IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ADAM GONZALES,
Appellant.

No. 2 CA-CR 2016-0277
Filed May 10, 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NOT FOR PUBLICATION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. CR20153668001
The Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Appellant Adam Gonzales appeals from his convictions on two counts of sexual assault and one count of sexual conduct with a minor. He contends the trial court reversibly erred in allowing the victim to testify she had been afraid of Gonzales because he had been in jail. Finding no error, we affirm.

¶2 "We view the facts in the light most favorable to upholding [the] convictions and sentences." *State v. Delgado*, 232 Ariz. 182, ¶ 2, 303 P.3d 76, 79 (App. 2013). In the summer of 2010, Gonzales had sexual intercourse with P.M., then sixteen, against her will, impregnating her while they were both staying with a relative, V.E. P.M. did not report the rapes until December 2010 after her pregnancy had become visible.

¶3 Gonzales was charged with two counts of sexual assault and two counts of sexual conduct with a minor. A jury found him guilty of one count of sexual conduct with a minor, but could not reach a verdict on the remaining charges. The second count of sexual conduct was dismissed with prejudice, and, after a second trial, Gonzales was convicted on the sexual assault counts. The trial court imposed enhanced, presumptive and minimum, consecutive and concurrent sentences totaling 31.5 years' imprisonment.

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[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.

¶4 On appeal, Gonzales contends "[t]he trial court committed reversible error by permitting [P.M.] to testify that [he] had been in jail." On the first day of the first trial, the parties discussed whether P.M. should be allowed to testify that "she didn't initially report because she was afraid because she had been told that Mr. Gonzales was in jail." The trial court found the probative value of such testimony outweighed any prejudice, and ruled it would be allowed. P.M. testified to that effect without objection. V.E. also testified that Gonzales had stayed with her because "he needed a place to stay when he got out of jail." Gonzales did not object when V.E. made the statement, but moved for a mistrial based in part on that testimony. The court denied the motion for mistrial, but offered a curative instruction, which Gonzales declined.

¶5 Before the second trial, Gonzales filed a motion in limine seeking to exclude any testimony by V.E. that he had been living with her "after getting out of jail." The trial court granted the motion, and V.E. testified only that Gonzales had lived with her. When P.M. testified at trial that she had not reported the rapes because she was afraid of Gonzales because he had "gone to jail before," Gonzales did not object. Indeed, Gonzales cross-examined P.M. as to whether he had told her personally he had been in jail. The state argues Gonzales forfeited the claim by failing to object at the second trial, but we need not decide whether his failure constituted a waiver because we find no error, fundamental or otherwise, in the trial court's ruling.

¶6 Gonzales argues that P.M.'s statement about his having been in jail "was not admitted for any permissible purpose under Rule 404(b)," Ariz. R. Evid. We agree that "[u]nder Arizona Rule of Evidence 404(b), other wrongs or acts are not admissible to show that a person acted in conformity with his or her character." *State v. Burns*, 237 Ariz. 1, ¶ 52, 344 P.3d 303, 320, *cert. denied*, ___ U.S. ___, 136 S. Ct. 95 (2015). Evidence of such acts "may, however, be admissible for other purposes, such as rebutting an attempt to impeach a witness." *Id.*

¶7 As the state argues, because Gonzales argued P.M.'s "accusation . . . was fabricated in light of the witness's delayed disclosure," her reason for delaying disclosure—her fear of Gonzales

based on his having spent time in jail—was relevant to his attempt to impeach her, not to a claim that he had acted in conformity with some other act. We therefore cannot say the evidence was barred by Rule 404. Nor can we say the trial court abused its broad discretion in determining the probative value of the evidence outweighed any prejudicial effect it might have had. *See State v. Harrison*, 195 Ariz. 28, 33, 985 P.2d 513, 518 (App. 1998), *approved*, 195 Ariz. 1, 985 P.2d 486 (1999) (trial court in best position to weigh prejudice and appellate court views evidence in favor of proponent, giving trial court broad discretion).

¶8 Therefore, we affirm Gonzales's convictions and sentences.