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DIVISION ONE
FILED: 09/30/2010
RUTH WILLINGHAM,
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0004
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ERNEST JOE KESTERSON, III,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-116931-001 DT

The Honorable F. Pendleton Gaines, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender, Phoenix
By Thomas K. Baird, Deputy Public Defender
Attorney for Appellant

D O W N I E, Judge

¶1 Ernest Joe Kesterson, III ("defendant") appeals his convictions on two counts of aggravated assault in violation of Arizona Revised Statutes ("A.R.S.") Sections 13-1204(A)(2) and -

1204(A)(8)(a) respectively. His appeal was filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Defense counsel has searched the record and can find no arguable question of law that is not frivolous and requests that we search the record for fundamental error. See *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona*, but has not done so. On appeal, we view the evidence in the light most favorable to sustaining the conviction. *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997). After reviewing the record, we affirm defendant's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶12 On March 8, 2009, defendant invited J.R. and his girlfriend, N.S., to a party at his house. There were approximately twenty to thirty guests at the party. After J.R. and N.S. arrived, a group of women approached N.S. and accused her of stealing a purse. J.R. attempted to quell the group's anger by offering to allow them to search his vehicle; they ignored his offer and began to push N.S. and pull her hair. Soon thereafter, the fight escalated, with the women on top of N.S., punching her. When J.R. attempted to pull the women off

of N.S., defendant punched J.R. in the back of the head. The other men at the party joined in and began hitting J.R.

¶13 The fight among the men moved outside, toward the middle of the cul-de-sac in front of the house. During the altercation, J.R. saw defendant run inside and return carrying a metal bat. Defendant used the bat to smash the side window of J.R.'s mother's car. He then approached J.R. with the bat; the group of men backed away. Defendant swung the bat three times while J.R. was still standing. The first two times, J.R. blocked the blow with his left arm, and the third time, the bat struck J.R. in the head, causing him to fall to the ground. While J.R. was on the ground, the men resumed hitting and kicking him, and defendant hit J.R. an additional five times with the bat. J.R. thought he was going to die.

¶14 Officers Fey and Scott were dispatched to the scene. When they arrived, they saw approximately ten people standing in the cul-de-sac; all but two of them scattered. The officers saw defendant holding a baseball bat, standing near J.R., who was on the ground. They observed defendant run into his house with the baseball bat; Officer Scott pursued defendant, and Officer Fey stayed with J.R.

¶15 Officer Fey noted that J.R. was dazed and confused. He had a bruise on his forehead, his lip was swollen with dried blood around his mouth, and he had bruises on his left elbow.

As a result of the assault, J.R. suffered a concussion, received stitches in his mouth, experienced muscle spasms in his eyes for approximately three months, and has ongoing back problems.

¶16 Without incident, Officer Scott detained defendant, handcuffed him, and placed him in the patrol car. Once inside the vehicle, defendant became belligerent and yelled obscenities at the officers. He began kicking the door of the patrol car. Officer Kuehler, who was on duty and wearing his patrol uniform, was assisting officers on the scene. He went to check on defendant and warned him to stop kicking the door "because he was just going to make things worse for himself." When Officer Kuehler opened the car door, defendant kicked the officer in the leg.

¶17 Defendant was charged with two counts of aggravated assault. A jury trial commenced, and defendant was found guilty of both counts, with a finding of dangerousness as to the first count.

¶18 At sentencing, defendant was given an opportunity to speak, and his mother asked for leniency, as it was defendant's first offense. The court sentenced defendant to a mitigated term of 5 years' imprisonment for count 1, to be served concurrently with a mitigated term of .5 years' imprisonment for count 2. Defendant received fifty-five days of presentence incarceration credit.

¶9 Defendant filed a petition for post-conviction relief, requesting permission to file a delayed notice of appeal. Without objection from the State, the request was granted. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).

DISCUSSION

¶10 We have considered the brief submitted by defense counsel and have reviewed the entire record. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Defendant was present and represented by counsel at all critical phases of the proceedings. The jury was properly comprised of eight jurors and two alternates. *See* A.R.S. § 21-102(B) (2002).

¶11 The State presented substantial evidence of defendant's guilt. J.R. testified that defendant hit him with a baseball bat at least eight times, and two officers testified that defendant was holding a bat and standing near J.R. when they arrived. J.R. sustained several injuries as a result of the assault and testified that he thought he was going to die that night. Officer Kuehler testified that defendant kicked him when he opened the patrol car door. Although conflicting testimony was presented, a reasonable jury could have found the

State's case more credible. See *State v. Lee*, 217 Ariz. 514, 516, ¶ 10, 176 P.3d 712, 714 (App. 2008) (holding it is the jury, not the appellate court, that weighs the evidence and resolves conflicting testimony).

¶12 The jury instructions were consistent with the charged offenses, and the record reflects no irregularity in the deliberation process. After the jury returned its verdict, the court received a presentence report. At sentencing, defendant was given the opportunity to speak, and the court stated on the record the basis for its findings. The court then imposed legal sentences for the charges on which Defendant was convicted.¹

CONCLUSION

¶13 We affirm defendant's convictions and sentences. 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). On this court's own motion, defendant shall have

¹ We note that defendant incorrectly received additional days of presentence incarceration credit. But because the sentencing error favors defendant and the State has not cross-appealed, we lack jurisdiction to correct this error. See *State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990).

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.

/s/

MARGARET H. DOWNIE, Judge

CONCURRING:

/s/

MAURICE PORTLEY, Presiding Judge

/s/

PATRICIA A. OROZCO, Judge