IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DELFINO GARCIA-ORTIZ, *Appellant*.

No. 1 CA-CR 12-0309
FILED 11-19-2013

Appeal from the Superior Court in Maricopa County
No. CR2006-009451-001
The Honorable Roger E. Brodman, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz

Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Terry J. Reid

Counsel for Appellant

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Patricia K. Norris and Judge Andrew W. Gould joined.

T H U M M A, Judge:

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Garcia-Ortiz has advised the court that, after searching the entire record, counsel has found no arguable question of law and asks this court to conduct an *Ander*s review of the record. Garcia-Ortiz was given the opportunity to file a supplemental brief pro se, but made no such filing. Finding no reversible error, Garcia-Ortiz's convictions and resulting sentences are affirmed.

FACTS[1] AND PROCEDURAL HISTORY

¶2 As is relevant here, in September 2006, a grand jury indicted Garcia-Ortiz of one count of sexual abuse, a class three felony, and two counts of sexual conduct with a minor, class two felonies, committed against L.C.. The charged offenses occurred between January 10, 2004 and November 9, 2005, when L.C. would have been 11 or 12 years old.[2] In September 2006, a warrant issued for Garcia-Ortiz's arrest and he was arrested in 2011.

¶3 Pretrial, the State moved to admit character trait evidence under Ariz. R. Evid. 404(c) consisting of other improper acts by Garcia-Ortiz against a second minor R.L. After full briefing, an evidentiary

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[1] This court views the facts "in the light most favorable to sustaining the verdict, and resolve[s] all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997) (citation omitted).

[2] Although the indictment originally alleged the crimes occurred between January 10, 2005 and November 9, 2005, at trial, without objection, the court granted the State's motion to amend the beginning date to January 10, 2004 to conform with the evidence.

hearing and oral argument, the superior court allowed evidence of Garcia-Ortiz's other improper acts taken against R.L. in a minute entry containing specific findings required by Ariz. R. Evid. 404(c).

¶4 The evidence at trial showed that the families of L.C. and Garcia-Ortiz were friends, and L.C. spent time at Garcia-Ortiz's home because she was good friends with his daughter. L.C. testified that, when she was 11 or 12 years old, Garcia-Ortiz fondled her breast inside her blouse, anally raped her and forced her to masturbate him. After L.C. disclosed these incidents to a teacher in November 2005, an investigation followed.

¶5 R.L. testified that her family and Garcia-Ortiz's family were friends and would often spend time together. R.L. testified that, on one occasion when she was approximately 11 or 12 years old, Garcia-Ortiz "sat me on his lap and started kissing my ear. . . . I could feel his saliva. It wasn't a simple kiss. It was like a man to a woman." R.L. described another occasion in which Garcia-Ortiz "grabbed [her] legs" and touched her "private parts" over her clothes. At some point, R.L. disclosed these incidents to her family and the police, although the date of disclosure is unclear from the record. Though both L.C. and R.L. were friends with Garcia-Ortiz's daughter, they did not know each other.

¶6 After a seven day trial, and after being instructed on the law and hearing closing arguments, the jury found Garcia-Ortiz guilty as charged. In special verdict forms for counts two and three, the jury found L.C. was "12 years of age or under" at the time of the offenses. In a special verdict form for count two, the jury found the sexual contact was not masturbatory in nature. Defendant did not object to the jury's findings on the verdict forms or at sentencing. The superior court sentenced Garcia-Ortiz to lifetime probation for count one; life imprisonment with the possibility of release after 35 years for count two and a presumptive, consecutive term of twenty years' imprisonment for count three.

¶7 Garcia-Ortiz timely appealed his convictions and resulting sentences. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031, and -4033(A)(1).[3]

[3] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

DISCUSSION

¶8 Counsel for Garcia-Ortiz advised this court that after a diligent search of the entire record, counsel found no arguable question of law. This court reviews Garcia-Ortiz's convictions and resulting sentences for reversible error. *See State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). A review of counsel's brief and the record reveals no such error.

¶9 The record shows Garcia-Ortiz was represented by counsel and assisted by an interpreter at all stages of the proceedings and counsel was present at all critical stages. The evidence presented at trial was substantial and supports the verdict. From the record, all proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. The sentence imposed was within the statutory limits. Neither Garcia-Ortiz nor his counsel has raised any issues on appeal. The court's review of the record reveals two issues that merit further discussion.

I. Sentencing.

¶10 For count 3, the jury found L.C. was "12 years of age or under" between January 10, 2004 and November 9, 2005, the time of the offenses. The superior court properly looked to the statutes in effect at the time Garcia-Ortiz committed the crime to determine his sentence. *See* A.R.S. § 1-246. Although not completely clear from the record, for count 3, it appears Garcia-Ortiz was sentenced pursuant to A.R.S. § 13-604.01(B) (2005). That statute, however, was unchanged from 2004 and requires the victim be "under twelve years of age," whereas the jury verdict for count 3 found the victim was "12 years of age or under" at the time of the crime. Accordingly, the jury finding did not align with the sentencing requirement under A.R.S. § 13-604.01(B) (2005). Even assuming that lack of alignment was fundamental error (an issue the court need not resolve), Garcia-Ortiz was not prejudiced by any such issue.

¶11 For count 3, Garcia-Ortiz was sentenced to 20 years in prison, which the superior court described as the presumptive sentence. While the jury finding for count 3 that L.C. was "12 years of age or under" does not align exactly to the statutory language under either A.R.S. § 13-604.01(B) (2005) (requiring the victim be "under twelve years of age") or § 13-604.01(C) (2005) (requiring the victim be "twelve, thirteen or fourteen years of age"), Garcia-Ortiz was sentenced under one or the other of these statutes and the presumptive sentence under either statute is 20 years in prison. More specifically, a sentence under A.R.S. § 13-604.01(B) (2005)

may be life imprisonment (which was not imposed here for count 3) and, if not life, then a presumptive prison term of 20 years. A sentence under A.R.S. § 13-604.01(C) (2005) does not have a life imprisonment option and directs a presumptive prison term of 20 years. Accordingly, under either statute, the presumptive sentence was the 20 year prison term imposed.

¶12 As applicable here, for both statutes, A.R.S. § 13-604.01(F) (2005) allows an increase or decrease to the presumptive term by up to seven years. During sentencing, the superior court read and considered several documents, heard arguments from counsel and reviewed the statutory requirements before imposing the presumptive 20-year term. There is no indication from the record, and Garcia-Ortiz has not presented any arguments or evidence, that his sentencing would differ under A.R.S. § 13-604.01(B) (2005) as opposed to A.R.S. § 13-604.01(C) (2005). On this record, Garcia-Ortiz has not shown any prejudice and, therefore, his sentence is affirmed. *Cf. State v. Paredes*, 181 Ariz. 47, 51, 887 P.2d 577, 581 (App. 1994) (declining remand in absence of prejudice despite sentencing error).[4]

II. Ariz. R. Evid. 404(c) Character Trait Evidence.

¶13 When a defendant is charged with certain sex offenses, specified character trait evidence may be admitted at trial "if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Ariz. R. Evid. 404(c). Before admitting such evidence, the superior court must make specific findings, including (1) finding by clear and convincing evidence that defendant committed the act(s); (2) finding the commission of the act(s) provides a reasonable basis to infer defendant had a character trait giving rise to an aberrant sexual propensity to commit the charged sexual offense and (3) finding the evidentiary value of the other act is not substantially outweighed by the danger of unfair prejudice or specifically enumerated factors. Ariz. R. Evid. 404(c); *State v. Aguilar*, 209 Ariz. 40, 49, ¶ 30, 97 P.3d 865, 874 (2004). The superior court also "shall instruct the jury as to the proper use of such evidence." Ariz. R. Evid. 404(c)(2).

[4] There is no comparable issue for Count 2, because the jury findings parallel the statutory language in requiring the minor be "twelve years of age or younger," and the contact not be masturbatory in nature. *See* A.R.S. § 13-604.01(A) (2005).

¶14 Prior to trial but after briefing, the superior court held an evidentiary hearing, reviewed interviews and held oral argument regarding the admissibility of the prior acts pursuant to Ariz. R. Evid. 404(c). The superior court issued a detailed minute entry, seven pages of which address the 404(c) issues, and made all findings required by the rule. At trial, the court instructed the jury on the proper use of such evidence. Because the court properly considered the facts and circumstances and made the required specific findings under Ariz. R. Evid. 404(c), which are supported by the record, there was no error.

CONCLUSION

¶15 This court has read and considered counsel's brief and has searched the record provided for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). From that review, Garcia-Ortiz's convictions and sentences are affirmed.

¶16 Upon the filing of this decision, counsel's obligation to represent Garcia-Ortiz in this appeal has ended. Counsel must only inform Garcia-Ortiz of the status of the appeal and of Garcia-Ortiz's future options, unless counsel identifies an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 585, 684 P.2d 154, 157 (1984). Garcia-Ortiz shall have 30 days from the date of this decision to proceed, if desired, with a pro se motion for reconsideration or petition for review.

Ruth A. Willingham · Clerk of the Court
FILED: mjt