

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



DIVISION ONE
FILED: 08-03-2010
PHILIP G. URRY, CLERK
BY: DN

STATE OF ARIZONA,) 1 CA-CR 09-0501
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MATTHEW LEE GALVAN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-140036-001 SE

The Honorable Connie Contes, Judge

AFFIRMED

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

Michael S. Reeves Phoenix
Attorney for Appellant

Matthew Lee Galvan San Luis
Appellant

O R O Z C O, Judge

¶1 Matthew Lee Galvan (Defendant) appeals his conviction and sentence for misconduct involving weapons, a class four felony.

¶2 Defendant's 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 a search of the entire appellate record, he found no arguable question of law that was not frivolous. Defense counsel, however, advises this Court that Defendant wishes us to address two specific issues, and we do so below. Defendant was afforded the opportunity to file a supplemental brief in propria persona, and he has done so. Defendant raises one additional issue, which we also address below.

¶3 Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). 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, and -4033.A.1 (2010).¹ Finding no reversible error, we affirm.

¹ We cite to the current version of the applicable statutes when no revisions material to this decision have occurred.

FACTS AND PROCEDURAL HISTORY

¶4 When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996).

¶5 In the early morning of June 26, 2008, a multi-jurisdictional task force went to Defendant's residence to execute an arrest warrant. Defendant did not answer the door when officers knocked and announced their presence. Officer S. opened the front door and demanded that Defendant show his hands. Officer S. testified that upon seeing officers enter the residence, Defendant sprinted down a hallway and pointed a gun at him. Officer S. yelled "gun" to the other officers and Officer S. fired one shot at Defendant before Defendant disappeared into a bedroom at the end of the hallway. A few seconds later, Defendant reemerged into the hallway with his hands up and surrendered to officers. During a search of the residence, a pistol grip shotgun and a canvas bag that contained shotgun shells were found in Defendant's bedroom closet.

¶6 Defendant was charged by direct complaint with aggravated assault and misconduct involving weapons. The weapons charge was based upon Defendant's status as a prohibited possessor; Defendant was on probation, the terms of which forbid him from possessing a firearm.

¶7 At trial, Defendant attempted to establish a duress defense to the misconduct involving weapons charge. Defendant testified that two weeks² prior to his arrest, he was attacked by a group of people and a man pulled a knife on him and tried to stab him. Defendant said a friend gave him the gun in case the alleged attackers came back and tried to kill him; Defendant testified that he "was afraid [for his] life." The trial court did not instruct the jury on duress.

¶8 Defendant was found not guilty of aggravated assault but guilty of misconduct involving weapons. Because Defendant admitted to two prior felony convictions, he was sentenced as a repetitive offender. Defendant received the presumptive sentence of ten years for the conviction on the misconduct involving weapons charge. He also had his probation revoked and was sentenced to prison terms to be served consecutive to his ten-year sentence in the instant case. Defendant timely appealed.

DISCUSSION

Sufficiency of the evidence

¶9 It is the duty of the fact-finder, not the appellate court, to weigh the evidence. *State v. Lucero*, 204 Ariz. 363,

² In his supplemental brief, Defendant argues that the time between the attack and his arrest was shorter than two weeks, but our review of the record indicates that the time period was approximately two weeks.

366, ¶ 20, 64 P.3d 191, 194 (App. 2003). “Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.” *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶10 Misconduct involving weapons requires proof that Defendant knowingly possessed a deadly weapon while he was a prohibited possessor. A.R.S. § 13-3102.A.4 (2010). A “prohibited possessor” is defined, in part, as a person “[w]ho has been convicted within or without this state of a felony . . . and whose civil right to possess or carry a gun or firearm has not been restored.” A.R.S. § 13-3101.A.7(b) (2010).

¶11 Defendant admitted that: he possessed a gun; he knew he was not supposed to have a gun; and he was on probation for two felony theft convictions at the time he possessed a gun. Thus, based on Defendant’s own testimony, substantial evidence supported the jury’s verdict of guilty on the misconduct involving weapons charge.

Failure to file an information

¶12 Defendant’s counsel argues that the State’s failure to file an information before trial potentially deprived the superior court of subject matter jurisdiction. Article 2, Section 30, of the Arizona Constitution requires that “[n]o

person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment." The Arizona Supreme Court, however, recently held in *State v. Maldonado*, 223 Ariz. 309, ___, ¶ 25, 223 P.3d 653, 657 (2010), that the failure to file an information will be reviewed only for fundamental error if the defendant fails to object before trial. Fundamental error is "error going to 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) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). The defendant bears the burden of proving both the existence of the error and that the error was prejudicial. *Henderson*, 210 Ariz. at 567, ¶¶ 19-20, 115 P.3d at 607.

¶13 In this case, Defendant failed to object to the State's failure to file an information. Although no information or indictment was filed, the direct complaint was sufficiently detailed to make Defendant aware of the charges against him. Defendant had a hearing where he waived his right to a preliminary hearing to determine probable cause. The trial court found that the direct complaint served the same purposes as an information, and thus the failure to file an information was merely a "technical defect." Because that defect did not go

to the foundation of the case and was not prejudicial, the State's failure to file an information is not fundamental error.

Denial of duress instruction

¶14 Defendant argues that the trial court abused its discretion in denying his request for a duress instruction as a possible defense to the misconduct involving weapons charge. A party is only entitled to a jury instruction that "is reasonably and clearly supported by the evidence." *State v. Walters*, 155 Ariz. 548, 553, 748 P.2d 777, 782 (App. 1987). A trial court's denial of a requested jury instruction is reviewed for an abuse of discretion. *State v. Rosas-Hernandez*, 202 Ariz. 212, 220, ¶ 31, 42 P.3d 1177, 1185 (App. 2002). Failure to give a requested instruction "is not reversible error unless it is prejudicial to the rights of a defendant and such prejudice appears on the record." *State v. Barr*, 183 Ariz. 434, 442, 904 P.2d 1258, 1266 (App. 1995).

¶15 Defendant's attorney requested that the jury be instructed on the possible defense of duress. Section 13-412.A (2010) defines the duress defense, and it states:

Conduct which would otherwise constitute an offense is justified if a reasonable person would believe that he was compelled to engage in the proscribed conduct by the threat or use of immediate physical force against his person . . . which resulted or could result in serious physical injury which a reasonable person in the situation would not have resisted.

Defendant's basis for the duress defense was his belief that he needed to have a gun in order to protect himself from a group of men who had recently assaulted him. Defendant testified that he was attacked in front of his home approximately two weeks prior to his arrest, was beaten and had a knife pulled on him. Defendant testified he believed there was a "very immediate" threat to his life. Though Defendant testified that he felt his life was in continuing danger, Defendant's attorney conceded as to the issue of immediacy that "the only question is the time gap." The trial court could have reasonably determined that the passing of two weeks was simply too long of a time period to consider the threat "immediate." Therefore, the duress instruction was not reasonably and clearly supported by the evidence, and the trial court did not abuse its discretion in omitting that instruction.

Repetitive offender sentencing

¶16 Defendant also argues that the trial court erred in sentencing him as a repetitive offender. Defendant claims that because his prior convictions are unrelated in nature to his conviction for misconduct involving weapons, he is not a repetitive offender and his sentence should not have been aggravated.

¶17 Section 13-703.C (2010) states, in part, "a person shall be sentenced as a . . . repetitive offender if the person is at least eighteen years of age or has been tried as an adult and stands convicted of a felony and has two or more historical prior felony convictions." The statute does not require that the prior felony convictions be related in nature. Because Defendant admitted to being on probation for two prior felony convictions, he was properly sentenced under the repetitive offender statute. See A.R.S. § 13-703.C.

¶18 Additionally, Defendant questions why he was sentenced to fourteen years' imprisonment when the presumptive sentence for misconduct involving weapons is two-and-one-half years. Because Defendant is a class three repetitive offender, not a first-time offender, the presumptive sentence for misconduct involving weapons is ten years, which is the sentence the court imposed. See A.R.S. § 13-703.J. Defendant's probation was also revoked in accordance with A.R.S. § 13-708.C (2010), and he was sentenced to the presumptive terms for those offenses, which are not the subject of this appeal. Thus, the trial court did not err in sentencing Defendant to a total of fourteen years.

CONCLUSION

¶19 We have read and considered both counsel's brief and Defendant's supplemental brief, carefully searched the entire record for reversible error and we have found none. *Clark*, 196

Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the jury's finding of guilt. Defendant was present and represented by counsel at all critical stages of the proceedings. At sentencing, Defendant and his counsel were given an opportunity to speak and the court imposed a legal sentence.

¶20 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant 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). Defendant 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.³

³ Pursuant to Arizona Rule of Criminal Procedure 31.18.b, Defendant or his counsel have fifteen days to file a motion for reconsideration. On the Court's own motion, we extend the time to file such a motion to thirty days from the date of this decision.

¶21 For the foregoing reasons, Defendant's conviction and sentence are affirmed.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

DANIEL A. BARKER, Judge

/S/

LAWRENCE F. WINTHROP, Judge