IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06/07/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA, Appellee, v. RANDALL KENNETH CLARK, Appellant.	)	1 CA-CR 10-0755 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Navajo County

Cause No. CR-2009-0142

The Honorable John N. Lamb, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
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Attorneys for Appellee

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Attorneys for Appellant

W E I S B E R G, Judge

¶1 Randall Kenneth Clark ("Defendant") appeals from his convictions for sexual conduct with a minor and attempted sexual

assault following a jury trial and from the sentences imposed. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Defendant was charged with one count of sexual conduct with a minor, a class 2 felony and dangerous crime against children; two counts of attempted sexual assault, class 3 felonies; two counts of sexual conduct with a minor, class 6 felonies; and one count of tampering with physical evidence, a class 6 felony. Viewed in the light most favorable to sustaining the convictions, *State v. Stroud,* 209 Ariz. 410, 412, ¶ 6, 103 P.3d 912, 914 (2005), the following evidence was presented at trial. Defendant was the boyfriend of the victim's mother and lived with them from the time the victim was about two until she was sixteen. When the victim was seven or eight, Defendant began sexually abusing her. She was afraid to tell anyone because Defendant had told her that if she did, "her mom wouldn't want her there anymore," she would be "shipped off to Florida," her younger sister "wouldn't have a dad" and that "no one would believe [her]."

¶3 In February of 2005, when the victim was thirteen, Defendant engaged in sexual intercourse with her by digital penetration (Count 1). This caused bleeding that did not stop. That evening, the victim's mother took her to the hospital. The examining physician observed blisters and ulcers in her genital

area. Although the tests were negative, the doctor believed that the victim had contracted genital herpes. When questioned, the victim denied any sexual abuse. The victim's mother testified she believed Defendant had genital herpes.

¶4 Sometime in June or July of 2007, when the victim was fifteen or sixteen, Defendant twice attempted to have sexual intercourse with her by penile penetration and also digitally penetrated her (Counts 2, 3 and 4). Sometime between July and August of 2007, Defendant had oral sexual contact with the victim. (Count 5). This was the last time Defendant sexually abused her.

¶5 During her freshman year in high school, the victim told her best friend about the abuse. They began writing a book "back and forth to each other" and would "tell each other secrets." The victim stated in the book that Defendant was abusing her. One day, Defendant looked through the victim's backpack, found the book and burned it (Count 6). The relationship between the victim's mother and Defendant ended around September of 2007.

¶6 On March 26, 2008, the victim's mother took her to see a doctor and during the examination, she began to cry.[1] She told

[1]During Detective Webster's cross-examination, defense counsel attempted to elicit testimony from him that the victim went to the doctor for treatment of a vaginal blister. The prosecutor objected on relevance grounds, warned defense counsel

him that Defendant had been sexually abusing her and the doctor called the Navajo County Sheriff's Department. Detective Webster supervised the investigation.

¶7 The jury found Defendant guilty of Counts 1 through 5 and not guilty of Count 6. The court sentenced Defendant to presumptive, consecutive sentences totaling twenty-nine years. Defendant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(B) (2003) and 13-4033(A)(1)(2010).

DISCUSSION

¶8 Defendant argues that the trial court abused its discretion in denying Defendant's motion for mistrial based on juror misconduct and in denying his motion to exclude evidence of the victim's prior sexual conduct under A.R.S. § 13-1421.

Juror Misconduct

¶9 After the court instructed the jury, it selected two alternative jurors. Prior to deliberations, Juror Number 14 told the court at a side bar with the attorneys present, "I was accused of this about 22 years ago. I don't think I should be here, and I have an 8th grade education. I don't even know what I'm doing. . . . I don't want to mess anything up." The court

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he was opening the door, and defense counsel withdrew the question.

instructed the juror to return to his seat and held a conference with the attorneys in chambers.

¶10 The prosecutor told the court, "I didn't hear any of it," and the court reporter read back the juror's statement. The court recommended that one of the alternates be chosen to replace Juror Number 14 and that Juror Number 14 be excused for cause because he had failed to disclose during voir dire that he had been accused of a crime. The court stated, "I'm not going to let this guy sit there after he said he doesn't know what is going on and he doesn't want to mess things up." The court observed that "nobody has began [sic] deliberations and we just get our alternates, that's why we have alternates."

¶11 Defense counsel moved for a mistrial on the ground that the "whole [voir dire] process has been tainted," that "we made our, not only challenges for cause, but also peremptory [strikes] based on this knowledge of the group that we have as a whole, and if we had known this it certainly would have affected the whole process." The court denied the motion because "the jurors had been under the admonition, nobody has talked to this juror, so the jurors that have been selected couldn't have been tainted." The court designated Juror Number 14 as an alternate, excused him, and selected another alternate to begin deliberations.

¶12 Defendant argues that it is not clear from the record if some or all of the remaining jurors heard the juror's comments at sidebar and that the juror's misconduct tainted the whole jury selection process. He also maintains that the strong appearance of impropriety created a presumption of prejudice and that the court should have granted the mistrial.

¶13 "Declaring a mistrial is an unusual remedy for trial error and should not be resorted to unless justice requires such a result." *State v. White,* 160 Ariz. 24, 33, 770 P.2d 328, 337 (1989). The grant or denial of a mistrial trial "is addressed to the trial court's discretion, which is not disturbed on appeal unless plainly abused." *Id.* at 34, 770 P.2d at 338. A mistrial is not necessarily required for juror misconduct if the court can "correct the situation with the mere dismissal of the individual juror, leaving sufficient jurors to decide the case." *Evans v. Abbey,* 130 Ariz. 157, 160, 634 P.2d 969, 972 (App. 1981). *See also State v. Brewer,* 26 Ariz. App. 408, 417, 549 P.2d 188, 197 (1976) (holding that it was not abuse of discretion to deny a motion for mistrial where three jurors involved in alleged misconduct were designated as alternates, did not participate in the verdict, and there was no showing of prejudice).

¶14 "[J]uror misconduct warrants a new trial if the defense shows actual prejudice *or if the prejudice may be fairly*

presumed from the facts." *State v. Eastlack,* 180 Ariz. 243, 256, 883 P.2d 999, 1012 (1994) (quoting *State v. Miller,* 178 Ariz. 555, 558, 875 P.2d 788, 791 (1994)). However, a mere assertion that the other jurors may have overhead the comments made by Juror Number 14 or that the whole jury selection process was tainted is insufficient to show actual or presumed prejudice. *See Eastlack,* 180 Ariz. at 256, 883 P.2d at 1012 (where prospective juror had improper conversation with one juror who was excused as an alternate, and another juror who did not sit, mere assertion that jury panel was tainted and that conversation prejudiced defendant did not warrant a mistrial).

¶15 Here, it is highly unlikely that the other jurors heard the comments of Juror 14 inasmuch as the prosecutor did not hear them. There is no evidence that Juror 14 talked to the other jurors, and the court excused him prior to deliberations. Nothing in the record suggests that Defendant suffered actual prejudice as a result of misconduct by Juror 14 or that prejudice can be presumed on these facts.

¶16 The cases relied on by Defendant are distinguishable. In *State v. Hall,* 204 Ariz. 442, 448, ¶ 18, 65 P.2d 90, 96 (2003), although the defendant failed to show actual prejudice, there was a presumption of prejudice because "[m]ost of the jurors received extrinsic evidence and considered it during deliberations." In *State v. Rojas,* 177 Ariz. 454, 868 P.2d 1037

(App. 1993), before deliberations, a juror handed the bailiff a note with a $20 bill to give to the victims. The note expressed the juror's opinion that "it took great courage to come to court and testify in front of a jury," that he believed they would "overcome this mess and go on to become excellent citizens," and was giving them money "as a small token of how proud" he was of them. *Id.* at 456, 868 P.2d at 1039. We reversed the trial court's denial of a motion for mistrial because the juror's "statement of impartiality" prior to trial was "on its face irreconcilable with what he did." *Id.* at 459, 868 P.2d at 1042. Here, however, Juror No. 14 did not engage in deliberations nor is there evidence that he communicated his concerns to any other juror. The trial court did not err in denying Defendant's motion for mistrial.

Exclusion of Evidence Under A.R.S. § 13-1421

¶17 The State filed a pre-trial motion in limine to preclude the defense from, among other things, "admitting any prior act evidence involving the victim without a hearing." The basis of the motion was that Defendant failed to comply with the notice and hearing requirements of A.R.S. § 13-1421. Defendant did not file a response to the State's motion, and the court granted it.

¶18 During the defense case, the victim's boyfriend testified. Defendant attempted to elicit testimony from him

that in 2008, the victim had told him about an incident during which she went to the hospital because she had blisters, that the nurses had asked her if she was sexually active and that she told them no. The judge sustained the State's objection on hearsay grounds.

¶19 Out of the jury's presence, defense counsel asked the court to reconsider part of its previous ruling under A.R.S. § 13-1421 because new information had been discovered during the trial. The alleged newly-discovered evidence was that the victim's boyfriend had told Detective Webster that the victim had told him that Defendant had torn "something inside of her before" and that when the victim and the boyfriend had had sex, "it tore again." He also wanted to call Detective Webster and ask him about statements that the victim had allegedly made to Detective Miltenberger to the effect that the victim and her boyfriend "had had sex recently and tore the same area and she had bled." Defense counsel argued that when the victim went to the hospital, what "actually occurred" was that the tearing had happened because she and her boyfriend were having sex.

¶20 When the court asked defense counsel to explain why this was new evidence, he stated that he believed the victim's testimony at trial was inconsistent with her earlier statements. He contended that her testimony suggested that "the source of this injury was her having sex with her boyfriend."

¶21 The prosecutor reminded the court that the vaginal tearing, which required the victim to go to the hospital, had occurred in 2005, not in 2008. He stated that there was no evidence that the initial vaginal tearing had occurred in March of 2008 when the victim was no longer living with Defendant. The prosecutor argued that this was a "late attempt" to circumvent the statute "by combining two events, which are separate." The court denied the motion to reconsider because Defendant did not request a hearing before trial pursuant to A.R.S. § 13-1421(A) and also because there was no evidence the victim went to the hospital in 2008, and therefore, the proffered evidence was irrelevant. Defendant claims this was error.

¶22 Section 13-1421(A)(2) (2010) provides in part that "[e]vidence of specific instances of the victim's prior sexual conduct may be admitted only if a judge finds the evidence is relevant and is material to a fact in issue . . . and . . . if the evidence is . . . [e]vidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or trauma." Section 13-1421(B) provides in part that evidence described in subsection A must be established by "clear and convincing evidence" after written notice and a hearing. It further provides that "[i]f new information is discovered during the course of the trial that may make the evidence described in

subsection A admissible, the court may hold a hearing to determine the admissibility of the evidence."[2]

¶23 "The court's determination of the relevance and admissibility of the evidence [under A.R.S. § 13-1421] will not be disturbed on appeal absent a clear abuse of the court's discretion." *State v. Gilfillan,* 196 Ariz. 396, 405, ¶ 29, 998 P.2d 1069, 1078 (App. 2000). Even if we overlook Defendant's failure to timely request a hearing under A.R.S. § 13-1421(B), the evidence had no probative value on any material fact at issue. The trial testimony showed that the victim went to the hospital with a vaginal tear in 2005, not in 2008. She stated that the last time Defendant sexually abused her was in July or August of 2007. By September of 2007, she and her mother were no longer living with Defendant. The testimony that Defendant sought to introduce involved alleged statements about the victim's sexual conduct with her boyfriend in 2008. The proferred evidence was irrelevant and inadmissible, and the court properly excluded it. *State v. Oliver,* 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988) (trial court can preclude evidence of

[2]A.R.S. § 13-1421 (Arizona Rape Shield Law) "seemingly codified the rule enunciated in the Arizona Supreme Court case *State ex rel. Pope v. Superior Court In and For Mohave County,* 113 Ariz. 22, 545 P.2d 946 (1976) and its progeny." *State v. Gilfillan,* 196 Ariz. 396, 401 n. 3, ¶ 15, 998 P.2d 1069, 1073 n. 3 (App. 2000).

a victim's prior sexual history if irrelevant or unrelated to issues in case); Rules 401, 402, Ariz. R. Evid.

CONCLUSION

¶24 For the foregoing reasons, we affirm Defendant's convictions and sentences.

_/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

_/s/_____
MAURICE PORTLEY, Presiding Judge

_/s_____
LAWRENCE F. WINTHROP, Judge