IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

EDWARD LEE THOMAS,
Appellant.

No. 2 CA-CR 2020-0100
Filed November 10, 2021

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NOT FOR PUBLICATION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 Cochise County
No. CR201900690
The Honorable Timothy B. Dickerson, Judge

AFFIRMED AS CORRECTED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Edward Thomas appeals from his convictions and sentences for three counts of molestation of a child. On appeal, he asserts that the trial court erred by denying his motion to dismiss due to preindictment delay and by denying his motion for a mistrial after the victim testified about precluded other acts. For the following reasons, we affirm Thomas's convictions and sentences as corrected.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts, resolving reasonable inferences against Thomas. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999). Between 2005 and 2006, Thomas, on three separate occasions, molested his granddaughter, M.H., who was under fifteen at the time. These incidents were eventually reported to law enforcement and in 2007, M.H. participated in a forensic interview.

¶3 Due, at least in part, to M.H.'s mother not wanting to pursue criminal charges, the investigation did not progress at that time. However, during an interview with detectives in 2009 regarding an unrelated matter, Thomas admitted that he had touched M.H. "near her vaginal area" more than once and that the touching was not accidental.

¶4 In 2018, M.H., then over eighteen-years-old, filed a records request seeking reports from the investigation. After receiving the reports, she sought to have the case reopened. In 2019, Thomas was indicted for three counts of child molestation, alleged to have occurred in 2007. That indictment was superseded in 2020, reflecting that the charged conduct occurred between 2005 and 2006.

¶5 A jury found Thomas guilty as charged, and the trial court sentenced him to three consecutive seventeen-year prison terms.[1] This

[1]Regarding Thomas's sentence in count three, we note a discrepancy between the trial court's minute entry and its oral pronouncement. The

appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Preindictment Delay

¶6 Thomas first contends the trial court abused its discretion by denying his motion to dismiss due to preindictment delay and that the denial deprived him of a due process right. We review the denial of a motion to dismiss criminal charges for an abuse of discretion, *see State v. Lemming*, 188 Ariz. 459, 460 (App. 1997), and defer to the court's findings of fact unless clearly erroneous, *State v. O'Dell*, 202 Ariz. 453, ¶ 8 (App. 2002). We review Thomas's claim that his due process rights have been violated de novo. *See id.*

¶7 After he was first indicted in 2019, Thomas filed a motion to dismiss with prejudice for preindictment delay. He argued prosecution of the alleged offenses violated his due process rights under the United States and Arizona Constitutions because the state intentionally delayed prosecuting him for over twelve years and during that delay destroyed relevant evidence that may have been exculpatory, thereby prejudicing him. The state responded that Thomas had not shown that it intentionally delayed proceedings because the delay was due to M.H.'s mother declining to seek prosecution. It further argued Thomas could not demonstrate actual prejudice and his assertion that M.H.'s 2007 forensic interview, the

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minute entry erroneously omits that count three is to run consecutively to counts one and two, and instead twice states that count two runs consecutively to count one. Although not raised by either party, given the clear clerical error, the minute entry should be corrected to conform with the court's oral pronouncement of sentence: "Two will be consecutive to One. Three will be consecutive to Counts One and Two." *See State v. James*, 239 Ariz. 367, ¶¶ 7, 9 (App. 2016) (we may modify minute entry if court's intention is ascertainable by record, and "[w]hen there is a discrepancy between the trial court's oral statements at a sentencing hearing and its written minute entry, the oral statements control").

recordings of which were apparently destroyed in 2008,[2] may have contained exculpatory material was purely speculative.

¶8 After a hearing, the trial court considered four factors in determining the cause of delayed prosecution: the disposal of evidence notice,[3] mistakes regarding the referral of the case from law enforcement to prosecution, M.H.'s mother's desire to not prosecute, and M.H. waiting a couple of years after she had turned eighteen to pursue the case. The court observed there was no applicable statute of limitations and concluded Thomas had not met his burden of proving a due process violation. As a result, it denied the motion to dismiss.

¶9 On appeal, Thomas argues this ruling was an abuse of discretion and reasserts that the preindictment delay violated his due process right to be protected from unreasonable delay in prosecution. *See State v. Lacy*, 187 Ariz. 340, 346 (1996) (Fifth and Fourteenth Amendments to the United States Constitution protect defendants from unreasonable delay). "The due process clause plays only a limited role in evaluating preindictment delay" because the statute of limitations is the "primary guarantee against a stale prosecution."[4] *State v. Broughton*, 156 Ariz. 394, 397 (1988). To establish a denial of due process because of preindictment delay, the defendant must make two showings: (1) "that the prosecution intentionally delayed proceedings to gain a tactical advantage over [him] or to harass him" and (2) "that [he] has actually been prejudiced by the delay." *Id.*; *Lacy*, 187 Ariz. at 346 (claimant's burden). Because Thomas has shown neither, the trial court did not abuse its discretion in denying his motion to dismiss.

Intentional Delay

¶10 As proof of intentional delay, Thomas points to the time between the allegations and indictment; the state's failure to investigate;

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[2]There were three pieces of evidence destroyed. They included a video and audio recording of M.H.'s 2007 forensic interview, and an audio recording of an interview with M.H.'s sister.

[3]The trial court found this did not cause delay, but noted it because both parties presented it as such.

[4]Class two felony sexual offenses listed in title 13, chapter 14 of the Arizona Revised Statutes, have no time limit for prosecution. A.R.S. § 13-107(A).

and the allegedly intentional destruction of evidence. But these circumstances do not show intentional delay of prosecution to gain a tactical advantage or harass in this case. *See Lacy*, 187 Ariz. at 346 ("Absent proof of an intentional delay for strategic or harassment purposes" a preindictment-delay "claim must fail."). A stale investigation does not normally violate due process. *Broughton*, 156 Ariz. at 397.

¶11 In contrast to Thomas's assertions of failures by the state, the trial court found that the delay had been caused by M.H.'s mother's desire to not prosecute, M.H. waiting until after she had turned eighteen to reopen the case, and a mistake in the referral of the case from law enforcement to prosecutors. This type of investigative delay does not demonstrate the requisite intent to delay on the part of the state that is necessary to establish a denial of due process. *See Lemming*, 188 Ariz. at 462 (investigative delay, distinguished from intentional tactical delay, does not violate due process).

¶12 Thomas argues his case cannot be characterized as one of "investigative delay" because there was no ongoing investigation. Instead, he argues the state "gained a tactical advantage" by delaying the prosecution until many years after the 2007 forensic interview was destroyed. But even if the state "gained a tactical advantage," Thomas has not shown, as required, that the state delayed the prosecution with that intent. *See Broughton*, 156 Ariz. at 397; *Stoner v. Graddick*, 751 F.2d 1535, 1543 (11th Cir. 1985) ("although the state has not proffered a good, detailed reason for the delay . . . no bad faith reason existed"); *cf. State v. Gilbert*, 172 Ariz. 402, 405 (App. 1991) (state's case being in "disarray" does not necessarily show intentional delay). And there is no constitutional requirement that the state file charges immediately upon securing evidence sufficient to prove guilt. *Lacy*, 187 Ariz. at 346.

¶13 As to the destruction of evidence, which Thomas asserts was intentional, the trial court found there was "no evidence" that it had been "a deliberate act . . . to cause the delay to prejudice" Thomas. Indeed, the destruction may have been wholly inadvertent; the notice of disposal contained Thomas's case number, but listed the names of other defendants—a fact Thomas acknowledged at the hearing. This finding was supported by the state's proffered exhibit in its motion and is not clearly erroneous. *See O'Dell*, 202 Ariz. 453, ¶ 8. In any event, Thomas does not explain how the destruction of evidence in 2008 demonstrates an intentional delay in the 2019 indictment to gain a tactical advantage or harass him. Accordingly, he has not shown intentional delay.

Actual Prejudice

¶14 Even assuming there was intentional delay by the state, Thomas's claim fails because he has not shown actual prejudice. "[A] defendant has a heavy burden to prove that pre-indictment delay caused actual prejudice; the proof must be definite and not speculative." *Broughton*, 156 Ariz. at 397-98. "[I]t is not enough to show the mere passage of time nor to offer some suggestion of speculative harm; rather the defendant must present concrete evidence showing material harm." *State v. Dunlap*, 187 Ariz. 441, 450 (App. 1996) (quoting *United States v. Anagnostou*, 974 F.2d 939, 942 (7th Cir. 1992), abrogated on other grounds as recognized by *United States v. Canoy*, 38 F.3d 893, 902 (7th Cir. 1994)). A showing of some prejudice does not necessarily rise to "actual and substantial prejudice that mandates a dismissal." *State v. Medina*, 190 Ariz. 418, 422 (App. 1997).

¶15 Thomas contends he was prejudiced because M.H. may have had "diminished" or "contaminated" recollection. But "diminished recollection by witnesses does not, by itself, constitute the type of substantial prejudice warranting a finding of a due process violation." *See Broughton*, 156 Ariz. at 398. Thomas attempts to distinguish *Broughton* on the ground that there had been a year-long delay in that case as opposed to the delay of over a decade in this case, but courts will not presume prejudice even in cases of extraordinary preindictment delay. *See, e.g.*, *Dunlap*, 187 Ariz. at 450-51 (citing cases showing length of delay not determinative of due process violation); *Graddick*, 751 F.2d at 1540, 1546 (claim that witnesses' recall dimmed over nineteen-year delay did not demonstrate actual prejudice).

¶16 Thomas also contends he was prejudiced because he could not confront M.H. with her prior "potentially exculpatory" statements from her 2007 forensic interview, thus impacting his right to cross-examination. *See* U.S. Const. amend. VI. But his claim that the evidence was "potentially exculpatory" and thus whether its destruction prejudiced his case is speculative, not apparent. *See Broughton*, 156 Ariz. at 397-98; *Dunlap*, 187 Ariz. at 452-53 (where evidence "might have been exculpatory, but [its] exculpatory value is not apparent" a defendant "cannot show prejudice in fact"). To the extent he argues in his reply brief that the exculpatory nature is "apparent" because M.H. is a material witness, such a fact is not dispositive. *See, e.g.*, *Dunlap*, 187 Ariz. at 451 (death of material witness allegedly helpful to defense insufficient to establish prejudice in preindictment-delay claim); *United States v. Lovasco*, 431 U.S. 783, 785-86,

797 (1977) (death of two allegedly material witnesses did not require dismissal).

¶17 M.H. testified at trial and Thomas was able to cross-examine her on her recollection of the destroyed 2007 interview—affirming that the information in that interview may have been different from what she testified to at trial and that she had provided more detail at trial. "[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *United States v. Owens*, 484 U.S. 554, 559 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)) (no Sixth Amendment violation where defendant cross-examines witness on their current belief, even if witness cannot recall reason for that belief).

¶18 Thomas also cross-examined M.H. on the report of the detective who had observed, recorded, and taken notes of the 2007 interview.[5] *Cf. Medina*, 190 Ariz. at 422 (no substantial prejudice where delay resulted in absence of witness but another witness could offer the same evidence at trial).

¶19 Moreover, pursuant to *State v. Willits*, 96 Ariz. 184 (1964), as Thomas requested and over the state's objection, the trial court also instructed the jury,

> If you find that the State has lost, destroyed or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the State which itself may create a reasonable doubt as to the defendant's guilt.

This further mitigated any potential prejudice to Thomas from the destruction of the 2007 forensic interview. *See State v. Tucker*, 157 Ariz. 433,

[5]M.H. noted one inaccuracy in the detective's summary: although the report correctly stated the first incident had occurred in "the propane area" it placed it at Thomas's house, when it had actually occurred at her mother's house.

443 (1988) (*Willits* instruction protected right to fair trial where jury could infer "exactly what the destroyed evidence, at best, could have proved"). Accordingly, Thomas has not shown the "actual and substantial prejudice" required for a dismissal due to preindictment delay. *See Medina*, 190 Ariz. at 422.

Testimony Regarding Precluded Other Acts

¶20 Thomas next contends the trial court erred in denying his motion for a mistrial after M.H. testified about other acts he had committed, which the court had precluded. "We review a trial court's denial of a motion for mistrial for an abuse of discretion, bearing in mind that a mistrial is a 'most dramatic' remedy that 'should be granted only when it appears that that is the only remedy to ensure justice is done.'" *State v. Blackman*, 201 Ariz. 527, ¶ 41 (App. 2002) (quoting *State v. Maximo*, 170 Ariz. 94, 98-99 (App. 1991)). "[U]nless there is a 'reasonable probability that the verdict would have been different had the [improper] evidence not been admitted,'" we will not reverse the denial of a mistrial. *State v. Welch*, 236 Ariz. 308, ¶ 21 (App. 2014) (alteration in *Welch*) (quoting *State v. Dann*, 205 Ariz. 557, ¶ 44 (2003)).

¶21 On the second day of trial, the state argued it should be permitted to introduce evidence of other acts Thomas had committed against M.H. after 2006. It asserted Thomas had opened the door to the other acts during his cross-examination of M.H. by attempting to impeach her on her knowledge of the timeframe of the offenses—pointing out that a detective's report said M.H. had discussed a timeframe in 2007. The following day, the trial court, after reviewing the transcript with the parties, denied the state's request. That same day, during defense counsel's continued cross-examination of M.H., the following occurred:

> [Defense counsel:] Yesterday, we talked about some specific events that occurred you said during the time frame that we're talking about probably some time November of 2005 until March of 2006; correct?
>
> [M.H.:] Correct.
>
> [Defense counsel:] And you talked about that you concurred the events that you described to us to your place in school and that's how you remember them?

[M.H.:] That's correct.

[Defense counsel:] And that you had reviewed the summary that was prepared by the . . . [detective]—

[M.H.:] Yes.

[Defense counsel:] —of the sheriff's office, and that's the only record of the forensic interview at this point?

[M.H.:] That's right.

[Defense counsel:] In reviewing that record of the event, do you recall that [the detective] described your discussion with the forensic interviewer of the what's called the desk incident?

[M.H.:] Okay.

[Defense counsel:] Do you recall that?

[M.H.:] Yes.

[Defense counsel:] And do you recall that she said in her report that you said that you were approximately 11 years old at the time of the desk incident?

[M.H.:] I do now want to clarify that might be over the course of eighteen months and the abuse that I reported was more than the three.

[Defense counsel:] Objection, privileged.

[Court:] Sustained. The jury will disregard that part of the question.

[Defense counsel:] So the forensic interview was some time after the report was made to the sheriff's office in June of 2007; correct?

> [M.H.:] Yes. If I can recall, that was about a week.

¶22 Thomas subsequently moved for a mistrial because M.H. had "expanded [her testimony] to include other acts that were not permitted to be discussed." The state argued a mistrial was not appropriate because M.H.'s statements were harmless, the jury would be given "absolutely no detail concerning anything other than the three incidences," and Thomas had brought up the issue of events occurring in 2007. It further asserted the trial court's instruction had eliminated the testimony from the record.

¶23 The trial court denied Thomas's motion noting the law presumes jurors follow the instructions. It further observed the testimony was not prejudicial to Thomas because the jury had already heard two other witnesses testify regarding other acts Thomas had committed against them. It stated it would not instruct the jury further unless Thomas proposed an instruction.

¶24 On appeal, Thomas asserts this ruling was erroneous because the testimony "directly referred to the other acts, beyond the three charged," which "likely had a great deal of influence on the jury's determinations, resulting in prejudice to [him]." He further argues the jury was improperly influenced because the trial court never instructed them to disregard M.H.'s testimony, rather it instructed them to "disregard that part of the question."

¶25 "When unsolicited prejudicial testimony has been admitted, the trial court must decide whether the remarks call attention to information that the jurors would not be justified in considering for their verdict, and whether the jurors in a particular case were influenced by the remarks." *State v. Jones*, 197 Ariz. 290, ¶ 32 (2000). It is within the court's discretion to determine if a remedy short of mistrial will cure the error. *Maximo*, 170 Ariz. at 98-99. Testimony regarding other acts does not necessarily require reversal, *Jones*, 197 Ariz. 290, ¶ 34, and we grant deference to the court's decision because of its position to evaluate "the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial," *State v. Kuhs*, 223 Ariz. 376, ¶ 18 (2010) (quoting *State v. Bible*, 175 Ariz. 549, 598 (1993)).

¶26 The parties do not dispute, and we agree, that M.H.'s statement that she "want[ed] to clarify that might be over the course of eighteen months and the abuse that [she] reported was more than the three"

was testimony the jury was not entitled to consider given the trial court's ruling precluding it. However, the court did not abuse its discretion by refusing to grant a mistrial on the basis of this testimony, which was not directly called for by Thomas's questioning.

¶27 After M.H.'s statement, the trial court immediately sustained Thomas's objection and instructed the jurors to "disregard that part of the question." *See State v. Stuard*, 176 Ariz. 589, 602 (1993) (jury instruction can mitigate possible prejudice). Thomas asserts that because the court did not instruct the jurors to disregard M.H.'s answer, this case is distinguishable from others in which "the jury was instructed to disregard the testimony." But Thomas did not object at trial to the court's instruction, and when it specifically invited him to propose a limiting instruction to address the erroneous testimony, he apparently declined.[6] Thus, we do not address the propriety of the court's instruction further. *See State v. Bolivar*, 250 Ariz. 213, ¶ 14 (App. 2020) (absent fundamental error, failure to object to error or omission in jury instruction waives issue on appeal).

¶28 Limiting instruction aside, we cannot say there is a reasonable probability the verdict would have been different had M.H. not offered the improper testimony. *See Welch*, 236 Ariz. 308, ¶ 21. Her precluded testimony was short and relatively general. *See Jones*, 197 Ariz. 290, ¶ 34 (no error in denying mistrial, in part, because references to unproven crimes fairly vague). Although she referenced reporting more than three instances of abuse, she did not provide any details as to those other incidents, diminishing the likelihood the remark improperly influenced the jurors. *See State v. Bailey*, 160 Ariz. 277, 280 (1989) (determining inadmissible statement "relatively innocuous" because even if jury were to conclude defendant previously had been in prison, it would not know for how long or what for). In contrast, she described the three charged incidents in specific detail over two days of testimony, confirming they occurred between 2005 and 2006 as charged in the indictment.

¶29 Additionally, the jury heard testimony from a detective who had conducted the 2009 interview with Thomas in which he had admitted to intentionally touching M.H. "near her vaginal area" on more than one occasion, and that he should not have done it. Moreover, as the trial court

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[6]Thomas does not point to anywhere in the record where he asked for a more precise limiting instruction. Additionally, the jury was instructed to disregard any question to which an objection had been sustained and not to consider anything stricken from the record.

considered, the jury also heard detailed other-acts testimony from two other witnesses about instances when Thomas had touched them inappropriately as minors.

¶30 Based on the record before us, M.H.'s brief statement regarding precluded other acts does not require reversal, and the court did not abuse its discretion in denying Thomas's request for a mistrial. *See State v. Laird*, 186 Ariz. 203, 207 (1996) (no error in denying mistrial where improper testimony was stricken and was a "brief and tiny part of extensive trial testimony" containing significant evidence including admissions).

Disposition

¶31 For the foregoing reasons, we affirm Thomas's convictions and sentences; the sentencing minute entry shall be corrected to reflect the trial court's oral pronouncement of sentence.