IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 07/21/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	1 CA-CR 09-0646
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
NEDJO JOKIC,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-148643-001 DT

The Honorable John R. Hannah, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

DeBrigida Law Offices, P.L.L.C. — Glendale
By Ronald M. DeBrigida, Jr.
Attorneys for Appellant

Nedjo Jokic — Tucson
Appellant

W I N T H R O P, Judge

¶1 Nedjo Jokic ("Appellant") appeals from his conviction for one count of sexual conduct with a minor (under the age of fifteen) and sentence of twenty flat years' imprisonment. Appellant's counsel has 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), 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 has also allowed Appellant to file a supplemental brief *in propria persona*.

¶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). Finding no reversible error, we affirm Appellant's conviction and sentence.

PROCEDURAL HISTORY AND FACTS[1]

¶3 On July 26, 2007, a 14-year-old child ("M.A.") who had been exercising at an L.A. Fitness Center approached one of the

[1] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

employees and stated that he had been sexually molested by a man in the wet sauna. M.A. identified Appellant as the person who had molested him, and the Appellant was detained by the staff of L.A. Fitness. When the police arrived, they handcuffed Appellant and took him to the station for questioning. A subsequent search of L.A. Fitness revealed neither DNA nor other physical evidence of the crime.

¶4 Once Appellant arrived at the police station, it was determined that he could only speak Serbian. Officer Armin Borovac, a Serbian translator certified by the Phoenix Police Department, was then called to the police station to assist in the interrogation. Once Officer Borovac arrived, he read Appellant his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) and began questioning him. Officer Borovac, who is of Bosnian descent, gave Appellant a false Serbian name and also falsely stated that he was Serbian so that Appellant would trust him. Although Appellant gave differing accounts as to his actions that day, he steadfastly denied the allegations against him. The police also swabbed Appellant's mouth and genitals for DNA samples. After being told that these samples were going to be collected, Appellant was recorded on video wiping out the inside of his mouth.

¶5 On May 22, 2008, Appellant was indicted on two counts of knowingly or intentionally engaging in sexual intercourse or

oral sexual contact with a minor under the age of fifteen, a Class 2 felony and a dangerous crime against children. *See* A.R.S §§ 13-1401 (2010) and 13-1405 (2010).[2] Count 1 accused Appellant of performing oral sex on M.A., and Count 2 accused Appellant of placing his penis into M.A.'s mouth. Appellant was arrested and taken into custody on May 26, 2008.

¶6 A twelve-member jury panel was selected and the case proceeded to trial on June 16, 2009. Appellant was represented at trial, was provided with a court-appointed interpreter, and was present for all portions of the trial.

¶7 On the first day of trial, M.A. testified that on July 26, 2007, he entered the dry sauna in L.A. Fitness where he encountered both Appellant and a second unidentified man. M.A. stated that Appellant began masturbating and the other individual left the sauna. When M.A. attempted to leave the dry sauna, Appellant grabbed him and ordered him to enter the wet sauna. M.A. testified that upon entering the wet sauna, Appellant performed oral sex on him. Appellant then forced M.A. to perform oral sex on him until he ejaculated. After this occurred, M.A. left the wet sauna, and after some time, alerted the staff of L.A. Fitness to what had occurred. The police later interviewed M.A. and swabbed DNA samples from his mouth

[2] We cite the current version of the applicable statute because no revisions material to this decision have occurred.

and genitals. Several L.A. Fitness employees were called to corroborate M.A.'s testimony.

¶8 Various police officers testified regarding the investigation and subsequent interrogation of Appellant. At trial, Officer Borovac admitted that while he was translating, he paraphrased both the detective's questions and Appellant's answers, failed to translate certain responses made by Appellant, and noted that there were various errors in the transcript of the interrogation.[3] The State also presented DNA analysts who had tested the DNA samples collected from both M.A. and Appellant. The analysts found one single sperm cell in the oral sample taken from M.A. and both non-nucleated and nucleated material in all the remaining samples. Although neither the additional DNA nor the sperm cell on M.A.'s samples directly matched Appellant's, it was consistent with Appellant's, and vice versa. It was also revealed that one of the analysts had inadvertently contaminated one of M.A.'s samples with her own DNA.

¶9 The defense presented one character witness who saw Appellant on the day of the incident, and Appellant also testified on his own behalf. Appellant testified that when he was sitting in the dry sauna, M.A., and not he, began to

[3] As a result of Officer Borovac's testimony, Appellant's counsel raised a *Brady* issue that was considered and rejected by the court.

masturbate. Appellant stated that M.A. then approached him, grabbed his crotch, and unsuccessfully attempted to perform oral sex on him. He stated that he had not visited the wet sauna that day and did not approach the L.A. Fitness staff regarding the incident because he could not speak English. Appellant explained that he did not tell the police about these events because he realized Officer Borovac was not Serbian and did not trust him to give an accurate translation. He also explained that he had wiped out his mouth before he was swabbed for DNA because his dentures had become loose.

¶10 On July 8, 2009, the jury found Appellant not-guilty on Count 1 and guilty on Count 2. On August 14, 2009, Appellant was sentenced to the presumptive flat term of twenty years' imprisonment and was awarded 452 days of pre-sentence credit. At the sentencing hearing, Appellant made a statement to the court on his own behalf. No historical priors were alleged and no aggravating factors were requested. Counsel for Appellant filed a timely notice of appeal.

ANALYSIS

¶11 In his supplemental brief, Appellant contends that both the evidence and testimony presented by the State were either unreliable or untrustworthy and the jury erred in relying on it to convict him. He also argues that his counsel should have allowed him to take a lie detector test per his request.

Finally, Appellant argues that his Serbian friend, and not Officer Borovac, should have translated for him when he was interrogated by the police.

¶12 Addressing Appellant's first argument, we affirm the principle that it is the role of the jury, and not the appellate court, to weigh the evidence and determine the credibility of witness testimony. *State v. Lewis*, 224 Ariz. 512, 516, ¶ 21, 233 P.3d 625, 629 (App. 2010) (noting further that "we view the evidence in the light most favorable to sustaining the verdict"); *see also State v. Bronson*, 204 Ariz. 321, 328, ¶ 34, 63 P.3d 1058, 1065 (App. 2003) (reiterating that a jury is free to give credit or discredit to witness testimony and that the appellate court cannot guess what the jury relied on to reach its decision (citation omitted)). We do not find anything in the record to suggest that the jury erred in reaching its verdict.

¶13 Appellant's second argument, that his counsel erred by failing to arrange for a lie detector test, is essentially an argument of ineffective assistance of counsel. To the extent that his argument constitutes an ineffective assistance of counsel claim, that is a claim we do not address on direct appeal. *See State v. Spreitz,* 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (precluding the review of ineffective assistance of counsel claims on direct appeal). Instead, Appellant's claims

as related to his trial counsel must be raised in a petition for post-conviction relief pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. *Id.*; *see also State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984) (stating that "the power to decide questions of trial strategy and tactics rests with counsel").

¶14 Finally, Appellant points to no authority, nor have we found any, that require the police to furnish or utilize an unqualified interpreter during an interrogation at the defendant's request. Further, Officer Borovac was certified by the Phoenix Police Department to act as a Serbian translator, whereas Appellant's friend had no such certification. Appellant himself admitted that Officer Borovac's translation and police report was generally accurate. Outside of the flaws in the translation, which were addressed in court, nothing in the record suggests that the police erred in letting Officer Borovac translate the interrogation. Accordingly, the use of Officer Borovac as a translator during Appellant's interrogation did not constitute reversible error.

¶15 We have reviewed the entire record for reversible error and find none.[4] *See Leon*, 104 Ariz. at 300, 451 P.2d at

[4] From our review of the record, however, it appears that the trial court erred in calculating Appellant's pre-sentence incarceration credit. Appellant should have received credit for only 445 days, rather than the 452 days he actually received.

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 sentence imposed was presumptive and within the statutory limits. Appellant was represented by counsel and assisted by an interpreter at all stages of the proceedings and exercised his right to speak, both at trial and during sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶16 After the 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.

Relying on *State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990) (stating that absent a timely cross-appeal, this court cannot correct an illegally lenient sentence that favors an appellant), we do not correct this error.

CONCLUSION

¶17 Appellant's conviction and sentence is affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PHILIP HALL, Presiding Judge

_____/S/_____
JON W. THOMPSON, Judge