

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



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

STATE OF ARIZONA,) 1 CA-CR 09-0721
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
LUCIO RIOS ZAMACONA,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200800389

The Honorable John Paul Plante, Judge

AFFIRMED

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

N O R R I S, Judge

¶1 Lucio Rios Zamacona timely appeals from his convictions and sentences for four counts of sexual exploitation of a minor, a dangerous crime against children. After searching the record on appeal and finding no arguable question of law

that was not frivolous, Zamacona'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 Zamacona to file a supplemental brief *in propria persona*, but Zamacona chose not to do so. Through counsel, however, Zamacona has raised several arguments. None of the arguments raised by Zamacona have merit, and after reviewing the entire record, we find no fundamental error. Therefore, we affirm Zamacona's convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND¹

¶12 A Walgreens employee contacted Yuma police after a film technician discovered photographs depicting child nudity. Zamacona later picked up the photographs and was recorded on the store video. Police interviewed Zamacona who admitted he took the pictures of the nine-year-old daughter of his girlfriend while in Mexico, took them to be developed at Walgreens in Yuma, and picked them up.

¶13 A grand jury indicted Zamacona on five counts of sexual exploitation of a minor, in violation of, *inter alia*,

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

Arizona Revised Statutes ("A.R.S.") §§ "13-3553(A)(1), 13-3553." See A.R.S. § 13-3553(A)(1) (Supp. 2007). For each count, the indictment initially alleged Zamacona committed "sexual exploitation of a minor . . . to wit: DEFENDANT TOOK PHOTOGRAPH OF VICTIM[] . . . FOR DEFENDANT'S SEXUAL STIMULATION" related to a specific photograph. The State subsequently amended the indictment "in that the 'to wit' for all counts should read, 'possessed photographs' instead of 'took photographs'." The amended indictment was filed 18 days before trial. At trial, the State dismissed one of the counts.

DISCUSSION

I. Zamacona's Issues on Appeal

¶4 Through counsel, Zamacona raises several issues. He first argues the jury "lacked knowledge of relevant policy and jurisdictional laws," and was unable to "distinguish between what was just and unjust." Except as discussed below, the record demonstrates the jury was properly instructed, and its guilty verdicts on the charges are amply supported by the evidence.

¶5 Next, Zamacona argues "[n]o one has taken into account the fact that the victim and all the parties to the case are citizens of Mexico, and not the United States," and "[n]o one has taken into account the impact that his conviction and eternal sentence will have upon the welfare of his wife and

family in Mexico." These statements present no legal issue for our review. Further, the record is clear: first, Zamacona possessed the images in Arizona, and second, the court imposed a legal sentence -- one prescribed by state statute.

¶16 Zamacona next argues he lacked the necessary "criminal intent" when he "created the images in question" to meet the requirements of sexual exploitation. See A.R.S. § 13-3551(4) (2010)² ("'Exploitive exhibition' means the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer."). One photograph entered into evidence contained a close up of the victim's vagina with an adult hand pulling down the pants; Zamacona testified it was his hand. An image on Zamacona's mobile phone contained a picture of adult hands spreading open the vagina of the victim; Zamacona testified they were his hands. Moreover, despite his counsel's best efforts, Zamacona testified twice he thought the pictures underlying the charged crimes were not proper. Thus, ample evidence supported the State's allegation of sexual exploitation.

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

¶17 Zamacona also argues the prosecutor and the investigating officer engaged in misconduct. The record demonstrates no evidence of prosecutorial or police misconduct.

¶18 Finally, Zamacona argues defense counsel was ineffective for a variety of reasons. Zamacona'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").

II. Anders Fundamental Error Review

¶19 In addition to reviewing those portions of the record necessary to address Zamacona's arguments, we have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Zamacona received a fair trial. He was represented by counsel at all stages of the proceedings and was present at all critical stages. The jury was properly comprised on 12 members.

¶10 We note the amended indictment was improper because it was untimely and it did not merely "correct mistakes of fact or remedy formal or technical defects," as required by Arizona Rule of Criminal Procedure 13.5(b). Zamacona raised no objection to the amended indictment, however. Accordingly, our review is limited to fundamental error. *State v. Henderson*, 210 Ariz.

561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error goes "to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). After a defendant shows fundamental error, he must also demonstrate the error prejudiced him. *Id.* at ¶ 20. Here, although the amended indictment failed to comply with Rule 13.5(b), the amended indictment did not amount to fundamental error. The amendment occurred 18 days before trial and at trial Zamacona admitted possessing the images.

¶11 We also note the court's sexual exploitation of a minor instruction was not limited to possession and described conduct different from possession.³ Again, however, Zamacona did not object to the instruction. Thus, again, our review is limited to fundamental error. Here, because the State amended the indictment to only allege possession, inclusion of this other conduct in the jury instruction amounted to error. However, this error was neither fundamental nor prejudicial. As noted above, Zamacona admitted possessing the images and the

³The court instructed the jury the "crime of sexual exploitation of a minor requires proof that the defendant knowingly recorded, filmed, photographed, developed, duplicated, transported, or possessed any visual depiction in which the minor was engaged in exploitative exhibition."

only defense he raised to the charges was that he had not possessed the images for the purpose of sexual stimulation.

¶12 The court correctly instructed the jury on Zamacona's presumption of innocence and the State's burden of proof.⁴ The superior court received and considered a presentence report, Zamacona was given an opportunity to speak at sentencing, and his sentences were within the range of acceptable sentences for his offenses.⁵

CONCLUSION

¶13 We decline to order briefing and affirm Zamacona's convictions and sentences.

¶14 After the filing of this decision, defense counsel's obligations pertaining to Zamacona's representation in this appeal have ended. Defense counsel need do no more than inform Zamacona 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.

⁴We note the court did not instruct the jury on the necessity of reaching a unanimous verdict on each count. Not only is such an instruction consistent with Arizona law, see Article 2, Section 23 of the Arizona Constitution, but such an instruction avoids jury confusion. Nevertheless, the jury was polled and each juror responded in support of the verdicts.

⁵The court sentenced Zamacona to consecutive mitigated sentences of ten years in prison on each count with credit for time served on each count of 544 days.

State v. Shattuck, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

¶15 Zamacona 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 Zamacona 30 days 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