DIVISION ONE
FILED: 12/07/10
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0061
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JONATHAN DAVID EIBERT,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. No. CR2009-006283-001 DT

The Honorable Daniel G. Martin, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

Jonathan David Eibert — Florence
Appellant

S W A N N, Judge

¶1 Jonathan David Eibert ("Appellant") appeals from his conviction for one count of Indecent Exposure to a person under 15 years old, a class 6 felony under A.R.S. § 13-1402(A),(B)[1] (1983); five counts of Molestation of a Child, class 2 felonies and dangerous crimes against children, A.R.S. § 13-1410 (1990, 1993); and five counts of Sexual Conduct with a Minor, class 2 felonies and dangerous crimes against children, A.R.S. § 13-1405 (1990, 1993).

¶2 Appellant appeals pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Appellant's counsel, having searched the record on appeal, finds no arguable non-frivolous question of law. See *Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel now asks this court to independently review the record for fundamental error, and Appellant has filed a supplemental brief. We have reviewed the record and considered the issues raised in Appellant's brief, and find no fundamental error. Accordingly, we affirm.

[1] Now § 13-1402(A), (C), but with no relevant alteration.

FACTS[2] AND PROCEDURAL HISTORY

¶3 C.A. was born in 1984. She was about six when her older sister started dating Appellant in 1991, and later that year Appellant moved in with C.A.'s family. Shortly thereafter, Appellant began molesting C.A.

¶4 Appellant lived in the same home as C.A. until 1992. One day during that period, Appellant exposed his penis to C.A. and convinced her to kiss it, and later put his finger in C.A.'s vagina.

¶5 In 1992 C.A.'s family moved to a different town, Appellant married C.A.'s older sister and they moved into a place of their own. But Appellant would occasionally spend the night at C.A.'s home. During one of those visits, Appellant put his hand under C.A.'s clothing and touched her vagina, and on a number of occasions he put her hand on his penis.

¶6 C.A. would also visit Appellant's home, and on one such visit when she was 12, Appellant convinced C.A. to perform oral sex by making it a condition of inviting one of C.A.'s friends over to play. On two other visits, Appellant made oral contact with C.A.'s vagina.

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[2] On appeal, we view the facts in the light most favorable to sustaining the convictions. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008).

¶7 Appellant moved back in with C.A.'s family when he separated from C.A.'s older sister in 1996, when C.A. was 12. During approximately the year that followed, Appellant would have C.A. give him massages that led to her touching his penis, and would give her massages during which he touched her vagina.

¶8 Appellant later moved to his own apartment. C.A. would visit him, and on one such visit Appellant had C.A. masturbate him. Appellant moved out of state in early 1998, when C.A. was about 14 years old.

¶9 As she grew older, C.A. came to hate Appellant, and in 2004, when her mother "mentioned [Appellant] in a loving fashion," she became upset and told her mother about Appellant's offenses. The police were contacted, and as part of the police investigation of the incidents, C.A. made a number of confrontation calls to Appellant, first with the police, and then on her own using equipment the police supplied to her. When the detective first assigned to the case retired, the new detective assigned to the case listened to the tapes and submitted the case for prosecution.

¶10 Two days before the trial, the state moved to amend some of the dates of the alleged incidents in the indictment. Appellant's trial counsel neither filed a brief in opposition to the motion nor objected to it, and the court granted the motion on December 9, 2009, the final day of testimony in the trial.

¶11 At trial, C.A. testified about the incidents and was cross-examined by Appellant's trial counsel. The recorded confrontation calls were admitted into evidence and played for the jury.

¶12 Appellant testified that he had never inappropriately touched or been touched by C.A., denying every count of the indictment. He testified that he made the incriminating admissions heard on the confrontation calls to "tell her whatever she needed to hear to leave me alone," implicitly admitting that the recordings were authentic and unmodified.

¶13 The jury returned a verdict of guilty for each count of the indictment. After receiving a presentence report and hearing from the victim, the victim's family, and Appellant's supporters, the trial court found that the mitigating and aggravating factors balanced out, and imposed the presumptive sentence for each crime, allowing the sentences to run concurrently except those that were required to run consecutively. The sum of Appellant's consecutive prison terms is 135.5 years. Appellant was give credit for 268 days of presentencing incarceration.

DISCUSSION

¶14 We first address the issues raised in Appellant's brief: the late amendment of the indictment, the sufficiency of the evidence, the legality of recording the confrontation calls,

admissibility of the recordings of those calls, whether the jury was properly empanelled, and the effectiveness of Appellant's trial counsel.

I. LATE AMENDMENT OF THE INDICTMENT WAS NOT FUNDAMENTAL ERROR.

¶15 Appellant complains that the indictment was amended to change the dates of the incidents. An indictment is a "plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged." Ariz. R. Crim. P. ("Rule") 13.2(a). Motions to amend an indictment must be "made no later than 20 days prior to trial." Rule 16.1(b). Absent a defendant's consent, a criminal "charge may be amended only to correct mistakes of fact or remedy formal or technical defects." Rule 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).

¶16 The amendments here corrected errors the victim made in originally recalling the exact dates of events, errors that arose because of the large number of separate incidents of abuse that occurred[3] and the absence of common milestone events, such

[3] In the sentencing hearing, C.A. stated that although Appellant was "charged with 11 counts," Appellant had committed similar acts "hundreds of times over the course of seven very formative years of my life."

as moving from one grade to the next, because the victim was home-schooled. The amendments did not change the nature of the charged offenses, the statutes Appellant was alleged to have violated, or the elements recited in the indictment. There is no indication Appellant was misled, and Appellant did not object to the amendments. Therefore the trial court did not err by allowing the late but technical alteration of the indictment. 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."); c*f. State v. Freeney*, 223 Ariz. 110, 113, ¶ 17, 219 P.3d 1039, 1042 (2009) (finding error when the amendment altered the elements of the charged offense).

II. SUFFICIENT EVIDENCE FOR EACH CONVICTION WAS PRESENTED.

¶17 Appellant argues that the decision of the first detective assigned to the case to not seek an indictment shows that the evidence was insufficient to convict him. Whether the evidence was sufficient to warrant a conviction is an ultimate issue for the jury, and therefore the opinion of another on that issue is generally inadmissible unless it "assist[s] the trier of fact to understand the evidence or to determine a fact in issue." *State v. Williams*, 133 Ariz. 220, 228, 650 P.2d 1202, 1210 (1982) (citing Ariz. R. Evid. 704 cmt.). Therefore, even if the first detective's decision to not seek an indictment was

based on his opinion that the evidence was insufficient, that decision has no legal relevance.

¶18 We review a claim of insufficient evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). But as an appellate court:

> [W]e do not . . . reevaluat[e] the evidence to determine whether we would have convicted defendant . . . . Rather, we must view the evidence in the light most favorable to sustaining the verdict, and we must resolve all reasonable inferences against defendant. If "substantial evidence" exists to support the verdict, we will not disturb the jury's decision. By "substantial evidence" we mean evidence that would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is presented.

State v. Atwood, 171 Ariz. 576, 596-97, 832 P.2d 593, 613-14 (1992) (internal citations omitted)*, overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 241, ¶ 25, 25 P.3d 717, 729 (2001). Here, there was substantial evidence supporting each conviction in the victim's testimony and the corroborating admissions made by Appellant in the confrontation calls.

III. RECORDING THE CONFRONTATION CALLS WAS NOT ILLEGAL.

¶19 Appellant argues that recording the confrontation calls was illegal under both federal and New Hampshire law because both parties did not consent to the recording. Appellant is mistaken about federal law, which like Arizona law only requires the consent of one party. 18 U.S.C. §

2511(2)(c); A.R.S. § 13-3005(A)(1),(2). In contrast, New Hampshire Rev. Stat. § 570-A:2 requires all parties to consent, and Appellant was in New Hampshire when the calls were recorded.

¶20 In *State v. Fowler*, 139 P.3d 342 (Wash. 2006), the court considered and rejected a nearly identical argument. There, the confrontation call was placed and recorded in Oregon, a one-party consent state, to Washington, a two-party consent state. *Id.* at 343, ¶¶ 1-2. The court held that "the test for whether a recording of a conversation or communication is lawful is determined under the laws of the place of the recording." *Id.* at 347, ¶ 16. Noting that the officers in Oregon were not acting as agents of Washington law enforcement, the court observed: "While Fowler undoubtedly has an expectation of privacy as a Washington resident, he does not have an expectation of privacy related to his behavior in Oregon and the resulting criminal investigation by the Oregon police regarding his sexual misconduct with M.P. while in Oregon." *Id.* We find the reasoning of *Fowler* persuasive and adopt it here.

IV. ESTABLISHING THE CHAIN OF CUSTODY FOR THE RECORDINGS OF THE CONFRONTATION CALLS WAS UNNECESSARY.

¶21 Appellant objects to the admission of the recordings of the confrontation calls on the grounds that no chain of custody was established. "A foundation for [evidence's] introduction may be laid [e]ither through identification

testimony [o]r by establishing a chain of custody; to require both would be unnecessary . . . .” *State v. Macumber*, 119 Ariz. 516, 521-22, 582 P.2d 162, 167-68 (1978). Here C.A. identified the tapes before they were introduced into evidence, and Appellant’s own testimony implicitly admits the tapes’ authenticity and integrity. Therefore the trial court did not commit fundamental error by admitting the tapes into evidence.

V. THE JURY WAS PROPERLY EMPANELLED.

¶22 Appellant claims the jury was “not of my peers, being my mother’s age or grandmother’s.” Appellant’s objection is baseless, since no juror was excluded because of his or her age. Appellant also objects that some jurors had “relationships with law enforcement of some kind,” but this alone does not disqualify a juror. *See State v. Hill*, 174 Ariz. 313, 319-21, 848 P.2d 1375, 1381-83 (1993) (upholding trial court’s refusal to strike from the jury a police officer who knew the prosecutor, coroner, and investigator who worked on the case). Appellant also unsuccessfully tries to misrepresent a juror’s colloquial indication that the juror would not be biased as an indication that the juror might be biased. The record provides no evidence that the jury was not properly empanelled and no evidence that the jury did not perform its sworn duty correctly.

VI. THIS COURT WILL NOT ADDRESS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL BROUGHT ON DIRECT APPEAL.

¶23 Appellant disagrees with some of his trial counsel's decisions. This court will not consider claims of ineffective assistance of counsel on direct review; such claims must be presented to the trial court in a petition for post-conviction relief. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

VII. REMAINING ISSUES

¶24 The record reflects Appellant received a fair trial. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Appellant was represented at all stages of the proceedings. The court properly instructed the jury on the elements of the charged offenses. Further, the court properly instructed the jury on the State's burden of proof. The court received and considered a presentence report and imposed a legal sentence.[4] Appellant's sentences were properly reduced to account for presentencing incarceration.

[4] Because of the substantial uncertainty regarding when Appellant committed some of the offenses, the sentence has been evaluated under the most lenient sentencing statutes in effect during the span of time –- as long as six years -- given in each verdict. For example, Count 4, Molestation of a Child, occurred between October 1, 1992, and December 31, 1997. Until A.R.S. § 13-604.01 (now § 13-705) was amended effective January 1, 1994, it required that sentences for dangerous crimes against children –- including molestation of a child -- be consecutive to all other sentences imposed at any time. *See* 1993 Ariz. Sess. Laws, ch. 255, § 8 (1st Reg. Sess.). The 1993 amendments allowed

CONCLUSION

¶25 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm Appellant's convictions and sentences. Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Appellant of the status of this appeal and his future options. *Id.* Appellant has 30 days from the date of this decision to file a petition for review *in propria persona. See* Rule 31.19(a). Upon the court's

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concurrent sentences for multiple molestation convictions that involved the same child. *Id.* The trial court imposed concurrent sentences for all of Appellant's molestation convictions that might have occurred in 1994 and beyond. Appellant's conviction for the 1991 molestation of C.A. ran consecutive with his other convictions, as required by the sentencing statutes in effect in 1991.

own motion, Appellant has 30 days from the date of this decision in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge