FILED BY CLERK
OCT 23 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. FRANK K.C. HERTEL, Appellant.	)	2 CA-CR 2012-0451 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20002435

Honorable Paul E. Tang, Judge

AFFIRMED IN PART; VACATED IN PART

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Alan L. Amann
Tucson
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
By Kristine Maish
Tucson
Attorneys for Appellant

E C K E R S T R O M, Judge.

¶1 Frank Hertel was convicted after a jury trial held in his absence of sexual conduct with a minor under the age of fifteen and sentenced to a twenty-year prison term. On appeal, he argues the trial court erred in admitting evidence of other acts of sexual misconduct pursuant to Rule 404(c), Ariz. R. Evid. We vacate the criminal restitution order entered at sentencing, but otherwise affirm Hertel's conviction and sentence.

¶2 Hertel's conviction was based on an incident in July 1996 in which he performed oral sex on his daughter, H. Hertel and his family had recently moved to Tucson from Ohio and they were staying with a family friend when the incident occurred. Before trial, Hertel moved to suppress evidence of sexual acts between Hertel and H. that had occurred in Ohio. The state then filed a notice stating it would seek to admit evidence that Hertel had been sexually abusing H. since she was eight years old. That evidence consisted of H.'s statements, a recording she had made of a telephone conversation with Hertel in which he admitted sexual conduct with her while the family lived in Ohio, and Hertel's own admissions to police about those events. The trial court limited the evidence to incidents in which Hertel had performed oral sex on H. and an incident in which she had performed oral sex on him. As to those incidents, the court found that any risk of unfair prejudice did not outweigh the evidentiary value of the evidence, that the events were not too remote in time, that the offenses were similar to the count charged, and that the evidence the events had occurred was strong, particularly in light of Hertel's admissions. The court excluded evidence of numerous incidents in which Hertel had touched H.'s vagina and breasts and an occasion in 1997 when he had spied on her while she was bathing.

¶3 At trial, H. testified Hertel had sexually abused her for her "whole life," and described incidents occurring in the basement of their Ohio home in which Hertel had performed oral sex on her, and one occasion when she had performed oral sex on him. She testified the occurrences stopped when the family moved into their new home in Tucson because she would lock the door to the bathroom and to her bedroom. A redacted tape recording of her telephone conversation with Hertel was played for the jury, and jurors were provided with a transcript of that conversation. As we noted above, during that conversation, Hertel admitted his ongoing molestation of H.

¶4 When a defendant is charged with a sexual offense, Rule 404(c) permits the presentation of "evidence of other crimes, wrongs, or acts . . . if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Before admitting such evidence, the trial court must determine and make specific findings "that clear and convincing evidence supports a finding that the defendant committed the other act," that "commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the charged sexual offense," and that "the evidentiary value of proof of the other act is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other factors mentioned in Rule 403[, Ariz. R. Evid.]" *State v. Aguilar*, 209 Ariz. 40, ¶ 30, 97 P.3d 865, 874 (2004). Rule 403 permits a court to exclude relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." In

making the Rule 403 determination required by Rule 404(c), the court must consider the factors listed in Rule 404(c)(1)(C). We review the admission of evidence pursuant to Rule 404(c) for an abuse of discretion. *Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d at 874.

¶5 On appeal, Hertel acknowledges the trial court made the appropriate findings required by Rule 404(c) and provided an appropriate limiting instruction. He does not suggest the court erred in finding that the factors listed in Rule 404(c)(1)(C) favored admission. He instead argues only that the court erred by concluding the evidence was not unfairly prejudicial. Hertel suggests the evidence of his prior sexual abuse of H. should have been excluded because the state's case "rested entirely on [H.]'s testimony." We recognize that the risk the jury will consider the prior acts as substantive evidence of guilt on the charged offense is heightened where, as here, the prior acts all involved the same victim as the charged offense, the prior acts are numerous, and all involved the same particular sexual behavior as that alleged in the instant case. Thus, the concern raised by Hertel—that the prior-acts evidence here might be viewed as unduly prejudicial and indeed might be viewed as dispositive evidence of guilt in the instant case—is not a trivial one.

¶6 However, the trial court is better equipped to weigh the prejudicial impact of the evidence against its probative value, and we defer to its conclusions. As our supreme court has observed, subsection (c) of Rule 404 was proposed in order to respond "to the distinctive difficulties and issues of proof in sexual offense cases. Relevant considerations include the typically secretive nature of sexual crimes, and resulting lack of neutral witnesses in most cases . . . ." *Aguilar*, 209 Ariz. 40, ¶ 19, 97 P.3d at 870-71,

quoting Proposed Amendments to Arizona Rules of Evidence; Amending Rule 404 and 405; and Adding Rule 412 (Petition to Amend), R-96-0002 (Jan. 29, 1996). Accordingly, we do not find the lack of corroborating evidence regarding the charged incident particularly meaningful in evaluating whether the evidence of Hertel's previous sexual abuse of H. was unfairly prejudicial. It certainly did not require the trial court to exclude the evidence.

¶7 Hertel further suggests that the volume of other-act evidence was unduly prejudicial—that because he was accused of only one act of misconduct it was improper to admit evidence of his numerous other acts. He also contends the evidence was unduly prejudicial because the evidence did not provide specifics about the particular acts and instead merely generally demonstrated that Hertel had sexually abused H. many times. Thus, he concludes, he was faced with the "insurmountable burden of overcoming the evidence [of] two to three dozen *other acts* of misconduct."

¶8 But he cites no authority, and we find none, suggesting the state should be limited, beyond the concerns otherwise addressed in weighing prejudicial impact against probative value, when it presents evidence of a defendant's aberrant sexual propensity, provided the evidence otherwise meets the requirements of Rule 404(c). Although the evidence here arguably was cumulative because it described a multitude of very similar incidents, that aspect did not require that some of the incidents be excluded. There was no dispute that Hertel had engaged in sexual conduct with H. on multiple occasions. And, we are skeptical that limiting the evidence of that ongoing abuse to a more precise, lesser number of incidents would have made a meaningful difference to the jury's

resolution of the case, particularly in light of the trial court's instructions to the jury that it "may not convict the defendant of the crime charged simply because you find he committed these acts or that he had a character trait that predisposed him to commit the crime charged" and that "[e]vidence of these acts does not lessen the State's burden to prove the defendant's guilt beyond a reasonable doubt." *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) ("We presume that the jurors followed the court's instructions."). Based on the foregoing, the trial court did not abuse its discretion in concluding that the evidentiary value of Hertel's repeated prior sexual conduct with his daughter outweighed any unfair prejudice caused by the admission of that evidence.

¶9 We reject Hertel's additional claim that the presumption of innocence was "overwhelmed" by the presentation of prior-act evidence, thus violating his right to a fair trial. In support of this argument, he cites only *United States v. Daniels*, in which the court of appeals noted that "once evidence of prior crimes reaches the jury, 'it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence.'" 770 F.2d 1111, 1118 (D.C. Cir. 1985), *quoting Gov't of the Virgin Islands v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976). But, of course, evidence of prior crimes and other acts is admissible in certain circumstances. Hertel has not explained how our analysis of whether the presumption of innocence was improperly "overwhelmed" would differ from our analysis of whether the trial court abused its discretion in admitting the evidence, and we find no relevant difference. Having determined the court could correctly admit the evidence pursuant to Rule 404(c), we necessarily conclude that Hertel's right to a fair trial was not violated by admission of that evidence.

¶10 At sentencing, the trial court imposed various fees and assessments, and the sentencing minute entry stated they were "reduced to a Criminal Restitution Order [CRO], with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." Although Hertel does not raise this issue on appeal, this court has determined that in these circumstances, based on A.R.S. § 13-805(C),[1] "the imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009).

¶11 For the reasons stated, the CRO is vacated. Hertel's conviction and sentence are otherwise affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

[1]Section 13-805 has been modified several times since Hertel committed his offense, but none of those alterations are material here. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1; 2011 Ariz. Sess. Laws, ch. 99, § 4; 2005 Ariz. Sess. Laws, ch. 260, § 6; 1999 Ariz. Sess. Laws, ch. 106, § 2.