DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. REXFORD GENE WOLFE, Appellant.	)	No. 1 CA-CR 09-0897 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in La Paz County

Cause No. S1500CR200900087

The Honorable Michael J. Burke, Judge

AFFIRMED

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

David Goldberg — Fort Collins
Attorney for Appellant

H A L L, Judge

¶1 Defendant, Rexford Gene Wolfe, appeals from his convictions for ten counts of sexual exploitation of a minor, dangerous crimes against children and class two felonies. For reasons set forth more fully below, we affirm.

FACTS[1] AND PROCEDURAL HISTORY

¶2 On March 31, 2009, defendant was indicted on ten counts of sexual exploitation of a minor, dangerous crimes against children and class two felonies. The relevant facts presented at trial are not disputed.

¶3 Defendant avidly collected child pornography for approximately four years in the late 1970s. In 2002, Jim Jarvis, who cared for defendant's elderly mother, Dale, for the ten years preceding her death, called defendant to inform him that Dale had died. Dale left her property in Arizona to Jarvis and defendant asked to store some of his belongings in a shed located on the property. Jarvis agreed to defendant's request and cleaned out the shed. Shortly thereafter, defendant drove numerous locked trunks from his residence and storage facility in California to Jarvis' home in Arizona. Defendant, alone, transported the trunks from his truck into the shed. Defendant then placed a padlock on the shed, gave Jarvis a key and left.

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[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vendever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

Defendant neither informed Jarvis of the nature of the items stored in the shed nor returned to Jarvis' property.

¶4 In 2008, Jarvis decided to clean out the shed so he could use it for storage. Jarvis lost the key defendant had given him and broke the padlock to the shed. He then began breaking the locks on defendant's individual trunks and inspecting the contents. The first two trunks contained collections of Playboy and Penthouse magazines. As Jarvis continued opening the trunks, however, the nature of the pornography became "progressively [] worse and worse," and Jarvis stopped emptying the shed and went to bed because "[i]t was sickening." When Jarvis resumed cleaning out the shed the following morning, he opened more trunks and found numerous magazines containing child pornography and bestiality that were "indescribably terrible" and "sickening." In the final trunk, Jarvis found a collection of newspaper clippings documenting changes in child pornography laws.

¶5 Jarvis then contacted the police and asked them to seize defendant's belongings. The detective that investigated the case testified that the items of child pornography at issue[2]

[2] Although thousands of images of child pornography were seized, the State sought charges relating to only ten images.

involved children that were clearly under fifteen years of age.[3] He also testified that, in addition to the pornography, defendant stored several personal items in the trunks, including his social security card, his high school yearbook, his high school and college diplomas, and numerous letters the Department of Treasury U.S. Customs Service had mailed him in the late 1970s and early 1980s informing him obscene merchandise he had purchased had been seized. The trunks also contained several books on pedophilia and incest. Finally, the detective testified that each trunk contained items bearing defendant's name, whether personal belongings or mailings.

¶6 Following the State's presentation of evidence, defendant moved for directed verdicts pursuant to Arizona Rule of Criminal Procedure 20, which the trial court denied. Defendant then testified on his own behalf. He admitted that he began collecting "all kinds" of pornography, including child pornography, after he was discharged from the military in 1976. He stated that he placed his pornography collection in storage, along with his personal items, in 1980 or 1981. He further stated that he transported his pornography collection from a storage facility in California to Jarvis' home as a cost-saving measure, and noted that he had "paid a lot of money" to store

[3] Defendant did not dispute that the pornographic images involved children under the age of fifteen.

the pornography in California. He claimed that he "essentially forgot" about his belongings stored at Jarvis' home and that he had "no further interest in the stuff."

¶7 On cross-examination, defendant further admitted that he alone transported the child pornography from California to Arizona in 2002. He also admitted that he had maintained a scrapbook of newspaper clippings detailing changes to child pornography and child molestation laws. He disavowed any ownership of the pornography, however, and stated that if anyone was to be charged with possession of child pornography, it should be Jarvis.

¶8 A jury found defendant guilty as charged. At the November 30, 2009 sentencing hearing, the trial court found only mitigating factors (absence of any criminal history and the child pornography was legal when purchased) and sentenced defendant to mitigated, consecutive ten-year terms of imprisonment on each count.

¶9 Defendant timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 and -4033 (2010).

DISCUSSION

I. Sufficiency of the Evidence

¶10 Defendant contends that the trial court erred by denying his motions for directed verdict. Specifically, defendant argues that the State failed to prove that he "'possessed' the child pornography in 2002 when he brought the property to Jarvis' home in Arizona."

¶11 We review a trial court's denial of a motion for directed verdict for an abuse of discretion and will only reverse if there is not substantial evidence to support the conviction. *State v. Henry*, 205 Ariz. 229, 232, ¶ 11, 68 P.3d 455, 458 (App. 2003). Substantial evidence may be direct or circumstantial and is evidence that a reasonable jury may accept as sufficient to find guilt beyond a reasonable doubt. *Id*. A trial court must submit a case to the jury if reasonable minds could differ on the inferences to be drawn from the evidence. *Id*. We view the evidence in the light most favorable to sustaining the trial court's ruling, *State v. Sullivan*, 205 Ariz. 285, 287, ¶ 6, 69 P.3d 1006, 1008 (App. 2003), and if conflicts in the evidence exist, we resolve them in favor of sustaining the verdict. *State v. Salman*, 182 Ariz. 359, 361, 897 P.2d 661, 663 (App. 1994).

¶12 To secure a conviction for sexual exploitation of a minor, as charged in the indictment, the State needed to prove

that defendant "knowingly possessed" a "visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct." *See* A.R.S. § 13-3553(A)(2) (2010). Thus, the State was required to demonstrate that defendant had actual physical possession of the pornography or otherwise exercised dominion and control over it. *See* A.R.S. § 13-105(33) (2010).

¶13 In this case, the undisputed evidence reflects that defendant purchased numerous materials that depicted minors engaged in exploitive exhibition or other sexual conduct. The undisputed evidence also reflects that, in 2002, he alone transported these voluminous materials from California to Jarvis' home. Moreover, the record reflects that defendant, alone, moved the locked trunks of pornography from his vehicle and arranged them in Jarvis' shed. Thus, contrary to defendant's argument, Jarvis was not "the only person in actual possession of the materials during the relevant time period." Rather, defendant knowingly exercised dominion and control over the child pornography in Arizona the moment his vehicle entered the state and he physically possessed the child pornography while he moved it from his vehicle and placed it in Jarvis' shed. Therefore, the trial court did not abuse its discretion by denying defendant's motions for directed verdict.

II. Prosecutorial Misconduct

¶14 Defendant argues that the State engaged in prosecutorial misconduct during its closing argument by (1) suggesting that defendant had continued to view and collect child pornography via the internet, (2) characterizing defendant's assertion that Jarvis, not he, "possessed" the child pornography as arrogant and demonstrating a lack of remorse, and (3) stating that the child pornography represents crimes against children.

¶15 "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process,'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)), and was "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial." *State v. Rosas-Hernandez*, 202 Ariz. 212, 218-19, ¶ 23, 42 P.3d 1177, 1183-84 (App. 2002) (quoting *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997)). Prosecutorial misconduct constitutes reversible error only if (1) misconduct exists and (2) "a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Anderson*, 210 Ariz. 327, 340, ¶ 45, 111 P.3d 369, 382 (2005) (citation omitted).

¶16 During closing, the prosecutor argued, in relevant part:

> Child pornography is like a prize to this defendant. It's his trophy. That's why he keeps it. He cherished the child pornography. He could not get rid of it. If he wanted to get rid of it, he could've gotten rid of it. He chose not to.
>
> I asked him a question about the computer yesterday. He said, [y]es, I have a computer at my house.
>
> As you know, with technological advancements, you don't need the hard copies anymore. He could easily have child pornography on his computer at home. It's easier. It's less risky. You can download it. You can hold more child pornography. He just advanced with the times. He didn't get rid of it.
>
> You also got a little glimpse into the arrogance of this defendant yesterday, severe arrogance and a lack of remorse.
>
> Jim Jarvis took care of his mother up until the day she died. This defendant said yesterday he left child pornography at Mr. Jarvis's home, didn't tell Mr. Jarvis it was child pornography; and he told you, the jury, that Mr. Jarvis is responsible for it. That's the height of arrogance and lack of remorse.
>
> Those pictures represent crimes. All of those children are someone's children. They may be from the '70s, but they're someone's children, and they've all been victimized, and to state it's a victimless crime is the height o[f] ignorance. This is a victim crime. And that defendant right there, he took his sexual gratification through the abuse of children.
>
> Keep that in mind when you're looking at those photos. It's not a victimless crime.

¶17 Defendant did not object to these arguments in the trial court, so we review for fundamental error only. *State v. Roque*, 213 Ariz. 193, 228, ¶ 154, 141 P.3d 368, 403 (2006).

Prosecutorial misconduct constitutes fundamental error only when it is "so egregious as to deprive the defendant of a fair trial." *State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991).

¶18 Defendant first contends that the prosecutor's suggestion that defendant may continue to access child pornography online argued matters outside the evidence and constituted fundamental error. Although defendant correctly notes that there was no evidence presented to the jury that demonstrates he continues to view child pornography, we do not conclude that the prosecutor's statement, attempting to undermine defendant's claim that he completely abandoned the practice, constitutes fundamental error. Even assuming that the prosecutor's statement was improper, given the undisputed evidence at trial satisfying the elements of defendant's charges, we do not find that this brief comment affected the outcome of the verdicts or was "so egregious" as to deprive defendant of a fair trial. *See Hernandez*, 170 Ariz. at 307, 823 P.2d at 1315.

¶19 Next, defendant contends that the prosecutor's characterization of him as arrogant and lacking in remorse constitutes fundamental error. Defendant acknowledged that he failed to inform Jarvis that he was storing illegal materials in his shed, but nonetheless asserted that Jarvis should be legally

responsible for the contraband. The prosecutor argued this was the height of arrogance. Contrary to defendant's claim, the prosecutor's argument was not an impermissible comment on defendant's claim of innocence; instead, the prosecutor simply noted that defendant attempted to inculpate a person who indisputably had no knowledge of the child pornography and thus committed no crime. We do not find that the prosecutor's statement constitutes error, fundamental or otherwise.

¶20 Similarly, we do not find that the prosecutor's statement that the children depicted in the pornography were victimized was error. There was no dispute at trial that all of the children depicted in the pornography were clearly under the age of fifteen and therefore all sexual acts upon them were necessarily crimes. *See State v. Berger*, 212 Ariz. 473, 482, ¶ 45, 134 P.3d 378, 387 (2006) (noting the production of images of child pornography "require[s] the abuse of children"). Therefore, defendant's claim of prosecutorial misconduct is without merit.

III. Constitutionality of the Sentence

¶21 Defendant asserts that his mandatory consecutive minimum prison terms of ten years per count of sexual exploitation of a minor violates the constitutional prohibitions against cruel and unusual punishments. *See* U.S. Const. amend. VIII, Ariz. Const. art. 2, § 15. Although defendant

acknowledges that this very sentence was recently upheld as constitutional by the supreme court in *Berger*, 212 Ariz. at 481, ¶ 39, 134 P.3d at 386, he asserts that *Berger* is distinguishable. We disagree.

¶22 We review the constitutionality of a sentencing statute de novo and construe it, when possible, to uphold its constitutionality. *State v. Davolt*, 207 Ariz. 191, 214, ¶ 99, 84 P.3d 456, 479 (2004). As outlined in *Berger*, we review challenges to the length of a prison sentence under a two-prong analysis. *Berger*, 212 Ariz. at 475-76, ¶ 11, 134 P.3d at 380-81. First, as a threshold issue, we determine whether defendant has shown gross disproportionality between the gravity of the offense and the harshness of the penalty. *Id*. at 476, ¶ 12, 134 P.3d at 381. Second, if we conclude a comparison leads to an inference of gross disproportionality, we then examine the sentences the "state imposes on other crimes and the sentences other states impose for the same crime." *Id*. "[A]s a general rule, [we] will not consider the imposition of consecutive sentences in a proportionality inquiry[.]" *Id*. at 479, ¶ 27, 134 P.3d at 384 (internal quotation omitted).

¶23 As noted in *Berger*, a sentence need not be strictly proportional to the crime. *Id*. at 476, ¶ 13, 134 P.3d at 381. Instead, "only extreme sentences that are grossly disproportionate to the crime" are deemed unconstitutional. *Id*.

(internal quotation omitted). "A prison sentence is not grossly disproportionate, and a court need not proceed beyond the threshold inquiry, if it arguably furthers the State's penological goals and thus reflects a rational legislative judgment, entitled to deference." *Id*. at 477, ¶ 17, 134 P.3d at 382 (internal quotation omitted).

¶24 In *Berger*, the supreme court discussed at length the legislature's intent in criminalizing the possession of child pornography. The court noted that "[c]riminalizing the possession of child pornography is tied directly to state efforts to deter its production and distribution[,]" but it also serves to "encourage[] the destruction" of existing pornographic materials. *Id*. at 477, ¶¶ 18-19, 134 P.3d at 382 (internal quotation omitted). The court also noted that "[c]hild pornography not only harms children in its production, but also causes the child victims continuing harm by haunting the children in years to come." *Id*. at 477, ¶ 18, 134 P.3d at 382 (internal quotation omitted); *see also United States v. Sherman*, 268 F.3d 539, 547 (7th Cir. 2001) ("The possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest in avoiding the disclosure of personal matters."). Thus, the court "conclud[ed] that the legislature had a 'reasonable basis for believing' that

mandatory and lengthy prison sentences for the possession of child pornography would 'advance the goals of [Arizona's] criminal justice system in [a] substantial way,'" *Berger,* 212 Ariz. at 478, ¶ 23, 134 P.3d at 383 (quoting *Ewing v. California*, 538 U.S. 11, 28 (2003)), and a ten-year sentence is not "grossly disproportionate to [the] crime of knowingly possessing child pornography depicting children younger than fifteen." *Id*. at 479, ¶ 29, 134 P.3d at 384.

¶25 Although defendant contends that the facts and circumstances of this particular case are distinguishable from those in *Berger* because he obtained the child pornography at issue before possession was criminalized, we find no reason to depart from *Berger* here. Defendant was not convicted of his acquisition of child pornography in the late 1970's. Rather, he was convicted of possessing that previously acquired child pornography in 2002, nearly two decades after possession had been criminalized. Defendant's claim of ignorance of the law, notwithstanding his scrapbook documenting changes in child pornography laws, is irrelevant. The undisputed evidence reflects that defendant knowingly possessed the illegal materials when he brought them in the state.

¶26 As the supreme court found in *Berger*, "[t]he images for which [defendant] was convicted, graphically depicting sordid and perverse sexual conduct with pre-pubescent minors,

[are] well within the statutory definition of contraband." *Id*. at 480, ¶ 35, 134 P.3d at 385. Moreover, as in *Berger*, defendant here was not "inadvertently" in possession of these illegal materials. *See id*. Rather, by his own admission, defendant spent a significant amount of money maintaining and storing his child pornography collection in California and he then drove these illegal materials to Arizona to be stored in Jarvis' shed as a cost-saving measure instead of destroying them. Therefore, we conclude that defendant "consciously sought to do exactly that which the legislature sought to deter and punish," *id*. at 482, ¶ 49, 134 P.3d at 387, and hold that his ten consecutive ten-year sentences are not grossly disproportionate to those crimes.[4]

[4] Defendant also requests that we apply A.R.S. § 13-4037(B) to vacate his mandatory sentences and strike the dangerous crime against children enhancements. Pursuant to A.R.S. § 13-4037(B), an appellate court, upon finding a sentence is excessive, may vacate the sentence and "impose any legal sentence." As explained above, we conclude that defendant's mitigated sentences are legal, and, already mitigated, are not subject to reduction under A.R.S. § 13-4037(B).

CONCLUSION

¶27 For the reasons stated above, we affirm defendant's convictions and sentences.

_/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_/s/_____
JON W. THOMPSON, Judge

_/s/_____
LAWRENCE F. WINTHROP, Judge