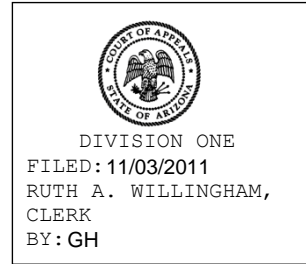


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) No. 1 CA-CR 11-0055  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
CESAR JESUS CERVANTES, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-113485-001 SE

The Honorable Warren J. Granville, Judge

**AFFIRMED**

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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 Terry J. Adams, Deputy Public Defender  
Attorney for Appellant

Cesar Jesus Cervantes,  
Appellant

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**D O W N I E**, Judge

¶1 Cesar Jesus Cervantes timely appeals his conviction for molestation of a child in violation of Arizona Revised Statutes ("A.R.S.") sections 13-1401(2) and -1410. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has searched the record, found no arguable question of law, and asks that we review the record for fundamental error. See *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant filed a supplemental brief *in propria persona*. On appeal, we view the evidence in the light most favorable to sustaining the conviction. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

#### **FACTS AND PROCEDURAL HISTORY**

¶2 On February 23, 2009, police officers arrived at the victim's home in response to a disturbance complaint. When Officer Lipford questioned the victim, she revealed information that caused him to take her to the Center Against Family Violence. There, she spoke with Detective Thomas and revealed that several years earlier, her step-father, Cervantes, had molested her. The victim testified that when she was 13 years old, Cervantes entered her room, placed his hand inside her underpants, and rubbed her vagina with his fingers.

¶3 Officer Lipford asked Cervantes if he would come to the police station for questioning, and Cervantes agreed. At

the station, Detective Lopez questioned Cervantes about the victim's allegations. According to Detective Lopez, Cervantes admitted undoing the victim's pants and touching her vagina when she was 12 or 13 years old. Cervantes also confessed that he knew his actions were wrong.

¶4 Cervantes was indicted on one count of molestation of a child, a class 2 felony and dangerous crime against children. A jury trial ensued. The victim and Detectives Lopez and Thomas testified. At the conclusion of the State's case-in-chief, Cervantes moved for a judgment of acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure ("Rule"). The motion was denied. The jury found him guilty as charged. The trial court sentenced Cervantes to a mitigated term of 12 years' imprisonment, with 681 days of pre-sentence incarceration credit; he was also ordered to register as a sex offender.

#### **DISCUSSION**

¶5 We have read and considered the briefs submitted by Cervantes and his counsel and have reviewed the entire record. *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Cervantes was present at all critical phases of the proceedings and was represented by counsel. The jury was properly impaneled and instructed. The

jury instructions were consistent with the offense charged. The record reflects no irregularity in the deliberation process.

¶16 In his supplemental brief, Cervantes identifies several issues, which we address below.

#### **I. Rule 20 Motion**

¶17 Cervantes argues the trial court should have dismissed the charges against him because the victim's allegations were not corroborated by witnesses or physical evidence. A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. ("Rule") 20. Substantial evidence is such proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citation omitted). "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).

¶18 The State presented substantial evidence of guilt. A person is guilty of child molestation when he intentionally or knowingly touches, fondles, or manipulates any part of the genitals, in a sexual nature, of a child who is under 15 years of age. Ariz. Rev. Stat. ("A.R.S.") § 13-1410(A), -1401. The victim testified that when she was 13 years old, Cervantes put

his hands inside her underwear and rubbed her vagina with his fingers. Detective Lopez testified that Cervantes admitted undoing the victim's pants and sexually touching her vagina. Cervantes also acknowledged that he knew his actions were wrong. Because the State introduced evidence sufficient to support the conviction, the court did not err in denying Cervantes's Rule 20 motion.

## II. Jury Panel

¶19 Next, Cervantes assigns error to the jury's composition because only nine of the ten jurors were present on the final day of trial. However, because Cervantes faced less than 30 years' imprisonment, see A.R.S. § 13-705(D) (providing maximum sentence of 24 years for child molestation), only eight jurors were required, see A.R.S. § 21-102(B). Although the lone Hispanic juror was designated the alternate because he failed to appear for the final day of trial,<sup>1</sup> the jury was nevertheless legally proper. Because the record does not "affirmatively show[] that [Cervantes] was not tried by a fair and impartial jury," the court did not err in proceeding without that juror. *State v. Thomas*, 133 Ariz. 533, 537, 652 P.2d 1380, 1384 (1982) ("The defendant is not entitled to a particular jury, but only a fair one . . .") (citations omitted).

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<sup>1</sup> The juror called just as trial was resuming and reported that a work-related emergency had arisen.

### III. Alleged Judicial and Prosecutorial Misconduct

¶10 Cervantes next contends reversible error occurred when the State introduced evidence about the victim's second interview with Detective Thomas in violation of a pre-trial agreement. Absent a clear abuse of discretion, an appellate court "will not 'second-guess the trial court's ruling on the admissibility or relevance of evidence.'" *State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997) (citation omitted). "[W]here evidence is erroneously admitted, reversal is required only when it is reasonably probable that, absent the tainted evidence, the jury would have reached a different conclusion." *State v. Brown*, 125 Ariz. 160, 162, 608 P.2d 299, 301 (1980) (citation omitted).

¶11 At the beginning of trial, the parties agreed that evidence about the victim's second interview with Detective Thomas would not be presented. Although Cervantes claims the State breached this agreement, he provides no record citation. Our independent review of the record suggests a potential issue arising on the last day of trial. When the State introduced exhibit 2 into evidence, it did not realize the exhibit referred to the second interview. Defense counsel quickly advised the court and the prosecutor of the reference, and the State did not

elicit further testimony regarding the exhibit. At the end of the trial, before the exhibit was given to the jury, the parties redacted the second interview reference. Because the State did not use the exhibit to elicit testimony contrary to the agreement, and the court redacted the exhibit before giving it to the jury, no prejudicial error exists.

#### **IV. Ineffective Assistance of Counsel**

¶12 Cervantes also claims his counsel was ineffective. Because that claim is inappropriate for direct appeal, we decline to address it. Rule 32; *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (any claims of ineffective assistance “improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of their merit”).

#### **V. Other Matters**

¶13 Cervantes’s supplemental brief asserts other errors, but provides no context or argument for those claims. For example, Cervantes states that on the second day of trial, the jury was reduced from 12 to 10 jurors.<sup>2</sup> He also claims his sentence was unduly harsh.<sup>3</sup> Cervantes fails to cite the record or applicable law and does not provide an argument beyond

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<sup>2</sup> The jury consisted of 10 jurors throughout trial, with 2 serving as alternates.

<sup>3</sup> Cervantes was sentenced to 12 years’ imprisonment, which is within the statutory range. See A.R.S. §§ 13-702(A), -705(D).

stating these claims. We have considered all issues identified with some measure of clarity and have independently reviewed the record for fundamental error, including the sentencing phase and the jury's composition.

#### CONCLUSION

¶14 We affirm Cervantes's conviction and sentence. Counsel's obligations pertaining to Cervantes's representation in this appeal have ended. Counsel need do nothing more than inform Cervantes 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). On the court's own motion, Cervantes shall have 30 days from the date of this decision to proceed, if he desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/

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MARGARET H. DOWNIE,  
Presiding Judge

CONCURRING:

/s/

\_\_\_\_\_  
PETER B. SWANN, Judge

/s/

\_\_\_\_\_  
DONN KESSLER, Judge