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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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BY: RWillingham

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0173
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
FABIAN JAMIE MORENO,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-117501-001 DT

The Honorable Cari A. Harrison, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender Phoenix
By Thomas K. Baird, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Fabian Jamie Moreno ("Defendant") appeals from the superior court's judgment of guilt and imposition of sentence on eight counts:

(1) Count 1: attempted first degree murder, a class two dangerous felony and a domestic violence offense, pursuant to A.R.S. §§ 13-1105(A)(1) and 13-1001(A)(2);

(2) Count 2: aggravated assault, a class three dangerous felony and a domestic violence offense, pursuant to A.R.S. §§ 13-1203(A)(2) and 13-1204(A)(2);

(3) Count 3: aggravated assault, a class four felony and a domestic violence offense, pursuant to A.R.S. §§ 13-1203(A)(1) and 13-1204(A)(3);

(4) Count 4: aggravated assault, a class four felony and a domestic violence offense, pursuant to A.R.S. §§ 13-1203(A)(1) and 13-1204(A)(3);

(5) Count 5: kidnapping, a class two dangerous felony and a domestic violence offense, pursuant to A.R.S. § 13-1304(A)(3);

(6) Count 6: misconduct involving weapons, a class one misdemeanor, pursuant to A.R.S. § 13-3102(A)(2);

(7) Count 7: misconduct involving weapons, a class four felony, pursuant to A.R.S. § 13-3102(A)(4); and

(8) Count 8: possession of a narcotic drug, a class four felony, pursuant to A.R.S. § 13-3408(A)(1).

¶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). Counsel has informed us,

however, that Defendant has identified two issues for appeal: (1) ineffective assistance of counsel, and (2) the limits that the superior court placed on impeachment of the victim with evidence of her drug use. Defendant was given the opportunity to file a supplemental brief *in propria persona*, but he did not do so.

¶13 Our independent review of the record reveals no fundamental error, and we affirm.

FACTS AND PROCEDURAL HISTORY

¶14 The counts on which Defendant was convicted were charged in a direct complaint filed on March 21, 2008, and stemmed from events that occurred on March 16 and March 18, 2008. After a preliminary hearing at which probable cause was found for all counts, the court entered a plea of not guilty to all charges on Defendant's behalf. Defendant did not accept plea offers extended by the State, and a jury trial commenced in this complex case on January 12, 2009. Before counsel gave opening statements, the court heard argument on the State's motion to preclude evidence of the victim's methamphetamine use before March 16, 2008 and ruled that Defendant could ask the victim whether she was under the influence of drugs or alcohol on March 16, 2008, but could not refer to methamphetamine specifically.

¶15 At trial, the State presented evidence that Defendant and the victim had been involved in a romantic relationship and had lived together at the victim's mother's house for several months. The relationship had ostensibly ended in December 2007 or January 2008, but Defendant and the victim still saw each other occasionally. On the evening of March 15, 2008, the victim went to the house where Defendant was then residing and spent the night there.

¶16 When the victim woke up the next morning, she attempted to leave but Defendant told her that she could not do so. After allowing the victim to use his cell phone to check on her children, Defendant accused her of having lied to him about where she had been staying, and used a closed fist to strike her about four or five times in her face and on her head. He then accused her of having cheated on him, and began striking her again. He stopped when she asked for a cup of water.

¶17 When Defendant went outside of the room to retrieve the water, the victim opened a window and screamed for help. Defendant re-entered the room and pulled her down. He instructed another man staying at the house, Gerado, to close the window from the outside and to increase the volume of the living room stereo. Gerado complied and Defendant kneeled on top of the victim, told her that he was going to kill her, and shoved part of a T-shirt into her mouth. He then attempted to

choke her with a belt. When the belt broke, he removed a cord from a bedroom lamp and used the cord to whip her leg.

¶18 Defendant then set the cord aside and sprayed the victim's upper body with WD-40. He said that he was going to burn her, and used a lighter to set her hair on fire. When the victim was able to put out the fire, Defendant again picked up the lamp cord and used his teeth to fray its end. He told the victim that she was going to die of electrocution, plugged in the cord, and began stroking the exposed end of the cord against the victim's body. When Defendant noticed that the victim felt a shock when the cord was touched to her arm, which was still moist with WD-40, he poured a jug of water over her, apparently planning to shock her again.

¶19 The victim was able to evade Defendant's attempts to shock her by moving around the room every time he plugged the cord into a different electrical socket. Defendant responded by unplugging the cord and again whipping her with it. He then attempted to bind her legs and cover her mouth with duct tape, but she was able to rip off the tape. When Defendant left the room to get different tape, the victim attempted to break through a boarded-up window by pounding her hands against it. Defendant returned to the room, pulled her down, and hit her on the head. He then instructed the victim to call her mother and say that everything was okay. The victim complied.

¶10 Defendant then told the victim that she was going to "be his bitch" and iron his clothes and pack his luggage for him. Defendant plugged in an iron and handed it to the victim, laughing as he burned her wrist by rubbing the iron across it. Once the victim had possession of the iron, she used it to make a gesture toward Defendant. In response, Defendant swung at the victim with a golf club. The victim was able to block the blow with the iron, which broke.

¶11 Defendant then picked up a nearby ten-inch-long drill bit with a pointed tip. He twice stabbed at the victim with the drill bit; the victim was able to block Defendant and was stabbed in her arm. Throughout the encounter, the victim begged to be allowed to leave, but Defendant refused her requests. Defendant yanked at the victim's pants and told her that he and his friend were going to "pull a train" on her.

¶12 At that point, Defendant instructed Gerado to make him food and coffee. Gerado complied, and Defendant handed the victim a cup of coffee. Defendant told the victim that he was not going to harm her anymore. But he then threw his coffee at her, hitting her body with the warm liquid. He then spit food in her face and threw a plate of food, which contained jalapeños, at her.

¶13 Defendant then told the victim to take a shower. He told her that she needed to be cleaned up before he took her

home. As he pulled her up from the floor to take her to the shower, she again begged to be allowed to leave. Defendant told her that she would be allowed to leave if she knelt, apologized, and begged for his forgiveness. She did so, but when she refused to admit to having cheated on him, he began hitting her in her face and on her head. He also kicked her in her ribs. When she told him that she could not breathe, he asked her how she would like to die from not being able to breathe and kicked her again.

¶14 Defendant then transported the victim to the shower. As Defendant walked her to the bathroom, the victim saw Gerado and another man, whom she had never seen before, sitting on the couch outside of the bedroom. The victim was in the shower when Defendant threaded the frayed lamp cord, which he had plugged into a socket on the opposite side of the bathroom wall, toward her through a hole in the bathroom's drywall. The victim was able to pull the cord free from the socket and away from Defendant, and she placed the cord in the shower with her.

¶15 After the victim exited the shower and changed into clean clothes, Defendant met her with what appeared to be a BB gun or rifle and told her to go back into the bedroom. She complied. Defendant told the victim to rest, and she sat down and fell asleep. Defendant elbowed her awake and told her to get up and that it was not over. He then told her that he was

going to take her home, and stepped outside the room to make a phone call. When he returned, he had Gerado's gun.

¶16 Defendant showed the victim the gun and some clips. He wiped down the gun, loaded a clip, and told her that the gun was for her. He wiped the gun across her face and told her that it was not yet the right time. Defendant unloaded the gun and began preparing to leave, apparently to pick up another person whom he believed had acted with the victim to take Defendant's dog.

¶17 Before Defendant could leave, Phoenix police officers responding to a welfare check request, knocked at the door. The three men in the house answered the door as a group. The victim exited the bedroom, went past the men, and asked the officers for protection. The victim was transported to a hospital where she received medical care for her injuries, which included swelling, bruises, the burn on her wrist, the puncture wound on her arm, black eyes, a fractured rib, and a small pneumothorax.

¶18 The officers were not able to apprehend Defendant that day. He apparently fled the house before the officers, who had initially retreated with the victim after she informed them that the men inside the house had guns, could secure the scene. The police did, however, later obtain a warrant and search the house. The search revealed physical evidence corroborating the victim's account of what had transpired inside of the house. In

the bedroom, officers found a belt with a detached belt buckle, a lamp, a can of WD-40, rolls of clear packaging tape and duct tape, pieces of wadded-up tape with hair attached, an iron broken into two pieces, a golf club, a wet black sweatshirt that smelled of peppers and appeared to have bits of food on it, and three unfired bullets. In the bathroom, they found a cut and frayed electrical cord in the shower stall.

¶19 Defendant was taken into custody several days later, on March 18, 2008. After placing Defendant in handcuffs, police officers searched Defendant's person. They found a handgun tucked into Defendant's waistband and covered by his shirt, a Mexican voter's registration card but no United States driver's license, and a rock of cocaine base in his shirt pocket. An officer, who did not know whether Defendant had been read his *Miranda* rights at that point, asked Defendant to identify the rock, and Defendant did so, using a slang term for cocaine. Defendant then indicated that he wanted to speak to an attorney. Later laboratory testing confirmed that the rock was cocaine base and later investigation revealed that Defendant did not have a permit to carry a concealed weapon. The handgun that Defendant was carrying was of the same caliber as the bullets recovered from the bedroom of the house.

¶20 At the conclusion of the State's case in chief, Defendant moved for a judgment of acquittal on all counts

pursuant to Ariz. R. Crim. P. 20. That motion was denied, and Defendant testified on his own behalf in narrative form. He testified that on March 16, 2008, he returned from Las Vegas, Nevada at approximately 2:00 p.m., and then drank with friends at a Cave Creek, Arizona apartment, spending the night at the apartment. He testified that he was notified by phone calls that police had arrested the victim at the house where the events underlying the charged offenses allegedly occurred.

¶21 Defendant admitted that when he was arrested on March 18, 2008, he had a handgun and a rock on his person, but denied that he identified the rock to an officer as cocaine base. He also admitted that he was not a legal resident of the United States and did not have a concealed weapons permit.

¶22 At the conclusion of Defendant's testimony, the defense rested and the court gave the jury its final instructions. Although the court had earlier agreed with the prosecutor's suggestion that the final jury instructions include an instruction that the jury not consider evidence that Defendant had requested an attorney when he was apprehended, that instruction did not appear in the final instructions.¹

¶23 After hearing closing arguments and considering the evidence, the jury found Defendant guilty of all counts as detailed above. After evidence was presented on aggravating

¹ Nor did it appear in Defendant's proposed instructions.

circumstances, the jury also found that the offenses charged in Counts 1, 2, 3, 4, and 5 of the complaint were aggravated because those offenses had resulted in physical, emotional, or financial harm to the victim.

¶124 The court entered judgment on the jury's verdicts and sentenced Defendant to consecutive prison terms of 21 years, 15 years, 3 years, and 3 years for, respectively, Counts 1, 2, 3, and 4. Concurrent terms of 21 years, 6 months, 3 years, and 2.5 years were imposed for, respectively, Counts 5, 6, 7, and 8. Defendant was awarded credit for 351 days of presentence incarceration.

¶125 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 (2001), and 13-4033(A)(1) (Supp. 2009).

DISCUSSION

I. Ineffective Assistance of Counsel

¶126 Ineffective assistance of counsel claims are properly brought under Ariz. R. Crim. P. 32, and we will not consider them on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

II. Limitation on Use of Evidence of Victim's Drug Use

¶127 We find no error in the court's ruling that defense counsel could ask the victim whether she was under the influence

of drugs or alcohol on March 16, 2008, but could not refer to methamphetamine specifically.²

¶128 Whether the victim was under the influence at the time of the alleged incident was relevant, and therefore properly admissible, because her cognitive state bore directly on her ability to accurately perceive and recall events. See Ariz. R. Evid. 401, 402, 608(b). But the court did not err in determining that any relevance attached to the mention of methamphetamine in particular was outweighed by the danger of unfair prejudice attributable to public perceptions of that drug. See Ariz. R. Evid. 403. And evidence of the victim's prior drug use - that is, drug use beyond that which might have affected her cognitive abilities on March 16, 2008 - was not only irrelevant but was also inadmissible character evidence. See Ariz. R. Evid. 401, 404.

III. Remaining Issues

¶129 The record reflects that Defendant received a fair trial. Defendant was present, represented by counsel, and assisted by an interpreter at all critical stages of the proceedings.³ The record of voir dire does not demonstrate the

² We note that counsel complied with the court's ruling when cross-examining the victim, and the victim testified that she was not under the influence of drugs or alcohol on the relevant date.

³ Neither Defendant nor an interpreter were present on January 22, 2009, day seven of trial, but on that date defense

empanelment of any biased jurors, and the jury was properly comprised of twelve jurors and two alternates. See A.R.S. § 21-102(A) (2002).

¶30 At trial, the State presented properly admissible evidence that was easily sufficient to support the jury's findings of guilt on all counts. Although no hearing was held to determine the voluntariness of Defendant's statement to a police officer that the rock found in his pocket was cocaine, Defendant did not request such a hearing and neither the prosecutor nor the court had any obligation to raise the issue. *State v. Alvarado*, 121 Ariz. 485, 487, 591 P.2d 973, 975 (1979). And although the final jury instructions did not include a limiting instruction regarding the officer's testimony about Defendant's in-custody request for an attorney, the prosecutor - not Defendant - requested that instruction, and there is no indication in the record that Defendant objected to its absence. We will not disturb the court's failure to give an instruction that was not requested or objected to by the defendant absent fundamental error. *State v. Spinks*, 156 Ariz. 355, 361, 752 P.2d 8, 14 (App. 1987). Under the facts of this case, where there was overwhelming evidence supporting Defendant's convictions, we find no fundamental error. We further find that

counsel, the prosecutor, and the court merely discussed how to respond to questions submitted by the jury during its deliberations.

the instructions given were proper, the prosecutor's closing and rebuttal arguments did not contain reversible error, and there was no evidence of any jury misconduct.

¶31 Additionally, there was sufficient evidence to support the jury's findings that Counts 1, 2, and 5 were dangerous and that Counts 1, 2, 3, 4, and 5 were domestic violence offenses. There was also sufficient evidence to support the jury's finding that an aggravating circumstance - an effect of physical, emotional, or financial harm to the victim - existed as to Counts 1, 2, 3, 4, and 5.

¶32 Before sentencing, the court ordered and considered a presentence report. At sentencing, Defendant was given the opportunity to speak and the court stated on the record the evidence and materials it considered and the factors it found in imposing sentence. The sentences imposed were within the permissible ranges for the offenses. And because the conduct underlying the convictions for Counts 1, 2, 3, and 4 was composed of distinct multiple acts, the sentences for those counts were properly imposed consecutively. See *State v. Gordon*, 161 Ariz. 308, 316, 778 P.2d 1204, 1212 (1989). Defendant was correctly credited with 351 days of presentence incarceration.

CONCLUSION

¶133 We have reviewed the record for fundamental error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm. Defense counsel's obligations pertaining to this appeal have come to an end. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Defendant of the status of this appeal and his future options. *Id.* Defendant has thirty days from the date of this decision to file a petition for review *in propria persona*. See Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has thirty days from the date of this decision in which to file a motion for reconsideration.

/S/

PETER B. SWANN, Presiding Judge

CONCURRING:

/S/

LAWRENCE F. WINTHROP, Judge

/S/

MICHAEL J. BROWN, Judge