IN THE
# ARIZONA COURT OF APPEALS
**DIVISION ONE**

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STATE OF ARIZONA, *Appellee*,

*v.*

JUAN MANUEL CHAVEZ, *Appellant*.

No. 1 CA-CR 16-0305
FILED 2-28-2017

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Appeal from the Superior Court in Maricopa County
No. CR2014-101311-001
The Honorable Carolyn K. Passamonte, Judge *Pro Tempore*

**AFFIRMED**

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COUNSEL

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

Michael J. Dew Attorney at Law, Phoenix
By Michael J. Dew
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Randall M. Howe joined.

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**K E S S L E R**, Judge:

**¶1** Appellant Juan Manuel Chavez was tried and convicted of attempted aggravated robbery, a class 4 felony, and sentenced to 4.5 years' imprisonment. Counsel for Chavez filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530 (App. 1999). Finding no arguable issues to raise, counsel requests this Court search the record for fundamental error. Chavez filed a supplemental pro per brief raising several issues we address below. For the reasons that follow, we affirm Chavez's conviction and sentence.

**FACTUAL AND PROCEDURAL HISTORY**

**¶2** Around midnight on January 9, 2014, EC, a uniformed hotel security guard, noticed an altercation outside the main lobby of a Phoenix hotel. Chavez was arguing with another man, NS, over a bag in NS's possession. EC described the situation as a "tug of war" between Chavez and NS over the bag. NS testified that Chavez tried to pull the bag from his grip and warned NS that "you don't want to hit a Mexican." While Chavez and NS were struggling over the bag, Chavez called an associate over to help him. Chavez's associate threw a punch at NS. EC testified it appeared Chavez and his associate were the aggressors and that NS was attempting to get to EC for assistance.

**¶3** EC instructed the parties to move closer to the hotel lobby and to calmly wait for the police. Chavez insisted that NS had stolen his belongings and had them in his bag. NS opened his bag to show that it did not contain any of Chavez's belongings. EC observed that the bag was filled with pamphlets and fliers for a church. NS testified the bag contained resumes, mail, and biblical literature.

**¶4** Chavez grabbed NS and they began to fight. EC intervened in the fight and was hit by Chavez. At this point, EC warned he was about to use pepper spray and then proceeded to pepper spray the entire group. This ended the fighting. EC then ordered Chavez to lay on the ground until the

police arrived, but Chavez refused to comply. EC had to physically restrain Chavez, who managed to hit EC two or three more times. With the assistance of an individual from the crowd, EC was able to handcuff Chavez until the police arrived. EC declined medical attention and NS testified his only injuries were due to the pepper spray.

**¶5** Chavez was arrested and charged with one count of attempted aggravated robbery, a class 4 felony. During trial, Juror 3 became bedridden and was unable to come to court. Juror 3 was excused on agreement of both parties, leaving eight jurors and an alternate.

**¶6** Additionally, Juror 2 informed the court that he saw a chain of prisoners from one of the other criminal courts in black and white jumpsuits being led away. Chavez was not one of the prisoners seen by Juror 2. The court questioned Juror 2 in the presence of counsel but outside the presence of the jury whether what he saw would affect his ability to be fair and impartial in this case. Juror 2 had not discussed what he saw with any other jurors. Defense counsel had no objections to Juror 2 remaining on the jury.

**¶7** Chavez was convicted after a jury trial and sentenced to 4.5 years' imprisonment. Chavez timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2016) and 13-4033(A)(1) (2010).[1]

## DISCUSSION

**¶8** In an *Anders* appeal, this Court must review the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to her defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005) (citation omitted). To obtain reversal for fundamental error, the defendant bears the burden to show the error was prejudicial. *Id*. at ¶ 20.

### I. Sufficiency of Evidence

**¶9** In reviewing the sufficiency of evidence at trial, "[w]e construe the evidence in the light most favorable to sustaining the verdict,

[1] We cite to the current version of statutes unless changes material to this decision have occurred.

and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12 (1998) (citation omitted). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25 (1976)).

**¶10** Chavez was convicted of attempted aggravated robbery. To constitute an attempt, a person must act "with the kind of culpability otherwise required for commission of an offense, [and i]ntentionally does or omits to do anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission" of the intended offense. A.R.S. § 13-1001(A)(2) (2016). The crime of aggravated robbery requires proof of the following: (1) the taking of the property of another person; (2) the taking was from the other person's person or immediate presence; (3) the taking was against the other person's will; (4) the taking involved the use or threat to use force against any person with the intent to coerce surrender of the property or to prevent resistance to taking or keeping the property; and (5) the taking was aided, in the course of committing the robbery, by an accomplice actually present at the scene. *See* A.R.S. §§ 13-1903(A) (2016); 13-1902(A) (2016).

**¶11** Video footage and eye witness testimony establish that Chavez was struggling with NS over a bag. NS described the contents of the bag before showing them to EC, who believed NS's claim the bag was his. Furthermore, the bag contained personal effects, including mail, that identified NS. Chavez used both force and the threat of force to attempt to take the bag from NS. Chavez's warning that "[Y]ou don't want to hit a Mexican" was to coerce NS into surrendering his property. Finally, EC's and NS's testimony, as well as the video footage, indicate that Chavez and his associate were working together to rob NS. We find sufficient evidence supports Chavez's conviction.

II. Issues Raised on Appeal

**¶12** In his brief, Chavez raises a number of issues. Several of these appear to relate to other prosecutions against Chavez that were occurring concurrently to this case. These claims include assertions that Chavez's plea deal was the "result of force, threats and promises," the superior court failed to determine if the plea was voluntary, and he was not given the sentence agreed to in the plea bargain. As Chavez did not make a plea agreement here, these issues are moot. Chavez's remaining claims relate to two broad categories: the jury and the conduct of his counsel.

A. Jurors

**¶13** Chavez asserts he was prejudiced by Juror 2's observation of chained prisoners in black and white jumpsuits being led from one of the other courtrooms. Chavez claims Juror 2 saw him being "led back in chain[s] wearing [a] black and white jumpsuit." However, Chavez was always in the courtroom prior to the jury being brought in and was never in a jumpsuit. Furthermore, Juror 2 stated that seeing the prisoners would not affect his ability to be impartial. Neither party had any objection to retaining Juror 2. We find no error.

**¶14** In addition, Chavez claims the court informed the potential jurors during voir dire that he was going to plead guilty. The record contains no evidence of any such statement. Rather, the court clearly informed the panel that "Mr. Chavez has plead not guilty to this charge." No error occurred.

**¶15** Finally, Chavez contends the superior court failed to include an instruction on a lesser included offense. Again, the record does not support this claim. The verdict form includes the lesser offense and the transcript indicates the court gave clear instructions regarding lesser included offenses. This claim fails.

B. Attorney Conduct

**¶16** The primary assertion of attorney misconduct revolves around Chavez's *Anders* brief. Chavez asserts that because his counsel did not find any non-frivolous errors, his attorney was not diligent in his preparation of Chavez's appeal. Chavez asks this Court to order an independent review of the entire record. However, we have reviewed the record and find no grounds justifying this request.[2]

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[2] The court has considered Chavez's request for appointment of other counsel. Although he has the right to competent counsel on appeal, this does not include the right to counsel of choice. *State v. Cromwell*, 211 Ariz. 181, 186, ¶ 28 (2005) (citations omitted). Further, the Sixth Amendment does not guarantee a meaningful relationship between a defendant and his attorney. *Morris v. Slappy*, 461 U.S. 1, 14 (1983); *Cromwell*, 211 Ariz. at 186, ¶ 28 (citations omitted). Finally, counsel need not raise every issue on appeal requested by appellant. *State v. Febles*, 210 Ariz. 589, 596, ¶ 19 (App. 2005) (citation omitted). Therefore, and because we find no basis for his argument that his attorney was not diligent in preparation of the appeal, we deny that motion.

**¶17** Chavez also argues that his conviction should be reversed because his lawyer did not object to retaining Juror 3. In fact, Juror 3 was dismissed due to medical hardship. Thus, Chavez's claim that his counsel was aware of a conversation between Juror 3 and EC before deliberation is both implausible and irrelevant.

## CONCLUSION

**¶18** After careful review of the record, we find no meritorious grounds for reversal of Chavez's conviction or modification of the sentence imposed. The evidence supports the verdict, the sentence imposed was within the sentencing limits, and Chavez was represented at all stages of the proceedings below and was allowed to address the court before sentencing. Accordingly, we affirm Chavez's conviction and sentence.

**¶19** Upon the filing of this decision, counsel shall inform Chavez of the status of the appeal and his options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Chavez shall have thirty days from the date of this decision to proceed, if he so desires, with a pro per motion for reconsideration or petition for review.


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