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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THE STATE OF ARIZONA, Appellee, v. JEFFREY POTTER, Appellant.	2 CA-CR 2008-0299 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20074813

Honorable Frank Dawley, Judge
Honorable John S. Leonardo, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Appellant Jeffrey Potter appeals from his conviction and sentence for sexual conduct with a minor. He argues the trial court erred by denying his motion to suppress evidence of telephone calls the victim made to him at the request of law enforcement. He also contends the court violated his right to "confront and cross-examine his accuser" by excusing her as a witness before impeachment evidence—a case file from Child Protective Services (CPS)—had been produced, erred in denying his motions to continue the trial, and by excluding other impeachment evidence under A.R.S. § 13-1421. Potter further argues § 13-1421 is unconstitutional on its face and as applied to him. Finally, he contends the court's erroneous denial of his motion for acquittal on several charged counts created a "real possibility that the jury returned a non-unanimous verdict" on the charge of which he was convicted. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Potter's conviction and sentence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In August 2007, S., who was then beginning her junior year of high school, reported that her stepfather, Potter, had been sexually abusing her since the beginning of her sophomore year. Potter was arrested following a forensic interview of S. and two telephone calls she made to him at the behest of officers in which Potter made incriminating statements.

¶3 A grand jury charged Potter with four counts of sexual conduct with a minor and one count of attempted sexual conduct with a minor, and the case proceeded to

trial. On the fifth day of the eight-day trial, after the close of the state's case, the trial court granted Potter's motion for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., on one count of sexual conduct with a minor, but it denied the motion as to the remaining counts. The jury found Potter guilty of one count of sexual conduct with a minor but failed to reach a verdict on any of the remaining counts. Pursuant to a plea agreement on the remaining counts, Potter then pled no contest to an amended count of attempted sexual conduct with a minor. The court sentenced him to a substantially mitigated, three-year prison term for sexual conduct with a minor. For attempted sexual conduct with a minor, the court suspended the imposition of sentence and placed Potter on probation for a ten-year term. This appeal followed.

Discussion

Evidence of Telephone Conversations with S.

¶4 Potter first argues the trial court erred in denying his motion to suppress evidence of telephone conversations with S. in which he had made incriminating statements. When reviewing the denial of a motion to suppress, we consider only the evidence presented at the suppression hearing, and we view that evidence in the light most favorable to upholding the trial court's findings of fact. *State v. Guillen*, 222 Ariz. 81, ¶ 2, 213 P.3d 230, 231 (App. 2009). After S. reported that Potter had been sexually abusing her, Pima County sheriff's detective Erin Gibson contacted Potter and asked that he provide an interview. Potter agreed, but when he later contacted Gibson and told her he wanted an attorney present, Gibson cancelled the interview. At least two weeks later,

at Gibson's request, S. came to her office to "conduct a confrontation call" with Potter. S. called Potter twice from the police substation, and Potter made several incriminating statements during those calls. Gibson recorded both calls.

¶5 Potter moved to suppress evidence of those telephone conversations, arguing that, because he had invoked his right to counsel and S. had called him at Gibson's request, the calls violated his Sixth Amendment right to counsel. The state conceded S.'s telephone calls to Potter were the "functional equivalent to an interrogation" but argued Potter's Sixth Amendment right to counsel had not attached because he had not yet been arrested. The trial court agreed and denied the motion on that ground.[1] We review the court's decision for an abuse of discretion, but we review constitutional and purely legal issues de novo. *See Guillen*, 222 Ariz. 81, ¶ 2, 213 P.3d at 231.

¶6 On appeal, Potter renews his argument that, because he had invoked his right to counsel, law enforcement officers "must honor that demand and cannot make further attempts to initiate questioning." What Potter does not do, however, is articulate the constitutional basis for the right to counsel he purportedly invoked. He concedes his Sixth Amendment right to counsel had not yet attached because he had not been indicted.

[1]The trial court also denied the motion on procedural grounds, stating it was untimely and Potter should have "brought [the issue] back to the judge," who had denied an earlier suppression motion that argued S., as a minor, could not have consented to the recording of the same telephone calls. But, because the court addressed the motion on its merits and we agree with its conclusion, we do not address these alternate grounds. *See State v. Wassenaar*, 215 Ariz. 565, ¶ 50, 161 P.3d 608, 620 (App. 2007).

See State v. Fulminante, 161 Ariz. 237, 246, 778 P.2d 602, 611 (1988) ("The sixth amendment right to counsel does not attach during pre-indictment questioning."). And he cites no authority suggesting the Fifth Amendment right to counsel applies to noncustodial interrogations.[2] Albeit under different circumstances and without explicitly stating that the Fifth Amendment does not apply to noncustodial questioning, our supreme court has stated that, "even though a suspect invokes his right to decline further interrogation until he has spoken to a lawyer, the police may continue to question him in a non-custodial setting." *State v. Stanley*, 167 Ariz. 519, 525, 809 P.2d 944, 950 (1991). The United States Supreme Court has stated, "The Fifth Amendment right identified in *Miranda* [*v. Arizona*, 384 U.S. 436 (1966),] is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that [the defendant] invoked and there would be no occasion to determine whether there had been a valid waiver." *Edwards v. Arizona*, 451 U.S. 477, 485-86 (1981); *see also Alexander v. Connecticut*, 917 F.2d 747, 751 (2d Cir. 1990) ("Absent a police dominated interrogation, the fifth amendment right to counsel does not attach."); *Collier v. Municipality of Anchorage*, 138 P.3d 719, 720 (Alaska Ct. App.

[2]Moreover, Potter cites no authority supporting his argument that, absent custodial interrogation or attachment of the Sixth Amendment right to counsel, the invocation of the right to counsel precludes police questioning. The cases on which he relies address police conduct occurring while the defendant was in custody. *See, e.g., State v. Routhier*, 137 Ariz. 90, 93-94, 669 P.2d 68, 71-72 (1983); *McNutt v. Superior Court*, 133 Ariz. 7, 9-10, 648 P.2d 122, 124-25 (1982); *State v. Rosengren*, 199 Ariz. 112, ¶¶ 3-4, 10, 14 P.3d 303, 306-07 (App. 2000); *State v. Sanders*, 194 Ariz. 156, ¶ 6, 978 P.2d 133, 134 (App. 1998). Thus, the cases are inapposite.

2006) ("The right to counsel under the Fifth Amendment only arises during custodial interrogation."); *People v. Goyer*, 638 N.E.2d 390, 396 (Ill. App. Ct. 1994) ("The fifth amendment right to counsel relates only to *custodial* interrogation."); *Hunt v. State*, 687 So. 2d 1154, 1159-60 (Miss. 1996) ("Fifth Amendment right to counsel . . . not implicated" in noncustodial setting); *State v. Hoadley*, 651 N.W.2d 249, ¶ 26 (S.D. 2002) ("A person is not entitled to counsel if the interrogation is noncustodial."); *State v. Bradshaw*, 457 S.E.2d 465, 467 (W. Va. 1995) ("[T]he *Miranda* right to counsel has no applicability outside the context of custodial interrogation."). Plainly, S.'s telephone calls to Potter did not constitute custodial interrogation, and Potter does not argue otherwise. Therefore, because he was not in custody and his Sixth Amendment right to counsel had not attached either when he spoke to Gibson or during the telephone conversations with S., Potter had no right to counsel to invoke.

¶7 Moreover, even assuming Potter's Fifth Amendment right to counsel would apply to the telephone calls, he cites no authority for the proposition that a defendant who is not in custody may invoke his or her right to counsel under the Fifth Amendment prior to an interrogation, much less a noncustodial interrogation. As the Supreme Court noted in *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991), if *Miranda* rights could be invoked before custodial interrogation, they could be invoked prior to arrest or "even prior to identification as a suspect." It observed that "[m]ost rights must be asserted when the government seeks to take the action they protect against" and that "[t]he fact that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future

custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect." *Id*.; *see also Wilson v. Commonwealth*, 199 S.W.3d 175, 179 (Ky. 2006) ("[I]t is clear that the Fifth Amendment rights protected by *Miranda* attach only after a defendant is taken into custody and subjected to interrogation. Any attempt to invoke those rights prior to custodial interrogation is premature and ineffective."). At the time Potter invoked his right to counsel, he was not being interrogated in any fashion. Thus, his invocation of his right to counsel two weeks before his telephone conversations with S. would have been ineffective in any event, even were such a right applicable to those calls.

¶8 Potter also asserts Gibson's conduct in asking S. to call him rendered his statements involuntary because they "overc[a]me [his] will to exercise his constitutional rights." But, as we have explained, Potter had no constitutional right to counsel, and thus there was no valid assertion of that right to be "overcome" by police conduct. Moreover, to the extent the conversations may implicate Potter's Fifth Amendment right to remain silent, the trial court found his statements were voluntary, and Potter identifies no evidence produced at the suppression hearing, or makes any argument here, suggesting this finding was incorrect.[3]

[3]In his opening brief, Potter asserts the calls created "emotional difficulty" for him because he had not spoken with S. for some time and her allegations were "personally devastating." To support these assertions, however, he refers to trial testimony. Even assuming the testimony suggests Potter's statements were involuntary, we consider only the evidence produced at the suppression hearing. *See Guillen*, 222 Ariz. 81, ¶ 2, 213 P.3d at 231.

¶9 Additionally, none of the three cases he cites in support of this argument is applicable. His reliance on *People v. Bowman*, 782 N.E.2d 333, 337, 343 (Ill. App. Ct. 2002) is misplaced because, there, police had used an informant to elicit a confession from a jailed defendant after the defendant, while in custody, had asserted his right to remain silent. Similarly, in *State v. Fuller*, 278 N.W.2d 756 (Neb. 1979), *withdrawn in part and supplemented by* 281 N.W.2d 749, the court determined the defendant was in custody when he was interrogated by a police agent. 281 N.W.2d at 749. Finally, not only was *Macias v. State*, 733 S.W.2d 192, 194-95 & n.2 (Tex. Crim. App. 1987), grounded only in state law, the defendant was in custody during the interrogation. Therefore, for the reasons stated, we conclude the trial court did not abuse its discretion in denying Potter's motion to suppress.

Motions to Continue

¶10 Potter next argues the trial court erred in failing to hold a hearing before it denied his motion to continue the trial. Approximately one month before trial, Potter filed a stipulation for substitution of counsel signed by his former attorney and his new attorney, and his new attorney filed a notice of appearance. Several days later, his new attorney filed a motion to continue the trial, advising the court Potter's former attorney had not made any "formal disclosure . . . pursuant to Rule 15.2, Ariz. R. Crim. P." and no interviews with the state's witnesses had been conducted. Counsel asserted the currently scheduled trial date was "not realistic if [he] is to be as thorough and prepared as he should for trial in this matter." The court rejected the notice of appearance because it did

not contain a statement, required by Rule 6.3(c), Ariz. R. Crim. P., that Potter's new counsel was prepared for trial. New counsel then filed an amended notice of appearance stating he was "aware of the July 22, 2008 trial date and will be prepared for trial." The court subsequently denied the motion to continue, stating that "defense counsel had averred in his Amended Notice of Appearance that he was aware of the current trial date and would be prepared to go to trial on that date."

¶11 Potter asserts the trial court erred when it denied his motion to continue "without holding a hearing to determine whether delay was indispensable to the interests of justice." Rule 8.5, Ariz. R. Crim. P., permits a trial court to grant a motion to continue "only upon a showing that extraordinary circumstances exist and that delay is indispensible to the interests of justice." But Potter cites no authority, and we find none, suggesting a court must hold a hearing to make that determination.[4] Although Potter asserts he was "offered no opportunity by the court to explain the length of the continuance he was seeking," it is a party's obligation to assert in its motion any factors relevant to the court's determination. *See* Ariz. R. Crim. P. 8.5(a) ("Any motion [to continue] must be in writing and state with specificity the reason(s) justifying the continuance."). Furthermore, in neither his motion to continue nor his request for a

[4]Relying on *United States v. Garrett*, 179 F.3d 1143, 1147 (9th Cir. 1999), Potter asserts it was the trial court's responsibility "to create a record of its reasoning denying the continuance." But nothing in *Garrett* suggests the trial court must do so after a hearing. The court plainly explained its reason for denying the continuance—Potter's counsel's avowal he would be prepared for trial. As we explain, it was not error for the court to rely on that avowal.

hearing did Potter suggest he needed a hearing to provide further reasons supporting his motion to continue. Thus, the court did not err in denying it without holding a hearing.

¶12 Potter also argues, however, that it was improper for the trial court to rely on his attorney's statement in the amended notice of appearance that he would be prepared for trial because he "had made it abundantly clear [in the motion to continue] that he needed more than one month to prepare for trial." In support of this contention, Potter relies on this court's recent decision in *State v. Aragon*, 221 Ariz. 88, 210 P.3d 1259 (App. 2009). In *Aragon*, one week before trial, the defendant through appointed counsel moved to continue the trial so that a private attorney the defendant wanted to retain could have enough time to prepare for trial and file a notice of appearance. *Id.* ¶ 2. The trial court denied the motion to continue and required Aragon to proceed with his appointed counsel, "citing both the short time before trial and the Rule 8[, Ariz. R. Crim. P.,] deadline." *Id.* ¶¶ 3-4. The trial court also noted, referring to Rule 6.3, that "'the criminal rules state that if substitute counsel is to come in, they have to be prepared to go to trial on the date set.'" *Id.* ¶ 3.

¶13 We reversed, finding the trial court's denial of Aragon's motion to continue was unreasonable and violated Aragon's right to counsel of his choice, resulting in structural error. *Id.* ¶ 9. We observed that "it [wa]s undisputed that Aragon had legitimate reasons for his request" and had not previously sought a continuance. *Id.* ¶ 6. Unlike the trial court here, however, the trial court in *Aragon* had relied on Rule 8 in denying the continuance and had done so improperly because the additional time plainly

would have been excluded from any speedy-trial time limits. *Id.* ¶ 7. We also determined the *Aragon* trial court improperly had based its conclusion on Rule 6.3. *Id.* ¶ 8. Noting that rule "is primarily intended to protect the rights of defendants," we stated we would not "'elevat[e a] technical requirement above [Aragon']s right to counsel of his choice.'" *Id.*, *quoting State v. Coghill*, 216 Ariz. 578, ¶ 44, 169 P.3d 942, 953 (App. 2007) (alterations in *Aragon*).

¶14 Unlike the defendant in *Aragon*, however, Potter was permitted to proceed to trial with counsel of his choice. And, although we recognize Rule 6.3's requirement that substitute counsel avow he or she is prepared for trial is technical, it is not empty. The trial court here was not obliged to ignore counsel's avowal pursuant to that rule because a previous motion—albeit filed only two hours before the amended notice of appearance—was arguably contradictory. In these circumstances, it was reasonable for the court to conclude Potter's substitute counsel had reevaluated his ability to be prepared for trial. Accordingly, we conclude the court did not abuse its discretion in denying Potter's motion to continue. *See State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990).

¶15 Potter further contends the judge who presided over the trial—a different judge than had been assigned to the case before trial—erred by denying Potter's motion to continue made on the first day of trial. But, as the state points out, although Potter informed the court a previous motion to continue had been denied, he did not urge the court to continue the trial. Indeed, Potter told the court he "didn't want to try to get a

continuance in any other fashion." In his reply brief, Potter focuses on the court's statement that it would not "continue another judge's trial." But the court made that statement in considering when to hold an evidentiary hearing on Potter's recently filed motion to suppress, clearly suggesting the statement was unrelated to Potter's previous motion to continue. The court opted to delay swearing in the jury so the evidentiary hearing could be held before jeopardy attached, and Potter did not object to this procedure. There is thus no order denying a continuance for us to review.

Cross-Examination of S.

¶16 Less than two weeks before trial, Potter filed a motion seeking production of the Child Protective Services (CPS) case file pertaining to its investigation of S. The state asserted in response that "all records [it] ha[d] received from [CPS] ha[d] been disclosed." The trial court nonetheless ordered CPS to disclose "any and all records in [its] possession regarding [S.]." On the third day of trial, during S.'s testimony, Potter informed the court that he had not yet received the file from CPS. He stated the file was "something we need to see before we can complete our cross-examination on [S.]." The state informed the court that S. was scheduled to return to her home, out of state, the following day. After S. completed her testimony, the court excused her over Potter's objection. Potter did not receive the CPS records until the fifth day of trial, after which he informed the court they contained "some materials . . . that [he] could have used to cross-examine [S.]."

¶17 Potter asserts on appeal that the trial court's decision to excuse S. "denied [his] right to confront and cross-examine [her]" based on the CPS records and thereby violated the Confrontation Clause of the Sixth Amendment. The Due Process Clause of the Fourteenth Amendment ensures a defendant a "meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). A defendant also has the right to confront and cross-examine adverse witnesses under the Sixth Amendment. *See Davis v. Alaska*, 415 U.S. 308, 315 (1974). We observe, however, despite Potter's claim that the court's action rendered S. "unavailable," the court never stated S. could not be recalled as a witness. Indeed, it plainly indicated it would be willing to recall S. if Potter so requested. The court noted in a minute entry on the third day of trial that, "in the event new information arises that might necessitate further examination of [S.], that issue will be addressed at the time it is raised."

¶18 Additionally, when excusing S., the court stated that, if Potter found "something [in the CPS records] that[is] new or different[,]" that would be a "reason [to] allow [the] defense to recall her." Although noting that "we may need to recall her," the court declined to "direct the State to keep her here" and stated, "[I]f we have a problem, then we will deal with it when we have it." Thus, Potter's assertion that S. was unavailable for cross-examination was plainly incorrect. *Cf.* Ariz. R. Evid. 804(a)(4)-(5) (defining unavailability to include being "unable to testify . . . because of death or then existing physical or mental illness or infirmity" or being "absent from the hearing and the

proponent of a statement has been unable to procure the [witness's] attendance . . . by process or other reasonable means").

¶19 Indeed, Potter never asked the trial court to recall S. for further testimony. He therefore waived his right to cross-examine her based on the CPS file. *Cf. United States v. Darrell*, 828 F.2d 644, 650 (10th Cir. 1987) (right to cross-examine waived where defendant "failed to ask the court to recall the witnesses"); *United States v. Cook*, 530 F.2d 145, 153 (7th Cir. 1976) (when witness's testimony "cut off" after witness mentioned precluded information, right to cross-examine waived because defendant "did not request the district court to allow him to do so"); *Calvert v. United States*, 323 F. Supp. 112, 114 (D. Ky. 1971) ("Neither the court nor the prosecution is responsible for determining what witnesses the defendant should call."); *Blackwell v. United States*, 405 F.2d 625, 626 (5th Cir. 1969) (finding waiver where court excused witness after direct testimony and defendant failed to request cross-examination). Accordingly, we do not address this argument further.

Preclusion of Evidence Under A.R.S. § 13-1421

¶20 Potter next argues the trial court erred in excluding under § 13-1421 evidence that S. may have falsely accused her former boyfriend, C., of rape. Section 13-1421(A) prohibits the admission of "[e]vidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity." It does, however, permit "[e]vidence of false allegations of sexual misconduct made by the victim against others," provided the trial court "finds the evidence is relevant and is material to a fact in issue in

the case and that the inflammatory or prejudicial nature of the evidence does not outweigh [its] probative value." *Id.* The standard for admissibility of such evidence is by clear and convincing evidence. § 13-1421(B).

¶21 The state moved in limine to preclude Potter from introducing evidence S. had accused another person of raping her. Potter responded that such evidence was relevant to S.'s credibility. During a hearing on this issue, S. stated she told one of her sisters C. had raped her. Potter then referred S. to a letter she had written in which she discussed having had consensual sex with C. but did not mention rape. S. stated she previously had consented to have sex with C. when she "gave [her] virginity to him" but that he had raped her after that encounter. She also admitted she had lied to behavioral health professionals by telling them she was not sexually active, stating she had done so because "it's none of their business if I'm sexually active."

¶22 Potter asserts he had presented clear and convincing evidence that S. had falsely accused C. of rape but contends the trial court had "ignor[ed] . . . other evidence of [S.'s] untruthfulness," for example, her threat to accuse a different individual of rape and "her multiple claims of false pregnancy." We review a trial court's decision to preclude evidence under § 13-1421 for an abuse of discretion. *See State v. Gilfillan*, 196 Ariz. 396, ¶ 29, 998 P.2d 1069, 1078 (App. 2000). S. adequately explained both the statement in her letter that she had consensual sex with C. and her decision to lie about her sexual activity. Even in light of other instances suggesting S. had lied or threatened to lie, given that "[t]he trial court was in the best position to evaluate the evidence and

judge the credibility of the witnesses," *id.* ¶ 33, we find no error in the court's determination that Potter failed to establish, by clear and convincing evidence, that S.'s accusation C. had raped her was false.

Constitutionality of § 13-1421

¶23 Potter next asserts § 13-1421 is unconstitutional on its face because it violates his right to confront and cross-examine witnesses, violates the constitutionally mandated separation of powers between the legislature and the courts, and infringes upon our supreme court's rulemaking powers. He acknowledges Division One of this court has already determined § 13-1421 to be constitutional on its face. *Gilfillan*, 196 Ariz. 396, ¶¶ 22-23, 28, 998 P.2d at 1076-77. He asserts, however, that *Gilfillan* is no longer good law in light of the United States Supreme Court's decision in *Holmes v. South Carolina*, 547 U.S. 319 (2006). Although the Court stated in *Holmes* that "the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote," *id.* at 326, Division One addressed this concern in *Gilfillan*, determining that our legislature "had a legitimate governmental purpose in enacting" § 13-1421, 196 Ariz. 396, ¶ 28, 998 P.2d at 1077, and that its provisions are not disproportionate to that interest. *Id.* ¶ 23. Nothing in *Holmes* suggests that conclusion was incorrect.

¶24 Potter additionally contends the burden of clear and convincing evidence imposed by § 13-1421(B) is "unconstitutionally onerous." He asserts "no other provision in Arizona law" requires a defendant to meet a similar burden. First, Potter is plainly

incorrect. For example, A.R.S. § 13-502(C) requires a defendant to prove his or her "legal insanity by clear and convincing evidence."[5] And a defendant must also prove the affirmative defense of entrapment by clear and convincing evidence. A.R.S. § 13-206(B). Second, even were this standard of proof unique, that fact alone would not render § 13-1421(B) unconstitutional. Potter cites no authority suggesting otherwise. Nor are we persuaded the burden of proof prescribed in § 13-1421 is constitutionally infirm, as Potter suggests, because "other jurisdictions require only the balancing test of relevance versus unfair prejudice." *See, e.g.*, Fed. R. Evid. 412; Cal. Evid. Code § 782; Idaho Code Ann. § 18-6105; Mo. Rev. Stat. § 491.015; Nev. Rev. Stat. § 48.069; N.J. Stat. Ann. § 2A:84A-32.1; N.M. Stat. § 30-9-16.

¶25 Moreover, some of the jurisdictions to which Potter refers us require more than a balancing test. For example, Alaska requires the trial court to determine whether the "prior allegations of sexual assault were false, as, for example, where the charges somehow had been disproved or where the witness had conceded their falsity." *Covington v. State*, 703 P.2d 436, 442 (Alaska Ct. App. 1985); *see* Alaska Stat. § 12.45.045. Colorado requires a defendant to demonstrate prior allegations of sexual assault were "demonstrably false." *People v. Weiss*, 133 P.3d 1180, 1189 (Colo. 2006); *see* Colo. Rev. Stat. § 18-3-407. Similarly, several other jurisdictions require defendants

[5]Potter attempts to distinguish § 13-502(C) from § 13-1421 because the latter, unlike § 13-1421(C), does not apply to a specific "piece of evidence." Potter does not explain, however, how this distinction is constitutionally significant.

to meet a high standard to admit such evidence. *See, e.g., State v. Quinn*, 490 S.E.2d 34, 40 (W. Va. 1997) ("strong and substantial proof"); *Little v. State*, 413 N.E.2d 639, 643 (Ind. Ct. App. 1980) (must show prior allegation "demonstrably false").

¶26 Although Potter generally asserts that *Gilfillan*'s "analysis is unpersuasive," he points to no meaningful concern or argument it did not thoroughly address. "Absent a decision by the Arizona Supreme Court compelling a contrary result, a decision by one division of the Court of Appeals is persuasive with the other division." *Scappaticci v. Sw. Sav. & Loan Ass'n*, 135 Ariz. 456, 461, 662 P.2d 131, 136 (1983). Thus, those decisions are binding "'unless we are convinced that the prior decisions are based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable.'" *Id., quoting Castillo v. Indus. Comm'n*, 21 Ariz. App. 465, 471, 520 P.2d 1142, 1148 (1974). Accordingly, we decline to revisit *Gilfillan* and therefore reject Potter's argument that § 13-1421 is facially unconstitutional.

¶27 Potter also asserts § 13-1421 is unconstitutional as applied to him. Although the defendant in *Gilfillan* also unsuccessfully challenged the constitutionality of § 13-1421 "as applied" to him, such a challenge requires case-by-case evaluation. 196 Ariz. 396, ¶¶ 18, 23, 998 P.2d at 1075-76. "We review the constitutionality of statutes de novo." *State v. Stummer*, 219 Ariz. 137, ¶ 7, 194 P.3d 1043, 1047 (2008). As we noted above, a defendant has a right to present a complete defense and to confront and cross-examine witnesses. *Trombetta*, 467 U.S. at 485; *Davis*, 415 U.S. at 315. "[A] defendant's right to present relevant testimony is not limitless," however, and may be

balanced against the state's legitimate interests in criminal proceedings. *Gilfillan*, 196 Ariz. 396, ¶ 20, 998 P.2d at 1075; *see also Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (right to present relevant testimony may be limited to accommodate legitimate state interests); *LaJoie v. Thompson*, 217 F.3d 663, 669 (9th Cir. 2000) (balancing defendant's constitutional right with potential for prejudice on case-by-case basis). Therefore, a trial court retains wide latitude in limiting testimony "'based on concerns about . . . harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant.'" *State v. Cañez*, 202 Ariz. 133, ¶ 62, 42 P.3d 564, 584 (2002), *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

¶28 Potter argues he was entitled to present evidence of S.'s allegedly false rape accusation because it was relevant to her credibility and S. "was not harassed or unfairly prejudiced." *See Lucas*, 500 U.S. at 150 (rape shield statute protects "valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy"); *see also State v. Oliver*, 158 Ariz. 22, 27, 760 P.2d 1071, 1076 (1988) (extending rape shield doctrine to child molestation cases). The Confrontation Clause, however, does not require evidence of prior false allegations be admitted in sexual abuse cases when minimally probative, particularly when "the defendant intends to use the evidence as part of an attack on the 'general credibility' of the witness." *United States v. Tail*, 459 F.3d 854, 860 (8th Cir. 2006). Although, if false, S.'s prior allegation of rape has relevance to her credibility, we observe that Potter thoroughly impeached S. by discussing her history of mental illness,

suicide attempts, and her abuse of alcohol and illegal drugs, as well as by exposing significant differences between her testimony about her mental health treatment and the reports of the doctors and counselors who had treated her following her suicide attempts. He also identified several discrepancies between her trial testimony and her statements during the forensic interview. Most significantly, Potter presented evidence that S. previously had threatened to accuse another man falsely of rape. Given this other evidence, the impeachment value of her allegedly false accusation of C. was both minimal and cumulative.

¶29 Moreover, the state has a compelling interest in protecting "'minor victims of sex crimes from further trauma and embarrassment.'" *Maryland v. Craig*, 497 U.S. 836, 852 (1990), *quoting Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); *see also Gilfillan*, 196 Ariz. 396, ¶ 21, 998 P.2d at 1075. In view of that valid interest, Potter's use of other evidence to effectively attack S.'s credibility, and his failure to establish by clear and convincing evidence that S.'s prior allegation against C. was false, we cannot say Potter's constitutional rights were violated by the trial court's proper application of § 13-1421 to exclude the evidence. *See Tail*, 459 F.3d at 860; *see also Gilfillan*, 196 Ariz. 396, ¶¶ 32-33, 998 P.2d at 1078; *State v. Davis*, 205 Ariz. 174, ¶ 33, 68 P.3d 127, 132 (App. 2002) ("[A] defendant's constitutional rights are not violated where, as here, evidence has been properly excluded.").

Nonunanimous Verdict

¶30 As noted above, the grand jury charged Potter with five counts, four alleging sexual conduct with a minor and one alleging attempted sexual conduct with a minor. The first two counts alleged that, between May 1 and June 20, 2007, Potter had committed sexual conduct with S. by "placing his penis inside [her] vulva" and "by having [her] masturbate him." The third count alleged that, on May 1, 2007, he committed attempted sexual conduct with S. "by attempting to place his penis inside [her] anus." The fourth and fifth counts, both alleging sexual conduct with a minor between July 30 and August 3, 2007, alleged respectively that Potter had "plac[ed] his penis inside [S.'s] vulva" and "ha[d] [S.] masturbate him." At the close of the evidence, over Potter's objection, the trial court granted the state's motion to amend the indictment to conform to the evidence, altering the date range for count three to encompass the period from May 1 through June 20, 2007.

¶31 Potter then moved for a judgment of acquittal on all counts. The state conceded it had presented insufficient evidence regarding count two, and the trial court granted Potter's motion on that count but denied it for the remaining four charges. On appeal, Potter argues the court erred in denying his motion as to counts one and three because "the State introduced no evidence that [he] committed any sexual acts with [S.] between May 1 and June 20." Although the jury did not reach a verdict on those counts, or on count five, Potter argues the "submission of [those] counts to the jury for deliberation increased the likelihood of a non-unanimous verdict."

¶32 Potter primarily relies on *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003). In *Davis*, the defendant was charged with four counts of sexual conduct with a minor. *Id.* ¶ 7. For count one, the state presented evidence of two discrete acts of sexual conduct—one occurring on the date alleged in the indictment and one occurring nearly two weeks later. *Id.* ¶¶ 7, 51. Further, the trial court had instructed the jury the state need not prove the exact date on which the offense occurred, and the verdict form did not contain a date. *Id.* ¶ 52. The supreme court determined that, because it could not "be certain which offense served as the predicate for the conviction . . . the real possibility of a non-unanimous jury verdict exists." *Id.* ¶ 59. The court further observed that, when "'the evidence shows, or tends to show, that several acts of intercourse have occurred between defendant and prosecuting witness, it is incumbent upon the prosecution to elect which one of such acts it relies upon for a conviction.'" *Id.* ¶ 61, *quoting Hash v. State*, 48 Ariz. 43, 50, 59 P.2d 305, 308 (1936). The court concluded the state's failure to do so rendered the charge in count one duplicitous and held "the resulting risk that the jury returned a non-unanimous verdict constituted error." *Id.*; *see also State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989) (indictment charging separate crimes in same count duplicitous, creating risk of nonunanimous jury verdict).

¶33 We agree with Potter that his situation is analytically similar to that in *Davis*. In her testimony, S. made general references to having had sexual intercourse with Potter. She testified to only two specific occurrences, however, that arguably fell within the dates alleged in the indictment: one during the "summertime" between her

sophomore and junior years in high school when Potter had sexual intercourse with her and attempted to have anal intercourse with her, and the other during the week preceding August 9 when Potter had sexual intercourse with her. The latter event falls within the date range alleged in count four of the indictment—July 30 to August 3. As to the first event, however, S.'s testimony was more confusing. Although she agreed the event had occurred in the summer, she also stated it had occurred "right before" her junior year began. Thus, that occasion arguably could fall into either the date range alleged in count one, May 1 to June 20, or in count four, July 30 to August 3, or neither. Thus, the jury theoretically could have found Potter guilty of sexual conduct with S. in count four without agreeing which of the two acts formed the basis of its verdict.[6]

¶34 Potter asserts the state's failure to elect which act formed the basis of which charge created a duplicitous charge like the one discussed in *Davis*.[7] But he overlooks

[6]Whether the trial court erred in denying Potter's motion for a judgment of acquittal on count one is not relevant to this analysis, however. The evidence of both sexual acts was before the jury, regardless of whether the court dismissed one of the counts. Additionally, we summarily reject his argument that the court's denial of his motion for acquittal "implicitly [informed the jury] that the dates in the indictment did not matter." This argument presupposes that the jury was aware the court had denied the motion; but that motion was made and denied outside the jury's presence.

[7]The state argues Potter is precluded from raising this argument on appeal because he did not file a timely motion pursuant to Rules 13.5(e) and 16.1(b) and (c), Ariz. R. Crim. P., which, respectively, require defects in the charging document to be raised by pretrial motion and provide that such a motion not made at least twenty days before trial is precluded. Although Potter did argue the indictment was duplicitous before trial, his motion was not filed at least twenty days before trial. We nonetheless conclude Potter is not precluded from raising this issue. His argument necessarily depends on the evidence the state chose to present at trial and could not have been evaluated fully until the close of

that the state informed the trial court, Potter, and the jury which acts formed the basis of each charge of sexual conduct based on Potter's having had intercourse with S. During discussion of Potter's motion for acquittal, the state responded that, "In terms of election, . . . it's clear that Counts Four and Five deal with the last incident of sexual contact that [S.] discussed" and that "[t]he other discrete incident . . . was the act of anal intercourse with the intercourse that was also happening." And, in closing argument, the state informed the jury the indictment "covers two different and distinct time periods." The state further explained there were "two separate and distinct events," "one[] where [S.] tells you sometime in the summer . . . that Mr. Potter tried to have anal intercourse with her and also had intercourse, penile/vaginal, with her during the same time," and another that occurred in "[an]other time frame that's covered in the indictment," "in the neighborhood of a week before school" when Potter "had sex with her."

¶35 Although we find several Arizona cases discussing the circumstances in which the state must elect which incident forms the basis of a particular charge, none describes what procedure the state must follow in order to do so. *See, e.g.*, *State v. Adrian*, 111 Ariz. 14, 17, 522 P.2d 1091, 1094 (1974); *State v. Klokic*, 219 Ariz. 241, ¶¶ 14-38, 196 P.3d 844, 847-52 (App. 2008); *State v. Solano*, 187 Ariz. 512, 520, 930

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the state's case. Although, in moving for acquittal, Potter characterized his argument below as attacking the sufficiency of the state's evidence, the crux of his argument was that the jury would be unable to determine which acts formed the basis of the charged crimes.

P.2d 1315, 1323 (App. 1996); *State v. Schroeder*, 167 Ariz. 47, 53, 804 P.2d 776, 782 (App. 1990); *State v. Counterman*, 8 Ariz. App. 526, 531, 448 P.2d 96, 101 (1968).

¶36 Other jurisdictions addressing this issue have reached somewhat divergent conclusions. *See, e.g.*, *State v. Arceo*, 928 P.2d 843, 874-75 (Haw. 1996) (either state must elect "at or before the close of its case-in-chief" or trial court must give unanimity instruction); *State v. Voyles*, 116 P.3d 720, 723-24 (Kan. Ct. App. 2007) (state must inform jury which act to rely on in deliberations), *overruled on other grounds by State v. Voyles*, 160 P.3d 794 (Kan. 2007); *State v. Shelton*, 851 S.W.2d 134, 138 (Tenn. 1993) ("Any description [by the prosecution] that will identify the prosecuted offense for the jury is sufficient."); *Phillips v. State*, 193 S.W.3d 904, 912 (Tex. Crim. App. 2006) (state must elect at close of its evidence "when properly requested"; rejecting "valid jury charge" as proper election method because it fails to give defendant notice of "evidence it must refute in order to challenge the specific act in the indictment"). But we find no case suggesting there is any risk of a nonunanimous verdict when the state—as it did here—informs the trial court and the defense at the close of its case, and informs the jury in closing argument, which specific acts it relies upon to prove the charges. Accordingly, we conclude the state's actions here were sufficient to prevent that risk and that *Davis* therefore does not control.

Disposition

We affirm Potter's conviction and sentence for sexual conduct with a minor.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge