

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 08-10-2010
PHILIP G. URRY, CLERK
BY: DN

STATE OF ARIZONA,) 1 CA-CR 08-1090
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
BRANDON LIEF WINTER,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Yavapai County

Cause Nos. V-1300-CR-0820070877
V-1300-CR-0820080344

The Honorable Raymond W. Weaver, Retired Judge
The Honorable Michael R. Bluff, Judge

AFFIRMED

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

Abigail Jensen Prescott
Attorney for Appellant

Brandon Lief Winter Florence
Appellant

N O R R I S, Judge

¶1 Brandon Lief Winter appeals from his convictions and sentences for 18 counts of sexual conduct with a minor. After searching the record on appeal and finding no arguable question of law that was not frivolous, Winter's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. This court granted counsel's motion to allow Winter to file a supplemental brief *in propria persona*, and Winter chose to do so. We reject the arguments raised in Winter's supplemental brief and, after reviewing the entire record, find no fundamental error. Therefore, we affirm Winter's convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 When M.B. was approximately 13 years and 8 months old, she discovered she was pregnant by Winter. M.B. reported to police that during the periods in which Winter had access to her, he had been having sex with her "at least once a month" since she was in the sixth grade. Police discovered a second victim of Winter, M.G., based on information reported by M.B.

¶3 A grand jury indicted Winter on 20 counts of molestation of a child (M.B.) pursuant to Arizona Revised

¹We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Winter. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

Statutes ("A.R.S.") section 13-1410 (2010)² and 20 counts of sexual conduct with a minor (M.B.) under the age of 15 pursuant to A.R.S. § 13-1405 (2010). In a separate cause number involving M.G., a grand jury indicted Winter on one count of molestation of a child pursuant to A.R.S. § 13-1410, one count of sexual conduct with a minor under the age of 15 pursuant to A.R.S. § 13-1405, and one count of sexual abuse with a person under 15 years of age involving only the female breast pursuant to A.R.S. § 13-1404 (2010).

¶4 Before trial, the superior court granted the State's motion to consolidate the two cases for trial, dismissed the child molestation charges involving both victims, see A.R.S. § 13-1410, and dismissed the sexual abuse charge involving M.G.'s breast, see A.R.S. § 13-1404. The superior court subsequently renumbered the 20 remaining counts of sexual conduct with a minor, M.B., as counts 1 through 20 and the remaining count of sexual conduct with a minor, M.G., as count 21. After the State presented its case, the superior court granted Winter's motion for a directed verdict on three of the counts involving M.B. A jury convicted Winter on the 18 remaining counts. The superior court sentenced Winter to life

²Although certain statutes in this decision were amended after the dates of Winter's offenses, the revisions are immaterial. Thus, we cite to the current version of these statutes.

imprisonment on 12 counts -- those counts involving M.B. when she was under the age of 13 -- and 20 years flat time on the remaining six counts, with the sentences to run consecutively to each other on each count. The superior court gave Winter 378 days of presentence incarceration credit for count one.

DISCUSSION

I. Judicial Bias, Incompetence, and Misconduct

¶15 Winter first argues the appointment of a retired judge in his "complex case" demonstrated judicial bias. The record contains no evidence of judicial bias in the appointment of a retired judge.

¶16 Second, Winter argues the trial judge was incompetent because he "confused issues and testimony." Not only does Winter fail to cite any specific example of such confusion, but based on our review of the record, we have found none.

¶17 Third, Winter argues the superior court engaged in judicial misconduct because it (1) demonstrated favoritism for the State and (2) "did not ask if it was my wish to remain silent during trial." The record neither demonstrates the superior court favored the State nor does it contain evidence it denied or in any way limited Winter's right to testify.

II. Sufficiency of the Evidence

¶18 Winter next challenges the sufficiency of the evidence, arguing M.B. failed to specify the time or place of

the conduct covered by the counts concerning her or to "confirm" the testimony of certain witnesses. Although M.B.'s testimony did not directly identify a specific date for each count, she testified in detail about specific assaults, where they occurred, and where she was living. M.B.'s mother's testimony supplied key timeframes, locations, and other facts that supplemented and corroborated M.B.'s testimony. Moreover, other evidence introduced at trial demonstrated M.B. had presented a consistent account of abuse from her initial contact with police to her testimony at trial.³ Thus, ample evidence supported the jury's verdicts on all counts. See *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) ("Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.").

III. Testimony Regarding Defendant's Exercise of Fifth and Sixth Amendment Rights

¶19 Winter also argues he is entitled to a new trial because the State improperly elicited testimony from a detective when it asked, "What was the result of that interview [of

³During trial, a detective related statements made by M.B. during an interview. Winter's counsel raised no objection. Assuming these statements constituted hearsay and were not admissible under an exception to the hearsay rule, the introduction of these statements did not prejudice Winter as the testimony of the victims and M.B.'s mother amply supported his convictions. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005).

Winter]?" Winter's counsel timely, albeit generally, objected, the superior court overruled the objection, and the detective responded, "He said he would prefer to plead the Fifth and wait for an attorney." Winter's counsel moved for a mistrial. The superior court recessed for the day and, after hearing oral argument the following morning, found the detective's statement "inadvertent," denied the mistrial motion, and instructed the jury "to disregard the last question and answer of Detective [E.], that was yesterday afternoon just before we adjourned for the day."

¶10 We disagree with Winter the "very poorly phrased question," as the State characterized it, warrants a new trial. The prosecutor "avow[ed]" he had not deliberately elicited the detective's response and explained he had asked the question "to get to the fact that the interview ended and [the detective] moved on." The detective only briefly mentioned Winter's response, and, given the victims' testimony, there is no reasonable probability in this case the detective's statement materially affected the outcome of the trial.⁴ See *State v. Gilfillan*, 196 Ariz. 396, 406, ¶¶ 37-38, 998 P.2d 1069, 1079 (App. 2000).

⁴In her opening statement, Winter's counsel, faced with damaging DNA evidence, conceded Winter was the father of M.B.'s child.

IV. Ineffective Assistance of Counsel

¶11 Winter argues defense counsel was ineffective. Winter's ineffective assistance of counsel arguments are not properly before us. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007) ("defendant may bring ineffective assistance of counsel claims *only* in a Rule 32 post-conviction proceeding -- not before trial, at trial, or on direct review").

V. Prosecutorial Misconduct

¶12 Winter argues the prosecutor and the investigating officer engaged in misconduct for a variety of reasons.⁵ The record demonstrates no evidence of prosecutorial or police misconduct.

VI. Jury's Verdicts

¶13 Winter also argues the jury's verdicts echoed the State's closing argument and not its "own conclusions." This statement presents no legal issue for our review. Further, as discussed above, the evidence fully supports the jury's verdicts.

⁵Winter argues the difference between M.G.'s testimony and her report to police "suggests coercion"; the prosecutor did not investigate the criminal history of some of the State's witnesses; the prosecutor "purposely confused the jury"; various allegations and facts introduced at trial "went uninvestigated"; and the investigation by a detective was somehow improper.

VII. Anders Fundamental Error Review

¶14 We have reviewed the entire record for reversible error and find none.⁶ See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Winter received a fair trial. He was represented by counsel at all stages of the proceedings and was present at all critical stages.

¶15 The evidence presented at trial was substantial and supports the verdicts. The jury was properly comprised of 12 members, and the court properly instructed the jury on the elements of the charges, Winter's presumption of innocence, the State's burden of proof, and the necessity of a unanimous verdict. Winter was given an opportunity to speak at sentencing,⁷ and his sentences were within the range of

⁶Following an evidentiary hearing on the State's motion to admit other act evidence under Arizona Rule of Evidence 404(c), the superior court granted the State's motion, finding "there [was] a reasonable basis to infer that [Winter] had an abnormal sexual interest in young girls which suggests a *tendency to commit the current crimes charged*." (Emphasis added.) The finding articulated by the superior court deviated from the finding required by Rule 404(c)(1)(B). That rule requires the character trait to give rise to an "aberrant sexual propensity to commit the crime charged." The superior court's ruling, read in its entirety, however, reflects the court applied the correct standard and made the necessary finding when it explained the bases for its admission of the other act evidence. We also note a propensity is defined as "[a]n innate inclination; a tendency." The American Heritage Dictionary of the English Language 1405 (4th ed. 2006).

⁷Although the superior court ordered a presentence report, the court made no reference to it at sentencing. The report, however, made no sentencing recommendation because

acceptable sentences for his offenses. See A.R.S. § 13-604.01(A), (B), (L) (Supp. 2007) (this section is now A.R.S. § 13-705 (2010)).⁸

CONCLUSION

¶16 We decline to order briefing and affirm Winter's convictions and sentences.

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

¶18 Winter has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Winter 30 days

Winter refused to respond to questioning and the investigating officer was "unable to provide impressions of" Winter to the superior court.

⁸Although this statute was amended several times during the time period covered by Winter's offenses, the revisions are immaterial. Thus, we cite to the version in effect at the time of Winter's last offense.

from the date of this decision to file an *in propria persona* motion for reconsideration.

/s/

PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

MAURICE PORTLEY, Judge