DIVISION ONE
FILED: 11/01/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0618
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
DAVID RALPH GARCIA, JR.,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-159761-001 SE

The Honorable Christopher Whitten, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Presiding Judge

¶1 David Ralph Garcia, Jr. (defendant) appeals from his convictions and sentences for five counts of sexual conduct with

a minor and one count of molestation of a child, all class two felonies and dangerous crimes against children. His sole issue on appeal is whether the trial court abused its discretion in permitting the State to introduce other act evidence pursuant to Arizona Rule of Evidence 404(b) and (c). We affirm.

BACKGROUND

¶2 During the relevant time period, defendant lived with his wife, their two biological children K. and D. and their four adopted children including I. and G. On or about June 23, 2006, federal agents executed a search warrant at defendant's home and discovered on his computer and on a disk multiple images and videos depicting minors engaged in sexually explicit conduct. The United States charged defendant with possession of child pornography, and he was released from custody pending trial. As conditions of his release, defendant was ordered to wear an "ankle bracelet" and he was not allowed to be alone with his children unless his wife or mother-in-law were present. On August 22, 2008, defendant pled guilty in federal court to one count of possession of child pornography.

¶3 On September 22, 2008, before defendant was sentenced in the federal matter, he engaged in sexual intercourse with thirteen-year-old I. when she remained home as his wife and the

other children left to get D. a haircut.[1] Later that evening, I. went to a friend's house where she disclosed the incident to the friend's mother who called 9-1-1. Mesa Police investigated.

¶4 Police arrested defendant the next day, and the state charged him with sixteen counts of sexual conduct with a minor, two counts of molestation of a child, and two counts of sexual abuse, all related to incidents involving I. and G. between June 18, 2005 and September 22, 2008 when the girls were ten to thirteen years old.[2]

¶5 Before trial, the state moved under Arizona Rules of Evidence 404(b) and (c) to introduce evidence that defendant downloaded and possessed child pornography resulting in his federal conviction, and that L.C., a nanny who lived with defendant's family, observed defendant touching I.'s breast. Following the hearing, Judge Harrison granted the motion and ruled the evidence was admissible.[3]

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[1] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against defendant. *State v. Manzanedo,* 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005). The state also alleged the September 22 incident included oral and anal sex, but the jury found defendant not guilty on those counts.

[2] During trial, the state amended the indictment so that nineteen counts remained, and the court granted defendant's motion for judgment of acquittal as to count 12. Consequently, eighteen counts were presented to the jury.

[3] The state also sought to admit evidence that (1) defendant, referring to K.'s fourteen-year-old friend, responded "When am I

¶6 The case was reassigned from Judge Harrison to Judge Whitten and, during trial, the state moved to introduce evidence of the terms defendant used to search for the child pornography found on his computer. Specifically, the state sought to introduce the following: "14 yo," "preteen," "PTHC,"[4] "sister," "dad," "wife," and "preteen pussy." According to the state, Judge Harrison's prior evidentiary ruling was unclear as to whether the search terms were admissible. The state again argued Rule 404(b) and (c) as the basis for the terms' admissibility. Following argument, the court denied the state's motion as to the search terms "sister," "dad," and "wife" but granted the motion as to the other terms. The jury was given a limiting instruction as to the use of other act evidence.

¶7 The jury found defendant guilty of five counts of sexual conduct with a minor and one count of molestation of a child. The jury returned not guilty verdicts on the remaining twelve counts. The court imposed presumptive consecutive terms of imprisonment, and defendant appealed.

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going to get [the friend]?" when K. asked him about getting a cell phone, and (2) defendant gave L.C. a book about a father having sex with his daughter. The court found these allegations lacked factual support and denied the state's motion as to this evidence.

[4] According to the federal agent who conducted the forensic examination of defendant's computer, "PTHC" is an acronym for "preteen hardcore."

DISCUSSION

¶8 In general, evidence of other acts in inadmissible "to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). However, Rule 404(b) allows such evidence "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Such other act evidence is admissible if: (1) the evidence is admitted for a proper purpose; (2) the evidence is relevant; (3) the evidence is not unfairly prejudicial under Rule 403; and (4) the judge gives "an appropriate limiting instruction upon request." *State v. Nordstrom*, 200 Ariz. 229, 248, ¶ 54, 25 P.3d 717, 736 (2001). In addition, the state must prove by clear and convincing evidence that the other act occurred and that the defendant committed the act. *State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997).

¶9 In sexual offense cases, Rule 404(c) applies when determining the admissibility of specific types of other act evidence. That rule provides, in relevant part:

> **(c) Character evidence in sexual misconduct cases**
>
> In a criminal case in which a defendant is charged with having committed a sexual offense, . . . evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a

character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.

(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(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. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

(i) remoteness of the other act;

(ii) similarity or dissimilarity of the other act;

(iii) the strength of the evidence that defendant committed the other act;

(iv) frequency of the other acts;

(v) surrounding circumstances;

> (vi) relevant intervening events;
>
> (vii) other similarities or differences;
>
> (viii) other relevant factors.
>
> (D) The court shall make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1).
>
> (2) In all cases in which evidence of another act is admitted pursuant to this subsection, the court shall instruct the jury as to the proper use of such evidence.

¶10 Defendant argues generally that the court "committed reversible error by admitting other acts he allegedly committed without subjecting the evidence to the full requirements of Rule 404(c)." We disagree.

I. Possession of Child Pornography and L.C.'s Observation of Defendant Touching I.'s Breast

¶11 At the hearing on the state's first Rule 404 motion, Dr. Steven Gray, a psychologist who specializes in assessing sex offenders, testified that he reviewed the Mesa Police reports pertaining to the charges in this case and the federal law enforcement reports related to defendant's child pornography case pending in federal court. Dr. Gray testified that the ages of the children in the federal pornography case and the victims' ages in the state case "overlapped" as did the behaviors depicted in the pornography and the acts that formed the bases of the state charges. Dr. Gray testified that the sexual

activity in both cases was "pedophilic in nature" and "incestuous" and that "the time frames . . . virtually overlap." Specifically, he noted that defendant "took a plea 8-27-08 [sic] on the child porno, and then the arrest is 9-23. I think the incident was on 9-22 with I[.]"[5] Dr. Gray further testified some studies demonstrate "that people who have been convicted of child pornography [are] more likely than not . . . to have hands on behavior."

¶12 Regarding evidence that defendant fondled I. on the sofa, neither L.C. nor I. testified at the hearing regarding the incident — and the court was not presented with any prior testimony — apparently because of the state's expressed opinion that a hearing was not necessary due to I.'s status as a victim in this case. *See State v. Garner*, 116 Ariz. 443, 569 P.2d 1341 (1977).[6] A report of the incident was relayed in the course of

[5] This testimony, in addition to defendant's own testimony acknowledging his plea, belies his argument that "other than the prosecutor's vouching, no independent evidence was presented as to the pornography plea . . .." We also note that at trial the state introduced a certified copy of defendant's federal plea agreement.

[6] *See also State v. Ferrero*, 229 Ariz. 239, 242-244, ¶¶ 11-24, 274 P.3d 509, 512-14 (2012) (holding *Garner* evidence involving same victim subject to Rule 404(c) when offered to show aberrant sexual propensity and adopting narrow definition of "intrinsic evidence," noting: "Although prior sexual contact with the victim may be so closely related to the charged sexual offense that it is intrinsic and thus exempt from Rule 404 analysis, it may also be sufficiently remote and unrelated that it neither proves nor facilitates the charged act.").

Dr. Gray's testimony. Defendant claimed he was not touching I.'s breast, but rather checking to see if I. was wearing her sister's bra. His defense as to I. was consistently that he had never abused her.

¶13 After the hearing, the court found the acts admissible under Rule 404(b) to show motive, intent and absence of mistake or accident. Additionally, the court found:

> [S]ufficient evidence was presented to find that the Defendant committed the other acts. Defendant has entered a plea of guilty in a federal case on the child pornography charges. The evidence relating to the touching of [I.'s] breast will be presented by [I.'s] testimony and the testimony of [L.C.] Dr. Gray provided testimony related on [sic] the documents he was presented.
>
> The Court further finds that the commission of the other acts 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. There is sufficient evidence for a reasonable juror to find that the Defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.
>
> . . .
>
> The Court further finds that the value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues or the other factors outlined in Rule 403. The Court finds that the other acts are not too remote in time having occurred during the time the charged offenses were alleged to have been occurring.

> The Court further finds that the other acts are similar in nature to the alleged acts charged in this case. The child pornography on the Defendant's computer had images of pre-pubescent females involved in sexual acts. Dr. Gray testified as to research he has reviewed that demonstrates a relationship between child pornography and hands on pedophilic behavior. The act of touching [I.'s] breast is also similar as it is pedophilic in nature. As to the strength of the other acts evidence, the Defendant pled guilty to the child pornography charges and the jury will be able to assess the credibility of the Victim [I.] and [L. C.] as it relates to the touching of the breast incident.

¶14 The court's findings regarding defendant's guilty plea are supported by the record and comport with the requirements of Rule 404(c). No abuse of discretion occurred.

¶15 As to evidence before the jury that defendant fondled I. on the sofa, at trial L.C. testified she observed, during May or June 2006, defendant fondle I.'s breast. After the close of the evidence, the court instructed the jury as to the proper use of the other act evidence:

> Evidence of other acts has been presented. Evidence to rebut this has also been presented. You may consider this evidence in determining whether the defendant had a character trait that predisposed him to commit the crimes charged. You may determine that the defendant had a character trait that predisposed him to commit the crimes charged only if you decide that the State has proved by clear and convincing evidence that, one, the defendant committed these acts; and, two, these acts show that

> the defendant's character predisposed him to commit abnormal or unnatural sexual acts. You may not convict the defendant of the crimes charged simply because you find that he committed these acts or that he had a character trait that predisposed him to commit crimes [sic] charged. Evidence of these acts does not lessen the State's burden burden [sic] to prove the defendant's guilt beyond a reasonable doubt.

We presume the jury followed these instructions. *State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994). This instruction accurately explained the requisites of rule 404(c). S*ee also* Ariz. R. Evid. 104(b) (preliminary question with relevancy conditioned on fact). Moreover, this instruction is distinguishable from *Aguilar*, where the supreme court reversed a conviction because the trial court had directed the jury that they must consider the other act testimony and did not allow the option that the jury factually reject the evidence. *State v. Aguilar*, 209 Ariz. 40, 49-50, ¶¶ 33-36, 97 P.3d 865, 874-75 (2004); *but see State v. LeBrun*, 222 Ariz. 183, 187, ¶¶ 13-14, n 12, 213 P.3d 332, 336 (App. 2009). The jury returned not-guilty verdicts on twelve of the eighteen charges, thereby indicating that the jury did not simply convict defendant because of the other act evidence and the evidence did not unfairly prejudice defendant. The trial court's findings regarding defendant's fondling of I. are supported by the record and comport with the

requirements of Rule 404(c). We find no reversible error in the admission of this evidence.

II. Internet Search Terms

¶16 The court also properly made the requisite findings under Rule 404(c) to rule the internet search terms were admissible. The court found that Judge Harrison's reasoning regarding the admissibility of defendant downloading child porn and the resulting conviction equally applicable to the admissibility of the search terms: defendant admitted to downloading the illicit images, and Judge Harrison already found the evidence sufficient to find defendant had a character trait giving rise to an aberrant sexual propensity to commit the charged crimes. Further, the court found the probative value of the terms was great because they explained how the child porn got on defendant's computer "and that it wasn't just that the adolescent images appeared in a search for adult porn." In finding that the probative value of the other acts was not outweighed by the danger of unfair prejudice, the court expressly considered the remoteness, similarity, frequency, surrounding circumstances, and strength of the evidence that Defendant committed the other acts. The court also found that the terms themselves did not appreciably add to the prejudicial effect that defendant searched for child pornography using his

computer. Based on the foregoing, we the court did not abuse its discretion in admitting the search terms.[7]

[7] Defendant contends that the state's Rule 404 motion seeking to admit the terms was untimely because it was made during trial. Defendant provides no authority to support this contention. Similarly, defendant cites no authority for his assertion that the court reversibly erred by not making express findings on every factor listed in Rule 404(c)(1)(C)(i-viii) when weighing the prejudicial impact of the other act evidence against its probative value. We agree with defendant that, before deeming prior act character trait evidence admissible, Rule 404(c)(1)(D) requires the court to make a specific finding that the probative value of the evidence is not substantially outweighed by unfair prejudice. In making that finding, the court "shall take into account" a non-exclusive list of various factors. Rule 404(c)(1)(C)(i-viii). Contrary to defendant's implicit assertion, however, the court is not obligated to make explicit findings on the record regarding each of those specific factors. Defendant's apparent reliance on *State v. Aguilar*, 209 Ariz. 40, 97 P.3d 865 (2004) is misplaced. Our supreme court in that case expressly did not address the findings a trial court must make under Rule 404(c)(1)(C) other than to note the rule "mandates some specific indication of why the trial court found [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]." *Aguilar*, 209 Ariz. at 50, ¶ 36, 97 P.3d at 875. The courts' rulings in this case comported with this admonition in *Aguilar.*

CONCLUSION

¶17 The court did not commit reversible error in its evidentiary rulings regarding other act evidence. Accordingly, we affirm defendant's convictions and sentences.

/s/

JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/

PETER B. SWANN, Judge

/s/

SAMUEL A. THUMMA, Judge