

¶1 Fabian Andres Flores appeals from his conviction of possession of dangerous drugs, a class 4 felony. See Ariz. Rev. Stat. ("A.R.S.") §§ 13-3401(6) (Supp. 2012), -3407(A)(1), (B)(1) (Supp. 2012).¹ Finding no arguable issues to raise, counsel requested that this Court search the record for fundamental error pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999).

¶2 Flores filed a *pro per* supplemental brief asking this Court to determine whether placing his photograph in front of the jury during the trial violated his due process rights and was fundamental error. Because the record does not reveal any fundamental error, we affirm Flores' conviction, but modify his sentence to reflect an increase to his presentence incarceration credit.

FACTUAL AND PROCEDURAL HISTORY

¶3 In August 2007, Officers C and R saw a car run a red light near 47th Avenue and turn into a gas station parking lot. They followed this car into the parking lot and observed Flores exit the car and go into the store. Flores then exited the store and began to return to the car, but turned towards a Suburban in the opposite direction when he noticed the patrol

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

car. Officer C saw Flores reach into his pocket, pull out a small white object (later identified as a baggie), and throw it towards the Suburban's front tire. When a man in the Suburban drove away, another white object (also a baggie) became visible where its front tire had been. The officers seized the baggies, drove Flores to the police station, and turned the baggies in for processing. The bags tested positive for methamphetamine.

¶4 After the jury convicted Flores of possession of dangerous drugs, the jury also found that Flores had committed the offense while on community supervision release from a prior felony. Flores timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), -4033(A)(1) (2010).

DISCUSSION

¶5 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). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). In order to obtain a reversal, the defendant must also demonstrate that the error

caused prejudice. *Id.* at ¶ 20. On review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against the defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

I. Sufficiency of the Evidence

¶6 There is evidence in the record to support Flores' conviction. To obtain a conviction of possession of dangerous drugs, the State must prove that the defendant knowingly possessed a dangerous drug. A.R.S. § 13-3407(A)(1); see A.R.S. § 13-3401(6) (defining dangerous drug).

¶7 Officer C testified that he saw Flores throw the first white baggie under the Suburban, and Officer R testified that he saw Flores' throwing motion. Officer R asked the driver of the Suburban if he knew Flores, but did not have any further interaction with him. The officers did not record the driver's information, nor did they search the Suburban or run its license plate, so no testimony was presented to establish the origin of the second baggie. Regardless of the second baggie, there is sufficient evidence to support a jury finding that Flores knowingly possessed the first baggie containing methamphetamine.

¶8 The substance in the baggies was methamphetamine. This was established by a forensic scientist at trial, and the officers established a proper chain of custody for both baggies. Methamphetamine is defined as a dangerous drug in A.R.S. § 13-

3401(6)(b)(xvii).²

II. The Photograph of the Defendant Presented to the Jury

¶19 Flores has asked us to address whether his due process rights were violated, and if fundamental error occurred when the trial court permitted the State to place Flores' photograph in front of the jury during the State's witnesses' testimony.

¶10 The superior court found that Flores voluntarily absented himself from trial, so it was conducted in absentia. The court provided a photograph of Flores, admitted as Exhibit 1, to the jury throughout the trial. The State first entered Flores' photograph into evidence when examining Officer C to verify that the man he came into contact with and arrested on the night in question was Flores. This photograph remained in the jury's sight throughout the trial, and Flores' counsel objected. Flores' counsel argued that the photograph was prejudicial because it highlighted Flores' absence to the jury, it constituted a due process violation, and it tainted the jury to such an extent that it was grounds for a mistrial.

¶11 The superior court overruled the motion for mistrial, finding that it was not prejudicial to provide the jury with a human face in light of Flores' absence.

² This subsection has been twice renumbered since 2005, however there are no material differences thus we cite the 2012 pocket part.

~~¶11~~¶12 There was nothing incriminating about the photograph. The court instructed the jury that the defendant need not testify and that his absence at trial is not to be considered as evidence. The court had previously given essentially these same instructions during voir dire. Flores has not presented any evidence that the jury was prejudiced by viewing his photograph throughout the trial. Accordingly, we find no error, much less fundamental error.

III. Presentence Incarceration Credit

~~¶12~~¶13 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). Flores served ninety-nine days in custody prior to sentencing, yet he only received ninety-three days of credit. Therefore, we modify Flores' sentence to reflect six additional days of presentence incarceration credit.

CONCLUSION

~~¶13~~¶14 Accordingly, we affirm Flores' conviction but modify his sentence by granting him ninety-nine days of presentence incarceration credit. Upon the filing of this decision, counsel shall inform Flores 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). Flores 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/

MAURICE PORTLEY, Presiding Judge

/s/

SAMUEL A. THUMMA, Judge