IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ARTHUR JAMES QUINTANA JR.,
Appellant.

No. 2 CA-CR 2015-0088
Filed February 24, 2016

Appeal from the Superior Court in Gila County
No. S0400CR201300557
The Honorable Gary V. Scales, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

E C K E R S T R O M, Chief Judge:

¶1 Following a jury trial, appellant Arthur Quintana Jr. was convicted of child molestation and sexual conduct with a minor, both dangerous crimes against children. The trial court sentenced him to consecutive prison terms, the longer of which was a sentence of life without the possibility of release for thirty-five years.

¶2 On appeal, counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating she had reviewed the record and found no "arguable question of law" to raise on appeal. Quintana did not file a supplemental brief. In our review of the record pursuant to Anders, however, we discovered a non-frivolous issue relating to Quintana's having been convicted of both molestation and sexual conduct with a minor. Citing *State v. Ortega*, we ordered additional briefing. 220 Ariz. 320, ¶¶ 25-28, 206 P.3d 769, 777-78 (App. 2008).

¶3 Quintana contends his conviction for both counts based on a single act violated his rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. He contends such error is fundamental and his conviction for child molestation should therefore be set aside. The state acknowledges that this court in *Ortega* determined that child molestation is a lesser included offense of sexual conduct with a minor under fifteen and that conviction for both offenses "violate[s] the prohibition against double jeopardy when they are based on a single act." But it

contends *Ortega* was wrongly decided.[1] The state does not dispute that Quintana committed only one touching.

¶4 "Respect for precedent demands 'that we not lightly overrule precedent and we do so only for compelling reasons.'" *State v. Hickman*, 205 Ariz. 192, ¶ 37, 68 P.3d 418, 426 (2003), *quoting Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 107, 859 P.2d 724, 730 (1993). "[W]e depart from this doctrine of stare decisis only with 'special justification'—something 'more than that a prior case was wrongly decided.'" *Wells v. Fell*, 231 Ariz. 525, ¶ 11, 297 P.3d 931, 934 (App. 2013), *quoting Hickman*, 205 Ariz. 192, ¶ 37, 68 P.3d at 426. The state's argument that Quintana's convictions should both be affirmed is based on the premise that if the legislature "specifically authorizes cumulative punishment under two statutes" the court may impose multiple punishments in a single trial. *Missouri v. Hunter*, 459 U.S. 359 (1983); *see also State v. Siddle*, 202 Ariz. 512, ¶ 13, 47 P.3d 512, 1155 (App. 2002). But nothing in A.R.S. §§ 13-1410 or 13-1405(B) provides a "'clear indication'" of an inten[t] to authorize multiple punishments." *Siddle*, 202 Ariz. 512, ¶ 9, 47 P.3d at 516. And even were we to accept the state's contention that A.R.S. § 13-705(M) showed such an intent,[2] that statute, along with the case law on which the state relies, existed at the time this court decided *Ortega*, and the state's argument therefore amounts to one that *Ortega* was wrongly decided. We therefore see no basis on which to depart from our precedent, and we conclude Quintana's conviction for both

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[1]The state also asserts that our supreme court's decision in *State v. Jones*, 235 Ariz. 501, 334 P.3d 191 (2014), dictates that the "multiple punishments were otherwise proper here." But, *Jones* addresses multiple punishments for the same act made punishable in different ways by different statutes under A.R.S. § 13-116, not the central question here—whether child molestation is a lesser included offense of sexual conduct with a minor under fifteen.

[2] Section 13-705(M) is the statutory provision mandating consecutive sentences for dangerous crimes against children. Notably in this context, it allows for concurrent sentencing in some contexts when the crime of conviction is child molestation of one child. § 13-705(M).

child molestation and sexual conduct violated double jeopardy principles. Thus, we vacate the conviction for the lesser included offense.

¶5 Viewed in the light most favorable to sustaining the verdict, however, the evidence was sufficient to support the jury's finding of guilt on the sexual conduct count. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). The evidence presented at trial showed Quintana put his fingers inside the vagina of the victim, who was then five or six years old. We further conclude the sentence imposed on the sexual conduct conviction is within the statutory limit. *See* A.R.S. §§ 13-705(B); 13-1401(3), (4); 13-1405.

¶6 Therefore, we vacate Quintana's conviction and sentence for child molestation and affirm his conviction and sentence for sexual conduct with a minor under fifteen years of age.