

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MARK RUSSELL MITCHELL,
Appellant.

No. 2 CA-CR 2018-0001
Filed March 18, 2019

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR201602201
The Honorable Kevin D. White, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Alexander M. Taber, Assistant Attorney General, Tucson
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

STATE v. MITCHELL
Decision of the Court

MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Mark Mitchell was convicted after a jury trial of eight counts of sexual conduct with a minor under twelve years of age, seven counts of molestation of a child under fifteen, and five counts of sexual abuse. He was sentenced to concurrent and consecutive prison terms, including eight consecutive life sentences without the possibility of parole for thirty-five years. On appeal, he argues the trial court erred by precluding evidence that D.M., who had been married to Mitchell's former wife, the mother of the victims, had been convicted of public indecency to a minor in 2001 and was required to register as a sex offender. We affirm.

¶2 Mitchell's convictions stem from his repetitive sexual abuse of his daughters. Before trial, the state moved to preclude evidence of D.M.'s criminal history. In response, Mitchell argued the evidence was relevant to show the reason he and his former wife had engaged in a "high conflict" custody dispute over the victims, maintaining the allegations had been made against him only after he expressed his concern about his children's proximity to someone who was required to register as a sex offender. The trial court precluded the evidence pursuant to Rule 403, Ariz. R. Evid., concluding the value of the evidence was "outweighed by the danger of unfair prejudice, delay, [and] confusion of the issues," noting the risk that the trial would turn "into a trial of what happened with [the prior conviction] and how serious" it was. The court permitted Mitchell to elicit testimony about the "intense custody dispute" and that it "centered about [Mitchell's] concerns" about D.M.'s "serious criminal history."

¶3 Mitchell asserts the evidence of D.M.'s criminal history was relevant to his defense that the victims might have been "coached by their mother to make up this type of allegation." He points to her testimony that she would do anything to keep her children and that she had not been aware of any indication of abuse before the victims disclosed it. He also suggests that the precise nature of D.M.'s prior conduct was important for

STATE v. MITCHELL
Decision of the Court

him to “be able to explain why he was so concerned about the children’s safety.”

¶4 Evidence is relevant if it “has any tendency to make a fact more or less probable” and “the fact is of consequence in determining the action.” Ariz. R. Evid. 401. Relevant evidence is generally admissible, Ariz. R. Evid. 402, but may be precluded “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence,” Ariz. R. Evid. 403. We will not disturb a trial court’s decision to preclude evidence, including its evaluation of the evidence under Rule 403, absent an abuse of discretion. *See State v. Bocharski*, 200 Ariz. 50, ¶ 21 (2001); *see also State v. Leteve*, 237 Ariz. 516, ¶ 17 (2015).

¶5 Although we agree that the evidence was somewhat relevant to Mitchell’s theory of the case, Mitchell has cited no authority suggesting the trial court erred by precluding it pursuant to Rule 403. *See* Ariz. R. Crim. P. 31.10(a)(7)(A) (argument in brief must contain “citations of legal authorities”). Indeed, he does not meaningfully address the principal basis for the court’s ruling – that the evidence could result in unnecessary and confusing testimony about the seriousness of a 2001 offense that is, at best, only tangentially related to the facts at issue at trial. Thus, Mitchell has not established the court abused its discretion in precluding the evidence. *See Bocharski*, 200 Ariz. 50, ¶ 21. And, although he asserts in passing that the evidence was essential to his right to present a complete defense, he does not develop any argument that right should trump the court’s determination under Rule 403 in these circumstances. *See State v. Hardy*, 230 Ariz. 281, ¶ 49 (2012) (“A defendant’s constitutional right to present a defense ‘is limited to the presentation of matters admissible under ordinary evidentiary rules.’” (quoting *State v. Dickens*, 187 Ariz. 1, 14 (1996))). Thus, this argument is waived, and we do not address it further.¹ *See State v. Bolton*, 182 Ariz. 290, 298 (1995) (insufficient argument waives claim on appeal).

¶6 We affirm Mitchell’s convictions and sentences.

¹ Because Mitchell has not demonstrated error, we need not determine whether he preserved this argument in the trial court. *See generally State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018) (error not properly preserved reviewed only for “error that was both fundamental and prejudicial”).