DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 12-0327
	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION**
JAMES PIERRE WILLIAMS, Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-129509-002

The Honorable F. Pendleton Gaines, Judge (Deceased)

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Droban & Company, P.C. — Anthem
By Kerrie M. Droban
Attorneys for Appellant

James Pierre Williams — Kingman
Appellant

D O W N I E, Judge

¶1 James Pierre Williams timely appeals his convictions for aggravated assault and arson of an occupied structure in violation of Arizona Revised Statutes ("A.R.S.") sections 13-1204 and -1704. 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). Williams 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 During Williams' employment as a nurse at St. Luke's Hospital in 2006, a patient ("C.C.") accused him of inappropriate sexual contact. The allegations were investigated and DNA samples taken, but the case was not prosecuted at the time. In 2008, a patient at Paradise Valley Hospital ("S.F.") accused Williams of inappropriate sexual contact. An investigation ensued, and Williams was arrested in January 2009.

¶3 Joshua Deason was Williams' cellmate for approximately six weeks. Deason was released from jail on March 1, 2009. On March 5, 2009, Williams called a friend, John Swan, giving him

contact information for Deason and instructing Swan to call him. Williams explained that Deason was supposed to get "some paperwork done for [him]." Williams told Swan to tell Deason there was money in it for him. In a conversation with his wife on March 11, 2009, Williams stated he would not be coming home "unless one of my witnesses drop[s] dead."

¶4 During the early morning hours of March 19, 2009, someone threw a Molotov cocktail through S.F.'s bedroom window while she slept. S.F. was able to extinguish the fire and exit her apartment, along with her mother.

¶5 Following the arson, Swan spoke to Williams in code, reporting that a cocktail had been thrown through S.F.'s window, and that Deason would leave S.F. in the desert if necessary. Williams replied that Deason "didn't even do what he said he was going to do." Williams persuaded Swan to call S.F. and make up a "cockamamie" excuse to gain information. After Swan spoke with S.F., Williams instructed him to let Deason know, "I just spoke to [our] girl . . . stop bullshitting and do what he say he was going to do."

¶6 The fire investigator reviewed Williams' recorded jail conversations. Meanwhile, the detective investigating the sexual assaults contacted Deason's daughter and retrieved a piece of paper the daughter found in Deason's wallet that listed a physical description of S.F. and her address. This

information was written on the back of Williams' change of counsel form.

¶7 In May 2009, Williams was indicted on four counts of sexual assault, each a class two felony (counts 1 and 2 involved C.C.; counts 3 and 4 involved S.F.); one count of attempted first degree murder, a class two dangerous felony (count 5); one count of conspiracy to commit first degree murder, a class one dangerous felony (count 6); one count of aggravated assault, a class three dangerous felony (count 7); one count of endangerment, a class six dangerous felony (count 8); one count of arson of an occupied structure, a class two dangerous felony (count 9); and one count of use of wire communication or electronic communication to facilitate an offense, a class four felony (count 10).

¶8 A jury trial ensued. The State presented several witnesses, including the victims, the detectives who investigated the alleged crimes, and DNA lab technicians. The jury also heard a confrontation call between S.F. and Williams, viewed the police interrogation of Williams, and listened to excerpts of Williams' recorded telephone conversations. At the conclusion of the State's case in chief, Williams moved for a judgment of acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure ("Rule"). His motion was denied. Williams presented seven witnesses, including nurses who were working at

the time of one of the alleged sexual assaults. He also presented a DNA expert witness and his ex-wife.

¶9 The jury found Williams guilty of count 7, aggravated assault against S.F. based on the arson, and count 9, arson of an occupied structure. It acquitted him of the remaining counts. Williams was sentenced to a presumptive term of seven and one-half years' imprisonment for aggravated assault, and a presumptive term of ten and one-half years' imprisonment for arson of an occupied structure. The sentences were ordered to run concurrently, with 593 days' presentence incarceration credit.

DISCUSSION

¶10 We have read and considered the briefs submitted by Williams and his defense 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 sentence imposed was within the statutory range. 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.

¶11 In his supplemental brief, Williams identifies several issues that we address.

I. Alleged Prosecutorial Misconduct

¶12 Williams alleges the prosecutor "was guilty of prosecutorial misconduct throughout entire trial process." "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (internal quotation marks omitted). In determining whether a prosecutor's remarks constitute misconduct sufficient to warrant a mistrial, we consider: (1) whether the remarks called the jury's attention to matters it should not be considering in reaching its decision; and (2) the probability of the jurors being influenced by the remarks. *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001). In short, our "focus is on the fairness of the trial, not the culpability of the prosecutor." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993).

¶13 Williams contends the prosecutor's comments about why charges were not filed in 2006 —- i.e., that the State was awaiting DNA test results -- constituted misconduct. He also contends that statements regarding his alleged motive for the

arson –- his purported belief that his trial was on March 19, 2009 -- were improper.

¶14 The trial court considered the prosecutor's statements and, as a curative measure, permitted defense counsel to tell jurors in his opening statement that the comments about the 2006 case were lies and that DNA results had in fact been received but not pursued by the police department based on a lack of cooperation by the victim. In terms of the alleged motive for the arson, Williams presented evidence that he did not believe he had trial on the day the Molotov cocktail was thrown through S.F.'s window.

¶15 The trial court was in the best position to determine the effects of the prosecutor's comments on the jury. *See State v. Newell*, 212 Ariz. 389, 402, ¶ 61, 132 P.3d 833, 846 (2006) (citation omitted). In reviewing acts of prosecutorial misconduct, the question "is whether the misconduct affected the jury's ability to fairly assess the evidence." *State v. Rosas-Hernandez*, 202 Ariz. 212, 218, ¶ 23, 42 P.3d 1177, 1183 (App. 2002). Because Williams was acquitted of the sexual assault charges, it is clear that any misstatements about the 2006 matter did not prejudice Williams. And Williams had a full and fair opportunity to rebut the State's claimed motive for the

arson. We find no reversible error based on prosecutorial misconduct.[1]

II. Count 10

¶16 Williams' contention that the indictment was defective as to count 10 is untimely, *see* Rules 13.5(e) and 16.1(b) (requiring defects in charging document to be raised at least 20 days before trial), and moot, given his acquittal on that charge. The challenge to a jury instruction regarding count 10 and the court's handling of a jury question regarding that count is also moot in light of the verdict as to that charge.

¶17 The record does not support Williams' contention that, because he was found not guilty of count 10, "he cannot be guilty of any of the Counts that could only have been facilitated by the use of a telephone, e.g. Counts 5-10." The elements of the offenses alleged in counts 7, 9, and 10 are different. The fact that Williams was acquitted of use of wire communication or electronic communication to facilitate an

[1] We have also considered Williams' claim that other prosecutorial misconduct at trial included: (1) the State "escorting" S.F. "down the aisle by the arm in front of the jury as she cowers away from the Appellant"; and (2) use of a "therapeutic dog" at trial, constituting "improper vouching, [ostensibly] saying these victims are victims." We find no reversible error as to these matters. Williams also takes issue with other prosecutorial comments regarding the alleged sexual assault victims and their actions, but his acquittal on those charges establishes that he was not prejudiced thereby.

offense (count 10) does not *a fortiori* require acquittal as an accomplice on the aggravated assault and arson charges. Moreover, the State introduced evidence independent of telephonic communications, including Williams' change of counsel form that included a physical description of S.F. and her address, which wound up in Deason's possession.

III. Trial Court's Jurisdiction

¶18 Williams next contends the superior court lacked "subject matter jurisdiction" because the trial judge "had not taken and subscribed a timely Oath of Office (Loyalty Oath) at the time of Appellants' trial, conviction or sentencing." Williams attached copies of Judge Gaines' oaths of office filed in 1999, 2007, and 2010 to his supplemental brief. An appellate court "may take judicial notice of the records of the secretary of state," and we do so here. *Hernandez v. Frohmiller*, 68 Ariz. 242, 258, 204 P.2d 854, 865 (1949).

¶19 The record does not support the suggestion that Judge Gaines commenced his judicial duties before signing the Loyalty Oath of Office in 1999 –- only that he signed the oath one week after the Governor appointed him. Moreover, Judge Gaines' April 2007 oath authorized him to serve during a term of office that encompassed Williams' trial and sentencing. Finally, even assuming *arguendo* that there were defects in the oaths, our supreme court long ago adopted the "de facto officer" doctrine

in determining the validity of acts by public officers whose appointment to office is legally defective. *See Rogers v. Frohmiller*, 59 Ariz. 513, 520-22, 130 P.2d 271, 274-75 (1942) (adopting "de facto officer" doctrine in determining validity of acts of public officers whose appointment or election to office legally defective); *In re Estate of de Escandon*, 215 Ariz. 247, 252, ¶ 16, 159 P.3d 557, 562 (App. 2007) (when judge *pro tempore* "met the minimum constitutional requirements to serve as a superior court judge" and "had de facto authority to serve," litigant "waived any claim that [judge] lacked authority to preside over contested probate matters by not objecting before the hearing commenced").

CONCLUSION

¶20 We affirm Williams' convictions and sentences. Counsel's obligations pertaining to Williams' representation in this appeal have ended. Counsel need do nothing more than inform Williams 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, Williams 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,
Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
DIANE M. JOHNSEN, Chief Judge