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

STATE OF ARIZONA, Appellee, v. JAMES THURMOND MONTGOMERY, Appellant.	)	1 CA-CR 09-0487 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-148722-001 DT

The Honorable Shellie Smith, Judge Pro Tempore

AFFIRMED

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

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

James Thurmond Montgomery — Safford
Appellant

B A R K E R, Judge

¶1 James Thurmond Montgomery appeals from his conviction and sentence for one count of attempted sexual conduct with a minor over the age of fifteen. Montgomery was sentenced on June 17, 2009, and timely filed a notice of appeal. Montgomery'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), advising this court that after searching the entire record on appeal, he finds no arguable ground for reversal. We granted Montgomery leave to file a supplemental brief *in propria persona* on or before March 22, 2010, and he did so.

¶2 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 (2001), and 13-4033(A) (2001). We are required to search the record for reversible error. Finding no such error, we affirm.

Facts and Procedural Background[1]

¶3 In August 2008, Victim, a minor who was fifteen or older, was visiting Montgomery, her father, at an apartment. Montgomery and Victim began drinking gin and orange juice and snorting cocaine. While intoxicated, Montgomery told Victim the

[1] We view the facts in the light most favorable to sustaining the court's judgment and resolve all inferences against Montgomery. *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).

biblical story of Lot and his two daughters. Montgomery explained to Victim that Lot's daughters gave Lot wine to get him intoxicated. Once intoxicated, the daughters had sex with Lot to get pregnant. Montgomery told Victim it was okay for fathers and daughters to have sex in those days and that God approves of this type of relationship. Victim told Montgomery that was gross and unthinkable in today's society.

¶4 At midnight, Victim went to sleep on the couch in basketball shorts, a tank top, and a bra. Victim was not wearing underwear. When Victim awoke about six hours later, her basketball shorts were at her ankles, her legs were spread, and Montgomery was naked and hovering over her. Montgomery's knees were on the couch, and his penis was near Victim's vagina. Victim and Montgomery were alone in the apartment. Victim asked Montgomery what he was doing and told him to get away from her. Montgomery slowly moved away from Victim and then put his clothes on. Victim pulled her shorts on and went to the bathroom.

¶5 Victim then heard other people, including E.W., enter the apartment. When Victim left the bathroom, she was angry and yelled: "[W]hat are you thinking? I'm your daughter. Why are you trying to do this to me? You tried to rape me." Victim also threw a pitcher at Montgomery and threatened him with a knife. Victim then left the apartment. After hearing Victim

and Montgomery argue, E.W. left the apartment and found Victim at a bus stop. Victim then called the police.

¶6 Pursuant to A.R.S. §§ 13-1001, -1405, and -3601, Montgomery was charged with one count of attempted sexual conduct with a minor over the age of fifteen, a domestic violence offense. After rejecting the State's plea offers, Montgomery's case proceeded to trial. Montgomery was present and represented at all critical stages of the trial.

¶7 During the trial, the State presented testimony by Victim, E.W., the owner of the apartment, a forensic nurse, and two police officers. E.W. testified she observed Victim and Montgomery arguing because Victim accused Montgomery of trying to have sex with her. The owner of the apartment testified that when he returned to the apartment with E.W., he heard Montgomery and Victim fighting. The police case agent testified that during his interview with Montgomery, Montgomery admitted to pulling down Victim's shorts and almost having sex with her while she slept on the couch. The State played a recording of this interview to the jury. The forensic nurse who treated Victim testified that she found no forensic findings that a sexual assault occurred. The defense presented no witnesses.

¶8 At the conclusion of the trial, the eight-member jury convicted Montgomery of one count of attempted sexual conduct with a minor over the age of fifteen and found the count was a

domestic violence offense. The trial court sentenced Montgomery to 17 years imprisonment and credited Montgomery with 318 days of incarceration credit. The trial court also ordered Montgomery to submit to DNA testing and register as a sex offender.

Disposition

1. Disclosures to the Jury

¶9 In his supplemental brief, Montgomery argues he was prejudiced because the trial court violated various canons and rules of the Arizona Rules of Judicial Conduct, the Arizona Rules of Criminal Procedure, and the Arizona Rules of Evidence by (1) disclosing inflammatory information about the alleged crime during voir dire, (2) by subsequently altering the grand jury indictment to conform to this disclosure, and (3) by engaging in an argumentative exchange with Montgomery within earshot of the jury. We disagree.

¶10 The trial court did not disclose inflammatory information to the jury and did not alter the indictment. During the first day of voir dire, the trial court stated:

> In this case the State has alleged that James Montgomery on or about the 3rd day of August, in the year 2008, intentionally or knowingly attempted to engage in sexual intercourse or oral sexual contact with [Victim], who was a minor 15 years of age or over, and Defendant was her parent. Mr. Montgomery has denied these allegations and has pled not guilty to the charges.

¶11 This statement conforms to the wording of the grand jury indictment and the complaint filed in this case. Montgomery is confusing the notice of supervening indictment with the indictment. The notice of supervening indictment is the document that gave Montgomery notice that the grand jury indicted him for attempted sexual conduct with a minor. The indictment, which is a separate document, identifies attempted sexual conduct with a minor as the charge and, in the text, uses the exact language the trial court used during voir dire to specify the elements of attempted sexual conduct with a minor. Thus, the trial court properly informed the prospective jurors of the allegations against Montgomery as stated in the indictment and the complaint. Consequently, the trial court made no subsequent alteration of the grand jury indictment when it read the indictment to the jury prior to opening statements.

¶12 On the second day of voir dire, Montgomery and the trial court had a discussion regarding the alleged improper disclosure. However, this exchange took place outside of the presence of the jury. There is no evidence in the record indicating the jury heard the exchange. *GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990) ("An appellate court's review is limited to the record before the trial court.") Accordingly, there is no fundamental error.

2. Composition of the Jury

¶13 The trial court should strike prospective jurors for cause when they demonstrate serious misgivings about the ability to be fair and impartial. *State v. Rodriguez*, 131 Ariz. 400, 402, 641 P.2d 888, 890 (App. 1981). During voir dire, Juror 22, who ultimately sat on the jury, indicated that he could not sit through the case because of the nature of the allegations. Defense counsel and Juror 22 then had the following exchange:

> [JUROR 22]: It's repulsive to me I think. I think the thought of the act is the main concern for me.
>
> [DEFENSE COUNSEL]: There are a lot of repulsive criminal acts out there, whether they are sex crimes or whether murder or whether there are any number of other crimes.
>
> But it is the nature of this crime, the alleged crime, which has not been proven, is it such that you would be uncomfortable sitting as an impartial juror because you could in fact not be impartial?
>
> [JUROR 22]: I would feel uncomfortable, yes.

¶14 Defense counsel subsequently made a motion to strike Juror 22 for cause. The trial court decided to "bring 22 back." The next day of voir dire, defense counsel passed the panel, including Juror 22, for cause. Read literally, Juror 22's answer means that he would be "uncomfortable sitting as an impartial juror because [he] could not be impartial." However, given the context, the trial court likely interpreted it to mean

Juror 22 only would be uncomfortable because at no point did Juror 22 indicate that he could not be fair and impartial. This interpretation is confirmed by the private exchange between the court and the attorneys when discussing the motion to strike Juror 22. The trial court denied the motion to strike after the State's counsel indicated "being uncomfortable is not the same as being unable to judge." Because the trial court was able to observe Juror 22's demeanor and judge his credibility, we find no error in the trial court's decision not to strike Juror 22 for cause. *State v. Smith*, 182 Ariz. 113, 115, 893 P.2d 764, 766 (App. 1995) (holding that when a prospective juror's statements are amenable to different interpretations "the trial judge [is] better able to determine the juror's true meaning from her delivery"); *see also State v. Glassel*, 211 Ariz. 33, 48, ¶ 50, 116 P.3d 1193, 1208 (2005) (finding "[t]rial judges are permitted to determine a potential juror's credibility"). Accordingly, we find no fundamental error in the court's refusal to strike Juror 22 for cause.

3. Voluntariness Hearing

¶15 At trial, the State presented properly admissible evidence that was sufficient to support the jury's finding of guilt. Although no hearing was held to determine the voluntariness of Montgomery's statements to the case agent, Montgomery neither requested a voluntariness hearing nor

objected to the evidence at trial. There was no evidence or claim at trial that Montgomery's statements were involuntary, and the trial court had no obligation to *sua sponte* raise the issue. *State v. Alvarado*, 121 Ariz. 485, 487, 591 P.2d 973, 975 (1979). In addition, the jury was instructed to "not consider any statements made by the defendant to a law enforcement officer, unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily." Accordingly, no separate voluntariness hearing was required. *See State v. Peats*, 106 Ariz. 254, 257, 475 P.2d 238, 241 (1970).

¶16 We reviewed the remainder of the record and found no meritorious grounds for reversal of Montgomery's conviction or for modification of the sentence imposed. *See Anders*, 386 U.S. at 744; *Leon*, 104 Ariz. at 300, 451 P.2d at 881. After the filing of this decision, counsel's obligations in this appeal have ended subject to the following. Counsel need do no more than inform Montgomery of the status of the appeal and Montgomery's future options, unless counsel's review reveals 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). Montgomery 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.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
PETER B. SWANN, Judge