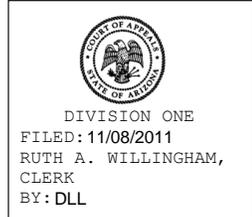


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,

1 CA-CR 10-0977

)
Appellee,)

DEPARTMENT B

)
v.)

MEMORANDUM DECISION

ALGENE ROYCE GOULD,)

(Not for Publication -
Rule 111, Rules of the
Arizona Supreme Court)

)
Appellant.)
)
)
)

Appeal from the Superior Court in Yavapai County

Cause No. V1300CR201080106

The Honorable Tina R. Ainley, Judge

AFFIRMED

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

Phoenix

Dean Trebesch, Yavapai County Public Defender
By John R. Thornton, Jr.
Attorneys for Appellant

Camp Verde

K E S S L E R, Presiding Judge

¶1 This appeal was filed in accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following *Algene Royce*

Gould's ("Gould") conviction of child molestation and kidnapping, both dangerous crimes against a child and class two felonies. Finding no arguable issues to raise, counsel requested that this Court search the record for fundamental error. Although Gould did not file a *pro per* supplemental brief, he suggested to his counsel that the Court review the following issues: 1) that the evidence was insufficient to support a guilty verdict; 2) that the court committed fundamental error in failing to grant Appellant's motion for directed verdict under Rule 20, Arizona Rules of Criminal Procedure ("Rule 20"); 3) that the court committed fundamental error in finding aggravating factors sufficient to warrant prison sentences beyond the statutory presumptive terms; 4) that the court committed fundamental error in permitting the State to impeach his testimony by use of his prior felony conviction pursuant to Rule 609, Arizona Rules of Evidence ("Rule 609"); and 5) ineffective assistance of counsel.

¶12 After reviewing the entire record, we conclude the evidence is sufficient to support the verdict and there is no reversible error. Therefore, we affirm Gould's convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY

¶13 We view the facts in the light most favorable to sustaining the conviction. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Gould was charged by indictment with ten separate counts. Count I and Count II both alleged acts of child molestation against victim S.D., a person under fifteen years of age. Count III alleged an act of kidnapping against S.D. Counts IV through X alleged acts committed on other dates against three other victims over fifteen years of age.

¶14 The court dismissed or entered a directed verdict on Counts II, VII, and IX, and the jury acquitted Gould on Counts IV, V, VI, VIII, and X.

¶15 The jury convicted Gould of Count I, child molestation of S.D., and Count II¹, kidnapping of S.D., both as dangerous crimes against children. After the verdicts were read, the prosecutor moved to admit evidence of Gould's prior felony conviction for a sex offense occurring April 19, 1997. Gould's attorney did not object, and the court admitted these exhibits for enhancement and aggravation purposes. Gould was sentenced to a flat term

¹ To avoid confusing the jury, the trial court renumbered the counts after disposing of Counts II, VII, and IX.

of twenty years imprisonment on Count I, and a consecutive flat term of twenty years imprisonment on Count II.

¶16 Gould timely appealed. See Arizona Rules of Criminal Procedure Rule 31.3. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, as well as Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A)(1) (2010)².

DISCUSSION

I. Standard of Review

¶17 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). To obtain reversal, the defendant must also show that the fundamental error prejudiced him. *Id.* at 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. On review, we view the facts in the light most

² We cite to the current versions of any statutes unless the statutes have been amended after the proceedings below.

favorable to sustaining the jury's verdict and resolve all inferences against the appellant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998) (citation omitted).

¶18 Gould raises five issues on appeal. The last of these issues, ineffective assistance of counsel, may not be considered on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). We address the remaining four issues for fundamental error.

II. Sufficiency of evidence

¶19 In reviewing the sufficiency of evidence at trial, "[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). "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)).

¶10 Gould was convicted of molestation of a child. A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in

sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age. A.R.S. § 13-1410 (2010). The offense is punishable pursuant to A.R.S. § 13-705 (2010), which covers dangerous crimes against children.

¶11 The State presented substantial evidence to support the jury's verdict. First, S.D. testified at trial that Gould forced his hands into her pants, beneath her clothing, while holding her so she could not escape. This suggests an intentional and knowing act. Second, he touched her vagina, fulfilling the "sexual contact" element of the statute. Finally, S.D. testified that she was born in 1995, making her fourteen years old at the time of the attack. Therefore, her testimony presents sufficient evidence to support Gould's conviction.

¶12 Gould was also convicted of kidnapping, in violation of A.R.S. § 13-1304, a class two felony. A person commits kidnapping by knowingly restraining another person with the intent to "inflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony." A.R.S. § 13-1304(A)(3) (2010). "Restrain" is defined as "restrict[ing] a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's

liberty, by either moving such person from one place to another or by confining such person." A.R.S. § 13-1301(2) (2010). Once the requisite intent of kidnapping is established, lack of consent can be satisfied if the victim is less than eighteen years old, unless the victim's custodian has acquiesced. *State v. Taylor*, 135 Ariz. 262, 263-64, 660 P.2d 863, 864-65 (App. 1982). S.D. testified at trial that Gould physically restrained her while molesting her. Additionally, S.D. was less than eighteen years old, and there is no evidence that S.D.'s custodian acquiesced to the confinement. Under these facts, a reasonable jury could find that Gould restrained S.D. without her consent.

III. Denial of Gould's motion for directed verdict

¶13 The court did not commit fundamental error in failing to grant Gould's motion for directed verdict under Rule 20. Gould requested a directed verdict on all counts. The only two counts the jury convicted Gould of were Counts I and II. As indicated above, there is sufficient evidence to support those convictions. A court should dismiss a claim only when there is no evidence supporting that charge. *State v. Carlos*, 199 Ariz. 273, 276, 17 P.3d 118, 121 (App. 2001).

IV. Aggravating factors

¶14 Gould argues that the court erred in imposing aggravated sentences. The court did not commit fundamental error in sentencing Gould. Pursuant to A.R.S. § 13-705(D), the presumptive sentences for the two offenses were twenty-eight years each. The court sentenced Gould to twenty years imprisonment on each count, to run consecutively. Those sentences were less than the presumptive sentences authorized by section 13-705(D).³

V. Impeachment under Rule 609

¶15 The court did not commit fundamental error in permitting the State to impeach Gould's testimony by use of his prior felony conviction pursuant to Rule 609. Rule 609(b) precludes admission of any prior conviction for which the defendant was released from prison more than ten years earlier. The court is also given discretion to admit prior convictions that would not meet the time limit should the court decide that the probative value of the conviction necessitates its entry. Ariz. R. Evid. 609(b).

¶16 The court conducted a Rule 609 hearing and permitted the introduction of Gould's prior conviction for

³ Although the court indicated at trial that it considered Gould's prior criminal history and harm to the victim as aggravating factors, the court ultimately imposed *enhanced*, rather than *aggravated*, sentences.

abusive sexual contact. Gould was released from prison after his prior conviction more than ten years before these charges were brought. However, the court found that because Gould had violated his probation and therefore served another prison sentence within the ten-year time period, his conviction and sentence were ongoing through the second release date (for the probation violation), as part of the original crime. The court also balanced the prejudice of admission of the prior conviction against its probative value and limited the impeachment of Gould to only the fact that he has a prior felony conviction, the date of the prior felony conviction, the court, the date of offense, and whether he was represented by counsel. We find no error, fundamental or otherwise.

CONCLUSION

¶17 After reviewing the record, we find no grounds for reversal of Gould's convictions. The record reflects that Gould had a fair trial, was present and represented by counsel at all critical stages prior to and during trial, as well as during the verdict and at sentencing. Additionally, the jury was comprised of twelve members as required by A.R.S. § 21-102(B) (2002). The evidence is sufficient to support the verdicts and the trial court imposed proper sentences for Gould's offenses.

¶18 We affirm Gould's convictions and sentences. Upon the filing of this decision, Gould's counsel shall inform him of the appeal's status and his future options. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *id.* On the court's own motion, Gould shall have thirty days from the date of this decision to file a *pro per* motion for reconsideration or petition the Arizona Supreme Court for review. See *id.*

/S/

DONN KESSLER, Presiding Judge

CONCURRING:

/S/

DIANE M. JOHNSEN, Judge

/S/

SHELDON H. WEISBERG, Judge*

* Pursuant to Article 6, Section 3, of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Sheldon H. Weisberg, as appointed to serve as a judge pro tempore in the Arizona Court of Appeals, Division One, to sit in this matter.