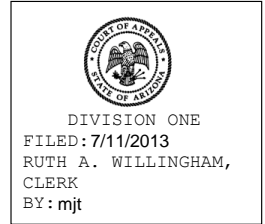


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 12-0374
)
Appellee,) DEPARTMENT C
)
v.)
) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
DERRICK MICHAEL ANTONE,) Arizona Supreme Court)
Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-113527-001

The Honorable Lisa Daniel Flores, Judge

AFFIRMED AS MODIFIED

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

Bruce F. Peterson, Maricopa County Legal Advocate Phoenix
By Kerri L. Chamberlin, Deputy Legal Advocate
Attorneys for Appellant

K E S S L E R, Judge

¶1 Derrick Michael Antone ("Antone") was tried and convicted of Count 1: second degree murder, and Count 2: leaving the scene of a fatal injury accident. Counsel for Antone filed

a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Antone was given the opportunity to file a supplemental brief, but did not do so. For the reasons that follow, we affirm Antone's convictions and modify his sentence to reflect an increase to his presentence incarceration credit.

FACTUAL AND PROCEDURAL HISTORY

¶2 Antone was in a parking lot with some female friends when the victim, "A.B.," approached Antone and asked for a ride. Shortly thereafter, a fist fight broke out between A.B. and Antone's party, ending when the females chased A.B. away with tire irons. Antone's party had entered a van when A.B. returned and began throwing rocks at the van. Antone started the van and began chasing A.B. around the parking lot. Antone eventually drove over a curb and struck A.B. with the van immediately before crashing into a telephone pole. Antone saw A.B.'s body as he stepped over it while exiting the van, but Antone did not stop to check on A.B. Instead, Antone attempted to flee in a friend's vehicle and was stopped and arrested shortly thereafter.

¶3 Antone later admitted that he had deliberately aimed the van with the intention of hitting A.B. The van's tire

tracks in the parking lot showed signs of acceleration without braking, and a nearby surveillance video captured the van chasing A.B. through the parking lot. A.B. died as a result of his injuries from being struck by the van.

¶14 A jury convicted Antone of second degree murder and leaving the scene of a fatal injury accident. The jury also found that Antone's offenses had "caused physical, emotional, or financial harm . . . to the victim's immediate family." The superior court sentenced Antone to thirteen years' incarceration for second degree murder, with 456 days of presentence incarceration credit, and a three-year supervised probation for leaving the scene of a fatal accident. Antone filed a timely appeal. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), -4033(A)(1) (2010).¹

STANDARD OF REVIEW

¶15 In an *Anders* appeal, this Court must review the entire record for fundamental error. *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of

¹ We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

such magnitude that the defendant could not possibly have had a fair trial. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain a reversal, the defendant must also demonstrate that the error caused prejudice. *Id.* at ¶ 20. On review, “[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant.” *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

DISCUSSION

¶6 After careful review of the record, we find no meritorious grounds for reversal of Antone’s convictions. The record reflects that Antone was present and represented at all critical stages of trial except when his presence was properly waived, the proceedings were held consistent with the Arizona Rules of Criminal Procedure, Antone was given the opportunity to speak at sentencing, and the sentences imposed were within the ranges for Antone’s offenses.

I. SUFFICIENCY OF THE EVIDENCE

¶7 In reviewing the sufficiency of evidence at trial, “[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant.” *Greene*, 192 Ariz. at 436, ¶ 12, 967 P.2d at 111. “Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of

probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

A. Second Degree Murder

¶18 There is evidence in the record to support the jury's conviction of Antone for the crime of second degree murder as a dangerous offense. A person commits second degree murder if without premeditation:

1. The person intentionally causes the death of another person, . . . or
2. Knowing that the person's conduct will cause death or serious physical injury, the person causes the death of another person, . . . or
3. Under circumstances manifesting extreme indifference to human life, the person recklessly engages in conduct that creates a grave risk of death and thereby causes the death of another person

A.R.S. § 13-1104(A) (2010) (emphasis added). Section 13-105(10) (Supp. 2012) defines the relevant culpable mental states:

- (a) "Intentionally" . . . means . . . that a person's objective is to cause that result or to engage in that conduct.
- (b) "Knowingly" means . . . that a person is aware or believes that the person's conduct is of that nature [of the statutory offense]
- (c) "Recklessly" means . . . that a person is aware of and consciously disregards a substantial and unjustifiable risk that the [resulting offense] will occur. . . .

Section 13-105 further provides:

13. "Dangerous offense" means an offense involving the . . . intentional or knowing infliction of serious physical injury on another person.

. . . .

39. "Serious physical injury" includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.

(Emphasis added.) "[A] person can commit second-degree murder without intending to kill and without knowing that his conduct will cause death if he knows that his conduct will cause 'serious physical injury' and his conduct actually causes death." *State v. Ontiveros*, 206 Ariz. 539, 541, ¶ 7, 81 P.3d 330, 332 (App. 2003) (quoting A.R.S. § 13-1104(A)(2)).

¶9 Antone's act of chasing A.B. around the parking lot and accelerating over a curb to hit A.B. constitutes circumstantial evidence that Antone acted recklessly and with "extreme indifference to human life." See *State v. Woodall*, 155 Ariz. 1, 5, 744 P.2d 732, 736 (App. 1987) (holding that speeding in a reduced speed area, crossing a center line, failing to assist the victim, and leaving the scene, *inter alia*, constituted "ample evidence of extreme indifference" (internal quotation marks omitted)). Antone also admitted twice to officers that he had deliberately aimed the van with the intent

of hitting A.B. A reasonable person would expect such an act to result in at least serious physical injury, and it in fact resulted in A.B.'s death.

B. Leaving the Scene of a Fatal Injury Accident

¶10 Likewise, there is evidence in the record to support the jury's conviction of Antone for the crime of leaving the scene of a fatal injury accident. Under A.R.S. § 28-661(A) (Supp. 2012), the driver of a vehicle involved in an accident resulting in injury to or death of a person shall:

1. Immediately stop the vehicle at the scene of the accident or as close to the accident scene as possible but shall immediately return to the accident scene.
2. Remain at the scene of the accident until the driver has fulfilled the requirements of [A.R.S.] § 28-663.

Section 28-663(A) (2012) also requires this driver to:

1. Give the driver's name and address and the registration number of the vehicle the driver is driving.
2. On request, exhibit the person's driver license to the person struck or the driver or occupants of or person attending a vehicle collided with.
3. Render reasonable assistance to a person injured in the accident, including making arrangements for the carrying of the person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if the carrying is requested by the injured person.

"The primary purpose of [these statutes] is to 'prohibit drivers from seeking to evade civil or criminal liability by escaping before their identity can be established.'" *State v. Powers*, 200 Ariz. 363, 364, ¶ 9, 26 P.3d 1134, 1135 (2001) (quoting *State v. Rodgers*, 184 Ariz. 378, 380, 909 P.2d 445, 447 (App. 1995)).

¶11 Although Antone stopped the van at the scene of the accident when he crashed into the telephone pole, two witnesses confirmed that Antone immediately left the scene in a friend's vehicle. Furthermore, Antone failed to offer A.B. any form of "reasonable assistance," including calling for support, when Antone knowingly stepped over A.B.'s body on his way to the getaway vehicle.

II. PRESENTENCE INCARCERATION CREDIT

¶12 Presentence incarceration credit is given for time spent in custody beginning the day of booking, *State v. Carnegie*, 174 Ariz. 452, 454, 850 P.2d 690, 692 (App. 1993), and ending the day before sentencing, *State v. Hamilton*, 153 Ariz. 244, 246, 735 P.2d 854, 856 (App. 1987). Antone was in custody from his arrest on March 16, 2011 until his sentencing on June 15, 2012. Antone spent 457 days incarcerated prior to sentencing, yet he only received a credit of 456 days. Therefore, we modify Antone's sentence to reflect this correction.

CONCLUSION

¶13 Accordingly, we affirm Antone's convictions but modify his sentence to grant him 457 days of presentence incarceration credit for his conviction of second degree murder. Upon the filing of this decision, counsel shall inform Antone of the status of the appeal and his options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Antone shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

DIANE M. JOHNSEN, Judge