DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0011
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
TODD ROBERT LAUGHLIN,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR 2005-032107-001 SE

The Honorable Sherry K. Stephens, Judge
The Honorable Helene F. Abrams, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Joel M. Glynn, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Todd Robert Laughlin ("Laughlin") appeals his convictions for four counts of sexual exploitation of a minor. Laughlin presents two primary issues on appeal. Laughlin argues the trial court erred when it admitted a number of uncharged images depicting minors engaged in exploitive exhibition and/or other sexual conduct in addition to the images that made the basis of the charges. Laughlin further argues the trial court erred when it refused to strike a juror for cause. For the reasons that follow, we affirm Laughlin's convictions.

FACTUAL AND PROCEDURAL HISTORY

¶2 Laughlin was charged with ten counts of sexual exploitation of a minor after images depicting minors engaged in exploitive exhibition and/or other sexual conduct were found on his computer. As charged in this case, a person commits sexual exploitation of a minor if they knowingly distribute, transport, exhibit, receive, sell, purchase, electronically transmit, possess or exchange any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct. Ariz. Rev. Stat. (A.R.S.) § 13-3553(A)(2)(2001). Laughlin was convicted of nine counts after a six-day jury trial.[1] Laughlin does not contest the sufficiency of the evidence to support his convictions.

[1] Count eight was dismissed prior to trial.

¶3 At the sentencing hearing, the state moved to dismiss five of the counts without any explanation other than it was "in the interest of justice." The trial court granted the motion and Laughlin was sentenced to four mitigated, consecutive terms of ten years' imprisonment. We provide additional details in the context of the issues addressed below.

DISCUSSION

A. Admission of Uncharged Images

¶4 As the first issue on appeal, Laughlin argues the trial court erred when it admitted thirty-seven or thirty-eight uncharged images as "other act" evidence pursuant to Arizona Rules of Evidence 404(b) and 404(c).[2] We review the admission of evidence of other acts pursuant to Rule 404(b) for abuse of discretion. *State v. Van Adams*, 194 Ariz. 408, 415, ¶ 20, 984 P.2d 16, 23 (1999). Likewise, we review the admission of other act evidence pursuant to Rule 404(c) for abuse of discretion. *State v. Garcia*, 200 Ariz. 471, 475, ¶ 25, 28 P.3d 327, 331 (App. 2001).

1. Rules 404(b) and 404(c)

¶5 Evidence of other acts is admissible pursuant to Rule 404(b) if relevant and admitted for a proper purpose, such as to prove motive, opportunity, intent, preparation, plan, knowledge,

[2] Laughlin's opening brief references both thirty-seven and thirty-eight images.

identity, or absence of mistake or accident. *Van Adams,* 194 Ariz. at 415, ¶ 20, 984 P.2d at 23. The purposes for admission identified in Rule 404(b) are illustrative and not exclusive. *State v. Wood*, 180 Ariz. 53, 62, 881 P.2d 1158, 1167 (1994).

¶6 Regarding Rule 404(c), "Evidence of an emotional propensity to commit aberrant sexual acts is admissible [pursuant to Rule 404(c)] to prove that an accused acted in conformity therewith." *State v. Arner*, 195 Ariz. 394, 395, ¶ 3, 988 P.2d 1120, 1121 (App. 1999). 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. at 475, ¶ 26, 28 P.3d at 331 (quoting Ariz. R. Evid. 404(c)). As long as there is a reasonable basis to conclude the evidence of the other act permits an inference that a defendant's aberrant sexual propensity is probative, evidence of the other act is admissible. *Arner*, 195 Ariz. at 396, ¶ 5, 988 P.2d at 1122.

¶7 Before evidence of other acts may be admitted, it must be shown by clear and convincing evidence the other 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. *State v. Lopez*, 170 Ariz. 112, 117, 822 P.2d 465, 470

(App. 1991). It is only necessary that the uncharged prior acts be similar to the charged offense. *Id.*

¶8 There are additional requirements for admission pursuant to Rule 404(c). Before admitting evidence pursuant to Rule 404(c), the trial court must find:

> (A) The evidence is sufficient to permit the trier of fact to find the defendant committed the other act;
>
> (B) The commission of the other act provides a reasonable basis to infer the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged; [and]
>
> (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.

Garcia, 200 Ariz. at 475, ¶ 27, 28 P.3d at 331 (quoting Ariz. R. Evid. 404(c)(1)).

2. Procedural Background

¶9 The procedural history of this issue is long and convoluted. The evidentiary hearing on the admissibility of these images took four days spread out over four months to complete.

¶10 Eleven months before trial, the state filed a motion to admit evidence of other acts pursuant to Rules 404(b) and

(c). In that motion, the state sought to admit two types of evidence. First, the state sought to admit a printed and digital version of an uncharged image on which the word "childlover" appeared and which depicted two women on a couch. Defendant admitted to police he possessed this image and that he printed the hard copy. The state sought to admit this image pursuant to Rule 404(b) only. The state also sought to admit "[t]estimony regarding the amount, location of, and statistical date information about files containing uncharged images and videos which depict apparent minors engaged in sexual conduct or exploitive exhibition." The motion did not seek admission of the uncharged images themselves.

¶11 Over the course of the four-day hearing, it was established police examined Laughlin's computer after it came to their attention it might contain contraband images. Software on the computer identified Laughlin as the registered owner. Video files of Laughlin were discovered on the computer as were audio files in which he identified himself. Police found no evidence to indicate Laughlin's roommate used his computer. Over 400 images of contraband were found on Laughlin's computer and on a compact disc he created. The disc had been created less than a half hour after Laughlin created a video of himself sitting at his computer.

¶12 The majority of the images were duplicates. There were forty-seven original images which depicted what was described generally as "child pornography." The state brought charges for only ten of these original images. Many of the charged and uncharged images were created or accessed at the same time. A printed copy of the "childlover" image was also obtained by police. Digital copies of this same image were found on Laughlin's computer.

¶13 At the conclusion of the first day of the hearing, the trial court noted it was unclear as to what the state sought to admit into evidence. The state explained it sought to admit "Testimony regarding the amount, location of, and statistical date information about files containing uncharged images and video." The state explained it would have a detective testify about this information and describe the content of the uncharged images. The state argued that with the possible exception of the childlover image, it did not seek to admit copies of the uncharged images themselves.

¶14 The state then argued the uncharged images were admissible as other act evidence pursuant to Rule 404(b) to show identity, absence of mistake or accident, to show that Laughlin's roommate was not the person who placed the images on the computer and to show that Laughlin had knowledge of the images on his computer. Before the state could address Rule

404(c), the court continued the hearing and ordered the State to clarify its motion and provide additional information for the court's consideration.

¶15 The second day of the hearing, more specific information was provided regarding the number of images found on Laughlin's computer, how many of those images were originals and how many were duplicates. At the conclusion of the second day, the state explained to the court it wanted to admit the previously described information about thirty-seven of the uncharged images and their contents, but again only through the testimony of a detective. The state argued that it would not admit the uncharged images themselves, but would have a detective testify generally that the images "fit the statute, that they are child pornography" either by testifying as to the contents "in a general way" through comparison to the charged images or through "a conclusory statement that there were other images of child pornography, much like the ones that are charged." If the court deemed it appropriate, the detective could "assist in the showing of any additional uncharged original images." Laughlin objected to presenting descriptions of the contents of the uncharged images through the testimony of a detective and argued if evidence of the images was to be admitted, the determination of what those images contained should be made by the jury.

¶16 The state once again argued the information was admissible pursuant to Rule 404(b) to show identity, absence of mistake or accident and to show Laughlin's knowledge, possession and control of the images. Regarding Rule 404(c), the state argued the evidence was admissible to show Laughlin had an aberrant sexual interest in children. At the completion of the second day of the hearing, the trial court continued the hearing again so that the court could view the uncharged images. The court further ordered the state to provide additional information regarding the images on Laughlin's computer. The third day of the hearing, a detective testified regarding the additional information sought by the court. However, the hearing was continued again and no additional argument was provided at that time.

¶17 The fourth day of the hearing, no additional testimony was provided. The parties once again presented their arguments regarding why the uncharged images should or should not be admitted pursuant to Rules 404(b) and 404(c). By this time, the state was willing to either admit testimony regarding the images or the images themselves, whichever the court deemed more appropriate. However, the state emphasized it sought to admit only testimony regarding the images and not the images themselves. The trial court took the matter under advisement.

¶18 In a subsequent minute entry, the trial court held the State could admit the additional uncharged images pursuant to Rules 404(b) and 404(c). In making its ruling, the court noted it considered the pleadings, testimony and exhibits admitted over the course of the hearing as well as the arguments of counsel. The court further noted it had viewed all the images at issue. In regard to Rule 404(b), the court found the uncharged images were relevant to prove identity, intent, knowledge and absence of mistake or accident. The court further found the probative value of the evidence was not outweighed by the danger of unfair prejudice, confusion of the issues or other concerns identified in Rule 403.

¶19 In regard to Rule 404(c), the court made more detailed findings. The court found there was clear and convincing evidence sufficient to permit the jury to find Laughlin possessed the images found on his computer. The court further found there was clear and convincing evidence sufficient to permit the jury to find Laughlin possessed the printed copy of the childlover image and, therefore, had knowledge, possession and control of the other images of children found on his computer. The court found these facts, coupled with the circumstances of the possession of these additional images and the similar nature of all the images, were sufficient to provide a reasonable basis to infer Laughlin had a character trait

giving rise to an aberrant sexual propensity for sexual attraction to female children under the age of fifteen and to commit the offense of sexual exploitation of a minor. The court found the evidentiary value of these images was not substantially outweighed by the danger of unfair prejudice or any of the other concerns identified in Rules 404(c)(1)(C) or 403.

¶20 The court further explained its rulings were also based on the timeframe within which the alleged acts occurred; the similarities and dissimilarities of the images and the conduct depicted; the strength of the evidence that Laughlin knowingly possessed and accessed the images; the nature and frequency with which the images were accessed and stored on the computer and associated media in various forms and through various methods, and "the surrounding circumstances and relevant intervening events."

¶21 Despite all this, while the uncharged images were admitted into evidence at trial in an envelope, the images were never displayed to the jury nor were their contents described. The only exception appears to be the childlover image, which did not depict children. In fact, there was hardly any reference to the uncharged images at all. We have no way of knowing whether the jurors chose to view the uncharged images during their deliberations. Therefore, we have no way of knowing whether any

juror ever actually saw any of the uncharged images admitted into evidence.

3. Discussion

¶22 Laughlin raises three arguments regarding the admission of the uncharged images. Laughlin argues the images were inadmissible because they were irrelevant for various reasons; the trial court failed to make specific findings when it made its ruling as required by Rule 404(c)(1)(D), and the court erred when it failed to give the jury an instruction limiting its use of this evidence.

4. Relevance

¶23 Laughlin argues the uncharged images were irrelevant because there was no clear and convincing evidence he possessed the images; because there was no evidence which directly linked him to the uncharged images; and because identity, intent, mistake and accident were never at issue because his sole defense was he did not commit the offenses.

¶24 We find no abuse of discretion. Despite Laughlin's assertions to the contrary, the evidence was more than sufficient to permit the trial court to find clear and convincing evidence Laughlin knowingly possessed the uncharged images. Further, identity and intent were at issue, as were the defenses of mistake and/or accident. Among other defenses, Laughlin expressly asserted the defenses of mere presence, lack

of specific intent, lack of criminal intent, mistaken identification and act of God. Intent was further placed at issue when the jury was instructed on mere presence at Laughlin's request. Mistake and/or accident were further placed in issue when Laughlin testified his computer would open web pages on its own and that he would sometimes wake in the morning to find his computer had spontaneously searched for, located and opened up to 160 web pages. Finally, the state had to prove every element of the offense regardless of whether Laughlin contested certain elements. *See State v. Dickens*, 187 Ariz. 1, 18, 926 P.2d 468, 485 (1996)(burden to prove every element of the offense is not relieved by a defendant's failure to contest elements of the offense). Therefore, the trial court did not abuse its discretion when it found the uncharged images were relevant.

5. The Failure to Make Specific Findings

¶25 Regarding the failure to make specific findings, as explained above, Rule 404(c)(1)(D) provides that when admitting evidence of another act pursuant to Rule 404(c), the trial court shall make specific findings regarding the sufficiency of the evidence the defendant committed the other act; whether the commission of the other act provides a reasonable basis to infer the defendant had an aberrant sexual propensity to commit the charged offense; and whether the evidentiary value of the other

act evidence is outweighed by danger of unfair prejudice or other factors identified in Rule 403. Ariz. R. Evid. 404(c)(1)(D).

¶26 However, Laughlin failed to object to the sufficiency of the trial court's findings. Therefore, we review only for fundamental error. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Even once fundamental error has been established, a defendant must still demonstrate the error was prejudicial. *Id*. at ¶ 26.

¶27 Based on the trial court's findings outlined above, we find no error, fundamental or otherwise. The trial court's findings were more than sufficient to comply with Rule 404(c)(1)(D). We fail to see how Laughlin was prejudiced by any failure to provide more specificity or further explanation.

6. The Failure to Give a Limiting Instruction

¶28 Finally, in regard to the failure to give a limiting instruction, Laughlin failed to request a limiting instruction at the time the final instructions were discussed and/or finalized and further failed to object to the omission of a

limiting instruction. Therefore, no limiting instruction was required in the context of Rule 404(b). *See State v. Mott*, 187 Ariz. 536, 546, 931 P.2d 1046, 1056 (1997). Regarding Rule 404(c), while Rule 404(c)(2) provides that a limiting instruction shall be given whenever evidence is admitted pursuant to Rule 404(c), we find no fundamental error. First, fundamental error does not exist where the trial court does not give a limiting instruction sua sponte. *State v. Taylor*, 127 Ariz. 527, 530-31, 622 P.2d 474, 477-78 (1980). Further, the failure to request a limiting instruction "constitutes a waiver of any right to the instruction." *Id*. at 531, 622 P.2d at 478. Finally, because we can never know whether the jury actually viewed the uncharged images, the existence of any prejudice is purely speculative. *See Henderson*, 210 Ariz. at 568, ¶ 26, 115 P.3d at 608 (even where fundamental error occurred, a defendant must still demonstrate the error was prejudicial in order to be entitled to relief).

B. The Refusal to Strike a Juror for Cause

¶29 As the final issue on appeal, Laughlin contends the trial court erred when it refused to strike Juror 3 for cause. During voir dire, Juror 3 expressed concerns regarding whether she could be fair and impartial due to the number of charges pending against Laughlin. When asked if she would be able to follow an instruction directing the jury to consider each charge

independently, Juror 3 responded, "I don't know. He keeps looking at me, and I don't like the way he's looking at me. I don't think I can be. I don't like it." No further questions were asked of Juror 3. Both the state and Laughlin later agreed Juror 3 should be struck for cause. However, when the trial court indicated which jurors would be struck for cause, Juror 3 was not identified. The trial court offered no explanation for why Juror 3 was not struck and neither party objected nor otherwise sought an explanation. Neither party used a peremptory strike to remove Juror 3, who was ultimately the first person selected to serve on the jury.

¶30 We do not address whether the trial court erred when it failed to strike Juror 3 for cause because Laughlin failed to preserve this issue for appeal. "[A] defendant is required to use an available peremptory strike to remove an objectionable juror whom the trial court has refused to remove for cause in order to preserve the issue for appeal. Failing to do so waives any error." *State v. Rubio*, 219 Ariz. 177, 181, ¶ 12, 195 P.3d 214, 218 (App. 2008) (footnote omitted). Because Laughlin failed to exercise a peremptory strike to remove Juror 3, he has waived any error.

CONCLUSION

¶31 Because we find no error, we affirm Laughlin's convictions.

/s/

_____
JON W. THOMPSON, Judge

CONCURRING:

/s/

_____
JOHN C. GEMMILL, Presiding Judge

/s/

_____
PATRICK IRVINE, Judge