

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
FILED: 10-12-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-0060
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
DAVID EDGAR MIDDLEMAS,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-142811-001 DT

The Honorable Lisa Daniel Flores, Judge

AFFIRMED

Terry Goddard, 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 Stephen R. Collins
Attorneys for Appellant

O R O Z C O, Judge

¶1 David Edgar Middlemas, (Defendant) appeals his convictions and sentences on two counts of sexual conduct with a minor, both class two felonies and dangerous crimes against children.

¶2 Defendant'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 a search of the entire appellate record, he found no arguable question of law that was not frivolous. Defendant was afforded the opportunity to file a supplemental brief in propria persona, but he did not do so. Through his attorney, however, Defendant challenges the sufficiency of the evidence and his convictions.

¶3 Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). 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 -4033.A.1 (2010).¹ Finding no reversible error, we affirm.

¹ We cite to the current version of the applicable statutes when no revisions material to this decision have since occurred.

FACTS AND PROCEDURAL HISTORY

¶4 Defendant's daughter (C.E.) was born in the Philippine Islands in March 2004. Defendant and C.E.'s mother were never married. Defendant and C.E. traveled extensively throughout the world, visiting and living in nine countries before C.E. reached the age of three. They visited Defendant's mother who lived in Mexico and his sister (C.F.), who resided in Arizona, a few times every year.

¶5 While in Mexico, C.E. was taken to the doctor by a nanny who suspected C.E. had been abused. The medical exam by a pediatrician indicated signs of possible abuse and C.E. told the doctor Defendant had sexually abused her. C.F. learned of the allegations of sexual abuse against Defendant. C.F. traveled to Mexico and brought C.E. back to her home in Arizona and made reports of the alleged sexual conduct to Child Protective Services (CPS) and the Buckeye Police Department. CPS placed C.E. in the custody of C.F.

¶6 During this time, Defendant began traveling to several different countries throughout Central America and Mexico. Officer D. of the Buckeye Police Department interviewed Defendant when he landed at Sky Harbor airport. Defendant admitted to sexual conduct with C.E. daily while bathing her, from the time C.E. was seven or eight months until she was removed from Defendant's custody at three and a half years of

age. Officer D. arrested Defendant and he was charged with two counts of sexual conduct with a minor, class two felonies and dangerous crimes against children.

¶7 Defendant chose to have a bench trial and the court questioned the voluntariness of Defendant's waiver of his right to a jury trial and his right to confront witnesses by allowing Officer D.'s police report to be admitted as evidence. The trial court determined that Defendant voluntarily waived his rights and found Defendant guilty of two counts of sexual conduct with a minor and sentenced him to two consecutive life sentences pursuant to A.R.S. § 13-604.01.A (2004).² Defendant timely appealed his convictions and sentences. Ariz. R. Crim. P. 31.3.

DISCUSSION

Sufficiency of Evidence

¶8 When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996).

¶9 On appeal, Defendant requests that his attorney challenge the sufficiency of the evidenced used to convict him. "The finder-of-fact, not the appellate court, weighs the

² This statute was subsequently renumbered as A.R.S. § 13-705.A. See 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29 (2d Reg. Sess.). In this decision, we refer to the version of this statute as worded and numbered at the time Defendant committed the offenses.

evidence and determines the credibility of witnesses." *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995). This Court will not disturb the fact finder's "decision if there is substantial evidence to support its verdict." *Id.*

¶10 Pursuant to A.R.S. § 13-1405.A (2010), "[a] person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse . . . with any person who is under eighteen years of age." As defined, "sexual intercourse" is penetration into the vulva by "any part of the body." A.R.S. § 13-1401.3 (2010).

¶11 Defendant waived his right to cross examine the State's witnesses and allowed the police reports to be admitted as evidence. At trial, the State established Defendant and C.E. visited Surprise, Arizona a few times each year. Police reports stated Defendant admitted he digitally penetrated C.E.'s vagina daily, while bathing her from the time she was seven or eight months old, until she was removed from Defendant's custody at the age of three and a half years. We find the State presented sufficient evidence to convict Defendant of the charges of sexual conduct with a minor.

Mental Competency and Voluntariness

¶12 Before trial, Defendant requested an evaluation pursuant to Rule 11.2 of the Arizona Rules of Criminal Procedure. The court appointed two doctors to perform mental

evaluations of Defendant. At the competency hearing the doctors' findings of Defendant's competency were divided. The court appointed a third expert to evaluate Defendant who found him competent to stand trial and to assist in his defense.

¶13 At trial, the court found that Defendant was capable of understanding the proceedings and assisting his counsel; competent pursuant to A.R.S. § 13-4510.B (2010); that his current medication regimen was necessary to ensure his ongoing competency; and that Defendant should continue taking his medications. Prior to trial the court questioned Defendant to determine if he was under the influence of any drugs or alcohol. Defendant responded that he had not taken any drugs, alcohol or medications within the past twenty-four hours, other than those administered by the prison staff.

¶14 When the superior court's authority to determine competency is not challenged at trial, the issue is examined for fundamental error on appeal. *State v. Silva*, 222 Ariz. 457, 459, ¶ 11, 216 P.3d 1203, 1205 (App. 2009). To obtain relief, Defendant must prove both fundamental error and actual prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). We must find error occurred, before reviewing for fundamental error. *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991). Here, we find no error.

¶15 During Defendant's testimony, he claimed some of the statements he made to police were made as a result of being under stress and intimidated. Defendant testified that when intimidated, he may say things he does not mean. For a statement to be admissible, it must be voluntary and "not obtained by coercion or improper inducement." *State v. Ellison*, 213 Ariz. 116, 127, ¶ 30, 140 P.3d 899, 910 (2006) (citing *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963)). A suspect's statements are presumed involuntary in Arizona. *Id.* (citing *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990)). Yet, "[a] prima facie case for admission of a confession is made when the officer testifies that the confession was obtained without threat, coercion or promises of immunity or a lesser penalty." *State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979). Here, Defendant testified that during his interviews, officers treated him professionally and with respect. Defendant has not made any claims or introduced any evidence that his confession was coerced or improper.

¶16 We find no error in the trial court's proceedings to determine competency or voluntariness and thus affirm the trial court's verdicts and sentences.

CONCLUSION

¶17 We have read and considered counsel's brief, carefully searched the entire record for reversible error and found none. *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the trial court's findings of guilt. Defendant was present and represented by counsel at all critical stages of the proceedings. At sentencing, Defendant and his counsel were given an opportunity to address the court and the trial court imposed a legal sentence.

¶18 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and his 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). Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an in propria persona motion for reconsideration or petition for review.³

³ Pursuant to Rule 31.18.b, Defendant or his counsel have fifteen days to file a motion for reconsideration. On the Court's own motion, we extend the time to file such a motion to thirty days from the date of this decision.

¶19 For the foregoing reasons, Defendant's convictions and sentences are affirmed.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

DANIEL A. BARKER, Judge

/S/

LAWRENCE F. WINTHROP, Judge