

NOTICE: 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: 10/30/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 12-0110
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MICHAEL D. ISHAM,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-147426-001 DT

The Honorable Connie Contes, Judge

AFFIRMED

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

Michael J. Dew, Phoenix
Attorney for Appellant

Michael D. Isham, Kingman
Appellant

D O W N I E, Judge

¶1 Michael D. Isham timely appeals his convictions for three counts of aggravated assault in violation of Arizona Revised Statutes ("A.R.S.") section 13-1204, resisting arrest in violation of A.R.S. § 13-2508, and misconduct involving weapons in violation of A.R.S. § 13-3102. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has searched the record, found no arguable question of law, and asked that we review the record for fundamental error. See *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Isham filed a supplemental brief *in propria persona*. On appeal, we view the evidence in the light most favorable to sustaining the convictions. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981), *cert. denied*, 459 U.S. 882 (1982).

FACTS AND PROCEDURAL HISTORY

¶2 Officers Mesquita and Happeny sat in a marked patrol car around midnight, blocking traffic near an accident site. A car driven by Isham drove directly toward them and made an evasive turn to avoid a collision. Officer Mesquita approached Isham, who was laughing and smiling with his car radio "blaring." The officer asked Isham three times to turn off the engine before he complied. Isham had bloodshot, watery eyes and smelled of alcohol, though he denied consuming drugs or alcohol that evening.

¶13 When the officer initiated an arrest, Isham asked why he was being arrested. Isham then reached toward the middle of his body and pulled a gun, which he raised toward Officer Mesquita. Officer Mesquita delivered "fist strikes" to Isham's face, causing Isham to drop the gun. Isham broke free and ran.

¶14 Officer Mesquita chased and tackled Isham. During the ensuing struggle, Officer Mesquita was "hit by elbows, flailing hands." A second officer assisted, but the struggle continued, and Isham ignored officers' commands to stop resisting. A third officer intervened before Isham could be handcuffed. The gun was impounded.

¶15 Isham was charged with aggravated assault (Officer Mesquita), a class 2 dangerous felony ("count 1"); aggravated assault (Officer Mesquita), a class 5 felony ("count 2"); aggravated assault (Officer Happeny), a class 5 felony ("count 3"); resisting arrest, a class 6 felony ("count 4"); and misconduct involving weapons, a class 4 dangerous felony ("count 5").¹ The State alleged multiple aggravating factors for purposes of sentence enhancement.

¶16 At trial, Isham stipulated to being a prohibited possessor, but denied the impounded weapon was his. Officers Mesquita and Happeny both testified. At the conclusion of the

¹ Count 5 was originally charged as a dangerous offense, but the superior court did not submit it to the jury as such.

State's case in chief, Isham moved for a judgment of acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure ("Rule"). The motion was denied. Isham presented two witnesses. The jury found him guilty as to counts 2 and 4 but could not reach a verdict regarding counts 1, 3, and 5.

¶17 A second trial ensued on counts 1, 3, and 5.² Isham stipulated that he was a prohibited possessor and that his arrest was lawful. The second jury found him guilty on all counts and found that the State had proven aggravating factors as to each offense.

¶18 Isham was sentenced to an aggravated term of 15 years for count 1, a presumptive term of 1.5 years for count 2, a presumptive term of 1.5 years for count 3, a presumptive term of 1 year for count 4, and a presumptive term of 2.5 years for count 5. The sentences were ordered to run concurrently, with 515 days' presentence incarceration credit.

DISCUSSION

¶19 We have read and considered the briefs submitted by Isham and his counsel and have reviewed the entire record. *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentences

² Counts 1, 3, and 5 were renumbered 1, 2, and 3 for purposes of the second trial.

imposed were within the statutory ranges. Defendant was present at all critical phases of the proceedings and was represented by counsel. The jury was properly impaneled and instructed. The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process.

¶10 In his supplemental brief, Isham identifies several issues that we briefly address.

¶11 During the second trial, Isham stipulated that his arrest was lawful. He now argues the stipulation was not in his best interest. This contention relates to trial strategy decisions and advice provided by defense counsel. Ineffective assistance of counsel claims must be brought in proceedings pursuant to Rule 32. "Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of their merit." *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

¶12 Isham did not testify at either trial. He argues the only reason he did not do so was to prevent his prior felony convictions from being used to impeach him.

¶13 It is well-established that a defendant must testify at trial before he can challenge an adverse pretrial ruling conditionally admitting evidence of prior convictions for purposes of impeachment. *State v. Smyers*, 207 Ariz. 314, 318, ¶ 15, 86 P.3d 370, 374 (2004) (citation omitted). Because Isham

did not testify, he cannot challenge the trial court's ruling regarding use of his prior convictions.

¶14 We cannot discern what additional arguments Isham may be attempting to assert, as his briefing lacks clarity, support, or context. Stating a conclusory claim (for example, that the police officers committed perjury) is insufficient. See *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004). To the extent Isham challenges the interpretation of evidence presented at trial, the credibility of witnesses and the weight to be given the evidence is for the jury to decide. *State v. Bustamante*, 229 Ariz. 256, 258, ¶ 5, 274 P.3d 526, 528 (App. 2012) (citation omitted). Appellate courts do not reweigh the evidence to decide whether we would reach the same conclusion as the trier of fact. *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984).

CONCLUSION

¶15 We affirm Isham's convictions and sentences. Counsel's obligations pertaining to Isham's representation in this appeal have ended. Counsel need do nothing more than inform Isham 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. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Isham shall have 30 days

from the date of this decision to proceed, if he desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
RANDALL M. HOWE, Judge