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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. THOMAS GEORGATOS, Appellant.	)	2 CA-CR 2008-0133 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause Nos. CR20070005 and CR20070747

Honorable Peter J. Cahill, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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B R A M M E R, Judge.

¶1 Following a jury trial, Thomas Georgatos was convicted of three counts each of involving a minor in a drug offense and sexual conduct with a minor under the age of fifteen. The trial court sentenced him to a combination of aggravated and presumptive prison terms, all consecutive, for a total of 124.75 years.[1] On appeal, Georgatos contends the court "erred in allowing inadmissible hearsay" evidence at trial and in denying his motion for judgment of acquittal.

¶2 "We view the facts and all reasonable inferences they permit in the light most favorable to sustaining the jury's verdict[s]." *State v. Streck*, 554 Ariz. Adv. Rep. 20, ¶ 2 (App. 2009). On January 1, 2007, seventeen-year-old D. and her friends L. and T., both fourteen years old at the time, went with Georgatos and another man to a hotel room, where Georgatos gave them methamphetamine. After the group smoked the methamphetamine, D. left the hotel room with the other man. L. and T. stayed behind with Georgatos and, except for a trip to a gas station, L. and T. remained at the hotel for approximately the next twenty-four hours. While there, they ingested more drugs Georgatos had given them and, according to the girls, Georgatos had sexual contact with each of them.

¶3 We address the hearsay issue first. Georgatos contends the trial court abused its discretion in allowing L.'s mother to testify that L. had told her in January 2007 about the

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[1]Significant portions of the Arizona criminal sentencing code have been renumbered, effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes to the sections relevant here, we refer in this decision to the current section numbers rather than those in effect at the time of the offenses in this case.

sexual contact with Georgatos. *See State v. Tucker*, 205 Ariz. 157, ¶ 41, 68 P.3d 110, 118 (2003) (admissibility of evidence reviewed for abuse of discretion). The court overruled Georgatos's hearsay objection and found the statement admissible based on Rule 801(d)(1)(B), Ariz. R. Evid., which provides that prior consistent statements of a declarant who testifies at trial and is subject to cross-examination are not hearsay if they are "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

¶4 It is uncontested that L.'s statements to her mother were consistent with her trial testimony that Georgatos had touched her vagina with his fingers and then again with his penis. However, L. had denied sexual contact with Georgatos in interviews with police on January 3 and 8, 2007. And, in his opening statement to the jury, defense counsel had asserted L. had first claimed sexual contact with Georgatos "[e]ight, nine, ten months" after the incident. He speculated she had lied about the contact because she was "not getting enough attention in this whole thing."

¶5 Georgatos contends the statements were made "after the existence of facts that indicate a bias arose" and were thus inadmissible under *State v. Martin*, 135 Ariz. 552, 663 P.2d 236 (1983). There, our supreme court stated:

> The only way to be certain that a prior consistent statement in fact controverts a charge of 'recent fabrication or improper influence or motive' is to require that the statement be made at a time when the possibility that the statement was made for the express purpose of corroborating or bolstering other testimony is minimized. In other words, to be admissible, the witness must

> make the prior consistent statement before the existence of facts that indicate a bias arises.

Id. at 554, 663 P.2d at 238. The statements here were made well before L. had a motive to fabricate them based on the defense's own theory. We find no abuse of discretion in the trial court's admission of the testimony.

¶6 Next, Georgatos contends the trial court abused its discretion by denying his motion for acquittal made pursuant to Rule 20, Ariz. R. Crim. P. "A judgment of acquittal is appropriate only when there is no substantial evidence to prove each element of the offense and support the conviction." *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.2d 931, 937 (App. 2007). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). "If reasonable persons could differ as to whether the evidence establishes a fact in issue, then the evidence is substantial." *McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.2d at 937.

¶7 To prove the allegations that Georgatos had involved a minor in a drug offense, the state had the burden of proving he had knowingly sold, transferred, offered to sell, or offered to transfer a dangerous drug to the victims. *See* A.R.S. §§ 13-3407, 13-3409(A)(2). The offenses constituted dangerous crimes against children if committed against children under the age of fifteen.[2] *See* § 13-705(P)(1)(m). Here, all three victims testified that

[2]The trial court's sentencing minute entry appears to contain a clerical error, incorrectly identifying count two against seventeen-year-old D. as a dangerous crime against children. The court's statements at sentencing, however, make clear that it imposed the

Georgatos had given them methamphetamine, which is defined as a dangerous drug under A.R.S. § 13-3401(6)(b)(xiii). It is uncontested that D. was seventeen years old and T. and L. were fourteen years old at the time of the offenses. Georgatos was an acquaintance of D.'s mother, and D. testified he knew her age. T. and L. both testified they had told Georgatos their ages. Therefore, substantial evidence had been presented to support the allegations of involving minors in a drug offense.

¶8 The offense of sexual conduct with a minor requires proof that the defendant intentionally or knowingly engaged in sexual intercourse or had oral sexual contact with a person under the age of eighteen. A.R.S. § 13-1405(A). "Sexual conduct with a minor who is under fifteen years of age is a class 2 felony and is punishable pursuant to § 13-705." A.R.S. § 13-1405(B). T. testified she had performed oral sex on Georgatos. As mentioned above, L. testified that Georgatos had touched her vagina with his fingers and his penis. She described the contact as "skin to skin." She also testified that she felt "pressure" from Georgatos's penis. She stated "[i]t hurt" and she could feel Georgatos's lower body "moving in . . . and outwards."

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presumptive prison term for this offense based on Georgatos having had two prior historical felony convictions, not because the court considered the offense a dangerous crime against children. *See* A.R.S. § 13-703(C), (J) (presumptive term for category three repetitive offender 15.75 years for class two felony). Therefore, we correct the sentencing minute entry to delete the reference to this count being a dangerous crime against children. *See State v. Johnson*, 108 Ariz. 116, 118, 493 P.2d 498, 500 (1972) (discrepancies between oral pronouncement of sentence and written judgment generally resolved in favor of oral pronouncement).

¶9 "Oral sexual contact" includes oral contact with the penis. A.R.S. § 13-1401(1). "Sexual intercourse" means "penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva." § 13-1401(3). Based on the above testimony, a reasonable jury could differ as to whether Georgatos had engaged in oral sexual contact with T. and had penetrated or had masturbatory contact with L.'s vulva. The trial court did not abuse its discretion by denying his motion for acquittal.

¶10 Georgatos's convictions and sentences are affirmed with the correction noted in footnote two above.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge