DIVISION ONE
FILED: 05/31/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0796
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JEROME LAMONT KEYS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-154695-001 DT

The Honorable Timothy J. Ryan, Judge
The Honorable Kristin C. Hoffman, Judge

AFFIRMED AS CORRECTED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Terry Reid, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Jerome Lamont Keys timely appeals his convictions for three counts of child molestation and one count of sexual conduct with a minor under 12 years of age, each a class two felony and dangerous crime against children. The superior court sentenced Keys to concurrent 17-year prison terms on two of the convictions of child molestation, a consecutive term of life in prison without the possibility of release for 35 years on the conviction for sexual conduct with a minor, and a consecutive 17-year prison term on the third conviction for child molestation. Keys timely appealed.

¶2 On appeal, Keys argues the superior court improperly precluded one of his witnesses from testifying, interfered with his constitutional right to a public trial by excluding this witness from the courthouse, and violated his right to unanimous verdicts by failing to take remedial action to avoid the possibility of non-unanimous verdicts on duplicitous charges. He also argues the evidence was insufficient to support one of his convictions for child molestation. For the reasons that follow, we disagree with the arguments and affirm his convictions. We agree with Keys, however, that the superior court failed to correctly calculate and apply his presentence incarceration credit and thus correct his sentence on two of his convictions.

DISCUSSION

I. Preclusion of Witness

¶3 Keys first argues the superior court abused its discretion in precluding him from presenting a witness at trial as a discovery sanction. We agree with Keys; however, because he failed to make a sufficient offer of proof regarding this witness's anticipated trial testimony, we cannot say the superior court committed reversible error in precluding the witness.

A. Standard of Review

¶4 We review a superior court's ruling precluding a criminal defendant's evidence as a non-disclosure sanction for an abuse of discretion. *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *State v. Sandoval*, 175 Ariz. 343, 347, 857 P.2d 395, 399 (App. 1993). Thus, an abuse of discretion occurs if the superior court makes an error of law or the record does not support its decision. *Merlina v. Jejna*, 208 Ariz. 1, 3, ¶ 6, 90 P.3d 202, 204 (App. 2004).

B. Background

¶5 On the day before trial, the State moved to preclude Keys's sister ("Sister") as a witness.[1] The State argued Sister should be precluded because she had failed to appear for a pretrial interview as ordered by the court. Opposing the motion, defense counsel generally described Sister's anticipated trial testimony, *see infra* ¶ 11, and told the court Sister had been evicted from her home on the day of the interview and her car had been repossessed with her cell phone inside it, leaving her without "any way of communicating with anybody at that time." The court then questioned Sister about her non-compliance with the court's order to appear for the interview, and she confirmed the eviction and repossession. The superior court then granted the State's motion, finding an insufficient showing to justify non-compliance with its interview order.

C. Law and Analysis

¶6 Pursuant to Arizona Rule of Criminal Procedure ("Rule") 15.7(a)(1), when a party violates a discovery rule, the superior court may impose "any sanction it finds appropriate" and such sanctions "include, but are not limited to: . . . [p]recluding or limiting the calling of a witness [or] use of evidence or argument in support of or in opposition to a charge or defense." Any sanction should have a minimal impact on the

[1]The State also moved to preclude other defense witnesses. Defense counsel informed the court Keys did not intend to call these other witnesses.

merits of the case. *Towery*, 186 Ariz. at 186, 920 P.2d at 308. Thus, precluding material evidence is rarely appropriate. *Id.* Nevertheless, although a defendant has a constitutional right to present a defense, this right is subject to the obligation to comply with discovery rules. *See Williams v. Florida*, 399 U.S. 78, 81-82, 90 S. Ct. 1893, 1896, 26 L. Ed. 2d 446 (1970) (upholding requirement that defendant make disclosure of alibi defense).

¶7 Here, the superior court sanctioned Keys because Sister failed to appear for the court-ordered interview. But, Rule 15 authorizes the imposition of sanctions "if a *party* fails to make a disclosure required by Rule 15." Ariz. R. Crim. P. 15.7(a) (emphasis added). The failure of a non-party witness to comply with a court order to appear for an interview is not a valid basis for sanctioning a party when, as here, the court is not presented with any evidence the party played any role in the witness's failure to comply with the court's order or bore some responsibility to ensure the witness's appearance. In this case, if the State wanted to enforce the superior court's order, it should have taken steps to ask the court to sanction the witness or compel her testimony.

¶8 The State argues, however, the superior court's sanction order was appropriate because Keys failed to disclose Sister's address in his notice of supplemental witnesses as

required by Rule 15.2(c). We disagree; events in the case cured Keys's non-compliance. First, at a status conference on March 2, 2009, the court, under the mistaken impression trial was to begin that day, ordered counsel to provide the clerk of the court Sister's address because she had failed to appear for trial. Second, on March 3, 2009, the day actually set for trial, Sister appeared in court in response to a defense subpoena, and the court then ordered her to appear for the interview and warned her that her failure to appear could result in various sanctions, including arrest.

¶9 Accordingly, under these circumstances the superior court should not have granted the State's motion to preclude the witness. But, that is not the end of the matter.

¶10 Although the superior court should not have precluded Sister's testimony under Rule 15.7, Keys failed to make an adequate offer of proof for purposes of our review. "Error may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context." Ariz. R. Evid. 103(a)(2). An offer of proof serves two purposes: In addition to putting the superior court in a better position to make a ruling on whether the evidence is subject to preclusion, it permits the appellate court to determine from the description whether any error was harmful in the context of the case. *Jones*

v. Pak-Mor Mfg. Co., 145 Ariz. 121, 129, 700 P.2d 819, 827 (1985) (citing M. Udall & J. Livermore, *Arizona Law of Evidence*, § 13, at 20 (2d ed. 1982)). "These purposes naturally imply that an offer of proof should be sufficiently detailed to clearly state what facts the evidence would establish and show why the excluded evidence should be admitted." 1 Ariz. Prac., Law of Evidence § 103.3, at 9 (4th ed. 2000).

¶11 Here, when asked by the superior court for an offer of proof regarding the witness's anticipated testimony, defense counsel generally explained Sister would testify regarding her observations:

> [Sister] and her two boys were living in the household where these events were said to have occurred, so she would be a witness in that regard.
>
> My understanding is that the State is bringing in Wendy Dutton to talk about victimology and I would expect that [Sister] would have some observations of these two girls' behavior after the events were said to have occurred with respect to [Keys].

This offer of proof was, to put it plainly, deficient on the details. Although the record reflects Sister lived with Keys and the victims' family for two months -- from the end of June to the end of August 2008 -- the superior court and, now on review, this court can only speculate as to what Sister would testify she saw. Did Sister see the victims "acting out?" Did she see Keys disciplining the victims? Did she see Keys trying

to maintain an appropriate relationship with the victims? On this record, one can only guess.

¶12 Further, we cannot determine from defense counsel's description of Sister's anticipated testimony whether the court's exclusion of it was prejudicial. For example, in her offer of proof, defense counsel may have been suggesting Sister "would have some observations" that would counter the anticipated trial testimony of Wendy Dutton, the State's expert witness regarding child-abuse victims. But, given the lack of detail in the offer of proof, we are again left to guess as to what Sister would have said vis-à-vis Dutton. And, although it is clear from the trial testimony of various witnesses that Sister observed Keys, the victims, and some of their interactions, the incidents of abuse occurred when Keys and the victims were alone and thus whatever Sister saw may well be immaterial to Keys's innocence or guilt.[2] Finally, even if we were to assume that, at best, Sister might have been able to testify Keys acted appropriately around the victims, this testimony would have been cumulative because other witnesses testified to this.

[2]In his interview with a detective (played to the jury at trial), Keys asserted there was "nobody else around but us" -- a reference to himself and the victims -- when the incidents occurred. The detective confirmed this, testifying she had not asked Sister about the victims' allegations because the victims had "indicated" they were alone with Keys during the incidents.

¶13 In short, we do not doubt Sister observed the victims and Keys and may have had relevant testimony to offer, but on the record presented, it is impossible for us to determine whether the court's exclusion of Sister's testimony prejudiced Keys and constituted reversible error. *State v. Hill*, 174 Ariz. 313, 329, 848 P.2d 1375, 1391 (1993); *see also State v. Fendler*, 127 Ariz. 464, 482-83, 622 P.2d 23, 41-42 (App. 1980) (holding no prejudice to warrant reversal for preclusion of testimony when "appellant's offer of proof was insufficient to fully inform the court of the relevancy, let alone the vitality, of the proposed testimony").

II. Right to Public Trial

¶14 Keys next argues the superior court interfered with his constitutional right to a public trial by excluding Sister from the courtroom. We disagree.

¶15 Both the federal and Arizona constitutions guarantee a defendant the right to a public trial. U.S. Const. amend. VI; Ariz. Const. art. 2, § 24. This right is for the benefit of the accused as it ensures judges, lawyers, and witnesses properly carry out their duties, *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 2215, 81 L. Ed. 2d 31 (1984), and reflects "the notion, deeply rooted in the common law, that justice must satisfy the appearance of justice." *Levine v. United States*, 362 U.S. 610, 616, 80 S. Ct. 1038, 1042, 4 L. Ed. 2d 989 (1960)

(internal quotation marks and citation omitted); *see also In re Oliver,* 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 506 n.25, 92 L. Ed. 2d 682 (1948) (public trials are for the benefit of the defendant so "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions") (quoting Cooley, 1 *Constitutional Limitations* 647 (8th ed. 1927)). "Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system." *Gannett Co. v. DePasquale*, 443 U.S. 368, 383, 99 S. Ct. 2898, 2907, 61 L. Ed. 2d 608 (1979).

¶16 "The right to a public trial, however, is not absolute and must give way in some cases to other interests essential to the fair administration of justice." *United States v. Sherlock*, 962 F.2d 1349, 1356 (9th Cir. 1989); *accord State v. Smith*, 123 Ariz. 243, 249, 599 P.2d 199, 205 (1979).

> The guarantee of a public trial does not mean that all of the public is entitled under all circumstances to be present during the trial. It means only that the public must be freely admitted so long as those persons and groups who make up the public

> remain silent and behave in an orderly fashion so that the trial may continue.

United States ex rel. Orlando v. Fay, 350 F.2d 967, 971 (2d Cir. 1965). Accordingly, the right to a public trial "has always been interpreted as being subject to the trial judge's power to keep order in the courtroom." *United States v. Hernandez*, 608 F.2d 741, 747 (9th Cir. 1979) (quoting *Fay*, 350 F.2d at 971).

¶17 A trial judge has the primary responsibility for controlling the conduct of spectators in the courtroom and the courthouse to ensure a fair and impartial judicial atmosphere. *State v. Bush*, 148 Ariz. 325, 330, 714 P.2d 818, 823 (1986). Here, as we explain, the superior court excluded Sister from the courtroom because of her improper conduct and did so to ensure Keys a fair trial.

¶18 After the court granted the State's motion to preclude Sister's testimony, Sister asked if she could "say something about that." The superior court told her she could not. After Sister responded, "That's not fair," the following exchange occurred:

> THE COURT: I'm sorry. You know, I have something to say. You can leave the courtroom right this second.
>
> [SISTER]: And I believe I will. It's not fair.
>
> THE COURT: Deputies, can you remind me, I have to talk to court security to make sure

> that she doesn't come back into any court building again.
>
> THE DEPUTY: Yes, sir.

¶19 Later in the hearing, the superior court denied defense counsel's request that it "revisit" its order barring Sister from returning to the courthouse, explaining:

> Your request is denied and you saw and heard and it's on F.T.R. just as I did. That was an entirely inappropriate display and a warning was given and it was still displayed and this case is fraught with emotion as it is already. I owe it to the attorneys and [Keys] to keep that to a back burner issue and let you work on the facts and the merits of the case. So it wasn't out of wrath or dismissiveness, but I see a loose cannon in your trial. I've taken a loose cannon off the deck, and that's what I did.
>
> . . . .
>
> I appreciate what it's like to be in your shoes and there's a conflicted point of, I'd like to be able to focus on the facts in my trial, at the same time, I'd like my client's family members to be present. I understand that, but at the same time, that was a person who was going to cause a possible mistrial by being present in the Court, or continuing to be disruptive, and that's why I like giving lots of opportunities to take a deep breath, to sit down and calm down. And I'm not unmindful of the fact that these are public proceedings and we try to keep them as public as possible for the entire public.

In its minute entry of the hearing, the court ordered Sister "not [to] return to this Courtroom or ANY courtroom in which a hearing is held with [Keys]."

¶20 Here, although the "cold record" does not reveal what Sister did to cause the court to enter the order it did, the record reflects Sister's conduct was inappropriate and remained inappropriate even after a warning. Indeed, although defense counsel asked the court to reconsider its order, she did not take issue with the court's description of Sister's conduct. Although the exclusion of a member of the public raises serious issues, here, the person excluded had already disobeyed a court order to appear for an interview and then had demonstrated an inability to conduct herself properly in the courtroom. Under these circumstances, the superior court could reasonably conclude the only way to ensure Sister would not disrupt the trial was to exclude her from the courtroom.

¶21 Keys's reliance on *Presley v. Georgia*, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010), *Waller v. Georgia,* 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), and *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty.*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984), is misplaced. In those cases, the trial judges excluded the entire public from the courtroom for a portion of the proceedings. *Presley*, 130 S. Ct. at 722, 175 L. Ed. 2d 675; *Waller*, 467 U.S. at 42, 104 S. Ct. at 2213,

81 L. Ed. 2d 31; *Press-Enterprise*, 464 U.S. at 503, 104 S. Ct. at 820, 78 L. Ed. 2d 629. In contrast, there was no true "closure" in this case. Only one person, Sister, was barred from the courtroom and no portion of the trial was conducted in secrecy. The superior court tailored its order of exclusion to resolve the particular problem caused by Sister's conduct, consistent with its obligation to ensure Keys received a fair trial. *See Sherlock*, 962 F.2d at 1358. Under the circumstances presented here, the superior court did not violate Keys's right to a public trial.

III. Right to Unanimous Verdict

¶22 Keys next argues he was deprived of the right to unanimous verdicts. Specifically, he argues the charges were duplicitous because the State presented evidence of multiple acts at trial and the superior court failed to take remedial measures to avoid the possibility of non-unanimous verdicts. We disagree.

¶23 In Arizona, a criminal defendant has the right to a unanimous jury verdict. Ariz. Const. art. 2, § 23. Because Keys did not raise the issue of the possibility of non-unanimous verdicts below, our review is limited to fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain relief under this standard of review, "a defendant must establish both that fundamental error exists and

that the error . . . caused him prejudice." *Id.* at ¶ 20. In determining whether error is fundamental, we consider the entire record and the totality of the circumstances. *State v. Hughes*, 193 Ariz. 72, 86, ¶ 62, 969 P.2d 1184, 1198 (1998).

¶24 An indictment is duplicitous when it charges two or more offenses in one count. *State v. Gerlaugh*, 134 Ariz. 164, 168, 654 P.2d 800, 804 (1982). The problem of duplicity may also arise when the State presents evidence of multiple criminal acts to prove one offense. *State v. Klokic*, 219 Ariz. 241, 244, ¶ 12, 196 P.3d 844, 847 (App. 2008). A duplicitous indictment and a duplicitous charge create the same hazard -- the potential for a non-unanimous jury verdict. *Id.* A superior court can avoid the risk of a non-unanimous verdict by either requiring the prosecution to elect which act constitutes the alleged crime or by instructing the jury it must unanimously agree the defendant committed the same specific criminal act. *Id.* at ¶ 14.

¶25 Although the superior court did not order the State to do so, the State elected which acts it was relying on to prove each count of the indictment. Each of the counts specifically described the nature of the act, and for the two counts of child molestation involving the younger victim, instead of specifying a date, the counts specified the offense as either the "first time" or "last time" in Arizona. For example, after alleging

the statutory elements of the offense of molestation, Count One included the parenthetical description "(to-wit: digital/vaginal contact, [first time])." Moreover, the State emphasized its election of the acts it was relying on for each count in closing argument -- specifically mentioning "the last time [it] happened" to one victim on August 26, 2008, and "the last time it happened" with the other victim. Finally, the verdict forms also included a parenthetical specifying the particular act that was the subject of each count. Thus, to the extent the jury instructions could be viewed as incomplete for not directing the jurors they must unanimously agree Keys committed the same specific criminal act for each count, the prosecutor's closing argument and the verdict forms cured any arguable prejudice. *See State v. Milke*, 177 Ariz. 118, 123, 865 P.2d 779, 784 (1993).

¶26 Finally, Keys's claim that some of the jurors may have based their decision to convict on the evidence he engaged in sexual misconduct with the victims on other uncharged occasions, notwithstanding the State's election of the specific acts for the charges, is mere speculation and insufficient to show fundamental error. *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006). On this record, Keys has failed to meet his burden of establishing the existence of

fundamental error and resulting prejudice with respect to his claim of non-unanimous verdicts.

IV. Sufficiency of Evidence

¶27 Count Two of the indictment alleged Keys committed child molestation "by engaging in sexual contact with [the victim], a child under fifteen years of age, (to-wit: digital/vaginal contact [last time])." On appeal, Keys challenges his conviction on this count, arguing the State failed to introduce any evidence he had contact with the victim's genitals or anus, as required by the applicable statute. We disagree.

¶28 In reviewing a sufficiency-of-the-evidence claim, we view the evidence in the light most favorable to sustaining the verdict and resolve all reasonable inferences against the defendant. *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997). Reversible error based on insufficient evidence occurs only if there is a complete absence of "substantial evidence" to support the conviction. *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. DiGiulio*, 172 Ariz. 156, 159, 835

P.2d 488, 491 (App. 1992) (quoting *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990)).

¶29 A person commits child molestation "by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age." Ariz. Rev. Stat. ("A.R.S.") § 13-1410(A) (2010).[3] "Sexual contact" is defined, in pertinent part, as "any direct or indirect touching, fondling or manipulating of any part of the genitals [or] anus . . . by any part of the body." A.R.S. § 13-1401(2).

¶30 While the victim did not testify at trial that Keys touched her genitals, the State introduced into evidence a video of her forensic interview conducted on the day she reported Keys's conduct. During this interview, the victim told the interviewer Keys had been touching her and her sister's vaginas even before they moved to Arizona. When asked about "the very last time that [Keys] touched [her] vagina," the victim answered "[y]esterday" and stated it occurred after she had fallen asleep in her mother's bedroom while her mother was at the pool. This evidence was more than sufficient to support the jury's conviction of Keys on Count Two.

[3]Although the Arizona Legislature amended certain statutes cited in this decision after Keys's offenses, the revisions are immaterial. Thus, we cite to the current version of these statutes.

V. Presentence Incarceration Credit

¶31 Finally, Keys argues the superior court should have awarded him credit for 397 days, rather than 395 days, of presentence incarceration and the credit should apply to the concurrent sentences imposed for Counts One and Two. The State concedes error and we agree.

¶32 A defendant is entitled to credit for "[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense." A.R.S. § 13-712(B) (2010). Police arrested and incarcerated Keys on August 31, 2008, and the superior court sentenced him on October 2, 2009. The court calculated this period as 395 days when, as Keys points out, it was actually 397 days.

¶33 In addition, the court mistakenly applied the presentence incarceration credit to only one of the two concurrent 17-year prison terms imposed for the convictions on Counts One and Two. A defendant is entitled to have presentence incarceration credit applied to each concurrent sentence. *State v. Cruz-Mata*, 138 Ariz. 370, 375, 674 P.2d 1368, 1373 (1983). We hereby correct Keys's sentences to reflect 397 days of presentence incarceration credit and direct the credit to apply to the concurrent sentences imposed on Counts One and Two. We further correct the sentencing minute entry and the order of confinement to reflect these changes. *See* A.R.S. §§ 13-712(E),

-4037(A) (2010); *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992).

CONCLUSION

¶34 For the foregoing reasons, we affirm Keys's convictions, but we correct the sentences imposed to reflect Keys is entitled to 397 days of presentence incarceration credit, such credit to be applied to the concurrent prison terms imposed on Counts One and Two.

_/s/_____
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

_/s/_____
JOHN C. GEMMILL, Judge

_/s/_____
PATRICIA A. OROZCO, Judge