IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 8/15/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

STATE OF ARIZONA,	)	1 CA-CR 12-0058
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
TOM DEAN SMITH,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Navajo County

Cause No. S0900CR201100301

The Honorable Robert B. Van Wyck, Judge Pro Tempore

AFFIRMED AS MODIFIED

Thomas C. Horne, Attorney General — Phoenix
by Joseph T. Maziarz, Assistant Attorney General,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

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Tom Dean Smith, Appellant — Florence

P O R T L E Y, Judge

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Defendant Tom Dean Smith has advised us that after searching the entire record, he has been unable to discover any arguable questions of law and has filed a brief requesting us to conduct an *Anders* review of the record. Defendant has filed a supplemental brief.

FACTS[1]

¶2 Defendant returned home to the trailer he shared with his wife, the victim,[2] on April 24, 2011. Upon entering the room they shared, he began pulling her hair, punching her in the face, and demanding oral sex. While threatening her, he pinned her arms down with his knees, and forced his penis into her mouth. After his discharge, Defendant left the room and the victim called 9-1-1.

¶3 Defendant was located and arrested the next day. He was subsequently indicted for kidnapping/domestic violence, a class two felony, aggravated assault/domestic violence, a class four felony, and sexual assault/domestic violence, a class two felony.

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[1] We view the facts "in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997).

[2] The victim has divorced the Defendant.

¶4 The matter proceeded to trial. In addition to hearing from the victim and the police, the jury heard a recording of a threatening message Defendant left on the victim's cell phone just prior to the assault. Defendant was found guilty as charged. He was subsequently sentenced to prison for 6.25 years for the sexual assault and five years for kidnapping and aggravated assault, all concurrent sentences, and given 367 days of presentence incarceration credit.

DISCUSSION

¶5 Defendant presents four arguments for our review. First, he argues that the court committed error by failing to provide him with all necessary documents. Specifically, he contends that the court failed to provide him with the portions of the transcript that had not been requested by counsel, namely, the jury selection, the reading of charges, the sentencing hearing, the opening statements and closing arguments, which prevented him from launching an effective appeal. He, however, had the requisite minute entries, and none demonstrate any legal issues that need to be reviewed on appeal. As a result, the argument does not present an issue that would lead to a new trial.

¶6 Next, Defendant argues that the court inappropriately instructed the jury about reasonable doubt. Specifically, he

contends that the court erred by using the term "reasonably convinced" instead of using "firmly convinced."

¶7 Our supreme court, in *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), mandated that trial courts give the following reasonable doubt instruction, exactly as written and without modification, which, in pertinent part, states: "[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt." *Id.* at 596, 898 P.2d at 974. *See also State v. Sullivan*, 205 Ariz. 285, 288, ¶ 15, 69 P.3d 1006, 1009 (App. 2003) (explaining that allowing modification by the trial court would be directly contrary to the fundamental purpose of providing a single, uniform instruction); Revised Arizona Jury Instructions ("RAJI") Preliminary Criminal 19 (Presumption of Innocence and Burden of Proof) at 1 (3rd ed. 2010). When a trial court deviates from the *Portillo* instruction, however, we only examine the instruction to determine if the error was harmless. *Sullivan*, 205 Ariz. at 289, ¶ 19, 69 P.3d at 1010. Accordingly, we examine "whether there was reasonable probability . . . that a verdict might have been different had the error not been committed." *State v. Williams*, 133 Ariz. 220, 225, 650 P.2d 1202, 1207 (1982) (quoting *State v. Brady*, 105 Ariz. 190, 196, 461 P.2d 488, 494 (1969)).

¶8 Here, the jury was instructed that "[p]roof beyond a reasonable doubt is proof that leaves you reasonably convinced of the defendant's guilt." Defendant argues that the instruction was improper because the standard set forth in *Portillo* uses the term "firmly convinced." 182 Ariz. at 596, 898 P.2d at 974. Although the court deviated from the *Portillo* instruction when it substituted "reasonably convinced" for "firmly convinced," the substitution did not increase the likelihood that the jury interpreted the instructions to find Defendant guilty by some standard other than proof beyond a reasonable doubt. *See also Victor v. Nebraska*, 511 U.S. 1, 22 (1994) (explaining that the inclusion of moral certainty in a reasonable doubt instruction did not increase the likelihood that jurors understood the reference to allow a conviction on factors other the government's evidence presented). The court's instructions clearly articulated the appropriate burden of proof and explained the consequences if the State failed to meet it. Consequently, we find that the instruction as read constituted harmless error, but does not entitle Defendant to relief.

¶9 The third issue Defendant raises is that his prison sentences for sexual assault and aggravated assault are excessive. We review the issue for an abuse of discretion because a trial court "has broad discretion in sentencing and, if the sentence imposed is within the statutory limits, we will

not disturb the sentence unless there is a clear abuse of discretion." *State v. Ward*, 200 Ariz. 387, 389, ¶ 5, 26 P.3d 1158, 1160 (App. 2001); *see also State v. Ferriera*, 128 Ariz. 530, 532, 627 P.2d 681, 683 (1980).

¶10 At sentencing, the court ordered that Defendant was sentenced to the presumptive term of 2.5 years for aggravated assault/domestic violence, which is within statutory limits. *See* A.R.S. § 13-1406; A.R.S. § 13-701(E); A.R.S. § 13-702 (West 2013). The minute entry, however, reflects a five-year term. Because the court's oral pronouncement controls, we modify the sentence to reflect that Defendant was sentenced to 2.5 years for aggravated assault/domestic violence. *See State v. Johnson*, 108 Ariz. 116, 118, 493 P.2d 498, 500 (1972) (explaining that where there is a discrepancy between the oral sentence and the written judgment, the oral pronouncement of the sentence controls). *See also* Ariz. R. Crim. P. 24.4; *State v. Hanson*, 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App. 1983).

¶11 Defendant also claims that his 6.25 year sentence for sexual assault was improper. His argument has no merit. The mitigated sentence is within the statutory limits. *See* A.R.S. §§ 13-1406, -701(E). Although he contends that he should have only been sentenced to the five years recommended in the presentence report, it is only a recommendation and a judge has to determine what the appropriate sentence should be in light of

all relevant circumstances. *State v. Toulouse*, 122 Ariz. 275, 278, 594 P.2d 529, 532 (1979) (rejecting the same argument because a sentencing court "is not bound by recommendations in the presentence report"). Defendant's argument is also misplaced because the recommended term of five years falls below the statutorily-defined minimum sentence. *See* A.R.S. § 13-1406; *State v. Vargas-Burgos*, 162 Ariz. 325, 326, 783 P.2d 264, 265 (App. 1989) (reasoning that where a "sentence imposed was less than [the] statutory minimum, it is void"). Consequently, the sexual assault sentence stands.

¶12 Finally, Defendant asserts that the verdict forms were incorrectly authenticated. Specifically, he argues the substitution of the juror's number for his signed name on the signature line renders the verdict invalid and unenforceable.

¶13 In *State v. McIntosh*, 213 Ariz. 579, 580, ¶ 1, 146 P.3d 80, 81 (App. 2006), we addressed the issue of whether a juror number satisfies the foreman signature requirement. In *McIntosh*, the foreman signed the verdict form with his juror number, and we held that the presence of the juror number on the signature line signified that the jury foreman attested to the unanimous verdict as the verdict of the jury. *Id.* at 581-82, ¶¶ 4, 12, 146 P.3d at 82-83.

¶14 Like *McIntosh*, the presence of the juror's number on the signature line satisfied the foreman signature requirement

because it signifies the foreman's intent to attest to the verdict. Additionally, the presumption that the jury read and followed all relevant jury instructions is supported by the fact that the verdict was read in open court in the presence of the jury absent any objections from the foreman. *See State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994) ("[A]bsent some evidence to the contrary, we presume that the jury read and followed the relevant instruction."). Consequently, the signature of a verdict form with a juror number instead of a signed name does not invalidate the verdict.

¶15 Having addressed Defendant's supplemental arguments, we searched the entire record for reversible error. We find no reversible error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. The record, as presented, reveals that Defendant was represented by counsel at all stages of the proceedings.

¶16 After this decision is filed, counsel's obligation to represent Defendant in this appeal has ended. Counsel must only inform Defendant of the status of the appeal and Defendant's future options, unless counsel identifies an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant may, if desired, file a motion for

reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure.

CONCLUSION

¶17 Accordingly, we affirm Defendant's convictions and sentences but order the court to modify the sentence for count two to reflect the oral pronouncement of the sentence of 2.5 years. Ariz. R. Crim. P. 24.4 (stating that a court may correct "[c]lerical mistakes in judgments, orders, or other parts of the record . . . at any time").

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DIANE M. JOHNSEN, Chief Judge