IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RICHARD BRIAN TOURNER,
Appellant.

No. 2 CA-CR 2020-0170
Filed June 16, 2021

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NOT FOR PUBLICATION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 Gila County
No. S0400CR201900278
The Honorable Bryan B. Chambers, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/
Section Chief of Criminal Appeals
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Based on his possession of child pornography, Richard Tourner was convicted after a jury trial of ten counts of sexual exploitation of a minor. The trial court sentenced him to consecutive, fifteen-year prison terms for each offense. On appeal, Tourner argues the court erred in allowing the state to admit into evidence information about eighty-three other videos and images found in his possession. He also argues the court erred in denying his motion for a judgment of acquittal under Rule 20, Ariz. R. Crim. P., for eight of his ten convictions. We affirm.

¶2 We view the evidence in the light most favorable to upholding the jury's verdicts. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). After FBI Special Agent Daniel Douglas determined that an internet address linked to Tourner had possibly been used to send or receive child pornography, he and detectives from the Gila County Sheriff's and Gila County Attorney's offices visited Tourner at his residence in December 2018. When Douglas told Tourner he investigated computer crimes involving "the sexual exploitation of minors," Tourner stated he was "not a child molester." Tourner allowed Douglas to take what he stated was his only computer.

¶3 Forensic examination of the computer's hard drive uncovered child pornography videos in the unallocated space—meaning the videos had been transferred to the computer and deleted by a user. A peer-to-peer file-sharing program was also found on the computer. The download log for that program showed over two thousand filenames that included a term used to locate and download child pornography. According to Douglas, child pornography is not "easy to find" online and cannot be obtained using common internet-search tools.

¶4 In May 2019, pursuant to a search warrant, law enforcement officers searched Tourner's residence, finding another computer and

several DVDs that contained child pornography videos and images. Specifically, one DVD contained six child pornography videos, a second DVD contained nine, and a third contained eleven. Forensic examination of the second computer found forty-nine child pornography images and two videos, at least some of which were in the unallocated space.

¶5 Tourner was charged with ten counts of sexual exploitation of a minor under the age of fifteen, consisting of the two videos found in the unallocated space of the first computer, six images found in the unallocated space of the second computer, and two videos found on the DVDs. After a three-day trial, he was convicted and sentenced as described above. This appeal followed.

¶6 Tourner first argues the trial court erred in permitting the state to present evidence that he possessed the eighty-three videos and images for which he was not charged. Before trial, the state filed a notice stating it intended to present evidence of Tourner's possession of those videos and images, arguing they were admissible pursuant to Rule 404(b) and (c), Ariz. R. Evid., and were admissible as intrinsic evidence of the charged offenses. At a pretrial hearing, Tourner objected, noting some of the images and videos had not been given a sexual maturity rating[1] and asserting the state was merely "making an independent assessment that these other images . . . are child pornography." Absent a maturity rating, he argued, the state had not demonstrated the images and videos were "in fact child pornography" and allowing the evidence would be "substantially prejudicial." He also argued the images and videos were not intrinsic to the charged offenses because there was no evidence they were "downloaded at the same time" and thus constituted "separate acts."

¶7 The state acknowledged that some of the uncharged images and videos "weren't rated or could not be rated." But the state asserted that

[1]A maturity rating is based on an expert's evaluation of a subject's age based on specific factors, including "the hair, the muscles, [and] the composition of that child." According to trial testimony, pediatric nurse practitioners evaluated the ten charged images and videos to provide maturity ratings. One nurse practitioner evaluated two videos and concluded they depicted prepubertal children under the age of fifteen. A second nurse practitioner evaluated six images and two videos. The practitioner was able to provide a sexual maturity rating for all but one of the subjects but concluded all the subjects were under the age of fifteen, including one subject under ten.

investigators would testify, based on "their background and their training and experience in child pornography" that "these additional images are child pornography." It additionally argued the images and videos were intrinsic evidence of the charged offenses because they "were possessed contemporaneously" with the videos and images for which Tourner had been charged.

¶8 The trial court agreed the evidence was admissible. It concluded the evidence was intrinsic because the images "were contemporaneously found in the same devices and media in the same place." It also determined the evidence was admissible under Rule 404(b) to show "motive, intent, knowledge, absence of mistake or fact, perhaps even opportunity." Any alleged deficiencies in the investigator's ability to evaluate the age of the subjects of those videos and images, the court noted, was a "proper subject for cross-examination." Regarding Rule 404(c), the court determined the evidence was sufficient for the jury to conclude Tourner had possessed the images and videos and to infer he had a "propensity to possess these types of images and videos." And, the court found the probative value of the evidence was not substantially outweighed by any improper prejudice, noting the images and videos were "similar to the ten images or videos that are subject to the ten counts here."

¶9 At trial, Douglas testified that, on Tourner's computers and DVDs, he had found ninety-three images and videos that depicted the sexual exploitation of a minor. He explained that he had "received several trainings" regarding the sexual exploitation of minors and had experience in evaluating whether a video or image depicted a prepubescent child.

¶10 Tourner argues the trial court erred in allowing the evidence of the uncharged videos and images on any of the three grounds addressed at trial. We review the trial court's decision whether to admit evidence for an abuse of discretion. *See State v. LeBrun*, 222 Ariz. 183, ¶ 5 (App. 2009). Because Tourner has not established the trial court erred in admitting the evidence under Rule 404(b), we need not address his other arguments.[2]

[2]The state concedes the images were not admissible as intrinsic evidence. Additionally, we note that the trial court directed the state to craft a "curative instruction" consistent with Rule 404. However, no such instruction was given. Because Tourner does not raise this issue on appeal, we do not address it. *See State v. Roseberry*, 210 Ariz. 360, n.10 (2005).

¶11 Evidence of "other crimes, wrongs, or acts" is inadmissible "to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b)(1). However, such evidence is admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b)(2).

¶12 Tourner asserts the images were inadmissible to show "motive and intent"[3] because some were "non-pornographic"[4] and a maturity rating could not be determined for others, citing *State v. Coghill*, 216 Ariz. 578 (App. 2007). In that case, a prosecution for possessing child pornography, the trial court permitted the state to present evidence under Rule 404(b) that the defendant had downloaded and stored adult pornography. *Id.* ¶¶ 11-12. We concluded that, although evidence the defendant was capable of and had the means to do so was admissible, the *content* of those downloads was not relevant for a proper purpose—the defendant's "ability and opportunity to obtain material from the internet could be demonstrated as effectively by his admission that he had downloaded and copied numerous nonpornographic movies and popular television shows." *Id.* ¶ 17. We also observed that his intent to download adult pornography said nothing about his intent to download child pornography and, thus, the evidence improperly suggested "a person who downloads adult pornography would be more likely to download child pornography as well." *Id.* ¶¶ 22-24.

¶13 But this case is different. The state presented evidence via Douglas's testimony that each of the eighty-three uncharged videos and images depicted the sexual exploitation of children. And Tourner is incorrect that a maturity rating by an expert is required for such evidence to be admissible. A witness—expert or otherwise—may testify about the

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[3]Although the state correctly points out that the trial court's ruling on Rule 404(b) was not limited to motive and intent, Tourner's argument arguably applies with equal force to other bases for admission under Rule 404(b). Thus, in our discretion, we decline to find Tourner has waived his argument the evidence was inadmissible under Rule 404(b). *See State v. Aleman*, 210 Ariz. 232, ¶ 24 (App. 2005) (appellate court has discretion to address waived arguments).

[4]Tourner asserts in his brief that the eighty-three uncharged videos and images "included non-pornographic materials" but cites no record evidence supporting that contention.

age of a person, and such testimony may be sufficient to support a conviction beyond a reasonable doubt. *See State v. Nereim*, 234 Ariz. 105, ¶¶ 12-13 (App. 2014).

¶14 The state need only present clear and convincing evidence a defendant committed a prior act. *State v. Hausner*, 230 Ariz. 60, ¶ 69 (2012). Tourner does not develop any argument the state failed to meet this standard. As we noted above, Douglas testified he had training and experience evaluating whether pornography included a prepubescent child—and Tourner acknowledges Douglas was an expert. Although Tourner is correct Douglas qualified his expertise by stating he could not necessarily tell whether a subject "above . . . puberty age" was "14 or 22" years old, that went to the weight the jury could give his testimony, not its admissibility. *See State v. Davolt*, 207 Ariz. 191, ¶ 70 (2004).

¶15 Tourner next asserts the trial court erred by denying his Rule 20 motion regarding his eight convictions based on videos and images found in the unallocated space of his computers. He contends the state failed to show he knowingly possessed the materials because they were inaccessible without special "technological software and equipment" and thus did not show he was aware "of the images on his computer." Tourner further contends, for the first time in his reply brief, that the child pornography "could have been searched for, downloaded, and deleted" before the first computer came into his possession, noting he "was given the computer by someone else before they left the country."[5]

¶16 To convict Tourner of sexual exploitation of a minor, the state was required to prove he knowingly received or possessed "any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct." A.R.S. § 13-3553(A)(2). We review the trial court's denial of a Rule 20 motion de novo, and we review the evidence in the light most favorable to sustaining the conviction. *State v. West*, 226 Ariz. 559, ¶ 15 (2011). We will only reverse a jury's verdict if "no substantial evidence supports the conviction." *State v. Denson*, 241 Ariz. 6, ¶ 17 (App. 2016) (quoting *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005)). Substantial evidence

[5]Although Turner failed to raise this argument in his opening brief, because insufficient evidence constitutes fundamental prejudicial error, we address it. *See State v. Clark*, 249 Ariz. 528, ¶¶ 16-20 (App. 2020). But, the argument appears limited to the two videos found on the first computer taken by Douglas, given it was that computer that Tourner claimed to have received from his daughter.

is "such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *West*, 226 Ariz. 559, ¶ 16 (quoting *State v. Mathers*, 165 Ariz. 64, 67 (1990)).

¶17 Tourner is correct that Douglas testified the materials in the unallocated space were inaccessible without special software, and there was no evidence such software was found on Tourner's computers. And Tourner told Douglas the first computer had belonged to his daughter, with whom he had lived. But his argument disregards much of the evidence presented at trial. First, there was evidence that, to appear in the unallocated space on the computers, the images first had to be downloaded and deleted by someone using the computer. The logs from the peer-to-peer file-sharing program showed child pornography images had been downloaded. And Tourner's possession of both charged and uncharged child pornography on DVDs shows that he had both an interest in child pornography and the knowledge required to obtain and store it. Based on this evidence, a jury could conclude the images existed in the unallocated space because Turner had put them there by receiving them and subsequently deleting them, even if he currently lacked the ability to again access them. *See State v. Jensen*, 217 Ariz. 345, ¶ 18 (App. 2008) ("[T]he presence of . . . [an] image in the unallocated cluster, coupled with the numerous syntax searches for words and phrases associated with child pornography, is evidence of voluntary action undertaken by the computer operator in an effort to receive child pornographic images from the internet.").

¶18 We affirm Tourner's convictions and sentences.