

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

STATE OF ARIZONA, *Appellee*,

v.

BRIAN GEOFFREY HOYLE, *Appellant*.

No. 1 CA-CR 18-0109
FILED 10-22-2018

Appeal from the Superior Court in Yavapai County
No. P1300CR201601171
The Honorable John D. Napper, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Elizabeth B. N. Garcia
Counsel for Appellee

Nichole Countryman, Phoenix
Counsel for Appellant

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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Lawrence F. Winthrop joined.

T H O M P S O N, Judge:

¶1 Defendant Brian Geoffrey Hoyle (defendant) appeals from ten convictions for exploitation of a minor, each a class 2 felony and a dangerous crime against children. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Police contacted defendant at his home and asked if he had images of criminal activity involving minors on his computer or other devices. Defendant indicated that any such images had been deleted and he gave his silver Toshiba laptop and password to police. Police obtained a search warrant for the computer and submitted it for forensic analysis.

¶3 Forensic analysis of the silver laptop revealed the presence of what the analyst deemed child erotica and child pornography.¹ Specifically, over 50 images of child erotica and over 350 images of child pornography were found in the allocated² space of the hard drive. The unallocated space of the hard drive contained at least 650 images each of child erotica and child pornography.

¶4 A detective selected ten images for determination of a sexual maturity rating – a method for determining if the child was likely aged 15 or under. An expert in the field determined that all ten images likely depicted children under age 15. In fact, the expert determined that each

¹ The analyst generally termed images of children which involved sexual activity of some sort to be pornographic, whereas “model” images of a child fully or partially nude, without sexual activity, to be child erotica.

² Allocated space generally refers to the hard drive space accessible to users. Unallocated space generally refers to the inaccessible space on the hard drive “where data goes when you delete it” and before it is overwritten.

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child had the lowest possible maturity rating with no evidence of breast tissue development or pubic hair.

¶5 Police obtained a second computer, a red HP, from defendant's residence. The red computer contained over a thousand images each of child erotica and child pornography. Of the ten images selected from the hard drive of the silver computer, six were also found on the red computer.

¶6 Defendant was charged with, and a jury convicted him of, ten class 2 felonies for exploitation of a minor, each of which was determined to be a dangerous crime against children. He was sentenced to ten consecutive, 12-year terms. He timely appealed.

DISCUSSION

¶7 On appeal, defendant raises two issues:

- a. Did the trial court commit fundamental error when it allowed the state to present evidence of the existence of uncharged images of child pornography during his trial; and
- b. Did the trial court commit fundamental error when it failed to instruct the jury as to how it was to consider the approximately 2000 images of child erotica and the 1940 images of child pornography.

¶8 As a threshold matter, defendant admits he never specifically objected to either the testimony about the uncharged images or the lack of a 404(b) jury instruction during trial. Because defendant failed to object at trial, we examine his claims under a fundamental error analysis. *See State v. Escalante*, ___ Ariz. ___, ___, ¶ 12 (2018). "We construe the evidence in the light most favorable to sustaining the verdict[s], and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12 (1998).

¶9 "A defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, or (3) the error was so egregious that he could not possibly have received a fair trial." *Escalante*, at ¶ 21 (emphasis in original). "If the defendant establishes fundamental error under prongs one or two, he must make a separate showing of prejudice." *Id.* "If the defendant establishes the third prong, he has shown both fundamental error and prejudice, and a new trial must be granted." *Id.* We

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may affirm the superior court's ruling on any basis supportable by the record. *State v. Robinson*, 153 Ariz. 191, 199 (1987).

A. Evidence of Numerous Uncharged Images

¶10 Defendant asserts that the trial court committed fundamental error in allowing testimony regarding the presence of numerous uncharged images on his computers. He argues that the evidence was unduly prejudicial even if it was admissible under either Ariz. R. Evid. 404(b) (other act evidence) or 404(c) (propensity evidence).

¶11 Prior to trial, the state filed a motion in limine to introduce evidence of uncharged images. The state did not seek to introduce the actual images on the silver computer, rather it sought admission of evidence that similar but uncharged images existed and that at least one of the charged images was also found on defendant's second computer. The state argued the images were either intrinsic evidence or alternatively, admissible to show absence of mistake or accident under Rule 404(b). Defense counsel did not file a written response, but in response to the judge's query, stated the uncharged images were not intrinsic evidence, but they were admissible under case law which he disagreed with. Shortly thereafter defense counsel agreed that there was no rule of evidence which would preclude an officer from testifying that thousands of potentially qualifying images were found on the computer. The court determined that the officer could say the images appeared to him to be child pornography. It discussed with counsel what could and could not be discussed in front of the jury.

¶12 In his opening statement, defendant claimed he did not know any of the images were in his computer or how they got there. He argued he'd lived various places and one of his acquaintances could have introduced the images, or they may have been accidentally downloaded from a thumb drive at some point, or a person could even have been using his computer remotely, from "other parts of the planet," to view child pornography.

¶13 During trial the officer testified to the number of images located on the silver computer. A jury question followed as to how many images had been found on the red computer. Defendant stated he had no objection to the officer answering the question. The officer stated that there were at least 1000 images each of child erotica and child pornography on the red computer.

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¶14 The state argued below that the existence of uncharged but similar images was admissible not only to show defendant's lack of mistake in having the images, but also as evidence intrinsic to the charged crimes. We need not decide whether the uncharged images were intrinsic because we conclude that the information was admissible pursuant to Rule 404(b) in that it demonstrated defendant's lack of mistake or accident in having the images. Rule 404(b), Arizona Rule of Evidence, "Other crimes, wrongs, or acts" reads:

Except as provided in Rule 404(c) 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Under this rule, "[e]vidence relevant for any purpose other than showing propensities to act in a certain way remains admissible." *State v. Connor*, 215 Ariz. 553, 563, ¶ 32 (App. 2007) (citation omitted).

¶15 When applying the 404(b) exception, "four protective provisions" must be met: (1) the evidence must be admitted for a proper purpose such as to show lack of mistake; (2) the evidence must be relevant under Rule 402; (3) the evidence may be excluded if its probative value is substantially outweighed by the potential for unfair prejudice under Rule 403; and (4) the court must give an appropriate limiting instruction if requested. *State v. Lee*, 189 Ariz. 590, 599 (1997). The evidence was relevant to determining defendant knowingly possessed the charged images pursuant to Arizona Revised Statutes § 13-3533 and no unduly prejudicial specifics were admitted. As discussed below, defendant did not request a limiting instruction.

¶16 We find that, on this record, the trial court did not commit legal error—let alone fundamental error -- in admitting evidence of the existence of uncharged images on defendant's computers.

B. 'Other Acts' Jury Instruction

¶17 Defendant argues the trial court fundamentally erred in failing to give RAJI jury instruction number 26A advising the jury as to how it was to consider the evidence of other similar uncharged images. [OB at 10] "The purpose of jury instructions is to inform the jury of the applicable law." *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996). We generally review the decision of whether to give a jury instruction for an

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abuse of discretion. *See State v. Forde*, 233 Ariz. 543, 566 (2014). However, where defense counsel invited trial error, “strategically or carelessly, the defendant cannot obtain appellate relief even if the error was fundamental and prejudicial.” *See Escalante*, ____ Ariz. at ____ ¶ 38.

¶18 Initially, both the state and defendant included the standard Rule 404 limiting instruction in their proposed jury instructions. However, on the last day of trial when the court was going through the instructions, defendant stated as to the limiting instruction:

I wonder if this just confuses the issue to have it in here at all, because I think it's been what potential other acts have been referred to is so limited that there's no specific act that's been brought in front of the jury, so to give this definition I think winds up more confusing than help[ful].

Thereafter, the court omitted the instruction on defendant's request. Because defense counsel strategically decided that the instruction was more confusing than helpful, defendant is not entitled to appellate relief even if there had been fundamental error here.

CONCLUSION

¶19 For the above stated reasons, defendant's convictions and sentences are affirmed.



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