IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee*,

*v.*

DONALD W. TAYLOR II,
*Appellant*.

No. 2 CA-CR 2018-0002
Filed July 10, 2019

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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NOT FOR PUBLICATION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. 31.19(e).

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Appeal from the Superior Court in Pinal County
No. S1100CR201601736
The Honorable Brenda Oldham, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Tanja K. Kelly, Assistant Attorney General, Tucson
*Counsel for Appellee*

Rosemary Gordon Pánuco, Tucson
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

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S T A R I N G, Presiding Judge:

**¶1** After a jury trial, Donald Taylor II was convicted of sixteen counts of sexual exploitation of a minor under the age of fifteen and sentenced to consecutive prison terms totaling 272 years. On appeal, he argues that the trial court erred by denying his request to represent himself, that his indictment was "void" because it did not identify the victims, and that the jury instruction given pursuant to A.R.S. § 13-3556 was unconstitutionally overbroad.[1] We affirm.

**¶2** Taylor was charged with sixteen counts of sexual exploitation of a minor after the discovery of child pornography on his cell phone, laptop, and desktop computer. At a January 2017 pretrial conference, Taylor asserted that he wished to represent himself. At a later hearing,

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[1]Counsel initially filed a brief citing *Anders v. California*, 386 U.S. 738 (1967), asserting she had reviewed the record and had found no "unresolved non-frivolous issue to raise on appeal." Taylor filed a supplemental brief identifying the three claims addressed in this decision. Based on our review of the record, we concluded the first issue was non-frivolous and, pursuant to *State v. Thompson*, 229 Ariz. 43 (2012), struck counsel's *Anders* brief and Taylor's pro se brief and directed counsel to file a brief addressing that claim and "any others counsel may identify." That brief, as we instructed, raised the issue whether the trial court had correctly denied Taylor's request to represent himself. Counsel, however, additionally raised "two issues Taylor raised in his Supplemental Brief" "[a]t Taylor's request and to preserve these issues for further review." But the procedure described in *Thompson* does not require counsel to identify or develop all the claims raised by the defendant in a supplemental pro se brief. Instead, counsel is "to proceed with briefing as with any other criminal appeal." *Id.* ¶ 5. It remains counsel's obligation to determine which issues to raise on appeal. *See State v. Febles*, 210 Ariz. 589, ¶¶ 19-20 (App. 2005).

however, when the court attempted to ensure that his waiver of his right to counsel would be knowing, voluntary, and intelligent, Taylor claimed he did not understand his right to counsel or the risks of self-representation, insisted that the court address him as "The Beneficiary," and asserted the court had no jurisdiction over him. The court sua sponte ordered that Taylor undergo a competency prescreening pursuant to Rule 11, Ariz. R. Crim. P.

**¶3** At another hearing about a month later, counsel reported that Taylor had refused to speak with him. And, when the trial court informed Taylor that he should review with counsel a new competency report concluding he was competent, Taylor refused to take the report from counsel and refused to speak with counsel about the report. The court then explained to Taylor that, before he would be permitted to represent himself, the court was required to find that his decision was knowing, voluntary, and intelligent and would ask him several questions to that end. Taylor refused to answer the court's questions but ultimately agreed he would decide whether to waive his right to counsel after reviewing discovery.

**¶4** At a hearing in March 2017, Taylor again asserted he was "The Beneficiary" and claimed assigned counsel was not his attorney. He stated he had just received the state's disclosure and would need three months to review it. Counsel reported that Taylor had previously refused to meet with him to receive discovery materials. Although the trial court again attempted to question Taylor about his wish to proceed without counsel, Taylor stated he would not answer questions until he had the opportunity to review discovery, claimed he did not understand the court's questions, and gave unresponsive answers, such as claiming he would not enter into a "business deal" with the court and that he is "not a chattel piece of property of this company or corporation." The court denied Taylor's request to represent himself, but informed Taylor it would reconsider if he answered the court's questions regarding his understanding of his rights. Taylor later withdrew his request. After a five-day trial, he was convicted and sentenced as described above. This appeal followed.

**¶5** Taylor first asserts the trial court erred by denying his request to forgo the assistance of counsel and represent himself. We review the court's decision for an abuse of discretion. *See State v. Weaver*, 244 Ariz. 101, ¶ 7 (App. 2018). A competent defendant is entitled to proceed pro se if he timely and unequivocally invokes his right to do so. *Id.* ¶ 8. A court is required, however, to first determine whether that decision is knowing, voluntary, and intelligent. *State v. McLemore*, 230 Ariz. 571, ¶ 25 (App.

2012). That is, the court must ensure the defendant understands the "dangers and disadvantages of self-representation," the charges against him, and the possible punishment he could face upon conviction. *State v. Dann*, 220 Ariz. 351, ¶ 24 (2009). The improper denial of a request to waive the right to counsel is structural error. *Weaver*, 244 Ariz. 101, ¶ 7.

**¶6** Taylor's request was at least arguably unequivocal[2] and, having been made well in advance of trial, timely. *See id.* ¶ 10. Taylor's claims that he did not understand the trial court's questions were apparently disingenuous. But we cannot fault the court for denying Taylor's request to proceed without counsel when he refused to participate meaningfully in the court's attempts to ensure that waiver would have been valid. Constitutional rights may be waived by conduct. For example, a defendant may waive the right to counsel at trial by engaging in "persistent disruptive or dilatory conduct," provided the court has adequately warned the defendant. *State v. Hampton*, 208 Ariz. 241, ¶ 7 (2004). Similarly, a defendant may waive the right to be present by persistently engaging in disruptive conduct "after being warned that such conduct will result in expulsion." Ariz. R. Crim. P. 9.2(a); *see also Illinois v. Allen*, 397 U.S. 337, 343 (1970).

**¶7** Here, the trial court repeatedly warned Taylor that he must answer the court's questions before the court would grant his request to proceed pro se. Taylor repeatedly declined to do so. And, the court advised Taylor that it would reconsider his request if Taylor agreed to answer the questions necessary to ensure his waiver was competent. Taylor instead withdrew his request. In these circumstances, the court did not err in rejecting Taylor's request to proceed pro se.

**¶8** Taylor next asserts that his indictment was "void" because the state failed to allege the identity of the victim. He relatedly suggests that the state was required to prove the victim's identity for the court to impose an enhanced sentence under A.R.S. § 13-705.

**¶9** Taylor relies primarily on this court's decision in *State v. Olquin*, 216 Ariz. 250 (App. 2007). But that case does not support his position. In *Olquin*, we addressed the sufficiency of the evidence for aggravated driving under the influence with a person under the age of

[2]The state asserts that we should deem Taylor's request equivocal because he refused to participate in the court's colloquy. Taylor's deliberate conduct, however, is better analyzed in the context of waiver.

fifteen in the vehicle. *Id.* ¶ 18. The defendant argued that, because there were three children in the vehicle and the state did not present evidence "regarding the names of the children," "the absence of proof of their identity renders the evidence insufficient." *Id.* In rejecting that claim, we observed that, when an offense is committed against multiple victims:

> the victim is a distinguishing factor and the identity of the victim therefore is an element of the offense. For example, the robbery of victim A is a different and separate offense than the robbery of victim B even if committed simultaneously, and a defendant can be charged and punished separately for each offense.

*Id.* ¶ 21. We did not conclude, as Taylor argues, that the victim's name must be alleged and proved in such circumstances. Indeed, we have explicitly refuted Taylor's proposed interpretation. *See State v. Villegas-Rojas*, 231 Ariz. 445, ¶¶ 8-9 (App. 2012) (clarifying that "[m]erely because a victim is a necessary element [of the offense] does not mean that the name of the victim is a necessary element of the offense").

**¶10** Moreover, nothing in A.R.S. § 13-3553 suggests that a child's identity is an essential element of the crime of sexual exploitation of a minor. We do not suggest that sexual exploitation of a minor is a victimless crime; child pornography results in long-lasting victimization of the children depicted. *See New York v. Ferber*, 458 U.S. 747, 758 (1982) (agreeing that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child"); *State v. McPherson*, 228 Ariz. 557 ¶¶ 19-21 (App. 2012) (recognizing that child pornography "continue[s] to haunt and harm the children depicted"). That the children are "victims," however, does not mean their identities are essential elements of the offense. *See Olquin*, 216 Ariz. at 255, ¶ 25 ("A person can be considered 'a victim' of an offense . . . even where the statute defining the offense does not include a victim as a necessary element of the offense."); *State v. Tschilar*, 200 Ariz. 427, ¶ 34 (App. 2001) (referring to crimes such as burglary in the first degree and fraudulent schemes and artifices in recognition that "offenses, even if involving victims, do not necessarily refer to the victim as an element of the offense"). Finally, sentence enhancement under § 13-705 does not require the state to identify the child victim, only to show the victim is an actual child. *See Wright v. Gates*, 243 Ariz. 118, ¶ 18 (2017). The fact the state did not prove the identity

of Taylor's victims has no effect on the validity of his convictions or sentences.

**¶11** Last, Taylor asserts and the state agrees the trial court erred by instructing the jury under § 13-3556 that it was permitted to "draw the inference that a participant was a minor if the visual depiction or live act through its title, text or visual representation depicted the participant as a minor." This instruction is unconstitutionally overbroad because it permits "a prosecution and conviction where no actual child was involved." *State v. Hazlett*, 205 Ariz. 523, n.10 (App. 2003). But Taylor did not object below and, thus, is entitled to relief only if he demonstrates the error was fundamental and prejudicial. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005). Taylor has not explained how the error prejudiced him and therefore has waived this claim on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008). He could not show prejudice in any event—there was ample and uncontested evidence that images he possessed depicted children under the age of fifteen.

**¶12** We affirm Taylor's convictions and sentences.