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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ANTHONY KING HUTCHINSON, Appellant.	2 CA-CR 2007-0283 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20062778

Honorable John S. Leonardo, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 Appellant Anthony Hutchinson appeals his convictions for kidnapping and three counts of sexual conduct with a minor under fifteen. He contends the trial court erred at his jury trial in permitting the state's expert to testify about the victim's credibility and in precluding evidence the victim had a "platonic boyfriend" and had watched pornography after the incident but before trial. For the reasons that follow, we affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In July 2006, twelve-year-old P. called into a telephone "chat line" and spoke with Hutchinson. After speaking with him on separate occasions, she agreed to meet Hutchinson near a playground at her apartment complex. When he arrived, Hutchinson spoke briefly with P., her younger sister, and a friend and proposed going to a nearby park. P.'s sister and friend declined, but P. got into Hutchinson's car.

¶3 After driving to the park, Hutchinson parked across the street and asked P. to perform oral sex on him. When she refused, he forced her. After approximately five minutes, P. got away and climbed into the backseat. Hutchinson followed her into the backseat, where he forced her to engage in vaginal and anal sex. He then dropped her off approximately one block from her apartment complex, and P. ran the rest of the way home. The next morning, she told her older sister what had happened.

¶4 Hutchinson was charged with kidnapping and three counts of sexual conduct with a minor. The state alleged the sexual conduct charges as dangerous crimes against

children. A jury found Hutchinson guilty of all charges, and the trial court sentenced him to the presumptive prison term of five years for kidnapping and to enhanced, presumptive terms of twenty years for each sexual conduct charge. The court ordered the sentences served consecutively. This timely appeal followed.

Discussion

Expert testimony

¶5 Hutchinson first argues that Wendy Dutton, the state's expert witness on the behavior and characteristics of child victims of sexual abuse, improperly vouched for P.'s credibility when Dutton testified that a child would "probably not" falsely allege rape to avoid being punished by her parents. He contends the statement invaded the province of the jury and denied him a fair trial. We review the trial court's admission of expert testimony for an abuse of discretion. *State v. Rojas*, 177 Ariz. 454, 459, 868 P.2d 1037, 1042 (App. 1993).

¶6 On direct examination, Dutton testified that research suggests false allegations are most common among younger children whose parents may be coaching them to gain an advantage in divorce or child-custody proceedings and adolescent girls who either want to change their living situations or conceal consensual sexual activity. On cross-examination, defense counsel asked,

> [I]f a child were to be punished for leaving her apartment complex for meeting an older boy or a young man and knew that she was going to be grounded, knew that she wouldn't be able to watch television or use the telephone, would that be a secondary gain that might motivate a child to make a false allegation?

Dutton answered, "It may." And, on redirect, the prosecutor asked Dutton whether, "based on [her] training and experience," a false allegation to avoid punishment was "more common in a stranger rape case or . . . in a boyfriend case?" She responded,

> Okay. Maybe my answers are misunderstood. . . . [W]hat I believe I said to the defense attorney's question, could [the avoidance of punishment] be a reason the child may make up a false allegation? The answer is, it may. Do I think it is possible? Yeah, it is possible. Is it probable? Probably not.

Hutchinson then objected to this statement, arguing it "invad[ed] the province of the jury," but the court overruled his objection. The state referred to this statement in its closing argument.

¶7 "[T]rial courts should not admit direct expert testimony that quantifies the probabilities of the credibility of another witness." *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986). This includes experts "giv[ing] their opinion of the accuracy, reliability or credibility of a particular witness in the case being tried" as well as "witnesses of the type under consideration." *Id.* In this case, Dutton's statement did not "quantify the probabilities of [P.'s] credibility" but was made to clarify Dutton's earlier response to defense counsel's case-specific, fact-laden question suggesting P. might have had a motive to make a false allegation to avoid punishment. Dutton had originally responded that "[i]t may" but, on redirect, stated avoidance of punishment would "probably not" be a motive for making a false allegation. Even assuming the latter fell within the prohibition by effectively telling the jury it was not probable that an alleged sexual assault victim would lie under the

circumstances of this case, we conclude any error was harmless beyond a reasonable doubt. *See State v. Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d 796, 805 (2000).

¶8 To determine whether an error is harmless, we consider whether "the tainted evidence supports a fact otherwise established by existing evidence, *id.* ¶ 40, and "the likely effect on the jury of the improperly admitted [evidence]," *State v. Fulminante*, 193 Ariz. 485, ¶ 50, 975 P.2d 75, 90 (1999). Here, in addition to Dutton's statement concerning probability, she also testified that the research in this field "suggests . . . false allegations . . . generally occur in . . . two situations," with young children and adolescent girls. She described the circumstances in which adolescent girls may fabricate rape allegations—to change their living situation or to cover up consensual sexual activity with a boyfriend. The prosecutor then asked whether fabrication "is very common in a situation where there's not a boyfriend, [and] it is a stranger that has never been met before, it's the very first encounter or meeting with this person; is that consistent with [the circumstances in which false allegations generally occur]?" Dutton responded, "Well, no," and stated she was not aware of any other reasons for false reporting besides those she had just described, other than mental illness.

¶9 This testimony, to which Hutchinson did not object below, clearly informed the jury that it was uncommon for an adolescent girl to fabricate a rape allegation under the circumstances present in this case. We fail to see how that information is materially different from Dutton's statements that an alleged victim in these circumstances "may" but "probably [would] not" lie. Thus, Dutton's statement concerning probability was cumulative to other, unchallenged evidence. *See Bass*, 198 Ariz. 571, ¶ 40, 12 P.3d at 806.

¶10 Furthermore, in response to a question on cross-examination, Dutton told the jury that "it would be inappropriate for [her] to even offer an opinion" on whether P. was telling the truth. She also noted on redirect that, when she conducts forensic interviews, she is "not called upon to evaluate whether the allegations are true or false because that's up to the members of the jury." Thus, the jury was specifically informed that Dutton's testimony was intended to be general and was not a comment about P.'s credibility in particular. And, considering Dutton's testimony as a whole, which included the statement that the circumstances of this case were not those in which false rape allegations tend to occur, we do not think her use of the word "probable" had a significant, additional effect on the jury. *See Fulminante*, 193 Ariz. 485, ¶ 50, 975 P.2d at 90 (considering likely effect of improper evidence on jury). We therefore conclude any error in the admission of this statement was harmless.

Alternate source of knowledge

¶11 Hutchinson also contends the trial court erred in excluding evidence that P. had a "platonic boyfriend" and viewed pornography after being interviewed by police officers but before Hutchinson's trial. He contends the evidence rebutted the state's argument that P. was a "naive . . . girl who had no previous knowledge or exposure to sex of any kind before the incident in question" and established an alternate source of her knowledge.[1]

[1]In making these arguments, Hutchinson refers extensively to A.R.S. § 13-1421, which precludes admission of certain "[e]vidence relating to a victim's chastity." However, that statute has no application to the issues presented here. There was no evidence that P. had engaged in prior sexual activity, and neither the existence of a "platonic boyfriend" nor viewing of pornography after the incident in question qualify as a "specific instance[] of . . .

Evidence must be relevant to be admissible. Ariz. R. Evid. 402. "Evidence is relevant if it tends to make a material fact more or less probable than it would be absent the evidence." *State v. Van Adams*, 194 Ariz. 408, ¶ 20, 984 P.2d 16, 23 (1999); *see also* Ariz. R. Evid. 401. But even relevant evidence may be inadmissible if its probative value is substantially outweighed by the potential for unfair prejudice. Ariz. R. Evid. 403; *see also State v. Oliver*, 158 Ariz. 22, 27, 760 P.2d 1071, 1076 (1988). However, if excluded evidence is not relevant, we need not reach the issue of prejudice. *Id.* at 28, 760 P.2d at 1077. We will not reverse the trial court's admission or preclusion of evidence absent an abuse of the court's discretion. *State v. Andriano*, 215 Ariz. 497, ¶ 17, 161 P.3d 540, 545 (2007).

A. Evidence of P.'s "platonic boyfriend"

¶12 Hutchinson argues the trial court erred in excluding evidence that P. had a "platonic boyfriend" because, he claims, she and her boyfriend "may have discussed sex," providing "an alternate source of her knowledge of sex as testified [to] in this case," apart from the assaults she had alleged. The state contends Hutchinson has waived this argument by failing to raise it below. We agree.

¶13 Before trial, Hutchinson sought to admit evidence P. had a boyfriend to establish an alternate source of any sexual assault-related injuries; however, the court precluded it because no specific evidence of prior sexual activity had been presented. *See* A.R.S. § 13-1421(A)(2). During trial, Hutchinson again moved to admit evidence that P. had

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prior sexual conduct" under the statute. Thus, we need not address Hutchinson's constitutional challenge to § 13-1421, and we assess this evidence under the general standards of relevance and admissibility.

a boyfriend to rebut the prosecutor's characterization of her as "this innocent girl who's never even been kissed before." The court denied the motion. On appeal, Hutchinson presents yet a third theory of admissibility—that P.R. and her boyfriend "may" have discussed sexual matters, which could have provided an alternate source for her knowledge of sex. Because this argument was not raised below, it is waived. *State v. Tankersley*, 191 Ariz. 359, ¶ 48, 956 P.2d 486, 498 (1998) (failure to argue particular theory of admissibility below waives argument on appeal).

¶14 In any event, there was no evidence any such conversations had actually occurred. And, contrary to Hutchinson's contention, absent such evidence, it would not have been "logical for the jury to infer that P[.] may have discussed sexual matters with a person she considered her boyfriend" merely because she considered him to be her boyfriend. The evidence was thus irrelevant, and the trial court did not abuse its discretion in excluding it. *See* Ariz. R. Evid. 401, 402.

B. Evidence that P. viewed pornography after the offense

¶15 Hutchinson also contends evidence that P. had viewed pornography after she was interviewed by police officers but before trial constituted an alternate source of sexual knowledge that the trial court erred in excluding. The state argues Hutchinson has waived this argument as well. Before trial, in his response to the state's motion in limine, Hutchinson stated he did not intend to elicit evidence concerning P.'s viewing of pornography. However, he moved to admit the evidence after the state elicited P.'s testimony that she had not viewed pornography before meeting Hutchinson. The court denied the

motion, noting "it would be irrelevant that she looked at pornography after she gave the interviews and described what happened to her." Hutchinson therefore has preserved this issue for appellate review. *See State v. Petrak*, 198 Ariz. 260, ¶ 27, 8 P.3d 1174, 1182 (App. 2000) (issue preserved where counsel provides trial judge with opportunity to remedy alleged error).

¶16 Nonetheless, we reject this claim. Hutchinson maintains the evidence was relevant because it explained P.'s "knowledge of sexual terms and sexual positions." We do not disagree with his general contention that, when a victim is young, "[k]nowledge of sexual matters acquired from an alternate source is relevant to rebut the inference that the complainant acquired the information from the offense in question." *Cf. State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988) (where victim "is of such tender years" that jury could infer defendant's guilt from amount of detail of victim's testimony, victim's prior sexual history may be relevant and admissible). However, here, Hutchinson has failed to establish that the pornography constituted an alternate source for P.'s knowledge of either the sexual terms or the sexual acts she described at trial.

¶17 During her police interview and medical examination, before she had viewed the pornography, P. knew and used slang terms for male and female genitalia. At trial she used the proper terms. Although it is unclear when P. first used the term "blow job," she stated during trial that, when Hutchinson "asked [her] for a blow job" on the night she was assaulted, she knew what he meant. Therefore, any evidence she viewed pornography was cumulative to the extent it showed knowledge of sexual matters. Furthermore, although

Hutchinson claims that P.'s description of his forcing her to have anal intercourse was physically impossible and that she could only have gotten the idea it was possible from viewing pornography, he failed to establish that the pornography P. viewed had depicted sexual acts similar to those she described at trial. He has therefore failed to demonstrate that P.'s viewing of pornography tended to provide an alternate source for her knowledge. The evidence was thus irrelevant, and its exclusion was not an abuse of the trial court's discretion. Ariz. R. Evid. 401, 402.

Disposition

¶18 For the reasons set forth above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge