Chantry's motive and intent was to molest little boys, the court's instructions were at minimum contradictory and confusing. Under the circumstances, we cannot presume the jury followed the instruction not to consider the other-act evidence for propensity purposes. *See State v. Anthony*, 218 Ariz. 439, 446, ¶ 40 (2008) (finding limiting instruction inadequate to eliminate prejudice from

erroneous admission of other-act evidence where the other-act evidence was particularly inflammatory and the State made it "a repeated theme of [its] closing argument"); *State v. Smith*, 242 Ariz. 98, 103, ¶ 20 (App. 2017) ("The state's continued emphasis on [improperly admitted evidence] both highlighted [the evidence] and exacerbated the effect of [its] erroneous admission"); *see also State v. Terrazas*, 189 Ariz. 580, 584 (1997) (observing other-act evidence could influence a jury's decision despite a cautionary instruction).

¶40 Considering the force of the other-act evidence in this case, the State's heavy reliance on it for an inadmissible purpose, and the "stringent concepts" that apply to our review for harmless error, we cannot conclude beyond a reasonable doubt that the verdicts were "surely unattributable" to evidence of Chantry's acts toward J.W., W.W., and D.L. *Anthony*, 218 Ariz. at 446, ¶¶ 39, 42 (quoting *Bible*, 175 Ariz. at 588).

II. Statute of Limitations

¶41 The charges in this case were filed in 2016. Chantry contends that prosecuting him for acts committed 20 years earlier violated the statute of limitations and his right to due process. Because he did not raise this argument in the superior court, we review his challenge for fundamental, prejudicial error only. *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018).

¶42 Arizona law requires prosecutions for molestation of a child, a class 2 felony, to be commenced within seven years "after actual discovery by the state or the political subdivision having jurisdiction of the offense or discovery by the state or the political subdivision that should have occurred with the exercise of reasonable diligence, whichever first occurs." A.R.S. §§ 13-107(B)(1), -1410(B). Constructive discovery takes place where the exercise of reasonable diligence would show probable cause an offense was committed. *State v. Jackson*, 208 Ariz. 56, 64–65, ¶¶ 30–32 (App. 2004). "Mere suspicion or conjecture that a suspect might have committed an offense is insufficient to trigger the limitation period." *Id.* at 67, ¶ 41. The statutory period is tolled "during any time when the accused is absent from the state or has no reasonably ascertainable place of abode within the state." A.R.S. § 13-107(D).

¶43 In this case, law enforcement did not actually discover M.J.'s allegations that Chantry molested him until 2016 and they were unaware of allegations Chantry committed other misconduct while pastoring at the Prescott church until 2015. Before M.J.'s disclosure to a detective, the only person to whom he reported the molestation was his now ex-wife. As

Chantry himself emphasized at trial, none of the children involved in the church's 2000 investigation—including M.J.—reported being molested at that time, and none of those involved in the investigation contacted the police. Because no one among church leadership, M.J.'s parents, or M.J.'s ex-wife is deemed to be a state actor for purposes of § 13-107(B), and the State had no reason to suspect Chantry of any misconduct until a report was made to law enforcement in 2015, the charges in this case fell within the statutory limitation period. *See State v. Escobar-Mendez*, 195 Ariz. 194, 197–98, ¶¶ 16–18 (App. 1999); *Jackson*, 208 Ariz. at 67, ¶ 40.

¶44 Even if charges are filed within the statute of limitations, a pre-indictment delay may violate due process. *State v. Dunlap*, 187 Ariz. 441, 450 (App. 1996) (citing *United States v. Marion*, 404 U.S. 307, 324 (1971) and *United States v. Lovasco*, 431 U.S. 783, 789 (1977)). To prove a violation, the defendant must establish "(1) that the delay was intended to gain a tactical advantage or to harass him and (2) that the delay actually and substantially prejudiced him." *Williams*, 183 Ariz. at 379. Chantry establishes neither requirement in this case. The record shows the delay was not attributable to the State, and Chantry "does not allege that the delay caused the loss of witnesses, the loss of evidence, or the loss of anything else that would have helped him." *Id.*

III. Law of the Case

¶45 The law of the case doctrine "concerns the practice of refusing to reopen questions previously decided in the *same* case by the same court or a higher appellate court." *State v. Whelan*, 208 Ariz. 168, 171, ¶ 8 (App. 2004) (citations omitted). As applicable here, because the doctrine is a rule of procedure, rather than a rule of substance, it "does not deprive a judge of the power to change his or her own nonfinal rulings or the nonfinal rulings of another judge of that same court sitting on the same case simply because the question was ruled on at an earlier stage." *Id.* (quoting *Davis v. Davis*, 195 Ariz. 158, 162, ¶ 14 (App. 1999) (citation omitted)).

¶46 Chantry's first trial was substantially different from the second trial in that the first trial included multiple victims from a variety of charges against Chantry. The second trial involved a single victim stemming from a singular type of felony charge. Thus, the law of the case doctrine did not apply between the first and second trials.

¶47 As to the second trial and anticipated third trial, the law of the case doctrine, similarly, does not necessarily apply. Although the charges against Chantry will be identical between the second and third trial, the

underlying facts and evidence that will be presented at trial are likely to be very different given the exclusion of the Rule 404(b) evidence which had been allowed during the second trial. For reasons discussed, *supra* ¶¶ 20–40, the Rule 404(b) evidence will not be allowed during the third trial. All of that to say that neither Chantry, the State, nor the trial court, should feel precluded from raising again other pre-trial issues that were previously raised or ruled upon in the previous two trials.

CONCLUSION

¶48 For the reasons set forth above, we reverse Chantry's convictions and remand the case for a new trial.

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