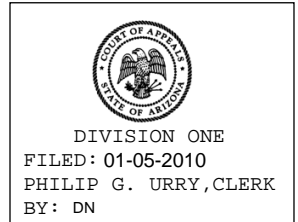


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) No. 1 CA-CR 08-0059
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
FRANCISCO M. DELACADENA,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2004-137060-001 DT

The Honorable Raymond P. Lee, Judge

**CONVICTIONS AND SENTENCES AFFIRMED
PRESENTENCE INCARCERATION CREDIT MODIFIED**

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Francisco Delacadena Buckeye
Appellant

J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following Francisco Delacadena's convictions of two counts of aggravated assault and one count of influencing a witness. Delacadena's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel now asks this court to search the record for fundamental error. After reviewing the entire record, we affirm Delacadena's convictions and sentences but modify his presentence incarceration credit.

FACTS AND PROCEDURAL HISTORY

¶2 During an argument with his wife, who at the time was sitting on the sofa holding the couple's three-month-old baby, Delacadena grabbed a gun.¹ He pressed the barrel of the gun into his wife's neck and told her she was going to die. He told her that, because it was her birthday, it was "a nice day to die." His wife testified at trial that while Delacadena held the gun to her neck, she was "scared." Delacadena then hit her on top of her head with the gun, causing her to bleed onto the sofa.

¹ Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Delacadena. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

He then told his wife not to call the police to report the incident. He said if she did, he would kill her, the baby and her daughter. They later drove to the bus station to pick up his wife's mother. During a moment when Delacadena had left the car, his wife told her mother what Delacadena had done and why she was afraid to call the police.

¶13 Delacadena next drove the group to a Phoenix store. He still had the gun with him, and his wife testified that "he wanted all of us to remain together so nobody could run away or so I couldn't ask for help." When Delacadena stepped away from the others for a moment, his mother-in-law told a store clerk about Delacadena's threats and the clerk called the police and took the group to a safe area of the store. Police officers arrived soon thereafter and arrested Delacadena, finding him in possession of a handgun and two clips of ammunition.

¶14 The jury found Delacadena guilty of two counts of aggravated assault, both Class 3 felonies, and one count of influencing a witness, a Class 5 felony. The superior court sentenced him to 7.5 years' incarceration for each count of aggravated assault and 1.5 years' incarceration for influencing a witness, all sentences to be served concurrently, with credit for 218 days served.

¶15 Delacadena 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) (2003), 13-4031 (2001) and -4033 (Supp. 2009).

DISCUSSION

¶16 In a supplemental brief, Delacadena raises numerous issues, which we address in turn.

A. Constitutional Issues.

1. *Miranda* warning.

¶17 Delacadena argues his Fifth Amendment rights were violated because he never received a *Miranda* warning.² The remedy for failure to provide a *Miranda* warning is suppression of statements obtained as a result of the constitutional violation. See *State v. Carter*, 145 Ariz. 101, 105, 700 P.2d 488, 492 (1985) ("In order to be admissible, statements obtained while an accused is subject to custodial interrogation require a prior waiver of *Miranda* rights."). Delacadena's argument fails because the State offered no evidence of any statements he made while in police custody.

2. Double jeopardy.

¶18 Delacadena contends his double jeopardy rights were violated because he "was charged with multiple offenses when all

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

lead to the same event," dangerousness was both an element of aggravated assault and was found separately by the jury, and he faced duplicitous and multiplicitous charges.

¶9 Delacadena's double jeopardy arguments fail. Double jeopardy is not implicated when "each of two offenses contains an element not contained in the other." *State v. Sanders*, 205 Ariz. 208, 222, ¶ 65, 68 P.3d 434, 448 (App. 2003) (citing *U.S. v. Dixon*, 509 U.S. 688, 696 (1993)). Arizona Revised Statutes § 13-1203(A) (2001) provides that a person can commit an assault by "[i]ntentionally, knowingly or recklessly causing any physical injury to another person" or by "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury." Under the statute, creating "reasonable apprehension of imminent physical injury" and "causing any physical injury" are separate offenses and double jeopardy does not bar prosecution and conviction on both types of assault. See *Sanders*, 205 Ariz. at 222, ¶ 66, 68 P.3d at 448.

¶10 Delacadena also contends that the court's enhancement of his sentences based on the jury's finding that both aggravated assault counts were "dangerous offenses," based on his use of a deadly weapon, violates his double jeopardy rights because use of a deadly weapon is also an element of aggravated assault. In *State v. Bly*, the Supreme Court of Arizona found no

violation of double jeopardy when a defendant's sentence was enhanced by an element of the underlying offense. 127 Ariz. 370, 372-73, 621 P.2d 279, 281-82 (1980) (sentence was enhanced due to defendant's use of deadly weapon and underlying armed robbery conviction was based on same use of deadly weapon). Accordingly, we find no error here, when Delacadena's enhanced sentence for a dangerous offense and underlying conviction of aggravated assault both were based on his use of a deadly weapon.

¶11 Additionally, we disagree that Delacadena faced duplicitious and multiplicitous charges in violation of double jeopardy. To avoid duplicity, each offense must be charged in a separate count. *State v. Axley*, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982). Here, the indictment contained three counts, alleging that Delacadena (1) committed aggravated assault by "using a handgun, a deadly weapon or dangerous instrument, [to] intentionally place[] [his wife] in reasonable apprehension of imminent physical injury," (2) committed an additional count of aggravated assault by "using a handgun, a deadly weapon or dangerous instrument, [to] intentionally, knowingly or recklessly cause[] a physical injury to [his wife]" and (3) committed one count of influencing a witness by "threaten[ing] [his wife], a witness in an official proceeding, or who

FRANCISCO M DELACADENA [sic] believed might be called as a witness in an official proceeding, with intent to influence the testimony of [his wife]." Because multiple offenses were not charged in separate counts, the indictment was not duplicitous and we find no error.

¶12 "Multiplicity occurs when an indictment charges a single offense in multiple counts . . . and raises the potential for multiple punishments, which implicates double jeopardy." *State v. Brown*, 217 Ariz. 617, 620, ¶ 7, 177 P.3d 878, 881 (App. 2008) (internal quotation and citation omitted). As shown above, each of the three counts in the indictment charged Delacadena with a separate crime based on separate acts corresponding to each count. The indictment did not charge a single offense in multiple counts, nor did the jury convict Delacadena of multiple crimes for a single offense. Count one charged him with aggravated assault for placing the gun barrel against his wife's neck and threatening to kill her. Count two charged him with aggravated assault for hitting her on the head with the gun. Count three charged him with influencing a witness for threatening to kill his wife and others if she reported his actions to police. Because each count related to separate conduct, the charges were not multiplicitous and we find no error.

3. *Brady v. Maryland.*

¶13 Delacadena argues the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by its failure to "disclose [his wife's] dramatic and compromising past," specifically, an allegation by Delacadena that his wife was simultaneously married to him and another man. In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. *Brady* applies also to impeachment evidence. *U.S. v. Bagley*, 473 U.S. 667, 676 (1985). Our review of the record reveals no evidence the prosecution or any investigating agency possessed evidence that Delacadena's wife was involved in multiple marriages or any other impeachment evidence involving her. Therefore, we find no *Brady* error.

4. Amendment of indictment.

¶14 Delacadena argues his rights were violated when the superior court granted the State's motion to amend the indictment during jury selection without remand to the grand jury. An indictment may not be amended in any matter of substance without the consent of the grand jury that returned

the indictment. *State v. Fogel*, 16 Ariz. App. 246, 250, 492 P.2d 742, 746 (1972). Amendment is improper when it deprives the defendant of either the right to notice of the charges with ample opportunity to prepare to defend against them or the right to double jeopardy protection against a subsequent prosecution on the original charge. *State v. Johnson*, 198 Ariz. 245, 248, ¶ 8, 8 P.3d 1159, 1162 (App. 2000). A defendant seeking reversal of a conviction due to an assertedly improper amendment also must show actual prejudice from the amendment. *Id.*

¶15 Here, the only difference between the indictment and the amended indictment as read at trial was the omission of count four, threatening or intimidating. The amendment of the indictment to drop one count neither deprived Delacadena of notice nor implicated his right to double jeopardy protection. Further, Delacadena cannot have been prejudiced by facing one less count to defend against at trial. He also incorrectly asserts that the indictment did not include the charge of influencing a witness. We find no error.

5. Speedy trial.

¶16 Delacadena argues his right to a speedy trial was violated. In Arizona, a defendant in custody has a right to be tried within 150 days of arraignment. Ariz. R. Crim. P. 8.2(a)(1).

¶17 Here, Delacadena was arraigned on February 25, 2005, but his trial did not begin until November 5, 2007. Delacadena failed to appear for superior court proceedings in April and March of 2005, causing bench warrants to be issued, and was a fugitive for a little more than two years. In addition, Delacadena once waived time limits, allowing a two-month continuance of his trial date and made his own motion for a continuance that was granted. The superior court continued the trial date twice more because Delacadena had medical issues and moved for a change in counsel. The court excluded applicable time in each of these instances.

¶18 Delacadena has not argued he suffered any prejudice from any delay in trial, nor is any apparent in the record. Because there is no showing of prejudice sufficient to merit reversal, we need not address whether there were errors in any of these exclusions of time. "A defendant who fails to establish that his defense was prejudiced or that he was deprived of a fair trial has not established prejudice sufficient to warrant reversal of his conviction." *State v. Wassenaar*, 215 Ariz. 565, 571, ¶ 16, 161 P.3d 608, 614 (App. 2007).

6. Confrontation clause.

¶19 Delacadena argues his Sixth Amendment right to confrontation of witnesses was violated because he did not have the opportunity to cross-examine the police officer who arrested him at the store. "Ordinarily speaking, a defendant is entitled to be confronted at the trial with all witnesses whose testimony is offered against him." *McCreight v. State*, 45 Ariz. 269, 271, 42 P.2d 1102, 1103 (1935). Here, the State did not call that officer to testify at trial. Furthermore, at trial Delacadena cross-examined all witnesses whose testimony was offered against him. Therefore, his rights under the confrontation clause were not violated.

7. Aggravated sentencing.

¶20 Delacadena argues he is entitled to "Cunningham relief" pursuant to *Cunningham v. California*, 549 U.S. 270 (2007), in which the United States Supreme Court held that a sentencing scheme allowing a court to engage in sentence-elevating fact-finding violates a defendant's Sixth and Fourteenth Amendment rights to a jury trial. *Cunningham*, 549 U.S. at 274.

¶21 Here, the superior court sentenced Delacadena to a presumptive term of 7.5 years' imprisonment on each of the two aggravated assault charges pursuant to A.R.S. § 13-604(I) (Supp. 2008), the sentencing provision applicable when the jury finds

the defendant guilty of a felony that is a dangerous offense; it sentenced him to a presumptive term of 1.5 years on the charge of influencing a witness pursuant to § 13-701(C)(4) (2001).³ The superior court engaged in no fact-finding that elevated Delacadena's sentence. That the two aggravated assault counts were dangerous offenses was found by the jury and the court imposed the presumptive sentences occasioned by such a finding. See A.R.S. § 13-604(I). Therefore, *Cunningham* is inapplicable.

8. Ineffective assistance of counsel.

¶22 Delacadena argues his appointed counsel was ineffective. This argument, however, is not properly raised on appeal but instead must be raised in a proceeding for post-conviction relief. *State v. Torres*, 208 Ariz. 340, 345, ¶ 17, 93 P.3d 1056, 1061 (2004).⁴

³ We cite the sentencing statutes in effect at the time of Delacadena's sentencing.

⁴ Delacadena also argues the court abused its discretion by denying his motion for change of counsel. The motion was filed six days before trial, alleging an "absence of cooperation" between his counsel and himself and that his counsel ignored him and was unwilling "to forward requested material." Delacadena also complained that his counsel had "pressure[d]" him to sign a plea agreement. Delacadena also asserted his counsel had told him that he would "personally file a lawsuit against Defendant before the Legal Counsel Board for filing Motions without his approval." When the court took up the motion on the first day of trial, Delacadena acknowledged that he had made similar allegations against two prior lawyers who had represented him earlier in this case. His counsel stated to the court that he had "basically no relationship whatsoever" with Delacadena and

B. Other Issues.

1. Superior court's jurisdiction.

¶123 Delacadena challenges the superior court's jurisdiction based on the assertion that "the entire indictment process and trial was based upon fraud." Our review of the record reveals no indication of fraud or prosecutorial misconduct. Thus, we find no merit in Delacadena's allegation of fraud or his contention that the court lacked jurisdiction.

2. Alleged failure to provide exculpatory evidence to grand jury.

¶124 Delacadena argues the State failed to present exculpatory evidence to the grand jury; he appears to refer to his wife's alleged involvement in a divorce proceeding in Pinal County. A prosecutor need not present all exculpatory evidence to the grand jury but must present all evidence that is "clearly exculpatory." *Francis v. Sanders*, 222 Ariz. 423, 426-27, ¶ 12, 215 P.3d 397, 400-01 (App. 2009). "Clearly exculpatory evidence is evidence of such weight that it might deter the grand jury

that he and the defendant "do not in any meaningful way communicate." Counsel told the court he had not prejudiced Delacadena's defense in any way and stated that by refusing to cooperate in his own defense, Delacadena was trying "to pull out some kind of relief on post-conviction relief." For his part, Delacadena stated he had not retained other counsel and was not prepared to defend himself. We cannot conclude the court abused its discretion by denying Delacadena's motion for change of counsel under these circumstances. See *State v. Peralta*, 221 Ariz. 359, 363, ¶ 18, 212 P.3d 51, 55 (App. 2009).

from finding the existence of probable cause." *Trebus v. Davis*, 189 Ariz. 621, 625, 944 P.2d 1235, 1239 (1997). Even assuming *arguendo* that the evidence Delacadena refers to exists, and that the prosecutor was aware of its existence, we cannot say evidence that Delacadena's wife was involved in a divorce proceeding is so weighty that it might have prevented the grand jury from finding probable cause. Therefore, Delacadena's argument fails.

3. Impartial jury.

¶125 Delacadena argues the jury was tainted because some potential jurors worked for the county or State, knew the prosecutor or were related to victims of domestic violence. Specifically, he contends that the jury pool was tainted because potential jurors asked questions of juror 46, who previously worked as a prosecutor for the county attorney's office.

¶126 During jury selection, several potential jurors indicated they had relatives who were victims of domestic violence. None of the potential jurors who stated they could not be fair and impartial served on the jury.

¶127 Juror 46 previously had worked as a prosecutor for the Maricopa County Attorney's Office and knew the prosecutor in this case. She stated that her experience and relationships would not prevent her from being fair and impartial. Later

during jury selection, juror 46 spoke with the judge and counsel in chambers. She told the judge several potential jurors had asked her questions because they knew she was a former prosecutor. They asked her if the proceedings to that point were "normal" and she responded, "yeah," and "brushed them off." At that point, juror 46 also told the judge she was not sure she could be fair and impartial and the court struck her from the panel for cause. Nothing in the record indicates any juror allowed to sit on the panel was biased against Delacadena. We find no error.

4. Alleged admission of hearsay testimony.

¶128 Delacadena contends that because the sole police officer who testified at trial was not the arresting officer, that officer's testimony was inadmissible hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). Our review of the officer's testimony reveals that he did not testify to any out-of-court statements constituting hearsay.

5. Witness testimony.

¶129 Delacadena argues his wife and the police officer testified falsely at trial. The jury sits as trier of fact and so must determine the credibility of witness testimony and weigh

the evidence accordingly. *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996).

6. Sufficiency of the evidence.

¶30 Delacadena argues his conviction went against the weight of the evidence. On appeal, we do not reweigh the evidence to determine whether we would have reached the same conclusion as the jury. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We will affirm the guilty verdict if it is supported by substantial evidence. *Id.* "Substantial evidence" is "[m]ore than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached." *Id.* (quoting *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981)).

¶31 The State produced substantial evidence on both counts of aggravated assault and on the count of influencing a witness. Therefore, the jury's guilty verdicts did not go against the weight of the evidence.

7. Jury instructions.

¶32 Delacadena asserts that the superior court erred by failing to include any defense theory in its final jury instructions and because the jury instructions were "faulty." The superior court should instruct the jury "on any theory reasonably supported by evidence." *State v. Doerr*, 193 Ariz.

56, 64, 969 P.2d 1168, 1176 (1998) (internal quotation and citation omitted).

¶133 On appeal, Delacadena does not suggest on what defense theory the court should have instructed the jury; the only evidence he offered at trial was his testimony that he did not commit the crimes alleged. Before closing arguments, the superior court correctly instructed the jury on the State's burden of proof and on all three counts, including the elements of each offense and definitions for terms included in the counts. Thus, we find no error in the court's jury instructions.

8. Alleged ex parte communications.

¶134 Delacadena contends that ex parte communications took place between the superior court judge and the prosecutor. He fails to point to any evidence of any such communication in the record, and our own review of the record does not reveal any such communication. Accordingly, we find no error.

9. Judge's alleged bias.

¶135 Delacadena argues he was prejudiced by the superior court judge's bias against him. He fails to explain in what way the judge was biased, except to assert that the court gave faulty jury instructions. As noted above, the court properly instructed the jury. Nor does the record reveal any suggestion

that the court was biased against Delacadena. Therefore, we find no error.

10. Alleged indifference to medical care.

¶36 Delacadena asserts the prison staff has refused to treat his medical problems, resulting in pain and suffering and constituting deliberate indifference. This appeal from his criminal convictions and sentences, however, is not the proper forum to raise such a claim.

C. Review of the Record.

¶37 The record reflects Delacadena received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages.⁵ The court held an appropriate pretrial *Donald*⁶ hearing at which Delacadena rejected the State's plea offer.

¶38 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of 12 members with one alternate. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous

⁵ The record indicates that Delacadena's counsel was not present at one trial management conference. Because at the conference the court merely confirmed the trial date and set a due date for submission of the joint pretrial statement and proposed jury instructions, we find no error.

⁶ *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000).

verdict. The jury returned a unanimous verdict, which was confirmed by juror polling. The court received and considered a presentence report, addressed its contents during the sentencing hearing and imposed a legal sentence on the charges arising out of the crimes of which Delacadena was convicted.

¶139 The superior court granted 218 days' presentence incarceration credit. According to the record, Delacadena was in custody from December 8, 2004 to December 11, 2004; December 17, 2004 to December 22, 2004; February 17, 2005 to February 26, 2005; and May 23, 2007 until his sentencing on January 8, 2008.⁷ By our calculation, the proper presentence incarceration credit should be 247 days.⁸

CONCLUSION

¶140 We have reviewed the entire record for reversible error and find the only error to be in the calculation of presentence incarceration credit. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm the convictions and the sentences imposed, except that we direct the judgment be modified to provide for 247 days' presentence incarceration credit.

⁷ The date of sentencing is not counted when calculating presentence incarceration credit. *State v. Hamilton*, 153 Ariz. 244, 246, 735 P.2d 854, 856 (App. 1987).

⁸ It appears the superior court's inclusion of 218 days' presentence incarceration credit failed to take into account the continuance of Delacadena's sentencing date from December 11, 2007 to January 8, 2008.

¶41 After the filing of this decision, defense counsel's obligations pertaining to Delacadena's representation in this appeal have ended. Defense counsel need do no more than inform Delacadena of the outcome of this appeal and his future options, 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, 684 P.2d 154, 156-57 (1984). On the court's own motion, Delacadena has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for reconsideration. Delacadena has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
DANIEL A. BARKER, Judge