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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROLAND JAMES SALISBURY, Appellant.	2 CA-CR 2011-0143 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000785

Honorable James L. Conlogue, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Roland Salisbury was convicted of eighteen counts of sexual exploitation of a minor under the age of fifteen, all dangerous crimes against children. He was sentenced to presumptive, consecutive prison terms of seventeen years on each count. On appeal, Salisbury contends the trial court fundamentally erred by failing to declare a mistrial sua sponte based on the state's untimely disclosure of an expert's opinion and abused its discretion by admitting other-acts evidence. For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Salisbury's convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Around August 2010, Salisbury was hired as the manager at an automotive shop in Sierra Vista. Employees previously had been permitted to use a desktop computer in an upstairs room of the shop for personal use during their breaks. But after Salisbury took over as the shop's manager, the computer was password protected and used by employees for training purposes only, and the employees no longer were allowed in that room while Salisbury was using the computer.

¶3 On September 13, 2010, a shop employee observed child pornography displayed on the computer's monitor after Salisbury had left the room momentarily. Using the camera on his cellular telephone (cell phone), the employee took a photograph of the image, and later that day another employee reported the incident to the Sierra Vista Police Department. By the next day, both employees had met with Detective Tim Wachtel, who began an investigation.

¶4 On September 15, 2010, Wachtel obtained a search warrant authorizing a search of Salisbury and the shop for "electronic devices." Wachtel and other detectives executed the warrant later that day after placing Salisbury under surveillance and following him to the shop. He was taken into custody and advised of his rights pursuant to *Miranda*.[1] When Wachtel asked him for his cell phone, Salisbury responded, "[I]t's no good, the cell phone's been dead for weeks" and that he "got rid of it." However, one of the detectives had observed Salisbury carrying what appeared to be a cell phone when Salisbury walked into the shop. So, acting on a hunch, Wachtel called the cell phone several times in an attempt to locate it by the sound of its ringtone. The detectives eventually found it hidden in a bin in the shop's air filter room.

¶5 During the search of the shop, the detectives discovered that, although the rest of the computer components were still there, the computer tower had been removed from the upstairs room. Wachtel then telephoned the shop's regional manager, N.W., who stated he had taken the computer tower with him to Prescott Valley to be repaired. N.W. said he still had it with him and had not yet taken it in for repairs, and Wachtel instructed him to take it to a nearby police station.

¶6 Detective Nicholas Lamay performed a forensic analysis of the computer and the cell phone and discovered numerous child-pornography images, eleven of which were the same on both devices. He concluded that at least some of the images on the cell phone were photos of the computer's monitor displaying images that had been downloaded to the computer. Although Lamay was able to establish when the images

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

had been downloaded from the internet to the computer, he was unable to determine exactly when the images had been placed on the cell phone.

¶7 Salisbury was indicted for twenty-two counts of sexual exploitation of a minor under the age of fifteen based on the photos found on the cell phone. On the first day of trial, the state and Salisbury stipulated that he had possession of the cell phone from August 9, 2010, until September 15, 2010, when he put it in the bin in the shop's air filter room. N.W. owned the cell phone and had loaned it to Salisbury. The jury found Salisbury guilty of eighteen counts and acquitted him of the others. He was sentenced as described above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

Disclosure Violation

¶8 Salisbury first argues the trial court "erred in not sua sponte declaring a mistrial when the state offered in evidence an undisclosed scientific comparison which was a direct change from a previous opinion on the same subject by the same witness." Because Salisbury did not move for a mistrial or otherwise object to the testimony at the trial, we review his claim for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶9 Under this standard of review, the defendant bears the burden of persuasion and "must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20. Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of

such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To prove prejudice, the defendant must show that, absent the error, a reasonable jury could have reached a different result. *See Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609. Salisbury has failed to prove fundamental error or prejudice.

¶10 In conducting a forensic analysis of the cell phone, Detective Lamay was unable to determine when the pornographic images had been placed on it. However, after viewing one of the state's demonstrative exhibits prior to his testimony on the second day of trial, Lamay's opinion changed. In preparation for trial, the state had created a chart on which the counts in Salisbury's indictment were matched with: the trial-exhibit numbers for the indicted images; the cell phone's file names for those images; and the dates and times the same images had been downloaded to the computer. Lamay testified that, upon reviewing the chart, he was able to infer that the file names were the actual dates and times the images had been placed on the phone.[2] And he stated that, based on the file names, he was able to conclude all twenty-two images had been placed on the cell phone between September 2, 2010, and September 13, 2010. He also explained he had a cell phone similar to the one in question, had taken a picture with his phone earlier in the day, and was able to confirm that the photo he had taken had a file name that matched the date and time the photo was taken. As Salisbury points out, it was only after Lamay had

[2]For example, Lamay opined that count eleven, which was based on a photo with file name "0912001409," was taken on September 12, 2010, at 2:09 p.m.

taken the witness stand that the prosecutor notified the trial court and defense counsel of Lamay's changed opinion.

¶11 Rule 15.1(b)(4), Ariz. R. Crim. P., requires the state to make available to the defendant "[t]he names and addresses of experts who have personally examined [the] defendant or any evidence in the particular case, together with the results of physical examinations and of scientific test, experiments or comparisons that have been completed." Disclosure is limited to "material and information within the prosecutor's possession or control," Ariz. R. Crim. P. 15.1(b), and must be made within thirty days after arraignment, Ariz. R. Crim. P. 15.1(c). Moreover, the state has a continuing duty to provide supplemental disclosure in accordance with Rule 15.6, Ariz. R. Crim. P.

¶12 On appeal, Salisbury argues the state was obligated to disclose Lamay's revised opinion prior to his testimony at trial. He maintains the state's failure to do so deprived him of his due process right to present a defense. Salisbury acknowledges that he failed to object below and that the trial court has discretion when imposing sanctions for disclosure violations. He nevertheless contends the court committed fundamental error by failing to declare a mistrial sua sponte because it was "the only viable remedy." The crux of Salisbury's defense had been that the state could not prove when the pornographic images had been placed on the cell phone and that they therefore could have been placed there before Salisbury possessed it. And he argues "the [state's] failure to disclose this information all but assured [his] conviction, in light of his stipulation that he was in possession of the cell phone from August 9, 2010 through September 15, 2010."

¶13 To support his argument, Salisbury cites *State v. Roque*, 213 Ariz. 193, 141 P.3d 368 (2006), which he contends "is directly on point." Prior to trial in that case, the state disclosed that its expert would testify about the general methodology of a particular diagnostic test. 213 Ariz. 193, ¶ 37, 141 P.3d at 383. During trial, however, the state elicited the expert's interpretation of the defendant's "results not only [on] that test, but also [on] another test . . . about which no disclosure was made." *Id.* Over the defendant's objection, the trial court permitted the testimony. *Id.* ¶ 27. Although the court stated it would grant the defendant a brief trial recess to interview the expert, he declined to do so. *Id.* ¶¶ 27, 49. On appeal, the defendant argued the court erred in not precluding the expert's opinion because the full scope of his testimony had not been disclosed. *Id.* ¶ 21. Our supreme court concluded the state had engaged in improper conduct, *id.* ¶ 52, because it "knew that its expert had an opinion on an issue to which he intended to testify, yet failed to disclose it" before trial, *id.* ¶ 37. Thus, the trial court erred in ruling the state had not violated Rule 15.1(b)(4).[3] *Id.* ¶¶ 40, 43. But, because the trial court proposed "an appropriate initial sanction that the defense refused to accept," the supreme court stated it could not conclude that the court's "failure to preclude [the expert's] testimony constitute[d] reversible error." *Id.* ¶ 52.

¶14 Salisbury's reliance on *Roque* is misplaced. In *Roque*, the state conceded that it was aware of the full scope of its expert's opinions in advance of trial but failed to disclose them. Here, the state complied with Rule 15.1(b)(4) by timely disclosing all of

[3]Rule 15.1(a)(3) was renumbered as Rule 15.1(b)(4). Ariz. R. Crim. P. 15.1 2003 committee cmt. Although *Roque* cites the former rule, we cite the current version.

Lamay's forensic reports and opinions that were "within the prosecutor's possession or control" prior to trial. Ariz. R. Crim. P. 15.1(b); *see also* Ariz. R. Crim. P. 15.1(c). And, as to Lamay's revised opinion, the prosecutor could not have complied with pretrial disclosure requirements, because Lamay did not change his opinion until the second day of trial—the same day he was scheduled to testify.

¶15 Salisbury nevertheless contends the state has a "continuing duty to disclose information seasonably" under Rule 15.6(a). And he argues the disclosure was untimely because the state learned of Lamay's changed opinion during the lunch break but did not disclose it until after Lamay had taken the witness stand later that afternoon. But in *State v. Ramirez*, 116 Ariz. 259, 267-68, 569 P.2d 201, 209-10 (1977), our supreme court held the trial court did not err in refusing to impose sanctions for a disclosure violation where the state learned of the expert's new opinion the "very day" he testified and the prosecutor disclosed the information within a few hours the same day she learned of it. This is precisely what occurred here. *Cf. State v. Ashelman*, 137 Ariz. 460, 465, 671 P.2d 901, 906 (1983) (trial court did not abuse discretion in denying continuance when known witness changed story night before testifying).

¶16 And, even assuming the state's disclosure had been untimely, Salisbury has not established the trial court fundamentally erred by not declaring a mistrial sua sponte. When a party fails to disclose material or information as required by Rule 15, the court may impose "any sanction it finds appropriate." Ariz. R. Crim. P. 15.7(a). "A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted." *State v. Adamson*, 136 Ariz. 250,

262, 665 P.2d 972, 984 (1983). Here, contrary to Salisbury's assertion, other remedies were available had they been requested, including precluding Lamay's changed opinion, granting a continuance, or allowing Salisbury to call a rebuttal witness. *See* Ariz. R. Crim. P. 15.7(a).

¶17 Moreover, Salisbury has not met his burden of establishing prejudice. He argues Lamay's changed opinion "utterly obliterated any possibility of . . . defending the case," in light of the stipulation regarding his possession of the cell phone during the critical timeframe.[4] But, as the state notes, there was other evidence, apart from the stipulation, that Salisbury had the cell phone in his possession during the relevant period. N.W. testified he had loaned the cell phone to Salisbury, who was using it in August and September 2010. N.W. and J.G. also confirmed that they had communicated with Salisbury while he was using that cell phone. Finally, Lamay testified he was "able to obtain the contact list that [had been] plugged into the cell phone" and a call history for the calls placed and received from September 9 to September 16, 2010. From this evidence, the jury reasonably could infer Salisbury had possession of the cell phone during the critical timeframe. He has not shown that a reasonable jury could have reached a different result. *See Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609. The trial court did not commit fundamental error by failing to grant a mistrial sua sponte.

[4]Salisbury argues the stipulation "would only have been entered into, absent an astonishingly reckless degree of ineffectiveness," based on Lamay's original opinion. However, we will not address claims of ineffective assistance of counsel in a direct appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

Other-Acts Evidence

¶18 Salisbury next argues the "trial court abused its discretion in permitting the state to elicit testimony regarding the existence and sequencing of unindicted images." The state contends the testimony was relevant, properly admitted to show proof of knowledge, and not unfairly prejudicial. We review the trial court's decision to admit other-acts evidence for an abuse of discretion. *State v. Villalobos*, 225 Ariz. 74, ¶ 18, 235 P.3d 227, 233 (2010). An abuse of discretion occurs when "the reasons given by the court . . . are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶19 Before trial, Salisbury filed a motion in limine to preclude evidence of any pornographic images found on the cell phone or the computer for which he was not indicted. He claimed that this other-acts evidence was inadmissible under Rule 404(b) and (c),[5] Ariz. R. Evid., and that any probative value was "far outweighed" by unfair prejudice under Rule 403, Ariz. R. Evid. After hearing argument, the trial court precluded admission of the images, explaining "[i]f there's some independent relevance, . . . [the state] can get into that. But if there's no specific relevance with regard to a specific image, then the motion is granted."

[5]In cases involving sexual misconduct, other-acts evidence is admissible under Rule 404(c), Ariz. R. Evid., to prove "the defendant ha[s] a character trait giving rise to an aberrant sexual propensity." *See also State v. Ferrero*, 229 Ariz. 239, ¶ 12, 274 P.3d 509, 512 (2012) (Rule 404(c) applies "if evidence of other sex acts is offered in a sexual misconduct case to show a defendant's 'aberrant propensity' to commit the charged act."). But Rule 404(c) does not apply here because the state offered the evidence to prove Salisbury's "knowledge that his phone contained child pornography," not to show aberrant sexual propensity.

¶20 The admission of other-acts evidence is governed by four rules of evidence: (1) Rule 402, Ariz. R. Evid., requires that the evidence be relevant; (2) Rule 404(b), Ariz. R. Evid., requires that the evidence be admitted for a proper purpose; (3) Rule 403, Ariz. R. Evid., requires that the danger of unfair prejudice not substantially outweigh probative value; and (4) Rule 105, Ariz. R. Evid., requires that the judge give an appropriate limiting instruction upon request.[6] *State v. Roscoe*, 184 Ariz. 484, 493, 910 P.2d 635, 644 (1996). Evidence is relevant if it tends to make a fact more or less probable than it would be absent the evidence and the fact is of consequence. Ariz. R. Evid. 401. Rule 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But the rule allows such evidence "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b).

¶21 When Salisbury's friend, J.G., testified on the second day of trial, Detective Wachtel recognized her as the person depicted in one of the photos on Salisbury's cell phone. At trial, the parties referred to that photo as image 51. Because the images before and after image 51 appeared to be child pornography, the state sought to admit that sequence of images "to show that . . . [Salisbury] knew that there was child pornography on his phone." After reviewing the evidence, the court ruled that the pornographic images could not be admitted but the state could introduce testimony concerning the

[6]Salisbury never requested a limiting instruction on the use of this other-acts evidence.

images' sequencing and general descriptions. Accordingly, Lamay testified that image 51 appeared to be a woman at a social gathering taken on September 6, 2010—based on its file name—and that the images before and after it appeared to be child pornography. The state also recalled Wachtel, who identified J.G. as the person in image 51 and stated that the images immediately before and after it were of child pornography.[7]

¶22 Contrary to Salisbury's argument, the testimony regarding the unindicted images was relevant under Rule 402 and properly admitted to show knowledge under Rule 404(b).[8] A person commits sexual exploitation of a minor by knowingly receiving or possessing any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct. A.R.S. § 13-3553(A). The detectives' testimony that the phone contained child-pornography images before and after a photo of J.G. was relevant to show Salisbury had knowledge that the phone contained child pornography. *Cf. State v. Jensen*, 217 Ariz. 345, ¶¶ 7, 14-18, 173 P.3d 1046, 1050, 1052-53 (App. 2008) (discussing knowing possession and knowing receipt). And proof of knowledge is a proper purpose for introducing other-acts evidence. Ariz. R. Evid. 404(b). Salisbury nevertheless suggests that the existence of pornographic images before and after J.G.'s photo does not provide a "strong inference" of knowledge because J.G. never testified

[7]Image 52 also depicts people at a social gathering; the detectives apparently were referring to images 50 and 53 as being pornographic.

[8]A Rule 404(b) analysis would be unnecessary if the testimony was admissible as intrinsic evidence. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 56, 25 P.3d 717, 736 (2001). Evidence is intrinsic if it: "(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, ¶ 20, 274 P.3d 509, 513 (2012). We agree with Salisbury that the testimony is not intrinsic, and the state does not argue otherwise.

that Salisbury took the photo of her. But, as we noted above, there was evidence that Salisbury had the cell phone in his possession during the critical timeframe, including September 6, the date J.G.'s photo was taken with the cell phone's camera. And nothing in the record suggests Salisbury loaned the phone to someone else during that period.

¶23 Salisbury alternatively contends that the testimony should have been excluded because of the danger of unfair prejudice under Rule 403.[9] Trial courts have broad discretion in balancing probative value against the danger of unfair prejudice. *State v. Taylor*, 169 Ariz. 121, 126, 817 P.2d 488, 493 (1991). Here, the detectives testified that the images before and after J.G.'s photo were child pornography, but neither the state nor the witnesses referred to the images as being additional images for which Salisbury was not indicted. And, as the state points out, the trial court refused to admit the images in evidence, likely in an attempt to minimize any potential prejudice. *See State v. Salazar*, 181 Ariz. 87, 92, 887 P.2d 617, 622 (App. 1994) ("Arizona courts have recognized . . . the value of eliminating irrelevant or inflammatory detail and limiting evidence to its probative core."). We cannot say the court abused its discretion in finding the probative value of this other-acts evidence was not outweighed by the danger of unfair prejudice.

[9]Salisbury points out that the trial court failed to make findings on the record that the probative value was not outweighed by the danger of unfair prejudice. Although the court made no express findings on the Rule 403 balancing, the record sufficiently demonstrates that "the necessary factors were argued, considered, and balanced by the trial court as part of its ruling." *State v. Beasley*, 205 Ariz. 334, ¶ 15, 70 P.3d 463, 466 (App. 2003). And, to the extent Salisbury argues the court erred by failing to make express findings, he waived that issue by failing to request the findings below. *See In re Commitment of Jaramillo*, 217 Ariz. 460, 465, 176 P.3d 28, 33 (App. 2008).

Disposition

¶24 For the foregoing reasons, Salisbury's convictions and sentences are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge