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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: 01/21/2010
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IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
)
 Appellee,) 1 CA-CR 08-0582
)
 v.) DEPARTMENT B
)
 BRADLEY KYLE-CAREY ROBERTS,) MEMORANDUM DECISION
) (Not for Publication -
) Rule 111, Rules of the
 Appellant.) Arizona Supreme Court)
)
 _____)

Appeal from the Superior Court of Mohave County

Cause No. CR 2007-1512

The Honorable Steven F. Conn, Judge

AFFIRMED

Terry Goddard, Attorney General
by Kent E. Cattani, Chief Counsel
Criminal Appeals Section
Attorneys for Appellee Phoenix

Dana P. Hlavac, Mohave County Public Defender
by Jill L. Evans, Deputy Public Defender
Attorneys for Appellant Phoenix

WEISBERG, Judge

¶1 Bradley Kyle-Carey Roberts ("Defendant") appeals from his convictions and sentences imposed after a jury trial. Defendant's counsel has filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 744 (1967), and *State v. Leon*, 104 Ariz. 297, 299,

451 P.2d 878, 880 (1969), advising this court that after a search of the entire record on appeal, she finds no arguable ground for reversal. This court granted Defendant an opportunity to file a supplemental brief, but none was filed. Counsel now requests that we search the record for fundamental error. *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

¶12 We have jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033 (A) (2001). Finding no reversible error, we affirm.

FACTS

¶13 We review the facts in the light most favorable to sustaining the verdicts. *See State v. Stroud*, 209 Ariz. at 410, 412, ¶ 6, 103 P.3d 912, 914 (2005).

¶14 Defendant was indicted for:

Count 1 - sexual assault, a class 2 dangerous offense, in violation of A.R.S. § 13-1406;

Count 2 - aggravated assault, a class 3 dangerous offense, in violation of A.R.S. § 13-1204(A)(2);

Count 3 - kidnapping, a class 2 dangerous offense, in violation of A.R.S. § 13-1304;

Count 4 - first-degree burglary, a class 2 dangerous offense, in violation of A.R.S. § 13-1508 and -1507; and,

Count 5 - forgery, a class 4 felony, in violation of A.R.S. § 13-3003.

The State filed an allegation that Defendant had a prior felony conviction for theft of a means of transportation and an allegation of aggravating factors other than the prior felony conviction.

¶15 The facts presented at trial showed the following. On October 2, 2007, the victim, lived in an apartment in Valle Vista with her two children and a roommate. That day she went to Wal-Mart and purchased two blank money orders. One was for \$300.00 and the other was for \$157.93. That night, the victim fell asleep with her two children in bed with her. She woke up in the middle of the night and saw a man, later identified as Defendant, standing over her with a knife. He was wearing a black hooded pullover shirt, black pants and black gloves. Except for his eyes, a dark blue bandanna with white wording on it covered his face.

¶16 The victim screamed and Defendant put his hand over her mouth. The victim bit Defendant and he shoved the knife in her mouth. She tried to pull the knife away and he cut her hand. Realizing that her children were in bed and she did not want them harmed, the victim stopped resisting. Defendant removed the victim's underwear, forced her to lie on the floor, put on a condom and sexually assaulted her. Defendant told the victim to stay there or he would hurt or kill her. After Defendant left, the victim called 9-1-1 and police were dispatched to the location.

¶17 An officer in the Kingman Police Department investigated the crime scene. He found and seized one half of a condom wrapper

on the floor near the bed and the other half on the bed. He was unable to obtain any latent fingerprints at the scene. Another officer interviewed the victim immediately after the sexual assault. She observed an injury to the victim's lip and to her hand. The victim was taken to the Kingman Regional Medical Center where a nurse examined her and obtained a buccal DNA swab from her.

The nurse observed injuries to the victim's lip and hand and a reddened area in her vaginal area consistent with having unlubricated sex.

¶18 The victim had left her purse on the dining room table, but two days after the incident, she realized that a credit card and the two money orders from Wal-Mart were missing from her wallet. She still had the receipt for the money orders. The victim gave Officer O. the receipt for the Wal-Mart money orders. He contacted MoneyGram, which provided him with the serial numbers on the money orders and advised him they were cashed at an unknown Wal-Mart on October 3, 2007. MoneyGram also gave him the approximate time when they were cashed. Officer O. then contacted an assistant protection associate at Wal-Mart. The associate was able to provide the officer with a copy of a surveillance tape that showed Defendant cashing the victim's two money orders at Wal-Mart as well showing his white Dodge pickup truck in the parking lot. Officer O. later determined that Defendant had put his driver's license number on the money orders when cashing them.

¶9 The officer knew Defendant from past dealings and recognized him from the surveillance video. The victim's description of her assailant matched Defendant's physical characteristics as to size and build. The officer went to Defendant's house to pick him up and observed a white Dodge pickup in his driveway. Defendant was transported to the police station and interviewed.

¶10 During the interview, Defendant gave several different versions of what happened on October 2, 2007. In the first version, he said he found the money orders in a discarded wallet on the side of the road. In the last version, Defendant said that he first met the victim at the Nashville Grille and had sex with her a couple of times in the past. Defendant told the officer that a friend would arrange meetings with the victim and that they would have sex in his car. He said that they did so on October 2, 2007 at 11:00 a.m. He also said that he went to the victim's residence that night and had sex with her. Defendant told the officer that he smokes marijuana every day.

¶11 Officer O. contacted individuals to attempt to verify Defendant's statements. Several people told him that the victim never left work during the day on October 2, 2007. Defendant's friend denied knowing the victim or arranging meetings between her and Defendant. He confirmed that Defendant smoked marijuana every day.

¶12 When Officer O. played the taped interview to the victim, she recognized Defendant's voice as that of her assailant. He also showed the victim a photograph of Defendant, but she could not identify him. When he covered the photograph showing only the suspect's eyes, she identified Defendant as her assailant. She was able to identify Defendant in court because of "his eyes," which she described as "not round" and "a little brownish." The victim said she never met Defendant and did not know him.

¶13 A Department of Public Safety criminalist obtained DNA profiles from buccal swabs from Defendant and the victim. She found some cellular material on the condom wrapper. She compared the DNA profile from the condom wrapper with the DNA profiles of Defendant and the victim. Three locations on the DNA profile from the swab of the condom wrapper matched the victim's DNA, but as to the other locations, the results were inconclusive. She did not find any cellular material or DNA that matched Defendant's DNA. There were no signs of bodily fluids on the victim's underwear so no DNA testing was done on it

¶14 Defendant's fiancée, who lived with him and their two children, testified on Defendant's behalf. She said that on the morning of October 3, 2007, Defendant went out and when he came back, he showed her blank money orders he had found and that he took them to Wal-Mart to cash. She testified that when the police came to arrest Defendant, he was smoking marijuana, that he smokes

everyday and that the marijuana affects his memory and he has trouble answering questions.

¶15 She admitted that on the night of October 2, 2007, Defendant did not go to bed when she did and that he later told her he went out during the night to get a soda. She also revealed that she and Defendant had previously lived at the apartment where the victim lived and that after they moved out, she saw the victim in her garage. After the close of evidence, the court granted the State's previously filed motion to add an allegation that Defendant committed the instant offenses while on probation. The jury found Defendant guilty on all counts.

¶16 The court advised the State that it could ask the court to sentence Defendant for a dangerous class 2 or 3 felony without the prior felony conviction as a sentence enhancement, but indicated the prior conviction could then be used as an aggravating factor; alternatively, the State could ask the court to sentence Defendant for a nondangerous class 2 or 3 felony with one prior historical felony conviction as a sentence enhancement. The options, not applicable to the forgery conviction, would change the sentencing ranges for those offenses. The judge also stated that he might take judicial notice of the prior felony conviction and Defendant's probationary status as he placed Defendant on probation for that prior conviction and also revoked his probation.

¶17 The State elected to designate the convictions for sexual assault, aggravated assault, kidnapping and first-degree burglary (Counts 1-4) as dangerous, but non-repetitive. The forgery conviction (Count 5) was treated as non-dangerous, but repetitive pursuant to A.R.S. § 13-604. Without objection, the court took judicial notice that Defendant had one historical prior felony conviction (Mohave County Cause Number CR-2006-1015) and was on probation on that matter when he committed the instant offenses.

¶18 As to the dangerous offenses, the court found as aggravating factors, the prior felony conviction and emotional impact on the victim. It found no mitigating factors. As to the forgery conviction, the court found that it was required to impose a presumptive sentence under A.R.S. § 13-604.02 and that there were no aggravating factors.

¶19 The court sentenced Defendant to aggravated terms of imprisonment of 21 years each for sexual assault (Count 1), kidnapping (Count 3) and burglary in the first degree (Count 4) and 15 years for aggravated assault (Count 2), the sentences to run concurrently to each other, but consecutively to the sentence imposed in the other cause number. The court sentenced Defendant to a presumptive term of imprisonment of 4.5 years on the forgery conviction, consecutive to Counts 1, 3 and 4. Because all of Defendant's presentence incarceration credit had been given for the

sentence in the other cause number, no additional presentence credit was given.

CONCLUSION

¶120 We have read and considered counsel's brief and have searched the entire record for reversible error. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, defendant was represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits and that there was sufficient evidence for the jury to find that the offenses were committed by defendant.

¶121 After the filing of this decision, counsel's obligations pertaining to defendant's representation in this appeal have ended.

Counsel need do no more than inform defendant of the status of the appeal and of defendant's future options, unless counsel's review reveals 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). Defendant has thirty days from the date of this decision to proceed, if he desires, with a motion for reconsideration or petition for review *in propria persona*.

¶22 Accordingly, we affirm defendant's conviction and sentence.

/S/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/S/_____
PATRICIA K. NORRIS, Presiding Judge

/S/_____
MARGARET H. DOWNIE, Judge