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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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/Cross-Appellant,

v.

DANIEL ALONSO SOPENA,
Appellant/Cross-Appellee.

No. 1 CA-CR 21-0353
FILED 10-25-2022

Appeal from the Superior Court in Maricopa County
No. CR2018-154463-001
The Honorable Jennifer C. Ryan-Touhill, Judge

AFFIRMED IN PART, VACATED IN PART AND REMANDED

COUNSEL

Arizona Attorney General's Office, Tucson
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By Robert W. Doyle
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MEMORANDUM DECISION

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

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

¶1 Daniel Sopena appeals his 14 felony convictions and sentences. The State cross-appeals his sentences on three felony counts. We affirm the convictions but vacate and remand the concurrent sentences imposed for child molestation because those sentences must be consecutive.

FACTS AND PROCEDURAL BACKGROUND

¶2 We view, and thus recount, the facts in the light most favorable to sustaining the jury's verdicts. *See State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

¶3 Sopena has an older sister ("Sister A"), a younger sister ("Sister B"), and a niece ("Niece") who is Sister A's daughter. At a family gathering in 2018, Niece, then 10 years old, told a cousin that Sopena, then 29 years old, had sexually molested her on multiple occasions. The abuse began when Niece was about 7 or 8 years old. She reported that Sopena had touched his penis to her vagina and tried to penetrate, had engaged in oral copulation and had inserted his fingers into her vagina. He would lift her from her bed in the middle of the night and carry her to a more secluded part of the house. The cousin relayed Niece's statements to her mom, Sister A, who called the police.

¶4 The police investigated. Two more victims came forward: Sister B and Sister A's stepdaughter. Sister B reported that she was molested by Sopena when she was 8 or 9 years old and he was about 11 years old, which left her "paralyzed," gripped with "intense fear," "disgusted," "confused," and "hurt." On a confrontation call with Sister B, Sopena admitted to having sexual contact with both Sister B and Niece. Sopena was arrested and charged with 16 felony counts—nine counts of sexual conduct with a minor, five counts of kidnapping, one count of molestation and one count of aggravated assault.

¶5 A jury trial was held. Jurors found Sopena guilty of 14 felony counts. As to Niece, Sopena was convicted of one count of child

molestation, five counts of sexual conduct with a minor, and four counts of kidnapping. As to Sister B, Sopena was convicted of two counts of child molestation, one count of sexual conduct with a minor, and one count of kidnapping. The superior court sentenced Sopena to two life-terms plus close to 200 years' imprisonment. The court ordered three 17-year terms to run concurrently; all other terms were to run consecutively. Sopena and the State both timely appealed. We have jurisdiction. *See* A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A)(1).

DISCUSSION

I. Expert Testimony

¶6 At trial, the State introduced testimony from an expert witness who had no information about Sopena's case, but educated the jurors about the forensic interview process and the methods of gaining rapport with victims of child sex abuse. This witness described how she talks to child sex abuse victims to elicit reliable information about the abuse, how victims respond to abuse, and the "process of the effects on a victim's psychological impressions."

¶7 Sopena argues this testimony should have been precluded as impermissible profile evidence. We review a trial court's admission of expert testimony for an abuse of discretion. *See State v. Haskie*, 242 Ariz. 582, 585, ¶ 11 (2017). Profile evidence may not be treated "as substantive proof of the defendant's guilt." *Id.* at ¶¶ 15-16. Profile evidence is defined as evidence "tend[ing] to show that a defendant possesses one or more of an informal compilation of characteristics or an abstract of characteristics typically displayed by persons engaged in a particular kind of activity." *Id.* at ¶ 14 (citation omitted).

¶8 We discern no abuse of discretion. This expert's testimony focused on victim behaviors, like delayed reporting. *See* Ariz. R. Evid. 401 (a)-(b); *Haskie*, 242 Ariz. at 586, ¶¶ 16-17 ("[E]xpert testimony about victim behavior that also describes or refers to a perpetrator's characteristics . . . is not categorically inadmissible.").

¶9 Sopena also argues this expert's testimony should have been excluded because it "prejudiced" him. Mere prejudice, however, is not enough to banish relevant evidence from the jury's review. Rather, its probative value must be "substantially outweighed" by a danger of unfair prejudice. Ariz. R. Evid. 403. The expert testified about the process of victimization, which helped the jury understand the victims' behavior in relation to the abuse. *See Haskie*, 242 Ariz. at 587-88, ¶ 24. As a result, its

probative value outweighed any prejudice. *See State v. Moran*, 151 Ariz. 378, 382 (1986) (testimony is not unfairly prejudicial just because it may "harm defendant's interests").

¶10 What is more, the superior court provided a limiting instruction for the jury to consider the expert's testimony only "for the limited purpose of explaining the behavioral characteristics of children who have been subjected to abuse and not for any other purpose." The court did not abuse its discretion. *See* Ariz. R. Evid. 105.

II. Motions to Sever

¶11 Sopena next contends the court should have severed the counts against Niece and Sister B because they involved different offenses on different victims at different times. We review a superior court's decision on joinder or severance of charges for an abuse of discretion, *see State v. LeBrun*, 222 Ariz. 183, 185, ¶ 5 (App. 2009), respecting its "broad discretion in such matters," *State v. Prince*, 204 Ariz. 156, 159, ¶ 13 (2003).

A. Grounds to Sever

¶12 Under Arizona Rule of Criminal Procedure 13.3(a), "[t]wo or more offenses may be joined in an indictment" as separate counts if they "(1) are of the same or similar character; (2) are based on the same conduct or are otherwise connected together in their commission; or (3) are alleged to have been a part of a common scheme or plan." Ariz. R. Crim. P. 13.3(a).

¶13 Here, the superior court found the charges were "of the same or similar character," were "otherwise connected together in their commission," and were "part of a common scheme or plan." *See* Ariz. R. Crim. P. 13.3(a)(1)-(3). The record supports that finding, showing a common thread of Sopena's abuse. In each case, Sopena abused prepubescent female family members who lived or stayed at his home. And each offense was cross-admissible under Rules 404(b) (motive, opportunity, plan, absence of mistake) and 404(c) (aberrant sexual propensity to abuse young girls in the family). Joinder was thus appropriate. *See State v. Stuard*, 176 Ariz. 589, 596 (1993) ("If the evidence of one crime would have been admissible in a separate trial for the others, it is unlikely that Defendant suffered prejudice by the court's denial of severance.").

B. Prejudice

¶14 Sopena also argues that the charges stemming from his childhood were too remote in time, and therefore prejudicial when

included in the same trial. Although courts may consider remoteness under the Rule 403 analysis, *see* Ariz. R. Evid. 404(c)(1)(C)(i), it is not the only factor, nor is it dispositive. *See, e.g., State v. Salazar*, 181 Ariz. 87, 92 n.5 (App. 1994) (allowing properly framed evidence of rape that "occurred more than twenty years before the crime," because it was "similar in such matters as setting, age of victim, and mode of operation").

¶15 Moreover, the superior court offered a limiting instruction to the jury, mitigating any unfair prejudice. *See* Ariz. R. Evid. 105. The court admonished the jurors:

> Each count charges a separate and distinct[] offense. You must decide each count separately on the evidence with the law applicable to it, uninfluenced by your decision on any other count. You may find that the State has proved beyond a reasonable doubt all, some, or none of the charged offenses. Your finding for each count must be stated in a separate verdict.

¶16 Sopena has not shown unfair prejudice. *See Stuard*, 176 Ariz. at 599 (limiting instruction circumvented any prejudice from joinder of charges).

III. Sentencing

A. Cruel and Unusual Punishment

¶17 The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments." U.S. Const. amend. VIII. This right "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense." *Roper v. Simmons,* 543 U.S. 551, 560 (2005). A noncapital sentence is subject to a "narrow proportionality principle," which only prohibits "extreme sentences" that are "grossly disproportionate" to the crime. *State v. Berger*, 212 Ariz. 473, 475-76, ¶¶ 10, 13 (2006).

¶18 We compare "the gravity of the offense [and] the harshness of the penalty." *State v. Florez*, 241 Ariz. 121, 128, ¶ 23 (App. 2016) (citation omitted). "A particular defendant's prison sentence is not grossly disproportionate to the crime if it arguably furthers the State's penological goals and reflects a rational legislative judgment to which the court owes deference." *Florez*, 241 Ariz. at 128, ¶ 23 (cleaned up). *See* A.R.S. § 13–705(P)(1)(d)–(e) (designating molestation of a child, sexual conduct with a minor and kidnapping as "dangerous crimes against children" subject to

mandatory flat consecutive sentences, and including minors tried "as an adult"). An individual sentence can represent cruel and unusual punishment, but not the cumulative effect of consecutive sentences for multiple crimes. *Berger*, 212 Ariz. at 479, ¶¶ 27–28.

¶19 Sopena challenges his 54-year combined sentence for multiple offenses as cruel and unusual punishment. But an "Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." *Id.* at 479, ¶ 28 (citation omitted). A sentence does not become disproportionately long "merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." *Id.* ("This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences."). Because Sopena did not challenge any one sentence as cruel and unusual punishment, his argument fails. *See State v. Carver*, 160 Ariz. 167, 175 (1989).

¶20 Sopena relies on *State v. Kleinman*, 250 Ariz. 362, 365, ¶ 14 (App. 2020), and *State v. Davis*, 206 Ariz. 377, 385, ¶ 37 (2003). His reliance is misplaced. Unlike the defendants in *Kleinman* or *Davis*, Sopena was nearly 30 years old when he sexually assaulted his 8-year-old Niece; the victims did not initiate or voluntarily engage in sexual conduct with Sopena, *see State v. Fristoe*, 135 Ariz. 25, 30 (App. 1982); the victims did not request leniency; and Sopena expressed no remorse or accountability for his actions.

B. Concurrent Sentences

¶21 The State cross-appeals Sopena's concurrent sentences for three counts of molestation of a child. These sentences involved two victims: one count for Niece, and two counts for Sister B. We review de novo whether the superior court properly construed a sentencing statute. *State v. Brock*, 248 Ariz. 583, 593, ¶ 28 (App. 2020).

¶22 Under Arizona law, "molestation of a child" is punishable as a dangerous crime against children ("DCAC"). A.R.S. § 13-1410(B); *see also* A.R.S. § 13-705(F). DCAC offenses may run concurrently only if they involved one victim. A.R.S. § 13-705(M) (2017).[1] "The sentence imposed

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[1] The DCAC provision in effect when Sopena committed the crimes against Sister B, § 13-604.01(K) (1999–2001), is substantively the same as the 2017 provision applicable to the conviction involving Niece. We therefore refer to the 2017 statute only.

on a person for any other dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time, including child molestation and sexual abuse of the same victim." *Id.* This mandate is not optional; it "require[s the court] to impose consecutive sentences" for such convictions. *Brock*, 248 Ariz. at 593, ¶¶ 28, 30.

¶23 The superior court "declin[ed] to follow" *Brock* here, over the State's objection, and imposed concurrent sentences on the three molestation counts. That was error. The court must resentence Sopena consecutively on those three counts because the superior court's "failure to impose a sentence in conformity with mandatory sentencing statutes makes the resulting sentence illegal." *Brock*, 248 Ariz. at 592, ¶ 27 (citation and internal quotation marks omitted).

CONCLUSION

¶24 For the foregoing reasons, we vacate and remand Sopena's sentences for child molestation because those three sentences must run consecutively. We otherwise affirm.

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