IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

THOMAS FORREST BOLTON, *Appellant*.

No. 1 CA-CR 15-0432
FILED 10-18-2016

Appeal from the Superior Court in Yavapai County
No. P1300CR201300942
The Honorable Tina R. Ainley, Judge

AFFIRMED IN PART; ONE CONVICTION AND SENTENCE VACATED

COUNSEL

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

Yavapai County Public Defender's Office, Prescott
By John David Napper
Counsel for Appellant

Thomas Forrest Bolton, Kingman
Appellant

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Randall M. Howe joined.

C A T T A N I, Judge:

¶1 Thomas Forrest Bolton appeals his convictions and sentences for sexual assault, kidnapping, and furnishing spirituous liquor to underage persons. Bolton's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), certifying that, after a diligent search of the record, he found no arguable question of law that was not frivolous. Counsel asks this court to search the record for reversible error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30 (App. 1999).

¶2 Bolton filed a supplemental brief arguing that (1) emotional harm is inherent in sexual assault and thus should not have been used as an aggravating factor for sentencing purposes, (2) he was improperly forced to wear a restraining device visible to the jurors during trial, (3) the State failed to reveal that its chief witness received favorable treatment in exchange for his testimony, (4) DNA evidence should have been precluded due to improper collection, testing, and chain of custody, and (5) his former attorney improperly failed to oppose preclusion of the victim's prior sexual conduct and failed to present a witness Bolton requested.

¶3 Additionally, we ordered *Penson*[1] briefing to address whether sufficient evidence supported Bolton's conviction of furnishing spirituous liquor to A.F. For reasons that follow, we vacate that conviction and the resulting sentence, but affirm his other convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND

¶4 On August 30, 2013, Bolton, his wife, and his step-daughter were sitting around a fire and eating pizza with A.F. (the victim) and her boyfriend. A.F. was 16 years old at the time, and her boyfriend was 18. Bolton, his wife, and A.F.'s boyfriend were drinking beer that Bolton had

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1 *Penson v. Ohio*, 488 U.S. 75 (1988).

purchased, and they became heavily intoxicated. A.F. drank an alcoholic malt beverage that had been provided by Bolton's wife.

¶5 Later that evening, Bolton's step-daughter fell asleep inside, and his wife went into the kitchen. As A.F. walked toward the bathroom, Bolton was waiting by his bedroom door, called her into the room, and started taking off both his and her clothing. A.F. told Bolton to stop, but Bolton proceeded to have sexual intercourse with her.

¶6 A few minutes later, A.F.'s boyfriend came into the house, heard a yell from the bedroom, and saw Bolton having intercourse with A.F. After the boyfriend yelled, Bolton ran into the bathroom and A.F. fled through the back door. A.F. and her boyfriend walked home, and the boyfriend's father called the police.

¶7 Bolton was later arrested and charged with, as relevant here, sexual assault (a class 2 felony), kidnapping (a class 2 felony), and two counts of misdemeanor selling or furnishing spirituous liquor to underage persons (A.F. and her boyfriend). Before trial, the State successfully moved to preclude evidence of A.F.'s prior sexual conduct and to allow evidence of A.F.'s prior sexual abuse by her father. The jury found Bolton guilty of both felony offenses, and the superior court found Bolton guilty of both misdemeanor counts. The jury additionally found physical and emotional harm to the victim to be an aggravating factor as to the felony counts.

¶8 The superior court sentenced Bolton to concurrent, aggravated terms of imprisonment for the felony convictions, the longest of which is 14 years flat time, with credit for 239 days of presentence incarceration. The court also imposed 180-day terms of incarceration (time-served) for the misdemeanor offenses, to run concurrently with the felony sentences. Bolton timely appealed.

DISCUSSION

¶9 We ordered *Penson* briefing to address the sufficiency of the evidence supporting Bolton's misdemeanor conviction for furnishing spirituous liquor to A.F. (trial count 3). The State concedes, and we agree, that this conviction lacked sufficient basis. The record shows that Bolton's wife gave A.F. the malt beverage, and there is no basis to conclude that she did so as his accomplice. Accordingly, we vacate Bolton's conviction and sentence for furnishing spirituous liquor to A.F. (trial count 3).

¶10 Bolton raises five issues in his *pro se* supplemental brief. First, he argues that emotional harm is inherent in the offense of sexual assault,

and thus the superior court erred by using it as an aggravating factor at sentencing. We review de novo whether a particular aggravating factor is an element of a substantive offense and whether the court properly used the factor to impose an aggravated sentence. *State v. Tschilar*, 200 Ariz. 427, 435, ¶ 32 (App. 2001).

¶11 Conduct that establishes an element of the charged offense may not be used as an aggravating factor unless it "rises to a level beyond that which is merely necessary to establish an element of the underlying crime." *See State v. Germain*, 150 Ariz. 287, 290 (App. 1986). But emotional harm to the victim is not an element of either sexual assault or kidnapping. *See* Ariz. Rev. Stat. ("A.R.S.") § 13-1406(A) (defining sexual assault as "intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person"); A.R.S. § 13-1304(A)(3) (defining kidnapping as "knowingly restraining another person with the intent to . . . [i]nflict death, physical injury or a sexual offense on the victim").[2] Accordingly, the court did not err by using emotional harm to the victim as a factor supporting aggravated sentences.

¶12 Second, Bolton argues that he was forced to wear a restraining device on his leg during trial, and that he was prejudiced because the jury could see the device through his pants. Because Bolton did not object before the superior court, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19–20 (2005).

¶13 Generally, a defendant has the right to be free from visible restraints and to wear civilian clothing in the courtroom throughout trial. *State v. Hardy*, 230 Ariz. 281, 292, ¶ 54 (2012) (citing *Deck v. Missouri*, 544 U.S. 622, 629 (2007)); *State v. Basset*, 215 Ariz. 600, 602, ¶ 10 (App. 2007). Although Bolton asserts that the jurors could see the restraint under his pant leg when he entered the courtroom on the second day of trial, the record reflects that the jury was not present at that time. Moreover, even if the jurors had been able to see something under Bolton's pant leg, Bolton did not make any record that this glimpse of his restraints resulted in prejudice. *See State v. Apelt*, 176 Ariz. 349, 361 (1993). Accordingly, Bolton has not established error, fundamental or otherwise.

¶14 Third, Bolton argues that the State failed to disclose a leniency agreement with A.F.'s boyfriend in exchange for his testimony against Bolton. The State cannot knowingly conceal leniency agreements entered

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[2] Absent material revisions after the relevant date, we cite a statute's current version.

into with material witnesses. *Giglio v. United States*, 405 U.S. 150 (1972). But here, Bolton offers no evidence of any secret leniency agreement, and he did not develop (or seek to develop) any such evidence before the superior court even though his counsel used the boyfriend's convictions (resulting in supervised probation and mental health treatment) as impeachment material at trial. Thus, his claim fails. *See State v. Serna*, 163 Ariz. 260, 265 (1990) (noting a defendant's burden to make a record of an alleged secret leniency agreement).

¶15 Fourth, Bolton argues that the superior court should have precluded DNA evidence from Bolton's bedsheet and A.F.'s underwear as unfairly prejudicial due to improper collection and testing, as well as chain of custody concerns. Because Bolton did not object to admission of the evidence at trial, we review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. at 567, ¶¶ 19–20; *State v. Pandell*, 215 Ariz. 514, 528, ¶ 44 (2007).

¶16 The court admitted evidence of three DNA tests, two DNA samples from Bolton's bedsheet and one DNA sample from A.F.'s underwear; Bolton could not be excluded as a minor contributor to the DNA from A.F.'s underwear. Although the victim removed her clothing outside the view of police officers, the State offered evidence at trial that the clothing remained unaltered once A.F. gave it to the officer. Bolton's assertion that the evidence was mishandled is speculative at best. *See State v. Spears*, 184 Ariz. 277, 287 (1996). Bolton has offered no basis from which to conclude admission of the DNA evidence was unfairly prejudicial.

¶17 Fifth, Bolton asserts that his former attorney improperly failed to oppose the State's motion to preclude evidence of the victim's prior sexual conduct, and that his trial counsel improperly failed to call Bolton's wife as a witness. These claims assert ineffective assistance of counsel, which may only be raised in a Rule 32 proceeding for post-conviction relief, not on direct appeal. *See State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20 (2007); *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9 (2002). We therefore do not address the merits of this argument.

¶18 We have reviewed the record for reversible error and, except as regards the furnishing spirituous liquor to A.F. conviction (trial count 3), we find none. *See Leon*, 104 Ariz. at 300. Bolton was present and represented by counsel at all stages of the proceedings against him. The record reflects that the superior court afforded Bolton all his constitutional and statutory rights, and that the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The court

conducted appropriate pretrial hearings, and the evidence presented at trial and summarized above was sufficient to support the guilty verdicts for sexual assault, kidnapping, and furnishing spirituous liquor to A.F.'s boyfriend. Bolton's sentences fall within the range prescribed by law, with proper credit given for presentence incarceration.

CONCLUSION

¶19 We vacate Bolton's conviction and sentence for furnishing spirituous liquor to A.F. (trial count 3), but affirm his other convictions and sentences. After the filing of this decision, defense counsel's obligations pertaining to Bolton's representation in this appeal will end after informing Bolton of the outcome of this appeal and his 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 (1984). Bolton shall have 30 days from the date of this decision to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

AMY M. WOOD • Clerk of the Court
FILED: AA