

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JOSE MARTIN CALDERON SALGADO, *Appellant*.

No. 1 CA-CR 15-0380
FILED 10-25-2016

Appeal from the Superior Court in Maricopa County
No. CR2014-124149-001
The Honorable John R. Ditsworth, Judge

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Poster Law Firm, PLLC, Phoenix
By Rick Poster
Counsel for Appellant

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Patricia A. Orozco and Judge Jon W. Thompson joined.

S W A N N, Judge:

¶1 Jose Martin Calderon Salgado (“Defendant”) appeals his convictions and sentences for five counts of sexual conduct with a minor, class 2 felonies, one count of sexual abuse, a class 3 felony, and one count of attempt to commit sexual conduct with a minor, a class 3 felony; all counts are dangerous crimes against children.

¶2 This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969). Defendant’s appellate counsel searched the record on appeal, found no arguable nonfrivolous question of law, and asks us to review the record for fundamental error. See *Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530 (App. 1999). Counsel did not identify any issues for review, and Defendant did not file a supplemental brief.

¶3 Having searched the record, we find no fundamental error, but we modify Defendant’s sentences to conform them to the court’s expressed intent and Arizona law.

FACTS AND PROCEDURAL HISTORY

¶4 The state presented the following evidence at trial. In 2004, when A.E. (“Victim”) was 12 years old and Defendant was 22 years old, Defendant engaged in sexual contact with her on at least three separate occasions. In July 2004, Victim’s cousin had asked her to babysit his children; Defendant was at her cousin’s house at the time. After her cousin left, Defendant gave her beer, which she drank. Victim did not remember anything else until she later woke up next to Defendant without her clothes, and he informed Victim that they had slept together. Victim told her mother about Defendant’s actions, but her mother gave him permission to continue seeing her, allowing him to drop her off and pick her up from middle school.

¶5 About a month later, Defendant took Victim to his apartment complex. While they were in the complex’s swimming pool, Defendant

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touched Victim's breasts and inserted his fingers into her vagina, and afterwards, he took her into the apartment and had intercourse with her. On another occasion, Defendant told Victim that they were going to the movies but instead brought her back to his apartment. Once there, he instructed Victim to touch his penis and engaged in oral sexual contact with her. He again touched her breasts, inserted his fingers into her vagina, had vaginal intercourse with her and attempted to engage in anal intercourse.

¶6 In August or September 2004, Victim discovered she was pregnant. Concerned that her mother would have the baby taken from her, she and Defendant left for Victim's father's house in North Carolina. While in North Carolina, she gave birth to a son, but Defendant had already returned to Phoenix. Sometime after the birth, Victim returned to Phoenix and despite her wishes, continued to encounter Defendant. She testified that while she was still a minor, she reported Defendant to the police, but they failed to investigate any further. The police did not find any records of the report.

¶7 In December 2013, fearing that Defendant would take her child away and feeling threatened by him and his family, Victim contacted the police again. During the police investigation, DNA testing of Victim's child and Defendant confirmed that he was likely the biological father.

¶8 At trial, the jury found Defendant guilty of all charges. The court's oral pronouncement sentenced Defendant to concurrent minimum terms of two years for sexual abuse (count 3) and five years for attempted sexual conduct with a minor (count 6), and following those sentences, five consecutive mandatory terms of 35 years to life for sexual conduct with a minor (counts 1, 2, 4, 5, and 7), with 374 days of presentence incarceration credit. The order of confinement, however, listed Defendant's sentence for count 3 as five years and gave Defendant 374 days of credit for all counts. The amended order, entered later the same day, applied 374 days of credit to counts 3 and 6 only. The sentencing minute entry is identical to the amended order of confinement.

DISCUSSION

¶9 A person commits sexual conduct with a minor when he "intentionally or knowingly engag[es] in sexual intercourse or oral sexual contact with any person who is under eighteen years of age." A.R.S. § 13-1405(A). When the minor is under fifteen, it is a class 2 felony. A.R.S. § 13-1405(B). In the circumstances here, a person attempts to commit sexual conduct with a minor when he "act[s] with the kind of culpability otherwise required for commission of an offense" and "[i]ntentionally does . . .

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anything which, under circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of an offense.” A.R.S. § 13-1001(A)(2). A person commits sexual abuse when he “intentionally or knowingly engag[es] in sexual contact with any person . . . who is under fifteen years of age if the sexual contact involves only the female breast.” A.R.S. § 13-1404(A). Sexual conduct with a minor and sexual abuse are both dangerous crimes against children when they are committed against a minor under fifteen. A.R.S. § 13-705(P)(1)(e), (j). The evidence presented at trial was sufficient to sustain Defendant’s convictions.

¶10 Before trial, Defendant requested a change of counsel, stating that his counsel had not visited him in jail and had not provided a translator for phone calls, forcing him to communicate in English, which he does not speak well. A defendant is entitled to representation by competent counsel. U.S. Const. amend. VI; *State v. LaGrand*, 152 Ariz. 483, 486 (1987). But he is not entitled to counsel of his choice or a “meaningful relationship” with his counsel. *State v. Moody*, 192 Ariz. 505, 507, ¶ 11 (1998). The court examines several factors in determining whether to grant the motion to substitute counsel:

whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel.

LaGrand, 152 Ariz. at 486-87. We review the court’s decision whether to grant a request for change of counsel for abuse of discretion. *Moody*, 192 Ariz. at 507, ¶ 11.

¶11 Defense counsel stated that Defendant’s contentions were untrue. She had visited him in jail, and while his English was limited, he was able to discuss the facts. She had also spoken to his family and provided him with copies of pertinent evidence ahead of trial. The court denied the request to change counsel, finding that counsel was “perfectly capable” of assisting Defendant and that they did not have a “breakdown of communication.” The court did not abuse its discretion in denying the motion.

¶12 At all critical stages of the proceedings, Defendant was present, represented by counsel, and provided with an interpreter. The jury was properly composed of 12 members without any issues of bias or

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misconduct, *see* A.R.S. § 21-102(A), and was properly instructed on the elements of the offenses. The prosecutor did not make any improper arguments at trial. Defendant elected not to testify at trial, but he spoke at his sentencing, and maintained that he had done nothing wrong.

¶13 The sentencing orders, minute entry and transcript are inconsistent with each other for Defendant's sentences. In the transcript, the court sentenced Defendant to "minimum terms of five years [for count 6] and two years [for count 3]." In the order of confinement, the amended order of confinement, and the sentencing minute entry, the sentence for count 3 is five years. When there is a discrepancy in sentencing, the court's oral pronouncement generally controls. *State v. Hanson*, 138 Ariz. 296, 304-05 (App. 1983). As sexual abuse (count 3) is a dangerous crime against children, it carries a minimum prison sentence of 2.5 years. A.R.S. § 13-705(F), (P)(1)(j).

¶14 While we generally decline to correct illegally lenient sentences absent an appeal or cross-appeal from the state, *State v. Dawson*, 164 Ariz. 278, 286 (1990), Defendant is serving his sentence for count 3 concurrently with the five-year sentence for count 6. Based on the transcript, the court intended to sentence Defendant to the minimum statutory term for count 3. We therefore amend the amended order of confinement and sentencing minute entry to conform to the legal minimum¹ sentence of 2.5 years. This does not impact Defendant's time served. The court properly calculated the presentence incarceration credit of 374 days, applied to counts 3 and 6,² *see* A.R.S. § 13-712(B), and the remaining sentences are legal, *see* A.R.S. § 13-705(A), (B), (J), (M), (O).

¹ The court may only impose a minimum sentence under § 13-705 if "factual findings and reasons in support of such findings are set forth on the record at the time of sentencing." A.R.S. § 13-701(C). The court did not set forth any reasons for the minimum sentences in the record, but we do not remand because the state did not appeal or cross-appeal. *See Dawson*, 164 Ariz. at 286.

² There is also some variation on the presentence incarceration credit between the transcript and the orders. The amended order of confinement and the sentencing minute entry both apply 374 days of presentence incarceration credit to counts 3 and 6 only, as they are served concurrently before the other five sentences. The transcript reads "Defendant is given 374 days of presentence incarceration following [h]is release on those for Counts 1, 2, 4, 5 and 7." As the transcript's meaning is ambiguous, we read

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CONCLUSION

¶15 For the foregoing reasons, we affirm Defendant's convictions and his sentences as modified.

¶16 Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Defendant of the status of this appeal and his future options. *Id.* Defendant has 30 days from the date of this decision to file a petition for review *in propria persona*. *See* Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has 30 days from the date of this decision in which to file a motion for reconsideration.



AMY M. WOOD • Clerk of the Court
FILED: AA

it to support the amended order of confinement and the sentencing minute entry.