IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 04-27-2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA,	)	1 CA-CR 08-0309
	)	1 CA-CR 08-0327
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT B
	)	
MARK ANDREW MURRAY,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2003-009651-001 DT and CR2005-110548-001 SE

The Honorable Connie Contes, Judge

AFFIRMED IN PART AS MODIFIED; REVERSED IN PART AND REMANDED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

Mark Andrew Murray — Florence
Appellant *in propria persona*

O R O Z C O, Judge

¶1 Mark Andrew Murray (Defendant), appeals his sentences and convictions for failure to register as a sex offender, a class four felony; sexual assault, a class two felony; and kidnapping, a class two felony.[1]

¶2 Defendant's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this Court that after a search of the entire appellate record, he found no arguable question of law that was not frivolous. Defendant filed a supplemental brief and raised various issues. Our obligation is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). After an initial review of the record, we ordered additional

[1] The record contains a notice of appeal for cause number CR2003-009651-001 DT, failure to register as a sex offender originating from a September 2002 violation. In his supplemental brief, Defendant states because he accepted a plea agreement, "any further reference to this cause is moot." Additionally, neither the opening brief nor supplemental brief develop any arguments regarding this cause number. *See* Ariz. R. Crim. P. 31.13.c.(1)(vi) (an opening brief must contain legal arguments with supporting authority). Therefore, Defendant has waived all issues regarding CR2003-009651-001 DT. *See State v. Cons*, 208 Ariz. 409, 416, ¶ 18, 94 P.3d 609, 616 (App. 2004) (failure to develop an argument results in waiver). Accordingly, CR2003-009651-001 DT is not discussed in this decision. We note, however, that count IV of CR2005-110548-001 SE is also a charge for failure to register as a sex offender. Because arguments are raised regarding the CR2005-110548-001 SE charge for failure to register as a sex offender in the supplemental brief, this charge and the corresponding sentence imposed is addressed in our decision.

briefing pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988) on the issues of: (1) whether Defendant's attorney could have waived Defendant's presence at a transcript reconstruction hearing for count IV of CR2005-110548-001 SE, failure to register as a sex offender; and (2) whether the procedure used to develop the reconstructed transcript complied with Arizona Rules of Criminal Procedure 31.8.f or g.[2] We have considered the *Penson* briefs, Defendant's supplemental brief, and reviewed the entire record for reversible error. For the reasons that follow, we affirm as modified in part, reverse in part and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶3 On March 8, 2005, victim, A.V., was an employee of Carl's Jr. and was on-duty when she went to use the restroom. When A.V. came out of the restroom, Defendant approached her and said there was blood in the men's restroom. A.V. stood in the doorway of the men's restroom and discovered there was no blood. A.V. tried to leave, but Defendant blocked her way and asked her if she wanted to die while holding an object that "looked like a little knife." Defendant guided A.V. into the bathroom and pushed her into a stall. Defendant asked A.V. if she wanted one thousand dollars, which A.V. refused. After latching the stall

[2] Unless otherwise specified, hereafter, an Arizona Rule of Criminal Procedure is referred to as "Rule ___."

door, Defendant pulled a blinking device out of his pocket and stated he was taping everything that was happening. Defendant told A.V. "to kiss him the way [she] had never kissed anybody before," had her pull her pants and underwear down to her knees, pulled down his pants and put a condom on. Defendant put on a second condom after the first one broke and made A.V. turn around and began rubbing his penis on her buttocks. Afterwards, Defendant forced A.V. to sign a piece of paper, and told her if she ever "did anything," he would find her and kill her. Defendant then fled.

¶4 After the incident was reported to the police, A.V. was shown a photo line-up. She identified Defendant from the photo line-up as the person who assaulted her. Defendant was apprehended and arrested on April 7, 2005. The note Defendant forced A.V. to sign during the incident was found in Defendant's wallet when he was arrested. In part, the note indicated that A.V. agreed to make an adult video, that she may be paid one thousand dollars if the video was "good enough to be published," and that she agreed to have sex at work.

¶5 Defendant was indicted for: violent sexual assault, a class two dangerous felony; kidnapping, a class two felony;

aggravated assault, a class three dangerous felony; and failure to register as a sex offender, a class four felony.[3]

¶6 Prior to trial, the charge for failure to register as a sex offender, count IV, was severed from the remaining counts and was tried separately. A one-day trial took place on November 7, 2005 for the charge of failure to register as a sex offender (Count IV Trial). A guilty verdict was returned in the Count IV Trial and sentencing was postponed until after the trial for the remaining charges. A trial on the remaining three charges began on August 15, 2006. That trial resulted in a mistrial (Second Trial).

¶7 The retrial on the remaining three charges began on August 15, 2007 (Third Trial).[4] A twelve-person jury with two alternates was empanelled. The jury found Defendant not guilty of violent sexual assault, but found him guilty of the lesser-included offense of sexual assault. The jury also found Defendant guilty of kidnapping, but not guilty of aggravated

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[3] As a result of a prior conviction for sexual assault, Defendant was required to register as a sex offender. The State alleged Defendant failed to register within the statutorily mandated time.

[4] Between the Second Trial and the Third Trial, the State filed a special action with this Court. We accepted jurisdiction and granted relief, holding that a historical prior felony conviction for a sexual offense was an element of the crime of violent sexual assault. Therefore, the State was permitted to introduce evidence of Defendant's prior sexual offense conviction in its case-in-chief. *State ex rel. Thomas v. Talamante*, 214 Ariz. 106, 149 P.3d 484 (App. 2006).

assault. The jury did not make a finding of dangerous for either the sexual assault or kidnapping charges. An aggravation/mitigation hearing was conducted immediately after the Third Trial. The jury found the State had proven nine aggravating factors beyond a reasonable doubt. Defendant was sentenced to the presumptive term of ten years' imprisonment for failure to register as a sex offender, and an aggravated sentence of twenty-five years' imprisonment for both the sexual assault and kidnapping convictions. The aggravated twenty-five year sentences for sexual assault and kidnapping were to be served concurrently, but consecutive to the failure to register as a sex offender sentence.

¶8 Defendant timely appealed.[5] We have jurisdiction to consider this appeal 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 and -4033.A.1 (2010).[6]

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[5] After Defendant filed his notice of appeal, it was discovered that the appellate record was incomplete because it did not include transcripts from the Count IV Trial. The court reporter for the Count IV Trial indicated to this Court that "the transcripts for that day's proceedings can not be prepared due to faulty equipment and unclear notes." In furtherance of this appeal, we ordered the transcript in the Count IV Trial reconstructed.

[6] We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

DISCUSSION

¶9 When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996). In his supplemental brief, Defendant raises several issues arguing that: (1) the jury selection was constitutionally defective; (2) Defendant was denied his right to a fair trial; and (3) the trial court erred in considering aggravating factors to justify the imposition of aggravated sentences. We address each argument in turn.

A. Count IV Trial

¶10 Defendant raises issues concerning the jury selection and juror eight in the Count IV Trial. Additionally, Defendant argues that the Count IV Trial was "fundamentally unfair" because he was not present for the transcript reconstruction hearing.

(1) Transcript reconstruction hearing

¶11 Defendant contends that because he was not present when the transcript from the Count IV Trial was reconstructed, his due process and Confrontation Clause rights were violated.

¶12 When a transcript is not provided on appeal, an appellate court presumes that the transcript would have supported the trial court's actions. *See State v. Wilson*, 179 Ariz. 17, 19 n.1, 875 P.2d 1322, 1324 n.1 (App. 1993). When a

transcript is unavailable, rather than not provided, the procedure to follow is set forth in Rules 31.8.f and g. The absence of a court reporter's transcript does not necessarily mandate a rehearing of the case. *State v. Madrid*, 20 Ariz. App. 51, 52, 510 P.2d 50, 51 (1973). When "the error complained of can be adequately reviewed by other portions of the record and there is no showing that the defendant's rights were prejudiced, the lack of a reporter's transcript does not require a retrial." *Id.* at 53, 510 P.2d at 52. In this case, we conclude that we cannot adequately review the issues Defendant raises on appeal using other portions of the record.

¶13 As previously discussed, *supra* n.5, the transcript from the Count IV Trial was reconstructed because it was not available. The judge who presided over the Count IV Trial, the State, Defendant's attorney and a court reporter were present at the reconstruction hearing. The reconstructed transcript shows that defense counsel waived Defendant's presence for purposes of the reconstruction hearing. The record reflects that neither procedure outlined in Rules 31.8.f nor g was followed. Rules 31.8.f and g contemplate the involvement of a defendant in the process used when a transcript is unavailable. In this case, Defendant was not present at the reconstruction hearing and thus was not permitted to provide his recollection of the Count IV

Trial. As a result, the reconstruction hearing did not proceed in substantial compliance with Rules 31.8.f or g.

¶14 Accordingly, we remand count IV of CR2005-110548-001 SE, failure to register as a sex offender, to the trial court for a reconstruction hearing in substantial compliance with Rules 31.8.f. or g. and so that Defendant may be present and provide his recollection of the Count IV Trial.

(2) Jury selection & juror eight

¶15 Defendant alleges that he was denied his constitutional right to a fair and impartial jury because the "Arizona Supreme Court has declared Maricopa County's procedure for selecting potential jurors unconstitutional." Specifically, Defendant alleges that the process employed for selecting jurors in Maricopa County, in his Count IV Trial "demographically prejudiced" Defendant by "singling out affluent from non-affluent citizens, political affiliation . . . and/or racial make-up."

¶16 Defendant next argues that there was an "ex parte communication" in the Count IV Trial with juror number eight that deprived him of his substantive due process rights. Specifically, Defendant contends he objected to juror eight sitting on the panel because she expressed concerns about being fair and impartial in light of her profession, which Defendant argues required "extensive exposure to sex offenders."

¶17 Because we remand count IV of CR2005-110548-001 SE, failure to register as a sex offender, to reconstruct the trial transcript, we do not reach a determination regarding either of these two issues. The reconstruction hearing should include information as to whether these issues were raised during the trial, and if so, how they were resolved.

B. Third Trial

¶18 Defendant contends the Third Trial was "fundamentally unfair" because: (1) the trial court erred in allowing sexual assault to be included as a lesser-included offense; (2) the trial court erred in its instruction regarding Defendant's prior conviction; (3) introduction of his prior felony conviction was inappropriate because it improperly allowed the admission of extrinsic evidence; and (4) the use of emotional harm to the victim as an aggravating factor was improper.

(1) Inclusion of sexual assault as a lesser-included offense

¶19 Defendant argues the trial court improperly allowed the inclusion of sexual assault as a lesser-included offense to the crime charged, violent sexual assault. Specifically, Defendant contends that because an element of sexual assault is "sexual intercourse" which is defined, in part, as "contact with the penis or vulva," the crimes charged did not properly fit the elements of the sexual assault statute. A.R.S. §§ 13-1401, -1406 (2010). Additionally, Defendant asserts that the

legislature did not intend sexual assault to apply to minors because the statute contains an element of "consent" and minors can never consent to sexual activity.

¶20 A trial court must instruct a jury "on any theory of a case" if the evidence supports it. *State v. Valenzuela*, 194 Ariz. 404, 405, ¶ 2, 984 P.2d 12, 13 (1999). A jury instruction on a lesser-included offense is proper if the evidence permits a jury to find that although the State did not prove the elements of the greater offense, it did prove the elements of the lesser-included offense. *Id.* at 406, ¶ 10, 984 P.2d at 14. A jury instruction on a lesser-included offense "is proper only if (1) the lesser offense is composed of some, but not all, of the elements of the greater crime so that it is impossible to commit the greater without committing the lesser offense, and (2) the evidence supports an instruction on the lesser offense." *State v. Miranda*, 198 Ariz. 426, 428, ¶ 9, 10 P.3d 1213, 1215 (App. 2000). We review *de novo* whether one crime is a lesser-included offense of another. *See In re James P.*, 214 Ariz. 420, 423, ¶ 12, 153 P.3d 1049, 1052 (App. 2007).

¶21 In this case, we must analyze whether violent sexual assault under A.R.S. § 13-1423 (2010), the greater offense, contains all the elements necessary to commit sexual assault under A.R.S. § 13-1406, the lesser-included offense. Violent sexual assault is perpetrated, in part, by "committing an

offense under § 13-1404, 13-1405, 13-1406 or 13-1410." A.R.S. § 13-1423. Violent sexual assault, as defined, includes the offense of sexual assault, A.R.S. § 13-1406. Sexual assault, the lesser offense, is composed of some, but not all of the elements of violent sexual assault. *Id*. Accordingly, we find no error in the trial court's inclusion of sexual assault as a lesser-included offense for violent sexual assault.

(2) Jury instructions – limiting use of prior conviction

¶22 Defendant next contends the trial court erred by failing to limit the jury instructions regarding Defendant's prior conviction. Specifically, Defendant alleges that after he was found not guilty of the charge of violent sexual assault and guilty of the lesser-included offense of sexual assault, the trial court should have "focus[ed] on the elements of A.R.S. 13-1406, which does not contain a historical prior felony conviction component," unlike the charged offense of violent sexual assault. *See* A.R.S. §§ 13-1423, -1406. Defendant argues that if the jury found Defendant not guilty of violent sexual assault, then it should not have been allowed to consider his prior felony conviction for the lesser-included offense of sexual assault.

¶23 We note that Defendant did not object to the jury instructions at trial, therefore, we review the jury instructions for fundamental error. *See State v. Henderson*, 210

Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). We will grant relief to a defendant if we are convinced that the error was both fundamental and prejudicial. *See id.* at 567, ¶ 20, 115 P.3d at 607. While jury instructions need not be faultless, they should reasonably inform the jury of the applicable law in understandable terms. *State v. Karr*, 221 Ariz. 319, 322-23, ¶ 15, 212 P.3d 11, 14-15 (App. 2008). The jury instructions must not mislead the jury. *Id.* at 323, ¶ 15, 212 P.3d at 15. We consider the jury instructions as a whole to determine whether the jury received the information necessary to arrive at a legally correct decision. *State ex rel. Thomas v. Granville (Baldwin*), 211 Ariz. 468, 471, ¶ 8, 123 P.3d 662, 665 (2005).

¶24 The jury instructions in the Third Trial instructed the jury that it may consider the use of Defendant's prior conviction in the context of violent sexual assault if the State had proven its existence beyond a reasonable doubt. The instructions stated that if the jury found the State had proven the existence of a prior conviction, the jury could *not* "use that fact as evidence to help [it] determine whether or not the State ha[d] proven the other elements beyond a reasonable doubt." Other jury instructions stated: that the prosecution had the burden of proof on each element of the charges beyond a reasonable doubt; defined "historical prior felony conviction;" instructed that each count charged a separate offense and must

be decided on the evidence and law applicable to it; and described the elements of the charged offenses. We presume that the jurors followed the jury instructions and do not agree that the instructions misled the jury. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 69, 132 P.3d 833, 847 (2006). We therefore find no error.

(3) Admission of exhibits

¶25 Defendant alleges that disclosure of his prior felony convictions was inappropriate because it permitted admission of extrinsic evidence. Specifically, Defendant alleges the trial court did not ensure that exhibits fifty-six and fifty-seven were "properly redacted versions" of Defendant's prior convictions. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. McGill*, 213 Ariz. 147, 154, ¶ 30, 140 P.3d 930, 937 (2006).

¶26 During the Third Trial, the State introduced exhibits fifty-six and fifty-seven, which the record indicates are documents evidencing Defendant's prior convictions. The record reflects that outside the presence of the jury, the trial court inquired as to exhibits fifty-six and fifty-seven to ensure that the redaction was satisfactory to both the State and Defendant. The State indicated all necessary information had been redacted out of exhibits fifty-six and fifty-seven. Additionally, defense counsel stated that all of the appropriate deletions

were made in the copies provided to the court. During the aggravation phase of the Third Trial, the State introduced exhibits fifty-eight and fifty-nine over defense counsel's objections. Exhibits fifty-eight and fifty-nine were un-redacted versions of exhibits fifty-six and fifty-seven, which evidenced Defendant's prior convictions. The State contended the exhibits were admissible during the aggravation phase because the jury was to consider not only whether Defendant had priors, but also consider the nature of those priors. We agree. The trial's guilt phase had concluded and any prejudice there might have been to Defendant was no longer a factor. Additionally, the court confirmed, prior to admitting the exhibits, that Defendant had been convicted of all of the offenses contained in exhibits fifty-eight and fifty-nine. We find no error in the admission of either exhibit.

(4) Aggravating factors for Third Trial

¶27 Finally, Defendant argues that because there were no facts presented to show A.V. suffered emotional harm beyond that of the actual incident, consideration of the aggravating factor of "emotional harm to the victim" was improper. Specifically, Defendant indicates that the evidence presented was "insufficient as a matter of law" to satisfy this aggravating factor.

¶28 Defendant relies on *State v. Germain* for the proposition that a trial court must point to a defendant's conduct that exceeds the elements of the crime charged or aggravates the offense in order for an aggravating factor to be properly considered. 150 Ariz. 287, 290, 723 P.2d 105, 108 (App. 1986). Defendant's reliance on *Germain* is misplaced. *Germain* specifically addressed using elements of the crime charged as aggravating factors. *Id*. We review *de novo* "whether a particular aggravating factor used by the court is an element of the offense and whether the court properly can use such a factor in aggravation." *State v. Tschilar*, 200 Ariz. 427, 435, ¶ 32, 27 P.3d 331, 339 (App. 2001).

¶29 In this case, emotional harm to the victim is not an element of either violent sexual assault[7] or kidnapping. *See* A.R.S. §§ 13-1423, -1304 (2010). Because emotional harm to the victim is not an element of violent sexual assault, sexual assault, or kidnapping, there was no requirement that the State prove emotional harm to the victim "above and beyond" the emotional harm suffered by the victim as a result of the crime itself. *See Germain*, 150 Ariz. 287, 723 P.2d 105.

[7] Additionally, emotional harm to the victim is not an element of the lesser-included offense of sexual assault, A.R.S. § 13-1406, which is the crime Defendant was ultimately convicted of.

¶30 Defendant concedes "[e]motional harm is almost always – if not *always* – present in cases involving sexual improprieties inflicted upon minors." In this case, the jury found the "offense caused emotional harm to the victim" beyond a reasonable doubt. Additionally, there was sufficient evidence presented at trial, including the testimony of A.V. and A.V.'s father, to support the finding of the aggravating factor. A.V. testified she feared that if she did not comply with Defendant's requests, he would kill her. She testified that immediately after the incident she was shaking when she attempted to relay the incident to a co-worker. A.V. further testified that she did not call the police right after the event because she was afraid and Defendant told her not to tell anyone, including the police. A.V.'s father testified that A.V. was visibly frightened when he arrived to pick her up the night of the incident. A.V.'s father also testified A.V.'s "eyes were red, and she looked like she had been crying." We find the trial court did not err in allowing the jury to consider emotional harm to the victim as an aggravating factor.

C. Sentencing order correction

¶31 Appellate counsel references that the trial court, in its sentencing order, referred to sexual assault and kidnapping as non-repetitive offenses. Our review of the record indicates that at sentencing, the judge stated that Defendant had "two

prior felony convictions that [he] avowed to in the plea agreement." Defense counsel stated there was "no dispute regarding the finding of the prior felonies that are used to enhance the sentence." In imposing an aggravated twenty-five year sentence for each sexual assault and kidnapping, the judge relied on this finding and used the priors to enhance Defendant's sentences. The sentencing order, however, incorrectly states that the offenses are both non-dangerous and "non-repetitive."

¶32 Where there is an inconsistency between the oral pronouncement of sentence and the sentencing order, the oral pronouncement controls; if the inconsistency can be resolved by reference to the record, we can correct the minute entry without a remand for resentencing. *State v. Bowles*, 173 Ariz. 214, 215-16, 841 P.2d 209, 210-11 (App. 1992); *State v. Hanson*, 138 Ariz. 296, 304, 674 P.2d 850, 858 (App. 1983). Therefore, we correct the sentencing order dated March 28, 2008, to reflect that Defendant's convictions for kidnapping and sexual assault, class 2 felonies, with two historical prior felony convictions, are non-dangerous, but repetitive offenses pursuant to A.R.S. § 13-604 (2003).[8]

[8] We refer to the version of the statute applicable at the time of Defendant's offense. *See* 2003 Ariz. Sess. Laws, ch. 11, § 1 (1st Reg. Sess.).

CONCLUSION

¶33 We have read and considered counsel's brief as well as Defendant's supplemental brief; we have also considered the supplemental briefing by appellate counsel and the State. We have carefully searched the entire record for reversible error and have found one. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. For the reasons set forth above, we reverse in part so that a reconstruction hearing for the Count IV Trial may be held again: (1) in substantial compliance with Rules 31.8.f or g; and (2) so that Defendant may be present. All of the other proceedings were conducted in compliance with the Rules and substantial evidence supported the jury's finding of guilt for the Third Trial. Defendant was represented by counsel at all critical stages of the proceedings. At sentencing, Defendant and his counsel were given an opportunity to speak and the court imposed a legal sentence.

¶34 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant shall have thirty days from the date of this decision to proceed, if he so desires,

with an *in propria persona* motion for reconsideration or petition for review.[9]

¶35 For the foregoing reasons, we affirm as modified Defendant's convictions and sentences in the Third Trial for sexual assault and kidnapping. We remand count IV of CR2005-110548-001 SE, the charge for failure to register as a sex offender, for a reconstruction hearing in compliance with either Rules 31.8.f. or g and with Defendant present at the hearing.

/S/
_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
MICHAEL J. BROWN, Judge

/S/
_____
PATRICIA K. NORRIS, Judge

[9] Pursuant to Rule 31.18.b, Defendant or his counsel have fifteen days to file a motion for reconsideration. On the Court's own motion, we extend the time to file such a motion to thirty days from the date of this decision.