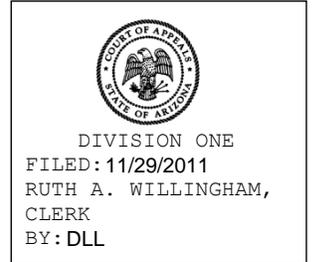


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 10-0902
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
CLINTON FLETCHER CHEATHAM,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR200901322

The Honorable William T. Kiger, Judge (Retired)

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Sarah E. Heckathorne
Attorneys for Appellee

David Goldberg Fort Collins, CO
Attorney for Appellant

N O R R I S, Judge

¶1 Defendant, Clinton Fletcher Cheatham, appeals from his convictions and sentences for one count of sexual molestation and two counts of sexual conduct with a minor under the age of

twelve,¹ each a class 2 felony and dangerous crime against children. He argues the superior court should not have, first, denied his motion to suppress statements he made in a police interview, second, admitted statements made by the victim to a nurse during a forensic examination, and third, denied his motion "for a directed verdict" on these counts.² He also argues the prosecutor committed misconduct when he commented on Cheatham's assertion of his right to remain silent. For reasons set forth below, we disagree with Cheatham's arguments and affirm his convictions and sentences.³

I. Denial of Motion to Suppress Interview Statements

¶12 Before trial, Cheatham moved to suppress the incriminating statements he made to Detective Z. in an early morning interview on the day police arrested him, asserting the detective had violated his *Miranda* rights when he failed to honor Cheatham's "unequivocal and unambiguous" request for an attorney and continued to question him. After conducting an

¹Cheatham was also convicted of one count of possession of marijuana and one count of possession of drug paraphernalia, but does not challenge those convictions on appeal.

²Although in the superior court and on appeal Cheatham's counsel referred to his motion as a motion for "directed verdict," Cheatham moved for a judgment of acquittal under Arizona Rule of Criminal Procedure 20(a).

³We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Cheatham. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

evidentiary hearing and viewing a videotaped recording of the interview, the superior court found Cheatham had not made an "unambiguous request for an attorney" and "[n]one of the statements he made were the result of any force, threats or promises made by any law enforcement officer." As we explain below, the superior court did not abuse its discretion in making these findings, and the record reflects no legal error. Accordingly, we disagree with Cheatham's argument. *State v. Ellison*, 213 Ariz. 116, 126, ¶ 25, 140 P.3d 899, 909 (2006) (appellate court reviews motion to suppress for abuse of discretion based on evidence presented at suppression hearing); *State v. Newell*, 212 Ariz. 389, 397, ¶ 27, 132 P.3d 833, 841 (2006) (appellate court reviews superior court's factual findings for abuse of discretion, reviews legal conclusions de novo).

¶13 The videotape shows that shortly after the detective read Cheatham his *Miranda* rights and asked if he was willing to answer some questions, Cheatham stated, "I don't want to say anything without a lawyer that's going to, you know . . . mess me up, but I don't want to go to jail tonight, I really don't." Cheatham maintains this statement was a request for an attorney and, by failing to honor the request and stop all questioning, the detective violated his right to counsel under *Miranda*.

¶4 In *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355, 129 L. Ed. 2d 362 (1994), the United States Supreme Court held that before a law enforcement officer must stop questioning a defendant, the defendant must unambiguously request the presence of counsel. The defendant "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* If a reasonable officer in the circumstances would have understood only that the defendant might want an attorney, then questioning need not stop. *Id.* Furthermore, although the Court recommended that a police officer suspend interrogation when a defendant makes an ambiguous or equivocal request, and clarify whether the defendant wants an attorney, it did not require officers to do so. *Id.* at 461, 114 S. Ct. at 2356. In *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259-60, 176 L. Ed. 2d 1098 (2010) (citation omitted), the Supreme Court recently reiterated, "[i]f an accused makes a statement concerning the right to counsel 'that is ambiguous or equivocal' or makes no statement, the police are not required to end the interrogation . . . or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights."⁴ See also *Ellison*, 213 Ariz. at 127, ¶ 26, 140 P.3d at

⁴The Court also affirmed that the same "unambiguous invocation" standard applies to remaining silent after *Miranda*

910 (not every reference to an attorney must be construed as invocation of right to counsel; officer not required to stop questioning when reference to attorney was ambiguous or equivocal and "reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel" (quoting *Davis*, 512 U.S. at 459, 114 S. Ct. at 2355); *State v. Eastlack*, 180 Ariz. 243, 250-51, 883 P.2d 999, 1006-07 (1994) (under *Davis*, request for counsel must be clear under circumstances; "I think I better talk to a lawyer first" was ambiguous)).

¶15 The record establishes Cheatham was read his *Miranda* rights twice on the morning of December 21, 2009. The first time was by the deputy who arrested him; the deputy did not ask Cheatham any questions. The second time was by the detective in the interview room. The videotape of the interview shows the detective read Cheatham his *Miranda* rights at the very beginning of the interview, and that Cheatham answered "yes," indicating he understood those rights.

¶16 Consistent with the superior court's findings, the videotape establishes Cheatham was distraught but lucid and was cognizant of what was occurring. Indeed, Cheatham was aware police were recording the interview, as early in the session he

warnings. *Id.* at 2260.

pointed to the camera and stated, "all this is being recorded on that thing."

¶17 Viewed in the context of the entire exchange on the videotape, Cheatham's statement was not an unambiguous request for an attorney. First, Cheatham's words in and of themselves were not a sufficiently clear invocation of his right to counsel. *Davis*, 512 U.S. at 459, 114 S. Ct. at 2355. After Cheatham made the statement, "I don't want to say anything without a lawyer that's going to, you know . . .," the detective began to say, "ok, so you" Cheatham then spoke over the detective and stated, "mess me up, but I don't want to go to jail tonight, I really don't." The detective responded that, because the charges were felony charges, he had no discretion but to book Cheatham into jail that night. At the suppression hearing, the detective testified that, under the circumstances, he did not take Cheatham's mention of an attorney as a request to speak to an attorney and that Cheatham had also never indicated he did not wish to speak with him.

¶18 Cheatham asserts the detective cut off his request for counsel with the explanation that he had no option but to book Cheatham into jail that night, and argues this was the detective's attempt to subvert his otherwise unambiguous request for counsel. The superior court found instead that, as the detective attempted "to clarify [Cheatham's] statement,"

Cheatham went on to voice his concerns about going to jail. The superior court concluded Cheatham's statement was "not an unambiguous request for an attorney." The videotape supports the superior court's interpretation of the exchange and its conclusion. Therefore, we cannot say the court abused its discretion in finding Cheatham had not clearly invoked his right to counsel.⁵

¶9 On appeal, Cheatham also maintains his statements were coerced by the detective and therefore involuntary. According to Cheatham, his statements were rendered involuntary because the detective made two "implied promises" to Cheatham before he waived his right to counsel.

¶10 Because Cheatham failed to raise this issue in the superior court, we review for fundamental error and resulting prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005). We see no error.

⁵Cheatham's reliance on *State v. Szpyrka*, 220 Ariz. 59, 202 P.3d 524 (App. 2008), is misplaced as the facts in *Szpyrka* are distinguishable. Unlike the present case, in *Szpyrka* we held the defendant's statements in response to *Miranda* warnings -- "I got nothin' to say" and "I ain't got nothin' to say" -- were unambiguous invocations of his right to remain silent. *Id.* at 61-62, ¶ 5, 202 P.3d at 526-27. Under those circumstances, the detective's use of post-invocation questions showed "a reluctance to acknowledge the [defendant's] invocation and a subtle effort to persuade [the defendant] to change his mind[,] [a]fter [he] had twice asserted he had 'nothin' to say.'" *Id.* at 62, ¶ 7, 202 P.3d at 527. Here, Cheatham's statement was not an unambiguous invocation of his right to counsel and the detective did not act improperly.

¶11 To be admissible, a defendant's statements must "be voluntary, not obtained by coercion or improper inducement." *Ellison*, 213 Ariz. at 127, ¶ 30, 140 P.3d at 910 (citing *Haynes v. Washington*, 373 U.S. 503, 513-14, 83 S. Ct. 1336, 1343, 10 L. Ed. 2d 513 (1963)). "Promises of benefits or leniency, whether direct or implied, even if only slight in value, are impermissibly coercive." *Id.* (quoting *State v. Lopez*, 174 Ariz. 131, 138, 847 P.2d 1078, 1085 (1992)).

¶12 According to Cheatham, the first "implied promise" occurred after the detective read him his *Miranda* rights and then asked if he was willing to answer questions. When Cheatham asked the detective if doing so would keep him "from going to the jail tonight," the detective replied, "that, I have no control over. That's probably going to happen anyway, but it would certainly help you in the long run." The second alleged "implied promise" occurred after Cheatham made his statement about a lawyer, see *supra* ¶ 7. As Cheatham cried and was visibly upset, the detective remarked that it seemed Cheatham was "just completely wracked with remorse," and stated he "would like to be able to indicate [that] in [his] report." According to Cheatham, the promise the detective "would help him in the 'long run' by putting something favorable in his report" induced him to waive his rights and confess.

¶13 Although, as noted above, Cheatham did not argue his statements were involuntary, the superior court nonetheless independently considered the issue when ruling on his motion to suppress. Based on the evidence presented to it on the motion to suppress, the court found Cheatham's statements were not "the result of any force, threats or promises made by any law enforcement officer."

¶14 First, although upset and appearing intoxicated, Cheatham was, as discussed, lucid and aware of his situation. See *State v. Tucker*, 157 Ariz. 433, 446, 759 P.2d 579, 592 (1988) (citation omitted) (test for voluntariness of defendant who is intoxicated or suffers mental disability is whether condition rendered him unable to understand meaning of his statements).

¶15 Second, neither comment constituted an impermissible promise. When unaccompanied by either a threat or promise, mere advice from the police that it would be better for a defendant to tell the truth does not render a subsequent confession involuntary. *State v. Amaya-Ruiz*, 166 Ariz. 152, 165, 800 P.2d 1260, 1273 (1990) (citation omitted). The detective never implied, directly or indirectly, that if Cheatham told him what had happened with the victim he would make things easier for him or make it possible for him to be released from jail or not prosecuted. The videotape confirms the superior court's finding

Cheatham's statements to the detective were not the product of "any force, threats or promises." Cheatham has failed to show the superior court committed error, let alone fundamental error. See *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991) (before court engages in fundamental error analysis, it must first find superior court committed some error).

II. Admission of Forensic Nurse's Statements

¶16 Cheatham next argues the superior court improperly "admitted substantial hearsay from the nurse [who] examined [the victim] some of which was entirely uncorroborated from [the victim's] testimony without adequate foundation under Rule 803(4)." In particular, Cheatham objects to the superior court's admission of the victim's statements to the nurse identifying Cheatham as the person who had "suck[ed] on his privates" and "put his finger in [the victim's] butt." At trial, the superior court overruled Cheatham's objections, finding the State had laid sufficient foundation to admit the statements pursuant to Arizona Rule of Evidence ("Rule") 803(4).

¶17 We review a superior court's admission of evidence under exceptions to the hearsay rule for an abuse of discretion. *State v. Tucker*, 205 Ariz. 157, 165, ¶ 41, 68 P.3d 110, 118 (2003) (citation omitted). "[A]bsent a clear abuse of discretion this court will not second-guess a [superior] court's ruling on the admissibility or relevance of evidence." *State v.*

Spreitz, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997) (citation omitted). As we explain, the superior court did not abuse its discretion in admitting the nurse's testimony under the hearsay exception at issue here.

¶18 Under Rule 803(4), hearsay statements to a medical provider are admissible if they are "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Relying on prior case law, in *State v. Robinson*, 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987), our supreme court reiterated a two-part test to "aid" in deciding whether hearsay statements are "reasonably pertinent to diagnosis or treatment: (1) was the declarant's apparent 'motive . . . consistent with receiving medical care;' and (2) was it 'reasonable for the physician to rely on the information in diagnosis or treatment.'" The court explained further that "[b]ecause of their young age, sexually abused children may not always grasp the relation between their statements and receiving effective medical treatment. It is particularly important, therefore, to ask whether the information sought by the treating doctor was reasonably pertinent to effective treatment." *Id.* And, the court further explained that although hearsay statements

identifying a victim's assailant are ordinarily inadmissible under Rule 803(4) because they are not relevant to diagnosis or treatment, "this general rule . . . is inapplicable in many child sexual abuse cases" because the identity of the abuser may be "critical to effective diagnosis and treatment." *Id.* at 200, 735 P.2d at 810. The court explained the "psychological sequelae of sexual molestation by a father, other relative, or family friend may be different and require different treatment than those resulting from abuse by a stranger." *Id.*

¶19 In this case, consistent with the principles established in *Robinson*, the court did not abuse its discretion in admitting the nurse's testimony under Rule 803(4). At the very outset of her testimony in the State's case-in-chief, the nurse testified that, before examining the victim, she had asked him general questions concerning why he was there to "find out what kind of treatment [she] need[ed] to give and what kind of exam [she] need[ed] to do."⁶ The nurse testified she had specifically told the victim he needed to tell her what had happened to him so she could "make sure [his] body [was] all right." She also testified the information was pertinent to determining what areas of the victim's body she needed to examine for diagnosis and treatment. Thus, for example, the

⁶The victim later testified he saw the nurse, who was "someone that checks you, makes sure you're okay and stuff like that."

victim's eventual statement Cheatham had "put his finger in [the victim's] butt" led her to conduct "a more detailed examination of [his] bottom area" and to her discovery of the injury to his anus.

¶120 The nurse also testified that, when obtaining information from a victim in a sexual assault case, it was important to determine the perpetrator's identity, because the perpetrator's identity and whether the perpetrator carried any sexually transmittable diseases might be relevant to the treatment plan she would prescribe for the victim. Although Cheatham argues the State never went on to establish with the nurse just how, in this case, information about Cheatham's identity was necessary to the victim's medical diagnosis and treatment, the nurse testified that based on the information of the perpetrator's identity, she made "a follow-up call to a physician that morning." The nurse discussed her examination of the victim and "the things [she] had learned" with the physician, and, after her examination, recommended the victim's mother follow up with a physician.

¶121 Under these circumstances, the court did not abuse its discretion in admitting the nurse's testimony under Rule 803(4).

III. Comment on Cheatham's Right to Remain Silent

¶122 Cheatham next argues the prosecutor improperly commented on his Fifth Amendment right to remain silent when he

asked the detective what Cheatham had said after being read his *Miranda* rights. The detective responded:

He responded, again sobbing, kind of head down . . . that he didn't really want to say anything without a lawyer that might mess him up, but he didn't want to go to jail, he kept saying.

Cheatham concedes he did not raise this objection at trial and that we therefore we review only for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. The record reflects no error, however.

¶23 The detective testified that after Cheatham made this statement, he explained to Cheatham he had no discretion in the matter and, "it's a booking offense so he would be going to jail." The detective continued testifying:

He sobbed a little bit more, and I asked him again . . . if he would tell me his side of the story, and [I] paused and said -- that's the whole reason we read you *Miranda* in the first place so you know what your options are.

And at that point he kind of hung his head, yeah, okay, and agreed to talk to me.

After this testimony, the detective eventually testified about the admissions Cheatham made to him.

¶24 "[A] prosecutor may not comment on a defendant's post-arrest, post-*Miranda* warnings silence as evidence of guilt." *State v. Ramirez*, 178 Ariz. 116, 125, 871 P.2d 237, 246 (1994).

A prosecutor may, however, "comment on a defendant's post-*Miranda* warnings statements 'because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent.'" *Id.* (citation omitted).

¶125 As the record shows, Cheatham did not elect to remain silent, but chose to speak with the detective after he had been read and reminded of his *Miranda* rights. Furthermore, the prosecutor never commented on Cheatham's response as any indication of his guilt. On this record, Cheatham has failed to bear the burden of proving any error occurred, let alone fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

IV. Sufficiency of the Evidence -- Counts 1-3

¶126 Cheatham argues the superior court should not have denied his motion for a judgment of acquittal⁷ on the molestation of a minor and sexual conduct with a minor charges because the verdicts were not supported by sufficient evidence. He also argues, at a minimum, the superior court should have dismissed, and we should vacate, the conviction for anal sexual conduct. We disagree.

¶127 "We review a [superior] court's denial of a Rule 20 motion for an abuse of discretion and will reverse only if no

⁷See *supra* n.2. Cheatham referred to his Rule 20(a) motion as a motion for "directed verdict."

substantial evidence supports the conviction[s]." *State v. Henry*, 205 Ariz. 229, 232, ¶ 11, 68 P.3d 455, 458 (App. 2003). "Substantial evidence" is "proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999) (quoting *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990)).

¶128 Evidence is no less substantial simply because the testimony is conflicting or because reasonable persons may draw different conclusions from it. *State v. Mercer*, 13 Ariz. App. 1, 2, 473 P.2d 803, 804 (1970). Furthermore, in child molestation cases, a "defendant can be convicted on the uncorroborated testimony of the victim." *State v. Jerousek*, 121 Ariz. 420, 427, 590 P.2d 1366, 1373 (1979) (victim's testimony sufficient to take defendant's prior bad acts to jury). To set aside a jury verdict because of insufficient evidence, "it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Jensen*, 217 Ariz. 345, 348, ¶ 5, 173 P.3d 1046, 1049 (App. 2008) (quoting *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987)). The evidence at trial supported Cheatham's convictions, and the superior court

therefore did not abuse its discretion in denying his Rule 20 motion.

¶129 The victim testified that, on a night when Cheatham was staying at his house, he woke up in his bedroom while Cheatham was touching him "in [his] private," meaning where he went "pee pee." He also testified Cheatham touched his private with his mouth and part of his private was "inside of [Cheatham's] mouth." When he realized what was happening, the victim went and told his mother, even though Cheatham had told him not to tell her. This evidence alone constitutes substantial evidence supporting Cheatham's convictions for molestation and one count of sexual conduct. The victim's mother, however, also testified the victim had come into her room, awakened her, and told her Cheatham had "started messing with him on his privates, woke him up and that [Cheatham] put his mouth down on his privates." After she and the victim confronted Cheatham, after initially denying it, Cheatham finally admitted he had touched the victim "down there." Further, Cheatham admitted to the detective that he had molested the victim and "sucked [his penis] for a couple of minutes."

¶130 The victim also testified, "[Cheatham] put his hands down my pants," and had touched his bottom. Although the victim also testified he did not remember and did not know whether Cheatham had put his finger inside his bottom, he also testified

he did remember telling the nurse Cheatham had "stuck his finger in [his] bottom," but, at trial, could not remember whether Cheatham had done so. When the prosecutor asked the victim if he knew why, at the time the nurse examined him, he told her Cheatham had done so, the following exchange took place:

A: No, but I remember why then but now I don't.

Q: Is it so long you've forgotten?

A: Yes.

Q: Okay. Is it possible [Cheatham] stuck his finger in your bottom and you just don't remember?

A: Yes.

Q: And is it possible that he didn't and you don't remember?

A: Yes.

¶31 As discussed above, the nurse also testified that, within hours of the assault, the victim said Cheatham had "put his finger in my butt." As a result, she examined the victim's anus carefully and discovered a "two millimeter abrasion with a little bit of blood . . . just inside his anus." Further, the nurse testified the injury was recent because "[t]he blood was not yet dried." This evidence was sufficient to support the jury's conviction on sexual conduct "by sexual intercourse."

¶32 Thus, the State presented the jury with more than sufficient evidence to support its verdicts on Counts 1-3. The

