IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. RICARDO GONZALES ROMERO, Appellant.	)	1 CA-CR 08-1049 1 CA-CR 08-1052 (consolidated) DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Maricopa County

Cause No. CR 2008-048410-001 DT
CR 2007-180710 DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

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

Michael J. Dew — Phoenix
Attorney for Appellant

Richardo Gonzales Romero — Florence
In propria persona

T H O M P S O N, Judge

¶1 This case comes to us as 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 Ricardo Gonzales Romero (defendant) has advised us that, after searching the entire record, he has been unable to discover any arguable questions of law and has filed a brief requesting this court to conduct an *Anders* review of the record. Defendant has been afforded an opportunity to file a supplemental brief *in propria persona*, and has done so.

¶2 In 2003, victim, R.F., returned from the grocery store to her apartment. As she got out of the car she was approached by defendant who asked her to "party." As R.F. turned to get her grocery bags defendant grabbed her from behind and drug her under some stairs between nearby apartment buildings as she yelled for help. Defendant pushed R.F. down, got on top of her, and unsuccessfully tried to remove her pants. Defendant then told R.F. to "suck his dick" and when she refused he ejaculated on her face.

¶3 In 2007, victim A.W. walked across a canal when defendant drove by in a white truck, honking at her. A.W. continued walking and heard footsteps coming up behind her. Defendant caught up to A.W., took her cell phone, and pulled her to the ground. Defendant then pulled down the top of her dress and sucked on her nipple. A.W. screamed but defendant punched her face. Defendant then took down his pants and used A.W.'s hand to touch his penis before penetrating her with his fingers and penis. A.W.'s phone rang and

scared defendant who broke the phone by throwing it down.

¶4 Defendant was charged with three counts of sexual assault, class 2 felonies; two counts of kidnapping, a class 2 felony; one count of sexual abuse, a class 5 felony; one count of misdemeanor assault, a class one misdemeanor; one count of robbery, a class 4 felony; and one count of attempted sexual assault, a class 3 felony. Defendant was found guilty on all counts by a twelve person jury in a consolidated trial. Defendant was sentenced to the presumptive sentences on all counts with the three sexual assault counts to run consecutively and the remaining charges to run concurrently. Defendant was given 260 days presentence incarceration credit. The appeals for these two cases have been consolidated.

¶5 Defendant has filed a supplemental brief requesting review of his sexual assault conviction, a class 2 felony, based upon the masturbatory conduct when he forced A.W. to touch his penis. Defendant asserts that the proper charge should have been sexual abuse, a class 5 felony, or, alternatively sexual abuse should have been a lesser included crime of sexual assault. Sexual abuse can be a lesser included of sexual assault. *State v. Wise*, 137 Ariz. 468, 470, 671 P.2d 909, 911 (1983). No such instruction was requested here and the trial court is not required to *sua sponte* instruct the jury on a lesser included offense. *State v. Lucas*, 146 Ariz. 597, 603- 04, 708 P.2d 81, 87-88 (1985), overruled

in part on other grounds by *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996) (no fundamental error in trial court's failure to *sua sponte* give jury instruction on possible lesser included sexual abuse charge). He also asserts the state altered the definition of sexual contact in the jury instructions. We note, first, that defense counsel supported allowing the exclusion of certain terms which were irrelevant to the charge. Second, the statutory definition given to the jury of "sexual intercourse" includes masturbatory contact and was correct. *See* Ariz. Rev. Stat. § 13-1401(3).

¶6 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. So far as the record reveals, defendant was adequately represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits. Defendant's counsel's obligations in this appeal are at an end and he need do no more than inform defendant 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. *See State v. Shattuck,* 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

¶7 We affirm the convictions and sentences.

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JON W. THOMPSON, Judge

CONCURRING:

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John C. Gemmill, Presiding Judge

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Patrick Irvine, Judge