DIVISION ONE
FILED: 1/24/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 11-0410
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
JOSE HILARIO HERNANDEZ, JR., Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-180091-001DT

The Honorable Sherry K. Stephens, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Defendant Jose Hilario Hernandez, Jr., appeals his convictions and sentences for child abuse and manslaughter. 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). Defendant's appellate counsel has searched the record on appeal, found no arguable nonfrivolous question of law, and asks us to review the record for fundamental error. *See Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Defendant was given the opportunity to file a supplemental brief *in propria persona*, but did not do so. He did, however, ask his counsel to raise several issues for consideration on appeal.

¶2 We have searched the record and considered the issues identified by Defendant. We find no fundamental error, and therefore affirm.

FACTS AND PROCEDURAL HISTORY

¶3 In December 2007, Defendant was indicted for child abuse, a class 2 felony under A.R.S. § 13-3623(A)(1) and a dangerous crime against children and domestic violence offense under A.R.S. §§ 13-604.01 (since renumbered as § 13-705) and 13-3601, and second-degree murder, a class 1 felony under A.R.S. § 13-1104(A)(3) and a dangerous crime against children and domestic violence offense under A.R.S. §§ 13-604.01 (now § 13-

705) and 13-3601. The matter proceeded to a jury trial in early 2011.

¶4 At trial, the state presented evidence of the following facts. The victim, J.W., was born in January 2007. J.W. was a healthy baby, who had numerous checkups with her pediatrician and received medical care when she contracted a seasonal virus in November 2007. Also in November 2007, J.W. and her mother began living with her mother's boyfriend, Defendant, at his parents' house.

¶5 The morning of December 14, 2007, J.W. behaved normally under her mother's care -- she ate breakfast, a snack, and lunch; she spent time playing with Defendant's mother; and she took a nap. Early in the afternoon, Defendant, who had returned to the home that morning after working a night shift, drove J.W.'s mother to her job. J.W. was left in the care of Defendant's mother, who was paid to babysit so that Defendant could sleep when he returned home.

¶6 Mid-afternoon, Defendant called 911 and reported that J.W. was limp, unresponsive, and having trouble breathing. As the call progressed, Defendant reported that J.W.'s lips were purple and she had stopped breathing. Emergency medical personnel arrived within five minutes and found J.W. at the home's carport, apparently dead. She had no respiration, pulse,

or blood pressure; her skin was pale and cool; and her pupils did not react to light.

¶7 The medical personnel immediately transported J.W. to Maryvale Hospital, working on her during the entire eight-minute ride. They gave CPR to J.W., intubated her, and administered epinephrine, but saw no improvement in her condition. At Maryvale Hospital, an emergency-room doctor gave J.W. intravenous fluids and a second dose of epinephrine. J.W. regained a pulse but was still unable to breathe on her own, and was transferred to St. Joseph's Hospital pediatric intensive care unit ("PICU") for further care. She was in extremely critical condition when she arrived at the PICU, with a slow heart rate, low blood pressure, non-reactive pupils, and only occasional gasps of independent breathing. J.W.'s condition never improved, and her PICU doctor ultimately concluded that there was nothing more he could do to help her. On the doctor's advice, J.W.'s mother decided to let J.W. pass away, and she died that night.

¶8 An autopsy performed the next day revealed an abrasion on the back of J.W.'s head, internal trauma to her neck, fresh bruising and hemorrhages in her scalp and the tissue layers overlaying her cranium, multiple cranial fractures, and brain swelling with subdural hemorrhages. The medical examiner who performed the autopsy concluded that the manner of J.W.'s death

was homicide. The cause of her death was multiple blunt force head traumas inconsistent with an accidental fall or low-velocity impact, and the nature of her injuries was such that a caretaker would have immediately noticed that something was wrong. A consulting forensic anthropologist agreed that J.W.'s cranium showed that she had suffered at least four or five blunt force impacts shortly before her death. A consulting neuropathologist who examined J.W.'s brain also agreed that J.W. died from acute head trauma. Like the medical personnel who had treated J.W., the medical examiner found no evidence of food or other material in J.W.'s airway.

¶9 Before the autopsy, Defendant had told police and medical personnel that he believed J.W. had choked on an orange segment, and he had recounted the following story. When he arrived home in the afternoon, he saw J.W. falling asleep in her chair. He picked her up, she gave the yell she usually made when he lifted her, and his mother handed her an orange segment. Defendant then carried J.W. to his room, placed her on the bed propped up with pillows, and left the room for a few minutes to use the restroom. When he returned, J.W. was coughing and clutching the orange segment tightly with her arms extended and shaking. Defendant picked her up and patted her back, and she coughed up pieces of orange and went limp.

¶10 After the autopsy, police visited Defendant, J.W.'s mother, and Defendant's parents at their home and asked, without making any promises or threats, if they would come to the police station to talk about what happened to J.W. They agreed. A detective drove J.W.'s mother to the station in his pickup truck, and a uniformed police officer drove Defendant in a squad car. The uniformed officer did not handcuff Defendant or tell him he was under arrest, but, for safety reasons, did ask him to ride in the backseat of the car and display the contents of his pockets before entering the car. The officer did not speak to Defendant during the five-minute drive, and upon arriving at the station escorted him to a small room off the public upstairs lobby. He was not searched or told he was under arrest.

¶11 Detectives interviewed Defendant, J.W.'s mother, and Defendant's parents in separate rooms. At his interview, Defendant related the same story that he had told police and medical personnel the day before. The interviewing detective then told Defendant that J.W. had died from a head injury, not from choking. Defendant repeatedly denied harming or disciplining J.W. But as the interview continued, he stated that when he had placed J.W. on the bed, she had bumped the wall with her shoulder. He later added that she had also hit her head on a wooden ball that was part of the bed's footboard, but had not seemed to be hurt -- though she initially looked as

though she might cry, she did not do so and continued to hold and offer the orange segment to him. Defendant explained to the detective that he had not disclosed this information before because he had not remembered it.

¶12 Defendant next met with J.W.'s mother alone in an interview room, told her the same information about J.W. hitting her head on the wooden ball but appearing fine, and explained that he had not previously disclosed it because he did not know that the impact could have caused J.W.'s death. Defendant also met with his parents alone in an interview room and told them that J.W. had hit her head on the wooden ball but had not lost consciousness. Defendant was then allowed to leave the station with his parents. J.W.'s mother stayed later, and during that time received a text message from Defendant in which he suggested that he might flee the country. The text message prompted police to send officers to Defendant's parents' house to arrest him.

¶13 At the conclusion of the state's case-in-chief, Defendant moved for a judgment of acquittal pursuant to Ariz. R. Crim. P. 20. The motion was denied.

¶14 For his defense, Defendant testified consistent with the story he had eventually told police: when he placed J.W. on the bed, she hit her head. But the impact was not hard, she did not cry, and she offered him the orange segment she was holding.

When he returned to the room after a few minutes in the bathroom, J.W. was stiff, her tongue was swollen, and she was having trouble breathing. Defendant further testified that he had not felt he was free to refuse the police-station interview or leave the room during the interview.

¶15 Defendant also offered the testimony of his parents. His mother testified that she believed J.W. was not a healthy baby because she vomited often, and on the morning of her death she vomited twice, coughed heavily, and acted unhappy. Defendant's father added that a few days before her death, he had seen J.W. have a convulsion when his wife was bathing her. Defendant's mother further testified that she had seen Defendant place J.W. on the bed the day of her death, and J.W. did not make any noise at that time.

¶16 Defendant finally offered the testimony of his own forensic expert. Defendant's expert acknowledged that J.W. had died from blunt force trauma, but opined that the forensic evidence showed signs of healing that meant the trauma could have occurred days before her death. In rebuttal, the medical examiner disagreed that the evidence showed signs of healing, and testified that he believed J.W.'s injuries were acute and would have immediately rendered her obtunded or unconscious.

¶17 After considering the evidence and counsels' arguments, the jury found Defendant guilty of intentional or

knowing child abuse under circumstances likely to produce death or serious physical injury, as charged. The jury was unable to agree on a verdict for the second-degree murder charge, but found Defendant guilty of the lesser-included offense of manslaughter. The court entered judgment on the verdicts and sentenced Defendant to concurrent prison terms of 17 years for the child abuse count and 5 years for the manslaughter count, with credit for 234 days of presentence incarceration.

¶18 Defendant filed a timely notice of appeal. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

DISCUSSION

¶19 Defendant requests that several issues be considered on appeal. We address each in turn.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

¶20 Defendant contends that his trial counsel "rushed through trial to accommodate the prosecutor's vacation schedule" and was unprepared. This is essentially a claim of ineffective assistance of counsel. We do not consider ineffective assistance of counsel claims on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Such claims must be raised in a petition for postconviction relief under Ariz. R. Crim. P. 32. *Id.*

II. DEFENSE EXPERT CALLED OUT-OF-ORDER

¶21 Defendant next contends that he was prejudiced because his forensic expert was called out-of-order, during the state's case-in-chief. The trial court has "reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." Ariz. R. Evid. 611(a). We discern no abuse of discretion in the court's decision to accommodate the defense witness's schedule and avoid later delays by taking her testimony out-of-order.

III. ADMISSION OF EVIDENCE REGARDING DEFENDANT'S TEXT MESSAGE TO J.W.'S MOTHER

¶22 Defendant next asserts that the parties stipulated before trial that evidence about the text message he sent to J.W.'s mother would not be presented at trial. He contends that he was prejudiced because the prosecutor elicited testimony about the text message, and he also contends that he requested a mistrial based on the admission of this evidence.

¶23 The record reveals no evidence of a written agreement to exclude evidence of the text message. When the issue arose at trial, defense counsel acknowledged that no written motion was filed but claimed an oral agreement had been reached to exclude evidence about the text message. The prosecutor,

however, contended that she had understood the oral agreement to apply to different evidence -- not to the text message. The record also shows that Defendant failed to make a contemporaneous objection when evidence of the text message was first introduced at trial, and that he later complained of prejudice but never moved for a mistrial.

¶24 The trial court has considerable discretion to determine the relevance and admissibility of evidence. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). We discern no abuse of discretion in the court's determination that evidence regarding the text message was admissible. Defendant was unable to prove that the parties had stipulated to exclude the evidence, and evidence of Defendant's plan to flee after his interview was relevant to show consciousness of guilt.

IV. EXCLUSION OF EVIDENCE REGARDING CHILD CUSTODY

¶25 Defendant finally contends that he was prejudiced because he was not allowed to introduce evidence that by the time of trial, J.W.'s mother had lost custody of her two surviving children "based on her having allowed a [new] boyfriend to live with her and hit one of the children." Again, the trial court has considerable discretion to determine the relevance and admissibility of evidence. *Amaya-Ruiz*, 166 Ariz. at 167, 800 P.2d at 1275. We find no abuse of discretion in the court's exclusion of evidence regarding the custody issue. The

evidence had no tendency to make any fact material to the trial any more or less probable, and was therefore appropriately excluded under Ariz. R. Evid. 401.

V. REMAINING ISSUES

¶26 The record reflects that Defendant received a fair trial. Defendant was present and represented by counsel at all critical stages. The state's closing and rebuttal arguments were proper. There was sufficient evidence to support Defendant's conviction for intentional and knowing child abuse under A.R.S. § 13-3623(A)(1): the state presented evidence that Defendant had care and custody over J.W., and he intentionally or knowingly caused or permitted her injury or caused or permitted her to be placed in a situation where her person or health was endangered, under circumstances likely to produce death or serious physical injury. There was also sufficient evidence to support the jury's determination that the child abuse offense was a dangerous crime against children and a domestic violence offense under A.R.S. §§ 13-3623(A)(1), 13-604.01 (now § 13-705) and 13-3601: J.W. was under fifteen years old and resided in the same household as Defendant. Finally, there was sufficient evidence to support Defendant's conviction for manslaughter under A.R.S. § 13-1103(A)(1): the state presented evidence that Defendant committed the child abuse recklessly, i.e., with a conscious disregard of the substantial

and unjustifiable risk that J.W.'s death would result (*see* A.R.S. § 13-105(10)(c)), and J.W.'s death did in fact result.

¶27 Before imposing sentence, the court ordered and considered a presentence report. Defendant was given the opportunity to speak at the sentencing hearing, and the court stated on the record the evidence and materials it considered and the factors it found in imposing sentence. The court imposed lawful sentences for Defendant's convictions. The court credited Defendant with 234 days of presentence incarceration. On this record, it appears that the presentence incarceration was incorrectly calculated. But because the error favors Defendant and the state has not cross-appealed, we do not correct the error. *State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990).

CONCLUSION

¶28 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm Defendant's convictions and sentences.

¶29 Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Defendant of the status of this appeal and his future options. *Id.*

Defendant has thirty days from the date of this decision to file a petition for review *in propria persona*. Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has thirty days from the date of this decision in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SAMUEL A. THUMMA, Judge