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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THE STATE OF ARIZONA, Appellee, v. ADAM ALCANTAR, Appellant.	2 CA-CR 2009-0109 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200601723

Honorable Boyd T. Johnson, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Adam Alcantar was convicted of indecent exposure, two counts of child molestation, three counts of attempted sexual conduct with a minor,[1] and four counts of sexual conduct with a minor. All but the indecent exposure conviction were found to be dangerous crimes against children. The trial court sentenced Alcantar to a combination of consecutive and concurrent prison terms totaling 144 years. On appeal, Alcantar argues the trial court committed reversible error by denying his motion to dismiss based on pre-indictment delay and by admitting certain expert testimony and other-act evidence. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). The various sex offenses Alcantar was charged with were committed against his daughter and nieces between 1989 and 1994.

¶3 Alcantar victimized his niece, C., three times during 1989 or 1990, when she was between seven and eight years old. One incident occurred when she was playing hide-and-seek with Alcantar at his residence. When Alcantar found C. hiding in a bedroom, he put her on the bed and held her down as he rubbed his crotch against hers and tried to unzip his pants. After C. screamed, another child came out of hiding in a nearby closet, and Alcantar let C. go. Another incident occurred when Alcantar was

[1]Although one of the verdict forms specified that Alcantar was "guilty of Count 3: Sexual Conduct with a Minor," count three of the indictment actually charged Alcantar with attempted sexual conduct with a minor. The sentencing minute entry correctly reflects that he was convicted of the attempted offense, and he was sentenced accordingly.

playing with C. and other children in the living room, picking them up by their legs and arms, and spinning them in circles to get them dizzy. When it was C.'s turn, Alcantar put two fingers inside her underwear and placed one finger inside her vagina. He dropped her onto a nearby couch when she started kicking him. The third incident took place at a family birthday party. There, Alcantar tried to put his fingers under C.'s swimming suit and touched her vaginal area while giving her a piggyback ride in a swimming pool.

¶4 Alcantar's daughter, A., and her cousin, D., were both in kindergarten when Alcantar began abusing them in 1990 or 1991. When A. and D. were playing at home one day jumping on a bed, Alcantar told them to show him their "private areas," which they did. They also followed Alcantar's instructions to touch themselves and each other. Alcantar then led A. out of the bedroom so he could be alone with D. After telling D. to partially undress, Alcantar performed oral sex on her, took off his pants, stroked his penis, and tried to penetrate her vagina with it. He stopped when he saw his wife and other family members coming home, and he immediately put D. in a closet and told her to get dressed.

¶5 When Alcantar and his wife separated, A. lived with Alcantar at his parents' house. Just before her eighth or ninth birthday, Alcantar came into the bedroom where A. was lying down. He lay down next to her, held down her arms, and began masturbating, touching her leg with his penis. Alcantar then repositioned A. onto her back, removed her underwear, held her arms down again, and forced her legs open. He tried inserting his penis into her vagina and slightly penetrated her several times, repeatedly instructing her, "Tell me you like it." Alcantar then tried to have anal sex with

her, saying several times, "I'm almost there." After performing oral sex on A. and trying to enter her vagina from behind, Alcantar said he was "almost done," and he ejaculated onto A.'s back.

¶6 Alcantar abused A. again a "couple [of] months" later when she was living with him at his girlfriend's house. One day when A. was showering, Alcantar came into the bathroom naked and got into the shower with her. He put soap on his penis and put his penis in her vagina several times, telling her he was "cleaning [her] out." When Alcantar's girlfriend came home, he told A. to "[g]et the hell out" of the shower, and A. ran out of the bathroom, crying.

¶7 At trial, C., D., and A. testified against Alcantar. In addition, the jury heard testimony from Wendy Dutton and Janet N., both of whom Alcantar had sought to preclude before trial. Wendy Dutton was an expert witness for the state who testified about the general behavior of child victims of sexual abuse. Janet N. testified about an incident that had occurred between her and Alcantar in 1988 that had resulted in his being convicted of attempted sexual abuse. The jury found Alcantar guilty of all ten counts in the indictment and, after he was sentenced, he filed this appeal.

Discussion

Pre-Indictment Delay

¶8 As he did below, Alcantar argues the trial court erred in denying his motion to dismiss the indictment due to the state's delay in obtaining it.[2] The Due Process

[2]Although Alcantar filed motions to dismiss his indictment based on "discovery violations" and a violation of his "speedy trial" right, the substance of those motions

Clauses of the Fifth and Fourteenth Amendments prevent the state from bringing criminal charges against a person when it has unreasonably delayed doing so. *State v. Lacy*, 187 Ariz. 340, 346, 929 P.2d 1288, 1294 (1996); *see also United States v. Lovasco*, 431 U.S. 783, 789, 790 (1977); *United States v. Marion*, 404 U.S. 307, 324-25 (1971). "To establish that pre-indictment delay has denied a defendant due process, there must be a showing that the prosecution intentionally delayed proceedings to gain a tactical advantage over the defendant or to harass him, *and* that the defendant has actually been prejudiced by the delay." *State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988). A defendant bears a "'heavy burden to prove that pre-indictment delay caused actual prejudice.'" *State v. Dunlap*, 187 Ariz. 441, 450, 930 P.2d 518, 527 (App. 1996), *quoting Broughton*, 156 Ariz. at 397-98, 752 P.2d at 486-87. We review the court's ruling on the motion to dismiss for an abuse of discretion. *See State v. Lemming*, 188 Ariz. 459, 460, 937 P.2d 381, 382 (App. 1997).

¶9 As noted above, Alcantar committed these sexual offenses between 1989 and 1994. They came to light in March 2002, when then-seventeen-year-old A. revealed to her mother that Alcantar had raped her when she had lived in Arizona. After learning Alcantar had also abused A.'s cousins, C. and D., A.'s mother drove from her home in Texas to report the offenses to authorities in Arizona that same month.

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concerned the state's delay in seeking the indictment and the destruction of evidence that occurred in the interim. Despite the "inaccurate[] labels" Alcantar utilized below, the trial court construed these filings as dismissal motions based on pre-indictment delay. Accordingly, on appeal we view the separate filings as a single motion to dismiss.

¶10 In the ensuing investigation, which took place over several years, detectives with the Casa Grande Police Department recorded interviews and collected other tangible evidence against Alcantar. The trial court summarized the subsequent developments as follows:

> [I]n 2005, believing the prosecutor's office had "declined" charging, the second assigned investigator authorized destruction of certain items that had been gathered in the investigation; these items included cassette recordings of interviews with victims and potential witnesses, letters between one victim and the Defendant and certain photographs; copies of the letters and photographs were made and retained with the police reports and have been made available to the Defendant; summaries of the recorded conversations are available in and contained within the investigator's reports; . . . the destruction of the evidence, while inadvertent and negligent, was not the result of "bad faith" behavior by law enforcement[.]

Alcantar has not provided a transcript of the evidentiary hearing held on his motion to dismiss. We therefore presume the missing portions of the record support the trial court's findings. *See State v. Geeslin*, 223 Ariz. 553, ¶ 5, 225 P.3d 1129, 1130 (2010).

¶11 Ultimately, the trial court found the four-year period from the initial report to law enforcement officials until the indictment was the result of personnel changes, locating and interviewing potential witnesses and victims, and "follow up investigation" conducted into "late 2006." The court found "the delay [wa]s not the result of intentional or 'bad faith' behavior on the part of law enforcement or prosecution." Because the record supports the court's finding that state officials did not delay prosecution to gain a tactical advantage or to harass Alcantar, the court did not abuse its discretion in denying the motion to dismiss. And, having failed to establish the first step in the two-step test,

Alcantar has not demonstrated that he is entitled to relief on appeal. *See Lacy*, 187 Ariz. at 346, 929 P.2d at 1294 (claim based on pre-indictment delay fails "[a]bsent proof of an intentional delay for strategic or harassment purposes").

¶12 In his appellate briefs, Alcantar emphasizes the prejudicial impact of the pre-indictment delay, particularly the destruction of the audio recordings. Yet prejudice caused by pre-indictment delay is a necessary but insufficient ground for dismissal. *Lovasco*, 431 U.S. at 790. Alcantar suggests that, because he suffered prejudice from the destruction of the evidence, state officials must have destroyed it for that reason. But the trial court, having observed the witnesses below and having served as the trier of fact in this matter, was in the best position to assess the officials' motives and credibility, and we consequently defer to the court's findings. *See State v. Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007).

¶13 Moreover, to the extent the destruction of evidence here may have caused prejudice, the trial court adequately remedied the problem by granting Alcantar's request for a *Willits* instruction.[3] The court specifically instructed the jury that, if it found the state had "lost, destroyed, or failed to preserve evidence whose contents or quality [we]re important to the issues in th[e] case," the jury should weigh the state's explanation for the unavailability of the evidence; if the explanation offered was inadequate, the jury could infer the evidence was against the state's interest and may have created a reasonable doubt about Alcantar's guilt. We find no error in the court's denial of the motion to dismiss.

[3]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

Other-Act Evidence

¶14 Alcantar next challenges the trial court's admission of testimony from Janet N. pursuant to Rule 404(c), Ariz. R. Evid. Janet testified that in 1988, when she was fourteen years old, she met Alcantar at a friend's house, he purchased alcohol that she then drank, and he then drove her to a secluded area. There, he took off her shirt and bra, touched and kissed her breasts, pressed "his penis . . . against [her] vagina" while the two were wearing jeans, and repeatedly asked her to have sex with him. While Janet and Alcantar were "making out," he remarked, "I wonder how many years I'm going to get for this." After she refused his requests to have intercourse, Alcantar eventually drove her back to her friend's house. The incident was quickly reported to the police, and Alcantar was convicted as a result.

¶15 When a defendant is charged with a sexual offense, Rule 404(c) provides that "evidence of other crimes, wrongs, or acts may be admitted . . . if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." The rule directs the trial court to make a number of findings on the record before such other-act evidence may be admitted. Ariz. R. Evid. 404(c)(1)(D). Specifically, the court must find each of the following conditions is met:

> (A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.
>
> (B) The 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.

> (C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403[, Ariz. R. Evid.]

Ariz. R. Evid. 404(c)(1)(A) through (C).

¶16 In weighing the probative value and risk of unfair prejudice posed by the admission of other-act evidence as Rule 403 requires, Rule 404(c)(1)(C) requires the trial court to consider the following factors:

> (i) remoteness of the other act;
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> (ii) similarity or dissimilarity of the other act;
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> (iii) the strength of the evidence that defendant committed the other act;
>
> (iv) frequency of the other acts;
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> (v) surrounding circumstances;
>
> (vi) relevant intervening events;
>
> (vii) other similarities or differences;
>
> (viii) other relevant factors.

We review a court's admission of evidence under Rule 404(c) for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004).

¶17 Here, the trial court expressly considered all the above-mentioned factors in ruling Janet's testimony admissible. Despite the notable differences between the prior incident and the charged offenses in this case—namely, that the event occurred only once; involved no vaginal penetration; did not involve a family member; took place outside the home; and was, as Janet testified, "consented to"—the court concluded the

evidentiary value of the other act was not substantially outweighed by the risk of unfair prejudice. At a pretrial hearing on the matter, the state presented the testimony of an expert witness in the area of mental health to establish that the prior incident "was sufficiently related . . . to indicate [Alcantar] has a character trait giving rise to an aberrant sexual propensity to commit the offenses charged in this case." As the state notes on appeal, Alcantar has not provided the transcript of that hearing, and in its absence we presume it supports the trial court's findings. *See State v. Geeslin*, 223 Ariz. 553, ¶ 5, 225 P.3d 1129, 1130 (2010).

¶18 Alcantar nonetheless contends the incident with Janet was inadmissible because it was "completely dissimilar in nature" from the offenses charged in this case. Although he acknowledges his prior conduct was illegal, he contends it "did not show a propensity towards aberrant sexual behavior with a child" because "Janet . . . was a developing teenager who thought she was on a date." Similarity, however, is only one factor to be considered in assessing evidence under Rule 404(c)(1)(C). "Exact similarity between acts is not required" for admission under the rule. *State v. Weatherbee*, 158 Ariz. 303, 304, 762 P.2d 590, 591 (App. 1988).[4] Furthermore, Alcantar appears to overlook that Rule 404(c)(1)(B)

> permit[s] the court to admit evidence of remote or dissimilar other acts provid[ed] there is a 'reasonable' basis, by way of expert testimony or otherwise, to support relevancy, i.e., that the commission of the other act permits an inference that

[4]*Weatherbee* specifically addressed the admissibility of sexual propensity evidence under *State v. McFarlin*, 110 Ariz. 225, 517 P.2d 87 (1973), and its progeny. *Weatherbee*, 158 Ariz. at 304, 762 P.2d at 591. Rule 404(c) subsequently codified the *McFarlin* rule. Ariz. R. Evid. 404 cmt. to 1997 amend.

> defendant had an aberrant sexual propensity that makes it more probable that he or she committed the sexual offense charged.

Ariz. R. Evid. 404 cmt. to 1997 amend. "The present codification of the rule permits admission of evidence of the other act either on the basis of similarity or closeness in time [or] supporting expert testimony . . . ." *Id.*

¶19 Although Janet was older than Alcantar's victims in the present case, sexual abuse of a minor under the age of fifteen was punishable as a class three felony when he attempted the crime in 1988. *See* 1985 Ariz. Sess. Laws, ch. 364, § 17. Alcantar's earlier behavior and attendant comment therefore suggested he would seek to gratify his sexual urges by acting out with young girls—girls the trial court described as "pre-pubescent or barely pubescent"—despite knowing that doing so was illegal and risked significant punishment. Under the circumstances, the trial court could have accepted the expert's opinion that the prior act demonstrated an aberrant sexual propensity that made it more probable Alcantar committed the present offenses. Thus, we find no abuse of discretion in the court's determination of relevance, its weighing of factors under Rule 403, or its admission of the prior-act evidence.

Expert Testimony

¶20 Alcantar further argues the trial court erred in denying his motion to preclude Wendy Dutton, who "testified as an expert witness on common characteristics of child victims of sex crimes." "We review the trial court's ruling on expert testimony for a clear abuse of discretion." *State v. Hyde*, 186 Ariz. 252, 276, 921 P.2d 655, 679 (1996).

¶21 Preliminarily, we note that, although Alcantar has characterized Dutton on appeal as a "purported expert, who had no special qualifications," he did not object to her testimony below on the ground that she was unqualified. In any event, there was ample evidence to support the trial court's recognition of Dutton as an expert in the area of child sexual abuse, a determination other courts have also reached. *E.g.*, *State v. Curry*, 187 Ariz. 623, 628-29, 931 P.2d 1133, 1138-39 (App. 1996).

¶22 Here, Dutton testified as a "cold expert," meaning she had no information about the facts of the case. In this capacity, Dutton testified sexual abuse within families is common, and, when it occurs, victims are more likely to delay revealing the abuse, often waiting until they become adults. She also described the "process of victimization," whereby sexual offenders manipulate or intimidate their victims so as to keep the abuse a secret. Alcantar contends this testimony was inadmissible pursuant to Rule 702, Ariz. R. Evid., because "the subject matter [wa]s already within the understanding of the average lay juror." We disagree.

¶23 "[A]n expert witness may testify about the general characteristics and behavior of . . . victims if the information imparted is not likely to be within the knowledge of most lay persons." *State v. Tucker*, 165 Ariz. 340, 346, 798 P.2d 1349, 1355 (App. 1990). Our courts have repeatedly observed that the behavior of child victims of sexual abuse is not within the common understanding of the jury. *State v. Lujan*, 192 Ariz. 448, ¶ 12, 967 P.2d 123, 127 (1998); *State v. Lindsey*, 149 Ariz. 472, 473-74, 720 P.2d 73, 74-75 (1986). Thus, "[w]hen the facts of the case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—

like the reactions of child victims of sexual abuse—expert testimony on the general behavioral characteristics of such victims should be admitted." *Lujan*, 192 Ariz. 448, ¶ 12, 967 P.2d at 127.

¶24 Here, Alcantar's defense called into question the veracity of the allegations against him based on his victims' delay in reporting the abuse. Alcantar specifically asked A. why, when he was seeking sole custody of her, she had not reported the abuse to the family court judge. He also questioned her about her subsequent interactions with him, including a time when she had given him a hug in public. Accordingly, in light of the facts of the case and the nature of Alcantar's defense, we find no abuse of discretion in the trial court's determination that Dutton's testimony would be helpful to the jury in evaluating the victims' testimony. *See id.*

¶25 Although Alcantar asserts "the expert . . . did nothing other than bolster the credibility of the complaining witnesses and usurp the jury's fact-finding role," we find nothing improper in Dutton's testimony. She explained that she had reviewed no materials related to the case and had conducted no interviews with anyone involved. She did not "quantify []or express an opinion about the veracity of a particular witness or type of witness," nor did she offer an opinion as to whether any of the victims' conduct was consistent with the alleged crimes' having occurred. *Tucker*, 165 Ariz. at 346, 798 P.2d at 1355. The trial court therefore did not err in denying Alcantar's motion to preclude Dutton's testimony.

Disposition

¶26 For the foregoing reasons, Alcantar's convictions and sentences are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge