IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE R.C.-H.

No. 2 CA-JV 2016-0192
Filed November 21, 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NOT FOR PUBLICATION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. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. JV20150344
The Honorable Joan Wagener, Judge

AFFIRMED

COUNSEL

Barbara LaWall, Pima County Attorney
By Dale Cardy
Counsel for State

The Hopkins Law Office, P.C., Tucson
By Cedric Martin Hopkins
Counsel for Minor

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Seventeen-year-old R.C.-H. appeals from the juvenile court's orders adjudicating him delinquent for two counts of sexual abuse, one count of molestation, and three counts of misdemeanor assault and placing him on juvenile intensive probation. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the juvenile court's rulings. *In re Natalie Z.*, 214 Ariz. 452, ¶ 2 (App. 2007). R.C.-H. was charged with committing the above offenses against M.C. and A.P. while they were living in his family's home. M.C. and A.P. are half-sisters; M.C. was born in 2002, and A.P. was born in 2005. Both girls began living with R.C.-H.'s family in late December 2012. A.P. remained there until May 2013, and M.C. remained there until February 2015.

¶3 M.C. testified that on her first night in R.C.-H.'s family home, she had been reading in his bedroom and said she wanted to leave, but he pinned her down on his bed, lifted up her shirt, and started to kiss her on her lips, her lower stomach, and her chest, and also touched her breasts over her clothes. A.P. testified that during the six months she lived in the home, R.C.-H. had invited her into his bedroom at night and, after she was on his bed, had lain on top of her and rocked back and forth and had kissed her "private parts," including her nipples and genitals. She told the court this first happened "about a month and-a-half" after she moved in, and then "almost every night" until she was taken in by the couple who eventually adopted her.

¶4 According to M.C., after A.P. moved away, R.C.-H. had, on three occasions, come into her bedroom at night and lain on top of her, and, although she had told him to get off of her, he had remained for about ten minutes before leaving. In February 2015, M.C. told her therapist that she believed R.C.-H. had come into her room while she slept to look at her

naked, and that she wanted to lock her door but had been forbidden to do so.

¶5 That disclosure eventually led to R.C.-H.'s mother calling the police. M.C. told the police about the first night she had been at the home and her belief that R.C.-H. had recently come into her room while she slept. The following morning, M.C. was moved to Illinois to live with an aunt. After M.C.'s disclosures, R.C.-H.'s father called A.P.'s adoptive parents. When A.P.'s mother asked her if R.C.-H. had touched her in inappropriate ways, she began to cry and said that he had. M.C. said she had not told anyone before because she felt uncomfortable talking about it and wanted to continue living with R.C.-H.'s family. And A.P. told her mother she had not said anything about it sooner because she thought that, had they known, the couple "would [not] want to adopt her because she was broken."

¶6 On the first day of the adjudication hearing, the juvenile court granted, over R.C.-H.'s objection, the state's motion to amend the petition to "backdate" the allegation dates by a year, such that the offenses involving A.P. were alleged to have occurred "[o]n or about the 1st day of October, 2012 through the 31st day of May, 2013" rather than sometime between October 1, 2013, and May 31, 2014. And the offenses against M.C. were alleged to have occurred sometime after October 2012, rather than October 2013. The adjudication hearing was held over five days in June 2016, and resulted in the adjudication and disposition noted above.

Discussion

Sufficiency of the Evidence

¶7 R.C.-H. first maintains the juvenile court erred in denying his motion for judgment of acquittal pursuant to Rule 29(D)(2), Ariz. R. P. Juv. Ct., which provides a court "shall enter a judgment of acquittal on one or more offenses . . . if there is no substantial evidence to support an adjudication." In reviewing this claim, "we do not reweigh the evidence but review [it] in the light most favorable to upholding the adjudication." *In re Jessie T.*, 242 Ariz. 556, ¶ 8 (App. 2017). We thus defer to the court's findings of fact and "draw all reasonable inferences therefrom in support of the [juvenile] court's conclusions." *In re William G.*, 192 Ariz. 208, 212 (App. 1997). But we review the sufficiency of that evidence de novo, and we will affirm the adjudication if "*any* rational trier of fact" could have

found every element of the offenses proven beyond a reasonable doubt. *Id.*, *citing Jackson v. Virginia*, 443 U.S. 307, 316, 319 (1979).

¶8 R.C.-H. does not allege a deficiency of proof with respect to any element of the offenses, but generally asserts the girls' testimony "was not reliable, contradictory and unsupported." He challenges A.P.'s statements about the frequency and timing of his offenses, which she testified occurred "[m]ostly every night" for a period of three months, with R.C.-H. typically entering her room just five minutes after she had been put to bed. And he cites M.C.'s failure to disclose all incidents at once, along with conflicts in the girls' testimony about their communications with each other. He contends this evidence was "not substantial enough to sustain [his] adjudication," and "disprove[s] the allegations contained in the delinquency petition."

¶9 Our supreme court rejected an argument similar to R.C.-H.'s in *State v. Scott*, 113 Ariz. 423, 424 (1976). In that case, a young woman testified she had been "forcibly raped by her father . . . in a single bed, which was also occupied by two younger sisters," "in a one-bedroom apartment, occupied by twelve people altogether," including her mother, an aunt, and an uncle. *Id.* One of her sisters generally corroborated the incident, "[a]lthough her preliminary hearing testimony and her trial testimony differed in certain respects," and "[t]he testimony of the two sisters, both at the preliminary hearing and at the trial, contained many inconsistencies which were brought out by thorough cross-examination." *Id.*

¶10 The court in *Scott* recognized authority "that a conviction for rape should not be permitted to stand" where the victim's uncorroborated testimony "is incredible, unreasonable, inherently improbable, or where there is evidence that malice inspired the prosecution." *Id.* But it also affirmed the conviction, noting there had been some corroboration and finding the testimony "[n]ot inherently improbable, unreasonable, incredible, or inspired by malice." *Id.* The court held there was "substantial supporting evidence" sufficient to sustain the guilty verdict, stating, "The credibility of witnesses is an issue to be resolved by the jury." *Id.* at 425.

¶11 Similarly, here, "[t]he juvenile court is in the best position to measure the credibility of witnesses." *In re Maricopa Cty. Juv. Action No. JV-132905*, 186 Ariz. 607, 609 (App. 1996). Even had the court found A.P. was mistaken about the timing of the offenses, and M.C.'s memory was flawed with respect to her communications with A.P., it could have found their testimony reliable and compelling with respect to the elements of the

offenses alleged. *See State v. Bronson*, 204 Ariz. 321, ¶ 34 (App. 2003) (fact-finder "is free to credit or discredit testimony"; reviewing court "cannot guess what [a jury] believed" or "determine what a reasonable jury should have believed"); *cf. State v. Merryman*, 79 Ariz. 73, 75-76 (1955) (affirming denial of directed verdict where victim "'testified directly and positively to the completed crime'"; unless determinable as a matter of law, "it is the function of the jury to determine whether her story is physically impossible or so incredible that no reasonable man could believe it"), *quoting State v. Laney*, 78 Ariz. 19, 22 (1954). R.C.-H. is asking that we reweigh the evidence, which we will not do. *In re John M.*, 201 Ariz. 424, ¶ 7 (App. 2001). Substantial evidence supports the adjudication of delinquency, and the court did not err in denying R.C.-H.'s motion for judgment of acquittal.

Duplicitous Charges

¶12 R.C.-H. also alleges the state "used evidence of multiple, ongoing criminal acts" resulting in duplicitous charges. A duplicitous charge occurs where "the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, ¶ 12 (App. 2008). When this occurs, a trial court must "take one of two remedial measures to insure that the defendant receives a unanimous jury verdict. It must either require 'the state to elect the act which it alleges constitutes the crime, or instruct the jury that they must agree unanimously on a specific act that constitutes the crime before the defendant can be found guilty.'" *Id.* ¶ 14, *quoting State v. Schroeder*, 167 Ariz. 47, 54 (App. 1990) (Kleinschmidt, J., concurring).

¶13 R.C.-H. did not ask that the state be required to elect evidence of particular events to prove the alleged charges, and we therefore review the claim only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* To prevail under fundamental error review, R.C.-H. "must establish that (1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice." *State v. Smith*, 219 Ariz. 132, ¶ 21 (2008).

¶14 We find no error here. As R.C.-H. acknowledges, in criminal prosecutions, a duplicitous charge may be remedied by instructing a jury that it may not find a defendant guilty unless there is unanimous agreement on the specific act that constitutes the crime. There was no risk of a non-unanimous determination in this delinquency proceeding because there

was only one factfinder: The juvenile court. In this context, we presume that court knows and follows the law. *See State v. Williams*, 220 Ariz. 331, ¶ 9 (App. 2008).

Amendment of the Petition

¶15 R.C.-H. also asserts the juvenile court erred by permitting the state to amend its petition on the first day of the adjudication hearing. He maintains he was "severely prejudiced" by the amendment, because the state "added a completely new time period to the petition, which substantially changes the nature of the case and defense."

¶16 A delinquency petition may be amended "at any time before adjudication, provided the parties are granted sufficient time to meet the new allegations," Ariz. R. P. Juv. Ct. 24(B), however, absent the juvenile's consent, "[t]he charge[s] may be amended only to correct mistakes of fact or remedy formal or technical defects," Ariz. R. P. Juv. Ct. 29(D)(1). In the analogous context of amending a criminal indictment, our supreme court has instructed "[a] defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the [accused] in any way." *State v. Bruce*, 125 Ariz. 421, 423 (1980). Ordinarily, "[a]n error as to the date of the offense alleged in the indictment does not change the nature of the offense, and therefore may be remedied by amendment," so long as the amendment does not result in "actual prejudice" to the defendant. *State v. Jones*, 188 Ariz. 534, 544 (App. 1996), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, ¶¶ 9-11 (2012).

¶17 At the adjudication hearing, R.C.-H. objected to the state's motion to amend on the ground of insufficient notice. But when questioned, R.C.-H.'s attorney acknowledged the state's disclosures had encompassed allegations "back to 2012," and she agreed her defense strategy "wouldn't change" as a result of the amendment.

¶18 Based on the evidence adduced at trial, the juvenile court did not abuse its discretion in permitting the amendment. M.C. testified that R.C.-H. first assaulted her on December 23, 2012, the night the girls moved into R.C.-H.'s family home, and A.P. testified to offenses that occurred while she lived there during the first five months of 2013. It appears extensive disclosure corroborated those dates, but none of those incidents would have been captured by the indictment the state sought to amend, which mistakenly identified all offenses as occurring after October 2013.

The amendment was properly allowed because it did not change the nature of the offenses charged or prejudice the defendant in any way. *See Bruce*, 125 Ariz. at 423 (rejecting allegation of prejudice where record revealed defense counsel's "notice of the discrepancies in the dates well before trial").

Discovery from Department of Child Safety

¶19 R.C.-H. additionally argues the juvenile court erred in failing to appoint a special master to review, for potential exculpatory evidence, records R.C.-H. had requested from the Arizona Department of Child Safety (DCS) related to investigations or dependencies involving M.C. and A.P. At a hearing on R.C.-H.'s motion, the court noted that his attorneys "had some contact" with the assistant attorney general representing DCS and asked if they were "comfortable with her redacting what she thinks is appropriate, and providing the court with a redacted version . . . of those records." After R.C.-H.'s attorney responded affirmatively, the court told DCS's counsel, "[I]t sounds like everybody is comfortable and confident with you redacting the information that you think is pertinent based on what we've talk[ed] about today, and the laundry list of items that [R.C.-H.]'s counsel has identified." R.C.-H. did not object to this procedure or suggest the appointment of a special master to review DCS's disclosures. Without citation to authority, R.C.-H. argues his due process rights were violated because both the assistant attorney general appearing for DCS and the attorney prosecuting the delinquency action represent the State of Arizona. He maintains the attorney for DCS had an "inherent conflict of interest" in reviewing disclosures for exculpatory evidence.

¶20 Because R.C.-H. failed to make this argument below, "we . . . review solely for fundamental, prejudicial error." *State v. Moreno–Medrano*, 218 Ariz. 349, ¶ 16 (App. 2008). It is R.C.-H.'s burden to establish that any error was fundamental and that it prejudiced him. *See id.* The disclosure of DCS records in this juvenile proceeding is governed by A.R.S. § 8-807(K), which provides, "The court shall review the requested records in camera and shall balance the rights of the parties who are entitled to confidentiality pursuant to this section against the rights of the parties who are seeking the release of the DCS information." In addition, "[t]he court shall take reasonable steps to prevent any clearly unwarranted invasions of privacy and protect the privacy and dignity of victims of crime." *Id.* R.C.-H. has not addressed application of the statute to these facts, explained why the procedures implemented by the juvenile court might not be considered among the "reasonable steps" taken to protect the girls' privacy interests,

or identified any prejudice resulting from those procedures. In short, he has failed to develop any argument that the alleged error was fundamental. Accordingly, he has waived our consideration of this issue, and we do not address it further. *See Moreno–Medrano*, 218 Ariz. 349, ¶ 17.

Ineffective Assistance of Counsel

¶21 R.C.-H. also contends his attorney rendered ineffective assistance in failing to call M.C.'s grandmother as a witness to her character for untruthfulness and in failing to retain and call an expert on memory and influence issues specific to child witnesses. Because this claim involves issues outside the record on appeal, we revested jurisdiction in the juvenile court to consider his claim of ineffective assistance of counsel under the procedures in Rule 32.6, Ariz. R. Crim. P. The juvenile court has summarily denied that claim, and the parties have filed supplemental briefs for our review of that ruling.

¶22 In its ruling on the issue, the juvenile court concluded R.C.-H. had failed to establish a colorable claim of deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The court relied in part on this court's decision in *State v. Leyva*, 241 Ariz. 521, ¶ 21 (App. 2017), in which we concluded summary disposition of an ineffective assistance claim was appropriate when a defendant "provided no affidavits or other evidence . . . suggesting his attorney's conduct fell below prevailing professional norms."

¶23 R.C.-H. challenges that ruling, arguing he did provide affidavits—from proposed family-member witnesses and a forensic psychologist about what their testimony might have been. But in citing *Leyva*, the court specifically referred to the absence of affidavits to demonstrate trial counsel's decision—to challenge the girls' testimony through "extensive[]" cross-examination rather than through additional witnesses—"fell below prevailing professional norms." *See Strickland*, 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). The court was correct that, like the defendant in *Leyva*, R.C.-H. did not provide the court with an expert affidavit that offered an opinion on the constitutional adequacy of his attorney's performance. *See Leyva*, 241 Ariz. 521, ¶ 21.

¶24 R.C.-H. also challenges the juvenile court's ruling with respect to prejudice, suggesting the court "focused only on [his] guilt or innocence and not the princip[al] subject of the claim, which [was] the

victim[s'] testimony." We cannot agree. In addressing R.C.-H.'s claim that counsel had been ineffective in challenging the victims' credibility, the court listed numerous "issues that [R.C.-H.] argues should have been presented at trial [that] were presented during [his mother's] testimony," cross-examination, and argument. In assessing potential prejudice from the absence of testimony from additional family members or an expert, the court concluded, "There is not a reasonable probability that this Court would have had reasonable doubt as to [R.C.-H.]'s guilt had the additional evidence as described in the Petition been presented." As the sole fact-finder at the adjudication, the juvenile court was uniquely suited to assess the issue of prejudice, and we will not disturb its conclusion that R.C.-H. failed to state a colorable claim. *See State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006) (to state colorable claim of ineffective assistance, defendant must show both deficient performance and resulting prejudice under *Strickland*; failure to satisfy either "is fatal" to claim).

Disposition

¶25 R.C.-H. has failed to identify any basis to vacate or reverse the juvenile court's judgment. Accordingly, we affirm the court's delinquency adjudication and disposition.