

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



DIVISION ONE
FILED: 02/11/2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA,)
) No. 1 CA-CR 08-0947
 Appellee,)
) DEPARTMENT D
 v.)
) **MEMORANDUM DECISION**
 DAVID LEON STOKES, II,)
) (Not for Publication -
 Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-005516-001 DT

The Honorable Rosa Mroz, Judge

AFFIRMED

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

Yvette Gray, Court Appointed Counsel Phoenix
By Yvette C. Gray
Attorney for Appellant

David Leon Stokes, II Florence
Appellant

G E M M I L L, Judge

¶1 David Leon Stokes ("Stokes") appeals his convictions
and sentences for one count of sexual assault, a class two

dangerous felony; one count of kidnapping, a class two dangerous felony; one count of aggravated assault, a class three dangerous felony; and one count of armed robbery, a class two dangerous felony. Stokes' counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that she has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. See *Smith v. Robbins*, 528 U.S. 259 (2000). Stokes has filed a supplemental brief *in propria persona* raising several issues he contends require the reversal of his convictions and sentences. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 On February 1, 2007, Stokes was indicted on one count of sexual assault, one count of kidnapping, one count of aggravated assault, one count of armed robbery, and one count of unlawful use of means of transportation. Prior to jury selection, the court dismissed the unlawful use of means of transportation charge with prejudice because the statute of limitations had expired. See Ariz. Rev. Stat. ("A.R.S.") §§ 13-107 (1998), -604(U)(3) (1998).

¶13 The evidence at trial established the following facts, which we view, along with all reasonable inferences therefrom, in the light most favorable to upholding the verdicts. See

State v. Powers, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶4 On August 22, 1998, at around 8:30 in the morning, the victim, A.L., drove a rental van to a self-serve car wash to clean and detail the van for her employer, a rental-car company. While A.L. was drying the van windows, she noticed Stokes approaching her from behind. As A.L. turned around, Stokes stabbed her in the lower abdomen with a small pocketknife. Stokes then pushed A.L. toward the van and told her to get inside.

¶5 When A.L. began to fight back, Stokes reached for his pocketknife and held it up to her neck. The knife blade left a visible cut on A.L.'s neck. Stokes then ordered A.L. to sit on the passenger floor and cover her face with a rag as he drove away. A.L. testified that she kept her eyes closed and the rag over her face the entire time she was in the van.

¶6 After driving for approximately fifteen minutes, Stokes stopped the van and began removing A.L.'s pants. A.L. expressed her confusion and told Stokes that she was a virgin. Stokes then ordered A.L. to the backseat of the van where he forcibly raped A.L. on the middle seat.

¶7 When Stokes was finished, he sprayed A.L.'s vagina multiple times with Windex and air freshener. Stokes then ordered A.L. to return to the passenger floor where he covered

her with a towel and a piece of cardboard so that no one could see her if they looked in the van. While sitting on the passenger floor, A.L. heard Stokes taking change from her pants and from a pocket on the van door.

¶18 After removing the change, Stokes drove the van to an unknown location where A.L. heard Stokes roll down the window and ask someone for a "dime." Stokes testified that a "dime" is ten dollars worth of crack cocaine and that he smoked crack cocaine in 1998. Stokes then drove a short distance before stopping again. This time, A.L. heard the sound of a lighter being ignited and smelled what she believed to be "some kind of drug."

¶19 Stokes continued to drive around before he eventually let A.L. out of the van wearing only her bra, socks, and t-shirt. A.L. walked a short distance before she was able to locate someone to call 911. A.L. was immediately taken to the hospital where she required surgery to repair her punctured colon. Prior to being taken to the operating room, doctors conducted a sexual assault examination on A.L.

¶10 A forensic scientist later analyzed the sexual assault examination data and determined that there were sperm cells inside A.L.'s vagina. Forensic scientists also examined the rental van, which was found abandoned in a parking lot the day after the attack. They found four usable fingerprints, none of

which matched Stokes or the victim. They also determined that there was sperm on the middle seat of the van where A.L. said she had been raped. The Phoenix Police Department Crime Laboratory did not perform a DNA test on the sperm sample found on the van seat.

¶11 The sperm taken from the sexual assault kit was not DNA tested until approximately three years after the attack. On December 31, 2004, the Phoenix Police Department Crime Laboratory informed police detectives that the DNA in the sperm found inside A.L. matched Stokes' DNA. Detective D.N. questioned Stokes about the sexual assault on April 7, 2005. Detective D.N. testified that during the interview, Stokes told him that he did not recognize A.L. When asked to explain why his sperm was found in A.L.'s vagina, Stokes responded that he did not know but that he used to give drugs to girls on the street in exchange for sex.

¶12 The jury found Stokes guilty of all four counts. The jury made a separate finding that all four offenses were dangerous offenses. In addition, the jury unanimously found beyond a reasonable doubt that the offenses caused physical, emotional, or financial harm to the victim.

¶13 At the sentencing hearing, the court found two categories of aggravating circumstances to be applicable. First, the court relied on the jury's finding that all four

offenses caused physical, emotional, or financial harm to the victim. Second, the court found beyond a reasonable doubt that Stokes had three prior felony convictions within the ten years immediately preceding the date of the current offenses. The three prior felony convictions included aggravated driving under the influence, a class five felony; theft, a class three felony; and possession or use of narcotic drugs, a class four felony. The court designated the 2007 convictions as non-repetitive offenses under the criminal code and also found that there were no mitigating circumstances. The court therefore sentenced Stokes to an aggravated prison term for all four convictions.

¶14 Stokes was sentenced to twenty years for the sexual assault conviction, twenty years for the kidnapping conviction, fifteen years for the aggravated assault conviction, and twenty years for the armed robbery conviction. The court ordered the sentences to be served concurrently with one another but consecutive to the sentence that Stokes was already serving for two prior felony convictions in 1999. The court also ordered Stokes to serve a term of community supervision equal to one day for every seven days of his twenty-year prison sentence. The community supervision was ordered to run consecutive to his prison sentences. Stokes was awarded zero days of presentence incarceration credit because he was already serving time in prison for the two prior felony convictions in 1999.

¶15 Stokes timely appeals his convictions and sentences. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033 (Supp. 2009).

DISCUSSION

¶16 Stokes raises numerous issues in his supplemental brief. He first argues that the Maricopa County Attorney's Office violated his due process rights by not bringing him to trial within ninety days after he filed a written request for final disposition. Under Rule 8.3(b)(1) of the Arizona Rules of Criminal Procedure, any person who is imprisoned in Arizona "may request final disposition of any untried indictment, information or complaint pending against the person in this State." The prisoner must be brought to trial within ninety days after sending a written request for final disposition to the court and the prosecutor. Ariz. R. Crim. P. 8.3(b)(3).

¶17 Stokes claims in his brief that an information was filed against him on April 6, 2005. He alleges that he filed a written request for final disposition of the information on July 15, 2005. Having reviewed the record, we find no evidence to support Stokes' claim that an information was filed against him on April 6, 2005. Rather, the record reveals that Stokes was indicted by a grand jury on February 1, 2007. We therefore find no support for Stokes' claim.

¶18 Stokes next argues that the trial court unfairly prejudiced the jury by compelling him to testify that he had spent fifteen years in prison between 1980 and 1998. Stokes' testimony was relevant because it offered an explanation as to why Stokes might not have used cocaine in the last nine and a half years.¹ The court determined that the probative value of Stokes' testimony was not substantially outweighed by the danger of unfair prejudice for two reasons: (1) the jury already knew, based on the parties' stipulation, that Stokes had three prior felony convictions, and (2) the victim of one of Stokes' prior felony convictions, M.F., described to the jury how Stokes held a knife to her throat and threatened to rape her. "The trial court's ruling on admissibility of evidence will not be disturbed on appeal absent a clear abuse of discretion." *State v. Emery*, 141 Ariz. 549, 551, 688 P.2d 175, 177 (1984). We find no abuse of discretion.

¶19 Stokes next contends that the State violated his due process rights by failing to disclose the DNA test results from the sperm found on the van seat. "A defendant's due process right to a fair trial is violated when the State either *suppresses* or *destroys* evidence favorable to him and he is prejudiced thereby." *State v. Rivera*, 152 Ariz. 507, 511, 733

¹ During direct examination, Stokes' counsel asked Stokes "[w]hen is the last time you used cocaine?" Stokes responded, "[a]lmost nine and a half years ago."

P.2d 1090, 1094 (1987). The State also has a duty "to ensure the preservation of evidence it is aware of where that evidence is obviously material and reasonably within its grasp." *State v. Perez*, 141 Ariz. 459, 463, 687 P.2d 1214, 1218 (1984).

¶20 Stokes' due process rights have not been violated, however, because the State did not suppress, destroy, or fail to preserve evidence. Rather, the sperm found on the van seat was never DNA tested by the State. Stokes could have made a request to have the State conduct a DNA test, or he could have made a request to independently conduct a DNA test. There is nothing in the record to suggest that Stokes ever made such a request, and the State generally does not have an affirmative duty to seek out potentially exculpatory evidence. See *Montano v. Superior Ct.*, 149 Ariz. 385, 389, 719 P.2d 271, 275 (1986); *Perez*, 141 Ariz. At 463, 687 P.2d at 1218 (1984). We therefore find no error here.

¶21 Stokes also contends that the State violated his due process rights by inferring to the jury that he was guilty because he exercised his right to remain silent during an interview with Detective D.N. in 2005. The record reveals, however, that Stokes voluntarily answered all of the detective's questions. The prosecutor then questioned Stokes about the prior inconsistent statements that he made to the detective to impeach his credibility. We find no error here.

¶122 Stokes next claims that the prosecutor did not limit his closing argument to evidence properly admitted into the record. Stokes takes issue with two comments made during the State's closing argument. First, Stokes argues that the State improperly suggested to the jury that Stokes had wiped down the van to remove any fingerprints. The prosecutor stated in his closing argument that "[Stokes] had every opportunity to wipe that car down, and he probably did." Second, Stokes takes issue with the prosecutor's statement that the sperm found inside A.L.'s vagina was "really good evidence [Stokes] was in the van."

¶123 Evidence properly admitted at trial supports the prosecutor's statements. Once evidence is properly admitted, the prosecutor can comment on it in closing argument and "urge the jury to draw reasonable inferences." *State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993). We find no error here.

¶124 Stokes next argues that the trial judge improperly instructed the jury regarding the existence of aggravating factors. Arizona Revised Statutes section 13-701(D)(9) (Supp. 2009)² authorizes the court to impose an aggravated sentence if the jury finds beyond a reasonable doubt that the victim

² We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

suffered physical, emotional, or financial harm. The trial judge instructed the jury that a defendant is eligible for an aggravated sentence if the jury finds beyond a reasonable doubt that "the offense caused physical, emotional, or financial harm to the victim." Thus, the jury instructions provided by the court were expressly authorized by A.R.S. § 13-701(D)(9). We therefore find no error.

¶25 Finally, Stokes argues that the aggravating circumstances did not exceed the mitigating circumstances. Arizona Revised Statutes section 13-701(C) (Supp. 2009) authorizes the court to determine whether mitigating circumstances exist. At the sentencing hearing, the court found that there were no mitigating circumstances. We therefore find no support for Stokes' claim.

¶26 Having considered defense counsel's brief and examined the record for reversible error, *see Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. The sentence imposed falls within the range permitted by law, and the evidence presented supports the conviction. As far as the record reveals, Stokes was represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶127 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Stokes of the disposition 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. Stokes has thirty days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

CONCLUSION

¶128 The convictions and sentences are affirmed.

_____/s/_____
JOHN C. GEMMILL
Presiding Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Judge

_____/s/_____
PATRICK IRVINE, Judge