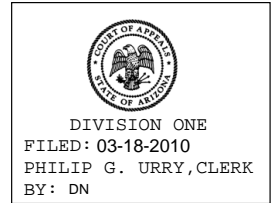


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA) 1 CA-CR 08-1043
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
FRANCISCO JAVIER RIVERA, JR.,) Rule 111, Rules of the
) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-129201-001 DT

The Honorable Julie P. Newell, Commissioner

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Julie A. Done, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Francisco Javier Rivera ("Rivera") appeals his conviction and sentence for one count of aggravated assault, a class-three felony. Rivera raises only one issue on appeal. He argues that the trial court erred by failing to have him make an on-the-record waiver of his right to testify. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On May 19, 2008, the State filed an indictment charging Rivera with one count of aggravated assault, a class-three dangerous felony. The State alleged that Rivera, while carrying a pocketknife, intentionally placed B.L. in reasonable apprehension of imminent physical injury.

¶3 The record reveals the following facts, which we view, along with all reasonable inferences therefrom, in the light most favorable to upholding the verdict. See *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶4 In early August 2008, Rivera prepared a handwritten motion for change of counsel. He stated in his motion that he and his appointed counsel "have very different opinions on [his] case." He asserted that his attorney discounted his suggestions on how to defend his case, dismissed his ability to testify with prior convictions, failed to investigate as promised, and urged him to resolve the case by entering a plea agreement despite his

declared innocence.

¶15 On August 18, 2008, the court held a settlement conference. During the settlement conference, Rivera told the court that he was not satisfied with his court-appointed counsel because he did not believe that she was fighting for him. Rivera also told the court that he and his counsel disagreed on whether Rivera should testify at trial. Rivera's counsel had advised Rivera prior to the settlement conference that it would be in his best interest not to testify because if he testifies, the State could impeach him with a prior felony conviction. The judge at the settlement conference explained to Rivera on two different occasions that he has an absolute right to testify. The judge also explained to Rivera that he could file a request for a new attorney with the assigned trial judge at the pre-trial conference.

¶16 Two days later at the pre-trial conference, Rivera filed the handwritten motion for change of counsel that he had prepared in early August. The trial judge denied the motion and informed Rivera that his attorney has an obligation to "give [him] a fair and honest opinion of how she thinks the case is going to go once it gets to the trial stage."

¶17 On September 18, 2008, the court conducted a trial-management conference. During the conference, Rivera told the court that he had not seen his attorney in over a month and that

he did know what was going on in his case. Rivera's counsel advised the court that she believed "the attorney-client relationship [was] irretrievably broken and it would be to [Rivera's] benefit to appoint new counsel." The court informed Rivera that it would be willing to grant his motion for change of counsel, but by doing so, it would delay the start date of the trial. Rivera informed the court that he no longer wanted a new attorney because he did not want to delay the trial any further.

¶18 Prior to the start of trial, Rivera's counsel disclosed to the State that Rivera may be called as a witness.

¶19 At some point after the trial had begun, the State argued that if either Rivera or defense witness, C.M., testified, it should be permitted to impeach them with a recorded phone conversation between Rivera and C.M. C.M. was Rivera's girlfriend, and in the recorded conversation Rivera told C.M. to memorize a letter that he had written to her, so that she would know "what to say and not to say" when she testified. The recorded conversation took place on September 22, 2008, while Rivera was in jail.

¶10 At the beginning of the third day of trial, defense counsel stated, without the jury being present, that "[i]n chambers the Court indicated that if [C.M.] or [Rivera] took the stand, that they would be allowed to be impeached by the use of

that jail call. For that reason, Your Honor, I'm not going to call [C.M.], and [Rivera] has decided not to take the stand." Rivera was present in the court and did not object when his attorney informed the court that Rivera would not be testifying.

¶11 On September 29, 2008, the jury found Rivera guilty of one count of aggravated assault. The jury further found that the offense was a dangerous offense because it involved the threatened use of a pocketknife.

¶12 At the sentencing hearing, the judge ordered Rivera to serve a mitigated prison term of six years. The judge also imposed a consecutive term of community supervision equal to one seventh of his prison term. The judge properly awarded Rivera 198 days of pre-sentence incarceration credit.

¶13 Rivera timely appeals his conviction and sentence. 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).

DISCUSSION

¶14 Rivera argues that the trial court erred by failing to have him make an on-the-record waiver of his right to testify. Rivera contends that the trial judge should have personally asked him to make an on-the-record waiver of his right to testify for the following reasons: (1) the court knew that

Rivera intended to testify, (2) the court knew that Rivera's relationship with his attorney was on shaky ground, and (3) there were no witnesses to the assault, so Rivera's testimony was critical to his defense. Because no objection was made at trial, Rivera must demonstrate prejudicial, fundamental error or structural error to obtain a reversal. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Rivera argues that the error is both fundamental and structural.

¶15 After reviewing the record and Rivera's arguments, however, we find no error -- fundamental, structural, or otherwise.

¶16 In Arizona, it is not generally required that a defendant make an on-the-record waiver of his right to testify. See *State v. Gulbrandson*, 184 Ariz. 46, 65, 906 P.2d 579, 598 (1995) (holding that the defendant was not denied his right to testify and is not entitled to a new trial based on the failure to make an on-the-record waiver). Indeed, Rivera concedes in his brief that an on-the-record waiver of the right to testify is not required under Arizona law. The Arizona Supreme Court has stated, however, that it may be "prudent" in an appropriate case for a trial court to require a defendant to make an on-the-record waiver of his right to testify. *Id.* Rivera claims that this is such a case, but we conclude otherwise.

¶17 In *State v. Martin*, the court reversed the defendant's

conviction because "the defendant unretreatingly demand[ed] that he be given the opportunity to testify but his counsel in direct contradiction to the defendant's wishes refuse[d] to put him on the stand." 102 Ariz. 142, 147, 426 P.2d 639, 644 (1967). In *State v. Tillery*, the defendant was indecisive about whether he wanted to testify. 107 Ariz. 34, 36, 481 P.2d 271, 273 (1971). On appeal, the defendant argued that the trial court refused to let him testify. *Id.* The Arizona Supreme Court explained, "[w]ere defendant's desires to testify in his own behalf as strong and unrelentless as he now claims they were, he would not have maintained his silence throughout the entire trial. He might very easily have directed his request to the court or made motion to have his attorney removed." *Id.* at 37.

¶18 The record in this case reveals that prior to trial, Rivera intended to testify despite his counsel's advice to the contrary. Rivera expressed his desire to testify at the settlement conference, the pre-trial conference, and in his motion for change of counsel. Circumstances changed, however, after the trial began. During trial, the court indicated that the State could impeach Rivera by asking him about the recorded jail phone conversation where he told his girlfriend, C.M., to memorize a letter that he had to written to her. At the beginning of the third day of trial, in the presence of Rivera, Rivera's counsel stated to the court that in light of the

court's ruling, "[Rivera] has decided not to take the stand."

¶19 If Rivera's desire to testify was as unrelenting as he now claims, he should have objected when his defense attorney told the court that "[Rivera] has decided not to take the stand." Furthermore, it is unlikely that Rivera, who had been very outspoken throughout the pre-trial conferences, would have stood idly by if he truly intended to testify. Rivera's failure to object suggests that he ultimately agreed with his defense attorney that testifying would not be in his best interest. The record here does not reveal that the court knew Rivera intended to testify regardless of developments at trial.

¶20 Rivera's argument that the court knew he intended to testify because he was noticed as a potential witness is unavailing. See *Gulbrandson*, 184 Ariz. at 64-65, 906 P.2d at 597-98 (finding that although the defendant was listed as a potential witness, the defendant did not make his desire to testify known at trial and therefore his constitutional right to testify was not denied). It is not uncommon for a defendant to be listed as a potential witness but ultimately not called to testify.

¶21 Rivera's contention that the trial judge should have personally asked him to make an on-the-record waiver of his right to testify because the court knew that Rivera's relationship with his attorney was on shaky ground is also

unpersuasive. The court was willing to grant Rivera's motion for change of counsel, but Rivera made an informed decision to withdraw his request because he did not want to delay the start date of the trial. Moreover, Rivera knew that it was ultimately his decision whether to testify because the judge at the settlement conference told Rivera on two different occasions that he had an absolute right to testify.

¶22 Rivera's contention that his testimony was critical to his defense because there were no witnesses to the assault is one factor that may make it more "prudent" for a trial judge to personally inquire whether the defendant intends to waive his or her right to testify. See *Gulbrandson*, 184 Ariz. at 65, 906 P.2d at 598. The fact remains, however, that Arizona law does not require the trial court to engage the defendant in an on-the-record discussion of his or her waiver of the right to testify. *Id.*; *State v. Allie*, 147 Ariz. 320, 328, 710 P.2d 430, 438 (1985).

¶23 For these reasons, we conclude that defendant was not denied his right to testify and is not entitled to a new trial based on the failure to make an on-the-record waiver. We find no error.

CONCLUSION

¶24 The conviction and sentence are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
SHELDON H. WEISBERG, Presiding Judge

_____/s/_____
PHILIP HALL, Judge