IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

VIRGINIA JOLENE CULPEPPER,
Appellant.

Nos. 2 CA-CR 2016-0254 and 2 CA-CR 2016-0255 (Consolidated)
Filed May 3, 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NOT FOR PUBLICATION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 Gila County
Nos. S0400CR201500132 and S0400CR201500189 (Consolidated)
The Honorable Timothy M. Wright, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Howard[1] concurred.

E C K E R S T R O M, Chief Judge:

¶1 Culpepper appeals from her convictions and sentences for four counts of child abuse and three counts of sexual conduct with a minor. For the following reasons, we vacate her four convictions for child abuse. We otherwise affirm her convictions and sentences.

Factual and Procedural Background

¶2 In 1986, Culpepper married William Culpepper (William). At that time, Culpepper already had two daughters, A. and D. The couple had a daughter together the following year, S. As the girls grew up, William committed numerous acts of physical and sexual abuse against them. Culpepper was present during many of these acts, but never attempted to intervene. In 2014, when D. was an adult, she learned that the statute of limitations had not expired and that William and Culpepper could still be prosecuted for their actions. D. reported the abuse to law enforcement.

¶3 Culpepper was charged in two separate case numbers, CR 201500132 (case 132) and CR 201500189 (case 189). The cases were consolidated for trial and have likewise been consolidated on appeal. After a jury trial, Culpepper was convicted of four counts of child abuse and three counts of sexual conduct with a minor. She was sentenced to consecutive, minimum terms of fifteen years for each of the three counts of sexual conduct with a minor and a combination of consecutive and concurrent presumptive terms totaling 6.5 years for the four counts of child abuse, to be served

[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

consecutively to the sentences for sexual conduct. This timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033.

Duplicity

¶4 Culpepper first asserts the four charges of child abuse were duplicitous. Because Culpepper did not object on this basis to the trial court, she has forfeited review absent fundamental, prejudicial error. *See State v. Urquidez*, 213 Ariz. 50, ¶ 4, 138 P.3d 1177, 1178 (App. 2006). However, a duplicitous charge constitutes fundamental error because it "raises the possibility that the defendant's right to a unanimous jury verdict . . . may be violated." *State v. Klokic*, 219 Ariz. 241, ¶ 32, 196 P.3d 844, 851 (App. 2008); *accord State v. Delgado*, 232 Ariz. 182, ¶¶ 18-19, 303 P.3d 76, 82 (App. 2013).

¶5 "A duplicitous charge exists '[w]hen the text of an indictment refers only to one criminal act, but multiple criminal acts are introduced to prove the charge.'" *State v. Paredes-Solano*, 223 Ariz. 284, ¶ 4, 222 P.3d 900, 903 (App. 2009), *quoting Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d at 847 (alteration in *Paredes-Solano*). The state may argue alternative legal theories of liability without creating a duplicity issue because "the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed." *State v. West*, 238 Ariz. 482, ¶ 13, 362 P.3d 1049, 1055 (App. 2015), *quoting State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993). However, when the state introduces evidence of separate incidents that may each support criminal liability, duplicity becomes an issue because "[t]he jury . . . must be unanimous 'on whether the criminal act charged has been committed.'" *Id.*, *quoting Herrera*, 176 Ariz. at 16, 859 P.2d at 126.

¶6 If the evidence introduced at trial renders a charge duplicitous, the state may cure that defect by electing which act it alleges constituted the crime. *See State v. Waller*, 235 Ariz. 479, ¶ 33, 333 P.3d 806, 816 (App. 2014). In its answering brief, the state contends the prosecutor elected which act constituted each offense

in her closing argument.[2] We address each of Culpepper's claims of duplicity in turn.

Child Abuse Against S.

¶7 Culpepper was charged in "count three"[3] of case 189 with child abuse as to S. committed "[o]n or about 1995 to on or about 2000" and specifically that she "intentionally or knowingly permitted [S.] . . . to be placed in a situation where her person or health was endangered." At trial, S. testified to multiple incidents that could have formed the basis for this count. She detailed how William had spanked her with a "[p]addle or belt" and stated that he had beaten her badly enough to have "broken two paddles over [her] before." She also testified that William had threatened her with a gun because she told him she was a lesbian. S. testified that, during both of these incidents, Culpepper had been present, but had done nothing.

¶8 In addition to these allegations of physical violence, S. also testified to a number of instances of sexual misconduct by William: he had forced her and her sisters to participate in

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[2]A prosecutor generally may cure a duplicity issue by electing which alleged act constitutes the charged crime. *See Waller*, 235 Ariz. 479, ¶ 33, 333 P.3d at 816. But we are skeptical that simply verbally identifying which act corresponds to which charge during closing argument is an appropriate solution when, as here, the jury must consider seven counts and far more numerous allegations of misconduct, all of which allegedly occurred over a period of years. Under these circumstances, we question whether a jury may be reasonably expected to remember which act corresponds to which charge based on a single statement by the prosecutor. However, we need not decide whether such a statement could be a sufficient election because, as explained below, the prosecutor's statements here did not clearly define which act was the basis for each charge.

[3]This charge was labeled "count three" in the indictment, but it was actually the first charge listed, and the third charge listed was also labeled "count three."

"[s]hutdown time," during which the girls performed household chores and other evening activities while nude, he had taken nude pictures of her, and he had done "checkups while [she] was in the shower to see how [she] was developing," all while Culpepper was present. Culpepper never attempted to stop any of these acts.

¶9 In her closing argument, the prosecutor, discussing the charge of child abuse "involving [S.] from '95 to 2000," stated, "And what did the defendant do? She allowed her daughter to have a gun pointed at her head, and told she would be killed, if she mentioned that she was gay again." However, a bit later in her argument, the prosecutor was discussing the standard of child abuse "[u]nder circumstances, other than those likely to produce death or serious physical injury," and she then noted, as an example of "what was going on," that "[S.] was paddled so hard, she broke the paddle." The prosecutor, in this statement, strongly implied that the paddling was the basis for the child abuse charge involving S. Given this ambiguity as to which act the state had elected, we cannot conclude that the prosecutor cured the duplicity problem. Culpepper has met her burden of establishing fundamental error as to this charge.[4]

¶10 Having determined that fundamental error occurred, we now must determine if the error was prejudicial. In a case where there is no "reasonable basis to distinguish between the acts," and

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[4]A.R.S. § 13-3623 provides that it is child abuse for a person who has care or custody of a child to cause or permit the child "to be placed in a situation where the person or health of the child . . . is endangered." The state has not argued on appeal that the term "situation" may be applied broadly to encompass the entire timespans cited in the counts charged, or that each discrete act which occurred therein could simply be presented as evidence that the "situation" in which the children lived endangered their persons or health. Nor did the state advance such a theory at trial. To the contrary, the state charged Culpepper with several individual counts of child abuse as to one of the children and purported to identify the individual event that supported each count. We express no opinion here as to whether such a theory of criminal liability would be appropriate.

the jury is simply presented with a question of whether to believe the victim or the defendant, there is no prejudice. *Klokic*, 219 Ariz. 241, ¶¶ 32-36, 196 P.3d at 851-52; *see State v. Schroeder*, 167 Ariz. 47, 53, 804 P.2d 776, 782 (App. 1990). The state asserts that such is the case here.

¶11 Culpepper testified at trial that she did not know that her husband had done anything inappropriate. She did not recall him forcing her daughters to be nude around the house, did not know about most of the nude photographs, and claimed she had not been present during the incident with the gun. However, she did acknowledge that she recalled "when he spanked [her]." Although she never specified which of her daughters this statement referred to, she did say that she thought it was wrong and she told William that she disagreed with it. From this testimony, the jury could have concluded that she did not intentionally permit S.'s health or person to be endangered when William had spanked her. *See* A.R.S. § 13-3623(B)(1). Culpepper presented different defenses as to these acts and has therefore shown fundamental, prejudicial error. *See Klokic*, 219 Ariz. 241, ¶ 37, 196 P.3d at 852. We vacate her conviction on this count.

Child Abuse Against D.

¶12 The charge of child abuse involving D., count three of the indictment in case 132, specified that it occurred from January 2000 to May 2003. D. testified that William had "masturbate[d]" her on the sofa on multiple occasions. On those occasions, Culpepper was present, but did not say anything or take any action to prevent it. Like S., D. testified about "shutdown time" and having nude photos taken. D. stated that William "ha[d] [her] touch his penis," and "penetrate[d] [her] with his fingers," but for these acts, she testified that Culpepper had not been present. When D. was sixteen, William "would spray [her] with silver water," supposedly as a treatment for ringworm. D. was naked during this procedure, and William took pictures of it. D. stated that William also "masturbate[d]" her under the pretense of applying medicine to ringworms on her vaginal area. As to that specific incident, D. testified that Culpepper had not been present.

¶13 During closing argument, in reference to the charge of child abuse involving D., the prosecutor stated, "This is the situation where [D.] was masturbated by her stepfather. Was required to masturbate[] him. Was required to perform other sexual acts for him." This statement, rather than electing a specific act that constituted the basis of the charge, referred to at least three different acts and was plainly insufficient to cure the duplicity issue.

¶14 On this charge, we must also conclude there was prejudice because there was a "reasonable basis to distinguish between the acts." *Klokic*, 219 Ariz. 241, ¶ 33, 196 P.3d at 851. D. specifically testified that her mother had not been present when William made her touch his penis and penetrated her with his fingers. D. also stated that her mother had not been present for the ringworm treatment. The jury, therefore, could have believed that Culpepper was innocent as to these acts but guilty as to the other alleged acts. Because there was a risk that the jury was not unanimous, fundamental, prejudicial error occurred, and we must vacate Culpepper's conviction on this charge. *See State v. Davis*, 206 Ariz. 377, ¶ 59, 79 P.3d 64, 77 (2003).

Child Abuse Against A.

¶15 Culpepper was charged with two counts of child abuse involving A., one, count sixteen in case 132, occurring from 1989 to 1990 or "when they first lived in Arizona," and one, count eighteen in case 132, between 1995 and 1997 "after they returned to Arizona."[5] Like her sisters, A. testified that she had been forced to participate in "shutdown time" and that William had taken nude pictures of her. A. also testified that William had "masturbate[d]" her while sitting on the couch.

¶16 A. testified that, when she was seven years old, William had forced her to do something he called "sex education." She was made to remove her clothing from the waist down and lie on the couch with her head in Culpepper's lap. A mirror was placed

[5]Culpepper was charged with a third count of child abuse against A., but that count was dismissed during trial.

between her legs "to show [her] what the different parts of [her] vagina were." William penetrated her with his pinky finger. William had Culpepper get butter knives, which he placed inside of her and used "to open [her] up." William also penetrated her with a douche nozzle. Throughout all of this, Culpepper provided William with the mirror and the knives, held A.'s hand, and patted her head. A. testified that this was "a weekly occurrence" for some time. A. claimed that William continued "sticking things in [her]" for "[n]early ten" years.

¶17 A. also testified that the police had brought her home after she ran away from home one evening. William punched her in the head repeatedly and then pushed her across the room. Culpepper was in the room, but did not attempt to intervene or tell William to stop.

¶18 During closing argument, the prosecutor described the incidents with the mirror, butter knives, and douche nozzle and told the jury "these acts of sexual conduct with a minor, also support [count sixteen,] the charge of child abuse . . . in 1989 to 1990." This statement was not a sufficient election of which conduct supported the charge because it described at least three separate acts, each of which could fulfill the statutory elements of the offense. Furthermore, the record is unclear as to whether all three implements were used in each of the several incidents of "sex education."

¶19 For count eighteen, the count occurring between 1995 and 1997, the prosecutor stated it was based on William "masturbat[ing]" A. on the couch. But the prosecutor also mentioned in her closing argument the incident during which William had punched A. in the head, which the evidence suggested also occurred during the relevant time frame. The prosecutor did not explicitly link this act to one of the charges, but she did emphasize this act, suggesting its occurrence alone demonstrated guilt on one of the counts. There was no count other than count eighteen for which this event could support criminal liability. For this reason, the jury could have reasonably believed that the punching incident was the basis for the child abuse charge allegedly committed in that time window.

¶20 We begin our prejudice analysis with count sixteen, the count alleging criminal acts between 1989 and 1990. As to at least one of the acts, Culpepper presented a different defense. *See Klokic*, 219 Ariz. 241, ¶ 37, 196 P.3d at 852. She did not deny that the act involving the "butter knives" had happened, but rather, she testified it had happened in Missouri and was done to check A. for a yeast infection. If the jury credited her testimony, it could have concluded that the incident had happened outside Arizona or that Culpepper had believed it was a legitimate medical examination. Therefore, the possibility existed that the jury was not unanimous, and individual jurors had instead anchored their conclusion of guilt in varying allegations. We must vacate this conviction. *See id*.

¶21 Finally, we consider prejudice as to count eighteen, the count involving A. and occurring from 1995 to 1997. As to both potential incidents forming the basis for this count, Culpepper's defense was the same—that she was unaware that they had occurred. However, the plausibility of that claim varied markedly between the two incidents. According to A., when William "masturbat[ed]" her on the couch, she was uncovered, and her mother was seated on the couch next to William. A. described this conduct as occurring "right in the open." A.'s sisters both agreed that William had "masturbate[d]" her in the presence of their mother. Thus, A.'s testimony, if credited, would render Culpepper's defense incredible. And A.'s testimony would be difficult to discredit, as it was corroborated by each of her sisters. *See State v. Rankovich*, 159 Ariz. 116, 120, 765 P.2d 518, 522 (1988) (evidence of guilt overwhelming where two eyewitnesses saw defendant commit crime). Moreover, all three sisters described the masturbation as if it was conduct that had occurred on multiple occasions. This further reduced the plausibility of Culpepper's claim that she was unaware of that behavior.

¶22 By contrast, the punching incident occurred only once, and A. testified that it had occurred at 1:00 or 2:00 in the morning, when most people would be sleeping. These facts lend greater plausibility to Culpepper's claim that she was unaware of this lone event. And, given that the event occurred but once and that it occurred approximately twenty years ago, a reasonable jury might

question the precision of A.'s memory that Culpepper had been present. In short, a jury could have conceivably found a reasonable doubt about Culpepper's guilt on this incident.

¶23 We are thus presented with two potential events that the jury could have reasonably construed as the basis for the child abuse count. For one of those incidents, the evidence was arguably overwhelming. On the other, all twelve jurors may not have found proof beyond a reasonable doubt. Because we cannot determine which incidents formed the basis of the jury's guilty verdict or whether all jurors perceived themselves to be deliberating as to the same incident, we face the very ambiguity that prevents the state from both introducing "multiple alleged criminal acts" to "prove the charge" and failing to elect the act it alleges constitutes the crime. *See Klokic*, 219 Ariz. 241, ¶¶ 12, 14, 196 P.3d at 847. Under similar circumstances, when a defendant presented a plausible defense to one of the two criminal incidents potentially supporting a conviction, our supreme court vacated the conviction and remanded for a new trial. *Davis*, 206 Ariz. 377, ¶¶ 58, 66, 79 P.3d 64, 76-78 (2003) (vacating conviction when two incidents, eleven days apart, could have supported the same count and the defendant possessed an alibi defense as to one).[6]

[6]Our supreme court has recently observed that a duplicitous charge does not result in prejudice from the risk of non-unanimity if "no reasonable jury could have found" the defendant not guilty as to at least one of the criminal acts. *State v. Payne*, 233 Ariz. 484, ¶ 90, 314 P.3d 1239, 1263-64 (2013); *accord Waller*, 235 Ariz. 479, ¶ 36, 333 P.3d at 816-17. However, we read this as applying exclusively in the context of duplicity concerns arising from a single criminal transaction—when either of two acts within that discrete event could form the basis for the charge. *See Payne,* 233 Ariz. 484, ¶¶ 84-90, 314 P.3d at 1263-64 (addressing same transactional event where crime could have been committed two ways); *see also Klokic*, 219 Ariz. 241, ¶¶ 24-38, 196 P.3d at 849-52 (adopting *Davis* and explaining "single transaction" distinction in assessing prejudice). We do not read that principle as applying where, as here, the acts

Jurisdiction

¶24 Culpepper next asserts the trial court lacked jurisdiction over the three counts of sexual conduct with a minor because those offenses did not occur in Arizona. Arizona courts have jurisdiction to prosecute a person for an offense if the offense occurs within the state. *State v. Fischer*, 219 Ariz. 408, ¶ 41, 199 P.3d 663, 674 (App. 2008). Because Culpepper did not move for judgment of acquittal on these counts pursuant to Rule 20, Ariz. R. Crim. P., our review is limited to fundamental error. *State v. Fimbres*, 222 Ariz. 293, n.1, 213 P.3d 1020, 1024 n.1 (App. 2009). However, insufficient evidence constitutes fundamental error. *Id.*

¶25 In our review, we view the facts in the light most favorable to upholding the verdict. *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011). We will not reverse a conviction unless it is not supported by substantial evidence, that is, evidence that a reasonable person could accept as sufficient to show guilt beyond a reasonable doubt. *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007). We will affirm if there is sufficient evidence to permit a jury to find that the offense occurred within Arizona. *See id.*; *see also State v. Willoughby*, 181 Ariz. 530, 540, 892 P.2d 1319, 1329 (1995).

¶26 A., the victim in these counts, testified the offenses had occurred in Arizona. Culpepper asserts this testimony contradicts other testimony in the case, including A.'s own statements. To the extent this is true, it does not establish that the evidence is insufficient. "The jury is tasked with deciding the facts of the case and, in so doing, must consider what testimony to accept or . . . reject," and a jury may choose parts of a witness's testimony to accept and parts to disregard. *State v. Ruiz*, 236 Ariz. 317, ¶ 16, 340 P.3d 396, 402 (App. 2014). Sufficient evidence supported a finding that these offenses occurred in Arizona, and the court therefore had jurisdiction to prosecute Culpepper.

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did not "cause[] a single result and were [not] part of a single criminal undertaking." *Klokic*, 219 Ariz. 241, ¶ 28, 196 P.3d at 850.

Facilitation

¶27 Culpepper's final claim of error is that the trial court should have granted her requested jury instruction on facilitation as a lesser-included offense of sexual conduct with a minor. We review a trial court's denial of a requested jury instruction for an abuse of discretion, *State v. Johnson*, 212 Ariz. 425, ¶ 15, 133 P.3d 735, 741 (2006), but we review whether an offense is a lesser-included offense of another crime de novo. *In re James P.*, 214 Ariz. 420, ¶ 12, 153 P.3d 1049, 1052 (App. 2007).

¶28 "In general, to constitute a lesser included offense, it must be impossible to have committed the greater offense without necessarily having committed the lesser offense." *State v. Scott*, 177 Ariz. 131, 139, 865 P.2d 792, 800 (1993). An offense may also be a lesser-included offense if the conduct described in the indictment describes the lesser offense, even if the lesser offense is not necessarily included in the offense charged. *Id.* at 140, 865 P.2d at 801.

¶29 In *Scott*, the defendant was charged with first-degree murder based on accomplice liability. *Id.* Our supreme court concluded that first-degree murder could clearly be committed without committing facilitation. *Id.* The court then considered whether the indictment nonetheless described conduct that would constitute facilitation and determined that it did not. *Id.* at 140-41, 865 P.2d at 801-02. Because the indictment "refer[red] only to the statutory provisions that impose accomplice liability" and "[t]he facts contained in the indictment [did] not describe the lesser crime of facilitation," the court concluded the defendant was not entitled to a jury instruction on facilitation as a lesser-included offense. *Id.*

¶30 Likewise, here, sexual conduct with a minor can clearly be committed without committing facilitation. *See* A.R.S. §§ 13-1405; 13-1004. The indictment referred to statutory provisions related to accomplice liability, but not facilitation. And the indictment did not describe conduct that would constitute facilitation. *See Scott*, 177 Ariz. at 141, 865 P.2d at 802; *see also State v. Gooch*, 139 Ariz. 365, 367, 678 P.2d 946, 948 (1984) ("Even though appellant *could* have been prosecuted for facilitation, that possibility does not affect the

decision of whether the instruction is proper."). We therefore conclude the trial court did not err in denying Culpepper's requested jury instruction on facilitation.

Disposition

¶31 For the foregoing reasons, we vacate Culpepper's convictions and sentences for count three in case number 189, child abuse against S., count three in case number 132, child abuse against D., count sixteen in case number 132, child abuse against A. from 1989 to 1990, and count eighteen in case number 132, child abuse against A. occurring between 1995 and 1997. We otherwise affirm her convictions and sentences.