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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 08-0859
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
BILL CLARK FLAKE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-030778-001 SE

The Honorable Steven P. Lynch, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Melissa Parham, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Thomas K. Baird, Deputy County Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Bill Clark Flake ("Appellant") appeals his convictions of (1) three counts of Sexual Conduct with a Minor, dangerous crimes against children, class 2 felonies and violations of A.R.S. § 13-1405; (2) one count of Sexual Abuse, a class 3 felony and a violation of A.R.S. § 13-1404; and (3) two counts of Sexual Conduct with a Minor, class 6 felonies and violations of A.R.S. § 13-1405. For the reasons that follow, we affirm.

FACTS¹ AND PROCEDURAL BACKGROUND

¶2 In 2007, Appellant's niece, T.,² went to the police because she was concerned that her cousin, D., was being abused by Appellant. When she was asked why she was concerned, T. told the police about two incidents in which Appellant abused her. The first incident occurred when T. was three or four and Appellant was babysitting. After Appellant dropped T.'s brother off at school, Appellant slid his hand into T.'s shorts and began fondling her vagina as he drove them home. The second episode occurred when T. was five or six and Appellant was babysitting T. and her siblings. As T. was walking past Appellant to join her siblings outside to play, Appellant grabbed her and began tickling her and blowing raspberries on

¹ We view the facts in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against Appellant. *State v. Nelson*, 214 Ariz. 196, 196, ¶ 2, 150 P.3d 769, 769 (App. 2007).

² T. was twenty-one at the time of trial in 2008.

her stomach. Then he pushed her pants and underpants aside and began kissing her on her stomach and vagina and then licked her vagina. While she was with the police, T. made a confrontation call to Appellant and asked him about his relationship with D. During this call, Appellant admitted to abusing D. but denied abusing T.³

¶13 In July 2007, J.⁴ went to the police and reported three instances in which Appellant abused her. The first two instances occurred when J. was six. Both times, Appellant digitally penetrated her. The third instance occurred when J. was eleven or twelve while she was watching a movie in the bedroom of her grandparents' house. She and Appellant were lying on the bed, with J. in front of him, facing the screen. Appellant slid his hand down her shoulder and grabbed her breast and then rested his hand on her hip.

¶14 In July 2007, D. was picked up by Child Protective Services and interviewed by the police.⁵ D. testified that Appellant abused her on at least two occasions. The first occasion was in October 2006; the second occurred two months

³ When Appellant was questioned by police, however, Appellant admitted to abusing both T. and T.'s younger sister, J.

⁴ At the time of trial, J. was eighteen.

⁵ At the time of trial, D. was seventeen.

later. In both instances, Appellant digitally penetrated D. while they were watching a movie.

¶15 On March 5, 2008, Appellant was indicted and charged with (1) one count of Molestation of a Child (a class 2 felony); (2) three counts of Sexual Conduct with a Minor (class 2 felonies); (3) one count of Sexual Abuse (a class 3 felony); and (4) two counts of Sexual Conduct with a Minor (class 6 felonies). A five-day trial commenced on July 28, 2008. During the course of the trial, the jury viewed a video recording of a police interview of Appellant in which he confessed to sexual contact with each of the three victims. The jury returned a guilty verdict on six of the seven counts, and a not guilty verdict on one count of Molestation of a Child. The trial court sentenced Appellant to a mitigated term of 15 years imprisonment, with 434 days of presentence incarceration credit, followed by two separate and consecutive 20-year prison terms. The court imposed suspended sentences of lifetime probation for each of the remaining counts.

¶16 On appeal, Appellant raises two issues that arise from the following events at trial. On the third day of trial, the father of J. and T. ("Father") testified.⁶ During his testimony, the following exchange occurred:

⁶ Father is also Appellant's brother and D.'s uncle.

THE STATE: Did you talk with your brother about any of these allegations?

FATHER: No, I have not.

THE STATE: Why is that?

FATHER: I know my children, and in a matter like this I know they would not lie. I didn't feel I needed to. I believe my kid.

DEFENSE COUNSEL: Objection, judge. Opinion on the ultimate issue.

THE COURT: I'll overrule the objection, but ladies and gentlemen of [the] jury, obviously [Father's] testimony on his opinion of what his daughters' truthfulness is should not impact your judging the facts of the case.

¶17 The prosecutor continued questioning Father and attempted to determine whether he was aware that anything might be amiss between his daughters and his brother:

THE STATE: Okay. During the course of the, I guess, 18 to 20 years that [J.] and [T.] have been around, were you aware of any unusual activity between them and your brother Bill?

FATHER: We came home from - I don't remember where we had gone, whether it was dinner or grocery shopping or someplace, but the kids expressed -

DEFENSE COUNSEL: Objection. Hearsay.

THE COURT: Sustained.

FATHER: I don't know how to answer, other than what my kids told me.

THE STATE: Just whether or not there was something you are aware of regarding the allegations?

FATHER: Yes.

THE STATE: Regarding the allegations in this case or something else?

FATHER: Something else.

¶18 The jury also heard the testimony of Detective Alonzo, who had conducted interviews of the three victims and Appellant. On direct examination, after detailing her training and experience investigating child sex crimes and with performing forensic and suspect interviews, she described Appellant's demeanor during her interview with him. She explained how he often paused before answering her questions and how he vacillated among volunteering information, waiting for the detective to offer him a choice of scenarios, and claiming he did not recall certain events.⁷ Defense counsel did not object to this line of questioning. He did, however, cross-examine the detective regarding her purpose for interviewing Appellant:

DEFENSE COUNSEL: And when you went in that room to interrogate Bill, you went in there to get a confession?

DETECTIVE: To get the truth.

DEFENSE COUNSEL: Well, you went in there to get a confession?

DETECTIVE: To get the truth.

DEFENSE COUNSEL: Well, he told you from the get-go about [D.], correct?

⁷ Select portions of the suspect interview substantiating the detective's observations were admitted and published to the jury.

DETECTIVE: Correct.

DEFENSE COUNSEL: And he denied doing anything with [J.] or [T.], correct?

DETECTIVE: Initially.

DEFENSE COUNSEL: Right. But you kept questioning him?

DETECTIVE: Yes, I did.

DEFENSE COUNSEL: You kept questioning him until he made the admission that we just saw on the TV?

DETECTIVE: Correct.

¶19 The detective's testimony continued into the next day of trial, when the following exchange occurred during re-direct examination:

THE STATE: When a suspect tells you in the investigation, when you say "There's allegations against you," and he responds "I don't remember," what does that indicate to you?

DEFENSE COUNSEL: Objection. Speculation.

THE COURT: Is this just a general question?

THE STATE: At first, yes[.]

THE COURT: I'll overrule it.

THE STATE: Go ahead.

DETECTIVE: In my experience with answers like that, that led me to believe that perhaps there's more there that they are not coming forth with.

THE STATE: A[nd] that's why you continue on asking more questions?

DETECTIVE: Yes.

¶10 Appellant timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1).

DISCUSSION

I. Opinion Testimony

¶11 Appellant argues that the trial court erred when it allowed the State to elicit improper opinion testimony from Father and Detective Alonzo. We disagree.

¶12 We review the trial court's rulings on the relevance and admissibility of evidence for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, 10, ¶ 15, 66 P.3d 50, 53 (2003). Testimony regarding the truthfulness of a statement made by another witness is prohibited in Arizona. *State v. Boggs*, 218 Ariz. 325, 335, ¶ 39, 185 P.3d 111, 121 (2008). "Determining veracity and credibility lies within the province of the jury, and opinions about witness credibility are 'nothing more than advice to jurors on how to decide the case.'" *Id.* (citation omitted).

A. Father's Testimony

¶13 Appellant contends that the trial court erred when it overruled his objection to Father's explanation of his reasons

for not discussing the allegations with his brother.⁸ He argues that Father impermissibly vouched for the reliability of his daughters' statements, and that the limiting instruction was insufficient to eliminate the prejudice from such testimony.

¶14 "Evidence inadmissible for one purpose may be admitted if admissible for another purpose." *State v. Williams*, 209 Ariz. 228, 234, ¶ 25, 99 P.3d 43, 49 (App. 2004). Here, Father's testimony was relevant to his own credibility. One would expect a reasonable jury to question why a father would fail to confront an alleged abuser of his own daughters. To "draw the sting" from any such inquiry on cross-examination, it is understandable that the State would choose to address it during direct examination. To be sure, the question would have been beyond criticism if asked by the defense. The testimony was therefore relevant to explain why Father elected not to confront his brother, and the trial court correctly overruled Appellant's objection.

¶15 Moreover, upon properly overruling the objection, the court issued a limiting instruction *sua sponte*, admonishing the

⁸ Appellant asserts for the first time in his reply brief that Father's testimony regarding his reasons for declining to discuss the allegations with his brother was irrelevant and was therefore inadmissible on this ground. Although we need not address issues not presented in a party's opening brief, *State v. Guytan*, 192 Ariz. 514, 520, ¶ 15, 968 P.2d 587, 593 (App. 1998), we do so here because whether the testimony is relevant is material to the question whether the testimony was properly admissible on other grounds.

jury against considering Father's opinion as evidence of the veracity of his daughters. This, combined with the powerful extrinsic evidence of Appellant's guilt, including the victims' testimony and Appellant's admissions, convinces us that Appellant was not unduly prejudiced by the testimony.

¶16 Accordingly, even were we to find error, it would be harmless. See *State v. Schroeder*, 167 Ariz. 47, 50-51, 804 P.2d 776, 779-80 (App. 1990) (holding that where trial court sustained defendant's objections to improper opinion testimony about victim's credibility and issued a curative instruction, the error was harmless); see also *State v. Herrera*, 203 Ariz. 131, 135, ¶¶ 7-8, 51 P.3d 353, 357 (App. 2002) (holding that trial court did not abuse its discretion when it promptly issued a curative instruction after sustaining an objection to an improper comment on defendant's guilt). We conclude the trial court did not abuse its discretion in overruling Appellant's objection to Father's testimony.

B. Detective Alonzo's Expert Testimony

¶17 Appellant also argues that the trial court committed error when it permitted Detective Alonzo to testify during re-direct about criminal suspects' behavior during interrogations and specifically about Appellant's demeanor. Appellant contends that this amounted to an impermissible comment on the

credibility of the defendant and an invasion of the province of the jury. We disagree.

¶18 The defense attempted on cross-examination to demonstrate that Detective Alonzo acted with the purpose of gaining a confession. That line of questioning appears to have been calculated to persuade the jury that Detective Alonzo persisted in her questioning in an effort to wear down Appellant and get him to confess to acts he did not recall. Faced with this attack on the detective's credibility, the State properly rehabilitated her by asking questions pertaining to her approach to questioning suspects who responded to questions by stating they "did not recall."

¶19 On re-direct examination, Detective Alonzo testified that in her experience, when suspects state that they cannot recall certain events, this may indicate that they are withholding information -- prompting her to question them further in this area. And despite Appellant's contention that the detective was unqualified to testify as an expert, Detective Alonzo's extensive experience with investigating child sexual abuse and with conducting forensic and suspect interviews qualified her to testify as an expert with respect to behaviors manifested by suspects during interviews. *See State v. Knapp*, 114 Ariz. 531, 541, 562 P.2d 704, 714 (1977) (trial court has wide discretion to determine when expert testimony from officer

on interrogation techniques is warranted); *cf. State v. Kevil*, 111 Ariz. 240, 246-48, 527 P.2d 285, 291-93 (1974) (holding that the trial court did not abuse its discretion by permitting a police officer, an undisclosed expert witness, to testify about "an objectively discernable pattern in certain robberies which are well known throughout the law enforcement community.").

¶20 While Appellant contends that Detective Alonzo's testimony invaded the province of the jury because it impermissibly commented on Appellant's credibility, the trial court clarified and the State agreed that the testimony to which Appellant objected pertained to the significance of a *suspect* claiming not to recall certain events, not to *the defendant* in this case. Accordingly, we find no abuse of discretion.⁹

II. Prosecutorial Misconduct

¶21 Appellant also contends that the State engaged in prosecutorial misconduct when it improperly elicited "other act" evidence during Father's testimony. We disagree.

¶22 "When a timely objection is made, reversal is warranted if 'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying the

⁹ The State contends that this issue was not properly preserved because Appellant only objected to Detective Alonzo's testimony on the grounds of speculation; the State therefore argues that we should review only for fundamental error. Because we conclude that Appellant's claim fails to withstand even an abuse of discretion analysis, this argument is moot.

defendant a fair trial.'" *State v. Speer*, 221 Ariz. 449, 458, ¶ 42, 212 P.3d 787, 796 (2009) (citation omitted). Absent such objection, our review is limited to fundamental error. *Id.* To establish fundamental error, Appellant must demonstrate that fundamental error occurred and that it caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005).

¶23 "Prosecutorial misconduct sufficient to justify reversal must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (citation omitted) (internal quotation marks omitted). Prosecutorial misconduct "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial." *Pool v. Superior Court (State)*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984) (footnote omitted). To determine whether the alleged misconduct constitutes fundamental error, "we focus on the probability that it influenced the jury and whether the conduct denied the defendant a fair trial." *State v. Wood*, 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994).

¶124 Appellant contends that the prosecutor impermissibly called the jury's attention to inadmissible "other act" evidence during his direct examination of Father where he inquired whether Father was aware of any improprieties between his daughters and his brother. When Father responded affirmatively, the prosecutor clarified, "Regarding the allegations in this case or something else?" And Father responded, "Something else."

¶125 Ariz. R. Evid. 404(b) provides a general prohibition against admitting evidence of other acts "to show action in conformity therewith."¹⁰ While the prosecutor's follow-up question, clarifying whether the allegations pertained to "this case or something else" was perhaps imprudent, we discern no fundamental error. There was no evidence that the prosecutor intentionally engaged in the improper conduct or that he did so with indifference or the specific intent to prejudice Appellant. See *State v. Roque*, 213 Ariz. 193, 228, ¶ 155, 141 P.3d 368, 403 (2006). Appellant does not raise any additional references to "other act" evidence. This single question and response

¹⁰ With respect to character evidence in sexual abuse cases, however, evidence of other acts may be admitted "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). But because of the vague nature of Father's response, there was insufficient information to determine that Appellant committed relevant other acts. Accordingly, Father's testimony would not be admissible pursuant to Rule 404(c), and we limit our discussion to Rule 404(b).

standing alone does not amount to prosecutorial misconduct. Because we find no prosecutorial misconduct, we conclude there was no fundamental error.

CONCLUSION

¶26 For the foregoing reasons, we affirm.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

DANIEL A. BARKER, Judge