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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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*,

v.

JONATHAN DAVID RIGGS, *Appellant*.

No. 1 CA-CR 22-0357
FILED 10-31-2023

Appeal from the Superior Court in Maricopa County
No. CR2021-130342-001
The Honorable Melissa Zabor, Judge

AFFIRMED

COUNSEL

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By Eliza C. Ybarra
Counsel for Appellee

Grand Canyon Law Group, Mesa
By Angela Poliquin
Counsel for Appellant

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MEMORANDUM DECISION

Judge Anni Hill Foster delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Kent E. Cattani joined.

F O S T E R, Judge:

¶1 Jonathan Riggs appeals his conviction of two counts of sexual abuse. For the following reasons, the conviction is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 Riggs was a massage therapist at a business that provided such services. Lily¹, also a massage therapist elsewhere, booked a massage at the business; Riggs was assigned as the therapist for the session. Lily noted early during the massage that Riggs' techniques did not seem quite right, but she attributed it to Riggs' inexperience. At one point during the massage, however, Riggs leaned over Lily and she felt his penis against her forehead while her eyes were closed. Then, during another portion of the massage, Riggs moved from applying normal therapeutic pressure on Lily's pectoral chest muscles to cupping and caressing her soft breast tissue. Riggs manipulated both of Lily's breasts in this manner. Lily did not stop the massage, assuming Riggs' intentions were therapeutic. As the session continued, Riggs began massaging Lily's abdominal muscles, but his strokes became broader and went lower on Lily's body until his hand went under Lily's underwear, and his fingers touched Lily's genitalia. At that point, Lily immediately got up, dressed, and left the premises.

¶3 Lily drove to a nearby parking lot, where she made several phone calls. First, she called the owner of the business ("Owner") to disclose the incident. Next, she called the non-emergency police line, but could not get through to anyone. She then called a friend who encouraged her to call 911. Lily did so and was directed to a family advocacy center for a forensic nurse examination. Lily was emotional throughout these calls. During the examination, swabs were taken from Lily's breasts and genitalia to test for DNA. Police later took a sample from Riggs for comparison.

¶4 Police interviewed Riggs the day after the incident. Riggs initially denied touching Lily inappropriately. Believing Riggs was not

¹ To protect the identity of the victim, a pseudonym is used.

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being fully cooperative, an officer falsely told him that his DNA had been found on Lily's breasts and genitalia as part of a ruse to gain more information. Riggs then admitted he made a mistake touching Lily's breasts and genitalia. The police offered Riggs the opportunity to write something to Lily and left Riggs alone for some time to do so. When police returned, Riggs had written an apology letter in which he said: "What I did was a huge mistake for working on areas too close for comfort . . . I promise to never stray from being professional and appropriate."

¶5 After a jury trial, Riggs was convicted of two counts of sexual abuse. Riggs timely appealed. This Court has jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A) and Arizona Rule of Criminal Procedure 31.2.

DISCUSSION

¶6 Riggs attacks three rulings from the superior court concerning (1) prohibiting discussion of the lack of DNA evidence, (2) admitting Lily's 911 call, and (3) prohibiting mention that Lily experienced Somato Emotion Release ("SER"). This Court reviews the superior court's rulings on the scope of closing arguments and its evidentiary rulings for abuse of discretion. *State v. Johnson*, 247 Ariz. 166, 182, ¶ 22 (2019) (scope of closing argument); *State v. Acuna Valenzuela*, 245 Ariz. 197, 207, ¶ 11 (2018) (evidentiary rulings).

I. THE COURT'S RULINGS ABOUT DNA EVIDENCE AND SER DID NOT PROHIBIT RIGGS FROM PRESENTING A COMPLETE DEFENSE.

¶7 Riggs attacks the superior court's rulings prohibiting discussion about the lack of DNA evidence and prohibiting discussion of SER. Riggs argues the rulings prevented him from presenting a complete defense. Due process grants criminal defendants the right to "a meaningful opportunity to present a complete defense." *State v. Abdi*, 226 Ariz. 361, 367, ¶ 27 (App. 2011) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). But this right is not absolute; the superior court has discretion to exclude testimony when the "probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Id.* at 367-68, ¶ 27 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006)).

- A. The DNA Ruling Allowed Riggs to Argue Reasonable Inferences and Present a Defense that the State Had Not Met Its Burden of Proof.

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¶8 A week before trial, the State and Riggs learned that the DNA comparison report from the crime lab was still pending and would not be ready for trial. The State moved the court to prevent Riggs “from eliciting testimony about [the] pending DNA comparison or arguing to the jury that a lack of DNA evidence gives rise to reasonable doubt.” The State asked to preclude any reference to DNA evidence to avoid commenting on Riggs’ invocation of his speedy trial rights under Arizona Rule of Criminal Procedure 15.6, because it was within seven days of trial and DNA would not be available until after the last day for holding trial lapsed. Ariz. R. Crim. P. 15.6(c); *see also* Ariz. R. Crim. P. 8.2(a). The Court rejected the State’s request to preclude any reference to DNA evidence, explicitly permitting Riggs to argue the lack of DNA evidence: “The Court is absolutely going to allow questions about [police] taking the DNA, when it was submitted, and all of that. [Riggs can] argue in closing with respect to evidence presented, evidence not presented.” It limited Riggs in only one aspect: “But ultimately asking why [police took DNA] in order to elicit, well, I didn’t have a strong enough case or something to that effect is not going to be allowed.”

¶9 Riggs contends the DNA ruling prevented him from arguing a reasonable inference that the State failed to meet its burden of proof based on the lack of DNA evidence. But the court allowed Riggs to argue the sufficiency of the State’s case without DNA, only limiting him from arguing that DNA would have exculpated him. Riggs not only *could* have but *did* argue in his closing that the lack of DNA weakened the State’s case: “You don’t have DNA to consider. They didn’t have it then. You don’t have it now. For your purposes, there is no DNA to consider because there isn’t [any]. So you can’t say, well, we have his DNA, we know this touch happened. There isn’t that evidence.” The superior court did not prevent Riggs from presenting inferences to the jury about the DNA evidence, and it did not abuse its discretion with this ruling.

B. The Ruling About SER Did Not Prevent Riggs from Presenting His Version of Events as a Defense.

¶10 When Owner confronted Riggs about the incident, Riggs said Lily experienced SER. Riggs also told police this theory during the interview the day after the incident. SER relates to “a form of massage therapy during which cerebrospinal fluid is moved through the head and spine, resulting in the release of ‘trapped’ emotions.” The State moved to prohibit Riggs from testifying about SER and to prohibit him from mentioning his comments about SER to Owner and to police. The State argued (1) Riggs was not an expert witness, (2) no expert witness had been disclosed, and (3) the technique was not generally accepted in the scientific

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community. The court granted the motion, preventing Riggs from testifying that Lily experienced SER. But the court allowed Riggs to cross-examine Lily about whether she discussed emotional topics during the massage and permitted him to testify that “[his] perception of her reaction was because of all these emotional things she’d been talking about through the course of the massage.”

¶11 Riggs contends the SER ruling prohibited him from providing context to Lily’s statements and prevented him from presenting his version of events. But the court’s ruling was limited; it clarified that “there’s nothing to prevent [Riggs] from cross-examining” Lily about the discussion they had about emotional topics. It also allowed Riggs the opportunity to testify about his thoughts as to why Lily abruptly left the massage. The court stated, “there’s nothing to preclude [Riggs] from saying, you know, my perception of her reaction was because of all these emotional things she’d been talking about through the course of the massage, and then she just got up and left.”

¶12 At trial, the court permitted Owner to testify about his experiences with clients having emotional responses to massages. Owner testified that clients “can carry stress with them in their body so that massages can lead to some strong emotional reactions,” including “crying” and becoming “freaked out.” He testified that such reactions are not unusual. He also testified about the essence of SER but without mentioning the potentially confusing term. Riggs was allowed to testify in a similar manner but did not.

¶13 Riggs attempts to bolster his claim by arguing that the court precluded him from providing expert testimony about SER while allowing Lily and Owner to testify about other areas of “specialized massage therapist knowledge.” “Expert opinion evidence on a matter is admissible when the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact, but not when it is of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.” *State v. Mosley*, 119 Ariz. 393, 399-400 (1978). The superior court has discretion to determine the areas where expert testimony would be appropriate. *Id.* at 400.

¶14 Riggs identifies Owner’s “expert” testimony that clients can become emotional during massages and that people can carry stress within their bodies. As for Lily’s “expert” opinions, Riggs points to her testimony “regarding proper draping, modesty, and professional boundaries for touch.” Again, Owner’s testimony discussed SER without using the term,

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and Lily's testimony concerned her expectations, not as a professional but as a client, for how her massage therapist should cover and protect her modesty. Riggs did not proffer expert testimony regarding SER and he was not precluded from testifying about emotional responses to massages. His decision not to testify as the court allowed does not result in an abuse of discretion.

II. THE SUPERIOR COURT PROPERLY ADMITTED LILY'S 911 CALL AS EVIDENCE.

¶15 Before trial, Riggs moved to preclude the State from introducing Lily's 911 call, arguing it was inadmissible hearsay. The court denied Riggs' motion, finding the call admissible as an excited utterance.

¶16 Riggs argues that the court erred in admitting Lily's 911 call because it was inadmissible hearsay not covered by either the excited utterance or prior consistent statement exception and that it was unfairly prejudicial. Hearsay is a statement made by a person when not "testifying at the current trial or hearing" which "a party offers in evidence to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c). Hearsay is inadmissible unless one of the exceptions applies. Ariz. R. Evid. 802. One such exception is "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Ariz. R. Evid. 803(2). Yet, even if the statement meets one of the exceptions, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . or needlessly presenting cumulative evidence." Ariz. R. Evid. 403.

¶17 Riggs contends the call was not an excited utterance "because it was [Lily's] fourth call and the third time she had described the incident." Admitting a statement as an excited utterance requires three things: "(1) a startling event, (2) a statement made soon after the event to ensure the declarant has no time to fabricate, and (3) a statement which relates to the startling event." *State v. Cabrera*, 250 Ariz. 356, 359, ¶ 9 (App. 2021) (quoting *State v. Bass*, 198 Ariz. 571, 577, ¶ 20 (2000)). A statement's spontaneity "is determined from the totality of the circumstances, including the length of time between the event and statement, the physical and emotional condition of the declarant, and the nature of the offense." *Id.* "*The physical and emotional condition of the declarant is the important thing.*" *State v. Rivera*, 139 Ariz. 409, 411 (1984) (quoting M. Udall and J. Livermore, *Law of Evidence*, § 127 at 270) (emphasis in original).

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¶18 The 911 call meets all three requirements for a statement to qualify as an excited utterance. Here, the incident was startling enough for Lily to stop the massage, dress while Riggs remained in the room, inform the business owner, and call the police. Being groped during a massage is a startling event. Lily's report to 911 also related to this startling event because she was reporting the incident to the authorities. And while Lily did not call 911 immediately after the incident, it was soon enough for her to remain physically and emotionally under the stress of the event. She called within an hour, she was crying and emotional as she spoke, and during the 911 call she provided details of the startling event. Because the 911 call was within the excited utterance exception, this Court need not address whether it also fell under the prior consistent statement exclusion. *See State v. Anaya*, 165 Ariz. 535, 538 (App. 1990).

¶19 Riggs also contends that the court should have excluded the call as unfairly prejudicial and cumulative. *See* Ariz. R. Evid. 403. "The trial court is in the best position to balance the probative value of evidence against dangers such as unfair prejudice . . . or presenting cumulative evidence." *State v. Fournier*, 2 CA-CR 2022-0108, 2023 WL 4752144, at *8, ¶ 38 (Ariz. App. July 26, 2023). "Unfair prejudice means an undue tendency to suggest decision on an improper basis . . . such as emotion, sympathy or horror." *State v. Riley*, 248 Ariz. 154, 177, ¶ 70 (2020) (quoting *State v. Schurz*, 176 Ariz. 46, 52 (1993)) (omission in original). Evidence is not unfairly prejudicial just because it is harmful. *Id.* at ¶ 71. Cumulative evidence "augments or tends to establish a point already proven by other evidence." *Felipe v. Theme Tech Corp.*, 235 Ariz. 520, 526, ¶ 22 (App. 2014) (quoting *State v. Kennedy*, 122 Ariz. 22, 26 (App. 1979)). Here, the superior court stated it "[did] not believe [the call was] designed to inflame the jury or cumulative to the effect that it cannot be used." The superior court did not abuse its discretion when allowing the 911 call to be admitted.

CONCLUSION

¶20 For the foregoing reasons, this Court affirms Riggs' conviction for both counts of sexual abuse.



AMY M. WOOD • Clerk of the Court
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