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

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0167
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
WESLEY GENE DURAN, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-006250-001 DT

The Honorable Glenn M. Davis, Judge

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED IN PART, VACATED IN PART AND REMANDED FOR RE-SENTENCING

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N O R R I S, Judge

¶1 Wesley Gene Duran timely appeals from his convictions and sentences for seven counts of sexual conduct with a minor,

class 2 felonies and dangerous crimes against children; five counts of molestation of a child, class 2 felonies and dangerous crimes against children; one count of public sexual indecency to a minor, a class 5 felony; one count of sexual abuse of a victim under 15 years of age, a class 3 felony and dangerous crime against children; one count of unlawful imprisonment, a class 6 felony; and one count of furnishing harmful items to minors, a class 4 felony.

¶2 After searching the record on appeal and finding no arguable question of law that was not frivolous, Duran's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (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 Duran to file a supplemental brief *in propria persona*, and Duran did so.

¶3 With one exception regarding sentencing on count 8 (sexual conduct with a minor), we reject the arguments raised in Duran's supplemental brief. After reviewing the entire record, we find no other fundamental error, with the exception of a sentencing error on count 13(a) (unlawful imprisonment). We therefore affirm all of Duran's convictions and sentences, with the exceptions of counts 8 and 13(a). We remand for

resentencing consistent with this decision on counts 8 and 13(a).

FACTS AND PROCEDURAL BACKGROUND[1]

¶4 Duran's multiple convictions arise out of his sexual abuse of one victim, his step-daughter at the time.

¶5 In 2002, when the victim was nine years old, Duran, who had been dating and later married the victim's mother, moved into the family's home in Phoenix. The victim testified Duran began sexually abusing her when she was ten years old. The victim recounted at least three separate incidents in the Phoenix home.

¶6 The victim testified the first time Duran did "anything inappropriate," she had walked into the master bedroom and he was "laying on the bed with no clothing on, fondling his penis." As she walked away, he called her back into the room, grabbed her arm, rubbed her vagina over her clothes, made her stroke his penis with her hand, then made her perform oral sex on him.

¶7 The victim also testified that during a second incident, Duran performed oral sex on her and made her perform

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

oral sex on him in the shower. She further testified he began using sex toys on her during this time.

¶8 She also testified that during the third incident, when she was 11, Duran rubbed her breasts, removed her pants and undergarments, rubbed and licked her vagina, then made her stroke his penis.

¶9 The same year, in August 2004, Duran and the victim moved to Florida, and the victim's mother and her younger brother followed approximately four months later. The victim testified Duran continued to sexually abuse her in Florida and promised, "on [her] sixteenth birthday, he would treat [her] like a real woman," which she interpreted to mean "full-on sex."

¶10 In 2006, when the victim was 13, the family returned to Arizona to live. The victim testified that in March or April of 2007, while preparing for a "father-daughter dance," Duran "put his hands on [her] upper arms and moved [her] backwards" toward the bed, then pushed her dress up, pushed her undergarments to the side, licked her vagina, and "put [his fingers] in [her] vagina."

¶11 Shortly after this incident, Duran accepted a job in Mississippi and moved there by himself. Although the victim's mother eventually divorced Duran in April or May of the next year, she sent the victim to visit Duran in August to keep up their "father-daughter relationship." The victim testified

Duran continued to abuse her while she visited him in Mississippi.

¶12 Finally, as the victim's 16th birthday approached, she was "[s]cared out of [her] mind" and her behavior noticeably worsened. Her mother pressed her for the reason she had been behaving so badly, and, after much hesitation, she revealed Duran's abuse. The victim and her mother eventually contacted police. At the request of police, the victim participated in a "confrontation call" with Duran. During the call, Duran repeatedly asked the victim whether someone was listening and, although he did not admit any specific acts, he did not deny any of the instances the victim discussed, and made incriminating statements including, "[i]f someone finds out, I go to jail . . . I have to register as a . . . . sex offender." A few days later, after the victim had obtained a personal recording device, she recorded a second phone conversation with Duran in which he told her, "you're playing a dangerous game . . . . you should never mention it . . . . Well, except when you and I are in private together."

DISCUSSION

I. Duran's Supplemental Brief

¶13 First, Duran argues the State committed prosecutorial misconduct by "knowingly and deliberately misrepresent[ing] statements made during the confrontation call" by piecing

different portions of the call together or taking them out of context during its opening and closing statements and during its examination of one particular witness. Although Duran's counsel objected to the State's use of the call during its examination of the witness, he did not object to its use of the call during opening and closing statements. Thus, where Duran's counsel objected, we review the alleged misconduct for harmless error, and where he did not, we review for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 18-20, 115 P.3d 601, 607 (2005).

¶14 As to the State's use of the call during its examination of the witness, the court sustained Duran's objection and later instructed the jury to disregard any questions and answers to which the court sustained objections. As to the State's use of the call during its opening and closing statements, the court instructed the jury, "[w]hat the lawyers said . . . is not evidence." The Arizona Supreme Court has instructed us, "absent some evidence to the contrary," to presume the jurors followed their instructions. *State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994). Further, the jurors heard the call, were provided a transcript of the call as an exhibit, and could determine the contents of the call for themselves. Thus, based on our review of the record we find no harmless or fundamental error and reject Duran's

assertion the State's use of the call during trial "infected the trial with unfairness." *See State v. Roque*, 213 Ariz. 193, 228, ¶ 152, 141 P.3d 368, 403 (2006).

¶15 Second, Duran argues the superior court should not have permitted the State to amend the indictment against him.[2] We review the superior court's decision on a motion to amend a charging document for an abuse of discretion. *See State v. Johnson*, 198 Ariz. 245, 247, ¶ 4, 8 P.3d 1159, 1161 (App. 2000).

¶16 The State initially charged Duran with multiple crimes arising out of the "father-daughter dance" incident, which occurred in Surprise, and alleged the offenses occurred "on or between the 18th day of May, 2007 and the 31st day of August, 2008." At trial, the victim testified the incident occurred in March or April, and the victim's mother testified Duran only lived with the family in Surprise between November 2006 and April 2007, when he moved to Mississippi. After this testimony, the State moved to amend the indictment to modify the offense dates to "on or between May 18th 2006, to May 18th 2007." The court granted the motion over Duran's continuing objections.

¶17 When a defendant does not consent, "a criminal 'charge may be amended only to correct mistakes of fact or remedy formal

[2]Although the State amended other counts in the indictment, Duran only challenges the amendments to counts 13-17. We find no fundamental error in the other amendments.

or technical defects.'" *State v. Freeney*, 223 Ariz. 110, 111, ¶ 1, 219 P.3d 1039, 1040 (2009) (quoting Ariz. R. Crim. P. 13.5(b)). A defect is "formal or technical" when its amendment does not "change the nature of the offense charged or . . . prejudice the defendant in any way." *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980). The State may remedy an error in offense dates if the amendment does not result in "actual prejudice" to the defendant. *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996). In analyzing prejudice,

> we consider whether . . . granting a motion to amend violated either of two rights every defendant has -- the right to "notice of the charges against [the defendant] with an ample opportunity to prepare to defend against them" and the right to double jeopardy protection from a subsequent prosecution on the original charge.

Johnson, 198 Ariz. at 248, ¶ 8, 8 P.3d at 1162 (internal citations omitted). The defendant bears the burden of proving "actual prejudice." *Id.*

¶18 Here, the amendments did not change the nature of the charged offenses, and before the State moved to amend, Duran had notice of the correct offense dates. First, before trial, the State provided Duran with the victim's mother's timeline of events she would later use to establish the dates during which Duran was in Surprise. Second, the superior court accepted the State's avowal –– which the defense did not dispute -- it had

disclosed to Duran a supplemental police report which included the amended dates. *See Bruce*, 125 Ariz. at 423, 610 P.2d at 58 (rejecting "allegation of prejudice" when record revealed defendant had notice of date discrepancies well before trial). Further, despite his arguments to the contrary, the record does not show the amendment prejudiced Duran's defense. At trial, before the amendment, he relied heavily on arguments the victim was not credible, and, although he asked the witnesses about the dates he was in Surprise, he did not challenge his presence there. Thus, Duran had notice of the charges and correct dates, and an opportunity to prepare a defense. Because Duran has not carried his burden of proving actual prejudice, we hold the superior court did not abuse its discretion by granting the State's motion to amend the offense dates.

¶19 Third, Duran argues his sentences -- five consecutive life sentences plus 57 years –- are improper under the dangerous crimes against children sentencing statutes and constitute cruel and unusual punishment.

¶20 In challenging the length of his sentences, Duran argues the superior court misinterpreted the dangerous crimes against children sentencing statutes to require mandatory life sentences for five of the sexual conduct with a minor

convictions (counts 3, 6, 8, 10, 11).[3] With the exception of count 8, all of the counts involved oral sexual contact, and the superior court thus correctly sentenced Duran to mandatory life sentences. A.R.S. § 13-604.01(A) (2001) and (2006) (current version at A.R.S. § 13-705(A)); *State v. Hollenback*, 212 Ariz. 12, 17, ¶¶ 16-18, 126 P.3d 159, 164 (App. 2005) (A.R.S. § 13-604.04(A) mandates life sentences unless sexual contact is "masturbatory," and oral sexual contact does not fall within this exception).

¶21 As to count 8, however, charging the act of "digital/penile" contact, the superior court did not note this contact would have permitted either a discretionary life sentence or a presumptive term of 20 years under A.R.S. § 13-604.01(B). *See Hollenback*, 212 Ariz. at 17, ¶ 18, 126 P.3d at 164. The record simply does not reflect the court understood it had discretion to impose a sentence other than life for this particular conviction and, indeed, noted, "it doesn't seem to me I have any choice in the matter." Thus, we remand count 8 to the superior court for resentencing.

[3]As to the two other convictions of sexual conduct with a minor (counts 15 and 16), the victim was no longer 12 years old or younger, and the superior court permissibly sentenced Duran to the presumptive term of 20 years each for both counts. Ariz. Rev. Stat. ("A.R.S.") § 13-604.01(C) (2006) (current version at A.R.S. § 13-705(C) (2010)).

¶22 Duran also argues the length of his sentences constitute cruel and unusual punishment. We disagree. We first review whether "there is a threshold showing of gross disproportionality by comparing the gravity of the offense [and] the harshness of the penalty," and "[i]f this comparison leads to an inference of gross disproportionality," we consider "the sentences the state imposes on other crimes and the sentences other states impose for the same crime." *State v. Berger*, 212 Ariz. 473, 476, 134 P.3d 378, 381 (2006) (internal quotations omitted). Our courts have repeatedly noted "child molestation is undeniably a serious offense" and have upheld life sentences imposed under the dangerous crimes against children sentencing provisions. *State v. Taylor*, 160 Ariz. 415, 422, 773 P.2d 974, 981 (1989); *see also State v. Kasten*, 170 Ariz. 224, 229, 823 P.2d 91, 96 (App. 1991). Unlike in *State v. Davis*, 206 Ariz. 377, 379, ¶ 1, 79 P.3d 64, 66 (2003), which Duran cites for the proposition his sentences are disproportionate, this case does not involve "voluntary sex with . . . post-pubescent teenage girls," but instead involves Duran's repeated abuse of his step-daughter beginning when she was only ten years old and continuing until she was at least 14. Duran's acts were "undeniably . . . serious" and under the facts of this case we hold Duran's sentences are not disproportionate, cruel, or unusual.

¶23 Fourth, Duran argues the jury convicted him of "multiple counts per incident" in violation of the prohibitions against double jeopardy and double punishment in the Fifth Amendment to the United States Constitution and A.R.S. § 13-116 (2010). We disagree. Although multiple charges against Duran arose from single sexual encounters with the victim, they represented separate sexual acts and "[m]ultiple sexual acts that occur during the same sexual attack may be treated as separate crimes." *State v. Boldrey*, 176 Ariz. 378, 381, 861 P.2d 663, 666 (App. 1993). Further, although Duran argues the other crimes were "lesser included offenses" of the sexual conduct with a minor crimes, there was sufficient separate evidence to convict Duran of each of the charges and under the circumstances in this case it was not "factually impossible" for Duran to have committed sexual conduct with a minor without committing the other crimes for which he was convicted. Thus, mandatory consecutive sentences for the sexual conduct with a minor convictions were permissible under A.R.S. § 13-116. *Id.* at 382-83, 861 P.2d at 667-68 (analyzing consecutive sentences for multiple sexual acts under *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989) and *State v. Tinghitella*, 108 Ariz. 1, 491 P.2d 834 (1971)).

¶24 Fifth, Duran argues the superior court should not have allowed the State to admit the tape and transcript of the

confrontation call into evidence. We disagree. Because Duran's counsel did not object,[4] we review the admission of the tape for fundamental error, *see Henderson*, 210 Ariz. at 567, ¶¶ 19-20, 115 P.3d at 607, and find none. The statements in the call were properly admitted, *see* Arizona Rule of Evidence 801(d)(2) ("A statement is not hearsay if . . . [it] is offered against a party and . . . is the party's own statement"), and Duran was given an opportunity to cross-examine the victim about the call. Further, the officer who transcribed the call testified it accurately represented the confrontation call and it "is well recognized that accurate typewritten transcripts of sound recordings, used contemporaneously with the admission of the recordings into evidence, are admissible to assist the jury in following the recordings while they are being played." *State v. Tomlinson*, 121 Ariz. 313, 319, 589 P.2d 1345, 1351 (App. 1978).

¶25 Finally, Duran argues the superior court should not have allowed the State to admit evidence of the other acts he allegedly committed in Florida and Mississippi. Again, we disagree. The State properly gave Duran notice of its intent to introduce the other acts evidence, the superior court made the required findings under Arizona Rule of Evidence 404(c)(1), and

[4]Although Duran also argues admitting the call was "fundamental error" because his counsel did not object, we will not address claims of ineffective assistance of counsel on direct review. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

these findings were supported by the record. Thus, we hold the trial court did not abuse its discretion in admitting the other acts evidence. *State v. Lehr*, 227 Ariz. 140, ¶ 19, 254 P.3d 379, 386 (2011) (reviewing admission of other acts evidence for abuse of discretion).

II. Anders *Review*

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

¶27 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, Duran'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, and Duran was given an opportunity to speak at sentencing.

¶28 With one exception, Duran's sentences were within the range of acceptable sentences for his offenses. A.R.S §§ 13-604.01(A), (C)-(E) (current at A.R.S. §§ 13-705(A), (C)-(D)); A.R.S. § 13-701(C) (1994) (current at A.R.S. § 13-702(D)

(2010)). The court's pronouncement and minute entry, however, reflect it intended to sentence Duran to the non-dangerous, non-repetitive presumptive sentence for count 13(a) (unlawful imprisonment, a class 6 felony). The proper sentence, then, would have been one year, not 1.75 years.[5] A.R.S. § 13-701 (C)(5) (current at A.R.S. § 13-702(D)). Because we are remanding count 8 for resentencing, we also vacate the sentence on count 13(a). On remand the superior court shall correct the sentence on this count consistent with this decision.

CONCLUSION

¶29 We decline to order briefing and affirm Duran's convictions. We affirm his sentences on all counts except counts 8 and 13(a). For the reasons discussed in paragraphs 20-21 and 28 *supra*, we remand counts 8 and 13(a) to the superior court for resentencing consistent with this decision.

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

[5]We also note the minute entry and oral pronouncement reflect the court imposed the "presumptive" term of 2.25 years for count 17 (furnishing harmful items to minors, a class 4 felony). The relevant presumptive term was 2.5 years, A.R.S. § 13-701(C)(3) (current at A.R.S. § 13-702(D)), but "we will not correct sentencing errors that benefit a defendant, in the context of his own appeal, absent a proper appeal or cross-appeal by the [S]tate." *State v. Kinslow*, 165 Ariz. 503, 507, 799 P.2d 844, 848 (1990).

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).

¶31 Duran 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 Duran 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

/s/
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
PHILIP HALL, Judge