DIVISION ONE
FILED: 11/06/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0842
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
CHARLES HENRY TODD,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Yavapai County

Cause No. V1300CR201180229

The Honorable Michael R. Bluff, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

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Attorney for Appellant

H O W E, Judge

¶1 Charles Henry Todd appeals his convictions for two counts of luring a minor for sexual exploitation. Todd argues

the trial court erred in admitting evidence of other acts and in excluding statements Todd made to two witnesses. Todd also argues the evidence was insufficient to support his conviction for count 1 and that the State's closing argument made that count duplicitous. For the reasons that follow, we find no error and affirm Todd's convictions.

FACTS AND PROCEDURAL HISTORY

¶2 In March 2011, an undercover Yavapai County deputy sheriff investigating the online solicitation of minors for sex created a fictitious profile on a social networking website. She listed her age as "19," but named the profile "Allyee13" and described herself as a thirteen-year old girl looking for an older boyfriend:

> Okay this is w[h]ere Im spose to brag about myself so here goes . . . . I live with my mom . . . . *Im in 7th grade homeschooled* which I hate btw. I love to chat but hate guys who try to get all nasty with me cuz Im not into that just here to chat n have fun n hopefully *find a bf* but u gotta get to no me first n me u before that can happen. Oh n I *like older guys* exp to chat with cuz guys my age or close are mostly all real jerks.

(Emphasis added.)

¶3 Todd sent Allyee13 a friend request through the website. Allyee13 responded that she does not often use the website, but Todd could chat with her on Yahoo Messenger. She asked, "You are okay chatting with me even though I am not

nineteen?" Todd replied, "The age thing has never been a problem with me." Todd added Allyee13 to his Yahoo Messenger account and requested that she add him: "Lothario60." Todd later testified that Lothario was a Shakespearean character who "used women."[1]

¶4 Between May 1 and May 15, 2009, Todd chatted online with Allyee13, believing that she was the thirteen-year-old girl described in her profile. Todd told her about his military, education, and work background. He sympathized when Allyee13 complained about being bored of living with a strict mom in a small town with nothing to do. Todd told Allyee13, "I will do anything u ask but I won't let u get in trouble and u are old enough to know that." When Allyee13 responded, "U cant realy keep me from doin stuff u [know]," he replied, "U r right, u can make ur own decisions." Although Todd also stated concerns that he might be "a bit too old for [her]," he urged Allyee13, "[We] could have a lot of fun but neither of us wants any trouble."

¶5 On May 2, Todd began chatting overtly about sex. He asked Allyee13 about the guys who "talked dirty" to her. She told him they asked her to take "dirty pictures," which she did not appreciate. Todd responded, "[E]ew, not me. I have seen naked women, made love to women, so I don't need pictures, I

[1] Lothario is actually the seducer in Nicholas Rowe's play, *The Fair Penitent* (1703). *See* Webster's Third New International Dictionary Unabridged 1338 (2002).

prefer the real thing." He described sex as "[p]retty simple really, it is what come[s] before that is fun and enjoyable." He assured Allyee13 that she will have sex someday, "But that is ur decision, it is ur body." Todd told Allyee13 that she was a "smart girl" when she told him that she watched sex videos on the computer. He said that he never "really" got into pornography because he "started [having sex] early in life, with an older woman," when he "was 14 and she was 18."

¶6 On May 12, Todd told Allyee13 that he read an internet story "about a guy having an affair with a 13 yr old girl and he was in his 50's." Todd said that the story made him think of Allyee13 and made him "really hard." Todd told Allyee13 that he liked her "a lot" and hoped to "hook up some day." He also said that Allyee13 "d[id] strange things to [his] body" because she was "good looking, sexy [and] smart." When she asked what he wanted her "to do about it," Todd responded that they "should find some time together and figure it out together"; and that he had "experience" being a boyfriend and wanted her "to be even smarter, sexy, closer to [him]" as her boyfriend.

¶7 Todd talked to Allyee13 about oral and vaginal sex, masturbation, orgasms, and contraception. Todd suggested that she could get the "pill" from Planned Parenthood. Allyee13 responded, "[W]ithout my mom? Even tho Im only 13?" Todd conceded that she might have to be sixteen or older to get the

pill without parental consent, but urged, "[U] r smart, u will figure out what to do."

¶8 Todd also complained about his girlfriend, Maria.[2] He said that Maria did not tell him that she "was 12 until like 3 weeks ago," even though they had been together for about four to six months. He said that he discovered her lie when she accidentally revealed that she was turning thirteen instead of fourteen. Later that evening, Todd told Allyee13 that Maria was not talking to him because he told her: "I found a new gf, one who is better looking and more friendlier." When Allyee13 said that his comment was "mean," Todd replied, "[W]ell, she lied to me . . . [about] her age . . . at least u r honest about it in your profile."

¶9 Allyee13 asked Todd whether it was true that "u can do a finger but still be a virgen." Todd replied, "[N]o, a finger could break it." He instructed Allyee13 to stick her finger inside "slowly some day and if [the hymen] is there [she] will feel it." He told her that it "should feel like a piece of tissue or plastic stretched across most of it." He then lamented, "I guess you have started your periods by now," and told her, "[K]inda sucks being your age."

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[2] In a prior e-mail, Todd referred to Maria when telling Allyee13 that he did not have a "steady girlfriend," but stated that he was "dating," and "ha[d] a 13 yr old that helps me clean my house and txts me at some real weird hours."

¶10 Todd suggested that Allyee13 ask her doctor to check to see if her hymen was intact, but then offered: "I can check it for you." After some confusion in the conversation, Allyee13 asked for clarification; Todd repeated his offer: "[I]f we meet I could check u to see if it [is] still there." At the end of their chat that night, Todd told her, "[S]till wanna take u to Disneyland some day."

¶11 On May 13, Todd again chatted with Allyee13 about his sexual history. Asked whether he had always liked "younger girls," Todd responded, "I guess so even when I was 10 I fooled around with a bunch of 8 and 9 yr old girls." Todd stated that his youngest girlfriend since he turned age twenty-five had been "about [Allyee13's] age a year either way, 12-15 I guess." He told Allyee13 that his first sexual encounter was at age "12, maybe 13, with an older woman . . . in her mid[-]twenties"; and that he had sex with a "12th grade English teacher," and with "twin sisters at the same time . . . in a tent in their back yard." Todd explained that he loved women, but that they would also ask him to do "weird things." He explained that some women wanted to be bound and blind-folded, to have anal sex, or to have her boyfriend watch while Todd had sex with her.

¶12 Todd bragged that a mother once introduced him to her daughter at a sex party because she wanted to find someone "that would be best for her daughter." Todd said that the mother

selected him because of his reputation, and that she "wanted her daughter to learn from a guy that knew what to do." Allyee13 asked if Todd knew "how to teach girls stuff." Todd responded, "[Y]es I do, and not just sex." When asked if sex would hurt, Todd replied that it "depends on the girl, but instead of just slamming it in, yes, it woul[d] be no different tha[n] pinching ur arm." Todd stated that he believed a "girl should enjoy what is happening, to [b]e a part of it, not just lay there until the guy is done." He asked Allyee13, "[D]on't you want to have the fun and pleasure also?"

¶13 After Allyee13 answered his question about what sexual acts she enjoyed, Todd responded, "you will learn and love to do more because u r a sensual person." Todd described in detail sexual acts that she could perform to arouse a man, such as tying him up, teasing him with her nipple and wearing sexy underwear. He said, "I get hard just thinking about it." Todd told Allyee13, "[F]or a guy that likes younger women you are like a gift from Santa early."

¶14 Todd suggested that they go some place where they could be together. Allyee13 asked if Todd meant that they should go somewhere "to do stuff." When he replied yes, she suggested that they bring blankets to the forest or that they go to a hotel, his house, or even his car if it was big enough to lie down in. Todd replied that his "car is big enough." After

further discussion, Allyee13 arranged to meet Todd at a park around noon the next day.

¶15 Todd was arrested the next day when he drove to the park for their rendezvous. Todd denied that he went there to have sex. The State charged Todd with two counts of luring a minor for sexual exploitation based on his online solicitations of Allyee13 for digital penetration (count 1) and oral sex (count 2).

¶16 Before trial, Todd moved to preclude all evidence of uncharged sexual acts with anyone other than the undercover detective. The State responded that it was not seeking to present evidence of other uncharged acts, but only those intrinsic to the charged crime of luring a minor for sexual exploitation. Todd replied that he objected only to the evidence about Maria because she had denied any sexual contact with Todd, and therefore, he argued the evidence did not show that he possessed "an abnormal, sexual interest in children." Noting that Todd had not objected to intrinsic evidence of the charged crime, the trial court granted his motion.

¶17 On the second day of trial, the parties were confused about which evidence the trial court had excluded. The State explained that the court had excluded evidence of Todd's sexual conduct with Maria, and the State agreed with that ruling. The State handed the court a redacted transcript of the online chats

that contained discussions about Maria's age and his sexual experiences with underage girls. The State argued that the evidence was admissible because it did not refer to Todd's sexual acts with Maria and was relevant to show his knowledge that Allyee13 was thirteen-years old——the same age as Maria. Todd objected to the evidence, admitting that he was arguing for the first time that the evidence was improper character evidence under the Arizona Rules of Evidence ("Rule") 404(b) and (c).

¶18 After taking the matter under advisement, the trial court clarified that although it had ruled that other acts evidence would be precluded under Rule 404, the redacted transcript of the online chats contained evidence intrinsic to the charged crimes. Accordingly, the court admitted the redacted transcript as exhibit 21.

¶19 Todd testified that he knew three or four days into their chats that Allyee13 was a police officer and not a minor. He testified that he even told his then girlfriend, D.L., and her son-in-law that he believed that he was chatting with a police officer. Todd said that he came to the park to invite the officer to "go have a beer or drink a cup of coffee" with him so that he could show the officer "a better way" to catch adults soliciting children for sex.

¶20 During Todd's testimony, his counsel asked if he ever had "any sexual relationships with Maria." The State then moved

to admit the excluded portions of the online discussion about his sexual acts with Maria and his sexual interest in children, arguing that Todd's testimony had "opened the door" to the precluded evidence. The court took the matter under advisement, noting its concern that admitting the evidence now would confuse the jury. At the next hearing, the trial court denied the State's motion to admit the excluded evidence but concluded that the evidence in the redacted transcript, including evidence about his twelve-year-old girlfriend Maria and his sexual experiences with other underage girls, had been admitted as intrinsic evidence.

¶21 The jury convicted Todd on both counts as charged. Todd timely appeals. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A), 13-4031 and -4033 (Westlaw 2012).[3]

DISCUSSION

1. Intrinsic Acts Evidence

¶22 Todd first argues that the trial court erred by admitting evidence of his online discussions about his relationship with his twelve-year-old girlfriend, Maria, and his sexual experiences with other under-aged girls. Todd contends

[3] We cite to the current version of applicable statutes when no revisions material to this decision has occurred since the date of the offenses.

that this was improper character evidence of other acts under Rule 404(b) (other acts) and 404(c) (acts showing a propensity for sexually aberrant behavior). "The trial court has considerable discretion in determining the relevance and admissibility of evidence, and we will not disturb its ruling absent a clear abuse of that discretion." *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). An abuse of discretion is "an exercise of discretion [that] is manifestly unreasonable, exercised on untenable grounds or for untenable reasons." *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992). "[T]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge." *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985) (citation omitted).

¶23 We find that the trial court did not abuse its discretion in admitting the evidence of the online chats about Maria and Todd's sexual experiences with underage girls as intrinsic to his charged offenses. "Intrinsic evidence" is evidence that: "(1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates

commission of the charged act." *State v. Ferrero*, 229 Ariz. 239, 243, ¶ 20, 274 P.3d 509, 513 (2012).[4]

¶24 Todd was charged with "luring a minor for sexual exploitation," which occurs when a person offers or solicits sexual conduct with another person, knowing or having reason to know that the other person is a minor. *See* A.R.S. § 13-3554(A). Evidence of Todd's discussions about Maria and her age, and of his sexual experiences with other underage girls was intrinsic to the luring of Allyee13 for sexual exploitation because it (a) directly facilitated his solicitation of Allyee13 and (b) occurred contemporaneously with it.

¶25 Todd's efforts to solicit Allyee13 began almost immediately after their initial contact on Yahoo Messenger. Todd repeatedly assured Allyee13 that he would not harm her or get her in trouble and that she was old enough to know when to

[4] At the time of trial, evidence was considered "intrinsic" to the crime if (1) evidence of the other act and evidence of the crime charged are "inextricably intertwined"; (2) both acts are part of a "single criminal episode"; or (3) the other acts were "necessary preliminaries" to the crime charged. *State v. Andriano*, 215 Ariz. 497, 502, ¶ 18, 161 P.3d 540, 545 (2007), *abrogated by Ferrero,* 229 Ariz. 239, 274 P.3d. 509. During this appeal, the Arizona Supreme Court narrowed the definition of intrinsic evidence in *Ferrero,* 229 Ariz. at 243, ¶ 20, 274 P.3d at 513. Because *Ferrero* applies retroactively to all cases not yet final, we apply its narrow definition of intrinsic evidence here. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding that a new criminal rule "is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").

have sex because it was her body. He complimented her as being "smart" for having watched sex videos on the computer. He also told Allyee13 multiple times that she was smart and sexy. After teaching her about various sexual acts, Todd assured Allyee13 that she "will learn to do more because [she is] a sensual person." He told her a story about a middle-aged man who had "an affair" with a twelve-year-old girl. He said the story reminded him of her and gave him an erection. Todd then discussed his sexual experiences, sexual prowess, reputation as a "guy who knew what to do," and prior relationships with underage girls as part of the groundwork to, in the language of the statute, "lure" Allyee13.

¶26 Todd's discussion of these matters was an integral part of his efforts to persuade Allyee13 to accept his offers or solicitations of sexual conduct. Todd's words served to groom Allyee13 and to accustom her to the idea of a sexual relationship between a thirteen-year-old girl and a middle-aged man. Todd also sought to persuade her that such relationships were not unusual but acceptable; that he had prior, successful experience with these relationships; that he knew what he was doing and, for these reasons, it would be safe for her to be with him.

¶27 Because these discussions occurred within the days before his actual offer of sexual conduct, they were part of the

grooming process and were contemporaneous with it. Under these circumstances, the trial court did not err in ruling that this was intrinsic evidence of Todd's crime.[5]

2. Exclusion of Todd's Hearsay

¶28 Todd next argues that the trial court erred by excluding hearsay testimony from D.L. and her son-in-law that he told them before his arrest that he believed he had been chatting with an undercover police officer. Specifically, Todd argued that his statements were not hearsay but prior consistent statements offered to rebut the State's implication of recent fabrication under Rule 801(d)(1)(B). Todd alternatively argues that his statements to these witnesses were admissible under Rule 803(3) as evidence of his "state of mind." We need not resolve whether the trial court correctly excluded this testimony because Todd's counsel nevertheless skillfully placed this information before the jury.

¶29 In his opening statement, Todd's counsel informed the jury that Todd believed he was chatting with a law enforcement officer involved in a sting operation and knew the person was not a minor. His counsel said that Todd told this to D.L. and her son-in-law before his arrest, and that the detective verified Todd's claim by speaking with D.L. The jury then heard

[5] Accordingly, we need not determine whether the evidence was also admissible under Rules 404(b) and (c).

evidence that Todd told the detective that he knew he was chatting with a law enforcement officer and that Allyee13 was not a minor. The detective also testified that because of Todd's claims, she met with D.L. to verify Todd's statement to the detective that he told D.L. that he knew that Allyee13 was a law enforcement officer. The detective acknowledged that she verified that part of Todd's claims. While they were not allowed to testify about what Todd actually said to them, D.L. and her son-in-law testified that Todd talked to them about his internet chats several days before he was arrested. Todd testified that during those conversations, he told them that he believed that he had been chatting with a law enforcement officer.

¶30 Todd's counsel then argued in closing that a week before Todd's arrest, he separately told D.L. and her son-in-law that he believed he was chatting with a law enforcement officer. Counsel argued that the detective admitted on the stand that as a result of Todd's claims, she verified with D.L. that Todd told her that he believed he was chatting with a law enforcement officer as part of a police operation.

¶31 In sum, Todd successfully presented this information to the jury despite the court's ruling that prevented his witnesses from testifying as to what he told them. Because the

jury thus considered the evidence, we find no reversible error on this ground.

3. Sufficiency of the Evidence

¶32 Todd argues that insufficient evidence supported his conviction for count 1, luring a minor for sexual exploitation. "A person commits luring a minor for sexual exploitation by offering or soliciting sexual conduct with another person knowing or having reason to know that the other person is a minor." A.R.S. § 13-3554(A). The fact that the other person is not a minor is not a defense. A.R.S. § 13-3554(B). "Sexual conduct" includes actual penetration of the vagina by any object except when done as part of a medical procedure. A.R.S. § 13-3551(9)(b).

¶33 Todd argues that his offer to check whether Allyee13's hymen was still intact was not an offer of "sexual conduct" as defined, but an offer to merely touch the exterior of her genitals with his hand. Todd further argues that a finger is not an "object." He does not contest the sufficiency of the evidence to support any other element of the offense.

¶34 "Reversible error based on insufficiency of the evidence occurs only where there is 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). "To set aside a jury verdict for 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. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) (citation omitted). "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene,* 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998) (citation omitted). We resolve any conflict in the evidence in favor of sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We do not reweigh the evidence. *See id*.

¶35 Sufficient evidence supports the jury's finding beyond a reasonable doubt that Todd offered or solicited "sexual conduct" from Allyee13. Todd did not offer to touch the outside of Allyee13's genitals as he now claims. Todd told Allyee13 to insert her finger inside to check for her hymen and described what it should feel like. Todd even offered to meet with Allyee13 and check for her. A reasonable jury could infer from this evidence that Todd offered or solicited to penetrate Allyee13's vagina with his finger to check for her hymen. This satisfies the definition of "sexual conduct" under the statutes.

See A.R.S. § 13-3551(9)(b) (defining "sexual conduct" to include penetration of the vagina "by any object").[6]

4. Duplicity of Count 1

¶36 Todd finally argues that the State's comments during closing argument that he made "two different offers" to check Allyee13's hymen rendered count 1 duplicitous. The record reveals no reversible error.

¶37 A count is duplicitous if the text of the indictment (1) charges two or more distinct and separate offenses or (2) "refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Paredes-Solano*, 223 Ariz. 284, 287, ¶ 4, 222 P.3d 900, 903 (2009). Todd does not argue that the indictment itself charges separate

[6] We reject Todd's argument that the sexual exploitation of children does not include digital penetration because a finger is not an "object" under the statutory definition of "sexual conduct." *See* A.R.S. §§ 13-3501 and -3551. Todd argues that the "object" must be inanimate and cannot include any body part. Todd misplaces reliance on dicta in *State v. Yegan*, 223 Ariz. 213, 221 P.3d 1027 (App. 2009), which states that the definition of "sexual conduct" under the sexual exploitation of children statutes, A.R.S. § 13-3551(9) (criminalizing penetration of the vagina by an object), is more stringent than the definition under the obscenity statutes, A.R.S. § 13-3501(7) (criminalizing physical contact with the genitals). *Yegan* did not involve digital penetration and does not support Todd's contention that a finger is not an "object." Nor does a plain reading of the word "object" preclude all body parts. Such an interpretation is irrational and would lead to the absurd result that penile penetration is not considered "sexual conduct." *See State v. Estrada*, 201 Ariz. 247, 251, ¶¶ 17-18, 34 P.3d 356, 360 (2001) (statutes shall be construed in a manner that avoids an irrational or absurd result).

crimes in count 1. Instead, he argues that the State effectively made the charge duplicitous during closing argument by stating that Todd committed count 1 "two different times." The transcript of the closing argument, however, shows that the State discussed only one criminal act of solicitation in count 1.

¶38 During closing argument, the State reviewed Todd's chat with Allyee13 chronologically. It explained that when Allyee13 asked Todd if she could still be a virgin after her boyfriend inserted his finger, Todd suggested that Allyee13 go ask her doctor to check whether her hymen was intact. Todd suggested that she could also insert her own finger inside to check for the hymen and described what that should feel like. The State argued that this was the first time Todd solicited her. The State then described Todd's confusion after Allyee13 asked, "[W]hat would you ask?" still referring to the doctor. Confused, Todd responded, "Ask who?" Allyee13 asked Todd if he had offered to check for her because she did not want to ask her doctor. Todd responded by repeating his offer: "[I]f we meet, I could check to see if [your hymen] is still there." The State explained that this was when he "again, attempted to offer to check her virginity by inserting his finger." It stated: "That's a digital penetration of the vagina, and that's been offered to be sexual conduct from him. That's two different

occasions he committed Count I[,]" and that he offered to check it twice. In context, the State was not urging the jury to find two distinct and separate acts of solicitation, but simply noting that Todd was clarifying Allyee13's misunderstanding of his offer of sexual conduct.[7] Moreover, the State's argument could not have prejudiced him because the evidence presented at trial revealed no other act of solicitation, and the court had instructed the jury that an attorney's comments during closing argument are "not evidence." *See State v. Hamilton*, 177 Ariz. 403, 410, 868 P.2d 986, 993 (App. 1993) (holding that reversal based on a duplicitous charge requires that a defendant demonstrate actual prejudice). We thus find no error.

[7] Todd supports his argument with the Arizona Supreme Court's decision in *State v. Davis,* 206 Ariz. 377, 388-89, ¶ 51, 79 P.3d 64, 75-76 (2003), which held that a single charge of sexual conduct with a minor was duplicitous because the State had argued that the jury could have found him guilty of that charge based on two separate acts of sexual intercourse that occurred eleven days apart. *Davis* is inapplicable to this case, however, because, unlike *Davis*, the evidence here shows that only one criminal act occurred.

CONCLUSION

¶39 For the reasons stated, we affirm Todd's convictions and sentences.

__/s/_____
RANDALL M. HOWE, Judge

CONCURRING:

___/s/_____
JOHN C. GEMMILL, Presiding Judge

__/s/_____
ANDREW W. GOULD, Judge