IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ANTHONY ARTEZ WHITMORE, *Appellant*.

No. 1 CA-CR 16-0276
FILED 7-25-2017

Appeal from the Superior Court in Maricopa County
No. CR2013-002730-003
The Honorable Warren J. Granville, Judge

AFFIRMED AS MODIFIED

COUNSEL

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

Maricopa County Legal Advocate's Office, Phoenix
By Frances J. Gray
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Chief Judge Michael J. Brown and Judge Maurice Portley[1] joined.

T H U M M A, Judge:

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297 (1969). Counsel for defendant Anthony Artez Whitmore has advised the court that, after searching the entire record, counsel has found no arguable question of law and asks this court to conduct an *Anders* review of the record. Whitmore was given the opportunity to file a supplemental brief pro se, and has done so. This court has reviewed the record and has found no reversible error. Accordingly, Whitmore's convictions and resulting sentences are affirmed as modified, so that the sentence on Count 1 is for life in prison, without the possibility of release on any basis until the completion of the service of 25 calendar years in prison.

FACTS[2] AND PROCEDURAL HISTORY

¶2 One day in early December 2012, D.M. was killed during an armed robbery outside of Chica's Cabaret in Phoenix. Whitmore, Chica employee C.K. and others were arrested and charged with various offenses. C.K. allegedly was responsible for informing the others about how much cash D.M. was carrying and where D.M. was located. As relevant here, the indictment charged Whitmore with first degree murder, a Class 1 felony (Count 1); conspiracy to commit armed robbery, a Class 2 felony (Count 2); armed robbery, a Class 2 felony (Count 3); and discharge of a firearm at a structure, a Class 3 felony (Count 5).

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[1] The Honorable Maurice Portley, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

[2] On appeal, this court views the evidence in the light most favorable to sustaining the verdict and resolves all reasonable inferences against the defendant. *State v. Karr*, 221 Ariz. 319, 320 ¶ 2 (App. 2008).

¶3 Through pretrial motion practice, Whitmore unsuccessfully challenged the presentation to the grand jury. During a "free talk" with law enforcement in 2013, C.K. implicated Whitmore and other co-defendants as the robbers and gunmen. C.K. said Whitmore was responsible for firing the shots that killed D.M. When asked "when you were at [D.M.'s] car . . . who was the 2 robbers that came up," C.K. responded "I want to say" Whitmore. When asked "who was the 2 when you got pushed out of the way," C.K. said it was "[Whitmore] and Quincey. When I got pushed out of the way they actually start[ed] firing." C.K. added Whitmore was "the one who pushed me out of the way" before shooting D.M., and Whitmore "was shooting then he took off running."

¶4 In March 2014, C.K. again participated in a free talk with Phoenix Police. After reviewing the March 2014 free talk, the State made a plea offer to C.K. In September 2014, the State notified Whitmore that C.K. had entered into a plea agreement and "disclosed via email to Whitmore's attorney . . . the free talk recording and agreement." In response, Whitmore moved to dismiss with prejudice or to preclude C.K. from testifying, arguing the State's disclosure of the free talk was untimely. In denying the motion, the superior court found that the State's disclosure was not improper. The court noted "a long-established policy that free talks are conducted and disclosures are not made until an agreement is finalized," adding that "[a]ny procedure that would require immediate disclosure, regardless of whether a testimonial agreement is reached, would have a 'chilling effect' on this important option for law enforcement."

¶5 Whitmore moved in limine to preclude the factual basis of C.K.'s plea agreement (which was included in the written plea agreement), arguing it (1) was inadmissible hearsay and (2) lacked foundation. The court granted Whitmore's motion and redacted several pages of the plea agreement, adding it would "give the redaction instruction to the jurors at the time the exhibit is introduced as well as at the final instructions."

¶6 Trial began in January 2016 and lasted for more than 20 days, with numerous testifying witnesses and numerous exhibits received in evidence. C.K. testified that during the robbery in the Chica's parking lot, Whitmore told her to move, and then nudged her out of the way, adding that she also saw Whitmore with a gun. C.K. testified that when Whitmore drew his gun, there was a "tug of war" between Whitmore and D.M. for the gun before she saw "the gun go off." When asked whether Whitmore or another co-defendant fired the gun, she testified "[i]t was [Whitmore] that fired and it looked like he fired the last two shots . . . in the air."

¶7 The jury found Whitmore guilty on all four counts, and the court imposed the following sentences: for Count 1, "Life with the possibility of parole after 25 calendar year(s) . . . upon release on Counts 2 and 3;"[3] for Counts 2 and 3, concurrent prison terms of 10.5 years with 1,000 days of presentence incarceration credit; and for Count 5, 7.5 years in prison concurrent as to Count 1 and consecutive to Counts 2 and 3. This court has jurisdiction over Whitmore's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and 13-4033(A)(2017).[4]

DISCUSSION

¶8 Counsel for Whitmore advised this Court that after a diligent search of the entire record, counsel has found no arguable question of law. In his supplemental pro se brief, Whitmore raises the following issues: (1) "prosecutorial misconduct by [the] knowing use of perjury;" (2) the superior court abused its discretion by "allowing [C.K.] to testify;" (3) the conviction was based on "uncorroborated testimony" and (4) a "[v]iolation of the Double Jeopardy Clause." This court addresses these arguments in turn.

¶9 First, Whitmore argues he was denied a fair trial due to prosecutorial misconduct, when "the State knowingly allowed the use of perjured testimony from State witness" C.K. "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes*, 193 Ariz. 72, 79 ¶ 26 (1998) (internal quotation omitted). "A person commits perjury by making . . . [a] false sworn statement in regard to a material issue, believing it to be false." A.R.S. § 13-2702(A)(1). Prosecutors "may not knowingly allow a witness to testify falsely." *State v. Rivera*, 210 Ariz. 188, 190 ¶ 11 (2005). "Knowing use of perjured or false testimony by the prosecution is a

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[3] The Legislature abolished parole in 1993. *See* 1993 Ariz. Sess. Laws, ch. 255 § 86 (1st Reg. Sess.) (amending A.R.S. § 41–1604.06); *see also* A.R.S. § 13–751(A) (outlining sentences for first degree murder). Given this change, the sentence properly is for life, without the possibility of release on any basis until the completion of the service of 25 calendar years in prison, A.R.S. § 13-751(A)(2), and is modified accordingly, *see* Ariz. R. Crim. P. 31.17(b); *accord* A.R.S. § 13-4037(A); *State v. Stevens*, 173 Ariz. 494, 495–96 (App. 1992).

[4] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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).

¶10 Whitmore bases his argument on the State calling C.K. as a trial witness after "she admitted . . . she lied in the first interview" then "changed her story" and said Whitmore was the shooter. In motion practice, Whitmore argued C.K. continuously "shifted from talking about information told to her by [a] Co-defendant . . . to claiming personal knowledge of the events at issue herein." The superior court allowed C.K. "to testify to what she observed by firsthand knowledge . . . as being a co-conspirator," but precluded "as hearsay and lack of foundation statements of issues that she was advised about after the fact." Whitmore has shown no error in this ruling.

¶11 During cross-examination at trial, Whitmore asked C.K. about inconsistent statements she made in pre-trial interviews. She never admitted that she knowingly made false statements during the interviews, but claimed she was intoxicated during her first interview and had said she was not sure about what she had perceived during the robbery. She also testified that, during her 2013 free talk, her recollection of the shooting was based on what she had perceived in addition to versions of the story that her brother told her after the shooting. Although fodder for cross-examination, as happened at trial here, Whitmore has not shown C.K. provided perjured testimony. As a result, Whitmore has not shown prosecutorial misconduct by the knowing use of perjury.

¶12 Second, Whitmore has not shown the superior court abused its discretion in allowing C.K. to testify. This argument is based on a claim that the State, by disclosing the March 2014 free talk interview transcript in September 2014, violated its disclosure obligations. By rule, the State was required to disclose "[a]ll statements of the defendant and of any person who will be tried with the defendant." Ariz. R. Crim. P. 15.1(b)(2). "[I]mposing sanctions for non-disclosure is a matter to be resolved in the sound discretion of the trial judge, and that decision should not be disturbed absent a clear abuse of discretion." *State v. Armstrong*, 208 Ariz. 345, 353–54 ¶ 40 (2004) (internal quotation omitted).

¶13 After considering the party's filings, the superior court denied Whitmore's request to preclude C.K.'s testimony based on the timing of the disclosure of the free talk transcript. In doing so, the court noted that "[a]ny procedure that would require immediate disclosure [of free talks], regardless of whether a testimonial agreement is reached, would have a

'chilling effect' on this important option for law enforcement." After stating the disclosure requirements in Rule 15.1(b)(2), the court applied *Armstrong*, which cautions that the court "should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible." 208 Ariz. at 354 ¶ 41 (internal quotation omitted). *Armstrong* directed the court to look at all "surrounding circumstances," including "how vital" challenged testimony is to the case, "whether the opposing party will be surprised and prejudiced" and whether the claimed violation "was motivated by bad faith or willfulness." *Id.* Applying this analysis, the superior court found that the State disclosed C.K's March 2014 free talk immediately after she entered her plea and several weeks before the then-scheduled trial, which was later continued several times and did not begin for more than a year after the disclosure. The court also concluded that Whitmore knew there was a potential that C.K. would enter into a testimonial agreement, concluding that "lesser prejudice . . . would be suffered by [Whitmore] . . . by allowing [her] testimony than would the harm be to the interests of justice if" her testimony was precluded. On this record, Whitmore has not shown the superior court abused its discretion in reaching this conclusion. *Armstrong*, 208 Ariz. at 355 ¶ 43.

¶14 Third, Whitmore asserts that the evidence was insufficient to support his conviction. Whitmore argues that the trial testimony of one witness was not corroborated in certain respects and, therefore, his convictions must be vacated. For this assertion, Whitmore cites *State v. Forgan*, which construed A.R.S. §13-136 (1973) as stating that "[a] conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which, in itself and without aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." 19 Ariz. App. 124, 125-26 (1973). That statute, however, was repealed in 1977 and has no application here. *See* 1977 Ariz. Sess. Laws ch. 142, § 2. Nor has Whitmore cited any authority for his assertion that under a "common law rule," any required corroboration was lacking.

¶15 The specific evidence Whitmore challenges also complies with the corroboration requirement that Whitmore advocates. During trial, this witness testified that during his initial interview, he did not disclose everything he knew because he did not want to "have [anything] to do with this." During trial, this witness testified that Whitmore showed him the phone and a text message from C.K. advising them to come and rob the victim. This witness added that Whitmore continued to use his phone for an extended period, stating Whitmore "wanted [him] to go with them down there and rob" D.M. This witness was cross-examined by Whitmore's

counsel, where he verified consistent statements that he made during his pre-trial interviews. After hearing all the evidence, and weighing the credibility of the witnesses, the jury found Whitmore guilty. Even if the corroboration requirement applied as alleged by Whitmore, other trial evidence sufficiently corroborates evidence of Whitmore's guilt. *See State v. Edwards*, 136 Ariz. 177, 185-86 (1983) (citing cases). Because it is supported by substantial evidence, this court will not disturb the jury's verdicts. *See State v. Fimbres*, 222 Ariz. 293, 297 ¶ 21 (explaining finder-of-fact, not appellate court, weighs evidence and assesse witness credibility).

¶16 Fourth, Whitmore argues double jeopardy violations. Under the double jeopardy clause, "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Whitmore was convicted of four different offenses. Whitmore asserts the "murder and discharging a firearm at a structure using the same victim, same gun and same time" is a double jeopardy violation, and that the same arguments "warrants reversal" of the conspiracy to commit armed robbery and armed robbery offenses as well. In determining whether double jeopardy applies, "the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *State v. Cope*, 241 Ariz. 323, 325 ¶ 8 (App. 2016).

¶17 Count 1 charged Whitmore with felony murder, alleging that he "committed or attempted to commit Armed Robbery" in violation of "A.R.S. § 13-1904, and in the course of doing so "caused the death of [D.M.] in violation of A.R.S. §13-1101." Count 5 charged Whitmore with "knowingly discharg[ing] a firearm at a non-residential structure . . . in violation of A.R.S. § 13-1211." These charges are not based on the same offense and, accordingly, do not violate Whitmore's double jeopardy rights. Whitmore argues a double jeopardy violation because the offenses occurred at the same time with the same victim, an argument that misconstrues his rights. Because the conduct required for a conviction for Count 1 (felony murder based on actual or attempted armed robbery) differs from that required for a conviction of Count 5 (knowing discharge of a firearm at a non-residential structure), Whitmore's double jeopardy claim based on those two counts fails. *See Cope*, 241 Ariz. at 325 ¶ 8. ("to avoid double jeopardy, it must be possible to violate one statute without violating the other.").

¶18 Turning to the conspiracy to commit armed robbery and armed robbery convictions, the sentences for these two offenses were concurrent, a fact Whitmore's argument does not address. *See* A.R.S. § 13-

116 ("An Act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent."); *see also* A.R.S. § 13-1003 ("A person commits conspiracy if, with the intent to promote or aid the commission of an offense, such person agrees with one or more persons that at least one of them or another person will engage in conduct constituting the offense and one of the parties commits an overt act in furtherance of the offense."); A.R.S. § 13-1904 ("A person commits armed robbery if, in the course of committing robbery . . . [the person] [i]s armed with a deadly weapon or . . . [u]ses or threatens to use a deadly weapon."). Again, Whitmore has not shown how the convictions violated his double jeopardy rights. *See also State v. Cook*, 185 Ariz. 358, 361 (App. 1995) ("If each statute does contain an element not found in the other, then the offenses are not the same and the double jeopardy bar does not apply.").

CONCLUSION

¶19 This court has read and considered counsel's brief and Whitmore's pro se supplemental brief, and has searched the record provided for reversible error and has found none. *Leon*, 104 Ariz. at 300; *State v. Clark*, 196 Ariz. 530, 537 ¶ 30 (App. 1999). Accordingly, Whitmore's convictions and resulting sentences are affirmed as modified, so that the sentence on Count 1 is for life in prison, without the possibility of release on any basis until the completion of the service of 25 calendar years in prison.

¶20 Upon the filing of this decision, defense counsel is directed to inform Whitmore of the status of the appeal and of his future options. Defense counsel has no further obligations unless, upon review, counsel identifies an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584–85 (1984). Whitmore 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