DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 08-0942
	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION**
GERALD VICTOR SVANOE, Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Apache County

Cause No. CR2007161

The Honorable Michael P. Roca, Judge Pro Tem

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Emily L. Danies — Tucson
Attorney for Appellant

O R O Z C O, Judge

¶1 Gerald Victor Svanoe (Defendant), appeals his convictions and sentences for eight counts of drug-related offenses.

¶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, she found no arguable question of law that was not frivolous. Defendant was afforded an opportunity to file a supplemental brief in propria persona, but he did not do so.

¶3 Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). 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). 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.A.1 (Supp. 2009).[1] Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶4 In 2006, Apache County narcotics officer Chris O. (Officer O.) received a letter written by Defendant and addressed to the Apache County Sheriff's Office. Defendant's

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

letter implied the sheriff's office seized a package Defendant was expecting from his post office box. The letter discussed the benefits of legalizing marijuana. In reaction to the letter, Officer O. asked the Postmaster to contact him if Defendant received another package.

¶5 On July 1, 2006 and August 24, 2006, the Postmaster contacted Officer O. regarding two packages delivered to Defendant. Both packages were identified by Officer O.'s drug detection canine as having illegal drug odors. The first package was turned over to a postal inspector, who later obtained a federal search warrant and found approximately one ounce of marijuana in the package.

¶6 Officer O. observed a controlled delivery of the August 24, 2006 package to Defendant. Following delivery, Officer O. stopped Defendant and served him with a search warrant for the package. Officer O. asked Defendant what was in the package and Defendant replied "that there was marijuana, among other things."

¶7 On April 30, 2007, Deputy Craig W. (Deputy W.) of the Apache County Sheriff's Office was contacted by St. John's Police Detective Lucas R. (Detective R.) regarding the arrest of a juvenile, J.W., for drug-related charges. Deputy W. was told that J.W. smoked marijuana with Defendant. Deputy W. and Detective R. went to Defendant's residence where they asked

Defendant about J.W.'s claims. Defendant admitted to smoking marijuana with J.W.

¶8 J.W. testified that when he asked Defendant for marijuana, "if he had it, he'd give it to me." However, J.W. clarified that Defendant never gave him the marijuana to take home; he was only allowed to smoke it with Defendant at Defendant's residence. At the time of trial, J.W. was seventeen years old. Defendant admitted at trial to sharing and smoking a pipe containing marijuana with J.W. sometime between April 1, 2007 and April 30, 2007.

¶9 During the April 30, 2007 visit to Defendant's residence, another juvenile, J.E., was present. After Detective R. advised Defendant of his *Miranda*[2] rights, he asked Defendant for the names of the juveniles with whom he had smoked marijuana. Defendant pointed at J.E. and said "[h]e's the one I smoke marijuana with." J.E. testified that he had gone to Defendant's house to smoke marijuana with him. At the time of trial, J.E. was fifteen years old.

¶10 During cross-examination, Defendant admitted that: (1) he shared and smoked marijuana with J.E. on or around April 30, 2007; (2) he knew sharing and smoking marijuana with J.W. and J.E. was illegal; (3) he knew both J.W. and J.E. were under the

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

age of eighteen when he shared and smoked marijuana with them; (4) on or about August 28, 2006[3] and April 30, 2007, he possessed both marijuana and drug paraphernalia; and (5) at the time of his conduct he knew possession of marijuana and drug paraphernalia was illegal and prohibited by Arizona law.

¶11 Prior to trial, on June 19, 2007, Defendant filed a motion to determine representation asking to "be allowed to represent himself." On June 28, 2007, Defendant filed a request for a *Donald* hearing[4] "for the purposes of demonstrating on the record in open Court that Defendant understands the [plea] offer made and makes a knowing and voluntary decision to reject it." However, a *Donald* hearing was never held.

¶12 On July 9, 2007, the trial court held a hearing on Defendant's Motion to Determine Representation. Finding Defendant knowingly, intelligently, competently, and voluntarily

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[3] Although the transcript indicates the State originally referred to April 28, 2006 as one of the dates in question, the State subsequently examined Defendant using August 28, 2006 as the date in question. The State's use of August 28, 2006 as the date in question is consistent with Counts VII and VIII of its Complaint.

[4] *State v. Donald*, 198 Ariz. 406, 418, ¶ 6, 10 P.3d 1193, 1205 (App. 2000) (holding that "(1) a defendant suffers a constitutionally significant injury who loses a favorable plea bargain as a consequence of ineffective assistance of counsel; (2) the loss of a favorable plea agreement due to ineffectiveness of counsel is not relieved by the defendant's receipt of a fair trial; and (3) the court has power to fashion a remedy for such a deprivation, including, if warranted under the circumstances, an order to reinstate the original plea offer.").

moved to represent himself, the trial court accepted Defendant's waiver of counsel. However, the trial court ordered Defendant's counsel to assume the role of advisory counsel.

¶13 On July 30, 2007, the trial court ordered a Rule 11 evaluation to inquire into Defendant's competency to stand trial, ability to represent himself, and his state of mind at the time of the offense. Defendant was evaluated by two experts, Jack L. P., M.D. (Dr. P.) and Eugene R. A., M.D (Dr. A.). Dr. P. concluded Defendant was not competent to stand trial because although he "obviously has a factual understanding of the proceedings . . . he does not have a rational understanding and he is attempting to use the justice system in a manner for which it is not designed." Dr. P. also concluded that Defendant was incapable of effectively assisting his attorney in his defense.

¶14 Dr. A. concluded Defendant was competent to stand trial, but incompetent to represent himself because of his disorganization. Dr. A. found Defendant had "a clear understanding of the charges and the law and the purpose of the various officers of the court." Moreover, Dr. A. concluded that Defendant's "disorganization is not causing him to be incompetent to stand trial."

¶15 On November 6, 2007, the trial court held a Rule 11 hearing and heard testimony from both Dr. P. and Dr. A.. The

trial court found Defendant competent to stand trial. Subsequently, the trial court found Defendant competent to stand trial but incompetent to represent himself.

¶16 Following voir dire, a twelve-person jury with two alternates was empanelled. After a two-day jury trial, Defendant was found guilty of: (1) two counts of involving a minor in a drug offense; (2) two counts of transfer of marijuana; (3) two counts of possession of marijuana; and (4) two counts of possession of drug paraphernalia. Defendant was sentenced to a total of nine and one-half years in prison.

DISCUSSION

Sufficiency of the Evidence

¶17 This court will not disturb the fact finder's decision if there is substantial evidence to support its verdict. *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995). Defendant was charged with eight separate counts of drug-related offenses.

¶18 To convict Defendant of counts I and II, involving a minor in a drug offense, the State must prove Defendant knowingly transferred, or offered to transfer, marijuana to a minor. A.R.S. §§ 13-3409.A.2 (Supp. 2009), -3405.A.4 (Supp. 2009). To convict Defendant of counts III and IV, transfer of marijuana, the State must prove Defendant knowingly transferred, or offered to transfer, marijuana. A.R.S. § 13-3405.A.4. To

convict Defendant of counts V and VII, possession of marijuana, the State must prove Defendant knowingly possessed or used marijuana. A.R.S. § 13-3405.A.1. To convict Defendant of counts VI and VIII, possession of drug paraphernalia, the State must prove Defendant possessed, with intent to use or deliver, drug paraphernalia. A.R.S. § 13-3415 (2001).

¶19 On cross-examination, Defendant admitted to committing each of the elements of counts I through VIII. Moreover, we find further support that Defendant committed the elements of counts I through VIII in the testimony from the investigating officers and the two minors involved in the case. After reviewing the record, we find the State elicited sufficient evidence to convict Defendant of counts I through VIII.

Rule 11 Competency to Stand Trial

¶20 Prior to trial, the trial court ordered a Rule 11 evaluation to determine Defendant's competency to stand trial. *See* Ariz. R. Crim. P. 11.[5] Pursuant to Rule 11.1, "[a] person shall not be tried, convicted, sentenced or punished for a public offense . . . while, as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own

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

defense." Following the Rule 11 Hearing, the trial court found Defendant competent to stand trial.

¶21 "[T]he determination of competency to stand trial is always and exclusively a question for the court." *Bishop v. Superior Court*, 150 Ariz. 404, 409, 724 P.2d 23, 28 (1989). "The judge's duty is to evaluate the data and determine whether the defendant's functional impairment is cumulatively so great that he fails to meet the minimum performance level necessary for the satisfaction of due process and the preservation of the integrity of the criminal adversary system." *Id.* (citations and internal quotations omitted). We review a trial court's finding of competency for abuse of discretion. *State v. Brewer*, 170 Ariz. 486, 495, 826 P.2d 783, 792 (1992). On appeal, we determine whether reasonable evidence supports the trial court's finding that the defendant was competent, considering the facts in the light most favorable to sustaining the finding. *Id.*

¶22 In this case, the trial court appointed two experts, Dr. P. and Dr. A., to perform Rule 11 evaluations. Dr. P. and Dr. A. disagreed as to Defendant's competency to stand trial. Dr. P. concluded Defendant was not competent to stand trial because although he "obviously has a factual understanding of the proceedings . . . he does not have a rational understanding and he is attempting to use the justice system in a manner for which it is not designed." Dr. P. also concluded Defendant was

incapable of effectively assisting his attorney in his defense. Dr. A. concluded Defendant was competent to stand trial, but incompetent to represent himself because of his disorganization. Dr. A. found Defendant had "a clear understanding of the charges and the law and the purpose of the various officers of the court." Moreover, Dr. A. concluded that Defendant's "disorganization is not causing him to be incompetent to stand trial."

¶23 Although the trial court considered differing evaluations in making its competency finding, we cannot say the trial court abused its discretion in light of the evidence. While, Dr. P. believed Defendant was incompetent to stand trial, he did find Defendant had a factual understanding of the proceedings. Moreover, Dr. A.'s evaluation presented sufficient evidence for the trial court to find Defendant competent to stand trial. In viewing this evidence in the light most favorable to sustaining the competency ruling, we find no abuse of discretion.

Incompetent for Purposes of Self-Representation

¶24 Following the Rule 11 Hearing, the trial court found Defendant incompetent to represent himself. Although the trial court originally accepted Defendant's waiver of counsel after the July 9, 2007 hearing on Defendant's Motion to Determine

Representation, we find the trial court properly ruled Defendant incompetent to represent himself.

¶25 In *Godinez v. Moran*, the United States Supreme Court stated,

> the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself. [A]lthough the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored." Thus, while "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation.

509 U.S. 389, 399-400 (1993) (citations omitted; footnote omitted). However, in *Indiana v. Edwards*, the United States Supreme Court announced a narrow exception, holding, "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [*v. United States*, 362 U.S. 402 (1960)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." 128 S.Ct. 2379, 2388 (2008).

¶26 In this case, the trial court was presented with evidence of Defendant's mental illness from the two court-appointed experts who performed Rule 11 evaluations. Both experts opined that they did not believe Defendant could proceed in propria persona due to his disorganization. Because, "[n]o

trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court," *Massey v. Moore*, 348 U.S. 105, 108 (1954), we find the trial court correctly found Defendant incompetent to represent himself.

Request for a *Donald* Hearing

¶27 On June 28, 2007, Defendant filed a request for a *Donald* hearing "for the purposes of demonstrating on the record in open Court that Defendant understands the [plea] offer made and makes a knowing and voluntary decision to reject it." However, a *Donald* hearing was never held. For the following reasons, we find the trial court did not err in failing to hold a *Donald* hearing.

¶28 The purpose of a *Donald* hearing is to establish whether a defendant has suffered a constitutional injury by losing a favorable plea bargain as a result of ineffective assistance of counsel. *Donald*, 198 Ariz. at 418, ¶ 46, 10 P.3d at 1205. Generally, a *Donald* hearing is required where a Defendant "present[s] more than a conclusory assertion that counsel failed to adequately communicate the plea offer or the consequences of conviction." *Id.* at 413, ¶ 17, 10 P.3d at 1200. Because there is no evidence that counsel failed to adequately communicate a plea offer or the consequences of a conviction to

Defendant, the court did not error in failing to hold a *Donald* hearing.

CONCLUSION

¶29 We have read and considered counsel's brief, carefully searched the entire record for reversible error and found none. *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the jury's finding of guilt. Defendant was present and 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.

¶30 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[6] or petition for review.

[6] Pursuant to Rule 31.18.b, Defendant or his counsel have fifteen days to file a motion for reconsideration. On the

¶31 For the reasons stated above, Defendant's convictions and sentences are affirmed.

/S/
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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
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PHILIP HALL, Presiding Judge

/S/
_____
DONN KESSLER, Judge

Court's own motion, we extend the time to file such a motion to thirty days.