

NOTE: 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



DIVISION ONE  
FILED: 11/08/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0527  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) MEMORANDUM DECISION  
)  
LAWRENCE LONG, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)  
)

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Appeal from the Superior Court in Yuma County

Cause No. S1400CR201000910

The Honorable Andrew W. Gould, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
Attorneys for Appellee

Law Offices of Kelly A. Smith Yuma  
By Kelly A. Smith  
Attorney for Appellant

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J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz.

297, 451 P.2d 878 (1969), following Lawrence Long's convictions of one count of aggravated assault, a Class 4 felony; one count of leaving the scene of an injury accident ("Leaving the Scene"), a Class 5 felony; and one count of driving under the influence while impaired to the slightest degree ("DUI"), a Class 1 misdemeanor. Long's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel now asks this court to search the record for fundamental error. Long was given the opportunity to file a supplemental brief but did not do so. He did, however, file a "Motion to Vacate Conviction" that raises issues that we address below.<sup>1</sup> After reviewing the entire record, we affirm Long's convictions.

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<sup>1</sup> This court extended Long's time for filing a supplemental brief after Long filed a motion complaining he had not received certain record items from his counsel. After his counsel gave notice of sending those items to Long, Long filed a second motion claiming his counsel in his Rule 32 proceeding had failed to provide him with certain documents that we understand are absent from the record on appeal. In Long's Motion to Vacate Conviction, he again claimed he was missing documents that are not part of our record. Because our review is limited to the record on appeal, we deny those portions of his second and third motions. Ariz. R. Crim. P. 31.8(a)(1); see *State v. Cutting*, 15 Ariz. App. 311, 313, 488 P.2d 667, 669 (1971). In his motions, Long also asks us to "search the record" for error, which we have done.

## FACTS AND PROCEDURAL HISTORY

¶2 While driving after drinking three vodka cocktails, Long struck J.T., who was using a walker to slowly cross a Yuma street in a crosswalk.<sup>2</sup> J.T. did not see Long's car before it struck him. The impact broke his femur and elbow. Long stopped his car about 50 to 70 feet beyond the crosswalk. He got out of the car and took several steps back toward J.T., who lay on the ground screaming in pain. After a brief exchange with J.T. and bystanders, Long returned to his car and drove away.

¶3 The State's amended indictment charged Long with one count of aggravated assault, one count of Leaving the Scene, and one count of DUI. The jury returned guilty verdicts on all three counts. We have jurisdiction of Long's appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012), 13-4031 (West 2012) and -4033 (West 2012).<sup>3</sup>

## DISCUSSION

### A. Unanimous Verdict.

¶4 Without objection by Long, the superior court instructed the jury on an element not alleged in the indictment

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<sup>2</sup> Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against the defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

<sup>3</sup> Absent material revisions after the date of the alleged offense, we cite a statute's current version.

that left open the possibility of a non-unanimous verdict on the aggravated assault charge. For the reasons that follow, we conclude the instruction does not warrant reversal of the conviction.

¶15 Aggravated assault requires both proof that a defendant committed an assault and that the assault was committed under a particular aggravating circumstance. A.R.S. § 13-1204(A) (West 2012). As relevant here, A.R.S. § 13-1203(A) defines two modes of assault:

A person commits assault by:

1. Intentionally, knowingly or recklessly causing any physical injury to another person; or

2. Intentionally placing another person in reasonable apprehension of imminent physical injury.

A.R.S. § 13-1203(A) (West 2012). The indictment alleged Long committed assault causing a bone fracture pursuant to A.R.S. §§ 13-1203(A)(1) and -1204(A)(3). There was no evidence at trial that J.T. was put in fear of being struck by the car; nor did the State argue Long violated § 13-1203(A)(2). Nevertheless, the court instructed the jury that it could find Long guilty of assault if it found he either caused physical injury, pursuant to § 13-1203(A)(1), or created reasonable apprehension, pursuant to § 13-1203(A)(2).

¶16 Article 2, Section 23, of the Arizona Constitution

requires unanimous verdicts in criminal cases. A violation of the right to a unanimous verdict constitutes fundamental error in the absence of a curative measure. *State v. Paredes-Solano*, 223 Ariz. 284, 291-92, ¶ 22, 222 P.3d 900, 907-08 (App. 2009) (quotation omitted).

¶7 The assault instruction the court gave here might have allowed the jury to convict Long without agreeing unanimously on the particular form of assault he committed. See *State v. Sisneros*, 137 Ariz. 323, 326, 670 P.2d 721, 724 (1983) (reversing conviction for assault where verdict did not indicate the variety of assault found by the jury). The risk of a non-unanimous jury verdict, however, can be "cured when the basis for the jury's verdict is clear, when the state elects for the jury which act constitutes the crime, or when the trial court instructs the jury that it must agree unanimously on the specific act constituting the crime." *Paredes-Solano*, 223 Ariz. at 290, ¶ 17, 222 P.3d at 906 (citing *State v. Schroeder*, 167 Ariz. 47, 53, 804 P.2d 776, 782 (App. 1990)).

¶8 Long plainly was not prejudiced by the erroneous instruction because the basis for the aggravated assault verdict is clear. In finding the presence of an aggravating circumstance pursuant to A.R.S. § 13-1204(A)(1) (assault causing "serious physical injury"), the jury necessarily concluded that he caused J.T. physical injury. Further, there was no evidence

that J.T. was put in reasonable apprehension; as noted, J.T. said he did not see Long's car prior to being struck, and even under Long's version of the events, J.T. was not in fear of being struck. Accordingly, there can be no doubt that Long's conviction for aggravated assault was by unanimous verdict.

**B. Sentencing.**

¶9 The superior court sentenced Long to two years' imprisonment for his conviction for Leaving the Scene, to be served concurrently with a three-year sentence for his conviction for aggravated assault.

¶10 In imposing the sentences, the superior court remarked, "I [would] have some motivation to lessen the sentence in this case if Mr. Long had show[n] any sympathy toward the victim or even attempted in an inartful way to apologize to him." The use of a defendant's lack of remorse as a factor in determining his sentence is fundamental error. *State v. Trujillo*, 227 Ariz. 314, 318, ¶ 15, 257 P.3d 1194, 1198 (App. 2011). At the same time, however, the superior court also may have erred in Long's favor by ordering his two terms of incarceration to be served concurrently. See A.R.S. § 28-661(D) (West 2012) (requiring sentence for Leaving the Scene to run consecutive to any sentences imposed for other convictions

related to the same vehicle accident).<sup>4</sup>

¶11 This court issued an order requesting supplemental briefing on the remorse issue, but, recognizing that Long might face a risk of increased imprisonment if consecutive sentences were imposed on remand, we asked Long to give notice of whether he would waive any sentencing error. In response to our order, Long filed a notice waiving any sentencing error. Accordingly, we will not determine any issue concerning his sentences.

**C. Fundamental Error Review.**

¶12 The record reflects Long received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court did not conduct a voluntariness hearing; however, the record did not suggest a question about the voluntariness of Long's statements to police. *See State v. Smith*, 114 Ariz. 415, 419, 561 P.2d 739, 743 (1977); *State v. Finn*, 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974). The jury was properly comprised of eight members with two alternates. The court received and considered a presentence report. The court did not deny Long presentence incarceration credit to which he was entitled by law.

¶13 Long's Motion to Vacate Conviction asserts that he was the victim of a fraud committed by the man injured in the accident and one of the witnesses for the purpose of obtaining

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<sup>4</sup> The State did not cross-appeal from the sentences imposed.

pain medication and that the police officers and victim were "imposters." We construe this assertion as an argument that the verdicts were not supported by the evidence. The State, however, presented both direct and circumstantial evidence sufficient to allow the jury to convict.

¶14 In his Motion to Vacate Conviction, Long also makes certain allegations concerning his trial counsel and his counsel on appeal. We construe these allegations to be claims of ineffective assistance of counsel. Ineffective assistance of counsel may not be addressed on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Such a claim must be made in a Rule 32 proceeding. *Id.*

#### CONCLUSION

¶15 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶16 After the filing of this decision, defense counsel's obligations pertaining to Long's representation in this appeal have ended. Defense counsel need do no more than inform Long of the outcome of this appeal and his future options, unless, upon review, counsel finds "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). On the court's own motion, Long has 30 days from the date of



this decision to proceed, if he wishes, with a *pro per* petition for reconsideration. Long has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/  
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/  
MAURICE PORTLEY, Presiding Judge

/s/  
LAWRENCE F. WINTHROP, Chief Judge