FILED BY CLERK
AUG 13 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CARL EDWARD LANE, Appellant.	2 CA-CR 2008-0283 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072360

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED AND REMANDED IN PART

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Appellant

V Á S Q U E Z, Judge.

¶1 Carl Lane appeals his convictions and sentences for continuous sexual abuse of a child under the age of twelve, commercial sexual exploitation of a minor under twelve,

sexual exploitation of a minor under fifteen, and sexual conduct with a minor under fifteen. The jury found all four offenses to be dangerous crimes against children, and the trial court sentenced him to consecutive life terms of imprisonment for each count. On appeal, Lane contends the court erred in admitting evidence of prior acts under Rule 404(c), Ariz. R. Evid., expert and lay testimony that vouched for the victim's credibility, and impeachment evidence that suggested he had violated the conditions of his parole. He also asserts, and the state concedes, that there was insufficient evidence to support his conviction for commercial sexual exploitation of a minor and that the court improperly enhanced his sentence based on two prior felony convictions. For the reasons that follow, we vacate Lane's conviction for commercial sexual exploitation of a minor, vacate his sentences, and remand for resentencing. However, we affirm in all other respects.

Facts and Procedure

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). In 1995, Laura M. and Lane began a romantic relationship, and shortly thereafter, they moved, with Laura's four-year-old daughter M., from California to Tucson. One morning, after M. had turned five years old, she woke up in bed next to Lane. They were both naked and the sheets were wet. A few days later, when Lane was tucking M. into bed, he touched her vagina. He continued to engage in manual and oral sexual contact with M. approximately every other day until she was fourteen or fifteen years old. When M. was eight or nine, Lane took pictures of her

vagina. He again took pictures when M. was eleven or twelve and fourteen. He also penetrated her vagina with his penis when she was eight years old.

¶3 In 2006, when M. was fifteen, she and Lane drove out into the desert because Lane wanted to take more pictures. Before he could do so, they were approached by a police officer, who spoke to M. and Lane individually and then released them. About two weeks later a caseworker from Child Protective Services spoke to M. at school and interviewed Laura and Lane at their residence. Then, around March 2007, Laura and M. moved out of the home. About one month later, M. moved in with Casey and Rose S., whom she had met while working at a community center. M. eventually told Casey and Rose what Lane had done to her, and she subsequently filed a police report.

¶4 Following an investigation, Lane was indicted, and a jury found him guilty of the offenses noted above. The trial court found Lane had two historical prior felony convictions, and for each count it imposed a consecutive, enhanced, mandatory prison term of life without the possibility of release for thirty-five years. This timely appeal followed.

Discussion

I. Conceded Errors

Rule 20 motion

¶5 Lane first contends the trial court abused its discretion in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., as to the charge of commercial sexual exploitation of a minor, arguing there was insufficient evidence to prove

he had committed the crime with a pecuniary motive. *See* A.R.S. § 13-3552(A) (commercial exploitation committed, inter alia, by knowingly "inducing . . . a minor to engage in . . . exploitive exhibition or other sexual conduct for the purpose of producing any visual depiction"); A.R.S. § 13-3551(7) ("'Producing' means financing, directing, manufacturing, issuing, publishing or advertising for pecuniary gain."). The state concedes on appeal that there was insufficient evidence to sustain Lane's conviction on that charge. We agree. The state presented no evidence from which the jury could have inferred Lane had produced the pictures of M. for pecuniary gain. *See State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (conviction must be supported by substantial evidence sufficient to conclude defendant guilty beyond reasonable doubt). Therefore, the court abused its discretion in denying the Rule 20 motion, *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007), and we vacate Lane's conviction for commercial sexual exploitation.

Sentencing

¶6 Lane also contends the trial court erred in finding he had two historical prior felony convictions, and therefore his sentences are illegal. Although he did not object to his sentences below, the imposition of an illegal sentence is fundamental error. *State v. Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d 437, 441 (App. 2002). Lane was sentenced pursuant to A.R.S. § 13-705(I)[1] which mandates a sentence of life imprisonment if the defendant is convicted of a

[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, *see* 2008 Ariz. Sess.

dangerous crime against children and has been convicted of two or more prior sexual offenses. *See also* § 13-704(P)(2). He contends, and the state agrees, the two offenses the court used to enhance his sentences pursuant to this statute were committed on the same occasion and the court therefore erred fundamentally when it enhanced his sentences based on two prior convictions. The sentencing minute entry establishes the court relied on Lane's convictions on "Counts One and Four, Child Molestation, . . . committed in September of 1984." Both counts arose from the same Maricopa County Cause Number, CR144629, and it is apparent that both were committed on the same occasion. Because Lane's sentences were improperly enhanced with two prior felony convictions, we vacate the sentences and remand this matter to the trial court for resentencing.

II. Rule 404(c) Evidence

¶7 Lane next argues the trial court erred in permitting the state to introduce evidence of certain acts under the aberrant sexual propensity exception in Rule 404(c), Ariz. R. Evid. He contends that even if potentially admissible under the rule, the evidence was more prejudicial than probative and should have been excluded. We review a trial court's admission of evidence pursuant to this rule for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004).

Laws, ch. 301, § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.

¶8 Prior to trial, the state notified Lane it intended to introduce evidence that in 1982 or 1983 Lane had engaged in sexual conduct with another child, D. He had penetrated D.'s vagina digitally and with his penis and had "molested her by [p]lacing an object, 'a tube' into her vagina." Lane filed a motion to preclude this evidence, arguing the prior acts were inadmissible and unfairly prejudicial. At the hearing on this issue, D. testified that Lane began touching her vagina when she was five years old, and over the course of the next five years, he touched her on an "every-other-day basis, or something like that," including engaging in oral-genital and digital-genital contact and inserting objects into her vagina. She also testified that on one occasion when she was eight or nine, Lane had inserted a hot dog into her vagina and "ate it out," and on another, he had placed a dog on her back in an attempt to have the dog's penis penetrate her vagina. The trial court found the evidence was "sufficient to permit the trier of fact to find that the defendant" had "digitally penetrated [D.'s] vulva, engaged in oral sexual contact, and also insert[ed] an object into her vagina," and that the "value of the other act evidence is not substantially outweighed by the danger of unfair prejudice."[2]

¶9 After the hearing, the state amended its notice of intent to introduce evidence of other acts to include testimony "consistent with [D.'s] testimony at the 404 hearing," to

[2]Although the state had alleged Lane placed a tube in D.'s vagina, it is unclear from the transcript of the hearing whether D. testified Lane had inserted any objects other than the hot dog. And, it is unclear whether the trial court was referring to the hot dog when it said there was sufficient evidence that Lane inserted an object into her vagina.

which Lane objected. The trial court ultimately ruled that it would permit the state to introduce evidence of the hot dog and bestiality acts. Lane filed a motion for reconsideration in which he argued these acts were too dissimilar from the charged acts to be relevant and also unfairly prejudicial. At a second hearing on this issue, defense counsel focused primarily on the bestiality act. The court concluded that "the allegation with regard to bestiality does shed considerable light on a character trait giv[ing] rise to an avid sexual propensity to commit the crime charge[d] in this pending case" and affirmed its prior ruling. D. then testified at trial about both acts and the others the court previously had found were admissible.

¶10 Generally, "evidence of other bad acts is not admissible to show a defendant's bad character" because "the jury might use the character evidence to improperly conclude that the defendant is a bad person and therefore more likely to have engaged in the charged offense." *Aguilar*, 209 Ariz. 40, ¶ 9, 97 P.3d at 867. However, our courts have "long recognized a[n] . . . exception to the exclusion of evidence of prior bad acts in cases involving charges of sexual misconduct . . . to show that a defendant had a 'propensity to commit such perverted' offenses." *Id.* ¶ 11, *quoting State v. McFarlin*, 110 Ariz. 225, 228, 517 P.2d 87, 90 (1973). This exception was codified in Rule 404; however, subsection (c) provides that before sexual propensity evidence may be admitted, the trial court must determine that:

> (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 the issues, or other factors mentioned in Rule 403[, Ariz. R. Evid.].

Lane makes clear he is not challenging on appeal the admission of D.'s testimony about acts similar in nature to those M. alleged. Nor is he challenging the sufficiency of D.'s testimony to establish that he committed these two acts. He is only contesting the court's finding that the acts involving bestiality and the hot dog were relevant and not substantially outweighed by the potential for unfair prejudice.

¶11 Lane contends these acts are not relevant because they were "completely different . . . than the actions alleged by the victim in this case." Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. To establish relevance for admission under Rule 404(c)(1)(B), the state need only demonstrate that "the other act evidence . . . lead[s] to a reasonable inference that the defendant had a character trait that gives rise to an aberrant sexual propensity to commit the charged sexual offense." *Aguilar*, 209 Ariz. 40, ¶ 27, 97 P.3d at 873. Here, the challenged acts were sexual in nature, and they involved a minor. Thus, they showed Lane had an aberrant sexual propensity to engage in sexual acts with

minors, which is precisely what he was alleged to have done in this case. The acts were therefore relevant.

¶12 However, whether the probative value of the prior acts was substantially outweighed by the potential for unfair prejudice is a separate question.[3] When considering the admissibility of Rule 404(c) evidence, the trial court must weigh the probative value of the evidence against the potential for unfair prejudice and consider eight enumerated factors, including: (1) remoteness in time, (2) similarity of the prior act to the charged act, (3) strength of the evidence of the other act, (4) frequency of the other act, (5) any surrounding circumstances, (6) intervening events, (7) other similarities and differences, and (8) any other relevant factors. Ariz. R. Evid. 404(c)(1)(C).

¶13 Lane contends that because twenty-five years separated the prior acts from the offenses in this case, they were so remote in time that they no longer had any probative value. Lane committed the challenged acts in 1982 or 1983, but he continued to abuse D. through 1984. He was convicted of molesting D. in 1985 and remained incarcerated until March 1995. He then began abusing M. later that year. Therefore, considering that Lane's continued sexual abuse of D. was followed by his incarceration for approximately twelve of

---

[3]When it considered the admission of these acts at the hearing on the motion for reconsideration, the trial court did not make an explicit finding that the probative value of the two acts was not substantially outweighed by the potential for unfair prejudice. Rule 404(c)(1)(D) requires the court to make this specific finding on the record. *See Aguilar*, 209 Ariz. 40, ¶¶ 30-31, 97 P.3d at 874. However, the failure to do so is not reversible if "the record contain[s] substantial evidence that the requirements of admissibility were met." *Id.* ¶ 37; *see also State v. Marshall*, 197 Ariz. 496, ¶ 7, 4 P.3d 1039, 1042 (App. 2000).

the thirteen years separating those acts from the current offenses, the prior acts were not so remote in time as to diminish their probative value. *See State v. Bible*, 175 Ariz. 549, 575, 858 P.2d 1152, 1178 (1993) (finding offense committed one year after serving seven-year prison term not too remote).

¶14 Although not too remote in time from the present offenses, the acts involving bestiality and use of a hot dog were undeniably "vastly dissimilar" to the acts Lane committed against M. Thus, because these acts were more outrageous than the acts alleged in this case, there is some merit to Lane's argument they were unfairly prejudicial. But, "where both probative value and prejudicial potential are found, [the law] does not require wholesale prescription. Rather, inquiry must turn to whether the probative value may be preserved and the risks of unfair prejudice minimized by careful restrictions on the scope or details of the proof." *State v. Castro*, 163 Ariz. 465, 469-70, 788 P.2d 1216, 1220-21 (App. 1989); *see also State v. Salazar*, 181 Ariz. 87, 92, 887 P.2d 617, 622 (App. 1994) (in trial for rape of adult woman, evidence of prior rape of different woman "under vastly dissimilar circumstances" inadmissible).

¶15 Because the two prior acts were so dissimilar from the acts in this case, they were only probative to the extent they demonstrated Lane had a general tendency to engage in sexual acts with minors. But, these particular acts were not the only evidence of Lane's aberrant sexual propensity. At trial, D. testified about other acts which were far more similar in kind and scope to the charged acts in this case. The acts were therefore cumulative to the

extent they were relevant. Thus, it seems that by introducing the two contested prior acts, particularly the bestiality act, "the prosecution's conspicuous purpose with this evidence was to luxuriate in inflammatory detail and create overwhelming prejudice against the defendant." *Salazar*, 181 Ariz. at 92, 887 P.2d at 622. Therefore, under the circumstances, the trial court abused its discretion by admitting evidence of the prior acts involving the hot dog and bestiality.

¶16 However, we need not reverse the convictions if the error was harmless. *See State v. Beasley*, 205 Ariz. 334, ¶ 27, 70 P.3d 463, 469 (App. 2003). Error is harmless if we are satisfied beyond a reasonable doubt that it did not affect the verdict. *State v. Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d 796, 805-06 (2000). M. testified at length about numerous sexual acts Lane had engaged in with her, including taking sexually explicit photographs and attempting to engage in sexual intercourse. M. stated the pictures Lane had taken were on a blue memory disk, and she identified a digital camera that police later found in Lane's possession as the one he had used to take pictures of her vagina as well as a blanket on which he had taken some pictures. Based on specific identifying characteristics, M. testified she was the person depicted in the pictures found on his computer and camera.

¶17 The state also read to the jury excerpts from a telephone call between M. and Lane during which M. asked Lane, "What about when . . . you took me out to the desert to do the pictures. You haven't told anybody about that; right?" Lane responded, "I haven't told anybody about anything, M[.]" And, when M. asked him whether he had deleted the

photographs he had taken of her, he told her he did not have any pictures and that "[t]he disk is gone." He later repeated that the pictures were gone and the disk was "destroyed."

¶18 Additionally, the investigating police officers testified that, based on the information obtained during the confrontation call and M.'s interviews, they executed a search warrant at Lane's home. During the search, officers found a digital camera; a blue memory chip containing photographic images of a vagina; and on the hard drive of Lane's computer, they discovered eighteen photographic images of the same vagina, including the images that were on the memory chip. Additionally, D. testified about other, similar acts Lane had committed against her. Moreover, the trial court properly instructed the jury it could "consider this evidence in determining whether [Lane] had a character trait that predisposed him to commit the crimes charged," but not to find him guilty because he had committed the prior acts. *See State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007) (court presumes jurors follow instructions). Thus, considering all the evidence presented and the court's limiting instruction, we conclude that the erroneous admission of these two prior acts was harmless beyond a reasonable doubt.

III. Witness Testimony

¶19 Lane argues the trial court erred when it permitted expert witness Amy Evans, a forensic interviewer, and lay witness Rose S. to improperly vouch for M.'s credibility by testifying she "showed the characteristics of telling the truth." Because he failed to object to either witness's testimony below, Lane has forfeited all but fundamental error review.

State v. Henderson, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). To obtain relief, Lane must demonstrate fundamental error exists—error going to the foundation of his case that necessarily renders his trial unfair—and that he was thereby prejudiced. *See id.* ¶¶ 23-26.

¶20 "Arizona prohibits lay and expert testimony concerning the veracity of a statement by another witness." *State v. Boggs*, 218 Ariz. 325, ¶ 39, 185 P.3d 111, 121 (2008). Rules 701, Ariz. R. Evid. (pertaining to lay witnesses), and 702, Ariz. R. Evid. (pertaining to expert witnesses), both limit a witness's opinion testimony to those circumstances in which the evidence will assist the trier of fact in understanding the evidence or determining facts in issue. *See also State v. Reimer*, 189 Ariz. 239, 240-41, 941 P.2d 912, 913-14 (App. 1997). Our courts have

> expressly determined that neither expert nor lay witnesses assist the trier of fact to understand the evidence or to determine a fact in issue when they merely opine on the truthfulness of a statement by another witness. Such opinions are rejected because they are "nothing more than advice to jurors on how to decide a case."

See id. at 241, 941 P.2d at 914 (citations omitted), *quoting State v. Moran*, 151 Ariz. 378, 383, 728 P.2d 248, 253 (1986).

¶21 At trial, Evans testified about the general indicia of reliability in forensic interviews and her observations of M. during their interview. Lane contends Evans's testimony constituted an opinion on M.'s credibility because Evans "testified to factors that indicated [when a victim's] statements were true and then applied them to M.'s statement

[during her interview]." The specific testimony Lane complains of consists of the following exchanges:

> [Prosecutor]: You mentioned detail and how that is something that you are looking for the person you are interviewing to provide you during that interview. Why is detail important?
>
> [Evans]: Because detail shows . . . specific memories of incidents that happened as opposed to . . . when somebody says, this is the way it happened all the time. . . .
>
> Details also show me that the child may not be suggestible. That . . . this is coming from their own memory[,] not someone else's memory.
>
> . . . .
>
> [Prosecutor]: What other components of the open-ended questions section are you looking for . . . to confirm what they are saying or to make sure what they are saying is coming from a place of free recall?
>
> [Evans]: I look to see if they are correcting me if I make any mistakes. A child in general who corrects me is probably not going to be suggestible.
>
> I am looking for consistency. I am looking that they are not constantly changing what they are telling me. And I'm looking for good eye contact throughout the interview, and I'm watching the body language.
>
> . . . .
>
> [Prosecutor]: You had talked about how you look for the person you are interviewing to provide detail?
>
> [Evans]: Yes.

[Prosecutor]: Did M[.] provide that type of detail?

[Evans]: Yes, she did.

. . . .

[Prosecutor]: Were there times during that interview . . . where she corrected you if you had misstated something to her?

[Evans]: There was a couple of times, maybe once or twice.

Lane acknowledges "the state can provide testimony about what factors are important in evaluating a child's statements and then provide testimony about the child's statement." But, he contends Evans's testimony was inappropriate because she "actually connected the background about how children [report incidents of sexual abuse] and what M[. reported] by putting them next to each other."

¶22 Lane relies heavily on *State v. Moran*, 151 Ariz. 378, 728 P.2d 248 (1986), and *State v. Tucker*, 165 Ariz. 340, 798 P.2d 1349 (App. 1990), to support his argument that Evans's testimony constituted a comment on M.'s credibility. These cases addressed instances in which witnesses in sexual abuse cases implied the alleged victims were telling the truth, and in each case, the reviewing court found reversible error. *Moran*, 151 Ariz. at 384-86, 728 P.2d at 254-56; *Tucker*, 165 Ariz. at 349-50, 798 P.2d at 1358-59. However, Lane's reliance on *Moran* and *Tucker* is misplaced.

¶23 In *Moran*, a witness testified she had been asked "'to do an evaluation to ascertain whether or not [*she*] *felt [the daughter] has been sexually molested*.'" 151 Ariz.

at 385, 728 P.2d at 255 (first alteration added). She then testified the results of personality tests she had given the victim were "consistent with an individual who had in fact some kind of trauma like a molest occur early in life and were now simply reacting to that in adolescence." *Id.* The supreme court acknowledged in *Moran* that this type of testimony is "slightly different than direct testimony on the victim's veracity," but found it inadmissible because "the inference offered the jury [from this testimony] is that because the victim's personality and behavior are consistent with a molest having occurred, the crime must have been committed." *Id.* The court further explained:

> This type of particularized testimony permits the expert to indicate how he or she views the credibility of a particular witness. Once the jury has learned the victim's behavior from the evidence and has heard experts explain why sexual abuse may cause delayed reporting, inconsistency, or recantation, we do not believe the jury needs an expert to explain that the victim's behavior is consistent or inconsistent with the crime having occurred.

Id. Thus, the court held this type of testimony is inadmissible. *Id.* at 386, 728 P.2d at 256.

¶24 Similarly, in *Tucker*, the expert applied his criteria for determining the truthfulness of a victim's allegations to other witnesses' trial testimony about the victim's behavior. 165 Ariz. at 349-50, 798 P.2d at 1358-59. The criteria included a motivation to lie and the presence of "'traumagenic dynamics,'" which the expert defined as behavioral indicators of sexual abuse. *Id.* He then applied these two factors to the particular case and stated that certain behaviors the victim purportedly had exhibited would be evidence of traumagenic dynamics in a child who had been molested. And he concluded, based on the

facts supplied to him, that the victim would have had no motivation to lie. *Id.* The court found these statements tantamount to "testi[mony] that the victim was truthful and not lying" and held them inadmissible.[4] *Id.* at 350, 798 P.2d at 1359.

¶25 The testimony in this case is different than that in *Moran* and *Tucker*. Although Evans testified about credibility factors generally, and provided specific evidence of what M. said and did during the interview, she never told the jury that she believed M. or that M.'s behavior was consistent with that of someone who had been sexually abused. Instead, after explaining the purpose and procedure for her interview, Evans reported that M. had given her detailed information during the interview and had corrected her once or twice. That the jury could, on its own, apply those statements to the factors Evans also mentioned, does not constitute "advice to jurors on how to decide the case." *Moran*, 151 Ariz. at 383, 728 P.2d at 253. Rather, it facilitated the jury's function as fact-finder and permitted it to draw the inference itself. There was no error in the admission of Evans's testimony.

¶26 However, the same cannot be said of Rose's testimony. The prosecutor asked Rose, "[w]hen you had that conversation in the car . . . with M[.] where she confided in you . . . , did you believe her?" Rose replied, "Yes, I did." This is an unambiguous lay opinion

---

[4]We question whether the expert's testimony is an example of inadmissible testimony. The witness testified, "'I would say that if a child who has been molested, that type of self-destructive behavior would be a result of the shame and the guilt," which he had earlier stated were underlying factors in the presentation of traumagenic dynamics. *Tucker*, 165 Ariz. at 349-50, 789 P.2d at 158-59. This statement appears to explain why sexual abuse victims display self-destructive behaviors; it does not support an inference that because the victim in that case displayed self-destructive behaviors she had been molested.

of the victim's credibility and, as such, it is prohibited by our rules of evidence. *See* Ariz. R. Evid. 702; *see also Reimer*, 189 Ariz. at 240-41, 941 P.2d at 913-14.

¶27 M. also provided lengthy and detailed testimony, the credibility of which the jury could assess for itself. And, M.'s testimony was at least partially corroborated by the photographic and other related evidence and testimony about the telephone call between her and Lane. Finally, the trial court also properly instructed the jurors that, ordinarily, opinion testimony was not permitted unless the witness was giving an opinion "on a subject upon which the witness ha[d] become an expert" and that they were not bound by any opinion and should only give an opinion the weight they believed it deserved. *See McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d at 938 (jurors presumed to follow instructions). Therefore, although Rose's opinion testimony was improper, Lane has failed to establish, in light of the weight of evidence presented, that it resulted in error that was both fundamental and prejudicial, entitling him to relief. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

IV. Evidence of Parole Violation

¶28 Finally, Lane contends the trial court abused its discretion by permitting the state to impeach him with evidence that he had violated the conditions of his parole by having contact with M.[5] The admission of impeachment evidence is within the sound

[5]Before trial, the state filed a notice of its intent to introduce evidence of Lane's prior convictions to impeach his credibility pursuant to Rule 609, Ariz. R. Evid. On appeal, Lane does not challenge the use of his prior convictions for impeachment purposes. However, he does challenge impeachment through the use of evidence of his specific parole conditions stemming from those prior convictions.

discretion of the trial court, and we will not disturb its ruling absent an abuse of that discretion. *State v. King*, 180 Ariz. 268, 275, 883 P.2d 1024, 1031 (1994).

¶29 During cross-examination, the prosecutor asked Lane whether, when he was released from prison in 1995, he was required, "as a convicted sex offender to abide by certain guidelines and conditions." He answered that upon his release he was only required to complete six months of parole. The prosecutor then asked about the specific conditions of his parole and subsequent sex offender registration, but defense counsel objected on relevancy and foundation grounds. The trial court overruled the objection. The prosecutor then asked a series of questions about Lane's parole conditions, including restrictions on his contact with minors. Defense counsel objected again, and at a bench conference, the parties discussed whether the prosecutor could impeach Lane with the conditions of his parole or sex offender registration. Ultimately, the court permitted the prosecutor to ask him about the length of his parole and any conditions imposed as a part of his parole, but it precluded evidence of the conditions of his sex offender registration. When Lane denied he was on parole beyond October 1995, six months after he was released from prison, the state introduced a copy of his parole conditions showing he was prohibited from having unsupervised contact with minors.

¶30 On appeal, Lane argues the prosecutor's assertion at trial that he was subject to parole conditions through 1998 was incorrect. He contends that, in any event, evidence

of his parole violation was not admissible for impeachment or any other purpose.[6] While we agree such evidence was inadmissible, its admission was harmless under the facts of this case.

¶31 "Impeachment of a witness with a prior felony conviction is allowed because any felony conviction is thought to bear upon the credibility of the witness." *State v. Beasley*, 205 Ariz. 334, ¶ 19, 70 P.3d 463, 467 (App. 2003); *see* Ariz. R. Evid. 609 (evidence of felony conviction admissible for purpose of attacking credibility of witness). But, "specific instances of the conduct of a witness, for the purpose of attacking . . . the witness' credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence." Ariz. R. Evid. 608; *see also State v. Orantez*, 183 Ariz. 218, 222, 902 P.2d 824, 828 (1995).

¶32 Even assuming Lane was subject to a parole condition prohibiting him from having unsupervised contact with minors at the time he began to associate with M., extrinsic evidence that he had violated his parole conditions was not appropriate for impeachment purposes. *See State v. Tucker*, 157 Ariz. 433, 448, 759 P.2d 579, 594 (1988). "It is the fact of conviction, not the extent or terms of the punishment, that is probative of . . . veracity." *Id.*

---

[6]Although the state does not concede error on this issue, it has not provided any argument that the evidence was properly admitted for impeachment purposes or that it was admissible on any other basis.

¶33 Furthermore, the evidence was inadmissible as substantive evidence of Lane's guilt. The mere fact that a person violated parole is not "admissible to prove the character of a person to show action in conformity therewith" under Rule 404(b). Even if relevant to establish an aberrant sexual propensity under Rule 404(c), this evidence was not properly disclosed as such before trial and therefore would not have been admissible on that basis. *See* Ariz. R. Evid. 404(c)(3). Thus, the trial court abused its discretion in admitting extrinsic evidence that Lane violated the conditions of his parole.

¶34 However, as we have already discussed, there was substantial evidence of Lane's guilt through M.'s testimony, the photographs and other evidence, and Lane's own admissions during the recorded telephone conversation. Additionally, the jury heard a great deal of evidence not only about Lane's prior convictions, but also the circumstances under which they were committed. We therefore do not believe the evidence that Lane had violated a condition of his parole by having unsupervised contact with M. could have affected the jury's verdicts. The erroneous admission of this evidence was harmless beyond a reasonable doubt.

Disposition

¶35 For the reasons stated above, we affirm Lane's convictions for continuous sexual abuse of a minor under twelve, sexual exploitation of a minor under fifteen, and sexual conduct with a minor under fifteen. However, we vacate his conviction for

commercial sexual exploitation and his sentences on all counts and remand for resentencing consistent with this decision.

_____
GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
J. WILLIAM BRAMMER, JR., Judge