IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LAMAR ROSHAUN ELLIS, *Appellant*.

No. 1 CA-CR 12-0421
FILED 11-19-2013

Appeal from the Superior Court in Maricopa County
No. CR2011-120554-001
The Honorable Pamela Hearn Svoboda, Judge

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz

Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Cory Engle

Counsel for Appellant

Lamar Roshaun Ellis
Appellant In Propria Persona

MEMORANDUM DECISION

Chief Judge Diane M. Johnsen delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Randall M. Howe joined.

J O H N S E N, Chief Judge:

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following Lamar Roshaun Ellis's conviction of one count of kidnapping, a Class 2 felony; three counts of aggravated assault, Class 3 felonies; and misconduct involving weapons, a Class 4 felony. Ellis's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. *See Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel now asks this court to search the record for fundamental error. Ellis has filed a supplemental brief identifying certain issues, which we address below. After reviewing the entire record, we affirm Ellis's convictions and sentences, but modify the judgment of conviction to omit the requirement that Ellis pay for the cost of DNA testing.

FACTS AND PROCEDURAL HISTORY

¶2 Ellis's home was burglarized, and neighbors told him the burglar was one of his acquaintances.[1] When the acquaintance later showed up at Ellis's home, Ellis and his friend confronted him about the burglary, then beat him with a gun and cut him with a knife while threatening further violence. They then placed the victim in a car, and, at Ellis's direction, the friend drove into the desert, where they threatened the victim again, then left him bruised and bloodied.

¶3 At trial, the victim did not testify, but a friend of Ellis who witnessed the assault identified Ellis as the assailant. A technician

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[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Ellis. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

testified that DNA matching the victim's was found in blood collected from Ellis's shoes, the floor of his living room and on a handgun and knife found in the trunk of his car.

¶4 The jury convicted Ellis of one count of kidnapping as a dangerous offense, three counts of aggravated assault as dangerous offenses, and one count of misconduct involving weapons. The superior court found that Ellis had two prior felony convictions, one of them a dangerous offense. The court sentenced Ellis to a term of 28 years' imprisonment on the kidnapping charge, a term of 20 years' imprisonment on each of the aggravated assault charges, and a term of 4.5 years' imprisonment on the charge of misconduct involving weapons, all to be served concurrently. Ellis was awarded 421 days of presentence incarceration credit.

¶5 Ellis timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2013), 13-4031 and -4033 (2013).[2]

DISCUSSION

A. Appellant's Supplemental Brief.

¶6 In his supplemental brief, Ellis first argues he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments. A claim of ineffective assistance of counsel, however, may not be reviewed on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). We therefore do not reach the merits of Ellis's argument that his counsel was ineffective.

¶7 Ellis next argues his attorney and/or the court either misinformed him of the terms of a second plea offer or failed to inform him of a second plea offer. This argument is not entirely clear, but to the extent it is directed to conduct of Ellis's counsel, it constitutes a claim of ineffective assistance, which we will not review on appeal. *Id.*; *State v. Donald*, 198 Ariz. 406, 413, ¶ 14, 10 P.3d 1193, 1200 (App. 2000).

¶8 Alternatively, to the extent Ellis contends that he was not informed of a "mandatory penalty" implicated by the plea offer, the record

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

does not support his assertion. The State offered Ellis a plea, which the court reviewed with Ellis and his attorney at a hearing. Ellis rejected the plea offer. Then, just before trial, the State acknowledged that at the prior hearing there may have been some confusion about the applicable sentencing range if Ellis were found guilty of the charged offenses. Because of that confusion, the State re-extended its initial plea offer. The court then reviewed the second offer with Ellis, making clear to him that the court would have to impose maximum sentences of incarceration for the kidnapping and aggravated assault charges if Ellis was found guilty. Ellis also had the opportunity to review the plea offer with his attorney, and he discussed it with his family. Again, he rejected the plea. In sum, there is no evidence in the record that the court made any misrepresentations concerning the implications of the State's plea offer.

¶9 Ellis also asserts that neither the court nor his counsel informed him that he could not withdraw his plea if the court refused to impose a sentence not recommended by the prosecution. This argument is moot, given that Ellis rejected the State's offer.

¶10 Ellis next contends his Sixth Amendment right to confront witnesses was violated when two witnesses testified about statements made by the victim during and immediately after the assault.

¶11 The Confrontation Clause prohibits the admission of "testimonial hearsay" from a declarant who does not testify at trial. *Crawford v. Washington*, 541 U.S. 36, 51, 68 (2004). "[A] statement may be testimonial under *Crawford* if the declarant would reasonably expect it to be used prosecutorially or if it was made under circumstances that would lead an objective witness reasonably to believe the statement would be available for use at a later trial." *State v. Parks*, 211 Ariz. 19, 27, ¶ 36, 116 P.3d 631, 639 (App. 2005). Excited utterances are not testimonial statements. *State v. Aguilar*, 210 Ariz. 51, 51, ¶ 1, 107 P.3d 377, 377 (App. 2005).

¶12 Two witnesses recounted statements made by the victim, who did not testify. Ellis's friend testified that the victim pleaded with Ellis, stating, "Man, don't kill me man." The person who found the victim in the desert testified that, immediately upon being discovered, the victim exclaimed, "They tried to kill me." Given that the statements were made during and immediately after a traumatic event, while the victim was in a panic, and outside the presence of law enforcement, the statements were non-testimonial and did not trigger Confrontation Clause issues. *See* Ariz. R. Evid. 803(2) (2013); *Crawford*, 541 U.S. at 68; *Aguilar*, 210 Ariz. at 51, ¶ 1,

107 P.3d at 377; *State v. Anaya*, 165 Ariz. 535, 539, 799 P.2d 876, 880 (App. 1990).

¶13 Finally, Ellis argues that he was denied a speedy trial in violation of 18 U.S.C. § 3161. This is a federal statute and does not apply in a state-court proceeding involving state-law claims. *Shotwell v. Donahoe*, 207 Ariz. 287, 290, ¶ 6, 85 P.3d 1045, 1048 (2004).

B. Other Issues Suggested by Counsel.

¶14 At Ellis's request, his counsel suggests we consider whether the superior court erroneously denied his request to change counsel. We review the denial of a motion to change counsel for an abuse of discretion. *State v. Cromwell*, 211 Ariz. 181, 186, ¶ 27, 119 P.3d 448, 453 (2005).

¶15 The Sixth Amendment guarantees indigent defendants the right to competent counsel. *State v. LaGrand*, 152 Ariz. 483, 486, 733 P.2d 1066, 1069 (1987); *see also Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). An indigent defendant, however, is not "entitled to counsel of choice, or to a meaningful relationship with his or her attorney." *State v. Torres*, 208 Ariz. 340, 342, ¶ 6, 93 P.3d 1056, 1058 (2004) (quotation omitted). In fact, a defendant is entitled to a change of counsel only upon an irreconcilable conflict or a complete breakdown of communications with his lawyer. *Id*.

¶16 Several months before trial, Ellis requested a change of counsel, asserting his attorney was not attempting to contact or secure alibi witnesses. After Ellis raised the matter during a pretrial conference, his lawyer explained that she had left messages for the witnesses, but they had not returned her calls. The record does not reflect an irreconcilable conflict or a "complete breakdown in communication" of the sort that is required to entitle a defendant to a change of counsel. *See id*. at 342, ¶ 6, 93 P.3d at 1058.

¶17 Ellis's counsel next suggests that Ellis's speedy-trial rights under Arizona Rule of Criminal Procedure 8 may have been violated. Rule 8.2 requires the superior court to grant a defendant in custody a trial within 150 days of his arraignment. Ariz. R. Crim. P. 8.2(a)(1). That time limit may be extended pursuant to Rule 8.4 (excluded periods) or 8.5 (continuances).

¶18 The last day pursuant to Rule 8 was set for October 16, 2011, but, without objection from Ellis, the State moved to continue the trial on September 7, 2011 to allow DNA testing. Ellis's counsel also moved to continue the trial twice – once on November 28, 2011 due to another

party's change in counsel, and again on March 2, 2012 because of newly discovered evidence. The superior court granted all three motions, and ultimately continued the trial to May 1, 2012.

¶19 Ellis did not contest the State's request for a continuance and in any event, he himself asked for two continuances. Nor does he assert he suffered prejudice from any delay. For these reasons, Rule 8 was not violated.

¶20 Ellis also suggested his counsel ask us to review the sufficiency of the evidence, given that the victim did not testify. This court will not reverse a conviction for insufficiency of the evidence "unless there is no substantial evidence to support the jury's verdict." *State v. Scott*, 187 Ariz. 474, 477, 930 P.2d 551, 554 (App. 1996). Even absent testimony by the victim, the record contained sufficient evidence, recounted above, to support the convictions.

C. Due Process Review.

¶21 The record reflects Ellis received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court held appropriate pretrial hearings. As noted, the State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of 12 members and two alternates. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict**.** The jury returned a unanimous verdict, which was confirmed by juror polling. The court received and considered a presentence report, addressed its contents during the sentencing hearing and imposed legal sentences for the crimes of which Ellis was convicted**.**

¶22 Our review reveals that in sentencing Ellis, the superior court ordered Ellis to "submit to DNA testing for law enforcement identification purposes and pay the applicable fee for the cost of that testing." In *State v. Reyes*, 232 Ariz. 468, 472, ¶ 14, 307 P.3d 35, 39 (App. 2013), this court held that A.R.S. § 13-610 (2013), which authorizes the collection of DNA samples for certain law enforcement purposes, does not authorize the court to impose a DNA testing fee on a convicted defendant. We therefore hold that pursuant to *Reyes*, which was issued after Ellis was sentenced, the court erred by imposing the fee.

CONCLUSION

¶23 We have reviewed the entire record for reversible error and find none, except that we modify the judgment of conviction to omit the requirement that Ellis pay for the cost of DNA testing. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶24 After the filing of this decision, defense counsel's obligations pertaining to Ellis's representation in this appeal have ended. Defense counsel need do no more than inform Ellis of the outcome of this appeal and his future options, 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). On the court's own motion, Ellis has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Ellis has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.