

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WILLIAM HAROLD VAN METER,
Appellant.

No. 2 CA-CR 2012-0425
Filed December 1, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20101648001
The Honorable Paul E. Tang, Judge
Honorable Edgar B. Acuna, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

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Lori J. Lefferts, Pima County Public Defender
By Lisa M. Hise, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

ESPINOSA, Judge:

¶1 After a jury trial, William Van Meter was convicted of one count of molestation of a child and three counts of sexual conduct with a minor. The trial court sentenced him to a mitigated term of thirteen years on the molestation count and three consecutive life sentences on the sexual conduct counts, to be served concurrently, and entered a criminal restitution order (CRO). On appeal, Van Meter contends the court abused its discretion in allowing the admission of sexual propensity evidence under Rule 404(c), Ariz. R. Evid., and in precluding him from presenting evidence that the victim had made allegations of sexual conduct against others.

Factual and Procedural Background

¶2 We state the facts in a light most favorable to sustaining the verdicts. *See State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). In March 2010, nine-year-old A. reported to a Department of Child Safety (DCS)¹ investigator that she had been sexually abused.

¹A. reported to an investigator with Child Protective Services (CPS), formerly a division of the Arizona Department of Economic Security (ADES). Effective May 29, 2014, the Arizona legislature repealed the statutory authorization for CPS and for ADES's administration of child welfare and placement services under title 8 and transferred powers, duties, and purposes previously assigned to those entities to the newly established DCS. *See* 2014 Ariz. Sess.

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During a forensic interview in April, she described an incident where her grandfather, Van Meter, came into her bedroom as she was going to sleep, got into bed with her, and touched her “private” and her “bottom” on the skin. A. said he had “done that” eight times in her bedroom and one time in her grandmother’s bedroom. She then described an incident in which Van Meter had removed her clothes and took photos of her with broken Easter eggs on her private and on her chest.

¶3 A. also related an incident in her grandmother’s room during which Van Meter put “his private” in her “bottom crack” once and in her mouth, three times. A. further related that Van Meter had put his private in her private twice. A., who was in fourth grade at the time of her interview, stated that all of the incidents had occurred over a number of days when she was in third grade, “almost nine” years old, and her grandfather was babysitting her and her two brothers.²

¶4 Van Meter subsequently was indicted on one count of molestation of a child, “touching . . . genitals,” and three counts of sexual conduct with a minor under fifteen involving anal penetration, sexual intercourse, and oral and sexual contact. He was convicted on all counts and was sentenced as described above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Admission of Evidence of Other Acts

Material Facts

¶5 Before trial, the state filed a notice of intent to introduce evidence of several incidents involving Van Meter in the past, pursuant to Ariz. R. Evid. 404(b) and (c). The first was in 1996 or

Laws 2d Spec. Sess., ch. 1, §§ 6, 20, 54. For simplicity, our references to DCS in this decision encompass both ADES and the former CPS.

²At trial in August 2012, A. testified she could not remember any of the acts she had described to the forensic interviewer, nor could she remember talking to the interviewer.

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1997 when he reportedly had put his hands under the shirt of C., a fourteen or fifteen year old girl, and “fe[lt] her breasts” on two occasions. The next incident concerned Z., who stated Van Meter had sexually abused her from approximately her sixth grade year to her sophomore year in high school. The third incident involved the Easter egg photographs described above, which were not charged in the indictment. The final incident pertained to the discovery on Van Meter’s computer and his ex-wife’s computer³ of “several stories” about children and adults engaged in sexual acts, including incest; “several browser and search history hits with the term ‘Lolita’ and . . . other items that appeared to be related to female child pornography”; and images of Japanese animation which included “young children, cartoon style, engaging in sex acts with adults.” The state later supplemented its notice of intent to include A.’s assertions that Van Meter had touched her a total of eight times and engaged in intercourse with her on two occasions.

¶6 At the evidentiary hearing, Z., then twenty-nine years old, stated that Van Meter had become her stepfather when she was six years old. She testified that just before she entered sixth grade, he had started “touching [her] breasts or [her] genital area outside of [her] pants, groping [her].” She related that he had become more aggressive, grabbing her under her clothes, and saying that no one would believe her if she told. Z. testified that when she was in eighth grade, Van Meter had begun to have intercourse with her, which continued to occur for approximately two years. She further stated that “the major sexual abuse” had stopped when she was a sophomore in high school. The incidents happened “mainly . . . in the house,” and Z. testified she had not told anyone because Van Meter convinced her he would harm her mother and brother if she did. Z. said that after she turned eighteen she had told her mother about the abuse, and the two took measures to enable Z. to avoid Van Meter, but did not contact police.

³Van Meter’s ex-wife was A.’s grandmother, with whom A. lived, and Van Meter would use her computer when he came to babysit A. and her brothers.

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¶7 C. also testified at the hearing. Van Meter is her mother's boyfriend's sister's ex-husband and Z. is her cousin. She stated that when she was either fourteen or fifteen she had been visiting at the Van Meters' house when Van Meter came up behind her and put his hands on her breasts. Later the same day, C. was napping upstairs in the house, when Van Meter "climbed into . . . bed" with her and "tried to touch [her] inappropriately again."⁴ C. ran away and later told her mother's boyfriend what had occurred, and he instructed Van Meter to leave C. alone.

¶8 After hearing Z.'s and C.'s testimony, the court found it sufficient, by clear and convincing evidence, for admission under Rule 404(C)(1)(A). The court also found "a reasonable basis to infer that [Van Meter] had [a character trait giving rise to an aberrant sexual propensity to commit the crimes charged], and obviously if it involves children under the age of 15, I think it has to be said to be an aberrant sexual propensity."

¶9 The trial court next evaluated whether the probative value of the evidence outweighed its prejudice and considered factors including remoteness in time, similarity, strength of the evidence, frequency of the acts, intervening events, and other similarity or differences or other relevant factors. The court noted "remoteness of the other acts" and some dissimilarity among the ages of the girls when the acts had begun, with Z. at about age eleven and C. either at fourteen or fifteen. But it observed similarities in that the girls were children within the family and to whom Van Meter had access. The court also noted a difference in frequency between C. and Z., but pointed out it was due to C.'s disclosure to her mother's boyfriend. The court further noted substantial prejudice to Van Meter and stated there would be a curative instruction to the jury, if the evidence were admitted.

¶10 In considering the stories found on Van Meter's computer and that of his ex-wife, the court appeared to exclude

⁴C. previously had reported to prosecutors that this incident involved Van Meter "reach[ing] his hands up [her] shirt . . . and touch[ing] her breasts."

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them from introduction during a pre-trial hearing but stated in its minute entry that to the “extent that they fall under Rule 404(c) the stories are relevant and . . . would be clearly evidence of an aberrant sexual propensity to commit the crimes charged.” The court later issued a supplement to its Rule 404(c) findings, noting it had reviewed exhibits under seal, which consisted of eight stories detailing in explicit and graphic detail adults engaging in sexual activities with minors, including incest and role playing by the children. The court found that these stories, together with the testimony of C. and Z., (collectively “Other Acts Evidence”) provided “a reasonable basis to infer the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.” It also noted it had considered “the basis of similarity or closeness in time to the charged offense.” Although the court admitted evidence of the stories, it precluded the state from publishing the stories to the jurors or relating to them any details or plotlines.

Analysis

¶11 Van Meter first challenges the trial court’s ruling that the Other Acts Evidence was sufficiently similar to the charged acts to support an aberrant sexual propensity to commit the charged acts. We review the admission of evidence pursuant to Rule 404(c) for an abuse of discretion. *State v. Garcia*, 200 Ariz. 471, 475, ¶ 25, 28 P.3d 327, 331 (App. 2001). In so doing, we view any disputed evidence “in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect.” *State v. Kiper*, 181 Ariz. 62, 66, 887 P.2d 592, 596 (App. 1994). “Abuse of discretion is ‘an exercise of discretion [that] is manifestly unreasonable, exercised on untenable grounds or for untenable reasons.’” *State v. Wassenaar*, 215 Ariz. 565, ¶ 11, 161 P.3d 608, 613 (App. 2007), quoting *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992).

¶12 “Evidence of an emotional propensity to commit aberrant sexual acts is admissible to prove that an accused acted in conformity therewith.” Rule 404(c) “permits the admission of evidence of uncharged acts to establish ‘that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.’” *Garcia*, 200 Ariz. 471, ¶ 26, 28 P.3d at 331;

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Ariz. R. Evid. 404(c). Before admitting evidence pursuant to Rule 404(c), the trial court must specifically find:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403.

Finally, the court must give a limiting instruction as to the proper use of such evidence. Ariz. R. Evid. 404(c)(2); *Garcia*, 200 Ariz. 471, ¶ 27, 28 P.3d at 331-32.

¶13 Van Meter argues that the incidents involving Z. were remote in time, “approximately 18 years prior to the current charges,” with “no evidence that the behavior was continuous over a period of time.” The incidents involving Z. and C. appear to have occurred about twelve years before the incidents involving A.⁵ We have found intervals longer than twelve years not too remote. See *State v. Weatherbee*, 158 Ariz. 303, 304-05, 762 P.2d 590, 591-92 (App. 1988) (uncharged rape occurring twenty years earlier admissible in trial for attempted child molestation); *State v. Salazar*, 181 Ariz. 87, 92-93 & n.5, 887 P.2d 617, 622-23 & n.5 (App. 1994) (instances of child molestation occurring nineteen to twenty-two years before trial not so remote to be precluded as evidence of sexual aberration); see also Ariz. R. Evid. 404(c) cmt. to 1997 amend. (no “bright line test of remoteness or similarity” of prior act to charged offense under

⁵The latest date of abuse of Z. and C. appears to have been in 1997.

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Rule 404(c)). Accordingly, the trial court did not abuse its discretion when it found the prior incidents not so remote as to preclude their admission.

¶14 Van Meter further contends that Z. and C. were “post-adolescent, while A. was pre-adolescent, making any finding that [he] had an aberrant sexual propensity with regard to pre-adolescent girls completely unsupported by the evidence.” All of the victims, however, were young girls; A. was almost nine, Z. was eleven, and C. was fourteen or fifteen. An act involving sexual contact with a child is by its nature aberrant sexual behavior. *See Aguilar*, 209 Ariz. 40, ¶ 11, 97 P.3d at 868. We have held that “the different ages of the victims raises no significant distinction,” where the acts are similar. *State v. Crane*, 166 Ariz. 3, 7, 799 P.2d 1380, 1384 (App. 1990) (sexual intercourse with fifteen-year-old girl sufficiently similar to sexual contact with seven-year-old girl); *see also Roscoe*, 184 Ariz. at 492, 910 P.2d at 643 (no abuse of discretion in admitting evidence of sexual encounter defendant had with fourteen-year-old girlfriend and of lewd statements he had made to young girls where charges involved a seven-year-old victim).

¶15 Van Meter also asserts the other acts described by Z. “were critically dissimilar” in that Z. described him “touching her over her clothes, eventually touching her under her clothes and becoming progressively more aggressive until he was penetrating her on a regular basis,” and had contended the abuse continued for five years. He further asserts the allegations by C. were “equally remote in time and dissimilar to the allegations by A.” Z., C., and A., however, were all within Van Meter’s family sphere,⁶ and he reportedly molested them when they were alone within his or their

⁶As the state notes, the offenses against the three children were apparently “crimes of opportunity in that [Van Meter] waited for each child target to enter into his familial orbit rather than actively hunting for child victims outside the family sphere” which “explains the differing ages of the child victims as well as the lengthy intervals of time between his initial sexual contact with each child victim and/or the remoteness of the prior sexual contact with the two cousins.”

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homes, as when he was babysitting A. All three girls described sexual touching. A. and C. both related that Van Meter got into bed with them as they were sleeping and touched them sexually. C. quickly reported the contact to an adult who intervened. Neither A. nor Z. reported the abuse immediately, and the abuse escalated.⁷ Both were subjected to oral, vaginal, and anal intercourse. Van Meter asserts that the abuse of Z. was more severe and therefore dissimilar to that of A. because it continued to occur for years. But the difference in the duration of the abuse was a mere fortuity resulting from the girls' availability to Van Meter. Z., his step-daughter, lived with him, whereas A. lived with her grandmother and two brothers, and in 2011 was only "occasionally" babysat by Van Meter. Further, A. reported the abuse within about a year, while Z. reported it some seven years after it began. We cannot conclude the court abused its discretion when it found the acts sufficiently similar to be admitted. *See State v. Roscoe*, 145 Ariz. 212, 218, 700 P.2d 1312, 1318 (1984) ("Absolute identity in every detail cannot be expected. Where an overwhelming number of significant similarities exist, the evidence of the prior act may be admitted; the major dissimilarity, and others here present, go to the weight of the evidence.").

¶16 Van Meter additionally argues the trial court erred in concluding the stories from the computers were sufficiently similar to the acts described by A. to be admissible under Rule 404(c). He maintains the stories, admitted under seal, "contain very disturbing descriptions of sex between mother and child, bestiality, bondage, sadism, and public sexual activity," with no similarities to the incidents described by A. "other than minors being involved." As noted above, the trial court allowed evidence that police had found fictional stories involving sexual contact between children and adults, including incest, but it did not admit the material itself or permit any mention of details or plotlines. Nor was the jury told

⁷Van Meter argues that the incidents involving A. "did not escalate." However, in her interview, A. described nine instances of touching, the photograph with the Easter eggs, and then several instances of intercourse.

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about the stories' references to other types of sexually deviant behavior, such as bestiality, bondage, sadism, and public sexual activity. The court could reasonably find that searching for and reading stories involving sexual contact with children was probative of Van Meter's propensity to commit the acts charged. *See State v. Ramsey*, 211 Ariz. 529, ¶¶ 2, 34, 124 P.3d 756, 759, 767 (App. 2005) (defendant's possession of pornographic incestuous stories relevant to motive and intent to have sexual relationship with minor daughter).

¶17 Finally, Van Meter contends "the probative value of the uncharged acts was substantially outweighed by the unfair prejudice and confusion of the issues, rendering the trial court's finding that the evidence was admissible 'manifestly unreasonable' and therefore an abuse of discretion." Unfair prejudice "means an undue tendency to suggest decision on an improper basis," such as emotion, sympathy, or horror. *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993), quoting Fed. R. Evid. 403 advisory committee's note. Because "[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice," it has broad discretion in this decision. *State v. Connor*, 215 Ariz. 553, ¶ 39, 161 P.3d 596, 607 (App. 2007). We see no abuse of discretion in the court's finding here that Z. and C.'s testimony was relevant and its probative value was not outweighed by unfair prejudice, nor its finding that, once it had limited the admission of the stories to a brief description of their relevant content, their probative value outweighed any danger of undue prejudice.⁸

⁸We note the trial court tempered the other-acts evidence by instructing the jurors "you may not convict the defendant of the crimes charges simply because you find that the defendant committed the other acts or that he had a character trait that predisposed him to commit the crimes charged."

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Victim's Allegations Against Others

Factual Background

¶18 Before trial, the state moved to preclude evidence that A. had made allegations of sexual abuse by others. In the first incident, which pre-dated the abuse by Van Meter, a classmate reported through an interpreter that A. had said her step-grandfather was taking showers with her and sleeping on top of her at night. When later questioned about the report, A. denied making the statement to the classmate and that any abuse had occurred. She continued to deny anything had happened in a follow-up forensic interview.

¶19 The next incidents, which post-dated the events involving Van Meter, involved statements by A. about her brothers. At the time of the allegations, A.'s brother C.V. was twelve- to thirteen-years old and D. was eight- to nine-years old. C.V. was removed from the family home for several months "due to acting out sexually" and "for being sexually inappropriate with A." CPS noted at the time of the removal, that as between A. and C.V., "no one was sure which child is telling the truth." The removal was to protect C.V. as well as A., but the CPS team recommended C.V. not visit his siblings at home during the time he was removed for fear he "may be falsely accused of sexually abusing A." C.V., however, admitted to one of A.'s sexual abuse allegations.

¶20 A. also stated that her younger brother, D., had on one occasion attempted to put his hands down her pants and that a young male classmate "took [her] hand and put it down his pants and had A. touch his penis." CPS team members did not believe D. had "sexually abuse[d] A.," noting D. did not "disclose sexual abuse," had "no history of sexually acting out," and the timeframes made the incident unlikely. The family's CPS case manager noted the allegation against A.'s classmate "does not seem plausible." A., however, did not retract her assertions.

¶21 At a hearing on the motion to preclude, the trial court found Rule 404(b) inapplicable because the purported allegations by A. were potential character evidence and A.'s character was not at

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issue. The court also determined the allegations did not qualify as Rule 608 specific instances of dishonesty, observing they mostly involved children, post-dated the incidents involving Van Meter, and CPS had investigated but made no explicit finding of falsehood. The court concluded, “[t]hese are really just unfounded allegations.” When asked later to clarify its ruling, the court stated that it did not find the evidence relevant.

Analysis

¶22 Van Meter contends the trial court “abused its discretion in precluding the defense from presenting evidence that A. had made similar false allegations against others.” The state responds that Van Meter forfeited this argument for failing to address A.R.S. § 13-1421, Arizona’s Rape Shield Law. Van Meter, in turn, replies that the state never asserted the rape shield statute below in its motion to preclude evidence of A. allegations concerning others and has therefore “forfeited its argument relative to the statute.” This court, however, is “required to affirm a trial court’s ruling if legally correct for any reason and, in doing so, we may address the state’s arguments to uphold the court’s ruling even if those arguments otherwise could be deemed waived by the state’s failure to argue them below.” *State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d 111, 113 (App. 2012).

¶23 Section 13-1421(A)(5) provides that evidence of false allegations of sexual misconduct made by a victim against others are admissible only if the judge finds the evidence relevant and “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.” Moreover, the defendant must be able to prove the accusations false by clear and convincing proof. A.R.S. § 13-1421(B); *see also State v. Gilfillan*, 196 Ariz. 396, ¶ 16, 998 P.2d 1069, 1074 (App. 2000). We review a trial court’s rulings regarding the admissibility of evidence under the Arizona Rape Shield Law for abuse of discretion. *Gilfillan*, 196 Ariz. 396, ¶ 29, 998 P.2d at 1078.

¶24 Here, there was no evidence that A. had falsely alleged sexual abuse. She repeatedly denied making an allegation against her step-grandfather to her classmate and, as the state notes, Van

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Meter presented no testimony from the classmate or anyone else disputing A.'s denial. Additionally, A.'s allegations concerning her brother C.V. were not retracted. C.V., in fact, admitted to one instance of abuse, and CPS described him as "acting out sexually," but made no determination as to which child, A. or C.V., was telling the truth regarding A.'s allegations.

¶25 Similarly, A.'s allegations about her brother D. attempting to put his hands down her pants and a male schoolmate putting A.'s hand on his penis were never retracted. We agree with the state, that although not corroborated, the allegations were "relatively innocuous" and "objectively plausible." Although CPS in its written reports found the claims to be unsubstantiated and implausible, as the state observes, Van Meter presented no testimony confirming the CPS conclusions.

¶26 Because Van Meter did not establish by clear and convincing evidence that A. had made any false allegations, the trial court did not err in finding the purported evidence irrelevant to the charges against him.⁹ See *Gilfillan*, 196 Ariz. 396, ¶¶ 30-33, 998 P.2d at 1078 (no clear and convincing evidence of false allegation of sexual misconduct where testimony by victim and witness inconsistent and defendant failed to offer testimony from any witness to the purported accusation); see also *State v. Oliver*, 158 Ariz. 22, 29 n.4, 760 P.2d 1071, 1078 n.4 (1988) (no abuse of discretion to

⁹Van Meter also argues the trial court's findings amounted to "a denial of [his] constitutional rights to due process, a fair trial, and to present a defense." But while the Constitution guarantees criminal defendants "'a meaningful opportunity to present a complete defense,'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984), that right "is limited to the presentation of matters admissible under ordinary evidentiary rules, including relevance," *State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996), abrogated in part on other grounds by *State v. Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d 509, 513 (2012). And, Van Meter has raised no argument that A.R.S. § 13-1421(B), the evidentiary rule we apply here, is itself unconstitutional.

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preclude evidence of prior allegation where insufficient evidence to establish victim's charge against witness unsubstantiated).

Criminal Restitution Order

¶27 Finally, although Van Meter has not raised the issue on appeal, we find fundamental error associated with the trial court's imposition of a CRO at sentencing. *See* A.R.S. § 13-805;¹⁰ *see also Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650 (court will not ignore fundamental error when it finds it). In the sentencing minute entry, the court ordered that "all fines, fees and assessments are reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while [Van Meter] is in the Department of Corrections." The imposition of a CRO before the expiration of Van Meter's sentence "'constitute[d] an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This is true even though the court ordered that the imposition of interest be delayed until after Van Meter's release. *See id.* ¶ 5.

Disposition

¶28 The CRO imposed at sentencing is vacated; Van Meter's convictions and sentences are otherwise affirmed.

¹⁰Section 13-805 was amended effective April 2013. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1. We refer to the version of the statute in effect at the time of Van Meter's offenses and sentencing.