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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STATE OF ARIZONA, Appellee, v. CHRISTOPHER LEE AWTREY, Appellant.	2 CA-CR 2008-0045 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20060820

Honorable Stephen C. Villarreal, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Following a jury trial, Christopher Awtrey was convicted of three counts of sexual conduct with a minor under fifteen and sentenced to two consecutive prison terms of seven years each for the first two counts, followed by seven years' probation for the third count. He challenges these convictions and sentences on appeal. We affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdicts. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). During the early 1980s, Awtrey began having sexual contact with his half-sister, L. She was three years old and Awtrey was sixteen when the abuse began and it persisted until L. was approximately nine years old. Awtrey forced L. to perform oral sex and also had intercourse with her on a monthly basis. L. testified she "blocked out most of [her] memory" of the abuse as a child, but when the memories returned in approximately 1990, she reported them to her mother who did not believe her story. L. reported the incidents to the police in 2003. She ultimately testified about these incidents at trial. Awtrey's other half-sister, J., his cousin, N., and his step-daughter, S., testified about separate incidents of sexual abuse Awtrey allegedly had perpetrated on them.[1] He was convicted and sentenced as outlined above.

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[1]Following this trial, Awtrey was acquitted of six counts of sexual conduct with a minor and child molestation stemming from J.'s and N.'s accusations. He was not charged with any crimes relating to the incidents involving S.; her testimony was admitted as evidence of aberrant sexual propensity, pursuant to Rule 404(c), Ariz. R. Evid.

Discussion

Sufficiency of Evidence

¶3 Awtrey contends his convictions were not supported by sufficient evidence because L.'s recollection of the abuse "contain[ed] aspects that are utterly implausible." He argues that because the state did not present expert testimony establishing it was possible for L.'s memory of the abuse she had suffered at three to return when she was thirteen, and because she had no memory of pain or bleeding and there was no evidence she had been taken to a doctor for treatment, her claim that her then sixteen-year-old step-brother had engaged in full vaginal intercourse with her when she was three is "incredible." We will not overturn a conviction for insufficiency of evidence unless there was a complete lack of evidence supporting the conviction. *State v. Johnson*, 215 Ariz. 28, ¶ 2, 156 P.3d 445, 446 (App. 2007).

¶4 At trial, L. testified that Awtrey had forced her to engage in both vaginal and oral sex. A conviction may properly be based on the uncorroborated testimony of the victim of sexual assault unless "the story is physically impossible or so incredible that no reasonable person could believe it." *See State v. Williams*, 111 Ariz. 175, 178, 526 P.2d 714, 717 (1974). Awtrey contends this is such a case and asserts, without support in the record or citation to authority, "no reasonable person would believe [Awtrey] had full vaginal sex with three[-]year[-]old [L.]" because "it is physically impossible . . . to do so, and, at the very least, injury would result." Although it is not the duty of the appellate court to seek authority

relating to a party's bald assertions, we note the existence of cases that undercut Awtrey's position. *See State v. Roqueni*, 82 Ariz. 295, 297-98, 312 P.2d 574, 575-76 (1957) (upholding conviction for rape of six-year-old although contemporaneous medical examination did not reveal physical injury); *People v. Willer*, 667 N.E.2d 708, 711, 715 (Ill. App. Ct. 1996) (affirming sexual assault and sexual abuse convictions despite absence of medical evidence or reports of pain to corroborate victim's testimony that defendant began having sexual intercourse with her when she was three or four years old).[2]

¶5 More importantly, as the jury was instructed, it could accept L.'s version of the events in whole or in part; thus, even assuming as true Awtrey's assertion that he could not have engaged "in full vaginal intercourse" with L., that is not a required element of the offense. Any penetration of L., whether it constituted "full vaginal sex" or something less, was sexual conduct with a minor. *See* 1977 Sess. Laws, ch. 142, § 63 (sexual intercourse is sexual conduct); 1983 Sess. Laws, ch. 202, § 8 (same); 1985 Sess. Laws, ch. 364, § 18 (same); 1977 Sess. Laws, ch. 142, § 63 ("'sexual intercourse' means penetration"); 1985 Sess. Laws, ch. 364, § 16 (same); *see also State v. Kidwell*, 27 Ariz. App. 466, 467, 556 P.2d 20, 21 (1976) ("slightest penetration . . . sufficient to complete the offense"). Therefore, viewing the facts in the light most favorable to upholding the jury's verdict, we cannot say there was insufficient evidence to support the jury's verdict.

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[2]We note counts six and eight of the indictment covered time spans during which the victim was three to nine years old.

Admission of S.'s Testimony

¶6 Awtrey next contends the trial court erred in admitting S.'s testimony, arguing "the evidence to support her claims was not clear and convincing and because the risk of unfair prejudice outweighed the evidentiary value of her testimony." We review a court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Kiper*, 181 Ariz. 62, 65, 887 P.2d 592, 595 (App. 1994). To admit evidence of prior acts as propensity evidence in sexual misconduct cases, the trial court must find:

> (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. 404(c)(1).

Sufficiency of Evidence

¶7 Awtrey first claims the trial court erred by considering only S.'s "manner and the cogent nature of her testimony" when it concluded her statements constituted clear and convincing evidence that he had had sexual contact with her. *See State v. Aguilar*, 209 Ariz. 40, ¶ 30, 97 P.3d 865, 874 (2004) (prior act must be established by clear and convincing evidence). He argues the court should have also considered that S.'s memory was poor, that she had given inconsistent statements in the past, and that she was "pathological when she

was a child" and had a "motive for lying about [Awtrey]." Finally, he insists that the county attorney's decision not to prosecute Awtrey when the conduct occurred demonstrates there is no clear and convincing evidence he committed a crime.[3]

¶8 Whether a defendant committed a prior sexual offense for the purposes of Rule 404(c) "turns largely on the credibility of the witnesses." *See Aguilar*, 209 Ariz. 40, ¶ 35, 97 P.3d at 875. As noted above, the uncorroborated statements of a single complaining witness can constitute sufficient evidence to uphold a conviction for a crime of sexual misconduct. *See Williams*, 111 Ariz. at 177-78, 526 P.2d at 716-17. The trial court is in the best position to determine the credibility of witnesses and we will not second-guess its determinations on appeal. *See State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981). Here, the court heard testimony from S. and found the evidence clear and convincing that Awtrey had committed the sexual contact with her; we cannot say it erred in so finding. *Cf. Aguilar*, 209 Ariz. 40, ¶ 35, 97 P.3d at 875 (reversing trial court's finding of clear and convincing evidence when no witnesses testified at Rule 404(c) hearing). Furthermore, Awtrey has not shown, and nothing in the record demonstrates, that S.'s "manner and the cogent nature of her testimony" were the only factors the court considered.[4]

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[3]In 1995, S. reported the abuse to a friend, who then disclosed it to law enforcement. After an investigation, the state did not bring charges against Awtrey.

[4]We note that in admitting S.'s testimony pursuant to Rule 404(c), the court issued a comprehensive, five-page ruling detailing its analysis.

Propensity

¶9 Awtrey also asserts that S.'s testimony was not admissible propensity evidence because "[S.] was much more mature than the alleged victims . . . [and] any sexual contact with her did not demonstrate a propensity to molest infants." He points to evidence that, although S. was eight at the time he allegedly molested her, she was well-developed and "had breasts and was menstruating," and was therefore significantly different from the three- to nine-year-old victims he was on trial for molesting. We find this a meaningless distinction. As the state points out, S. "recited identical types of sexual abuse as [Awtrey] had allegedly inflicted on [L., J., and N.] . . . when she was around the same age." Rule 404(c) does not require absolutely identical circumstances; S.'s age and the nature of the abuse she suffered were sufficient for the trial court to conclude that this evidence established Awtrey's propensity to engage in sexual conduct with young girls under Rule 404(c). Sexual activity with children is considered aberrant sexual behavior. *See Aguilar*, 209 Ariz. 40, ¶ 11, 97 P.3d at 868. And, the admissibility of other act evidence "will turn on either 'the basis of similarity or closeness in time [to the charged offense], supporting expert testimony, or other reasonable basis that will support'" an inference that the accused has an aberrant sexual propensity to commit the charged offense, *see id.* ¶ 27, *quoting* Ariz. R. Evid. 404(c) cmt. (alteration in *Aguilar*). The trial court specifically considered the above factors in its written ruling, and we see no abuse of discretion.

Prejudice

¶10 Awtrey further argues the trial court erred in admitting S.'s testimony because the risk of unfair prejudice outweighed its evidentiary value. He contends the multiple testifying victims—his half-sisters and cousin—undermined the evidentiary value of S.'s testimony because they "provided the kind of evidence that is ordinarily provided by Rule 404(c) evidence." He maintains "[e]ach additional account of sexual misconduct increase[d] the risk that the decision [would] be made on the grounds of emotion rather than the evidence of the charged actions." Awtrey did not make this specific argument below, although he did generally allege cumulative prejudice. Whether evidence is prejudicially cumulative is a question well within the trial court's discretion, *see State v. Verive*, 128 Ariz. 570, 576, 627 P.2d 721, 727 (App. 1981), and Awtrey has not demonstrated the trial court abused its discretion in permitting a single Rule 404(c) witness to testify, notwithstanding the similarity of her testimony to that of the victims of the charged offenses. As the state notes, the trial court could find S.'s testimony had additional probative value at trial because she was not related to the other victims, which contradicted Awtrey's defense that his half-sisters and cousin were colluding against him. The trial court was in the best position to decide whether the potential for prejudice outweighed the probative value of the Rule 404(c) evidence, and we see no reason to second-guess its determination based on the record before us. *Cf. State v. Connor*, 215 Ariz. 553, ¶ 39, 161 P.3d 596, 607 (App. 2007).

¶11 Awtrey also again challenges "the strength of the evidence that defendant committed the other act" as part of the balancing of evidentiary value and prejudice under Rule 404(c)(1)(C)(iii), pointing out the county attorney had previously declined to prosecute S.'s allegations and arguing "they concluded that there was not even probable cause that the offense occurred." The standard for criminal prosecution, however, is not probable cause, but proof beyond a reasonable doubt, the highest burden of proof required by law. *See State v. Brazil*, 18 Ariz. App. 545, 549, 504 P.2d 76, 80 (1972). As discussed above, the trial court found the evidence of S.'s allegations clear and convincing and we will not reweigh the court's determination. Accordingly, Awtrey has not shown the court abused its discretion in admitting S.'s testimony.

***Willits* Instruction**

¶12 Awtrey objects to the language of the jury instruction the trial court gave, at his request, pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). "When police negligently fail to preserve potentially exculpatory evidence, [a *Willits* instruction] permits the jury to infer that the evidence would have been exculpatory." *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999). To warrant such an instruction, the defendant must show the state failed to preserve potentially exculpatory material evidence and prejudice resulted from this failure. *Id*. "[A] *Willits* instruction is not appropriate if the defendant fails to demonstrate that the absent evidence would have exonerated him." *State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988) (finding state's destruction of prison

disciplinary hearing tapes did not merit instruction when no showing made beyond speculation tapes might have tended to exculpate defendant).

¶13 The trial court agreed to give the instruction based on a police detective's failure to properly connect a tape-recorder when she made a telephone call to two of the victims to ask if they still wanted to proceed with Awtrey's prosecution. At trial, Awtrey argued the conversation could have contained evidence that one of the sisters was "orchestrating the claims against [him] and that she wanted to talk to [another sister] before [the detective] did and tell her what to say." Over Awtrey's objection, the court instructed the jury that if "the explanation for the loss, destruction, or failure to preserve is inadequate," it could assume the contents of the tape were unfavorable to the state. Awtrey argues that the word "[']inadequate['] implies that more than mere negligence is required, such as bad faith." We need not dwell on this issue, however, because we agree with the state that Awtrey was not entitled to a *Willits* instruction at all.

¶14 As the state points out, the detective's uncontroverted testimony demonstrated the telephone call had not been made to generate evidence, but rather "[t]o advise that [the detective] would now be handling the . . . case . . . and to introduce [her]self and to further indicate that [the victims] could anticipate the trial proceeding if they were so willing." We agree that this situation is not one in which the state lost, destroyed, or failed to preserve evidence. *Cf. Broughton*, 156 Ariz. at 399, 752 P.2d at 488 (state's failure to conduct earlier testing of knife blade did not support *Willits* instruction where "[n]either the blade nor

anything on it was 'destroyed'"). Because police do not have a duty to generate exculpatory evidence, *see State v. Tyler*, 149 Ariz. 312, 317, 718 P.2d 214, 219 (App. 1986), and because no evidence here was destroyed, *see Broughton*, 156 Ariz. at 399, 752 P.2d at 488, Awtrey was not entitled to a *Willits* instruction, and therefore, any purported error in the instruction the court gave was harmless.

¶15 Moreover, assuming the instruction had been warranted, we could not say the word "inadequate" erroneously described the *Willits* standard, particularly when the instruction the trial court gave employed language articulated by our supreme court. *See State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993) (*Willits* requires instructions permitting jury to infer lost evidence detrimental to state's case if "they find the explanation for the loss *inadequate*") (emphasis added).

Jury Pool

¶16 Awtrey next contends the trial court erred in denying his motion for a mistrial during jury selection. In the course of voir dire, the court dismissed at least twenty-four prospective jurors after conducting bench conferences at which the prospective jurors recounted incidents of child abuse within their own families or otherwise stated that, due to the nature of the charges, they would be unable to be impartial. Awtrey moved for a mistrial, arguing the number of jurors who had spoken with the judge constituted "a parade of horrors" that prejudiced the pool. The court denied the motion, pointing out the remainder of the pool was unaware of the specific discussions and finding any claim of prejudice

"highly speculative." Awtrey claims the prospective jurors' dismissals "conveyed the fact of the frequency of child abuse and its emotional toll on relatives . . . [and] made it more likely that [he] had committed child abuse."

¶17 A defendant has the burden of showing that a jury panel is tainted or prejudiced. *State v. Doerr*, 193 Ariz. 56, ¶ 18, 969 P.2d 1168, 1173-74 (1998). Awtrey relies on *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997), for the proposition that jurors' statements and actions can taint a prospective jury. We do not disagree with that principle, but find *Mach* inapposite, even if it were binding precedent.[5] In *Mach*, a juror made statements that were "'expert-like,' dealt with material issues of the defendant's guilt and the victim's truthfulness, were delivered with certainty, and were repeated several times" in the presence of other prospective jurors. *See Doerr*, 193 Ariz. 56, ¶ 19, 969 P.2d at 1174, *quoting Mach*, 137 F.3d at 633. Here, the panel members spoke to the judge outside the hearing of the rest of the jury pool. Moreover, Awtrey concedes the judge was in the best position to determine whether the panel was prejudiced. *See Doerr*, 193 Ariz. 56, ¶ 23, 969 P.2d at 1174. Absent anything in the record that establishes jurors were influenced by the voir dire proceeding, we cannot speculate that the jury was prejudiced. *See State v. Bible*, 175 Ariz. 549, 568, 858 P.2d 1152, 1171 (1993) (in the absence of record establishing what jurors might have seen or understood, no presumption defendant denied a fair trial).

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[5]We are not bound by Ninth Circuit precedent. *See State v. Swoopes*, 216 Ariz. 390, ¶ 35, 166 P.3d 945, 956 (App. 2007).

Consecutive Sentences

¶18 Awtrey next contends the trial court erred in sentencing him to consecutive prison terms without stating its reasoning on the record. He requests that we remand this case to ensure he is correctly sentenced. The state argues Awtrey has waived review for all but fundamental error because he did not raise this argument below. An illegal sentence, however, "'is fundamental error that [this court] must correct.'" *State v. Vaughn*, 217 Ariz. 518, ¶ 14, 176 P.3d 716, 719 (App. 2008), *quoting O'Connor v. Hyatt, ex rel. Maricopa*, 207 Ariz. 409, ¶ 3, 87 P.3d 97, 99 (App. 2004) (alteration in original).

¶19 At the time Awtrey's abuse began, the applicable statute provided:

> If multiple sentences of imprisonment are imposed on a person at the same time, . . . the sentence or sentences imposed by the court shall run concurrently unless the court expressly directs otherwise, in which case the court shall set forth on the record the reason for its sentence.

1977 Ariz. Sess. Laws, ch. 142, § 57; 1978 Ariz. Sess. Laws, ch. 201, §§ 104, 108. The statute was subsequently modified and renumbered and, now, consecutive sentences are the default sentence; the court need not make any findings to justify a consecutive sentence. *See* § 13-711(A).

¶20 The state maintains that because consecutive sentences would have been proper under either the former or current version of the sentencing statute and Awtrey "merely challenges how his consecutive sentences were imposed," this is a procedural matter that does not warrant review. *Cf. State v. Ring*, 204 Ariz. 534, ¶ 24, 65 P.3d 915, 928 (2003)

(finding enactment of A.R.S. § 13-703.01 did not violate ex post facto principle because amendment of statute to permit jury, rather than judge to determine whether first-degree murder defendant should be sentenced to death was procedural). Consequently, the court was not required to articulate reasons for imposing consecutive terms. We need not decide this issue, however, because even under Awtrey's argument that the former statute applied, he has failed to establish the court committed fundamental error.

¶21 Under former § 13-708, the trial court was required to make findings on the record justifying its imposition of consecutive sentences. Such findings were required to be more than cursory. *See State v. Sanchez*, 130 Ariz. 295, 301, 635 P.2d 1217, 1223 (App. 1981) (appellate court would not speculate on trial court's reasoning when its statement was unclear). But, in interpreting the former statute, our supreme court held that a trial court need not "expressly state its reasons for imposing consecutive sentences" if its reasons appear in the record. *See State v. Lamb*, 142 Ariz. 463, 474, 690 P.2d 764, 775 (1984) (upholding sentence when court found "crime was a very brutal one" justifying "a more severe penalty").

¶22 Here, the trial court heard argument from both the state and Awtrey specifically on the issue of whether the terms should be concurrent or consecutive. It then cited a number of circumstances it found were aggravating and mitigating before imposing presumptive prison terms. Given the context in which the court noted the aggravating factors, we can infer it considered them relevant to its determination of whether to impose concurrent or consecutive terms, as well as to its decision that presumptive terms were warranted. *See*

State v. Bishop, 137 Ariz. 5, 9, 667 P.2d 1331, 1335 (App. 1983) (when court states aggravating factors on record, such factors need not be repeated to comply with requirements of § 13-708). Accordingly, because the court expressly found aggravating factors on the record, including the age of the victim and the effects of the crimes upon her, it made sufficiently clear the basis for its imposition of consecutive terms. Even assuming the court could have been more articulate in this regard, Awtrey has not demonstrated that it fundamentally erred.

Disposition

¶23 For the reasons stated above, Awtrey's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge