SUMMARY
March 25, 2021

2021COA37

No. 17CA1132, *People v. Chirinos-Raudales* — Evidence — Hearsay Exceptions — Statements of a Child

A division of the court of appeals decides, for the first time, that for purposes of the child hearsay statute, section 13-25-129, C.R.S. 2020, the relevant age of the child is that described in the language establishing the general offense and not the lower age relevant to a specific sentence enhancer with which the defendant is charged.

COLORADO COURT OF APPEALS **2021COA37**

Court of Appeals No. 17CA1132
City and County of Denver District Court No. 14CR231
Honorable Andrew P. McCallin, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Dennis R. Chirinos-Raudales,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART, VACATED IN PART
AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE TOW
Dailey and Berger, JJ., concur

Announced March 25, 2021

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¶ 1 Defendant, Dennis R. Chirinos-Raudales, appeals his judgment of conviction and sentence entered on jury verdicts finding him guilty of sexual assault on a child, sexual assault on a child by one in a position of trust, and sexual assault on a child – pattern of abuse. In part, he challenges the admission of the victim's forensic interview under section 13-25-129, C.R.S. 2020 (the child hearsay statute), which provides that certain out-of-court statements by a child, not otherwise covered by hearsay exceptions, are admissible. The statute applies to statements made by a child "as child is defined under the statutes that are the subject of the action." § 13-25-129(2).

¶ 2 We must decide for the first time whether the relevant age of the child is that described in the language establishing the general offense, or the age relevant to the specific sentence enhancer with which a defendant is charged. We conclude that the relevant age is that applicable to the general offense, not the age relevant to the sentence enhancer. Thus, we reject Chirinos-Raudales's challenge to the admission of the child hearsay. We also reject his claim that the trial court should have declared a mistrial after a prosecution

witness spontaneously implied that her job was to determine whether the child was telling the truth.

¶ 3 However, we discern multiple errors in the judgment of conviction related to the nature of the convictions and the sentence imposed. Consequently, we affirm the judgment of conviction in part, vacate it in part, and remand the case to the trial court for resentencing consistent with this opinion.

I. Background

¶ 4 Chirinos-Raudales is the victim's stepfather. In 2011, the victim reported to a school nurse that Chirinos-Raudales had sexually assaulted her. The victim was interviewed by an employee of Denver Human Services and, later, by a forensic interviewer from the Denver Children's Advocacy Center; in both interviews, she disclosed that Chirinos-Raudales had assaulted her multiple times over the past several years.

¶ 5 The People charged Chirinos-Raudales with sexual assault on a child with force (count one), two counts of sexual assault on a child by one in a position of trust (counts two and four), sexual assault by one in a position of trust – pattern of abuse (count three), and sexual assault on a child (count five). In a bill of

particulars, the People explained that counts one, two, and three "all relate to the same incident[,] which is designated as the 'Virginity Incident,'" and that counts four and five "both relate to the same incident[,] which is designated as the 'Last Time.'" (Although the bill of particulars referred to the second incident as the "Last Time," the parties, instructions, and verdict forms thereafter consistently referred to it as the "Last Incident." We shall as well.)

¶ 6 The case proceeded to trial, at the conclusion of which a jury found Chirinos-Raudales guilty of counts two, three, four, and five. For reasons we cannot discern, the jury was not instructed on count one and did not return a verdict on that count. The trial court, however, entered a judgment of conviction that reflected convictions — and imposed sentences — on all five counts. Specifically, the trial court sentenced Chirinos-Raudales to the custody of the Department of Corrections on

- count one, for eight years to life, consecutive to counts two and three;
- count two, for eight years to life, consecutive to counts one and three;

- count three, for twenty-four years to life, consecutive to counts one and two;
- count four, for eight years to life, concurrent with all other counts; and
- count five, for four years to life, concurrent with all other counts.

¶ 7 Chirinos-Raudales now appeals.

II. Discussion

¶ 8 Chirinos-Raudales contends that the trial court erred by (1) admitting the victim's forensic interview; (2) denying Chirinos-Raudales's motion for a mistrial; and (3) entering separate convictions on counts one and three, as well as consecutive sentences on counts one through three. We disagree with the first two arguments but agree with the third.

A. Admission of the Forensic Interview

¶ 9 Chirinos-Raudales argues the trial court erred by admitting the victim's forensic interview under the child hearsay statute. He contends that the interview would only have been admissible under the child hearsay statute if the victim was younger than fifteen when she gave the statement. We disagree.

1. Additional Background

¶ 10 In March of 2011, a forensic interviewer employed with the Denver Children's Advocacy Center conducted a forensic interview of the victim regarding the sexual assaults. During this videotaped interview, the victim described the sexual assaults in detail. The trial court found that the interview was admissible as a child hearsay statement, and the video of the interview was admitted into evidence and played during the trial. Although the incidents of abuse the victim described occurred before she turned fifteen years of age, the interview took place shortly after her fifteenth birthday.

2. Standard of Review and Applicable Law

¶ 11 This issue presents a question of statutory interpretation, which we review de novo. *People v. Perez*, 2016 CO 12, ¶ 8.

¶ 12 Hearsay "is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c). Hearsay is inadmissible "except as provided by these rules or by the civil and criminal procedural rules applicable to the courts of Colorado or by any statutes of the State of Colorado." CRE 802. The child hearsay statute provides one such exception:

> An out-of-court statement made by a child, as child is defined under the statutes that are the subject of the action, or a person under fifteen years of age if child is undefined under the statutes that are the subject of the action, describing all or part of an offense of unlawful sexual behavior . . . performed or attempted to be performed with, by, on, or in the presence of the child declarant, and that is not otherwise admissible by a statute or court rule that provides an exception to the hearsay objection, is admissible . . . .

§ 13-25-129(2).

3. Analysis

¶ 13 Chirinos-Raudales contends that the child hearsay statute is applicable only if the victim was less than fifteen years old when she gave the statement. We disagree.

¶ 14 In counts two and four, the People charged Chirinos-Raudales with sexual assault on a child by one in a position of trust, in violation of section 18-3-405.3(1), C.R.S. 2020. This statute states that

> [a]ny actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child by one in a position of *trust if the victim is a child less than eighteen years of age* and the actor committing the offense is one in a position of trust with respect to the victim.

§ 18-3-405.3(1) (emphasis added).

¶ 15 Thus, in one of the statutes under which Chirinos-Raudales was charged — in other words, one of the statutes that is "the subject of the action" — "child" is defined as someone who is less than eighteen years of age. And here, the victim was less than eighteen years old when she gave her statement.

¶ 16 The statute also includes a sentence enhancer, which provides that if the victim is less than fifteen years of age, then the violation is elevated from a class 4 felony to a class 3 felony. § 18-3-405.3(2)(a), (3); *see People v. Ewing*, 2017 COA 10, ¶ 17 ("The 'under fifteen' condition, which elevates the crime from a class 4 felony to a class 3 felony, is a sentence enhancer, not an element of a separate offense."). Because the victim was under fifteen years old at the time of the offense, the People charged Chirinos-Raudales under subsection (2)(a) of the statute. Chirinos-Raudales argues that because he was charged with this sentence enhancer, then the definition contained in that specific subsection of the statute controls. Thus, he contends, because the victim here was not under the age of fifteen at the time of the interview, her forensic

interview was inadmissible as a child hearsay statement. But Chirinos-Raudales misinterprets the child hearsay statute.

¶ 17 As noted, under the child hearsay statute, a "child is defined under the statutes that are the subject of the action." § 13-25-129(2). Here, the statute that is "the subject of the action" is section 18-3-405.3, which provides that the victim is considered a "child" if she is "less than eighteen years of age." *See also* COLJI-Crim. 3-4:40 (2019) (listing the fourth element of sexual assault on a child by one in a position of trust as "subjected *a child, under eighteen years of age*, who was not his . . . spouse to any sexual contact") (emphasis added).

¶ 18 The fact that the victim was young enough at the time of the offenses for Chirino-Raudales to face a sentence enhancer is of no import to this issue. Sentence enhancers are not elements of the offense, and "attach only after the prosecution has proven that the defendant committed the offense." *People in Interest of B.D.*, 2020 CO 87, ¶ 14; *see also People v. Eggers,* 196 Colo. 349, 351, 585 P.2d 284, 286 (1978) (sentence enhancers are "triggered only after a defendant has been found guilty of the substantive crime") (citation omitted).

¶ 19 If we were to accept Chirinos-Raudales's interpretation, a defendant whose victim turned fifteen before she provided a statement about the abuse would be insulated from the use of such evidence simply because his conduct subjected him to greater consequences. As the People point out, this would be an absurd result. *See Martinez v. People*, 2020 CO 3, ¶ 20 ("We avoid interpreting a statute in a way that would lead to an absurd result."). A child victim in this instance does not cease to be a child for purposes of the child hearsay statute merely because a defendant committed a more aggravated version of the offense.

¶ 20 Still, Chirinos-Raudales asserts that prior case law supports his position that subsection 2(a) of section 18-3-405.3 should dictate the definition of child. Specifically, he argues that *People v. Gookins*, 111 P.3d 525, 528 (Colo. App. 2004), stands for the proposition that the under-fifteen sentence enhancer dictates the definition of child. However, *Gookins* simply addressed the question of whether the child hearsay statute "require[d] the victim to be a 'child' at the time of trial." *Id.* at 527. The division in *Gookins* did not hold, or even imply, that the definitions contained in specific sentence enhancers supersede those established by the statute

defining the substantive charge. On the contrary, the division in *Gookins* correctly noted that the child hearsay statute "incorporates the definition of 'child' contained in the statutes defining the substantive charge." *Id.* at 528.

¶ 21 True, the division in *Gookins* stated that "[a]s to the position of trust offenses, the statutory age range of the victim must be 'fifteen years of age or older but less than eighteen years of age.'" *Id.* But there, the defendant's position of trust charges were based on conduct that occurred when the victim was fifteen years old. Consequently, we do not read the mere recitation of the specific sentencing provision applicable to the defendant as a holding that the age relevant to the sentencing range is the determinative age for purposes of the child hearsay statute.[1]

¶ 22 Because the substantive charges in counts two and four define child as someone under the age of eighteen and the victim was only fifteen when she provided the statement in question, we conclude

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[1] To the extent the division in *Gookins* did so conclude, we disagree with that interpretation and decline to follow it. *See People v. Smoots*, 2013 COA 152, ¶ 21 (noting that one division of this court is not bound by the decision of another division).

that the court did not err by admitting the forensic interview under the child hearsay statute.[2]

B. Motion for Mistrial

¶ 23 Next, Chirinos-Raudales argues the trial court abused its discretion when it denied his motion for a mistrial. We disagree.

1. Additional Background

¶ 24 At trial, the prosecution called as a witness Charis Carr, a Department of Human Services administrator who spoke with the victim after the victim reported the assault. During direct examination, the prosecutor asked Carr about the importance of asking open-ended and nonleading questions when interviewing children. In response, Carr stated,

> [m]y job, as a professional, is to determine, at the end of the case, whether I think these allegations are true or not. So for me to make that determination, and to make a finding, I need to conduct myself and do an investigation where I'm not giving the child answers that I want to hear.

¶ 25 At a bench conference, defense counsel moved for a mistrial, arguing that Carr had improperly opined on the victim's

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[2] Chirinos-Raudales does not challenge the admissibility of the statement in any other regard.

truthfulness. The trial court denied the defense counsel's request and instead instructed the jurors to disregard Carr's statement.

2. Standard of Review and Applicable Law

¶ 26 We review a trial court's denial of a motion for mistrial for abuse of discretion. *People v. Santana*, 255 P.3d 1126, 1130 (Colo. 2011); *People v. Johnson*, 2017 COA 11, ¶ 39. A trial court abuses its discretion "only when inadmissible evidence is likely to have substantially prejudiced the jurors despite the use of any alternative remedies." *People v. Salas*, 2017 COA 63, ¶ 9.

¶ 27 A mistrial is considered "the most drastic of remedies." *People v. Abbott*, 690 P.2d 1263, 1269 (Colo. 1984). The grant of a mistrial "is only warranted where the prejudice to the accused is too substantial to be remedied by other means." *Id.* Otherwise, the wrongful admission of prejudicial evidence is remedied by a jury instruction to disregard the evidence. *Salas*, ¶ 14. Absent contrary evidence, we presume the jury followed such an instruction. *Id.*

3. Analysis

¶ 28 Here, we perceive no abuse of the trial court's discretion in denying Chirinos-Raudales's motion for a mistrial and giving a curative instruction instead.

¶ 29 First, Carr's statement was not substantially prejudicial. Carr never directly commented on the victim's credibility. Rather, Carr explained the importance of asking open-ended and nonleading questions during her interviews. Any opinion that a reasonable juror could have formed about the victim's credibility — or about Carr's opinion regarding the victim's credibility — was inferential at most. Therefore, the comment was not so highly prejudicial that "but for its exposure, the jury may not have found the defendant guilty." *People v. Goldsberry*, 181 Colo. 406, 410, 509 P.2d 801, 803 (1973).

¶ 30 Furthermore, this single and brief statement was not referenced again by the prosecutor. *See Johnson*, ¶ 45 (considering that the prejudicial statement "was fleeting and no details were discussed"); *Salas*, ¶ 15 (noting that the prejudicial statement was a "single, fleeting, nonresponsive comment"). And Chirinos-Raudales, both at trial and on appeal, concedes that the prosecution did not intentionally elicit it. *See Abbott*, 690 P.2d at 1269 (concluding that a mistrial was unwarranted in part because prejudicial comment "was a single unelicited remark").

¶ 31 And finally, any minimal prejudice that may have flowed from this evidence was remedied by the trial court's instruction to disregard the evidence. Absent any evidence to the contrary, we presume that the jurors followed this instruction. *See Salas*, ¶ 14. For these reasons, we conclude the trial court did not abuse its discretion by denying Chirinos-Raudales's motion for a mistrial and instructed the jurors to disregard Carr's statement.

C. Convictions and Sentences

¶ 32 Chirinos-Raudales argues that the trial court entered an erroneous judgment of conviction and imposed an illegal sentence. Specifically, he contends that the trial court erred by (1) failing to merge the convictions for counts one and three; and (2) entering consecutive sentences on counts one through three.

1. Standard of Review

¶ 33 Whether merger applies to criminal offenses is an issue we review de novo. *People v. Zweygardt*, 2012 COA 119, ¶ 40. We also review de novo whether a sentence is illegal. *People v. Magana*, 2020 COA 148, ¶ 59. "When a sentence is illegal, it may be corrected at any time, even if challenged for the first time on appeal." *Id.*

2. The Number of Convictions

¶ 34 Chirinos-Raudales contends that the trial court erred by entering judgments of conviction and sentences on both counts one and three. We agree, albeit on different grounds than Chirinos-Raudales argues.

¶ 35 "In criminal cases, the constitutional guarantee of a trial by jury permits conviction only on a jury verdict finding the defendant guilty of having committed every element of the crime charged." *People v. Oliver*, 2018 COA 146, ¶ 17. Furthermore, "the trial court has a duty to instruct the jury properly on all of the elements of the offenses charged." *People v. Bastin*, 937 P.2d 761, 764 (Colo. App. 1996). "The jury cannot decide a charge on which it was not instructed." *People v. Wambolt*, 2018 COA 88, ¶ 38.

¶ 36 The People charged Chirinos-Raudales with sexual assault on a child with force (count one). However, as the People concede, the jury was not instructed on this charge and did not return a verdict form on it. Thus, the trial court violated Chirinos-Raudales's constitutional right to a jury trial when it entered a judgment of conviction on count one. *See Oliver*, ¶ 29.

¶ 37 Both Chirinos-Raudales and the People contend that the convictions and sentences for counts one and three should merge because they are based on the same charge and evidence. But because the jury never even returned a verdict on count one, we conclude that, rather than merging with count three, the conviction on count one and the corresponding sentence must be vacated.

3. Concurrent Versus Consecutive Sentences

¶ 38 Chirinos-Raudales also argues that the trial court was required to impose concurrent sentences on counts one through three because they were supported by identical evidence. Having concluded that there was no conviction, and thus can be no sentence, for count one, we address only the sentences for counts two and three and conclude that concurrent sentences are required.

¶ 39 Generally, a trial court has the discretion to impose concurrent or consecutive sentences when a defendant is convicted of multiple offenses. *Juhl v. People*, 172 P.3d 896, 899 (Colo. 2007). However, section 18-1-408(3), C.R.S. 2020, requires courts to impose concurrent sentences for offenses committed against a single victim when the convictions are "based on the same act or series of acts arising from the same criminal episode and the

evidence supporting the counts is identical." *Juhl*, 172 P.3d at 901. "[W]hether the evidence supporting the offenses is identical turns on whether the charges result from the same act, so that the evidence of the act is identical, or from two or more acts fairly considered to be separate acts, so that the evidence is different." *Id.* at 902. "A sentencing court is mandated to impose concurrent sentences only when the evidence will support no other reasonable inference than that the convictions were based on identical evidence." *Id.* at 900.

¶ 40 Here, counts two and three were based on the same "act or series of acts," *see id.* at 899 — namely, the virginity incident. This was demonstrated by the briefing, evidence, and arguments in this case. The People identified both counts with the same descriptor in the amended complaint and in the bill of particulars. The bill of particulars described the virginity incident as

> the time when her stepfather "took my virginity" with his finger. It happened in the basement of the house on Federal. She described crying and kicking at him, and he took hold of her legs to keep them still and put his leg over the top of one of her legs. He then removed his finger and forced his penis inside her.

Then, during direct examination of the victim, the prosecutor focused on and elicited details about this precise incident. And during closing argument, the prosecutor told the jury that "there are two distinct counts of sexual assault on a child, the virginity incident and the last incident . . . . So, instruction 13 [count three] and 16 [count two] are the same incident." Finally, the jury instructions and verdict forms identified counts two and three as specifically applying to the virginity incident.

¶ 41 The People argue that the evidence was not identical because there were two distinct acts of sexual contact during the virginity incident (digital penetration and intercourse). But in view of the bill of particulars and the manner in which the "incident" was presented to the jury, it is clear that counts two and three were based on the same "act or series of acts" — i.e., the virginity incident. Thus, the convictions are based on identical evidence.

¶ 42 *Schneider v. People*, 2016 CO 70, does not mandate a different result. There, the supreme court held that under the general sexual assault statute, two factually distinct acts could support multiple punishments even if the acts occurred without a break in time and place. *Id.* at ¶ 19. However, the general sexual assault

statute establishes multiple ways in which the crime of sexual assault could be committed. § 18-3-402(1)(a)-(h), C.R.S. 2020. The defendant in *Schneider*, ¶ 20, inflicted sexual penetration on the victim when she was physically helpless, *see* § 18-3-402(1)(h), then — when the victim regained consciousness and resisted — forced her to submit, *see* § 18-3-402(1)(a). The court rejected the defendant's double jeopardy challenge because the conduct changed "from one alternative means of committing sexual assault to another," and thus defendant could be convicted of multiple counts of sexual assault. *Schneider*, ¶ 19. The court also rejected the defendant's alternative claim that concurrent sentences were required, concluding that — even in the absence of a change in time or place — these were two distinct sexual assaults. *Id.* at ¶ 24 ("Nothing more than this was required to demonstrate that the particular successive commissions of sexual assault charged in this case were not proved by identical evidence.").

¶ 43 To the contrary, the legislature has only defined one way of committing sexual assault on a child or sexual assault on a child by one in a position of trust: by engaging in "any sexual contact." § 18-3-405(1), C.R.S. 2020; § 18-3-405.3(1). Neither statute

authorizes "multiple punishments for each discrete act of sexual contact that occurs within a single incident of sexual assault on a child." *Woellhaf v. People*, 105 P.3d 209, 215-16 (Colo. 2005).[3] Moreover, as we have noted, the parties, the pleadings, the evidence, and the instructions all treated the virginity incident as a single act or series of acts — the same for counts two and three. Thus, unlike in *Schneider*, there is no distinct act distinguishing the evidence underlying count two from that underlying count three. In other words, the convictions are based on identical evidence, and section 18-1-408 requires concurrent sentencing.

¶ 44 The People argue, however, that section 18-1.3-1004(5)(a), C.R.S. 2020, supersedes section 18-1-408, and requires consecutive sentencing on these counts.

¶ 45 Under section 18-1.3-1004(5)(a),

> [a]ny sex offender sentenced pursuant to subsection (1) of this section and convicted of one or more additional crimes arising out of the same incident as the sex offense shall be sentenced for the sex offense and such other

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[3] Of course, because Chirinos-Raudales's conduct violated both statutes, the elements of which are sufficiently distinct, double jeopardy does not prohibit separate convictions for sexual assault on a child and sexual assault on a child by one in a position of trust. *People v. Leske*, 957 P.2d 1030, 1046 (Colo. 1998).

> crimes so that the sentences are served consecutively rather than concurrently.

The People contend that "[b]ecause the sex offender statute is more specific, addressing only the sentencing of sex offenders, it must prevail as an exception to the general sentencing scheme."

¶ 46 But a division of this court has previously rejected this precise argument. *People v. Torrez*, 2013 COA 37. There, the division held that section 18-1.3-1004 "does not act as an exception to the general rule established by [section 18-1-]408(3) that sentences for convictions based on identical evidence . . . must be concurrent." *Id.* at ¶ 69. We agree with the reasoning in *Torrez* and conclude that because counts two and three were based on identical evidence, the court was required to impose concurrent sentences on those counts. *See id.* at ¶ 70.[4]

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[4] The People also contend that the sentences for counts four and five were required to be run consecutively to each other and ask us to correct that perceived error, even though they did not file a cross-appeal. However, given that we agree with Chirinos-Raudales's challenge to the consecutive sentences on counts two and three, and — like counts two and three — the act or series of acts underlying count four was the same as that underlying count five, we would necessarily reject the People's argument even if we were to address it.

¶ 47 Accordingly, we vacate the sentences for counts two and three and remand the case for the court to impose concurrent sentences on those counts, pursuant to section 18-1-408(3).

III. Conclusion

¶ 48 The judgment of conviction is vacated as to count one. The convictions as to the remaining counts are affirmed. The sentences as to counts two and three are vacated and the case is remanded to the trial court solely for resentencing on those counts consistent with this opinion.

JUDGE DAILEY and JUDGE BERGER concur.