DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 08-0463
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
KIRTLEY HAROLD MUNCY,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	
	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. CR-20061417

The Honorable Robert R. Moon, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

Rose and Huey, P.L.L.C. — Phoenix
By David L. Rose
Attorneys for Appellant

B R O W N, Judge

¶1 Kirtley Harold Muncy appeals his conviction and sentence for molestation of a child, a class 2 felony and dangerous crime against children. Muncy argues the court should have dismissed the charged offense of sexual conduct with a minor. He also asserts the court should not have instructed the jury on the lesser-included offense of molestation of a child and, that, in any event, the instruction given was incorrect. Muncy further argues the court erred (1) in admitting an audio recording and related transcript of a police interview with the the victim; and (2) in not granting his motion for judgment of acquittal. For the reasons that follow, we affirm.

BACKGROUND[1]

¶2 During the spring of 2006, Muncy would occasionally care for T.Y., his fiancée's three-year-old granddaughter. On July 4, 2006, T.Y. informed her mother of a sexual incident that had occurred between T.Y. and Muncy. T.Y.'s mother called the police.

¶3 Police detective G.D. conducted an audio taped interview with T.Y. During the interview, T.Y. said that Muncy "touched [her] peepee" and that she put lotion on Muncy's "peepee." The State subsequently charged Muncy with one count

[1] We view the evidence in the light most favorable to sustaining the conviction. *State v. Long*, 207 Ariz. 140, 142, ¶ 2, 83 P.3d 618, 620 (App. 2004).

of sexual conduct with a minor ("Count One"), based on an allegation that Muncy "intentionally or knowingly engaged in masturbation, contact with his penis with T.Y., a child who is under the age of fifteen years of age[,]" in violation of Arizona Revised Statutes ("A.R.S.") section 13-1405(A) (2001); and one count of molestation of a child ("Count Two"), based on an allegation that Muncy "intentionally or knowingly touched or fondled the genitals of T.Y., a person under 15 years of age[,] in violation of A.R.S. § 13-1410 (A) (2001).[2]

¶4 During the State's case, T.Y. testified that Muncy had never touched her "peepee"; accordingly, the trial court granted Muncy's motion for judgment of acquittal on Count Two under Arizona Rule of Criminal Procedure 20.[3] The court denied Muncy's Rule 20 motion as to Count One.

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[2] "A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse . . . with any person who is under eighteen years of age." A.R.S. § 13-1405(A). "Sexual intercourse," includes masturbatory contact with the vulva. A.R.S. § 13-1401(3). Molestation of a child, on the other hand, is committed by "causing a person to engage in sexual contact . . . with a child under fifteen years of age." A.R.S. § 13-1410(A). "Sexual contact" includes causing another person to directly or indirectly touch any part of the genitals. A.R.S. § 13-1401(2).

[3] The State conceded there was no evidence of Muncy inappropriately touching T.Y. The State did not introduce evidence of T.Y.'s statements to detective G.D. regarding Muncy touching T.Y.'s vagina; rather, when Muncy presented his case, he successfully moved to admit the audio tape and the transcript of the interview.

¶5 Over Muncy's objection, the court granted the State's request to instruct the jury on the lesser-included offense of molestation of a child on Count One. The jury found Muncy not guilty of Count One as charged, but found him guilty of the lesser-included offense of molestation of a child. The court sentenced Muncy to a mitigated term of eleven years' imprisonment and Muncy timely appealed.

DISCUSSION

¶6 Muncy contends the court should have dismissed Count One because there was no evidence of masturbatory contact.[4] We disagree. Although masturbatory contact is an element of sexual conduct with a minor, Muncy was acquitted of that offense. Masturbatory contact is not an element of molestation of a child, the crime for which Muncy was convicted. Thus, "the verdict cured any error which the trial court committed, if any"

[4] Muncy also claims the trial court erred in not properly defining "masturbatory contact" for the jury. However, Muncy does not sufficiently develop this argument; therefore, we do not address it. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to sufficiently argue a claim on appeal constitutes abandonment of that claim); *State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (noting opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised; failure to cite to legal authority usually constitutes abandonment and waiver of that claim); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi). Moreover, we note that Muncy cites to *State v. Hollenback*, 212 Ariz. 12, 14, ¶ 3, 126 P.3d 159, 161 (App. 2005), for the proposition that "masturbatory conduct requires some sort of penetration into the penis, vulva or anus." No reasonable reading of *Hollenback* supports this assertion.

in failing to grant Muncy's Rule 20 motion with respect to Count One. *See State v. Hitchcock*, 87 Ariz. 277, 285, 350 P.2d 681, 686 (1960).

¶7 Muncy next contends the trial court should not have instructed the jury on the lesser-included offense of molestation of a child. An instruction on a lesser-included offense is appropriate if (1) the offense is a lesser-included offense of the crime charged, and (2) the evidence otherwise supports the giving of the instruction. *State v. Vickers*, 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989). We review for an abuse of discretion a trial court's decision to give a requested jury instruction. *State v. Dann*, 220 Ariz. 351, 363-64, ¶ 51, 207 P.3d 604, 616-17 (2009).

¶8 The trial court did not abuse its discretion in instructing the jury on molestation because molestation of a child is a lesser-included offense of sexual conduct with a minor under fifteen years of age.[5] *In re Jerry C.*, 214 Ariz. 270, 274, ¶ 13, 151 P.3d 553, 557 (App. 2007). Nonetheless, Muncy points to a purported inconsistency in the holdings of *Jerry C.* and *State v. Ortega*, 220 Ariz. 320, 206 P.3d 769 (App. 2008), and argues, "[i]t is questionable . . . which of these two cases are correct and especially given the error made by the

[5] Muncy does not challenge the sufficiency of the evidence supporting a lesser-included instruction for molestation of a child.

failure to dismiss [C]ount [O]ne, certainly [Muncy] should not be forced to rely on a 'charging document test,' and be forced to guess what theory the state was going to proceed under[.]" Any argument that Muncy may have suffered prejudice is not persuasive, however, because *Ortega* was decided on October 14, 2008, more than six months after Muncy's trial concluded.

¶9 In addition, we disagree with Muncy's view that the two cases are inconsistent. In *Jerry C.*, this court addressed the issue of whether molestation of a child is a lesser-included offense of sexual conduct with a minor, and we recognized two tests to determine lesser-included offenses: the "elements test" and the "charging documents test". 214 Ariz. at 273, ¶ 7, 151 P.3d at 556. Applying the elements test, we determined that because a sexual conduct offense involves victims under eighteen years of age and molestation requires a victim to be under *fifteen* years of age, one can commit the greater offense by having sexual intercourse with a seventeen-year-old child without committing molestation. *Id*. at 273, ¶ 10, 151 P.3d at 556. Accordingly, we concluded molestation is not a lesser-included offense of sexual conduct with a minor under the elements test. *Id*. However, because the charging document charged *Jerry C.* with sexual conduct with a minor under the age of fifteen, we reasoned the document described the lesser-included offense of molestation. *Id*. at 274, ¶ 13, 151 P.3d at

557. We accordingly held that under the charging documents test, molestation of a child was a lesser-included offense of sexual conduct with a minor. *Id.*

¶10 In *Ortega*, Division 2 of this court subsequently questioned the use of the charging documents test as a separate test for determining lesser-included offenses. 220 Ariz. at ___, ¶ 13, 206 P.3d at 773. The court, however, applied the elements test and also concluded that molestation is a lesser-included offense of sexual conduct with a minor under the age of fifteen. *Id*. at ___, ¶¶ 24-25, 206 P.3d at 777. Division 2 noted that it disagreed with *Jerry C.*'s analysis only to the extent we considered the charging documents test to be distinct from the elements test. *Id*. at ___, ¶ 13, n.3, 206 P.3d at 774, n.3. Division 2 agreed with *Jerry C.* to the extent we "merely considered the offense *as it was charged* to inform [the] determination of the elements[.]" *Id*. Thus, for purposes of this appeal, we find no meaningful distinction between *Jerry C.* and *Ortega*.

¶11 Muncy also argues the court fundamentally erred in admitting hearsay evidence in the form of detective G.B.'s audio-taped interview with T.Y. and the attendant transcript. As previously noted, and conceded by Muncy in his opening brief, Muncy himself requested that this evidence be admitted. *See supra*, ¶ 4, n.4. He has thereby invited any resulting error,

and we do not address this issue. *See State v. Pandeli*, 215 Ariz. 514, 528, ¶ 50, 161 P.3d 557, 571 (2007) (concluding that defendant invited evidentiary error when defense counsel explicitly informed the trial court that he did not object to the admission of evidence in question); *State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001) ("If an error is invited, we do not consider whether the alleged error is fundamental, for doing so would run counter to the purposes of the invited error doctrine. Instead, as we repeatedly have held, we will not find reversible error when the party complaining of it invited the error.").

¶12 Muncy next contends the trial court should have granted his Rule 20 motion with respect to Count One. We disagree. We review a "trial court's denial of a Rule 20 motion for an abuse of discretion and will reverse a conviction only if there is a complete absence of substantial evidence to support the charges." *State v. Carlos*, 199 Ariz. 273, 276, ¶ 7, 17 P.3d 118, 121 (App. 2001). Substantial evidence is evidence that a reasonable jury can accept as sufficient to support a conclusion of guilt beyond a reasonable doubt. *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999). In determining whether a trial court abused its discretion in denying a Rule 20 motion, we view the evidence in the light most favorable to upholding the verdict. *State v. Gillies*, 135 Ariz. 500, 506,

662 P.2d 1007, 1013 (1983). If reasonable minds could differ on the inferences to be drawn from the evidence, whether direct or circumstantial, the case must be submitted to the jury. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993).

¶13 The trial court did not abuse its discretion when it denied Muncy's Rule 20 motion because the evidence required the court to submit the case to the jury. The State presented substantial evidence from which the jury could conclude that Muncy made T.Y. touch his penis. Specifically, the court heard the testimony of T.Y., who stated that Muncy made her put lotion on his penis, and she did so "for a little bit." To the extent T.Y. provided inconsistent testimony, issues of credibility and the weight given to testimony are issues for the fact finder, not this court, and "[e]vidence is not insubstantial simply because testimony is conflicting or reasonable persons may draw different conclusions from the evidence." *State v. Toney*, 113 Ariz. 404, 408, 555 P.2d 650, 654 (1976). Thus, the trial court did not err in denying Muncy's Rule 20 motion as to Count One.[6]

[6] Muncy also argues there was insufficient evidence to support the jury's guilty verdict as to Count One. Because we review a trial court's denial of a defendant's motion for directed verdict under a less deferential standard than we review a jury's verdict, and we find no reversible error here, we need not separately address this claim. *Compare State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (upholding a jury's verdict unless "there is a complete absence of probative facts to support the conviction") *with State v. McCurdy*, 216 Ariz. 567, 573, ¶ 14, 169 P.3d 931, 937 (App. 2007)

¶14 Finally, Muncy contends the trial court's instruction to the jury regarding the lesser-included offense of molestation was incorrect. We review de novo whether a jury is properly instructed. *Dann*, 220 Ariz. at 363-64, ¶ 51, 207 P.3d at 616-17. "Where the law is adequately covered by [the] instructions as a whole, no reversible error has occurred." *State v. Doerr*, 193 Ariz. 56, 65, ¶ 35, 969 P.2d 1168, 1177 (1998). "We will reverse only if the instructions, taken together, would have misled the jurors." *Id*.

¶15 The jury was instructed as follows:

> The crime of sexual conduct with a minor includes the less serious crime of molestation of a child. You may find the defendant guilty of the less serious crime if you agree unanimously that the State has not proved the more serious crime beyond a reasonable doubt or if, after reasonable efforts, you are unable to agree unanimously on the more serious crime and you do agree unanimously that the State has proved the less serious crime beyond a reasonable doubt.

¶16 Muncy challenges the court's reference to molestation as "less serious." He asserts the instruction promoted a compromise verdict and "clearly gave the jury the belief that it could affect the punishment meted out to [Muncy]." He does not, however, provide any authority for the proposition that an

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(reviewing a trial court's denial of a motion for judgment of acquittal for an abuse of discretion).

instruction referring to a lesser-included offense as "less serious" constitutes reversible error.

¶17 Furthermore, because he did not properly object to the instruction at trial, we review only for fundamental error.[7] *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prevail under fundamental error review, Muncy has the burden of not only establishing fundamental error, but he must show he was prejudiced, which means that absent the error, a reasonable jury could have reached a different result. *Id.* at 567-69, ¶¶ 19-20 and 27, 115 P.3d at 607-09.

¶18 Muncy acknowledges that "we may never know if [the instruction promoted a compromise verdict], nevertheless, inclusion of the term 'less serious' had to have had the affect of helping the jury to determine what punishment [Muncy] would receive." Muncy's speculation is insufficient to show prejudice. *See State v. Munninger,* 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006). We will not presume prejudice where none appears affirmatively in the record. *See State v. Trostle*, 191 Ariz. 4, 13-14, 951 P.2d 869, 878-79 (1997). We find none. In any event, any prejudice was remedied by the trial court's instruction to the jurors that they shall not

[7] The record reflects Muncy requested the trial court to "consider modifying or taking out the 'less serious'" language, and then he specifically stated he did not object to the instruction when it was read to the jury.

consider possible punishment during their deliberations. Because we presume juries follow their instructions, *State v. McCurdy*, 216 Ariz. 567, 574, ¶ 17, 169 P.3d 931, 938 (App. 2007), we thus conclude the challenged instruction did not constitute fundamental error.

CONCLUSION

¶19 Based on the foregoing, we affirm Muncy's conviction and sentence.

/s/

_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/

_____
MAURICE PORTLEY, Presiding Judge

/s/

_____
MARGARET H. DOWNIE, Judge