DIVISION ONE
FILED: 11/01/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0677
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
MARCUS EARL WIGGINS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-008116-001

The Honorable Roger E. Brodman, 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 Thomas K. Baird, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Defendant Marcus Wiggins appeals from his conviction for sexual conduct with a minor. 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 has submitted a brief *in propria persona* in which he raises issues on appeal.

¶2 We have searched the record for fundamental error and find none. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3 In December 2010, Defendant was indicted for intentionally or knowingly engaging in sexual intercourse or oral sexual contact with his stepdaughter, who was a minor (Count 1), and three counts of sexual abuse: sexual contact, breast (Count 2); sexual contact, penis/thigh (Count 3); and sexual contact, vagina (Count 4).

¶4 At trial, the state presented evidence of the following facts. On the evening of February 2, 2010, Defendant's stepdaughter, J., was on the phone speaking to her friend and boyfriend in her brother I.'s room. I. eventually left to take a shower. Defendant, who had been drinking heavily, came into the room, yanked J.'s hair, and uttered sexual innuendos to her. Defendant then forced J. to the ground, got on top of her and put his hand up her shirt. He

then attempted to pull down both his and J.'s pants. Although he was unable to pull down her pants, he proceeded to mimic sexual intercourse and kiss her neck. J. tried to push Defendant away but was unsuccessful. J. screamed for I., who returned to the room and attempted to push Defendant away. Defendant ultimately separated himself from J. When she heard the scream, L., Defendant's wife and J.'s mother, went upstairs to investigate. After Defendant and L. argued downstairs, L. returned upstairs and told J. and I. that they needed to call the police. She left with her youngest daughter, E. -- she did not want to face the police because she was on probation and had been impermissibly drinking.

¶5 Approximately ten minutes later, the police arrived at the house. The police separated J. and I. from Defendant, and took Defendant to question him. After speaking with Defendant, the police placed him under arrest and put him in the back of the police vehicle. Officer Tiona testified that on the way to the 4th Avenue Jail, Defendant said "I don't see what the big deal was. I only rubbed on her leg, and I [had] been drinking a little bit tonight and I was getting a little touchy-feely." Defendant was released subject to the supervision and restrictions of the electronic monitoring program.

¶6 After considering the evidence, the jury found Defendant guilty of Counts 1 and 3. Defendant filed a motion

for new trial, which the court denied. Defendant was sentenced to 3.5 years in prison for Count 1 and 1.25 years in prison for Count 3, to be served concurrently. Defendant was given 174 days of presentence incarceration credit.

¶7 Defendant moved to vacate the conviction on Count 3, arguing that his dual convictions as to Counts 1 and 3 violated double jeopardy. The court granted the motion, and vacated the conviction on Count 3. Defendant timely appealed his conviction and sentence on Count 1. On August 8, 2012, he filed a supplemental brief. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

DISCUSSION

I. REWEIGHING OF EVIDENCE

¶8 Defendant contends that witnesses lied under oath because "[t]he statements the state rec[ei]ved from all its witnesses were [i]nconclusive and contradicted the statements . . . given to the detectives who investigated the allegations." Defendant also requests "that this court review the [t]rial transc[r]ipts and rule in favor [of] the defendant."

¶9 Defendant's argument is unavailing. We must not "take the case away from the jury" by reviewing the record for evidence supporting a conclusion or inference different from the resulting decision. *Flanders v. Maricopa Cnty.*, 203 Ariz. 368,

371, ¶ 5, 54 P.3d 837, 840 (App. 2002). "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Id.* (citation omitted). The jury, as the finder of fact, found against Defendant on legally sufficient evidence. We do not reweigh the evidence presented to the trial court to reach the opposite conclusion.

II. REMAINING ISSUES

¶10 The record reveals no fundamental error. The record reflects that Defendant received a fair trial. The proceedings complied with the Arizona Rules of Criminal Procedure, and Defendant was present and represented by counsel at all stages. The record of voir dire does not demonstrate the empanelment of any biased jurors, and the jury was properly composed of eight jurors and three alternates. *See* Ariz. R. Crim. P. 18.1(a); A.R.S. § 21-102(B). The evidence that the state presented at trial was properly admissible, and the jury instructions were proper.

CONCLUSION

¶11 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶12 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 30 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, he has 30 days from the date of this decision in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Presiding Judge

/s/
_____
ANDREW W. GOULD, Judge