DIVISION ONE
FILED: 12/27/2012
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0804
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
EDUARD JAN BERT WILLEKENS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-006563-001

The Honorable Connie Contes, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Division Chief Counsel
Joseph T. Maziarz, Section Chief Counsel
And Robert A. Walsh, Assistant Attorney General
Criminal Appeals Section
Attorneys for Appellee

Droban & Company, P.C. — Anthem
By Kerrie M. Droban
Attorneys for Appellant

W I N T H R O P, Chief Judge

¶1 Eduard Jan Bert Willekens ("Appellant") appeals his convictions and sentences for seven counts of sexual

exploitation of a minor and three counts of surreptitious photographing, videotaping, filming, or digitally recording ("surreptitious videotaping") involving his stepdaughter ("the victim"). Appellant argues (1) the evidence is insufficient to support his convictions, (2) the trial court abused its discretion by admitting evidence of prior acts, and (3) his sentences constitute cruel and unusual punishment. For the reasons that follow, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

¶2 In September 2010, a grand jury issued an indictment, charging Appellant with seven counts of sexual exploitation of a minor, a class two felony and dangerous crime against children, and four counts of surreptitious videotaping, a class five felony, after members of the victim's family discovered a videotape containing scenes of the victim in two bathrooms while she was nude and/or in the process of undressing. The indictment alleged that the incidents that were the basis for the charges occurred between November 1996 and November 2000, when the victim was between eleven and fourteen years old.

¶3 A jury found Appellant guilty of all seven counts of sexual exploitation of a minor and three counts of surreptitious videotaping.[1] The trial court sentenced Appellant to an

[1] During trial, the trial court granted the State's motion to dismiss one count of surreptitious videotaping.

aggregate term of 120.5 years' imprisonment in the Arizona Department of Corrections.

¶4 Appellant filed a timely notice of appeal. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012),[2] 13-4031, and 13-4033(A)(1) and (4).

II. ANALYSIS

A. Sufficiency of the Evidence

¶5 Appellant argues the trial court erred in denying his motion for judgment of acquittal, *see* Ariz. R. Crim. P. 20, because the State's evidence was insufficient to support his convictions. A judgment of acquittal is appropriate only "if there is no substantial evidence to warrant a conviction." *Id*. "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996) (citation omitted). For reversible error based on insufficiency of the evidence to occur, there must be a complete absence of probative facts to support the conviction. *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). We will not set aside a jury verdict for insufficient evidence unless it

[2] Unless otherwise noted, we cite the current Westlaw version of the statutes if no changes material to our analysis have occurred since the relevant dates.

"clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) (citation omitted).

¶6 As charged in this case, a person commits surreptitious videotaping if the person knowingly videotapes, digitally records, or by other means secretly views or records another person without that person's consent while the other person is in a restroom, bathroom, or other location where that person has a reasonable expectation of privacy, and the other person is dressing, undressing, or nude. *See* A.R.S. § 13-3019(A)(1).[3] Also as charged in this case, a person commits sexual exploitation of a minor if the person knowingly records, films, photographs, develops, or duplicates any visual or print medium in which a minor under fifteen years of age is engaged in exploitive exhibition. *See* A.R.S. § 13-3553(A)(1).[4] The term

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[3] Appellant was charged under former A.R.S. § 13-3018(A)(1)-(2), which came into effect in 1998. *See* 1998 Ariz. Sess. Laws, ch. 289, § 11 (2nd Reg. Sess.). In 2000, the statute was renumbered as A.R.S. § 13-3019 and slightly amended. *See* 2000 Ariz. Sess. Laws, ch. 189, §§ 21, 23 (2nd Reg. Sess.). The legislature also revised the statute in 2006. *See* 2006 Ariz. Sess. Laws, ch. 146, § 2 (2nd Reg. Sess.). The amendments do not impact our analysis.

[4] In 1996, before Appellant committed the charged crimes, the legislature amended § 13-3553 to include the term "exploitive exhibition." *See* 1996 Ariz. Sess. Laws, ch. 112, § 3 (2nd Reg. Sess.). The statute was also amended during the timeframe in which Appellant committed his crimes. *See* 1998 Ariz. Sess.

"exploitive exhibition" is defined as "the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer." A.R.S. § 13-3551(4).[5] Appellant argues on appeal that there was no evidence he made the videotape.[6]

¶7 In our review of the record, we construe the evidence in the light most favorable to sustaining the verdict, and we resolve all reasonable inferences against Appellant. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). We also draw all reasonable inferences that support the verdict. *State v. Fulminante*, 193 Ariz. 485, 494, ¶ 27, 975 P.2d 75, 84 (1999). Additionally, we resolve any conflict in the evidence

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Laws, ch. 147, § 3 (2nd Reg. Sess.); 1999 Ariz. Sess. Laws, ch. 261, § 29 (1st Reg. Sess.) (changing the term "visual or print medium" to "visual depiction"); 2000 Ariz. Sess. Laws, ch. 189, § 28 (2nd Reg. Sess.). These amendments, as well as subsequent amendments to the statute, do not impact our analysis in this case.

[5] In 1996, before Appellant committed his crimes, the legislature amended A.R.S. § 13-3551, in part to provide a definition for the term "exploitive exhibition." *See* 1996 Ariz. Sess. Laws, ch. 112, § 1 (2nd Reg. Sess.). During the timeframe in which Appellant committed his crimes, the legislature further amended § 13-3551. *See* 1999 Ariz. Sess. Laws, ch. 261, § 27 (1st Reg. Sess.); 2000 Ariz. Sess. Laws, ch. 189, § 27 (2nd Reg. Sess.) (renumbering the definition of the term "exploitive exhibition" from subsection (1) to subsection (4)). These amendments, as well as a subsequent amendment to the statute, do not impact our analysis in this case.

[6] Although Appellant also argues there was no evidence he possessed the videotape, possession is not an element of either offense as charged in this case.

in favor of sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We do not weigh the evidence, however, because that is the function of the jury. *See id*.

¶8 As we have noted, Appellant was the victim's stepfather. Appellant and the victim's mother were married approximately nineteen years. In February 2010, the victim's mother took the children, moved in with her parents, and began the process to divorce Appellant. Shortly thereafter, the victim's mother and grandmother returned to Appellant's home, where Appellant still lived, and retrieved a number of items, including many videotapes the family had made over the years. In a subsequent review of the tapes to determine which should be retained and which should be discarded, the victim's grandmother discovered the videotape that resulted in the charges against Appellant.

¶9 The video contained a number of scenes of the victim when she was as young as eleven or twelve years old and as old as thirteen or fourteen years old. The victim's hairstyle and physical development changed from scene to scene, and the scenes were not in chronological order. Each scene depicted the victim in either the master bathroom of the house or the bathroom used by the children, and each scene was videotaped through an open door. The victim sometimes left the bathroom door open when she

bathed. Some of the scenes contained “loops,” in which the scene was momentarily reversed to repeatedly show the same action, such as the victim getting out of the bathtub in one scene or taking off her underwear in another.

¶10 Each scene that related to a count of surreptitious videotaping showed the victim nude, sitting and/or standing in a bathtub. Each scene that related to a count of sexual exploitation of a minor showed the victim in a bathroom while her pubic area and/or genitals were visible, usually after she stood to get out of the bathtub. The scenes could be differentiated by the presence of a window in one of the two bathrooms, the victim’s physical development and hairstyle, the victim’s activities, changes in camera position, and/or the appearance of other objects in the scene. The victim did not appear to know she was being videotaped. Neither the victim’s grandmother nor mother made the video, and neither knew how to edit or transfer video. Also, the victim did not make the video.

¶11 Appellant owned two video cameras. He admitted during the investigation of this case and in the divorce proceedings that, when the victim was nine or ten years old, he surreptitiously videotaped her while she was nude and playing in an empty bathtub. Appellant admitted he knew when the victim would be in the bathroom, so he put the video camera in the

bedroom and filmed her through the open bathroom door. Appellant claimed he did so only because he was curious and wanted to check the victim's development. Several years later, the victim caught Appellant attempting to use a mirror to look under the bathroom door and view her while she was nude. In another incident, the victim's mother caught Appellant attempting to look under the bathroom door and view the victim while the victim was nude.

¶12 The evidence was sufficient to permit a rational jury to find beyond a reasonable doubt that Appellant committed the charged offenses of surreptitious videotaping and sexual exploitation of a minor. Although reasonable minds could differ regarding inferences to be drawn from the evidence, that was a matter for the jury. *See State v. Hickle*, 129 Ariz. 330, 331, 631 P.2d 112, 113 (1981). Further, although much of the evidence was circumstantial, "[t]he probative value of evidence is not reduced because it is circumstantial." *State v. Murray*, 184 Ariz. 9, 31, 906 P.2d 542, 564 (1995) (citation omitted). "The conviction may be proved by circumstantial evidence alone." *State v. Burton*, 144 Ariz. 248, 252, 697 P.2d 331, 335 (1985) (citation omitted). Finally, although Appellant suggests the State failed to sufficiently disprove that someone else with access to the victim and her home may have made the videotape, "it is unnecessary for the prosecution to negate every

conceivable hypothesis of innocence when guilt has been established by circumstantial evidence." *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985) (citation omitted).

B. Evidence of Other Acts

¶13 As previously noted, the State introduced evidence of two prior incidents in which the victim and her mother caught Appellant attempting to look at the victim under the bathroom door. The trial court admitted the evidence pursuant to Arizona Rule of Evidence ("Rule") 404(b) as evidence of motive, opportunity, and intent.[7] Appellant argues the trial court erred when it admitted this evidence because there was insufficient evidence to show the incidents occurred, and these incidents were irrelevant, not sufficiently similar to the charged offenses, unfairly prejudicial, and not admitted for a proper purpose.[8]

¶14 We review the admission of evidence pursuant to Rule 404(b) for an abuse of discretion. *State v. Van Adams*, 194 Ariz. 408, 415, ¶ 20, 984 P.2d 16, 23 (1999). Evidence of prior acts is admissible pursuant to Rule 404(b) if relevant and

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[7] Although the majority of Appellant's argument on appeal addresses admission of this evidence in the context of Rule 404(c), the trial court expressly held that it was not admitting evidence of these two prior incidents pursuant to Rule 404(c). Therefore, we do not address Rule 404(c).

[8] Appellant raises no issue regarding admission of the evidence that he surreptitiously videotaped the victim while she was in the bathroom nude when she was nine or ten years old.

admitted for a proper purpose, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* Before a court may admit evidence of other acts, however, the proponent must show "by the clear and convincing standard that the act was committed and that the defendant committed it." *State v. Prion*, 203 Ariz. 157, 163, ¶ 37, 52 P.3d 189, 195 (2002). An "exact replication" of the charged offense to the prior acts is not required for the evidence to be admissible. *State v. Lopez*, 170 Ariz. 112, 117, 822 P.2d 465, 470 (App. 1991).

¶15 The trial court did not abuse its discretion when it admitted evidence of the two other acts. Regarding the sufficiency of the evidence, the victim and her mother provided substantial testimony sufficient to permit the jury to find by clear and convincing evidence that Appellant committed the other acts.[9] Further, evidence that Appellant had attempted to look under the bathroom door to view the victim in the nude was relevant to establish his motive, opportunity, and/or intent. Regarding similarity, the act of attempting to look under a bathroom door to surreptitiously view the victim in the nude is

[9] Appellant argues on appeal it would be impossible for him to look under a bathroom door because of his prosthetic leg. The only evidence Appellant introduced at trial was that he had a prosthetic leg of an undetermined type. There was no evidence his prosthetic leg limited him in such a way as to make it impossible for him to look under a bathroom door.

sufficiently similar to the charged offenses to render the other acts admissible pursuant to Rule 404(b). Further, the evidence was not substantially outweighed by the danger of unfair prejudice. Finally, the trial court gave the jury an instruction that limited consideration of this evidence to establishing the factors identified in Rule 404(b) and prohibited consideration of the evidence for other purposes. We presume that the jury followed its instructions. *See State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996).[10]

C. Cruel and Unusual Punishment

¶16 Because the seven counts of sexual exploitation of a minor were dangerous crimes against children, the trial court sentenced Appellant for each of those counts pursuant to former A.R.S. § 13-604.01.[11] Subsection (D) of the statute provides that the trial court shall sentence a defendant convicted of sexual exploitation of a minor as a dangerous crime against children to a presumptive term of seventeen years' imprisonment. The sentence may be mitigated or aggravated by up to seven years. *See* former A.R.S. § 13-604.01(F); *see also* current

[10] Because we find no error in the admission of the evidence pursuant to Rule 404(b), we need not address the trial court's determination that the evidence would also have been admissible pursuant to A.R.S. § 13-1420.

[11] *See* current A.R.S. § 13-705(D). Former A.R.S. § 13-604.01 was renumbered as § 13-705 and amended effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29 (2nd Reg. Sess.).

A.R.S. § 13-705(D). Subsection (K) of former A.R.S. § 13-604.01 provides that a sentence for a dangerous crime against children shall be served consecutively to any other sentence. *See also* current A.R.S. § 13-705(M).

¶17 Appellant argues that his seventeen-year sentences for sexual exploitation of a minor, both individually and in the aggregate, constitute cruel and unusual punishment. We review *de novo* whether a sentence constitutes cruel and unusual punishment. *See State v. Kasic*, 228 Ariz. 228, 231, ¶ 15, 265 P.3d 410, 413 (App. 2011).

¶18 The Eighth Amendment bars cruel and unusual punishment. *State v. Berger*, 212 Ariz. 473, 475, ¶ 8, 134 P.3d 378, 380 (2006). In a "noncapital" setting, this means that the sentence imposed may not be grossly disproportionate to the crime. *Id*. at ¶ 10. In analyzing whether a sentence is grossly disproportionate, "a court first determines if there is a threshold showing of gross disproportionality by comparing 'the gravity of the offense and the harshness of the penalty.'" *Id*. at 476, ¶ 12, 134 P.3d at 381 (quoting *Ewing v. California*, 538 U.S. 11, 28 (2003)). In doing so, the court "must accord substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences." *Id*. at ¶ 13. If a legislature has reasonable grounds to believe a sentence advances the goals of that state's criminal justice

system "in any substantial way," and the sentence "arguably furthers the State's penological goals and thus reflects 'a rational legislative judgment, entitled to deference,'" a sentence is not grossly disproportionate and the analysis need not continue further. *Id*. at 477, ¶ 17, 134 P.3d at 382 (quoting *Ewing*, 538 U.S. at 28, 30). It is exceedingly rare that a sentence in a noncapital case will violate the prohibitions against cruel and unusual punishment. *See id*.

¶19 A seventeen-year sentence for sexual exploitation of a minor is not grossly disproportionate to the crime. "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Id*. at ¶ 18 (quoting *Osborne v. Ohio*, 495 U.S. 103, 109 (1990)). Our legislature has a reasonable basis to believe that the lengthy sentences it has prescribed for sexual exploitation of a minor advance the goals of the Arizona criminal justice system in a substantial way. *Id*. at 478, ¶ 23, 134 P.3d at 383. A ten-year minimum sentence for sexual exploitation of a minor based on the mere possession of a single image of a child engaged in exploitive exhibition or other sexual conduct is not grossly disproportionate to the crime. *See id*. at 474, ¶ 1, 134 P.3d at 379.[12] Likewise, we

[12] The United States Supreme Court denied certiorari in *Berger*. *Berger v. Arizona*, 549 U.S. 1252 (2007).

find a seventeen-year presumptive sentence for sexual exploitation of a minor based on the creation of images of a child engaged in exploitive exhibition or other sexual conduct is not grossly disproportionate to the crime. Finally, the fact that the seventeen-year sentences must be served consecutively is not legally significant. "[I]f the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." *Berger*, 212 Ariz. at 479, ¶ 28, 134 P.3d at 384 (citation omitted).

III. CONCLUSION

¶20 Appellant's convictions and sentences are affirmed.

/S/
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

/S/
MICHAEL J. BROWN, Presiding Judge

/S/
JOHN C. GEMMILL, Judge