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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 09-0168  
)  
Appellee, ) DEPARTMENT A  
)  
v. ) **MEMORANDUM DECISION**  
)  
ROBERT LEE YAZZIE, )  
) (Not for Publication -  
Appellant. ) Rule 111, Rules of the  
) Arizona Supreme Court)  
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Appeal from the Superior Court in Maricopa County

Cause No. CR2007-005598-001 DT

The Honorable Christopher T. Whitten, Judge

**AFFIRMED**

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

James J. Haas, Maricopa County Public Defender Phoenix  
by Terry Reid, Deputy Public Defender  
Attorneys for Appellant

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**B A R K E R**, Judge

¶1 Robert Lee Yazzie appeals his convictions and sentences for one count of molestation of a child and one count of sexual conduct with a minor. Yazzie contends that his convictions violate the Double Jeopardy Clauses of the state and federal constitutions because the convictions arise from the same conduct. For the following reasons, we affirm.

***Facts and Procedural History***

¶2 We view the facts in the light most favorable to sustaining the court's judgment and resolve all inferences against Yazzie. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998); *State v. Moore*, 183 Ariz. 183, 186, 901 P.2d 1213, 1216 (App. 1995). In November 2006, Victim, who was under fifteen years of age, was watching television when Yazzie told her to go to the bedroom. Yazzie followed Victim to the bedroom, locked the door, yelled at Victim for going outside with her friends, and then removed Victim's clothes. Yazzie took his clothes off as well. While on the bed, Yazzie "started touching" Victim's "private place" and, "[a]s he touched [her]," Yazzie "put his finger inside [Victim]." After an adult found Victim and Yazzie in the bedroom and Victim told the adult what happened, Victim was taken to a hospital and police were contacted.

¶3 Yazzie was charged with two counts of molestation of a child (Counts 1 and 4), class two felonies and dangerous crimes

against children; one count of sexual conduct with a minor (Count 2), a class two felony and dangerous crime against children; and one count of indecent exposure (Count 3), a class six felony. The case proceeded to trial. At the conclusion of the State's case, the trial court granted a directed verdict of acquittal on one count of child molestation (Count 4). The jury convicted Yazzie of molestation of a child (Count 1) and sexual conduct with a minor (Count 2) and acquitted him of indecent exposure (Count 3). The trial court sentenced Yazzie to consecutive sentences of seventeen and twenty years' imprisonment on Counts 1 and 2 respectively. Yazzie filed a timely notice of appeal.

¶4 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).

### ***Discussion***

¶5 Yazzie argues that his convictions and sentences for molestation of a child and sexual conduct with a minor violate the Double Jeopardy Clause because the convictions were based on the same conduct. Because Yazzie failed to raise this issue before the trial court, our review is limited to fundamental error. *State v. Musgrove*, 223 Ariz. 164, 167, ¶ 10, 221 P.3d 43, 46 (App. 2009). "Double jeopardy violations, however, are

fundamental error, and we review de novo an assertion that a double jeopardy violation occurred." *Id.*

¶16 The Double Jeopardy Clauses of the Arizona and United States Constitutions protect a defendant from multiple criminal convictions and sentences for the same offense. *State v. Ortega*, 220 Ariz. 320, 323, ¶ 9, 206 P.3d 769, 772 (App. 2008). For purposes of double jeopardy, an offense and its lesser-included offense are the same offense. *Brown v. Ohio*, 432 U.S. 161, 168 (1977). Molestation of a child is a lesser-included offense of sexual conduct with a minor under the age of fifteen.<sup>1</sup> *Ortega*, 220 Ariz. at 328, ¶ 25, 206 P.3d at 777.

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<sup>1</sup> The statute relating to sexual conduct with a minor states:

- A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.
- B. Sexual conduct with a minor who is under fifteen years of age is a class 2 felony and is punishable pursuant to § 13-604.01. Sexual conduct with a minor who is at least fifteen years of age is a class 6 felony. Sexual conduct with a minor who is at least fifteen years of age is a class 2 felony if the person is the minor's parent, stepparent, adoptive parent, legal guardian or foster parent and the convicted person is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically

¶17 Yazzie's convictions and sentences do not violate the Double Jeopardy Clauses because substantial evidence demonstrates he was convicted and sentenced for two separate offenses that occurred during the same sexual episode. See *State v. Boldrey*, 176 Ariz. 378, 381, 861 P.2d 663, 666 (App. 1993) ("Multiple sexual acts that occur during the same sexual attack may be treated as separate crimes."). At trial, Victim gave the following account:

Q. And what did [Yazzie] do once he got on the bed with you?

A. He started touching me.

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authorized by § 31-233, subsection A or B until the sentence imposed has been served or commuted.

A.R.S. § 13-1405 (2001). The statute regarding child molestation states:

A. A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child under fifteen years of age.

B. Molestation of a child is a class 2 felony that is punishable pursuant to § 13-604.01.

*Id.* § 13-1410 (2001). "Sexual contact" includes "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact." *Id.* § 13-1401(2) (2001).

Q. Where did he touch you?

A. My private place.

Q. And when you say "private place," what do you mean by that? I know it's not easy to talk about these words and talk about what happened, but the jury might have an idea of what you mean by "private place," but they really need to know exactly [sic] what you mean by "private place." So what is your "private place"?

A. Where someone can't touch me when they are not supposed to be touching me yet.

Q. What do you use this place for?

A. To pee.

Q. So do you know of any adult words for that?

A. No.

Q. Okay. But it's the place where you pee. Is where he touched you?

A. Yes.

Q. As he touched you, did he do anything else with your private place?

A. He put his finger inside me.

Q. How did that feel?

A. Uncomfortable.

Q. Did it hurt?

A. A little.

¶18 Relying on *Ortega*, Yazzie contends "the evidence supporting counts one and two was based on one act, that of

touching [Victim's] genitals during the act of digital penetration." We disagree. In *Ortega*, the defendant, Ortega, was convicted of molestation of a child and sexual conduct with a minor. *Ortega*, 220 Ariz. at 323, ¶¶ 5-6, 206 P.3d at 772. The issue on appeal was whether Ortega touched the victim's vagina separately from the penetration with his penis during the December sexual episode. *Id.* at 329, ¶ 27, 206 P.3d at 778. On direct examination, the victim testified that Ortega touched her back, legs, and breasts with his hands and had sex with her. *Id.* On re-direct examination, the victim was asked, "During the times that you were asked on cross-examination [about] December, February, and March/April when the defendant forced you to have sex did he only have sex with you or did he also touch you?" *Id.* Victim responded that "[h]e would also touch me." *Id.* We noted, however, "there is nothing in her testimony making it clear that the touching she had been referring to included manual contact with her vagina." *Id.* Accordingly, we found no evidence demonstrating "Ortega committed an act that constituted molestation and which was separate from the act that gave rise to the charge of sexual conduct with a minor." *Id.* at ¶ 28, 206 P.3d at 778.

¶19 Here, viewing the evidence in the light most favorable to upholding the convictions, Victim's testimony describes a separate touching of her genitals prior to digital penetration.

She testified that when Yazzie got on the bed with her he "started touching" her "private place." (Emphasis added.) She testified that "[a]s he touched" he "put his finger inside [her]." (Emphasis added.) See also *State v. Carter*, 123 Ariz. 528, 530, 601 P.2d 291, 293 (App. 1978) (holding testimony that defendant touched victim "between her legs" is "substantial evidence from which the jury could find that appellant touched the victim's private parts"), overruled on other grounds by *State v. Carter*, 123 Ariz. 524, 601 P.2d 287 (1979).

¶10 Moreover, the jury also heard testimony from the nurse who examined Victim. During direct examination, the nurse testified:

Q. Now, in this case [Victim] disclosed that she had been touched once over the clothes about a few weeks before you saw her [in November 2006]?

A. Uh-huh.

Q. And then the late night before you saw her, *more touching and then digital or finger penetration?*

A. Yes.

(Emphasis added.) The nurse's testimony offers further evidence that Yazzie molested Victim on the night in question by first touching her genitals and then committed sexual conduct with a minor by digitally penetrating her. Therefore, there is no evidence of a double jeopardy violation because the convictions



and sentences were based on two distinct sexual acts arising from separate conduct.<sup>2</sup>

**Conclusion**

¶11 For the above-stated reasons, we affirm Yazzie's convictions and sentences for molestation of a child and sexual conduct with a minor under the age of fifteen.

/s/

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DANIEL A. BARKER, Judge

CONCURRING:

/s/

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PATRICIA A. OROZCO, Presiding Judge

/s/

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LAWRENCE F. WINTHROP, Judge

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<sup>2</sup> We invited the parties to brief the issue of whether we should invoke our authority under A.R.S. § 13-4037(B) (2010) to reduce Yazzie's sentence. We have reviewed the supplemental briefs submitted by both parties. Statutory reduction of a defendant's sentence is "rare," *State v. DePiano*, 187 Ariz. 27, 31, 926 P.2d 494, 498 (1996), and "[t]he power of this Court to modify sentences should further be tempered by the realization that a defendant appears in person before the trial judge, rendering that judge, in most instances, more able than ourselves to evaluate the defendant and his circumstances." *Id.* (quoting *State v. Patton*, 120 Ariz. 386, 388, 586 P.2d 635, 637 (1978)). Considering all the pertinent facts and authorities, in the exercise of our discretion, we decline to reduce Yazzie's sentences under A.R.S. § 13-4037(B).