IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GALEN TRENT TOOMBS,
Appellant.

No. 2 CA-CR 2016-0045
Filed October 19, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20135132001
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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MEMORANDUM DECISION

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

E P P I C H, Judge:

¶1 After a jury trial, Galen Toombs was convicted of two counts of sexual conduct with a minor under fifteen and one count of sexual abuse of a minor under fifteen. He was sentenced to two consecutive terms of life in prison with the possibility of release after thirty-five years, and one consecutive term of five years in prison. On appeal, he argues the trial court erred by improperly admitting other-act evidence under Rule 404(c), Ariz. R. Evid. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the jury's verdicts." *State v. Wright*, 239 Ariz. 284, ¶ 2, 370 P.3d 1122, 1123 (App. 2016). In December 2013, Toombs was charged with three offenses arising from sexual conduct between him and his seven-year-old daughter X., which occurred sometime between March 2012 and November 2013. Count two alleged Toombs had sexual conduct with a minor by having the victim perform oral sex on him. During a forensic interview, X. disclosed numerous acts of sexual conduct against her by Toombs, including the act relevant to this appeal: that he had her perform oral sex on him. She told the interviewer that his penis "looks like a candy stick," that "[l]ittle candy tasting stuff" comes out of it, which is "brown-ish and black-ish," and "tastes just like chocolate." She also reported that Toombs told her he had previously done this to another girl.

¶3 Before trial, the state sought to introduce evidence of other sex acts Toombs had committed ten years earlier against his stepdaughter S. Those acts were reported to law enforcement in 2005, and included the allegation that Toombs put chocolate sauce on his erect penis and had S. lick it off. However, under pressure from her mother and grandmother, S. recanted her accusations in a subsequent

2005 forensic interview, and Toombs denied the allegations. Thus, despite a general consensus among law enforcement and social workers that S. was "not . . . truthful" in her recantation, no charges were brought at that time. However, S. renewed her allegations against Toombs in a letter to her father in 2011 alleging a nearly identical story, including the use of chocolate sauce. During an interview in 2013, she admitted that her mother had protected Toombs during the 2005 investigation.

¶4 Toombs opposed the state's motion, but did not request an evidentiary hearing on the matter. After briefing from both parties and reviewing relevant interview transcripts, police reports, and other evidence provided by the state, the trial court ruled some of the other-act evidence inadmissible. However, "[w]ith respect to the allegation of the use of chocolate sauce on [Toombs]'s penis to induce a minor child to lick it off," the court found that because "the past and present allegations are very similar," it constituted other-act evidence admissible under Rule 404(c), and made the findings required by that provision.

¶5 At trial, S. testified about the incident involving chocolate sauce. With regard to the charged offenses, X. testified about the abuse, and the jury was shown the video of the forensic interview in which she made the statements recounted above.

¶6 Toombs was convicted and sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A)(1).

Discussion

¶7 Toombs argues that the trial court improperly admitted the other-act evidence in violation of the Arizona Rules of Evidence.[1] We review the admission of other-act evidence under Rule 404(c) for an abuse of discretion. *State v. Garcia*, 200 Ariz. 471, ¶ 25, 28 P.3d 327,

[1]Although Toombs cites a variety of Constitutional provisions, he does not make a constitutional claim independent of his claim under the rules of evidence, and we therefore deem those arguments waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

331 (App. 2001). An abuse of discretion includes an error of law, *State v. Cowles*, 207 Ariz. 8, ¶ 3, 82 P.3d 369, 370 (App. 2004), and when "a discretionary finding of fact is 'not justified by, and clearly against, reason and evidence.'" *State v. Aguilar*, 224 Ariz. 299, ¶ 6, 230 P.3d 358, 359 (App. 2010), *quoting State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶8 Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith." Ariz. R. Evid. 404(a). Additionally, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). An exception to both of these rules provides that, in cases of sexual misconduct, "evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Ariz. R. Evid. 404(c). To be admissible, such evidence must (A) be sufficient to permit the trier of fact to find the defendant committed the other act, (B) provide a reasonable basis to infer that the defendant has an aberrant sexual propensity to commit the charged crime, and (C) have evidentiary value that is not substantially outweighed by the danger of unfair prejudice, confusion of issues, or other factors listed in Rule 403. Ariz. R. Evid. 404(c)(1). The trial court is required to "make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1)." Ariz. R. Evid. 404(c)(1)(D).

¶9 In order to satisfy Rule 404(c)(1)(A), the other act must be established by clear and convincing evidence. *State v. James*, 242 Ariz. 126, ¶ 17, 393 P.3d 467, 472 (App. 2017). Rule 404(c)(1)(B) is satisfied "as long as there is a 'reasonable basis,' by way of expert testimony or otherwise, to conclude that the commission of the other act permits an inference that a defendant's aberrant sexual propensity is probative." *State v. Arner*, 195 Ariz. 394, ¶ 5, 988 P.2d 1120, 1122 (App. 1999), *quoting* Ariz. R. Evid. 404(c). In determining whether the proffered evidence's probative value is substantially outweighed by the danger of unfair prejudice, the trial court conducts an analysis under Rule 403, Ariz. R. Evid., but must also take into consideration: "(i) remoteness of the other act; (ii) similarity or dissimilarity of the other act; (iii) the strength of the evidence that defendant committed the other act; (iv) frequency of the other acts; (v) surrounding

circumstances; (vi) relevant intervening events; (vii) other similarities or differences; [and] (viii) other relevant factors." Ariz. R. Evid. 404(c)(1)(C).

¶10 Toombs argues the trial court abused its discretion in admitting the other-act evidence because the other act was not proven by clear and convincing evidence. Clear and convincing evidence is "proof both as to the commission of another crime and its commission by the defendant . . . by substantial evidence sufficient to take the case to a jury." *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997), *quoting State v. Hughes*, 102 Ariz. 118, 123, 426 P.2d 386, 391 (1967). Substantial evidence "is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). The uncorroborated testimony of a single victim may generally suffice as proof beyond a reasonable doubt in cases involving sexual offenses. *State v. Williams*, 111 Ariz. 175, 177-78, 526 P.2d 714, 716-17 (1974). Thus, a single victim's testimony plainly may constitute clear and convincing evidence. *See State v. Renforth*, 155 Ariz. 385, 386, 746 P.2d 1315, 1316 (App. 1987) (clear and convincing is lesser standard than proof beyond a reasonable doubt). We generally review the admission of evidence under Rule 404(c) for an abuse of discretion. *James*, 242 Ariz. 126, ¶ 11, 393 P.3d at 471.

¶11 Here, the trial court was provided with police reports from the 2005 investigation involving Toombs's abuse of S., police reports from 2010 in which S. renewed her allegations against Toombs, a letter S. sent to her biological father in 2011 in which she detailed Toombs's abuse, a 2013 police report detailing a forensic interview of S. conducted in that year, and the full transcript of that interview. These documents paint a clear picture that the alleged other act occurred as initially reported and that S.'s recantation was due to pressure from her mother and grandmother to protect Toombs. The court did not err in finding that there was clear and convincing evidence to support the admission of the other-act evidence under Rule 404(c). *See State v. LeBrun*, 222 Ariz. 183, ¶¶ 14-15, 213 P.3d 332, 336 (App. 2009) (court review of victim's prior statements sufficient to conclude other act occurred).

¶12 Toombs next argues that the trial court abused its discretion in admitting the other-act evidence because the court's finding that the allegations by S. and X. "'are very similar' . . . has no support in the record." We disagree. Although arguably subject to interpretation, X.'s statements during her forensic interview described an act strikingly similar to the other act reported by S.: that Toombs enticed her to perform oral sex on him using chocolate sauce.

¶13 Toombs also argues that the trial court abused its discretion in admitting the other-acts evidence because the other act did not demonstrate that he had an aberrant sexual propensity to commit the offense charged. Specifically, that the ten-year gap between the alleged incidents, the fact that there was "only a single incident of alleged misconduct involving S.," and that "the State failed to submit *any evidence whatsoever* to support its argument that this single prior act demonstrated that [Toombs] had the required 'aberrant emotional propensity,'" foreclosed such a finding.

¶14 Rule 404(c) "does not contemplate any bright line test of remoteness" of the prior act in relation to the charged offense. Ariz. R. Evid. 404(c), cmt. to 1997 amend. Prior cases have found other sexual acts admissible even though they occurred over twenty years before the current charges. *See, e.g.*, *State v. Salazar*, 181 Ariz. 87, n.5, 887 P.2d 617, 622 n.5 (App. 1994) (evidence of uncharged rape that occurred over twenty years earlier not foreclosed from use at trial on remand); *State v. Weatherbee*, 158 Ariz. 303, 304-05, 762 P.2d 590, 591-92 (App. 1988) (prior acts of child molestation that occurred nineteen and twenty-two years before trial admissible to show sexual aberration). Here, the trial court expressly addressed the time gap, stating, "While there are a number of years between the two incidents, this is due to the ages of the respective minors," referencing the fact that the abuse of both victims occurred when they were of approximately the same age, and when Toombs had access to them. *See Weatherbee*, 158 Ariz. at 305, 762 P.2d at 592. In light of this fact, the ten-year gap poses no bar to a finding that Toombs possessed an aberrant sexual propensity.

¶15 While in both *Salazar* and *Weatherbee* expert testimony established a reasonable basis for a finding of continuing propensity to engage in sexually aberrant behavior, the lack of such testimony poses no bar to such a finding here. At the time *Salazar* and *Weatherbee* were decided, expert testimony was required under *State v.*

Treadaway, 116 Ariz. 163, 167, 568 P.2d 1061, 1065 (1977). However, the adoption of Rule 404(c) eliminated the requirement of expert testimony in every case. *See Arner*, 195 Ariz. 394, ¶ 5, 988 P.2d at 1122. Now, "as long as there is a 'reasonable basis,' by way of expert testimony or otherwise, to conclude that the commission of the other act permits an inference that a defendant's aberrant sexual propensity is probative, the evidence is admissible." *Id., quoting* Ariz. R. Evid. 404(c) cmt. to 1997 amend. Arizona courts have long recognized that abnormal sex acts, including those committed against children, can constitute sufficient proof of an aberrant sexual propensity. *State v. Aguilar*, 209 Ariz. 40, ¶ 11, 97 P.3d 865, 868 (2004), *citing State v. McFarlin*, 110 Ariz. 225, 228, 517 P.2d 87, 90 (1973). The trial court did not abuse its discretion when it concluded that "the allegation of the use of chocolate sauce on [Toombs's] penis to induce a minor child to lick it off . . . show[s] a unique character trait giving rise to an aberrant sexual propensity to commit the charged offense."

¶16 Finally, Toombs argues that the trial court abused its discretion in determining that the probative value of the other act outweighed the danger of unfair prejudice. Specifically, he asserts the other-act evidence lacked probative value because "there was no evidence that [Toombs] ever committed any such act against X.," the remoteness of the other act, and the fact that the other act occurred only once. We have addressed each of these points above. There was sufficient evidence that Toombs enticed X. to perform oral sex on him with chocolate sauce, precisely as he did with S., the time gap between the acts is readily explainable by the age gap of the victims, and the unique nature of the acts was clearly sufficient to support a finding of an aberrant sexual propensity. That same unique and highly specific nature of the acts bolsters the probative value of the other-act evidence when weighed against the risk of unfair prejudice.

Disposition

¶17 For the foregoing reasons, Toombs's convictions and sentences are affirmed.