IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DONALD LEE LINVILLE, *Appellant*.

No. 1 CA-CR 17-0429
FILED 7-24-18

Appeal from the Superior Court in Maricopa County
No. CR2013-110421-001
The Honorable Christopher A. Coury, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jason Lewis
Counsel for Appellee

Robert L. Dossey PC, Chandler
By Robert L. Dossey
Counsel for Appellant

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge David D. Weinzweig joined.

M c M U R D I E, Judge:

¶1 Donald Lee Linville appeals his convictions and sentences for two counts of surreptitious filming (Counts 1 and 2), one count of sexual conduct with a minor (Count 4), and eleven counts of sexual exploitation of a minor (Counts 3 and 5–14). He argues the superior court erred by denying his motion to suppress, claiming evidence seized was the fruit of an illegal search. He also argues there was insufficient evidence to support ten convictions of sexual exploitation of a minor. Finally, he claims the superior court erred by considering testimony from his expert when denying the Rule 20 motion for acquittal. For the following reasons, we affirm.

FACTS[1] AND PROCEDURAL BACKGROUND

¶2 On October 24, 2012, B.T. was living in the same apartment complex as Linville. Linville, without her permission, placed a camera on B.T.'s balcony to record the interior of the apartment. B.T. discovered the camera, saw the camera had recorded two videos looking into her apartment, and called the police. The police viewed the videos B.T. told them about and impounded the camera.

¶3 One week later, the police arranged and recorded a phone conversation between Linville and B.T. Linville admitted to B.T. that he owned the camera and placed it on B.T.'s balcony. He asked B.T. to delete the contents of the camera's memory card and return the camera to him. Two days later, officers performed a warrantless forensic examination of the memory card. They discovered a deleted video on the memory card depicting Linville having sex with an unidentified female.

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[1] We view the facts in the light most favorable to upholding the verdicts and resolve all reasonable inferences against Linville. *State v. Harm*, 236 Ariz. 402, 404, ¶ 2, n.2 (App. 2015) (citing *State v. Valencia*, 186 Ariz. 493, 495 (App.1996)).

¶4 The police used these facts to obtain multiple search warrants. On November 6, 2012, police executed a search warrant on Linville's apartment, where they found Linville's computers. The police then executed a second search warrant on November 16 to search Linville's computers. Officers found child pornography on his computers. Based on the evidence seized from the memory card and Linville's computers, the State charged Linville for the crimes noted above.

¶5 The jury found Linville guilty of all charged crimes. The superior court imposed concurrent and consecutive sentences, totaling more than 120 years' imprisonment. Linville timely appealed his convictions and sentences. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

A. The Superior Court Properly Denied the Motion to Suppress.

¶6 Before trial, Linville moved to suppress all evidence obtained by law enforcement after the warrantless forensic examination of the recordings on the camera's memory card. The superior court denied the motion. We review a superior court's denial of a motion to suppress for an abuse of discretion and consider only the evidence presented at the suppression hearing. *State v. Spears*, 184 Ariz. 277, 284 (1996).

¶7 The Fourth Amendment to the United States Constitution and Article 2, Section 8, of the Arizona Constitution protect against unlawful searches and seizures. *State v. Wilson*, 237 Ariz. 296, 298, ¶ 7 (2015). Only a person with a "legitimate expectation of privacy in the invaded place" may claim Fourth Amendment protection. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *State v. Harding*, 137 Ariz. 278, 291 (1983). "A person retains no privacy interest . . . in abandoned property." *State v. Huerta*, 223 Ariz. 424, 426, ¶ 5 (App. 2010). Thus, warrantless searches and seizures of abandoned property do not violate the Fourth Amendment. *Abel v. United States*, 362 U.S. 217, 241 (1960). Property is abandoned when "the person prejudiced by the search [] voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Huerta*, 223 Ariz. at 426, ¶ 5 (quoting *State v. Walker*, 119 Ariz. 121, 126 (1978)). Intent to abandon property "is determined by objective factors, not the defendant's subjective intent. . . . The appropriate test is whether defendant's words or actions would cause a reasonable

person in the searching officer's position to believe that the property was abandoned." *Id.* (quoting *People v. Pereira*, 58 Cal. Rptr. 3d 847, 852 (App. 2007)); *see also United States v. Nordling*, 804 F.2d 1466, 1469 (9th Cir. 1986) ("[A]bandonment is a question of intent. The inquiry should focus on whether, through words, acts or other objective indications, a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure.").

¶8 Here, Linville abandoned the camera, and the memory card, when he intentionally left it on B.T.'s balcony. Linville argues his actions show he did not intend to abandon the camera. However, it is not Linville's subjective intent that controls the inquiry. *See Huerta*, 223 Ariz. at 426, ¶ 5; *see also United States v. Basinski*, 226 F.3d 829, 836 (7th Cir. 2000) ("Because this is an objective test, it does not matter whether the defendant harbors a desire to later reclaim an item; we look solely to the external manifestations of his intent as judged by a reasonable person possessing the same knowledge available to the government agents."). Even if Linville intended to retrieve the camera, he no longer retained a reasonable expectation of privacy in the camera when he left it on B.T.'s balcony, without her permission, to surreptitiously record her and her boyfriend. *See Huerta*, 223 Ariz. at 426, ¶ 5; *see also United States v. Juszczyk*, 844 F.3d 1213, 1215 (10th Cir. 2017) (defendant lacked an objectively reasonable expectation of privacy in backpack he threw onto woman's roof without permission, even if defendant intended to retrieve the backpack later); *State v. Ipsen*, 406 P.3d 105, 109 (Or. Ct. App. 2017) (defendant abandoned his privacy interest in camera left in coffee shop bathroom to surreptitiously record customers).

¶9 Even if we were to conclude Linville retained an expectation of privacy in the camera after leaving it on B.T.'s balcony, Linville unequivocally abandoned any expectation of privacy in the memory card during the later confrontation call with B.T. Although Linville asked B.T. to return the camera to him during the confrontation call, he specifically asked B.T. to delete the contents of the memory card. By directing B.T. to delete the contents, an act akin to throwing an item away, Linville relinquished any remaining expectation of privacy in the memory card's content. *See State v. Fassler*, 108 Ariz. 586, 593 (1972) (no expectation of privacy in garbage left in cans outside house); *see also Pennsylvania v. Richardson*, 383 A.2d 510, 585 (Pa. 1978) (jewelry abandoned when defendant told third person to flush item down a toilet). Linville's contemporaneous request for B.T. to return the camera does not alter this conclusion. *See United States v. Tugwell*, 125 F.3d 600, 603 (8th Cir. 1997) (defendant's later attempt to reclaim a suitcase did not undermine conclusion that defendant abandoned suitcase based on actions inconsistent with a continued expectation of

privacy); *Nordling*, 804 F.2d at 1469 (defendant's admission of ownership of bag, after previously denying ownership, did not constitute a reassertion of interest in the bag where defendant left bag "in circumstances in which it was virtually certain that the bag would be opened, inspected and turned over to law enforcement authorities before he could possibly attempt to reexert physical control"). Given Linville's directive to B.T. to delete the contents of the memory card, the subsequent warrantless search of the card did not violate the Fourth Amendment.

¶10 Assuming *arguendo* that Linville did not abandon the camera or his interest in the memory card, we nonetheless hold the superior court did not err by denying Linville's motion to suppress. The superior court correctly concluded that if Linville "did retain some reasonable expectation of privacy in the Forensic Data found in the camera, this still is of no legal consequence" because the warrant was not based on facts learned from the warrantless search. The November 6, 2012, search warrant was not issued based on any facts obtained from a warrantless search as the affidavit supporting the warrant did not mention any information found during the forensic examination of the memory card. Thus, the evidence seized from the November 6 search is not subject to suppression.

¶11 We also agree with the superior court's conclusion that the evidence seized from the November 16 search warrant was not subject to exclusion. The affidavit supporting the November 16 search warrant did reference information found during the forensic examination of the memory card. However, as the superior court found, the affidavit nonetheless still established probable cause to issue the search warrant if the reference to the forensic data was removed. When information illegally obtained is included in a search warrant, "[t]he proper method for determining the validity of the search . . . is to excise the illegally obtained information from the affidavit and then determine whether the remaining information is sufficient to establish probable cause." *State v. Gulbrandson*, 184 Ariz. 46, 58 (1995). The State must also show the information learned from the illegal search "did not affect the officer's decision to seek the warrant or the magistrate's decision to grant it." *Id.* Here, the officers obtained the November 16 search warrant to search Linville's computer and other electronic devices seized after the November 6 search, which we have already concluded was proper. Therefore, even if we were to conclude the warrantless forensic examination of the memory card was improper, that search did not taint either the November 6 or 16 searches. The superior court did not err by denying Linville's motion to suppress.

B. Sufficient Evidence Supported the Convictions for Sexual Exploitation of a Minor.

¶12 During the search of Linville's computers, officers discovered he had used a program called BitTorrent to download child pornography. The officers found some of the child pornography in a deleted memory section of the computer's hard drive, called unallocated space. When a user of a computer running a Windows operating system deletes files, the files are moved to an area of the hard drive called the "recycling bin." A user may still access the files in the recycling bin. If he or she decides to empty the contents of the recycling bin, the files will be moved to unallocated space. The typical user may no longer access files in unallocated space. Officers also found other pornography in the recycling bin of Linville's computer.

¶13 Linville makes several arguments why there was insufficient evidence to convict him of 10 counts of sexual exploitation of a minor. In reviewing the sufficiency of the evidence, the question is whether there was substantial evidence from which a rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Routhier*, 137 Ariz. 90, 99 (1983). Linville presents three claims. First, he argues there was no evidence of possession for counts 5, 6, and 7 because the charged files were found in unallocated space, an area of his computer over which he had no dominion or control. Second, he claims there was no evidence he knowingly received the child pornography. Finally, he argues that without evidence that he was sexually stimulated by the images, the jury could not convict him of sexual exploitation of a minor.

1. The Files' Location on Linville's Computer Did Not Bar the Convictions.

¶14 A defendant may be convicted for knowingly receiving child pornography, not only its possession. A.R.S. § 13-3553(A)(2); *State v. Jensen*, 217 Ariz. 345, 348–49, ¶ 6 (App. 2008). The presence of child pornography at any location on Linville's computer is circumstantial evidence of the receipt of the images. The State presented evidence that officers found the charged depictions on his desktop computer in 2013. Linville told officers no other person had used the computer. Regardless of where the files were eventually discovered on his computers, the jury had sufficient evidence to find Linville received the illegal depictions.

2. Sufficient Evidence Showed Linville Knowingly Received the Charged Videos and Images.

¶15 Linville argues he accidentally downloaded the ten charged child pornography files while downloading large amounts of adult pornography. The evidence belies his claim. The jury heard evidence that Linville opened 900 files with titles commonly associated with child pornography. Linville also opened 10 similarly-titled folders. He searched Google with terms like "preteen," "underage," and "how to punish a two-year-old girl."

¶16 Further, the presence of other files on Linville's computer indicates this was not accidental. Generally, a BitTorrent user searches for content he or she wants to download, and selects an item to download—a movie, for example. The BitTorrent program then downloads a ".torrent" file, which does not contain the content itself, but instead informs the program how to download the content going forward. Officers, and Linville's defense expert, discovered multiple torrent files on Linville's computer with names indicating child pornography that Linville would have affirmatively directed the BitTorrent program to download. We find sufficient evidence for the jury to determine Linville knowingly received the child pornography. *See Jensen*, 217 Ariz. at 351–52, ¶ 18 ("[T]he presence of two images in the temporary internet folder and the image in the unallocated cluster, coupled with numerous syntax searches for words and phrases associated with child pornography, is evidence of voluntary action undertaken by the computer operator in an effort to receive child pornographic images from the internet.").

3. The Depictions of Exploitive Exhibition and Sexual Conduct Fulfill the Requirements of the Statute.

¶17 Section 13-3553(A)(2) requires the minor in the charged visual depiction to be engaged in exploitive exhibition or other sexual conduct. Six of the ten charged depictions are videos or images of sexual conduct and therefore fulfill the requirements of the statute. The other four images and videos involve exploitive exhibition. Exploitive exhibition, in relevant part, is defined as "exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer." A.R.S. § 13-3551(5). Because the State did not present evidence of Linville's sexual stimulation, Linville argues there was insufficient evidence. We disagree.

¶18 In *State v. Chandler*, this court addressed the definition of exploitive exhibition. 244 Ariz. 336, 338–39, ¶ 7 (App. 2017). In *Chandler*, the

State charged the defendant with sexual exploitation of a minor for secretly filming his teenage daughters while they were using the toilet, bathing, and shaving their genitals. *Id.* at 337, ¶ 2. Chandler admitted to police that he thought about masturbating while watching the videos. *Id.* at 339, ¶ 8. Chandler argued there was insufficient evidence to establish exploitive exhibition because the minors did not have the purpose of sexually stimulating the viewer. *Id.* at ¶ 338, ¶ 5. The *Chandler* court held, "the provision 'for the purpose of sexual stimulation of the viewer' means that the viewer intends the photograph be used for sexual stimulation, rather than that the minor intends to sexually stimulate the viewer." *Id.* at 338–39, ¶ 7. The court further stated, "[i]nterpreting the statute in this manner will not lead to criminalization of innocent pictures or videos in which a child happens to be nude. The state is still required to prove that the photographer took the picture for the purpose of 'sexual stimulation.'" *Id.* at 339, ¶ 8.

¶19 *Chandler* presented unique facts not present in this case. There, the defendant was both the recorder and the viewer of the depictions. To clarify that the proper focus is not whether the minor intended to sexually stimulate the viewer, the court held the relevant question is whether the viewer intended the depiction be used for sexual stimulation. The correct inquiry, however, is whether the photographer or recorder of the depiction created it "for the purpose of sexual stimulation of the viewer." A.R.S. § 13-3551(5). Therefore, in cases such as here, where the defendant is not the creator of the depiction, the analysis must concentrate on the content of the depiction, not on the defendant's subjective purpose for possessing it. The State must prove the photographer or the recorder of the depiction created it for the purpose of sexually stimulating the viewer, not that the viewer had the depictions for his or her own sexual stimulation.

¶20 Linville's argument that the State must prove a defendant was sexually stimulated by the depictions would lead to results not intended by the statute. Linville's interpretation would mean that innocuous images of nude children in medical journals or baby-in-the-bath family photographs would be converted to images of sexual exploitation of a minor if a person collected them for sexual stimulation. This does not comport with the intent of the statute, which was to protect children who are the "subjects in the production of pornographic materials." 1978 Ariz. Sess. Laws, ch. 200, § 2 (2nd Reg. Sess.).

¶21 Our interpretation of the statute is consistent with caselaw from Arizona as well as jurisdictions with similar statutes. *See State v. Gates*,

182 Ariz. 459, 463 (App. 1994) ("[D]efendant's intent cannot create a 'lewd exhibition' out of otherwise innocent activity by children."), *superseded by statute*, A.R.S. §§ 13-3551, -3553, *as recognized in Chandler*, 244 Ariz. at 338, ¶ 7; *see also U.S. v. Amirault*, 173 F.3d 28, 34–35 (1st Cir. 1999) ("[I]n determining whether there is an intent to elicit a sexual response, the focus should be on the objective criteria of the photograph's design."); *United States v. Villard*, 885 F.2d 117, 125 (3d Cir. 1989) ("Child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo . . ."); *U.S. v. Wiegand*, 812 F.2d 1239, 1245 (9th Cir. 1987) ("Private fantasies are not within the statute's ambit."); *Illinois v. Sven*, 848 N.E.2d 228, 231 (Ill. App. Ct. 2006) ("It must be emphasized that we are assessing the content of the images rather than the conduct of the defendant.").

¶22 Applying this interpretation to the depictions in this case, each of the depictions enabled the jury to find the creator of the images or videos had the purpose of sexually stimulating the viewer. The video charged in Count 5 contains a young girl undressing, followed by scenes with the focal point of the camera concentrated on her vagina. Count 7's image depicts a young girl holding an older man's erect penis. The image in Count 11 is a young girl exhibiting her vagina. Count 14's photo contains a young nude girl on a bed with her vagina exposed. A rational jury could conclude these images were exhibitions for the purpose of sexual stimulation of the viewer.

C. The Superior Court Did Not Err by Denying Linville's Motion for Acquittal.[2]

¶23 During the State's case-in-chief, Linville informed the court of a defense expert's scheduling problem. The court allowed the expert to begin his testimony before the conclusion of the State's case to accommodate the expert's schedule. Before the defense expert concluded his testimony, the State resumed and finished its case-in-chief. Linville then moved for acquittal under Arizona Rule of Criminal Procedure 20. The court denied the motion on counts 4 and 8–14. The court also denied the motion on counts 5, 6, and 7 without prejudice and reserved final judgment until after reviewing pertinent caselaw. The defense expert then continued to testify, and the court denied the motion on counts 5, 6, and 7 the next

[2] Linville did not move for acquittal on the two counts of surreptitious filming or on one count of sexual exploitation of a minor. Therefore, we do not consider those counts here.

day. In denying the motion on the remaining counts, the court stated, "[t]here's evidence that [Linville downloaded child pornography] . . . through RSS searches . . . ."[3] The State's evidence did not contain any evidence of RSS; the defense expert had explained the concept and stated Linville had one RSS feed on his computer.

¶24 We review the superior court's ruling on a Rule 20 motion *de novo*. *State v. Florez*, 241 Ariz. 121, 124, ¶ 7 (App. 2016). A defendant who presents evidence after a denial of a Rule 20 motion "waives any error if his case supplies evidence missing in the state's case." *State v. Nunez*, 167 Ariz. 272, 279 (1991). Accordingly, "we evaluate the motion based on the entire record, including any evidence [the] defendant supplied." *Id.* A Rule 20 motion should only be granted if "there is no substantial evidence to support a conviction." Ariz. R. Crim. P. 20(a).

¶25 Substantial evidence supports the jury's verdicts. An officer testified Linville had 882 other images of child pornography on his computers. As stated above, he alone used those computers. One of the State's witnesses testified that each downloaded file required individual action. Another witness determined the children depicted in the charged images and videos were minors under the age of fifteen. And, as explained above, the evidence fulfills the elements of depictions containing exploitive exhibition or other sexual conduct. The superior court did not err by denying Linville's Rule 20 motion.

CONCLUSION

¶26 We affirm Linville's convictions and sentences.

AMY M. WOOD • Clerk of the Court
FILED: JT

[3] RSS refers to a computer tool which enables other applications to automatically download content to a user's computer.