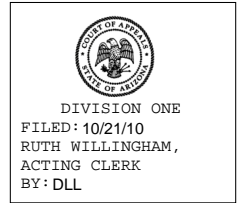


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 09-0410
)
Appellee,) DEPARTMENT C
)
v.)
) **MEMORANDUM DECISION**
ROGER HARDING,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-145916-001 DT

The Honorable Maria del Mar Verdin, Judge

AFFIRMED

Terry Goddard, Arizona 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 Peg Green, Deputy Public Defender	
Attorneys for Appellant	

K E S S L E R, Judge

¶1 Appellant Roger Harding ("Harding") was tried and convicted of aggravated assault and two counts of disorderly conduct, all three dangerous felonies. Counsel for Harding filed a brief in accordance with *Anders v. California*, 386 U.S.

738, 746 (1967), and *State v. Leon*, 104 Ariz. 297, 298, 451 P.2d 878, 879 (1969). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Harding was given the opportunity to, but did not file, a supplemental brief *in propria persona*. For the reasons that follow, we affirm Harding's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶2 Harding was charged with three counts of aggravated assault, one involving domestic violence, as a result of an incident occurring on May 12, 2008. Harding pled not guilty to the charges.

¶3 When the incident occurred, victim Jennifer G. was attempting to end a relationship with Harding, with whom she shares a two-year-old daughter. Harding called Jennifer G. many times asking where she and his daughter were staying. Jennifer G. informed him she was with their friend, victim Joy C. Harding began calling Joy C. and said he was coming to her house.

¶4 The two women waited in front of Joy C.'s home while Joy C.'s mother, victim Karen S., painted in the garage. Harding arrived driving at a fast speed and made an abrupt stop, causing Jennifer G. and Joy C. to jump back to avoid being hit by the vehicle. Harding approached Jennifer G., grabbed and squeezed her neck, and continued to choke her. He stood behind

Jennifer G. and placed her in a head-lock until Joy C. broke them apart. Harding then obtained a gun from his car and waved it in the air in the direction of the victims and the home. Harding threatened that he kill them and burn down the house.

¶15 Karen S. witnessed the altercation from the open garage. She retrieved a phone and announced within earshot that she was calling the police. Harding then got in his car and left the scene. The entire incident lasted a few minutes. Officers S. and F. responded to the scene and interviewed the three women; Officer S. testified that the victims were upset and scared for their lives. Officer F. testified that no photographs were taken of Jennifer G.'s injuries because they were not visible and she did not complain of any.

¶16 In March 2009, a jury convicted Harding of aggravated assault, two counts of disorderly conduct, and found all three counts dangerous offenses. Harding's sentence was enhanced pursuant to Arizona Revised Statutes ("A.R.S.") section 13-704(A) (2010).¹ He was sentenced to the presumptive term of 7.5 years for Count 1: aggravated assault, and 2.25 years each for two counts of disorderly conduct to run concurrent with each other and consecutive to Count 1. He was credited with 336 days for presentence incarceration.

¹ We cite to the most current version of the statute when it has not been substantively revised since the date of the underlying conduct.

¶17 Harding filed a timely appeal. See Ariz. R. Crim. P. 31.3. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 13-4031, -4033(A)(1) (2010); § 12-120.21(A)(1) (2003).

DISCUSSION

¶18 This Court has reviewed the entire record for fundamental error. Fundamental error is error that reaches "the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain a reversal, the defendant must also demonstrate that the error caused prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607. On review, this Court examines the evidence in the light most favorable to sustaining the verdict, and resolves all inferences against the defendant. *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997).

I. SUFFICIENCY OF THE EVIDENCE

¶19 As charged, aggravated assault required the State to prove that Harding: 1) committed assault by intentionally placing another person in reasonable apprehension of imminent physical injury; and 2) used a deadly weapon or dangerous instrument during the commission of the assault. A.R.S. §§ 13-1203(A)(2), -1204(A)(2) (2010).

¶10 Here, the evidence in the record supports the jury's conviction of Harding for the crime of aggravated assault. Witness testimony of Jennifer G., Joy C., Karen S., Officers S. and F., and 911 calls all provided evidence that Harding used a deadly weapon to intentionally cause Jennifer G. reasonable apprehension of imminent physical injury.

¶11 It was reasonable for the jury to find the act an intentional one by inferring such a *mens rea* from Harding's conduct and statements. *State v. Vann*, 11 Ariz. App. 180, 182, 463 P.2d 75, 77 (1970) ("What the defendant does . . . and what he says may be evidence of what is going on in his mind."). Harding choked and placed Jennifer G. in a head-lock immediately prior to threatening "I don't fight, I kill." He retrieved his gun and waved it aggressively until he realized the police were called. Such a series of events provided a basis for the jury to conclude that Harding intended to cause Jennifer G. apprehension of physical injury. There is also sufficient evidence from Jennifer G.'s testimony that she experienced reasonable apprehension of imminent physical injury. She testified that she was fearful Harding might shoot and Officer F. testified that Jennifer G.'s actions showed she was upset.

¶12 The evidence in the record also supports the second requirement of aggravated assault: Harding used a deadly weapon or dangerous instrument. A deadly weapon is anything designed

for deadly use, including a firearm; a firearm includes any loaded or unloaded handgun, pistol, revolver, or rifle. A.R.S. § 13-105(15), (19) (2010). All three victims testified that the object they saw Harding point and wave was a gun. Joy C. noted that the gun was pointed in Jennifer G.'s direction. The fact that Harding did not shoot the gun is immaterial: "[I]t is not a necessary element of aggravated assault that the victim be in actual substantial risk of imminent death or physical injury. All that is required is that the victim be in reasonable apprehension of physical injury." *State v. Morgan*, 128 Ariz. 362, 367, 625 P.2d 951, 956 (App. 1981).

¶13 Jennifer G.'s testimony that Harding is the father of their child and that they lived together before the incident establishes sufficient evidence to render this a domestic violence offense. A.R.S. § 13-3601(A)(1)-(2) (2010).

¶14 As charged, a conviction of disorderly conduct required the State to prove two elements: 1) the defendant recklessly handled, displayed or discharged a deadly weapon or dangerous instrument; and 2) the defendant acted with intent or knowledge to disturb the peace or quiet of a neighborhood, family or person. A.R.S. § 13-2904(A)(6) (2010).

¶15 The jury's verdict finding Harding guilty of disorderly conduct is sufficiently supported by the evidence. As the above analysis demonstrates, the jury was reasonable in

concluding that Harding handled or displayed a deadly weapon. In addition, there is sufficient evidence to conclude that Harding possessed the required mens rea of recklessness because he was likely aware of, yet consciously disregarded, the risks associated with brandishing a deadly weapon. A.R.S. § 13-105(10)(c).

¶16 Testimony about Harding's aggressive driving when he arrived at the scene and yelling curse words in the front of a home in a residential neighborhood late at night provided evidence that Harding intentionally disturbed the peace of the neighborhood and family in the home. The verdict is also sufficiently supported by Karen S.'s testimony that she was able to hear the altercation from some distance away, the need for Joy C., Karen S., and an anonymous neighbor to call 911, and Karen S.'s granddaughter running to Karen S. because she was frightened.

¶17 Lastly, denial of defense counsel's Rule 20 argument that there were "numerous inconsistencies" between the 911 calls, police reports and witness testimony involves an issue of credibility that is solely a matter for the fact-finder, and we defer such issues to the trial court. *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996).

¶18 In comparing the evidence in the record to the elements in the statutes, we find there was sufficient evidence to

support the jury's conviction of Harding for both aggravated assault and two counts of disorderly conduct.

II. Sentence Enhancement

¶19 Pursuant to A.R.S. § 13-704, a dangerous finding enhances the defendant's felony conviction sentence. A "dangerous offense" is one involving the "discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person." A.R.S. § 13-105(13). The jury was not provided with this definition during instructions. However, this Court "views instructions in their entirety" and determines if the jury was misled by the instructions when taken as a whole. *State v. Cox*, 217 Ariz. 353, 356, ¶ 15, 174 P.3d 265, 268 (2007). Here, the instructions for aggravated assault required the jury to find that the assault was aggravated by the defendant's use of "a deadly weapon or dangerous instrument," and the instructions for disorderly conduct required proof that the defendant recklessly "handled, displayed or discharged a deadly weapon or instrument." Thus, the instructions taken as a whole did not mislead the jury in their determination of dangerousness.

¶20 The United States Supreme Court has held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury" *Apprendi*

v. New Jersey, 530 U.S. 466, 490 (2000). Although Harding's use of a gun enhanced his sentence, no *Blakely* issues are implicated because that fact was determined by the jury. *Blakely v. Washington*, 542 U.S. 296, 301, 305-07 (2004).

III. PRESENTENCE INCARCERATION CREDIT

¶21 Harding was sentenced to 9.75 years with 336 days of presentence incarceration credit applied to Count 1. Presentence incarceration credit is applied to only one of the defendant's sentences if consecutive sentences are imposed. *State v. Jackson*, 170 Ariz. 89, 94, 821 P.2d 1374, 1379 (App. 1991). At the sentencing hearing, the allotted 336 days of credit included credit for 14 days during May 2008, but the record on appeal does not include evidence of those 14 days. Any sentence that favors the appellant cannot be corrected unless the State has filed a timely cross-appeal. *State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990). Because the State did not appeal the issue of presentence incarceration credit, the trial court's calculation of 336 days stands.

CONCLUSION

¶22 After careful review of the record, we find no meritorious grounds for reversal of Harding's conviction or modification of the sentence imposed. The evidence supports the verdict, the sentence imposed was within the sentencing limits,

Harding was present and represented at all stages of the proceedings below, there was no error in the jury instructions, and Harding was permitted to speak at the sentencing hearing. Accordingly, we affirm Harding's conviction and sentence.

¶123 Upon the filing of this decision, counsel shall inform Harding of the status of the appeal and his options. Defense counsel has no further obligations, 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). On the Court's own motion, Harding 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/

DONN KESSLER, Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Presiding Judge

/s/

PETER B. SWANN, Judge