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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OF ARIZONA, Appellee, v. MAXAMILIANO PAREDES-SOLANO, Appellant.	2 CA-CR 2010-0358 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20070945

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a second jury trial,[1] Maxamiliano Paredes-Solano was convicted of two counts of sexual exploitation of a minor under fifteen, both dangerous crimes against children, and sentenced to presumptive, consecutive, seventeen-year terms of imprisonment. On appeal, he contends the charges against him were duplicitous and thus the jury's verdicts may not have been unanimous. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the jury's verdicts. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). The following summary of facts, found in our decision on appeal after Paredes-Solano's first trial, remains accurate here:

> On February 23, 2007, Paredes-Solano took two rolls of film into a Walgreens store to be developed. After developing the film, a Walgreens employee called the police because some of the pictures depicted what appeared to be a young girl's genitalia and the same girl holding a man's penis. Paredes-Solano, whose appearance matched that of the man in the photographs, was arrested at the Walgreens on February 26 when he returned to pick up the pictures. Detectives later identified the child in the photographs who was five years old when they were taken.

[1]Paredes-Solano originally was convicted of one count of child molestation and two counts of sexual exploitation of a minor under fifteen following a jury trial in 2008. This court affirmed the conviction for child molestation on appeal but vacated the convictions for exploitation of a minor and remanded for further proceedings. *State v. Paredes-Solano*, 223 Ariz. 284, ¶ 28, 222 P.3d 900, 909 (App. 2009). This appeal arises from the second trial.

State v. Paredes-Solano, 223 Ariz. 284, ¶ 2, 222 P.3d 900, 902 (App. 2009) (*Paredes-Solano I*).

¶3 In his first trial, the jury found Paredes-Solano guilty of all three charges, and the trial court sentenced him to an enhanced, presumptive, seventeen-year prison term on each count. The court ordered the two sentences for sexual exploitation to be served consecutively to each other and concurrently with the sentence for child molestation.

¶4 Paredes-Solano appealed, claiming that the charges against him were duplicitous. *Paredes-Solano I*, 223 Ariz. 284, ¶ 1, 222 P.3d at 902. The indictment charged two counts of sexual exploitation of a minor and, under each count, it alleged, in relevant part, that Paredes-Solano had committed the offense "by possessing . . . photographing [or] developing a[] visual depiction in which a minor . . . is engaged in exploitive exhibition or other sexual conduct . . . in violation of A.R.S. §§ 13-3553(A)(1)(2)." We held subsections (1) and (2) of § 13-3553(A) constituted "two separate offenses, each encompassing a distinct phase of the child pornography . . . process." *Paredes-Solano I*, 223 Ariz. 284, ¶ 10, 222 P.3d at 903. Thus, because the term "possessing" is found in subsection (2), whereas "photographing" and "developing" are included in subsection (1) of § 13-3553(A), we concluded the indictment was duplicitous on its face and vacated the two exploitation convictions. *Paredes-Solano I*, 223 Ariz. 284, ¶ 28, 222 P.3d at 909. On remand, the state moved to amend the indictment, and the trial court, after a hearing, granted the state's motion. The indictment

was amended to remove the word "possessing," along with any reference to subsection (2) of § 13-3553(A). After a second jury trial, Paredes-Solano was again convicted of both counts of sexual exploitation and sentenced as described above. This appeal followed.

Discussion

¶5 Paredes-Solano's sole argument on appeal is that each count of sexual exploitation, as alleged in the amended indictment, constituted a duplicitous charge. Preliminarily, we note that although Paredes-Solano characterizes his argument as one involving "duplicitous charges," he also suggests the indictment itself was duplicitous. "A duplicitous charge exists '[w]hen the text of an indictment refers to only one criminal act, but multiple alleged criminal acts are introduced to prove the charge.'" *Paredes-Solano I*, 223 Ariz. 284, ¶ 4, 222 P.3d at 903, *quoting State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). A duplicitous charge is different from a duplicitous indictment, which charges "'two or more distinct and separate offenses in a single count.'" *Id.*, *quoting Klokic*, 219 Ariz. 241, ¶ 10, 196 P.3d at 846. But we need not determine Paredes-Solano's precise argument because both a duplicitous indictment and a duplicitous charge present the same problems. *Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d at 847. Both can "deprive the defendant of 'adequate notice of the charge to be defended,' create the 'hazard of a non-unanimous jury verdict,' or make it impossible to precisely plead 'prior jeopardy [] in the event of a later prosecution.'" *Id.*, *quoting State v. Davis*, 206 Ariz. 377, ¶ 54, 79 P.3d 64, 76 (2003).

¶6 On appeal, Paredes-Solano contends that "the charge is duplicitous because . . . it alleges in each count two different acts[—]photographing and developing[—]that the evidence showed occurred on different days." Therefore, "some of the jury may have believed [he] was not the photographer and others may have believed he did not know what was being developed," leading to the "possib[ility] that [he] was convicted by a nonunanimous jury." Whether the indictment was duplicitous depends on whether photographing and developing constitute separate offenses for purposes of § 13-3553(A)(1). We review questions of statutory interpretation de novo. *State v. Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d 756, 759 (App. 2005).

¶7 In making this determination, we find this court's reasoning in *State v. Dixon*, 127 Ariz. 554, 622 P.2d 501 (App. 1980), instructive. In *Dixon*, the theft count of the indictment, pursuant to A.R.S. § 13-1802, alleged that the defendant "stole from or knowing or having reason to know it was stolen, controlled or came into control of property," and the jury was instructed accordingly. *Dixon*, 127 Ariz. at 560-61, 622 P.2d at 507-08. Dixon requested the theft count be submitted to the jury on two separate verdict forms—one for the act of stealing and one for the act of controlling stolen property—but the trial court denied the request. *Id.* at 561, 622 P.2d at 508. On appeal, he argued his right to a unanimous verdict was violated by the trial court's refusal to separate the offenses. *Id.* This court disagreed, concluding that § 13-1802 described a single offense that could be committed in more than one way, rather than several separate and distinct offenses, each constituting theft. *Dixon*, 127 Ariz. at 561-62, 622 P.2d at

508-09. In reaching this conclusion, we considered four different factors: 1) the title of the act, 2) whether there is a readily perceivable connection between the various acts set forth, 3) whether the acts are consistent with and not repugnant to each other, and 4) whether the acts may inhere in the same transaction. *Id.* at 561, 622 P.2d at 508.

¶8 The first factor—the title of the act—is the least instructive. And in *Paredes-Solano I*, we concluded that subsections (1) and (2) of § 13-3553(A) constitute separate offenses, not merely different ways to commit exploitation of a minor. Thus, the heading of § 13-3553, "Sexual exploitation of a minor; evidence; classification" is not helpful in determining whether photographing and developing constitute separate offenses.

¶9 Application of the other *Dixon* factors, however, supports a conclusion that the acts listed within subsection (1) are merely different ways to commit the offense of sexual exploitation. The connection between photographing and developing a photograph is readily apparent—each is part of the process of creating an image. The acts are consistent with and not repugnant to one another, and both may inhere in the same transaction, particularly given today's digital technology.

¶10 We therefore conclude the legislature intended the acts of photographing and developing images of child pornography to be descriptions of "a single offense . . . committable in more than one way." *Dixon*, 127 Ariz. at 561, 622 P.2d at 508 (construing A.R.S. § 13-1802). And, "[a]lthough a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not

entitled to a unanimous verdict on the precise manner in which the act was committed." *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982) (citation omitted). Thus, the indictment here was not duplicitous. And, by this same reasoning, the charges also were not duplicitous, because the state, rather than alleging multiple criminal acts to support the charges, merely presented evidence of two different ways in which Paredes-Solano committed the offense. *See Paredes-Solano I*, 223 Ariz. 284, ¶ 4, 222 P.3d at 903, *quoting Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d at 847 (charge duplicitous where state alleges multiple criminal acts to support charge).

¶11 Our conclusion is supported by *Paredes-Solano I*. There, although we concluded that subsections (1) and (2) of § 13-3553(A) constituted separate and distinct offenses, *Paredes-Solano I*, 223 Ariz. 284, ¶ 15, 222 P.3d at 906, our holding suggested that the various acts within these subsections were *not* separate offenses, but merely were different ways of committing the act of sexual exploitation. Indeed, we stated that subsections (1) and (2) "address[] two separate harms—the creation of visual images and their subsequent distribution and viewing," which "suggests a legislative intention to create two separate offenses." *Id.* ¶ 10. Furthermore, "had the legislature intended to create two separate offenses" for photographing and developing child pornography, "it could easily have done so by enacting . . . [additional] separate subsections." *State v. Manzanedo*, 210 Ariz. 292, ¶ 9, 110 P.3d 1026, 1028 (App. 2005) (construing A.R.S. § 13-1207). Thus, with respect to charges based on § 13-3553(A)(1), "it is unnecessary to a guilty verdict that there be more than unanimity concerning guilt as to the single

crime, regardless of unanimity as to the means by which the crime is committed[,] provided there is substantial evidence to support each of the means charged." *Dixon*, 127 Ariz. at 561, 622 P.2d at 508 (alteration added).

¶12 Although Paredes-Solano contends *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003), supports his argument that the charges were duplicitous, we find that case distinguishable. In *Davis*, the defendant had been charged with sexual conduct with a minor on a specific date. *Id.* ¶ 51. But at trial, the state presented evidence that he had also engaged in intercourse with the minor on another date. The trial court then instructed the jury that "the exact dates were not important," and the verdict form contained no date. *Id.* ¶¶ 51-52. On appeal, the defendant argued the jury may not have unanimously agreed about which of the two acts constituted a crime. Our supreme court agreed, finding the charge duplicitous because the state presented evidence of more than one act of intercourse to prove a single charge. *Id.* ¶¶ 53, 59, 61.

¶13 In this case, each count of the indictment specified the timeframe within which the offense occurred and contained a description of the particular photographic image covered by that count of the indictment. For each count, the state presented evidence of the different ways in which Paredes-Solano committed the offense of sexual exploitation with respect to the particular image identified. *Davis* is inapposite.

¶14 Finally, Paredes-Solano argues our statement in *Paredes-Solano I*—that it was unclear whether the jury verdict was based on the act of photographing or developing— "is the law of the case," and supports his argument that each count charges

two separate and distinct offenses. But Paredes-Solano ignores the context of that statement. In *Paredes-Solano I,* we concluded the indictment was duplicitous on its face because it charged two subsections of the statute under one count. 223 Ariz. 284, ¶ 16, 222 P.3d at 906. We stated that such an error could be cured if "the basis for the jury's verdict [wa]s clear." *Id.* ¶ 17. And we determined the basis for the verdict was unclear, given the different dates the acts of photographing and developing occurred, Paredes-Solano's separate defenses to those acts, and the fact that some jurors may have believed Paredes-Solano had developed the photographs while others may have believed only that he had taken the photographs. *Id.* at ¶ 21. But in making this determination, we simply were saying that the verdict could not cure the duplicitous indictment, not that the verdict itself constituted error. Thus this argument lacks merit.[2]

Disposition

¶15 For the reasons stated above, we affirm Paredes-Solano's convictions and sentences.

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

[2]Paredes-Solano also argues that in *Paredes-Solano I,* we stated that photographing and developing are separate acts. But he ignores our statement in *Paredes-Solano I* that the drafting of subsections (1) and (2) of A.R.S. § 13-3553(A) "suggests a legislative intention to create two separate offenses, each encompassing a distinct phase of the child pornography production and distribution process." 223 Ariz. 284, ¶ 10, 222 P.3d at 904. Thus, contrary to his assertion, our holding does not support his argument that photographing and developing constitute two separate and distinct offenses.

CONCURRING:

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

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