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

DIVISION ONE
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PHILIP G. URRY,CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	1 CA-CR 08-0358
Appellee,	DEPARTMENT C
v.	**MEMORANDUM DECISION**
DEAN FRANKLYN SOARES,	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-048402-001 SE

The Honorable David K. Udall, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Susanne Bartlett Blomo, Assistant Attorney General
Attorneys for Appellee

Coppersmith Schermer & Brockelman PLC — Phoenix
By James J. Belanger
Attorneys for Appellant

B R O W N, Judge

¶1 Dean Franklyn Soares appeals from his convictions and sentences on two counts of sexual exploitation of a minor. He raises claims of insufficiency of evidence, improper denial of his motion to suppress and motion for mistrial, violation of equal protection, and violation of the prohibition against cruel and unusual punishment. For the reasons that follow, we affirm.

BACKGROUND

¶2 Soares was indicted on ten counts of sexual exploitation of a minor, class two felonies and dangerous crimes against children, after police discovered ten visual depictions of a minor under the age of fifteen engaged in sexually exploitive exhibition on his laptop computer. Mesa police detective Hinckley discovered at least one such image from the laptop computer after Soares allowed him and Lieutenant Ortega to enter his home and gave written consent to search his computer for child pornography. Before retrieving any additional images, the officers took Soares into custody and obtained a *Miranda*[1] waiver. Hinckley questioned him about the image[s] he had previewed at his house, and inquired as to what other images he might find in a forensic search of Soares' computer.

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶3 The jury saw a redacted videotape of the interview of Soares. During the interview, Soares explained that similar images of children, some as young as ten years old, would be found on his laptop. The images consisted of still photographs and/or video, of minors posing in elaborate settings and costumes, such as those of a duchess or a pirate. He said the images would be identified by the name of the website on which he found them, for example, "L.S.," which he said stood for "Lolita Studio." He told the detective that he considered the images "art,"[2] not child pornography, explaining that the sites he accessed contained disclaimers stating the images did not violate the United States Code, and were obtained with permission of the minor's parents. He admitted deleting some of the images after detectives told him that they wanted to search his laptop for child pornography, while he was in his bedroom ostensibly retrieving the laptop.

¶4 Detective Hinckley subsequently used specialized software to retrieve additional images of minors from Soares' laptop. The jury viewed the ten images retrieved from Soares' laptop computer that formed the ten counts of the indictment, which included three movie clips. Hinckley testified all of the

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[2] Although Soares claimed the images were art, on appeal he does not raise any argument that the images were constitutionally protected.

images were copied and saved between August and November 2005, and last accessed between April and June 2006, the same day the police went to Soares' house. A pediatrician testified that all of the girls in the images appeared to be under thirteen years of age.

¶5 The jury convicted Soares on Counts One and Two and found that these images, named respectively, "DUCH-008-074.jpg" and "1h2-019-070.jpg," depicted a minor under the age of fifteen. The jury was unable to reach a verdict on Count Six, and acquitted Soares of the remaining seven counts. The judge sentenced Soares to a minimum term of ten years on each count, to be served consecutively. Soares timely appealed.

DISCUSSION

A. Sufficiency of the Evidence

¶6 Soares argues that the evidence was insufficient to support his conviction on Count One based on the "erroneous, confusing, and at times contradictory testimony" of Detective Hinckley. Soares contends that Hinckley's testimony, that he first saw the image that was subject of Count One at Soares' home, and the prosecutor's argument to the same effect in closing, contradicted Hinckley's testimony that this image was a "lost file" and could only be retrieved through the use of specialized software. Soares argues that the jury convicted him based on the mistaken belief that Hinckley had seen the image at

his house, and that Soares admitted possessing this image during his interrogation by police before trial. We disagree.

¶7 "A person commits sexual exploitation of a minor by knowingly . . . possessing . . . any visual depiction in which a minor is engaged in exploitive exhibition." Arizona Revised Statutes ("A.R.S.") section 13-3553(A)(2)(Supp. 2009).[3] "'Exploitive exhibition' means 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) (Supp. 2009). In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict, and we resolve all conflicts in the evidence against the defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). Further, we do not make a distinction between circumstantial and direct evidence, and we leave credibility determinations to the jury. *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993); *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996). "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).

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[3] We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

¶8 As an initial matter, Soares does not argue on appeal that the image upon which Count One is based fails to depict "a minor [] engaged in exploitive exhibition." A.R.S. § 13-3553(A)(2). Nor does he contend that the image was not used "for the purpose of sexual stimulation of the viewer." A.R.S. § 13-3551(4). Rather, his argument is based solely on inconsistencies in Hinckley's testimony. We acknowledge that Detective Hinckley was apparently confused as to whether the image forming the basis of Count One was viewed on the day of arrest or whether it was discovered later with the special recovery software, but nonetheless his seemingly inconsistent testimony does not support a finding that the jury did not have enough evidence before it to find Soares guilty on Count One.

¶9 The jury viewed the image portrayed in Count One, which depicted "just the genital area" of a girl most likely under the age of thirteen. Hinckley testified this image had been copied and saved in October 2005 on Soares' laptop, and was last accessed in June 2006. In his videotaped interview, Soares admitted that the police would find a number of images he had saved on his computer depicting minors as young as ten years old, in a setting to reflect a theme such as pirates or a duchess. He told Hinckley that the images would show the logo of the website to which he subscribed, and indicated that the files would have names that reflected the depicted character,

such as "Duchess." He admitted deleting some of these images before handing the laptop over to the police. This evidence was sufficient to support Soares' conviction on the charged crime in Count One, possession of an image of a minor under the age of fifteen in exploitative exhibition of genitals for the purposes of sexual stimulation.

¶10 Whether Hinckley viewed the image at Soares' house on the day of the arrest, or whether he retrieved it later using the special software, does not change the essence of the State's evidence presented to the jury——that the image forming the basis for Count One was a sexually exploitive image of a minor. Thus, we reject Soares' claim that the jury relied on one portion of Hinckley's testimony to the exclusion of the other in reaching its verdict. The jury may have disregarded this aspect of Hinckley's testimony altogether, as it was not necessary to reach its verdict of conviction. Furthermore, defense counsel conceded in closing that the record was unclear and the detective might have viewed the image at Soares' home. It is the jury's function to resolve any such inconsistencies in the evidence. *See State v. Davis*, 104 Ariz. 142, 144, 449 P.2d 607, 609 (1969) ("It is for the jury, not a reviewing court, to resolve the conflicts in witnesses' accounts."). Moreover, whether the image was easily accessible or accessible only by specialized software, does not change the evidence that Soares

saved the image in October 2005, last accessed it in June 2006, and accordingly, possessed it within the time range specified in the indictment. In his videotaped interrogation, Soares freely admitted that further investigation of his computer would reveal many images of a similar nature to those previewed at his home, and argues only that these images are not child pornography because the website carried a disclaimer saying no illegal content was present. On this record, we find sufficient evidence to support Soares' conviction on Count One.[4]

B. Denial of Motion to Suppress

¶11 Soares next argues that the trial court erred in denying his motion to suppress evidence obtained during a search of his computer, because, before the officers obtained his consent to enter his house, they failed to expressly advise him of his right to refuse. Soares urges this court to interpret privacy rights under the Arizona Constitution as requiring officers to give "a right to refuse consent warning before police officers enter an individual's home during a knock and talk."

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[4] To the extent that Soares is arguing that this conviction should be vacated because the verdicts of acquittal on the other counts involving images retrievable only by specialized software are inconsistent, his claim is unavailing. *See State v. Zakhar*, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969)("[C]onsistency between the verdicts on the several counts of an indictment is unnecessary.").

¶12 In reviewing a trial court's ruling on a motion to suppress, we restrict our review to consideration of the facts the court heard at the suppression hearing. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996). We review the facts in the light most favorable to sustaining the court's ruling. *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (1996). We review the court's ruling on a motion to suppress for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62, 94 P.3d 1119, 1140 (2004).

¶13 The trial court conducted an evidentiary hearing at which both police officers and Soares testified. The court ultimately denied the motion to suppress after making a series of factual determinations, including a finding that Soares voluntarily invited two plain clothes police officers into his home after they identified themselves as police, displayed their badges, and informed him they were looking for child pornography on computers. The court further found that the officers had not made threats or promises, or used coercion, to gain entry into his home. The court also found that Soares, a highly educated computer expert, voluntarily signed a consent to search form specifying that he had the right to refuse to consent, and could withdraw his consent at any time. Finally, the court found that

the consent form advised Soares that the police officers would be looking for child pornography on his computer, he never indicated he had withdrawn his consent, and he voluntarily gave his laptop to the officers to conduct the search. Soares does not dispute the court's findings, which are supported by the record.

¶14 Soares argues instead that he had no idea he could refuse the police officers' request to enter his home, and urges this court, as he did in the trial court, to hold that Arizona constitutional privacy protections require police to provide a *Miranda*-type warning before they obtain the owner's consent to enter a home. We decline to do so. It is true that under limited circumstances, Article 2, Section 8 of the Arizona Constitution has been construed to afford more privacy rights in a person's home than does the Fourth Amendment. *See State v. Bolt*, 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984) (holding that police officers' warrantless entry of home to secure it while they awaited warrant, in absence of exigent circumstances, violated Arizona constitutional provision). Arizona courts have never construed this provision, however, to require a *Miranda*-type warning before a police officer obtains consent to enter a home. *See id.*

¶15 We decline to adopt such a requirement under the circumstances of this case. We have previously rejected a

request to interpret the Arizona Constitution to require a showing that a defendant in police custody "either knew of or was advised of his right to refuse to consent to the search" of his bedroom, in order to find that his consent was voluntary. *State v. Knaubert*, 27 Ariz. App. 53, 56, 550 P.2d 1095, 1098 (1976). Our supreme court has also previously rejected a claim that a *Miranda* warning was a necessary prerequisite to a consensual search. *State v. Dean*, 112 Ariz. 437, 439-40, 543 P.2d 425, 427-28 (1975). In rejecting the latter claim, the court adopted the reasoning of the United States Supreme Court that "[v]oluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." *Id.* at 440, 543 P.2d at 428 (quoting *Schneckcloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973)).

¶16 For his argument that we should require a *Miranda*-type warning in all "knock-and-talk" procedures, Soares misplaces his reliance on Washington and Arkansas cases in which the courts found that the procedures were so inherently coercive that their respective state's constitutional privacy provision required police to advise the homeowner of his right to refuse to consent to a warrantless search before they entered the home. *See State*

v. Ferrier, 960 P.2d 927, 932-33 (Wash. 1998) (holding that because such procedures are inherently coercive, as a matter of public policy, homeowners must be advised of their right to refuse entry in order to find their consent voluntary); *State v. Holmes*, 31 P.3d 716, 719-20 (Wash. App. 2001) (holding entry of house unlawful in absence of warning); *State v. Brown*, 156 S.W.3d 722, 729-32 (Ark. 2004) (following reasoning of *Ferrier* court and others in requiring homeowners to be advised of their right to refuse consent before a warrantless search of their home would be found valid on the basis of consent); *Woolbright v. State*, 160 S.W.3d 315, 326 (Ark. 2004) (holding entry of hotel room unlawful in absence of warning).

¶17 We need not reach the issue of whether the Arizona constitutional provision requires a similar warning of the right to refuse *consent*, because police provided Soares such a warning before they obtained his consent to search. In this case, the two plain clothes police officers who knocked on Soares' door were seeking only to obtain his consent to inspect his computer for child pornography, not to conduct a warrantless search of his house. After they were inside his house, they asked Soares for written consent to inspect his computer for child pornography. At that time, Soares voluntarily signed a consent to search form that explicitly authorized police to conduct only a limited search of his laptop computer for child pornography,

and specifically provided that he had the right to refuse consent to search, as well as the right to withdraw consent at any time.

¶18 Although police did not advise Soares of his right to refuse them entry to his home, they did advise him in writing of his right to refuse consent to a warrantless search before any search was conducted. This fact distinguishes this case from those cases on which Soares relies, in which the police failed to provide any advice of the right to refuse consent before obtaining consent, entering the house, and conducting the warrantless search of the house. *Supra* ¶ 16.

C. Denial of Motion for Mistrial

¶19 Soares argues that the trial court abused its discretion in denying his request for a mistrial on the ground a police officer violated a court order precluding evidence of the federal investigation that precipitated the officer's "knock and talk." A declaration of mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (quoting *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983)). We review a trial court's denial of a motion for mistrial for abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000).

"The trial judge's discretion is broad, because he is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Id.* (citations omitted).

¶20 Before trial, Soares filed a motion in limine seeking in pertinent part to preclude "any evidence allegedly discovered by Immigration Customs Enforcement ("ICE") that [Soares] purportedly subscribed to website(s) that displayed child pornography years prior to the alleged events charged in the Indictment." The court granted this portion of the motion, ruling that the officers could not testify that they were at Soares' home "based on illegal internet activity," and were not to get into the reason they were at his house beyond saying, "We're just in the neighborhood doing knock-and-talks." However, on direct examination of Lieutenant Ortega, the first officer to testify, the prosecutor asked, "What is a knock-and-talk?" To which she responded, "Basically, we knock at a person's house, and we ask them if we can come in and talk to them about a crime that we think has occurred." Defense counsel immediately moved for a mistrial. In denying the motion, the trial court noted, "The question's all right. The answer was – it was a generality – what they do when they do knock-and-talks in a particular neighborhood."

¶21 The court offered to consider a cautionary jury instruction if defense counsel presented one with final

instructions. At Soares' request, the court included the following instruction to the jury:

> Knock and talk. During Lieutenant Ortega's testimony, she commented that the purpose of a knock and talk was to investigate a crime that they suspected had been committed. This portion of Lieutenant Ortega's testimony was improper. You must disregard this portion of Lieutenant Ortega's testimony, and you must not use it as proof that the defendant is of bad character, had previously committed any crime, or that the defendant is therefore likely to have committed the crime with which he is now charged.

¶22 We find no abuse of discretion in the court's denial of a mistrial. The court was in the best position to evaluate any impact that the officer's testimony might have had on the jury, and in this case, the court determined that the statement only generally addressed what police officers do when they conduct knock-and-talks. The court implicitly found that the testimony did not call the jury's attention to the specific criminal investigation that had focused on Soares, and thus did not call the jurors' attention to matters it should not consider. The jurors' questions as to whether Soares was randomly selected for a knock-and-talk, or whether his computer was specifically targeted, contrary to Soares' argument, appear simply to evidence a curiosity about the procedure from the standpoint of *not* knowing how the targets were selected. The court, in any case, agreed to give Soares' requested instruction

to the jury to “disregard this portion of Lieutenant Ortega’s testimony,” and specifically not to use it as proof that Soares had previously committed a crime. The jury is presumed to have followed this instruction, and disregarded the testimony. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). We decline to find reversible error on this basis.

D. Cruel and Unusual Punishment

¶23 Soares next argues that the sentence imposed pursuant to A.R.S. § 13-604.01 (2001), the minimum ten years on each of the two counts to be served consecutively, violates the federal and state constitutional provisions against cruel and unusual punishment. We disagree.

¶24 The Eighth Amendment to the United States Constitution prohibits “cruel and unusual punishments.” U.S. Const. amend. VIII. We interpret Article 2, Section 15, of the Arizona Constitution, which similarly prohibits the infliction of cruel and unusual punishment, no differently than its counterpart in the federal constitution. *See State v. Davis*, 206 Ariz. 377, 380-81, ¶ 12, 79 P.3d 64, 67-68 (2003). The Eighth Amendment “does not require strict proportionality between crime and sentence but instead forbids only extreme sentences that are grossly disproportionate to the crime.” *State v. Berger*, 212 Ariz. 473, 476, ¶ 13, 134 P.3d 378, 381 (2006) (citations and internal quotation marks omitted). In determining whether a

threshold showing of "gross disproportionality" has been made, we first determine whether the legislature has a reasonable basis for believing that the sentencing provision "advances the goals of its criminal justice system in any substantial way." *Id.* at 477, ¶ 17, 134 P.3d at 382 (citations and internal punctuation omitted). We then consider whether the sentence of the particular defendant is grossly disproportionate to the crime committed. *Id.* "Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." *Id.* at 479, ¶ 28, 134 P.3d at 384 (*quoting United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988)). "Thus, if 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." *Id.* (citation omitted).

¶25 It is only if the threshold showing of gross disproportionality has been made that we compare this sentence with sentences for other offenses in Arizona (intra-jurisdictional analysis) and with the sentence imposed for the same crime in other states (inter-jurisdictional analysis). *Id.* at 476, ¶ 12, 134 P.3d at 381 (citation omitted). We review the constitutionality of a sentence de novo. *State v. Johnson*, 210 Ariz. 438, 440, ¶ 8, 111 P.3d 1038, 1040 (App. 2005).

¶26 We find no inference of gross disproportionality between the harshness of the sentence imposed and the gravity of the offense committed. Our supreme court has already determined that the Arizona Legislature had a "reasonable basis for believing that mandatory and lengthy prison sentences for the possession of child pornography would advance the goals of Arizona's criminal justice system in a substantial way." *Berger*, 212 Ariz. at 478, ¶ 23, 134 P.3d at 383 (internal punctuation and citation omitted); *see also id.* at 480, ¶ 33, 134 P.3d at 385 ("The ten-year sentence imposed for each offense is consistent with the State's penological goal of deterring the production and possession of child pornography.").

¶27 Further, we fail to find that the application of this sentencing scheme to Soares was one of those "extremely rare cases" that resulted in a grossly disproportionate sentence. *See id.* at 480, ¶ 38, 134 P.3d at 385. Soares' offense did not fall at the periphery of the broad sweep of the statute forbidding possession of child pornography, but fell within its very core. The "specific facts and circumstances" of Soares' offense in this case distinguish it from those of the defendant in *Davis*. In *Davis*, our supreme court held unconstitutional the imposition of four statutorily-mandated consecutive thirteen-year terms for four acts of intercourse with two girls who were a few months from their fifteenth birthday. 206 Ariz. at 379,

¶ 1, 388, ¶¶ 48-49, 79 P.3d at 66, 75. The court reasoned that the defendant's conduct was at the edge of the broad sweep of the statute. *Id.* at 385, ¶ 36, 79 P.3d at 72. The court concluded that the sentence therefore raised an inference of gross disproportionality, based on evidence that the defendant was only twenty years old, his maturity and intelligence fell far below that of a normal adult, and the post-pubescent victims sought him out and participated willingly in the sexual activity. *Id.* at 384-85, ¶¶ 36-37, 79 P.3d at 71-72.

¶28 Nothing in this record, unlike the record in *Davis*, suggests that defendant's maturity and intelligence fell far below that of a normal adult, or that the victims somehow sought out the defendant. The evidence showed that Soares was forty-seven years old at the time of his arrest, and possessed multiple advanced educational degrees. Soares did not accidentally encounter child pornography, but rather paid to subscribe to particular websites that sold child pornography, downloaded the images on different occasions, and saved the images for nearly a year. Soares himself estimated that the minors depicted in the sexually exploitative images were as young as ten years old, and the evidence showed that the images were of pre-pubescent girls who were most likely under the age of thirteen.

¶29 The evidence further suggests that Soares knew what he was doing was wrong. He told police he had deleted images from his laptop immediately before giving it to them because he thought they would not understand, and conceded that an image that focused solely on the child's genitalia "borders on inappropriate." Finally, the record fails to show that the jury, the prosecutor, or the court believed that the application of the sentencing enhancement for a dangerous crime against children was excessive in this case, as they did in *Davis*. *See id*. at 380, ¶¶ 9, 10, 388, ¶ 49, 79 P.3d at 67, 75. These facts distinguish this case from *Davis*, and lead us to the conclusion that this sentence was not grossly disproportionate to the crime. *See also Berger*, 212 Ariz. at 480, ¶ 36, 481-82, ¶¶ 43-49, 134 P.3d at 385, 386-87 (finding that a history of pursuing illegal depictions justified severe sentence).

¶30 Because we find no inference of gross disproportionality, we need not and will not conduct an intra/inter-jurisdictional analysis. *See id*. at ¶ 63. For the foregoing reasons, we conclude that Soares' sentence to the minimum ten years on each count, to be served consecutively, did not violate the prohibition against cruel and unusual punishment.

E. Equal Protection

¶31 Soares next argues that A.R.S. § 13-604.01 violates the Equal Protection Clause of the Arizona and United States Constitutions,[5] because the legislature failed to distinguish between those who victimize children in order to produce pornography under A.R.S. § 13-3552, and those, like him, who merely possess child pornography under A.R.S. § 13-3553. He argues that the provision fails under a rational basis test because "[t]here is no rational basis to treat a viewer of child pornography in the same way as a producer of child pornography." Soares raised this same assertion prior to sentencing, and the trial court rejected it. We reject it as well.

¶32 "Defining crimes and fixing penalties are legislative, not judicial, functions." *State v. Navarro*, 201 Ariz. 292, 298, ¶ 23, 34 P.3d 971, 977 (App. 2001) (quoting *State v. Wagstaff*, 164 Ariz. 485, 490, 794 P.2d 118, 123 (1990)). We review the constitutionality of a sentence de novo. *Johnson*, 210 Ariz. at 440, ¶ 8, 111 P.3d at 1040. We presume a statute is

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[5] We note, however, that nothing in the record indicates that Soares has complied with A.R.S. § 12-1841 (Supp. 2009) ("In any proceeding in which a state statute, ordinance, franchise or rule is alleged to be unconstitutional, the attorney general and the speaker of the house of representatives and the president of the senate shall be served with a copy of the pleading, motion or document containing the allegation at the same time the other parties in the action are served and shall be entitled to be heard."). Because we reject Soares' constitutional challenge, we need not address the consequences of his failure to comply with the mandatory notice requirements.

constitutional, and the challenging party bears the burden of establishing that it is unconstitutional. *See Navarro*, 201 Ariz. at 298, ¶ 24, 34 P.3d at 977 (citations omitted). Soares has failed to do so here.

¶33 The Equal Protection Clause of the Fourteenth Amendment[6] "generally requires that all persons subject to state legislation shall be treated alike under similar circumstances." *Id.* at ¶ 25 (quoting *Crerand v. State*, 176 Ariz. 149, 151, 859 P.2d 772, 774 (App. 1993)). The Equal Protection Clause, however, requires "only that individuals within a certain class be treated equally and that there exist reasonable grounds for the classification." *Id.* (quoting *In re Maricopa County Juv. Action No. J-72804*, 18 Ariz. App. 560, 565, 504 P.2d 501, 506 (1972)). "We will uphold legislation not involving a suspect classification or fundamental right when it is rationally related to a legitimate government purpose." *Id.* (quoting *Wigglesworth v. Mauldin*, 195 Ariz. 432, 438, ¶ 19, 990 P.2d 26, 32 (App. 1999)). "Legislation is presumed rational, and such presumption can be overcome only by a clear showing of arbitrariness or irrationality." *State v. Hammonds*, 192 Ariz. 528, 531, ¶ 9, 968 P.2d 601, 604 (App. 1998).

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[6] Because appellant has not separately argued that the Arizona constitutional provision provides greater or different protection, he has waived this claim on appeal. *See* Ariz. R. Crim. P. 31.13(c) (1) (vi).

¶34 Soares does not argue that he is a member of a suspect class, or that A.R.S. § 13-604.01 violates any fundamental right. We therefore apply the rational basis test. We find that the establishment of the same range of penalties for those who produce child pornography and those who possess child pornography is rationally related to the State's legitimate goal of protecting children who are victimized by all rungs of the distribution ladder. The sentencing provisions of A.R.S. § 13-604.01, were intended to, and serve the purpose of, protecting the State's children and severely punishing those who prey upon them. *See State v. Williams,* 175 Ariz. 98, 102-03, 854 P.3d 131, 135-36 (1993); *Wagstaff*, 164 Ariz. at 490-91, 794 P.2d at 123-24. The inclusion of the offense of possession of child pornography in the crimes subject to the sentencing enhancements under the Dangerous Crimes Against Children Act recognizes that the "producers of child pornography exist due to the demand for such materials." *Berger*, 212 Ariz. at 478, ¶ 21, 134 P.3d at 383; *see* A.R.S. § 13-604.01(D). "The consumers of child pornography therefore victimize the children depicted . . . by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects." *Berger*, 212 Ariz. at 478, 134 P.3d at 383 (quoting *United States v. Norris*, 159 F.3d 926, 930 (5th Cir. 1998)). The legislature had a rational basis for

setting the same sentencing range for producers of child pornography and consumers of child pornography, as neither could exist without the other—the demand for child pornography creates the supply. *See id.* at ¶¶ 21-23. Because there exists a rational basis to treat producers and possessors of child pornography equally by exposing them to the same range of sentences, A.R.S. § 13-604.01 does not violate equal protection.

F. Failure to Admit Evidence of Legal Disclaimers

¶35 Soares argues that the trial court abused its discretion in precluding him from offering evidence of legal disclaimers posted on the websites that he had accessed, on grounds of lack of proper disclosure.

¶36 On the fourth day of trial, defense counsel asked the court to admit a copy of the disclaimer for one particular site that Soares was referring to, a copy of which his forensic investigator had just obtained that day, and allow him to ask Detective Hinckley if this was the type of legal disclaimer with which he was familiar. The prosecutor objected to admission of the seven-page document on the ground the defendant had failed to previously disclose it. The court precluded admission of the document, but allowed defense counsel to ask Hinckley to read it silently and tell the jury whether this was the type of disclaimer he had previously seen. Detective Hinckley

subsequently acknowledged that the document was the type of legal disclaimer he had seen on these sites.

¶37 The next day of trial, defense counsel asked the court to reconsider admitting the document, on the ground that the State had notice immediately after Soares' arrest that he was claiming that these websites carried legal disclaimers similar to the one he had just produced, and the State made no effort to follow up and obtain a copy. Defense counsel argued, "This is an important aspect of the case. The State has to prove that Soares knowingly committed this offense with respect to each image, and I think if there's a disclaimer that specifically suggests that these are not illegal, for whatever that's worth, that should be some information that the jury should have." The prosecutor reiterated his initial objection of lack of disclosure, and also argued lack of foundation that this was actually the disclaimer that Soares was talking about two years before. The court denied the motion for reconsideration without explanation. In his closing argument, defense counsel nevertheless argued that Soares lacked the required *mens rea* because the websites contained disclaimers "telling him that the sites were legal."

¶38 We review a trial court's imposition of sanctions for discovery violations for abuse of discretion. *State v. Lee*, 185 Ariz. 549, 555-56, 917 P.2d 692, 698-99 (1996). We also review

a trial court's ruling on the admissibility of evidence for abuse of discretion. *State v. Tucker*, 215 Ariz. 298, 314, ¶ 58, 160 P.3d 177, 193 (2007).

¶39 Soares does not dispute that the document was not disclosed until trial. Thus, the court was within its discretion to preclude the evidence solely because its disclosure was untimely. Additionally, Detective Hinckley testified he never saw the actual disclaimers on the websites described by Soares, because he had never accessed those websites. As such, he would not have been able to lay the proper foundation for admission of the legal disclaimers. Soares did not propose calling any other witness who might have been able to lay such foundation and therefore the trial court did not abuse its discretion in precluding the document's admission.

CONCLUSION

¶40 For the foregoing reasons, we affirm Soares' convictions and sentences.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

LAWRENCE F. WINTHROP, Judge