

NOTE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 08/21/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0784
)
Appellee,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
MARIA SEPULVEDA,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200800958

The Honorable Andrew W. Gould, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Michael Breeze, Yuma County Public Defender Yuma
By Edward F. McGee, Deputy Public Defender
Attorney for Appellant

J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz.

297, 451 P.2d 878 (1969), following Maria Sepulveda's convictions of two counts of sexual conduct with a minor, Class 2 felonies, and one count of failure to report a reportable offense, a Class 6 felony. Sepulveda's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Sepulveda was given the opportunity to file a supplemental brief but did not do so. Instead, she requested her counsel raise several issues, which we address below. Counsel now asks this court to search the record for fundamental error. After reviewing the entire record, we affirm Sepulveda's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 Sepulveda's daughter is the victim of the offenses of which Sepulveda was convicted. When the victim was six years old, her stepfather began to touch her breast and vaginal areas.¹ The victim reported this sexual touching to Sepulveda, but when the stepfather denied it, Sepulveda took no action.

¶3 The stepfather continued to sexually abuse the victim for more than 10 years. In August 2005, when the victim was 16

¹ Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Sepulveda. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

years old, Sepulveda suggested that if the victim would have sex with the stepfather, the stepfather would stop touching her. Later that night, Sepulveda took the victim into bed with the stepfather and assisted him as he had sexual intercourse with the victim. One week later, the stepfather resumed touching the victim inappropriately.

¶14 In October 2005, Sepulveda proposed the victim should again have sex with the stepfather, this time as a present for his birthday. Sepulveda again took the victim into bed with the stepfather and assisted as they had intercourse, this time also instructing the victim on how to perform oral sex on the stepfather. Throughout this time, Sepulveda never reported the stepfather's actions to the authorities.

¶15 After the victim reported these incidents to police, the State charged Sepulveda with two counts of sexual conduct with a minor and one count of failure to report for her role in the August and October 2005 incidents. Sepulveda initially agreed to plead guilty to two counts of attempted molestation of a child, and the superior court accepted her guilty plea and imposed a five-year term of incarceration and lifetime probation. After Sepulveda then challenged the guilty plea and resulting sentence pursuant to Arizona Rule of Criminal Procedure 32, the State conceded that she could not have committed attempted molestation of a child against the 16-year-

old victim because the offense requires a victim under 15 years of age. See Ariz. Rev. Stat. ("A.R.S.") § 13-1410(A) (West 2012).² The court then vacated the convictions and sentences.

¶16 When another round of plea negotiations failed, the charges were set for trial, and a jury convicted Sepulveda of two counts of sexual conduct with a minor and one count of failure to report. The jury also found the State had proved two aggravating circumstances beyond a reasonable doubt. The court sentenced Sepulveda to aggravated consecutive terms of 10 years for each count of sexual conduct with a minor and an aggravated term of 1.5 years for failure to report, to be served concurrently with the second 10-year term. The court awarded Sepulveda 1,196 days' presentence incarceration credit against the first 10-year term.

¶17 Sepulveda timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033 (West 2012).

DISCUSSION

A. Issues Raised by Sepulveda.

1. Court's acceptance of Sepulveda's guilty plea.

¶18 Sepulveda argues the court denied her due process of law when it accepted her earlier guilty plea even though she was

² Absent material revision after the date of an alleged offense, we cite a statute's current version.

demonstrably not guilty of sexual molestation of a child, the offense to which she pled guilty. The court, however, granted Sepulveda's petition for post-conviction relief on this ground and vacated her guilty plea and the resulting sentence. This issue therefore is moot.

2. Ineffective assistance of counsel.

¶9 Sepulveda argues that the lawyer who represented her in the original plea negotiations, the lawyer who represented her in her Rule 32 petition, and her two trial attorneys all were ineffective for various reasons. A claim of ineffective assistance of counsel may not be reviewed on direct appeal. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007); *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (ineffective assistance of counsel claim must be raised under Arizona Rule of Criminal Procedure 32). We therefore do not address Sepulveda's arguments that her attorneys were ineffective.

3. Alleged prosecutorial misconduct.

¶10 Sepulveda argues the prosecutor denied her due process of law by "[u]s[ing] his wealth and education to obtain witnesses favorable to the prosecution; and . . . call[ing] a witness unknown to [Sepulveda] who claimed to know her." A claim of prosecutorial misconduct warrants reversal only if "(1) misconduct is indeed present; and (2) a reasonable likelihood

exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Moody*, 208 Ariz. 424, 459, ¶ 145, 94 P.3d 1119, 1154 (2004).

¶11 A prosecutor generally does not commit misconduct merely by presenting evidence favorable to the State's position. Sepulveda does not specify which trial witness was "unknown" to her, nor did she object at trial that the prosecutor presented testimony of a witness who was not properly disclosed. The prosecutor's role in presenting evidence from a witness who apparently contradicted some unspecified testimony by Sepulveda did not constitute misconduct.

4. Miscellaneous asserted errors by the superior court.

¶12 Sepulveda argues the court erred by failing to appoint her post-conviction relief attorney to represent her at her trial. Although a criminal defendant is entitled to competent representation, she is not entitled to appointed counsel of her choice. *State v. Moody*, 192 Ariz. 505, 507, ¶ 11, 968 P.2d 578, 580 (1998).

¶13 Next, Sepulveda contends the court erred by ordering the prosecutor not to reveal to the jury that Sepulveda's charges had been increased after plea negotiations failed or that the stepfather already was incarcerated for the same crimes. These arguments, however, are not based in fact. Sepulveda was tried on the same charges she faced prior to her

plea agreement. Nor does the record show any formal ruling on admissibility of evidence related to the stepfather's incarceration, although the court permitted some evidence of the charges against the stepfather and his incarceration to the extent relevant to the charges against Sepulveda.

¶14 Similarly, Sepulveda argues the court erred by permitting the victim to lie while testifying. Nothing in the record, however, suggests perjury by the victim, and Sepulveda does not provide evidence or argument beyond this bare accusation. Sepulveda also argues the court erred by telling her at sentencing that, if she appealed, she might eventually receive a more severe sentence. The record reflects no such admonition by the superior court.

¶15 Sepulveda next suggests the court erred by empaneling a jury of eight rather than twelve persons. Because Sepulveda faced a maximum possible sentence on all charges of less than 30 years, only eight jurors were required; the jury met that requirement. A.R.S. § 21-102(B) (West 2012).

¶16 Sepulveda also argues the court imposed excessive sentences "more appropriate to a homicide case." The court here imposed legal, albeit aggravated, sentences for the crimes of which Sepulveda was convicted. See A.R.S. § 13-702(A)(1) (2005) (aggravated term of 10 years allowed for a conviction of Class 2 felony sexual conduct with a minor); A.R.S. § 13-702(A)(5)

(aggravated term of 1.5 years for Class 6 felony failure to report).

¶17 Finally, Sepulveda contends the court erred by failing to note at sentencing that she had been convicted as an accomplice. A defendant convicted "only" as an accomplice remains fully criminally accountable for the commission of the substantive offenses. A.R.S. § 13-303(A) (West 2012). The court did not err.

B. Fundamental Error Review.

¶18 The record reflects Sepulveda received a fair trial. She was represented by counsel at all stages of the proceedings against her and was present at all critical stages. The court held appropriate pretrial hearings, including hearings on several motions in limine. After a hearing and making the appropriate findings, it ruled evidence of Sepulveda's role in other instances of the stepfather's sexual abuse of the victim was admissible under Arizona Rule of Evidence 404(b). The court did not conduct a voluntariness hearing; however, the record did not suggest a question about the voluntariness of Sepulveda's statements to police. See *State v. Smith*, 114 Ariz. 415, 419, 561 P.2d 739, 743 (1977); *State v. Finn*, 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974).

¶19 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was

properly comprised of eight members with two alternates. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned unanimous verdicts, which were confirmed by juror polling. The court received and considered a presentence report, addressed its contents during the sentencing hearing and imposed legal sentences for the crimes of which Sepulveda was convicted. The court did not deny Sepulveda presentence incarceration credit to which she was entitled by law.

CONCLUSION

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

¶21 After the filing of this decision, defense counsel's obligations pertaining to Sepulveda's representation in this appeal have ended. Defense counsel need do no more than inform Sepulveda of the outcome of this appeal and her 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). On the court's own motion, Sepulveda has 30 days from the date of this decision to proceed, if she wishes, with a *pro per* motion for reconsideration. She has 30 days from the

date of this decision to proceed, if she wishes, with a *pro per* petition for review.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Chief Judge