IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 12/28/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0046
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule
ALEJANDRO HERRERA, Appellant.	)	111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-127979-001 DT

The Honorable James T. Blomo, Judge Pro Tempore

AFFIRMED

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

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

N O R R I S, Judge

¶1 Alejandro Herrera timely appeals from his convictions and sentences for molestation of a child, sexual abuse, attempted sexual conduct with a minor, and sexual conduct with a minor. After searching the record on appeal and finding no

arguable question of law that was not frivolous, Herrera's counsel 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), asking this court to search the record for fundamental error. This court granted counsel's motion to allow Herrera to file a supplemental brief *in propria persona*, but he chose not to do so. After reviewing the entire record, we find no fundamental error and, therefore, affirm Herrera's convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 During a phone call in March 2009, 18-year-old T.H. told her mother that Herrera had molested T.H. during her childhood. Mother asked her other three daughters -- C.H., age 23; P.H., age 22; and A.H., age 14 -- whether Herrera had molested them when they were children, and they all said yes. Mother contacted the police, and the police then interviewed the daughters. Following the interviews, C.H. made a "confrontation call" to Herrera to attempt to get him to admit the molestations. During the call, Herrera admitted touching C.H.

[1]We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Herrera. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

and P.H. Later, in an interview with police,[2] Herrera again admitted touching C.H. and P.H.[3]

¶3 The State charged Herrera with 11 counts of various crimes, all classified as dangerous crimes against children. After a trial, at which Herrera did not testify, a jury found him guilty on six counts involving C.H. and P.H.: two counts of molestation of a child, a class 2 felony; two counts of sexual abuse, a class 3 felony; one count of attempted sexual conduct with a minor, a class 3 felony; and one count of sexual conduct with a minor, a class 2 felony. The jury could not reach a verdict on the other five counts involving T.H. and A.H. At the State's request, the superior court later dismissed those charges with prejudice.

¶4 The superior court sentenced Herrera to the presumptive term of imprisonment on all convicted counts[4] with 264 days of presentence incarceration credit.

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[2]Police advised Herrera of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), before the interview.

[3]At trial, a police detective testified Herrera admitted in the confrontation call and the interview to touching C.H., P.H., and T.H.

[4]The superior court ordered three counts to be served consecutively and three concurrently.

DISCUSSION

¶5 Through counsel on appeal, Herrera asserts his sentences were excessive and his trial counsel was ineffective. We reject both arguments. First, a sentence within statutory limits will not be reduced on appeal unless a clear abuse of discretion is shown, *State v. Matthews*, 104 Ariz. 421, 423, 454 P.2d 566, 568 (1969), and we find no abuse of discretion in the presumptive sentences imposed by the superior court. Second, an ineffective-assistance-of-counsel claim must be raised in a petition for post-conviction relief under Arizona Rule of Criminal Procedure 32 and cannot be considered on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

¶6 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Herrera received a fair trial. He was represented by counsel at all stages of the proceedings and was present at all critical stages.

¶7 The evidence presented at trial was substantial and supports the verdicts. The jury was properly comprised of 12 members, and the court properly instructed the jury on the elements of the charges, Herrera's presumption of innocence, the State's burden of proof, and the necessity of a unanimous verdict. The superior court received and considered a presentence report, Herrera was given an opportunity to speak at

sentencing, and his sentences were within the range of acceptable sentences for his offenses.

CONCLUSION

¶8 We decline to order briefing and affirm Herrera's convictions and sentences.

¶9 After the filing of this decision, defense counsel's obligations pertaining to Herrera's representation in this appeal have ended. Defense counsel need do no more than inform Herrera of the outcome of this appeal and his future options, unless, upon review, counsel finds 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).

¶10 Herrera has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Herrera 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

/s/
_____
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge