IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LUIS G. MARTINEZ,
Appellant.

No. 2 CA-CR 2016-0349
Filed December 4, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201601534
The Honorable Jason R. Holmberg, Judge

AFFIRMED

COUNSEL

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

Rosemary Gordon Pánuco, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

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

¶1 Luis Martinez appeals from his convictions and sentences for twenty-four counts of myriad sexual offenses over thirty years and against ten children, raising numerous claims of error. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the verdict. *State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999). On twenty-four occasions between 1979 and 2012, Martinez sexually touched ten children—both family members and their friends—while they were sleeping or while under a blanket watching movies. After one of his victims, L.E., attempted suicide, the family held a meeting with Martinez in which they confronted him, and he admitted touching her vagina as she alleged.

¶3 After a jury trial, Martinez was convicted of nine counts of child molestation, seven counts of sexual contact with a minor, seven counts of sexual abuse, and one count of sexual assault.[1] Eighteen counts constituted dangerous crimes against children. *See* A.R.S. § 13-705.[2] The trial court sentenced Martinez to two mandatory, consecutive life sentences followed by consecutive, presumptive prison sentences totaling 283.5

[1]The state voluntarily dismissed one count of indecent exposure, and, pursuant to Rule 20, Ariz. R. Crim. P., the court dismissed two counts of child molestation.

[2]The statute changed in material parts throughout the period of Martinez's offenses. *See* 1985 Ariz. Sess. Laws, ch. 364, § 6 (enacting dangerous-crimes-against-children statute); 2008 Ariz. Sess. Laws, ch. 301, § 29 (version in effect at time of Martinez's most recent offenses). The trial court applied the version of the statute in place at the time of each offense.

years.[3] Martinez appealed. We have jurisdiction. A.R.S. §§ 13-4031, 13-4033.

Relevance of Suicide Note

¶4 Martinez first contends the trial court erred by allowing the state to introduce a "suicide note" written by L.E. because it was unfairly prejudicial.[4] "Evidentiary rulings are subject to the trial court's determination and will not be disturbed, absent an abuse of discretion." *State v. Jones*, 197 Ariz. 290, ¶ 47 (2000).

¶5 Martinez argues the note was unfairly prejudicial because "it made [him] look like a murderer to the jur[ors] . . . [who] could easily use it to believe that he caused [L.]E. to attempt suicide."[5] But the note was

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[3]The September 30, 2016 minute entry does not specify whether Martinez's sentences are to be served consecutively or concurrently. However, the oral pronouncement specifies all sentences would "run consecutive." Where there is any discrepancy, the oral pronouncement controls. *State v. Ovante*, 231 Ariz. 180, ¶ 38 (2013). Accordingly, we correct the minute entry to reflect that all of Martinez's sentences run consecutively. *See id.* (reviewing court may "order the minute entry corrected if the record clearly identifies the intended sentence").

We also note the court orally pronounced two sentences as to count twenty-one—one and a half years and seven years—but did not pronounce a sentence as to count twenty. We adopt the sentences for counts twenty and twenty-one as reflected in the minute entry because a one-and-a-half-year sentence falls squarely within the sentencing range for count twenty, a class five felony, and a seven-year sentence falls squarely within the sentencing range for count twenty-one, a class two felony. *See* 2006 Ariz. Sess. Laws, ch. 148, § 1; *State v. Gourdin*, 156 Ariz. 337, 339 (App. 1988) (reviewing court may correct technical errors in sentencing).

[4]Martinez also challenges the evidence as irrelevant. Although he claims that he "preserved this issue by objecting to the suicide note . . . because it was overly prejudicial," his objection was based solely on a claim of unfair prejudice and did not address relevancy. Because he did not challenge the relevance of the suicide note below, and has not now claimed its admission was fundamental error, we deem this claim waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17 (App. 2008).

[5]Martinez did not challenge any testimony regarding L.E.'s suicide attempt on grounds of relevance or prejudice either below or before this

probative of whether L.E. had suffered childhood trauma, which she attributed to Martinez having molested her, and whether she had become acutely aware of that trauma in August 2013, contrary to any assertion she was lying. *See* Ariz. R. Evid. 401. As the state correctly observes, both of these facts are probative of the events leading up to the family meeting during which Martinez admitted touching her.

¶6 We also note the trial court explicitly warned the state it would entertain a mistrial if it "really la[id] on the sympathy." Although the note may have had some tendency to unfairly prejudice Martinez by engendering sympathy or emotion toward L.E., *see State v. Ortiz*, 238 Ariz. 329, ¶ 9 (App. 2015), we cannot say the trial court abused its discretion by determining that risk did not substantially outweigh the probative value of the note. Ariz. R. Evid. 403; *see State v. Kiper*, 181 Ariz. 62, 65 (App. 1994) (trial court in best position to balance probative value and prejudicial effect).

Testimony to Uncharged Crimes

¶7 Martinez next complains the court erroneously allowed victims A.E. and L.E. to testify to uncharged sexual acts, thereby prejudicing him. Because Martinez did not object at trial, we review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). "To prevail under [fundamental error] review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶8 When a defendant is charged with a sexual offense, "evidence of other crimes, wrongs, or acts may be admitted . . . 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). The trial court must find such evidence is "sufficient to permit the trier of fact to find that the defendant committed the other act"; the act "provides a reasonable basis to infer . . . [such] a character trait"; and "[t]he evidentiary value . . . is not substantially outweighed by danger of unfair prejudice." Ariz. R. Evid. 404(c)(1)(A)-(D). The court must also "instruct the jury as to the proper use of such evidence." Ariz. R. Evid. 404(c)(2).

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court. He also did not challenge the note on the ground of hearsay either below or before this court.

A.E.'s Testimony

¶9 A.E. testified that when she was around thirteen years old she awoke to find Martinez, her stepfather, performing oral sex on her—a crime not charged in the indictment. Following her testimony, the trial court clarified with counsel that the state did not charge Martinez with performing oral sex on A.E. Defense counsel determined he did not "have anything that [he] would like to ask the Court to do," and the state asked the court to admit the testimony pursuant to Rule 404(c). In admitting the statements, the court found by clear and convincing evidence that the act had occurred, *see State v. James*, 242 Ariz. 126, ¶ 17 (App. 2017), and that it was consistent with Martinez's "modus operandi" with other victims.[6] The court then gave the jury a limiting instruction consistent with Rule 404(c).

¶10 Martinez argues A.E.'s testimony was improper under Rule 404(c) because "[n]one of the counts where [A.]E. was the victim . . . involv[ed] oral sex." But Rule 404(c) does not limit such evidence to the same acts committed against the same victim, and Martinez cites no authority supporting that position. *See State v. Lehr*, 227 Ariz. 140, ¶ 21 (2011) ("Acts need not be perfectly similar in order for evidence of them to be admitted under Rule 404."). Moreover, as Martinez acknowledges, the state charged him with another count in which he performed oral sex on a victim who had been sleeping. *See id.* Accordingly, the court did not err by admitting A.E.'s testimony pursuant to Rule 404(c).

L.E.'s Testimony

¶11 The next witness, L.E., testified to three uncharged acts. First, she described an incident when she was eleven or twelve in which she woke to find Martinez fondling her breast and touching her vagina over her clothes. Second, she testified Martinez digitally penetrated her vagina, an uncharged act, during the same incident in which he performed oral sex on

[6]We interpret the court's determination to be consistent with finding a character trait giving rise to an aberrant sexual propensity because the record provides a reasonable basis for it. *See State v. Dixon*, 226 Ariz. 545, ¶ 15 (2011). Likewise, although the court failed to make an express finding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence, such findings are not necessary when, as here, the record sufficiently demonstrates "the necessary factors were argued, considered, and balanced by the trial court as part of its ruling." *State v. Beasley*, 205 Ariz. 334, ¶ 15 (App. 2003).

her, a charged act. Third, while the state was eliciting testimony concerning her suicide attempt, L.E. volunteered that "[a]t one point, [Martinez] tried to put his penis in my vagina."

¶12 Again, the court brought the uncharged acts to the attention of counsel. Defense counsel considered, but ultimately decided not to move for a mistrial, and the state moved to admit the statements pursuant to Rule 404(c). The court made the requisite findings and properly instructed the jury.

¶13 Martinez contends "the attempted penile-vaginal penetration was much different from the rest of the [charged] acts . . . chang[ing] the character and context of this case." He asserts this alleged act was "so bad compared to the other testimony that [the] jury could not help but convict him on the 'bad man' theory." We disagree. Although Martinez was not otherwise charged with attempted intercourse, the context of L.E.'s testimony suggests all other circumstances of the incident were consistent with other charged acts. *See Lehr*, 227 Ariz. 140, ¶ 21 (perfect similarity not required).

¶14 Martinez also asserts L.E.'s statement, that he attempted to insert his penis into her vagina, compromised his ability to defend the charges because he had no opportunity to investigate the new allegations. To the extent Martinez argues the lack of disclosure of this particular evidence infringed upon his due process rights, he has cited no authority in support of this argument, and we therefore deem any such claim waived. *See State v. Carver*, 160 Ariz. 167, 175 (1989) ("In Arizona, opening briefs must present significant arguments, supported by authority . . . . Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

Vouching

¶15 Martinez next argues the state impermissibly vouched for the credibility of certain witnesses by asking Detective C.P. whether their testimony was consistent with statements made during police interviews. Because Martinez did not object at trial, we review for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19.

¶16 "Prosecutorial vouching takes two forms: '(1) where the prosecutor places the prestige of the government behind its [evidence] [and] (2) where the prosecutor suggests that information not presented to the jury supports the [evidence].'" *State v. Newell*, 212 Ariz. 389, ¶ 62 (2006), *quoting State v. Vincent*, 159 Ariz. 418, 423 (1989) (alterations in *Newell*).

Martinez insists the prosecutor vouched by suggesting police interviews, not admitted into evidence, supported the testimony at trial. But nothing about the prosecutor's question suggested that anything in the victim's interviews provided any additional evidence of Martinez's guilt, beyond the statements introduced at trial. *See id.*; *cf. State v. Brown*, 856 N.W.2d 685, 688 (Iowa 2014) (expert report stating child victim's reports were "consistent" did not constitute vouching); *but see Wilkes v. State*, 7 N.E.3d 402, 405 (Ind. Ct. App. 2014) (detective's testimony that a victim's reports were "consistent" amounted to "indirect vouching"); *State v. Hinton*, 738 S.E.2d 241, 247 (N.C. Ct. App. 2013) (officer's testimony that witness's in-court identification consistent with prior identification "may . . . be construed as improper vouching"). In the absence of any improper suggestion that the jury should convict, at least in part, on the basis of other evidence not before it, we conclude the state did not vouch for its witnesses.[7]

Amended Indictment

¶17 Finally, Martinez contends the trial court erred by allowing the state to amend several dates in the indictment to correspond to the testimony offered at trial. Because Martinez did not object below, we review for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19.

¶18 Rule 13.5(b), Ariz. R. Crim. P., provides a "charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment." Moreover, "[t]he charging document shall be deemed amended to conform to the evidence adduced at any court proceeding," *id.*, provided such amendment does not change the nature of the underlying crime. *State v. Eastlack*, 180 Ariz. 243, 258 (1994). Martinez acknowledges this rule allowed the indictment to be amended, but he claims the amendments denied him his due process right to present a defense.

¶19 On the first day of trial, the state moved to amend several charges in the indictment to reflect the prior numbering and language of the dangerous-crimes-against-children statute. Defense counsel did not object. On the sixth day of trial, the court amended the date ranges of

[7] Even assuming arguendo the prosecutor's questions about the interviews constituted vouching, we are not persuaded the error was of such a magnitude that it deprived Martinez of a fair trial. *See Henderson*, 210 Ariz. 561, ¶ 19.

sixteen counts related to five victims to conform to the dates and ages to which they testified. Defense counsel consented to the amendments.

¶20 Martinez now insists, however, the changes were so "significant" they violated his constitutional right to notice. But, he has not identified any change in the nature of the charges, either by renumbering or by amending the date range. *See id.*; *State v. Self*, 135 Ariz. 374, 380 (App. 1983) (no error when date in indictment amended at close of trial to conform to testimony); *cf. State v. Blakely*, 204 Ariz. 429, ¶¶ 53-54 (2003) (defendant deprived of right to fair trial where state amended predicate offense to felony murder on eve of closing arguments).

¶21 Instead, Martinez argues that by shifting and expanding the dates, particularly counts twenty-six and twenty-seven, which grew from one to five years, "[a]ny theory he developed based on the time frames as they were charged in the . . . [i]ndictment[] was worthless." Considering the number of victims and charges spanning over thirty years, we do not agree. Martinez's defense at trial was that all his victims either lied or "cross-contaminate[d]" each other's memories—a defense not affected by shifting dates. Further, he has not pointed to any alternate theory of defense he would have raised. *See Blakely*, 204 Ariz. 429, ¶¶ 54-55 (prejudice where record supports argument that defendant would have pursued alternate theory of defense had state timely disclosed theory of prosecution). Moreover, as the trial court noted, the amendments inured to Martinez's benefit because the sentencing range under the amended indictment was "less stringent." Additionally, respecting count twenty-seven, the state not only dropped the dangerous-crimes-against-children allegation, it reduced the count from a class three to a class five felony. Thus, Martinez was not prejudiced and the court did not err by amending the indictment.

Disposition

¶22 For all the above reasons, we affirm Martinez's convictions and sentences.