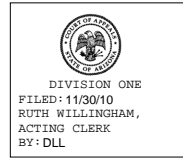


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) 1 CA-CR 10-0261  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication - Rule  
ROBERT SANCHEZ LOPEZ, ) 111, Rules of the Arizona  
) Supreme Court)  
Appellant. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-048664-001 DT

The Honorable Glenn M. Davis, Judge  
The Honorable Timothy J. Ryan, Judge

**AFFIRMED AS CORRECTED**

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Terry Goddard, 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 Stephen R. Collins, Deputy Public Defender  
Attorneys for Appellant

Robert Sanchez Lopez Marana  
Appellant

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**N O R R I S**, Judge

¶1 Robert Sanchez Lopez timely appeals from his convictions and sentences for forgery and marijuana possession. After searching the record on appeal and finding no arguable question of law that was not frivolous, Lopez's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. This court granted counsel's motion to allow Lopez to file a supplemental brief *in propria persona*, and Lopez did so. We reject the arguments raised in Lopez's supplemental brief and, after reviewing the entire record, find no fundamental error. Therefore, we affirm Lopez's convictions and sentences as corrected. See *infra* ¶ 20.

#### **FACTS AND PROCEDURAL BACKGROUND<sup>1</sup>**

¶2 On September 2, 2009, police placed Lopez and a Phoenix house under surveillance because of Lopez's two valid, outstanding felony arrest warrants. After Lopez drove away from the house, the police conducted a traffic stop and arrested him. In a search incident to arrest, an officer discovered an Arizona driver's license in Lopez's wallet with Lopez's picture but another individual's name and personal information. Based on

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<sup>1</sup>We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Lopez. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

this, the State charged Lopez with knowingly possessing a forged instrument with the intent to defraud, a class four felony in violation of Arizona Revised Statutes ("A.R.S.") section 13-2002 (2010).

¶13 At the time of Lopez's arrest, officers anticipated they would need to search the house to arrest another fugitive who might be at the house, Lopez's brother. Thus, before advising Lopez of his *Miranda*<sup>2</sup> rights and in anticipation of securing the house to execute a search warrant, a detective asked Lopez if there were other people or "any guns, [or] anything like that" at the house. In response, Lopez told the detective he had a small amount of marijuana at the house. The detective relied on this statement to obtain an affidavit for a search warrant for Lopez's house. During the search, police found 20 grams of marijuana in the room identified as Lopez's.<sup>3</sup> Based on this, the State charged Lopez with knowingly possessing or using marijuana weighing less than two pounds, a class six felony in violation of A.R.S. § 13-3405 (2010).

¶14 Lopez represented himself at trial, and on February 17, 2010, a jury found Lopez guilty of both offenses. The court

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<sup>2</sup>*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

<sup>3</sup>At trial, when Lopez asked the detective how she knew it was Lopez's bedroom, the detective testified Lopez's mother-in-law coherently identified the room as Lopez's.

found Lopez had three prior felony convictions and was on felony warrant release status when he committed the charged offenses. The court sentenced Lopez to the minimum for each count, see *infra* ¶ 20, plus a two-year enhancement for Lopez's felony warrant status, to run concurrently -- five years for forgery and three years for marijuana possession -- with 205 days of presentence incarceration credit. The court also imposed a \$20 probation fee and community supervision equal to one day of every seven days of the sentence after Lopez's five-year sentence.

#### DISCUSSION

¶15 In his 37-page supplemental brief, Lopez raises a host of arguments challenging every fact of the case -- from the initial stop to pretrial and trial procedures, all the way to sentencing. Based on our review of the record, almost all of these arguments are without factual foundation or legal merit, and an individualized discussion of each is unwarranted. Accordingly, we discuss only those few issues we have determined are worth addressing, as restated for clarity and brevity.

¶16 First, Lopez challenges the sufficiency of the evidence, citing inconsistent testimony and lack of proof he possessed the contraband. A review of the sufficiency of the evidence underlying a conviction is limited to determining "whether substantial evidence supports the verdict." *State v.*

*Sharma*, 216 Ariz. 292, 294, ¶ 7, 165 P.3d 693, 695 (App. 2007).  
"Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (quoting *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980)).

¶7 Having reviewed the entire record, we find ample evidence supports Lopez's conviction on each count. Possession can include either physical possession or merely an ability to "exercise dominion or control over property." A.R.S. § 13-105(33) (2010). For the forgery count, officers testified they found the forged driver's license in the wallet in Lopez's pants pocket. As for Lopez's intent to defraud, the officers testified no item in Lopez's wallet identified him accurately. Further, Lopez had valid, outstanding warrants, which constitutes circumstantial evidence of the "intent" requirement for the forgery count as Lopez arguably was aware of these warrants. Regarding the marijuana possession, detectives testified they found marijuana in Lopez's bedroom.

¶8 Second, Lopez argues the court violated his right to a speedy trial. We disagree. Trial began on February 10, 2010, 142 days after his arraignment on September 21, 2009. See Ariz.

R. Crim. P. 8.2(a)(1) (if held in custody, entitled to be tried within 150 days from arraignment).

¶19 Third, Lopez argues the marijuana was the fruit of an illegal search for two separate reasons. First, he argues the search warrant was deficient because the statement forming the basis of the warrant was obtained in violation of his *Miranda* rights. *Miranda*, however, does not require exclusion of the physical fruits of a defendant's voluntary, unwarned statement, *United States v. Patane*, 542 U.S. 630, 641-42, 644-45, 124 S. Ct. 2620, 2629, 2631, 159 L. Ed. 2d 667 (2004) (plurality opinion), which was the case here. Thus, because the court found based on ample evidence Lopez's statements were voluntary, albeit obtained in violation of *Miranda*, the police properly could use Lopez's statement in the affidavit and the items seized did not need to be excluded. Second, Lopez argues the police improperly entered the house before obtaining the search warrant. The record reveals Lopez's in-laws invited the officers into the house before the judicial officer issued the search warrant while the officers were securing the house. Thus, the officers did not enter the house improperly, and the court properly admitted the marijuana into evidence.

¶10 Fourth, Lopez raises many challenges of prosecutorial misconduct, including but not limited to disclosure, voir dire, opening and closing statements, examination of witnesses,

ethical violations, and misstatements of facts and law. These assertions, however, are not borne out by the record and are without merit.

¶11 Fifth, Lopez further alleges police misconduct both during the investigation and at trial. The record, however, does not support Lopez's allegations. There is no evidence in the record demonstrating the police testified untruthfully, failed to comply with the evidentiary rules, or conspired with the prosecutors to convict Lopez.

¶12 Sixth, Lopez next argues the court made several improper rulings relating to jury selection, admitting evidence, permitting inappropriate forms of questions, Lopez's ability to confront witnesses, and Lopez's motion for new trial. The record does not support any of these assertions.

¶13 Seventh, Lopez argues the judge improperly instructed the jury by failing to tell them subsection B of A.R.S. § 13-2002 (2010) essentially negates any inference of intent to defraud if a person possesses fewer than five forged instruments.<sup>4</sup> We disagree. Although the statute gives rise to an inference of intent with five or more forged instruments, it cannot reasonably be construed to allow the negative inference

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<sup>4</sup>Subsection B provides: "The possession of five or more forged instruments may give rise to an inference that the instruments are possessed with an intent to defraud." A.R.S. § 13-2002(B) (2010).

-- that there is no inference of intent if the person possessed fewer than five forged instruments. The court, therefore, properly instructed the jury on the elements of possessing a forged instrument with the intent to defraud.

¶14 Eighth, Lopez argues he was entitled to counsel at trial. The record reflects, however, Lopez requested to represent himself at trial and knowingly, intelligently, and voluntarily waived his right to counsel. Further, Lopez had advisory counsel throughout the trial.

¶15 Ninth, Lopez argues he was denied effective assistance of counsel. We will not review the merits of an ineffective-assistance-of-counsel claim on a direct appeal, however, because the issue must be raised in a Rule 32.1 post-conviction relief proceeding. Ariz. R. Crim. P. 32.1; *State v. Spreitz*, 202 Ariz. 1, 2, ¶ 4, 39 P.3d 525, 526 (2002).

¶16 Tenth, Lopez argues the superior court improperly subjected him to a jury trial despite his requests for a bench trial. A defendant, however, cannot demand a bench trial; rather, the court and prosecution must agree to a defendant's request. Ariz. R. Crim. P. 18.1(b). Here, the court properly denied Lopez's request for a bench trial because the State objected to his request.

¶17 Eleventh, Lopez argues the superior court improperly enhanced his sentence because copies of the convictions were not



authenticated, and the presentence report for this case and the probation report from 1991 listed different birth cities for Lopez.<sup>5</sup> The record does not support these arguments. The State properly submitted into evidence certified public records to prove Lopez's prior felony convictions, and the record does not reflect any confusion over birth cities as both reports accurately identified Lopez by name, date of birth, and Social Security number.

¶18 In addition to reviewing those portions of the record necessary to address Lopez's concerns, we have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Lopez received a fair trial. Before he began to represent himself, he was represented by counsel at all stages of the proceedings. Lopez was also present at all critical stages.

¶19 As discussed, the evidence presented at trial was ample and supports the verdicts. The jury was properly comprised of eight members and the court properly instructed the jury on the elements of the charges, Lopez's presumption of innocence, the State's burden of proof, and the necessity of a unanimous verdict. The superior court received and considered a presentence report, Lopez was given an opportunity to speak at

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<sup>5</sup>The presentence report in this case listed Lopez's birth city as San Antonio, Tex., whereas the probation report from 1991 listed it as Hereford, Tex.

sentencing, and his sentences were within the range of acceptable sentences for his offenses.<sup>6</sup>

¶120 Finally, we note the superior court sentencing minute entry misstates the case number for one of Lopez's prior felony convictions and mistakenly refers to his sentences as "mitigated" sentences. An error in the sentencing minute entry requires modification. See *State v. Sands*, 145 Ariz. 269, 278, 700 P.2d 1369, 1378 (App. 1985). We have authority to correct a discrepancy between the superior court's oral pronouncement of a sentence and its sentencing minute entry when the discrepancy can be resolved by reference to the record. *State v. Contreras*, 180 Ariz. 450, 453 n.2, 885 P.2d 138, 141 n.2 (App. 1994). Because we can resolve the discrepancies here by reference to the record, we do so. The sentencing minute entry lists the

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<sup>6</sup>We note the superior court added two years to Lopez's sentence pursuant to A.R.S. § 13-708(D) (2010) because it determined Lopez was on felony release status when he committed these offenses. The court should have submitted this determination to a jury. See *State v. Gross*, 201 Ariz. 41, 45, ¶ 19, 31 P.3d 815, 819 (App. 2001) (under A.R.S. § 13-604(R) (Supp. 2007), jury must determine defendant's release status beyond a reasonable doubt; A.R.S. § 13-604(R) renumbered in 2008 to A.R.S. § 13-708(D)). We review only for fundamental error, however, because Lopez did not object at trial to the court deciding this issue. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Assuming we find fundamental error, such error also must result in prejudice. *Id.* at 568, ¶ 26, 115 P.3d at 608. Based on the record before the sentencing court, no reasonable jury could have found Lopez was not on felony release at the time he committed the offenses. Therefore, we need not remand on this issue because Lopez was not prejudiced by the court, not a jury, determining release status.

wrong case number for the prior marijuana possession felony committed September 4, 1988. Additionally, the sentencing minute entry refers to the sentences as "mitigated," however, they are "minimum," not mitigated, sentences. We hereby correct the sentencing minute entry to reflect the accurate case number for the prior offense: CR88-09075 and to reflect Lopez was sentenced to minimum sentences.

#### CONCLUSION

¶121 We decline to order briefing and affirm Lopez's convictions and sentences as corrected.<sup>7</sup>

¶122 After the filing of this decision, defense counsel's obligations pertaining to Lopez's representation in this appeal have ended. Defense counsel need do no more than inform Lopez 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. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

¶123 Lopez has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Lopez 30 days

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<sup>7</sup>On November 19, 2010, Lopez moved to add documents to the record. We deny this motion because the record contains sufficient factual information for our consideration of the arguments he has raised on appeal. Further, Lopez has not shown that these materials were either filed with the superior court or otherwise included in the record on appeal.

from the date of this decision to file an *in propria persona* motion for reconsideration.

/s/

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PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

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LAWRENCE F. WINTHROP, Presiding Judge

/s/

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PATRICK IRVINE, Judge