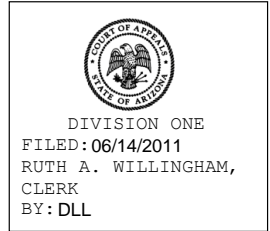


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 10-0543
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
ADAM PETER NICOLIA,)
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-007150-001 DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

ROBERT L. DOSSEY P.C. Chandler
By Robert L. Dossey
Attorney for Appellant

B A R K E R, Judge

¶1 Adam Nicolia appeals his convictions and sentences for one count of attempted molestation of a child, a class 3 felony; and molestation of a child, a class 2 felony. For the reasons set forth below, we affirm.

Facts and Procedural Background¹

¶2 As a younger child, the Victim lived with his two sisters, his mother, and Nicolia, his mother's live-in boyfriend. When the Victim was around five to seven years old, he and Nicolia were playing video games in the family living room when Nicolia attempted to touch the Victim's penis. The Victim told Nicolia "no," and Nicolia returned to playing video games. Nicolia then reached for the victim's penis again, slipped his hand under the elastic waistband of the Victim's shorts and boxers, and touched the Victim's penis.

¶3 At trial, the State called witness Wendy Dutton as an expert witness in the characteristics of child sexual abuse victims. Dutton's testimony related only to the general characteristics of child sexual abuse victims, and she did not testify specifically about the characteristics of the Victim in this case. Rather, her testimony was offered by the State to dispel common misconceptions about the characteristics of abused

¹ We review the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Nicolia. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

children. Nicolia objected to the testimony on the grounds that it was irrelevant and unduly prejudicial. The trial judge permitted Dutton to testify as an expert, finding that her testimony was relevant to dispel misconceptions about child abuse, but the court did not permit Dutton to render an opinion about the facts of the particular case.

¶14 The jury ultimately convicted Nicolia of both molestation and attempted molestation of a child, and Nicolia was sentenced to ten years in prison with lifetime probation. Nicolia timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes "A.R.S." sections 12-120.21(A)(1) (2003), 13-4031, and 13-4033(A)(1) (2010).

Discussion

¶15 Nicolia appeals his convictions and sentences on the grounds that (1) the court should not have permitted Wendy Dutton to testify because her testimony was irrelevant and unduly prejudicial, and (2) insufficient evidence existed to support both of Nicolia's convictions.² We disagree, and discuss each of these points in turn.

² Nicolia argues both that the trial court should have granted his Rule 20 motion and that insufficient evidence existed to support the jury verdict.

1. Relevance of Dutton's Testimony

¶16 Nicolia argues that the probative value of Dutton's testimony was outweighed by its prejudicial nature because Dutton testified as to the characteristics of sexual abuse victims in general, and her testimony did not relate to the specific facts of the case at hand. He argues that Dutton's testimony was irrelevant because she testified that almost any behavior exhibited by children could be consistent with having been abused. He also contends that Dutton's testimony was inflammatory because it related to adult sexual predators of children.

¶17 As a preliminary matter, we address Nicolia's assertion that Dutton had not been qualified by the court as an expert witness. Had Dutton testified as only a fact witness, we agree her testimony would be of questionable relevance. The trial court, however, plainly admitted her as an expert:³

³ At one point during Dutton's testimony, the trial court stated that Dutton was not qualified as an expert on the issue of the sexual motivation of the perpetrator:

THE COURT: What are you asking this question for?

[DEFENSE COUNSEL]: Because I've asked for the jury instruction on the defense of non-sexual touching.

. . . .

THE COURT: If she has reviewed the materials so that she could render that

THE COURT: All right. The Court finds that *under Rule 702 of the Arizona Rules of Evidence* that Ms. Dutton may be allowed to testify regarding the common misperception of child abuse, or at least the perceived perception - misconception of child abuse.

(Emphasis added.) Rule 702, of course, is Arizona's expert witness testimony rule. Additionally, when Nicolia made his motion at trial to preclude Dutton's testimony, he called it his "Motion to Preclude Wendy Dutton as an expert witness." At trial, Nicolia did not object to Dutton's testimony on the grounds that she was not qualified as an expert,⁴ nor does he

opinion - and I agree with you, if that was an expert that it could probably be the subject for expert opinion. But what is she supposed to be speculating, that some people can touch and cannot touch?

. . . .

I'm not sure how that's relevant. . . . [S]he's not qualified to at this point in time to render that opinion.

[DEFENSE COUNSEL]: For that specific opinion. I understand.

The trial court thus was not stating that Dutton did not qualify as an expert witness; instead it was properly limiting the scope of her qualified expertise to only the behavior of child victims.

⁴ Although Nicolia discussed Dutton's lack of qualifications, this was mentioned in the context of Dutton's testimony being irrelevant. As stated above, Nicolia never made an objection based on Dutton's lack of qualification as an expert.

argue this on appeal. We therefore address Nicolía's objections only under general relevance and prejudice rules.

¶18 Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. Relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." Ariz. R. Evid. 403. "Because 'probative value' and 'the danger of unfair prejudice' are not easily quantifiable factors, we accord substantial discretion to the trial court in the Rule 403 weighing process." *Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 481, ¶ 13, 212 P.3d 810, 819 (App. 2009).

¶19 In child sexual abuse cases, our supreme court has held that a trial court does not abuse its discretion in finding expert testimony relevant and admissible when (1) a "reasonable basis to believe that the jury will benefit from the assistance of expert testimony that explains recognized principles of social or behavioral science" exists, and (2) "the facts needed to make the ultimate judgment may not be within the common knowledge of the ordinary juror." *State v. Lindsey*, 149 Ariz. 472, 473, 475, 720 P.2d 73, 74, 76 (1986). When relevant, expert testimony on the general behavioral characteristics of child abusers and their victims has been consistently upheld by

Arizona courts. *Id.* at 473, 720 P.2d at 74 (“The trial judge has discretion to allow such expert testimony where it may assist the jury in deciding a contested issue.”); *State v. Curry*, 187 Ariz. 623, 628-30, 931 P.2d 1133, 1138-40 (App. 1996) (permitting testimony on “a set of behavioral characteristics common to child sexual abuse victims”); *State v. Hamilton*, 177 Ariz. 403, 408-09, 868 P.2d 986, 991-92 (App. 1993) (permitting testimony “regarding the general characteristics of child molesters and their victims, or ‘child abuse accommodation syndrome’ as it is known”). The expert must not offer opinions on the defendant’s specific case. *State v. Herrera*, 226 Ariz. 59, 69-71, ¶¶ 35-40, 243 P.3d 1041, 1051-53 (App. 2010) (holding that, although State conceded “testimony about the specific percentage of false sexual abuse allegations and the most common type of perpetrators of sexual abuse was error,” the error was not prejudicial, so reversal was not required).

¶10 We decline to disturb the extensive precedent of Arizona courts holding such general testimony may be admissible. We note, however, that *Lindsey* held “[t]estimony of this type is not to be permitted in every case, but only in those where the facts needed to make the ultimate judgment may not be within the common knowledge of the ordinary juror.” 149 Ariz. at 473, 720 P.2d at 74. Here, Dutton did not testify as to the credibility of the Victim in this case, and she did not have any knowledge

as to the specific facts of the case at hand. Defendant is correct that Dutton testified that almost any behavior could be consistent with being a child abuse victim, but this assertion explains precisely why such testimony was relevant. Nicolia admits that a key issue at trial was the Victim's credibility. The State offered Dutton's testimony to dispel common misconceptions that sexual abuse victims will always act or respond to the abuse in a given manner.

¶11 Nicolia also argues that Dutton's testimony was unduly prejudicial and irrelevant because it was inflammatory in nature and because Dutton lacks sufficient qualifications⁵ to testify on the behavior of child sexual abuse victims. Nicolia does not cite to any specific portion of Dutton's testimony that was unduly inflammatory; he states only that it "touched right on the jury's nerves about sexually perverted individuals who prey on children" Testifying about the crime of child sexual abuse generally when the defendant is charged with that precise crime is not unduly inflammatory. The testimony was no more "inflammatory" than was necessary to discuss the crime at issue.

¶12 Finally, Dutton's qualifications, or lack thereof, are pertinent to the testimony's weight, but not its relevance.

⁵ As stated above, Nicolia does not argue that Dutton did not qualify as an expert, only that her lack of qualifications made her testimony irrelevant and unduly prejudicial.

Nicolia was free at trial to cross-examine Dutton as to her lack of qualifications or the absence of scientific backing for her methodology, and he in fact did so at length. The jury was then able to give Dutton's testimony the proper weight and credence, and we defer to the jury's assessment on these issues. *State v. Williams*, 209 Ariz. 228, 231, ¶ 6, 99 P.3d 43, 46 (App. 2004). Therefore, the trial court did not abuse its discretion in permitting Dutton to testify.

2. Sufficiency of the Evidence

¶13 Nicolia argues that the evidence presented at trial was insufficient to support the convictions of attempted sexual assault of a child and sexual assault of a child. As we describe below, viewing the facts in the light most favorable to upholding the verdict, *Fontes*, 195 Ariz. at 230, ¶ 2, 986 P.2d at 898, we hold that the evidence was sufficient to support the convictions. For the same reasons, the trial court properly denied Nicolia's Rule 20 motion.⁶

¶14 We reverse a conviction based on a claim of insufficient evidence "only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*,

⁶ Arizona Rule of Criminal Procedure 20(a) states that the trial court must grant an acquittal if "there is no substantial evidence to warrant a conviction." We review a Rule 20 motion for an abuse of discretion. *State v. Latham*, 223 Ariz. 70, 72, ¶ 9, 219 P.3d 280, 282 (App. 2009).

187 Ariz. 186, 200, 928 P.2d 610, 624 (1996). The evidence supporting the verdict may be direct or circumstantial in nature. See *State v. Arredondo*, 155 Ariz. 314, 317, 746 P.2d 484, 487 (1987). This court does not assess witness credibility and weight of the evidence when deciding whether sufficient evidence exists to support the verdict, as these determinations are solely within the purview of the jury. *Williams*, 209 Ariz. at 231, ¶ 6, 99 P.3d at 46. We resolve all conflicts in the evidence in favor of upholding the verdicts. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶15 Here, Nicolía was charged with one count of attempted molestation of a child and one count of molestation of a child. Attempted sexual molestation of a child requires proof that the defendant intentionally committed any act that was a "step in a course of conduct planned to culminate in commission of" the sexual molestation of a child. A.R.S. § 13-1001(A)(2). Sexual molestation of a child consists of "intentionally or knowingly engaging in . . . sexual contact . . . with a child who is under fifteen years of age." A.R.S. § 13-1410(A). "Sexual contact" is "any direct or indirect touching, fondling or manipulating of any part of the genitals . . . by any part of the body or by any object or causing a person to engage in such contact." A.R.S. § 13-1401(2).

¶16 Here, the evidence was sufficient to prove all elements of the accused crimes. The Victim testified that he was between the ages of five and seven when the incident occurred. As to the attempted molestation, the Victim testified that he and Nicolia were playing video games when Nicolia attempted to reach over and touch the Victim's penis. Additionally, Nicolia admitted to his mental health counselor that he attempted to fondle the Victim, stating that he tried to "pull down [the Victim]'s pants, but [the Victim] stopped [him] and [he] never did it again."

¶17 As to the actual sexual molestation, the Victim testified that, after the initial attempt, Nicolia "reached for [the Victim's] penis again [and] slip[ped] his hand into [the Victim's] shorts." The Victim explained that he was wearing basketball shorts and boxers and that Nicolia reached his hand through the elastic waistbands of both and touched the Victim's penis. The Victim testified that Nicolia "play[ed] with" and "touch[ed]" the Victim's penis for "a couple seconds."

¶18 Nicolia argues that this testimony was insufficient because (1) it was inconsistent with prior statements that the Victim had made to police, (2) it was inconsistent as to the duration of the molestation, (3) the Victim did not report the molestation immediately after it happened, (4) Nicolia denied the allegations, (5) the Victim's memory was "extremely weak,"

(6) the Victim "had an agenda to testify against" Nicolìa, and (7) the witnesses did not pinpoint a definite time as to when the incidents occurred.⁷ These statements, however, go merely to the credibility of the witness and the weight of the evidence. "[W]e do not weigh the evidence; that is the function of the jury." *Williams*, 209 Ariz. at 231, ¶ 6, 99 P.3d at 46. Testimony of a victim, even if uncorroborated, can be sufficient to support a conviction. *State v. Jerousek*, 121 Ariz. 420, 427, 590 P.2d 1366, 1373 (1979) ("In child molestation cases, the defendant can be convicted on the uncorroborated testimony of the victim."). Here, the jury presumably found that the Victim's statements were credible; the testimony was sufficient to establish all required elements of both crimes.

⁷ In his reply brief, Nicolìa characterizes some of the Victim's inconsistencies as an "outright recantation." Nicolìa appears to be referencing two portions of the Victim's cross-examination. At one point during questioning, the Victim stated that he had initially told the police Nicolìa had pulled his shorts down. The Victim later clarified that Nicolìa had instead put his hand down the front of the Victim's shorts and the shorts remained on the Victim's body. The Victim explained that he "was trying to hurry [his explanation to the police] up because [he] was uncomfortable talking so [he] was just saying stuff to the police." Additionally, the Victim clarified during cross-examination that the molestation happened in "less than a minute," and did not last for five minutes as he had previously told officers. These statements are not an "outright recantation," but rather corrections of the initial statements that the Victim gave to the police. As we explain below, the jury was free to weigh these inconsistencies in their evaluation of the Victim's credibility.

¶19 Nicolia also argues that the evidence was insufficient to show that Nicolia had a "sexual interest" when he touched the victim. A defendant's assertion that the acts were not motivated by "sexual interest" is an affirmative defense that a defendant must prove by a preponderance of the evidence. A.R.S. § 13-205(A) ("Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence."); A.R.S. § 13-1407(E) ("It is a defense to a prosecution pursuant to section 13-1404 or 13-1410 that the defendant was not motivated by a sexual interest."). "Sexual interest" is not a required element. Therefore, the State was not required to prove guilt on the issue of sexual motivation, even though here such an interest can be inferred from the conduct at issue. See *State v. Simpson*, 217 Ariz. 326, 329, ¶ 19, 173 P.3d 1027, 1030 (App. 2007) (holding that the State is not required to prove guilt as to sexual motivation).

¶20 Therefore, the record contains sufficient evidence to support the jury's verdicts. For the same reasons, the trial court did not abuse its discretion by denying Nicolia's Rule 20 motion.

Conclusion

¶21 For the foregoing reasons, we affirm.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

PATRICIA K. NORRIS, Judge