NOTICE: NOT FOR PUBLICATION.
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

CHERISH ARROYO, *Appellant*.

No. 1 CA-CR 12-0812

FILED 12-26-2013

Appeal from the Superior Court in Maricopa County
No. CR2011-149163-001
The Honorable Edward W. Bassett, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz

Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Terry J. Adams

Counsel for Appellant

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Maurice Portley and Judge Samuel A. Thumma joined.

K E S S L E R, Judge:

¶1 Appellant Cherish Arroyo ("Arroyo") was convicted of five counts of sexual conduct with a minor and sentenced to lifetime probation on all five counts, with nine months' jail time as a condition of probation for count 2. Counsel for Arroyo filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Arroyo was given the opportunity to file a *pro per* supplemental brief, but did not do so. For the following reasons, we affirm Arroyo's convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY

¶2 The victim, S.J., was born on June 21, 1994. He was a high school student whom Arroyo met by hosting booster club meetings at her home.

¶3 In May 2011, when S.J. was sixteen years old, Arroyo and S.J. became friends on the social media website Facebook, through which the two began exchanging instant messages. In August 2011, after S.J. inadvertently left his Facebook account open on his family computer, S.J's mother ("Mother") read through S.J.'s Facebook messages and noticed the conversations between him and Arroyo. Mother contacted the police and notified S.J.'s father ("Father"), who confronted S.J. about the suspicious Facebook messages. S.J. told Father that he and Arroyo had sex.

¶4 In September 2011, the Maricopa County Sheriff's Office ("MCSO") arranged a confrontation call between S.J. and Arroyo. During that call, S.J. told Arroyo that his parents saw their Facebook messages and now think that they are having sex. Arroyo responded that she could go to jail because S.J. is a minor.

¶5 Thereafter, MCSO detectives confronted Arroyo at her home and brought her in for an interview. MCSO Detective T.M. read Arroyo

her *Miranda* rights[1] at the start of the interview. Arroyo admitted to having oral and penile-vaginal sex with S.J. multiple times.

¶6 Arroyo was indicted on six counts of sexual conduct with a minor, all class 6 felonies. The indictment alleged three separate instances of oral sexual contact and three separate instances of penile-vaginal intercourse.

¶7 At trial, S.J. testified about sex acts occurring on three separate dates. According to S.J., the first encounter took place in May 2011, when Arroyo invited him over via Facebook. He explained that the second encounter occurred in late May or early June 2011 and followed the same pattern of watching television in bed, followed by oral and then penile-vaginal sex. S.J. said that he and Arroyo had sex a third time in late June.

¶8 Arroyo's principal defense was that she did not engage in these sexual acts voluntarily due to the effects of her narcolepsy medication. Arroyo testified that she was diagnosed with narcolepsy in August 2009 and takes a medication that induces sleep in fifteen to forty-five minutes. She also said that S.J. was aware that she had this condition, that she took this medication, and of its effects. According to Arroyo, each of the sexual encounters occurred while she was under the influence of her narcolepsy medication, and as a result she was not conscious of what was occurring. She asserted, in essence, that S.J. took advantage of her while she was in a drug-induced sleep. Arroyo admitted, however, that she was conscious when engaging in the Facebook conversations.

¶9 In addition to Arroyo's testimony, her physician testified that the drug involved is related to GHB, commonly known as the "roofie" drug, that sleepwalking and similar symptoms can occur while under the influence, and that Arroyo is prescribed a high dose of the drug. Arroyo's husband also testified that the medication sometimes makes Arroyo act differently. He explained that if Arroyo is under the influence, "[w]hoever wakes her up is basically in control of her." As examples of this behavior, Arroyo's husband said that he has caught Arroyo checking their son's blood sugar, eating, drinking, and sweeping while asleep.

¶10 The jury found Arroyo not guilty on count 1,[2] but guilty on counts 2 through 6. Arroyo was sentenced to lifetime probation on all five

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

counts, with nine months' jail time as a term of probation on count 2, and was required to register as a sex offender.

¶11 Arroyo timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(1) (2010).

DISCUSSION

¶12 In an *Anders* appeal, we review the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). After careful review of the record, we find no grounds for reversal of Arroyo's convictions or sentences. The record reflects that Arroyo had a fair trial and all proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Arroyo was present and represented at all critical stages of trial, was given the opportunity to speak at sentencing, and the sentences imposed were within the range for Arroyo's offenses.

I. Sufficiency of the Evidence

¶13 When reviewing the sufficiency of evidence at trial, "[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶14 To obtain a conviction, the State must show that Arroyo "intentionally or knowingly engag[ed] in sexual intercourse or oral sexual contact with [a] person who is under eighteen years of age." A.R.S. § 13-1405(A) (Supp. 2013).[3] Here, Arroyo was indicted on six counts of sexual conduct with a minor: three counts of oral sexual contact and three counts

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[2] Count 1 was the first allegation of oral sexual contact.

[3] We cite to the current versions of statutes unless they have been materially amended since the relevant time period.

of sexual intercourse. Ultimately, Arroyo was convicted on five counts of sexual conduct with a minor who is at least fifteen years of age.

¶15 The evidence sufficiently supports the verdict. S.J. was born June 21, 1994, making him sixteen or seventeen at the time of the encounters. As noted above, he testified to each of the charged offenses. In addition, the State introduced a video recording of a police interview with Arroyo in which she admitted to engaging in oral and penile-vaginal sex with S.J. multiple times. The State also introduced an audio recording of a confrontation call between S.J. and Arroyo in which she explained to S.J. that she could go to jail because he is a minor.

¶16 As noted above, Arroyo did not deny that penile-vaginal intercourse occurred during the first and third encounters, but rather testified that she was under the influence of her sleep-inducing narcolepsy medication during each encounter and thus was not consciously or voluntarily engaging in the sexual conduct. Given S.J.'s testimony, the confrontation call, and the police interview, the jury was free to reject Arroyo's argument.

¶17 Accordingly, there is sufficient evidence to support the jury's finding that Arroyo intentionally or knowingly performed oral sex on S.J., a minor, on two separate occasions, and intentionally or knowingly engaged in sexual intercourse with him on three separate occasions.

II. Presentence Incarceration Credit

¶18 Presentence incarceration credit is given for time spent in custody beginning on the day of booking, *State v. Carnegie*, 174 Ariz. 452, 454, 850 P.2d 690, 692 (App. 1993), and ending on the day before sentencing, *State v. Hamilton*, 153 Ariz. 244, 246, 735 P.2d 854, 856 (App. 1987). The record does not show that Arroyo spent any time in custody prior to sentencing. Accordingly, she received no presentence incarceration credit, nor was she entitled to any.

CONCLUSION

¶19 For the foregoing reasons, we affirm Arroyo's convictions and sentences. Upon the filing of this decision, defense counsel shall inform Arroyo of the status of her appeal and her future appellate options. Defense counsel has no further obligations 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). Arroyo shall have thirty days from the date of this

decision to proceed, if she so desires, with a *pro per* motion for reconsideration or petition for review.