

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



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FILED: 02/09/2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA,) No. 1 CA-CR 09-0070
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JESUS AVILA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-126209-001 DT

The Honorable John R. Ditsworth, Judge

AFFIRMED

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

Robert J. Campos & Associates, P.L.C. Phoenix
By Robert J. Campos
Attorneys for Appellant

D O W N I E, Judge

¶1 Jesus Avila ("defendant") timely appeals his conviction for aggravated assault in violation of Arizona Revised Statutes ("A.R.S.") section 13-1203 (2001) and -1204 (Supp. 2009)¹. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has advised that he has thoroughly searched the record and found no arguable question of law and requests that we review the record for fundamental error. See *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona*, but he did not do so. On appeal, we view the evidence in the light most favorable to sustaining the conviction. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981), *cert. denied*, 459 U.S. 882 (1982).

FACTS AND PROCEDURAL HISTORY

¶2 On April 27, 2008, Officer J.T. responded to a 9-1-1 call at a residence, where he found J.V. bleeding from a four-to five-inch laceration on his arm. J.V. told the officer that the person who cut him was inside the house; that person was later identified as defendant.

¹ We cite to the current version of this statute because no changes material to this decision have occurred.

¶13 The incident that led to the injury started earlier in the day, when J.V. and his family went to defendant's house to pick up J.V.'s father, who was living there. When J.V. and his family arrived, they saw the father was "really beat up," with "bruises from one side of his neck to the other, scrapes on his face." J.V.'s family stayed by the street with the father, while J.V. walked up the driveway to ask the homeowner, a friend of his father's, how his father was injured. The homeowner explained the father was mugged and fell over a bush in the yard. J.V.'s father denied the story, and the conversation between J.V. and the homeowner became heated.

¶14 Defendant, the homeowner's son, and his friend watched from inside the house. At one point, J.V. pushed the homeowner and turned away, telling his family, "let's go, let's leave." Inside the house, the son's friend yelled, "they hit your dad, they hit your dad." Defendant grabbed a kitchen knife and ran outside, screaming "who hit my dad?" Defendant continued to advance on J.V., swinging the knife at him and saying, "I am going to kill you." J.V. retreated, but defendant followed him and slashed J.V.'s arm and side; J.V. required seven stitches. J.V.'s brother and cousin attempted to take the knife away from defendant, but he kept them away by slashing the knife at them. When the brother and cousin backed away, defendant chased J.V.

around a parked car until J.V.'s sister called the police and defendant ran back to the house.

¶15 J.V. identified defendant as the man who cut him, and Officer J.T. placed defendant in a police vehicle. Officer J.T. photographed J.V.'s injuries and a small cut on defendant's thumb. An officer found a knife blade in the street and impounded it. Officer H.D. issued *Miranda* warnings to defendant and interviewed him; the interview was taped.

¶16 Defendant was charged with aggravated assault for using a knife to cause physical injury to J.V. At trial, J.V., three witnesses, and three police officers testified. Defendant presented two witnesses and testified on his own behalf. The defense asserted that J.V. hit defendant's father, and defendant acted in self-defense to protect his father and himself from an attack by J.V. and his family.

¶17 The jury was instructed as to aggravated assault and the lesser-included offense of assault. It found defendant guilty of aggravated assault. The jury also found the offense was a dangerous one and that the State had proven an aggravating factor: that the offense caused physical, emotional or financial harm to the victim.

¶18 At sentencing, defendant admitted he committed the offense while on release for another felony offense. After engaging in a colloquy with defendant, the court accepted his

admission. Defendant was sentenced to a presumptive term of 7.5 years for the aggravated assault and a consecutive two-year term for committing the offense while on release;² he received eighty days of pre-sentence incarceration credit.

DISCUSSION

¶9 We have considered the brief submitted by defense counsel and have reviewed the entire record. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Defendant was present at all critical phases of the proceedings and represented by counsel. The jury was properly impaneled and instructed. At the conclusion of trial, the jury instructions were consistent with the charged offense. The record reflects no irregularity in the deliberation process.

¶10 The State presented substantial evidence of guilt. J.V. and the other prosecution witnesses similarly described how defendant wielded the knife, threatened to kill J.V., and swung the knife at J.V. and others. J.V. testified he was "scared"

² See Ariz. Rev. Stat. Section 13-604(R) (2001) (requiring an additional two years be added to a sentence when it is committed while defendant is released on his own recognizance on a separate felony offense).

during the attack. He received a sizeable laceration on his arm, which required medical care. Defendant admitted taking the knife from the kitchen before confronting J.V. and that the knife caused J.V.'s injuries. In the taped interview with Officer D.H., defendant admitted the same, although he "changed his story 11 times" during the eight- to nine-minute interview, which was played for the jury. Although conflicting testimony was presented at trial, a reasonable jury could have found the State's case more credible. See *State v. Thomas*, 104 Ariz. 408, 411, 454 P.2d 153, 156 (1969) (holding it is the jury, not the appellate court, that weighs the evidence and chooses between contradictory versions) (citations omitted).

¶11 The trial court also appropriately accepted defendant's waiver of a jury trial regarding whether the offense was committed while on release from a prior felony offense. Before accepting such a waiver, "the court shall address the defendant personally, advise the defendant of the right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent." Ariz. R. Crim. P. 18.1(b)(1), (2). Whether a waiver is made knowingly will depend on the unique circumstances of each case. *State v. Butrick*, 113 Ariz. 563, 566, 558 P.2d 908, 911 (1976) (citation omitted). The pivotal consideration "is the requirement that the defendant understand that the facts of the case will be determined by a judge and not a jury."

State v. Conroy, 168 Ariz. 373, 376, 814 P.2d 330, 333 (1991) (citation omitted). To ensure that a defendant understands the right he or she is waiving, the court must address the defendant personally and receive an affirmative response. *Butrick*, 113 Ariz. at 566, 558 P.2d at 911.

¶12 Defendant's admission was made outside the presence of the jury. The State provided certified copies of the prior felony charge and release conditions. The court directly addressed defendant and explained the jury was "still here" to consider the issue, ascertained defendant had discussed the impact of his decision with counsel, and asked whether defendant was "willing to waive the jury and make this admission." Defendant responded affirmatively after each inquiry. Only then did the court accept defendant's admission.

CONCLUSION

¶13 We affirm defendant's conviction and sentence. Counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do nothing more than inform defendant of the status 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. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, defendant shall have

thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge