

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BAUDELIO RODRIGUEZ,
Appellant.

No. 2 CA-CR 2019-0219
Filed July 22, 2020

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NOT FOR PUBLICATION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).

Appeal from the Superior Court in Pima County
Nos. CR20182501001 and CR20182029001 (Consolidated)
The Honorable Gus Aragón, Judge
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Eric K. Knobloch, Assistant Attorney General, Phoenix
Counsel for Appellee

Vanessa C. Moss, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

ECKERSTROM, Judge:

¶1 Baudelio Rodriguez appeals from his convictions and sentences for sexual conduct with and molestation of a minor and for sexual exploitation of multiple minors. He argues the trial court erred in consolidating counts and again in refusing to sever those same counts. He also argues the court erred in admitting evidence “without foundation and in violation of the Confrontation Clause.” We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A). For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts, resolving all reasonable inferences against Rodriguez. *State v. Nelson*, 214 Ariz. 196, ¶ 2 (App. 2007). In February 2018, Tucson Police Department Detective Scott Glass received an alert from the National Center for Missing and Exploited Children (NCMEC) regarding a Dropbox account containing images and videos depicting “sexual exploitation of minors or minors engaged in exploitive acts with their genitals.” Detective Glass requested that Dropbox freeze and preserve the account so that it could not be accessed but he could continue the investigation.

¶3 Detective Glass identified Rodriguez as the account holder for the IP address that had been accessing the Dropbox account, as well as the owner of the email address attached to the Dropbox account. Detective Glass then obtained a search warrant for Rodriguez’s residence. He interviewed Rodriguez, who admitted the email address in question belonged to him and he had a Dropbox account, which he confirmed he used to view and upload images of “child pornography.”

¶4 Detective Glass then obtained a search warrant for Rodriguez’s Dropbox account. Dropbox sent Detective Glass an encrypted thumb drive of the account’s files. His review of the files made it possible for him to identify Rodriguez’s home as the setting for many of the images. He also identified a child portrayed in multiple sexually exploitative

STATE v. RODRIGUEZ
Decision of the Court

images as Rodriguez's three-year-old niece, A.M. And, he identified Rodriguez in multiple images, including some that depicted A.M. in sexually exploitative positions.

¶5 Before trial, the trial court granted the state's motion to consolidate all charges against Rodriguez, which had been brought in two separate indictments. The first indictment charged Rodriguez with ten counts of sexual exploitation of a minor. The second, which focused on Rodriguez's crimes against A.M., charged him with three counts of sexual conduct with a minor, two counts of molestation of a minor, and thirteen additional counts of exploitation of a minor.

¶6 A jury found Rodriguez guilty after a two-day trial. The trial court sentenced him to twenty-seven consecutive terms of seventeen years each,¹ resulting in a total prison sentence of 459 years. This appeal followed.

Consolidation of Charges

¶7 Rodriguez argues the trial court abused its discretion when it consolidated the charges in the first indictment, relating to his possession of exploitative images, with the second indictment's charges, which involved criminal sexual conduct with, molestation of, and sexual exploitation of his minor niece. At the very least, he argues, the charges specific to sexual conduct and molestation should have been severed from the counts originally charged in the first indictment. "We review a trial court's decisions on joinder and severance for an abuse of discretion." *State v. LeBrun*, 222 Ariz. 183, ¶ 5 (App. 2009). We will uphold the court's ruling if it is legally correct for any reason. *State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7 (App. 2012).

¶8 After a pretrial hearing, and over Rodriguez's objection, the trial court granted the state's motion to consolidate the two cases. Citing only Rule 13.3(a)(1), Ariz. R. Crim. P., the court reasoned the charges were properly consolidated because the cases involved "allegations and victims that are of the same or similar character and the two cases involve allegations of the same or similar conduct." The court treated Rodriguez's pretrial motion to sever as a motion for reconsideration, which it denied. It

¹The trial court granted the state's motion to dismiss one count of sexual exploitation of a minor prior to trial.

STATE v. RODRIGUEZ
Decision of the Court

also denied Rodriguez's renewal of his motion to sever on the final day of trial.

¶9 A trial court has broad discretion with regard to joinder and severance. *State v. Prince*, 204 Ariz. 156, ¶ 13 (2003). We will not reverse an improper consolidation or an improper denial of severance unless the defendant demonstrates the ruling prejudicially influenced his defense. *See State v. Stuard*, 176 Ariz. 589, 596 (1993) (reversal not required when defendant could not demonstrate he "suffered prejudice" from joinder of offenses); *State v. Roper*, 140 Ariz. 459, 461 (App. 1984) (even if charges improperly consolidated, "it may nevertheless not be prejudicial or an abuse of discretion to try the charges together as similar acts, where the evidence of the other crimes would be admissible under another theory advanced"). This test applies even when a defendant is entitled to severance as a matter of right, which occurs when charges are consolidated solely under Rule 13.3(a)(1).² *Stuard*, 176 Ariz. at 596.

¶10 Rodriguez has not demonstrated that the consolidation of his offenses prejudiced his defense because the evidence of each case would have been cross-admissible had he received separate trials. *See Ariz. R. Evid. 404(b)* (evidence of other crimes admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"); *see also State v. Ives*, 187 Ariz. 102, 106 (1996) (if evidence in one trial would have been admissible in second trial as other act evidence under Rule 404(b), improper denial of severance not reversible error). At a minimum, Rodriguez put his knowledge at issue when, during cross-examination of Detective Glass, he suggested that Dropbox accounts could be hacked or accessed by other people. Rodriguez advanced this defense theory during closing argument, when he insinuated that the state had not proven Rodriguez's guilt because it had failed to verify that "there

²Although the trial court cited only Rule 13.3(a)(1), the state correctly asserts that the court's reasoning also reflected the language permitting severance as provided by Rule 13.3(a)(2). Defendants whose cases are consolidated pursuant to Rule 13.3(a)(2) are not entitled to severance as a matter of right. *See Ariz. R. Crim. P. 13.4(b)*. Because we find no prejudice here, there is no available remedy even if the charges were consolidated solely under Rule 13.3(a)(1) and should have been severed at Rodriguez's request. Thus, we need not determine which provision of Rule 13.3 governed the court's decision.

STATE v. RODRIGUEZ
Decision of the Court

hadn't been any hacking, tampering" of the files.³ Thus, Rodriguez has not demonstrated that he is entitled to any remedy resulting from the consolidation of his offenses.

¶11 Furthermore, any prejudice from an improper denial of severance was mitigated because the trial court instructed the jury to consider the evidence with respect to each charge separately, and it provided the jury with a separate verdict form for each charge. *Stuard*, 176 Ariz. at 599-600 (no prejudice when court instructed jury that evidence must be considered separately with respect to each charge, evidence was "separate and distinct for each count," and jury received separate verdict form for each count). Accordingly, Rodriguez has not established prejudice as to his consolidated trial.⁴

Dropbox Evidence

¶12 Rodriguez also argues the photographs he stored on Dropbox were not admissible because (1) the state laid an improper foundation as it presented no witness to testify about how Dropbox identified or preserved the images prior to the execution of the search warrant and (2) the admission of photographs violated his right under the Sixth Amendment to the United States Constitution's Confrontation Clause because he was "unable to confront Dropbox and NCMC about how the file contents were created, identified, tracked, and used to initiate an investigation against him." We review for abuse of discretion evidentiary rulings such as those

³Rodriguez argues in his reply brief that these citations do not support a characterization that he put knowledge at issue in the case. However, Rodriguez presented no witnesses or evidence, instead basing his defense solely on attorney argument and cross-examination of witnesses. Under these circumstances, Rodriguez cannot argue that his cross-examination of Detective Glass and his attorney's closing argument were insufficient to support a claim that he challenged the issue of his knowledge of the criminal acts.

⁴Rodriguez has waived any claim suggesting the trial court's rulings violated his due process rights under the United States Constitution because he failed to provide substantial argument or authority for such a claim in his opening brief. Ariz. R. Crim. P. 31.10(a)(7); *see also State v. Carver*, 160 Ariz. 167, 175 (1989) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

STATE v. RODRIGUEZ
Decision of the Court

at issue in Rodriguez's foundation claim, *State v. King*, 213 Ariz. 632, ¶ 7 (App. 2006), and we review de novo challenges to admissibility based on the Confrontation Clause, *id.* ¶ 15.

¶13 Rodriguez's foundation challenge to the Dropbox evidence fails because the evidence was obtained through valid search warrants, and a detective who executed those warrants testified from personal knowledge that the photos admitted into evidence were the same images obtained through the search warrants. *See* Ariz. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony."); Ariz. R. Evid. 901(a), (b)(1) (foundation properly laid when witness with personal knowledge testifies an "item is what the proponent claims it is"); *see also State v. Steinle*, 239 Ariz. 415, ¶¶ 24-26 (2016) (witness testimony based on personal knowledge may be sufficient to lay proper foundation for photographic evidence).

¶14 Detective Glass testified at trial, from his personal knowledge and training, about the general process of investigating a report from the NCMC based on a tip from Dropbox, as well as the specific process of collecting and identifying the pertinent images in this case. Rodriguez cross-examined Detective Glass on these matters. Furthermore, the jury heard evidence that Rodriguez had admitted to possessing and uploading images of child pornography to a Dropbox account, which he accessed on his phone, and that the email address associated with the account in question was his. So, to the extent Rodriguez challenges the authenticity of the photographs as belonging to him, Detective Glass's testimony sufficiently laid a foundation that Rodriguez had possessed the images presented at trial. And, to the extent the images of unknown children were not conclusively linked to Rodriguez or A.M., the images taken inside Rodriguez's home served as powerful circumstantial evidence that all of the photos in the account had been placed there by Rodriguez.

¶15 As to Rodriguez's Confrontation Clause challenge, Detective Glass's testimony outlining the process by which the NCMC informed officers about the images comprised non-testimonial hearsay. Ariz. R. Evid. 801(c)(2) ("Hearsay" means a statement that "is offered to "prove the truth of the matter asserted in the statement."). The state offered this testimony regarding Dropbox's tip of potentially criminal images in Rodriguez's account to explain the process of the investigation, not to prove that Rodriguez had possessed or uploaded the images. Non-testimonial hearsay does not implicate the Confrontation Clause. *State v. Tucker*, 215

STATE v. RODRIGUEZ
Decision of the Court

Ariz. 298, ¶ 61 (2007); *see also Davis v. Washington*, 547 U.S. 813, 821 (2006) (non-testimonial hearsay not subject to Confrontation Clause scrutiny). Thus, Rodriguez's Confrontation Clause challenge fails on that ground, as well.

Disposition

¶16 For the foregoing reasons, we affirm.