

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 08/30/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,

Appellee,

v.

DOMINIC JAMES HERI,

Appellant.

1 CA-CR 11-0612

DEPARTMENT E

MEMORANDUM DECISION

(Not for Publication -
Rule 111, Rules of the
Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-121409-001 DT

The Honorable Larry Grant, Judge

AFFIRMED, WITH CLARIFICATION OF LIFE SENTENCE

Thomas C. Horne, Attorney General

Phoenix

By Kent E. Cattani, Chief Counsel

Criminal Appeals/Capital Litigation Division

Attorneys for Appellee

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Tucson

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Attorney for Appellant

G E M M I L L, Judge

¶1 Dominic James Heri ("Heri") appeals from his convictions and sentences for first-degree murder and child

abuse. Heri's counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. Heri was afforded the opportunity to file a *pro se* supplemental brief, and he has done so. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001). On March 26, 2007, Heri was with his daughter when he claims she fell off the couch and hit her head. When doctors examined her at the hospital, they found she had skull fractures and bleeding of the brain. The child later died from her injuries. Doctors testified at trial that the child suffered a "severe impact injury" consistent with being in a car accident. A jury found Heri guilty of first-degree murder and child abuse. Heri was sentenced to life in prison with parole eligibility after 35 years on the conviction for first-degree murder and to the presumptive term of 17 years on the conviction for child abuse, to be served concurrently.

¶13 Heri timely appeals.¹ This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(2010)².

DISCUSSION

¶14 Heri raises three issues on appeal. He first claims he received ineffective assistance of counsel for several reasons. Our supreme court has directed that such claims will not be addressed on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Claims of ineffective assistance of counsel must be brought in a petition for post-conviction relief under Rule 32 of the Arizona Rules of Criminal Procedure. *Id.*

¶15 Next, Heri claims to have new evidence to present on appeal. Heri seeks to admit his own testimony that he was holding his daughter and making her a bottle when she fell out of his arms and hit her head. He then claims he took her to the couch where she later fell and hit her head again. Heri had an opportunity to testify at trial. He elected not to do so. His apparent new desire to testify does not constitute "newly discovered evidence" that might support a new trial.

¹ Although Heri's notice of appeal was filed almost two years after sentencing, the superior court found there was good cause to grant Heri's motion to file a delayed appeal.

² Absent material revisions after the date of an alleged offense, we cite a statute's current version.

Accordingly, we find no error on this basis.

¶16 Heri's final argument is that the jury instructions were improper. Heri claims that his attorney told him he would have a good chance to win his appeal because "the judge messed up on jury instructions resulting in misapplication of law." Heri cites no specific jury instructions that were allegedly improper, and we find none.

¶17 We note in our review of the sentencing minute entry order dated May 6, 2008, and filed May 8, 2008, that there may be some unintended ambiguity regarding Heri's sentence on the first degree murder conviction. The order provides for a sentence of "35 years before eligible for parole from 05/06/2008." We have reviewed the transcript from the sentencing hearing on May 6, 2008 and the relevant statutes. It is clear that the trial court was sentencing Heri to life in prison with the possibility of parole after 35 years. To avoid any possible ambiguity, we hereby order that the formal sentence be clarified to be life in prison with possibility of parole after 35 years.

¶18 Having considered defense counsel's brief and examined the record for reversible error, see *Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. The sentences imposed fall within the range permitted by law, and the evidence presented supports the convictions. As far as the record reveals, Heri was

represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶19 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Heri of the disposition 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. Heri has thirty days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

CONCLUSION

¶10 The convictions and sentences are affirmed, and the sentence for first degree murder is clarified to be life in prison with possibility of parole after 35 years.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

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

_____/s/_____
PHILIP HALL, Judge