IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CHARLES WESLEY LEWIS,
Appellant.

No. 2 CA-CR 2015-0095
Filed April 15, 2016

Appeal from the Superior Court in Pima County
No. CR20121186001
The Honorable Casey F. McGinley, Judge Pro Tempore

AFFIRMED

COUNSEL

The Hopkins Law Office, P.C., Tucson
By Cedric Martin Hopkins
Counsel for Appellant

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 Charles Lewis was convicted after a jury trial of seven counts of sexual exploitation of a minor under the age of fifteen, five counts of sexual conduct with a minor under the age of fifteen, one count of attempted sexual conduct with a minor, and one count of molestation of a child under the age of fifteen, all dangerous crimes against children. The jury also found as an aggravating factor that the victim had suffered emotional harm. The trial court found as additional aggravating factors the presence of an accomplice, the victim's age, Lewis's position of trust and authority over her, and "the systematic, repetitive, and ongoing nature of [Lewis's] offenses." The court sentenced Lewis to consecutive prison terms totaling 342 years.

¶2 Counsel has 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), asserting he has reviewed the record but found no arguable issue to raise on appeal. Consistent with *Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d at 97, he has provided "a detailed factual and procedural history of the case with citations to the record" and asks this court to search the record for error. Lewis has filed a supplemental brief raising numerous arguments, none of which warrant relief.

¶3 Viewing the evidence in the light most favorable to sustaining the jury's verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), sufficient evidence supports them, as well as the trial court's finding of additional aggravating factors. Between June 2011 and March 2012, Lewis repeatedly forced his

girlfriend's fourteen-year-old daughter to engage in sexual acts with him. *See* A.R.S. §§ 13-1001; 13-1401(A)(1), (3), (4); 13-1405(A), (B); 13-1410(A). Additionally, he received from his girlfriend, the victim's mother, at least six sexually explicit photographs of the victim, as well as one sexually explicit video. *See* A.R.S. § 13-3553(A), (C). His sentences are within the statutory range and were properly imposed. A.R.S. §§ 13-705(C), (D), (J), (M), (P); 13-1001(B); 13-1405(B); 13-1410(B); 13-3553(C).

¶4 Lewis first argues that one of his convictions of sexual conduct is improper because the indictment refers to it having been the "first incident of oral sex" and the victim had testified he had first performed oral sex on her before she moved to Arizona. Thus, he concludes, the trial court lacked jurisdiction over him in regards to that count. But facts merely mentioned in the indictment do not become elements of an offense and, as long as amendment "does not result in a different crime being charged," the indictment is deemed amended to conform to evidence actually adduced at trial. *State v. Marshall*, 197 Ariz. 496, ¶ 39, 4 P.3d 1039, 1049 (App. 2000). Lewis does not contend he did not commit sexual conduct with the victim as otherwise described in that count by engaging in oral sexual contact with her in Arizona within the timeframe described in the indictment, or that he was prejudiced by any purported lack of clarity in the indictment. For the same reason, we reject his similar argument regarding his molestation conviction.

¶5 Lewis next asserts the evidence was insufficient to support another one of his convictions of sexual conduct because the victim initially testified he had not penetrated her with his penis. But she later clarified that he had done so and, thus, the evidence was sufficient to support the jury's verdict.

¶6 We also reject Lewis's claim that two of the sexual conduct counts were multiplicitous because both described acts of oral sex. *See generally Merlina v. Jejna*, 208 Ariz. 1, ¶ 12, 90 P.3d 202, 205 (App. 2004) ("Charges are multiplicitous if they charge a single offense in multiple counts."). Lewis did not raise this claim below and has not argued any error was fundamental or that it prejudiced him. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601,

607-08 (2005) (claims not raised in trial court reviewed only for fundamental, prejudicial error). Thus, he has waived this argument on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008). In any event, his argument would fail because the indictment expressly addressed distinct incidents—that is, one in which Lewis performed oral sex on the victim and another in which he forced her to perform oral sex on him.

¶7 We also find unavailing Lewis's assertion that several of his convictions of sexual exploitation of a minor were improper because there was no evidence he had opened the e-mail attachments containing the video and images. Given that the victim testified Lewis asked his girlfriend to send him explicit images and she had discussed such images with Lewis, the jury readily could conclude he viewed the images and video.

¶8 Lewis also raises several issues in regard to search warrants related to a search of his motorhome and of a computer seized from that motorhome. But he does not meaningfully address or cite authority relevant to the trial court's conclusion that, despite defects in the first warrant, the good-faith exception permitted the search of the motorhome. Nor does he identify any error in the court's conclusion that the second search warrant was proper because his girlfriend had given him the computer upon which incriminating evidence was found. Accordingly, we do not address these issues further. *See State v. King*, 226 Ariz. 253, ¶ 11, 245 P.3d 938, 942 (App. 2011) (failure to properly develop claim constitutes waiver).

¶9 Lewis next asserts he was improperly precluded from examining the victim about her sexual history. Specifically, he contends he should have been permitted to elicit testimony that she had lost her virginity to someone other than him—testimony purportedly inconsistent with her previous statements. But even had Lewis raised this argument below, such testimony is prohibited by Arizona's rape shield law, A.R.S. § 13-1421. And although Lewis suggests the statute is unconstitutional, we have already determined otherwise. *See State v. Gilfillan*, 196 Ariz. 396, ¶ 23, 998 P.2d 1069, 1076 (App. 2000). Lewis has identified no error in that

determination, and we decline to revisit it, particularly given that Lewis did not raise a constitutional argument below.

¶10 We observe, however, that evidence prohibited by § 13-1421 may nonetheless be admissible if it "'has substantial probative value and when alternative evidence tending to prove the issue is not reasonably available.'" *State ex rel. Montgomery v. Duncan*, 228 Ariz. 514, ¶ 5, 269 P.3d 690, 692 (App. 2011), *quoting Gilfillan*, 196 Ariz. 396, ¶ 22, 998 P.2d at 1076. But Lewis did not raise this argument below, and does not develop an argument on appeal that fundamental error occurred or that he was prejudiced by such error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. Thus, we do not further address this issue. *See King*, 226 Ariz. 253, ¶ 11, 245 P.3d at 942; *Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d at 140.

¶11 Lewis further contends the trial court incorrectly evaluated under Rule 404(c), Ariz. R. Evid., whether to allow admission of additional explicit photographs and videos of the victim as well as testimony concerning his sexual abuse of another child. Lewis, however, did not raise below most of the arguments he now raises on appeal and has not asserted any error was fundamental or prejudicial. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. Nor does he identify any error in the trial court's rejection of the arguments he does repeat on appeal. Thus, we do not address these arguments further. *See King*, 226 Ariz. 253, ¶ 11, 245 P.3d at 942; *Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d at 140.

¶12 Pursuant to our obligation under *Anders*, we have searched the record for fundamental error and found none. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (*Anders* requires court to search record for fundamental error). And we have rejected the arguments Lewis raised in his supplemental brief. We therefore affirm Lewis's convictions and sentences.