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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/03/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
) No. 1 CA-CR 10-0762
)
 Appellee,) DEPARTMENT E
)
 v.) MEMORANDUM DECISION
)
 SCOTT ROMAN STELTER,) (Not for Publication -
) Rule 111, Rules of the
 Appellant.) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-141312-002 DT

The Honorable Arthur T. Anderson, Judge

AFFIRMED

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 Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Scott Roman Stelter (defendant) appeals from his convictions and the sentences imposed. For the reasons set forth below, we affirm.

¶2 Defendant's appellate counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising that, after a diligent search of the record, she was unable to find any arguable grounds for reversal. This court granted defendant an opportunity to file a supplemental brief, which he has not done. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). He did, however, request that his counsel submit four issues in her brief for our review.

¶3 We review for fundamental error, error that goes to the foundation of a case or takes from the defendant a right essential to his defense. See *State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988). We view the evidence presented at trial in a light most favorable to sustaining the verdict. *State v. Cropper*, 205 Ariz. 181, 182, ¶ 2, 68 P.3d 407, 408 (2003).

¶4 On June 25, 2009, defendant was charged by indictment with count one: aggravated assault, a class three dangerous felony in violation of Arizona Revised Statutes (A.R.S.) section 13-1204(A)(1) (Supp. 2011), and count two: aggravated assault, a class four felony in violation of § 13-1204(A)(3).

¶15 The following evidence was presented at trial. On June 19, 2009, Adam M. (the victim), Amber H., and Teresa M. went to a club at the Westgate Plaza. The victim was visiting friends in Phoenix prior to moving to Virginia and he planned to sleep at Amber's apartment that night and leave the next morning to drive to Virginia. The victim testified that after leaving the club, he made a wrong turn driving to Amber's apartment complex. This upset Amber and she told the victim to drop her off "because she didn't want to ride with [him]." The victim dropped Amber and Teresa off at a gas station. He then called his friend, Justin A., explained what happened, and asked if he could stay at Justin's house that night.

¶16 Justin suggested that he pick up the victim because the victim had been drinking alcohol. The victim explained that he was at Amber's apartment complex to get his belongings. When Justin arrived at the apartment complex, he told the victim, "why don't you just park your Jeep, get in the car, I'll take you back to my house and we'll square everything away in the morning." Justin testified that a few minutes later, a "reddish" color vehicle with six occupants, including Amber, drove into the apartment complex and the victim approached the vehicle. Justin stated that the victim leaned into the driver's side window to speak with Amber and tried to "just reason with her" to let him get his belongings, but Amber refused. After a

few minutes, the victim relented and told Amber that he would come back in the morning. The driver then told the victim "that wasn't going to happen, . . . [and the driver] was going to knock [the victim] out." He also told the victim that he was going to "[p]liss in [his] mouth." The victim responded by asking the driver to step out of the vehicle. After the driver exited the vehicle, the driver and the victim began fighting. They both fell to the ground, and Justin attempted to stop the fight. The victim stated that he then heard a car door open and shut, and "saw someone coming up, and that was it. It was lights out."

¶17 Justin testified that when he tried to separate the driver and the victim, "[the victim] kind of let go" of the driver. Justin then saw defendant's foot "slam[] down and smash[] [the victim] in the top of the head." The victim became "completely lifeless" and was bleeding. "[H]is eyes rolled up in the back of his head and he was out. He was unconscious completely." Justin continued that "all hell broke loose" and "[t]he four males, [including defendant], that were in the car were stomping" the victim. Justin saw "feet, just one right after another from all directions coming in on [the victim]" for about two minutes. Defendant was "the most aggressive" and stomping on the victim "with the [most] gusto[.]" Justin stood over the victim, "straddled" the victim's body between his legs,

and attempted "to deflect some blows with [his] own legs to keep [defendant and the three other men] from hitting [the victim's] head." Justin "frantically tr[ie]d to fight [the four men] off of" the victim. After a couple of minutes, the four males got back into the red vehicle and started driving away. Justin then "heard brakes" and the driver reversed the vehicle. The four males "came back," "surrounded [the victim]," and "started stomping [the victim] again." Justin described the event as "vicious[]" and "brutal[. . .]. It was all just raw . . . animalistic rage. There was nothing human about that moment." After a resident in the apartment complex stated he had called the police, the men stopped stomping on the victim.

¶18 Teresa testified that defendant and three other males that had been in the red vehicle "attack[ed]" the victim and "forcefully punched and knocked [the victim] to the ground." After the victim was on the ground Teresa stated that the four men "continued to repeatedly kick him and beat him and punch him" "even after he was unconscious."

¶19 Officer David Ebert and other officers of the Peoria Police Department responded to an aggravated assault call at an apartment complex located at 83rd Avenue and Thunderbird. Ebert testified that the victim was lying on his back in a parking space and appeared to be unconscious. He also testified that he took over immobilizing the victim from Justin. He tried to

speak with the victim, however the victim was only "moaning, groaning."

¶10 Detective Michael Connolly picked defendant up, read defendant his *Miranda*¹ rights, and proceeded to interview him. Detective Connolly testified that defendant's answers were inconsistent and defendant initially stated that he did not know whether anyone had kicked the victim, but subsequently provided specific details about the victim being kicked. Defendant admitted to Detective Connolly that "he was under the influence of alcohol and extremely angry" at the victim because the victim had punched his friend, the driver. Defendant stated that two of the males in the vehicle had kicked the victim and that the victim was "out cold." Defendant conceded that "he may have lost his cool and kicked" the victim. Defendant also initially told Detective Connolly that he and the other males left after the incident occurred, but later admitted that he exited a vehicle a second time to confront the victim after the victim had been rendered unconscious. Defendant elaborated that although "a reasonable person would have gotten into the car and just left" after the altercation ended, defendant exited the vehicle a second time "to talk . . . shit."

¶11 Dr. Ross McArthur testified that the victim sustained a small temporal bone fracture and an extraaxial hemorrhage on

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

the left side of his head. He also sustained frontal contusions on the right side of his brain, and a small shift of the midline due to the pressure from the bleeding on the left side. The victim had additional injuries of bilateral small nasal fractures and a fracture of the superior wall of the left maxillary sinus.

¶12 Dr. Paul LaPrade testified that he performed three surgeries on the victim in order to remove a blood clot from the victim's brain, which consisted of taking a segment of skull bone out to expose the brain, and to subsequently replace the section of the victim's skull that had been removed.

¶13 The jury found defendant guilty as charged. The jury further found that count one was a dangerous offense.

¶14 The trial court sentenced defendant to a slightly mitigated prison term of six years for count one, and a presumptive prison term of two and one-half years for count two, to be served concurrently. Defendant received 115 days of presentence incarceration credit.

¶15 At defendant's request, counsel presents the following issues on appeal: (1) insufficiency of the evidence, (2) failure of trial court to give lesser-included instructions, (3) use of hearsay, and (4) abuse of discretion by the trial court in not granting Rule 20 motion.

¶16 We construe defendant's first and fourth issues as a challenge to the sufficiency of the evidence. We review the sufficiency of the evidence by determining whether substantial evidence supports the jury's finding and we view the facts in the light most favorable to upholding the verdicts. *State v. Kuhs*, 223 Ariz. 376, 382, ¶ 24, 224 P.3d 192, 198 (2010). Substantial evidence is adequate proof that defendant was guilty beyond a reasonable doubt. *Id.* We will set aside a jury verdict for insufficiency of the evidence only when it is clear "that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶17 Defendant was convicted of aggravated assault for causing "serious physical injury to another." Ariz. Rev. Stat. § 13-1204(A)(1) (Supp. 2011). Here, the State presented evidence from which the jury could reasonably have concluded that defendant assaulted and caused serious physical injury to the victim: (1) Justin testified that he saw defendant aggressively stomp on the victim's head with his foot; (2) Teresa testified that she saw defendant repeatedly attack and kick the victim after he was unconscious; (3) defendant admitted that he was extremely angry with the victim and may have kicked the victim; and (4) the victim sustained serious injuries to his

face and brain that required multiple surgeries and extensive medical intervention and care.

¶18 Defendant was also convicted of aggravated assault for using "force that caused temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part or a fracture of any body part." Ariz. Rev. Stat. § 13-1204(A)(3) (Supp. 2011). There was sufficient evidence presented at trial to support the jury's second aggravated assault conviction: (1) Justin and Teresa testified they saw defendant repeatedly stomp or kick the victim; (2) defendant admitted he may have kicked the victim; (3) the victim sustained multiple fractures in his head and face; and (4) the victim had three surgeries on his brain to repair damage caused by defendant and had to temporarily have part of his skull removed. We therefore conclude there was sufficient evidence to convict defendant of both counts of aggravated assault and that the trial court did not err in denying defendant's Rule 20 motion.

¶19 Next, defendant claims that the trial court erred by not providing the lesser-included instruction of misdemeanor assault for both aggravated assault counts. We review a trial court's denial of a requested jury instruction for an abuse of discretion. *State v. Hurley*, 197 Ariz. 400, 402, ¶ 9, 4 P.3d 455, 457 (App. 2000).

¶20 Assault is defined as “[i]ntentionally, knowingly or recklessly causing any physical injury to another person” or “intentionally placing another person in reasonable apprehension of imminent physical injury” or “[k]nowingly touching another person with the intent to injure, insult or provoke such person.” Ariz. Rev. Stat. § 13-1203(A) (2010). A lesser-included instruction requested by the defendant should be given if the State failed to prove an element of the greater offense and the evidence is sufficient to support a conviction on the lesser offense. *State v. Wall*, 212 Ariz. 1, 4, ¶ 18, 126 P.3d 148, 151 (2006) (citation omitted). Thus, “the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense.” *Id.* The evidence here clearly supports the trial court’s decision to deny defendant’s request for lesser-included offense instructions. As we previously stated, two witnesses testified that they saw defendant repeatedly kick and attack the victim, even after the victim was unconscious. Defendant admitted that he was extremely angry with the victim and may have kicked the victim. The victim sustained a temporary, substantial impairment of his brain, had skull and nasal fractures, had to undergo multiple surgeries, and received extensive medical care as a result of defendant’s actions. Thus, the jurors could not have rationally concluded that defendant only committed a lesser offense of

assault. The trial court did not abuse its discretion in denying defendant's motion for a lesser-included offense instruction.

¶21 Finally, defendant argues that the court improperly permitted hearsay at the trial. The trial court allowed Detective Connelly to testify to defendant's statement to Detective Connelly that one of the co-defendants, Amer Salman, told defendant immediately after the attack that he had kicked the victim in the head. The court found that the statement was being offered to impeach defendant's credibility and not offered for the truth of the matter asserted—that Salman kicked the victim in the head. "The express purpose of [Arizona Rules of Evidence] 806 is to allow a party to attack the 'credibility' of the hearsay declarant." See *State v. Huerstel*, 206 Ariz. 93, 104, ¶ 42, 75 P.3d 698, 709 (2003). "By its terms, the rule's limited purpose is impeachment." *Id.* In this case, Detective Connelly was permitted to testify that although defendant had initially stated he did not know if the victim had been kicked, defendant subsequently stated that Salman told defendant immediately after the attack on the victim that Salman had kicked the victim in the head. This testimony was properly permitted, pursuant to Arizona Rule of Evidence 806, for the limited purpose of impeaching defendant's credibility. We discern no error.

¶122 We have read and considered counsel's brief and have searched the entire record for reversible error. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Defendant was given an opportunity to speak before sentencing, and the sentences imposed were within statutory limits. Furthermore, based on our review of the record, there was sufficient evidence for the jury to find that defendant committed the offenses for which he was convicted.

¶123 After the filing of this decision, counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do no more than inform defendant 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. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant has thirty days from the date of this decision to proceed, if he desires, with a pro per motion for

reconsideration or petition for review. Accordingly,
defendant's convictions and sentences are affirmed.

_____/s/_____
PHILIP HALL, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
JOHN C. GEMMILL, Judge