DIVISION ONE
FILED: 11-02-2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0497
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
CONLEY MAURICE NEWMAN,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-162334-003 DT

The Honorable Joseph C. Welty, Judge

AFFIRMED

Terry Goddard, Attorney General by Kent E. Cattani, Chief Counsel, Criminal Appeals/Capital Litigation Section Attorneys for Appellee	Phoenix
Michael J. Dew Attorney for Appellant	Phoenix
Conley Maurice Newman Appellant	Douglas

W I N T H R O P, Judge

¶1 Conley Maurice Newman ("Appellant") appeals from his convictions and sentences for possession for sale of narcotic

drugs, possession for sale of marijuana, misconduct involving weapons, and two counts of possession of drug paraphernalia. Appellant's counsel has filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record on appeal and found no arguable question of law that is not frivolous. Appellant's counsel therefore requests that we review the record for fundamental error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). This court has also allowed Appellant to file a supplemental brief *in propria persona*, and he has done so.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010). Finding no reversible error, we affirm Appellant's convictions and sentences.

PROCEDURAL HISTORY AND FACTS[1]

¶3 On October 10, 2007, a grand jury indicted Appellant, charging him with five felony counts. Count I was for the

[1] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

possession of narcotic drugs for sale, a class two felony. *See* A.R.S. § 13-3408 (2010).[2] Count II was for the possession of marijuana for sale, a class four felony. *See* A.R.S. § 13-3405 (2010). Count III was for misconduct involving weapons, a class four felony. *See* A.R.S. § 13-3102 (2010). Counts IV and V were for possession of drug paraphernalia, a class six felony. *See* A.R.S. § 13-3415 (2010).

¶4 The State presented Appellant with a proposed plea agreement at a pretrial settlement conference on March 28, 2008. At the same time, the State set forth the strength of its case, and the court explained the possible sentences to Appellant. Appellant, however, did not enter a plea agreement.

¶5 The case went to trial on January 20, 2009. Appellant failed to appear, and the court determined that Appellant had voluntarily absented himself from the proceedings. The State presented evidence to support the following facts: After receiving a number of complaints about suspected drug activity at a Phoenix home, Phoenix police officers set up surveillance of the home. Based on their surveillance, the police were able to obtain a search warrant.

¶6 On September 22, 2007, the police executed the search warrant by splitting into two groups - one for the front of the

[2] We cite the current version of the applicable statute because no revisions material to this decision have occurred.

house, the other for the back. An officer who was part of the group at the front door reported that, while he was waiting for officers to move into position in the back, he could detect the odor of burnt marijuana coming from the house. Another officer, who was part of the team in the back, stated that he smelled marijuana as well.

¶7 When the house's occupants noticed the officers moving into the backyard, the officers in the front used a ram to force open the front door. Nine adults and six children were in the home. The police escorted the occupants out onto the front lawn, detained them, and questioned them about their presence in the house.

¶8 One of those individuals was Appellant. After advising him of his rights pursuant to *Miranda*,[3] an officer spoke with Appellant, who said that he had been at the house only to get his hair braided by a woman who lived there. Appellant claimed that he lived with his mother and not at the house that the police had just entered.

¶9 While the police officers interviewed the home's occupants on the lawn, other police officers were inside the house collecting evidence. In the west bedroom, officers found several items that appeared to be Appellant's personal belongings: a sweatshirt that seemed to be Appellant's size, a

[3] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

social security card bearing Appellant's name, a photograph of a birthday cake decorated with Appellant's name, a Wal-Mart credit card issued to Appellant, and family-court paperwork addressed to Appellant. In the same bedroom, the police also found four cell phones, several razor blades, scales, a rifle, some lighters, a bag containing 190 grams of marijuana, and other bags holding smaller amounts of marijuana. They also found a black backpack, which contained both $477 in cash and a plastic bag with 3.4 grams of crack cocaine.

¶10 After this evidence was discovered, Appellant was again questioned about his place of residence. Appellant became angry, however, and refused to answer the questions.

¶11 At trial, a forensic scientist testified that the substances found in the west bedroom were useable amounts of marijuana and cocaine. Testing also indicated that a fingerprint on the bag containing cocaine matched Appellant's fingerprint. Sergeant Mendez, a former undercover officer in the Phoenix Police Drug Enforcement Bureau, testified that he had reviewed evidence gathered from the west bedroom. Based on his first-hand, professional experience in drug investigation and enforcement, Sergeant Mendez stated that the combination of the packaging of the drugs, the presence of the scales, the multitude of cell phones, the amount of cash on hand, and the rifle in the closet constituted evidence of drug sales.

¶12 On January 26, 2009, a twelve-member jury found Appellant guilty of all five charged counts. The jury also found two aggravating circumstances: the expectation of pecuniary gain and the possession of a deadly weapon.

¶13 Before sentencing, the court determined that Appellant had two historical prior felony offenses. The court then sentenced Appellant to concurrent presumptive sentences on all five counts: 15.75 years' incarceration in the Arizona Department of Corrections for possession of narcotic drugs for sale, 10 years' incarceration for possession of marijuana for sale, 10 years' incarceration for misconduct involving weapons, and 3.75 years' incarceration for each count of possession of drug paraphernalia. Appellant received credit for fifty-two days of presentence incarceration. Appellant filed a timely notice of appeal.

ANALYSIS

¶14 Appellant's supplemental brief addresses two general topics: the State's failure to disclose an expert witness and an alleged shifting of the burden of proof. We address each in turn.

A. Failure to Disclose

¶15 Appellant argues that the State did not fully comply with the disclosure requirements outlined in the Arizona Rules of Criminal Procedure. He cites Rule 15.1, which requires that

"at the arraignment, or at the preliminary hearing, whichever occurs first, the prosecutor shall make available to the defendant all reports containing . . . [t]he names and addresses of experts who have personally examined . . . any evidence in the particular case." Ariz. R. Crim. P. 15.1(a), (b)(4). Further, Rule 15.8 requires that the State make this disclosure thirty days before a defendant's plea deadline. Ariz. R. Crim. P. 15.8. Appellant also cites Rule 16.1, Ariz. R. Crim. P., to buttress his argument that the State's lack of timeliness constituted reversible error.[4]

¶16 During the arraignment on October 19, 2007, the court found that the State had not complied with Rule 15.1(a) and ordered it to do so within five business days. By November 14, 2007, the State had filed its notice of disclosure. But at the initial pretrial conference on December 3, 2007, the court found that the State had still not made all disclosures required by Rule 15.1(a) and ordered it to comply within twenty-five business days. Ultimately, the State did not complete its disclosure until it named all of its intended expert witnesses in a supplement that it filed on April 1, 2008. Appellant, though, had rejected the State's plea agreement on March 28,

[4] In particular, Appellant focuses on Rule 16.1(c), which states: "Any motion, defense, objection, or request not timely raised under Rule 16.1(b) shall be precluded . . . ." Ariz. R. Crim. P. 16.1(c).

2008, four days before the State filed its supplemental disclosure.

¶17 That late filing, Appellant argues, was so prejudicial as to constitute reversible error. Specifically, Appellant contends that although the State had disclosed an expert on drug trafficking as a potential witness back in November 2007, the State failed to identify that witness as Sergeant Mendez until after Appellant rejected the plea offer. Because the State failed to meet its Rule 15.1(b) requirement in a timely way, Appellant argues that he was prevented from making a truly informed decision.

¶18 Arizona Rule of Criminal Procedure 15.8 directly addresses this concern. If the prosecution fails to disclose the information required by Rule 15.1(b) "at least 30 days prior to the plea deadline, the court, upon motion of the defendant, shall consider the impact of the failure to provide such disclosure on the defendant's decision to accept or reject a plea offer." Ariz. R. Crim. P. 15.8.

¶19 Therefore, although the State had not strictly complied with Rule 15.1 before Appellant rejected the plea offer, Rule 15.8 provided an appropriate remedy. Appellant could have raised this issue with the court after receiving the late supplemental disclosure; however, he did not do so. Furthermore, a drug trafficking expert was generically listed in

the State's initial disclosure. When he decided to reject the plea offer, Appellant was fully aware that the State could call such an expert, regardless of that expert's specific identity. Neither the record nor Appellant's supplemental brief explains how the omission of Sergeant Mendez's specific identity had any impact on Appellant's rejection of the plea agreement.

¶20 Nor does Appellant's invocation of Rule 16.1 help him. He argues that the State's supplemental disclosure was "not timely raised under Rule 16.1(b)" and therefore that Sergeant Mendez's testimony must be "precluded." *See* Ariz. R. Crim. P. 16.1(c). But Rule 16.1 has a specific subject matter: it is concerned with the timeliness of "[a]ny motion, defense, objection, or request." Ariz. R. Crim. P. 16.1(c). The timeliness of supplemental disclosures, like all disclosures, is governed by Rule 15.8 and subject to the analysis above. We find, then, that the State's late disclosure created no reversible error.

B. Shift of Burden

¶21 Appellant also argues that the State improperly shifted the burden of proof by asking a forensic witness to confirm that Appellant could have conducted his own fingerprint testing. Under Arizona law, a "prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not

constitute a comment on defendant's silence." *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987). Furthermore, even if the prosecutor's comment might imply that a defendant has the burden of proof, a trial court's limiting or curative instruction to the jury can be sufficient to cure any harm. *Id.*

¶22 At trial, one of the State's expert forensic witnesses testified that she found latent prints on multiple items, including the bag of cocaine that had Appellant's fingerprint on it. On cross-examination, Appellant asked the expert whether she had tested other items for his fingerprints. The expert admitted that she had not tested the scale, the lighters, the phones, or the razor. On re-direct examination, the State asked the witness whether Appellant could have tested those items himself had he wished to do so. Appellant objected to that question as "[b]urden shifting." After conferencing with both sides, the court determined that the question was permissible.

¶23 We conclude that the trial court committed no error, much less fundamental error, in permitting the State's question. The court determined that, rather than being an attempt to improperly comment on Appellant's silence, the question was an appropriate response to Appellant's criticism of the State's limited evidentiary analysis. We agree. Furthermore, before the jury began deliberating, the court instructed it that the

State bore the burden to prove guilt beyond a reasonable doubt and that Appellant was not required to produce evidence of any kind. We presume that the jury followed the court's instructions. *See State v. Trujillo*, 120 Ariz. 527, 531, 587 P.2d 246, 250 (1978).

C. Remaining Analysis

¶24 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdicts, and the sentences were within the statutory limits. Appellant was represented by counsel at all stages of the proceedings and was given the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶25 After the filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant 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.

CONCLUSION

¶26 Appellant's convictions and sentences are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PATRICIA A. OROZCO, Presiding Judge

_____/S/_____
DANIEL A. BARKER, Judge