IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 10/28/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0514
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
WILLIS EDWARD WYNN,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-144570-001 DT

The Honorable Janet E. Barton, Judge

AFFIRMED

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

James Haas, Maricopa County Public Defender — Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

Willis Edward Wynn — Florence
Appellant

B R O W N, Judge

¶1 Willis Edward Wynn appeals his convictions and sentences for child molestation and sexual conduct with a minor. Counsel for Wynn 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, she was unable to find any arguable grounds for reversal. Through counsel, Wynn has raised several issues for review. In addition, he has filed a supplemental brief *in propria persona.*

¶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 Wynn. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Finding no reversible error, we affirm.

¶3 In July 2008, Wynn was indicted on two counts of child molestation, class 2 felonies and dangerous crimes against children in violation of Arizona Revised Statutes ("A.R.S.") section 13-1410 (2010), and seven counts of sexual conduct with a minor, class 2 felonies, non-dangerous crimes against

children, all in violation of A.R.S. § 13-1405 (2010).[1] The following evidence was presented at trial.

¶4 The victim testified that Wynn, her biological father, molested her and engaged in sexual conduct with her on several occasions over several years. The State presented video and audio recordings of Wynn's police interrogation. In those recordings, Wynn initially denied any contact with the victim, stating that "the only thing that ever happened" was when he helped the victim take a shower when she was ten or eleven years old and had a cast on her hand. Eventually, he told the police that he helped his daughter groom her pubic area and his penis touched her vagina "three or four times" and that it was not an accident. Later in the interview, he told detectives that he was "curious" as to what "just shaved skin" would feel like so, using his hand, he rubbed his penis on his daughter's vagina and clitoris.

¶5 Wynn testified on his own behalf. He stated that he did not think it was "odd" to groom his daughter's pubic hair; rather, he thought it similar to "changing her diapers." He adamantly denied any sexual conduct between them, claiming instead that the interrogation recordings were fabricated.

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[1] Absent material revisions after the date of an alleged offense, we cite the statute's current version.

¶6 The jury found Wynn guilty of eight counts.[2] He was sentenced to a combination of consecutive and concurrent terms, totaling sixty-two years.[3] He filed a timely notice of appeal.

DISCUSSION

¶7 In his supplemental brief, Wynn challenges the sufficiency of the evidence, asserting that the trial court erred by denying his motion for acquittal pursuant to Arizona Rule of Criminal Procedure 20. We will reverse a conviction for insufficiency of evidence only if "there is a complete absence of probative facts to support the conviction." *State v. Scott,* 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976). Evidence sufficient to support a conviction may be either circumstantial or direct. *State v. Pena,* 209 Ariz. 503, 505, ¶ 7, 104 P.3d 873, 875 (App. 2005). The trier of fact must resolve conflicting testimony and weigh the credibility of witnesses in making such determinations. *State v. Lee*, 217 Ariz. 514, 516, ¶ 10, 176 P.3d 712, 714 (App. 2008).

¶8 To convict Wynn of Count 1, molestation of a child, the State was required to prove that Wynn intentionally or

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[2] At the conclusion of the State's case, Wynn successfully moved for a Rule 20 motion of acquittal as to Count 2 only.

[3] Wynn was sentenced as follows: Count 1, 17 years with 348 days of presentence incarceration credit; Count 3, 20 years, to be served consecutively to Count 1; Count 4, 20 years, to be served consecutively to Count 3; Counts 5-9, 5 years each, to be served concurrently with each other and consecutively to Count 4.

knowingly engaged in direct or indirect touching of the victim's genitals by any part of his body, and that the victim was a child under the age of fifteen. A.R.S. § 13-1410(A). The victim testified that when she was approximately ten years old, Wynn placed his hands and on her vagina after he put her to bed.

¶9 To convict Wynn on Counts 3 and 4, sexual conduct with a minor, the State was required to prove that Wynn intentionally or knowingly engaged in sexual intercourse or oral sexual contact with any person under the age of fifteen. A.R.S. § 13-1405(B). The victim testified that when she was approximately fourteen years old, she exited from the shower to find Wynn in the bathroom. Wynn instructed her to position herself so that he was able to place his mouth on her vagina and his penis in her mouth, and she did so.

¶10 To convict Wynn of sexual conduct with a minor by a parent or guardian, the State was required to prove that Wynn intentionally or knowingly engaged in sexual intercourse or oral sexual contact with any person under the age of fifteen, and that Wynn was the minor's parent or guardian. A.R.S. § 13-1405(B). It is undisputed that Wynn is the victim's father. As to Counts 5 through 7, the victim testified that Wynn engaged in oral contact with her vagina and her anus. She further testified that Wynn placed a condom on his penis and tried to put it inside her. He was not able to penetrate her, but she

confirmed that his penis did touch her vagina. Regarding Counts 8 and 9, she testified that Wynn had oral sexual conduct with her and inserted an unknown object into her vagina. Further, as reflected in the audio tape of his conversation with the police, Wynn admitted his penis touched his daughter's vagina "three or four times" and he also admitted the contact was not accidental. Thus, we find sufficient evidence to support the jury's verdicts.

¶11 Through counsel, Wynn raises several additional issues. He asserts first that his right to a speedy trial was violated because "no one asked for his permission [n]or did he give permission for his trial date to be moved" from February 2, 2009, to March 19, 2009. Under Arizona Rule of Criminal Procedure 8.5(b), a judge may grant a continuance "upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." If a defendant fails to object to the delay and assert constitutional claims, his claims are waived and we will not reverse absent fundamental error. *State v. Dickens*, 187 Ariz. 1, 10, 926 P.2d 468, 477 (1996).

¶12 Here, the record reflects that Wynn's counsel requested the continuance due to a scheduling conflict with another trial. Notably, Wynn was present during the hearing on the motion for continuance and voiced no objection to his

counsel's request. The trial court acted within its discretion in granting the continuance.

¶13 Wynn also contends that "other bad acts regarding grooming" were improperly admitted. In the interrogation recordings, Wynn discussed the fact that he regularly "grooms" his daughter's pubic area, his penis has touched her vagina "probably three or four times," he was "curious" as to what "just shaved skin" felt like, and the contact was "not an accident." At trial, Wynn testified that he engaged in such behavior and did not consider it "odd." Arizona Rule of Evidence 404(b) states "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Wynn's statements did not refer to other crimes, wrongs, or acts; instead, his justification for repeatedly touching the victim's pubic area was evidence of the crimes for which he was charged. His argument is without merit.

¶14 Wynn also asserts that the interrogation recordings admitted as evidence were incomplete because they did not include denials he made with respect to various charges. Again, Wynn made no objection to the admission of the recordings and was permitted to challenge the veracity of the evidence during his testimony. Moreover, the State had disclosed the existence of the recordings and it introduced testimony showing the

recordings were intact and unaltered. We therefore decline to find error on this ground. *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996) (finding a failure to object to admission of evidence at trial waives the challenge absent fundamental error, which will not be found if defendant offers no evidence to support his contentions and the state introduces testimony affirming validity of evidence).

¶15 Wynn further contends that the indictment identified the victim by the wrong last name. The indictment, "while technically incorrect, was sufficient to put [Wynn] on notice as to the time, place, and nature of the offense[s] charged." *State v. Sowards*, 147 Ariz. 185, 191, 709 P.2d 542, 548 (App. 1984). His failure to file a Rule 16 motion renders a challenge to this defect waived. *Id.*; Ariz. R. Crim. P. 13.5(e). Additionally, the indictment was "deemed amended to conform to the evidence" presented at trial. Ariz. R. Crim. P. 13.5(b).

¶16 Finally, Wynn asserts that the court did not timely rule on his motion for a "replacement lawyer." To constitute a colorable claim for new counsel, a defendant must allege facts sufficient to demonstrate irreconcilable differences with currently appointed counsel that pose a clear prospect of an unfair trial. *State v. Cromwell*, 211 Ariz. 181, 187, ¶ 30, 119 P.3d 448, 454 (2005). "The superior court has no obligation to act on a motion to change counsel until the defendant proffers

specific facts supporting the motion." *State v. Paris-Sheldon*, 214 Ariz. 500, 504, ¶ 8, 154 P.3d 1046, 1050 (App. 2007). Here, Wynn failed to allege any facts demonstrating irreconcilable differences and therefore we find no error.

¶17 We have read and considered counsel's brief and Wynn's supplemental brief, and have reviewed the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The record shows that Wynn was present and represented by counsel at all pertinent stages of the proceedings, he was afforded the opportunity to speak before sentencing, and the sentence imposed was within statutory limits. Accordingly, we affirm Wynn's convictions and sentences.

CONCLUSION

¶18 Upon the filing of this decision, counsel shall inform Wynn 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). Wynn has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

/s/

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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

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JON W. THOMPSON, Judge

/s/

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SHELDON H. WEISBERG, Judge