

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JOSEPH LOPEZ, *Appellant*.

No. 1 CA-CR 14-0239
FILED 2-2-2016

Appeal from the Superior Court in Maricopa County
No. CR2013-000464-001
The Honorable Rosa Mroz, Judge

CONVICTIONS AFFIRMED; SENTENCES REMANDED

COUNSEL

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

DeBrigida Law Offices, PLLC, Glendale
By Ronald M. DeBrigida, Jr.
Counsel for Appellant

Joseph Lopez
Appellant

STATE v. LOPEZ
Decision of the Court

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Andrew W. Gould joined.

S W A N N, Judge:

¶1 Defendant Joseph Lopez appeals his convictions and sentences for multiple felonies.

¶2 This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969). Defendant's appellate counsel searched the record on appeal and found no arguable nonfrivolous question of law; he now asks us to review the record for fundamental error. See *Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530 (App. 1999). Though Defendant did not avail himself of the opportunity to file a supplemental brief *in propria persona*, he did identify several issues for review in his notice of appeal.

¶3 Having searched the record for fundamental error and considered the issues raised by Defendant, we affirm Defendant's convictions but remand for clarification of his sentences.

FACTS AND PROCEDURAL HISTORY

¶4 The state charged Defendant with two counts of kidnapping under A.R.S. § 13-1304(A)(3), two counts of armed robbery under A.R.S. §§ 13-1902(A) and -1904(A)(1), two counts of aggravated assault under A.R.S. §§ 13-1203(A)(2) and -1204(A)(2), two counts of threatening or intimidating under A.R.S. § 13-1202(A)(1), one count of assisting a criminal street gang under A.R.S. § 13-2321(B), one count of misconduct involving weapons under A.R.S. § 13-3102(A)(4), and one count of theft of means of transportation under A.R.S. § 13-1814(A)(5). The state alleged that Defendant committed the offenses while on felony probation; the state also alleged multiple historical prior felonies and aggravating circumstances. Defendant pled not guilty, and the matter proceeded to a jury trial.

¶5 At trial, the state presented evidence of the following facts. On December 14, 2011, C.P. socialized at a motel with Michael (the father of one of her children) and their mutual friend Blaineden. Michael and

STATE v. LOPEZ
Decision of the Court

Blaineden were taken into police custody late that night or early the next morning. C.P. then returned to her Mesa apartment, where Michael's sister V.A. was spending the night. At the apartment, C.P. smoked marijuana, posted a message on social media about Michael, informed Michael's family of his arrest, and went to sleep.

¶6 Meanwhile, Defendant's sister Michelle, who was Michael's girlfriend at the time, instructed Michael's family to remove his belongings from her house. She further instructed Michael's friend Daniel, who also lived at the house, to move out. Michael's mother and brother helped Daniel do so. At the house, Michael's mother saw an African-American woman wearing pajama pants.

¶7 The same afternoon, Michael's mother also visited Defendant and Michelle's mother's house, on the Salt River Pima-Maricopa Indian Community. There, she met Defendant for the first time. Defendant listened as Michael's mother told his mother that Michael had been taken into custody.

¶8 Later in the day, in Mesa, C.P. awoke and began moving around her apartment as V.A. napped. Looking out of a window, C.P. saw two people interacting in the apartment complex's parking lot. One of the individuals was male; the other was an African-American female wearing pajama pants. As C.P. watched, the two separated and walked in separate directions. A few minutes later, C.P. heard a knock at her front door.

¶9 C.P. opened the door to a man wearing a hat pulled down low on his head. She did not recognize him, but later noticed that the man was wearing a distinctive jeweled necklace that she recognized as belonging to Daniel. The man asked if "Patricia" was there. Responding that nobody by that name lived there, C.P. started to close the door. But the man stopped the door with his hand. He then entered the apartment, pulled out a handgun, pointed it at C.P., and demanded drugs and money. C.P. denied having drugs or money. The man responded that he had been watching the apartment for weeks, and he asked about the whereabouts of C.P.'s children and "the other girl." C.P. responded that the other girl was asleep in another room. The man instructed C.P. to wake her up.

¶10 The man followed C.P. into the bedroom where V.A. was sleeping. He then woke V.A., took her cell phone, directed her to stand by C.P., and pointed the gun at them both. Repeating his demands for drugs and money, he forced them through the apartment at gunpoint while

STATE v. LOPEZ
Decision of the Court

opening and emptying drawers; he also took the jewelry that V.A. was wearing. He told the women that Michael had stolen from him, that he was torturing Daniel in a box, and that he was going to kill them if they did not comply with his demands. The man removed a brown bandana from his pocket, threw it on the ground, and stated, “that’s my Brown Pride” and “this is Mexican Mafia.” Both women were very frightened.

¶11 The man ordered C.P. and V.A. to stand in a bathtub, but they refused. The man then forced them into a bedroom, where he hog-tied them with electrical cords and placed pillows over their faces. He asked them for their keys and descriptions of their vehicles; C.P. described her vehicle and identified the correct key. He emptied both women’s purses and left the apartment with their keys and cell phones, as well as V.A.’s jewelry.

¶12 After hearing the man leave, V.A. freed herself and helped C.P. do the same. C.P. looked out of a window and saw the man leaving in her vehicle. The women then ran to a neighbor’s apartment, where C.P. called 911.

¶13 Mesa police responded to the scene and interviewed the victims, both of whom were visibly upset and both of whom bore ligature marks on their wrists. The police tracked the victims’ cell phones to a Phoenix neighborhood where Defendant had once lived. The victims independently provided consistent physical descriptions of their attacker; C.P. also described Michael’s relationship to Michelle and stated that Michelle’s brother, whom C.P. had never met, did not like her.

¶14 One of the detectives at the scene knew from a recent encounter with Defendant that Defendant was Michelle’s brother and that he had recently been paroled. During the same encounter, the detective had documented Defendant as a member of an active criminal street gang with ties to the Mexican Mafia, based on Defendant’s self-proclamation and tattoos. Defendant had told the detective that he had been placed in protective custody during his incarceration because the Mexican Mafia wanted to kill him. The detective knew that Michelle, Michael, Michael’s brother, Daniel, and Blaineden were members of a different street gang with no ties to the Mexican Mafia.

¶15 Based on the foregoing, Defendant became a suspect. Michael’s brother independently reached the same conclusion and shared a photo of Defendant with C.P. and V.A. via cell phone. V.A. found the photo too blurry to be of any value, but C.P. told Michael’s brother that she thought the photo depicted her attacker. After informing law

STATE v. LOPEZ
Decision of the Court

enforcement of the cell-phone photo, V.A. identified Defendant in a photo lineup, with what she characterized as “100%” certainty; C.P. identified a different person with hesitation, explaining that the attacker had worn a hat low on his head and that she had been focused on his gun.

¶16 Defendant was arrested the next day. After waiving his *Miranda*¹ rights, he denied any responsibility for the attack. He stated that he had stayed at his mother’s house all day, visiting with various relatives throughout the day, and could not have left because he did not have a vehicle or a driver’s license. He volunteered that he was not allowed to be in the area to which the victims’ cell phones had been tracked. He stated that he was not a member of the Mexican Mafia and had in fact been targeted by that gang when he was in prison. Consistent with court records, he agreed that he was a prohibited possessor. He voluntarily provided a DNA sample, and he was fingerprinted. Later forensic comparisons did not link Defendant to C.P.’s apartment, but his fingerprint was recovered from C.P.’s vehicle when it was found a month later.

¶17 At the conclusion of the state’s case-in-chief, Defendant moved under Ariz. R. Crim. P. 20 for a judgment of acquittal on the counts related to C.P. Defendant argued that he was entitled to judgment on those counts because C.P. failed to identify him in the photo-lineup and had not been asked to make an in-court identification. The court denied the motion on the basis of V.A.’s identification.

¶18 For his case, Defendant testified that he had been at his mother’s house and with relatives on the day of the attack, and Defendant’s mother confirmed that Defendant was at her house in the evening hours. Defendant denied going to C.P.’s apartment and hypothesized that his fingerprint was found in her vehicle because he had many sexual encounters with women in different vehicles. He denied gang membership and weapon possession, and he claimed that he was in fact a target of the Mexican Mafia.

¶19 After considering the evidence and counsels’ arguments, the jury found Defendant guilty on all counts: kidnapping, armed robbery, aggravated assault, and threatening or intimidating as against both C.P. and V.A.; misconduct involving weapons; theft of means of transportation; and assisting a criminal street gang. In the aggravation phase, the jury found that Defendant was on felony parole when he

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

STATE v. LOPEZ
Decision of the Court

committed the offenses. Further, with respect to all of the counts except for misconduct involving weapons, the jury found that: (1) the offenses involved the infliction or threatened infliction of serious physical injury; (2) Defendant committed the offenses as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value; (3) the offenses caused physical, emotional, or financial harm to the victims; (4) Defendant had previous involvement in violent offenses; (5) Defendant previously served time in prison; (6) Defendant had a lengthy criminal record; and (7) there was a need to protect the public from Defendant. With respect to the misconduct involving weapons count, the jury found the latter four aggravating circumstances only.

¶20 The court entered judgment on the jury's verdicts, and sentenced Defendant to aggravated prison terms on each count. The court sentenced Defendant to 22 years of imprisonment for each kidnapping conviction, 22 years of imprisonment for each armed robbery conviction, 15 years of imprisonment for each aggravated assault conviction, 4 years of imprisonment for each threatening or intimidating conviction, 12 years of imprisonment for the misconduct involving weapons conviction, 15 years of imprisonment for the assisting a criminal street gang conviction, and 15 years of imprisonment for the theft of means of transportation conviction.

¶21 Defendant timely appeals his convictions and sentences.

DISCUSSION

I. DEFENDANT'S CONVICTIONS ARE PROPER.

¶22 Having searched the record and considered the issues raised by Defendant, we find no fundamental error in the pretrial or trial proceedings. Defendant was present and represented by counsel at all critical stages. We do not consider Defendant's contention that his counsel was ineffective -- such claims must be raised in a petition for post-conviction relief under Ariz. R. Crim. P. 32. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9 (2002).

¶23 The jury was properly composed of 12 jurors. See A.R.S. § 21-102(A); Ariz. R. Crim. P. 18.1(a). The record reflects no evidence of juror bias or misconduct.

STATE v. LOPEZ
Decision of the Court

- A. The State Presented Proper and Sufficient Evidence to Support the Jury's Verdicts.

¶24 Defendant contends that the state violated *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* and Ariz. R. Crim. P. 15.1 require the state to timely disclose material exculpatory evidence. At trial, Defendant argued that the state failed to promptly disclose a color copy of the photograph of him that Michael's brother shared with C.P. and V.A. before they were asked to identify their attacker in the photo-lineup. The state had apparently disclosed a black-and-white copy of the photo. But, according to Defendant, the color copy reflected what the victims actually saw, and it was clearer than the black-and-white copy. Even assuming that the state's disclosure of the color copy was untimely and that the color copy was exculpatory, the state did not violate *Brady*. *Brady* is designed to protect the defendant's right to a fair trial. *State v. Jessen*, 130 Ariz. 1, 4 (1981). "When previously undisclosed exculpatory information is revealed at the trial and is presented to the jury, there is no *Brady* violation." *Id.* Defendant was provided with the color copy before trial, and it was admitted at trial, both in a full-page print and in a smaller-scale, higher-resolution print.

¶25 Concurrent with his *Brady* argument, Defendant argued that the state had improperly "alter[ed] evidence" by showing the jury an edited version of the video recording of his interrogation. Early in the trial, counsel had agreed that the jury should not hear the portion of the interrogation in which Defendant described a prior, unrelated arrest. Accordingly, the state presented a version of the recording that muted that portion, and the court instructed the jurors that the muted portion was irrelevant and they were not to speculate as to its substance. This was proper under Ariz. R. Evid. 403 and 404. But even assuming that the edited version of the recording carried potential prejudice, the jury was ultimately presented with the full and unedited version, at Defendant's insistence over his counsel's advice. And because Defendant affirmatively requested the admission of the unedited version, he cannot now complain of any prejudicial effect that it may have carried.

¶26 Similarly, Defendant cannot complain of any prejudice that may have resulted from the admission of his prison records. Over his counsel's advice, Defendant requested that his records be presented to the jury in their entirety.

¶27 Contrary to Defendant's contention, there is no indication in the record that either his or the victims' statements to law enforcement were coerced. And though he questions the victims' credibility, such

STATE v. LOPEZ
Decision of the Court

issues were for the jury to decide. *State v. Cox*, 217 Ariz. 353, 357, ¶ 27 (2007).

¶28 The state's evidence was sufficient to support Defendant's convictions for kidnapping, armed robbery, aggravated assault, threatening or intimidating, assisting a criminal street gang, misconduct involving weapons, and theft of means of transportation. The state presented evidence that Defendant was a criminal street gang member and prohibited possessor who forced his way into C.P.'s apartment, pointed a gun at her and V.A. while demanding drugs and money, claimed that he was a member of the Mexican Mafia, told them that he was torturing Daniel, threatened to kill them, hog-tied them with electrical cords, demanded their vehicle keys, and drove off in C.P.'s vehicle. Contrary to Defendant's contention, the absence of DNA evidence linking Defendant to C.P.'s apartment did not create error -- the evidence was sufficient to support the jury's verdicts even without the support of DNA evidence. See *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996) ("Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.") (citation omitted).

¶29 A person commits kidnapping under A.R.S. § 13-1304(A)(3) if he "knowingly restrain[s] another person with the intent to . . . [i]nfllict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony." A person commits armed robbery under A.R.S. §§ 13-1902(A) and -1904(A)(1) "if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property," and such person "[i]s armed with a deadly weapon or a simulated deadly weapon." A firearm qualifies as a "deadly weapon." A.R.S. § 13-105(15). A person commits aggravated assault under A.R.S. §§ 13-1203(A)(2) and -1204(A)(2) if he "[i]ntentionally plac[es] another person in reasonable apprehension of imminent physical injury" while "us[ing] a deadly weapon or dangerous instrument." A person commits threatening or intimidating under A.R.S. § 13-1202(A)(1) and (B)(2) "if the person threatens or intimidates by word or conduct . . . [t]o cause physical injury to another person," and the actor is a "criminal street gang member" -- whose status may be established under A.R.S. § 13-105(8) and (9) by tattoos and self-proclamation of membership in an ongoing association of persons whose members "engage in the commission, attempted commission, facilitation, or solicitation of any felony act." A person commits assisting a criminal street gang under

STATE v. LOPEZ
Decision of the Court

A.R.S. § 13-2321(B) if he “commit[s] any felony offense, whether completed or preparatory for the benefit of, at the direction of or in association with any criminal street gang.” A person commits misconduct involving weapons under A.R.S. § 13-3102(A)(4) if he “knowingly . . . possess[es] a deadly weapon or prohibited weapon if [he] is a prohibited possessor.” And finally, a person commits theft of means of transportation under A.R.S. § 13-1814(A)(5) “if, without lawful authority, the person knowingly . . . [c]ontrols another person’s means of transportation knowing or having reason to know that the property is stolen.”

B. The State’s Improper Rebuttal Argument Did Not Deprive Defendant of a Fair Trial.

¶30 Defendant contends that the prosecutor engaged in misconduct. Prosecutorial misconduct is misconduct that “is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal.” *Pool v. Superior Court (State)*, 139 Ariz. 98, 108 (1984) (footnote omitted). One type of prosecutorial misconduct is vouching, which can take two forms: “(1) where the prosecutor places the prestige of the government behind its witness; [or] (2) where the prosecutor suggests that information not presented to the jury supports the witness’s testimony.” *State v. Vincent*, 159 Ariz. 418, 423 (1989).

¶31 On cross-examination, the prosecutor asked Defendant why “you didn’t appear to care too much about [V.A.] when she was crying on the stand and you were joking around over here,” and, later, again referenced “your demeanor and your behavior when [V.A.] was crying on the stand.” A prosecutor may properly comment in closing argument on a testifying defendant’s courtroom demeanor. *State v. McDaniel*, 136 Ariz. 188, 197 (1983), *abrogated on other grounds by State v. Walton*, 159 Ariz. 571 (1989). By extension, we conclude that the prosecutor’s comments, though perhaps heavy-handed, did not constitute prosecutorial misconduct.

¶32 But the prosecutor’s statements during argument were improper. Disputing Defendant’s testimony that his fingerprint was found in C.P.’s vehicle as a result of his frequent liaisons with women, the prosecutor stated in rebuttal argument:

Did you hear [defense counsel] talk about that fingerprint?
Not a whole lot. Not a whole lot. Did you hear him talk

STATE v. LOPEZ
Decision of the Court

about the women showing up in the middle of the night? *I bet you a million dollars he wished his client didn't say that, because that's a tough one as an attorney standing up here trying to defend that; that's a low point in an attorney's life to have to make that argument, because it's absolutely absurd, absurd.* You would have to believe that story about women rolling through in the middle of the night to explain the fingerprint to -- for there to be a reasonable doubt. And it has to be a reasonable doubt here. That story which, again, [defense counsel] elected, understandably, not to repeat to you is *absolutely laughable*

(Emphases added.) By these statements, the prosecutor expressed a personal opinion concerning a credibility determination. This was improper. Ariz. R. Sup. Ct. 42, ER 3.4(e).

¶33 Nonetheless, the impropriety does not require reversal of Defendant's convictions. Prosecutorial misconduct will warrant reversal only where it denied the defendant a fair trial. *State v. Moore*, 108 Ariz. 215, 222 (1972). That is, reversal will be appropriate only where the misconduct, viewed cumulatively, "so infected the trial with unfairness as to make the resulting conviction a denial of due process" and was "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial." *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26 (1998) (citations omitted). Here, we cannot say that the prosecutor's isolated improper statements, when viewed in the context of the entirety of the trial and the evidence, permeated the proceedings and deprived Defendant of a fair trial.

II. DEFENDANT'S SENTENCES ARE UNCLEAR.

¶34 The state presented sufficient evidence to support the aggravating circumstances found by the jury under A.R.S. § 13-701(D)(1), (6), (9), and (25). The evidence showed that Defendant threatened C.P. and V.A. with serious physical injury, demanded money and drugs, took their personal items and C.P.'s vehicle, and harmed them physically, emotionally, and financially. The evidence also showed that Defendant was a parolee with a lengthy criminal record that included seven prior felony offenses (some violent) committed on at least three different occasions, and several prison terms.

¶35 The court legally sentenced Defendant as a class three repetitive offender for non-dangerous offenses, *see* A.R.S. § 13-703, and imposed legal aggravated terms for each conviction, *see* A.R.S. §§ 13-703,

STATE v. LOPEZ
Decision of the Court

-1304(A)(3) & (B), -1904(A)(1) & (B), -1204(A)(2) & (D), -1202(A)(1) & (B)(2), -2321(B) & (D), -3102(A)(4) & (M), -1814(A)(5) & (D).

¶36 But the court's oral and written pronouncements of sentence arranged the prison terms in an inconsistent manner. In its oral pronouncement of sentence, the court stated that the sentences for Counts 1, 3, 5, 7, 8, 10, and 11 would run concurrent with each other, and that the sentences for Counts 2, 4, 6, and 9 would run concurrent with each other and consecutive to the sentences for the first grouping of counts, for a practical total of 44 years in prison. But in the minute entry, the court purported to impose a different and also internally inconsistent arrangement, ordering that all of the sentences were concurrent, that all of the sentences except for the sentence for Count 2 were concurrent, and that all of the sentences except for the sentence for Count 1 were concurrent. The written order of confinement also purported to describe a different and internally inconsistent scheme, concomitantly ordering that all of the sentences were concurrent, that all of the sentences except for the sentence for Count 2 were concurrent, and that all of the sentences except for the sentence for Count 6 were concurrent.

¶37 We cannot discern the court's actual intent by reference to the record. Accordingly, we must remand the case to the superior court for the purpose of determining what sentence was actually imposed. *State v. Bowles*, 173 Ariz. 214, 216 (App. 1992).

CONCLUSION

¶38 For the reasons set forth above, we affirm Defendant's convictions but remand the case to the superior court for clarification of his sentences.



Ruth A. Willingham · Clerk of the Court
FILED : ama