

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: 07-22-2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA,) 1 CA-CR 09-0683
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
LUCIO RIOS ZAMACONA,) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200800457

The Honorable John Paul Plante, Judge

REVERSED

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

Michael A. Breeze, Yuma County Public Defender Yuma
by Edward F. McGee, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 This is an appeal under *Anders v. California*, 386 U.S.
738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878
(1969). Counsel for Defendant Luis Rios Zamacona advised us

that, after searching the entire record, he was unable to discover any arguable questions of law, and has filed a brief requesting us to conduct an *Anders* review of the record. At the conclusion of his brief, however, counsel lists issues that Defendant asked him to raise.¹ Defendant was given an opportunity to file a supplemental brief, but did not file one.

¹ Defendant raises the following issues: (1) "[t]he jury lacked knowledge of relevant policy and jurisdictional laws, thus allowing themselves to be bribed and manipulated by the prosecution and police"; (2) "[n]o one [took] into account the fact that the victim and all the parties to the case are citizens of Mexico"; (3) "[n]o one has taken into account the fact that he created the images in question, not with criminal intent, but, in the presence of his wife, for the purpose of embarrassing the victim in the event she should in the future balk at taking a bath or doing her homework"; (4) the investigating officer "engaged in misconduct" by going "to [his] home in Mexico and demand[ing] that his wife surrender all their family photos," by bringing photos used in this case from Mexico, and by being "[un]truthful in his testimony before the jury"; (5) the police forensic expert engaged in misconduct by lying to the jury, by not responding properly to questions, and by showing "only the mute clip to the jury without its sound track"; (6) the prosecutor engaged in misconduct by "[f]alsely [telling] the jury that [he] had gone looking for victims," by "fail[ing] to inform the jury that [his] wife is the mother of the alleged victim," by "fail[ing] to inform the jury that [he] had acted as the alleged victim's guardian and not as a stranger to her," by "[leading] the jury to believe that the alleged victim and other participants in the case are from the United States when in fact, they are Mexican nationals," by "play[ing] the video clip (Exhibit 3A) for the jury without its sound track," and by "accus[ing] [him] of using the images in this case for his own stimulation"; (7) his trial lawyer "failed him" by "fail[ing] to point out . . . that [he] and the alleged victim are from Mexico," by "fail[ing] to provide [him] with a copy of the search warrant to search his phone," by "fail[ing] to present any legal documents during trial," and by "fail[ing] to respond to [his] complaints about the way the trial was being conducted as it was in progress."

¶2 After our review, we issued a *Penson*² order and asked both parties to address whether Defendant could be convicted of an offense that was not contained in the indictment. Defendant timely filed a brief in response to the order. The State did not respond to the *Penson* order.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Defendant was indicted on six counts of sexual exploitation of a minor, class two felonies, in violation of Arizona Revised Statutes ("A.R.S.") section 13-3553(A)(1) (2010),³ for having a video clip and five still images on his cellular telephone. The indictment was never amended. At trial, the State did not present evidence that Defendant had violated § 13-3553(A)(1), which makes it a crime to "[r]ecord[], film[], photograph[], develop[] or duplicat[e] any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct."

¶4 Instead, the State presented evidence, and argued, that Defendant should be convicted for possessing a cellular telephone which contained a video clip and five still images or photographs of a prepubescent female vagina. After his motion pursuant to Arizona Rule of Criminal Procedure 50 was denied and the jury was instructed, the jury found Defendant guilty as

² *Penson v. Ohio*, 488 U.S. 75, 80 (1988).

³ We cite to the current version of the statute because it has not been amended in any way material to this decision.

charged. He was sentenced to minimum consecutive prison terms of 10 years on each count, with 528 days of presentence incarceration credit per count.⁴ He appealed, and 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, and -4033(A) 2010.

DISCUSSION

¶5 The issue raised in the *Penon* order was whether Defendant was convicted of the crimes contained within the indictment. If he was convicted of a crime not encompassed by the indictment, there was no jurisdiction and the convictions and sentences must be vacated. See *State v. Mikels*, 119 Ariz. 561, 562-63, 582 P.2d 651, 652-53 (App. 1978). Because we address the jurisdiction issue de novo, we need not consider the list of issues raised by Defendant.⁵

⁴ Pursuant to *State v. Jackson*, 170 Ariz. 89, 94, 821 P.2d 1374, 1379 (App. 1991), presentence incarceration credit is applied only to one of Defendant's convictions if consecutive sentences are imposed. Because the State did not appeal the trial court's award of 528 days of presentence incarceration credit on each count, we cannot address the discrepancy. See *State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990) (holding that a sentencing error that favors a defendant cannot be corrected absent a timely appeal by the State); *State v. Kinslow*, 165 Ariz. 503, 507, 799 P.2d 844, 848 (1990).

⁵ Defendant's ineffective assistance of counsel claims are not properly before us. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007) (stating that "a 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").

¶6 The indictment alleged that Defendant violated § 13-3553(A)(1). Section 13-3553(A)(1) criminalizes the “[r]ecording, filming, photographing, developing or duplicating any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.” The section does not, however, include the “possession” of contraband images.

¶7 Possession of contraband images is prohibited by § 13-3553(A)(2). The section criminalizes “[d]istributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, **possessing** or exchanging any visual depiction in which a minor is engaged in exploitive or other sexual conduct.” § 13-3553(A)(2) (emphasis added). Because “possession” of contraband is a separate statutory offense and all the evidence against Defendant involved the (A)(2) offense of possession, Defendant was tried for crimes he was not charged with by indictment.

¶8 Our supreme court has addressed a similar circumstance. In *State v. Taylor*, the court found that the “state intended to charge Taylor with photographing [the victim] between May and October 1986 and possessing a photograph of [the victim] in February 1987.” 160 Ariz. 415, 419, 773 P.2d 974, 978 (1989). After finding that the possession of a photograph charge was never amended and Taylor was convicted as charged, the court stated that “[Defendant] cannot be convicted of a

crime not presented to the grand jury and not the basis for the grand jury's indictment." *Id.* (citing *State v. Cummings*, 148 Ariz. 588, 590, 716 P.2d 45, 47 (App. 1985)). The court, as a result, reversed the conviction. *Taylor*, 160 Ariz. at 419, 773 P.2d at 978.

¶9 Defendant was indicted for violating § 13-3553(A)(1). The State, however, presented evidence that he only possessed the video clip and photographs; offenses outside of the indictment. Consequently, we follow our supreme court, and find that Defendant cannot be convicted of crimes that were not presented to the grand jury and not the basis for the indictment. Consequently, we reverse the convictions.

CONCLUSION

¶10 Based on the foregoing, we reverse Defendant's convictions.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Judge

/s/

MARGARET H. DOWNIE, Judge