DIVISION ONE
FILED: 8/13/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0514
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JERRY ALFONSO OCHOA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-006260-001

The Honorable Maria del Mar Verdin, Judge

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED AS MODIFIED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

The Hopkins Law Office — Tucson
By Cedric M. Hopkins
Attorney for Appellant

Jerry Alfonso Ochoa — Florence
Appellant

B R O W N, Judge

¶1 Jerry Alfonso Ochoa appeals his convictions and sentences for sexual conduct with a minor and sexual exploitation of a minor. Counsel for Ochoa filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising that after searching the record on appeal, he was unable to find any arguable grounds for reversal. Ochoa was granted the opportunity to file a supplemental brief in *propria persona*, and he has done so, as well as an amended supplemental brief.[1]

¶2 Our obligation is to review the entire record for reversible error. *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We view the facts in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Ochoa. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We find no reversible error.

BACKGROUND

¶3 In July 2010, the State charged Ochoa with Counts 1-3, sexual conduct with a minor, class 2 felonies and dangerous crimes against children, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1405, Counts 4-8, sexual conduct

[1] Because Ochoa's amended supplemental brief was not timely filed, and he did not seek an extension of time for filing, we hereby strike the amended supplemental brief.

with a minor, class 6 felonies, in violation of A.R.S. § 13-1405, Counts 9-14, child prostitution, class 2 felonies, in violation of A.R.S. § 13-3212,[2] and Counts 15-19, sexual exploitation of a minor, class 2 felonies in violation of A.R.S. § 13-3553. The following evidence was presented at trial.

¶4 The victim testified that she met Ochoa in 2006 when she was fourteen years old. The victim testified that shortly after meeting Ochoa, while she was still fourteen, the two of them engaged in sexual activity on three separate occasions, including one instance of digital vaginal penetration and two instances of sexual intercourse. The victim and Ochoa stopped their sexual activities for a time, but before the victim's sixteenth birthday, the two again had intercourse. The victim also testified that she and Ochoa had intercourse numerous times while she was seventeen. The victim testified that in the course of their relationship, Ochoa took several photographs of her with his cell phone. The photographs depicted the victim without clothing, including at least two photographs of her vaginal area. When the photographs were offered as evidence at trial, the victim confirmed Ochoa took the photos and identified herself in them. The victim also testified that she was present

[2] Ochoa was found not guilty of Counts 9-14 and therefore we do not discuss the evidence presented on those counts.

when Ochoa viewed the photographs on his phone and "he would just say stuff that a boyfriend would say."

¶5 Detective Bill testified that she came into contact with the victim in February 2010 when she assisted the victim in obtaining an order of protection and serving it on Ochoa. In an interview with Detective Bill, the victim gave a thorough account of her relationship with Ochoa, including dates and places they engaged in sexual intercourse. Detective Bill then interviewed Ochoa and based on that interview obtained a search warrant for his home and cell phone. Evidence collected from the home included mixed DNA that matched Ochoa and the victim, and a forensic analysis of the cell phone revealed the sexually explicit photographs of the victim.

¶6 Ochoa, who was thirty-one years old at the time of trial, testified that he did not meet the victim until April of 2009 and only knew the victim as someone that occasionally visited his mother. Ochoa further testified that when he first met the victim, she told him that she was eighteen years old. When initially confronted by police about a possible relationship with the victim, Ochoa denied having any relationship with her. After the police confronted Ochoa with the information they had received from the victim, however, Ochoa admitted to having a relationship with the victim but insisted that he only had sexual intercourse with her when she

was eighteen. Ochoa also denied ever having taken any photographs of the victim with his phone.

¶7 Following nineteen days of trial, a jury convicted Ochoa of Counts 1, 2, 3, 4, 7, 8, 15 and 16. The jury acquitted Ochoa on Counts 9 through 12 and 14 and could not reach an agreement on Counts 5, 6, and 13. The trial court sentenced Ochoa to the presumptive term of twenty years' imprisonment on Counts 1, 2, and 3, to run consecutively.[3] The court sentenced Ochoa to presumptive terms of imprisonment of 1.75 years on Counts 4, 7, and 8 to run concurrently with one another but consecutive to the sentence for Count 3. Finally, the court sentenced Ochoa to presumptive terms of 9.25 years' imprisonment on counts 15 and 16, to be concurrent with each other but consecutive to Counts 4, 7, and 8. The overall result of the court's sentencing was a total of seventy-one years' imprisonment with 504 days of presentence incarceration credit applied to Count 1. Ochoa filed this timely appeal. We have jurisdiction pursuant to A.R.S. § 12-120.21(A)(1), 13-4031 and -4033.

[3] The court's sentencing minute entry does not reflect that it imposed sentences on Counts 1, 2, and 3 pursuant to A.R.S. § 13-705(C). Because it is clear that the court did, in fact, sentence Ochoa based on that statute, the sentencing minute entry should be amended to reflect that intent. *See State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992).

DISCUSSION

¶8 In his supplemental brief, Ochoa raises several issues. We consider alleged trial error under the harmless error standard when a defendant objects at trial and thereby preserves an issue for appeal. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005) (citation omitted). Fundamental error review, in contrast, applies when a defendant fails to object to alleged trial error. *Id.* at 567, ¶ 19, 115 P.3d at 607 (citing *State v. Bible,* 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993)). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* (citation and internal quotations omitted). Under this type of review, Ochoa bears the burden of proving that a fundamental error occurred and that the error caused prejudice. *Id*. at 567, ¶¶ 19–20, 115 P.3d at 607.

¶9 Ochoa first argues on appeal the trial court abused its discretion by not granting his oral motion for change of trial counsel, a motion the record does not reflect that Ochoa ever made. Instead, in February 2011, Ochoa filed a motion to proceed in *propria persona* alleging his counsel, Cooke, refused to file certain motions or seek a remand to the grand jury to present more evidence. The trial court questioned Ochoa

extensively about his right to an attorney and the responsibilities of representing himself, including that the trial would not be continued for him. Ochoa accepted the responsibility and voluntarily waived his right to counsel; the court granted his motion to proceed pro per. However, the court ordered Cooke to remain involved in the case, but only as advisory counsel. Immediately thereafter, and at the same hearing, Ochoa orally moved for change of advisory counsel. The court denied Ochoa's request. A couple of weeks later, Dossey, who had been previously retained as Knapp[4] counsel, became counsel of record and Cooke was relieved of further responsibility.

¶10 The appointment of advisory counsel is a decision within the trial court's discretion and we will not disturb that decision absent an abuse of discretion. *See* Ariz. R. Crim. P. 6.1(c) ("When a defendant waives his or her rights to counsel, the court *may* appoint an attorney to advise him or her during any stage of the proceedings.") (emphasis added); *State v. Gonzales*, 181 Ariz. 502, 510, 892 P.2d 838, 846 (1995). On appeal, Ochoa does not challenge the court's decision to appoint advisory counsel, but instead argues he should have been appointed different advisory counsel. Once a court appoints

[4] *Knapp v. Hardy*, 111 Ariz. 107, 111, 523 P.2d 1308, 1312 (1974).

advisory counsel, however, "[a] defendant does not have the right to the appointment of [advisory] counsel of his choosing." *State v. Fayle*, 134 Ariz. 565, 577, 658 P.2d 218, 230 (App. 1982). Accordingly, the court did not err in denying Ochoa's motion for change of advisory counsel.[5]

¶11 Ochoa asserts his *Brady*[6] and due process rights were violated when the trial court denied several of his motions seeking admission of evidence he believed was relevant. In November 2010, Ochoa filed a motion asking the court to determine the admissibility of the victim's history of engaging in prostitution and the fact that the victim had falsely accused him of assaulting her in the past. Ochoa claimed such evidence would constitute proper impeachment, was relevant and material, and its prejudicial nature would not outweigh the probative value. In response, the State asserted it would introduce evidence of the victim's history of prostitution, but the assault request was mere conjecture. The court determined the

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[5] We also note that advisory counsel was appointed only for a brief period of time following the trial court's order granting Ochoa's request to represent himself. That changed, however, when Ochoa hired a different attorney to represent him shortly before trial. Moreover, to the extent Ochoa suggests that his trial counsel failed to provide adequate representation, we do not address ineffective assistance of counsel claims on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

[6] *See Brady v. Maryland*, 373 U.S. 83 (1963).

victim's prostitution history would be admissible, but that without additional facts, evidence regarding an alleged assault would be inadmissible without further court order.

¶12 In January 2011, Ochoa requested an *in camera* inspection of all CPS records involving the victim, her sexual and/or prostitution history, and her alleged relationship with Ochoa. He also requested that certain CPS caseworkers submit to interviews. Ochoa argued the *in camera* inspection and interviews were required under *Brady* because they would reveal the victim previously told a CPS caseworker that she did not have a relationship with Ochoa. He asserted non-disclosure of the material would deprive him of a fair trial and the ability to impeach and cross-examine the victim. The State assured the court the victim would testify to her admission and therefore, the intrusion into her CPS records was not needed. Based on the State's avowal that the victim would testify to the information Ochoa sought from the CPS records, the court denied Ochoa's request for an *in camera* inspection. The court also denied Ochoa's request for information regarding the victim's prior sexual relationships, classifying the request as a "fishing expedition" and not relevant to the case. As to Ochoa's motion, the court found that "the information sought by [Ochoa] and any benefits he may or may not have as a result of this information, do not outweigh the . . . Victim's right to confidentiality and

the harm that may come to her as a result of the release of the information."

¶13 "[W]hether a criminal defendant is entitled to discovery of certain evidence is a matter within the trial court's discretion." *State v. Tyler*, 149 Ariz. 312, 314, 718 P.2d 214, 216 (App. 1986). We find no abuse of discretion here. The trial court appropriately resolved Ochoa's motions, in light of the State's avowal, balancing Ochoa's due process rights with the victim's rights. *See State v. Connor*, 215 Ariz. 553, 558, ¶¶ 9, 11 161 P.3d 596, 601 (App. 2007) (requiring, in context of medical records request, a trial court to weigh competing rights of defendant and victim and demanding that a defendant present a "sufficiently specific basis" for disclosure); *see also* A.R.S. § 8-807(J) (requiring a court to "balance the rights of the parties who are entitled to confidentiality . . . against the rights of the parties who are seeking the release of the CPS information").[7]

¶14 Ochoa further argues the court erred in granting the State's motion in limine to preclude evidence of the victim's

[7] Ochoa also makes passing reference to the court's denial of a motion to continue trial to allow him time to gather evidence regarding the victim's age and to refute her claim of no past sexual conduct. The record does not reveal such a motion. To the extent Ochoa is referring to his March 8, 2011 motion to continue, we find no error. The court denied Ochoa's March 8 motion to continue after his new counsel assured the court that counsel was ready to proceed with trial.

mental health. On the first day of trial,[8] the State filed a motion in limine to preclude evidence that the victim was at one time a "cutter." The State asserted that "cutting" is a version of self-harm and is therefore a medically diagnosed symptom outside the knowledge of an average juror. Without expert testimony, the State argued that such evidence would be confusing, prejudicial, and misleading to the jury. *See* Ariz. R. Evid. 403. Ochoa responded that evidence of the victim's personality disorders would make her testimony less credible. The trial court granted the State's motion, concluding that the evidence was irrelevant under Arizona Rules of Evidence 402 or 403. As to whether the victim had a personality disorder, the court questioned whether an expert was needed, but ultimately decided to "cross that bridge when we come to it." Ochoa never raised the personality disorder issue again.

¶15 A court has broad discretion regarding admission of evidence and we only disturb its ruling when there is an abuse of that discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167,

[8] Ochoa suggests that the court erred in ruling on the motion in limine because it was untimely under Arizona Rule of Criminal Procedure 16.1. Invocation of Rule 16.1 "is a judicial remedy designed to protect judicial interests. Its invocation, therefore, rests in the discretion of the trial court subject to review only for abuse." *State v. Vincent*, 147 Ariz. 6, 8-9, 708 P.2d 97, 99-100 (App. 1985). The trial court acted within its discretion in deciding to consider the State's motion on the merits. *See State v. Colvin*, 231 Ariz. 269, ___, 293 P.3d 545, 547 (App. 2013).

800 P.2d 1260, 1275 (1990). According to Arizona Rule of Evidence 402, evidence is not admissible unless it is relevant. "Evidence is relevant if it has any basis in reason to prove a material fact in issue." *State v. Kennedy*, 122 Ariz. 22, 26, 592 P.2d 1288, 1292 (App. 1979). Likewise, when the "probative value [of certain evidence] is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" a court can exclude relevant evidence. Ariz. R. Evid. 403. Here, the trial court properly applied these standards and determined that the victim's mental health would have no bearing on whether her recollection of events was truthful and was therefore irrelevant. Thus, the court did not abuse its discretion in precluding that evidence.

¶16 As we interpret his next argument, Ochoa asserts the court erred in denying his request to appoint a defense expert after it allowed the untimely disclosure of a witness for the State. At the March 9 hearing, Ochoa complained of a recently received Notice of Supplement of Witnesses from the State.[9] The supplement added Detective Oldenburg as a witness who would prepare a supplemental report of the cell phone analysis. Ochoa

[9] To the extent Ochoa asserts the State misrepresented several facts to the court, our review of the record does not indicate any such misconduct. Moreover, Ochoa's allegations are nothing more than speculation and are therefore insufficient to establish prejudice. *State v. Martin*, 225 Ariz. 162, 166, ¶ 15, 235 P.3d 1045, 1049 (App. 2010).

requested a defense expert to "refute or at least neutralize what the new expert is going to say." The State responded, explaining to the court that Detective DeMassey, who had done the original phone analysis, had been deployed, and thus a second report was necessary. The State avowed that the supplement would provide the exact same information that had previously been disclosed to defense counsel. The State also characterized Oldenburg as a "technician," not an "expert." The court clarified several times that no new information would be used. The State further explained that it would have the supplemental report available for defense counsel to review prior to trial. Based on this exchange with counsel, the court did not view the late disclosure as preventing Ochoa from being ready for trial.

¶17 Ochoa again moved for a court-appointed defense expert who could also perform an analysis on the phone. The court denied the request because it was untimely, and Ochoa conceded this point. Thereafter, the court concluded that it would reconsider Ochoa's request for a defense expert if Oldenburg's supplement indicated something new or different from the previous analysis. Absent a change in analysis, the court explained that neither Ochoa's defense nor the posture of the case would change and that consequently, Ochoa would not be prejudiced.

¶18 Broad discretion is given to a trial court in determining whether evidence has been properly disclosed. *See Link v. Pima County*, 193 Ariz. 336, 338, ¶ 3, 972 P.2d 669, 671 (App. 1998). A court's decision regarding disclosure will not be disturbed absent an abuse of that discretion. *Solimeno v. Yonan*, 224 Ariz. 74, 77, ¶ 9, 227 P.3d 481, 484 (App. 2010). Here, the trial court expressly stated that if new information emerged from Oldenburg's analysis and supplement, it would reconsider Ochoa's motion for appointment of a defense expert. Presumably, no new evidence emerged because Ochoa never re-urged his request for appointment of an expert. Thus, we find no abuse of discretion.

¶19 Nor can we say the trial court abused its discretion in permitting the late disclosure of Oldenburg's supplemental report. It is undisputed that the State disclosed DeMassey's original report of the cell phone "dump" to defense counsel within the applicable time limits. *See* Ariz. R. Crim. P. 15.1 and 15.6. Oldenburg's report, which became necessary due to DeMassey's absence, did not change the substance of what Ochoa had received previously and thus could not have adversely affected his defense strategy.

¶20 Next, Ochoa argues the evidence obtained from his cell phone at the time of his arrest was inadmissible because it was seized in violation of his Fourth Amendment rights. Because

Ochoa never moved to suppress the evidence, however, we have no record to review to determine whether fundamental error occurred. *See State v. Anderson*, 174 Ariz. 431, 433, 821 P.2d 669, 671 (1993) (refusing to consider a fundamental error analysis when "the record is inadequate").

¶21 Ochoa also argues the trial court erred in denying his motion for new trial because (1) the jury instructions for Counts 15-19 (sexual exploitation of a minor) were erroneous and (2) there was insufficient evidence to support the jury's finding that he "possessed" a visual depiction of a minor engaging in sexually exploitative conduct. With respect to the jury instructions, Ochoa asserts that the court improperly defined "sexual conduct" because the definition did not pertain specifically to the crime of sexual exploitation of a minor. In his proposed instructions, Ochoa requested that the trial court give certain instructions provided in the Revised Arizona Jury Instructions ("RAJI"). As relevant here, Ochoa requested instructions 14.05.01 ("Sexual Conduct with a Minor") and 32.11 ("Definitions"). Instruction 14.05.01 provides, "[t]he crime of sexual conduct with a minor requires proof that the defendant intentionally or knowingly engaged in sexual intercourse with a person under eighteen years of age." And instruction 32.11 defines sexual conduct as "sexual contact, sexual intercourse, oral sexual contact or sadomasochistic abuse." Those

instructions were given verbatim at trial. Because Ochoa requested the instruction he is challenging on appeal, "we will not consider it as a ground of error." *State v. Logan*, 200 Ariz. 564, 566-67, ¶ 15, 30 P.3d 631, 633-34 (2001).

¶22 Moreover, a jury could find Ochoa guilty of sexual exploitation of a minor if it found beyond a reasonable doubt that Ochoa knowingly possessed "any visual depiction in which a minor is engaged in exploitative exhibition *or* other sexual conduct." A.R.S. § 13-3553 (emphasis added). In the context of the sexual exploitation charges, based on the evidence received at trial, there was no evidence of "sexual conduct" as defined by A.R.S. § 13-3551 and thus instructing the jury on the applicable definition of that phrase for those charges was not necessary and, indeed, would have been improper. *See State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995) (stating that a defendant is entitled to a jury instruction if it is reasonably supported by the evidence). Furthermore, Ochoa's conviction did not have to turn on whether the picture depicted "sexual conduct;" rather, Ochoa could still be found guilty of sexual exploitation of a minor based on possessing images of a minor engaged in "exploitative exhibition." Thus, the only applicable definition would be "exploitative exhibition," which Ochoa concedes was properly given, and the evidence supports

such an instruction. We therefore find no error, fundamental or otherwise.

¶23 Additionally, Ochoa asserts the jury was "deceived" by the court's inclusion of the term "nudity" following the definition of "sexual exploitation of a minor" in the jury instructions. However, jury instructions "must be viewed in their entirety in order to determine whether they accurately reflect the law." *State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000). And, we presume jurors follow the instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996) ("[E]xperience teaches us that [jurors] possess both common sense and a strong desire to properly perform their duties."). Ochoa's assertion that "the jury must have thought the term 'nudity' was included for a reason" is speculative and therefore insufficient to establish prejudice. *See State v. Martin*, 225 Ariz. 162, 166, ¶ 15, 235 P.3d 1045, 1049 (App. 2010).

¶24 Finally, Ochoa contends there was insufficient evidence demonstrating he "possessed" a visual depiction of a minor engaging in exploitative exhibition. Specifically, Ochoa argues his testimony shows he did not know the images were on the phone, Oldenburg's testimony did not confirm that Ochoa viewed the photos on the phone, and the State had no physical

evidence that Ochoa could have viewed the images on the broken phone or when the phone was functional.

¶25 "When reviewing for sufficiency of the evidence, we determine whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have convicted the defendant of the crime[s] in question." *State v. McGill*, 213 Ariz. 147, 152, ¶ 17, 140 P.3d 930, 935 (2006). The victim testified that Ochoa took pictures of her exposed vaginal area with his phone, which she identified at trial, and that she had seen Ochoa review the pictures on his phone and heard him make comments about them. That evidence was sufficient for the jury to rationally conclude Ochoa possessed the images in question and that they depicted exploitative exhibition. *See id*.

CONCLUSION

¶26 We have searched the entire record for reversible error and find none. All of the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The record shows Ochoa was present and represented by counsel at all pertinent stages of the proceedings (except when he represented himself at his own request), was afforded the opportunity to speak before sentencing, and the sentences imposed were within statutory limits. Based on the foregoing, we affirm Ochoa's convictions and sentences, except that we modify the sentencing

minute entry to reflect that the trial court sentenced Ochoa on Counts 1 through 3 pursuant to A.R.S. § 13-705(C) (providing increased punishment for dangerous crimes against children).

¶27 Upon the filing of this decision, counsel shall inform Ochoa of the status of the appeal and his options. Defense counsel has no further obligations unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Ochoa shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
SAMUEL A. THUMMA, Presiding Judge

_____/s/_____
DIANE M. JOHNSEN, Judge