DIVISION ONE
FILED: 03/20/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ABDULLAHI MOHAMUD, Appellant.	)	1 CA-CR 10-0929 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-119386-001 DT

The Honorable Cari A. Harrison, Judge

AFFIRMED

Thomas C. Horne, 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 Peg Green, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878

(1969). Counsel for Defendant Abdullahi Mohamud has advised us that, after searching the entire record, she has been unable to discover any arguable questions of law. She has filed a brief requesting us to conduct an *Anders* review of the record. Defendant did not submit a supplemental brief but requested that counsel raise the issue of excessive sentence.

FACTS[1]

¶2 Defendant was staying with his friend, Mohamed Bukurow, and Bukurow's family; all were Somali emigrants. During the evening of April 12, 2010, B.A., Bukurow's teenage daughter, and J.A., his sister, were in the apartment with Bukurow's young son and J.A.'s two children.

¶3 B.A. heard screaming or arguing some time after 10:00 p.m. and got up to investigate. B.A. found her aunt in Defendant's room, and saw them lying naked on the floor behind the far side of the bed. Defendant was holding J.A. down and covering her mouth with his hand. B.A. ran out of the room and called 9-1-1.

¶4 B.A., who could communicate in English, told the police officers what she had seen, and then acted as an interpreter when the police spoke to J.A. Defendant was arrested, and the police obtained a search warrant to secure

[1] We review the facts in the light most favorable to sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989) (citation omitted).

samples of his deoxyribonucleic acid ("DNA"). DNA samples were collected from J.A. when she underwent a sexual assault examination.

¶5 Defendant pled not guilty to the kidnapping and sexual assault charges.[2] During the subsequent trial, Bukurow testified that the matter had been resolved within the Somali community and the trial was unnecessary.[3]

¶6 J.A. testified that when Defendant came home he grabbed her, took her to his room, threw her down, and removed his pants. Despite the fact that she "was saying no" and also "told him to get off," he took her pants off and lay on top of her. She then testified that nothing else happened, but admitted that she told a detective that Defendant had raped her. She also testified that B.A. came in after she screamed.

¶7 The forensic nurse who did the sexual assault examination of J.A. testified that she observed injuries that were consistent with vaginal penetration. The forensic scientist who examined the DNA swabs testified that DNA from J.A. was discovered on the base of Defendant's penis and that

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[2] Defendant was originally indicted on three additional counts based on a separate incident. After the two counts on appeal were severed, the remaining counts were dismissed.

[3] Bukurow had delivered an affidavit to the Maricopa County Attorney's Office which stated that "the case for which [Defendant] has been arrested has been resolved" and was signed by J.A., Bukurow, and the "president" and "vice president" of the Somali Bantu Community. The affidavit was admitted into evidence.

Defendant could not be excluded as a contributor to the male DNA on J.A.'s external genital swab.

¶8 After instructions and closing argument, the jury convicted Defendant as charged. He was subsequently sentenced to five years and three months in prison followed by a seven-year probation term, and was given 205 days of presentence incarceration credit.

¶9 We have jurisdiction over this appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012), 13-4031 (West 2012), and 13-4033(A)(1) (West 2012).

DISCUSSION

¶10 We have read and considered counsel's brief and have searched 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 compliance with the Arizona Rules of Criminal Procedure. The record, as presented, reveals that Defendant was present, assisted by a Somali interpreter, and represented by counsel at all stages of the proceedings.

¶11 We have also considered Defendant's claim that the sentences were excessive and conclude that each was imposed in accordance with the statutory sentencing scheme. Defendant was found guilty of sexual assault, a class two felony that requires a minimum mandatory sentence of not less than five and a quarter

years. A.R.S. § 13-1406(B) (West 2012).[4] Because the State did not allege any aggravating factors, Defendant could not be sentenced for longer than the seven-year presumptive term. *See State v. Johnson*, 210 Ariz. 438, 441, ¶ 10, 111 P.3d 1038, 1041 (App. 2005) (citing A.R.S. §§ 13–701(C) and 13–702(A)) ("Under Arizona's noncapital sentencing statutes, the maximum punishment authorized by a jury verdict alone, without the finding of any additional facts, is the presumptive term."). The imposition of a sentence within the prescribed range, however, is within a judge's discretion. *State v. Martinez*, 210 Ariz. 578, 583, ¶ 16, 115 P.3d 618, 623 (2005).

¶12 Here, the court did not find any mitigating factors sufficient to warrant any sentence less than the presumptive term. *See* A.R.S. § 13-701(E)(6) (West 2012) (court may consider any factor it finds to be mitigating). Because the court was in the best position to weigh the information that was provided as mitigation in light of the evidence from the trial, the court did not err by imposing the presumptive sentence.

¶13 The trial court also imposed a seven-year probation term in lieu of a prison sentence for the kidnapping conviction, to begin after Defendant served his prison sentence. A consecutive sentence may be imposed for charges that stem from

[4] Unless indicated otherwise, we cite to the current version of a statute if there have been no material revisions since the criminal offense occurred.

the same incident if the court finds that "the perpetrator's conduct in seizing or detaining the victim put the victim to a different or additional risk of harm than that inherent in the ultimate offense." *State v. Gordon*, 161 Ariz. 308, 314, 778 P.2d 1204, 1210 (1989).

¶14 Here, the court could have reasonably concluded, based on B.A.'s testimony that she saw Defendant lying beside J.A., holding her down, and covering her mouth, that the sexual assault had already occurred and the force that Defendant used to restrain J.A. was "more than incidental to the ultimate crime" of sexual assault. *Id.*; *see State v. Eagle*, 196 Ariz. 27, 33, ¶ 27, 992 P.2d 1122, 1128 (App. 1998), *aff'd*, 196 Ariz. 188, 994 P.2d 395 (2000) (citation omitted) (setting forth test to determine whether consecutive sentences for kidnapping and sexual offenses is permissible). As a result, the court did not err by sentencing Defendant to a consecutive probation term instead of a consecutive prison term.

CONCLUSION

¶15 We affirm Defendant's convictions and sentences. After this decision has been filed, counsel's obligation to represent Defendant in this appeal has ended. Counsel must only inform Defendant of the status of the appeal and Defendant's 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, 585, 684 P.2d 154, 157 (1984). Defendant may, if desired, file a motion for reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure.

/s/
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MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
JON W. THOMPSON, Presiding Judge

/s/
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JOHN C. GEMMILL, Judge