

ARIZONA COURT OF APPEALS

DIVISION TWO

STATE OF ARIZONA,

Appellee,

v.

JAMES COGHILL,

Appellant.

2 CA-CR 2006-0215

Pima County
Superior Court
No. CR-2004-2573

APPELLEE'S ANSWERING BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court deny Appellant's request for retained counsel of his choice?
2. Did the trial court abuse its discretion in allowing admission of the mere fact that Appellant possessed adult pornography, without allowing the jury to view the adult pornography?
3. Did the trial court abuse its discretion in allowing the jury to view the subject child pornography when the jury was constitutionally required to find beyond a reasonable doubt that the images were child pornography regardless of any stipulation between the parties on the matter?
4. Did the prosecutor refer to facts not in evidence during closing argument?
- 5 & 7. Can Appellant show that his enhanced sentence under the dangerous crimes against children statute constitutes fundamental error?
6. Can Appellant show that his 15-year total prison sentence for 15 separate crimes involving the sexual exploitation of children constitutes fundamental error?
8. Did Appellant invite any error stemming from his failure to examine his computer's hard drives before trial, and even if not, is his untimely claim forfeited for failure to raise it below and for lack of sufficient argument on appeal?

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STATEMENT OF THE CASE

¶ 1 On April 1, 2003, Jacob Franks informed the police that his friend Appellant possessed child pornography. (R.T. 3/29/06, at 33.) Police obtained a warrant to search Appellant's residence based on Franks' information and Appellant's own statements to police. (*Id.*, at 37; R.T. 3/30/06, at 118–19.) Police found in the residence CDs containing both adult and child pornography that had been downloaded from the internet. (R.T. 3/30/06, at 79–80.) They seized the CDs and Appellant's computer. (*Id.*, at 119, 123.)

¶ 2 Appellant was charged with 14 counts of sexual exploitation of a minor by knowingly possessing child pornography in which one or more of the depicted minors was under 15 years of age and one count of attempted sexual exploitation of a minor. (R.O.A. at 1.) The State also alleged for sentencing purposes that the 14 counts of sexual exploitation of a minor were dangerous crimes against children under A.R.S. § 13–604.01. (*Id.*)

¶ 3 Although Franks had reported the child pornography to police, Appellant's defense at his 6-day trial was that the pornography was Franks' and not his. (R.T. 4/4/06, at 162, 167–78.) The jury found Appellant guilty as charged. (R.T. 4/5/06, at 4–9; R.O.A. at 72–86.)

¶ 4 After trial, the prosecutor dismissed the proven dangerous crimes against children allegations on 13 of the 14 convictions for sexual exploitation

of a minor. (R.T. 6/2/06, at 2–3, 74–75; R.O.A. at 103.) Accordingly, the trial court sentenced Appellant to a partially mitigated, 15-year prison term under § 13–604.01 on one conviction and to lifetime probation on the remaining convictions. (R.T. 6/2/06, at 75; R.O.A. at 117.)

¶ 5 On June 13, 2006, Appellant filed a timely notice of appeal from the judgment and sentence. (R.O.A. at 118.) 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 DENY APPELLANT’S REQUEST FOR RETAINED COUNSEL OF HIS CHOICE.

¶ 6 Appellant contends for the first time on appeal that it is structural error for a trial court to deny a defendant’s choice of retained counsel. (Opening Brief at 11–20.) This Court need not address Appellant’s untimely legal argument, however, because his denial-of-counsel-of-choice claim lacks a factual basis. The trial judge did not deny Appellant his choice of counsel. Rather, as Appellant acknowledges, the judge merely dismissed without prejudice on technical procedural grounds Appellant’s motion to allow his father, an attorney licensed to practice in Illinois, to represent him pro hac vice. (*Id.* at 12; R.O.A. at 16–17.)

¶ 7 Specifically, Appellant failed to comply with the procedural requirements of former Arizona Rule of the Supreme Court 33,¹ a provision pertaining to pro hac vice representation, by, according to Appellant, failing to show that his father had submitted a required “application” form with the Arizona State Bar. (*Id.* at 17) Appellant did not cure the procedural deficiency and resubmit the motion or inform the trial judge that he could not cure the deficiency. Instead, he proceeded to trial, without objection, with previously retained counsel.

¶ 8 Accordingly, the judge never had an opportunity to rule on the merits of a motion for pro-hac-vice representation. (*Id.* at 17; R.T. 6/2/06, at 73–74.) Indeed, after Appellant’s father complained at sentencing, the trial judge evinced surprise that Appellant had not been represented by counsel of choice and implied he would have allowed Appellant’s father to represent Appellant had Appellant simply addressed the procedural deficiency and refiled the motion for pro-hac-vice representation, stating:

I’m going to say one thing with regard to [Appellant’s] father’s statement and argument to me here. I did look at the record and at least one of the motions for pro hac vice submitted and [this] Court ruled on was without prejudice and it was simply for failure to comply with the local rules

¹ Currently Arizona Rule of the Supreme Court 38.

that were required. And so if there is a subsequent request or something, there may be in the file, the one that I found most quickly, was just simply failure to follow procedures, that we do appoint people pro hac vice in this—in this court regularly. It is done, but you do have certain requirements that you have to make in following that. And I don't see that they were met in this case. Denial was without prejudice, and it was simply for failure on [the defense's] part [to meet the procedural requirements].”

(R.T. 6/2/06, at 30–32, 73–74.)

¶ 9 Appellant claims for the first time on appeal that “examination of Rules 33(d) and 38 [of the Arizona Rules of the Supreme Court] reveals a more serious obstacle to the [pro-hac-vice] admission of [his] father [than the technical deficiency that resulted in the dismissal without prejudice of the pro-hac-vice motion]: attorneys [like Appellant’s father] who are residents of Arizona cannot appear pro hac vice.” (Opening Brief at 12.) He argues for the first time on appeal that the non-residency requirement “runs afoul of the Sixth Amendment right to counsel.” (*Id.*)

¶ 10 Appellant did not present this issue in the trial court, and, as discussed above, the judge did not address it when dismissing the motion for pro-hac-vice representation. Accordingly, Appellant’s untimely attack on the non-residency-requirement is forfeited as to all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 18–22, 115 P.3d 601 (2005) (defendant bears the burden of proving on the existing appellate record that

untimely challenged error is fundamental and prejudicial);² *State v. Morales*, 215 Ariz. 59, ¶ 10, 157 P.3d 479 (2007) (same). The trial court committed no error because Appellant never submitted a cognizable application for pro-hac-vice representation. Accordingly, Appellant’s claim is forfeited under *Henderson* and *Morales*.

¶ 11 Moreover, because the non-residency requirement did not ripen into an actual controversy below, any ruling thereon would be merely advisory. *See Citibank v. Miller & Schroeder Fin., Inc.*, 168 Ariz. 178, 182, 812 P.2d 996, 1000 (App. 1990) (“The concept of justiciability requires a court to decline to hear a case if a dispute is . . . lacking and/or the parties are so situated that the court’s determination would be merely advisory.”); *Iman v. Southern Pacific*

² The Arizona Supreme Court in *Henderson*, acknowledging that “prior appellate decisions have not consistently described the showing necessary to establish fundamental error,” recently set forth the standard all Arizona appellate courts must follow when a defendant has forfeited the right to appellate relief by failing to make an appropriate objection in the trial court, expressly stating, “[t]o the extent that any prior decisions are inconsistent with today’s holding, we disapprove of them.” *Henderson*, at ¶ 21. The supreme court made clear that “[t]he scope of review for fundamental error is limited.” *Id.*, at ¶ 19. The court also stated, “we place the burden of persuasion in fundamental error review on the defendant.” *Id.* The court set forth a three-step analysis. First, the defendant “must prove error.” *Id.*, at ¶ 23. Second, the defendant must prove that it is one of the “rare cases” that the error is “fundamental.” *Id.*, at ¶¶ 19, 24. Third, the defendant must “demonstrate that the error caused him prejudice.” *Id.*, at ¶ 26.

Co., 7 Ariz. App. 16, 20–21, 435 P.2d 851, 855–56 (1968) (“A mere difference of opinion as to the constitutionality of legislation does not afford a basis for [judicial] relief. A [legal] proceeding to obtain an advisory judgment or to answer a moot or abstract question will not lie.”) (internal citation and quotations omitted); *Uhlmann v. Wren*, 97 Ariz. 366, 390, 401 P.2d 113, 129 (1965), quoting *Matter of State Industrial Comm.*, 119 N.E. 1027, 1028 (N.Y. App. 1918) (“Judge Cardozo, in refusing to render an advisory opinion on a matter submitted to the New York Court of Appeals, stated the matter with his usual insight when he said: ‘We are asked by an omnibus answer to an omnibus question to adjudge the rights of all. That is not the way in which a system of case law develops. We deal with the particular instance; and we wait till it arises.’”). Appellant’s untimely claim is forfeited and non-justiciable.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING ADMISSION OF THE MERE FACT THAT APPELLANT POSSESSED ADULT PORNOGRAPHY, WITHOUT ALLOWING THE JURY TO VIEW THE ADULT PORNOGRAPHY.

¶ 12 Appellant contends that the trial court abused its discretion in allowing, over his objection, “mention [at trial] of the fact [that he] possessed adult pornography.” (Opening Brief at 20, 20–29.) *See State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990) (a trial court’s ruling on the

admission of evidence is reviewed for an abuse of discretion). The claim is meritless.

¶ 13 As the trial court properly determined, Appellant's admission to possessing adult pornography and the fact that CDs containing downloaded adult pornography were found in his residence were admissible under Arizona Rule of Evidence 404(b) to prove opportunity, knowledge, and limited intent, that is, that Appellant had had the intent to permanently record his pornographic viewings and the means and know-how to do so. (R.T. 3/30/06, at 95.) *See* Ariz. R. Evid. 404(b) (Other-act evidence can be admissible to prove motive, *opportunity*, *intent*, preparation, plan, *knowledge*, identity, or absence of mistake or accident.); *State v. Williams*, 182 Ariz. 548, 552, 898 P.2d 497, 501 (App. 1995) (same).

¶ 14 But even assuming *arguendo* that the adult pornography were not proper Rule 404(b) evidence, any error in merely mentioning at trial Appellant's possession of such material was clearly harmless. An adult's possession of adult pornography is not illegal. Indeed, adult material can be purchased or rented at mainstream video store chains throughout this country. The mere mention at trial that Appellant possessed adult pornography could not have so inflamed the jury that he did not receive a fair trial. For all the foregoing reasons, reversible error did not occur.

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE JURY TO VIEW THE SUBJECT CHILD PORNOGRAPHY WHEN THE JURY WAS CONSTITUTIONALLY REQUIRED TO FIND BEYOND A REASONABLE DOUBT THAT THE IMAGES WERE CHILD PORNOGRAPHY REGARDLESS OF ANY STIPULATION BETWEEN THE PARTIES ON THE MATTER.

¶ 15 Appellant contends that the trial court abused its discretion in allowing the jury to view the subject child pornography after he had proposed to stipulate to the unlawful nature of the material. (Opening Brief at 29–33.) *See Amaya-Ruiz*, 166 Ariz. at 167, 800 P.2d at 1275 (a trial court’s ruling on the admission of evidence is reviewed for an abuse of discretion). Appellant’s claim is meritless.

¶ 16 At trial, defense counsel, in an apparent attempt to keep the child pornography from the jury, stated that the defense was “willing to stipulate that every one of [the visual depictions] are identical to the charged items in the Indictment and constitutes a violation of the [sexual exploitation of a minor] statute[.]” (R.T. 3/30/06, at 150–51.) *See* A.R.S. § 13–3553 (the two elements of sexual exploitation of a minor by knowingly possessing child pornography are: (1) knowing possession (2) of any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct). The trial court asked the prosecutor if he wished to stipulate to that element of the charged offenses,

and the prosecutor responded in the negative. (*Id.* at 151.) Accordingly, the judge rejected the proposed stipulation and ordered the child pornography to be presented to the jury. (*Id.*)

¶ 17 Appellant contends that the trial court erred in refusing to compel the State to stipulate to one of the two elements of the charged offenses. (Opening Brief at 29–33.) But this Court rejected that identical argument in *State v. Lopez*, 209 Ariz. 58, ¶¶ 4–9, 97 P.3d 883 (App. 2004), holding that a defendant cannot compel the State to stipulate to an element of a charged offense. *See id.* (although a defendant might in some circumstances be entitled to a compelled stipulation on a mere sentence-enhancement factor, a defendant cannot compel the State to stipulate to an element of a charged offense). *Lopez* is on all fours here. Because Appellant could not compel the State to stipulate to an element of the charged offenses, the trial court properly rejected the proposed stipulation when the State declined to participate. *Id.*

¶ 18 Arizona Supreme Court case law decided after *Lopez* issued confirms the propriety of this Court’s decision in *Lopez*. Specifically, the supreme court held in *State v. Carreon*, 210 Ariz. 54, ¶ 47, 107 P.3d 900 (2005), that a stipulation between the State and defense on an element of a charged crime does not “satisf[y] the State’s burden of proving [that] element.” Rather, the jury must still find the element beyond a reasonable doubt. *Id.*, at ¶¶ 44–48.

Because the State was required to prove beyond a reasonable doubt that the subject images were child pornography notwithstanding any stipulation between the parties on the matter, and because the State could not meet that burden without presenting the subject images to the jury, the trial court would have abused its discretion had it prevented the State from presenting that crucial evidence to the jury. *See Amaya-Ruiz*, 166 Ariz. at 167, 800 P.2d at 1275; *Lopez*, at ¶¶ 4–9; *Carreon*, at ¶¶ 44–48. Accordingly, Appellant’s evidentiary claim is meritless. *Id.*

IV

THE PROSECUTOR DID NOT REFER TO FACTS NOT IN EVIDENCE DURING CLOSING ARGUMENT.

¶ 19 Appellant contends on appeal, as he did below, that the prosecutor referred to facts not in evidence when, during closing argument, the prosecutor referred to two CDs with handwriting on them. (Opening Brief at 35–39; R.T. 4/4/06, at 159–60.) For the first time on appeal, Appellant challenges those same comments on a new ground that he did not raise below: that the comments were improper because the handwriting on the CDs had not been “authenticated” by a handwriting expert, i.e., no expert had confirmed that the handwriting was his. (Opening Brief at 37–39.) Appellant’s properly preserved claim is meritless, and his newly raised claim is forfeited for failure to raise it below and for lack of sufficient argument on appeal.

A. Properly preserved reference-to-facts-not-in-evidence claim.

¶ 20 Addressing the properly preserved claim first, Appellant is incorrect that the prosecutor’s comments regarding the two CDs with handwriting on them referenced facts not in evidence. (R.T. 4/4/06, at 159–60.) Contrary to Appellant’s objection at the time, both CDs and the handwriting printed thereon had been admitted in evidence, as Appellant’s own factual recitation reflects. (Opening Brief at 36–37.) Accordingly, Appellant’s sole ground for objecting to the prosecutor’s comments was meritless.

¶ 21 But even had the prosecutor erroneously referred to facts not in evidence, any error would have been harmless because, as the trial court instructed the jury and stated when overruling Appellant’s objection, it was for the jury alone to determine “what the facts [were] from their recollection.” (R.T. 4/4/06, at 160, 187–88.) For the foregoing reasons, Appellant’s properly preserved claim fails.

B. Untimely unauthenticated-handwriting claim

¶ 22 Because Appellant failed to challenge in the trial court the prosecutor’s reference to the CDs with handwriting on them on the ground that the handwriting had not been authenticated by a handwriting expert, he forfeited that specific claim as to all but fundamental, prejudicial error. *Henderson*, at ¶¶ 18–22; *Morales*, at ¶ 10; *see also State v. Hamilton*, 177 Ariz. 403, 408, 868

P.2d 986, 991 (App. 1993) (objection to the admission of evidence must be made with specificity; objection on one ground does not preserve issues relating to admission of that evidence on other grounds). Appellant does not even acknowledge that his untimely claim is forfeited as to all but fundamental error, let alone argue that fundamental error occurred. *See Henderson*, at ¶¶ 19, 24 (for untimely raised appellate claims, the defendant bears the burden of proving that the alleged error is fundamental and prejudicial). Accordingly, Appellant forfeited for lack of sufficient argument on appeal any fundamental-error claim he might have raised. *See State v. Bolton*, 182 Ariz. 290, 316–17, 896 P.2d 830, 856–57 (1995) (supreme court refuses to consider claims for which insufficient argument was offered in the opening brief).

¶ 23 Even if Appellant had not forfeited his untimely claim for lack of sufficient argument, he cannot show that the prosecutor’s comments constituted fundamental error on the ground that the referenced handwriting samples had not been authenticated by an expert. The prosecutor never suggested that they had. Moreover, defense counsel cured any possible confusion the jury may have had on the matter by arguing in closing:

And if you go back into the jury box and for one second consider—consider what might have been the implication of the county attorney in his closing remarks, that you compare one item of writing to another, to make yourselves handwriting experts in this case, are you kidding me? Ask yourselves that. Are you kidding me? Is the State asking

you to do their work for them? To take one disc and to compare it to another? Are you kidding me? This is proof? This is possible proof? This is probable proof beyond a reasonable doubt? It's not in front of you, and the county attorney asked you to go back and make some decisions on your own by comparing some handwriting? That's proof?

(R.T. 4/4/06, at 170.) For all the foregoing reasons, the aspect of Appellant's argument that he preserved for appeal is meritless, and his untimely claim is forfeited for failure to raise it below and for lack of sufficient argument on appeal. *Henderson*, at ¶¶ 18–22; *Morales*, at ¶ 10, *Bolton*, 182 Ariz. at 316–17, 896 P.2d at 856–57.

V & VII

APPELLANT CANNOT PROVE THAT HIS ENHANCED SENTENCE UNDER THE DANGEROUS CRIMES AGAINST CHILDREN STATUTE CONSTITUTES FUNDAMENTAL ERROR.

¶ 24 In Arguments V and VII of the opening brief, Appellant contends for the first time on appeal that his enhanced sentence under the dangerous crimes against children statute, § 13–604.01, for the offense of sexual exploitation of a minor is unlawful because the State failed to prove that he knew the minor victim was a child under 15 (Argument V) and because his knowing possession of child pornography did not meet the focused-conduct requirement (Argument

VII).³ (Opening Brief at 39–41, 50–52) *See State v. Sepahi*, 206 Ariz. 321, ¶ 19, 78 P.3d 732 (2003) (application of the dangerous crimes against children statute requires only the commission of an enumerated offense and focused or targeted conduct). Appellant did not raise either claim below and thus both are forfeited it as to all but fundamental, prejudicial error. *Henderson*, at ¶¶ 18–22; *Morales*, at ¶ 10 (same). To constitute fundamental error, a sentence must be illegal. *State v. Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d 437 (App. 2002.) Appellant cannot show that his sentence under § 13–604.01 is illegal, and thus his untimely sentencing claims are forfeited. *Henderson*, at ¶¶ 18–22; *Morales*, at ¶ 10, *Cox*, at ¶ 13.

¶ 25 Addressing the failure-to-know-the-minor’s-age argument first, Appellant cites extra-jurisdictional case law addressing the constitutionality of a federal crime—possession of child pornography—for the proposition that Arizona’s dangerous crimes against children statute silently imposes a requirement that defendants must know that the victim is a child under 15. (Opening Brief at 40.) But case law pertaining to a federal substantive offense

³ Appellee addresses Argument VII before Argument VI for an orderly presentation of the issues. *See State v. Lavers*, 168 Ariz. 376, 381, 814 P.2d 333, 338 (1991) (“We address each of [defendant’s] issues, but do not address them in the same order as presented by defendant.”).

of possession of child pornography is irrelevant to the applicability of § 13–604.01: a *sentencing* statute pertaining to a broad range of substantive offenses, most of which do not involve the possession of child pornography. *See* § 13–604.01(M).

¶ 26 The Arizona Supreme Court has expressly held that a defendant need not know the child victim’s age under § 13–604.01. *See State v. Williams*, 175 Ariz. 98, 103, 854 P.2d 131, 136 (1993) (“We do not hold that the [dangerous crimes against children] statute applies only when the accused targets a victim whom the accused knows is under the age of fifteen[; o]n the contrary, we approve of an earlier holding of the court of appeals that knowledge of the victim’s age is unnecessary under the statute.”); *Sepahi*, at ¶ 17 (this court issued a “clear statement in *Williams* that the defendant need not know the age of the victim” for purposes of § 13–604.01). Because Appellant’s untimely failure-to-know-the-victim’s-age claim is meritless, it is forfeited under *Henderson* and *Morales*.

¶ 27 Turning to the other untimely claim, Appellant’s lack-of-focused-conduct argument evinces his fundamental misunderstanding of that statutory requirement. The gist of Appellant’s claim is that sexual exploitation of a minor by knowingly possessing child pornography cannot meet § 13–604.01’s

legislatively imposed focused-conduct requirement, and thus the offense is not a dangerous crime against children at all. (Opening Brief at 50–52.)

¶ 28 To the contrary, because the Arizona Legislature expressly enumerated sexual exploitation of a minor as a dangerous crime against children, each of the various statutorily prescribed permutations of that crime, including sexual exploitation of a minor by knowingly possessing child pornography, *must* meet the focused-conduct requirement. Compare § 13–604.01(M)(1)(g) (enumerating without qualification “[s]exual exploitation of a minor”) with § 13–604.01(M)(1)(h) (enumerating with qualification “[c]hild abuse as prescribed in § 13–3623, subsection A, paragraph 1[, knowing or intentional child abuse under circumstances likely to produce death or serious physical injury],” but excluding subsection A, paragraphs 2 and 3, reckless and negligent child abuse under circumstances likely to produce death or serious injury, and subsection B, child abuse under circumstances other than those likely to produce death or serious physical injury). Knowingly possessing child pornography—unlike some of the other enumerated offenses such as aggravated assault with a dangerous instrument or deadly weapon—can be committed only one way. That is, in every instance one must knowingly possess the contraband described in the statute. If knowing possession of such contraband were not inherently focused conduct, the Legislature would not

have enumerated the offense as a dangerous crime against children. To construe the Legislature's focused-conduct requirement in a manner that would eliminate as a dangerous crime against children one of the Legislature's specifically enumerated offenses would clearly be infirm.

¶ 29 The Arizona Supreme Court cautioned in *Williams* that “[a]s a practical matter, the question of whether the child victim is the target of the defendant’s criminal conduct will *rarely be an issue* given the nature of the crimes listed in [the statute].” 175 Ariz. at 103–04, 854 P.2d at 136–37 (emphasis added). The court admonished that, although driving drunk and crashing into another vehicle (as occurred in *Williams*) can be committed without necessarily focusing on or targeting persons, “[i]t is impossible to imagine how . . . sexual exploitation [of a minor]. . . could be committed without targeting persons.” 175 Ariz. at 104, 854 P.2d at 137.

¶ 30 This Court must reject Appellant’s belated invitation to effectively rewrite the dangerous crimes against children statute. Appellant’s untimely and meritless lack-of-focused-conduct claim, like his untimely failure-to-know-the-victim’s-age claim, is forfeited under *Henderson* and *Morales*.

VI

APPELLANT CANNOT PROVE THAT HIS 15-YEAR TOTAL PRISON SENTENCE FOR 15 SEPARATE CRIMES INVOLVING THE SEXUAL EXPLOITATION OF CHILDREN CONSTITUTES FUNDAMENTAL ERROR.

¶ 31 The dangerous crimes against children statute mandated consecutive sentences on Appellant's 14 convictions for sexual exploitation of a minor. (R.O.A. at 103.) *See* § 13–604.01(K). Accordingly, before the State dismissed after trial the proven dangerous crime against children allegations on 13 of those 14 convictions, Appellant faced a minimum, mitigated 140-year total term of imprisonment under § 13–604.01. (R.O.A. at 103.) Despite the fact that Appellant received only a small fraction of the total prison sentence he would have received had the State not dismissed the established enhancement-factor circumstances, he contends for the first time on appeal that his 15-year total prison sentence constitutes cruel and unusual punishment. (Opening Brief at 41–50.)

¶ 32 Appellant did not raise this claim below and thus forfeited it as to all but fundamental, prejudicial error. *Henderson*, at ¶¶ 18–22; *Morales*, at ¶ 10 (same). To constitute fundamental error, a sentence must be illegal. *Cox*, at ¶ 13. Appellant cannot meet his burden of proving that his 15-year total sentence is illegal because in the very case he cites, *State v. Berger*, 212 Ariz. 473, ¶¶ 51, 134 P.3d 378 (2006), the Arizona Supreme Court upheld against an

Eighth Amendment cruel and unusual punishment challenge a 200-year total sentence—20 consecutive 10-year sentences for 20 counts of sexual exploitation of a minor by knowingly possessing child pornography—mandated under the dangerous crimes against children statute. (Opening Brief at 42.) If a 200-year total sentence under § 13–604.01 for multiple counts of possessing child pornography does not constitute cruel and unusual punishment, then a 15-year total sentence for multiple counts of possessing child pornography certainly does not.

¶ 33 In an apparent attempt to avoid *Berger*'s ruling, Appellant speculates that the *Berger* court would have reached a different result had it resolved the cruel and unusual punishment claim on state, rather than federal, constitutional grounds. (Opening Brief at 44–50.) He cites as the basis for his speculation Justice Hurwitz' concurrence and Justice Berch's dissent in *Berger*, in which both evinced concern that the consecutive sentences imposed in that case were mandatory and thus did “not allow consideration of the particular situation of the offender.” *Id.*, at ¶¶ 52–53, 58 (Justice Hurwitz writes, “As a policy matter, there is much to commend [dissenting] Justice Berch's suggestion that the cumulative [200-year] sentence imposed upon Mr. Berger was unnecessarily harsh, and my personal inclination would be reach such a conclusion[; however, United States] Supreme Court precedent [does not]

allow us to find consecutive sentences for separate crimes unconstitutional if the individual sentences for each crime are not.”) (Hurwitz, J., concurring). (Opening Brief at 44–55.)

¶ 34 Under current law, Appellant’s 15-year total sentence for possession of child pornography does not constitute cruel and unusual punishment. *Id.*, at ¶ 51. As this Court held in *State v. Keith*, 211 Ariz. 436, 122 P.3d 229 (App. 2005), in analyzing whether fundamental sentencing error occurred, an appellate court cannot anticipate or expect a change in the law. *Id.*, at ¶¶ 2–3 (Defendant’s reliance on existing Supreme Court case law for the proposition that at some future time the Supreme Court will change the prevailing law that prior convictions need not be found by a jury does not establish as fundamental error the trial judge’s, rather than a jury’s, making the prior-convictions finding in his case; “[w]e are not allowed to anticipate how the Supreme Court may rule in the future.”). Rather, the law prevailing at the time controls. *Id.*

¶ 35 But even assuming *arguendo* that Justices Hurwitz and Berch will someday convince a majority of their brethren that the Arizona Constitution’s cruel and unusual punishment provision must be interpreted more broadly than the federal provision in cases dealing with mandatory consecutive sentences for multiple counts of possessing child pornography *and* that the total sentence imposed in *Berger* constitutes cruel and unusual punishment under the

broadened standard, that would mean only that a 200-year total sentence for possessing child pornography constitutes cruel and unusual punishment under the Arizona Constitution. Clearly, one cannot reasonably conclude from the fact that a 200-year total sentence constitutes cruel and unusual punishment that a 15-year total sentence suffers the same infirmity. Appellant's untimely cruel-and-unusual-punishment claim is forfeited for failure to prove fundamental sentencing error under current law. *Henderson*, at ¶¶ 18–22; *Morales*, at ¶ 10; *Cox*, at ¶ 13; *Keith*, at ¶¶ 2–3.

VIII

APPELLANT INVITED ANY ERROR STEMMING FROM HIS FAILURE TO EXAMINE HIS COMPUTER'S HARD DRIVES BEFORE TRIAL, BUT EVEN IF NOT, HIS UNTIMELY CLAIM IS FORFEITED FOR FAILURE TO RAISE IT BELOW AND FOR LACK OF SUFFICIENT ARGUMENT ON APPEAL.

¶ 36 Appellant contends for the first time on appeal that the State violated his right to full disclosure by providing him with duplicate copies of the contents of his computer's two hard drives rather than allowing him to retrieve the contents himself. (Opening Brief at 52–55.) But nothing in the record indicates that Appellant ever evinced dissatisfaction with receiving duplicate copies of the hard drive files in lieu of retrieving them himself. (See R.O.A. at 30, 38–39, 47, 50, 60–61, 65.) Nor does the record indicate that the State

would have denied Appellant’s computer expert reasonable access to the hard drives had Appellant simply asked. (*Id.*) Accordingly, nothing in the record indicates that Appellant disapproved of the manner in which the State disclosed the hard-drive evidence.

¶ 37 A party cannot implicitly invite a particular course of action by another party at trial and then attack the other party’s action for the first time on appeal. *See State v. Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d 631 (2001) (a reviewing court does not consider whether invited error is fundamental; to do so would run counter to the purposes of the invited error doctrine); *State v. Moreno*, 173 Ariz. 471, 473, 844 P.2d 638, 640 (App. 1992) (a party on appeal “may not be heard . . . to decry a result fashioned by his own handiwork”).

¶ 38 But even if Appellant did not invite any error stemming from his failure to seek direct access to the computer hard drives—evidence that he obviously knew the State possessed—he forfeited his untimely claim as to all but fundamental, prejudicial error. *Henderson*, at ¶¶ 18–22; *Morales*, at ¶ 10. Appellant does not acknowledge that his untimely claim is forfeited as to all but fundamental error, let alone argue that fundamental error occurred. *See Henderson*, at ¶¶ 19, 24 (for untimely raised appellate claims, the defendant bears the burden of proving that the alleged error is fundamental). Moreover, Appellant does not meaningfully argue that his failure to examine the subject

hard drives resulted in actual prejudice. His “argument” consists of the bare statement that his alleged inability “to inspect the original hard drives . . . prejudiced [him] because his expert was unable to determine whether there had been any changes made in the content of the drives.” (Opening Brief at 54–55.) Appellant forfeited for lack of sufficient argument on appeal any fundamental/prejudicial error claim he might have raised. *See Bolton*, 182 Ariz. at 316–17, 896 P.2d at 856–57 (supreme court refuses to consider claims for which insufficient argument was offered in the opening brief).

¶ 39 But even if the untimely claim were not forfeited for lack of sufficient argument, and even putting aside the fundamental-error issue, Appellant’s bare assertion of possible prejudice clearly does not establish that actual prejudice occurred, as *Henderson* and *Morales* require. Indeed, his allegation that his computer expert lost the opportunity to determine whether changes had been made to the contents of the hard drives does not even establish that any such changes were not reflected in the duplicate files the State gave Appellant. But assuming a disparity, Appellant is still unable to show on the present record that any such changes were detrimental to his defense. Because Appellant cannot prove actual prejudice on the existing appellate record, his untimely claim is forfeited under *Henderson* and *Morales*.

CONCLUSION

¶ 40 Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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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 5,107 words.

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