DIVISION ONE
FILED: 07-29-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0105
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
PABLO RUIZ ALVAREZ,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-006420-001 DT

The Honorable James T. Blomo, Judge Pro Tempore

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
by Louise Stark, Deputy Public Defender
Attorney for Appellant

P O R T L E Y, Judge

¶1 This is 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 Pablo Ruiz Alvarez has advised us that, after searching the entire record, she has been unable to discover any arguable questions of law, and has filed a brief requesting us to conduct an *Anders* review of the record. Defendant was given an opportunity to file a supplemental brief and has not filed one.

FACTS[1]

¶2 Police officers responded to a disturbance at a bar involving a gun on September 20, 2007. They searched Defendant and found a bag of cocaine in his pocket. Defendant was subsequently charged with possession of narcotic drugs, a class four felony.

¶3 On the first day of trial, the case was dismissed without prejudice because a key witness for the State was unavailable. The State re-filed the charges on April 25, 2008, under a new cause number. Defendant subsequently filed a motion to dismiss the case with prejudice, arguing that his speedy trial rights were violated and that the State violated its

[1] We review the facts in the light most favorable to sustaining the verdict. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

discovery obligations. Following oral argument, the motion was denied.

¶4 The matter proceeded to trial, and Defendant testified during trial. The jury found Defendant guilty as charged, and he was subsequently sentenced to one year of probation. We have jurisdiction over his appeal 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, and -4033(A)(1) (2010).

DISCUSSION

¶5 We have read and considered counsel's brief and searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. While Defendant did not file a supplemental brief, counsel listed three issues that she believed her client wanted to raise. We address each issue.

¶6 Defendant first argues that the trial court erred when it denied his motion to dismiss the case with prejudice. He contends that his motion should have been granted for two reasons – the State was inexcusably unprepared for trial; and the State sought to circumvent the provisions of Arizona Rule of Criminal Procedure 8 by filing its motion to dismiss without prejudice.

¶7 We do not have jurisdiction to address the issue. Although Defendant filed the motion in the current case, he was required to challenge the State's motion to dismiss when it was filed or seek review by special action. *See State v. Paris-Sheldon*, 214 Ariz. 500, 508-09, ¶ 24, 154 P.3d 1046, 1054-55 (App. 2007).

¶8 In *Paris-Sheldon*, the defendant filed a motion to dismiss the case with prejudice and argued that the State's motion to dismiss without prejudice filed in the earlier proceeding was done "solely to avoid the provisions of Rule 8." *Id.* at 507, ¶ 21, 154 P.3d at 1053 (internal quotations and citations omitted). We held that "filing a motion to dismiss in the second case was not the correct method by which to challenge the grant of the state's motion to dismiss without prejudice in the first case." *Id.* at 508-09, ¶ 24, 154 P.3d at 1054-55; *see also State v. Alvarez*, 210 Ariz. 24, 30, ¶ 23, 107 P.3d 350, 356 (App. 2005), *vacated in part on other grounds by* 213 Ariz. 467, 143 P.3d 668 (App. 2006). Consequently, in accordance with *Paris-Sheldon*, we lack jurisdiction to address the dismissal without prejudice.

¶9 Defendant next argues that the trial court erred when it denied his request for a mistrial based on prosecutorial misconduct. During closing argument, the prosecutor stated that

"no one has produced evidence that [Defendant] has never been in trouble before." Defendant did not object after the statement was made. Instead, he unsuccessfully moved for a mistrial while the jury was deliberating.

¶10 We review a trial court's failure to grant a mistrial for an abuse of discretion. *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003). The trial judge has broad discretion in ruling on a motion for a mistrial because he or she "is in the best position to determine whether the evidence will actually affect the outcome of the trial." *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). "A declaration of a mistrial, . . . is 'the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.'" *Dann*, 205 Ariz. at 570, ¶ 43, 74 P.3d at 244 (quoting *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983)).

¶11 Here, the trial court did not abuse its discretion in denying the motion for a mistrial. Although the statement was erroneous, it was not relevant to any material element. The only issue in the case was whether Defendant knowingly possessed cocaine, and there was ample evidence for the jury to have found Defendant guilty as charged. Moreover, the court properly

instructed the jury that the lawyers' comments are not evidence. We presume the jury followed that instruction. *State v. Tucker*, 215 Ariz. 298, 319, ¶ 89, 160 P.3d 177, 198 (2007). Consequently, the trial court did not abuse its discretion when it denied the motion for a mistrial.[2]

¶12 Defendant next argues that the trial court erred in answering a juror question. During deliberations, a juror sent out a written request asking the court why the police officers originally detained and searched Defendant at the bar. The court responded by stating that "[t]he parties stipulated that [Defendant] was lawfully detained and searched. You must accept that stipulation."

¶13 Defendant correctly maintains that the court erred by instructing the jurors that they must accept the stipulation. *See State v. Allen*, 223 Ariz. 125, 127, ¶ 11, 220 P.3d 245, 247 (2009) (holding that "jurors may accept or reject" stipulations). Defendant did not, however, object to the court's response. Accordingly, Defendant must show fundamental error and prejudice. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). We conclude that Defendant has failed to demonstrate fundamental error or prejudice.

[2] We note, however, that both ethical rules and case law oblige a prosecutor "to see that defendants get a fair trial." *State v. Cornell*, 179 Ariz. 314, 331, 878 P.2d 1352, 1369 (1994); Ariz. R. Sup. Ct. 42, ER 3.8.

Although the court's response to the juror question was inaccurate, the question and answer were legally unrelated to the sole issue in the case — whether Defendant knowingly possessed cocaine. Consequently, Defendant is not entitled to relief.

¶14 Finally, at trial Defendant testified that he did not understand he had the right to remain silent because he could not hear the officer who was reading him his *Miranda*[3] rights. He explained, however, that he nevertheless told the officer that he understood his *Miranda* rights because the officer became angry and insulted him.

¶15 The defendant has the burden of raising any issue of voluntariness. *See State v. Alvarado*, 121 Ariz. 485, 487, 591 P.2d 973, 975 (1979). A court need not hold a *sua sponte* voluntariness hearing unless the evidence is such as to alert the court that the voluntariness of statements is at issue. *State v. Fassler*, 103 Ariz. 511, 513, 446 P.2d 454, 456 (1968). Here, Defendant never requested a voluntariness hearing, and the record fails to show that his interrogation was in any way coercive, which is a necessary predicate to finding the statements involuntary. *State v. Smith*, 193 Ariz. 452, 457, ¶ 14, 974 P.2d 431, 436 (1999). In fact, Defendant admitted that

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

a Spanish-speaking officer read him his *Miranda* rights in Spanish twice and that the officer allowed him to read the *Miranda* warning for himself. Consequently, we conclude that the trial court properly handled any statement Defendant made to the police.

¶16 Having searched the entire record for reversible error, we find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. The record, as presented, reveals that Defendant was represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits.

CONCLUSION

¶17 After this decision has been filed, counsel's obligation to represent Defendant in this appeal has ended. Counsel need do no more than inform Defendant of the status of the appeal and Defendant's future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 585, 684 P.2d 154, 157 (1984). Defendant can, if he desires, file a motion for reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure.

¶18 Accordingly, we affirm Defendant's conviction and sentence.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge