DIVISION ONE
FILED: 4/23/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0079
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
GREGORY MICHAEL HARDIN,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-131263-001

The Honorable Dawn M. Bergin, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Joseph T. Maziarz, Chief Counsel,
Criminal Appeals Section
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 Gregory Michael Hardin appeals from his convictions of three counts of indecent exposure to a minor under fifteen years of age. 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 for fundamental error and considered the issues identified by Defendant. We find no fundamental error. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3 In June 2011, Defendant was indicted pursuant to A.R.S. § 13-1402 for three counts of indecent exposure to three minors under the age of fifteen. At trial, the state presented evidence of the following facts.

¶4 Three young girls were visiting a family member's home in Chandler, Arizona. They decided to walk to the community lake nearby where the girls often played. Walking to the lake, the girls saw Defendant lying on a neighbor's driveway.[1] The

[1] Defendant testified that he was injured and decided to rest on the driveway at the neighbor's home. After the incident with

girls described Defendant as being bald, not wearing a shirt, and wearing dark blue basketball shorts. Defendant then proceeded to stand up, pull down his pants and expose his penis. The girls watched for a few seconds and then ran back to the relative's home, where they reported the incident. Relatives called the police.

¶5 The police issued an Attempt to Locate ("ATL"), and a park ranger responded, stating that he was in contact with Defendant. The police then generated a black-and-white photographic lineup, with Defendant's picture included. Because the neighbor picked Defendant from the photographic lineup, the police, who had located Defendant after the park ranger's response to the ATL, proceeded to arrest him.

¶6 At the conclusion of the state's case-in-chief, defense counsel filed a Rule 20 motion.[2] The court denied the motion, but noted "that the testimony from the witnesses has been scattered and inconsistent and [the court] found i[t] not

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the girls, Defendant and the neighbor briefly interacted, and the neighbor then entered his home, leaving Defendant alone outside.

[2] Defense counsel argued that there was insufficient evidence to convict Defendant because two of the girls did not actually see Defendant expose his penis, there was inconsistent testimony regarding whether the shorts had a flap or a drawstring and whether Defendant was standing or lying down when he exposed his penis, and there was inconsistent evidence regarding the color of the shorts Defendant was wearing.

to be particularly credible." After hearing closing arguments and considering the evidence, the jury found Defendant guilty of all three counts. The jury further found that the victim in each count was under the age of fifteen.

¶7 Before the sentencing hearing, the state waived the aggravation phase of the case. Although Defendant had two prior felonies, the court found that those two felonies were not aggravators for sentencing in this case, and one felony was not a historical prior felony conviction under the statute now numbered A.R.S. § 13-703(B)(2).[3] Further, the court found several mitigating factors.[4] First, the court found that Defendant's mental health was a mitigating factor because it

[3] The state proved to the court that Defendant had two prior felony convictions that both occurred on February 24, 2004: unlawful flight from a law enforcement vehicle, a class 5 felony, and aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs ("Aggravated DUI"), a class 4 felony. The court determined that for the purposes of sentencing, the Aggravated DUI conviction was a historical prior felony conviction, but the unlawful flight from a law enforcement officer was not. However, although the state's recommendation in the presentence report was that the court "impose[] greater than the presumptive term with concurrent terms for each count," the court found that it could not do so because it did "not have any aggravators in this case."

[4] Defendant contends that the court erred in denying his Rule 20 motion. We disagree. The judge did find that there had been inconsistencies in the state's evidence, but concluded that she was "not here to usurp the role of the jury in determining facts," and that reasonable minds could differ on the conclusions that the evidence could support. The judge factored her concerns into Defendant's mitigated sentence.

"believe[d] that that's contributed to his homelessness, and if he hadn't been homeless he wouldn't have had the need to walk around the neighborhood, and he would have a place to stay and would be probably able to maintain stable employment." Second, the court found a mitigating circumstance because two of the victims did not see the exposure; the court also found this as a basis to impose concurrent sentences rather than consecutive sentences. Finally, the court found a mitigating circumstance due to the fact that there was "quite a distance from where [the youngest victim] saw [Defendant]."

¶8 Because the court found that there were no aggravators in the case and there were mitigating circumstances, it sentenced Defendant to a mitigated sentence of one year in prison for each count, to be served concurrently. The court also imposed "community supervision equal to one day for every seven days of the sentence to be served consecutively to the actual period of imprisonment." The court warned Defendant that failure to abide by the conditions of community supervision could result in Defendant being required to spend the remaining term of his community supervision in prison. The court credited Defendant with 206 days of presentence incarceration, and found that Defendant would not have to register as a sex offender.

¶9 Defendant timely appeals. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

DISCUSSION

¶10 Defendant requests that we address several issues on appeal. We consider each in turn.

I. DEFENDANT AS AN ALLEGED VICTIM OF A HATE CRIME

¶11 Defendant contends that he was the victim of a hate crime perpetrated by the girls. The contention lacks merit. A hate crime occurs when there is "[e]vidence that the defendant committed the crime out of malice toward the victim," which manifests evidence of prejudice based on the victim's "race, color, religion, national origin, sexual orientation, gender or disability." A.R.S. §§ 13-701(D)(15), 41-1750(A)(3). Defendant turns this definition on its head by suggesting that the girls -- who were charged with no crime, but rather were the victims in this case -- could legally have committed a hate crime.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

¶12 Defendant essentially makes three claims of ineffective assistance of counsel. First, Defendant contends that his trial counsel presented a trial strategy which he opposed. Second, Defendant contends that his "counsel on appeal has a conflict of interest because both she and trial counsel work for the Office of the Public Defender[.]" Third, Defendant contends that defense counsel failed to strike a juror who was a

police officer's daughter.[5] 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.*

III. PROSECUTORIAL MISCONDUCT

¶13 Defendant contends that he "was prejudiced by prosecutorial misconduct throughout the case." To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (citation omitted). Here, Defendant does not suggest how he was prejudiced by prosecutorial misconduct, and does not demonstrate that the trial was unfair. We perceive no prosecutorial misconduct in this case.

IV. ALLEGED IMPROPER TREATMENT IN JAIL AND DURING TRIAL

¶14 Defendant also contends that he was not given proper medical care in jail and was not treated humanely during trial. This proceeding is not the proper forum for such a claim, and

[5] We have reviewed the transcript of jury selection proceedings and find no indication that one of the jurors was a police officer's daughter. _ One juror had a stepdaughter-in-law who is a Chandler police officer. We see nothing in the record that suggests that juror should have been stricken for cause.

the argument has no relation to any fundamental error that might warrant relief on direct appeal from a criminal conviction.

V. REMAINING ISSUES

¶15 The record reveals no fundamental error. Defendant was represented by counsel at all critical proceedings, except when he voluntarily waived his appearance. The record of voir dire does not demonstrate the empanelment of any biased jurors, and the jury was properly composed of eight jurors and two alternates. *See* Ariz. R. Crim. P. 18.1(a); A.R.S. § 21-102(B).

¶16 The evidence that the state presented at trial was properly admissible. The state presented evidence that Defendant pulled down his shorts and exposed his penis in the presence of three minors under the age of fifteen in the driveway of a neighbor's home.

¶17 After the jury returned its verdict, the court, in its discretion, imposed a legal sentence of one year in prison for each count, to be served concurrently. *See State v. Garza*, 192 Ariz. 171, 176, ¶ 17, 962 P.2d 898, 903 (1998) (finding that judge has discretion to choose between consecutive and concurrent sentences). The state's closing and rebuttal arguments were proper. The court ordered and considered a presentence report before sentencing, gave Defendant the opportunity to speak at the sentencing hearing, and stated on the record the evidence and materials it considered and the

factors it found in imposing the sentence. The court correctly calculated Defendant's presentence incarceration of 206 days.

¶18 The sentences imposed were lawful. Pursuant to A.R.S. § 13-703(B)(2) "[a] person shall be sentenced as a category two repetitive offender if the person . . . stands convicted of a felony and has one historical prior conviction." The court found that Defendant had one prior felony with a historical prior conviction. The court found mitigating factors under A.R.S. §§ 13-701(E)(2) and (6). Therefore, Defendant properly received a mitigated sentence under A.R.S. § 13-703(I).

CONCLUSION

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

¶20 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/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
LAWRENCE F. WINTHROP, Chief Judge