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Ariz. R. Crim. P. 31.24



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

STATE OF ARIZONA,)
) 1 CA-CR 08-0980
)
 Appellee,) DEPARTMENT C
)
 v.)
)
) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)
)
 BILL EDWARD MEKARA,)
)
)
 Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-105721-001 SE

The Honorable Helene F. Abrams, Judge

AFFIRMED AS MODIFIED

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Bill Edward Mekara Phoenix
Appellant

K E S S L E R, Judge

¶1 This appeal was 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 Bill Edward Mekara's ("Mekara") conviction of one count of aggravated assault, a class 4 felony. Finding no arguable issues to raise, counsel requested that this Court search the record for fundamental error. Mekara filed a supplemental brief *in propria persona*, asking this Court to review seven issues: (1) double jeopardy; (2) speedy trial violations; (3) the superior court failed to enforce his subpoenas; (4) judicial bias; (5) African-Americans and the NAACP conspired against him; (6) insufficient evidence; and (7) he was not afforded adequate time to prepare for the second trial. The record, however, does not reveal any fundamental error.

¶2 After reviewing the entire record, we conclude the evidence is sufficient to support the verdict and there is no reversible error. Therefore, we affirm Mekara's conviction, but modify his sentence.

FACTUAL AND PROCEDURAL HISTORY

¶3 We view the facts in the light most favorable to sustaining the conviction. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶4 In September 2006, victim G. ("G.") was seated at a McDonald's restaurant eating his dinner and watching television when Mekara walked past him on the way to the restroom. After G. happened to laugh at something on T.V., Mekara asked, "What

did you say?" G. responded, "Leave me alone, old man." and Mekara walked back towards the restroom. Suddenly, Mekara struck G. on the right side of the face. G. responded by knocking Mekara into the condiments section, which was approximately eight feet away from where G. was originally seated. G. testified that he cannot recall striking Mekara, but believes he hit him once or twice in the face. G. only remembers people grabbing him from behind and pulling him away from Mekara. After Mekara continued towards the restroom, G. asked the restaurant manager to call the police. The police arrived shortly thereafter.

¶5 G. initially thought he would be fine except for a few bumps and bruises. However, after speaking to police and being examined by paramedics at the scene, G. returned to the McDonald's restroom to clean up and discovered a problem with his eye. When G. blew his nose, he heard a popping sound and watched his eyeball swell shut. Paramedics took G. to the hospital where doctors examined him and found several fractures around his eye. The physician, who examined G. on the night of the incident, testified that he found eight fractures in G.'s facial bone. In addition to these fractures, G. suffered from a broken nose.

¶6 Several witnesses testified, confirming G.'s version of the events.

¶7 The State filed a complaint in Maricopa County Superior Court against Mekara alleging one count of aggravated assault, a class 4 felony.¹ During his initial appearance, Mekara indicated he wanted to represent himself. Subsequently, Mekara signed and filed a waiver of counsel form that the court accepted after questioning him on the matter.

¶8 Mekara later filed a motion to dismiss his case alleging that he previously pled guilty to a misdemeanor assault in municipal court for the same offense. In the municipal court case, Mekara entered into a no contest plea, but the plea was vacated and the court dismissed the case without prejudice. The superior court denied Mekara's motion to dismiss, indicating the State had the right to proceed.

¶9 The superior court became concerned that Mekara had mental competency issues because it believed he did not understand the meaning of giving up his right to counsel. Consequently, the court, upon its own motion, ordered two prescreening evaluations. The court also appointed the Maricopa County Public Defender's Office to serve as Mekara's advisory counsel. After the court reviewed written reports evaluating Mekara's competency, the court found him competent. The court arraigned Mekara a few weeks later.

¹ The case was originally submitted as a misdemeanor assault in the Mesa Municipal Court ("municipal court") in case number 2006-51944 ("municipal court case").

¶10 Mekara filed a motion to determine time limits asserting the case should be dismissed for speedy trial violations. Mekara argued that the superior court should include in its calculations the time spent screening him for competency. The State responded that Mekara's prescreening process began in March 2007 and was completed in September 2007 with his arraignment taking place on September 17, 2007.² Thus, the State argued that once it subtracted time for completing the evaluation, Mekara's case had to be fully adjudicated by February 14, 2008 to comply with the Arizona Rule of Criminal Procedure ("Ariz. R. Crim. P.") 8.

¶11 Mekara's first trial resulted in a hung jury and the superior court declared a mistrial. Thereafter, Mekara petitioned for a change of judge for cause alleging bias, but the court denied his petition. Mekara also petitioned to remove his legal advisor and filed a second waiver of counsel form. After conducting a colloquy, the court found that Mekara knowingly, intelligently, and voluntarily waived his right to counsel. Mekara then petitioned for new advisory counsel, but

² Mekara incorrectly states that he was arraigned on January 26, 2007. Our review of the record shows that the direct complaint was filed that day and Mekara was not arraigned. Further, Mekara was not arraigned at his initial appearance on February 26, 2007. Instead, his arraignment was delayed because the superior court ordered Mekara to undergo prescreen evaluations. He was arraigned after the court received the results from his prescreen evaluations and it found him competent.

the court denied the petition noting that Mekara was entitled to competent representation, not counsel of his choice.

¶12 The parties held an unsuccessful settlement conference. Before trial, the State filed a motion in limine to preclude six defense witnesses from testifying and alleged that the witnesses were improperly disclosed and irrelevant to Mekara's case. The court granted the State's motion in limine for five of the six witnesses.

¶13 After a three-day jury trial, the jury convicted Mekara of one count of aggravated assault, a class 4 felony. The superior court sentenced Mekara to two years' probation and awarded Mekara 151 days of presentence incarceration credit.

¶14 Mekara timely filed his notice of appeal. See Ariz. R. Crim. P. 31.3. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, as well as Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, -4033(A)(1)-(3) (2010).³

DISCUSSION

I. Standard of Review

¶15 This court has reviewed the entire record for fundamental error. *State v. Barraza*, 209 Ariz. 441, 447, ¶ 21, 104 P.3d 172, 178 (App. 2005). Fundamental error is "error

³ We cite to the most current version of the statute when it has not been substantively revised since the date of the offense.

going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). On review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against the defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

II. Double Jeopardy

¶16 Mekara contends that double jeopardy should have precluded the State from filing the felony charge in superior court. The Double Jeopardy Clause in the Fifth Amendment of the United States Constitution and Article 2, Section 10 of the Arizona Constitution prohibit: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Lemke v. Rayes*, 213 Ariz. 232, 236, ¶ 10, 141 P.3d 407, 411 (App. 2006) (citations omitted).

¶17 Here, Mekara filed a motion to dismiss the case on double jeopardy grounds alleging that he previously pled guilty to a misdemeanor assault in municipal court for the same offense. While Mekara entered into a no contest plea, the municipal court did not formally accept the plea and granted the

State's motions to vacate the plea for a number of reasons. One of the reasons included that the plea was not accepted "after due consideration of the views of the parties and the interest of the public[,]" and that no factual basis was taken at the time of the plea. Consequently, on March 15, 2007, the municipal court dismissed the case without prejudice. In reviewing the record, we do not find any evidence of double jeopardy because Mekara was never convicted, acquitted, and did not receive multiple punishments in the misdemeanor assault case. Thus, the superior court did not err in allowing the State to proceed with the felony charge.

III. Speedy Trial Violations

¶18 Mekara argues that his right to a speedy trial was violated because the superior court did not properly calculate the time he spent being screened for competency. Ariz. R. Crim. P. 8.2 provides, "every person against whom an indictment, information or complaint is filed shall be tried by the court . . . within . . . 150 days from arraignment if the person is held in custody" Ariz. R. Crim. P. 8.2 (a)(1). Additionally, Ariz. R. Crim. P. 8.4(a) provides, "[d]elays occasioned by or on behalf of the defendant [such as] delays caused by an examination and hearing to determine competency" shall be excluded from the computation of time limits.

¶19 Mekara's arraignment was held on September 17, 2007. During the December 2007, January 2008, and February 13, 2008 status conferences, Mekara stated he was unprepared for trial because he wanted to conduct additional interviews of witnesses, the State failed to turn over photographs taken by police, and he was "not sure" when he would be prepared. Mekara's advisory counsel indicated that the State gave Mekara the photographs and he had an opportunity to review them, but he wished to enlarge them before trial. The court noted that the case had to be tried no later than February 14, 2008 to comply with Mekara's speedy trial requirements, but Mekara agreed to exclude time so he could prepare for trial. After excluding time, there were 140 days between Mekara's arraignment and the first trial.

¶20 In the second trial, during the status and trial management conferences held on March 26 and June 2, 2008, Mekara asked the superior court to delay setting a trial date because he was unprepared and had yet to receive out-of-state medical records and transcripts from the first trial.⁴ Because the delayed trial was occasioned by Mekara on numerous occasions, such time is excluded from the computation of time. Ariz. R. Crim. P. 8.4(a). Thus, the court did not err in continuing the

⁴ The superior court noted that the transcripts were offered to Mekara, but he refused to pay for them. Mekara said he did not have money to pay for the transcripts and acknowledged that he did not submit a written motion asking the court for a continuance.

trial date and Mekara's speedy trial rights were not violated. After excluding time, there were 145 days between the March 19, 2008 status conference and the second trial.

VI. Superior Court Failed to Enforce Subpoenas

¶21 Mekara asserts the superior court erred in refusing to enforce his subpoenas for trial. "A trial court has broad discretion over discovery matters, and we will not disturb its rulings on those matters absent an abuse of that discretion." *State v. Fields*, 196 Ariz. 580, 582, ¶ 4, 2 P.3d 670, 672 (App. 1999).

¶22 Regarding Mekara's subpoena for "Virginia" of Biomat USA, Inc., the court quashed the subpoena after Mekara could not explain how such testimony helped his case. Mekara agreed to release Mr. Whitney, his attorney in the municipal court case, Mr. and Mrs. W., and Mrs. N. from the subpoenas. Consequently, because Mekara provided no explanation as to how Virginia's testimony was relevant to his case, we do not find that the court erred in quashing that subpoena.

V. Judicial Bias

¶23 Mekara contends the trial court judge exhibited judicial bias because it denied all of Mekara's motions. We presume a trial judge is free from prejudice and bias. *State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997); *State v. Hurley*, 197 Ariz. 400, 404, ¶ 24, 4 P.3d 455, 459 (App. 2000).

To rebut this presumption, a party must prove bias or prejudice by a preponderance of the evidence. *Hurley*, 197 Ariz. at 404-05, ¶ 24, 4 P.3d 455, 459-60.

¶24 In his supplemental brief, Mekara merely states that the trial judge denied "all [of his] motions" and does not cite to portions of the record demonstrating any alleged bias by the trial judge. "It is generally conceded that the bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source and not from what the judge has done in his participation in the case." *Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977). Consequently, Mekara has not met his burden. Further, our review of the entire record on appeal does not reveal evidence of judicial bias or prejudice towards Mekara. Instead, the court indicates on the record that it "considered all of [Mekara's] motions and [it] allowed [him] to argue all of [his] motions." Thus, we find no evidence of judicial bias.

VI. Conspiracy

¶25 Mekara appears to argue that the superior court erred in not addressing his argument that African-Americans and the NAACP conspired against him. In his motions and an affidavit filed with the superior court, Mekara alleges that African-Americans steal his court papers and vandalize his property every day. It is within the trial court's discretion to exclude

evidence that is not relevant to a defendant's case. *State v. Hampton*, 213 Ariz. 167, 178, ¶ 45, 140 P.3d 950, 961 (2006). Here, neither on appeal nor in the superior court has Mekara explained how his allegation, that such an alleged conspiracy against him might be relevant to whether he assaulted G. and caused physical injury to him. Thus, the superior court did not err.

VII. Insufficient Evidence

¶26 Mekara asserts there was insufficient evidence to support his conviction and sentence. Mekara asserts that he could not have hit G. on the right side of the face, which was facing a wall, because only his left side was exposed. "We review the sufficiency of evidence presented at trial only to determine whether substantial evidence supports the jury's verdict" *State v. Cox*, 217 Ariz. 353, 357, ¶ 22, 174 P.3d 265, 269 (2007). "Substantial evidence" is evidence that "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). When considering a defendant's claim regarding the sufficiency of evidence, we construe the evidence in the light most favorable to sustaining the verdict, *State v. Jensen*, 217 Ariz. 345, 348, ¶ 5, 173 P.3d 1046, 1049 (App. 2008) (citation omitted), and we will not disturb the trial court's ruling absent an abuse of discretion.

State v. Morris, 215 Ariz. 324, 333, ¶ 33, 160 P.3d 203, 212 (2007).

¶27 Mekara was charged with aggravated assault. To prove aggravated assault, the State was required to show that Mekara, using force, intentionally, knowingly or recklessly caused physical injury to G. A.R.S. § 13-1204(A)(1) (2010). The State presented sufficient evidence to support its verdict. It called witnesses to testify and they stated that they saw Mekara hit G. on the face. Additionally, the State called the physician who examined G. on the night of the incident to testify that he found eight fractures in G.'s facial bone. Thus, there was sufficient evidence to support Mekara's conviction of aggravated assault.

VIII. Inadequate Time to Prepare for Second Trial

¶28 Mekara argues the superior court abused its discretion because it did not give him sufficient time to prepare for the second trial. A trial court's decision to grant or deny a continuance will not be disturbed "unless there is a clear abuse of discretion and prejudice results." *State v. Sullivan*, 130 Ariz. 213, 215, 635 P.2d 501, 503 (1981) (citation omitted). As stated *supra*, ¶ 20, the trial was delayed on two separate occasions because Mekara was unprepared. Further, during the July 2, 2008 status conference, the court asked Mekara when he would be prepared for trial and he responded, "I don't know."

After the State indicated the case would be ready for trial the week of August 11, more than a month after the status conference, the court scheduled a three-day trial for that week. Thus, the court did not abuse its discretion and afforded Mekara sufficient time to prepare for trial. Further, the record discloses no prejudice to Mekara sufficient to constitute fundamental error.

IX. Presentence Incarceration Credit

¶29 Finally, the superior court awarded 151 days of presentence incarceration credit to Mekara. Our review of the record and calculation indicate that the Mekara is entitled to an additional eleven days of credit.

CONCLUSION

¶30 After careful review of the record, we find no meritorious grounds for reversal of Mekara's conviction. The record reflects Mekara had a fair trial, was present and that advisory counsel was present at all critical stages prior to and during trial, as well as for the verdict and sentencing. Additionally, the jury was properly comprised of eight members pursuant to A.R.S. § 21-102(B) (2002). Additionally, the court imposed the proper sentence for Mekara's offense.

¶31 We affirm Mekara's conviction, but modify his sentence to grant him 162 days of presentence incarceration. A.R.S. § 13-4037(A) (2010). Upon the filing of this decision, Mekara's

counsel shall inform him of the appeal's status and his future options. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Mekara shall have thirty days from the date of this decision to file a motion for reconsideration *in propria persona* or petition the Arizona Supreme Court for review. *See id.*

/S/

DONN KESSLER, Judge

CONCURRING:

/S/

PATRICK IRVINE, Presiding Judge

/S/

MICHAEL J. BROWN, Judge