DIVISION ONE
FILED: 9/3/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 13-0054
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
DONALD LEE COOK,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-033017-001

The Honorable Harriett E. Chavez, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Joel M. Glynn, Deputy Public Defender
Attorneys for Appellant

Donald Lee Cook — Florence
Appellant

W I N T H R O P, Judge

¶1 Donald Lee Cook ("Appellant") appeals his convictions and sentences for two counts of sexual conduct with a minor.

Appellant's counsel has filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record on appeal and found no arguable question of law that is not frivolous. Appellant's counsel therefore requests that we review the record for fundamental error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). In addition, this court has allowed Appellant to file a supplemental brief *in propria persona*, and he has done so, raising issues that we address.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2013),[1] 13-4031, and 13-4033(A). Finding no reversible error, we affirm.

I. FACTS AND PROCEDURAL HISTORY[2]

¶3 On February 9, 2005, law enforcement officers executed a search warrant on Appellant's apartment, confiscating computer

[1] We cite the current Westlaw version of the applicable statutes because no revisions material to this decision have since occurred.

[2] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

equipment and compact disks containing child pornography and showing adults engaging in sexual activity with children. After further investigation, the State ultimately charged Appellant with eight counts of sexual exploitation of a minor, two counts of sexual conduct with a minor, and one count of child molestation, all class two felonies and dangerous crimes against children.

¶4 Separate trials were held, and the first trial involved the eight counts of sexual exploitation of a minor. In February 2008, a jury convicted Appellant of all eight charged counts, and he was sentenced to seventeen years' imprisonment for each count.[3]

¶5 The second trial involved the two counts of sexual conduct with a minor and one count of child molestation. Before trial, the court granted the State's motion to dismiss the child molestation charge without prejudice. A jury initially convicted Appellant of two counts of sexual conduct with a minor under the age of twelve, but after sentencing this court reversed Appellant's convictions and remanded the case for a

[3] On appeal, this court affirmed Appellant's convictions, vacated Appellant's sentences, and remanded for resentencing. *See State v. Cook*, 1 CA-CR 09-0804, 1 CA-CR 09-0808, 2011 WL 4795374, at *3, ¶ 11 (Ariz. App. Oct. 11, 2011) (mem. decision). The trial court subsequently sentenced Appellant to presumptive terms of seventeen years' imprisonment for each count, and this court affirmed Appellant's sentences. *See State v. Cook*, 1 CA-CR 12-0073, 1 CA-CR 12-0075, 2012 WL 3100553, at *1, ¶¶ 1, 3 (Ariz. App. July 31, 2012) (mem. decision).

retrial. *See State v. Cook*, 1 CA-CR 09-0801, 2011 WL 3211052, at *1, ¶ 1 (Ariz. App. July 28, 2011) (mem. decision). Appellant's appeal in this case concerns matters related to his retrial and subsequent sentencing.

¶6 Appellant's retrial in this matter began on December 12, 2012. At trial, the State presented two video files recovered from Appellant's computer. Both video files had a "last written date" of July 6, 2003. The files contained images showing Appellant engaging in sexual conduct with a young girl ("the victim"). The victim's father testified that the girl shown on the video files was his daughter, and she was approximately ten years old at the time of the incident.

¶7 At the conclusion of the trial, a jury found Appellant guilty of both charged counts of sexual conduct with a minor and that the victim was under the age of twelve years. The trial court sentenced Appellant to serve consecutive terms of life without the possibility of parole for thirty-five years.[4]

II. ANALYSIS

A. Ineffective Assistance of Counsel

¶8 In his supplemental brief, Appellant argues that his prior appellate attorney disregarded his objectives and prevented him from fully participating in his defense because

[4] The court also ordered that the sentences be served consecutively to the sentences imposed for Appellant's convictions for sexual exploitation of a minor.

she requested a retrial rather than a dismissal when this case was previously appealed. Appellant also argues that defense counsel refused to subpoena the victim before his first trial in this matter, and his counsel therefore denied him the right to confront his accuser. Even assuming without deciding that these arguments are timely, Appellant's arguments constitute claims of ineffective assistance of counsel. Because ineffective assistance of counsel claims must be brought through Rule 32 proceedings, we do not further address these arguments on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

B. State's Failure to Preserve Evidence

¶9 Appellant next argues that his constitutional rights to due process and a fair trial were violated because the State failed to preserve evidence. We disagree.

¶10 Upon proof that the State has failed to preserve material evidence that was reasonably accessible and might have tended to exonerate him, a defendant may be entitled to a *Willits*[5] instruction. *See State v. Bolton*, 182 Ariz. 290, 308-09, 896 P.2d 830, 848-49 (1995). A *Willits* instruction directs a jury that if it finds the State has lost or destroyed any evidence whose content or quality was at issue, the jury may infer that the true fact is against the State's interest. *Id*.

[5] *See State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

at 308, 896 P.2d at 848; *State v. Strong*, 185 Ariz. 248, 251, 914 P.2d 1340, 1343 (App. 1995). Nonetheless, the exculpatory value of the evidence must have been apparent before it was destroyed, and the State generally has no duty to seek out or preserve potentially exculpatory evidence for a defendant when it has developed sufficient evidence against him. *State v. Davis*, 205 Ariz. 174, 180, ¶ 37, 68 P.3d 127, 133 (App. 2002). Additionally, "[a] *Willits* instruction is not given merely because a more exhaustive investigation could have been made." *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995) (citation omitted).

¶11 In this case, the evidence to which Appellant refers consists of a computer hard drive belonging to his neighbor. During the search of Appellant's apartment, detectives found an internet cable running from Appellant's apartment to his neighbor's apartment upstairs. Police did not confiscate the neighbor's computer equipment, however, because a detective who examined that computer and hard drive found "no evidence of any type of criminal activity or anything that would give [police] cause to take the computer away from [the neighbor]," including any evidence "that showed that any files had been transferred one way or the other."

¶12 Appellant fails to explain how any evidence related to his neighbor's computer is relevant, much less potentially

exculpatory, given the testimony of the detective and the specific charges of sexual conduct with a minor faced by Appellant. Appellant has not shown that the State's failure to confiscate the neighbor's computer prejudiced him in any way, *see Bolton*, 182 Ariz. at 308-09, 896 P.2d at 848-49, and we find no reversible error.

C. Other Issues

¶13 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdicts, and the sentences were within the statutory limits. Appellant was represented by counsel at critical stages of the proceedings and was given the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶14 After filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

Appellant has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

III. CONCLUSION

¶15 Appellant's convictions and sentences are affirmed.

/S/
LAWRENCE F. WINTHROP, Judge

CONCURRING:

/S/
PETER B. SWANN, Presiding Judge

/S/
RANDALL M. HOWE, Judge