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Ariz. R. Crim. P. 31.24



DIVISION ONE  
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RUTH WILLINGHAM,  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 09-0852  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) MEMORANDUM DECISION  
)  
BENJAMIN THOMAS SALCIDO, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-139668-001 DT

The Honorable Michael W. Kemp, Judge

**CONVICTIONS AND SENTENCES AFFIRMED AS MODIFIED**

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Attorneys for Appellee

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J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following Benjamin Thomas Salcido's

conviction on 18 various charges. Salcido's counsel has searched the record and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. at 739; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Salcido was given the opportunity to file a supplemental brief but did not do so. Salcido asked his counsel to raise one issue, which we address below. Counsel now asks this court to search the record for fundamental error. After reviewing the entire record, we affirm Salcido's convictions and sentences as modified.

#### FACTS AND PROCEDURAL HISTORY

¶2 At about 11:30 p.m. one night, Salcido and a friend were drinking alcohol and smoking marijuana in the parking lot of a pool hall.<sup>1</sup> They had spent the day in the desert target-shooting and drinking beer and stopped on their way home to finish their beer. The pool hall manager came out and asked them to pour out their alcohol, but they refused, and Salcido became aggressive. S.M., another billiards hall employee, approached Salcido and his friend to ask them to stop drinking in the parking lot. Salcido refused to leave, and pushed S.M. S.C., a regular patron at the pool hall, also approached Salcido

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<sup>1</sup> Upon review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Salcido. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

and his friend to inform them that in the past, the police had been called for people drinking in the parking lot.

¶13 Accounts of what then ensued varied, but all agree that Salcido eventually punched S.C. in the face. R.A., another pool hall patron, testified Salcido and his friend started the fight. The fight escalated, and S.C. ended up on the ground, with Salcido straddling him and Salcido's friend kicking him. C.P., another patron, took half of a pool cue with him into the fight and hit Salcido two times in order to break up the fight. He was unsuccessful. S.M. heard that a fight had broken out, so he went back outside, grabbed a pair of brass knuckles and hit Salcido in the back of the head and on his side 10-15 times. B.A., another patron, was punching and kicking Salcido at the same time. A.G., the other employee working that night, also heard there was a fight and ran outside to the parking lot.

¶14 Finally, Salcido pulled an AK-47 rifle from the trunk of his car. He pointed the gun at S.M., and S.M. ran back to the front of the pool hall. While he was running, S.M. heard seven or eight shots fired. B.A., R.A., C.P. and A.G. saw the gun pointed in their direction and "swinging around," and they ducked for cover. While K.M. was in her car, it was struck by at least three shots. K.A., who also was in the parking lot, testified Salcido "grabbed the gun, proceeded to chamber it and

went from the left side of the parking lot, complete 180 to the right side of the parking lot just shooting."

¶15 A.H., Sh.M., S.R., J.A. and St.M. also were in the parking lot. They were not injured by the gunfire, but each of them saw the gun and was afraid. S.C. had started to pick himself up from the ground when he saw the AK-47 pointed at him, and as he began to run away, he looked back and was struck in the face by gunfire. He lost vision in his right eye and sustained other major injuries. Salcido put the gun back in the trunk and left the scene before police arrived. Police who arrived saw that the pool hall had been hit with some bullets.

¶16 The pool hall manager told police he recognized Salcido's friend, and the friend eventually told police it was Salcido who fired the weapon. Police never found the weapon. Salcido said he sold the gun because he "didn't want anything to do with it."

¶17 A jury found Salcido guilty of one count of assault against S.C., a Class 1 misdemeanor; one count of aggravated assault against S.C., a Class 3 dangerous felony; and 13 counts of disorderly conduct, all Class 6 dangerous felonies. Additionally, the jury found Salcido guilty of one count of unlawful discharge of a firearm, a Class 6 dangerous felony; one count of discharge of a firearm at a structure, a Class 3

dangerous felony; and one count of tampering with physical evidence, a Class 6 felony. After the appropriate colloquy, Salcido then admitted that the aggravated assault count and each of the disorderly conduct charges "involved the infliction or threatening infliction of serious physical injury" and that the charge of discharge of a firearm at a structure "involved the taking of or damage to property in an amount sufficient to be an aggravating circumstance."

¶18 The court sentenced Salcido to a total of 14.25 years' incarceration as follows: Count 1, assault, 158 days' incarceration with an identical number of days of presentence incarceration credit; Count 2, aggravated assault, an aggravated sentence of 12 years' imprisonment with 158 days' presentence incarceration credit; Counts 3-8 and 10-16, disorderly conduct, presumptive concurrent sentences of 2.25 years' imprisonment, to be served consecutively to Count 2, also with 158 days' presentence incarceration credit; Count 9, disorderly conduct, a presumptive sentence of one year with 158 days' presentence incarceration credit, consecutive to Count 2 and concurrent with all other counts;<sup>2</sup> Count 17, unlawful discharge of a firearm, a

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<sup>2</sup> We note that the court found that Count 9 was not a dangerous offense even though the jury found it to be dangerous. The discrepancy does not change the overall length of Salcido's sentence. We also note the court granted presentence incarceration credit on each of the sentences. Pursuant to

presumptive sentence of 2.25 years' imprisonment with 158 days' presentence incarceration credit, concurrent with all counts except Count 2; Count 18, unlawful discharge of a firearm at a nonresidential structure, 10.5 years' imprisonment, with 158 days' presentence incarceration credit, concurrent with all other counts; and Count 19, tampering with physical evidence, a presumptive term of one year imprisonment with 158 days' presentence incarceration credit, concurrent with all counts except Count 2.

¶9 Salcido timely appealed. 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 (2010) and -4033(A)(1) (2010).<sup>3</sup>

## DISCUSSION

### A. Excessive Sentence.

¶10 Salcido requested his counsel raise the following issue: "The sentence imposed was excessive in light of recommendations by the victim of Counts 1 and 2 and the

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*State v. Cuen*, 158 Ariz. 86, 88, 761 P.2d 160, 162 (App. 1988), presentence incarceration credit is applied only to one conviction if consecutive sentences are imposed. Because the State did not appeal from the sentences, however, we will not address the issue. See *State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990) (sentencing error that favors a defendant cannot be corrected absent appeal by the State).

<sup>3</sup> Absent material revisions after the date of an alleged offense, we cite a statute's current version.

circumstances of the incident that resulted in appellant's conviction of 18 counts." We review a sentence for an abuse of discretion. *State v. Cazares*, 205 Ariz. 425, 427, ¶ 6, 72 P.3d 355, 357 (App. 2003). "When a sentence is within statutory limits, it will not be modified on review unless from the circumstances it clearly appears that the trial court abused its discretion by showing arbitrariness or capriciousness, or by failing to conduct an adequate investigation into the facts." *State v. Fatty*, 150 Ariz. 587, 592, 724 P.2d 1256, 1261 (App. 1986).

¶11 Salcido stipulated that his aggravated assault conviction was subject to one aggravating circumstance. In addition, the court found other aggravating circumstances in the seriousness of the injuries to the victim, the financial harm to the victim and other persons being in the zone of danger. In sentencing Salcido, the court considered the presentence report, 36 letters submitted by friends and family, the statements by the victim of the aggravated assault and his family, the in-court statements by Salcido's parents, his attorney and Salcido himself. The court also heard testimony from a psychologist and a psychiatrist regarding the effect of the injuries Salcido received from the brass knuckles during the altercation in the parking lot. Although the victim of the aggravated assault

requested a minimum sentence be imposed, the victim's family and other victims asked the court to impose the maximum sentence.

¶12 At sentencing, the court told the victim of the aggravated assault:

[S.C.], I think you've got more to say than anybody else in this courtroom about what should happen, and your opinion and recommendation is important to me. But I also have other things I have to look at. I have to look at other people in similar situations. I have to try as best I can to treat Mr. Salcido equally, the way I would treat other people in similar circumstances.

The presumptive sentence for the aggravated assault conviction was 7.5 years, and the maximum was 15 years. A.R.S. § 13-604(I) (Supp. 2008).<sup>4</sup> The court imposed a sentence of 12 years. We conclude the court did not abuse its discretion in imposing that or any of the other sentences.

#### **B. Fundamental Error Review.**

¶13 The record reflects Salcido received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court held appropriate pretrial hearings.

¶14 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of 12 members and three alternates. The

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<sup>4</sup> This was the version of the statute in effect at the time of the offense.



court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned a unanimous verdict, which was confirmed by juror polling.

¶15 The court received and considered a presentence report and addressed its contents during the sentencing hearing and imposed legal sentences on the crimes of which Salcido was convicted. We note, however, that the transcript shows that with respect to Count 18, discharge of a firearm at a structure, a Class 3 dangerous felony, the court stated it was sentencing Salcido to "the presumptive term of 10.5 years." The court further stated, "I find the aggravating and mitigating factors balance one another out" on that count. The presumptive sentence for a Class 3 dangerous felony, however, is 7.5 years, not 10.5 years. A.R.S. § 13-604(I). Therefore, we direct the judgment be modified to reduce Salcido's sentence on Count 18 to 7.5 years' imprisonment with 158 days' presentence incarceration credit, to run concurrently with the other counts.

#### CONCLUSION

¶16 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm the convictions and the sentences imposed, except that we direct the judgment be modified to

reflect the presumptive term of 7.5 years' imprisonment for Count 18.

¶17 After the filing of this decision, defense counsel's obligations pertaining to Salcido's representation in this appeal have ended. Defense counsel need do no more than inform Salcido of the outcome of this appeal and his future options, unless, upon review, counsel finds "an issue appropriate for submission" to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Salcido has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Salcido has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/  
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/  
PATRICK IRVINE, Judge

/s/  
PHILIP HALL, Judge