DIVISION ONE
FILED: 04-06-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 08-1081
	)	Department D
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication - Rule 111, Rules of Arizona Supreme Court)
NOE GONZALEZ-SALVADOR, Appellant.	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR2008-133958-001 SE

The Honorable Helene F. Abrams, Judge

AFFIRMED

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

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

T H O M P S O N, Judge

¶1 Noe Gonzalez-Salvador (defendant) appeals his conviction and sentence of one count of sexual indecency

involving a minor under age fifteen, a class five felony. Defendant asserts that the conviction should be reversed as there was no evidence that he saw the minor or that the minor was "present" under the statutory language of Arizona Revised Statutes (A.R.S.) § 13-1403(B) (2006). Finding no error, we affirm.

¶2 Defendant was convicted by a jury of one count of public sexual indecency, a class one misdemeanor, as to M.R. (Mother) and one count sexual indecency to the minor H.R. after a jury trial. The evidence was that defendant pulled his smaller sedan along side Mother's SUV while he was masturbating and that he was seen by the minor victim, age three, who was in a child's car seat in the back seat of the driver's side of the vehicle. Mother testified that she first became aware of defendant's actions when H.R. laughed and said "Look, Mommy."

¶3 On appeal, defendant challenges only the felony conviction and asserts there was insufficient evidence that he was "reckless" pursuant to A.R.S. § 13-1403(B) as to whether a minor under the age of fifteen was "present." Defendant testified that he did not masturbate, and although he walked up to Mother's car to "confront her" for chasing him, he never saw any children in Mother's car.

¶4 On appeal we view the evidence in the light most favorable to sustaining the verdict and resolve all inferences against defendant. *State v. Atwood*, 171 Ariz. 576, 596, 832 P.2d 593, 613 (1992). For there to be reversible error on the sufficiency of the evidence there must be a "complete absence of probative facts to support the conviction." *Id.*, at 597, 832 P.2d 614 (citation omitted).

¶5 Section 13-1403(B) states "A person commits public sexual indecency to a minor if the person intentionally or knowingly engages in any of the [listed acts]. . . and such person is reckless about whether a minor under the age of fifteen years is present." For the purposes of this statute, victims are "present" when they are within viewing range of the defendant. *State v. Jannamon*, 169 Ariz. 435, 438, 819 P.2d 1021, 1024 (App. 1991). The evidence at trial was not only that the minor was within viewing range of defendant while defendant masturbated, but that minor was actually the first to witness it, therefore he was "present." As to defendant's claim that he was not reckless, the evidence supports the jury's verdict. A person is "reckless" if that person "is aware of and consciously disregards a substantial and justifiable risk that a minor might be present or in

viewing range. *See Jannamon*, 169 Ariz. at 438, 819 P.2d at 1024; A.R.S. § 13-105(10)(c).

¶6 For the foregoing reasons, defendant's convictions and sentences are affirmed.

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
DIANE M. JOHNSEN, Judge