IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA,
Appellee,

v.

RENE FRANK REYES,
Appellant.

No. 1 CA-CR 15-0260
FILED 8-9-2016

Appeal from the Superior Court in Maricopa County
CR2014-000352-001
The Honorable Rosa Mroz, 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 Tennie B. Martin
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Lawrence F. Winthrop and Judge Donn Kessler joined.

S W A N N, Judge:

¶1 Rene Frank Reyes ("Defendant") appeals his convictions for unlawful use of a means of transportation, assault, possession or use of dangerous drugs, and possession of drug paraphernalia.

¶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, found no arguable nonfrivolous question of law, and 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). Counsel did not identify any issues for review, but Defendant filed a supplemental brief identifying two issues. He asserts that the court erred in denying his *Batson* challenge, and that the prosecutor knowingly used perjured testimony to obtain his conviction, both of which would be fundamental errors requiring reversal.

¶3 Having searched the record and considered the briefings, we find no fundamental error.

FACTS AND PROCEDURAL HISTORY

¶4 Defendant and Victim were in a relationship and had lived together at Victim's house for about thirteen years. In February 2014, the two had an argument during which Defendant punched Victim in the face several times, hit her with a chair, and kicked her. He then left in Victim's vehicle. A couple of days later when Defendant had not returned the vehicle, Victim called a member of her family to help her locate it. When they did not find it, Victim reported the vehicle stolen. The responding officer noticed at the time that Victim had visible bruises, consistent with Victim's report that Defendant had struck her. Defendant had called several times saying he would return the vehicle, but he failed to follow through. On February 28, he told Victim he would return the car that day. Victim called the police, and when Defendant returned to Victim's house, police were waiting and blocked the driveway.

¶5 Defendant initially refused to exit the vehicle. When he did get out of the vehicle, one of the officers observed that Defendant was sweaty and had glassy eyes, leading the officer to believe that he was under the influence of drugs. Then, he ran from the police and only stopped when the police sent a dog after him. In the car, officers found a methamphetamine pipe on the driver's-side floorboard and a small black plastic bundle on the center console containing what was later determined to be a usable amount of methamphetamine. Police also found clothing and personal items belonging to Defendant in the vehicle. Defendant was charged with unlawful use of means of transportation, a class 5 felony; assault, a class 1 misdemeanor; possession or use of dangerous drugs, a class 4 felony; and possession or use of drug paraphernalia, a class 6 felony.

¶6 During jury selection at trial, Defendant's counsel made a *Batson* challenge to the prosecution's strike of jurors 2, 13 and 45, arguing that the prosecutor had exercised his strikes to eliminate minorities from the jury. Because juror 2 selected "other" as his race or ethnicity on the juror form, the court recalled him to clarify if he belonged to a minority group. He refused to answer saying "I don't like labels," though he eventually revealed he was born in Puerto Rico. The court found that Defendant made the prima facie showing of discrimination and questioned the prosecutor on the reasons for his strikes. The prosecutor explained that juror 13 had family members with drug offenses and the spouse of juror 45 had done criminal law work. He stated that he struck juror 2 because "[h]e seemed evasive and kind of odd in his demeanor." The court found the prosecutor's reasons for the strikes to be race neutral and rejected the challenge, ruling that the strike of juror 2 "had nothing to do with race. It had everything to do with . . . demeanor."

¶7 The jury found Defendant guilty on all counts. It additionally found that he was on probation at the time of the offenses and found one aggravator for counts 1 and 2: the offenses caused physical, emotional or financial harm to the victim. The court sentenced Defendant to jail for 6 months for assault, and to prison for 7.5 years for unlawful use of means of transportation, 12 years for possession or use of dangerous drugs, and 4.5 years for possession of paraphernalia, with 275 days of presentence incarceration credit. The court also imposed a fine of $1,830.

DISCUSSION

I. THE TRIAL COURT DID NOT ERR IN REJECTING DEFENDANT'S *BATSON* CHALLENGE.

¶8 Defendant asserts that the court fundamentally erred when it rejected his *Batson* challenge, because the prosecution eliminated all the potential minority jurors with its peremptory strikes. A *Batson* challenge has three components:

> (1) the party challenging the strikes must make a prima facie showing of discrimination; (2) the striking party must provide a race-neutral reason for the strike; and (3) if a race-neutral explanation is provided, the trial court must determine whether the challenger has carried its burden of proving purposeful racial discrimination.

State v. Bustamante, 229 Ariz. 256, 260, ¶ 14 (App. 2012) (citation omitted). The third component requires the court to evaluate the credibility of the state's explanation of its strikes. *Id.* We will not disturb the trial court's determination unless it is clearly erroneous. *State v. Murray*, 184 Ariz. 9, 24 (1995).

¶9 It is certainly true that all potential jurors who were minorities were dismissed and that the prosecution did use its peremptory strikes to remove the last three people of color from the jury. The court found that Defendant made the prima facie showing of discrimination and questioned the prosecutor on the reasons for his strikes. Defense counsel accepted the race-neutral explanations for jurors 13 and 45 and only seriously challenged juror 2. The prosecutor explained that juror 2 "seemed evasive and kind of odd in his demeanor." When juror 2 was questioned privately, he was uncooperative and refused to answer the court's questions directly, which supported the prosecutor's assertion that the juror was evasive. The court found the prosecution's explanation for striking juror 2 was race-neutral and not evidence of purposeful discrimination. On the record here, we cannot say that the trial court committed error, much less fundamental error.

II. THE STATE DID NOT INTRODUCE PERJURED TESTIMONY.

¶10 Defendant contends that the prosecutor knowingly introduced perjured testimony at trial. A person commits perjury by "making . . . [a] false sworn statement in regard to a material issue, believing it to be false," or "[a] false unsworn declaration . . . or statement

in regard to a material issue that the person subscribes as true under penalty of perjury, believing it to be false." A.R.S. § 13-2702(A). And if the state knowingly uses perjured or false testimony it "is a denial of due process and is reversible error without the necessity of a showing of prejudice to the defendant." *State v. Ferrari*, 112 Ariz. 324, 334 (1975).

¶11 Defendant first asserts that the prosecutor and Victim falsely reported the date of the incident. Victim testified that Defendant came to her house, struck her and took her vehicle on Valentine's Day, but the complaint and indictment state that the incident causing her injuries occurred on February 19. According to the officer who took Victim's statement, Victim reported to him the incident occurred around February 19, though he also testified that witnesses often get dates wrong. And in his brief, Defendant claims that the incident, in fact, took place on February 19, but Defendant testified at trial that he believed it was February 20. Given that even Defendant reported two different dates for the incident, the variance in dates is more likely the result of imperfect memories than lies. In any event, there is no evidence of perjury.

¶12 "A technical or formal defect in an indictment may be remedied by amendment," and "[a] defect is technical or formal if it does not change the nature of the offense charged or prejudice the defendant in any way." *State v. Jones*, 188 Ariz. 534, 544 (App. 1996), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239 (2012); *see* Ariz. R. Crim. P. 13.5(b). The state moved to amend the date on the indictment to February 14 to conform to Victim's testimony, and the court granted the motion. As the exact date of the offense is immaterial to the nature of the offense, any inconsistency was cured by the amendment to the indictment.

¶13 Defendant next contends that the prosecutor knowingly elicited false testimony from Victim that Defendant had struck and injured her. Victim testified that Defendant hit her in the head with his fists and then hit her with a metal chair, which left her with bruises and a "busted lip." Victim's cousin also testified that Victim had bruises on her arms and legs when the cousin came over a few days after the incident. The officer who first responded to Victim's call also corroborated Victim's testimony, testifying that Victim had "a bruise to the back of her head, kind of [a] reddish bruise, and she had the similar on her stomach, about three inches around." Defendant denied striking Victim, testifying that he did not see any bruises on her. Defendant, however, has presented no evidence demonstrating that the testimony of Victim, her cousin and the police officer were false, and the fact that he disagrees with their testimony does not make it perjury.

¶14 We find no error elsewhere in the record. Defendant was present and represented at all critical proceedings. The jury properly contained eight jurors and two alternates. A.R.S. § 21-102(B). Defendant elected to testify on his own behalf. And the prosecutor made no improper arguments at trial.

¶15 The evidence that the state presented at trial was properly admissible and sufficient to support the jury's verdicts and its findings of aggravating factors. As charged here, unlawful use of a means of transportation requires that a person "[k]nowingly take[ ] unauthorized control over another person's means of transportation." A.R.S. § 13-1803(A)(1). The state presented evidence that Defendant did not have permission to use Victim's vehicle, and Defendant admitted that he had exclusive control of the vehicle for a period of time after he took it. A person commits assault when he intentionally or knowingly "caus[es] any physical injury to another person." A.R.S. § 13-1203(A)(1). Here, Victim testified that Defendant struck her several times, both with his extremities and a chair; Victim's cousin and a police officer also testified that Victim had bruises after the incident. Finally, A.R.S. § 13-3407(A)(1) prohibits a person from knowingly possessing or using a dangerous drug; methamphetamine is a dangerous drug under A.R.S. § 13-3401(6)(c)(xxxviii). And A.R.S. § 13-3415(A) prohibits possessing drug paraphernalia with an intent to use. When Defendant returned the vehicle to Victim's house, police found a baggie containing methamphetamine in the vehicle and a meth pipe under the driver's-side seat. As Defendant had been the sole driver of the vehicle for a period of time, the jury could have reasonably inferred that he was in knowing possession of the methamphetamine and the pipe with the intent to use them.

¶16 At sentencing, Defendant was given an opportunity to speak, and the court stated on the record the evidence and materials it considered in imposing the sentences. Defendant stipulated to the admission of his criminal record, including four prior felonies. The sentencing minute entry seems to indicate that the sentence for count 2 runs consecutively to the other sentences, *see* A.R.S. § 13-711(A), but the court's oral pronouncement ordered all sentences to run concurrently. "Where there is a discrepancy between the oral sentence and the written judgment, the oral pronouncement controls." *State v. Hanson*, 138 Ariz. 296, 304-05 (App. 1983); *see also* Ariz. R. Crim. P. 26.16. Thus, the sentences are concurrent, and the minute entry is modified accordingly. The court imposed legal sentences for the offenses, *see* A.R.S. §§ 13-701(D)(9), -703(J), -707(A)(1), -708(A), and correctly calculated Defendant's presentence incarceration credit under A.R.S. § 13-712(B).

CONCLUSION

¶17 For the foregoing reasons, we affirm Defendant's convictions, and his sentences as modified.

¶18 Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Defendant of the status of this appeal and his future options. *Id.* Defendant has 30 days from the date of this decision to file a petition for review *in propria persona*. *See* Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has 30 days from the date of this decision in which to file a motion for reconsideration.

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