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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>THOMAS WAYNE McCORMICK,<br><br>Appellant. | ) | 2 CA-CR 2009-0169<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082335

Honorable Hector E. Campoy, Judge

AFFIRMED

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

**¶1** After a jury trial, appellant Thomas McCormick was convicted of one count of child molestation and sentenced to a mitigated term of ten years' imprisonment. He was acquitted on a charge of sexual abuse of the same victim, his teenage daughter N.,

and on a charge of sexual conduct involving N.'s friend, A. On appeal, McCormick urges us to reverse his conviction on the ground of insufficient evidence. For the following reasons, we affirm.

**¶2** Our review for the sufficiency of evidence is limited to whether substantial evidence supports the jury's verdict and we view the facts and all reasonable inferences in the light most favorable to sustaining the conviction. *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997). "Substantial evidence is evidence that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007), *quoting State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914-15 (2005). "To set aside a jury verdict for insufficient evidence it must clearly appear that under no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). Thus, we will reverse for insufficient evidence "'only where there is a complete absence of probative facts to support the conviction.'" *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996), *quoting State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976).[1]

[1]McCormick also asserts the trial court erred in denying his motion for judgment of acquittal, *see* Ariz. R. Crim. P. 20, and his motion for a new trial, *see* Ariz. R. Crim. P. 24.1, but both motions were based on the same claim of insufficient evidence. Accordingly, we see no need to address McCormick's claim in multiple contexts. *See State v. Neal*, 143 Ariz. 93, 98, 692 P.2d 272, 277 (1984) ("A Rule 20 motion is designed to test the sufficiency of the state's evidence."); *see also State v. Mincey*, 141 Ariz. 425, 432-33, 687 P.2d 1180, 1187-88 (1984) (noting similarity of Rule 20 and Rule 24.1 standards and deciding issues regarding sufficiency and weight of evidence without separate analyses).

**¶3** The evidence established that, in June 2008, the Pima County Sheriff's Department was investigating an allegation that McCormick had engaged in sexual conduct with A. According to A., when she told N. about McCormick's alleged conduct, N. had told her "something had happened" between N. and McCormick as well. Investigators conducted interviews with N., who reported that, a year or so earlier, she had awakened from sleep and found McCormick rubbing her breasts, stomach, and vagina.

**¶4** At trial, however, N. recanted these statements and denied her father had ever "sexually touched" her breasts or vagina. When confronted with the transcript of one of her statements to Theodore Zachos, the Child Protective Services employee who had interviewed her, N. acknowledged having made the allegations but said she did not remember her conversation with Zachos. She could not explain why she had alleged her father had touched her breasts and her vagina if it had not been true.

**¶5** Referring to N.'s transcribed interview with Zachos, McCormick argues evidence of N.'s prior statements was "insufficient as a matter of law" to establish he was guilty of molesting N. "by touching her vagina with his hands" as alleged in the indictment.[2] In her statement, N. told Zachos:

[2]When McCormick committed the offense, A.R.S. § 13-1410(A) provided, "A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact . . . with a child under fifteen years of age." 1993 Ariz. Sess. Laws, ch. 255, § 29. "'Sexual contact'" is defined, in relevant part, as "any direct or indirect touching, fondling or manipulating of any part of the genitals . . . by any part of the body." A.R.S. § 13-1401(2).

> I was sleeping and [McCormick] came in and he was rubbing me. And he was rubbing my stomach and my boobs. And then he went down to my vagina and then I woke up. Like, I—I was half asleep, but I felt it and I woke up and I just turned over and he left.

**¶6** According to McCormick, N.'s statement that he "went down to [her] vagina" was too vague to establish that he had touched her vagina with his hands.[3] But, as the state points out, the jury also heard Zachos's testimony that this statement was made in his second interview with N., when she had been asked to "recap" what she had told him in a longer, initial interview the police had inadvertently failed to record.

**¶7** While Zachos could not recall the exact words N. had used in her first interview, he testified the "nature of her disclosure," including N.'s specific allegations that her father had touched her breasts and her vagina, was the same in both interviews. And Detective Mark Martinez, who observed both interviews, testified he heard N. tell Zachos that, as she was trying to sleep, McCormick had come into her bedroom and "proceeded to touch her breasts and touch her vagina." Because both Zachos and Martinez testified about the substance of N.'s statements in her first, unrecorded interview, McCormick is mistaken that the jury was left to "conjecture" or "speculate"

[3]Citing *State v. Allred*, 134 Ariz. 274, 655 P.2d 1326 (1982), McCormick also contends "our courts do not favor using a prior inconsistent statement as the sole substantive proof of a defendant's guilt." But *Allred* does not stand for that proposition. *State v. Moran*, 151 Ariz. 378, 380, 728 P.2d 248, 250 (1986). Rather, *Allred* set forth a five-factor test to determine whether admission of a prior inconsistent statement is unfairly prejudicial under Rule 403, Ariz. R. Evid. *Allred*, 134 Ariz. at 277, 655 P.2d at 1329. We need not conduct such a review here, because McCormick does not challenge the admission of N.'s statements but whether they are legally insufficient to support his conviction.

about her allegations.[4] And, although McCormick suggests the probative value of N.'s prior statements was diminished by the circumstances of the molestation, those surrounding her interviews, and her later recantation, these are issues of credibility that were fully developed at trial and properly left to the jury. *See Soto-Fong*, 187 Ariz. at 200, 928 P.2d at 624 (credibility of witnesses issue for jury); *State v. Gallagher*, 169 Ariz. 202, 203, 818 P.2d 187, 188 (App. 1991) ("[T]he credibility of a witness is for the trier-of-fact, not an appellate court."). We will not reevaluate the jury's determination of witness credibility on appeal.

**¶8** Nor are we persuaded by McCormick's argument that his acquittal on the charge of sexual abuse, for allegedly touching N.'s breasts on the same occasion, was "probative of the lack of evidence" to support his conviction. "Verdicts on different counts of an indictment need not be consistent." *State v. Adams*, 189 Ariz. 235, 238, 941 P.2d 908, 911 (App. 1997). Moreover, although McCormick testified he might have inadvertently touched N.'s breasts while trying to awaken her from a bad dream, he denied ever having touched her vagina. And, as the trial court reasoned in denying McCormick's renewed motion for judgment of acquittal and motion for a new trial, evidence at trial "could have allowed the jury to find that . . . the touching of the victim's breast was accidental. The jury clearly evaluated the three distinct charges in the indictment as separate crimes[,] each to be considered in [its] own right."

[4]Indeed, although N. testified she did not remember what she told Zachos, she agreed, based on the available transcript, that she told him her father had touched both her breasts and her vagina.

**¶9** Finally, we reject McCormick's apparent suggestion that the evidence was insufficient because the state failed to present evidence of his "sexual motivation." As he acknowledges, this is not an element of molestation the state is required to prove. *State v. Simpson*, 217 Ariz. 326, ¶ 18, 173 P.3d 1027, 1029 (App. 2007).[5]

**¶10** We conclude the evidence of N.'s statements to investigators was sufficient to support the jury's verdict. *See Arredondo*, 155 Ariz. at 316, 746 P.2d at 486. Accordingly, we affirm McCormick's conviction and sentence.

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

CONCURRING:

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

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[5]McCormick's reliance on *State v. Berry*, 101 Ariz. 310, 419 P.2d 337 (1966), and other cases to argue that "nothing inherent in the facts support[s] the scienter of 'molestation'" is misplaced. As the court in *Simpson* explained, under the applicable version of § 13-1410, as amended in 1993, a lack of sexual interest is an affirmative defense that a defendant must prove by a preponderance of the evidence. *Simpson*, 217 Ariz. 326, ¶¶ 19-22, 173 P.3d at 1030-31; *see also* A.R.S. § 13-205(A) ("Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence."); 2005 Ariz. Sess. Laws, ch. 185, § 4 ("It is a defense to a prosecution pursuant to section . . . 13-1410 that the defendant was not motivated by a sexual interest."). McCormick does not argue the jury was required, as a matter of law, to find he had met that burden.