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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 09-0741
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
RAMON LUIS MENDOZA,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-170870-001 DT

The Honorable Margaret R. Mahoney, Judge

AFFIRMED

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

Bruce Peterson, Legal Advocate Phoenix
By Kerri L. Chamberlin, Deputy Legal Advocate
Attorney for Appellant

G E M M I L L, Judge

¶1 Ramon Luis Mendoza appeals from his convictions and

sentences of armed robbery and kidnapping, class 2 dangerous felonies, aggravated assault, a class 3 dangerous felony, and misconduct involving weapons, a class 4 felony. Mendoza'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). Mendoza 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 the late night of November 13, 2008 the victim ("Victim") drove to a gas station to get a soda. When he arrived at the gas station, a young woman approached Victim and asked if he had a cell phone. Because he did not, he gave her some change to make a phone call at the payphone. After making the call, the woman returned the remaining fifty cents and asked Victim if he could give her a ride. Victim agreed and drove the woman to an apartment complex near 1600 W. Pierson. After

pulling into the parking lot, he backed his truck into a parking space and put it in park.

¶14 Immediately after the truck was parked, Mendoza and his accomplice, Simon Juan Ortega, ran up to the truck. Both men were wearing blue latex gloves and Mendoza was carrying a gun. Mendoza held the gun to Victim's face and commanded him to get out of the truck. At Mendoza's direction, the woman got into the driver's seat, Ortega rode shotgun, and Mendoza put Victim in the back seat and held him at gunpoint. As the truck pulled out of the parking lot, Mendoza ordered Victim to keep his head down. Victim tried to stay aware of his surroundings and the direction he was traveling, but he was disoriented because Mendoza and Ortega repeatedly hit him in the head with their fists and the butt of the gun.

¶15 While the woman continued to drive the truck, Mendoza demanded Victim hand over his wallet, credit cards, and cell phone. At that time, Victim only had a money clip with ninety-five dollars and his silver St. Christopher necklace. Mendoza held the gun to Victim, threatening to kill him, while Victim turned the money clip and necklace over to Ortega. After turning his property over, Victim struggled with Mendoza over the gun. During the struggle, the gun discharged once taking out the driver-side window and injuring Ortega's hand. At this time, the woman had been driving on the I-17; she pulled the

truck over and Victim looked on as Mendoza and Ortega got out of the truck, replaced the magazine, got reorganized, and then got back into the truck. When Mendoza reentered the truck he told Victim, "now we got to kill you."

¶16 At some point, the truck came under police surveillance. Mendoza, Ortega, and the woman, aware of police involvement, became more agitated as they were driving through a neighborhood attempting to evade the police and planning to meet back at a relative's house. At one point, the woman slowed down so Mendoza could ditch the gun; a few minutes later, all three abandoned the truck. As the woman and Ortega took off running, Mendoza told Victim, "keep your head down. I'll shoot you." Soon after abandoning the truck, Ortega and Mendoza were apprehended in the surrounding neighborhood. That same night, Victim identified both Ortega and Mendoza in one-on-one identifications.¹

¹ Mendoza requested, and the court held, a *Dessureault* hearing to determine whether Victim's one-on-one identification of Mendoza was reliable. Immediately after the crime, Victim provided the interviewing officer sufficiently accurate descriptions of the three suspects' gender, height, weight, ethnicity, and age. Mendoza and Ortega were apprehended, separately, while Victim was being interviewed, and Victim was taken to identify them separately. Prior to viewing Ortega, the officer advised Victim: "this may or may not be the person. Remember what he looks like, take a look at the person. Keep in mind that it may or may not be him." The officer could not remember whether he gave the same admonition to Victim before showing him Mendoza. When Victim saw Mendoza he initially identified him, "yeah that's him," then he changed his mind and

¶17 Mendoza was charged with one count of armed robbery, a class 2 dangerous felony, one count of kidnapping, a class 2 dangerous felony, one count of aggravated assault, a class 3 dangerous felony, and one count of misconduct involving weapons, a class 4 felony. At trial, the State presented testimony of Victim and police officers identifying Mendoza. Victim's DNA was found on Mendoza's clothing, and a piece of blue latex glove containing both Victim's and Mendoza's DNA was found in the back seat of the truck.

¶18 Mendoza was convicted on all counts and the jury found the offenses alleged in counts 1, 2, and 3 to be dangerous. With respect to count 4, the misconduct involving weapons charge, Mendoza stipulated to a prior felony conviction. At sentencing, the court found the involvement of accomplices, physical and emotional harm to the victim, financial harm, and the violent nature of the offense to warrant aggravated terms on counts 1, 2, and 3. The court sentenced Mendoza to aggravated terms of 16 years for counts 1 and 2, an aggravated term of 11 years for count 3, and the presumptive term of 4.5 years for

said, "I'm not sure." The suspect had been looking over his shoulder and when he turned to face Victim his head was down. But, when the suspect lifted his head and looked up, Victim identified Mendoza saying, "yeah, that's him. I recognize his face. He's the one who had the gun." Based on the totality of the circumstances, the court found the one-on-one identification to be reliable.

count 4, with all four sentences to be served concurrently.

¶19 Mendoza timely appealed 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 On August 9, 2009, a month after the jury returned a verdict, Mendoza filed a *pro se* motion for new trial seeking a change of counsel, alleging prosecutorial misconduct, and claiming he had been prejudiced when a juror saw him in restraints.² Even though the motion was both untimely and improperly filed, the court held an evidentiary hearing to determine whether Mendoza was actually prejudiced by a juror

² Mendoza's motion was a conflation of three motions (1) to reconsider Judge Kemp's pre-trial denial of Mendoza's motion for new counsel, (2) for a new trial due to prosecutorial misconduct, and (3) for a new trial due to Mendoza being prejudiced when a juror saw him in restraints. The court disposed of the first issue as untimely and not ripe; Mendoza's motion for reconsideration should have been filed before Judge Kemp, see *State ex rel. Romley v. Superior Court*, 183 Ariz. 139, 142, 901 P.2d 1169, 1172 (App. 1995) (to preserve judicial resources, a second trial judge should not review the first judge's ruling unless new circumstances have arisen), and it should have been filed "no later than 20 days prior to trial." Ariz. R. Crim. P. 16.1. Regarding the second issue and despite the fact that as a represented party, Mendoza did not have a right to file a motion for new trial, the court considered and dismissed his prosecutorial misconduct claim for lack of sufficient detail. Cf. *Lincoln v. Lincoln*, 155 Ariz. 272, 274, 746 P.2d 13, 15 (App. 1987) (represented party "has no right to personally conduct any aspect of the litigation except through counsel."). We find no reversible error in these rulings.

seeing him in restraints. See *State v. Apelt*, 176 Ariz. 349, 361, 861 P.2d 634, 646 (1993) (“[B]rief and inadvertent exposure of a handcuffed or shackled defendant to members of the jury outside the courtroom is not inherently prejudicial, and a defendant is not entitled to a new trial absent a showing of actual prejudice.”).

¶11 At the hearing, Mendoza testified that a juror who was still in the hallway while he was being moved to the in-custody holding tank during a recess may have seen him in restraints. He claimed that he had already crossed into the hallway when the bailiff and a man walking with her passed by and saw him. Mendoza testified that he did see the man but he did not recognize him. The sheriff’s deputy responsible for transferring Mendoza testified that the clerk had approached him as he was about to bring Mendoza into the hallway and stopped him from doing so because the hallway had not been cleared of jurors. The deputy did not see the bailiff or the possible juror in the hallway. The clerk testified that she had stopped the deputy because she heard the bailiff and a man walking behind her in the hallway; she was not sure whether the man had been a juror, and she did not think that the man and the bailiff had seen Mendoza.

¶12 Because there was no evidence the man in the hallway was a juror or that he had ever seen Mendoza, the court

concluded that Mendoza did not show actual prejudice and therefore denied Mendoza's motion for a new trial. Mendoza does not raise this issue on appeal, and, in any event, we find no reversible error.

¶13 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 evidence presented supports the convictions and the sentences imposed fall within the ranges permitted by law. As far as the record reveals, Mendoza 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.

¶14 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 Mendoza 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. Mendoza 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

¶15 The convictions and sentences are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

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

_____/s/_____
PHILIP HALL, Judge