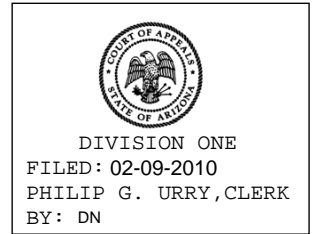


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0414
)
Appellee,) DEPARTMENT B
)
v.) MEMORANDUM DECISION
)
BRANDON ASHLEY DANIELS,)
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-162583-001 DT

The Honorable Sam J. Myers, 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 Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

Brandon Ashley Daniels Safford
Appellant

B A R K E R, Judge

¶1 Brandon Ashley Daniels ("Daniels") appeals from his conviction and sentence for a single count of armed robbery, a class 2 felony, which the jury found to be dangerous. Daniels was sentenced on May 11, 2009 and timely filed a notice of appeal on May 29, 2009. Daniels' counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this court that after searching the entire record on appeal, he finds no arguable ground for reversal. Daniels' counsel raised no issues on appeal, but Daniels himself filed a supplemental brief *in propria persona* raising a number of issues.

¶2 We have jurisdiction 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 (2001), and 13-4033(A)(1) (2001). We are required to search the record for reversible error. *Anders*, 386 U.S. at 744; *Leon*, 104 Ariz. at 299, 451 P.2d at 880. Because we find no such error, we affirm.

Facts and Procedural Background

¶3 On October 3, 2008 at approximately 5:30 p.m., Detective Brian Hartman of the Scottsdale Police Department high enforcement arrest team ("HEAT") observed two men acting suspiciously in front of a Taco Jalisco, which is adjacent to a tobacco shop called the Coughing Canary Smoke Shop. Daniels

admits to being in the area with Ernest Fredrick, but claims that they were simply waiting for someone. After approximately twenty to twenty-five minutes, Daniels drove to EZ Pawn Shop in a yellow Dodge Neon with Fredrick as a passenger. Hartman and another officer from HEAT followed the Neon to EZ Pawn Shop.

¶4 J.N. was working at EZ Pawn at the time and testified that he saw Daniels and Fredrick in a yellow Neon and that Daniels came into the shop trying to pawn a Taurus Millennium pistol ("Taurus"). Daniels owned two pistols, the Taurus and a High Point pistol ("High Point"). Daniels had loaned the High Point to Fredrick for his protection months prior to the robbery, and Fredrick had the High Point on him that day. After receiving less than a desirable offer for the Taurus, Daniels drove back with Fredrick as his passenger to Daniels' apartment to make sure that his (Daniels') SRP power box was still on.

¶5 Daniels testified that Fredrick next asked him to drive him back to the Coughing Canary area because Fredrick wanted to meet someone there. Daniels backed into a parking spot on 71st street, which is adjacent to the Coughing Canary. Fredrick exited the vehicle while Daniels stayed and listened to music. Daniels testified that Fredrick did not tell him that he was going to the Coughing Canary and that he did not see Fredrick with a gun and mask. V.H. was working at the Coughing Canary when Fredrick entered the shop wearing a mask and held

her up at gunpoint. Fredrick demanded money, placed the money in a plastic bag, and ran out.

¶16 Meanwhile, Detective Hartman was in the area, was unaware of the robbery, and watched the yellow Neon leave and head west on Thomas road. The HEAT team followed the Neon throughout the night, losing it at certain times, until eventually pulling over the vehicle around 2:30 A.M. At that time the team knew about the robbery at the Coughing Canary and suspected Daniels. They stopped the Neon. Daniels was the only one in the vehicle. The officers took him into custody.

¶17 Daniels was interviewed twice while in custody. During the first interview, Daniels did not give the detectives Fredrick's name and also denied going back to the Coughing Canary area during the time of the robbery. At the second interview Daniels gave the detectives Fredrick's name and address and admitted going back to the Coughing Canary. Daniels also admitted at the interview and trial that Fredrick and he were having financial problems. Daniels further admitted that he had thought about committing a robbery for about a week before the incident.

¶18 The officers searched the yellow Neon the following afternoon pursuant to a search warrant and found a gun (the Taurus), a Halloween mask, and a plastic bag. In a later search

of Fredrick's apartment, officers found Daniels' other gun (the High Point) and a similar, but different, Halloween mask.

¶19 During the trial Daniels testified that he met up with Fredrick that day to get his High Point back so that he could pawn it. Daniels further testified that he went back to the Coughing Canary area because Fredrick wanted to meet someone. Additionally, Daniels testified that he was not aware that Fredrick had robbed someone until some point on the way back to Fredrick's apartment after the robbery.

¶10 A jury found Daniels guilty of one count of armed robbery, a class 2 felony, under accomplice liability. At sentencing, the court gave Daniels an opportunity to speak and after granting his motion not to consider the pre-sentence report, sentenced him to the mitigated term of seven years.

Discussion

¶11 Daniels raises a number of issues in his supplemental brief which we have grouped in seven areas. They are without merit.

1. The Transcript Errors

¶12 Daniels alleges that the reporter made numerous errors in the transcript. This, however, has no bearing on the jury's verdict because the jury does not read the transcripts. Accordingly, we find no fundamental error.

2. Detective Nolan's Testimony

¶13 Daniels alleges that it was an error to allow Detective Nolan's testimony about Daniels admitting that Fredrick and he had prior discussions about committing a robbery without "clear[ing] it up" immediately. Daniels is referring to the fact that after Detective Nolan's testimony, Detective Nolan reviewed the interview tape recordings and then four days later (the next trial day) went back on the stand to correct his testimony. What Daniels actually said in the interview was that he, himself, had thought about committing a robbery. The jury was able to evaluate the testimony. There was no fundamental error.

3. The Denial of the Motion to Preclude the Taurus, Gloves, and Hat

¶14 Daniels alleges that it was an error to deny the motion to preclude the mention of Daniels' Taurus, gloves, and hat, asserting that they were not used in the robbery. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or

needless presentation of cumulative evidence." Ariz. R. Evid. 403. Moreover, a reviewing court gives substantial discretion to the trial court's Arizona Rule of Evidence 403, weighing process. *Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 481, ¶ 13, 212 P.3d 810, 819 (App. 2009) (citing *State v. Gibson*, 202 Ariz. 321, 324, ¶ 17, 44 P.3d 1001, 1004 (2002)).

¶15 There was a question at trial as to which gun was used. Daniels' Taurus was a semi-automatic two-tone, black and grey handgun. The victim, V.H., testified that the gun used in the robbery looked olive colored in the yellow tinted light, which she thought meant that it was silver in color. When shown the Taurus, she testified that it was "[p]ossibly" the gun used. If the Taurus was used, the fact that Daniels had this in his possession earlier and later in the day makes it more likely that Daniels gave the gun to Fredrick with the intent to aid in the robbery. This makes the Taurus relevant and highly probative.

¶16 Additionally, the trial court ruled that the gloves, and hat were relevant to Daniels' knowledge of the robbery. Even if this was error, it does not rise to the level of fundamental error as their admission did not result in an unfair trial. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005) Accordingly, we find no reversible error.

4. The Mention of the Sentence Length in the Police Interview

¶17 Daniels alleges that the court erred by not allowing his counsel to correct a comment made in the police interview about the sentence length of the armed robbery. Daniels claims that Detective Lefay's comment that he was "not looking at ten years" unfairly led the jury to believe that he was not facing a substantial prison term. Generally, the jury must make their decision absent consideration of punishment. *State v. Koch*, 138 Ariz. 99, 105, 673 P.2d 297, 303 (1983).

¶18 Here, the statement was relevant to the voluntariness of Daniels' interview. At trial, Daniels' counsel sought not to redact the statement, but rather to instruct the jury that Lefay's statement was inaccurate and that Daniels faces a sentence of ten or more years. The trial court elected to instruct the jury to consider Lefay's statement only in regards to the voluntariness of Daniels' statements. Furthermore, both the State's direct and the defense's cross developed testimony from Detective Lefay that she was unable to know how much time Daniels was actually facing. Thus, the testimony on the actual sentencing range was equivocal. We find no fundamental error.

5. The Denial of the Arizona Rule of Criminal Procedure Rule 20 Motion

¶19 Daniels alleges that the trial court's denial of his Rule 20 motion was an error. "We review the sufficiency of

evidence presented at trial only to determine if substantial evidence exists to support" the verdict. *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005). Additionally, when determining whether the evidence was sufficient to sustain a verdict, evidence must be construed in the "light most favorable to sustaining the verdict." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). We find that substantial evidence exists to support the verdict.

¶20 Arizona Revised Statute § 13-1902(A) (2001) defines "robbery" as when:

A person . . . in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

Arizona Revised Statute § 13-1904(A) (2001) defines "armed robbery" as when:

A person . . . in the course of committing robbery as defined in § 13-1902, such person or an accomplice:

1. Is armed with a deadly weapon or a simulated deadly weapon; or
2. Uses or threatens to use a deadly weapon or dangerous instrument or a simulated deadly weapon.

A crime is a dangerous offense per A.R.S. § 13-604(P) (Supp. 2007) when it involves "the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the

intentional or knowing infliction of serious physical injury upon another person." A person is an accomplice per A.R.S. § 13-301 (2001) when:

[A] person . . . who with the intent to promote or facilitate the commission of an offense:

1. Solicits or commands another person to commit the offense; or
2. Aids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense.
3. Provides means or opportunity to another person to commit the offense.

¶21 V.H. testified that she was robbed at gunpoint at her place of work, the Coughing Canary, by an African American male. Daniels testified that he was parked outside the Coughing Canary area, and after leaving the area, his passenger, Fredrick, admitted that he had just robbed someone. Daniels drove the passenger away from the area. Detective Hartman observed two black males looking suspicious in the area of the Coughing Canary hours before the robbery and then getting into the yellow Neon, which he then followed. Many hours later in the night, Detective Hartman pulled over the Neon and identified Daniels as the driver. Further, Daniels admitted to have been in financial problems and to have thought about committing a robbery for about a week prior to this robbery. This evidence is sufficient, when viewed in the light most favorable to

sustaining the verdict, to support the conviction. Accordingly, we find no fundamental error.

6. The Denial of the Continuance for A.O.'s Testimony

¶22 Daniels alleges that it was reversible error for the court to deny a continuance thus preventing A.O. from testifying about the gun used in the robbery. "A continuance of any trial date shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." Ariz. R. Crim. P. 8.5(b). A reviewing court will not disturb a trial court's ruling on a continuance unless there is a clear abuse of discretion and a resulting prejudice. *State v. Vasko*, 193 Ariz. 142, 144, ¶ 8, 971 P.2d 189, 191 (App. 1998).

¶23 The record does not show circumstances that precluded Daniels from serving a subpoena on A.O. and securing his attendance at trial. Thus, denying the continuance was not an abuse of discretion. There was no fundamental error.

7. The Denial of a Jury Instruction on Hindering Prosecution (Accessory After the Fact)

¶24 Lastly, Daniels alleges that the denial of including a hindering prosecution jury instruction was reversible error. Defense counsel did not request the instruction be given. Hindering prosecution is not a lesser-included offense to armed robbery. *In re Jeremiah T.*, 212 Ariz. 30, 32, ¶ 5, 126 P.3d 177,

179 (App. 2006) (“[C]ommission of the greater offense always results in the commission of the lesser offense.”) (citations omitted). Therefore, we find no reversible error.

Disposition

¶125 In addition to addressing the foregoing issues raised by Daniels, we have reviewed the record and have found no meritorious grounds for reversal of Daniels’ conviction or for modification of the sentence imposed. See *Anders*, 386 U.S. at 744; *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Daniels was present at all critical stages of the proceedings and was represented by counsel. All proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Accordingly, we affirm.

¶26 After the filing of this decision, counsel's obligations in this appeal have ended subject to the following. Counsel need do no more than inform Daniels 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). Daniels has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

PETER B. SWANN, Judge