IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06/16/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	1 CA-CR 10-0295
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
DENNIS ALAN HIPSKIND,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-008360-001DT

The Honorable John R. Hannah, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
And Jeffrey L. Sparks, Assistant Attorney General
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Michael J. Dew — Phoenix
Attorney for Appellant

T H O M P S O N, **Judge**

¶1 Dennis Alan Hipskind (defendant) appeals his convictions and sentences for three counts of molestation of a child, two counts of sexual abuse, and four counts of sexual conduct with a minor. Defendant raises three evidentiary issues, and he argues the court should have granted his motion for a mistrial based on the state's purported disclosure violation. As set forth below, we find no reversible error and therefore affirm.

BACKGROUND

¶2 On October 3, 2007, the state charged defendant with four counts of molestation of a child, four counts of sexual conduct with a minor, two counts of sexual abuse, and two counts of attempted molestation of a child. All the charged offenses were alleged as dangerous crimes against children and related to incidents that allegedly occurred between October 14, 1988 and April 10, 2007 involving three female victims, J.D. and M.D., who are sisters, and S.J. The victims testified at trial about the incidents underlying the charges. Over defendant's objection, a videotape of a forensic interview with S.J. was played for the jury. Defendant's wife, Bonnie, and the victims' mothers, Sandra (Bonnie's sister) and Christina, further testified during the state's case-in-chief. Bonnie testified that when she initially confronted defendant about the victim's

and their mother's allegations, he denied them. Defendant also denied the allegations when he testified at trial.

¶3 In rebuttal, M.D. again testified, and specifically stated that she had a discussion with defendant and Bonnie sometime after the abuse when defendant asked her, "Did you tell anyone what I did to you?" Defendant unsuccessfully moved for a mistrial, arguing the state never disclosed defendant's question to M.D. Additional details are discussed below in the context of the issues addressed.

¶4 On the state's motion, the trial court dismissed count 12, one of the molestation charges relating to S.J. The jury found defendant not guilty as to count 7, a charge of attempted molestation of a child relating to M.D. Regarding the other charge of attempted molestation, count 6, the jury was unable to reach a verdict. The jury found defendant guilty as charged on the remaining counts. Defendant unsuccessfully moved for a new trial. After the court sentenced defendant, he 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), 13-4031 and -4033.A.1 (2010).

DISCUSSION

¶5 We review a trial court's evidentiary rulings for abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 208, ¶ 60, 84 P.3d 456, 473 (2004). Generally, we will find that the

superior court committed an abuse of discretion when "the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision." *State v. Cowles*, 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004) (quoting *Files v. Bernal*, 200 Ariz. 64, 65, ¶2, 22 P.3d 57, 58 (App. 2001)). We will reverse such a ruling only upon a finding of clear prejudice. *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994). Similarly, a trial court has broad discretion in deciding whether to grant a mistrial, and we will reverse a ruling on a mistrial motion only if the trial court's "conduct is palpably improper and clearly injurious." *State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989) (citation omitted).

I. Videotape

¶6 Defendant first argues that the trial court erred in admitting the videotaped forensic interview of S.J. as an exhibit for the jury to consider during deliberations.[1]

¶7 During the state's direct examination of the forensic interviewer, defendant objected to admission of the tape on

[1] We summarily reject defendant's cursory assertion that the court erred in finding S.J. was feigning her memory loss at trial. The record supports the court's finding, and in any event, the court observed S.J. and was thus in a better position than we are to determine the veracity of her testimony. *See State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996); *State v. Ossana*, 199 Ariz. 459, 461, ¶ 7, 18 P.3d 1258, 1260 (App. 2001).

hearsay grounds. Referring to eight-year-old S.J.'s trial testimony that she did not remember defendant inappropriately touching her, and she did not remember the substance of her forensic interview,[2] the state argued the tape was admissible under Arizona Rule of Evidence (Rule)[3] 801(d)(1) as a non-hearsay inconsistent statement because S.J.'s testimony reflected feigned memory loss. *See State v. King*, 180 Ariz. 268, 275, 833 P.2d 1024, 1031 (1994) (reiterating rule that, for purposes of admitting statements under Rule 801(d)(1), "[a] claimed inability to recall, when disbelieved by the trial judge, may be viewed as inconsistent with previous statements . . . ." (quoting *U.S. v. Rogers*, 549 F.2d 490, 496 (8th Cir. 1976))). The trial court agreed with the state and specifically found that S.J. feigned her lack of memory because "she was afraid to say it in open court." Alternatively, the state asserted the tape was admissible under hearsay exception Rule 803(5) as a recorded recollection. The court also agreed with the state on this basis for the tape's admissibility. The court, however, did not permit the state to admit the tape as an exhibit "at this point," but did allow the tape to be played for

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[2] S.J. was six when she was interviewed.

[3] Hereafter, the Arizona Rules of Evidence will be referred to as Rule ___, unless a full citation is necessary for the sake of clarity.

the jury. Before playing the tape in open court, the court advised the jury:

> Please listen to it carefully because it's not going to be admitted into evidence, so you're not going to be able to take it into the jury room and look at it with you. So treat it as though it's like the defendant's testimony, that you wouldn't have a copy of a transcript of it, and listen to it carefully. . . . Just so it's clear, let's put this on the record, that Exhibit 19 will not be admitted into evidence . . . . It will not be transcribed.

¶8 Seventeen days later, during its direct examination of the police department's case agent who observed S.J.'s recorded forensic interview and collected the videotape, the state sought to formally introduce the tape as an exhibit so the jury would have the evidence available during deliberations. Apparently based on its understanding that the state was seeking to admit the tape as a recorded recollection, the court sustained defendant's objection on hearsay grounds. *See* Ariz. R. Evid. 803(5) (memorandum or record admitted as a recorded recollection "may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."); *see also State v. Martin*, 225 Ariz. 162, 165, ¶ 13, 235 P.3d 1045, 1048 (App. 2010) (trial court erred in allowing deliberating jury to review videotape admitted under Rule 803(5)). During a subsequent sidebar conference, the court reconsidered its ruling in light

of its findings regarding S.J.'s feigned memory loss and admitted the tape as Exhibit 19 pursuant to Rule 801(d)(1).

¶9 In *Martin*, we held that although Rule 803(5) permitted playing a videotaped forensic interview for the jury during trial, the rule precluded admitting the tape into evidence for the jury to consider during deliberations. 225 Ariz. at 165, ¶ 13, 235 P.3d at 1048. However, we found that the defendant in that case failed to satisfy his burden under fundamental review of proving prejudice because he could not show that the deliberating jury actually watched the tape, and even if he could, other trial evidence supported his conviction; namely, we noted, "[t]he jury could have found [d]efendant guilty . . . based solely on the jury's viewing of the videotape at trial." *Id*. at 165, ¶ 15, 235 P.3d at 1049.

¶10 Here, the state contends that the court properly admitted the tape into evidence as a prior inconsistent statement under Rule 801(d)(1) and pursuant to *King*, 180 Ariz.

268, 833 P.2d 1024.[4] Alternatively, the State argues that even if the court did err, the error was harmless.[5] We agree.

¶11 The court's ruling that entered the videotape as an exhibit did not prejudice defendant. When the video was played at trial, the court twice reminded the jury that the tape would not be available during deliberations, and therefore entreated the jury to pay close attention. We assume the jury did so, and absent any indication in the record to the contrary, the jury consequently had no need to view the tape during deliberations in order to find defendant guilty of the charges regarding S.J.[6] Defendant does not argue S.J.'s recorded statements are insufficient to support his convictions. Accordingly, we fail to see how availability of the tape to the deliberating jury clearly prejudiced Defendant such that we would be compelled to

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[4] The state's reliance on *King* is somewhat misplaced. That case addressed the admissibility under Rule 801(d)(1) of *testimony* regarding prior inconsistent statements, it did not address the propriety of admitting into evidence *videotaped* statements under that rule. *King*, 180 Ariz. at 275, 833 P.2d 1031.

[5] Referring to *Martin*, the state concedes that admitting the tape as an exhibit was error if Rule 803(5) was the sole basis for admissibility. Unlike Rule 803(5), Rule 801(d)(1) does not expressly prohibit entering, as an exhibit, a videotaped statement that is admissible under that rule.

[6] In *Martin*, we found no prejudice because we determined the defendant did not show that the jury actually watched the tape at issue, even though the record indicated the jury asked whether the tape would be available during deliberations. 225 Ariz. at 166, ¶ 15, 235 P.3d at 1049.

find reversible error on this basis. *See Ayala*, 178 Ariz. at 387, 873 P.2d at 1309 (clear prejudice required to find reversible evidentiary error); s*ee also State v. Shearer*, 164 Ariz. 329, 340, 793 P.2d 86, 97 (App. 1989) (holding that the introduction of inadmissible evidence was harmless error when said evidence was cumulative to and consistent with other trial testimony).

II. Evidence of Defendant "Spinning" J.D. and M.D.

¶12 On the seventh day of trial, J.D. testified that defendant would "spin" her, M.D. and Defendant's daughter "when they were smaller" by holding them up with one hand under their chests while his other hand would grip their underwear as a "handle." J.D. then stated, "Sometimes he would stick his, you know, his hands underneath, you know, our underwear when he was doing it." Defendant objected "to the 404C and B, lack of notice and disclosure." The trial court noted the objection and matters proceeded. J.D. then reiterated that defendant would "grab, you know, actually our underwear and our shorts and make it into a handle, you know, the butt crack area, I guess you could say." When the prosecutor asked whether defendant "touch[ed] the skin of your genital area[,]" defendant repeated his objection.[7]

[7] Defendant testified to spinning the children, but stated that it was not sexual in nature.

¶13 At the ensuing bench conference, defendant argued any testimony of improper touching during the "spinning" was inadmissible because the evidence constituted an uncharged act under Rule 404(B), and although defendant was "aware of the spinning" as mentioned in a police report, defendant claimed the state improperly failed to "file a pleading called notice of intent to use 404 B or 404 C act." *See* Ariz. R. Crim. P. 15.1.b.(7) (requiring prosecutor to disclose all prior acts of defendant intended for use at trial). The court found Rule 404(B) inapplicable because the challenged testimony did not constitute "404 B acts." J.D. resumed her testimony, but on another topic.

¶14 Defendant argues the court abused its discretion and committed reversible error in admitting the "spinning" testimony as an "uncharged sexual act showing propensity without a Rule 404(C) hearing[.]" We disagree. Contrary to defendant's argument, the evidence was not presented so the jury would convict him because he was "a child molester who preyed on young children." The court denied the state's request to instruct the jury on defendant's "aberrant sexual propensity" pursuant to Revised Arizona Jury Instructions Standard Criminal 26(B) (character evidence in sexual misconduct cases), and the state did not mention the spinning incidents in closing arguments on the sixteenth day of trial.

¶15 In light of J.D.'s specific testimony regarding the events underlying the counts one through three,[8] and her mother Sandra's corroborating testimony – specifically her testimony that defendant told her, "I'm sorry. I don't know why I did this" when she confronted him after J.D. disclosed the molestations to her – we conclude that the very brief "spinning" testimony did not contribute to the jury's verdicts. Accordingly, we find no reversible error. *State v. Eastlack*, 180 Ariz. 243, 251, 883 P.2d 999, 1007 (1994) ("The inquiry on review 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'") (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

III. Bonnie's Statements to Victims' Mothers

¶16 Defendant argues that he is entitled to a new trial because the trial court improperly admitted impeachment evidence for the purpose of establishing defendant's guilt. It appears defendant is referring to testimony by Sandra, Bonnie's sister and the mother of J.D. and M.D., that Bonnie told her defendant said "he would pull down [J.D.'s] pants, and it was his breath

[8] Two of the alleged incidents occurred while defendant and five-year-old J.D. were alone watching television when he fondled her vagina with his fingers before performing oral sex on her. The other incident involved defendant forcing J.D. to grab his erect penis while the two were in defendant's hot tub.

she felt on her, not his mouth." It seems defendant is also challenging the following portion of Christina's testimony:

> Bonnie had told me that she had a conversation with [defendant], and he was really upset, that they ended up in the garage, and she asked him if he – told him that he shouldn't be as upset if he didn't do anything and asked him if he did, and he told her yes, but [S.J.] started it.

The state presented this testimony by Sandra and Christina during its rebuttal case in response to Bonnie's testimony on direct examination that she did not make the foregoing statements.

¶17 We review the trial court's determination of admissibility of impeachment evidence for abuse of discretion. *State v. Sucharew*, 205 Ariz. 16, 23, ¶ 19, 66 P.3d 59, 66 (App. 2003). We will reverse the trial court's determination "only when [it] constitute[s] a clear, prejudicial abuse of discretion." *Ayala*, 178 Ariz. at 387, 873 P.2d at 1309.

¶18 Rule 403 states, in pertinent part, that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or . . . needless presentation of cumulative evidence." Accordingly, although impeachment evidence is generally inadmissible when it is being introduced for the dual purpose of proving defendant's guilt, *State v. Cruz*, 128 Ariz. 538, 540, 627 P.2d 689, 691 (1981), the trial

court retains discretion in balancing the probative value of the testimony against any potential danger of prejudice. *See State v. Miller*, 187 Ariz. 254, 259, 928 P.2d 678, 683 (App. 1996) (trial court did not abuse its discretion in admitting impeachment testimony in light of Rule 403 balancing).

¶19 In determining whether impeachment testimony that is also being used for substantive purposes is inadmissible under Rule 403, the court may consider several factors, including, but not limited to: 1) whether the impeached witness denies making the impeaching statements; 2) whether the impeaching witness has an interest in the proceeding and there is no corroboration of the statement; 3) whether the "true purpose" of the testimony is substantive rather than impeachment; and, 4) whether the testimony is the only evidence of defendant's guilt. *State v. Allred*, 134 Ariz. 274, 277, 655 P.2d 1326, 1329 (1982).

¶20 Defendant contends that Sandra and Christina's impeachment testimony should have been excluded under Rule 403 because Bonnie denied making the impeaching statements, Sandra and Christina had other interests in the proceeding, the true purpose of the testimony was to prove guilt, and that this testimony was the only evidence of defendant's guilt. We disagree. First, the record is replete with evidence of defendant's guilt from the testimony, statements, and interviews of all three victims and from defendant's own statements.

Second, even if some of the factors weigh in defendant's favor, it is within the sound discretion of the trial court to make an admissibility determination on a case-by-case basis, bearing in mind that the *Allred* factors are neither exhaustive nor mechanistically dispositive. *Miller*, 187 Ariz. at 259, 928 P.2d at 683. Accordingly, finding no evidence of clear prejudice against defendant, we decline to disturb the determination of the trial court.

IV. Motion for Mistrial: Defendant's "Statement" to M.D.

¶21 Finally, defendant contends the court erred in admitting defendant's question to M.D., "[d]id you tell anyone what I did to you?" Specifically, defendant argues the court improperly found the question was not in writing and therefore was not a "statement" subject to Rule 15.1. *See* Ariz. R. Crim. P. 15.4.a.(1) ("statement" defined to mean a writing adopted by a person, or a writing or other recording of a person's oral communications). Defendant fails to point out anything in the record that constitutes a writing that would subject his statement to the disclosure requirements of Rule 15.1. *See* Ariz. R. Crim. P. 15.1.b.(2) (requiring disclosure of all "statements of the defendant" within the prosecutor's possession or control). Defendant notes M.D. told the court that she informed the prosecutors of defendant's statement before trial, and he postulates: "[T]he only logical inference is that the

State had this information in its notes prior to examining the witness. It would defy that very logic to assume they simply memorized the entirety of the statements of their witnesses." Defendant cites to no supporting authority. We summarily reject such rank speculative error.

CONCLUSION

¶22 Defendant's convictions and sentences are affirmed.

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge