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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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STATE OF ARIZONA, *Appellee*,

*v.*

PHILLIP DANIEL SIMS, *Appellant*.

No. 1 CA-CR 17-0092  
FILED 5-1-2018

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Appeal from the Superior Court in Coconino County  
No. CR 2013-00814  
The Honorable Dan R. Slayton, Judge

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix  
By Gracynthia Claw  
*Counsel for Appellee*

Coconino County Public Defender's Office, Flagstaff  
By Brad Bransky  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Jennifer M. Perkins joined.

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**C A T T A N I**, Judge:

¶1 Phillip Daniel Sims appeals his convictions and sentences for 10 counts of sexual exploitation of a minor, arguing that the superior court improperly instructed the jury. For reasons that follow, we affirm.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 During a parole compliance check at Sims's residence, Sims admitted that there were inappropriate items on his computer. Sims's parole officer viewed the items and determined that Sims may have violated the conditions of his parole and had possibly engaged in criminal activity. Police investigators discovered 10 images of sexually exploited male minors stored on a USB drive Sims owned, and Sims admitted that he had downloaded the images.

¶3 The State charged Sims with 10 counts of sexual exploitation of a minor. The jury found him guilty on all counts. The jury also found seven of the counts to be dangerous crimes against children, and the superior court imposed consecutive life sentences for those counts. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 13-705(I), (P)(1)(g), -3553(C). The court imposed concurrent, presumptive terms of 15.75 years for the three remaining convictions. Sims timely appealed, and we have jurisdiction under A.R.S. § 13-4033.

**DISCUSSION**

¶4 Sims argues the superior court erred by (1) refusing to give the jury instructions he requested and (2) not sua sponte clarifying terms in the sexual exploitation statute. We review the court's decision not to give Sims's requested jury instructions for an abuse of discretion, noting that the court need not give a requested instruction when other instructions adequately cover the substance of the proposed instruction. *See State v. Cox*, 214 Ariz. 518, 521-22, ¶¶ 16-17 (App. 2007). We review Sims's assertion that the court was required to provide unrequested additional clarification for fundamental, prejudicial error. *See State v. Gendron*, 168 Ariz. 153, 154

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(1991); *see also State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19–20 (2005). We will not reverse based on instructional error unless the instructions, taken as a whole, are likely to have misled the jurors. *State v. Schrock*, 149 Ariz. 433, 440 (1986).

¶5 Sims requested the following instructions:

27. “Minor” means a real person or real persons who were under eighteen years of age at the time a visual depiction was created, adapted or modified.

28. “Visual depiction” includes each visual image that is contained in an undeveloped film, videotape, or photograph or data stored in any form and that is capable of conversion into a visual image. The visual depiction must be of a real person. The visual depiction must not have been digitally created from scratch or manipulated in a way to create a new image from one [t]hat would not have been in violation of the law.

The superior court rejected Sims’s proposed instructions, and instead—consistent with Revised Arizona Jury Instructions (“RAJI”) Criminal 35.53, 35.51(5), and 35.51(6) (4th ed. 2017)—instructed the jury as follows:

The crime of sexual exploitation of a minor requires proof that the defendant knowingly received or possessed any visual depiction in which a minor was engaged in exploitive exhibition.

Exploitive Exhibition means the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer.

Minor means a person or persons who were under eighteen years of age at the time a visual depiction was created, adapted or modified.

*See also* A.R.S. §§ 13-3553(A)(2) (“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.”), -3551(5) (“‘Exploitive exhibition’ means the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer.”), -3551(6) (“‘Minor’ means a

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person or persons who were under eighteen years of age at the time a visual depiction was created, adapted or modified.”).

¶6 Sims asserts that his requested instruction was necessary to clarify the meaning of the statutory term “minor,” arguing that the minor child depicted in a photograph underlying a sexual exploitation of a minor charge must have been a “real person.” He argues that his proposed instructions were necessary under *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which held that a statute is unconstitutional if it defines child pornography as sexually explicit images that appear to depict minors but are produced without using real children.

¶7 Sims’s argument fails, however, because the superior court’s instruction that “minor” means “a person or persons” (rather than Sims’s proposed “a real person or real persons”) adequately addressed the issue. No further definition was needed because the word “person” was used in its ordinary sense. *See State v. Barnett*, 142 Ariz. 592, 594 (1984) (noting that the court need not define terms that “have no technical meaning peculiar to the law in the case but are used in their ordinary sense and commonly understood by those familiar with the English language”); *see also State v. Hazlett*, 205 Ariz. 523, 527, ¶ 11 (App. 2003) (construing the statutory definition of “minor” for these purposes as necessarily denoting “an actual living human being”). Accordingly, the superior court did not err by declining to further define “minor” or “person.”

¶8 Sims (based on his assertion at trial that one of the 10 images charged might have been “doctored”) also argues that the exploitive exhibition instruction, which included the statutory phrase “actual or simulated exhibition of the genitals,” *see* A.R.S. § 13-3551(5), may have confused the jurors into believing that the statute did not require that the victim be a real person. He asserts that the jurors could have believed that the word “simulated” modified not only the word “exhibition,” but also the word “genitals,” and that his requested instructions would have avoided such confusion by specifying that “[t]he visual depiction must not have been digitally created from scratch or manipulated in a way to create a new image.” Sims argues in the alternative that the superior court should have avoided any such confusion by sua sponte instructing the jurors on the statutory definition of “simulated.” *See* A.R.S. § 13-3551(11) (“‘Simulated’ means any depicting of the genitals or rectal areas that gives the appearance of sexual conduct or incipient sexual conduct.”). But the instruction given specifically stated that the genitals depicted must be “of any person.” Thus, for the reasons set forth above, it follows that the statutory phrase

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“simulated exhibition of the genitals” referred to the “simulated exhibition” of the genitals of a real person. Accordingly, Sims’s assertion of error fails.

**CONCLUSION**

¶9 We affirm Sims’s convictions and sentences.



AMY M. WOOD • Clerk of the Court  
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