

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY -7 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2011-0352
)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JOSEPH DAVID BROMLEY, SR.,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091163001

Honorable Terry L. Chandler, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Amy M. Thorson

Tucson
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
By Kristine Maish

Tucson
Attorney for Appellant

M I L L E R, Judge.

¶1 After a second jury trial, Joseph Bromley was convicted of continuous sexual abuse of his daughter and furnishing her with marijuana. He was sentenced to

consecutive, presumptive terms of twenty years for each offense. On appeal, Bromley argues the second trial violated double jeopardy, that prosecutorial vindictiveness violated his due process rights, and that the trial court improperly admitted testimony pursuant to Rule 404, Ariz. R. Evid. We affirm his convictions and sentences.

Factual and Procedural Background

¶2 In December 2008, B.V. told her aunt that her father, Bromley, had been sexually abusing her, and the aunt reported it to the police. According to B.V., the abuse began in 2005, when B.V. was twelve years old, and included oral sex and other sexual contact, and that intercourse began in late 2006. Throughout this time, Bromley also provided B.V. with marijuana, which they smoked together. Bromley was arrested and charged with one count of continuous sexual abuse of a child by engaging in sexual intercourse with a child under fourteen, and one count of involving or using minors under fifteen in drug offenses; both counts alleged the acts occurred on or about March 7, 2004 through March 7, 2006. The case was initially assigned to Judge Charles Sabalos.

¶3 Bromley's first trial ended in a mistrial on the first day of testimony. The state presented the case to the grand jury again, which returned an indictment amending the continuous sexual abuse count to include oral sex, and changing the time frames of both counts to March 7, 2005 through December 15, 2008.

¶4 Judge Sabalos retired and Judge Terry Chandler was assigned the case. She stated she would respect Judge Sabalos's earlier rulings and proceeded to trial. After the close of evidence, but before the jury received its final instructions, Judge Chandler

informed the parties the indictment was broader than the time periods allowed for the offenses. Specifically, the child abuse offense required that the victim be under fourteen, and the drug offense required that the victim be under fifteen. See A.R.S. §§ 13-1417, 13-3409(B). B.V. turned fourteen on March 7, 2007 and fifteen on March 7, 2008, but the indictment stated the incidents occurred through December 15, 2008. Judge Chandler included interrogatories on the verdict forms to determine whether the jury found beyond a reasonable doubt that the offenses occurred prior to March 7, 2007 and 2008, respectively.

¶5 Shortly after the jury began deliberating, the trial court raised the additional issue of evidence of other acts having been improperly admitted after the statutory time period because of the overbroad indictment. After discussion with counsel, Judge Chandler gave the jury limiting instructions based on Rule 404(b) and (c), Ariz. R. Evid. The jury found Bromley guilty on both counts, within the proper time periods, and found that both counts were dangerous offenses against children. Bromley was sentenced to two consecutive twenty-year prison terms.

Discussion

Double Jeopardy

¶6 Bromley first contends the trial court erred in denying his motion to dismiss the second indictment on double-jeopardy grounds. Relying on *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984), Bromley argues prosecutorial misconduct necessitated the mistrial, and therefore the retrial was barred by Arizona's Double Jeopardy Clause, Ariz. Const., art. II, § 10.

¶7 “We review a trial court’s decision whether to dismiss a prosecution with prejudice under this scenario for an abuse of discretion.” *State v. Korovkin*, 202 Ariz. 493, ¶ 5, 47 P.3d 1131, 1133 (App. 2002). A mistrial due to prosecutorial misconduct does not usually bar a later retrial. *State v. Trani*, 200 Ariz. 383, ¶ 5, 26 P.3d 1154, 1155 (App. 2001). However, in *Pool*, our supreme court held that double jeopardy attaches when a mistrial is granted on the defendant’s motion under the following conditions:

1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Pool, 139 Ariz. at 108-09, 677 P.2d at 271-72 (footnote omitted).

¶8 The first indictment charged Bromley with intercourse with a child for two years beginning March 7, 2004. On the first day of trial, the state moved to amend the indictment to include other types of sexual contact. The trial court denied the motion due to lack of notice to the defendant. The court also limited the evidence to the time period in the indictment, noting that to go outside the time period would, “expand[] the indictment.”

¶9 During the first day of testimony, B.V. testified about multiple sexual acts, but had difficulty giving exact dates for when they occurred. In the course of trying to narrow down a time period for a particular event, the prosecutor asked, “And do you recall

within the time period that we're talking about from 2005 to 2006, do you recall when that happened?" B.V. answered, "Shortly before he went to jail." Bromley requested a mistrial, but the state argued that it was curable, and that it had previously admonished the witness not to testify about jail. Bromley's counsel admitted he was "not damming [the prosecutor], but it came out and it was . . . inflammatory." Noting the gravity of Bromley's potential sentences, the trial court granted the mistrial.

¶10 Before the retrial occurred, the state obtained a second indictment that expanded the time period. Bromley moved to dismiss the indictment on double jeopardy grounds, but Judge Sabalos denied the motion. During the hearing, the court noted the state "didn't ask the witness anything that would lead a reasonable fact finder to believe that she was encouraging her to say anything about a jail term." He also noted B.V. "appeared crestfallen because she knew she had made a mistake," and "[h]er body language suggested that she . . . didn't intentionally try to do something . . . to cause a mistrial in the case."

¶11 Bromley argues on appeal, as he did before the trial court, that the prosecutor engaged in misconduct similar to that in *Pool* by intentionally going beyond the relevant time period to cause a mistrial in order to fix a problematic indictment. But in *Pool*, the prosecutor's actions were extreme, characterized by our supreme court as seeking to "ventilate his feelings to the court." *Pool*, 139 Ariz. at 100, 677 P.2d at 263. The court in *Pool* detailed the prosecutor's more egregious actions during cross-examination of the defendant, including multiple irrelevant questions repeated after sustained objections,

improper characterization of the evidence, argumentative questions, and questions characterizing the defendant as a “cool talker” and a “good buddy” of defense counsel. *Id.* at 102-03. In that case, the mistrial was granted on the grounds of, “general belligerent and argumentative attitude and improper questioning” by the prosecutor. *Id.* at 101 n.5.

¶12 Here, the prosecutor’s actions cannot be characterized as belligerent or improper; moreover, the trial court found B.V.’s improper response to be unintentional. *See Korovkin*, 202 Ariz. 493, ¶ 8, 47 P.3d at 1133 (deferring to the trial court’s finding that the prosecutor’s comment, if improper, was not intentionally so). Even if the prosecutor’s questions were sometimes inartful, the question that ultimately led to the mistrial was focused on 2005 and 2006. The questions were not intended to elicit a response referencing jail time that did not begin until 2007. Not only did the court find the elicited response unintentional, nothing in the record suggests the prosecutor asked questions with an improper purpose. *See State v. Lamar*, 205 Ariz. 431, ¶ 45, 72 P.3d 831, 840 (2003) (finding no improper purpose where prosecutor elicited hearsay statements); *Trani*, 200 Ariz. 383, ¶ 15, 26 P.3d at 1157-58 (although reading hearsay statement was clear error, single misstep was not a “pattern of misconduct that ‘permeated the trial.’”)

¶13 Bromley further argues that had the first trial proceeded, there would have been insufficient evidence to support the sexual abuse charge because B.V. had already testified that only a single act of intercourse had occurred in the relevant time frame. He relies on *Burks v. United States*, 437 U.S. 1, 11 (1978), for the proposition that double jeopardy “forbids a second trial to afford the prosecution another opportunity to supply

evidence it failed to muster in the first proceeding.” His reliance is misplaced. *Burks* holds that a retrial violates double jeopardy protections when a case is reversed on appeal for insufficiency of the evidence. *Id.* at 17-18; *State v. Moody*, 208 Ariz. 424, ¶ 25, 94 P.3d 1119, 1133-34 (2004). Here, there has been no finding of insufficient evidence nor could there be—the mistrial occurred forty minutes into the first day of testimony and the state was just beginning to present its case. The limited time frame of the indictment may have ultimately been problematic for the state, but we cannot predict what might have happened had B.V. and other witnesses continued to testify. Bromley’s claim of insufficient evidence therefore fails.

Prosecutorial Vindictiveness

¶14 Bromley next argues his due process rights were violated due to the vindictiveness of the prosecutor. Bromley failed to raise this issue in his motion to dismiss or later at trial; therefore, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error “takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *State v. Ray*, 226 Ariz. 54, ¶ 12, 243 P.3d 1036, 1039 (App. 2010), quoting *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. If a defendant can show that fundamental error has occurred, he must also demonstrate that the error caused him prejudice. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶15 “[T]he Constitution’s due process guarantees prevent prosecutors from punishing defendants for exercising their protected legal rights by subsequently subjecting them to more severe charges.” *State v. Mieg*, 225 Ariz. 445, ¶ 10, 239 P.3d 1258, 1260 (App. 2010). To demonstrate prosecutorial vindictiveness, a defendant may either show actual vindictiveness, or “rely on a presumption of vindictiveness if the circumstances establish a ‘realistic likelihood of vindictiveness.’” *Id.* ¶ 11, quoting *United States v. Goodwin*, 457 U.S. 368, 372 (1982). This presumption could then be overcome with objective evidence justifying the prosecutor’s actions. *Goodwin*, 457 U.S. at 376 n.8.

¶16 Bromley points to the second indictment as evidence of vindictiveness. It is clear in the record, however, that the state originally moved to amend the indictment on the eve of trial before there was any mistrial that might have prompted the state to punish Bromley. Further, after the mistrial, the trial court, not the state, originally raised the issue of amending the indictment and stated that the state could simply take the evidence back to the grand jury for a new indictment. No charges were added or otherwise increased; rather, the grand jury expanded the timeline and included other qualifying acts for the sexual abuse charge, which are allowed under the same statute. The record justified the prosecutor’s action, and there was no error, let alone fundamental error. *See Mieg*, 225 Ariz. 445, ¶¶ 17-21, 239 P.3d at 1262-63 (where sole factor supporting vindictiveness was drug charge added after mistrial, trial court erred in finding state’s action intended to penalize defendant).

¶17 Bromley contends on appeal that the “trial court erred in admitting other bad acts of sexual propensity . . . without conducting a rule 404(c) screening.” He argues that the admission of B.V.’s testimony regarding sexual acts that occurred after B.V. turned fourteen violated the Rules of Evidence and denied his rights to due process and a fair trial. Bromley did not object at trial to evidence about sexual conduct with his daughter after her fourteenth birthday, which usually limits review to fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶18 Bromley argues that he preserved the issue for review by objecting to the admission of 2008 testimony as outside the time limits of the first indictment before the first trial, and that the rulings from the first trial were still in effect at the time of the second trial. This argument ignores the changes in the indictment that provided the basis for the court’s ruling. When the time frame of the indictment was expanded for the second trial, Bromley made no objection, either to the indictment itself, or later when witnesses began testifying to events in 2008. Defense counsel even asked B.V. questions about other bad acts in 2007 and 2008. By failing to object below, Bromley has forfeited the right to relief on this issue for all but fundamental error. *See State v. Miller*, 112 Ariz. 95, 98, 537 P.2d 965, 968 (1975) (error waived where defendant failed to object to allegedly prejudicial testimony and some of the prejudicial remarks were elicited by defense counsel on cross-examination).

¶19 Assuming there was error, Bromley has not met his burden of showing prejudice. To show prejudice, Bromley must establish that, absent any error in admitting the evidence, a reasonable jury could have reached a different result. *See Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609. The state had to prove three or more acts of oral sex or sexual intercourse over at least a three-month period prior to March 7, 2007. *See A.R.S. § 13-1417(A)*. Here, B.V. testified to oral sex in the summer of 2005, another incident several weeks later, and then that sexual conduct regularly increased until the end of 2007, when sexual conduct occurred once per week. She also testified to sexual intercourse occurring approximately five times toward the end of 2006. Further, to corroborate her testimony, Bromley’s prison letters to B.V. after she turned fourteen indicated she would have to “do certain things” five or six more times, how “I want, not how you want,” and other references B.V. interpreted to mean sexual acts.

¶20 Although B.V. did testify to more incidents outside of the statutory time period, that testimony was cumulative to the evidence of numerous acts that occurred within the statutory time frame. Moreover, the jury received a limiting instruction based on Rule 404(c), Ariz. R. Evid., as well as an interrogatory asking if the jurors found beyond a reasonable doubt that the offense was committed before B.V.’s fourteenth birthday. Presuming that jurors follow the court’s instructions, *State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847 (2006), Bromley has failed to show he was prejudiced by the admission of the Rule 404(c) evidence. *See State v. Miles*, 211 Ariz. 475, ¶ 30, 123 P.3d 669, 677 (App. 2005).

Testimony of W.B.

¶21 Finally, Bromley argues that testimony of a family friend, W.B., was improperly admitted. Specifically, he argues the trial court erred in admitting W.B.’s testimony that he had witnessed Bromley and B.V. use marijuana together four or five times in 2008; W.B.’s testimony that he saw Bromley go into B.V.’s bedroom and close the door on two occasions in 2008; W.B.’s opinion that B.V. “always told the truth”; and W.B.’s opinion Bromley was “overselling” the fact that he was not guilty.

¶22 The first two categories of testimony were admitted due to the same mistake detailed above—the date range on the indictment included December 15, 2008, while the statutory cutoff for the sexual abuse offense was March 7, 2007, and the cutoff for the drug offense was March 7, 2008. *See* A.R.S. §§ 13-1417(A), 13-3409(B). As above, in the first trial, the trial court limited any testimony to the time period of the original indictment that W.B. saw Bromley use marijuana with his daughter or go in her room. When the second indictment included dates beyond the statutory limit, Bromley did not move to dismiss the indictment for that reason nor did he object to the admission of the testimony when the witness began testifying about events that occurred after March 7, 2008. Thus, Bromley also has forfeited this argument on appeal for anything but fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08.

¶23 Regarding the marijuana use, Bromley has not met his burden of showing prejudice. *Id.* at ¶ 27. B.V. testified that the first time Bromley gave her marijuana was when she was twelve years old, and that she smoked with him one or two times a week

after that, before she started smoking every day. One of the letters from Bromley to B.V., sent when she was fourteen, was signed, “I love you very much and always will 4:20,” which B.V. said she understood to be related to marijuana. B.V.’s grandmother, who lived in the house with Bromley and B.V., testified that she knew Bromley smoked marijuana in the house in 2005, 2006 and 2007, and that on a few occasions she had seen B.V. in the room with him while he was smoking. Although W.B.’s testimony that he saw Bromley and B.V. use marijuana about four or five times was outside the time frame, the jury received a limiting instruction based on Rule 404(b), Ariz. R. Evid., and the verdict form included an interrogatory asking the jury whether it found beyond a reasonable doubt that the crime was committed prior to March 7, 2005. As above, because W.B.’s testimony about the marijuana use was cumulative to ample evidence supporting the drug conviction, and because we presume that jurors follow court instructions, *Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d at 847, Bromley has failed to show he was prejudiced by the admission of testimony about his marijuana use.

¶24 Likewise, Bromley has failed to show he was prejudiced by the admission of W.B.’s testimony that he saw Bromley go into B.V.’s bedroom and close the door on two occasions. To the extent such testimony could be construed as improper propensity evidence pursuant to Rule 404(b), the jury was instructed pursuant to Rule 404(b) and (c) as to the proper use of such evidence.. The jury also received an interrogatory asking whether the sexual assault was committed before March 7, 2007, and B.V.’s testimony, Bromley’s letters to B.V., and other evidence support the jury’s verdict.

¶25 Bromley also argues that W.B. should not have been able to testify that B.V. was truthful because the state, not the defense, first attacked B.V.’s credibility when it mentioned during opening statements that she had previously reported abuse, but had recanted. Although Bromley failed to object when W.B. testified, he objected to evidence of B.V.’s character for truthfulness in a motion in limine before the first trial and the issue was raised again before W.B.’s testimony. A contemporaneous objection would have allowed the court to cure the problem at the time, *State v. Rutledge*, 205 Ariz. 7, ¶ 30, 66 P.3d 50, 56 (2003), but a motion in limine generally preserves an objection for purposes of appeal. *State v. Lujan*, 136 Ariz. 326, 328, 666 P.2d 71, 73 (1983). Therefore, we review for abuse of discretion. *See State v. Reimer*, 189 Ariz. 239, 241, 941 P.2d 912, 914 (App. 1997).

¶26 Rule 608, Ariz. R. Evid., states that evidence of the witness’s truthful character is admissible “only after the witness’s character for truthfulness has been attacked.” However, a party may be allowed to “draw the sting,” when the attack on its witness is anticipated. *State v. Fulminante*, 161 Ariz. 237, 252-53, 778 P.2d 602, 617-18 (1988).

¶27 During a hearing before the first trial, Judge Sabalos concluded that if the defense suggested B.V. was lying, he would permit W.B.’s general opinion about her veracity. Defense counsel responded, “Well, what other defense is there in a case like this?” Anticipating the defense, the state mentioned during opening statements that B.V. had previously recanted a claim of abuse. As expected, the theme of the defense’s

opening statement was that the allegations were false. Here, the state was allowed to “draw the sting” by introducing the fact that B.V. had lied in the past, and then have W.B. testify that she had an overall character for truthfulness. *Fulminante*, 161 Ariz. at 252-53, 778 P.2d at 617-18. There was no abuse of discretion.

¶28 Finally, Bromley argues that W.B.’s testimony, that he did not believe Bromley’s denial of the accusations constituted an improper lay opinion under Rule 701, Ariz. R. Evid. Although Bromley did not object, nor move to strike the answer as non-responsive, Bromley raised the issue in a motion in limine before the first trial, and, during a bench conference prior to W.B.’s testimony, Judge Chandler noted that such testimony would only be appropriate if a witness testified that Bromley was truthful. Therefore, we review for abuse of discretion. *Groener v. Briehl*, 135 Ariz. 395, 398, 661 P.2d 659, 662 (App. 1983).

¶29 “Arizona courts have expressly determined that neither expert nor lay witnesses assist the trier of fact to understand the evidence or to determine a fact in issue when they merely opine on the truthfulness of a statement by another witness.” *Reimer*, 189 Ariz. at 241, 941 P.2d at 914. However, otherwise improper testimony may not constitute error where the witness makes only a single reference, and the jury is admonished not to consider the question or answer and instructed that credibility is solely an issue for the jury. *State v. Schroeder*, 167 Ariz. 47, 50-51, 804 P.2d 776, 779-80 (App. 1990) (finding no error where police officer testified that he believed victim was telling truth).

¶30 Here, Bromley’s counsel asked W.B. when he stopped being good friends with Bromley. W.B. answered, “When he was overselling the fact that he was not guilty.” Because defense counsel never objected or moved to strike the answer, the jury was not admonished as it was in *Schroeder*; however, the opinion was a non-responsive answer from a family friend, not a police officer, and was not “designed to boost the victim’s credibility,” but merely implied that he did not believe Bromley. *See Schroeder*, 167 Ariz. at 50, 804 P.2d at 779. Although we acknowledge that W.B.’s opinion about Bromley’s truthfulness was not proper testimony, we find no reversible error in its admission given the lack of contemporaneous objection.

Disposition

¶31 For the reasons stated above, Bromley’s convictions and sentences are affirmed.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge