IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FRANCISCO M. MEDINA,
Appellant.

No. 2 CA-CR 2022-0130
Filed December 19, 2023

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NOT FOR PUBLICATION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 Pima County
No. CR20201022001
The Honorable Javier Chon-Lopez, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Sklar authored the decision of the Court, in which Vice Chief Judge Staring and Judge O'Neil concurred.

S K L A R, Judge:

¶1 Francisco Medina appeals his convictions and sentences for eight counts of sexual conduct with a minor under the age of fifteen and seven counts of sexual conduct with a minor while being in a position of trust. *See* A.R.S. § 13-1405. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Medina. *See State v. Felix*, 237 Ariz. 280, ¶ 2 (App. 2015). Medina and his former wife adopted M.M. when she was a toddler. When M.M. was around ten years old, Medina began to sexually abuse her. Medina typically entered her bedroom at night, closed the door, undressed her, and had sexual intercourse with her. He did so three to four times a week until M.M. was seventeen years old.

¶3 Years later, M.M. reported Medina's sexual abuse to the Tucson Police Department. Medina was charged with eleven counts of sexual conduct with a minor and seven counts of sexual conduct with a minor under the age of fifteen. One count was dismissed before trial. The jury found Medina guilty of fifteen of the remaining seventeen counts after an eight-day trial. Medina was sentenced to four consecutive terms of life imprisonment in addition to a combination of consecutive and concurrent prison terms totaling eighty-five years.

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

ADEQUATE NOTICE OF CHARGED OFFENSES

¶5 On appeal, Medina argues the indictment violated his due-process rights under the Sixth and Fourteenth Amendments to the United

States Constitution and Article II, Section 24 of the Arizona Constitution. We review Medina's due process claim de novo. *See Mack v. Cruikshank*, 196 Ariz. 541, ¶ 6 (App. 1999).

¶6 Specifically, Medina contends that the indictment was insufficient because the counts alleged that he had vaginal intercourse with or performed oral sex on M.M. for "the first time" or "the last time" for each year of M.M.'s life between ages eleven and seventeen. He argues that this language was insufficient because it lacked specificity as to the dates and times of the charged offenses. This shortcoming, he argues, deprived of him of the ability to present alibi defenses. He notes that when the crimes were occurring, he was employed as a newspaper photographer and frequently worked nights. In his view, a more specific indictment would have allowed him to investigate the newspaper archives and develop a defense that he was not at home on the dates of the crimes.

¶7 The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ." Likewise, Article II, Section 24 of the Arizona Constitution states, "In criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of the accusation." Arizona courts have construed the notice requirements of Article II, Section 24 as identical to the Sixth Amendment right, as applied to the states via the Due Process Clause in the U.S. Constitution's Fourteenth Amendment. *See State v. Von Reeden*, 9 Ariz. App. 190, 193 (1969); *see also In re Oliver*, 333 U.S. 257, 273-74 (1948) (applying due-process right to state prosecution via Fourteenth Amendment). Thus, under both constitutions, criminal defendants have a due-process right to receive adequate notice of the charges against them. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, . . . [is] among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.").

¶8 An indictment satisfies due process "if it informs the defendant of the essential elements of the charge, is definite enough to permit the defendant to prepare a defense against the charge, and affords the defendant protection from subsequent prosecution for the same offense." *State v. Copeland*, 253 Ariz. 104, ¶ 8 (App. 2022) (quoting *State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, ¶ 36 (App. 2010)). An indictment need not allege an offense's exact date unless the date is a material element of the offense. *See State v. Davis*, 206 Ariz. 377, ¶¶ 60-61 (2003) (agreeing

that "the date of the offense is not an element of the crime of sexual conduct with a minor"); *see also Hash v. State*, 48 Ariz. 43, 50-51 (1936) (noting that exact date of charged rape offense need not be alleged in indictment or information).

¶9 In *Copeland*, this court considered the sufficiency of an indictment charging a defendant with fifty counts of child molestation. 254 Ariz. 104, ¶¶ 7, 9. In that case, the indictment's first count alleged that the defendant had molested the victim "[o]n or between June, 2016 and December, 2017." *Id.* ¶ 7. The remaining forty-nine counts contained identical language, except they specified a designation from "the second time" to "the fiftieth time." *Id.* The defendant argued that the Sixth Amendment and Rule 13.1(a) of the Arizona Rules of Criminal Procedure entitled him to "more notice and specificity" of the charges. *Id.* We concluded that the indictment provided the defendant with adequate notice because it tracked the language of the molestation statute, identified the victim, alleged the county where the offenses had occurred, and provided a time frame for the offenses. *Id.* ¶ 13.

¶10 In *Copeland*, we emphasized that an offense's date is not an element of child molestation. *Id.* The disclosed grand-jury transcript also informed the defendant of the nature of the allegations, including where and approximately when the offenses were alleged to have occurred. *Id.* In addition, we observed that requiring an indictment to allege the exact date "could effectively insulate the most egregious child molesters from prosecution." *Id.* ¶ 11 (quoting *People v. Jones*, 792 P.2d 643, 651 (Cal. 1990)). As early as 1936, our supreme court similarly recognized that requiring an indictment to allege the precise time of a rape would abolish "the leeway the statute allows for faulty memory or inaccuracy of [the] date of occurrence." *Hash*, 48 Ariz. at 51.

¶11 *Copeland* is on point. Like in *Copeland*, the indictment here charged Medina with multiple counts over particular time periods. Rather than alleging fifty incidents over an eighteen-month period, each count alleged the first or last incident over a twelve-month period. If anything, the shorter periods alleged here provided Medina with better notice than the defendant in *Copeland*.

¶12 In addition, Medina's indictment satisfied the remaining due process requirements. It listed the charged offenses and described the underlying acts. Given that the conduct occurred over a lengthy period of time many years earlier, greater specificity was likely impossible. Thus, the

indictment provided Medina a sufficient basis to prepare a defense, and it protected him from future prosecution for the same crimes.

¶13 Medina, however, points to language in *Copeland* stating that the defendant there had not "meaningfully explained how he would have defended differently had the indictment . . . been more specific" and had not shown that an alibi defense had been available. 253 Ariz. 104, ¶ 15. Applying this language, he argues that *Copeland* is distinguishable because he was "in a unique position" and "would have been able to establish his exact whereabouts on specific dates and times that were related to his work as a photojournalist."

¶14 We disagree. When a court determines an indictment's sufficiency, the indictment "must be read in the light of the facts known by both parties" when it is filed. *Id.* ¶ 8 (quoting *State v. Magana*, 178 Ariz. 416, 418 (App. 1994)). Thus, an indictment's sufficiency cannot be dependent upon the success of an alibi defense, which requires the defendant to develop and present supporting evidence. *See Davis*, 206 Ariz. 377, ¶ 70 ("A defendant's mere assertion of an alibi defense 'cannot compel the state to elect an exact day.'" (quoting *State v. Simmering*, 89 Ariz. 261, 264 (1961))). Nor has Medina pointed to any case law suggesting that an indictment can be sufficient as to defendants who lack an alibi defense but insufficient as to others. We do not read *Copeland* as suggesting otherwise. Rather, we understand its comment concerning an alibi defense as explaining that the assertedly insufficient indictment did not prejudice the defendant. We therefore conclude that the indictment was sufficient to satisfy Medina's due process rights.

ALIBI INSTRUCTION

¶15 Medina argues that the trial court erred in denying his request for an alibi jury instruction. He contends that his testimony and the testimony of other witnesses demonstrated that he could not have been present at the times and locations of the incidents.

¶16 "We review a trial court's decision to give or refuse a jury instruction for an abuse of discretion . . . ." *State v. Turner*, 251 Ariz. 217, ¶ 22 (App. 2021). In determining whether a defendant is entitled to an alibi instruction, a court must consider whether sufficient evidence was presented at trial to reasonably support the defense. *Id.* ¶ 17. This includes "evidence tending to establish when the crime occurred and evidence showing [the] defendant's whereabouts during that time." *Id.* "Evidence tending to show that the defendant had no opportunity to commit the crime

because he was at another place when the crime occurred raises the alibi defense." *Id.*

¶17 At trial, M.M. testified that Medina had sexual intercourse with her three to four times a week in her room over seven years. In support of an alibi instruction, Medina points to testimony that, in light of his employment, he was frequently away from home, often for extended periods. He also testified that he took frequent camping, hunting, and fishing trips. Similarly, Medina's former wife and sister testified that he had a busy, unpredictable work schedule.

¶18 We agree with the trial court that the evidence did not support an alibi defense. Although the jury could have concluded that Medina was frequently away from home, the circumstances of each incident of sexual intercourse or oral sex described in M.M.'s testimony were not necessarily limited to exact dates and times of each year. As we have already explained, more specific dates and times were not required. Medina presented no evidence that he was away from M.M. for any entire year of her life. Nor did he present evidence that any of his absences deprived him of the opportunity to commit any one of the acts identified in M.M.'s testimony. His testimony that he was away from home for some periods did not preclude him from committing the charged offenses when he was home. Thus, the court did not abuse its discretion in denying Medina's request for an alibi instruction.

DISCLOSURE OF PRIVILEGED MATERIALS

¶19 Medina also challenges the trial court's partial denial of his disclosure requests for privileged documents made under Rule 15.1(g) of the Arizona Rules of Criminal Procedure. He argues that the disclosure "was essential to protect his rights to confront and cross-examine the witnesses against him and to a fair trial under the state and federal constitutions."

¶20 Before trial, Medina requested that a broad range of privileged documents be submitted for the court to review in camera. The requests included documents in the possession of the Department of Child Safety (DCS) that pertained to M.M. They also pertained to another foster child, S.H., who testified to similar sexual abuse by Medina. Medina also requested information concerning all DCS case managers who had worked on behalf of the Medina family during the period of the alleged abuse and all school records pertaining to M.M. from a similar period. He argued that

these materials contained evidence that was directly relevant to the veracity of M.M.'s and S.H.'s claims.

¶21 The trial court granted some of Medina's disclosure requests, denied others, and ordered that documents responsive to another be submitted for in-camera review. For the requests that were denied, the court reasoned in part that Medina had failed to articulate a specific basis to establish that the documents might contain relevant information. It further explained that one of Medina's disclosure requests was "a fishing expedition" and that some of his assertions were "simply speculation."

¶22 Trial courts generally have "broad discretion over discovery matters, and we will not disturb [their] rulings on those matters absent an abuse of that discretion." *State v. Dunbar*, 249 Ariz. 37, ¶ 25 (App. 2020) (quoting *State v. Kellywood*, 246 Ariz. 45, ¶ 5 (App. 2018)). Nevertheless, "to the extent a defendant 'sets forth a constitutional claim in which he asserts that the information is necessary to his defense,' we will conduct a de novo review." *Id.* (quoting *State v. Connor*, 215 Ariz. 553, ¶ 6 (App. 2007)).

¶23 A trial court may order third parties, such as DCS, to produce information or material if (1) "the defendant has a substantial need for the material or information to prepare the defendant's case," and (2) "the defendant cannot obtain the substantial equivalent by other means without undue hardship." Ariz. R. Crim. P. 15(g)(1). When a defendant's due-process right to the disclosure conflicts with a victim's constitutional or statutory privilege, the disclosure may be produced for an in-camera review if the defendant shows "a reasonable possibility that the information sought includes evidence that would be material to the defense or necessary to cross-examine a witness." *R.S. v. Thompson*, 251 Ariz. 111, ¶ 1 (2021).

¶24 However, "the burden of demonstrating a reasonable possibility is not insubstantial, and necessarily requires more than conclusory assertions or speculation on the part of the requesting party." *Id.* ¶ 23 (quoting *Kellywood*, 246 Ariz. 45, ¶ 9). The defendant's request must provide a "sufficiently specific basis to deter fishing expeditions, prevent a wholesale production of the victim's . . . records, and adequately protect the parties' competing interests." *Id.* ¶ 30.

¶25 Medina implicitly acknowledges that his requested disclosure involved M.M.'s and S.H.'s privileged information. *See* Ariz. Const. art. II, § 2.1(A)(5), (C). He nevertheless argues that the trial court's partial denial of his disclosure requests "violated [his] right to present a defense."

¶26 We disagree. Medina's briefing contains only conclusory assertions and speculation that the requested documents might support an argument that M.M. and S.H. fabricated their accusations. At most, his reply brief points to generic testimony by his expert witness in forensic psychiatry. That testimony describes how memory works and how false memories of child abuse can be implanted. But nothing about that testimony established that M.M. or S.H. had fabricated their accusations or would otherwise testify falsely. Nor did Medina renew his request after M.M. and S.H. had testified at a pretrial motions hearing. That suggests their testimony did not support the need for the disclosure before trial. We therefore conclude that the trial court did not err in denying Medina's disclosure requests.

OTHER-ACT EVIDENCE

¶27 Medina argues the trial court erred in admitting evidence about Medina's other sexual acts against S.H. In particular, Medina argues that the state failed to prove by clear and convincing evidence that Medina committed those acts. He also argues that the court erred in finding that the evidence's probative value outweighed the danger of unfair prejudice.

¶28 After an evidentiary hearing, the trial court found the evidence admissible under Arizona Rules of Evidence 404(b) and 404(c). On appeal, Medina has not challenged the court's admission of the evidence under Rule 404(b). We therefore address only the argument that the court improperly admitted the evidence under Rule 404(c). Once the evidence was admitted under that rule, the jury could consider it to show that Medina "had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Ariz. R. Evid. 404(c). We review a trial court's ruling on the admissibility of other-act propensity evidence under Rule 404(c) for an abuse of discretion and will reverse only upon a finding of clear prejudice. *State v. Rix*, ___ Ariz. ___, ¶ 17, 536 P.3d 253, 259 (App. 2023).

¶29 At a hearing on the state's motion to admit evidence of Medina's sexual abuse of S.H., she testified as follows: she lived with Medina and his former wife as a foster child when she was eight and nine years old, and Medina began sexually abusing her shortly after she had moved in. The abuse began with Medina grabbing her and trying to remove her clothes. It escalated to oral sex, which occurred nearly every night. Medina also touched S.H.'s vagina and anus with his fingers. He threatened her with consequences if she told anyone about the abuse.

¶30 Several years later, after S.H. had been adopted by another family, she told a counselor about Medina's behavior. S.H.'s mother took her to the police. During an interview, S.H. described Medina's behavior, as well as sexual abuse she had suffered from the teenage son of her previous foster family. However, when S.H. was asked for more detail, her mother ended the interview.

¶31 Nearly three years later, S.H. told a counselor about Medina's sexual abuse. The counselor reported it to the police. An incident report was filed, but S.H. was unaware whether any further action had been taken. For the next fifteen years, S.H. told only her husband about Medina's abuse, until a detective contacted her about the investigation into Medina's abuse of M.M.

¶32 In general, evidence of a defendant's character trait is not admissible to prove that the defendant acted in conformity with that character trait on a particular occasion. Ariz. R. Evid. 404(a). However, evidence of a defendant's other acts is admissible if the defendant is charged with a sexual offense and the evidence is relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the charged offense. Ariz. R. Evid. 404(c).

¶33 Before admitting evidence under Rule 404(c), a court must make specific findings on three elements, namely, whether: (1) "[t]he evidence is sufficient to permit the trier of fact to find that the defendant committed the other act," (2) "[t]he commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged," and (3) "[t]he evidentiary value of proof of the other act is not substantially outweighed by a danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403." Ariz. R. Evid. 404(c)(1)(A)-(C). To satisfy the first element, the state must prove, by clear and convincing evidence, that the defendant committed the other act. *See State v. James*, 242 Ariz. 126, ¶¶ 17, 25 (App. 2017). Medina does not challenge the trial court's finding that the state satisfied the second element. We therefore address only the first and third.

¶34 As to the first element, Medina argues that the trial court abused its discretion in concluding that the state had proved by clear and convincing evidence that Medina committed the other acts. The state presented that evidence primarily through S.H.'s testimony. A victim's uncorroborated testimony is generally sufficient to support a finding of guilt beyond a reasonable doubt "unless the story is physically impossible

or so incredible that no reasonable person could believe it." *State v. Rios*, 255 Ariz. 124, ¶ 30 (App. 2023) (quoting *State v. Munoz*, 114 Ariz. 466, 469 (App. 1976)). Thus, victim testimony must necessarily also be sufficient to satisfy the lower standard of clear and convincing evidence.

¶35 In this case, S.H.'s testimony was neither physically impossible nor incredible. It was also corroborated by her previous statements to police and a counselor. Medina, however, points to testimony that M.M. was unaware that Medina had abused S.H. even though the two shared a bedroom. But that fact did not require the trial court to dismiss the balance of S.H.'s testimony. *See State v. Bass*, 198 Ariz. 571, ¶ 46 (2000) (finder of fact is free to credit or discredit testimony). The trial court did not abuse its discretion in finding that clear and convincing evidence proved Medina's abuse of S.H.

¶36 As to Rule 404(c)(1)'s third element, Medina argues that the trial court erred in finding that the evidence's probative value outweighed the danger of unfair prejudice. This element applies the standard of Rule 403. In arguing for prejudice, Medina notes that the incidents involving S.H. occurred earlier than those involving M.M. He also argues that S.H. had a history of making unsubstantiated sexual abuse allegations, which relates to her credibility. However, the court considered these factors in a detailed analysis that addressed: (1) remoteness of the other act, (2) similarity or dissimilarity of the other act, (3) strength of the evidence that the defendant committed the other act, (4) frequency of the other acts, (5) relevant intervening events, (6) other similarities or differences, and (7) other relevant factors.

¶37 Medina asks us to reweigh the trial court's balancing of these factors on appeal. We will not do so, and we find no clear abuse of discretion in the court's analysis. *See State v. Vickers*, 159 Ariz. 532, 540 (1989) ("The weighing and balancing of the probative value against the prejudice of evidence is 'within the discretion of the trial court and will not be disturbed on appeal unless it has been clearly abused.'" (quoting *State v. Williams*, 133 Ariz. 220, 230 (1982))). Hence, we conclude that the court did not err in admitting evidence of Medina's sexual abuse of S.H. under Rule 404(c).

REACTIVE ATTACHMENT DISORDER DIAGNOSIS

¶38 Medina argues that he was deprived of his constitutional right to present a defense when the trial court precluded his expert witness in forensic psychiatry from testifying at trial about reactive attachment

disorder. We review a trial court's judgment on the admission of expert testimony for an abuse of discretion. *State v. Salazar-Mercado*, 234 Ariz. 590, ¶ 13 (2014).

¶39 In several DCS records pertaining to S.H., case workers noted that, according to her adoptive mother, S.H. suffers from reactive attachment disorder. During the pretrial motions hearing, Medina called Dr. Roy Lubit, a forensic psychiatrist specializing in attachment disorders and emotional trauma, to testify generally regarding reactive attachment disorder.

¶40 Dr. Lubit testified that reactive attachment disorder is characterized by the inability to form normal emotional attachments to other people, particularly caregivers. It is often the result of serious early-childhood neglect. He also testified that he had found no link in the scientific literature between reactive attachment disorder and a propensity to make false allegations. However, he testified that a child with reactive attachment disorder may be more willing to make a false allegation against a family member. He explained that such a child lacks the restraining forces of affection and worry about hurting that person and that the child is also more likely to have false memories. Dr. Lubit provided no testimony as to whether S.H. exhibited behaviors consistent with reactive attachment disorder or whether her purported diagnosis was accurate.

¶41 The state requested that Dr. Lubit be prohibited from testifying about reactive attachment disorder at trial. The trial court granted this request. It reasoned that S.H.'s purported diagnosis was speculative and that any probative value gained from questioning Dr. Lubit regarding the diagnosis would be outweighed by a danger of unfair prejudice and misleading the jury.

¶42 Medina challenges this ruling. He argues that the evidence of S.H.'s purported reactive attachment disorder diagnosis was relevant to whether her recollection of Medina's sexual abuse was reliable.

¶43 As the trial court did, we first address whether the evidence would be admissible under Rule 608 of the Arizona Rules of Evidence because it was relevant to S.H.'s credibility. Other than in circumstances not relevant here, Rule 608 allows a witness's credibility to be attacked only using reputation or opinion evidence. Ariz. R. Evid. Rule 608(a). Dr. Lubit's proposed testimony is not reputation or opinion evidence concerning S.H. His testimony concerned only reactive attachment

disorder generally. Thus, Rule 608 could not supply a basis for admitting his testimony as to S.H.'s purported reactive attachment disorder diagnosis.

¶44 Similarly, that testimony would have a high risk of "confusing the issues" or "misleading the jury." *See* Ariz. R. Evid. 403. It would inject evidence into the case about a medical diagnosis that was supported by insufficient evidence. Likewise, as Dr. Lubit's testimony at the motions hearing suggested, any testimony linking reactive attachment disorder and false allegations would have been speculative. *See* Ariz. R. Evid. 702(b); *State v. Jacobson*, 244 Ariz. 187, ¶ 17 (App. 2017) ("An expert's testimony is not admissible if the testimony is based upon insufficient facts or data."). The trial court therefore did not abuse its discretion in precluding the testimony.

DISPOSITION

¶45 For the foregoing reasons, we affirm Medina's convictions and sentences.