DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ROBERT RICHARD SPURLING, III, Appellant.	)	1 CA-CR 09-0939 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Coconino County

Cause No. CR 2008-0672

The Honorable Fred Newton, Judge

AFFIRMED IN PART; REVERSED IN PART

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W I N T H R O P, Judge

¶1 Robert Richard Spurling, III ("Appellant") appeals his convictions and sentences for five counts of child molestation.

Appellant contends that he was convicted of crimes not charged by the grand jury and that the indictment was duplicitous and prejudicial. For the following reasons, we affirm Appellant's convictions on four of the five appealed counts and reverse on the remaining count.

FACTS AND PROCEDURAL HISTORY

¶2 On August 14, 2008, an indictment charged Appellant of the following offenses: Count 1 – sexual abuse of a minor ("S.L."), a class 3 dangerous felony against children; Counts 2, 3 and 5 – child molestation of S.L., class 2 dangerous felonies against children; Count 4 – sexual conduct with S. L., a class 2 dangerous felony against children, and; Counts 6, 7 and 8 – child molestation of minor ("K.F."), class 2 dangerous felonies against children.[1]

¶3 The evidence at the grand jury hearing was presented by Detective Larry Thomas, who was involved in the initial investigation. Count 1 was alleged to have occurred on or about May 30, 2008, and involved an incident wherein Appellant was accused of inappropriately touching S.L. at a soccer game. Count 3 was alleged to have occurred on or about June 1, 2008, and involved an incident wherein Appellant was accused of "kneeling on [S.L.'s] bed" and rubbing S.L.'s vaginal area over

[1] The court granted Appellant's motion for a directed verdict on Counts 2 and 4. Accordingly, we do not discuss these counts any further.

her clothing on at least three separate occasions. Count 5 was alleged to have occurred on or about July 1, 2008, and involved an incident wherein Appellant was accused of rubbing S.L.'s vaginal area over her clothing while they were watching a movie together on the couch. Count 6 was alleged to have occurred on or about July 21, 2008, and involved an incident wherein Appellant was accused of rubbing K.F.'s vaginal area over her clothing on two separate occasions while they were watching a movie. Count 7 was alleged to have occurred on or around July 22, 2008, and involved an incident wherein Appellant was accused of entering S.L.'s bedroom, placing a puppy on K.F.'s lap, and rubbing K.F.'s vaginal area over her clothes. Count 8 was also alleged to have occurred on or around July 22, 2008, and involved an incident wherein Appellant was accused of entering S.L.'s bedroom, placing S.L.'s baby brother on K.F.'s lap, and rubbing K.F.'s vaginal area over her clothes.

¶4 The testimony at trial differed in several respects from the detective's summary at the grand jury hearing. In regards to Count 3, S.L. testified that she had been molested while sleeping on a mattress in the living room and that the molestation occurred "every night," not just on three occasions. In regards to Count 5, S.L. never testified that Appellant touched her on the couch while they were watching a movie, but she did testify that she had been touched on at least two other

specific occasions (besides the occasion described in Count 3) while sleeping in the living room. In regards to Count 6, K.F. testified that Appellant touched her vaginal area three times during the movie. In regards to Counts 7 and 8, K.F. testified that Appellant touched her vaginal area "one, two, or three" times, but only testified to one specific act of touching that day. Appellant objected to these inconsistencies during oral argument, stating that they were at odds with the facts upon which the indictment was based. The court subsequently granted the State's motion to amend Count 7 so that it was alleged to have occurred on or about July 21, 2008, rather than July 22, 2008. Appellant testified on his own behalf, in which he repeatedly denied ever touching S.L. or K.F. inappropriately, or if he did, that such touches were unintentional.

¶5 During informal discussions regarding the jury instructions and verdict forms, Appellant objected to the number of offenses testified to at trial not matching the counts in the indictment. In response, the court offered to have the jury complete a special interrogatory after they had made their decision to ensure that the jury was unanimous in which offense led to each guilty verdict.[2] Ultimately, Appellant did not object to the jury instructions. In Appellant's motion for a

[2] During the subsequent Rule 20 proceedings, the judge reaffirmed his intent to provide the jury with a special interrogatory.

directed verdict pursuant to Rule 20 of the Arizona Rules of Criminal Procedure, Appellant again, and in great detail, objected to the inconsistencies between the trial and grand jury testimony. Appellant also argued that the uncharged acts should not have been introduced pursuant to Arizona Rules of Evidence 404(c). The court denied Appellant's motion for a directed verdict pursuant to Rule 20.

¶6 The Court instructed the jury that they had to agree, unanimously, on the verdict. After the jury was given its instructions and taken from the room, the court conferred with the parties. In that meeting, the court: (1) determined that Appellant overstated the number of additional non-charged acts that had been introduced; (2) noted that the incidents testified to at trial were "remarkably similar . . . if not identical" to the incidents in the indictment, and; (3) ruled implicitly under Arizona Rules of Evidence 404(c) that the additional uncharged acts were admissible and the probativity of such acts outweighed any prejudicial effect. The court, over the objection of Appellant, gave an additional instruction allowing the jury to consider the uncharged bad acts as evidence of Appellant's "lewd disposition or an aberrant sexual propensity towards that particular victim but not towards other victims." At a subsequent proceeding, the court decided not to give the jury the special interrogatory as it had initially intended, and

instead, over Appellant's objection, gave the following jury instruction:

> In your consideration of all of the charged counts you must agree unanimously, if you can, what specific acts the defendant committed, if any . . .
>
> . . .
>
> . . . if your're going to find the defendant guilty, you have to agree on a specific set of facts for that guilty verdict. All of you must agree. You can't agree on one – some of you agree on one set of facts and others agree on a different set of facts.[3]

The court also gave the jury an example further explaining these instructions.

¶7 The jury found Appellant guilty on Counts 3, 5, 6, 7, and 8 and not guilty on Count 1. Appellant submitted a motion for a new trial on September 4, 2009. After oral argument, the court considered Appellant's request for a new trial and allowed Appellant to file a brief concerning the issue of "additional acts not charged/but testified to at trial." The court subsequently denied the motion for new trial, finding "that the difference between testimony at the Grand Jury and the testimony of the victims at trial does not amount to grounds for a new trial." The court also held that Appellant had notice that the

[3] The jury also received a written instruction stating "[i]n your consideration of all the charged counts, you must agree unanimously, if you can, what specific acts the defendant committed, if any."

victims may testify to more acts than testified to before the grand jury and suggested that Appellant was not prejudiced because Appellant's defenses to all of the charges were the same. Appellant was sentenced to a total of thirty-four years' imprisonment – serving concurrent 17 year sentences for Counts 3 and 5 consecutively to concurrent 17 year sentences for Counts 6, 7, and 8.

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

ANALYSIS

¶9 Appellant contends that he was convicted of crimes not charged by the grand jury in Counts 3, 5, and 7. Appellant also argues that the indictment was duplicitous in relation to Counts 3, 6, 7, and 8 and that the duplicitous indictment unduly prejudiced him.

I. Non-indicted charges in Counts 3, 5, and 7

¶10 Appellant argues that the inconsistencies between the grand jury and trial testimony led to his being convicted of crimes different than those for which he was indicted. Appellant argues that the indictment failed to give him notice of the nature of the offenses for which he was being charged in Counts 3, 5, and 7 and, therefore, he was unable to prepare

adequate defenses. "We review the denial of a motion to dismiss based on [the] insufficiency of the indictment for abuse of discretion." *State v. Far West Water & Sewer, Inc.*, 224 Ariz. 173, 187, ¶ 35, 228 P.3d 909, 923 (App. 2010). A defendant cannot be convicted of crimes not presented to the grand jury and for which the defendant was not indicted. *See State v. Cummings* 148 Ariz. 588, 590, 716 P.2d 45, 47 (App. 1985) (citation omitted).

¶11 In Arizona, the accused has a right to notice of the crime being charged. *See* Ariz. Const. art. 2, § 24. A defendant receives notice of the nature of the crime being charged when the State furnishes "a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged." *State v. Magana*, 178 Ariz. 416, 418, 874 P.2d 973, 975 (App. 1994); *accord* Ariz. R. Crim. P. 13.2(a). This court has found that an indictment provides "sufficient notice of the crimes charged" if it identifies the defendant, victim, the date, location, elements, type, class, and nature of each charge, and includes the applicable statutes. *See Far West*, 224 Ariz. at 187, ¶ 37, 228 P.3d at 923. Further, the indictment "must be read in the light of the facts known by both parties." *Id.* at 187, ¶ 36, 228 P.3d at 923.

¶12 In this instance, we note that Appellant had notice that the children were going to testify about multiple acts of

molestation spanning a two-month period. Appellant had access to the children's interviews with the Safe Child Center wherein each child accused Appellant of multiple instances of molestation. Further, during the grand jury proceeding, Detective Thomas described multiple instances of molestation. The nature of the charges (i.e. touching of each child's vaginal area over their clothing), were the same for each Count (except for Count 1, which is not at issue here), and the indictment clearly notified Appellant of the date and location of each incident being charged. Appellant was also on notice that the State could utilize any one of a number of alleged incidents to prove the offense in each charge. *See State v. Arnett*, 158 Ariz. 15, 18-20, 760 P.2d 1064, 1067-69 (1988) (stating that "There is no requirement that the defendant receive notice of how the State will prove his responsibility for the alleged offense" and allowing the state to bring in evidence relating to felony murder though the defendant had only been charged with "first degree murder").

¶13 Count 3 of the indictment related to an incident that took place when Appellant molested S.L. while she slept. Appellant argues that Count 3 was limited to an incident occurring in S.L.'s bedroom, and that no testimony relating to such an incident was presented at trial. Appellant incorrectly reads the grand jury statements. Detective Thomas testified

that the incident in Count 3 occurred while Appellant was "kneeling on her bed." At trial, S.L. testified she had been molested while she slept on her bed that had been placed on the living room floor. Neither the grand jury nor the trial testimony constrained the acts described in Count 3 to taking place in the bedroom. Accordingly, we do not find that the Appellant lacked notice of the offense charged in Count 3 or that he was convicted of a crime for which he was not charged.

¶14 Count 7 of the indictment related to an incident that took place on or about July 22, 2008 when Appellant molested K.F. in S.F.'s bedroom when he placed either S.L.'s dog or baby brother in K.F.'s lap. At trial, the State successfully amended Count 7 to reflect the incident occurred on or about July 21, 2008. Appellant argues that no testimony was presented at trial showing that Appellant touched K.F. while she was in S.L.'s bedroom, and that all testimony regarding July 21 pertained to incidents that occurred in S.F.'s living room.[4] At trial, K.F.

[4] Appellant also argues that the amendment of the date itself substantially changed the nature of the charge, and therefore, he was unable to properly prepare a defense as a result of the amendment. We disagree. The incident in Count 7 was initially alleged to have occurred "On or about [July 22, 2008,]" which certainly encompasses any incidents that may have occurred the day beforehand. Further, "An error as to the date of the offense alleged in the indictment does not change the nature of the offense, and therefore may be remedied by amendment." *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996) (citations omitted). Accordingly, we find that the amendment

testified that Appellant had molested her at least three times while placing either the baby or the dog on her lap. She also testified that Appellant had touched her in the same manner up to three times on July 22, 2008. Even if the incidents testified to at trial did not occur in the bedroom, but rather, in the living room, Appellant has not compellingly demonstrated why the slight change of location caused him to lack sufficient notice of the crime charged in Count 7 or how the slightly differing testimony precluded him from adequately preparing a defense. Accordingly, we do not find that the Appellant lacked notice of the offense charged in Count 7 or that he was convicted of a crime for which he was not charged.

¶15 Count 5 of the indictment related to an incident that took place when Appellant molested S.F. while they sat on a couch in the living room watching a movie. Appellant argues that his conviction on this count is invalid because no testimony whatsoever at trial was presented supporting the charge in Count 5. The State does not point us to any trial evidence pertaining to the factual scenario supporting Count 5, and our review of the record has not revealed any such evidence. The State points to three specific instances testified to by S.F. wherein she stated that Appellant had molested her on the

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did not substantially change the nature of the charge nor do we find that Appellant was prejudiced by the amendment.

floor of the living room while she slept as the basis for the conviction in Count 5. The problem, however, is that Appellant was indicted in Count 5 solely on the charge that he had molested S.F. while they sat on a couch watching a movie in the living room, not while she was sleeping on a mattress in the living room. The testimony that the State points to as being the basis for the conviction on Count 5 was clearly not the same incident for which Appellant was charged. *See e.g. State v. Mikels*, 119 Ariz. 561, 582 P.2d 651 (App. 1978) (overturning the defendant's conviction because the indictment charged the defendant of sodomizing his cellmate in the shower between February 24 and 28, 1977, but finding that the conviction was based on evidence that the defendant had sodomized the victim in the shower on February 12 or 13, 1977). Because no evidence whatsoever was presented to prove that Appellant molested S.L. while they watched a movie on the couch, we can only conclude that Appellant was convicted on Count 5 of a crime for which he was not indicted and for which Appellant lacked notice.

¶16 Accordingly, we reverse Appellant's conviction only for Count 5, but affirm the convictions on Counts 3 and 7. Because the reversal on Count 5 alone does not affect the duration of Appellant's sentence, we need not remand this case for re-sentencing.

II. Duplicitous Indictments

¶17 Appellant contends that the indictment for Counts 3, 6, 7, and 8 was duplicitous because it improperly charged him of committing one or more incidents of molestation in each count. Appellant goes on to argue that he was prejudiced by the duplicitous indictment because it failed to give notice of the charges against him and because it led to the risk of a non-unanimous verdict. "An indictment is duplicitous if it charges more than one crime in the same count." *State v. Anderson*, 210 Ariz. 327, 335, ¶ 13, 111 P.3d 369, 377 (2005); *see also State v. Paredes-Solano*, 223 Ariz. 284, 287, ¶ 4, 222 P.3d 900, 903 (App. 2009) (noting that "A duplicitous charge exists '[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge.' [] A duplicitous charge is different than a duplicitous indictment, which 'charges "two or more distinct and separate offenses in a single count."'" (quoting *State v. Klokic*, 219 Ariz. 241, 243-44, ¶¶ 10-12, 196 P.3d 844, 846-47 (App. 2008))).

¶18 Pursuant to Arizona Rules of Criminal Procedure 13.5(e) and 16.1, perceived defects in an indictment must be challenged no later than twenty days prior to the trial, or else the objection is precluded unless the defect was unknown and incapable of being known at the time the objection needed to be

made. By Appellant's own admission, the statements giving rise to a potentially duplicitous indictment are found in the grand jury transcript. Appellant does not argue, nor can he, that he was unaware of the potential defects in the indictment at the time he was required to object. Because Appellant failed to timely object to the indictment, he is precluded from doing so on appeal. *See Anderson*, 210 Ariz. at 336, ¶ 17, 111 P.3d at 378 (requiring "pretrial objections to an indictment in order to allow correction of any alleged defects before trial begins"); *see also U.S. v. Robinson*, 651 F.2d 1188, 1194 (9th Cir. 1981) (noting that a defendant's remedy when an indictment is duplicitous "is to move to require the prosecution to elect either the count or the charge within the count upon which it will rely").

¶19 Further, we cannot find that there was any error stemming from either the indictment or the evidence at trial, let alone fundamental error, which prejudiced Appellant. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005) (stating that a defendant may only prevail on a claim of fundamental error if the error is fundamental and if it prejudiced the defendant). Appellant argues that he was prejudiced due to a lack of notice of the crimes being charged and because the indictment gave rise to the likelihood of a non-unanimous jury. We reject Appellant's argument that the

indictment resulted in a failure to give notice of the crimes being charged for the same reasons as discussed in section I of this decision. As for the unanimity issue, we note that the court instructed the jury on several occasions that their verdict must be unanimous. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006) (holding that we must "presume that the juror's followed the court's instructions"); *cf. Paredes-Solano*, 223 Ariz. at 290, ¶ 17, 222 P.3d at 906 (holding that even when there is a duplicitous indictment, the defendant must show that the indictment prejudiced him or her. The court noted that any error resulting from a duplicitous indictment may be "cured" if "the trial court instructs the jury that it must agree unanimously on the specific act constituting the crime" (citation omitted)). The instructions given in this case were sufficient to cure any potential prejudice caused by the indictment. Further, Appellant is entitled only to a unanimous verdict on whether the criminal act charged was committed, but not "the precise manner in which the act was committed." *State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993). Although the jury may have disagreed on the manner by which the children were molested (i.e. whether they were molested when Appellant placed the dog or the baby on their lap), our review of the record gives us no reason to believe the jury did not unanimously agree that Appellant committed the

charged act of child molestation. *See id.* (finding no constitutional violation when the defendant was convicted of kidnapping despite the fact that the jury may not have "unanimously agree[d] on the manner in which he committed the kidnapping"). Because Appellant raised the same defense to each charge – that he did not molest either child – we find that Appellant was not prevented from defending against each act, and therefore, was not prejudiced by the indictment or the trial testimony. *See State v. Schroeder*, 167 Ariz. 47, 53, 804 P.2d 776, 782 (App. 1990) (finding that when the defendant utilized the same defense to defend against trial testimony of multiple acts of sexual abuse occurring over a short period of time, the defendant was not prejudiced by the indictment alleging only one count of sexual abuse. It held that when the defense was the same as to all acts, and the nature of the acts were virtually identical, the only issue before the jury was one of credibility). We do not find that the indictment or the testimony at trial constituted fundamental error. Accordingly, we affirm the convictions on Counts 3, 6, 7, and 8.[5]

[5] We need not consider any issues relating to the admission of additional acts at trial as Appellant confines all arguments in this appeal to challenging the indictment itself. Although Appellant complains of the testimony at trial, Appellant does not submit any argument or authority on appeal relating specifically to either the judge's admission of additional acts or the State's reliance on Arizona Rules of Evidence 404(c) to justify the admission of such acts. We conclude, therefore,

CONCLUSION

¶20 For the reasons set forth above, we affirm the convictions relating to Counts 3, 6, 7, and 8 but reverse the conviction relating to Count 5.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PHILIP HALL, Presiding Judge

_____/S/_____
JON W. THOMPSON, Judge

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that Appellant has abandoned or waived any argument on these issues. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (holding that opening briefs "must present significant arguments, supported by authority" of all issues on appeal, and failure to provide such argument or authority "usually constitutes abandonment and waiver of that claim").