DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 09-0223
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)
JOHN JOSEPH BYRNE, Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-155803-001 SE

The Honorable Helene F. Abrams, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Stephen M. Johnson — Phoenix
Attorney for Appellant

D O W N I E, Judge

¶1 John Joseph Byrne ("defendant") appeals his convictions for child molestation, sexual conduct with a minor, and sexual abuse. Pursuant to *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878

(1969), defense counsel has advised that he has thoroughly searched the record and found no arguable question of law and requests that we review the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona* but did not do so. On appeal, we view the evidence in the light most favorable to sustaining the convictions. *State v. Tison,* 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981), *cert. denied,* 459 U.S. 882 (1982).

FACTS AND PROCEDURAL HISTORY

¶2 In 2005, a thirteen-year-old girl ("victim") rode a school bus driven by defendant. She began spending time alone with defendant on the bus. One day, defendant gave the victim a red rose and a card, telling her not to show it to anyone. The victim told her mother that her "boyfriend" gave her the rose.

¶3 In February 2006, the victim turned fourteen. Her interactions with defendant became "more physical." Defendant would drive the bus to a vacant lot and park. One day, defendant began touching the victim's breasts and vagina over her clothes. On other occasions, he rubbed his penis on her stomach underneath her clothes and made her touch his penis with her hand.

¶4 On August 20, 2007, defendant parked the bus near a vacant lot, walked to the back of the bus, and "kept saying come

here." The victim initially refused, but ultimately went to the back of the bus. Defendant touched her vagina under her clothes and her breast with his hand, put his mouth on her breasts, exposed his penis, "made" the victim touch it, and put his finger in her vagina. On August 24, 2007, defendant pulled down the victim's pants and touched her vagina, touched her breasts with his mouth and hands, rubbed his penis against her vagina, and put his fingers and penis inside her vagina; the victim touched defendant's penis. The next morning, the victim called her mother crying and said she might be pregnant because she had "sex . . . [with] the bus driver."

¶5 On August 25, 2007, Detective J.W. interviewed the victim, who placed a recorded confrontation call to defendant. A forensic nurse conducted a sexual-assault exam and documented a bruise on the victim's chest, "two bruises and a scratch on either leg" and a "fresh" genital tear. Defendant was arrested and advised of his *Miranda* rights; he stated he was "willing to talk." Pursuant to a search warrant, officers searched defendant's home and seized several items, including a hand-written note from defendant's desk that referenced the victim by her first name as "the hot Burnett [sic]."

¶6 Defendant was indicted on eleven counts. A jury trial ensued. At the conclusion of the State's case, the court denied defendant's motion for a judgment of acquittal pursuant to Rule

20, Arizona Rules of Criminal Procedure ("Rule"), on eight of the counts. The defense presented no evidence.

¶7 The jury convicted defendant of molestation of a child, a class 2 felony and dangerous crime against children (Count 1); sexual conduct with a minor, a class 2 felony and dangerous crime against children (Count 2); sexual abuse, a class 3 felony and dangerous crime against children (Count 3); and three counts of sexual conduct with a minor, all class 6 felonies (Counts 4, 7, 8). Defendant was acquitted of the remaining charges. He was sentenced to: Count 1, seventeen-year presumptive sentence concurrent with Counts 3, 4, 7, 8; Count 2, thirteen-year mitigated term consecutive to Count 1; Count 3, five-year presumptive term concurrent with Counts 1, 4, 7, 8; Count 4, one-year presumptive term concurrent with Counts 1, 3, 7, 8; Count 7, one-year presumptive term concurrent with Counts 1, 3, 4, 8; Count 8, one-year presumptive term concurrent with Counts 1, 3, 4, 7, 8. Defendant received 573 days' presentence incarceration credit for each of the concurrent sentences.

DISCUSSION

¶8 We have read and considered the brief submitted by defense counsel and have reviewed the entire record. *Leon,* 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the

Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Defendant was present at all critical phases of the proceedings and represented by counsel. The jury was properly impaneled and instructed. The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process.

1. Amended Indictment

¶9 Before trial, the State moved to amend the indictment to remove the parenthetical "to wit" sections for Counts 2 and 3 because "an error in the way [the indictment] was typed" led to the "to wit" section from Count 1 being erroneously copied into Counts 2 and 3. The original indictment stated, in pertinent part, that defendant:

> **COUNT 1:**
>
> . . . intentionally or knowingly molested [victim], a child under the age of fifteen years, by engaging in sexual contact with [victim], a child under fifteen years of age, (to wit: this refers to [victim] touching Defendant's penis) in violation of A.R.S. §§ 13-1401, 13-1410, 13-3821, 13-610, 13-604.01, 13-702, 13-702.01, and 13-801.
>
> **COUNT 2:**
>
> . . . intentionally or knowingly engaged in sexual intercourse or oral sexual contact with [victim], who was a minor under the age of fifteen years, (to wit: this refers to [victim] touching Defendant's penis) in violation of A.R.S. §§ 13-1401, 13-1405, 13-3821, 13-610, 13-604.01, 13-701, 13-702, 13-702.01, and 13-801.

> **COUNT 3:**
>
> . . . intentionally or knowingly engaged in any direct or indirect touching, fondling, or manipulating of any part of the female breast of [victim], a minor under fifteen years of age, (to wit: this refers to [victim] touching Defendant's penis) in violation of A.R.S. §§ 13-1404, 13-1401, 13-3821, 13-610, 13-604.01, 13-702, 13-702.01, and 13-801.

The State avowed without contradiction that it had given the defense substantial discovery, including police reports, transcripts, and tapes of interviews, that gave defendant notice of "what the State's evidence is for proving each one of these allegations."

¶10 An indictment is a "plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged." Ariz. R. Crim. P. 13.2(a). Absent a defendant's consent, a criminal "charge may be amended only to correct mistakes of fact or remedy formal or technical defects."[1]

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[1] Motions to amend an indictment are subject to Rule 16, which requires that motions be "made no later than 20 days prior to trial." Ariz. R. Crim. P. 16.1(b). *Accord* Ariz. R. Crim. P. 13.5(a). Here, the State's motion was filed five calendar days before trial. There is no indication that defendant objected to the timeliness of the motion, nor, as we discuss *infra,* that he was prejudiced by the late filing. *See* Ariz. Const. art. 6, § 27 *(*"No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.")*; State v. Sustaita,* 119 Ariz. 583, 591, 583 P.2d 239, 247 (1978) (finding that a "one-digit, one-number error in the statute citation was a technical . . . defect" that could be amended on the first day of trial because "[n]o contention was made at trial that the defendants

Ariz. R. Crim. P. 13.5(b). "A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *State v. Bruce,* 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980) (citations omitted).

¶11 The amendments here did not change the nature of the charged offenses. Each count specified the statutes defendant was alleged to have violated, and each statute provided the elements necessary for conviction. There is no indication defendant was misled. Under these circumstances, the trial court did not err by allowing the amendments.[2] *Cf. State v. Freeney,* 223 Ariz. 110, 113, ¶ 17, 219 P.3d 1039, 1042 (2009) (finding error when the amended indictment altered the elements of the charged offense).

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lacked notice of the nature of the charge or that they were harmed in preparing a defense.")

[2] Even assuming *arguendo* that the court erred, a Rule 13.5(b) violation like the one presented here is subject to harmless error review. *See State v. Freeney,* 223 Ariz. 110, 114, ¶ 26, 219 P.3d 1039, 1043 (citations omitted). Under that standard, the State must show that the error was harmless beyond a reasonable doubt. *Id.* at ¶ 25. The State met that burden by demonstrating that the indictment correctly identified the statutory basis for the charges, and defendant was presented "from Day 1" with discovery detailing the State's evidence. Also harmless is any error stemming from the grand jury's reliance on the "to wit" section in finding probable cause for indictment because the jury ultimately found defendant guilty beyond a reasonable doubt on Counts 2 and 3. *See id.* at 115 n.4, ¶ 30, 219 P.3d at 1044 ("'[A]ny failure to have submitted an element to the grand jury for a finding of probable cause is perforce harmless error' because the jury found [the defendant] guilty beyond a reasonable doubt.") (citation omitted).

2. Exclusion of Parents

¶12 In May 2008, the court granted the victim's Motion for Appointment of Victim's Representative Pursuant to Rule 39, based on her minor status and because she and her parents were "emotionally devastated." *See* Ariz. R. Crim. P. 39(g) ("Upon request, the court shall appoint a representative for a minor victim . . . as provided by ARS § 13-4403."). At the start of trial, the State asserted that the Victim's Bill of Rights allowed the victim's mother ("R.P.") and step-father to remain in the courtroom even though they would testify and the defense had invoked the rule of exclusion. *See* Ariz. R. Crim. P. 9.3(a) (allowing the trial court "to exclude prospective witnesses from the courtroom during opening statements and testimony of other witnesses."); Ariz. R. Evid. 615 (allowing the trial court to exclude certain witnesses "so that they cannot hear the testimony of other witnesses"). Over defendant's objection, the parents remained in the courtroom throughout trial.

¶13 A victim "has the right to be present throughout all criminal proceedings in which the defendant has the right to be present." Ariz. Rev. Stat. ("A.R.S.") § 13-4420 (2010).[3] *Accord* Ariz. R. Crim. P. 9.3(a) (exempting victims, as defined in Rule 39(a), from the rule excluding prospective witnesses from the

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

courtroom during opening statements and the testimony of other witnesses). Section 13-4403 (2010) provides, in pertinent part:

> C. If the victim is a minor or vulnerable adult the victim's parent, child or other immediate family member may exercise all of the victim's rights on behalf of the victim.
>
> . . . .
>
> E. The minor or vulnerable adult's representative shall accompany the minor or vulnerable adult through all proceedings, including delinquency, criminal, dependency, and civil proceedings, and, before the minor's or vulnerable adult's courtroom appearance, shall explain to the minor or vulnerable adult the nature of the proceedings and what the minor or vulnerable adult will be asked to do . . . .

¶14 We have previously determined that a minor victim has a right to a "parent's continuing presence in the courtroom," even when that parent is scheduled to testify. *State v. Uriarte,* 194 Ariz. 275, 277-78, ¶ 13, 981 P.2d 575, 577-78 (1999). *Uriarte,* however, did not address the issue presented here, where the victim requests the presence of both her appointed representative *and* her parents.

¶15 Section 13-4418 (2010) requires us to "liberally" construe Chapter 40 "to preserve and protect the rights to which victims are entitled." Section 13-4403(C) allows parents of minor victims to "exercise all of the victim's rights on behalf of the victim." In *Uriarte,* we rejected a definition of "on behalf of" that would "limit a parent's exercise of a minor's

rights to situations in which the victim was unable to exercise her rights personally." 194 Ariz. at 278, ¶ 16, 981 P.2d at 578. Instead, we adopted a "commonsensical" approach that gives minor victims "the benefit of parental support during proceedings which will be difficult for the child." *Id.* Parental support was clearly appropriate here in light of the victim's age, her emotional devastation, and the need for sexually explicit evidence about the underlying events.[4]

¶16 A minor victim's representative serves a different purpose from a parent. He or she is statutorily required to accompany the minor "through all proceedings" and is responsible for explaining the nature of the proceedings, including what the minor will be asked to do. A.R.S. § 13-4403(E). As a lawyer, the victim's representative here had specialized knowledge of legal proceedings and the challenges the victim would face during her testimony--unique skills that differ qualitatively from parental support. We thus find no error in allowing both the victim's parents and her "Rule 39 Representative" to be present throughout trial. Nor do we discern any prejudice arising from that decision.

[4] The record reveals that during the trial testimony, the victim became emotional on several occasions and sometimes required a recess before continuing.

3. Motion to Admit Evidence

¶17 The victim testified she was "scared" of defendant. Defendant filed a Motion to Admit Evidence of Mother's Prior Victimization, alleging that the victim knew her grandfather, who was serving a thirty-year prison sentence, had threatened to kidnap or kill R.P.'s family if they revealed his abuse. This information was relevant, the defense claimed, to explain the victim's "claims to being frightened of [the defendant] when there is absolutely no other evidence of any threatening behavior ever undertaken by [the defendant]." Defendant also sought to cross-examine the victim on that issue. After an evidentiary hearing, the trial court determined there was no "relevant information to be asked on cross-examination" and denied the defense motion.

¶18 A trial court has considerable discretion in ruling on the relevancy and admissibility of evidence, and we will not reverse such a ruling absent a clear abuse of discretion. *State v. Hensley*, 142 Ariz. 598, 602, 691 P.2d 689, 693 (1984) (citations omitted). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Torres ex rel. Torres v. N. Amer. Van Lines, Inc.*, 135 Ariz. 35, 40, 658 P.2d 835, 840 (App. 1982) (citation omitted). A trial court is vested with "power to protect witnesses against cross-examination that does little to

impair credibility, but that may be invasive of their privacy." *State v. Zuck,* 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982).

¶19 During the evidentiary hearing, R.P. testified that the victim "might have overheard" a 2002 conversation in which she discussed the threats and believed that the victim had discussed the matter in counseling. The victim, however, testified she had "no knowledge, whatsoever," about the threats, had not overheard her mother's conversation, and had not discussed the threats in counseling. Under these circumstances, we find no abuse of the trial court's considerable discretion in excluding evidence and cross-examination about her grandfather's threats.

4. Rule 20 Motion

¶20 The defense moved for a judgment of acquittal, claiming the State failed to present substantial evidence that the events alleged in Counts 1, 2, and 3 occurred when the victim was age fourteen, or that the events leading to Counts 5, 6, 9, 10, and 11 were non-consensual.[5] The court denied the motion.

¶21 A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20. Substantial evidence is such proof that

[5] Because defendant was acquitted on counts 5, 6, 9, 10, and 11, we need not address the issue of consent.

"reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citations omitted). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996). We find that the State presented substantial evidence of guilt as to the challenged counts.

¶22 The victim testified that while she was still in seventh grade, defendant began "touching my vagina and my boobs." Later, she testified that the touching progressed in 2006, while she was still in seventh grade. The victim then testified about a particular event that occurred when she was fourteen and rode the bus on an early-release day from school. When she and defendant were alone on the bus, she felt his hand "touching me and going towards my vagina and then another hand started touching me on my boobs." She also testified about another occasion when she was fourteen, when defendant rubbed her body with his penis and "made" her touch his penis. The State also presented defendant's videotaped interrogation, where he stated that "mutual" touching of the victim's breasts and his penis occurred "two years ago" and about a year ago.

¶23 Defense counsel cross-examined the victim about inconsistencies regarding when the touching occurred and suggested that "all the touching" occurred after she turned 15. The victim responded, "Some of it, not after 15." Although conflicting evidence was presented, a reasonable jury could have found that the victim was aged fourteen when the conduct alleged in counts 1, 2, and 3 occurred. *See State v. Thomas,* 104 Ariz. 408, 411, 454 P.2d 153, 156 (1969) (holding it is the jury, not the appellate court, that weighs the evidence and chooses between contradictory versions) (citations omitted). The trial court properly denied defendant's Rule 20 motion.

5. Motion for New Trial

¶24 After the verdict, the defense filed a Motion for New Trial or in the Alternative Enter Judgment of Acquittal as to Counts 1, 2, 3, and 4. As we stated *supra,* defendant's claim that the evidence on Counts 1, 2, and 3 was "so equivocal as to not constitute 'substantial evidence'" is not supported by the record. His motion also asserted for the first time that the evidence did not support Count 4, which alleged digital penetration of the victim on August 20, 2007. At oral argument on the motion, the trial court also questioned "whether there was insertion or not," but ultimately denied defendant's motion, stating:

> I'm not sure that the question was ever specifically asked. . . . The problem is that there has to be no [substantial] evidence. And based on what, based on the testimony, I'm not sure that I can find that there was no [substantial] evidence presented. The fact that I might have a question may be something that is not questioned by the jury.

¶25 The victim testified on direct examination that defendant touched her vagina with his hands underneath her clothes on August 20. When asked whether defendant "put anything inside of your vagina" on that date, the victim initially responded, "[N]o," that defendant "was just touching me with his hand." The prosecutor then asked:

> Q. And do you remember telling [the investigating detective] about whether or not [the defendant] had put anything inside your vagina that day on August 20th?
>
> A. Not that I remember.
>
> Q. Okay. So do you recall telling Detective [J.W.] during your interviews with him that [the defendant] had put his finger inside your vagina?
>
> A. Yes.

¶26 During his interrogation, defendant denied that "sexual" penetration occurred on August 20. But when asked whether his finger penetrated the victim's vagina, defendant said, "Probably. Yeah. That was it." Based on the evidence presented at trial, the court did not err in denying defendant's motion for new trial.

CONCLUSION

¶27 We affirm defendant's conviction and sentence. Counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do nothing more than inform defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
PETER B. SWANN, Judge