

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



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
) No. 1 CA-CR 09-0436
 Appellee,)
) DEPARTMENT E
 v.)
) MEMORANDUM DECISION
 FERNANDO VARGAS BENCOMO,)
) (Not for Publication -
 Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-137251-001 DT

The Honorable Barbara L. Spencer, Judge Pro Tem

AFFIRMED

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

Maricopa County Public Defender's Office Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Fernando Vargas Bencomo appeals his convictions and sentences for two counts of aggravated assault, class-five

felonies, and resisting arrest, a class-six felony. Bencomo's counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that she has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. See *Smith v. Robbins*, 528 U.S. 259 (2000). Bencomo was afforded the opportunity to file a supplemental brief *in propria persona* but did not do so. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶13 On June 14, 2008, at approximately one in the morning, Phoenix Police Detectives T.K, D.H., and J.N. were driving to police headquarters after finishing their "street enforcement" shift. They were riding in an unmarked, white Chevrolet Tahoe. The Tahoe was equipped with spotlights, red and blue emergency lights located in the front and back, and strobe lights located inside of the front headlights. The detectives were wearing their gang enforcement uniforms, which included outer vests with the word "police" written across it. The vests also had cloth police badges.

¶14 As the detectives were traveling northbound on Central Avenue, Detective T.K. observed Bencomo riding a bicycle northbound in the double-turn lane on Central. Bencomo was drinking from a beer can and had a plastic bag containing beer hanging from the left handlebar. The bicycle did not have a front headlight or rear reflector. In an effort to get Bencomo off the road, Detective T.K. drove the Tahoe next to Bencomo and, with the driver's side window rolled down, motioned Bencomo to move to the side of the road. Bencomo looked directly at Detective T.K., moved to the southbound lanes on Central, and continued traveling northbound.

¶15 After Bencomo ignored Detective T.K.'s directions, T.K. decided that he needed to stop Bencomo and investigate him. T.K. moved the Tahoe into the double turn lane and activated the Tahoe's emergency lights. Bencomo moved to the west sidewalk on Central and continued riding north. T.K. drove the Tahoe onto the sidewalk, in front of Bencomo. Despite seeing the red and blue emergency lights, Bencomo maneuvered around the Tahoe and continued north. T.K. pulled the Tahoe in front of Bencomo two more times in an attempt to stop Bencomo, but each time Bencomo continued past the Tahoe. During one of the attempted stops, Detectives D.H. and J.N. were able to exit the Tahoe before Bencomo could ride past them. Bencomo, however, rode the bicycle directly towards Detective J.N and kicked J.N. as he

rode by. As a result of the kick, J.N. fell to the ground and injured his left hand.

¶16 The detectives continued to chase Bencomo in the Tahoe and followed him into an alley. Once in the alley, Detectives J.N. and D.H. exited the Tahoe and chased Bencomo on foot. As D.H. was chasing Bencomo he was shouting "stop, stop, police, stop." D.H. eventually caught up to Bencomo and as he reached out to grab him, Bencomo lost control of his bike and fell over, causing Detective D.H. to also fall. D.H. was able to get on top of Bencomo and tell him that he was under arrest. Bencomo kicked and elbowed Detective D.H. He also kicked Detective J.N., who was trying to assist D.H. After a brief struggle, the detectives were able to subdue Bencomo and put him in handcuffs. After being handcuffed, Bencomo cursed at the detectives and said, "you better arrest me, I'm a Sureno and I'll f---ing murder you."¹

¶17 On June 23, 2008, Bencomo was indicted on three counts of aggravated assault, three counts of threatening or intimidating, one count of resisting arrest, and one count of assisting a criminal street gang. The State later amended the indictment to allege that all crimes charged in the indictment were committed with the intent to promote, further, or assist a

¹ According to Officer T.K., the word "Sureno" is a reference to the Sur Trece Sureno street gang.

criminal street gang. The State also alleged that Bencomo had two prior convictions.

¶18 After a three day jury trial in March 2009, Bencomo was convicted of two counts of aggravated assault and one count of resisting arrest. The jury did not find that Bencomo had committed the offenses with the intent to promote, further or assist the criminal conduct of a criminal street gang. The court sentenced Bencomo to a presumptive prison term of 2.25 years for each aggravated assault conviction and a presumptive prison term of 1.75 years for the resisting arrest conviction, the sentences to be served concurrently. Bencomo was given presentence incarceration credit of 341 days.

¶19 Bencomo timely appeals his convictions and sentences. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).

DISCUSSION

¶10 Having considered defense counsel's brief and examined the record for reversible error, *see Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. The sentences imposed fall within the range permitted by law, and the evidence presented supports the convictions. As far as the record reveals, Bencomo was represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his

constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶11 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Bencomo of the disposition 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. Bencomo has thirty days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

CONCLUSION

¶12 The convictions and sentences are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
SHELDON H. WEISBERG, Presiding Judge

_____/s/_____
PHILIP HALL, Judge