IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

RODNEY LYNN DALTON, *Appellant*.

No. 1 CA-CR 21-0201
FILED 5-10-2022

Appeal from the Superior Court in Yavapai County
No. P1300CR201801024
The Honorable Krista M. Carman, Judge

AFFIRMED AS MODIFIED

COUNSEL

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Cynthia J. Bailey and Judge D. Steven Williams joined.

S W A N N, Judge:

¶1 Rodney Lynn Dalton appeals from his convictions and sentences for sexual assault and kidnapping. For the following reasons, we affirm the convictions and sentences as modified.

FACTS[1] AND PROCEDURAL HISTORY

¶2 Shortly after marrying Dalton, Margaret gave birth to their twins, James and Hannah, in June 2003.[2] She has five other children from a previous marriage. Early in Margaret's relationship with Dalton, she learned that he expected sexual intercourse on a daily basis. As time went on, this became more of a demand.

¶3 In December 2009, Dalton asked Margaret to join him in their bedroom. When Margaret refused, Dalton dragged her to the bedroom, prevented her from leaving, and forced her to engage in sexual intercourse. She told him "no" multiple times. Months later, in March 2010, Dalton began to initiate sexual intercourse with Margaret. When she refused, Dalton ripped off her clothes and forced her to engage in sexual intercourse. She cried and told him to stop throughout the offense.

¶4 Late one evening in the spring of 2012, Margaret and Hannah fell asleep in the same bed. Margaret awoke to Dalton digitally penetrating her vagina and told him to stop. Despite Margaret's protests, Dalton digitally penetrated her vagina a second time and then forced her to engage in penile-vaginal intercourse. At some point, Hannah woke up and tried to help her mother. Dalton only stopped when Hannah ran crying from the bedroom.

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[1] We view the facts in the light most favorable to sustaining the verdicts. *See State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

[2] We use pseudonyms to protect the privacy of the victim and witnesses.

¶5 In August 2014, Margaret returned home from a work trip. Dalton joined Margaret in the shower and tried to engage in penile-anal intercourse. When she expressed discomfort, he forced her to engage in penile-vaginal intercourse. Later that evening, Margaret awoke to Dalton digitally penetrating her vagina. Over her protests, he forced her to engage in sexual intercourse.

¶6 Hoping to save the marriage, Margaret did not report the offenses to law enforcement. While meeting with marriage counselors, the couple discussed Dalton's inability to take "no" for an answer with regard to sexual intercourse. Margaret also expressed concerns about what she called "forced sex" in emails to Dalton and her personal journals.

¶7 Margaret filed for divorce in 2015. After a contentious divorce, Dalton struggled to maintain a relationship with his children and they grew increasingly resistant to visitation. James and Hannah would run away to avoid Dalton and, on one occasion, were detained by law enforcement for violating the terms of visitation.

¶8 In April 2018, James sent a letter to various superior court judges and law enforcement agencies in an effort to terminate visitation. In the letter, James disclosed that Dalton had physically and emotionally abused their family, detailing specific instances of abuse and threatening behavior. The letter also indicated that Dalton had sexually abused Margaret. An investigation by law enforcement ensued, ultimately leading to Margaret disclosing the offenses and James and Hannah providing corroborating details. Later, at trial, Dalton claimed Margaret and the children fabricated the allegations as part of a "master plan" to have him arrested.

¶9 The grand jury indicted Dalton on Counts 1 and 2, sexual assault and kidnapping, committed on or about December 2009; Count 3, sexual assault, committed on or about March 2010; Count 4, sexual assault, committed on or about March 1, 2012; and Count 5, sexual assault, committed on or about August 2014.[3] All of the counts constituted class 2 felonies and domestic violence offenses. During trial, the state amended the date of the offense alleged in Count 4 to have occurred between March and October 2012.

[3] The indictment included a sixth count of aggravated domestic violence, a class 5 felony, which was later dismissed without prejudice.

¶10 The jury returned guilty verdicts on all counts. The superior court sentenced Dalton to an aggregate term of 28 years' imprisonment, imposing concurrent sentences in Counts 1 and 2 and consecutive sentences in Counts 3, 4, and 5. The court applied 48 days of presentence incarceration credit to the sentence in each count. Dalton appeals.

DISCUSSION

I. THE INDICTMENT PROVIDED ADEQUATE NOTICE.

¶11 Dalton argues the dates of offenses listed in the indictment lacked specificity, depriving him of adequate notice of the underlying charges and his right to present an alibi defense. We review the superior court's ruling on the sufficiency of an indictment for an abuse of discretion. *See State v. Malvern*, 192 Ariz. 154, 155, ¶ 2 (App. 1998).

¶12 An indictment "must fairly indicate the crime charged, must state the essential elements of the alleged crime, and must be sufficiently definite to apprise the defendant so that he can prepare his defense to the charge." *State v. Maxwell*, 103 Ariz. 478, 480 (1968); *see also* Ariz. R. Crim. P. 13.1(a). When the date is not an essential element of the offense, the indictment need not list an exact date to provide adequate notice of the underlying charge. *See State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 201 (1971). The mere assertion of an alibi defense does not compel the state to allege an exact date of offense. *See State v. Davis*, 206 Ariz. 377, 391, ¶ 70 (2003).

¶13 Before trial, Dalton moved to dismiss all counts in the indictment except Count 4, arguing the date ranges listed in the indictment failed to give him adequate notice of the underlying charges. The superior court disagreed and denied the motion. At trial, the state presented evidence that the offenses occurred either on a specific date or within a date range. In turn, Dalton attacked gaps in the state's timeline, pointed out disparities between testimony and the indictment, and argued he lacked the opportunity to commit the offenses on the alleged dates.

¶14 We discern no error. The state was not required to allege Dalton committed the offenses on an exact date. *See* A.R.S. §§ 13–1304(A)(3) (elements of kidnapping), -1406(A) (elements of sexual assault); *see also State v. Verdugo*, 109 Ariz. 391, 392 (1973) (finding evidence a sexual assault occurred "on or about" a given date to be sufficient). The indictment listed the charged offenses for each count, the essential elements of the offenses, the associated victim, and the relevant date range. The dates introduced at trial fell within the ranges listed in the indictment. Dalton was not

prevented from attacking the state's timeline and mounting a vigorous defense. The indictment provided adequate notice of the underlying charges.

II. THE AMENDMENT TO COUNT 4 DID NOT CONSTITUTE ERROR.

¶15 Dalton argues the superior court erred by allowing the state to amend the date of the offense alleged in Count 4 and contends the amendment prevented him from presenting an alibi defense. We give the court considerable discretion in ruling on a motion to amend the indictment. *See State v. Sammons*, 156 Ariz. 51, 54 (1988).

¶16 Without the defendant's consent, an indictment may only be amended to "correct mistakes of fact or remedy formal or technical defects." Ariz. R. Crim. P. 13.5(b). "A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *State v. Bruce*, 125 Ariz. 421, 423 (1980). Absent actual prejudice, a defect "as to the date of the offense alleged in the indictment does not change the nature of the offense, and therefore may be remedied by amendment." *State v. Jones*, 188 Ariz. 534, 544 (App. 1996), *abrogated on other grounds*, *State v. Ferrero*, 229 Ariz. 239 (2012).

¶17 At trial, Margaret testified that the offense alleged in Count 4 occurred in the "spring of 2012." Over Dalton's objection, the superior court allowed the state to amend the date of the offense alleged in Count 4 to occur between March and October 2012 based on Margaret's testimony. Dalton elicited testimony that the couple was separated for much of 2012 and they did not live at the location where the offense occurred until April 2012, and he later argued that the evidence did not support the state's timeline.

¶18 The amendment conformed to the evidence at trial and did not impact the nature of the offense. Dalton was not prevented from presenting evidence contradicting the state's timeline, and arguing he lacked the opportunity to commit the offense. Any purported harm to Dalton's alibi defense is theoretical. *See State v. Hamilton*, 177 Ariz. 403, 410 n.6 (App. 1993) ("Defendant's assertion that he was unable to present an alibi defense, because he could not reconstruct his life for a specific year, is a theoretical, not an actual, prejudice that could be asserted any time an offense was alleged to have occurred over a period of time."). Without

more, Dalton has failed to show the amendment to the alleged date of offense constituted actual prejudice. We find no error.

¶19 To the extent Dalton claims the amendment did not conform to Margaret's testimony, we are not persuaded. While the superior court appeared to conflate portions of testimony associated with Counts 3 and 4 in making its ruling, the amendment is supported by the record. *See State v. Moreno*, 236 Ariz. 347, 350, ¶ 5 (App. 2014) ("We will uphold the court's ruling if legally correct for any reason supported by the record.").

III. THE EVIDENCE PRESENTED AT TRIAL DID NOT RENDER COUNT 4 A DUPLICITOUS CHARGE.

¶20 Dalton claims that Count 4 constituted a duplicitous charge, depriving him of the right to a unanimous jury verdict. Because Dalton raises this issue for the first time on appeal, we review only for fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, 140, 142, ¶¶ 12, 21 (2018).

¶21 A duplicitous charge occurs when "the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, 244, ¶ 12 (App. 2008). An unremedied duplicitous charge results in prejudice, and therefore fundamental error, if the defendant shows that the jury may not have reached a unanimous verdict. *See State v. Delgado*, 232 Ariz. 182, 188, ¶¶ 18–19 (App. 2013). Remedial measures are unnecessary if "all the separate acts that the State intends to introduce into evidence are part of a single criminal transaction." *Klokic*, 219 Ariz. at 244, ¶ 15. We may consider whether the defendant presented the same defense as to each of the acts in making this determination. *Id*. at 245, ¶ 18.

¶22 The indictment listed Count 4 as a sexual assault, involving sexual intercourse or oral sexual contact. As relevant here, "sexual intercourse" includes digital and penile penetration of the vulva. *See* A.R.S. § 13-1401(A)(4). As to the offense alleged in Count 4, the state elicited testimony that Dalton digitally penetrated Margaret's vagina twice and, without a break in time, forced her to engage in penile-vaginal intercourse. Dalton did not request remedial measures be taken to identify which specific act constituted the offense.

¶23 Without a break in time, the forced digital penetration and penile-vaginal intercourse were "part of a single criminal transaction," and the superior court did not need to take remedial measures to ensure a unanimous verdict. *See Klokic*, 219 Ariz. at 244, ¶ 15. Dalton offered the

same defense for all acts, including a categorical denial he committed any of the offenses. *See State v. Whitney*, 159 Ariz. 476, 480 (1989) (rejecting claim of duplicitous charge when the defendant offered a blanket denial). Dalton has not established error, fundamental or otherwise.

IV. THE ADMISSION OF OTHER-ACT EVIDENCE DID NOT RESULT IN UNDUE PREJUDICE.

¶24 Dalton argues the superior court's admission of overwhelming other-act evidence resulted in prejudice. We review the court's ruling on other-act evidence for an abuse of discretion. *See State v. Robinson*, 165 Ariz. 51, 56 (1990).

¶25 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). Such evidence, however, 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). This list is not exhaustive and may include any relevant evidence admitted for a purpose other than to show the defendant's propensity to commit the alleged offense. *See State v. Scott*, 243 Ariz. 183, 187, ¶¶14–15 (App. 2017). Moreover, the defendant may open the door to otherwise inadmissible other-act evidence if he raises the subject in his opening statement and lines of questioning. *See State v. Mincey*, 130 Ariz. 389, 404–05 (1981); *State v. Connor*, 215 Ariz. 553, 563, ¶ 35 (App. 2007). If introduced by the defendant, the state may present "any competent evidence that directly replies to or contradicts any material evidence introduced by the accused." *State v. Fulminante*, 161 Ariz. 237, 254 (1988).

¶26 Before trial, the state argued, and the superior court agreed, that instances of Dalton's emotional and physical abuse of James, Hannah, and Margaret's children from a previous marriage would be admissible to refute an inference that Margaret biased the children against him and that the allegations arose out of a concerted effort to end visitation. The court strove to narrow the use of the other-act evidence, specifically precluding any mention of Dalton's arrests or convictions related to the abuse. From the outset of trial, Dalton painted Margaret as a "master manipulator" who used the children to spread her false narrative. Dalton elicited testimony that, although he was a loving and supportive father, James and Hannah treated him with extreme disrespect and once told him they had "a plan and you're not going to like it."

¶27 As Dalton continued to place the children's behavior at issue, the superior court allowed the state to admit the other-act evidence. At the close of evidence, the court instructed the jury that the other-act evidence was admitted solely to explain the behavior of the state's witnesses and not as proof Dalton acted in conformity with any character trait in committing the alleged offenses. The state stressed the court's limiting instruction in closing argument.

¶28 By placing the children's behavior at issue, Dalton opened the door to evidence explaining the motivation behind that behavior. Even if otherwise objectionable, the other-act evidence was ultimately offered for the proper purpose of rebutting Dalton's theory of the case. Because Dalton brought the issue into contention as early as his opening statement, he cannot claim error from the state presenting evidence to contradict his claims. *See State v. Hausner*, 230 Ariz. 60, 79, ¶ 76 (2012). And the superior court mitigated any potential prejudice by providing a sufficiently limiting instruction. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68 (2006) ("We presume that the jurors followed the court's instructions."). We find no abuse of discretion.

¶29 Dalton further argues the state's use of other-act evidence to demonstrate his sexual propensity to commit the charged offenses constituted error. *See* Ariz. R. Evid. 404(c) (requirements for admitting and limiting the jury's consideration of sexual propensity evidence). Dalton failed to adequately preserve this issue at trial and waived all but fundamental error review. Ariz. R. Evid. 103(a); *see State v. Walker*, 181 Ariz. 475, 481 (App. 1995). The state properly used evidence of Dalton's forceful sexual conduct, either generally during the marriage or committed directly before a charged offense, as intrinsic to the charged offenses or to rebut Dalton's consent defense. *See State v. Ferrero*, 229 Ariz. 239, 243–44, ¶¶ 20–22 (2012) (evidence may be admitted as intrinsic if it "directly proves the charged act" or "is performed contemporaneously with and directly facilitates commission of the charged act"); *State v. Scott*, 243 Ariz. 183, 187, ¶ 15 (App. 2017) (other-act evidence may be admitted to rebut consent defense to sexual assault). Insofar as the state painted Dalton as sexually aggressive, the jury could have drawn the same conclusion from evidence solely related to the charged offenses, which involved multiple instances of forced sexual intercourse. Absent a showing of prejudice, any error in the state's use of the evidence did not amount to fundamental error. *See Escalante*, 245 Ariz. at 142, ¶ 21.

V. THE CUMULATIVE IMPACT OF THE ALLEGED INSTANCES OF PROSECUTORIAL ERROR DOES NOT WARRANT REVERSAL.

¶30 Dalton contends that the cumulative impact of prosecutorial error deprived him of the right to a fair trial. He argues the prosecutor engaged in multiple instances of vouching, improper argument, harassing and argumentative conduct, and he also argues that the prosecutor relied on improper other-act evidence. In considering such a claim, we review objected-to instances for harmless error and unobjected-to instances for fundamental error. *See State v. Hulsey*, 243 Ariz. 367, 429, ¶ 88 (2018). After reviewing the instances for error, we determine whether the total impact rendered the defendant's trial unfair. *Id*.

¶31 Prosecutorial error "broadly encompasses any conduct that infringes a defendant's constitutional rights," ranging from inadvertent error to intentional misconduct. *In re Martinez*, 248 Ariz. 458, 469, ¶ 45 (2020). We give prosecutors wide latitude in their cross-examination of adverse witnesses and in providing impassioned remarks in closing argument. *See State v. Amaya–Ruiz*, 166 Ariz. 152, 171 (1990) (criticism of defense theories permissible); *State v. Gonzales*, 105 Ariz. 434, 437 (1970) (emotional remarks are the "bread and butter weapon of counsel's forensic arsenal"); *State v. Holden*, 88 Ariz. 43, 54–55 (1960) (rigorous cross-examination of the defendant and defense witnesses permissible).

¶32 Throughout trial, both Dalton and the prosecutor aggressively litigated their respective cases and engaged in combative argument in front of the jury. While the prosecutor appeared critical of Dalton's defense and grew increasingly argumentative, we do not find that any particular instance rose to the level of harassing Dalton or his counsel, vouching for the state's witnesses or information not presented to the jury, or shifting the burden of proof. The prosecutor used the other-act evidence for a proper purpose, requested clarifying rulings from the superior court, and limited witnesses from testifying as to precluded evidence. Without condoning the prosecutor's combative behavior in front of the jury, we do not find any of the alleged instances amounted to error.

¶33 The superior court properly instructed the jury, and the state repeatedly confirmed in closing argument, that statements made by counsel were not evidence, the only evidence came from the witnesses and exhibits introduced in court, the state carried the burden of proof, and the other-act evidence could only be considered for a limited purpose. *See Newell*, 212 Ariz. at 403, ¶ 68. On this record, we do not find that the alleged instances

of prosecutorial error, considered cumulatively, prevented Dalton from receiving a fair trial.

VI. THE SUPERIOR COURT MISCALCULATED THE AMOUNT OF PRESENTENCE INCARCERATION CREDIT.

¶34 Dalton argues the superior court miscalculated the amount of presentence incarceration credit applied to his sentences and, in this regard, the state concedes error. A defendant is statutorily entitled to credit for "[a]ll time actually spent in custody pursuant to an offense." A.R.S. § 13–712(B). The court's failure to grant the proper amount of presentence incarceration credit constitutes fundamental error. *See State v. Cofield*, 210 Ariz. 84, 86, ¶ 10 (App. 2005).

¶35 Although the parties agree that the superior court erred in calculating Dalton's presentence incarceration credit, they do not agree as to the amount owed. Dalton argues he is entitled to 68 days of presentence incarceration credit, including credit for the five days he spent in custody before the grand jury returned the indictment. The state disagrees, arguing Dalton was not held in custody before the indictment.

¶36 The record shows that Dalton was arrested on two separate occasions before the grand jury returned the indictment, totaling five days of presentence incarceration credit. We find support for this conclusion in the state's notice of complaint, release documents, and an addendum filed by the adult probation department. Dalton is therefore entitled to 68 days of presentence incarceration credit, and we modify his sentences accordingly.

¶37 Finally, Dalton received presentence incarceration credit for his sentences in each count, including consecutive sentences. "When consecutive sentences are imposed, a defendant is not entitled to presentence incarceration credit on more than one of those sentences." *State v. McClure*, 189 Ariz. 55, 57 (App. 1997). Though tasked with reviewing the proper amount of presentence incarceration credit to be awarded, the state failed to address this error. "It is clear in this case that the state, had it chosen to do so, could have challenged the incorrect pre-sentence incarceration credit on appeal or by appropriate post-trial motion." *State v. Lee*, 160 Ariz. 323, 324 (App. 1989). We lack the jurisdiction to correct an illegally lenient sentence absent appeal or cross-appeal by the state. *See State v. Dawson*, 164 Ariz. 278, 281–82 (1990). We cannot correct this error.

CONCLUSION

¶38 We affirm Dalton's convictions and resulting sentences as modified.

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