

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JESSE RYAN SWAFFAR,
Appellant.

No. 2 CA-CR 2016-0406
Filed November 13, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20151629001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Nicole Farnum, Phoenix
Counsel for Appellant

MEMORANDUM DECISION

Judge Eppich authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

E P P I C H, Judge:

¶1 Jesse Swaffar appeals his convictions for ten counts of sexual exploitation of a minor under fifteen years of age related to his possession of child pornography. On appeal, he challenges the admission of evidence of other acts, the lack of a jury instruction regarding the other acts, and the effectiveness of his representation. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Wright*, 239 Ariz. 284, ¶ 2 (App. 2016). Swaffar's girlfriend found images of child pornography on his computer and reported him to law enforcement. Swaffar was arrested and charged with ten counts of sexual exploitation of a minor for ten files containing child pornography, although police ultimately found thousands of such files on Swaffar's hard drives.

¶3 Before trial, the state sought to introduce evidence of the other uncharged images under Rule 404(b) and (c), Ariz. R. Evid. Swaffar objected and argued that the state had the burden to prove the uncharged conduct at an evidentiary hearing and show that it was otherwise admissible under Rule 403, Ariz. R. Evid. The court found that the evidence of the uncharged images was admissible under Rule 404(b) as intrinsic evidence, as showing an absence of mistake or accident, and demonstrating knowledge. The court also concluded the evidence was admissible under Rule 404(c) as demonstrating an aberrant sexual propensity and determined that its probative value was not outweighed by the danger of unfair prejudice to Swaffar.¹ The court ruled without conducting an

¹In its answering brief the state expressly abandons any claim that the evidence was admissible under Rule 404(c). Accordingly, and because we conclude the evidence was admissible under Rule 404(b), we need not decide whether it was also admissible under Rule 404(c). *See Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9 (App. 2006) ("We may affirm the trial court's ruling if it is correct for any reason apparent in the record."). Nor do we

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evidentiary hearing, but was provided a copy of a forensic report detailing the uncharged conduct.

¶4 On the eve of trial, the state filed a motion asking the trial court to determine defense counsel's fitness to try the case. The state referenced issues associated with counsel's performance in the case, including his failure to pick up over half of the exhibits the state intended to introduce at trial. It also pointed out that a few months earlier counsel had requested a continuance for medical reasons in a trial in which he was the named defendant. The court took the issue under advisement, but denied the state's motion.

¶5 At trial, the state referred to the uncharged images on Swaffar's hard drives.² Swaffar's attorney did not request a limiting instruction regarding the uncharged images, and the court did not give one. The jury found Swaffar guilty as charged. The court sentenced him to a 100-year term of incarceration, imposing ten-year consecutive terms for each count. This appeal followed. We have jurisdiction pursuant to Ariz. Const. art. VI, § 9, A.R.S. §§ 12-120.21(A)(1), 13-4031, 13-4033, and Ariz. R. Crim. P. 31.2.

Evidence of Other Acts

¶6 Swaffar raises two issues regarding the admission of evidence of the uncharged images on his hard drives. First, he argues that the trial court abused its discretion by not "curtailing the evidence," of the uncharged images. He does not challenge whether they were admitted for a proper purpose under Rule 404, but argues that referring to the sheer volume of uncharged images was unduly prejudicial and should have been precluded by Rule 403. Second, he argues that the court erred in not conducting an evidentiary hearing to determine whether there was clear and convincing evidence that the acts had occurred. We review the admission of other acts evidence for an abuse of discretion. *State v. Goudeau*, 239 Ariz. 421, ¶ 96 (2016).³

decide whether the trial court erred in determining that the evidence was intrinsic. *See id.*

²None of the uncharged images were admitted into evidence, only the fact of their existence.

³The state argues that Swaffar failed to object to the admission of the evidence of the other images and therefore forfeited review of the issue for

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Relevance

¶7 Generally, relevant evidence is admissible. *See* Ariz. R. Evid. 402. Relevant evidence is that which “has any tendency to make a fact [of consequence in determining the action] more or less probable than it would be without the evidence.” Ariz. R. Evid. 401. Even relevant evidence may be excluded, however, if “its probative value is substantially outweighed by the danger of . . . unfair prejudice.” Ariz. R. Evid. 403. “Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror.” *State v. Mott*, 187 Ariz. 536, 545 (1997). We review the trial court’s determination of the relevance and admissibility of evidence for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, ¶ 15 (2003).

¶8 Here, the trial court acted within its discretion in allowing the state to refer to the large quantity of uncharged images. The information was relevant to show knowledge and absence of mistake or accident and any prejudice to Swaffar was not unfair. By claiming accident or mistake, Swaffar opened the door to the existence of the large quantity of uncharged images. *Cf. State v. Hausner*, 230 Ariz. 60, ¶ 80 (2012) (defendant opened door to evidence of prior assaults by testifying he was non-violent). Swaffar now argues the court should have curtailed the evidence by limiting reference to the sheer number of such images. However, he did not propose such a solution to the court at the time it made its ruling. *Cf. State v. Dann*, 205 Ariz. 557, ¶ 66 (2003) (failure to object while error can be corrected waives error). Moreover, Swaffar offers no judicially manageable standard by which we or the trial court should ascertain how many images would have been acceptable.

Evidentiary Hearing

¶9 Swaffar argues that the trial court abused its discretion in admitting evidence of the uncharged images without conducting an evidentiary hearing and without reviewing the proposed evidence. We disagree.

all but fundamental error. However, the arguments made by Swaffar at the pretrial hearing on the matter were sufficient to preserve the issue for review. *See State v. Burton*, 144 Ariz. 248, 250 (1985) (Generally, “where a motion in limine is made and ruled upon, the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial.”).

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¶10 Evidence of other acts is only admissible at trial if the court determines that the defendant committed the other alleged acts by clear and convincing evidence. *State v. Terrazas*, 189 Ariz. 580, 582 (1997). Rule 404(b) does not require an evidentiary hearing to make this determination. *State v. LeBrun*, 222 Ariz. 183, ¶ 10 (App. 2009).

¶11 The trial court had the opportunity to review the proposed evidence, a forensic examination report completed by an analyst who had reviewed Swaffar's hard drives. The court weighed the evidence appropriately and specifically considered its strength. And the evidence was essentially the same as what the state would be introducing to prove the charged conduct at trial. The court's review of the report allowed it to find by clear and convincing evidence that Swaffar had committed the other acts. Accordingly, the court did not abuse its discretion in admitting the evidence without conducting an evidentiary hearing.

Limiting Instruction

¶12 A trial court is not required, sua sponte, to give a limiting instruction for evidence admitted under Rule 404(b). *State v. Miles*, 211 Ariz. 475, ¶ 31 (App. 2005). Further, failure to give an instruction limiting the effect of certain evidence when counsel does not request one is not fundamental error. *See State v. Taylor*, 127 Ariz. 527, 530 (1980).

¶13 Swaffar's attorney never requested a limiting instruction.⁴ The trial court was not required to give one sua sponte. We find no error.

Ineffective Assistance of Counsel

¶14 Ineffective assistance of counsel claims may only be raised in a post-conviction proceeding pursuant to Rule 32, Ariz. R. Crim. P. *State v. Spreitz*, 202 Ariz. 1, ¶ 9 (2002). Any such claims raised in a direct appeal will not be addressed regardless of merit. *Id.*

⁴The trial court did not give an instruction on the proper use of evidence admitted under Rule 404(c), and Swaffar did not request one. While Rule 404(c)(2) states that the court "shall instruct the jury as to the proper use" of evidence admitted under this subsection, Swaffar does not raise the lack of this jury instruction on appeal. Thus, we consider the issue waived. *See Ariz. R. Crim. P. 31.13(c)(1)(vi); State v. Bolton*, 182 Ariz. 290, 298 (1995).

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¶15 Swaffar argues his case is distinguishable from our prior decisions due to the trial court's decision to deny the state's motion to determine defense counsel's fitness to try his case. Because the court denied the state's motion, he argues, the court committed structural error akin to denying him the right to counsel altogether, allowing him to raise the issue on appeal. We disagree.

¶16 Structural error deprives a defendant of basic protections without which a criminal trial cannot reliably serve its function as a vehicle to determine guilt or innocence. *State v. Valverde*, 220 Ariz. 582, ¶ 10 (2009). Structural error is limited to circumstances such as a denial of counsel or a biased trier of fact. *Id.*

¶17 Swaffar was not deprived of his right to an attorney. He merely argues that his attorney's representation was not effective. Despite the trial court's action in denying the state's motion, Swaffar's claim is still one of ineffective assistance of counsel and can only be raised in a petition for post-conviction relief.⁵

Disposition

¶18 For the foregoing reasons, we affirm Swaffar's convictions and sentences.

⁵Swaffar's reliance on *State v. Carriger*, 143 Ariz. 142 (1984), to suggest that we can consider an ineffective assistance claim on direct appeal is misplaced. Our supreme court in *Spreitz* expressly modified or clarified *Carriger* to the extent it permitted direct review. *Spreitz*, 202 Ariz. 1, ¶ 11.