

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

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FEB 21 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0225
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
SUSAN IRENE HERNANDEZ,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR201100320

Honorable Robert Duber II, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
David A. Sullivan

Tucson
Attorneys for Appellee

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By Kirk Smith

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Attorneys for Appellant

K E L L Y, Judge.

¶1 After a jury trial, appellant Susan Hernandez was convicted of luring a minor for sexual exploitation and sentenced to a mitigated, two-year prison term. On appeal, Hernandez argues the trial court erred in denying her motion to strike a member of the jury panel for cause and in instructing the jury on the elements required to prove the offense charged. For the following reasons,¹ we affirm the conviction and sentence.

Motion to Strike Panel Member for Cause

¶2 Hernandez contends the trial court erred in denying her motion to strike jury panel member number sixty (“Juror # 60”) for cause. She contends Juror # 60 was “obviously biased” and that, as a result of the court’s ruling, she was denied her right to a fair and impartial jury, in violation of state and federal constitutional guarantees. But although the court denied Hernandez’s motion to strike and initially declined to excuse Juror # 60, the court later excused that juror sua sponte, along with other panel members who, like Juror # 60, doubted their ability to follow an instruction that a defendant need not present evidence of her innocence. Thus, Hernandez’s claim that she was denied a fair trial because the court failed to excuse Juror # 60 for cause is not supported by the record, and we will not address it further.

¹Hernandez also argues the trial court erred in sentencing her to a prison term rather than suspending her sentence and placing her on probation, in violation of her Fifth Amendment rights. We have addressed that issue in a separate opinion in this case. *See* Ariz. R. Sup. Ct. 111(h); Ariz. R. Civ. App. P. 28(g).

Jury Instruction

¶3 Pursuant to A.R.S. § 13-3554, “A person commits luring a minor for sexual exploitation by offering or soliciting sexual conduct with another person knowing or having reason to know that the other person is a minor.” As used in chapter 35 of the criminal code, sexual conduct is defined as “actual or simulated” acts, including “[s]exual intercourse, . . . genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex.” A.R.S. § 13-3551(9)(a). Consistent with these definitions, the trial court instructed the jury, in relevant part, as follows:

The crime of luring a minor for sexual exploitation requires proof that:

1. The defendant offered or solicited sexual intercourse (whether genital-genital, oral-genital, anal-genital, or oral-anal) with another person (whether of the opposite or same sex); and
2. The defendant knew or had reason to know that the other person was under eighteen years of age at the time.

¶4 Hernandez did not object to this instruction at trial. Accordingly, she has forfeited our review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). On appeal, Hernandez argues the jury instruction “misled” the jury because it did not incorporate the definition for “[s]exual contact” found in A.R.S. § 13-1401(2). As the state points out, however, the definition in § 13-1401(2) is irrelevant to the charge of luring a minor for sexual exploitation. Instructing the jury in a manner consistent with relevant statutory definitions is not error, much less fundamental error.

Disposition

¶5 Hernandez has failed to persuade us of any reasoned basis to disturb her conviction or sentence; accordingly, they are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge