DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. CHRISTIAN PAUL ROYALTY, Appellant.	)	No. 1 CA-CR 10-0527 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR200900998

The Honorable Michael R. Bluff, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
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J O H N S E N, Judge

¶1 Christian Paul Royalty appeals from his convictions and sentences on ten counts of sexual exploitation of a minor,

each a Class 2 felony and dangerous crime against children in the first degree. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Royalty moved in with his grandparents in September 2008. On September 25, 2009, police executed a search warrant at the grandparents' home. Inside a closet in Royalty's bedroom, police found a locked briefcase that contained a six-page computer printout from a website titled "Hot Teen Clips" that included 68 pictures of real and computer-generated children engaged in various sexual acts or exploitive exhibitions. When questioned, Royalty admitted he owned the briefcase, but denied any responsibility for the pictures, stating they were his grandfather's.

¶3 Royalty was indicted on ten counts of sexual exploitation of a minor (under the age of 15) based on ten of the 68 pictures on the computer printout. The State additionally alleged Royalty committed the offenses while on release and that he had multiple historical prior felony convictions, including four predicate felony convictions for dangerous offenses.

¶4 A jury found Royalty guilty on each count. The superior court further found the State had proved the prior predicate felony convictions and sentenced Royalty as a repetitive dangerous offender pursuant to Arizona Revised

Statutes ("A.R.S.") section 13-705 (2011)[1] to ten consecutive life terms without the possibility of release for 35 years. Royalty timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2011), 13-4031 (2011), and -4033(A)(1) (2011).

DISCUSSION

A. Motion to Suppress.

¶5 Royalty moved to suppress the evidence found in the search of his bedroom based on alleged defects in the issuance of the search warrant. The superior court denied the motion, ruling it was untimely because it was filed just 12 days before trial. We review a ruling on the timeliness of a motion for abuse of discretion. *State v. Aguilar*, 217 Ariz. 235, 237, ¶ 4, 172 P.2d 423, 425 (App. 2007).

¶6 Arizona Rule of Criminal Procedure 16.1(b) states that "[a]ll motions shall be made no later than 20 days prior to trial, or at such other time as the court may direct." An untimely motion under Rule 16.1(b) is precluded unless the basis for the motion "was not then known, and by the exercise of reasonable diligence could not then have been known, and the

[1] We apply the substantive law in effect when the offenses were committed. *See* A.R.S. § 1-246 (2011); *State v. Newton*, 200 Ariz. 1, 2, ¶ 3, 21 P.3d 387, 388 (2001). Absent material revisions after the date of an offense, we cite the statute's current version.

party raises it promptly upon learning of it." Ariz. R. Crim. P. 16.1(c). "The preclusion of issues applies to constitutional objections as well as statutory objections because an adherence to procedural rules serves a legitimate state interest in the timely and efficient presentation of issues." *State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981).

¶7 Royalty's motion to suppress was untimely, and he does not contend and we cannot conclude on this record that the exception provided by Rule 16.1(c) applies. Thus, the motion was barred by Rule 16.1, and the superior court did not abuse its discretion in denying it on that ground. *See State v. Montano*, 204 Ariz. 413, 419, ¶ 18, 65 P.3d 61, 67 (2003) (upholding denial of untimely motion to dismiss).

¶8 Although the superior court found the motion untimely, its order also indicated that it considered and rejected the motion on its merits. In considering the merits of a ruling on a motion to suppress, we will affirm the order unless we conclude the superior court clearly erred. *State v. Spreitz*, 190 Ariz. 129, 145, 945 P.2d 1260, 1276 (1997). We view the facts in the light most favorable to sustaining the ruling, *State v. Dean*, 206 Ariz. 158, 161, ¶ 9, 76 P.3d 429, 432 (2003), but we review *de novo* the court's legal conclusion, *State v. Mendoza-Ruiz*, 225 Ariz. 473, 475, ¶ 6, 240 P.3d 1235, 1237 (App. 2010).

¶9 Royalty argues that the facts averred in support of the search warrant did not create probable cause to believe that he had engaged in "exploitive exhibition or other sexual conduct," as defined by A.R.S. § 13-3551(4) (2011) ("[e]xploitive exhibition") or (9) ("[s]exual conduct"). The affidavit in support of the warrant averred that an officer had interviewed an 11-year-old Florida girl who said she had been introduced on the Internet to a 12-year-old girl by her father. The officer further averred that the Florida girl said that the "father" of the 12-year-old had sent her a video. The officer averred he had seen the video, which he said displayed a "prepubescent female taking a shower" and "repeatedly focus[ed] directly onto the real female child's vaginal and breast area[s]." The affidavit further asserted that the IP address of the computer from which the video was sent was associated with a computer at Royalty's grandparents' home. The officer also averred that, posing as the Florida girl's father, another officer had communicated with the sender of the video, who offered to "purchase" the Florida girl for $450,000. Finally, the officer averred that based on his training and experience, "persons who view images depicting the sexual exploitation of a minor will often collect and save images for their own sexual gratification as well as for their value to trade to other perpetrators."

¶10 Royalty argues that although the affidavit might have justified a search of "electronic media" and computers, the affidavit did not justify a search of other areas inside the home. But the affidavit's description of the videotape of the prepubescent girl in the shower, including the fact that the video reportedly "focus[ed] directly" on the girl's vaginal area, constituted probable cause to believe that someone associated with the computer in the home had violated A.R.S. § 13–3553(A)(2) (2011) by distributing, exhibiting, possessing, receiving, and/or electronically transmitting a "visual depiction" of a minor engaged in exploitive exhibition within the meaning of A.R.S. § 13-3551(11). This evidence was sufficient to establish probable cause to believe that someone in the home possessed additional images of exploitive exhibition located not on the computer. *See United States v. Vosburgh*, 602 F.3d 512, 526, n.13 (3d Cir. 2010); *United States v. Renigar*, 613 F.3d 990, 994 (10th Cir. 2010). Moreover, the evidence that someone used the computer to attempt to lure the Florida girl for sexual activity independently supported probable cause to believe that child pornography existed in the home. *See United States v. Brand*, 467 F.3d 179, 198 (2d Cir. 2006) ("child pornography shares a strong nexus with pedophilia").

¶11 Neither do we agree with Royalty's argument that the warrant was invalid because the magistrate accepted the

officer's description of the videotape rather than view it himself. *See N.Y. v. P.J. Video, Inc.*, 475 U.S. 868, 874, n.5 (1986). Likewise, we do not accept Royalty's invitation to disregard the officer's assertion that, based on his training and experience, "persons who view images depicting the sexual exploitation of a minor" tend to save such images for lengthy periods because such images "are often difficult to obtain and costly."

¶12 For these reasons, we conclude the superior court did not abuse its discretion by denying Royalty's motion to suppress.[2]

B. Sufficiency of Evidence.

¶13 Royalty also argues the superior court erred by denying his motion for judgment of acquittal. He contends the evidence was insufficient to establish he possessed the child pornography found in his briefcase. We review a claim of insufficient evidence *de novo*. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶14 A judgment of acquittal is appropriate only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence" may be direct or

[2] We will not address Royalty's arguments that the search violated the Arizona Constitution and that the warrant was insufficiently specific because he did not make those arguments in his motion to suppress.

circumstantial and "is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). In reviewing a claim of insufficient evidence, we construe the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against the defendant. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). "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) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶15 A person commits sexual exploitation of a minor by "knowingly distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct." A.R.S. § 13–3553(A)(2). The State alleged Royalty was guilty because he "possess[ed]" the ten charged images.[3] Thus, the State was required to demonstrate that Royalty had actual physical

[3] Royalty does not dispute that the ten images qualify as child pornography, the possession of which is prohibited by A.R.S. § 13–3553(A)(2).

possession of the images or otherwise exercised dominion and control over them. *See* A.R.S. § 13-105(35) (2011).

¶16 "Constructive possession can be established by showing that the accused exercised dominion and control over the [contraband] itself, or the location in which [it] was found." *State v. Teagle*, 217 Ariz. 17, 27, ¶ 41, 170 P.3d 266, 276 (App. 2007). Royalty admitted the briefcase belonged to him. Moreover, the key to the briefcase was found with his other keys and identification. This evidence supports an inference that he possessed the contents of the briefcase, including the printout of the images of child pornography. The fact that others also might have had access to the briefcase does not preclude the jury from finding that Royalty possessed the briefcase within the meaning of the statute. *See State v. Jenson*, 114 Ariz. 492, 493-94, 562 P.2d 372, 373-74 (1977) (proof of possession sufficient where marijuana found under chest of drawers owned by defendant, notwithstanding chest was located in hallway where others had access to it); *State v. Villavicencio*, 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972) (exclusive control of place where contraband is found is not necessary to prove constructive possession).

¶17 Although Royalty denied knowing of the printout when questioned by the police and stated it belonged to his grandfather, the grandfather testified the pictures were not

his. The jury was free to reject Royalty's denials of responsibility and instead believe the grandfather's testimony. *See State v. Hall*, 204 Ariz. 442, 455, ¶ 55, 65 P.3d 90, 103 (2003) ("The credibility of witnesses . . . is a matter for the jury."). The trial court did not err in denying Royalty's motion for judgment of acquittal based on his contention that there was insufficient evidence of possession.

¶18 In the alternative, Royalty also argues the evidence supports only three counts of sexual exploitation of a minor. Citing *State v. Valdez*, 182 Ariz. 165, 894 P.2d 708 (App. 1994), Royalty asserts that because the ten images of child pornography on which the ten counts were based were found on only three pages in the computer printout, the evidence did not permit the jury to find he possessed more than three "visual depictions" of contraband images. After the *Valdez* decision, however, the legislature altered the "unit of prosecution" for this offense from the medium on which the images are located to the images themselves. *See* A.R.S. § 13-3551(11) ("'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."); 1999 Ariz. Sess. Laws, ch. 261, § 27; *State v. Berger*, 212 Ariz. 473, 474, ¶ 3, 134 P.3d 378, 379 (2006) ("Under this statutory scheme, the possession of each image of child pornography is a separate

offense."); *State v. Jensen*, 217 Ariz. 345, 348, ¶ 6, n.5, 173 P.3d 1046, 1049 (App. 2008) ("Since its amendment . . . the offense is defined in terms of the visual image itself rather than any specific media or physical object containing the image."). Thus, the holding in *Valdez* limiting the number of counts to the number of media possessed rather than the number of images has no applicability to the instant case. For the same reason, Royalty's reliance on *State v. Taylor*, 160 Ariz. 415, 773 P.2d 974 (1989), is equally unavailing.

¶19 Because the evidence was sufficient to permit the jury to find that Royalty possessed ten separate images of minors engaged in exploitive exhibition or other sexual conduct, Royalty was properly convicted on all ten of the charged counts.

C. Enhancement of Sentences.

¶20 Prior to trial, the State gave notice that Royalty had four predicate prior felony convictions for purposes of the imposition of enhanced punishment pursuant to A.R.S. § 13-705. This statute provides, in pertinent part: "A person who is convicted of any dangerous crime against children in the first degree . . . and who has been previously convicted of two or more predicate felonies shall be sentenced to life imprisonment." A.R.S. § 13-705(I). At sentencing, the court ruled that Royalty's prior convictions qualified as predicate

felonies under A.R.S. § 13-705 because they were "dangerous" offenses.

¶21 Royalty contends his prior convictions were not predicate felonies for purposes of sentencing under A.R.S. § 13-705 because they were not "dangerous crimes against children." Specifically, he argues that a "predicate felony" for purposes of sentence enhancement under A.R.S. § 13-705 must be an offense committed against a child. We review issues of statutory interpretation *de novo*. *State v. Christian*, 205 Ariz. 64, 66, ¶ 6, 66 P.3d 1241, 1243 (2003).

¶22 The legislature has defined "predicate felony" to mean:

> [A]ny felony involving child abuse pursuant to § 13-3623, subsection A, paragraph 1, a sexual offense, conduct involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.

A.R.S. § 13-705(P)(2).

¶23 In construing a statute, our goal is to determine and give effect to the legislature's intent. *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990). We look first to the language of the statute because it is "the best and most reliable index of a statute's meaning." *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993) (quoting *Janson v.*

Christenson, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991)). "If the language is plain, we need look no further." *Id.*

¶24 The statute's definition of predicate felony is clear and unambiguous. It includes four distinct categories of offenses in the disjunctive: child abuse pursuant to § 13-3623(A)(1); sexual offenses; conduct involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, *i.e.*, dangerous offenses; and dangerous crimes against children in the first or second degree. Only the first and last of these four categories are limited to offenses committed against children. The other two categories, sexual offenses and dangerous offenses, are defined by the nature of the criminal conduct, not the age of the victim. *See* A.R.S. §§ 13-105(13), -1420(C) (2011) (defining "dangerous" and "sexual" offenses). Thus, the fact that Royalty's prior convictions are not "dangerous crimes against children" does not preclude them from qualifying as predicate felonies under A.R.S. § 13-705(P)(2) if they fall within one of the other categories of offenses included in the statute.

¶25 We also reject Royalty's argument that the State failed to prove that his prior convictions qualify as predicate felonies involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening

exhibition of a deadly weapon or dangerous instrument. The certified court records in evidence demonstrate that Royalty's four prior convictions for conspiracy to commit first degree escape, first degree escape, aggravated assault and felony endangerment all were designated "dangerous" offenses. By definition, a "dangerous offense" is an offense "involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury." A.R.S. § 13-105(13). Thus, the superior court did not err in ruling that Royalty's four prior felony offenses qualified as predicate felonies for purposes of sentence enhancement under A.R.S. § 13-705.

D. Consecutive Sentences.

¶26 Royalty also argues that his ten consecutive sentences violate the Fifth Amendment's guarantee against double jeopardy and A.R.S. § 13-116 (2010). In his opening brief, Royalty advances several arguments in support of this claim of error. In his reply brief, however, Royalty concedes that resolution of his challenge to the sufficiency of the evidence to support ten separate convictions will control the outcome of his challenge to the consecutive sentences. Because we have held the evidence was sufficient to support Royalty's convictions on ten separate counts of sexual exploitation of a minor, we conclude the superior court properly imposed ten consecutive sentences. *See*

A.R.S. § 13-705(M) (mandating imposition of consecutive sentences for dangerous crimes against children in the first degree).

E. Cruel and Unusual Punishment.

¶27 Finally, Royalty maintains that the imposition of mandatory life sentences violates the Eighth Amendment's prohibition against cruel and unusual punishment. Royalty argues that a life sentence for the mere possession of child pornography is grossly disproportionate to the nature of his offenses, noting that a person could receive far lesser punishment for a much more "serious offense" such as killing someone. His argument, however, ignores that he was sentenced as a repetitive offender with at least two predicate prior dangerous convictions. Given these circumstances, Royalty's argument that his life sentences violate the Eighth Amendment's cruel and unusual punishment clause is without merit. *See Ewing v. California*, 538 U.S. 11, 30-31 (2003) (rejecting claim that sentence of 25 years to life imposed for minor felony under California's "three strikes law" is cruel and unusual punishment); *Rummell v. Estelle*, 445 U.S. 263, 284-85 (1980) (holding no violation of Eighth Amendment to sentence three-time offender to life in prison with possibility of parole).

CONCLUSION

¶28 Finding no error, we affirm Royalty's convictions and sentences.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
PHILIP HALL, Judge