DIVISION ONE
FILED: 09/29/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0697
	)	
Appellee,	)	Department D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
FAWAD AHMAD SAYED,	)	Rule 111, Rules of
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court of Mohave County

Cause No. CR2009-00420

The Honorable Judge Rick Williams

AFFIRMED

John A. Pecchia, Mohave County Public Defender — Kingman
by Jill L. Evans, Deputy Public Defender
Attorneys for Appellant

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

T H O M P S O N, Judge

¶1 Fawad Ahmad Sayed (defendant) appeals his conviction and sentence for public sexual indecency as to a

minor under the age of fifteen, a class 5 felony. Defendant asserts that the conviction should be reversed as there was insufficient evidence that he acted recklessly as to whether a minor was present under the statutory language of Arizona Revised Statutes (A.R.S.) § 13-1403(B) (2006). Finding no error, we affirm.

¶2 Defendant visited a garage sale where he spoke to the adult woman holding the sale and referenced her daughter, then age six, who was present. Defendant made small talk with the adult, asking her questions such as whether she was single. While trying to engage her in conversation, defendant first rubbed his penis through his sweatpants then exposed himself to the adult woman and masturbated.

¶3 Defendant was charged with count 1, indecent exposure, a class 1 misdemeanor; count 2, public sexual indecency, a class 1 misdemeanor; count 3, indecent exposure, a class 6 felony; and count 4, public sexual indecency to a minor, a class 5 felony. Defendant was convicted by a jury on counts 1, 2 and 4. Defendant was sentenced to concurrent jail terms: six months for each of the misdemeanor charges and to a mitigated 1.25 years prison term on the felony conviction, with 259 days of presentence incarceration credit. Defendant timely

appealed. Defendant challenges only the felony conviction and asserts there was insufficient evidence that he was reckless pursuant to A.R.S. § 13-1403(B) as to whether a minor under the age of fifteen was "present."

¶4 On appeal we view the evidence in the light most favorable to sustaining the verdict and resolve all inferences against defendant. *State v. Atwood*, 171 Ariz. 576, 596, 832 P.2d 593, 613 (1992). For there to be reversible error on the sufficiency of the evidence there must be a "complete absence of probative facts to support the conviction." *Id.* at 597, 832 P.2d at 614 (citation omitted).

¶5 Section 13-1403(B) states "A person commits public sexual indecency to a minor if the person intentionally or knowingly engages in any of the [listed acts]. . . and such person is reckless about whether a minor under the age of fifteen years is present." For the purposes of this statute, victims are "present" when they are within viewing range of the defendant. *State v. Jannamon*, 169 Ariz. 435, 438, 819 P.2d 1021, 1024 (App. 1991). The evidence at trial was not only that the minor was within viewing range of defendant, but that minor in fact viewed defendant's exposed penis. We find, therefore, the minor was "present." As to defendant's claim that he

was not reckless, the evidence supports the jury's verdict. A person is "reckless" if that person "is aware of and consciously disregards a substantial and unjustifiable risk" that a minor might be present or in viewing range. *See Jannamon*, 169 Ariz. at 438, 819 P.2d at 1024; A.R.S. § 13-105(10)(c). Defendant knew the minor was present because he referenced her when talking to her mother. Further, other elementary-aged children were present in the yard and garage area, including defendant's own daughter.

¶6 Finding no error, defendant's convictions and sentences are affirmed.

/s/
_____
JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/
_____
DANIEL A. BARKER, Judge

/s/
_____
ANN A. SCOTT TIMMER, Judge