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



DIVISION ONE
FILED: 10/22/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0611
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
DAVID REGGIE CAMPOS,) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-165541-001

The Honorable Connie Contes, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
by Joseph T. Maziarz, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

Tennie B. Martin, Maricopa County Public Defender Phoenix
Attorneys for Appellant

T H U M M A, Judge

¶1 Defendant David Reggie Campos appeals from his
convictions and sentences for aggravated robbery, armed robbery

and unlawful flight. Campos argues the superior court erred in denying his motion for new trial and that his convictions for aggravated robbery and armed robbery are multiplicitous. Finding no error, the convictions and sentences are affirmed.

FACTS¹ AND PROCEDURAL HISTORY

¶2 On December 15, 2011, M.L.² was riding a bicycle in Phoenix when a male, later identified as Asuncion Angel Olivas, attacked him from behind and pulled him to the ground. While M.L. was face down on the ground, Olivas "stuck a knife in [his] throat." Olivas told Campos to grab the victim's cell phone and wallet, and Campos did so, also taking the victim's hat. After telling M.L. "don't move," Olivas and Campos jumped into a white car with blue lights and drove away. M.L. then walked to a gasoline station and called 9-1-1.

¶3 Phoenix Police Officer Kerger responded and broadcast a description of the car. Within minutes, Officers Jensen and Olson located the car and activated their patrol car's lights. After slowing and speeding up three times, the car eventually came to a stop near a field. Olivas then got out of the

¹ This court views the evidence in the light most favorable to sustaining the convictions and resolves all reasonable inferences against defendant. *State v. Karr*, 221 Ariz. 319, 320, ¶ 2, 212 P.3d 11, 12 (App. 2008).

² Initials are used to protect the victim's privacy. *State v. Maldonado*, 206 Ariz. 339, 341, n.1, 78 P.3d 1060, 1062 n.1 (App. 2003).

passenger side of the car and ran. Officer Olson ran after Olivas while Officer Jensen detained Campos, who had been driving the car. Officer Castillo, who was responding to the scene, assisted Officer Olson in apprehending Olivas.

¶14 Although the victim could not identify either Olivas or Campos, he did identify the car as the getaway car. The victim's wallet and hat were found inside the car. Officers Olson and Castillo retraced the path where Olivas ran and found the victim's cell phone and a pocket knife.

¶15 The State charged Campos with aggravated robbery, a Class 3 dangerous felony; armed robbery, a Class 2 dangerous felony and unlawful flight, a Class 5 felony. Campos and Olivas were tried separately. Campos testified on his own behalf and maintained Olivas forced him to participate. Campos testified that Olivas was armed and threatened him. Campos also testified he was afraid Olivas would have killed him or the victim (or both) if Campos did not do as Olivas directed.

¶16 The jury found Campos guilty as charged. The superior court sentenced Campos to a presumptive prison term of 7.5 years for aggravated robbery and a concurrent slightly mitigated prison term of 8 years for armed robbery; the superior court also imposed a consecutive 3-year probation term for unlawful flight. Campos timely appealed. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution

and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and 13-4033 (2013).³

DISCUSSION

I. The Superior Court Lacked Jurisdiction To Consider Campos' Motion For New Trial.

¶7 Campos argues the superior court improperly denied his motion for new trial alleging prosecutorial misconduct. On June 21, 2011, four days after the jury verdicts, the prosecutor received information that Officer Castillo was on a Phoenix Police Integrity List (IL). The prosecutor notified defense counsel of that fact that same day via e-mail, mailed a copy of the IL file to defense counsel and requested a status conference with the court. Defense counsel received the IL material on June 22, 2011. On June 27, 2011, defense counsel filed a motion for extension of time to file a motion for new trial. At a July 6, 2011 status conference, noting "[t]here being no objection, and to the extent the Court has authority to do so," the superior court gave Campos "until 5:00 p.m. on July 7, 2011 in which to file his motion for new trial." On July 6, 2011, Campos filed a motion for new trial arguing the untimely IL disclosures for Officer Castillo and another officer improperly deprived him of critical information and constituted prosecutorial misconduct justifying a new trial.

³ Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

¶18 After hearing oral argument, the superior court found it lacked jurisdiction to consider the motion for new trial because it was not timely filed. The court then allowed Campos' counsel to "make a record" and heard argument on the timeliness issue as well as on Campos' claims asserted in the motion for new trial. After taking the matter under advisement, the superior court denied Campos' motion for new trial.

¶19 On appeal, Campos argues "fundamental fairness" requires his motion for new trial be deemed timely filed and that, on the merits, his motion should have been granted. This court reviews issues regarding the superior court's jurisdiction de novo and reviews the denial of a motion for new trial on the merits for an abuse of discretion. *State v. Donahoe*, 220 Ariz. 126, 127, ¶ 1, n.1, 203 P.3d 1186, 1187, n.1 (App. 2009) (citation omitted); *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996).

¶10 "A motion for a new trial shall be made no later than 10 days after the verdict has been rendered." Ariz. R. Crim. P. 24.1(b). As noted in the comment to Rule 24.1(b), the Arizona Supreme Court "has held that the time limit is jurisdictional; a trial court has no power to grant a new trial after its expiration. *State v. Hill*, 85 Ariz. 49, 330 P.2d 1088 (1958)." Accord *State v. Hickie*, 129 Ariz. 330, 332, 631 P.2d 112 (1981).

¶11 As applicable here, the July 6, 2011 motion for new trial was filed twenty days after the verdicts. Although noting he filed a motion to extend the deadline within ten days of the verdicts, Campos cites no authority for the proposition that the superior court had the power to extend the ten-day jurisdictional time limit.⁴ Although the State may not have objected, jurisdiction of the superior court to hear a motion for new trial cannot be created by estoppel. *Interlott Technologies, Inc. v. Ariz. Dep't of Revenue*, 205 Ariz. 452, 455-56, ¶ 17, 72 P.3d 1271, 1274-75 (App. 2003). Finally, notwithstanding Campos' stated concern about how a defendant should treat IL material in a court filing, those concerns do not trump the jurisdictional time limit of Rule 24.1(b). Accordingly, the superior court lacked jurisdiction to consider Campos' motion for new trial.⁵

⁴ Although Campos cites *State v. Villalobos*, 114 Ariz. 392, 561 P.2d 313 (1977), that case found that an incorrectly date-stamped motion was, in fact, timely filed. No such error occurred here.

⁵ Officer Castillo testified only about how he helped catch Olivas; cross-examination established that Officer Castillo had no contact with Campos or the victim. Officer Olson's trial testimony echoed Officer Castillo's trial testimony. Although IL information about another officer was disclosed during trial, the court precluded that officer from testifying in the State's case in chief and that officer did not testify at trial. Based on the State's showing, the superior court found no bad faith in the late disclosures. This record does not show that the untimely IL disclosures for these two officers would constitute grounds for a new trial. Ariz. R. Crim. P. 24.1(c)(1).

II. The Charges Were Not Multiplicitous.

¶12 Before trial, Campos unsuccessfully argued the aggravated robbery and armed robbery charges were multiplicitous because both were charged as dangerous offenses and were based on the same facts. On appeal, Campos argues his conviction for aggravated robbery is multiplicitous and should be vacated.

¶13 "Multiplicity occurs when an indictment charges a single offense in multiple counts . . . [and] raises the potential for multiple punishments, which implicates double jeopardy." *State v. Brown*, 217 Ariz. 617, 620, ¶ 7, 177 P.3d 878, 881 (App. 2008) (citation omitted). "In deciding whether a defendant has been punished twice for the same offense, it is necessary to examine the elements of the crimes for which the [defendant] was sentenced and determine 'whether each [offense] requires proof of [an additional] fact which the other does not.'" *State v. Eagle*, 196 Ariz. 188, 190, ¶ 6, 994 P.2d 395, 397 (2000) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). This "same elements" test asks whether each offense contains an element not contained in the other, meaning they are two separate offenses. *United States v. Dixon*, 509 U.S. 688, 697 (1993). The focus is on the statutory elements of the offenses, not the facts used to prove the offenses. *State v. Siddle*, 202 Ariz. 512, 516, 47 P.3d 1150, 1154 (App. 2002).

¶14 Applying the "same elements" test, there is no multiplicity. "A person commits aggravated robbery if in the course of committing robbery as defined in [A.R.S.] § 13-1902,⁶ such person is aided by one or more accomplices actually present." A.R.S. § 13-1903(A). "A person commits armed robbery if in the course of committing robbery as defined in [A.R.S.] § 13-1902, such person or an accomplice . . . [i]s armed with a deadly weapon or a simulated deadly weapon." A.R.S. § 13-1904(A)(1). Aggravated robbery does not require the use of a deadly weapon or dangerous instrument, and armed robbery does not require the aid of an accomplice who is actually present. Given these differences, the charges are not multiplicitous and do not violate double jeopardy considerations.

¶15 Campos argues the charges are multiplicitous because they arise out of a single incident or set of facts in which he acted as either an accomplice or in concert with an accomplice who was armed with a deadly weapon. Arizona law, however, does not recognize a "single incident" approach in addressing double jeopardy. *See, e.g., Anderjeski v. City Court of Mesa*, 135 Ariz. 549, 550, 663 P.2d 233, 234 (1983)(rejecting double jeopardy

⁶ "A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force . . . with [the] intent to coerce surrender of property or to prevent resistance to such person taking or retaining property." A.R.S. § 13-1902.

challenge to defendant's driving under the influence convictions and concurrent sentences under A.R.S. § 28-692 (A) and (B), which describe two separate, distinct offenses that arose out of a single act of intoxication). Although sentences for multiple convictions that arise from "the same conduct" must be concurrent, the court properly imposed concurrent sentences on the two offenses. *Anderjeski*, 135 Ariz. at 551, 663 P.2d at 235.

¶16 Campos also argues the offenses fail under the "same elements" test because both were charged as "dangerous" offenses. The "dangerousness" allegations are sentencing enhancements, not an "element" of either offense. A.R.S. §§ 13-105, 13-704. Enhancement provisions "do not constitute separate crimes or create elements of an offense." *State v. Olsen*, 157 Ariz. 603, 607, 760 P.2d 603, 607 (App. 1988). Because the aggravated and armed robbery charges and convictions are not multiplicitous and do not violate double jeopardy,⁷ the court did not err in denying the motion to dismiss.

⁷ Apart from a memorandum decision that cannot properly be cited, Ariz. R. Crim. Proc. 31.24, Campos' reliance on *United States v. Szalkiewicz*, 944 F.2d 653 (9th Cir. 1991) is misplaced. In *Szalkiewicz*, the defendant was charged with multiple counts of possession of different firearms committed on the same date, and claimed the charges were multiplicitous. *Id.* In agreeing that they were, the court found there is only one offense of possession of a firearm by a felon under 18 U.S.C. § 922(g)(1) "regardless of the number of firearms involved, absent a showing that the firearms were stored or acquired at different times and places." *Id.* *Szalkiewicz* does not address a defendant charged with separate offenses with separate elements.

CONCLUSION

¶17 Campos' convictions and sentences are affirmed.

/S/ _____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/ _____
RANDALL M. HOWE, Presiding Judge

/S/ _____
DIANE M. JOHNSEN, Judge