IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 08/25/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0504
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
RICHARD EUGENE AARON, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in La Paz County

Cause No. S1500CR2009-00252

The Honorable Michael J. Burke, Judge

CONVICTIONS AND SENTENCES VACATED; REMANDED FOR NEW TRIAL

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W I N T H R O P, Chief Judge

¶1 Richard Eugene Aaron ("Appellant") appeals his convictions for three counts of sexual conduct with a minor under the age of twelve and one count of aggravated assault.

Appellant contends that the trial court's decision to require the recordings of interviews with the victim to be played in their entirety and the admission of the interview transcripts violated various Arizona Rules of Evidence, as well as the Confrontation Clause of the Sixth Amendment of the United States Constitution, and that such error was not harmless. Appellant also argues that the prosecutor made improper statements throughout his closing argument, which amounted to prosecutorial misconduct. For the following reasons, we vacate Appellant's convictions and sentences, and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

¶2 On August 18, 2009, a grand jury issued an indictment, charging Appellant with the following crimes allegedly committed between December 2005 and August 2008: Counts One through Three, sexual conduct with a minor under the age of twelve, a Class 2 felony and a dangerous crime against children; Count Four, continuous sexual abuse of a minor under the age of twelve, a Class 2 felony and a dangerous crime against children; Count Five, child abuse of a child under the age of twelve, a Class 2 felony and a dangerous crime against children; and Count Six, aggravated assault, a Class 3 dangerous felony and a dangerous crime against children.[1] The minor victim ("S.W.") was

[1] Counts Four and Five were later dismissed and are not at issue here.

Appellant's step-daughter, and the charges were based on allegations made by S.W. against Appellant in four separate interviews - two conducted by employees of the HAVEN House and two conducted by La Paz County investigator Larry Kubacki (collectively "the interviews"). The allegations arose shortly after Appellant and S.W.'s mother separated after a dispute and terminated their marriage.

¶3 On December 17, 2009, an evidentiary hearing was held that addressed the admissibility of videotapes of the interviews. The court determined that the interviews could not be admitted by the State as prior consistent statements because they constituted hearsay statements that were made after a motive to fabricate had arisen. *See* Ariz. R. Evid. 801(d)(1). At that same hearing, Appellant asked that he be allowed to use portions of the interviews to impeach S.W. with prior inconsistent statements and/or refresh her memory.[2] *See* Ariz. R. Evid. 801(d)(1)(A). The State responded that if Appellant used any of the interviews to impeach S.W., he would have to play the interview in its entirety. *See* Ariz. R. Evid. 801(d)(1)(B). Appellant agreed that any use of the interviews to impeach S.W. would allow the State to subsequently play and admit prior

[2] At various points throughout the interviews, S.W. denied that Appellant had ever sexually molested her and also was unable to tell the interviewers what the word "sex" meant or describe the sexual assaults.

consistent statements into evidence, but disagreed with the State's contention that his use of prior inconsistent statements necessitated the playing of the interviews in their entirety. *Id.* The court admitted it had not listened to or otherwise reviewed the transcripts or videotapes of the interviews before the proceeding. The court ultimately ruled that Appellant could use the interviews to impeach S.W.'s testimony, but if he did so, he would have to play the interviews in their entirety. The court made its ruling pursuant to Arizona Rules of Evidence 801(d)(1)(A)-(B).

¶4 At trial, the State called S.W.'s mother, various police officers, including investigator Kubacki, and an expert witness, who opined as to the reliability of S.W. and the interviews. The State also presented evidence that Appellant's DNA matched a semen sample found on a towel that S.W. claimed Appellant used to wipe himself after sexually abusing her.

¶5 S.W., who was eight years old at the time of trial, also testified on behalf of the State. She testified that, as "a punishment," Appellant would have "sex" with her. She then went on to briefly describe that Appellant, on different occasions: 1) had vaginal sex with her on a couch; 2) had penetrated her "butt" with a sex-toy; 3) had forced her to perform oral sex on him in the kitchen; and 4) threatened her on a bed by putting a knife to her throat when she wouldn't

cooperate with one of her punishments. S.W. also testified that she was "be[ing] strong" and "tell[ing] the truth" on the stand. On cross-examination, S.W. admitted that she did not know what the word "sex" meant when she used it to accuse Appellant of molesting her. The cross-examination also revealed other inconsistencies in her testimony. Appellant also played the interviews in their entirety to impeach S.W.'s testimony.[3]

¶6 In his defense, Appellant presented various character witnesses, S.W.'s therapist, and his own expert witness to give an opinion on the reliability of the interviews and S.W.[4] Appellant did not testify on his own behalf. During closing arguments, counsel for both the State and Appellant referenced the interviews.

¶7 The jury found Appellant guilty on all counts.[5] Appellant was sentenced to three terms of life imprisonment, corresponding to each count of sexual conduct with a minor, and

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[3] Appellant also provided transcripts for three of the four interviews and had them admitted into evidence. The videotapes themselves were marked as exhibits, but not admitted into evidence. At the jury's request, copies of two of the transcripts were given to the jury for its use during deliberations.

[4] Both parties' experts agreed that the interviews were poorly conducted, but they differed as to their opinions of S.W.'s veracity and motivations.

[5] The jury also found that S.W. was a minor under the age of twelve when the crimes were committed and found that the aggravated assault was non-dangerous.

seventeen years' imprisonment for the count of aggravated assault. The sentences were ordered to be served consecutively, for a minimum of 122 years' imprisonment. Appellant's motion for a new trial was denied.

¶8 Appellant filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes sections 12-120.21(A) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).

ANALYSIS

¶9 Appellant argues that the interviews were erroneously admitted in their entirety under Arizona Rule of Evidence 801(d)(1)(B) and, further, were not admissible under Rules 103, 104, 106, or 613(b). Accordingly, Appellant contends that the court abused its discretion in requiring the interviews to be played as the interviews constituted inadmissible hearsay and such error was not harmless. Alternatively, Appellant argues that the admission of the interviews in their entirety violated his right to confront his accusers and present a complete defense as guaranteed under the Constitution. *See* U.S. Const. amend. VI, XIV, § 1. Finally, Appellant contends that statements made by the prosecutor in his closing argument were improper and constituted fundamental error.

I. Ariz. R. Evid. 801(d)

¶10 We begin by determining whether the court erred in requiring, pursuant to Rule 801(d)(A)(1) and (2), that the

interviews be played in their entirety if Appellant used selective portions of the interviews to impeach S.W.'s testimony. "We review a trial court's ruling on the admissibility of hearsay evidence for an abuse of discretion." *State v. Bronson*, 204 Ariz. 321, 324, ¶ 14, 63 P.3d 1058, 1061 (App. 2003).

¶11 Rule 801(d) allows prior out-of-court statements to be admitted as non-hearsay if the declarant testifies at trial and such testimony is inconsistent with the declarant's prior statement. *See* Ariz. R. Evid. 801(d)(1)(A). The rule also allows for a declarant's prior statement that is consistent with the declarant's trial testimony to be admitted if offered to rebut a charge of recent fabrication or improper influence or motive by the declarant. *See* Ariz. R. Evid. 801(d)(1)(B). Prior consistent statements, however, may only be used to rebut the charges of recent fabrication. *See State v. Jeffers*, 135 Ariz. 404, 423-24, 661 P.2d 1105, 1124-25 (1983) (reiterating that prior consistent statements may only be admitted pursuant to Rule 801(d)(1)(B) if used as rebuttal of prior challenged testimony).

¶12 In the instant case, Appellant properly used S.W.'s prior inconsistent statements for impeachment purposes.[6]

[6] Appellant argues that he only used the interviews to refresh S.W.'s memory and/or that the statements from the

Accordingly, pursuant to Rule 801(d)(1)(B), the State was, at least in the abstract, allowed to rebut Appellant's impeachment through the use of statements that qualify under the Rule as prior consistent statements.

¶13 One problem here, however, is that the presentation of the interviews was not limited solely to both the prior inconsistent and rebutting consistent statements made by S.W. during the interviews. Rather, the court ordered that the interviews be played in their entirety, with the result being the jury heard various extraneous and inadmissible statements by S.W. that were neither inconsistent nor consistent with her direct testimony or subsequent impeachment. Accordingly, allowing the tapes to be played in their entirety was improper, and the court abused its discretion in doing so. *See, e.g.,*

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interview were not inconsistent with S.W.'s testimony and, therefore, Rule 801(d)(1)(B) does not apply under any scenario. We disagree with such a characterization. Although S.W. consistently stated that she did not remember what she said during the interviews, Appellant never once indicated that he intended to use the interviews merely to refresh her memory. Further, after playing the interviews for the jury, Appellant clearly used them to impeach S.W.'s trial testimony and cast doubt on her veracity. In a further attempt to avoid the application of Rule 801(d)(1)(B), Appellant contends that he did not use the interviews to imply that S.W. was engaging in a recent fabrication. We also disagree with this contention. Even assuming *arguendo* that Appellant was not using the interviews to imply that S.W. was perpetrating recent fabrications in her testimony, he was certainly using the interviews to imply that S.W.'s testimony was the result of "improper influence or motive," for which Rule 801(d)(1)(B) allows the admission of consistent prior statements to rebut such charges.

State v. Bruggeman, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989) (noting that Rule 801(d)(1)(B) is limited and applies "only to the use of prior consistent statements as *affirmative evidence* and [is] not controlling when such statements are used *only for rehabilitation*" (quoting *United States v. Rubin*, 609 F.2d 51, 66 (2nd Cir. 1979) (Friendly, J., concurring))).

¶14 Further, our supreme court has held that for prior consistent statements to be admitted under Rule 801(d)(1)(B), "the witness must make the prior consistent statement before the existence of facts that indicate a bias arises." *State v. Martin*, 135 Ariz. 552, 554, 663 P.2d 236, 238 (1983); *accord Starkins v. Bateman*, 150 Ariz. 537, 545, 724 P.2d 1206, 1214 (App. 1986). The court in the instant case determined that S.W.'s bias arose the day Appellant separated from S.W.'s mother and left the house, which occurred before all of the statements made in the interviews. Accordingly, the court's decision to admit S.W.'s consistent statements was also in error as the statements were made subsequent to the point in time when S.W.'s potential bias arose.

II. Other Rules of Evidence

¶15 The State correctly notes that "[w]e are obliged to affirm the trial court's ruling if the result was legally correct for any reason." *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (stating that the trial court's

arrival "to the proper conclusion for the wrong reason is irrelevant"). We must, therefore, determine whether there is any other basis for the court to admit the interviews under the Arizona Rules of Evidence.

¶16 The State first argues that under Rule 106, the "Rule of Completeness," the court has the discretion to admit any "recorded statement which ought in fairness to be considered contemporaneously with [any already admitted portion of a recorded statement]." Ariz. R. Evid. 106. The State contends that the interviews were admissible under Rule 106 because the interviews revealed reasons why S.W. was reluctant to talk about her abuse during the interviews and also, eventually, corroborated S.W.'s trial testimony.

¶17 To support its argument that the entirety of the interviews were admissible under Rule 106, the State relies primarily on *State v. Prasertphong,* 210 Ariz. 496, 114 P.3d 828 (2005) (*Prasertphong II*), which states that "[t]he rule of completeness does not always require the admission of the entire statement[; i]nstead, it requires the admission of those portions of the statement that are 'necessary to qualify, explain or place into context the portion already introduced.'" *Id*. at 499, ¶ 15, 114 P.3d at 831 (quoting *United States v. Branch*, 91 F.3d 699, 728 (5th Cir. 1996)); *see also State v. Dunlap*, 187 Ariz. 441, 454-55, 930 P.2d 518, 531-32 (App. 1996)

(recognizing that under the Rule 106 rule of completeness, certain excluded portions of a writing or recording must be admitted if those portions are necessary "to explain the admitted portion, place the admitted portion in context, avoid misleading the trier-of-fact, and insure a fair and impartial understanding of the writing"). The court in *Prasertphong II* also noted that, pursuant to Rule 106, when a defendant makes the "tactical decision" to admit portions of a prior writing or recording into the record, he forfeits any claim that the introduction of any other portion "necessary to prevent the jury from being misled" violates his rights under the Confrontation Clause of the Sixth Amendment. 210 Ariz. at 503, ¶ 29, 114 P.3d at 835.

¶18 Although a court may admit any part of a prior writing or recording that serves to explain or provide context for any other already admitted portion of the same writing or recording, Rule 106 "does not create a rule of blanket admission for all exculpatory statements simply because an inculpatory statement was also made." *State v. Cruz*, 218 Ariz. 149, 162, ¶ 58, 181 P.3d 196, 209 (2008); *see also State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997) (stating that Rule 106 "does not require the admission of irrelevant or prejudicial evidence").

¶19 In *Prasertphong II*, the trial court did not err in admitting statements under Rule 106 because "the State merely

sought to introduce the remaining portions of the *same statement* to put the selected portions in their proper context, not a separate statement altogether." 210 Ariz. at 500, ¶ 18, 114 P.3d at 832. Unlike *Prasertphong II*, the court in the instant case allowed the State to not only introduce portions providing context or explaining the statements utilized by Appellant for impeachment purposes, but admitted the interviews in their entirety, which included many statements that bore little or no relation to the statements utilized by Appellant. Further, the interviews contained passages that were highly prejudicial to Appellant - wherein S.W. discussed uncharged acts and unrelated prior bad acts neither introduced by the State nor relevant to the portions of the interviews used by Appellant to impeach S.W.[7] Many of the statements made throughout the entirety of the interviews simply did not qualify, explain, or place into context previously admitted portions of the interviews, and therefore, should not have been admitted under Rule 106. *See Cruz*, 218 Ariz. at 162, ¶ 58, 181 P.3d at 209 (holding that the court properly refused to admit a statement into the record under Rule 106 because the "statement does not 'qualify, explain

[7] The interviews contain multiple instances of uncharged and prior bad acts, including sexual assaults of S.W. in the garage and in the shower, throttling of S.W.'s head and whipping her with a belt, and a statement that Appellant owned a firearm.

or place into context'" any statement that had previously been admitted).

¶20 Further, the court admittedly had not reviewed any of the interviews or transcripts before making its conditional ruling allowing them to be played in their entirety. We hold that, to the extent the court relied on Rule 106 and the rule of completion, it abused its discretion when it ruled without first determining whether the interviews qualified, explained, or provided context for the statements Appellant sought to use for impeachment. Although the contents of the interviews were briefly discussed at the evidentiary hearing, we do not find that such discussion provided a sufficient basis for the court to rule that the entirety of the interviews should be played for the jury, especially since the interviews contained details of both uncharged and unrelated prior bad acts.[8]

¶21 The State also contends that the interviews were admissible under Arizona Rule of Evidence 803(5) to refresh S.W.'s memory. The record, however, does not support such a contention. S.W. testified fully and accurately to at least three instances of sexual contact with Appellant, and the State

[8] We do agree with the State's argument that the court, under Rule 103, need not *sua sponte* require a party to make an offer of proof before ruling on the admissibility of evidence. If the court, however, seeks to admit evidence under Rule 106, it is obligated to review the material in some meaningful way before exercising its discretion.

never utilized her interview statements to refresh her memory regarding those instances. At no point did S.W. adopt the interviews as an accurate portrayal of her memory and knowledge. In fact, S.W. testified that she did not remember what she had said in the interviews and admitted at trial that she forgot or otherwise failed to include various details regarding her abuse in the interviews.

¶22 We have reviewed all other hearsay exceptions and have determined that none of them provide a basis for admitting the interviews in their entirety. As a result, we conclude that the court abused its discretion in admitting the interviews into evidence and requiring that they be played in full to the jury after Appellant used selective portions to impeach S.W.'s testimony.

III. Harmless Error Analysis

¶23 Because Appellant objected below and we have concluded that the admission of the interviews constituted error, we must determine whether such error was, in this case, harmless. In a harmless error review, the State must demonstrate beyond a reasonable doubt that the error did not affect or contribute to the verdict or sentence. *See State v. Armstrong*, 218 Ariz. 451, 458, ¶ 20, 189 P.3d 378, 385 (2008). We do not consider whether, absent the interviews, the facts are still sufficient to support the conviction; rather, we consider, absent the

interview, whether beyond a reasonable doubt Appellant would still have been found guilty. *See, e.g., State v. McVay*, 127 Ariz. 450, 453, 622 P.2d 9, 12 (1980).

¶24 The State contends that all of the statements in the interviews were merely cumulative to the evidence and testimony presented at trial, and also argues that S.W.'s allusions to other instances of molestation were "passing and vague." We disagree. As stated above, various uncharged, irrelevant, and unrelated bad acts were discussed in the interviews and were not testified to at trial, rendering the interviews more than cumulative and possibly adding significant credibility to S.W.'s testimony. *See State v. Medina*, 178 Ariz. 570, 577, 875 P.2d 803, 810 (1994) (finding that the court erred in admitting videotaped testimony in violation of the confrontation clause, and also finding that the videotaped testimony was not harmless or cumulative because the testimony was important to the State's case, included facts that no other witness had testified to, and included details of defendant's confession that "may have added significant credibility" to other properly admitted evidence regarding the defendant's confession). The uncharged acts discussed in the interviews were no more "passing and vague" than the descriptions of molestation S.W. did testify to at trial. Accordingly, we cannot agree that the statements made in the interviews were merely cumulative or *de minimus*, and must

therefore conclude that the statements in the interviews likely impacted the verdict.

¶25 In *State v. Schroeder*, 167 Ariz. 47, 52-53, 804 P.2d 776, 781-82 (App. 1990), we held that even though the victim in a child sexual abuse case testified that the defendant had committed more acts of abuse than he had been indicted for, the introduction of those uncharged acts did not prejudice the defendant. We held that the defendant "was not prejudiced by the fact that the indictment charged only one rather than several counts of sexual abuse" because: 1) all of the acts occurred "over a relatively short period of time during one evening"; 2) all of the acts described by the victim were of the same nature and type; and 3) the defendant offered the same defense to all of the acts - he denied their occurrence. *Id.* at 53, 804 P.2d at 782. With those factors present in *Schroeder*, we held that, regardless of the testimony of uncharged acts, "the jury was left with only one issue - who was the more credible of the only two witnesses to the alleged acts?" and we concluded that the conviction of the defendant implies that the jury "did not believe the only defense offered." *Id.* (citations omitted).

¶26 Like *Schroeder*, the uncharged and prior bad acts described in the interviews here occurred over approximately the same period of time as the acts for which Appellant was charged,

they were generally of the same nature and type as the crimes Appellant was charged with and convicted of, and Appellant offered the same defense to all the acts. *Schroeder* does not, however, compel that we affirm the verdict. Because our standard of review is for harmless error, the State has the burden of demonstrating, beyond a reasonable doubt, that the interviews did not affect the verdict. While selected portions of the interviews certainly benefitted Appellant - notably the portions where S.W. denied ever having been molested - other passages could have served to add significant support to S.W.'s credibility and testimony at trial. Further, unlike *Schroeder*, wherein the impact of the testimony of uncharged acts was ambiguous, we cannot ignore the probability that the interviews played some role in the jury's deliberations, as they specifically requested copies of the transcripts of the interviews. We can only speculate as for what purpose the jury used the transcripts and which side benefitted from such consideration, but it is the State's obligation to demonstrate beyond a reasonable doubt that the error did not affect or contribute to the verdict. The State has failed to make such a showing, even under *Schroeder*. The content of the interviews was prejudicial, and the record clearly shows that the jury took them into account during its deliberations.

¶27 We cannot, therefore, determine that the interviews did not affect the jury's verdict. Accordingly, we do not find that the admission of the interviews constituted harmless error, and therefore, we must vacate Appellant's convictions and remand for a new trial.

¶28 Because we are overturning all of Appellant's convictions on the above-mentioned grounds, we need not address Appellant's remaining arguments.

IV. Double Jeopardy

¶29 Appellant argues that double jeopardy precludes retrial on two of the counts of sexual conduct with a minor and the count of aggravated assault. *See* U.S. Const. amend. V; Ariz. Const. art. 2, § 10. Appellant argues that, without the use of the interviews, the State failed to present sufficient evidence to convict him of those crimes. *See, e.g., State v. Hardwick*, 183 Ariz. 649, 655-56, 905 P.2d 1384, 1390-91 (App. 1995) (finding that "[t]he State failed to produce evidence that reasonable persons could accept as sufficient to support the convictions," and holding that the court therefore erred in failing to grant the defendant's motion for a directed verdict and that double jeopardy would preclude the prosecution from trying the defendant on those counts again).

¶30 We disagree with Appellant's contention that, beyond the interviews, the State failed to present evidence sufficient

to convict him. S.W. testified regarding all of the charged crimes and did so in sufficient detail to support a conviction. Also, S.W.'s testimony was supported by physical DNA evidence linking Appellant to the crime. Further, selected portions of the interviews may potentially be used as long as they qualify under Rule 106 or any other Arizona Rule of Evidence. Accordingly, we find that the State presented evidence that reasonable persons could accept as sufficient to support Appellant's convictions in a new trial.[9]

CONCLUSION

¶31 For the reasons set forth above, we vacate Appellant's convictions and the resulting sentences. We remand for a new trial on all counts.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
MARGARET H. DOWNIE, Presiding Judge

_____/S/_____
PATRICK IRVINE, Judge

[9] We also do not find that the errors in the instant case leading to the vacation of the convictions were the result of prosecutorial misconduct.