**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
**See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24**

DIVISION ONE
FILED: 05-04-2010
PHILIP G. URRY, CLERK
BY: GH

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA, | ) | 1 CA-CR 08-0075 |
| | ) | |
| Appellee, | ) | DEPARTMENT D |
| | ) | |
| v. | ) | MEMORANDUM DECISION |
| | ) | (Not for Publication - |
| PETER STANLEY WLUDYKA, | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |
| | ) | |

Appeal from the Superior Court in Mohave County

Cause No. CR-2006-0394

The Honorable Steven F. Conn, Judge

**AFFIRMED IN PART; VACATED IN PART**

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Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

Dana P. Hlavac, Mohave County Public Defender — Kingman
By Jill L. Evans, Deputy Public Defender
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**O R O Z C O**, Judge

**¶1** Peter Stanley Wludyka (Defendant) appeals his convictions and sentences on three counts of child molestation,

one count of sexual conduct with a minor, and nine counts of sexual exploitation of a minor, all class two felonies and dangerous crimes against children. For the reasons that follow, we vacate one child molestation conviction and affirm the remaining convictions and sentences.

**FACTS AND PROCEDURAL HISTORY**

**¶2** The convictions on three counts of child molestation and one count of sexual conduct arose from Defendant's sexual contact with three girls under the age of fifteen and oral sexual contact with one of the girls. The convictions for nine counts of sexual exploitation of a minor arose from Defendant's possession of nine CD-ROM digital files containing visual depictions of victims under the age of fifteen engaged in sexual conduct. The trial court sentenced Defendant to mitigated terms on each conviction, except for the two counts involving the same victim, which were to be served consecutively, for a total of one hundred twenty-three years in prison. Defendant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031, and -4033.A (2010).[1]

[1] We cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

## DISCUSSION

### Prosecutorial Vindictiveness

**¶3** Defendant argues that the State's amendment of the Indictment to add an explicit allegation that the nine counts of sexual exploitation of a minor were dangerous crimes against children was "presumptively and apparently vindictive" and the State failed to meet its burden to rebut the presumption of vindictiveness. Defendant thus argues that the trial court erred in denying his motion to dismiss the Indictment, or alternatively, the enhancements, for prosecutorial vindictiveness. Defendant requests the Indictment on these nine counts be dismissed and his convictions vacated, or the enhancements dismissed and these counts remanded for resentencing.

**¶4** This case arose from the joinder of two separate indictments. The State first indicted Defendant on three counts of sexual conduct with a minor, three counts of child molestation, and one count of continuous sexual abuse of a child. The first indictment also alleged that each victim was under the age of fifteen. With respect to the count of continuous sexual abuse, the State alleged the victim was under the age of fourteen and specifically referred to A.R.S. § 13-

604.01 (2001),[2] the sentencing enhancement statute for dangerous crimes against children.[3] Two months later, the State indicted Defendant on nine counts of sexual exploitation of a minor. Each count of the second indictment alleged that the visual depictions of minors engaged in sexual conduct depicted a minor under fifteen years of age. In the second indictment, the State cited A.R.S. § 13-3553 (2001), but did not expressly cite A.R.S. § 13-604.01, or identify the offenses as dangerous crimes against children.

**¶5** During the first trial, the trial court granted judgment of acquittal on one count of sexual conduct with a minor and one count of child molestation, Counts One and Two of the Indictment. The trial court reduced the continuous sexual abuse charge, Count Three, to a charge of child molestation. The jury acquitted Defendant of one count of sexual conduct of a minor, Count Four, but deadlocked on all remaining counts, including all nine sexual exploitation counts.

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[2] Section 13-604.01 has since been renumbered as A.R.S. § 13-705 (2010).

[3] We cite to the version of the statutes Defendant was alleged to have violated in effect at the time the crimes were allegedly committed.

**¶6** Before the second trial on the remaining counts,[4] the State filed a "Motion to Add Allegation of Dangerous Crime Against Children as an Addendum to the Indictment" alleging the nine counts of sexual exploitation of a minor. The State explained that it was simply attempting to correct its mistake in failing to refer to the sentencing enhancement statute for dangerous crimes against children in the original Indictment. Defendant objected on the ground that he was now facing much more serious charges than the simple class two felonies for sexual exploitation of a minor that he had faced at the first trial, a concern the trial court also expressed. The trial court granted the State's motion with the proviso that he would permit Defendant to re-open the issue if he were convicted on the sexual exploitation counts and the jury found the minors depicted were under fifteen years of age.

**¶7** After the jury convicted Defendant of the sexual exploitation counts and found the offenses involved a minor under the age of fifteen, Defendant moved to dismiss the Indictment, or in the alternative, bar application of the enhancement for dangerous crimes against children. Defendant argued that the State acted vindictively in adding the

[4] On retrial, the trial court renumbered the reduced Count Three charge as Count One, and designated as Counts Two, Three and Four, the remaining charges of sexual conduct with a minor and two counts of molestation. The sexual exploitation charges were renumbered as Counts Five through Thirteen.

allegation that these offenses were dangerous crimes against children after he rejected a plea offer, by "drastically increasing the prison range [Defendant] would now be facing," from three to twelve and one-half years on each count for a normal class two felony, to ten to twenty-four years on each count for a dangerous crime against children. The State responded that the original Indictment sufficiently alleged that the sexual exploitation charges were dangerous crimes against children and subject to the sentencing enhancements, and Defendant's position during plea negotiations before the first trial offering to plead to "lifetime probation on one of the exploitation counts" confirmed that he was aware that the State was alleging that these were dangerous crimes against children. The State argued that because the trial court had expressed a belief during the first trial that the Indictment had not alleged the sentencing enhancement, it found it necessary to file the addendum specifically alleging the sentencing enhancement "to put the court on notice . . . that the issue needed to be addressed."[5]

**¶8** At argument on the motion before sentencing, the trial court noted that at the first trial, it had not instructed the

[5] The record on appeal does not include transcripts from the first trial regarding this discussion, or of the discussion about verdict forms or instructions.

jury that it was required to find whether the minors portrayed in the sexual exploitation counts were under the age of fifteen, as required for sentencing under the dangerous crimes against children enhancement, nor had it given the jury a verdict form to do so. The trial court found, however, that the original Indictment charged sexual exploitation of a minor under the age of fifteen, and its failure to explicitly refer to A.R.S. § 13-604.01 "probably is a technical deficiency." It further found that the exhibits attached to the State's response regarding plea negotiations indicated that Defendant was aware he was facing the sentencing enhancement for dangerous crimes against children. The trial court also found no "impropriety in the circumstances under which the State filed the allegation that the Sexual Exploitation of Minor charges were dangerous crimes against children." As a consequence, it found no basis to dismiss the Indictment, or alternatively, the enhancement allegations. Therefore, the trial court denied Defendant's motion and imposed sentences for the sexual exploitation convictions enhanced as dangerous crimes against children.

**¶9** We review a trial court's ruling on a motion to dismiss for vindictive prosecution for abuse of discretion. *State v. Brun,* 190 Ariz. 505, 506, 950 P.2d 164, 165 (App. 1997). We find no such abuse in this case.

**¶10** A defendant's due process right to protection from charges brought to penalize him for exercising his legal rights limits a prosecutor's otherwise broad discretion over charging decisions. *Blackledge v. Perry,* 417 U.S. 21, 27-29 (1974); *see United States v. Goodwin*, 457 U.S. 368, 382 (1982). A prosecutor is therefore constitutionally prohibited from substituting a more serious charge for an original charge against a defendant, to retaliate against the defendant for exercising a constitutional right, such as the right to appeal a conviction. *See Perry*, 417 U.S. at 28-29. A defendant may demonstrate prosecutorial vindictiveness by proving "objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." *Goodwin*, 457 U.S. at 384.

**¶11** Because such a showing is difficult, a defendant may under some circumstances rely upon a rebuttable presumption of vindictiveness. *See id.* at 376; *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992). The presumption arises when a defendant presents facts that indicate "a realistic likelihood of vindictiveness." *See Goodwin*, 457 U.S. at 384 (declining to apply presumption to a prosecutor's pre-trial decision to indict defendant on felony charges arising from same incident as pending misdemeanor charges after defendant demanded a jury trial on the pending misdemeanor charges) (citation and internal

quotations omitted); *Tsosie*, 171 Ariz. at 687, 832 P.2d at 704 (holding that re-indictment on more serious charges following defendant's successful invocation of his speedy trial rights raised presumption of vindictiveness). A prosecutor may overcome the presumption of vindictiveness with "objective evidence justifying the prosecutor's action," such as evidence demonstrating that it was impossible to proceed on the more severe charges at the outset. *See Goodwin*, 457 U.S. at 376 n.8; *Perry*, 417 U.S. at 29 n.7; *Tsosie,* 171 Ariz. at 688, 832 P.2d at 705.

**¶12** We find no abuse of discretion in the trial court's finding that the prosecutor had not acted vindictively because the addendum did not increase the punishment or in any way "up the ante" after the first jury failed to reach a determination on the charges. Arizona Rule of Criminal Procedure 13.2.b requires that an indictment "state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated." Rule 13.2 does not require the indictment to include a citation to the sentencing statutes. Nor does A.R.S. § 13-604.01 require that the indictment include an allegation that the offense is a dangerous crime against children. *See generally id.; compare* A.R.S. § 13-703.N (Supp. 2009) ("The penalties prescribed by this section shall be substituted for

the penalties otherwise authorized by law if an allegation of prior conviction is charged in the indictment or information and admitted or found by the court.").

**¶13** All that was necessary to provide notice to Defendant that the State was alleging that these crimes were dangerous crimes against children was a citation to A.R.S. § 13-3553 and an allegation that the victims depicted were under the age of fifteen. *See State v. Woolbright*, 178 Ariz. 462, 463-64, 874 P.2d 1019, 1020-21 (App. 1994) (holding that citation to statute which referenced A.R.S. § 13-604.01 and allegation that victim was under fifteen years was sufficient notice to invoke enhancement). In this case, each count of sexual exploitation of a minor alleged a violation of A.R.S. § 13-3553 with a victim under the age of fifteen. Section 13-3553.C provides in pertinent part that "[s]exual exploitation of a minor is a class 2 felony and if the minor is under fifteen years of age it is punishable pursuant to § 13-604.01." Section 13-604.01.D requires that the trial court impose the specified punishment for the offense of sexual exploitation of a minor under the age of fifteen. Accordingly, the original Indictment provided notice to Defendant that the State's sexual exploitation charges were subject to the sentencing enhancement for dangerous crimes against children.

**¶14** The State's addendum to the Indictment expressly stated that the sexual exploitation charges were subject to the sentencing enhancement under A.R.S. § 13-604.01. Therefore, Defendant was not exposed to an increased sentence. Because the addendum did not increase Defendant's potential punishment, there was no realistic likelihood that the prosecutor acted vindictively in filing the addendum after the jury deadlocked on the charges in the first trial. *See State v. Webb*, 140 Ariz. 321, 323, 681 P.2d 473, 475 (App. 1984) (holding that vindictive prosecution was not demonstrated because "[t]he prosecutor did not charge appellant with a higher crime," but merely revoked a plea offer); *United States v. Burt*, 619 F.2d 831, 836 (9th Cir. 1980) (stating that in most cases, the appearance of vindictiveness "involves a showing that the prosecutor has re-indicted the defendant and increased the severity of the charge").

**¶15** For reasons not reflected in the record, the trial court did not instruct the jurors in the first trial that they must determine whether the victims portrayed in the sexual exploitation counts were under the age of fifteen, which was necessary to impose the sentencing enhancement. The trial court nevertheless found, after consideration of the pleadings and evidence in the record at the second trial, that the addendum cured what was "probably a technical deficiency" in the original

Indictment, and was not improper. We find no abuse of discretion in this finding.

**¶16** Furthermore, there was no realistic likelihood, and thus no presumption, that the prosecutor acted vindictively in offering this addendum. The addendum simply clarified what the original Indictment had already alleged, that the sexual exploitation offenses involved victims under the age of fifteen, subjecting Defendant to the sentencing enhancement of A.R.S. § 13-604.01.

**¶17** Moreover, even assuming that a presumption of vindictiveness arose from these circumstances, the State sufficiently rebutted the presumption. The State explained that it believed the original Indictment provided adequate notice of the enhancement, but, because the trial court had indicated it did not agree during the first trial, it had filed the addendum to "put the court on notice . . . that the issue needed to be addressed." On this record, we find no abuse of discretion in the trial court's refusal to dismiss the Indictment or the addendum, on the grounds of prosecutorial vindictiveness.

**Molestation a Lesser Included Offense of Continuous Sexual Abuse**

**¶18** Defendant argues that the trial court erred as a matter of law in finding that child molestation was a lesser included offense of the charged crime of continuous sexual abuse of a child. Defendant thus contends his conviction on the

uncharged crime of molestation cannot stand. After reconsidering its judgment of acquittal in the first trial, the trial court reduced the count of continuous sexual abuse of a child to child molestation as a lesser included offense. The jury convicted Defendant of the reduced count of molestation at the second trial, and Defendant was sentenced to ten years on this conviction.

**¶19** Based on this Court's recent decision in *State v. Larson*, 222 Ariz. 341, 214 P.3d 429 (App. 2009) (finding sexual conduct with a minor is not a lesser included offense of continuous sexual abuse of a child), the State concedes in its Answering Brief that the trial court erred as a matter of law in reducing the continuous sexual abuse charge to one of molestation. Defendant was thus convicted of an offense with which he had not been charged, violating his right to be informed of the accusation against him and to due process. *See id.* at 343, ¶ 6, 214 P.3d at 431. Relying on *Larson*, and the State's concession, we vacate Defendant's conviction on Count One for child molestation, and the corresponding ten-year sentence. *See id.* at 345, ¶ 18, 214 P.3d at 433.

## CONCLUSION

**¶20** For the foregoing reasons, we vacate Defendant's conviction on Count One, child molestation, and his ten-year sentence on this conviction, but affirm Defendant's convictions and sentences on the remaining counts.

/S/
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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
LAWRENCE F. WINTHROP, Judge

/S/
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JON W. THOMPSON, Judge