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

STATE OF ARIZONA, Appellee, v. JOHANN HARTMAN, Appellant.	)	No. 1 CA-CR 10-0273 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. CR2008-0280

The Honorable Lee F. Jantzen, Judge

AFFIRMED

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T I M M E R, Presiding Judge

¶1 Johann Hartman appeals his convictions and sentences imposed after a jury found him guilty of eleven counts of sexual

exploitation of a minor under the age of fifteen. He argues the trial court committed reversible error because (1) insufficient evidence supported the convictions, (2) the convictions for ten counts violated double jeopardy principles, (3) consecutive sentences for ten counts violated Arizona Revised Statutes ("A.R.S.") section 13-116 (2007), and (4) the sentences imposed constituted cruel and unusual punishment in violation of the federal and state constitutions. For the following reasons, we disagree and therefore affirm.

BACKGROUND

¶2 Between approximately midnight and 12:30 a.m. on November 5, 2007, ten images of child pornography were downloaded to a memory card in Hartman's cell phone. The next day, Hartman lost the phone. Three days later, a third party turned the phone in to the police, indicating it contained child pornography. The police determined that the phone belonged to Hartman.

¶3 The State's forensic expert found approximately thirty images of child pornography on the phone in allocated (not deleted) space. The ten images downloaded on November 5 formed the bases for counts one through ten. The same expert also examined Hartman's home computer and found multiple images of child pornography in unallocated (deleted) space. One image formed the basis of count eleven.

¶4 On March 13, 2008, a grand jury indicted Hartman, charging him with eleven counts of sexual exploitation of a minor in violation of A.R.S. § 13-3553 (2007), each a class two felony. On February 18, 2010, a jury convicted Hartman on all eleven counts and separately found that the minor in each image was under the age of fifteen. The court sentenced Hartman to mitigated consecutive ten-year terms of imprisonment for each count as required by law. This timely appeal followed.

DISCUSSION

I. Sufficiency of the Evidence

¶5 Section 13-3553(A), A.R.S., provides in relevant part that "[a] person commits sexual exploitation of a minor by knowingly . . . (2) . . . possessing . . . any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct." Hartman argues the trial court erred by failing to grant his motion for judgment of acquittal because insufficient evidence supported a conclusion that he knowingly possessed the child pornography images found on his cell phone memory card and home computer.

¶6 In reviewing the sufficiency of evidence, we review the facts in the light most favorable to upholding the verdict and resolve all conflicts in the evidence against the defendant. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). Evidence is sufficient when it is more than a mere

scintilla and is such proof as could convince reasonable persons of the defendant's guilt beyond a reasonable doubt. *State v. Tison,* 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). With these principles in mind, we address Hartman's arguments concerning the cell phone and home computer in turn.

A. Cell phone

¶7 Hartman contends no evidence showed he obtained the images on the cell phone memory card "by anything more than 'inadvertence.'" We disagree. Although the jury was free to conclude Hartman unknowingly downloaded the images when he viewed adult pornography or other materials, it was not compelled to do so as sufficient evidence supported a conclusion he knowingly possessed the images.

¶8 First, Hartman told police that, prior to losing his cell phone, it had not been out of his possession and any downloads were likely his. Second, evidence supported an inference that Hartman had transferred the images from his home computer to his cell phone via the memory card. *See In re William G.*, 192 Ariz. 208, 213, 963 P.2d 287, 292 (App. 1997) (holding that absent an admission, a defendant's mental state

"must necessarily be ascertained by inference from all relevant surrounding circumstances."). One of the images found on the memory card depicted the same victim as a deleted image found on the computer. Further, internet searches that had been conducted on the computer led directly to some images found on the memory card. Third, the images on the memory card were in "allocated space," meaning they were visible to the user. Fourth, and finally, Bullhead City Police Sergeant Reff testified that child pornography images are not readily obtained from the internet but must be sought; they do not "pop up." From this evidence, the jury could reasonably conclude that Hartman knowingly possessed ten images of child pornography on his cell phone.

B. Home computer

¶9 Hartman similarly contends the jury had insufficient evidence to find he knowingly possessed the single image of child pornography underlying count eleven, which was found in unallocated space on his home computer. We reject this contention as well. Although the jury could have agreed with Hartman that his computer's hard drive contained the image when he bought it or that the images were downloaded inadvertently by a computer virus, the jury was also free to reject these alternative explanations for the presence of the image.

¶10 Hartman maintained he had installed a replacement hard drive for his computer about six months before he lost his phone and pointed out that the drive could have contained the image before he installed it. A police detective testified that Hartman had told him twice the hard drive was new, however, permitting the jury to conclude it unlikely that files in the unallocated space were downloaded prior to installation into Hartman's computer.[1] Also, though expert witnesses for both parties agreed that a computer virus could hypothetically download child pornography without a computer user's knowledge, there was no evidence of a virus on Hartman's computer.

¶11 Other evidence permitted a reasonable juror to find that Hartman knowingly possessed the image on his computer. Sergeant Reff testified he discovered at least thirty deleted images of child pornography, 1,500 deleted images of child erotica, and evidence that the hard drive had been used to visit numerous child pornography websites using search terms geared to discovering these sites. The quantity and variety of child pornography-related images and search terms found on the computer permitted the jury to reasonably conclude it unlikely

[1] Hartman asserts on appeal that the hard drive was actually used when he bought it and cites a portion of the transcript as support. The page of cited transcript does not exist, however, and we could not find support for the assertion elsewhere in the evidence. Even if such testimony existed, we would resolve the conflict of evidence against Hartman. *Girdler,* 138 Ariz. at 488, 675 P.2d at 1307.

that the image at issue was inadvertently downloaded. Moreover, as previously described, *see supra* ¶ 8, images on Hartman's cell phone memory card matched deleted images on the computer and some of the sites visited on the computer contained images on the memory card, supporting a conclusion that Hartman had viewed the images on his computer and downloaded some onto the card for portable viewing. Finally, Sergeant Reff testified that the image on the computer underlying count eleven had been affirmatively deleted by a user, making this case distinguishable from the scenario in *United States v. Kuchinski*, 469 F.3d 853, 862 (9th Cir. 2006), which involved images found in computer "cache files" that can be downloaded by a web browser without the user's knowledge. Based on this evidence, a reasonable juror could have found that Hartman knowingly possessed the image of child pornography found on his computer.

II. Double Jeopardy

¶12 Hartman next argues the trial court violated his constitutional rights to be free from double jeopardy because the jury convicted him on ten counts of exploitation of a minor for the images found on his cell phone even though those images were downloaded "in one particular sitting" and therefore constitute one offense. He requests we vacate nine of the convictions and resulting sentences. Because Hartman failed to raise this objection to the trial court, we review for

fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶13 The United States Constitution and the Arizona Constitution each forbid "multiple punishments for the same offense." *State v. Welch*, 198 Ariz. 554, 555, ¶ 6, 12 P.3d 229, 230 (App. 2000) (citations omitted). The two double jeopardy clauses are interpreted in the same manner and therefore separate analysis is unnecessary. *State v. Eagle*, 196 Ariz. 188, 190, ¶ 5, 994 P.2d 395, 397 (2000). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). The issue before us, therefore, is whether the legislature intended to punish the act of possessing each depiction of child pornography even when those depictions are acquired in quick succession.

¶14 Our supreme court has effectively resolved the pending issue by interpreting A.R.S. § 13-3553(A)(2) to mean "the possession of each image of child pornography is a separate offense." *State v. Berger,* 212 Ariz. 473, 474, ¶ 3, 134 P.3d 378, 379 (2006); *see also* A.R.S. § 13-3551(11) (2007) (defining "visual depiction" as "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."). Thus, because the legislature intended the court to impose punishment for possession of each depiction of child pornography, the trial court did not violate Hartman's double jeopardy rights by imposing multiple punishments for a single offense. *See Hunter*, 459 U.S. at 366.

¶15 Hartman cites *State v. Taylor*, 160 Ariz. 415, 420, 773 P.2d 974, 979 (1989), as support for the principle that a defendant who acquires multiple child pornography images at the same time commits a single act. The defendant in *Taylor* was convicted of fifty counts of sexual exploitation of a child for possessing fifty images he photographed of children engaged in sexual activity. *Id*. at 419, 773 P.2d at 978. After rejecting the defendant's argument that the rule of lenity required the trial to either impose concurrent sentences or merge the counts into a single count, the court noted its conclusion might be different if the defendant had "acquired all of the photographs at the same time in one book from someone else." *Id*. at 420, 773 P.2d at 979. *Taylor* does not alter our conclusion, however, as the evidence did not show that Hartman acquired the images in a single download, which is analogous to receiving multiple pictures in a book. Rather, the images were downloaded successively, albeit in a short timeframe. Thus, like the defendant in *Taylor* who possessed photographs taken

individually, Hartman's act in separately downloading images of child pornography were properly treated as separate offenses.

¶16 We find equally unpersuasive Hartman's analogies to several cases from other jurisdictions. In *United States v. Prestenbach*, 230 F.3d 780, 782-83 (5th Cir. 2000), *United States v. Planck*, 493 F.3d 501, 503-05 (5th Cir. 2007), and *State v. Sutherby*, 165 Wash.2d 870, 878-83, 204 P.3d 916, 919-22 (2009), the defendants' punishments arose from statutes that prohibited the possession of "any" of the forbidden items, not "each" forbidden item. In *United States v. Reedy*, 304 F.3d 358, 364-68 (5th Cir. 2002), the Fifth Circuit concluded that the relevant statute was ambiguous and therefore applied the rule of lenity. *See United States v. Santos*, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."). In light of the supreme court's decision in *Berger*, there is no ambiguity about the meaning of A.R.S. § 13-3553(A)(2), and the rule of lenity does not apply.

III. Consecutive Sentences

¶17 Hartman next argues the sentences for ten counts of possessing child pornography images on his cell phone violate A.R.S. § 13-116 (2007), which prohibits the imposition of consecutive sentences for offenses arising out of a single act that is "made punishable in different ways by different sections

of the law[] . . . ." Because Hartman did not raise this issue to the trial court, he has waived it absent fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. The imposition of consecutive sentences in violation of § 13-116 constitutes fundamental error. *State v. Martinez*, 226 Ariz. 221, 224, ¶ 17, 245 P.3d 906, 909 (App. 2011).

¶18 As previously explained, *see supra* ¶¶ 12-16, Hartman's possession of each image on his cell phone constitutes a separate offense. Consequently, Hartman's convictions were not based on a single act punished by different laws; they were based on multiple acts punished by the same law.[2] *See State v. Roberts*, 131 Ariz. 519, 522, 642 P.2d 864, 867 (App. 1981) (holding § 13-116 "applies only where the same act violates more than one statute."), *aff'd in part and vacated in part on other grounds*, 131 Ariz. 513, 642 P.2d 858 (1982). Because each conviction involved a child under the age of fifteen, the court was required to impose consecutive sentences. *Berger*, 212 Ariz. at 474, ¶ 4, 134 P.3d at 379; A.R.S. § 13-604.01(L) (2007). We do not discern error.

[2] In light of our conclusion, we need not consider the test set out in *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989).

IV. Cruel and Unusual Punishment

¶19 Hartman finally argues his combined 110-year prison sentence is so grossly disproportionate to his crimes that it constitutes cruel and unusual punishment in violation of the federal and state constitutions. *See* U.S. Const. amend. VIII; Ariz. Const. art. 2, § 15. Hartman persuasively argues we should consider the consecutive nature of his sentences when conducting this proportionality analysis. *See State v. Berger*, 212 Ariz. 473, 489, ¶ 79, 134 P.3d 378, 394 (2006) (Berch, VCJ., concurring in part, dissenting in part) (". . . I would find that a minimum mandatory sentence of 200 years for possession of twenty pornographic images raises an inference of gross disproportionality that requires additional analysis before ultimately the court determines whether the sentence is unconstitutionally disproportionate."). The supreme court's majority holding in *Berger* is directly on point, however, and requires us to reject Hartman's contention. 212 Ariz. 473, 134 P.3d 378; *see State v. Sullivan*, 205 Ariz. 285, 288, ¶ 15, 69 P.3d 1006, 1009 (App. 2003) (holding court of appeals bound by supreme court decisions).

¶20 In *Berger*, a jury convicted the defendant on twenty counts of sexual exploitation of a minor for possessing printed and digital photographs of children engaged in sexual acts. 212 Ariz. at 475, ¶ 5, 134 P.3d at 380. The jury also found that

each depiction showed a child under the age of fifteen. *Id*. The trial court sentenced the defendant to a mitigated ten-year prison sentence for each offense and ordered that the sentences run consecutively as required by law. *Id*. at ¶ 6. On review, the supreme court rejected the defendant's argument that the cumulative sentences were grossly disproportionate to his crimes and therefore violated the federal and state proscriptions against cruel and unusual punishment. *Id*. at 483, ¶ 51, 134 P.3d at 388. After concluding that each sentence must be examined without regard to whether the sentences must be served consecutively, *id*. at 479, ¶ 27, 134 P.3d at 384, the court held that a ten-year prison sentence is not grossly disproportionate for the offense of possessing images showing children younger than fifteen engaged in sexual acts. *Id*. at ¶ 29.

¶21 Hartman argues that this case is distinguishable from *Berger* because his cumulative sentences arose from "a single act of possession." We disagree. For the reasons previously explained, *see supra* ¶¶ 12-16, Hartman's convictions stemmed from multiple acts of possession because he possessed separate depictions of young children engaged in sexual activities. Additionally, we are not persuaded that the cumulative effect of the sentences should be considered solely because the depictions all came into Hartman's possession during an approximately one-half hour period. Although the *Berger* defendant acquired two of

the twenty images underlying the convictions six years before his arrest and other evidence demonstrated a history of searches for such material, *see id.* at 480, ¶ 35, 134 P.3d at 385, the supreme court did not ultimately rest its holding on any temporal factor.[3] Additionally, we do not discern a reason for analyzing the issue differently depending on the length of time between acquisitions of images. The children depicted in the images are no less victimized if the images are acquired in quick order rather than over a long period of time.

¶22 Hartman asks us to reduce his sentence under A.R.S. § 13-4037(B) (2007) in a manner similar to *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003). In *Davis*, our supreme court held unconstitutional the imposition of four statutorily mandated consecutive thirteen-year prison terms for four acts of intercourse with two girls under the age of fifteen. 206 Ariz. at 379, ¶ 2-3, 388, ¶¶ 48-49, 79 P.3d at 66, 75. The court

[3] The *Berger* court stated that the defendant's sentences were "'amply supported' by evidence indicating his 'long, serious' pursuit of illegal depictions and are 'justified by the State's public-safety interest' in deterring the production and possession of child pornography." 212 Ariz. at 480, ¶ 36, 134 P.3d at 385 *(citing Ewing v. California,* 538 U.S. 11, 29-30 (2003)). It appears the court was making the point that the defendant's possession of contraband was not fleeting or inadvertent, thereby justifying the lengthy sentence. *Id*. at ¶ 35. Similarly, the evidence in this case showed that Hartman had conducted many internet searches geared to finding child pornography and had additional contraband images on his home computer and cell phone that did not form the basis for the charged crimes. *See supra* ¶¶ 3, 11.

reasoned that the defendant's conduct was at the edge of the "broad sweep" of the statute. *Id.* at 385, ¶ 36, 79 P.3d at 72. "*Davis* represents an 'extremely rare case' in which the court concluded prison sentences were grossly disproportionate." *Berger*, 212 Ariz. at 480, ¶ 38, 134 P.3d at 385. Hartman's "conduct is at the core, not the periphery, of the prohibitions of A.R.S. § 13-3553(A)(2)." *Berger,* 212 Ariz. at 481, ¶ 44, 134 P.3d at 386. Like Berger and unlike Davis, Hartman "cannot be characterized as someone merely 'caught up' in a statute's broad sweep." *Id.* Therefore, no reason exists "to depart from the general rule that the consecutive nature of sentences does not enter into the proportionality analysis." *Id.*

¶23 Finally, Hartman contends his prison sentence is unconstitutional because his crimes were not violent and he did not directly abuse any children. The *Berger* court considered this argument and rejected it. *Id.* at 482, ¶ 45, 134 P.3d at 387 ("Nor do we accept Berger's assertion that his crimes were 'victimless' merely because he did not touch or even photograph any children himself."). We follow *Berger* and reject Hartman's contention.

CONCLUSION

¶24 For the foregoing reasons, we affirm Hartman's convictions and sentences.

/s/
Ann A. Scott Timmer
Presiding Judge

CONCURRING:

/s/
Patrick Irvine, Judge

B A R K E R, Judge, specially concurring.

¶25 I agree fully with the foregoing decision. I write only to urge, for the reasons set forth in then-Vice Chief Justice Berch's cogent dissent in *Berger*, that the Arizona Supreme Court revisit whether the mandatory, consecutive nature of these offenses "requires additional analysis before ultimately the court determines whether the sentence is unconstitutionally disproportionate." 212 Ariz. at 489, ¶ 79, 134 P.3d at 394 (Berch, V.C.J., concurring in part, dissenting in part).

/s/
Daniel A. Barker, Judge