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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THE STATE OF ARIZONA, Appellee, v. JOHN DAVID LLOYD, Appellant.	2 CA-CR 2009-0325 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause Nos. CR20040165 & CR20080609 (Consolidated)

Honorable Peter J. Cahill, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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E C K E R S T R O M, Judge.

¶1 Following a jury trial, appellant John Lloyd was convicted of eleven counts of sexual conduct with a minor and sentenced to a total of 220 years' imprisonment. On appeal, he argues the trial court erred in denying his motion to dismiss based on a speedy trial violation, admitting hearsay testimony at trial, and denying his motion for a new trial based on his claim that several of his charges were duplicitous. We recite below only those facts necessary to each issue raised, viewing the evidence in the light most favorable to upholding the verdicts. *See State v. Paredes-Solano*, 223 Ariz. 284, ¶ 2, 222 P.3d 900, 902 (App. 2009). For the following reasons, we affirm.

Speedy Trial

¶2 Lloyd first contends the trial court erroneously denied his motion to dismiss based on the nearly three-year delay between his indictment and arrest. The motion specifically alleged a violation of Lloyd's rights to a speedy trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution as well as by article II, § 24 of the Arizona Constitution. The trial court found the state's failure to exercise due diligence in executing the arrest warrant had resulted in a thirty-four-month delay that the court described as "uncommonly," "[u]nconscionably," and "disgracefully long." The court noted this delay was presumptively prejudicial pursuant to *Doggett v. United States*, 505 U.S. 647, 655-56 (1992). Nevertheless, because the court found the delay had not caused Lloyd actual prejudice, it denied the motion. Lloyd now contends his motion should have been granted because prejudice should have been presumed from the length of the delay. We find no error.

¶3 As *Doggett* made clear, the necessary first step in asserting a speedy trial claim is to show "the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." 505 U.S. at 651-52, *quoting Barker v. Wingo*, 407 U.S. 514, 530 (1972). This step is required "[s]imply to trigger a speedy trial analysis." *Id.* at 651. Such a showing of "'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice." *Id.* at 652 n.1. Once this first step has been cleared, a defendant then must show he is entitled to relief upon considerations of (1) whether the delay was uncommonly long, (2) whether the state or defendant was more to blame for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) whether the defendant suffered prejudice as a result of the delay. *Id.* at 651. "In weighing these factors, the length of the delay is the least important, while the prejudice to [the] defendant is the most significant." *State v. Spreitz*, 190 Ariz. 129, 139-40, 945 P.2d 1260, 1270-71 (1997).

¶4 Here, the trial court noted Lloyd had offered no suggestion his defense had been impaired, nor had he identified any prejudice that had resulted from the delay. The court also stated it would revisit its pretrial ruling if a more fully developed record showed Lloyd had been prejudiced by the delay. But Lloyd does not indicate in his opening brief whether the issue ever was raised again below. And he likewise fails to allege that he suffered any prejudice.[1] We therefore find no error in the court's denial of the motion.[2]

[1]In a somewhat disjointed paragraph, Lloyd suggests the memory of one of his victims, A., may have been affected by the delay because her testimony that Lloyd had

Hearsay

¶5 Lloyd next argues the trial court erred in admitting hearsay testimony from a nurse that a male victim, M., had told the nurse Lloyd had engaged in anal sex with him. The nurse testified that the interview in which the victim made this statement was conducted for the purpose of treatment and diagnosis, and the reason for eliciting the perpetrator's identity, specifically, was to determine M.'s likely exposure to sexually transmitted diseases. Over Lloyd's objection, the court admitted the nurse's testimony under the hearsay exception created by Rule 803(4), Ariz. R. Evid., which concerns statements made for the purpose of medical diagnosis or treatment. As the state correctly points out, our supreme court ruled similar testimony of a sexual abuser's identity admissible under Rule 803(4) in *State v. Robinson*, 153 Ariz. 191, 199-200, 735 P.2d 801, 809-10 (1987).[3]

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repeatedly raped her "was in direct contrast with the scientific examination of her vaginal area in 2002, which showed an intact hymen." We note Lloyd has failed to provide a correct citation to the record to support this factual assertion about the alleged "scientific examination," as required by Rule 31.13(c)(1)(vi), Ariz. R. Crim. P. In any event, this argument properly goes to the veracity of A.'s initial allegations, not the quality of her memory. Thus, it would have applied equally had there been no significant delay between the 2004 indictment and his trial.

[2]Although Lloyd has not independently developed his speedy trial argument as it relates to the Arizona Constitution, we generally follow federal jurisprudence in this area, *see, e.g., State v. Henry*, 176 Ariz. 569, 578-79, 863 P.2d 861, 870-71 (1993), and our conclusion therefore would not differ on this ground.

[3]We note the continued vitality of *Robinson* is an open question in light of *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Supreme Court held the Confrontation Clause prohibits the admission of testimonial hearsay statements by nonappearing witnesses despite their admissibility under state rules of evidence. *Id.* at 61, 68-69. Under some circumstances, courts have found a child's statement to a

¶6 The record here, however, suggests the trial court did not receive foundational testimony about M.'s motive in making the statement regarding the perpetrator's identity or about his understanding of how such information could affect his medical treatment.[4] *See United States v. Turning Bear*, 357 F.3d 730, 738 (8th Cir. 2004) (specifying evidence of perpetrator's identity admitted under analogous federal rule of evidence only when "'the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding'"), *quoting United States v. Renville*, 779 F.2d 430, 438 (8th Cir. 1985); *United States v. White*, 11 F.3d 1446, 1450 (8th Cir. 1993) (holding statement to social worker identifying perpetrator inadmissible when motive for child's disclosure

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physician identifying the perpetrator of a sex crime to be testimonial and inadmissible under *Crawford*. *See, e.g.*, *In re T.T.*, 892 N.E.2d 1163, 1176-77 (Ill. App. Ct. 2008). Here, however, because M. testified and was cross-examined, the Confrontation Clause did not prohibit the admission of his statement. *See Crawford*, 541 U.S. at 59 n.9.

[4]The child's understanding of the purpose of the question may have been especially unclear given the facts of this case, which are similar to those in *In re T.T.*, 892 N.E.2d at 1176-77. Here, nurse Judy Denton, who had received special training as a "sexual assault nurse examiner" and had performed hundreds of examinations similar to the one at issue, testified she had examined M. in the Yavapai County Family Advocacy Center after he was brought there by his adoptive mother and representatives of both Child Protective Services and the local police department. Denton stated that, although she always asks children if they know why they are brought to the center, "[s]ome children don't know why they come to the Advocacy Center." She did not clarify whether such children are then informed of the reason, nor did she say whether M. was aware or informed of the reason in this particular case. Denton further acknowledged the only document she filled out regarding M. was a "Sexual Assault Forensic Examination" form. And she confirmed she did not follow up with M.'s care, make any treatment recommendations, or have any further contact with him, his doctors, or his psychologists after the examination. Her only subsequent contacts were with law enforcement officials and prosecutors.

unclear). As scholars have noted, the primary rationale for admitting such hearsay statements is that a person's self-interest in receiving appropriate medical care ensures the reliability of his or her report. Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. Rev. 257, 257 (1989). Accordingly, if courts admit statements by child victims of sexual abuse based only on the statements' limited relevance to medical or psychological diagnoses or treatment, they risk "undermin[ing] the coherence of the exception" and "los[ing] touch with the theories of trustworthiness that underlie [it]." *Id.* at 257-58.

¶7 In any event, M. ultimately testified at trial that Lloyd had anal sex with him, just as he had told the nurse, and he was subject to Lloyd's cross-examination. We therefore agree with the state's contention that any error in admitting the challenged testimony was harmless beyond a reasonable doubt. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) ("Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict."); *see also State v. Hoskins*, 199 Ariz. 127, ¶ 66, 14 P.3d 997, 1014 (2000) (finding admission of arguable hearsay statement harmless when declarant testified to substance of statement and was cross-examined).

Duplicitous Charges

¶8 The final issue Lloyd raises on appeal concerns duplicitous charges. After he was convicted, Lloyd raised the issue of duplicity for the first time in a motion for a new trial filed pursuant to Rule 24.1, Ariz. R. Crim. P. In the motion, he argued A.'s broad testimony that he had raped her every day over the course of several years rendered

counts one through six of his amended indictment duplicitous because the jury was "presented with evidence that hundreds of acts could support each count." The trial court denied the motion for new trial.

¶9 Lloyd's original indictment in CR20040165 contained six counts alleging he had "engaged in sexual intercourse" with A., a child under fifteen years old, "[d]uring" a different calendar year, beginning with 1993 and ending with 1998. However, as the state correctly points out, Lloyd was not convicted on count three of his original indictment because this count was dismissed before trial. Hence, Lloyd was convicted of five counts of sexual conduct against A., not six, as he suggests on appeal.[5]

¶10 As our supreme court explained in *Spencer v. Superior Court*, 136 Ariz. 608, 610, 667 P.2d 1323, 1325 (1983), a "duplicitous" indictment—one "charging separate crimes in the same count"—is prohibited by law because it fails to give adequate notice of the charge to be defended, risks creating a nonunanimous verdict, and makes a precise pleading of double jeopardy impossible in the event of a future prosecution. To the extent the indictment here, like the indictment in *Spencer*, was duplicitous on its face because it "actually charged as many as one hundred . . . offenses," *id.* at 609, 667 P.2d at 1324, Lloyd was required to raise this issue before trial to allow the state to cure the defect in the charging document. *See State v. Anderson*, 210 Ariz. 327, ¶ 17, 111 P.3d 369, 378 (2005). And if, as Lloyd claims, the charges became duplicitous due to the

[5]Lloyd had also been charged with continuous sexual abuse of A. pursuant to former A.R.S. § 13-1417, *see* 1993 Ariz. Sess. Laws, ch. 33, § 2, but this charge also was dismissed before trial.

evidence presented at trial, this defect should have been remedied either by requiring the state to elect which specific act it would rely on for a conviction, *see State v. Davis*, 206 Ariz. 377, ¶ 61, 79 P.3d 64, 77 (2003), or by instructing the jury that all of its members had to agree on which specific act constituted the crime in order to find guilt. *See State v. Klokic*, 219 Ariz. 241, ¶ 14, 196 P.3d 844, 847 (App. 2008); *accord Anderson*, 210 Ariz. 327, n.5, 111 P.3d at 378 n.5. By failing to request these remedies in a timely fashion below, *see Anderson*, 210 Ariz. 327, n.3, 111 P.3d at 378 n.3, Lloyd has forfeited review of this issue for all but fundamental error. *See Davis*, 206 Ariz. 377, ¶ 62, 79 P.3d at 77.

¶11 This more restrictive standard of review exists in part to discourage defendants from engaging in procedural gamesmanship by reserving a curable error as a "'hole card'" in the event they are dissatisfied with the result of their trial. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Valdez*, 160 Ariz. 9, 13, 770 P.2d 313, 317 (1989), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995). A defendant who seeks relief under this standard bears the burden of showing "both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20. Duplicitous charges are fundamental insofar as they violate a defendant's right to a unanimous verdict, *see Davis*, 206 Ariz. 377, ¶ 64, 79 P.3d at 77, and by their very nature are likely to result in prejudice to a defendant. *See, e.g., State v. Paredes-Solano*, 223 Ariz. 284, ¶ 22, 222 P.3d 900, 908 (App. 2009).[6]

[6]A technical distinction is often drawn between a "duplicitous charge" and a "duplicitous indictment," as we noted in *Paredes-Solano*, 223 Ariz. 284, ¶¶ 4-5, 222 P.3d at 903, which involved a duplicitous indictment. However, because the same problems relating to notice, jeopardy, and unanimity arise from the different types of duplicity

¶12 The likelihood of success on appeal is but one possible advantage to the strategy of silence. Forbearance in the face of duplicity may be a sound legal tactic inasmuch as it may limit the number of counts a defendant faces, thereby "avoid[ing] the potential of multiple punishments." *Anderson*, 210 Ariz. 327, ¶ 17, 111 P.3d at 378. It also may offer a greater chance of acquittal by consolidating into a single count multiple offenses for which the defendant does not have equally compelling defenses. For these reasons, our supreme court has intimated that a duplicity objection is simply waived if not timely asserted and is not subject to fundamental error review. *See Anderson*, 210 Ariz. 327, ¶¶ 17-18, 111 P.3d at 378. Our own court has similarly recognized that the risk of a nonunanimous verdict is a risk defendants are often willing to take, and they should not be permitted to belatedly raise a duplicity objection when they have "simply gambled and lost." *State v. Rushton*, 172 Ariz. 454, 456, 837 P.2d 1189, 1191 (App. 1992). But we have construed these cases as being confined to situations where the duplicity is facially apparent in the indictment. *See, e.g.*, *Paredes-Solano*, 223 Ariz. 284, ¶¶ 7-8, 222 P.3d at 903-04.

¶13 If we assume here that Lloyd's charges were made duplicitous due to the presentation of evidence at trial and that his argument is subject to fundamental error review, he still has not demonstrated he is entitled to relief. When we review duplicitous charges in a fundamental error posture, the defendant must specify the particular prejudice he has suffered from the charges' lack of precision. *See State v. Ramsey*, 211

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errors, *Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d at 847, we find the case law in this area equally instructive in assessing Lloyd's claim of duplicitous charges.

Ariz. 529, ¶ 7, 124 P.3d 756, 760 (App. 2005) (denying relief when defendant "[did] not specifically articulate[] how his defense was impaired or prejudiced by the indictment against him"). Simply asserting prejudice by pointing to the rationale for the rule against duplicity, as Lloyd does here, is not enough. We therefore could deny relief based on Lloyd's failure to develop his argument in his opening brief.

¶14 But even if his argument were properly developed, it would not alter our conclusion. Lloyd's testimony at trial amounted to a blanket denial of the charges in question. Our courts have repeatedly held similar all-or-nothing defenses staked on a witness's alleged lack of credibility are not prejudiced by duplicitous charges. *E.g.*, *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989); *State v. Schroeder*, 167 Ariz. 47, 53, 804 P.2d 776, 782 (App. 1990). It is not apparent how Lloyd's defense was adversely affected by the generality of A.'s testimony here. Indeed, defense counsel himself emphasized the broad, sweeping nature of A.'s allegations during cross-examination when he asked whether it was her "sworn testimony to th[e] jury" that Lloyd had raped her "every day for four years," "365 days a year," "1,500 times." If anything, the lack of specificity of her testimony made Lloyd's defense more plausible. Accordingly, we find no prejudice on the record before us.

Disposition

¶15 For the foregoing reasons, we affirm Lloyd's convictions and sentences.

/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