

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,) No. 1 CA-CR 08-1096
)
Appellee,) DEPARTMENT D
v.)
) **MEMORANDUM DECISION**
LUIS SILVA-LOZANO)
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
FILED 07-01-2010

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-012779-001 DT

The Honorable Maria del Mar Verdin, Judge

AFFIRMED

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

Maricopa County Public Defender's Office Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Luis Silva-Lozano appeals from his conviction for the offense of aggravated domestic violence, a class five felony and domestic violence offense. Silva-Lozano's 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 he 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). Silva-Lozano was afforded the opportunity to file a supplemental brief *in propria persona* but did not do so. For the following reasons, we affirm the conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶12 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶13 On March 21, 2006, Victim called 9-1-1. Her husband, the defendant, had arrived at her house smelling of alcohol and seeking to enter the home. When she refused to unlock the screen door for him, Silva-Lozano demanded the keys to the car. Again, she refused. In response, Silva-Lozano punched his hand through the glass window at the front of the house, attempting to enter. Silva-Lozano then ran around to the back of the house, and punched through a window to get to the kitchen door. Fearing for her safety and unsure of whether Silva-Lozano had entered the house or fled, Victim called 9-1-1 and gathered her daughters in front of the house to await the police.

¶14 When the police entered the house, they found blood

spattered across the kitchen floor. The blood trail led them to the bedroom where they discovered Silva-Lozano wedged between the mattress and the wall, covered by a blanket, lying in a pool of his own blood.

¶15 Because of two prior domestic violence convictions, Silva-Lozano was charged with aggravated domestic violence, a class five felony. At trial, the Defendant's wife testified as the victim of the March 21, 2006 incident and of the two prior domestic violence offenses on November 21, 2005 and January 29, 2006. During the course of her testimony, Victim improperly referenced Silva-Lozano's immigration status; the Defendant moved for, and the judge granted, a mistrial. A new trial was set for October 8, 2008. At the new trial, Victim again testified regarding the instant aggravated domestic violence charge and Silva-Lozano's two prior convictions. Both Victim and the police officer who responded to her call identified Silva-Lozano as the defendant.

¶16 Silva-Lozano was found guilty and sentenced to the presumptive term of 1.5 years on November 24, 2008. He timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).

DISCUSSION

¶17 During the first trial, Silva-Lozano filed a motion to

allow impeachment of the state's main witness, Victim, with motive, bias and prejudice evidence. The Defendant sought to introduce evidence of Victim and Silva-Lozano's divorce in April 2008 to show that her desire to have sole custody of the children may influence her testimony. Because the divorce proceedings did not occur until two years after the domestic violence incident at issue, the court found that the impeachment evidence was not relevant and denied the motion. Defense counsel submitted, and the court accepted, a written offer of proof.

¶18 At the second trial, defense counsel mentioned the motion to impeach, that it had been denied by the judge in the first trial, and that he had submitted an offer of proof to the court. Defense counsel did not, however, re-urge the motion, but sought only to insure that the offer of proof was filed. When the court asked whether the motion was before it, counsel replied, "[t]hat's already been resolved." When defense counsel cross-examined the victim, he did not seek to impeach her as outlined in his offer of proof and did not complain that the trial court was improperly limiting his cross-examination.

¶19 "[The] defendant in a criminal case should be given wide latitude in cross-examining his prosecutor for the purpose of showing motive, bias or prejudice." *State v. Aldrich*, 75 Ariz. 53, 58, 251 P.2d 653, 657 (1952). The trial judge does

have discretion to limit the extent of cross-examination, but excluding evidence that "would clearly show bias, interest, favor, hostility, prejudice, promise or hope of reward . . . is error and will be ground for a new trial." *State v. Holden*, 88 Ariz. 43, 55, 352 P.2d 705, 714 (1960).

¶10 We need not decide whether Silva-Lozano may have been improperly barred from impeaching his ex-wife with evidence of motive or bias, however, because his failure to re-urge the motion waived any argument on appeal. Submitting the offer of proof in the first trial, preserved the record for appeal, but the granting of a mistrial effectively eliminated the proceedings, including the ruling on the motion. *See Gray v. Gardiner*, 92 Ariz. 208, 211, 375 P.2d 562, 564 (1962) ("a mistrial is equivalent to no trial."). Silva-Lozano's failure to re-urge the motion -- even though he submitted the same offer of proof -- in the second trial results in waiver of the argument. *See State v. Hagen*, 27 Ariz. App. 722, 726, 558 P.2d 750, 754 (1976) (attorney who had the opportunity to re-urge a motion in limine but failed to do so, waived the motion).

¶11 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, Silva-Lozano 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.

¶12 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 Silva-Lozano 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. Silva-Lozano 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

¶13 The conviction and sentence are affirmed.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Judge

_____/s/_____
PATRICK IRVINE, Judge