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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BRADLEY WILLIAM KENNEDY, Appellant.	2 CA-CR 2009-0066 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR-2003031405001 SE

Honorable Patrick Irvine, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Bradley Kennedy was convicted of seven counts of sexual exploitation of a minor under fifteen and one count of forgery. For each of the sexual exploitation counts, the trial court imposed presumptive, consecutive prison sentences of seventeen years. The court also imposed a presumptive, 2.5-year prison term for the forgery count that it ordered to be served concurrently with one of the terms imposed on the sexual exploitation counts. On appeal, Kennedy argues: (1) insufficient evidence supported his convictions for sexual exploitation of a minor; (2) the sentences imposed constitute cruel and unusual punishment; (3) the court violated Kennedy's confrontation and cross-examination rights by denying him access to his wife's medical records; (4) the court erroneously admitted evidence of other acts that were not "tied to" Kennedy by clear and convincing evidence; (5) the court denied Kennedy's constitutional rights by precluding third-party culpability evidence; and (6) the trial judge abused his discretion by refusing to recuse himself from the case. We affirm Kennedy's convictions and sentences for the reasons that follow.

BACKGROUND

¶2 The evidence in this case, viewed in the light most favorable to upholding the verdicts, *see State v. Valdez*, 182 Ariz. 165, 168 n.1, 894 P.2d 708, 711 n.1 (App. 1994), established the following facts. In 1999, Kennedy was involved in a child support and custody case assigned to Judge David Roberts of the Maricopa County Superior Court.[1] In

[1]Judge Roberts retired from the bench in 2001.

the course of those domestic proceedings, Judge Roberts found Kennedy in contempt of court for failing to pay child support and jailed him over the Thanksgiving holiday. Consequently, Kennedy held a grudge against Judge Roberts and, in the words of Kennedy's wife at the time, Joann, he developed a "constant obsession with how to get back at him."

¶3 In September 1999, Judge Roberts learned that several adhesive labels had been posted in his neighborhood with his personal information and defamatory comments about him typed on them. One such label insinuated Judge Roberts was involved in the disappearance of a young girl from Mesa, Arizona, who was presumed to have been murdered. Around this time, Judge Roberts also began receiving unsolicited mailings at his residence, including a letter rejecting a credit card application that had originally been sent to Kennedy's address.

¶4 In October 1999, the situation escalated. Envelopes containing photographs of a naked boy were dropped off at a children's museum and at two offices in Mesa. The envelopes originally had been addressed to Judge Roberts and appeared to have been taken from his trash.

¶5 In November 1999, another office received an envelope through its mail slot that bore only the return address of an attorney who was opposing counsel in Kennedy's domestic relations matter before Judge Roberts. In that envelope, along with several photographs of a nude young boy, was a letter purportedly from this attorney to Judge

Roberts telling him to "[e]njoy little boy blue" and offering to exchange similar photographs in the future.

¶6 At the end of November 1999, Kennedy's wife, Joann, discovered photographs in her garage of a naked boy with some similarities to those that had been distributed anonymously around the city. Kennedy later admitted to her that he had taken the photographs and that the boy depicted in them was a member of their family. She also found adhesive labels in Kennedy's closet bearing typewritten, defamatory statements about Judge Roberts. Joann and Kennedy separated immediately after she found the photographs; she destroyed the photographs and the labels without reporting them to law enforcement. In destroying these materials, Joann believed she had prevented Kennedy from trying to "frame" Judge Roberts. She was unaware that similar items had already been distributed around the city. After being separated for several weeks, Joann permitted Kennedy to move back into their home, and they attempted to salvage their relationship.

¶7 In 2003, when Joann discovered Kennedy was being investigated after a separate incident, she informed police officers about the photographs she had found in her home. A Maricopa County Grand Jury subsequently charged Kennedy with seven counts of sexual exploitation of a minor under the age of fifteen, one count of forgery, and one count

of harassment. The court dismissed the harassment charge before trial, and a jury found Kennedy guilty of the remaining charges. This appeal followed.[2]

SUFFICIENCY OF THE EVIDENCE

¶8 Kennedy first argues the evidence was insufficient to support his convictions for sexual exploitation of a minor, as alleged in counts one through seven of the indictment, because the photographs underlying those charges were not "sexually exploitive" as a matter of law. We review the sufficiency of the evidence de novo, *see State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993), but "[w]e will find reversible error based on insufficient evidence only where there is a complete absence of probative facts to support a conviction." *State v. Fernane*, 185 Ariz. 222, 224, 914 P.2d 1314, 1316 (App. 1995). We will affirm a conviction based on substantial evidence, meaning evidence that "'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005), *quoting State v. DiGiulio*, 172 Ariz. 156, 159, 835 P.2d 488, 491 (App. 1992). That evidence may be direct or circumstantial. *Id.* In considering a claim of insufficient evidence, "[w]e construe the evidence in the light most favorable to sustaining the verdict[s], and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998).

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[2]The case was transferred to Division Two of this court based in part on the fact that a judge from Division One had presided over Kennedy's trial.

¶9 Pursuant to A.R.S. § 13-3553(A)(1) and (2), a person commits "sexual exploitation of a minor" when the person knowingly duplicates, transports, exhibits, exchanges, or possesses a photograph "in which a minor is engaged in exploitive exhibition or other sexual conduct."[3] Because the photographs here depicted a lone, nude boy who was not engaged in any "sexual conduct," as the phrase is defined in A.R.S. § 13-3551(9), the jury properly could convict Kennedy only if the photographs involved the "exploitive exhibition" of the minor. Section 13-3551(4) defines "[e]xploitive exhibition" as "the actual or simulated exhibition of the genitals or pubic or rectal areas of any person *for the purpose of sexual stimulation of the viewer*." (Emphasis added.)

¶10 Kennedy contends such a purpose was absent here because the evidence only showed, consistent with the state's theory of the case, that he had taken the photographs to harass or embarrass a judge, not to sexually stimulate viewers. Kennedy also points out correctly that the state presented no evidence that any person who saw the photographs was sexually stimulated by them. Notwithstanding the state's theory and Kennedy's characterization of the evidence, we find there was substantial evidence Kennedy took and possessed the photographs for the purpose proscribed by § 13-3551(4).

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[3]Although the statute proscribes other conduct and materials, *see* § 13-3553(A), we focus only on those acts listed in the jury's instruction. The version of the statute in effect at the time Kennedy committed the offenses is the same in relevant part. *See* 1998 Ariz. Sess. Laws, ch. 147, § 3; *see also* 1999 Ariz. Sess. Laws, ch. 261, § 29.

¶11 That Kennedy had, at least in part, "the purpose of sexual stimulation of the viewer" is evident from the letter he included in the envelope from November 1999. *Id.* Referring to the photographs in that envelope, the letter said, "Enjoy little boy blue." The letter purported to be authored by someone who had a sexual interest in young boys and a desire to exchange similar photographs in the future with the letter's purported recipient. As the actual author of the letter, Kennedy therefore presented the images with the purpose of being sexually stimulating to certain viewers, and he took the photographs so that they would titillate this potential audience. By creating the photographs with the purpose of sexually stimulating the hypothetical pedophile viewer, Kennedy violated §§ 13-3551(4) and 13-3553(A). *See State v. Gates*, 182 Ariz. 459, 462, 463, 897 P.2d 1345, 1348, 1349 (App. 1994) (in analyzing whether visual depiction of minor's genitals violated former sexual exploitation statute, defendant's intent to stimulate pedophile with exhibition is relevant inquiry).

¶12 The content of the photographs also allowed the jury to infer they were created for the purpose of sexually stimulating potential viewers. *Cf. United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986) (enumerating factors to be considered to determine whether photographs showed "lascivious exhibition of the genitals"). The Polaroid photographs underlying the charges depicted a boy under the age of fifteen lying down in various positions. The boy's face is not visible in any of the photographs, as it is either outside the picture frame or obscured by what appears to be a blue comforter or sleeping bag. Most of

the pictures show only the lower half of the boy's body, and the focal point in all the pictures is the boy's genitals.[4] In some of the photographs, his legs are spread apart so as to call attention to this area. In one photograph, the boy appears to have an erection.

¶13 Given the exclusive focus on the boy's genitals, the contrived poses, and the sexually suggestive setting, *see id.*, the photographs themselves were circumstantial evidence that Kennedy took the pictures for the purpose of sexually stimulating the viewer. Kennedy does not assert on appeal that the photographs depicted mere child nudity and were therefore constitutionally protected speech, *see Osborne v. Ohio*, 495 U.S. 103, 112 (1990), or that they were taken for any medical, scientific, educational, or other legitimate purpose. *See State v. Hazlett*, 205 Ariz. 523, ¶¶ 23-28, 73 P.3d 1258, 1265-66 (App. 2003) (interpreting sexual exploitation statute as excluding materials produced for legitimate, non-sexual purposes); *see also People v. Cantrell*, 9 Cal. Rptr. 2d 188, 199 (Ct. App. 1992) (interpreting phrase "'for the purpose of sexual stimulation of the viewer'" as ensuring "nude photographs of children without more would not fall within the purview of the [sexual exploitation] statute"), *quoting* Cal. Penal Code § 311.4(d)(1); *State v. Bohannon*, 814 P.2d 694, 697 (Wash. Ct. App. 1991) (construing phrase "'for the purpose of sexual stimulation of the viewer'" in sexual exploitation statute as designed to exclude photographs "taken for 'legitimate scientific, medical, or educational activities'"), *quoting* Wash. Rev. Code

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[4]We disagree with Kennedy's assertion that "[t]he pictures do not focus on the person's genitalia." Indeed, this is their only focal point.

§ 9.68A.011(3)(e). The jury could have found beyond a reasonable doubt, therefore, that the photographs depict the "[e]xploitive exhibition" of a minor as the phrase is defined in § 13-3551(4).

¶14 Whether Kennedy had other illicit motives for taking and distributing the pictures—namely, revenge—was therefore irrelevant. When enacting a prior version of the sexual exploitation law, our legislature announced one of the policies and purposes behind the statute was "[t]o prohibit any conduct which causes or threatens psychological, emotional or physical harm to children as a result of . . . sexual exploitation." 1978 Ariz. Sess. Laws, ch. 200, § 2(B)(2). The statute thus prohibits sexual exploitation of minors regardless of whether a defendant's motivation is primarily the sexual stimulation of viewers. Under the current § 13-3553(A)(2), for example, the sale of child pornography is categorically prohibited, and a defendant cannot escape a conviction under this subsection by arguing that his principal purpose for producing or distributing sexually stimulating images of children was pecuniary gain. Kennedy's argument that he merely took the pictures to harass a judge is similarly unavailing, as his plan to frame Judge Roberts for sexual exploitation of a minor entailed actually committing this crime himself. *See State v. Berger*, 212 Ariz. 473, ¶ 20, 134 P.3d 378, 383 (2006) (observing purpose of statute criminalizing sexual exploitation of minor "to 'prevent any person from benefitting financially or otherwise from the sexual exploitation of children'"), *quoting* 1978 Ariz. Sess. Laws, ch. 200, § 2(B)(3).

¶15 Furthermore, we reject Kennedy's suggestion that the state was required to offer evidence that someone who saw the photographs was sexually stimulated by viewing them. By its terms, § 13-3551(4) requires only that depictions of nude children have the *purpose* of sexually stimulating viewers; the *actual* sexual stimulation of a viewer is not required in order for photographs to constitute sexual exploitation.

¶16 Because the trial court correctly instructed the jury on the crime of sexual exploitation of a minor, and because the evidence permitted a reasonable jury to find the photographs depicted the exploitive exhibition of a minor, we affirm Kennedy's convictions as to counts one through seven.

SENTENCE

¶17 We must also reject Kennedy's argument that his consecutive sentences for sexual exploitation of a minor constitute cruel and unusual punishment prohibited by the United States Constitution. When combined, his sentences total 119 years. Yet our supreme court has held that proportionality review under the Eighth Amendment requires us to focus on the sentence imposed for each specific crime, rather than the total sentence imposed. *See Berger*, 212 Ariz. 473, ¶¶ 27-28, 134 P.3d at 384. And the Court has determined the Constitution is not offended by Arizona's sentencing scheme for sexual exploitation of a minor, notwithstanding the fact that our statutes may require a centuries-long term of imprisonment for the simple possession of child pornography. *See id.* ¶¶ 25, 29, 33.

¶18 Although Kennedy urges this court to distinguish his case from *Berger*, we find no principled basis for doing so—including Kennedy's suggestion that he "is not a child pornographer." By secretly producing and distributing photographs that his wife accurately described as "amateur child pornography," Kennedy "consciously sought to do exactly that which the legislature sought to deter and punish." *Id.* ¶ 49. The fact that Kennedy sexually exploited a young boy as a means to exact revenge on a judge and an attorney is not an especially mitigating circumstance rendering his an "'extremely rare case'" where a lengthy consecutive sentence is "grossly disproportionate" to the criminal conduct. *Id.* ¶ 38. We therefore find the court's imposition of seven presumptive, consecutive sentences of seventeen years each to be constitutional.

MEDICAL RECORDS

¶19 Kennedy further argues the trial court violated his constitutional rights "to confrontation and cross-examination" by denying him discovery of his wife's medical records. Well in advance of trial, Kennedy and the state stipulated that "all medical, psychological, and psychiatric records of [the] State's witness Joann[] Kennedy from January 1, 1998 to [April 12, 2005] will be gathered and collected in their entirety and then delivered to [the trial court] for *in camera* inspection" to determine their relevance. Kennedy argued the records should have been disclosed to the extent they showed Joann's drug use, untruthfulness, bias against Kennedy and motive to lie, inability to accurately perceive events, and general lack of credibility. Referring to *Brady v. Maryland*, 373 U.S. 83 (1963),

he also sought disclosure of the records on the ground that they might lead to exculpatory evidence.

¶20 The trial court denied Kennedy access to the records after determining they were irrelevant to the charges against him and unlikely to lead to any admissible evidence. In so ruling, the court noted the records would be inadmissible under Rule 608(b), Ariz. R. Evid., to attack Joann's credibility with specific instances of conduct. The court further noted that Kennedy had already discovered significant issues relating to Joann's credibility—namely, her abuse of alcohol and prescription drugs and her lying to support this behavior. Consequently, the court concluded Kennedy could present his defense effectively and challenge Joann's credibility without the records being disclosed. At trial, Kennedy cross-examined Joann regarding her history of lying, abusing drugs and alcohol, and misappropriating medications by using Kennedy's dental license. He also questioned her about her prior felony conviction for child endangerment and referred to their ongoing "divorce and custody battle."

¶21 A witness's medical and psychological records are generally confidential. *See* A.R.S. §§ 13-4062(4) (setting forth physician-patient privilege), 32-3283(A) (setting forth behavioral health professional-client privilege); *State v. Connor*, 215 Ariz. 553, ¶ 18, 161 P.3d 596, 603 (App. 2007) ("Once the privilege attaches it prohibits 'not only testimonial disclosures in court but also pretrial discovery of information within the scope of the privilege.'"), *quoting Bain v. Superior Court*, 148 Ariz. 331, 333, 714 P.2d 824, 826 (1986).

However, these statutory privileges of confidentiality may be overcome by a defendant's due process rights if the "records are exculpatory and are essential to presentation of the defendant's theory of the case, or necessary for impeachment of the [witness] relevant to the defense theory." *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 239, 836 P.2d 445, 452 (App. 1992) (emphasis omitted). In order to make these determinations, we have approved a trial court's inspection of a witness's medical records *in camera*. *See, e.g.*, *id.* at 235, 836 P.2d at 448. We review for an abuse of discretion a trial court's ruling on a discovery request for health records. *See State v. Tyler*, 149 Ariz. 312, 314, 718 P.2d 214, 216 (App. 1986). To the extent a defendant claims such records were essential to his defense, we review this constitutional issue de novo. *Connor*, 215 Ariz. 553, ¶ 6, 161 P.3d at 600.

¶22 We agree with the state that Kennedy's rights to confrontation and cross-examination were not impaired by the non-disclosure of the medical records here. The Confrontation Clause primarily protects a defendant's trial rights; it does not grant him a broad right to conduct pretrial discovery. *Id.* ¶ 28; *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1987) (plurality opinion). In *Connor*, this court found no violation of a defendant's right to cross-examination where the defendant did not identify any limitation on his cross-examination of witnesses resulting from the non-disclosure of medical records. 215 Ariz. 553, ¶ 28, 161 P.3d at 605. Kennedy, too, has failed to identify any such limitation. Having developed the facts tending to show Joann's bias against him, motive to lie, inability

to accurately perceive or recall events, and general lack of credibility, Kennedy subjected her to an extensive cross-examination that achieved the objectives for which he had originally sought disclosure of her medical records. Because he effectively presented his defense without the use of the records in question, and because any information in the records relating to questions of bias and honesty therefore would have been cumulative, the court did not violate Kennedy's confrontation or cross-examination rights in maintaining the records' confidentiality.

¶23 Insofar as Kennedy also challenges the trial court's finding that the records were not likely to lead to admissible evidence, we have reviewed these records on appeal and agree with the trial court's conclusion. We need not revisit the propriety of the *in camera* review itself, as Kennedy now urges this court to do, given that he expressly agreed to this process below. *See State v. Logan*, 200 Ariz. 564, ¶ 11, 30 P.3d 631, 633 (2001) (invited error doctrine prevents party who injected error into proceeding from benefitting from error on appeal).

OTHER-ACT EVIDENCE

¶24 Kennedy argues the trial court erred in admitting certain evidence under Rule 404(b), Ariz. R. Evid., "that could not be tied to [Kennedy] by clear and convincing evidence." Specifically, he contends there was insufficient evidence showing he was responsible for the "magazine subscriptions, business inquiries, and solicitations" made in Judge Roberts's name, but not by Judge Roberts, that resulted in information or products

being sent to Roberts's residence. The trial court ruled that evidence of these mailings would be admissible, provided the state laid the proper foundation for them.

¶25 At trial, in connection with the forgery count, the state presented evidence that a credit card application submitted in the name of the "Roberts Family Trust" had originally been mailed to Kennedy's address. The application had been filled out with Judge Roberts's credit card number, home address, and forged signature. The rejection letter for the application was written to "Bradley K.," though the rejection letter itself was delivered to Judge Roberts's address.

¶26 Later, the state identified and admitted eight other mailed documents that contained handwritten information about Judge Roberts or his family. The state's handwriting expert testified that, although he was unable to identify who wrote these documents, they appeared to have been written by the same person. Two of the documents contained Judge Roberts's credit card number; three contained Roberts's forged signature; and one of the items requested a subscription for the "Robertson Family Trust." In addition to these eight items, the court admitted four related envelopes and response letters, bringing to twelve the total number of items admitted under Rule 404(b) to which Kennedy objected.

¶27 Evidence of other crimes, wrongs, or acts is admissible under Rule 404(b) only upon proof by clear and convincing evidence that the acts were committed by the defendant.

State v. Terrazas, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997).[5] Clear and convincing evidence creates a high probability that a proposition is true, *State v. Roque*, 213 Ariz. 193, ¶ 75, 141 P.3d 368, 390 (2006); *State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988), but need not establish that it is certainly or unambiguously true. *State v. Renforth*, 155 Ariz. 385, 388, 746 P.2d 1315, 1318 (App. 1987). The purpose of requiring other-act evidence to be proven by clear and convincing evidence is to avoid "'highly circumstantial inferences'" causing severe prejudice to a criminal defendant. *Terrazas*, 189 Ariz. at 584, 944 P.2d at 1198, *quoting* Vivian M. Rodriguez, *The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. Miami L. Rev. 451, 457 (1993). We review a court's admission of other-act evidence for an abuse of discretion. *State v. Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d 942, 946 (App. 2007).

¶28 Although circumstantial, clear and convincing evidence linked Kennedy to the unsolicited mailings. Kennedy's wife, Joann, testified he was obsessed with getting even

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[5]The additional requirements for admitting evidence under Rule 404(b) are not at issue in this case. *See State v. Vigil*, 195 Ariz. 189, ¶ 14, 986 P.2d 222, 224 (App. 1999) ("Before admitting [other-act] evidence, the trial court must conclude that (1) the state has proved by clear and convincing evidence that the defendant committed the alleged prior act; (2) the state is offering the evidence for a proper purpose; and (3) its probative value is not outweighed by the potential for unfair prejudice."). Although Kennedy asserts in passing that the state used the challenged evidence for an improper purpose, he has failed to develop and support this argument in his opening brief. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief must contain citations to record and legal authority for each issue raised). We therefore do not address it. *See State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (failure to develop properly argument in opening brief results in waiver on appeal).

with Judge Roberts. Like the credit card application originally sent to Kennedy's house, the additional mailings requested products or information for Judge Roberts or his family, sometimes using Judge Roberts's credit card number, and were sent in the same general period of time that Kennedy distributed the child pornography envelopes around the city. Because a jury could conclude it was extremely unlikely that there were two individuals who had resolved to harass Judge Roberts in precisely this way during this particular window of time, the trial court did not abuse its discretion in admitting the mailings, even if there was no direct or forensic evidence conclusively linking Kennedy to each specific item.

THIRD-PARTY EVIDENCE

¶29 Kennedy argues the trial court erred in precluding evidence that another person, Raymond Hinde, may have been responsible for harassing Judge Roberts. Before trial, the state moved to preclude any evidence that Hinde had been a possible suspect in 1999. Kennedy opposed the motion, emphasizing that Hinde had once written a letter to Judge Roberts stating that Judge Roberts was influenced by Satan. This reference to Satan, Kennedy contended, connected Hinde to the adhesive labels that had been found near Judge Roberts's home. One of those labels referred to Judge Roberts as "David Lucifer L. Roberts" and stated he was a "Satan worshiper."

¶30 After a hearing on the matter, the trial court found there was no evidence suggesting Hinde had committed the charged offenses. Noting Hinde's letter to Judge Roberts and the anonymously posted labels near Roberts's home were dissimilar, the court

found that the evidence relating to Hinde was not "relevant to [Kennedy]'s culpability" and amounted to "mere suspicion or speculation." The court therefore ruled inadmissible any evidence concerning Hinde. We review a trial court's exclusion of third-party culpability evidence for an abuse of discretion. *State v. Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d 189, 193 (2002). We find no abuse of discretion here.

¶31 A defendant has a constitutional right to present a defense. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988). A defendant may therefore present exculpatory evidence showing a third party committed the charged offense, subject to certain conditions. *See Prion*, 203 Ariz. 157, ¶¶ 21-22, 52 P.3d at 193; *State v. Gibson*, 202 Ariz. 321, ¶ 19, 44 P.3d 1001, 1004 (2002). First, the evidence must be relevant, meaning it must tend to create a reasonable doubt as to the defendant's guilt. *See Gibson*, 202 Ariz. 321, ¶¶ 15-16, 44 P.3d at 1003-04. Second, in accordance with Rule 403, Ariz. R. Evid., the probative value of the evidence must not be outweighed substantially by the risk that it will cause undue prejudice, confusion, or delay. *See Gibson*, 202 Ariz. 321, ¶ 13, 44 P.3d at 1003.

¶32 Here, the trial court correctly determined that law enforcement's investigation of Hinde was irrelevant to the issues in Kennedy's case. The suspicions of police officers and their reasons for taking particular actions do not constitute evidence of a third-party's wrongdoing. *See Oliver*, 169 Ariz. at 591, 821 P.2d at 252. Accordingly, the court did not

err in precluding evidence that Hinde once had been suspected by the police of harassing Judge Roberts.

¶33 Similarly, the trial court did not abuse its discretion in concluding the evidence relating to Hinde had no bearing on Kennedy's guilt. *See Gibson*, 202 Ariz. 321, ¶ 15, 44 P.3d at 1003. When compared with Hinde's letter to Judge Roberts, the labels found near Roberts's home were only superficially similar, sharing only an apparent dissatisfaction with Judge Roberts and a reference to Satan. Unlike Hinde's letter, which urged Judge Roberts to reconsider a ruling he had made in Hinde's civil case, the labels attempted to implicate Roberts in the murder of a young girl. The epithets on the labels were also more varied and branded Judge Roberts a "Pedophile." In addition, whereas Hinde signed his letter to Roberts and offered it as a pro se motion, the labels were anonymously distributed in an apparent effort to embarrass the judge. Thus, the trial court did not err in finding the proffered evidence did not tend to exculpate Kennedy. *See State v. Phillips*, 202 Ariz. 427, ¶ 28, 46 P.3d 1048, 1055-56 (2002).

¶34 In general, "mere suspicion or speculation regarding a class of persons" is distinguishable from admissible evidence of a third-party's guilt. *State v. Dann*, 205 Ariz. 557, ¶ 36, 74 P.3d 231, 243 (2003). Even if the proffered evidence here showed there was a class of people who were so upset with Judge Roberts that they might be motivated to commit the charged offenses, Judge Roberts's own testimony established this fact. Thus, to the extent any such evidence would have been brought to demonstrate that others might have

had similar motivations to harass Roberts, that evidence would have been cumulative. The trial court therefore properly could have concluded that the risk the proffered evidence would confuse or mislead the jury outweighed any minimal probative value it might have had. *See Gibson*, 202 Ariz. 321, ¶ 13, 44 P.3d at 1003. Consequently, we find no error in the court precluding evidence relating to Raymond Hinde.

RECUSAL

¶35 Kennedy argues "the irregular proceedings below concerning selection of a trial judge require a retrial before a completely independent judge." Two factors had complicated the assignment of a judge in Kennedy's case. First, the victim of the forgery offense was a retired judge from the Maricopa County Superior Court. Second, in 2003, a warning was issued within the Maricopa County Superior Court about Kennedy based on his having been found on the Arizona State University campus with weapons and a list of personal information about Maricopa County Superior Court judges.

¶36 Because Kennedy committed the crimes in the instant case in Maricopa County, his trial was originally set in the Maricopa County Superior Court. After the case was reassigned several times within that court, however, the case was transferred to the Pinal County Superior Court. After several assignments there, no judge could be found to try the case within Pinal County, and the Pinal County Superior Court transferred the case back to the Maricopa County Superior Court. The presiding judge of that court, Judge Barbara Mundell, then selected a retired judge from Yavapai County to hear Kennedy's case.

Following the apparent withdrawal of that judge due to an illness, Judge Mundell assigned Kennedy's case to Judge Patrick Irvine of Division One of the Arizona Court of Appeals.

¶37 In the first hearing before Judge Irvine, Kennedy objected to him presiding over the case and stated: "Judge Mundell should not and could not have been the picker of judges[,] . . . including you." Judge Irvine clarified that, although he had been selected by Judge Mundell, he had only discussed scheduling issues with her; he was personally unaware of any warnings regarding Kennedy; and the only information Judge Irvine had received regarding the case came from reading the case file. Noting he had "no biases [or] preconceived ideas," Judge Irvine ruled that "to the extent [Kennedy] mov[ed] to disqualify me because Judge Mundell picked me," the motion was denied.

¶38 On appeal, Kennedy argues Judge Mundell's selection of Judge Irvine created an appearance of impropriety, requiring Kennedy's convictions to be reversed. It is well established, however, that the bias of an assigning judge is not imputed to a judge who is subsequently assigned a case. *See State v. Eastlack*, 180 Ariz. 243, 254, 883 P.2d 999, 1010 (1994); *State v. Watkins*, 125 Ariz. 570, 575, 611 P.2d 923, 928 (1980). Our supreme court has rejected the argument that "an appearance of impropriety" is created by allowing "a judge . . . dismissed for cause to subsequently appoint" another judge to hear the case. *Watkins*, 125 Ariz. at 575, 611 P.2d at 928. The court also has held that a presiding judge who is disqualified personally from a case "ha[s] no duty to recuse himself [or herself] from selecting the judge to hear th[e] case." *Eastlack*, 180 Ariz. at 254, 883 P.2d at 1010.

¶39 Kennedy invites this court to factually distinguish his case from *Watkins* and *Eastlack*. We are unable to do so. As an intermediate appellate court, "we may not disregard or modify the law as articulated by the Arizona Supreme Court." *State v. Bejarano*, 219 Ariz. 518, ¶ 6, 200 P.3d 1015, 1017 (App. 2008). Accordingly, we conclude there was no impropriety or appearance of impropriety in the presiding judge of the Maricopa County Superior Court, who had an alleged conflict, from assigning a judge from Division One of the Court of Appeals to preside over Kennedy's case. Nor did Judge Irvine abuse his discretion by refusing to recuse himself. We therefore deny Kennedy's request for relief.

DISPOSITION

¶40 For the foregoing reasons, we affirm Kennedy's convictions and sentences.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge