IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WILLIAM HOWARD CULPEPPER,
Appellant.

No. 2 CA-CR 2016-0003
Filed January 30, 2017

Appeal from the Superior Court in Gila County
Nos. S0400CR201500131 and S0400CR201500188
The Honorable Timothy M. Wright, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By David A. Sullivan, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Vásquez concurred.

H O W A R D, Presiding Judge:

¶1 William Culpepper appeals from his convictions and sentences for various sex-related and child abuse crimes against his daughter and stepdaughters (collectively "daughters"). Culpepper argues the trial court erred in admitting testimony of his niece, M., as other act evidence under Rule 404(c), Ariz. R. Evid. Because we find no abuse of discretion, we affirm his convictions and sentences.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Rivera*, 226 Ariz. 325, ¶ 2, 247 P.3d 560, 562 (App. 2011), *quoting State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In October 2014, D., Culpepper's stepdaughter, reported to law enforcement that Culpepper had sexually and physically abused her. As a result of the ensuing investigation, the state charged Culpepper with twenty-one counts of crimes against his daughters, A., D., and S., including child abuse, child molestation, sexual conduct with a minor, sexual abuse, and public sexual indecency to a minor.[1]

¶3 Before trial, the state moved for admission of testimony by M., Culpepper's niece, regarding an alleged sexual assault by Culpepper and other prior acts under Rule 404(b) and (c). At a pretrial hearing, the trial court denied the motion as to other acts under Rule 404(b), but reserved ruling on the Rule 404(c) issue until it had reviewed the proposed other-act testimony in more detail. After the parties provided more information about the proposed

[1] The state brought these charges in two cases that were consolidated for trial.

other-act testimony, the court ruled that M.'s testimony was admissible under Rule 404(c), and specifically that the sex act against M. was sufficiently similar to at least some of the charged acts. The court excluded evidence of non-sexual other acts from M.'s testimony.

¶4 At trial, M. testified that, in 1989, when she was seventeen years old, she went to live with Culpepper and his wife, who were her uncle and aunt. At the time, Culpepper lived in Missouri. While living with the Culpeppers, M. asked her aunt "a question about boys." M. testified that Culpepper approached her and said that he could answer her question. Culpepper explained he was "master of the universe," and in particular a "master of sex." M. explained she did not want his advice, but Culpepper made M. undress and then he digitally penetrated her. Culpepper explained to M. that he was penetrating her "because [she] had asked the questions" and that she "had to deal with the consequences of the questions." M. later ran away from Culpepper's home.

¶5 Culpepper's stepdaughter, D.,[2] testified that when she was approximately fifteen, after the family had moved back to Arizona, Culpepper began to masturbate her and digitally penetrate her. This abuse occurred multiple times, occurring "every couple of months for the next few years." Culpepper justified some of these acts as medical treatment or as some form of sexual education.

¶6 Culpepper's other stepdaughter, A., also testified that, in 1989 while she was approximately seven years old, Culpepper inserted two butter knives and his finger into her vagina. Culpepper justified this behavior as sexual education. Over the span of weeks, Culpepper repeatedly inserted his fingers and foreign objects into A.'s vagina. Culpepper also forced A. to masturbate starting at age nine and showed her pornography, again explaining that this behavior was sexual education. At a certain point, Culpepper began

[2]We note that Culpepper was also charged with and convicted of various crimes against his biological daughter, S., but because these crimes are not relevant to our analysis, we have omitted S.'s testimony here.

to fondle and engage in mutual masturbation with A., to teach A. "how to please [her] husband." Culpepper later engaged in numerous acts of oral and vaginal intercourse with A., explaining that she had to learn "because no man likes a dead fish in bed" and that he was not molesting her because he did not enjoy the sexual contact and was solely doing it for educational purposes.

¶7 Culpepper did not testify at trial. In his opening and closing statements, Culpepper argued alternatively that he had not committed any, or at least not all, of the crimes, that he had no sexual motivation for the sexual contact, and that the testimony of M., D., and A., was fabricated or inconsistent. After trial, the jury convicted Culpepper of all counts, and the trial court sentenced him to concurrent and consecutive sentences totaling 228.5 years. Culpepper appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Discussion

¶8 Culpepper argues that the trial court abused its discretion by admitting M.'s testimony because it was neither relevant, pursuant to Rule 401, Ariz. R. Evid., nor admissible under Rules 403 and 404(c), Ariz. R. Evid., essentially because the types of sexual misconduct at issue in his trial were too dissimilar from the sexual misconduct about which M. testified. We review a trial court's decisions regarding relevancy and admissibility of other acts evidence for an abuse of discretion. *State v. Herrera*, 232 Ariz. 536, ¶ 19, 307 P.3d 103, 111-12 (App. 2013).

¶9 Rules 401 and 402, Ariz. R. Evid., provide that relevant evidence is generally admissible, and "[e]vidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Rule 404(c) provides "evidence of other crimes, wrongs, or acts may be admitted . . . if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." To admit evidence under Rule 404(c), as is relevant here, a trial court must find 1) sufficient evidence exists to allow the jury to find the defendant committed the other act, 2) the other act "provides a reasonable basis

to infer that the defendant has a character trait giving rise to an aberrant sexual propensity to commit the crime charged," and 3) the evidentiary value of the other act evidence is not substantially outweighed by the danger of unfair prejudice under Rule 403. Ariz. R. Evid. 404(c)(1)(A)–(C). When conducting the Rule 403 balancing as a part of the Rule 404(c) determination, the court should consider, among numerous other factors, the "similarity or dissimilarity of the other act." Ariz. R. Evid. 404(c)(1)(C)(ii).

¶10 Culpepper first argues, after citing Rule 404 concerning aberrant sexual propensity, that his alleged sexual act with M. is irrelevant to the crimes against A., D., and S., because "[t]here is nothing about this incident that would make any fact at issue more or less probable." Culpepper does not cite any authority, or explain this contention further. We thus conclude it is waived. *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument constitutes waiver of claim); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall include argument containing "contentions of the appellant with respect to the issues presented, and reasons therefor, with citations to the authorities, statutes and parts of the record relied on").

¶11 Culpepper next contends that M.'s testimony was not admissible under Rule 404(c) because the molestation of M. was too dissimilar to the molestation of Culpepper's daughters. In particular, Culpepper posits that the victims were too dissimilar first, because the age differences between M. and his daughters was too large, and second, because Culpepper raised his daughters for many years while only caring for M. for "about ten months."

¶12 Here, Culpepper was charged with, inter alia, digitally penetrating D. when she was fifteen. Culpepper was also charged with digitally penetrating A., beginning when she was seven. As noted above, Culpepper attempted to justify his molestation of both D. and A. as attempts to educate or administer medical treatment. The other act evidence pertained to digitally penetrating M. when she was seventeen and Culpepper attempting to justify his behavior as a consequence of her asking a question about boys. All of the girls resided in Culpepper's home at the time of the abuse, and all were related to him either by blood or marriage. Thus the acts

themselves, i.e. digital penetration of young girls living at Culpepper's home, coupled with an attempt to justify the abuse as non-sexual, are quite similar.

¶13 Culpepper has not demonstrated that these acts were too dissimilar to be more probative than prejudicial under Rules 403 and 404(c). And, although some of the other charged crimes were more dissimilar, Culpepper has not cited any authority for the proposition that the other act must be similar to every charged crime to satisfy Rule 404(c)'s requirements. Indeed, Rule 401 indicates that evidence is relevant if "it has any tendency to make a fact more or less probable," which means evidence is relevant if it pertains to a particular fact, not necessarily all facts at issue.

¶14 In support of his contention that the prior acts were dissimilar, Culpepper relies solely on *State v. Treadaway*, 116 Ariz. 163, 568 P.2d 1061 (1977), as authority. In *Treadaway*, our supreme court found that the state had not met its burden in proving that two instances of sexual misconduct with a minor were sufficiently similar for Rule 404(c) purposes, because the state did not provide expert testimony to establish a connection between the prior act and the charged offense. *Id.* at 166-67, 568 P.2d at 1064-65. Because "[t]he admissibility of the prior act depend[ed] initially upon its relevancy, which involve[d] complicated questions of sexual deviancy in a sophisticated area of medical and scientific knowledge," the court stated that it was "not prepared to resolve such questions in the absence of such expert knowledge." *Id.* at 167, 568 P.2d at 1065. The court explained: "we must hold the admission of this prior bad act in a trial involving this crime constitutes reversible error unless and until there is reliable expert medical testimony that such a prior act three years earlier tends to show a continuing emotional propensity to commit the act charged." *Id.* at 167, 568 P.2d at 1065.

¶15 The comment to the 1997 amendment to Rule 404(c), however, states

> Subsection (1)(B) of Rule 404(c) is intended to modify the *Treadaway* rule by permitting the court to admit evidence of remote or

> dissimilar other acts providing there is a "reasonable" basis, by way of expert testimony or otherwise, to support relevancy, i.e., that the commission of the other act permits an inference that defendant had an aberrant sexual propensity that makes it more probable that he or she committed the sexual offense charged. The *Treadaway* requirement that there be expert testimony in all cases of remote or dissimilar acts is hereby eliminated.

The comment further explains "the rule does not contemplate any bright line test of remoteness or similarity, which are solely factors to be considered under subsection (1)(c) of Rule 404(c)." *Id. Treadaway* is therefore inapplicable here.

¶16 But Culpepper argues that the lack of expert testimony "was not the only basis for the court's decision" and that our supreme court also reversed the trial court in *Treadaway* because of concerns over the two acts being potentially dissimilar and highly prejudicial. The court in *Treadaway* did indeed note some concerns regarding sexual propensity other act evidence, but listed those concerns as reasons justifying the need for an expert witness. 116 Ariz. at 167, 568 P.2d at 1065. The court explained that because the two at-issue acts "may well involve different psychological and emotional dispositions," the admission of the other act was "significant, particularly in light of . . . the lack of expert testimony relating to its relevancy." *Id.* In fact, the court noted it was "reluctant to overturn the trial court" on the issue of admissibility. *Id.*

¶17 Furthermore, the two acts in *Treadaway* were more dissimilar than the acts here. In *Treadaway*, the appellant had been convicted of the sodomy and murder of a six-year-old boy. *Id.* at 164, 568 P.2d at 1062. On appeal, Treadaway claimed it was error to admit evidence that he had committed fellatio and anilingus on a thirteen-year-old boy three years before the murder. *Id.* at 165, 568 P.2d at 1063.

¶18 Last, Culpepper argues that the trial court abused its discretion by admitting M.'s testimony because it was more prejudicial than probative under Rule 403. Culpepper contends, without citation to authority, that the evidentiary value of M.'s testimony "is minimal given the dissimilarities between it and the charged crimes." Therefore, Culpepper argues, the court should have excluded M.'s testimony because the evidence was likely to lead the jury to make "an emotional decision" that Culpepper had committed the charged crimes because he had committed a crime toward M. in the past. But this argument amounts to a restatement of his earlier argument that the two acts were too dissimilar. We have rejected that argument and need not address it again.

Disposition

¶19 For the foregoing reasons, we affirm Culpepper's convictions and sentences.