DIVISION ONE
FILED: 04/29/10
PHILIP G. URRY, CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0580
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
DAVIS MICHAEL ROMERO,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-006033-001 DT

The Honorable Andrew G. Klein, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Michael J. Dew — Phoenix
Attorney for Appellant

Davis Michael Romero — Florence
Appellant

W I N T H R O P, Judge

¶1 Davis Michael Romero ("Appellant") appeals his convictions and sentences for five counts of sexual conduct with

a minor, thirteen counts of tampering with a witness, and two counts of influencing a witness. Appellant's counsel 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). This court granted Appellant the opportunity to file a supplemental brief *in propria persona*, and he has done so.

¶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) (2003), 13-4031 (2010), and 13-4033(A) (2010).

¶3 Finding no reversible error, we affirm Appellant's convictions and sentences. However, we modify the court's sentencing minute entry to reflect that counts 36, 39, and 40 reflect jury findings of guilt for tampering with a witness, each with a presumptive sentence of one year's imprisonment, rather than furnishing obscene or harmful items to a minor. We also modify the sentencing minute entry to reflect that Appellant's convictions for counts 2 through 6 reflect the crime

of sexual conduct with a minor twelve years of age or younger, rather than "[u]nder the age of twelve years."

FACTS AND PROCEDURAL HISTORY

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

¶5 The victim ("D.A.") met Appellant in the summer of 2003, when he rented a couch at D.A.'s mother's house. When they first met, D.A. was eleven years old, and Appellant was twenty-seven years old. Appellant and D.A. developed a close and amicable relationship. They engaged in sexual intercourse for the first time at D.A.'s mother's house after D.A. turned twelve years old. Appellant and D.A. continued to be sexually active throughout most of 2004 and until February 2005.

¶6 During that time, D.A. ran away from home several times, partially because her brother and her mother's boyfriends had a history of sexually abusing her. After Appellant left her mother's house, D.A. frequently lived with Appellant. While together, Appellant and D.A. often misrepresented their identities and their relationship. They also continued to be sexually active.

¶7 A complaint filed against Appellant in the summer of 2004, charging him with permitting the morals of a minor to be

impaired by neglect, abuse, or immoral associations; contributing to the delinquency of a minor; and false reporting to a law enforcement agency was eventually dismissed without prejudice. Later in 2004, after being provided *Miranda*[1] warnings, Appellant admitted in a video-taped interview with a Glendale detective that he had engaged in sexual activity with D.A. both at his apartment and at D.A.'s mother's house.

¶8 D.A. did not want Appellant to get into trouble, however, so on at least two occasions she lied to law enforcement officials about the nature of her relationship with Appellant. On other occasions she admitted, and later at trial she testified, that they had engaged in sexual activity together. At some point during the relationship, they ran away together, and in February 2005, the FBI caught Appellant and D.A. at a public library in Seattle. After they were detained, an FBI medical examiner took some of D.A.'s underwear as evidence for testing. The underwear contained DNA from Appellant's semen.

¶9 Charges filed against Appellant in federal district court in Washington and Arizona were eventually dismissed without prejudice. Meanwhile, a Maricopa County grand jury indicted Appellant in 2005, charging him with one count of

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

custodial interference, five counts of sexual conduct with a minor, and one count of kidnapping.

¶10 While Appellant was in jail awaiting trial, he and D.A. contacted each other by phone and corresponded by mail. D.A. kept Appellant's letters, several of which instructed D.A. to lie about their relationship, while some promised D.A. wealth in exchange for falsifying her testimony at trial and some described their sexual relationship. In 2007, upon motion of the State, the previous indictment was dismissed without prejudice after a new indictment with additional charges was filed. The new indictment included the previous charges and charged Appellant additionally with twenty counts of furnishing obscene or harmful items to a minor, two counts of influencing a witness, and fourteen counts of tampering with a witness. Two counts of furnishing obscene or harmful items to a minor and one count of tampering with a witness were later dismissed upon motion by the State.

¶11 At trial, Appellant testified that he did not engage in sexual activity with D.A. until they went to Seattle. He further testified that he had simply tried to help D.A. escape her abusive home, and claimed he had admitted to the Glendale detective that he had engaged in sexual activity with D.A. based on the understanding that if he confessed to doing so, the police would help D.A. Appellant also admitted writing the

letters addressed to D.A., which were admitted into evidence. On cross-examination, he conceded that he had engaged in sexual activity with D.A. in Bisbee, Arizona, when she was thirteen years old.

¶12 The jury convicted Appellant of five counts of sexual conduct with a minor twelve years of age or younger, each a class two felony and dangerous crime against children, two counts of influencing a witness, each a class five felony, and thirteen counts of tampering with a witness, each a class six felony. *See* A.R.S. §§ 13-1405 (2010), -2802 (2010), -2804 (2010).[2]

¶13 The trial court sentenced Appellant to consecutive flat-time terms of life without the possibility of parole for thirty-five years for each of the five counts of sexual conduct with a minor. For his other convictions, the court sentenced Appellant to concurrent, presumptive terms of 1.5 years' imprisonment for each count of influencing a witness and one year's imprisonment for each count of tampering with a witness, and made those sentences consecutive to Appellant's sentences for sexual conduct with a minor.[3] Additionally, the court

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[2] We cite the current version of the statutes if no changes material to our analysis have since occurred.

[3] The court also stated that it was sentencing Appellant to 2.5 years' imprisonment for each count of furnishing obscene or

credited Appellant for 933 days of pre-sentence incarceration. Appellant filed a timely notice of appeal from his convictions and sentences.

ANALYSIS

A. Vindictive Prosecution

¶14 In his supplemental brief, Appellant argues that the trial court erred by denying his motion to dismiss for vindictive prosecution. He contends that the State prosecuted him vindictively when it chose to seek further indictments against him.

¶15 A defendant who claims vindictive prosecution bears the initial burden of establishing an appearance of vindictiveness; thereafter, the burden shifts to the prosecution to show that the decision to prosecute was justified. *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992) (citation omitted). A prosecution may be considered presumptively vindictive if the defendant shows facts that indicate a "realistic likelihood" that the prosecutor brought additional charges against the defendant to punish him for invoking his legal rights. *See id.* (citations omitted). Nonetheless, "[i]t is within the sound discretion of the prosecutor to determine whether to file criminal charges and

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harmful items to a minor, but we note that Appellant was not convicted of any of those counts.

which charges to file." *Id*. (citing *State v. Hankins*, 141 Ariz. 217, 686 P.2d 740 (1984)). As the United States Supreme Court recognized in *United States v. Goodwin*:

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized.

457 U.S. 368, 381 (1982).

¶16 In this case, Appellant fails to show any realistic likelihood that the indictments filed against him were filed due to his prior exercise of his rights or for any other vindictive reason. Further, our review of the record indicates that new and substantial evidence was developed to justify each new indictment filed against Appellant.

¶17 As part of his argument that the State exhibited vindictiveness toward him, Appellant also complains that the State ignored his requests for a favorable plea agreement. However, a defendant has no constitutional right to a plea agreement, and the State is not required to offer one. *State v. Jackson*, 170 Ariz. 89, 91, 821 P.2d 1374, 1376 (App. 1991). We find no error, much less fundamental error, in the trial court's

denial of Appellant's motion to dismiss for vindictive prosecution.

B. Voir Dire Questions Regarding Religious Beliefs

¶18 Appellant, who states he is a member of "the Wiccan/Pagan spiritual path," next argues that the trial court erred when it did not question prospective jury members during *voir dire* about how their religious beliefs might impact their impartiality. The record indicates that Appellant, who proceeded *pro per* with advisory counsel before trial, filed a list of forty proposed *voir dire* questions, some with subparts, including the following:

> 15. Would your religious convictions impede your judgement of impartiality?
> A.) anyone not within your religious convictions?
> b.) bias against all others?

¶19 At a subsequent case management conference, the court stated that it would prescreen the jurors with a questionnaire, which would incorporate some of the questions raised by Appellant, and then during *voir dire* the court would ask some of the other questions Appellant sought to be asked. The court also stated that it would allow limited questioning by the prosecutor and Appellant at the close of *voir dire*. The court ordered the prosecutor to prepare the questionnaire, subject to Appellant's approval.

¶20 At the beginning of trial, the questionnaire was presented to ninety prospective jury members as a prescreening device. Although the questionnaire incorporated some of Appellant's proposed questions, it did not include Appellant's proposed question number fifteen. Based on the venirepersons' answers to the questionnaire, the court made an initial strike with assistance from the prosecutor and Appellant. The court next *voir dired* the remaining venire panel, and allowed both the prosecutor and Appellant to ask questions at the close of *voir dire*. Appellant did not raise the subject of religion in his proffered questions to the venire panel. Further, he passed the panel for good cause before and after exercising his peremptory strikes, specifically stating that he had no objections to the panel. Thus, the record shows that Appellant had several opportunities before trial and during *voir dire* to again raise this matter, but he did not do so until the fourth day of trial.

¶21 Absent fundamental error, a defendant waives his right to object to a jury panel when he passes it or otherwise fails to object during *voir dire*. *See generally State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). We find no error, much less fundamental error, in the trial court's rejection of Appellant's untimely objection. Further, Appellant has not demonstrated how any alleged error caused him prejudice. *See id.* at ¶ 20.

C. The Prosecutor's Cross-Examination of Appellant

¶22 Appellant generally alleges that numerous instances of prosecutorial misconduct occurred. Most specifically, however, he argues that the prosecutor committed misconduct by improperly questioning him about his religious practices during cross-examination, and he contends that such misconduct prejudiced the jury. In support of his argument, he points to a subsequent jury question that indicated skepticism regarding the veracity of his testimony because, before testifying, he swore to tell the truth to a God in whom he disbelieves.

¶23 The line of questioning that Appellant specifically objects to is as follows:

> [THE PROSECUTOR]: All right. Now, before we start getting back into the swing of how everything played out, I wanted to ask you a question about this handfasting because you mentioned that in a couple of your letters and I'm not sure I know what that is. Can you explain that for us?
>
> [APPELLANT]: It's Pagan, handfasting.
>
> [THE PROSECUTOR]: It's like what?
>
> [APPELLANT]: Ceremony.
>
> [THE PROSECUTOR]: It's what?
>
> [APPELLANT]: Pagan.
>
> [THE PROSECUTOR]: Pagan?
>
> [APPELLANT]: Uh-huh.
>
> [THE PROSECUTOR]: P-A-G-A-N?

[APPELLANT]: Pagan, P-A-G-A-N.

[THE PROSECUTOR]: What exactly is it?

[APPELLANT]: It's a symbolic sort of marriage kind of thing.

At the completion of Appellant's testimony, the following question was submitted by a juror: "Because of the defendant's religious beliefs, how can we as jurors believe his testimony as he swore to God? In his letters he talks about f[]ing Christian values." The trial court read the question to the jury but did not allow Appellant to answer this question, and responded on the record as follows:

> [THE COURT]: That's a question that should be more appropriately addressed to me. And I will instruct you at the time we do final instructions that the issue of the credibility of witnesses is what you as jurors have to decide.
>
> You will also be instructed that you are to evaluate the credibility of the defendant just as you would any other witness. So when you ask how can we believe his testimony, you can easily ask how can you believe any witness's testimony. That's for you people to decide that, not me. That's for you to decide.

¶24 In its final instructions to the jury, the trial court provided the following instruction: "You must evaluate the defendant's testimony the same as any other witness's testimony." The court also instructed the jury:

> In deciding the facts of the case, you should consider what testimony to accept and what to reject. You may accept everything that a witness says or part of it or none of it.

> In evaluating testimony, you should use the tests for truthfulness that people use in determining matters of importance in everyday life, including such factors as the witness's ability to see, or hear, or know the things the witness testified to; the quality of the witness's memory; the witness's manner while testifying; whether the witness has any motive, bias or prejudice; whether the witness was contradicted by anything that the witness said or wrote before trial, or by other evidence; and the reasonableness of the witness's testimony when considered in the light of the other evidence.
>
> Consider all of the evidence in the light of reason, common sense, and experience.

¶25 Because Appellant did not object to the prosecutor's line of questioning at the time, he waived his right to object absent fundamental, prejudicial error. *See State v. Morales*, 198 Ariz. 372, 374-75, ¶ 9, 10 P.3d 630, 632-33 (App. 2000).

¶26 We find no error, much less fundamental error. We note initially that the juror question Appellant attributes as evidence of jury bias caused by the prosecutor's questioning actually refers to Appellant's own letters as the source of knowledge about Appellant's religious beliefs. Furthermore, the prosecutor's question was relevant; it asked Appellant to define an uncommon term he had used to describe his relationship with the victim. It was Appellant who volunteered that the term described a pagan ritual. Accordingly, if any error occurred, it was instituted by Appellant. *See State v. Armstrong*, 208 Ariz. 345, 357 n.7, ¶ 59, 93 P.3d 1061, 1073 n.7 (2004) (stating

that the invited error doctrine exists to prevent a party from injecting error into the record and then profiting from that error on appeal); *see also Schlecht v. Schiel*, 76 Ariz. 214, 220, 262 P.2d 252, 256 (1953) ("By the rule of invited error, one who deliberately leads the court to take certain action may not upon appeal assign that action as error."). Moreover, in its final instructions, the trial court also instructed the jury to disregard Appellant's religious beliefs in its deliberations. Specifically, the court instructed the jury, "In determining whether or not the defendant committed the charged crimes, you may not consider his religious practices." We presume that the jury followed the court's instructions. *See State v. Preston*, 197 Ariz. 461, 467, ¶ 14, 4 P.3d 1004, 1010 (App. 2000). We have searched the entire record, including the prosecutor's cross-examination of Appellant, and find no instance of prosecutorial misconduct.

D. Sufficiency of the Evidence to Convict

¶27 Appellant argues that the State presented insufficient evidence to support his convictions because D.A.'s testimony was unreliable. We disagree.

¶28 The jury, as the finder of fact, weighs the evidence and determines the credibility of witnesses. *State v. Fimbres*, 222 Ariz. 293, 297, ¶ 4, 213 P.3d 1020, 1024 (App. 2009). In general, we defer to the jury's assessment of a witness's

credibility and the weight to be given evidence. *See id.* at 300, ¶ 21, 213 P.3d at 1027. After reviewing the entire record, we find no error, much less fundamental error, in the jury's possible reliance on D.A.'s testimony. Further, we conclude that, even without her testimony, substantial evidence was presented to support Appellant's convictions.

E. Remaining Analysis

¶29 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 assisted by advisory counsel before trial and through *voir dire* and opening statements, he was fully represented by counsel at all other stages of the trial and sentencing proceedings, and he 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.

¶30 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.

CONCLUSION

¶31 Appellant's convictions and sentences are affirmed. The trial court's sentencing minute entry is modified to reflect that counts 36, 39, and 40 reflect jury findings of guilt for tampering with a witness, each with a presumptive sentence of one year's imprisonment, rather than furnishing obscene or harmful items to a minor. The sentencing minute entry is further modified to reflect that Appellant's convictions for counts 2 through 6 reflect that the victim was twelve years of age or younger rather than under the age of twelve years.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PETER B. SWANN, Presiding Judge

_____/S/_____
MICHAEL J. BROWN, Judge