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

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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THE STATE OF ARIZONA, Appellee, v. JERROLD DEAN BROMAN, Appellant.	2 CA-CR 2011-0192 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000784

Honorable James L. Conlogue, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and Alan L. Amann — Tucson
Attorneys for Appellee

Peter A. Kelly — Palominas
Attorney for Appellant

B R A M M E R, Judge.

¶1 Jerrold Broman appeals from his convictions and sentences for eleven counts of sexual exploitation of a minor. He argues his sentences constitute cruel and

unusual punishment under article II, § 15 of the Arizona Constitution, and the trial court erred both in denying his motion to suppress evidence and by permitting testimony about images of child pornography not included in the charged offenses. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Broman's sentences and convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In September 2010, Broman's probation officer Jason Bryant visited his residence. Broman previously had been placed on probation for failing to register as a sex offender, a felony. As a condition of his probation Broman was required to submit to warrantless searches of his person and property. During a walk-through of the home during his visit, Bryant saw an image of adult pornography on Broman's desktop computer screen and asked Broman to open his internet browsing history.

¶3 Upon checking Broman's search history, Bryant discovered a website name that included the words "teen love," which depicted pictures of "young looking boys" and pictures of genitals. Bryant then called the police to assist with the probation search and Corporal Brian Sebastian responded. Bryant and Sebastian asked Broman to open his email and discovered a message with the subject "reply to pics," which Bryant testified had said something to the effect of "I really liked those pictures, but I want younger boys." At that point, Sebastian felt "there was a very strong indication that there would be child porn[ography]" on the computer and offered to seize the computer as part of the probation search. Bryant agreed.

¶4 Detective Nicholas Lamay performed a preliminary search of the computer by scanning its hard drive and found images of child pornography. He then secured a warrant to search for child pornography and data showing ownership and found approximately fifty to seventy child pornography images. Lamay forwarded approximately twenty of the images to the county attorney's office, and twelve were selected as the basis for prosecution. A full computer forensic exam revealed "probably over 800" images of child pornography. During his arrest, police also seized Broman's laptop, which contained eighty-four or eighty-five child pornography images.

¶5 Broman was charged with twelve counts of sexual exploitation of a minor under the age of fifteen. Broman filed a motion to suppress the evidence resulting from the search of his desktop computer and its contents. After a hearing, the trial court denied the motion. The state filed a superseding indictment charging Broman with ninety-seven counts of sexual exploitation of a minor under the age of fifteen including the original twelve counts.

¶6 Trial proceeded on the original twelve counts, but one count was dismissed. After a three-day jury trial, Broman was convicted of the remaining eleven counts, all of which were dangerous crimes against children. *See* A.R.S. § 13-705(P)(1)(g). He was sentenced to presumptive, consecutive, seventeen-year terms of imprisonment for each count. This appeal followed.

Discussion

Motion to Suppress

¶7 Broman argues the trial court erred by denying his motion to suppress evidence obtained from the search of his home computer and its contents. He contends Bryant's search and seizure of his home computer violated the Fourth Amendment because it was not supported by reasonable suspicion. "We review the denial of a motion to suppress evidence for a clear abuse of discretion, viewing the evidence presented at the suppression hearing in the light most favorable to upholding the trial court's factual findings and reviewing its legal conclusions de novo." *State v. Esser*, 205 Ariz. 320, ¶ 3, 70 P.3d 449, 451 (App. 2003).

¶8 The state may require probationers to consent to warrantless searches as a condition of probation without violating their Fourth Amendment rights, especially when the search is performed or authorized by a probation officer. *State v. Montgomery*, 115 Ariz. 583, 584-85, 566 P.2d 1329, 1330-31 (1977); *see also State v. Walker*, 215 Ariz. 91, ¶ 18, 158 P.3d 220, 224 (App. 2007). Broman does not dispute this principle, but argues such a search "may not be constitutional" if performed without reasonable suspicion. He contends "there was no particular reason to justify [the] search" in this case and challenges the trial court's finding that Bryant's and the police officers' actions had been "reasonable."

¶9 The ultimate touchstone of Fourth Amendment analysis is reasonableness. *Kentucky v. King*, ___ U.S. ___, ___, 131 S. Ct. 1849, 1856 (2011). To determine whether the warrantless search of a probationer's home is reasonable, we examine the

totality of the circumstances and balance "the degree to which it intrudes upon an individual's privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118-19 (2001); *see also Walker*, 215 Ariz. 91, ¶ 20, 158 P.3d at 224 (probation search authorized by reasonable suspicion of criminal activity).

¶10 At the time of the search, Broman was on probation for having failed to register as a sex offender. He had acknowledged that a condition of his probation required him to submit to warrantless searches of his person and property. Therefore, he had a reduced expectation of privacy. *Walker*, 215 Ariz. 91, ¶ 18, 158 P.3d at 224. Bryant testified that in his experience sex offenders are a "high risk" category and "there is a lot of third party liability associated with sex offenders looking at any kind of pornography" and an increased need to protect the community. *Cf. United States v. Arvizu*, 534 U.S. 266, 273-74 (2002) (officers may determine reasonable suspicion based on inferences and deductions from experience and training). The government has a legitimate interest in protecting society from future criminal violations, and history tells us that probationers are more likely than ordinary citizens to violate the law. *Knights*, 534 U.S. at 119-20; *see also Montgomery*, 115 Ariz. at 584-85, 566 P.2d at 1330-31 (recognizing probation authorities' special interest in invading privacy of probationers). Bryant's initial decision to look at the address bar on Broman's computer was a minimal intrusion into Broman's privacy. Bryant testified he would not have extended the scope of his view any farther had the computer's history not shown anything implying underage content. Therefore, the search at its inception was reasonable.

¶11 Broman contends the search was not initiated based on reasonable suspicion, but instead upon "an erroneous assumption made by the probation officer," alleging Bryant either did not know or forgot Broman was not prohibited from viewing adult pornography. Sebastian and Lamay testified Bryant had told them Broman was not allowed to look at adult pornography. However, Bryant testified he did not misunderstand Broman's probation conditions and knew he was permitted to view adult pornography. More importantly, whether a search is reasonable is an objective inquiry based on the facts available to the officer at the moment of the search. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968); *see also State v. Sweeney*, 224 Ariz. 107, ¶ 22, 227 P.3d 868, 873 (App. 2010). And we agree with the trial court that when Bryant saw the computer image "it was not in any way unreasonable . . . , whether or not there was a probation violation, for him to look further into the situation, given the circumstances."

¶12 Broman focuses on Bryant's reasons for initiating the search, but, to the extent he argues his rights were violated by the subsequent search and seizure of his computer, those further intrusions were supported reasonably at each stage by the discovery of additional content suggesting criminal activity. These discoveries included finding the website with images of "young looking boys" and genitals, the email asking for pictures of "younger boys," and the images Lamay discovered by scanning the hard drive.

¶13 Broman points out that Lamay's affidavit in support of the search warrant contained the inaccurate statement that "[a]s part of the terms of his probation [Broman] is not allowed to view pornography in any of its forms." He contends the statement was

grossly negligent or reckless and argues "[t]his court should not uphold a finding of reasonable suspicion which is founded upon the false material statement of a probation officer." He does not challenge the validity of the warrant directly and, therefore, we do not address the issue on appeal.[1] Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument shall contain contentions with citation to authority relied on); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (argument not developed on appeal waived). Instead, Broman appears to argue the affidavit demonstrates Bryant's initial search was based on inaccurate information. As we have discussed above, Bryant's search was reasonable based on the circumstances. Therefore, the trial court did not err by denying Broman's motion to suppress evidence.[2] *See Esser*, 205 Ariz. 320, ¶ 3, 70 P.3d at 451.

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[1]To the extent Broman intended to attack the validity of the search warrant based on its contents, Sebastian testified, and the trial court concluded, the computer had been seized and searched as part of the probation search, which did not require a warrant. *See Walker*, 215 Ariz. 91, ¶ 18, 158 P.3d at 224. Additionally, even if a warrant had been necessary, the affidavit refers to a "child pornography investigation" and Broman fails to explain how the probation statement was necessary to show probable cause of child pornography possession. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 42, 25 P.3d 717, 733 (2001) (defendant must prove affiant made false statement knowingly, intentionally, or with reckless disregard for truth and false statement necessary to finding probable cause).

[2]The state also contends Broman's acceptance of the search condition constituted consent and a complete waiver of his Fourth Amendment rights. The United States Supreme Court has held a warrantless search can be conducted of a parolee without reasonable suspicion where his parole includes a search condition, but noted that "parolees have fewer expectations of privacy than probationers." *Samson v. California*, 547 U.S. 843, 846, 850 (2006). And the Ninth Circuit recently held permissible pursuant to a probation condition a warrantless search without reasonable suspicion. *United States v. King*, No. 11-10182, *2, *5, 2012 WL 807016 (9th Cir. Mar. 13, 2012) (probation condition allowing search without probable cause permitted search "whether or not police suspect [probationer] of wrongdoing"). However, because we conclude the search was reasonable, we need not address this issue.

Admission of Other Images

¶14 Broman also argues the trial court erred by permitting the state to present testimony that additional inappropriate images of nude children or children engaged in sexual acts, "probably over 800," were discovered on Broman's computer. Broman contends the only purpose in admitting the testimony was "to inflame the jury and unfairly prejudice them against [him]." "We review the . . . 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).

¶15 Over Broman's objection, the trial court allowed the testimony under Rule 404(b), Ariz. R. Evid, and rejected Broman's argument made pursuant to Rule 403, Ariz. R. Evid. 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 may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." And Rule 403 provides that relevant evidence may be excluded if its probative value is outweighed substantially by the danger of unfair prejudice. Unfair prejudice occurs only when "the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997).

¶16 The trial court determined the purpose of the testimony was "to show knowledge and absence of mistake." The record supports the admission of the testimony because it was relevant and admitted for a proper purpose. *See State v. Van Adams*, 194 Ariz. 408, ¶ 20, 984 P.2d 16, 23 (1999) (evidence of other acts admissible if relevant and

admitted for proper purpose, including proof of knowledge). From the outset, Broman's theory of the case was that someone else had placed the images on his computer. *See State v. Andriano*, 215 Ariz. 497, ¶ 27, 161 P.3d 540, 546 (2007) (other act evidence admissible under Rule 404(b) to rebut defense theory). Broman asserted there was "no link" between himself and the images, argued the state had failed to prove Broman had known the images were child pornography when he accessed them, suggested Broman actually had deleted the images, and alluded someone else had put the images on the computer. The state used the challenged testimony to argue Broman's possession of the images was "not a mistake or an accident." Because Broman denied knowledge of the images and contended they ended up in his possession by mistake, the court properly allowed the challenged testimony to prove otherwise. *See State v. Stein*, 153 Ariz. 235, 239, 735 P.2d 845, 849 (App. 1987) (where defendant argued heroin in home sent to him mistakenly, evidence of other drugs admissible to prove absence of mistake); *see also* Ariz. R. Evid. 404(b) (other acts admissible to prove knowledge and absence of mistake); Ariz. R. Evid. 401 (evidence relevant if has any tendency to make fact of consequence more or less probable).

¶17 Without citation to Rule 403, Broman also argues the testimony was unfairly prejudicial.[3] However, the trial court minimized the potential for unfair

[3]Broman refers to the state's assertion that "[Broman] is the defendant who basically traffics on the internet in child porn," to support his argument the challenged testimony was offered only to prejudice and inflame the jury. Broman does not challenge the statement as improper, nor did he object to the statement below. In context, the statement was made as part of the state's argument that "this [was] not a case of accident or mistake." The testimony was admissible for that purpose pursuant to Rule 404(b),

prejudice by allowing testimony about the additional images but not admitting the images. *See State v. Coghill*, 216 Ariz. 578, ¶ 19, 169 P.3d 942, 947 (App. 2007) ("In the context of Rule 404(b), Arizona courts have emphasized the importance of the trial court's role in removing unnecessary inflammatory detail from other-act evidence before admitting it."). And evidence that additional images of child pornography had been found on Broman's computer was highly probative of the absence of mistake and did not have an undue tendency to suggest decision on an improper basis. *See Mott*, 187 Ariz. at 545, 931 P.2d at 1055. Thus, the testimony was admitted for a proper purpose, and the potential for unfair prejudice did not outweigh substantially its probative value. *See State v. Terrazas*, 189 Ariz. 580, 583, 944 P.2d 1194, 1197 (1997). Therefore, the court did not abuse its discretion in admitting the testimony.

Article II, § 15 of the Arizona Constitution

¶18 Broman argues his sentences violate the prohibition on cruel and unusual punishment found in article II, § 15 of the Arizona Constitution.[4] He objected to the sentences below only on the basis of the Eighth Amendment to the United States

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regardless of subsequent statements made by the state but not objected to by Broman. *See State v. Moody*, 208 Ariz. 424, ¶ 153, 94 P.3d 1119, 1155 (2004) (failure to object to comment in closing argument waives argument on appeal absent fundamental error); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal).

[4]In support of his argument, Broman refers to an appendix he provided on appeal. The materials contained in the appendix were not presented to the trial court and thus are not part of the record on appeal, and we will not consider them. *See* Ariz. R. Crim. P. 31.8(a)(1) (record on appeal includes items in evidence at trial); *State v. Schackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997) (appellate court generally does not consider materials outside record on appeal).

Constitution. Broman concedes he did not raise the Arizona constitutional challenge below, but contends to have done so "would have been fruitless." Because Broman raises the issue for the first time on appeal, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶19 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.'" *Id.* ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Such error must be "'clear, egregious, and curable only via a new trial.'" *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993), *quoting State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). To obtain relief on appeal under fundamental error review, "a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. The imposition of an illegal sentence constitutes fundamental error. *State v. Kasic*, 228 Ariz. 228, ¶ 15, 265 P.3d 410, 413 (App. 2011).

¶20 Article II, § 15 of the Arizona Constitution provides no greater protection than does the Eighth Amendment to the United States Constitution. *State v. McPherson*, 228 Ariz. 557, ¶ 16, ___ P.3d ___, ___ (App. 2012); *see also Kasic*, 228 Ariz. 228, n.5, 265 P.3d at 413 n.5. Review of noncapital sentences is "subject only to a 'narrow proportionality principle' that prohibits sentences that are 'grossly disproportionate' to the crime." *State v. Berger*, 212 Ariz. 473, ¶ 10, 134 P.3d 378, 380 (2006), *quoting Ewing v. California*, 538 U.S. 11, 20, 23 (2003). Courts give the legislature "substantial

deference" regarding policy choices behind sentencing statutes. *Id.* ¶ 13. "[I]f 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.* ¶ 28.

¶21 In *Berger*, our supreme court held the defendant's twenty consecutive ten-year prison terms following conviction on twenty counts of sexual exploitation of a minor under the age of fifteen did not constitute cruel and unusual punishment under the Eighth Amendment. *Id.* ¶ 1. In so holding, the court articulated the historical policy justifications behind mandatory minimum sentencing for offenses involving child pornography, including protecting children from exploitation, combating sexual abuse, and punishment and deterrence. *Id.* ¶¶ 18-22. In light of these justifications, the court concluded "the 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.'" *Id.* ¶ 23, *quoting Ewing*, 538 U.S. at 28 (alterations in *Berger*). Thus, a ten-year sentence for each offense was determined to be consistent with the legislature's goals. *Id.* ¶ 33.[5]

¶22 Broman was sentenced, consistent with our statutory scheme, to eleven presumptive terms of seventeen years, to be served consecutively. *See* A.R.S. § 13-3553(C) (sexual exploitation of minor under fifteen punishable pursuant to A.R.S.

[5]Broman concedes the relief he seeks is limited by *Berger*, but invites us to depart from settled precedent and find that article II, § 15 of the Arizona Constitution provides greater protection than the Eighth Amendment. We decline to do so.

§ 13-705); A.R.S. § 13-705(D) (providing seventeen-year presumptive term for dangerous crime against children including sexual exploitation of minor); § 13-705(M) (sentences imposed for dangerous crime against children involving different victims shall be consecutive); A.R.S. § 13-708(A) (person on probation for conviction of felony when commits felony involving dangerous offense must be sentenced to at least presumptive term). His sentences are "consistent with the State's penological goal of deterring the production and possession of child pornography." *Berger*, 212 Ariz. 473, ¶ 33, 134 P.3d at 385. And we have determined previously that this sentencing scheme does not violate the Eighth Amendment and that article II, § 15 of the Arizona Constitution provides no greater protection. *See McPherson*, 228 Ariz. 557, ¶¶ 15-16, ___ P.3d at ___. Therefore, because Broman does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, we do not address his argument further. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if found).

Disposition

¶23 For the foregoing reasons, we affirm.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge