DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. HOWARD HOFMANN, Appellant.	)	1 CA-CR 10-0483 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-138328-001DT

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

Thomas C. Horne, Arizona 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 Margaret M. Green, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Howard Hofmann ("Hofmann") filed this appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967), and

State v. Leon, 104 Ariz. 297, 451 P.2d 878 (1969), following his convictions of two counts of indecent exposure (class 6 felonies) under Arizona Revised Statutes ("A.R.S.") section 13-1402 (Supp. 2010), three counts of molestation of a child (class 2 felonies and dangerous crimes against children) under A.R.S. § 13-1410 (2010), and one count of public sexual indecency to a minor (a class 5 felony) under A.R.S. § 13-1403 (Supp. 2010). [1]

¶2 Finding no non-frivolous issues to raise, Hofmann's counsel requested that this Court search the record for fundamental error. This Court gave Hofmann an opportunity to file a supplemental brief, but he did not do so.

¶3 After reviewing the entire record, we conclude that the evidence is sufficient to support the verdicts and there is no reversible error. Therefore, we affirm Hofmann's convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY

¶4 In 2007, police received reports that Hofmann exposed his penis to K.W., H.W., and T.M. and touched their vaginas in 2006 through 2007. During a recorded telephone call with K.W.'s father, Hofmann admitted to touching K.W.'s and H.W.'s vaginas and having K.W. and H.W. touch his penis. Hofmann told K.W.'s father that the incidents would not happen again.

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

¶5 At the beginning of Hofmann's police interview in June 2007, the police detective gave Hofmann warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). During the interview, Hofmann acknowledged touching K.W. and H.W. "over the clothes" "a couple times" and having them touch him, but denied touching T.M. or having T.M. touch him.

¶6 Hofmann was indicted on four counts of molestation of a child, class 2 felonies and dangerous crimes against children (two involving K.W., one each involving H.W. and T.M.); four counts of indecent exposure, class 6 felonies (two involving T.M., one each involving K.W. and H.W.); and one count of public sexual indecency to a minor, a class 5 felony (involving H.W).

¶7 At the time of trial, H.W. was nine years old and K.W. was seven. During the trial and at H.W.'s forensic interview prior to trial, H.W. stated that Hofmann touched her "pee pee" under her clothing on more than one occasion. She also told the jury that one time she observed Hofmann touching K.W.'s "pee pee." Additionally, H.W. testified at trial that Hofmann made her and K.W. touch his genitals. During the earlier forensic interview, H.W. stated that Hofmann showed her his penis four or five times and that she told her parents about it afterward. At trial, H.W. testified that Hofmann told her not to tell anybody, but she reported the incident to her uncle when she got home.

¶8 K.W. testified that Hofmann showed her his penis and

on a separate occasion made H.W. and her touch his penis by unzipping his pants as the girls were under a table.

¶9 A jury found Hofmann guilty on two counts of indecent exposure (one each involving H.W. and K.W.), three counts of molestation of a child (one involving H.W. and two involving K.W.), and one count of public sexual indecency to a minor (involving H.W.). It also found that three counts of child molestation were against children under fifteen years old, and Hofmann was over eighteen years old at the time of the offense. Therefore, the three counts of molestation of a child were dangerous crimes against children as defined by A.R.S. § 13-705(P)(1)(d) (2010).[2]

¶10 The jury acquitted Hofmann on the charges involving T.M., which comprised of two counts of indecent exposure and one count of molestation of a child. The State did not request an aggravation phase.

¶11 As to the counts involving H.W., the trial court sentenced Hofmann to the presumptive terms of seventeen years

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[2] If a defendant is charged with crimes punishable under the dangerous crimes against children statute, the trial court can sentence a defendant under the statute even if the jury found the crimes were not dangerous during the guilt phase. *See State v. Smith*, 156 Ariz. 518, 525, 753 P.2d 1174, 1181 (App. 1987) (holding that where the State alleged and the crime qualifies as a dangerous crime against children, the State need not assert and the jury need not find a separate allegation of dangerousness), *disapproved on other grounds by State v. Jonas*, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990).

for molestation of a child, one year for indecent exposure, and 1.5 years for public sexual indecency to a minor. All three sentences were to run concurrently.

¶12 For the charges involving K.W., the trial court sentenced Hofmann to presumptive terms of seventeen years for each count of molestation of a child and one year for indecent exposure. All three of those sentences were to run concurrently with each other but consecutive to the counts involving H.W. The trial court also applied 1,073 days of presentence incarceration credit.

¶13 Hofmann timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, as well as A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(1) (2010).

STANDARD OF REVIEW

¶14 In an *Anders* appeal, this Court must review the entire record for fundamental error. *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Fundamental error is "error going 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." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (citation omitted). The defendant must also show that he suffered prejudice from any

error. *Id.* at ¶ 20. On review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against the defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

I. Substantial evidence in the record supports the jury's verdict.

¶15 In reviewing a claim of insufficient evidence, "[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). We review the evidence presented at trial only "to determine if substantial evidence exists to support the jury verdict." *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005). "Substantial evidence is more than a 'mere scintilla' and is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

A. Molestation of a Child

¶16 For a jury to have found Hofmann guilty of the three

charges of molestation of a child under A.R.S. § 13-1410, it had to find proof that he intentionally or knowingly engaged in sexual contact with a child under the age of fifteen. Sexual contact is defined as engaging in "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breasts by any part of the body or by any object or causing a person to engage in such contact." A.R.S. § 13-1401(2) (2010).

¶17 Under A.R.S. § 13-105(10)(a) (2010), intentionally is defined as "a person's objective . . . to cause that result or to engage in that conduct" as described by the statute defining an offense. Section 13-105(10)(b) defines knowingly as, "with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that [his] conduct is of that nature or that the circumstance exists." Knowledge of the unlawfulness of the act is not required. A.R.S. § 13-105(10)(b). Moreover, sexual motivation and proof of sexual intent are not required elements to establish child molestation. *State v. Simpson*, 217 Ariz. 326, 329-30, ¶ 22, 173 P.3d 1027, 1030-31 (App. 2007). A reasonable jury can infer a defendant's requisite state of mind through evidence presented at trial, and such evidence may permit an inference of molestation. *State v. Bible*, 175 Ariz. 549, 595-96, 858 P.2d 1152, 1198-99 (1993).

¶18 The State presented substantial evidence to support the jury's verdict. H.W. testified that Hofmann touched her "pee pee" when she was six years old. H.W. also stated that she witnessed Hofmann touching K.W. "on her pee pee" while K.W. was sleeping, and that Hofmann forced K.W. and her to touch his genitals. H.W. directly identified Hofmann as the perpetrator at trial.

¶19 K.W. testified that Hofmann showed his penis to H.W. and her and made them touch him. She remembered being five years old at the time. K.W. also testified to a separate incident when she was four years old, and Hofmann directed her and H.W. to go underneath the kitchen table and touch Hofmann's penis after he unzipped his pants. K.W. directly identified Hofmann as the perpetrator.

¶20 The State also introduced Hofmann's statements to the police, in which he admitted touching H.W. and K.W. and having them touch him. Hofmann's admissions, along with the testimony of the victims, are sufficient to support his convictions on three counts of child molestation: one each involving H.W. and K.W. pertaining to the same incident, and the third charge pertaining to K.W. touching Hofmann.

B. Indecent Exposure

¶21 For a jury to find Hofmann guilty of indecent exposure to a minor under sections 13-1402(A) and (C), the jury had to

find proof that he exposed his genitals while a minor under the age of fifteen was present, and he was reckless about whether the minor, as a reasonable person, would have been offended or alarmed by the act.[3] The statute does not require that the acts be sexually motivated. *State v. Sandoval*, 175 Ariz. 343, 347, 857 P.2d 395, 399 (App. 1993).

¶22 Under A.R.S. § 13-105(10)(c), recklessly means that "with respect to a result or to a circumstance described by a statute defining an offense . . . a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." The "risk must be of such nature and degree that disregard[ing] . . . [the] risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." *Id.* A reasonable jury can infer a defendant's requisite state of mind through evidence presented at trial. *Bible*, 175 Ariz. at 596, 858 P.2d at 1199.

¶23 Sufficient evidence supports Hofmann's convictions of indecent exposure involving H.W. and K.W. H.W. testified that Hofmann showed her and K.W. his genitals. She believed she was six years old during the first incident and seven years old the

[3] Under A.R.S. § 13-1402(C), indecent exposure to a minor who is under fifteen years of age is a class 6 felony, rather than a class 1 misdemeanor that applies if the victim was fifteen or older.

second time.

¶24 K.W. further testified that Hofmann showed his penis to H.W. when she was five. The State also introduced Hofmann's statements to the police, in which he admitted exposing himself to H.W. and K.W.

¶25 The record contains sufficient evidence to support Hofmann's convictions on both counts of indecent exposure pertaining to H.W. and K.W.

C. Public Sexual Indecency

¶26 For a jury to find Hofmann guilty of public sexual indecency to a minor, it had to find under A.R.S. § 13-1403(B) that Hofmann intentionally or knowingly engaged in an act of sexual contact and was reckless about whether a minor under the age of fifteen years was present. With respect to minors, the statute does not require "that the defendant be reckless as to whether his victims would be offended or alarmed"; the defendant need only be reckless with regard to a minor being present or within viewing range. *State v. Jannamon*, 169 Ariz. 435, 438, 819 P.2d 1021, 1024 (App. 1991).

¶27 The State presented evidence to support Hofmann's conviction of public sexual indecency toward H.W. H.W. testified to observing Hofmann touching K.W. "on her pee pee" while K.W. was sleeping. H.W. stated that she did not remember how old she was at the time of the incident. H.W. did testify,

however, that she was born on September 12, 2000, which made her nine years old at the time of the trial and, thus, less than fifteen years old when the incident occurred. Additionally, the jury was free to believe Hofmann's admissions to the police, which included Hofmann acknowledging that he touched H.W. and K.W.

¶28 Thus, the record contains sufficient evidence to support Hofmann's conviction for public sexual indecency toward H.W.

CONCLUSION

¶29 After careful review of the record, we find no meritorious grounds for reversal of Hofmann's conviction. The record reflects that Hofmann had a fair trial and he was present and represented by counsel at all critical stages prior to and during trial. Hofmann was present when the jury read the verdict and when he was sentenced, and he was given the opportunity to speak at sentencing. Additionally, the jury consisted of twelve jurors pursuant to A.R.S. § 21-102(A) (2002). The evidence is sufficient to sustain the verdict and the trial court imposed legally permissible sentences for Hofmann's offenses.[4]

[4] The two counts of molestation of a child were enhanced as dangerous crimes against children under A.R.S. § 13-705(P)(1)(d), and the imposed sentences were within the enhanced sentencing range as outlined in A.R.S. § 13-705(D).

¶30 For the foregoing reasons, we affirm Hofmann's conviction and sentence. Upon the filing of this decision, counsel shall inform Hofmann of the status of his appeal and counsel's opinions about his future appellate options. Defense counsel has no further obligations, unless it finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Upon the Court's own motion, Hofmann shall have thirty days from the date of this decision to file a *pro per* motion for reconsideration in this Court or petition for review in the Arizona Supreme Court.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Presiding Judge

/s/
MICHAEL J. BROWN, Judge