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
FILED: 07-29-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	1 CA-CR 08-0810
	1 CA-CR 08-0989
Appellee,	(Consolidated)
v.	DEPARTMENT C
STEPHEN FRANK KARBAN,	**MEMORANDUM DECISION**
Appellant.	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2005-011629-001 DT

The Honorable Raymond P. Lee, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

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

J O H N S E N, Judge

¶1 Stephen Frank Karban appeals his convictions of one count of molestation of a child, one count of sexual abuse and nine counts of sexual conduct with a minor. For the reasons that follow, we affirm Karban's convictions and resulting sentences.

FACTS AND PROCEDURAL HISTORY

¶2 Karban does not contest the sufficiency of the evidence to support his convictions. Therefore, it will suffice to say he committed the offenses against three minor girls, "E," "J" and "A," while on vacation in Arizona in December 2002. E was 11 years old at the time, J was 16 and A was 10.

¶3 Karban represented himself at a 30-day jury trial that took place over the course of eight weeks. He was sentenced to a presumptive aggregate term of 138.5 years' imprisonment. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A) (2003), 13-4031 (2010)[1] and 13-4033(A)(1) (2010).

---

[1] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

DISCUSSION

A. Admission of Computer Images.

¶4 Karban contends the superior court erred when it admitted images found on his computer that depicted adult men and/or women engaged in various acts involving urination. The State argued the images were relevant because at least one of the victims would testify Karban asked her to urinate on him for sexual gratification. The court held the images were admissible pursuant to Arizona Rule of Evidence 404(c). Pursuant to Rule 404(c), the court found the evidence was sufficient to permit the jury to find Karban possessed the images on his computer, the images provided a reasonable basis to infer Karban had an aberrant sexual propensity to commit the charged offenses, the probative value of the images was "substantial" and was not outweighed by the danger of unfair prejudice or confusion of the issues, and the images were sufficiently similar to the referenced acts to permit their admission and were not too remote in time.

¶5 We review the admission of evidence pursuant to Rule 404(c) for an abuse of discretion. *State v. Garcia*, 200 Ariz. 471, 475, ¶ 25, 28 P.3d 327, 331 (App. 2001). The superior court's discretion is "considerable." *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990).

¶6 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)). "Evidence of an emotional propensity to commit aberrant sexual acts is admissible to prove that an accused acted in conformity therewith." *State v. Arner*, 195 Ariz. 394, 395, ¶ 3, 988 P.2d 1120, 1121 (App. 1999). Before admitting evidence pursuant to Rule 404(c), the court must specifically find that:

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

Ariz. R. Evid. 404(c). Finally, the court must give a limiting instruction as to the proper use of such evidence. Ariz. R. Evid. 404(c)(2); *Garcia*, 200 Ariz. at 475, ¶ 27, 28 P.3d at 331.

¶7 On appeal, Karban argues, without citing Rule 404(c), that the court should have excluded the images because they failed to provide a reasonable basis to infer he had a character

trait giving rise to an aberrant sexual propensity to commit the crimes charged. He contends the images were "too attenuated" because they involved adults, and not children. In making this argument, Karban does not argue that if the images had depicted children, they would not have provided a reasonable basis to infer he had a character trait giving rise to an aberrant sexual propensity to commit the charged crimes.

¶8 Although the images the court admitted did not depict minors or a female urinating on a male, exact replication is not required before a prior act may be admitted. *State v. Lopez*, 170 Ariz. 112, 117, 822 P.2d 465, 470 (App. 1991); *see also State v. Williams*, 209 Ariz. 228, 233-34, ¶¶ 18-21, 99 P.3d 43, 48-49 (App. 2004) (pursuant to Arizona Rule of Evidence 404(b), evidence of conduct by defendant with adult woman was admissible on charge the defendant committed a similar act with a child). Moreover, a difference in gender between the victims and the subjects of other-act evidence does not necessarily render the other acts inadmissible. *See State v. McDaniel*, 119 Ariz. 373, 376, 580 P.2d 1227, 1230 (App. 1978) (evidence that defendant had touched a young boy at the same time as the young girl victim in the prosecution was admissible under the prior "lustful disposition" exception to the rule excluding prior bad acts). As long as there is a reasonable basis to conclude evidence of the other act "permits an inference that a

defendant's aberrant sexual propensity is probative, the evidence is admissible." *Arner*, 195 Ariz. at 396, ¶ 5, 988 P.2d at 1122.

¶9 Finally, the instructions appropriately limited the jury's consideration of the evidence. The jurors were instructed they could not consider evidence of other acts unless they found by clear and convincing evidence that (1) Karban committed those acts and (2) the evidence of those acts showed Karban had a character trait that predisposed him to commit the crimes charged. We also note the State argued in closing that the jurors could not assume Karban was guilty simply because they heard evidence of other acts and reiterated that the jury must find Karban committed the other acts before it could consider those acts as evidence.

¶10 Abuse of discretion is "an exercise of discretion which 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) (internal quotations and citations omitted). Under these circumstances, the superior court did not abuse its discretion when it admitted the other-act evidence.[2]

---

[2] While Karban asserted he did not put the images on his computer, that was a matter for the jury. *See* Ariz. R. Evid. 404(c)(1)(A); *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (appellate court does not determine credibility).

B. Preclusion of Evidence of Other Activities of J.

¶11 Karban next contends the court erred when it granted the State's motion in limine to preclude evidence that J had engaged in various other acts of a sexual nature. The State's motion was directed at evidence that (1) J had viewed internet pornography; (2) she had a password that allowed her access to the internet; (3) she viewed adult movies; (4) she "experimented with adult lotions;" and (5) she wrote sexually explicit emails.

¶12 We review the superior court's evidentiary rulings for a clear abuse of discretion. *Amaya-Ruiz*, 166 Ariz. at 167, 800 P.2d at 1275. We need not address whether the court abused its discretion in this case, however, because Karban was not prejudiced by the ruling. "[E]rror is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bolton*, 182 Ariz. 290, 303, 896 P.2d 830, 843 (1995).

¶13 All of the evidence in the motion at issue ultimately was admitted despite the superior court's ruling. Evidence was introduced that J was sexually "permissive" and had been sexually active in the past, that she had access to a computer with internet access, that she was able to get on the internet regardless of whether she knew Karban's password, that she had viewed pornography on the internet, that she had watched pornographic movies with a friend, that she had used sexual

lubricants and sometimes did so with a friend, that she had email access and that some of her emails contained pornographic material. Accordingly, Karban was not prejudiced by the court’s ruling granting the State’s motion in limine.

C. Preclusion of Evidence of "Sexual Normalcy."

¶14 Karban also argues the court erred when it precluded evidence of his good character in the form of "sexual normalcy." Karban concedes this issue was not properly preserved below and, therefore, we review only for fundamental error. *See 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). We will not reverse for fundamental error unless a defendant demonstrates the error was prejudicial. *Id.* at ¶ 26.

¶15 We find no error, fundamental or otherwise. Karban never sought to have the court admit evidence of "sexual normalcy" and does not identify any evidence of "sexual normalcy" the superior court failed and/or refused to admit or which otherwise was excluded. When the court addressed the issue of whether evidence of Karban's general "good character" could be admitted, Karban informed the court that he only sought

to admit evidence that other people were present when the alleged conduct occurred and that they saw nothing inappropriate, as well as evidence of alibi. The court held Karban could introduce such evidence. There is no error in the failure to admit evidence a defendant did not ask the court to admit.

¶16 We note that almost a year after the hearing on the admission of evidence of good character and before trial began, Karban was informed on the record of our then-recent decision in *State v. Rhodes*, 219 Ariz. 476, 200 P.3d 973 (App. 2008). In *Rhodes*, we held evidence of sexual normalcy or appropriate interaction with children may be admissible in cases involving sexual offenses against minors. *Id.* at 478-79, ¶¶ 10-12, 200 P.3d at 975-76. Even after being informed of the decision in *Rhodes*, however, Karban did not seek admission of evidence of sexual normalcy.

D. Preclusion of Evidence of the Michigan Acquittals.

¶17 Finally, Karban argues the superior court erred when it precluded evidence that a Michigan jury had acquitted him of certain offenses; he argues evidence of the acquittals was admissible "to weaken and rebut" other-act evidence admitted against him pursuant to Rule 404(c).

1. Background.

¶18 The procedural background of this issue is somewhat convoluted. The State first filed a notice of its intent pursuant to Rule 404(c) to offer evidence that Karban engaged in "prior sexual conduct" with the victims in Michigan. Karban responded that he was "in agreement with the State's request" and indicated that he too wanted to offer evidence of other acts in Michigan. Karban then filed a motion to admit evidence of his acquittal of similar charges in Michigan. He argued it would be unfair to admit evidence of the other acts without also informing the jury he was acquitted of committing those acts. Karban further argued he should be allowed to use evidence of the acquittals to impeach the victims.

¶19 In its response to Karban's motion to admit evidence of the acquittals, the State withdrew its request to use any evidence of prior acts committed in Michigan, but indicated it still would seek to admit evidence of other acts committed in Wisconsin. Absent evidence of other acts committed in Michigan, the State argued, evidence that Karban had been acquitted of similar offenses in Michigan would be irrelevant. The State conceded, however, that Karban could use testimony from Michigan to impeach the victims and other witnesses.

¶20 The superior court held evidence of the acquittals was not admissible but ruled that Karban could use transcripts from

the Michigan trial to impeach witnesses. Despite the State's withdrawal of its motion to admit evidence of other acts committed in Michigan, however, such evidence was introduced at trial. Not only did Karban not object to the admission of any of this evidence, he introduced some of the evidence.

¶21 For example, when E described one of the Arizona offenses, the State asked her if anything similar had happened in Michigan or Wisconsin. The State then asked E to describe one of the Michigan incidents. Karban raised no objections to the State's questions of the victims about offenses committed in Michigan. Karban himself injected references to Michigan and other acts committed in Michigan in his cross-examination of the victims. For example, Karban asked E if she went to court in Michigan, without reference to what type of court or the circumstances. He also refreshed E's memory and/or impeached her with her Michigan testimony, frequently referring to her "testimony" and her having "testified to that fact in the past" and doing so "in court," albeit without reference to Michigan, Michigan criminal charges or any Michigan legal proceedings. When Karban cross-examined J, he referred to reports prepared by Michigan police and had J read from those reports.

¶22 Karban never asked the court to reconsider its ruling on the admissibility of the Michigan acquittals. Further, the

jury was never informed that Karban was charged or tried for any conduct that occurred in Michigan.

2. Analysis.

¶23 The case authorities conflict on the issue of whether a defendant may offer evidence of an acquittal to rebut evidence of a prior bad act. *Compare State v. Little*, 87 Ariz. 295, 304, 350 P.2d 756, 761 (1960) (evidence of prior act was inadmissible because the defendant was acquitted of committing that act), *and State v. Davis*, 127 Ariz. 285, 286, 619 P.2d 1062, 1063 (App. 1980) ("the better rule allows proof of an acquittal to weaken and rebut the prosecution's evidence of the other crime") *with United States v. De La Rosa*, 171 F.3d 215, 219-20 (5th Cir. 1999) (trial court does not abuse its discretion when it excludes evidence of a prior acquittal for a related offense; citing cases), *and United States v. Gricco*, 277 F.3d 339, 352 (3d Cir. 2002) ("well established . . . that evidence of prior acquittals is generally inadmissible").

¶24 We need not reconcile these authorities because there is nothing in the record establishing the specific acts of which Karban was acquitted in Michigan. Karban provided the superior court with a copy of an order of acquittal entered by a Michigan court stating he was acquitted of 15 unidentified counts after a jury trial. Attached to that order was a copy of a felony information that charged Karban with a total of 14 counts of

"criminal sexual conduct" of varying degrees and one count of "attempted sexual conduct." The information identified the three victims in this case along with one other victim. Each count identified the statutory offense, the victim, the applicable statute(s) and a two-word description of the conduct involved, such as "penile-vaginal," followed by the phrase "with [the victim's name]." The information did not identify the date or location of any offense or provide any additional facts regarding any offense. Nor did Karban make an offer of proof to provide any additional information regarding the offenses charged in Michigan of which he was acquitted.

¶25 As a result, there is nothing in the record to establish that any of the Michigan "other act" evidence referenced at trial was the same conduct on which Karban was charged, tried and acquitted in Michigan. All the record reveals is that Karban was acquitted of ostensibly similar offenses committed in Michigan against the same victims. The contention that any of those charged offenses was the same as any of those referenced in the trial in this case is speculation. Absent information to connect the other-act evidence introduced at trial in this case with the conduct of which Karban was acquitted in Michigan, we cannot conclude the court erred by precluding evidence of the acquittals.

CONCLUSION

¶26 We affirm Karban's convictions and sentences.

/s/ ______________________________
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/ ______________________________
DONN KESSLER, Judge

/s/ ______________________________
PATRICIA K. NORRIS, Judge