DIVISION ONE
FILED: 06/28/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0780
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
LUIS C. RUIZ, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR201000013

The Honorable William T. Kiger, Judge

AFFIRMED

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

John David Napper — Prescott
Attorney for Appellant

O R O Z C O, Judge

¶1 Luis C. Ruiz (Defendant) timely appeals his convictions and sentences for four counts of child molestation;

all class two dangerous, non-repetitive felonies, with the exception of count one, which was a class two non-dangerous, non-repetitive felony. 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.

¶2 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, and -4033.A.1 (2010).[1] Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3 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). Defendant was indicted on four counts of molestation of a child, a class two felony.

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

¶4 Prior to trial, Defendant filed a motion to suppress statements he made during a confrontation call with the victim, J.R., and during a subsequent in-person confrontation with J.R. The trial court held an evidentiary hearing. The trial court denied Defendant's motion to suppress. Defendant filed a motion to reconsider, which was also denied.

¶5 Defendant waived his right to a jury trial. The facts were established by a stipulated record submitted to the trial court. Included in the record was an interview of the victim, J.R. In the interview, J.R. stated:

> I remember when I was little; the incident occurred obviously when I was taking naps, or whatever. . . . I would be laying down taking a nap and then [Defendant] . . . would go lay down with me and I remembered him touching me down there all the time. I would try to get away and he would hold me really tight and not let me go. . . . This happened for years with me, I mean, since I was 8 or 9.

J.R. described the "touching" as digital penetration, explaining, "[he] would put his hand underneath her clothing and touch her (vaginal area)." She also estimated that the incidents occurred "well over 100 times" from 1984 until 1987.

¶6 Also part of the record was a confrontation call between Defendant and J.R. During the call, Defendant and J.R. had the following exchange:

> [J.R.:] [W]hat would make you do like, just molest so many girls. What, what would make you do that?
>
> [Defendant:] I don't know. (Inaudible) I, I, it's the devil. I guess the devil gets into you and uh you don't think about what's gonna happen later on. (Inaudible) gets into you and uh I don't know what, how else to explain it but uh oh only God knows and I pray to God like I say to get everybody's forgiveness and I hope, I hope everybody does come around. It's, it's really hard and (Inaudible)

¶7 J.R., in the company of her brother, also confronted Defendant in person while wearing a "body wire" that recorded his statements. During this conversation, the following exchange took place:

> [Brother:] What are you saying you're sorry for, you haven't told me what you're sorry for.
>
> [Defendant:] Well I'm sorry for what I did to the girls, [J.R.], and the rest of the girls.
>
> [Brother:] Which is what? You're not (inaudible).
>
> [Defendant:] Abusing them, like I did, touching their privates and whatever it was that I did, you know, I don't remember everything but I know that I did that. And that's, it's horrible; [i]t's horrible to think about it. . . .
>
> [Brother:] If it's so horrible, how long did this go on for?
>
> [Defendant:] I don't know, I don't remember.

[Brother:] I, was it just one time, two times?

[Defendant:] Do you remember?

[J.R.:] What I remember, mine was years, for many years. . . .

[Defendant:] Well[. . . .]

[Brother:] You don't remember.

[Defendant:] Maybe it was ya. I don't remember 9 years, no.

* * *

[J.R.:] OK, you say you remember, what do you remember doing to me?

[Defendant:] Just touching you, but I don't remember sticking my finger in[.]

[J.R.:] Touching me where[?]

[Defendant:] Your privates.

* * *

[J.R.:] You just remember touching me on my genital area. Huh?

[Defendant:] Yes.

¶8 The court found Defendant guilty on all counts; however, due to a medical condition, Defendant was not present when the verdict was read.[2] The trial court sentenced Defendant

[2] Defendant's absence may be treated as a waiver of the right to be present, Ariz. R. Crim. P. 9.1; however, assuming without deciding that Defendant's absence was involuntary, it did not result in harm. *State v. Sainz*, 186 Ariz. 470, 474, 924 P.2d 474, 478 (App. 1996) ("Criminal proceedings conducted in violation of a defendant's right to be present may be reviewed

to consecutive, presumptive terms of seven years' imprisonment on count one, and seventeen years' flat time imprisonment on each of counts two through four. The trial court gave Defendant one day of presentence incarceration credit towards his sentence for count one.

DISCUSSION

¶9 The trial court properly denied Defendant's motion to suppress. "When reviewing a trial court's denial of a motion to suppress, we consider only the evidence presented at the suppression hearing, and view it in the light most favorable to upholding the court's ruling." *State v. Blakley*, 226 Ariz. 25, __, ¶ 5, 243 P.3d 628, 630 (App. 2010) (internal citations omitted). If the matter involves a discretionary issue, we employ an abuse of discretion standard; we review constitutional and purely legal issues de novo. *Id*.

¶10 As a predicate to invoking Fifth Amendment *Miranda* rights, Defendant must be in custody. *Edwards v. Arizona*, 451 U.S. 477, 485-86 (1981); *State v. Stanley*, 167 Ariz. 519, 523, 809 P.2d 944, 948 (1991); *see Miranda v. Arizona*, 384 U.S. 436 (1966). Likewise, the Sixth Amendment right to counsel does not attach until adversarial proceedings have been initiated. *State v. Palenkas*, 188 Ariz. 201, 210, 933 P.2d 1269, 1278 (App. 1996)

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for harmless error.").

(citing *United States v. Gouveia*, 467 U.S. 180, 189 (1984)). Thus, because Defendant was not in custody when J.R. confronted him on either occasion, nor had adversarial proceedings been initiated, neither *Miranda* nor the Sixth Amendment has been violated. Moreover, the record does not indicate that Defendant's will was overborne such that his statements were involuntary. *See State v. Lopez*, 174 Ariz. 131, 137, 847 P.2d 1078, 1084 (1992). Thus, the trial court properly denied Defendant's motion to suppress.

¶11 There is sufficient evidence to support the court's verdict of guilty on all counts. Evidence is sufficient when it is "more than a [mere] scintilla and is such proof" as could convince reasonable persons of Defendant's guilt beyond a reasonable doubt. *State v. Tison,* 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) (citation omitted).

¶12 A person is guilty of child molestation when he knowingly molests a child who is under fifteen years of age by "touching the private parts of such child." A.R.S. § 13-1410 (1984-87). In this case, sufficient evidence indicates that Defendant, on numerous occasions, touched the genital area of

J.R. when she was under the age of fifteen years. Defendant admitted to such conduct on two occasions; once during the confrontation call with J.R., and again during an in-person confrontation with J.R. Thus, there is substantial evidence to support the verdict of guilty on all counts.

CONCLUSION

¶13 We have read and considered counsel's brief, carefully searched the entire record for reversible error, and we have 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 court's finding of guilt. Defendant was present and represented by counsel at all critical stages of the proceedings. At sentencing, Defendant's counsel was given an opportunity to speak and the court imposed a legal sentence.

¶14 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 has 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]

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

/S/
_____
PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
_____
PATRICIA K. NORRIS, Presiding Judge

/S/
_____
JOHN C. GEMMILL, Judge

[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.