DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0917
Appellee,	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
LUIS ANTHONY SANCHEZ,	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200801386

The Honorable Mark W. Reeves, Judge

AFFIRMED

Thomas Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And
Michael O'Toole
Attorneys for Appellee

Yuma County Public Defender — Yuma
by Edward F. McGee, Deputy Yuma County Defender
Attorneys for Appellant

H A L L, Judge

¶1 Defendant, Luis Anthony Sanchez, appeals from his convictions on two counts of sexual conduct with a minor under the age of twelve years. He maintains that (1) the trial court committed reversible error because it permitted him to be convicted of duplicitous charges; (2) the trial court committed "fundamental, reversible error" because the duplicitous charges did not provide him with adequate notice; and (3) the trial court committed "fundamental, reversible error" because the duplicitous charges did not offer him double jeopardy protection against potential future charges. For reasons set forth more fully below, we affirm.

FACTS[1] AND PROCEDURAL HISTORY

¶2 Defendant and his ex-wife, Candi, have three daughters: two younger twin daughters, A. and I., and an older daughter, E.[2] When defendant and Candi divorced, defendant was granted custody of their daughters because Candi was a methamphetamine addict and unable to care for them.

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[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vendever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

[2] We use the initial of each victim's first name to protect her privacy as a victim. *State v. Maldonado*, 206 Ariz. 339, 341 n.1, 78 P.3d 1060, 1062 n.1 (App. 2003).

¶3 From October 2005 to December 2007, while defendant worked in Iraq, his daughters lived in a trailer in Yuma with defendant's mother, Yolanda, and her husband. At night, the girls all slept in one bed in a bedroom at one end of the trailer while their grandparents slept on a make-shift bed formed from chair cushions in the middle area of the trailer.

¶4 During the two years he worked in Iraq, defendant would return home for a few weeks roughly every four months. When he did so, he would sleep either in the bedroom in the trailer with all of his daughters or take the three girls with him to a motel room. In fact, defendant testified at trial that his daughters stayed with him "at every hotel in Yuma . . . including the Royal Motor Inn."

¶5 The offenses in this case came to light after the twins made some statements during breakfast at a friend's house where all three girls had spent the night. Their friend's grandmother, Gerry, heard the comments and spoke further to the twins and to E. about them. After speaking with the three children, Gerry contacted the Yuma Police Department, and the case was eventually assigned to Detective D. M., a sex crime detective and forensic interviewer specializing in crimes against children, who interviewed the children.

¶6 The state charged that, between August 2006 and December 2007, defendant sexually molested his daughters.

During that time period, A. and I. were seven or eight years old and E. was ten or eleven years old. The indictment specifically charged that defendant engaged in "sexual intercourse or sexual oral contact" with A. and I. (Counts 1 and 2 respectively), and that he engaged in "sexual contact" with E. by "touching her breasts and vagina" (Count 3).

¶7 A. testified at trial that, on some visits when defendant returned to Yuma, he would sleep with her and her sisters in the trailer bedroom. On one occasion, while he was sleeping with them in the bedroom, defendant "took his private out and tried to stick it in [her] private." According to A., "first [defendant's private] touched on the outside of [her] private and then he tried -- he tried and . . . and it went in a little bit." She also testified that "it hurt" and that she "was scared" when it happened.

¶8 I. testified at trial that, when they were staying in the bedroom at the trailer and her dad was visiting, defendant "would try to pull down [their] pants" and "would try to put his . . . private part into ours." I. stated that defendant touched her private part "[o]nce [with] his private part and once with his fingers." She testified, when defendant had touched his private part to her private part, he "kind of put it in our private part . . . [i]n our pee pee" and that it "hurt" and "felt disgusting because he's our dad."

¶9 E. testified at trial that, when defendant came back from Iraq and stayed with them in the bedroom in the trailer, he would "stick his hand up [her] shirt" and also "down there" where her "bottom private." E. stated that defendant had touched "under my shirt my boobs" and where "you go pee out of." While defendant was doing this, she was "scared" and she "would try to push away or pretend [she] was asleep." E. also testified that she had told Yolanda about this, but that Yolanda never called the police.

¶10 Defendant testified at trial and denied committing the offenses or ever having inappropriately touched the three girls, even "accidentally." Defendant's theory of the case was that that the charges were the result of the three girls' renewed contact with their mother beginning in June 2007,[3] and that Candi had influenced them to fabricate their accusations.

¶11 Yolanda also testified on defendant's behalf. She stated that in February 2008, after the girls had started seeing their mother again, E. had told her, in the presence of the twins, that Candi had "yelled at them" and "told them that they had to tell [Candi] something bad about [defendant]." She also testified that she started seeing a change in behavior in the

[3] The testimony established that Candi had walked out on the marriage and abandoned her children when the twins were nine months old and E. was two years old and that she had little or no regular contact with them until June 2007 when she moved into the neighborhood of Yolanda's trailer.

girls once they started visiting Candi, and that they started "back talking" her and "using bad words." She also maintained that her grand-daughters had never informed her about any "sexual behavior" involving defendant, but had just told her about "something else" involving defendant.

¶12 A jury found defendant guilty of Count 1, sexual conduct with a minor under the age of twelve (A.), a Class 2 felony and dangerous crime against children; Count 2, sexual conduct with a minor under the age of twelve (I.), a Class 2 felony and dangerous crime against children; and Count 3, sexual abuse of a minor under the age of fifteen (E.), a Class 3 felony and dangerous crime against children. On November 17, 2009, the trial court sentenced defendant to mandatory consecutive life sentences without the possibility of release for 35 years on Counts 1 and 2 and to a consecutive, presumptive term of 5 years in prison on Count 3.

¶13 Defendant timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 and -4033 (2010).

DISCUSSION

I. Duplicitous Charges

¶14 Defendant maintains that, while not duplicitous on its face, the indictment in this case was rendered duplicitous

because the prosecutor "offered proof of multiple acts of sexual intercourse [with A. and I.] in support of each of the individual counts of sexual conduct with a minor." According to defendant, for this reason, "there is the distinct possibility" that the jury could have rendered a guilty verdict on either Count 1 or 2 that was not unanimous and thus requires our reversal of those convictions.[4] Defendant also faults the trial court for not having "cured the defect" through either its jury instructions or via special verdict forms.

¶15 The state argues that defendant raised no objections to either the trial court's proposed jury instructions or to the proposed verdict forms and that we need therefore review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (defendant who fails to object at trial forfeits right to appellate relief except in rare instances involving fundamental error). Defendant maintains that he "repeatedly objected" to the "other act evidence" on "precisely this basis," that the error was therefore preserved, and that we must apply a harmless error review. *See id*. at 567, ¶ 18, 115 P.3d at 607. In support of this argument, he points us to a portion of the transcript of a hearing on the state's motion to introduce evidence of the other

[4] Defendant does not appeal from his conviction on Count 3, sexual abuse of a minor, involving E.

acts for Arizona Rules of Evidence (Rule) 404(c)[5] purposes at which he made the following argument:

> Your Honor, the defense would argue that if the State is allowed to go forward in that manner then they are taking a shotgun approach to presenting evidence of a criminal act, in effect presenting evidence of a number of different events and the jury gets to take their pick of which one they think fits the indictment.
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> [T]he defense would say that the State needs to prove one or the other and then instruct the jury that these acts are not charged events. Or are they saying that more than one act proves the indictment, in which case you have multiplicitous acts charged with one indictment, which means that the indictment is not quite right. They're saying any number of acts can support the indictment.

¶16 We agree with the state. Based on defendant's claim that the charges as presented were duplicitous, he was required to request a clarifying jury instruction before the case was submitted to the jury in order to preserve the issue. *State v. Klokic*, 219 Ariz. 241, 244, ¶ 13, 196 P.3d 844, 847 (App. 2008). He therefore forfeited this claim absent fundamental error. *See Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Nonetheless, even assuming that defendant's stated objection to the admission of the other act evidence was sufficient to

[5] Rule 404(c) of the Arizona Rules of Evidence permits the state to introduce evidence of "other crimes, wrongs or acts" to establish that a defendant "had a character trait giving rise to an aberrant sexual propensity to commit the offense charged."

preserve this issue for appeal, and therefore applying the more rigorous abuse of discretion standard, *see State v. Ramsey*, 211 Ariz. 529, 532, ¶ 5, 124 P.3d 756, 759 (App. 2005) (reviewing a trial court's ruling on a motion to dismiss a criminal charge as duplicitous for an abuse of discretion), we find no error.

¶17 "An indictment that charges separate or multiple crimes in the same count is duplicitous." *Id*. at 532, ¶ 6, 124 P.3d at 759. "Duplicitous indictments are prohibited because they fail to give adequate notice of the charge to be defended, because they present the hazard of a non-unanimous jury verdict and because they make a precise pleading of prior jeopardy impossible in the event of a later prosecution." *Id*. A duplicitous charge occurs when only one crime is charged in the indictment but multiple alleged acts are introduced to prove that charge. *Klokic*, 219 Ariz. at 244, ¶ 12, 196 P.3d at 847. It presents the same hazards as a duplicitous indictment. *Id*. None of these hazards, however, is a consideration in the present case.

¶18 Defendant conceded at trial that the other act evidence to be presented through the testimony of A. and I. was admissible pursuant to Rule 404(c) and does not raise any objections to its admission on that basis on appeal. He argues only that the evidence of the additional four "sexual touchings" described by A. and the additional three incidents described by

I. left the jurors free to "pick and choose" among all of the acts they described when determining that defendant was guilty of sexual conduct, thereby undermining the unanimity of their guilty verdicts. Our review of the record shows this argument to be without merit.

¶19 "A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a person under the age of eighteen." A.R.S. § 13-1405(A) (2010). "Sexual intercourse" is defined as "penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva." A.R.S. § 13-1401(3) (2010). "Oral sexual contact" is defined as "oral contact with the penis, vulva or anus." A.R.S. § 13-1401(1) (2010). In this case, the state charged that defendant committed the crime of sexual conduct with a minor specifically by having "sexual intercourse" with A. (Count 1) and I. (Count 2).

¶20 Both in their interviews with Detective M. and at trial, A. and I. each testified that defendant engaged in only one act of sexual intercourse with each of them as that term is commonly understood, that is, actual penile/vaginal penetration. Furthermore, each of them testified at trial that, in each of their cases, the one act occurred in the bedroom at the trailer. Indeed, the state specifically argued in closing that the

"sexual intercourse" in Counts 1 and 2 involved the actual penile/vaginal penetration that occurred while the victims were in the bedroom at their grandmother's trailer. *See Hamilton*, 177 Ariz. at 410, 868 P.2d at 993 (finding no prejudice based on possibility of non-unanimous jury verdict when state clearly delineated during closing arguments what specific conduct constituted offenses charged in each separate count). Thus, it is sheer speculation on defendant's part to suggest that the other acts that were alleged to have occurred in a hotel room, and which did not involve actual physical penile/vaginal penetration, may have been relied upon by the jurors for their guilty verdicts on Counts 1 and 2.[6]

¶21 In addition, the trial court instructed the jurors that they had to find that the state proved defendant committed each element of each separate offense alleged beyond a reasonable doubt and that all twelve of them had to agree on the verdicts. It also instructed the jurors that they could only

[6] As the state notes, A. testified that at a hotel defendant rubbed his "private part" against her private part but only "on top of [her] underwear." A. also testified that defendant had licked his fingers and touched her private part while they were in the bedroom in the trailer. However, the state argued only that this act was the alleged intercourse with A. I. testified that defendant had also touched her private part with his fingers in the trailer, that it had felt "disgusting" and that it had "hurt." However, she also maintained that he had "just kind of touch[ed] it" without indicating any penetration as she did when she testified that he had put his "private part . . . *in* [her] pee pee." (Emphasis added.)

consider the other act evidence that had been presented to determine whether defendant had a character trait that predisposed him to commit the crimes charged, but admonished that the evidence did not otherwise lessen the state's burden to prove the defendant guilty of each crime charged beyond a reasonable doubt. Defendant raised no objections to the proposed final instructions at trial, and we must presume that the jurors followed them. *State v. Velazquez*, 216 Ariz. 300, 312, ¶ 50, 166 P.3d 91, 103 (2007).

¶22 Defendant likewise did not object to the proposed verdict forms and is now precluded from doing so on appeal. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. In any case, we find no error in either the instructions or the verdict forms the trial court provided in this case.

¶23 Defendant relies on *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003), for his argument that the state's evidence of multiple acts of sexual conduct at trial may render charges duplicitous even if the indictment in which they are with charged is not duplicitous on its face. However, *Davis* is readily distinguishable from this case.

¶24 In *Davis*, the defendant was charged with one count of sexual conduct with a minor for having sex with T.E. "on or about the 18th day of January 1999." 206 Ariz. at 388-89, ¶ 51, 79 P.3d at 75-76. The jury heard evidence, however, that the

defendant had sex with the victim on two separate occasions occurring at least eleven days apart, the latter dates being those of Super Bowl weekend. Although the prosecutor in *Davis* mentioned "briefly in closing" that the offense charged occurred on the 18th, she also argued that testimony supported a finding that the offense had occurred eleven days later. *Id*. The verdict form did not specify the date of the offense, and the trial court informed the jury that the exact dates of the offense were not important. *Id*. at 389, ¶ 51, 79 P.3d at 76. Our supreme court found that, because the state offered evidence of more than one offense to support this charge and because the events were not part of a single transaction, the charge involving T.E. was duplicitous. *Id*. at 390, ¶ 66, 79 P.3d at 77. It found fundamental error and reversed on this count because it reasoned that "the jury determination may have been other than unanimous." *Id*.

¶25 In the present case, defendant was charged with two separate counts each involving one act of sexual intercourse with each separate victim. Although Rule 404(c) evidence of other sexual acts involving each victim was also introduced at trial, the prosecutor argued, and the evidence supported, that the offenses charged involved only the one act of actual intercourse that occurred with each victim while in the trailer. Furthermore, the jury was instructed as to the proper use of the

other act evidence. Thus, unlike in *Davis*, the state in the present case did not present evidence of more than one offense to support the charges in either Count 1 or Count 2.

¶26 Also, unlike in the present case, the defendant in *Davis* offered more than one defense to the offenses with which he was charged. *Id*. at 389, ¶ 58, 79 P.3d at 76. He offered an alibi defense for the charge that he had sex with *any* of his victims over Super Bowl weekend and also denied having sex altogether with T.E. *Id*. Our supreme court in *Davis* found it "possible" therefore that some of the jurors accepted defendant's alibi defense for Super Bowl weekend but nonetheless found defendant guilty for an offense that occurred on January 18, while other jurors might have thought him not guilty of the January 18 event but convicted him for the Super Bowl weekend offense. *Id*. It found reversal warranted because it could not be certain of "which offense served as the predicate for the conviction." *Id*. at 390, ¶ 59, 79 P.3d at 77.

¶27 In the present case, the defendant offered only one defense. He denied committing any sexual acts with either A. or I. and maintained that their accusations were fabrications prompted by Candi's influence. Thus, unlike in *Davis*, the unanimity of the jurors' verdicts in this case would not have been affected by any lack of specificity in the indictment.

They could only accept or reject defendant's explanation of events, and they all simply rejected it.

¶28 Based on our review of the record, we find that the other act evidence presented in this case did not render the charges duplicitous. We also find no error, let alone fundamental error, in either the jury instructions or verdict forms provided by the trial court. Contrary to defendant's argument, reversal on Counts 1 and 2 is not warranted on this basis.

II. Adequate Notice of Crimes Charged

¶29 Defendant next argues that the lack of specificity in the indictment deprived him of adequate notice of the crimes of which he was accused and required to defend against. Defendant acknowledges that he did not raise this specific objection before the trial court. He has therefore forfeited relief on this basis absent a showing of fundamental error. *Henderson*, 210 Ariz, at 567, ¶ 19, 115 P.3d at 607. To prevail under this standard, the burden rests with defendant to establish both that fundamental error exists and that the error in his case caused him prejudice. *Id*. at ¶ 20, 115 P.3d at 607.

¶30 A duplicitous charge occurs when an indictment charges only one criminal act but multiple alleged criminal acts are introduced to prove the single crime charged. *Klokic*, 219 Ariz. at 244, ¶ 12, 196 P.3d at 847. Depending on the context, a

duplicitous charge can, like a duplicitous indictment, create the hazard of a non-unanimous jury verdict or deprive a defendant of adequate notice of the charge to be defended. *Id*.

¶31 Defendant contends that, because of the evidence of other acts committed at motel rooms, he was unclear about precisely which act he was called upon to defend when defending against the allegations in Counts 1 and 2. The record shows that defendant had adequate notice of the offenses with which he was charged in Counts 1 and 2 and was able to defend against them.

¶32 The state charged that defendant had sexual intercourse with A. (Count 1) and I. (Count 2). In the recording of the twins' interviews with M., which defendant presumably had prior to trial, A. tells M. that "one time" defendant put his private in her private was at her grandmother's trailer. I. also tells M. that, while in the bedroom in the trailer, defendant "tried" and "then he did put [his private] in me." According to I., he did it only the "one time." At the hearings on the state's Rule 404(c) motion, the prosecutor, defense attorney, and the trial court went over in great detail what the charged offenses were as opposed to the "other act evidence." The prosecutor noted that the charged acts involved what occurred at the trailer, not the hotels. Furthermore, the state specifically argued in its opening and

closing arguments that the sexual conduct charges involving A. and I. consisted of defendant "putting his penis in his daughter's vagina" for both A. and I. and that these acts occurred while the two girls resided in their grandmother's trailer. Thus, defendant had adequate notice that the charged offenses involved the acts of actual sexual intercourse that occurred in the trailer.

¶33 Moreover, defendant has not shown that any lack of specificity denied him a right essential to his defense that caused him prejudice in his case. *Henderson*, 210 Ariz. at 567, ¶¶ 19-20, 115 P.3d 607. His defense at trial was a blanket denial that he had committed any inappropriate sexual acts, let alone any of the crimes, of which he was accused and that A. and I. were simply lying. Therefore, his defense was not affected by whether the acts he denied were performed in a hotel room or a trailer. *See, e.g., State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989) (alleged defect with duplicitous count did not deny defendant "right essential to his defense" or cause prejudice when defendant's defense was that offenses charged never took place and victims fabricated stories); *Ramsey*, 211 Ariz. at 533, ¶ 7, 124 P.3d at 760 (alleged duplicity of charged offenses did not impair or prejudice ability to defend when global defense was that wife "set him up out of revenge" and defendant had not committed any of the charges). Consequently,

the trial court in this case committed no error, let alone fundamental error, by not *sua sponte* dismissing the charges in Counts 1 and 2 as duplicitous for failing to provide adequate notice.

III. Double Jeopardy

¶34 Finally, defendant argues that, due to the duplicitous charges in this case, he would never be able to effectively establish which of the claims of A. or I. the jury convicted him. Thus, if a new tribunal were to consider similar charges arising out of the same incidents it would not be able to determine "precisely which of his acts have already been punished" and potentially subject him to double jeopardy. *See Klokic*, 219 Ariz. at 244, ¶ 12, 196 P.3d at 847 (one hazard of duplicitous charges is inability of defendant to plead "prior jeopardy").

¶35 First, defendant is not currently being prosecuted for any additional charges arising out of these events. Therefore this claim is premature. *See, e.g., State v. Rasch*, 188 Ariz. 309, 312-13, 935 P.2d 887, 890-91 (App. 1996) (double jeopardy issue not ripe until defendant prosecuted following mistrial; issue normally presented in second prosecution with motion to dismiss for double jeopardy). *See also United States v. Tovar-Rico*, 61 F.3d 1529, 1532 (11th Cir. 1995) (double jeopardy claim ripe if government decides to proceed with another trial using

same evidence; cannot speculate whether second proceeding will occur).

¶36 Second, for the reasons stated above, the charges of which defendant was convicted in this case are not duplicitous. Therefore, if the state engages in an additional prosecution of defendant based on this evidence, the entire record would clearly establish the offenses of which defendant was convicted and would be available to defendant to protect against double jeopardy. *See State v. Bruce*, 125 Ariz. 421, 424, 610 P.2d 55, 58 (1980) (record taken as a whole would substantiate double jeopardy bar if state seeks subsequent prosecution based on same acts); *see also State v. Schneider*, 148 Ariz. 441, 446, 715 P.2d 297 (App. 1985) (in defending against double jeopardy in possible future proceeding, defendant not limited to four corners of indictment but entire record available to bar subsequent prosecution).

CONCLUSION

¶37 For the reasons stated above, we affirm defendant's convictions and sentences on Counts 1 and 2.

_/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_/s/_____
JON W. THOMPSON, Judge

_/s/_____
LAWRENCE F. WINTHROP, Judge