

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA,

Appellee,

v.

STEPHEN FRANK KARBAN,

Appellant.

1 CA-CR 08-0810

Maricopa County

Superior Court

No. CR-2005-011629-001 DT

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STATEMENT OF THE CASE

On July 25, 2005, Appellant Stephen Karban, was indicted for eleven counts of sexual offenses committed against three of his adopted daughters: molestation of a child under 15 (Count 1), sexual conduct with a minor under 15 (Counts 2-6), sexual conduct with a minor 15 years of age or over (Counts 7-10), and sex abuse (Count 11). (R.O.A., Item 1; 10/24/08-11:00 a.m., at 3-6.) The evidence adduced at trial, viewed in the light most favorable to sustaining the verdicts, and resolving all conflicts of evidence against Appellant, is summarized as follows.

A. BACKGROUND.

Cherie Queen met Appellant at the Pentecostal Church in Escanaba, Michigan, when Cherie was 15 years old. (R.T. 4/24/08, at 78-79.) They married the following year, when Cherie was 16, and Appellant was 21. (*Id.* at 80.) The first part of the marriage was “very stressful,” with arguments and “physical fights.” (*Id.* at 82-83.) Appellant and Cherie had sex “probably once a day,” and Appellant pressed Cherie to have “anal sex,” even after she tried it and told him that it “hurt.” (*Id.* at 86-87.)

Although Appellant and Cherie tried to have children, Cherie did not get pregnant. (*Id.* at 94-95.) In the mid 1990s, Appellant and Cherie began serving as foster parents, and eventually decided to adopt children. (*Id.* at 98, 102-03;

R.T. 4/30/08-a.m., at 7.) By April 2002, they had adopted 9 children, most of whom had been physically or sexually abused:

- In 1998, Appellant and Cherie adopted twins, Amanda and Ryan (age 6), and their brother Donald (age 7). (R.T. 4/24/08, at 111-18.) The children had been physically abused, and Amanda had been sexually abused. (*Id.*)
- Jasmine (age 13) and her brother Jesse (age 10) moved in with the Karbans in June of 1999. (R.T. 4/24/08, at 122, 125.) Both children had been physically abused, and Jasmine had been “badly” “sexually abused.” (*Id.* 122, 130-34; R.T. 4/29/08, at 119; R.T. 5/8/08-a.m., at 41-43.)
- In April of 2001, the Karbans became foster parents for Allison (age 11), Elsie (Age 9), and Michelle (age 4), who had the same birth mother, but different fathers. (R.T. 4/28/08, at 32-35.) The girls’ mother’s rights were terminated because she was not taking care of them. (*Id.* at 36-37.) The girls then lived with their grandmother (Sue), who would beat them and make them do “unusual things for consequence.” (*Id.* at 37-38, 40; R.T. 4/29/08, at 116-17; R.T. 5/5/08-p.m., at 82-83; R.T. 5/27/08, at 167-68.) The Karbans adopted the girls in August of 2002. (R.T. 4/28/08, at 43.)
- In April of 2002, the Karbans adopted Alex, a 4-year-old boy with hydrocephalus (“water on the brain”). (*Id.* at 41-47.)

B. APPELLANT’S MICHIGAN AND WISCONSIN RESIDENCES.

After the Karbans began adopting children, Cherie stayed home to care for them. (R.T. 4/24/08, at 134.) This was made possible by the “adoption subsidies” that the Karbans received, which paid \$748-1,000 per month per child. (R.T. 4/28/08, at 26-30; Exhibit 186.) In August of 2000, the Karbans

moved from their four-bedroom trailer into a large 6-bedroom tri-level house in Rapid River, Michigan (the “Rapid River house”), which they had built on 15 acres of land owned by Appellant’s father. (R.T. 4/24/08, at 113, 127-28, 133, 137-39.)

In early 2002, Appellant began working in Wisconsin, about 3 hours from Rapid River. (R.T. 4/28/08, at 57-62.) Rather than commute, he rented a studio apartment in Green Bay, and eventually moved into a nicer apartment in Kaukauna (“the Kaukauna apartment”). (*Id.* at 60-62, 64.) Appellant returned home on the weekends, and minded the children while Cherie did other things. (*Id.* 62-63, 83; R.T. 5/7/08, at 51.)

After Appellant moved into the Kaukauna apartment, the children—usually the older girls (Jasmine, Amanda, Elsie and Allison)—sometimes stayed with him during the week. (R.T. 4/28/08, at 65-66; R.T. 4/30/08-a.m., at 47; R.T. 5/7/08, at 50-51.) At times, Jasmine, Allison, and Amanda went individually. (R.T. 4/28/08, at 88-89, 97; R.T. 5/8/08-a.m., at 67; R.T. 5/19/08, at 40-41; R.T. 5/28/08, at 12.) The children did not appear to mind staying with Appellant. (R.T. 4/30/08-a.m., 48; R.T. 5/1/08, at 54-55, 89.) He was the “fun parent,” and let them watch “a lot of movies and TV.” (R.T. 4/28/08, at 72-73; R.T. 5/1/08, at 54-55.)

C. APPELLANT’S SECRET LIFE.

After Appellant moved to Wisconsin, his sex life with Cherie dwindled to where it became “pretty much non-existent.” (R.T. 4/28/08, at 85; R.T. 6/5/08, at 22-24; see also R.T. 5/7/08, at 32, 54, 95.) Appellant—using the name “Busyboy 68”—began frequenting internet chat rooms, and having extramarital affairs. (R.T. 4/28/09, at 73; 4/29/08, at 16, 26; R.T. 4/30/08-p.m., at 9-13; R.T. 6/5/08m at 22-23; Exhibits 189, 201.) Appellant also was having sex with Jasmine, and eventually molested Amanda and Elsie as well.

Jasmine

When Jasmine first came to live with the Karbans, she was “very sexually permissive,”¹ and behaved as though she were competing with Cherie for Appellant’s affection. (R.T. 4/24/08, at 122-24; see also R.T. 5/7/08, at 62.) Appellant began molesting Jasmine when the family was still in their trailer, and thereafter both at the Rapid River house and the Kaukauna apartment. (E.g., R.T. 5/8/08-a.m., at 81, 87; R.T. 5/13/08, at 45-46.) During that period:

¹ Jasmine’s birth father (Ernie) began having sex with Jasmine when she was 6 or 7 years old, and forced her to have sex (vaginal, oral, anal) “many times.” (R.T. 5/8/08-am, at 41-43.) If she refused, he beat her. (*Id.*) Although Ernie was sent to prison for sexually abusing Jasmine, when he got out, he did it again. (R.T. 4/24/08, at 131-33; see also R.T. 5/8/08-am, at 44-46.)

- Appellant had vaginal sex with Jasmine on numerous occasions, sometimes ejaculating “inside” her, sometimes “all over” her, and sometimes “in [her] hair.” (R.T. 5/8/08-a.m., at 86-87, 106.)
- Appellant put Jasmine’s “mouth down on his private part” and ejaculated in her mouth. (*Id.* at 92.)
- Sometimes Appellant would lay down on his back with a towel or a blanket under him and have Jasmine “pee” on his erect penis. (*Id.* at 93-95.)
- Appellant sometimes “shaved” Jasmine’s pubic hair so that she would be “smoother.”² (*Id.* at 97-100.)
- In Wisconsin, when Jasmine didn’t want to have sex, Appellant let her drink hard liquor, and she would do “whatever he wanted.” (*Id.* at 106-07.)
- Once, when Alex was too young to understand, Appellant had sex with Jasmine while Alex was “right on top of [Appellant], being a little monkey.” (R.T. 5/8/08-a.m., at 89-90; see also R.T. 5/13/08, at 50.)
- On at least two occasions, Appellant had Jasmine “do things in front of the web cam” (*e.g.*, “lift [her] shirt up” and “flash parts of [her] body”) while Appellant was communicating with others on the internet.³ (R.T. 5/12/08, at 21-22; R.T. 5/13/08, at 19, 62.) While this was going on, Appellant would “type something,” and the others would

² Appellant also asked Cherie to shave her vagina during the first part of their marriage. (R.T. 4/24/08, at 89-90.)

³ Five photographs of web-cam activity (previously deleted but recovered by a Michigan Police forensics analyst) were admitted into evidence as Exhibits 55-59, one of which depicted Appellant’s face. (R.T. 5/12/08, at 22-24; R.T. 5/28/08, at 151-57.)

“say something funny or stupid back.” (R.T. 5/12/08, at 25.)

Notwithstanding the on-going nature of Appellant’s conduct, Jasmine never told anyone because she was afraid it would break the family apart. (R.T. 5/8/08, at 88; see also *id.* at 108, 111; R.T. 5/13/08, at 77.) Also, Appellant was “nicer” than Jasmine’s birth father, who “forced a lot,” and sometimes beat her. (R.T. 5/8/08-a.m., at 108; note 1.) Appellant was “loving,” and “caring,” and “showed respect.” (R.T. 5/8/08-a.m., at 105, 110-11.) Indeed, Jasmine believed that she was “in love with [Appellant].” (R.T. 5/13/08-a.m., at 74-75, 77.)

Amanda

Amanda (who was 5 years old when she started living with the Karbans) could not remember when the abuse started (R.T. 5/19/08, at 117-18), but recalled that Appellant molested her both at the Rapid River house and the Kaukauna apartment.

- In Michigan, when Alex had a seizure and had to go the hospital with Cherie, Appellant got into the family “hot tub” with Amanda, while both of them were naked. (*Id.* at 76-77.) After they got out of the hot tub, Appellant and

Amanda had sex (he put his “hot dog” in her “butterfly”⁴).
(*Id.* at 79.)

- In Wisconsin, Appellant had Amanda spread her legs over him and pee on his penis, while he was laying naked on his back. (*Id.* at 73-74; see also, Argument I, *infra.*) Amanda also may have “rubbed [his hot dog] on [her] butterfly.” (*Id.* at 75.)
- When asked how many times Amanda had seen something come out of Appellant’s “hot dog,” Amanda responded, “more than one time.” (R.T. 5/19/08, at 80.) When asked where it would go, Amanda said, “On my butterfly” and “There was one time that it went in my mouth.” (*Id.*) When asked how it tasted, Amanda said, “Disgusting.” (*Id.* at 80-81; see also Exhibit 210 [1/31/03 Interview] at 12:08:00 et seq.)⁵

When asked why she did not tell anyone else, Amanda explained: “I always have a fear that if I tell someone that that has happened to me that they would look at me different. . . . Like they would think that she’s just a sick person, I don’t want to be around her.” (R.T. 5/20/08, at 97.)

⁴ “Butterfly” and “hot dog” were words that Amanda used for her vagina and a man’s penis. (R.T. 4/24/08, at 118-19; R.T. 4/28/08, at 87-88; R.T. 5/19/08, at 60-61.)

⁵ On cross-examination, Appellant established that, on other unidentified occasions: (i) Amanda once had sex with him for “half of a Nutty Bar”; (ii) Appellant would “take [his] finger and rub it on [her] private”; and (iii) Appellant would “lay on his back and Amanda would get on top of [him] and bounce,” and, even though that “hurt,” Amanda agreed to “get on the bottom.” (R.T. 5/19/08, at 140-41.)

Elsie

Before late 2002, Appellant had touched Elsie on her vagina once at the Rapid River house and again at his Kaukauna apartment. (R.T. 5/6/08-a.m., at 19-21; Exhibit 207.) The incident at Rapid River occurred in the downstairs TV room while Appellant and the other kids (but not Cherie) were watching TV, and Appellant and Elsie were under a blanket. (*Id.* at 20-21; see also Exhibit 207.) Elsie recalled that it “felt good.” (*Id.*; see also R.T. 5/7/08, at 20-21.)

Allison

During a visit to the Kaukauna apartment, Allison (then 13 years old) told Appellant that she had “drank once” when she was a “kid” and thought she could “handle alcohol,” and Appellant made her a \$5 bet that she could not “handle” it. (R.T. 5/28/08, at 12-13, 58.) Appellant drove Allison to the liquor store and let her pick out some hard liquor, which she mixed with Mountain Dew. (*Id.* at 12-13, 59) She eventually “blacked out” in the computer room and woke up, stark naked, with a blanket over her. (*Id.* at 15, 54-55, 60-61, 85; R.T. 6/9/09, at 18-19.) When she asked Appellant why she had no clothes on, Appellant told her that she had “gotten sick.” (R.T. 5/28/08, at 62.) Allison then went to take a shower, and Appellant asked her if she needed “help taking the shower.” (*Id.* at 16, 54-55, 61-62.) That night, Appellant wanted Allison

“to sleep in the bed with him.” (*Id.* at 54-55.) He also told Allison not to tell anyone about the fact that he had let her drink.⁶ (R.T. 6/5/08, at 139; see also R.T. 6/9/08, at 18.)

D. THE ARIZONA OFFENSES.

In December 2002, Cherie and the children traveled to Phoenix, Arizona, in their 15-passenger van to spend the Christmas holidays with Cherie’s mother and step-father, the Horners. (R.T. 4/28/08, at 97-98, 102; R.T. 5/19/08, at 122.) Appellant traveled by plane and joined them on December 21. (R.T. 4/28/08, at 99-100; R.T. 4/30/08-p.m., at 34.)

Because Appellant was allergic to animals and the Horners had pets, Appellant slept in the Horners’ “pop up trailer” in the yard (“the camper”). (*Id.* at 100-01; R.T. 4/29/08, at 47; Exhibits 73, 75, 90, 92, 106.) Cherie did not sleep with him because they were “too big” and it wouldn’t have been comfortable. (R.T. 4/28/08, at 104; R.T. 4/30/08-p.m., at 36; see also R.T. 4/24/08, at 96-97.) The camper had attractions, however, such as “Nintendo, T.V., [and] a VCR,” and the “girls” and the “boys” generally took turns

⁶ Appellant confirmed much of the above, admitting that: (i) he purchased the alcohol (Mandarin vodka) for Allison; (ii) she got so drunk that she “literally [fell] down,” and vomited on multiple occasions; (iii) he took off all her clothes and slept with her in the same bed; and (iv) he instructed her not to tell anyone about the drinking. (R.T. 6/9/08, at 15-17.)

sleeping outside with Appellant. (R.T. 4/28/08, at 104-05; R.T. 4/29/08, at 46-47; R.T. 4/30/08-p.m., at 38; R.T. 5/6/08-a.m., at 12; R.T. 5/8/08, at 71; see also R.T. 5/1/09, at 101-02, 117.) While in Arizona, Appellant again molested Jasmine, Elsie and Amanda.

Jasmine

Appellant molested Jasmine (then 16 years old) twice during the Phoenix visit, both times in the camper. (R.T. 4/28/08, at 51; R.T. 5/8/08-a.m., at 73-86.) On the first occasion, Appellant and Jasmine were watching TV with some of the other kids, and Jasmine was sitting behind Appellant. (*Id.* at 73-74.) Appellant reached behind him, under Jasmine's dress, and put his fingers "inside" of her, "going in and out and going in and out." (*Id.* at 74-78, 80-81.) The other children were not paying attention because they were watching TV. (*Id.* at 79-80.) Also, Appellant's body was big enough to block the view of Jasmine's skirt and genital area from the other children.⁷ (R.T. 5/13/08-a.m., at 64-65.) While Appellant was "fingering" Jasmine, his fingernails cut her vagina, causing her to bleed. (R.T. 5/8/08-a.m., at 85-86; R.T. 5/13/08-a.m., at 8.) Jasmine later washed her underwear with soap and water in the house. (R.T. 5/13/08-a.m., at 9-10.)

⁷ Appellant weighed nearly 300 pounds. (R.T. 6/5/08, at 164.)

The second incident occurred when Appellant and Jasmine went out to the camper alone “to take a nap,” and took off their clothes. (R.T. 5/8/08-a.m., at 82-84.) On that occasion, Appellant: (i) “put his private part in [hers]” and “he comed [sic]”; (ii) put his fingers “inside of [her]”; and (iii) touched Jasmine’s “boobs,” and kissed her “all over and all over,” including on her “vagina.” (*Id.* at 82, 84-86; R.T. 5/12/08-a.m., at 4.)

Elsie

One night during the Christmas vacation Cherie went out to the camper and found Elsie (11 years old) laying “right next” to Appellant on the bed while they were watching TV, and told Elsie that she was “too old” to be sleeping with Appellant. (R.T. 4/28/08, at 116-17; R.T. 5/1/08, at 73; R.T. 4/30/08-p.m., at 37-38; R.T. 5/6/08-a.m., at 6-7, 11-12; R.T. 6/5/08, at 39.) Elsie got into one of the other beds with Alex and Michelle. (R.T. 5/6/08-a.m., at 13.) Eventually, however, Elsie got back into bed with Appellant (who was sleeping with Amanda), gave Appellant a hug, and fell asleep next to him. (*Id.* at 13, 15, 76-78; see also R.T. 6/9/08, at 28.) When Elsie awoke the next morning, Appellant had his hand under her pajama pants and was rubbing her vagina

“skin-to-skin” with his finger. (R.T. 5/6/08-a.m., at 13, 15-17.) He also put his finger “inside” of her. (R.T. 5/7/08, at 18.)⁸

Amanda

When the Karbans visited Arizona in 2002, Amanda was 10 years old. (R.T. 5/19/08, at 44-45.) While in Arizona, Appellant had sex with Amanda “more than one time.” (*Id.* at 59-61.)

On one occasion, Amanda was sleeping in the bed with either Alex or Michelle, and Appellant told the other child to “go sleep with Elsie and Allison.” (*Id.* at 60.) Appellant took off his clothes and “would stick his hot dog up [Amanda’s] butterfly or [her] butt.” (*Id.* at 60-62.) The other children did not see what was happening because “the curtains were closed.” (*Id.* at 62.) Nor could they hear, because Appellant’s “breathing machine” (for sleep apnea) was on. (*Id.* at 62-63.) When Appellant put his “hot dog” in Amanda’s “butterfly,” it felt “sore,” but she did not cry out because she did not want the other kids to see or hear what was happening. (*Id.* at 63.)

The second occasion was “basically the same,” except the boys may have been in the camper. (*Id.* at 64.)

⁸ See also Exhibit 207 (1/31/03 police interview with Elsie.)

On another occasion, Appellant touched his penis to Amanda's vagina, but "didn't put it in." (*Id.* at 70.) This occurred when Amanda was naked, after Appellant had kicked one of the other children (Alex or Michelle) out of bed, and "told them to go somewhere else." (*Id.* at 71.)

Amanda recalled that when Appellant put his penis in her butt, she would "scoot away toward the window," because she didn't like it and it made her feel "sore." (*Id.* at 69-70.) Also, when Appellant put his penis in her vagina or her butt in Arizona: "He would use spit [to make it easier] because he didn't have baby oil." (*Id.* at 71-72.)

On the last occasion, Appellant asked Amanda whether she remembered the dollar that she owed him from renting "Casper Meets Wendy," and she said, "yeah," and asked him "what for"? (*Id.* at 66.) He said that, if he and Amanda had "fun," he would "make it even and give [her] \$5." (*Id.* at 66; R.T. 5/20/08, at 106.) Amanda agreed, and they undressed. (R.T. 5/19/08, at 66-67.) Amanda believed that this was the time Appellant "stuck his hot dog in [her] butt," but did not know. (*Id.* at 67.)⁹

The following morning Appellant gave Amanda five \$1 bills. (*Id.* at 66, 88-89.)

⁹ See also Exhibit 210 [1/31/03 interview], at 12:15:10-12:24:00.

D. THE DISCOVERY AND ITS AFTERMATH.

On the morning of December 31, 2002, Amanda walked into the Horners house with a “handful of bills,” and Cherie said, “Amanda where did you get the money?” (R.T. 4/28/08, at 118; R.T. 5/19/08, at 84-85.) Amanda said it was a “secret.” (R.T. 4/28/08, at 118; R.T. 5/19/08, at 84-85.) Cherie said, “[W]hat do you mean, Amanda? We don’t have secrets.” (R.T. 4/28/08, at 118.) Amanda repeated, “It’s a secret. I can’t tell.” (*Id.* at 119.) Cherie took Amanda into the back room under the pretext of “do[ing] her hair,” and again asked “how she got the money.” (*Id.* at 119.) Amanda finally disclosed: “[Appellant] had sex with her and stuck it in her butt, but he didn’t have any oil this time so he had to use spit.” (*Id.* at 119; see also R.T. 4/30/08-p.m., at 45, 49.)

When Cherie asked Amanda whether anyone else had seen this happen, Amanda told her that Elsie had been “out there.” (R.T. 4/28/08, at 119.) Although Elsie told Cherie that she had not seen anything (the “curtain was closed”), when Cherie asked Elsie whether Appellant had touched her, Elsie became upset and responded, “[Y]es, he put his hands down [my] private parts and put his fingers in [my] private areas.” (*Id.* at 119-20; R.T. 4/30/08-p.m., at 51; R.T. 5/6/08-a.m., at 22, 24.)

Cherie woke up her step-father (Harold), who had been working the night shift as a security officer, and asked for his gun. (R.T. 4/28/08, at 120; R.T. 5/1/08, at 97-98, 108.) When Harold asked why, Cherie said that Appellant had been “messing with [her] girls.” (R.T. 4/28/08, at 120; R.T. 5/1/08, at 108.) Harold got up, but did not give Cherie the gun. (R.T. 5/1/08, at 120.)

Cherie confronted Appellant as he was returning to the house from loading a U-Haul trailer, and said, “I know you have been messing with my girls. I know what you did to the girls.” (*Id.* at 121; R.T. 4/29/08, at 53-55.) Cherie hit him and punched him and yelled at him, screaming things like “how could you do this?”, and “I trusted you.” (R.T. 4/28/08, at 121, 123; R.T. 5/7/08, at 65-66.)

After Harold pulled Cherie off Appellant, Cherie went in the house and asked the two older girls (Jasmine and Allison) whether Appellant had touched them. (R.T. 4/28/08, at 123.) They said no.¹⁰ (*Id.*) After Cherie left the room, however, Jasmine started telling Allison about “things that had been done to her,” and Allison told Jasmine that “she needed to tell [her] mom.” (R.T.

¹⁰ Jasmine lied because she “didn’t want to tell on [her] dad,” and because she “thought it was more of a love than wrong.” (R.T. 5/12/08-a.m., at 8.)

5/28/03, at 27, 48-49.) Thereafter, both girls asked Cherie to come into the back bedroom. (R.T. 4/28/08, at 124.) Allison told Cherie that Appellant had gotten her drunk in Wisconsin and that she woke up naked on the bed. (*Id.* at 125; R.T. 4/30/08-p.m., at 56.) Jasmine said that Appellant had been “touching her since she came.” (R.T. 4/28/08, at 125; R.T. 4/30/08-p.m., at 62.) She also said that she thought she was pregnant. (R.T. 4/28/08, at 127; R.T. 4/30/08-p.m., at 63.) Cherie confronted Appellant again, and he admitted that he got Allison drunk, but maintained that “nothing sexual ever happened.” (R.T. 4/30/08-p.m., at 57.)

Appellant was allowed to pack, and Harold drove him to the airport. (R.T. 4/28/08, at 126; R.T. 5/1/08, at 111.) At the airport, Harold told Appellant that he hoped Appellant “had not done what Cherie was accusing him of,” and Appellant said that, “he had done some of it,” but not “all.”¹¹ (R.T. 5/1/08, at 112.)

That same afternoon, Cherie called Michigan Protective Services and asked them what she should do. (R.T. 4/28/08, at 127-29; R.T. 5/1/08, at 40.) They told her to come back to Michigan “as soon as possible, and to contact

¹¹ By the time Appellant left for the airport, he was at least aware that he was being accused of having “anal sex” with Amanda and letting Allison drink. (R.T. 6/9/08, at 29-30.)

[their] agency and the state police when she returned.” (R.T. 4/28/08, at 128-29; R.T. 5/22/08, at 11; see also R.T. 5/1/08, at 40.)

Appellant spent New Year’s Eve at a Motel 6 in Arizona (where he invited what turned out to be a transvestite back to his room), and flew back to Wisconsin the following day. (R.T. 6/9/08, at 32-34.) Cherie and the children left Arizona in the van the same morning, accompanied by her sister (Sandy) and Linda, a friend who had traveled with the family. (R.T. 4/28/08, at 130, 135; R.T., 4/29/08, at 58-60.) Before leaving, Cherie called Appellant on his cell phone and asked him “how it happened, and where and when and why.” (R.T. 4/28/08, at 133.) Appellant said that “it happened the first time in a hotel room with Jasmine and one thing led to another.” (*Id.*; R.T. 4/30/08-p.m., at 63-64; see also Exhibit 202 at 5.) Appellant also called Cherie on her way back and told her “not to tell anybody,” and “not to go the police.” (R.T. 4/28/08, at 134.) He said “[they] could handle this and keep it within the family and that he would go away contracting and just make sure that [Cherie] was taken care of.” (*Id.*)

Cherie and the children finally arrived at the Rapid River house on the morning of January 3 (*id.* at 135), two days after Appellant’s return to Wisconsin (R.T. 6/9/08, at 32-34). When Cherie pulled into the driveway, she saw that her fish pond had been unplugged and was “all frozen over” and the

fish were dead. (R.T. 4/28/08, at 136.) One of Amanda's shirts was "cut up on the floor in Amanda's room." (*Id.*) Cherie called the authorities and told them that they would come in as soon as they had had "a couple hours to get some sleep." (*Id.*)

F. APPELLANT'S ARREST.

On January 5, 2003, 4 days after Appellant's return to Wisconsin, the Kaukauna Police stopped him in his 2002 Suburban, and thereafter searched the vehicle. (R.T. 5/15/08-a.m., at 10-15.) The Suburban was "packed full of different kinds of items," including (i) Appellant's sleep apnea machine; (ii) a new gas can and plastic tubing (purchased January 3); (iii) a 2003 Rand McNally Road Atlas (purchased January 3); (iv) a laptop computer and printer; (v) a couple of storage bins and a suitcase; and (v) a brief case with various documents, including a receipt for \$1,500 in cash withdrawn January 4, 2003, and a new cell-phone agreement, dated January 4, 2003. (*Id.* at 15-16; R.T. 5/15/08-p.m., at 8-9, 41-51, R.T. 6/5/08, at 71-77, 82-85; Exhibits 5-7, 11-13, 15-16, 21, 24, 26-27, 171, 225, 233.) As Appellant was showing the police the documents in his briefcase, he "shuffled past" a document, trying to hide it. (R.T. 5/15/08-a.m., at 16; R.T. 6/5/08, at 105, 139.) The document was an article entitled: "Creating a New Identity in North America," which Appellant

had purchased on January 2, 2003 (R.T. 5/15/08-a.m., at 17-21, 59; R.T. 5/15/08-p.m., at 5-6; Exhibit 230.)

The police searched Appellant's Kaukauna apartment, and found that almost everything had been removed and he appeared to be moving out. (R.T. 5/15/08-a.m., at 21, 25-27; Exhibits 29-37, 40-54.)

In examining Appellant's laptop computer, a police forensics officer discovered that, on January 2, 2003 (the day after Appellant returned from Arizona), Appellant had used a 30-day trial version of a computer program called "Window Washer," the purpose of which is to "eliminate files" from a computer hard drive. (R.T. 5/21/08, at 78-79, 90, 92-98; see also R.T. 6/5/08, at 20; R.T. 6/9/08, at 43-44.) The police subsequently recovered multiple images from the temporary internet folders of the computer, acquired January 4, 2003, which depicted women urinating in various poses. (R.T. 5/21/08, at 82, 85-86, 102-03, 124; Exhibits 236-37, 239.)

G. THE DEFENSE CASE.

Testifying on his own behalf, Appellant admitted purchasing alcohol for Allison and Jasmine (R.T. 6/5/08, at 116; R.T. 6/9/08, at 15-17) and having extramarital affairs (R.T. 6/4/08, at 232-33; R.T. 6/5/08, at 22-25), but denied molesting any of his daughters, or admitting to doing so. (R.T. 6/5/08, *passim*; R.T. 6/9/08, at 34-37.) Appellant called 25 other witnesses and raised numerous

other arguments, including the absence of any medical evidence confirming the molestations, and the children's delay in reporting the abuse.

However, as confirmed by two pediatricians practicing in the area of child sexual abuse, the absence of penetration injury in child molestation cases is not unusual, and does not mean that penetration did not occur. (R.T. 5/20/08, at 121, 128-33, 141-42 [J. Quinn]; R.T. 6/10/08, at 8, 15-16, 18-27, 29-30, 35, 49, 63-64, 73, 76-77 [L. Quinn].) Furthermore, Wendy Dutton of the Child Abuse Assessment Center at St. Joseph's Hospital, who has conducted over 5,000 forensic interviews, testified that "one of the more common characteristics of child sexual abuse victims is that they delay disclosure," particularly when the person who is abusing them is "someone they love or trust or care about." (R.T. 5/5/08-a.m., at 15-16, 18-19, 24, 34-36)

H. VERDICTS AND SENTENCES.

Following a 30-day trial, the jury convicted Appellant on all counts. (R.T. 6/16/08, at 10-12; R.O.A., Items 329-339.) In sentencing Appellant, the trial court remarked that the jurors' verdicts reaffirmed the trial court's belief in "the remarkable ability of jurors to get it right," and: "if ever they got it right, they got it right on this one." (R.T. 5/19/08, at 26.) The trial court sentenced Appellant to serve the following consecutive terms in prison: Count 1: 17 years; Count 2: 20 years; Count 3: 20 years; Count 4: 20 years; Count 5:

20 years; Count 6: 20 years; Count 7: 5 years; Count 8: 5 years; Count 9: 5 years; Count 10: 5 years; Count 11: 1.5 years. (*Id.* at 27-29; R.O.A., Item 362.)

On September 19, 2009, Appellant filed a timely notice of appeal from the judgments and sentences. (R.O.A., Item 360.) This Court has jurisdiction under Arizona Constitution Article VI, Section 9, and Arizona Revised Statutes §§ 12-120.21(A)(1), 13-4031, and -4033(A).

ARGUMENTS

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED URINATION IMAGES TAKEN FROM APPELLANT'S COMPUTER AND PRECLUDED EVIDENCE THAT JASMINE HAD VIEWED "PORNOGRAPHIC MATERIAL."

Appellant claims that the trial court abused its discretion when it admitted images taken from his computer that depicted adult women urinating and precluded evidence that Jasmine had viewed "pornographic material" prior to the Arizona molestations. Appellant's first claim fails because the photographs were relevant to corroborate the testimony of Jasmine and Amanda that Appellant had requested them to urinate on him. Appellant's second claim fails because the fact that Jasmine had previously viewed

pornography was irrelevant, and in any event, Jasmine readily testified that she had done so.

A. STANDARD OF REVIEW.

Where an evidentiary objection is preserved below, the appellate courts review a trial court's ruling for an abuse of discretion. *See State v. Tucker*, 215 Ariz. 298, 314, ¶ 58 (2007). "Because '[t]he trial court is in the best position to balance the probative value of the challenged evidence against its potential for unfair prejudice,' [it] has broad discretion in this decision." *State v. Connor*, 215 Ariz. 553, ¶ 39 (App. 2007) (internal quotations and citations omitted).

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE URINATION PHOTOGRAPHS.

1. The Pertinent Facts.

During trial, both Amanda and Jasmine testified that Appellant had coerced them to squat over him as he lay on his back, and to urinate on his penis.

When asked "[o]ther than . . . coming in your mouth and putting his private part in your mouth," whether Appellant had done anything "unusual," Jasmine responded: "Where I have to pee on top of-on him, pee on his private part." (R.T. 5/8/08-a.m., at 93.) This, Jasmine explained, occurred "more than one time," and happened both in Michigan and Wisconsin. (*Id.*) When asked

“if [Appellant] asked you to pee on him, where were you?”, Jasmine explained: “On top of him and I’ll pee right on his private part. His private part will be right under me and I will be right on top of him and I pee right on his private part.” (*Id.* at 93-94.) While this was taking place, Appellant laid “right on his back,” and Jasmine would have her “private part lifted up so that [she] would pee right on him.” (*Id.* at 94.) When asked “where would the pee go,” Jasmine responded: “Right on his private part, right on it.” (*Id.*) When asked whether it made a “mess,” Jasmine explained:

Yes, but I mean it makes a mess because it goes all over the towel or whatever we set down on the bottom so it would [not] get on the floor, the bed.

* * * *

Where we lay something down so that pee wouldn’t get all over whatever we were laying on, the bed or the floor, and the pee would run right down. I mean pee on his private part would run down so I would go on the towel or blanket or whatever that was laid down.

(*Id.* at 94-95.)

Amanda testified that, when she was visiting Appellant in Wisconsin, he took her to a video store to get “Casper Meets Wendy,” and Amanda saw some “change” in his car and asked if she could have it. (R.T. 5/19/08, at 73.) Appellant said, “[Y]ou can have it only if you don’t go to the bathroom until I say so.” (*Id.*) After they returned to the apartment, Amanda told Appellant she “really had to go,” and Appellant “said okay, then he went into the room, laid a

towel on his bed, got undressed, laid down and told [her] to pee on [his penis].” (*Id.* at 74.) As Amanda explained it, “I would have my legs spread over him and he was laying down and I just squat and pee.” (*Id.*)

Anticipating the above testimony, Appellant fought to keep out the urination images the police retrieved from his laptop computer¹² (Statement of the Case (“SOC”) at Part F; Exhibits 236-37, 239), arguing, *inter alia*, that the images did not sufficiently demonstrate Appellant’s “propensity” to engage in such behavior because: (i) the images had been accessed by an acquaintance of Appellant (Brenda Augustine, aka “Emerald Enchantress 1867”) in a rented motel room, when Appellant was “not even in the room”;¹³ and (ii) the pictures involved “adult images” and did not “depict a female urinating on a male,” but rather “a male urinating on a female” and a “female[] urinating in a toilet or a bowl.” (R.T. 3/21/08, at 46-48; R.O.A., Item 183) The State opposed the motion, arguing, *inter alia*, that not only had the images been found on

¹² Although Appellant broadly describes the evidence at issue as “computer images depicting pornographic material of adults engaging in consensual, unusual sexual practices” (O.B. 16), Appellant’s subsequent discussion and the transcript cited makes it clear that the evidence referred to are the above-discussed urination images recovered from Appellant’s computer.

¹³ Appellant took the same position at trial. (R.T. 6/5/08, at 85-95; R.T. 6/9/08, at 61-69, 94-95.)

Appellant's own computer, but they corroborated Amanda and Jasmine's anticipated testimony that Appellant had asked the girls to urinate on him.¹⁴ (R.T. 4/15/08, at 17-26; see also R.T. 3/21/08 at 43-46; R.O.A., Item 194)

The trial court denied Appellant's motion on March 21, 2008 (R.T. 3/21/08, at 53-54), but subsequently requested additional oral argument (R.T. 4/14/08, at 3-4), which was held on April 15, 2008 (R.T. 4/15/08, at 13-26). The trial court ultimately concluded the images were admissible under Rule of Evidence 404(c), finding "clear and convincing evidence" that Appellant had possession of his computer depicting the urination images, and, based on that: "there [was] a reasonable basis to believe that this other act may have occurred and that the trier of fact is permitted to draw the inference that there was a propensity for the defendant to have committed the allegations against him." (R.T. 4/16/08, at 3-4.) The trial court also concluded that "the probative value is substantial and is not outweighed by . . . any unfair prejudice," and "because of the similarity of the acts that they are not unduly remote in time and that the evidence is reliable." (*Id.* at 4.)

¹⁴ Appellant suggests that the State further argued that "neither child apparently ever viewed pornographic images" (O.B. at 17), but cites no support for that assertion.

2. The Urination Images Were Admissible Under Rule 404(c) Because They Corroborated Amanda and Jasmine’s Testimony That Appellant Had Made The Girls Urinate On Him.

Appellant’s argument that the trial court abused its discretion in admitting the urination photographs under Rule of Evidence 404(b) (O.B. at 16, 18-19)¹⁵ overlooks the fact that the trial court’s ruling was based on *Rule 404(c)*, which specifically provides that, where a defendant is charged with having committed a sexual offense, evidence of other “acts” may be admitted “if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.”

In Appellant’s entire argument, the only apparent reference to Rule 404(c) is his contention that: “Here, the State sought to introduce the computer images to show Appellant’s propensity,” but that “[t]he evidence was too attenuated [because] the pictures involved adults urinating on each other.” (O.B. at 19.) However, the fact that the persons urinating in the photographs

¹⁵ Although Appellant recites that the trial court’s ruling also violated the Arizona and United States Constitutions, he has failed to support those arguments with authority or analysis. Therefore, the arguments are abandoned. *See State v. Moody*, 208 Ariz. 424, 452, ¶ 101 n.9 (2004) (“Merely mentioning an argument is not enough.”); *State v. Carver*, 160 Ariz. 167, 175 (1989); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi). In any event, the arguments are forfeited and waived because they were not raised below. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005); *State v. Zuck*, 134 Ariz. 509, 513 (1982) (“other grounds not specified are waived”).

were adults hardly prevented the evidence from being “relevant” to demonstrate Appellant’s “aberrant sexual propensity” to commit the charged offenses under Rule 404(c), because the images corroborated Amanda and Jasmine’s testimony that Appellant had asked them to urinate on him by graphically demonstrating that Appellant had a sexual obsession with urination.¹⁶ Granted, Appellant was not “charged” in Arizona for having his daughters urinate on him. Nevertheless, the evidence that he previously had done so, including the corroborating urination images on his computer, was clearly “relevant” to demonstrate his “sexual propensity” to molest the same children.¹⁷ Thus, viewed in conjunction with Jasmine and Amanda’s testimony, the photographs provided a “reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.” Ariz. R. Evid. 404(c)(1)(B).

¹⁶ See *State v. McCall*, 139 Ariz. 147, 159 (1984) (“[A]ny evidence that substantiates the credibility of a prosecution witness on the question of guilt is material and relevant and may properly be admitted”); *State v. Lindsey*, 149 Ariz. 493, 498 (App. 1985) (defendant’s photographs of ex-wife nude were admissible to corroborate molestation victim’s testimony that he took nude pictures), *vacated in part on other grounds*, 149 Ariz. 472 (1986).

¹⁷ Appellant did not object at trial to Amanda and Jasmine’s testimony concerning Appellant’s urination requests, nor does he do so now.

Appellant’s “attenuation” argument further conflicts with the court’s comments concerning Rule 404(c) in *State v. Aguilar*, 209 Ariz. 40 (2004), which point out that subsection 1(B) of the rule was intended to modify prior case law by allowing a court to “admit evidence of remote or *dissimilar* other acts providing there is a ‘*reasonable*’ basis . . . to support relevancy,’ *i.e.*, that the commission of the other act permits an inference that the defendant had an aberrant sexual propensity that makes it more probable that he or she committed the sexual offense charged.” *Id.* at 47 n.10 (emphasis added). In other words, the rule permits the admission of the other acts “either on the basis of similarity, closeness in time, expert testimony, or *other reasonable basis* that will support such an inference.” *Id.* (emphasis added). Thus, the question is not whether the urination images were “similar” to child molestation, but whether the evidence that Appellant had requested his daughters to urinate on him and had urination images on his computer “[led] to a reasonable inference that the [Appellant] had a character trait that [gave] rise to an aberrant sexual propensity to commit the charged sexual offense.” *Id.* at 48, ¶ 27.

Appellant’s suggestion that the trial court erred under Rule of Evidence 403 because the probative value of the images was “substantially outweighed by the danger of unfair prejudice” (O.B. at 19) is also meritless. As discussed

above, the probative value of the urination images lay in their corroboration of the testimony of two of Appellant's children (both victims of the Arizona molestations) that Appellant had asked them to urinate on his penis, which graphically demonstrated Appellant's propensity to molest children in general, and those children in particular. While the images were "prejudicial," they were not "unfairly" so. *See Connor*, 215 Ariz. at 564 ("Evidence is unfairly prejudicial only when it has an undue tendency to suggest a decision on an improper basis such as emotion, sympathy, or horror."). Accordingly, the trial court's ruling must stand.

Further, any conceivable abuse of discretion in admitting the images would amount to harmless error, because a conviction will not be reversed for evidentiary error unless there exists a reasonable probability that the verdict would have been different had the evidence not been admitted. *See State v. Van Adams*, 194 Ariz. 408, 416, ¶ 23 (1999); *State v. Lacy*, 187 Ariz. 340, 348 (1996). In this case, no such probability existed.

It defies the imagination to suggest that the jury would not have convicted Appellant without the urination images in his computer, which Appellant claimed had been acquired without his knowledge. These images were only a miniscule portion of the overwhelming evidence against Appellant, which included detailed testimony of three of Appellant's daughters (Jasmine,

Amanda, and Elsie) about Appellant's molestations in Arizona (SOC, Part D), and a further accounting of his prior conduct in Michigan and Wisconsin (SOC, Parts C). Not only were the victims' claims that they had been molested by Appellant unwavering, they were corroborated by other evidence, including Cherrie's testimony that Appellant admitted to having sex with Jasmine ("it happened the first time in a hotel room . . . and one thing led to another") (R.T. 4/28/08, at 133; R.T. 4/30/08-p.m. at 63-64), and thereafter attempted to persuade Cherie "not go to the police," and promised to "go away contracting and just make sure that [Cherie] was well taken care of." (R.T. 4/28/08, at 134.) Other consistencies included the fact that Amanda and Jasmine both testified in detail about Appellant's bizarre urination ritual (Part B), and Jasmine's knowledge that Appellant had "red" pubic hair and a "rash" in his genital area, which was particularly telling because the hair on Appellant's scalp was a different color. (R.T. 4/24/08, at 91-93; R.T. 5/8/08, at 95-96)).¹⁸

Equally damning was Appellant's frenetic behavior after he returned from Arizona, including: (i) his use of "Window Washer" on his computer the

¹⁸Moreover, although Appellant denied the molestations, he did admit to such inappropriate behavior as purchasing alcohol for Jasmine (wine coolers) and Allison (vodka) when they visited him in Wisconsin, and sleeping in the same bed with Allison after he allowed her to get drunk and took off her clothes. (Note 6; R.T. 6/5/08, at 116-17.)

day after he arrived (SOC, Part F; R.T. 6/9/08, at 44); and (ii) the fact that, at the time he was arrested by the Wisconsin authorities (4 days after returning), he had packed up his Suburban with most of his belongings, including a new gas can, a new Rand McNally Road Atlas, and the article “Creating a New Identity in North America,” which he had purchased within 2 days after his return (SOC, Part F; R.T. 6/5/01, at 100; R.T. 6/9/08, at 50).

Of course, Appellant denied molesting his daughters and/or admitting to doing so, and offered his own explanations for the above events.¹⁹ In the end, however, the case came down to a credibility contest between Appellant and his three daughters, which fell squarely within the province of the jurors, *State v. Cox*, 217 Ariz. 353, 357 ¶ 27 (2007), who are presumed to follow their instructions, *State v. LeBlanc*, 186 Ariz. 437, 439 (1996). In this regard, the jurors were cautioned at the beginning and the end of the case that they were not to base their verdicts on guesses, sympathy, or prejudice, but only on whether the State had proved its case beyond a reasonable doubt. (R.T.

¹⁹ For example, Appellant attempted to persuade the jury that he was planning to return to Michigan, and had purchased “Creating a New Identify In North America” on January 2 because he had read an article about “identity theft” and wanted to protect himself against that (R.T. 6/5/08, at 72-85; R.T. 6/9/08, at 39-41, 54-57), and that he had installed Window Washer on his laptop on January 1 to eliminate duplicate engineering drawings (R.T. 6/5/08, at 17-18, 20).

4/24/08, at 7-9; R.T. 6/10/08, at 80-82.) They were also instructed on how to assess witness credibility (R.T. 6/10/08, at 83), and that they could not convict simply on the basis of the fact that Appellant had committed “prior bad acts,” or had a “character trait that predisposed him to commit the charged crimes,” *i.e.*, that “evidence of these acts does not lessen the State’s burden to prove the defendant’s guilty beyond a reasonable doubt.” (*Id.* at 87.)

Assuming *arguendo* that the jurors believed Appellant’s testimony—that he did not commit the molestations—but did not believe his claim that he did not download the images, it would be beyond speculation to conclude that they convicted him of serious child molestation offenses solely because of the images. It would also be beyond speculation to say that, after the lengthy direct and cross-examination of all three victims concerning the egregious acts with which Appellant was charged, and Appellant’s numerous attempts to impeach their credibility, that the convictions turned on photographs of activity between apparently consenting adults. *See State v. Robinson*, 165 Ariz. 51, 57 (1990) (“Realistically, any prejudice against the defendants arising from this evidence was minimal in view of the egregious conduct with which the defendants were charged”); *State v. Via*, 146 Ariz. 108, 122 (1985); *State v. Watkins*, 126 Ariz. 293, 299 (1980).

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PRECLUDING EVIDENCE THAT JASMINE HAD VIEWED “PORNOGRAPHIC MATERIAL.”

Appellant also contends that the trial court abused its discretion by precluding evidence that Jasmine—a teenager—had “viewed pornography on the computer, had her own password, rented adult movies off the satellite dish, experimented with adult lotions [and] drafted numerous sexually explicit e-mails.” (O.B. at 20.) This argument fails on multiple grounds, not the least of which are that such evidence would have been irrelevant, cumulative and confusing, and much of it ultimately was admitted at trial.

1. The Pertinent Facts.

Before trial, the State filed a motion *in limine* under A.R.S. § 13-1421 and Rule of Evidence 608, which sought to preclude Appellant from introducing, *inter alia*, “evidence of other ‘sexual activity’ regarding Jasmine . . . being on the computer in a chat room, Jasmine’s computer password ‘sexy babe’, Jasmine watching an adult pornographic movie on her own, Jasmine fooling around with ‘adult’ lotion, and cousins or other children having inappropriate sexual contact.” (R.O.A., Item 80 [motion]; R.O.A., Item 81 [response].) Among other things, the State pointed out that, given Jasmine’s prior molestation by her biological father (see note 1 and accompanying text), evidence of Jasmine’s subsequent exposure to pornography was “cumulative” and unduly prejudicial. (R.T. 4/20/07, at 24-27.) Following oral argument, the

trial court granted the State's motion, concluding that any probative value was outweighed by the fact that the evidence was "cumulative" and potentially "may be confusing to the jury." (R.T. 4/20/07, at 15-29.) Appellant's motion for reconsideration was denied. (R.O.A., Item 117; R.T. 8/27/07, at 41.)

Notwithstanding the foregoing, at trial, Jasmine testified on direct examination that she *had* looked at pornography, and that Appellant had looked at pornography with her ("women, not men"). (R.T. 5/8/08, at 100-02.) And Appellant examined her about incidents in which (i) she and a friend had gotten into trouble with Cherie for viewing a pornographic movie, (ii) she had gotten in trouble for viewing "inappropriate material on the internet," and (iii) she and a friend "found this sex gel" in his bedroom and "played with some of [the] stuff [they] found." (R.T. 5/12/08, at 93, 107-09.)

2. The Fact That Jasmine Had Viewed "Adult Pornographic Material" Was Irrelevant, But In Any Event, Was Disclosed To The Jury.

As Appellant acknowledges, Arizona raises legislative and judicial barriers to a defendant accused of sexual misconduct who seeks to subject the victim to allegations of prior sexual conduct that have no substantial connection to the offense in question. For example, under Arizona's Rape Shield Statute, A.R.S. § 13-1421, evidence of "specific instances of the victim's prior sexual conduct" may be admitted only if the trial court finds, by

“clear and convincing evidence,” that the evidence “is relevant and material to a fact in issue in the case and that the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence,” and if the evidence falls within the following five limited categories:

- (i) “evidence of the victim’s past sexual conduct with the defendant”;
- (ii) “evidence . . . showing the source or origin of semen, pregnancy, disease or trauma”;
- (iii) “evidence that supports a claim that the victim has a motive in accusing the defendant of the crime”;
- (iv) “evidence offered for the purpose of impeachment when the prosecutor puts the victim’s prior sexual conduct in issue”;
- (v) “evidence of false allegations of sexual misconduct made by the victim against others.”

Id.; see also *State v. Oliver*, 158 Ariz. 22 (1988) (adopting judicial rape shield established in *State v. Pope*, 113 Ariz. 22, 28-29 (1976) for child molestation situations and adding an exception allowing admission of a young child’s sexual history to show an alternate basis for that child’s explicit sexual knowledge).

Appellant fails to demonstrate how any of the evidence precluded by the trial court’s *in limine* ruling was relevant and admissible under the above

authorities or why any probative value of the evidence was not “cumulative” and potentially “confusing,” as the trial court held. *See* Ariz. R. Evid. 403.²⁰

Thus, although Appellant argues that evidence that Jasmine “repeatedly viewed pornography on the computer, had her own password, rented adult movies off the satellite dish,” “experimented with adult lotions” and drafted “sexually explicit e-mails”²¹ was admissible to “show [Jasmine’s] ability and motive to fabricate the charges” (O.B. at 20), he neither states nor demonstrates how such conduct possibly provided a “motive,” or what evidence would have done so. He also fails to support his speculative claim that the unidentified materials may have “explain[ed] why or how [Jasmine] might have described urination as a deviant sexual proclivity.” (*Id.*)²²

²⁰ As in his previous claim, Appellant recites that the trial court’s ruling violated the Arizona and United States Constitutions, but fails to support those arguments with authority or analysis. Therefore, the arguments are abandoned. See note 15.

²¹ Appellant’s brief ambiguously claims that the e-mails “referenced exactly the acts to which Appellant was charged.” (O.B. at 20.) However, the record cited provides no meaningful support for that assertion. R.T. 4/20/07, at 19 simply contains Appellant’s general statements that Jasmine had been viewing pornography. R.T. 5/29/08, at 28-33 is Appellant’s examination of the police officer assigned to review the headers of what appears to be Appellant’s e-mails, to the effect that headers suggested nothing of evidentiary value.

²² Appellant asserts, without citation to the record, that Jasmine previously had been subjected to “abusers who demanded that they urinate on them.” (O.B. at (continued ...))

Appellant also claims that Jasmine’s access to pornography would have demonstrated that she had “sources of information other than Appellant.” (*Id.*) Although *Oliver* held that a victim’s sexual history is relevant where the victim is “of such tender years that a jury might infer that the only way a victim could testify in detail about the alleged molestation is because the defendant had in fact sexually abused the victim,” 158 Ariz. at 28, that exception applies with less force to an older victim, like Jasmine, who was almost 17 years old at the time of the disclosure. *See id.* at 31. Furthermore, the jury in this case was clearly apprised that Jasmine had been exposed to repeated sexual abuse at the hands of her biological father,²³ thus eliminating any suggestion that Appellant

(... continued)

21.) This may be a reference to *Amanda*, with respect to whom Appellant did make such an assertion. (See R.T. 3/9/08, at 49-50, 54; R.T. 3/21/08, at 53.) If so, Appellant brought Amanda’s experience to the jury’s attention through his expert witness, who testified: “In the Michigan state police reports there’s an indication that Amanda’s birth father urinated on her. She makes that statement . . . while she’s being interviewed by the police.” (R.T. 6/4/08, at 27; see also *id.* at 80.)

²³ The State itself examined Jasmine about the abuse. (R.T. 5/8/08, at 42-46.) Appellant also cross-examined both Cherie and Jasmine on this topic, asking Jasmine whether her biological father was “penetrating” her with his penis in the vagina and in the rectum, and the fact that he had been sent to prison for abusing her. (R.T. 4/29/08, at 119, 132; R.T. 5/12/08, at 49-53.) Appellant also called Jasmine’s birth mother (Joleen) to testify during Appellant’s case-in-chief, and she confirmed that Jasmine’s birth father had molested her. (R.T. 5/29/08, at 6-7.)

was the sole source of her “information.” Indeed, it was this fact that appears to have led the trial court to rule that the subject evidence would have been “cumulative.” (R.T. 4/20/07, at 15-29.)

In any event, even if this Court were to find theoretical relevance in the evidence that Jasmine had viewed “pornography,” rented “adult movies” or used “adult lotions” before accusing Appellant of molesting her (which the State disputes), Appellant ultimately *did* question Jasmine about the fact that she had gotten in trouble for viewing a “pornographic movie” and “looking at inappropriate material on the internet,” and he also examined her about the time she and her friend had played with some “sex gel” they found in his bedroom (R.T. 5/12/08, at 93, 107.) In light of this testimony, the whole point of Appellant’s claim becomes illusive.

Furthermore, any conceivable abuse of discretion with respect to the above ruling would amount to harmless error, *Van Adams*, 194 Ariz. at 416, ¶ 23; *Lacy*, 187 Ariz. at 348, because there is no reasonable probability that the jury would have disregarded Jasmine’s testimony if it had received additional evidence that she was looking at pornography and experimenting with “adult lotion,” or knew she was writing sexually explicit e-mails. Again, the jury was apprised that Jasmine had viewed sexually-oriented material. (R.T. 5/8/08, at 100-02; R.T. 5/12/08, at 93, 107-09.) It was also apprised that, even before

Jasmine came to live with Appellant, she had been the victim of unthinkable sexual abuse (Part C, *supra*; note 1), and, upon arriving at the Karban home she was “very sexually permissive,” and behaved as though she were competing with Cherie for his affection (R.T. 4/24/08, at 122-24), which Appellant rendered. The fact that Jasmine may have looked at additional pornography or written sexually explicit emails during her teenage years did not directly or indirectly rebut any of the overwhelming evidence of Appellant’s guilt.

II

THE TRIAL COURT’S “GOOD CHARACTER” RULING DID NOT CONSTITUTE FUNDAMENTAL ERROR.

Appellant’s claim that the trial court committed fundamental error by precluding him from offering evidence of “sexual normalcy” under *State v. Rhodes*, 219 Ariz. 476 (App. 2008), is forfeited and waived. In any event, Appellant cannot establish fundamental error or prejudice, because Appellant did in fact present considerable testimony from witnesses that, based on their observations, Appellant’s conduct with his children was “appropriate.”

A. THE PERTINENT FACTS.

Before trial, the State moved to preclude evidence of Appellant’s “good character” and the fact that Appellant “may not have molested other children.” (R.O.A., Item 71.) Appellant opposed the motion, arguing that such evidence was admissible under Rule of Evidence 404(c) to rebut the suggestion that he

had a “character trait giving rise to an aberrant sexual propensity to commit the crime charged,” and that, under *State v. Lopez*, 174 Ariz. 131 (1992), a defendant is entitled to offer evidence of his good character to “encourage the fact finder to draw the inference that the defendant did not commit the crime charged.” (R.O.A., Item 85.)

At oral argument, the State modified its position, stating that “general law-abiding character comes in,” but continued to maintain that “it is not relevant that he didn’t molest every other child that he came into contact with.” (R.T., 4/20/07, at 5.) In response, Appellant clarified:

It is not my intent to per se bring in witnesses to testify to the fact that I did not molest *other children*. I am bringing in other individuals to testify to the fact that *they were in my house* when this molestation was supposed to be going on and those individuals *see nothing inappropriately* [sic].

(*Id.*, emphasis added; see also *id.* at 6-7.) This, the trial court held, would be permissible (*id.* at 7), and with that understanding the court granted the State’s motion, finding:

If you were to, . . . bring in character witnesses or tried to present evidence that says that you didn’t have sex with *other girls* at *other times* at *other opportunities* that kind of evidence will not be admissible, but the kind of evidence that you just made reference to would be admissible

(*Id.* at 8, emphasis added.)²⁴

Almost a year later, this Court decided *State v. Rhodes*, 219 Ariz. 476 (App. 2008), which recognized the right of a defendant charged with sexual conduct with a minor to present lay opinion testimony on the defendant's "reputation for sexual normalcy," including that, in the witness's opinion, the defendant's conduct around children was "appropriate," and the defendant's character was "not of the nature such that he would engage in sexual conduct with a child." *Id.* at 479, ¶ 11. Although Appellant had not previously sought to present such testimony, the State promptly brought the decision to the attention of both Appellant and the trial court:

[THE PROSECUTOR]: Judge, previously there had been a motion in limine to prohibit the defendant from introducing evidence of his good character.

THE COURT: Which I granted.

[THE PROSECUTOR]: I thought you did. *State versus Rhodes*, and I'm sorry I don't have the cite, but it's R-H-O-D-E-S, very recently was decided. It's a case that involved I believe sexual abuse or sexual allegations and the Court found that *character evidence the form of reputation for opinion only*, so no specific

²⁴ Appellant also indicated that he may be attempting to deflect the suggestion that he had a "propensity" to molest children by putting on evidence that he was having "age-appropriate consensual sex with adult women." (R.T., 4/20/07, at 8.) Although the trial court remarked, "that's not what's before the Court," it stated that such evidence was not permissible because "the issue is whether you were having sex with young girls." (*Id.* at 8-9, 11.)

instances regarding how a defendant behaves around kids *relevant, so that comes in.*

* * * *

THE COURT: [After suggesting that Appellant's advisory counsel get the cite from the prosecutor] You'll bring the case tomorrow. I want to read it.

[THE PROSECUTOR]: Yes.

THE COURT: And then if it changes *other rulings* or something we can figure it out because it's a case that obviously came out after I made my rulings. The law *obviously changed* based on this Rhodes, R-H-O-D-E-S

(R.T. 4/15/08, at 58-60, emphasis added.) Appellant did not, however, request that the trial court reverse its prior ruling based on *Rhodes*.

At the ensuing trial, Appellant elicited testimony from numerous witnesses that they had never seen Appellant act "inappropriately" with his children or in a manner that "concerned" witnesses. Nonetheless, at no point cited by Appellant or discovered by Appellee did Appellant offer evidence that, by reputation or in the witness's opinion, Appellant's character was "not of the nature such that he would engage in sexual conduct with a child." *Rhodes*, 219 Ariz. at 479, ¶ 11.

B. STANDARD OF REVIEW.

Where a defendant has failed to object on a particular ground, he forfeits his right to obtain appellate relief, except in those "rare cases" that involve "fundamental error," *i.e.* "error going to the foundation of the case, error that

takes from defendant a right essential to his defense, and error of such a magnitude that the defendant could not possibly have received a fair trial.” *Henderson*, 210 Ariz. at 567, ¶ 19 (citation and internal quotations omitted). To prevail under this standard of review, Appellant must prove that (i) the trial court erred, (ii) the error was “fundamental,” and (iii) the error caused him prejudice. *Henderson*, 210 Ariz at 567-68, ¶¶ 19-20, 23. To demonstrate “prejudice,” Appellant must show but for the alleged error, a reasonable jury could have reached a different result. *Id.* at 568-69, ¶¶ 22 & 27.

C. THE TRIAL COURT DID NOT COMMIT FUNDAMENTAL ERROR.

Appellant’s “character” claim fails for two reasons.

First, Appellant does not establish “error,” much less “fundamental error,” because even if the trial court’s *in limine* ruling is construed to preclude the type of opinion and reputation testimony subsequently allowed by *Rhodes*, Appellant points to no instance in which he actually informed the trial court that he wished to introduce such testimony and was turned down. For example, although Appellant generally opposed the State’s “good character” motion (R.O.A., at 85; R.T. 4/20/07, at 6), he specifically informed the trial court that his plan was to bring in witnesses to testify that they were in his house “when this molestation was supposed to be going on” and they saw “nothing

inappropriate[],” which the trial court held would be permitted.²⁵ (R.T. 4/20/07, at 6.) Moreover, at no point did Appellant seek similar permission to present the type of witnesses he now claims he should have been permitted to present, *i.e.*, “character witnesses who would have testified that he had a reputation for sexual normalcy,” and that “by reputation, and in their opinion, [Appellant’s] character was not of the nature such that he would engage in sexual conduct with a child.” (O.B., at 24.) In any event, Appellant overlooks the obvious fact that the legal landscape changed after *Rhodes*, which the State brought to Appellant’s and the trial court’s attention promptly after it was decided, and the trial court clearly indicated its willingness to change any rulings affected thereby. (R.T. 4/15/08, at 59-60.) Nevertheless Appellant made no subsequent motion based on *Rhodes*.

Second, even if this Court were to conclude that the trial court erred, based on the circumstances herein, Appellant cannot establish either that the error was “fundamental,” or that Appellant suffered “prejudice” based thereon. *Henderson*, 210 Ariz at 567-69, ¶¶ 19-20, 22-23, 27.

In this respect, to the extent Appellant claims that he was prevented from offering testimony from witnesses that they had observed his “conduct around

²⁵ See also, note 24.

children,” and in their opinion, “it was appropriate” (O.B. at 24), Appellant is simply wrong. In apparent reliance on *Rhodes*, Appellant repeatedly elicited testimony from witnesses that they had never observed him act “inappropriately” or act in a manner that “concerned” them with *any* of his children, not just the victims herein.²⁶ (E.g., R.T. 4/29/08, at 72-74, 101-02 [Sandra Cambell]; R.T. 5/22/08, at 56 [Amber Kangas], 95 [David Berg II]; R.T. 5/29/08, at 48 [Heidi Berg], 82 [David Berg], 103-04 [Yolanda Berg]; R.T. 6/2/08, at 84 [Kathy Aos], 93 [Linda Knight].) Indeed, under questioning from Appellant, Cherie readily admitted that: (i) in her 13 years of marriage with Appellant, she had “never once seen [Appellant] touch a child inappropriately” (R.T. 4/30/08-p.m., at 55); (ii) no one had ever accused Appellant of abuse until December 31, 2000 (R.T. 4/30/08-a.m., at 48); and (iii) all of the children had expressed their love for Appellant (R.T. 4/30/08-p.m., at 5).²⁷ More importantly, Appellant points to no part of the record where

²⁶ Appellant also broached the matter indirectly, for example by eliciting testimony that none of the children had previously reported that Appellant was engaging in sexual misconduct (e.g., R.T. 4/29/08, at 72, 102; R.T. 5/7/08, at 144-45; R.T. 5/22/08, at 96, 131; R.T. 5/29/08, at 113; R.T. 6/2/08, at 77-78; R.T. 6/4/08, at 137, 143-44) and that, other than the victims, no one had seen Appellant do anything “inappropriate” (R.T. 5/28/08, at 32, 34, 56).

²⁷ Arguably, some of this evidence was inconsistent with the trial court’s initial ruling. Given that the prosecutor brought *Rhodes* to the court’s attention, and
(continued ...)

he was prevented from introducing opinion evidence, such as that permitted by *Rhodes*.

In addition, although Appellant admitted that, by the time he moved to Wisconsin his sex life with Cherie was “pretty much non-existent” (R.T. 6/5/08, at 24), he took pains to establish that the women on his Yahoo messenger account (where he identified himself as “busyboy 68”) included: “Tempis 2001,” *age 26*; “Sweet As Scarlet,” *age 47*; “Blondie 6954143,” *age 33*; “Julie 61767,” “Humble One 2,” *age 40*; “Tight Seal 2001,” *age 38*; “Rosebud 0412692002,” *age 33*; and “Emerald Enchantress 1867,” *age 35*. (R.T. 4/30/08-p.m., at 10-13; Exhibits 189, 201.) And Appellant affirmatively testified that he was carrying on extramarital affairs with women he met in “on line” chat rooms. (R.T. 6/4/08, at 232-33; R.T. 6/5/08, at 22-25).

(... continued)

that the prosecutor did not object to this testimony based on the in limine ruling, it appears the parties proceeded as if the court’s ruling were effectively modified by *Rhodes*. At any rate, Appellant’s failure to make an offer of proof as to any evidence that was theoretically excluded on this issue effectively precludes any intelligible review or at least prevents Appellant from meeting his burden under a fundamental error review standard. *See State v. Dickens*, 187 Ariz. 1, 13 (1996) (“Because Defendant did not provide the judge with a specific offer of proof regarding [the evidence], this court cannot determine the relevance of those acts.”).

In the end, any suggestion that the jury would have arrived at a different conclusion if Appellant had his witnesses specifically state he had a “reputation for sexual normalcy” is entirely speculative. The problem was, notwithstanding Appellant’s prolonged ability to conceal his behavior and proclivities and the fact that he was sufficiently interested in adult women to have extramarital affairs, the overwhelming evidence revealed that his extramarital affairs also included repeated molestations of Jasmine, Amanda, and Elsie, and a serious attempt at seducing Allison, as well.

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT’S MOTION TO INTRODUCE EVIDENCE OF HIS PRIOR MICHIGAN AQUITAL INVOLVING DIFFERENT CHARGES.

A. THE PERTINENT FACTS.

On January 11, 2006, the State filed a “Notice of Intent to Introduce 404(c) Evidence,” advising that the State intended to introduce evidence of Appellant’s “prior sexual conduct” with Amanda, Elsie, and Jasmine, which had been reported to the police in Michigan and Wisconsin. (R.O.A., Item 20.) Appellant responded that he was “in agreement with the State’s request,” and informed the trial court that he, too, desired to introduce evidence of the victims’ allegations of prior sexual misconduct. (R.O.A., Item 50.) Appellant also filed a separate motion in which he sought to admit into evidence his

“Michigan Acquittal,” in which he claimed to have been found “Not Guilty” on “all counts” charged in Michigan. (R.O.A., Item 57 and Exhibit B.)

In response to Appellant’s motion to introduce the Michigan acquittal, the State withdrew its request to use “prior bad act evidence” from Michigan, and argued that the acquittal had thereby become irrelevant. (R.O.A., Item 76.) The State further maintained that the acquittal was inadmissible in any event, because “an acquittal is not evidence,” but rather is a subjective decision made by a jury “based on evidence presented to that jury.” (*Id.*; R.T. 3/9/07, at 12.)

Following argument, the trial court informed Appellant that he was free to attempt to impeach the victims with the Michigan allegations,²⁸ but would not be permitted to introduce the Michigan acquittal into evidence. (R.T. 3/9/07, at 17-19, 21.) Nor did Appellant request the trial court to make Rule 404 findings, because he himself wanted to introduce such evidence:

[THE STATE]: . . . State had said [it] was not going to bring in 404 evidence from Michigan. At the last hearing the defendant said well I want the 404 evidence from Michigan. He was planning on going there with that with his own testimony.

So with regard to 404C evidence from Wisconsin, . . . if defendant stipulates that he wants all of that evidence in then Your Honor

²⁸ The trial court denied Appellant’s request to “read in” Michigan testimony because the witnesses had not been subject to cross-examination by the State of Arizona. (R.O.A., Items 63 and 77; R.T. 4/20/07, at 26-31.)

doesn't have to make all of these findings because they are not objecting to 404C evidence.

THE COURT: And, Mr. Karban, you are not objecting?

MR. KARBAN: That is correct, Your Honor.

[THE STATE]: *In fact, he wants to bring in Michigan evidence, not the State.* So Wisconsin 404C evidence is the only evidence that the State intends to bring and Mr. Karban is stipulating to that. Mr. Karban is intending to bring in 404 evidence from Michigan himself. So the State's position and the defense position that you do not have to go through in detail the analysis under 404C.

THE COURT: So you actually made my work easy on this particular issue.

(R.T. 4/20/07, at 30-32.)

At trial, Appellant did not object when the State asked the victims about Appellant's molestations in Michigan and Wisconsin. Instead, pursuant to Appellant's initial strategy, he sought to use the allegations as a sword, including by using his opening statement to: (i) give specific examples of the allegations, and attack them as implausible (R.T. 4/24/08, at 51-55); (ii) emphasize that his daughters had never reported the molestations, notwithstanding the "rotisserie" of social workers that came into the Karbans' Michigan residence (*id.* at 55, 60-61); and (iii) point out that the police had never found physical evidence supporting the allegations in the Michigan residence (such as "Polaroid photographs" and "videotape[s]") (*id.* at 69-72). He pursued these same themes in questioning witnesses at trial, where he

sought to discredit the Arizona accusations by emphasizing the victims' failure to report the Michigan molestations,²⁹ the numerous persons living in and visiting in the Michigan household,³⁰ and the absence of physical evidence recovered by the Michigan police.³¹ He also called four Michigan police officers to testify about the Michigan investigation (R.T. 5/27/08, at 12 et seq. [Sgt. Sailer]; *id.* at 149 et seq. [Officer Belonga]; R.T. 5/28/08, at 142 et seq. [Det. Sgt. Cruz]; R.T. 5/29/08, at 23 et seq. [Det. Poupard].)

At the conclusion of the evidence, the trial court instructed the jury on the prerequisites for considering "prior bad acts" and "character evidence," including that the jury could consider the facts only if it found them proved by "clear and convincing evidence," and the specific purposes for which the evidence could be used. (R.T. 6/10/08, at 86-87.)

²⁹ E.g., R.T. 4/30/08-a.m., at 31-32, 48 [Cherie]; R.T. 4/30/08-p.m., at 5, 9 [Cherie]; R.T. 5/6/08, at 42, 58 [Elsie]; R.T. 5/12/08, at 56-57 [Jasmine]; R.T. 5/19/08, at 132, 134 [Amanda]; R.T. 5/20/08, at 35-36, 76-77 [Amanda].)

³⁰ E.g., R.T. 4/30/08-a.m., at 20-31 [Cherie]; R.T. 5/6/08, at 87-90 [Elsie]; R.T. 5/12/08, at 62-63, 99-100 [Jasmine]; R.T. 5/20/08, at 63-66 [Amanda]; R.T. 5/27/08, at 56-57 [Sgt. Sailer].

³¹ E.g., R.T. 5/13/08, at 22-25 [Jasmine]; R.T. 5/27/08, at 46-54, 99, 105-08; 150-59; R.T. 5/28/08, at 145-49, 165-66.

B. STANDARD OF REVIEW.

Where an evidentiary objection is preserved below, the appellate courts review a trial court's ruling for an abuse of discretion. *See Tucker*, 215 Ariz. at 314, ¶ 58; *see also State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 182 (1982). "Because '[t]he trial court is in the best position to balance the probative value of the challenged evidence against its potential for unfair prejudice,' [it] has broad discretion in this decision." *Connor*, 215 Ariz. at 553, ¶ 39.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING EVIDENCE THAT APPELLANT WAS ACQUITTED OF THE MICHIGAN MOLESTATIONS.

Appellant's contention that the trial court abused its discretion in precluding him from admitting evidence of his acquittal in Michigan is contrary to numerous well-reasoned cases, which follow the general rule that a defendant is not entitled to inform the jury that he has previously been acquitted of other conduct about which evidence has been admitted at his trial.³² *See United States v. De La Rosa*, 171 F.3d 215, 219-20 (5th Cir. 1999) ("Other circuits overwhelmingly agree that, for all the reasons enumerated,

³² As in previous claims, Appellant recites that the trial court's ruling violated the Arizona and United States Constitutions (O.B. at 26), but fails to support those arguments with authority or analysis. Therefore, the arguments are abandoned. See note 15.

evidence of prior acquittals are generally inadmissible”); *see also United States v. Gricco*, 277 F.3d 339, 352-53 (3rd Cir. 2002); *United States v. Smith*, 145 F.3d 458, 462 (1st Cir. 1998); *United States v. Tirrell*, 120 F.3d 670, 677-78 (7th Cir. 1977); *United States v. Thomas*, 114 F.3d 228, 249-50 (D.C. Cir. 1997); *Prince v. Lockhart*, 971 F.2d 118, 122 (8th Cir. 1992); *United States v. Jones*, 808 F.2d 561, 566-67 (7th Cir. 1986); *United States v. Irvin*, 787 F.2d 1506, 1516-17 (11th Cir. 1986); *United States v. Kerley*, 643 F.2d 299, 300-01 (5th Cir. 1981); *United States v. Viserto*, 596 F.2d 531, 537 (2nd Cir. 1979) (same).

There are three sound justifications for this rule.

1. “[A] judgment of acquittal is hearsay.” *Viserto*, 596 F.2d at 537.

The Federal and Arizona Rules of Evidence except from the operation of the hearsay rule “only judgments of conviction, Rule 803(22), not judgments of acquittal.” *Id.*; *see also Gricco*, 277 F.3d at 352-53; *De La Rosa*, 171 F.3d at 219-20; *Prince*, 971 F.2d at 122; *Irvin*, 787 F.2d at 1516-17; *McKinney v. Galvin*, 701 F.2d 584, 586 n.5 (6th Cir. 1983).

2. Unlike a prior conviction, “[E]vidence of prior acquittal is *not relevant* because it does not prove innocence but rather merely indicates that the prior prosecution failed to meet its burden of proving beyond a reasonable doubt at least one element of the crime.” *De La Rosa*, 171 F.3d at 219 (internal quotations and citation omitted); *see also Gricco*, 277 F.3d at 352-53 n.4

“Judgments of acquittal . . . may not present a determination of innocence, but rather only a decision that the prosecution has not met its burden of proof beyond a reasonable doubt.”); *Tirrell*, 120 F.3d at 677-78; *Jones*, 808 F.2d at 566-67; *Kerley*, 643 F.2d at 300-01.

3. “[E]ven if the judgments of acquittal were admissible, exclusion under FedR.Evid 403 would be justified—and highly recommended—because the danger of the jury confusion would greatly outweigh the evidence’s limited probative value.” *Gricco*, 277 F.3d at 352-53; *De La Rosa*, 171 F.3d at 219-20; *Irvin*, 787 F.2d at 1516-17; *Kerley*, 643 F.2d at 301-02.

Here, application of the rule is particularly warranted—not only for the above reasons, but because even after Appellant learned that he would not be permitted to introduce the acquittal, *Appellant*—for his own purposes—still wished to delve into the Michigan accusations. (R.T. 4/20/07, at 30-32.) Thus, although the State ultimately did introduce testimony concerning Appellant’s conduct in Michigan during the State’s case, Appellant did not object to that evidence, apparently gambling that he could use the same accusations to impeach the credibility of the Arizona testimony.

Ignoring the above case law, Appellant cites *State v. Davis*, 127 Ariz. 285 (App. 1980), a 30-year old Division 2 case which states, without elaboration, that the “better rule allows proof of an acquittal to weaken and rebut the

prosecution's evidence of the other crime.”³³ *Id.* at 286. However, not only has *Davis* never been cited by another Arizona decision, application of *Davis* is unwarranted for three reasons.

First, after *Davis* was decided, our supreme court held that the admissibility of evidence is governed first and foremost by the Arizona Rules of Evidence. *State v. Gibson*, 202 Ariz. 321, 323-24, ¶¶ 9-19 (2002) (rejecting defendant's reliance on prior case law concerning the admissibility of a particular type of evidence and holding that the appropriate analysis is found in Rules 401, 402, and 403 of the Arizona Rules of Evidence). *Davis* contains no discussion of the Arizona Rules of Evidence. Consequently, in light of *Gibson*, *Davis* is based on “clearly erroneous [legal] principles,” and, thus, this panel should decline to follow it. *Scappaticci v. Southwest Sav. and Loan Ass'n*, 135 Ariz. 456, 461 (1983) (stating that one division of the court of appeals is

³³ In *Davis*, the defendant was originally charged with aggravated assault upon two victims, Mr. and Mrs. Ellison. The jury found defendant not guilty as to Mrs. Ellison, but was unable to agree on a verdict as to Mr. Ellison. Following a second trial, at which both victims testified, the jury convicted defendant of the assault on Mr. Ellison. On appeal, defendant argued that the trial court erred in refusing to allow him to introduce into evidence the fact that he had been tried for and acquitted of the assault on Mrs. Ellison. 127 Ariz. at 286.

not bound by another if it is convinced that the other division’s opinion is based on “clearly erroneous principles”).³⁴

Second, as demonstrated by the above federal cases, the result in *Davis* is inconsistent with the rules of evidence, not only because the judgment of acquittal is hearsay, but because it is irrelevant under Rule 401, and any hypothetical relevance is outweighed by the danger of unfair prejudice and confusion under Rule 403. In this regard, 17 years after *Davis*, the Arizona Supreme Court significantly enhanced a defendant’s protection under Rule 404(b) by promulgating the “clear and convincing evidence” standard for admissibility of “other acts” evidence, which prohibits the trial court from admitting prior bad acts evidence unless it concludes that the State has proved, by clear and convincing evidence, that those acts had been committed. *See State v. Terrazas*, 189 Ariz. 580, 584-85 (1997).³⁵ Furthermore, as indicated above, Appellant’s protection was further enhanced by trial court’s instruction

³⁴ *Davis* was decided by a panel from Division Two. This Court recently ruled that the geographic location of a panel of the court of appeals is irrelevant in determining the precedential value of an opinion. *State v. Patterson*, 222 Ariz. 574, 577-80, ¶¶ 13-21 (App. 2009). Nonetheless, consistent with *Scappaticci, supra*, one panel of the court of appeals is not absolutely bound by the decision of another panel.

³⁵ Rule of Evidence 404(c), adopted in 1997, also imposes the “clear and convincing evidence” standard.

to the jury that it must not consider any of the State's "other acts" or "character" evidence unless it too found that the State had proved "by clear and convincing evidence" that Appellant had committed the alleged acts. (R.T. 6/10/08, at 86-87.)

All the Michigan acquittal proved was that—for whatever reason—the Michigan prosecution failed to convince a jury *beyond a reasonable doubt* that Appellant's conduct satisfied the elements of the offenses alleged in Michigan, which has no logical bearing on whether an Arizona jury should conclude that the State of Arizona had proved the prior acts by "clear and convincing evidence," in accordance with the trial court's instructions. Further, any arguable relevance of the Michigan acquittal under Rule 401 paled in comparison to the danger of juror confusion and unfair prejudice to the State under Rule 403, by allowing Appellant to attack the credibility of the victims by arguing to the jury that the jurors in Michigan had concluded that the victims were lying or not to be believed.

Third, preclusion of Appellant's acquittal applies with particular force in a case like this, where record demonstrates that Appellant desired to get the allegations of prior molestations before the jury *for his own purposes*—regardless whether they were introduced by the State—in an attempt to bolster his efforts to impeach the credibility of the same victims.

Here, Appellant's rights were amply protected by the trial court's instructions, which prevented the jurors from even *considering* the other acts evidence unless the jurors found by "clear and convincing evidence" that Appellant committed the acts, and then strictly limited the bases for which the acts could be considered. *See State v. LeBlanc*, 186 Ariz. 437, 439 (1996) ("Jurors are presumed to follow their instructions.")³⁶

Kinney v. People, 187 P.3d 548 (Colo. 2008), the only case cited by Appellant to have addressed the admissibility of acquittals in the past 30 years, is both unpersuasive and distinguishable. In rejecting the federal cases cited above in favor of a rule that gives the trial court "discretion" to determine the issue based on the "facts of the case and the nature of the testimony presented," *id.* at 551, 556-57, *Kinney* concluded that an "acquittal instruction" was required in the case before it to avoid unfair juror speculation that the defendant had been convicted of prior assaults, where the State introduced testimony from two other women whose accusations had resulted in acquittals, and the testimony repeatedly referred to the witnesses' testimony at prior

³⁶ The only other Arizona decision cited by Appellant is *State v. Little*, 87 Ariz. 295 (1960), which considered the effect of an acquittal on the admissibility of evidence of a prior conviction, *id.* at 306, a point Appellant did not raise below.

“proceedings,” and the jury asked to see the “prior trial transcripts” from those proceedings. *See id.* 555-58.

However, if a defendant, as in *Kinney*, is concerned that the jury may speculate about the existence and outcome of prior proceedings, the concern is easily remedied by asking the trial court to instruct the jury that it must not engage in such speculation. More importantly, the result in *Kinney* not only overestimates the scant (or non-existent) relevance of a prior acquittal, it underestimates the unfair prejudice visited upon the State from advising the jury that another jury has already acquitted the defendant of similar accusations made by the same victims. *See Gricco*, 277 F.3d at 353 (“[E]ven if the judgments of acquittal were admissible, exclusion under Fed.R.Evid 403 would be justified—and highly recommended—because the danger of jury confusion would greatly outweigh the evidence’s limited probative value.”). Such a result is particularly warranted where, as here, the defendant desired to use the victims’ allegations of prior misconduct, and the jury was forbidden by the trial court from even considering the other acts against Appellant unless it

concluded that the State had proved by clear and convincing evidence that the acts occurred.³⁷

In the end, a jury in Arizona is more than capable of judging the credibility and veracity of victims who are testifying before them and subjected to lengthy cross-examination. It is inappropriate to prejudice that process by informing the jury of conclusions arrived at by another jury in another state in a case being prosecuted by different prosecutors.

Finally, any conceivable abuse of discretion in the trial court's ruling would amount to harmless error, because a conviction will not be reversed for evidentiary error unless there exists a reasonable probability that the verdict would have been different had the evidence been admitted. *See Van Adams*, 194 Ariz. at 416, ¶ 23; *Lacy*, 187 Ariz. at 348. In this case, no such probability existed, because:

1. The jury—who were the sole judges of the victims' credibility—were precluded from even considering the Michigan molestations unless it determined that the State had presented by clear and convincing evidence that Appellant had committed the alleged acts.

³⁷ Unlike Arizona, Colorado law permitted the prosecution to present the jury with “other acts” evidence based on a mere “preponderance of the evidence” that the other act occurred, *Kinney*, 187 P.3d at 554

2. The three victims were subject to wide ranging cross-examination by Appellant, including about the Michigan molestations. (R.T. 5/6/08, at 34-94 and R.T. 5/7/08, at 3-6, 29-30; R.T. 5/12/08, at 31-138 and R.T. 5/13/08, at 3-48, 78-81; R.T. 5/19/08, at 104-148 and R.T. 5/20/08, at 3-66, 73-90, 114-117.)

3. Even setting aside the Michigan molestations, the direct and circumstantial evidence against Appellant was overwhelming. (SOC, Parts C-F; Argument I, Part B, pp. 29-31.) *See State v. Gamez*, 144 Ariz. 178, 180 (1985).

CONCLUSION

Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2010, I electronically filed Appellee's Answering Brief with the Clerk of Court of Appeals, Division One, by using the Court's ACE system.

Copies of this Brief were deposited for mailing this date to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 31.13, Arizona Rules of Criminal Procedure, undersigned counsel certifies that this brief is double spaced, uses a 14-point proportionately-spaced typeface, and contains 13,889 words.

/s/ _____
Craig W. Soland