

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SCOTT CHARLES BAUER,
Appellant.

No. 2 CA-CR 2015-0018
Filed April 28, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pinal County
No. CR201201201
The Honorable Craig A. Raymond, Judge Pro Tempore

AFFIRMED

COUNSEL

Harriette P. Levitt, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Following a jury trial, appellant Scott Bauer was convicted of nineteen counts of sexual exploitation of a minor, dangerous crimes against children. The trial court sentenced him to presumptive, consecutive terms totaling 323 years' imprisonment. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating she has reviewed the record and has found "no arguable issues on appeal." Counsel has asked us to search the record for reversible error.

¶2 In a supplemental pro se brief, however, Bauer argues that "the State's failure to allege and prove the identities" of his victims requires reversal of his convictions and voided his indictment and that the trial court erred in instructing the jury based on A.R.S. § 13-3556.¹

¶3 Viewed in the light most favorable to sustaining the verdicts, see *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the evidence was sufficient to support the jury's finding of guilt.

¹Bauer also asserted that because appellate counsel had failed to request the transcripts of jury voir dire or opening and closing arguments by counsel, she had not sufficiently reviewed the record pursuant to her obligation under *Anders*. We therefore ordered the record expanded to include those transcripts and allowed counsel to supplement her briefing. Counsel declined to file a supplement, as did Bauer.

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The evidence presented at trial showed Bauer had stored nineteen images of children under the age of fifteen engaged in exploitive exhibition or other sexual conduct on the hard drive of his computer.

¶4 Relying on *State v. Hazlett*, Bauer contends the trial court erred in instructing the jury that it could “draw the inference that a participant was a minor if the visual depiction or live act through its title, text or visual representation depicted the participant as a minor.” 205 Ariz. 523, 73 P.3d 1258 (App. 2003). In *Hazlett*, the court concluded A.R.S. § 13-3556, from which the language of the instruction was taken, was unconstitutionally overbroad because it could allow a conviction even when “no actual child was a participant in the depiction.” *Hazlett*, 205 Ariz. 523, n.10, 73 P.3d at 1264 n.10.

¶5 Because Bauer did not object to the instruction below, we review solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). In the context of reviewing jury instructions for fundamental error, to establish the prejudice required for reversal, a defendant “must show that a reasonable, properly instructed jury ‘could have reached a different result.’ In determining whether a defendant has shown prejudice, the court considers the parties’ theories, the evidence received at trial and the parties’ arguments to the jury.” *State v. Dickinson*, 233 Ariz. 527, ¶ 13, 314 P.3d 1282, 1286 (App. 2013) (citation omitted), quoting *State v. James*, 231 Ariz. 490, ¶ 15, 297 P.3d 182, 186 (App. 2013).

¶6 In this case, we cannot say Bauer has established prejudice, because no reasonable, properly instructed jury would have failed to determine the images on Bauer’s computer depicted actual minors. The state’s expert testified at length and specifically about the ages of the children depicted based on their sexual development. The images themselves clearly depict actual minors, not adults pretending to be minors. Indeed, Bauer himself agreed the pictures depicted persons who were “obviously children.” And Bauer directs us to nothing in the record to suggest the images were computer-generated or were otherwise deceptive as to the subjects’

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ages. Therefore, even accepting the trial court erred in instructing the jury pursuant to § 13-3556, Bauer has not met his burden to establish resulting prejudice.

¶7 We further conclude the sentences imposed are within the statutory limit. A.R.S. §§ 13-705(D), (M); 13-3553(A)(2), (C). And, pursuant to our obligation under *Anders*, we have searched the record and considered Bauer's other claims in his supplemental brief for fundamental, reversible error and have found none. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (*Anders* requires court to search record for fundamental error).²

¶8 Therefore, we affirm Bauer's convictions and sentences.

²To the extent Bauer contends his trial and appellate counsel were ineffective, such a claim may only be raised in a timely proceeding pursuant to Rule 32, Ariz. R. Crim. P. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).