DIVISION ONE
FILED: 06-15-2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0119
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
COREY JOSEPH BRAXTON,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR2007-176447-001 DT

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

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

Bruce Peterson, Legal Advocate — Phoenix
By Kerri L. Chamberlin, Deputy Legal Advocate
Attorneys for Appellant

Corey Joseph Braxton — Phoenix
Appellant

T H O M P S O N, Judge

¶1 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 Corey Joseph Braxton, Sr. (defendant) 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 this court to conduct an *Anders* review and search the record for fundamental error. This court granted counsel's motion to allow defendant to file a supplemental brief *in propria persona*, and he has done so.

¶2 In his supplemental brief, defendant asks this court to search the record for error with regard to three issues: (1) whether the state abused its prosecutorial discretion in charging defendant with aggravated assault as opposed to an aggravated domestic violence offense; (2) whether the state violated defendant's equal protection rights in prosecuting defendant with an aggravated assault charge; and, (3) whether defendant's sentence violates his Eighth Amendment right against cruel and unusual punishment. We reject the arguments raised in defendant's supplemental brief, and after reviewing the entire record, find no fundamental error. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶3 Defendant was charged by indictment with one count of aggravated assault, a class 4 felony and a domestic violence offense. The following evidence was presented at trial.[1]

[1] Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark,* 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against defendant. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶4 On June 26, 2007, police officers responded to a domestic fight in progress at defendant's residence. Upon arrival, police observed that eighteen-year-old C.B., defendant's son, had a swollen, bleeding left eye. According to the officer's testimony at trial, C.B's mother and defendant's wife, V.J, stated the defendant and C.B. had gotten into an argument and that the defendant kicked C.B. in the face. Defendant was not present at the scene when the police arrived. C.B. was taken to the hospital where it was documented that the cause of the injury to his eye was a "kick in the eye by father." The state's expert witness, Dr. MacArthur, testified C.B. sustained fractures to both the left maxillary sinus and to the ethmoid sinus. Dr. MacArthur further testified the degree of force required to result in such injury was "moderate to severe," and that the injury was consistent with "the reported . . . mechanism of a kick to the eye."

¶5 At trial, V.J. testified that she had little recollection of the incident. Defendant, who testified on his own behalf, explained that he and his son were having an argument on the narrow stairwell in the residence when his son attempted to punch him. Defendant claimed he kicked up his leg to block the punch, but that his kick did not contact his son.

¶6 A jury convicted defendant of aggravated assault, a class 4 felony and domestic violence offense. At sentencing, the court found defendant had three prior felony convictions. The court

considered mitigating factors of "strong and unanimous family support" and defendant's in-jail mental health diagnosis of bipolar disorder. The court sentenced defendant to eight years imprisonment with 76 days of presentence incarceration credit. Defendant timely appealed his conviction and sentence. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) (2003), 13-4031 and -4033(A)(1) (2010).

DISCUSSION

¶7 In *Anders* appeals, we review the entire record for reversible error. *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). Defendant raises three issues, which we consider in turn.

1. Prosecutorial Discretion

¶8 Defendant claims the state abused its prosecutorial discretion by charging him with aggravated assault instead of aggravated domestic violence. "It is clearly within the sound discretion of the prosecutor to determine whether to file charges and which charges to file." *State v. Hankins*, 141 Ariz. 217, 221, 686 P.2d 740, 744 (1984) (citing *State v. Murphy*, 113 Ariz. 416, 418, 555 P.2d 1110,1112 (1976) (a prosecutor's "broad discretion is present in a capital case as well as any other, and such discretion even in capital cases is not violative of the constitution.")).

¶9 Furthermore, we note that A.R.S. § 13-3601 is "a

procedural statute" and "it does not create a separate offense of domestic violence." *State v. Schackart*, 153 Ariz. 422, 423-24, 737 P.2d 398, 399-400 (App. 1987) (vacating defendant's sentence where the state correctly conceded it was error to "impose a separate sentence for the 'offense' of domestic violence."). Here, the state, in its discretion, charged defendant with aggravated assault, which qualifies as a domestic violence offense under these circumstances, where the victim was defendant's son. *See* A.R.S. § 13-3601(A)(4). Accordingly, this claim is without merit.

2. Selective Prosecution

¶10 Defendant also argues his equal protection rights were violated because the state selectively chose to prosecute him under aggravated assault when others committing substantially the same offense are charged with domestic violence. To prevail on this claim, he must show, "(1) other similarly situated people were not charged with the crime he is accused of; and (2) the decision to charge him with that crime was made based on an impermissible ground, like race or religion." *State v. Montano*, 204 Ariz. 413, 428, ¶ 78, 65 P.3d 61, 76 (2003) (citation omitted). Defendant has failed to meet this burden and we find no evidence in the record to support his claim.

3. Cruel and Unusual Punishment

¶11 Finally, defendant argues the imposed sentence of eight years imprisonment is a violation of his Eighth Amendment right

against cruel and unusual punishment. A sentence violates the Eighth Amendment's prohibition of cruel and unusual punishment if there is a showing of "gross disproportionality by comparing 'the gravity of the offense [and] the harshness of the penalty.'" *State v. Berger*, 212 Ariz. 473, 476, ¶12, 134 P.3d 378, 381 (2006) (quoting *Ewing v. California*, 538 U.S. 11, 22 (2003)). Here, the trial court found defendant had been convicted of three prior felonies for sentence enhancement purposes under A.R.S. § 13-604(C) (Supp. 2007) (this section is now A.R.S. § 13-703(C),(J)). Defendant was sentenced to a term of eight years imprisonment, which is the minimum term in the range of acceptable sentences. Accordingly, we see no gross disproportionality between the sentence imposed and the offense committed by defendant.

¶12 Defendant argues that if he was convicted of aggravated domestic violence, his sentence would be substantially lowered. However, defendant was convicted of one count of aggravated assault. Defendant argues his conviction is not supported by the facts of the case or the evidence.[2] The jury, as finder of fact, determines the credibility of witnesses and weighs the evidence. *State v. Fimbres*, 222 Ariz. 293, 297, ¶ 4, 213 P.3d 1020, 1024

[2] Defendant also asserts the trial court failed to give a domestic violence instruction. Defendant was not entitled to have the jury instructed of a domestic violence offense rather than the aggravated assault charge. *See State v. Politte*, 136 Ariz. 117, 121, 664 P.2d 661, 665 (App. 1982) (a defendant "is not entitled to an instruction on another offense even though he might have been charged with and convicted of that offense.") (citation omitted).

(App. 2009). In general, we defer to the jury's assessment of a witness's credibility and the weight to be given evidence. *See id.* at 300, ¶ 21, 213 P.3d at 1027. After reviewing the entire record, we find substantial evidence was presented to support defendant's convictions.

CONCLUSION

¶13 We have read and considered counsel's brief and have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, defendant was adequately represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits. Pursuant to *State v. Shattuck,* 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), defendant's counsel's obligations in this appeal are at an end.

¶14 We affirm the conviction and sentence.

/s/
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JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
DIANE M. JOHNSEN, Judge