DIVISION ONE
FILED: 06-29-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0035
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
GIL SOSA LOZOYA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-139228-001 DT

The Honorable Robert L. Gottsfield, Judge

AFFIRMED

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

Kessler Law Office — Mesa
By Eric W. Kessler
Attorney for Appellant

S W A N N, Judge

¶1 Gil Sosa Lozoya ("Defendant") appeals from his convictions of one count of leaving the scene of a serious injury accident, a class 2 felony and a violation of A.R.S. § 28-661, and one count of driving while his license was suspended, a class 1 misdemeanor and a violation of A.R.S. § 28-3473.

¶2 This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Defendant has advised us that he has searched the record on appeal and finds no arguable question of law that is not frivolous. *See Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Defendant was given the opportunity to file a supplemental brief *in propria persona*, but did not do so. Counsel now asks this court to search the record for fundamental error. We have done so, and find none.

Factual and Procedural History

¶3 On the evening of June 22, 2008, in Phoenix, Paula L. was driving northbound on 43rd Avenue in her Ford Explorer. She was traveling with four passengers: Jeremiah, her two-and-a-half-year-old son; Alexia, her four-year-old daughter; Jeremy, the father of Alexia and Jeremiah; and Juan, Jeremy's cousin.

As she approached the cross-street of Southern Avenue,[1] Paula observed a patrol vehicle proceeding through the intersection and traveling southbound on 43rd Avenue. After the patrol vehicle cleared the intersection, she continued driving northbound at a speed between 21 and 24 miles per hour. A Ford F-350 truck, traveling eastbound on Southern Avenue, did not stop before entering the intersection with 43rd Avenue; it hit the Explorer midway through the intersection. The truck was traveling at a speed of approximately 49 miles per hour at the moment of impact.

¶4 Upon hearing the crash, Officers Ashley Gagnon and Ryan Arnett, who were traveling in the patrol vehicle, returned to the intersection. Officer Gagnon found Juan lying in the middle of the intersection; he was having difficulty breathing.[2] Officer Gagnon also attended to Paula, who was also thrown from the Explorer.[3] Despite her injuries, Paula picked herself up from the pavement and walked to the Explorer to check on her family members. When she realized that Jeremiah was not in the

[1] There is a four-way stop at the intersection of 43rd Avenue and Southern Avenue.

[2] As a result of the accident, Juan received stitches above his right eyebrow, several staples on his head, and his jaw was wired shut.

[3] Paula sustained injuries, including a fractured ankle and road rash that left scarring, and she received stitches above her eyebrow.

vehicle, she asked Jeremy, "[W]here's the baby?" Thereafter Officer Arnett assisted Paula with locating Jeremiah, who was found buckled into his car seat at the north side of the intersection -- unconscious.[4]

¶5 Soon after the collision, a husband and wife, who were traveling eastbound on Southern Avenue, arrived at the intersection. When the driver stopped his pickup truck, Defendant approached the passenger-side window, which was rolled down. Defendant tried to open the door and said, "Hey . . . let me get in your truck." When the husband refused, Defendant attempted to get in the bed of the couple's truck. The husband then got out of his pickup and told Defendant that he was not going to take him anywhere. Soon thereafter, Defendant left the scene on foot.[5]

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[4] As a result of the accident, Jeremiah sustained serious injuries. His treating physician testified that when Jeremiah arrived at the hospital, he had severe traumatic brain injury. He had bruising to his brain and shear tearing of the nerves of his brain. Jeremiah's Glasgow Coma score was less than eight, which usually means the person is almost comatose or comatose. He was in intensive care from June 22, 2008, until July 2, 2008, and in the hospital for more than a month. As of the date of trial, Jeremiah continued to suffer from language deficiencies and to have trouble maintaining his balance. He was receiving outpatient speech therapy, physical therapy and occupational therapy. With respect to future care, school-based therapies and accommodations may be necessary throughout his life.

[5] When they were later interviewed by the police, the husband and the wife each independently identified Defendant as the driver of the F-350 from a photographic line-up.

¶6 The following day, Defendant called the police to report that his truck had been carjacked the previous evening. Sheriff's Deputy Mark Pulst interviewed Defendant regarding the stolen vehicle. In addition to discussing the purported carjacking, Defendant admitted to the deputy that he knew he was driving on a suspended license at the time the vehicle was stolen.[6] Pulst and Defendant were interrupted by the arrival of detectives who interviewed Defendant, then placed him under arrest and took him into custody.

¶7 Defendant was indicted and charged with count 1: leaving the scene of a serious injury accident; count 2: leaving the scene of an injury accident;[7] and count 3: driving while his license was suspended. A jury trial commenced on November 19, 2008. At the trial's conclusion, the court instructed the jury.

¶8 As the court was providing its instructions on the law relating to the charge of leaving the scene of a serious injury accident and the lesser-included offense of leaving the scene of an injury accident, the court requested a sidebar with the attorneys. It later excused the jury to discuss further the *mens rea* requirement of these offenses. The court compared the RAJI 28.661 to A.R.S. § 28-661 to discern whether the State was

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[6] The State introduced additional evidence of the suspension of Defendant's driving privileges during trial.

[7] This charge was dismissed with prejudice before trial.

required to prove only that a defendant knew the accident resulted in an injury, or to prove that a defendant knew that it was a *serious* injury accident. The court was concerned that absent a requirement that a defendant know that it was a serious injury accident, the *mens rea* requirement for the greater offense would be the same as that of the lesser-included offense. After hearing arguments from counsel, the court determined that the State was required to prove a defendant knew that there was an injury, not the degree or extent of the injury.

¶9 Following a five-day trial, a jury convicted Defendant for leaving the scene of a serious injury accident and driving while his license was suspended. At sentencing, Defendant admitted to two historical prior felonies for aggravated DUI. With respect to the conviction for leaving the scene of a serious injury accident, the court found that a mitigated sentence was not warranted and sentenced Defendant to a presumptive term of 15.75 years imprisonment, with 199 days presentence incarceration credit. As to the conviction for driving on a suspended license, the court sentenced Defendant to a term of six months with time served, and ordered the sentences to be served concurrently.

¶10 Defendant timely appeals. 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 (2010), and 13-4033(A)(1).

Discussion

¶11 The record reveals no fundamental error. Defendant was represented at all stages of the proceedings against him and was present at all critical stages. The record of voir dire does not demonstrate the empanelment of any biased jurors. The jury was properly comprised of twelve jurors and two alternates. *See* A.R.S. § 21-102(A) (2002).

¶12 At trial, the State presented direct and circumstantial evidence sufficient to allow the jury to find Defendant guilty of the charged offenses. This evidence was properly admissible. The State's closing and rebuttal arguments were also proper, and the court properly instructed the jury on the elements of the charged offenses, the lesser-included offense,[8] and the State's burden of proof.

[8] "[L]iability under A.R.S. § 28-661 attaches *only* where a defendant has actual knowledge of the personal injury or knowledge that the accident was of such a nature that one would reasonably anticipate that it resulted in personal injury." *State v. Blevins*, 128 Ariz. 64, 68, 623 P.2d 853, 857 (App. 1981) (emphasis added). There is no requirement that a defendant know the extent of the injury. *See id.* To conclude otherwise would undermine the legislative purpose of prohibiting a driver involved in an accident from evading responsibility by escaping or leaving the scene before providing his identifying information and rendering assistance to those injured in the accident. *See* A.R.S. § 28-663(A) (2004). In effect, such a requirement would *encourage* a defendant to leave the scene of an accident before determining the extent of the injury -- allowing

¶13 After the jury returned its verdicts, the court received a presentence report. At sentencing, Defendant was given the opportunity to speak and the court stated on the record the basis for its findings. The court then imposed legal sentences on the charges on which Defendant was convicted. *See* A.R.S. § 13-703(C), (J) (previously A.R.S. § 13-604(C)); A.R.S. § 13-707(A)(1).

Conclusion

¶14 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm. After the filing of this decision, defense counsel's obligations in this appeal have come to an end. Defense counsel need do no more than inform Defendant of the outcome of this appeal and his future options, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review. Ariz. R. Crim. P. 31.19(a).

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him to benefit from his willful ignorance as to the scope of the injury.

Upon the court's own motion, Defendant has 30 days in which to file a motion for reconsideration.

/s/
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PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge