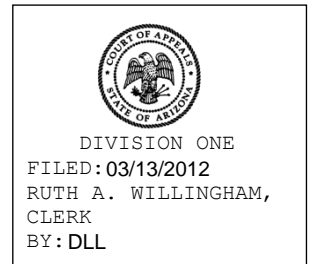


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) 1 CA-CR 10-0711  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication - Rule  
MIGUEL ANGEL XOCHICALE, ) 111, Rules of the Arizona  
) Supreme Court)  
Appellant. )  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-150166-001 DT

The Honorable Glenn M. Davis, Judge

**CONVICTIONS AFFIRMED; SENTENCES AFFIRMED AS CORRECTED**

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

Sharmila Roy Attorney at Law Laveen  
By Sharmila Roy  
Attorneys for Appellant

Miguel Angel Xochicale, Appellant Buckeye

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

¶1 Miguel Angel Xochicale timely appeals from his convictions and sentences for one count of burglary, a class 2 felony, seven counts of aggravated assault, class 3 felonies,

seven counts of kidnapping, class 2 felonies, four counts of armed robbery, class 2 felonies, one count of misconduct involving weapons, a class 4 felony, and one count of impersonating a peace officer, a class 4 felony. After searching the record on appeal and finding no arguable question of law that was not frivolous, Xochicale'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 Xochicale to file a supplemental brief *in propria persona*, and Xochicale did so. We reject the argument raised in Xochicale's supplemental brief. After reviewing the entire record, we find two sentencing errors which we correct, but find no other fundamental error. Therefore, we affirm Xochicale's convictions and sentences as corrected.

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

¶2 Between two and three o'clock in the morning on July 27, 2009, a group of men wearing all black clothing, masks, gloves, and tactical vests, broke into a family's home while a father and three of his children were at home. The men, who

---

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

were carrying assault rifles, claimed to be "FBI," and forced the four family members to the ground and bound them with duct tape. As the men were ransacking the home and taking property, another family member returned home, accompanied by a family friend and the friend's girlfriend. The masked men met them at the door, claimed to be FBI, pointed guns at them, and forced them inside, where they placed them on the floor and bound their legs and arms with duct tape. The men covered the family friend and his girlfriend with a blanket and, while underneath, the friend was able to reach his cell phone and send a text message to his mother, which indicated where they were and instructed her to "Call cops." The victims testified that from what they could see, the men took their televisions, cell phones, iPods, computers, X-Box video game consoles and X-Box games, jewelry, the father's leaf blower, and the friend's wallet and computer.

¶13 The friend's mother called the police and described the location of the home and her son's black SUV. Initially, two police patrol cars responded, and as they drove up the family's street, one officer noticed people getting into a gray truck while the driver, a male who was "wearing a black shirt, was very sweaty, [and] was focused straight ahead," tried to avoid looking at her. As she turned her car around, the officer saw the family friend's black SUV outside and followed the gray

truck as it left, noting a large television in the bed of the truck.

¶14 When the officers attempted to stop the truck, it briefly slowed down, then sped away. The officers did not pursue it directly, but one of the officers followed in the direction the truck fled. Within minutes, he found the truck in the middle of the street and discovered it had crashed, the passenger-side doors were open, and no one was inside. A nearby motorist told the officer he had seen three men run away from the truck. Police set up a "perimeter" to prevent people from leaving the area and, using a K-9 unit, found Xochicale and his brother, Genaro Arias, hiding in backyards in the neighborhood.<sup>2</sup> Police found a cell phone and cell phone covers strewn across the backyard where they found Xochicale hiding in rolled-up carpeting, and a handgun on the roof of the house next door.

¶15 When police searched the crashed truck, they found it was registered in Arias' name. Inside the truck, police found, among other things, assault rifles, tactical vests, gloves, duct tape, two X-Box video game consoles, a leaf blower, the family friend's wallet with his identification still inside, and masks -- one of which had DNA inside that matched Xochicale's DNA profile.

---

<sup>2</sup>A third suspect was arrested in the same neighborhood, but was not a party to this case.

## DISCUSSION

### *I. Xochicale's Supplemental Brief*

¶16 Xochicale argues the superior court abused its discretion by refusing to give the jury a *Willits* instruction<sup>3</sup> when the State "failed to preserve the photo lineup that was created during the investigation of the incident" and one of the victims "testified directly to being shown multiple photographs of potential perpetrators." We disagree. The record supports the argument the State made at trial: no photo lineup ever existed. The investigating detective testified he had no record of showing any photo lineup to any of the victims, two victims testified they were only shown photographs of property, not people, and the older brother of the victim who testified to seeing photographs of potential perpetrators confirmed he was with the victim at the time she claimed she saw the photographs and they were never shown any photographs of potential perpetrators. Thus, we hold the superior court did not abuse its discretion in refusing to give a *Willits* instruction,

---

<sup>3</sup>*State v. Bolton*, 182 Ariz. 290, 308, 896 P.2d 830, 848 (1995) (citing *State v. Willits*, 96 Ariz. 184, 187, 393 P.2d 274, 276 (1964)) (*Willits* instruction "would have instructed the jury that if it found that the state had lost or destroyed evidence whose content or quality was in issue, it may infer that the true fact is against the state's interest").

because the record reflects no photo lineup ever existed. *State v. Speer*, 221 Ariz. 449, 457, ¶ 39, 212 P.3d 787, 795 (2009) (appellate court reviews refusal to give *Willits* instruction for abuse of discretion); see also *State v. Reffitt*, 145 Ariz. 452, 462, 702 P.2d 681, 691 (1985) (no abuse of discretion when, even assuming defendant entitled to instruction, overwhelming evidence established guilt and defendant could not establish prejudice).

## *II. Sentencing Matters*

¶7 The superior court imposed 13-year sentences on the counts of misconduct involving weapons (count 20) and impersonating a peace officer (count 22). Based on our review of the record, the sentences imposed on these two counts are illegal. Although the superior court's sentencing minute entry cites Arizona Revised Statutes ("A.R.S.") section 13-702 (2009) as the applicable sentencing provision for both counts, the sentencing minute entry and sentencing hearing transcript reflect the court treated these counts as "repetitive." Thus, considering Xochicale's three prior historical felonies -- found beyond a reasonable doubt by the jury -- and treating these counts as "repetitive," the applicable sentencing statute was A.R.S. § 13-703(C) (2009) (for "category three repetitive offender[s]"). Therefore, even if the superior court relied on the correct statute in imposing the sentences on these counts,

its minute entry cited the wrong statute, and the court did not cite the correct statute or applicable subsection anywhere else on the record.

¶18 Under the applicable statute, A.R.S. § 13-703(C), the presumptive term for these class 4 felonies was ten years, the "maximum" term was 12 years, and anything beyond a sentence of 12 years would have constituted an "aggravated" sentence requiring proof of "at least two aggravating circumstances." A.R.S. § 13-703(G), (J). Given that the court imposed 13-year sentences, it is clear it imposed aggravated sentences.

¶19 Here, although the jury found that two aggravating factors ("the presence of an accomplice" and "the infliction of emotional harm") applied to Xochicale's other convictions<sup>4</sup> and the court relied on those factors in imposing sentences on the other convictions, the jury did not find, nor was it asked to find, those same aggravators for counts 20 and 22. Further, although the jury also found Xochicale had three prior felonies and "was on probation or parole" at the time he committed the present offenses, neither the sentencing minute entry nor the sentencing hearing transcript reflect the court relied on either of those factors in imposing aggravated sentences on counts 20 and 22, despite repeated requests from this court and our

---

<sup>4</sup>The jury also found a third aggravator, not relevant here, applied to Xochicale's burglary conviction (count 1).

supreme court to make specific findings on the record. See *State v. Harrison*, 195 Ariz. 1, 5, ¶ 17, 985 P.2d 486, 490 (1999) (quoting *State v. Poling*, 125 Ariz. 9, 11, 606 P.2d 827, 829 (App. 1980)) (in considering aggravating factors, "it would be 'better practice for a trial judge to state in the more precise terms of the statute' that he or she has found or considered 'certain specific circumstances'"); see also *State v. Fisher*, 141 Ariz. 227, 236 n.1, 686 P.2d 750, 759 n.1 (1984) ("We strongly urge trial courts to include in the record the reasons for their decisions so that appellate courts may review those decisions in a more directed and efficacious manner.").

¶10 Furthermore, although the court could have relied on Xochicale's priors as one aggravating factor, the State did not ask the court to impose aggravated sentences on counts 20 and 22. Indeed, in its sentencing memorandum, the State clearly asked the court to use "the priors for sentencing enhancement," and recommended it sentence Xochicale to the presumptive terms (ten years) on these counts. Similarly, the State only alleged Xochicale's probationary status for the purpose of sentencing enhancement, not aggravation.

¶11 Thus, on these counts, we are faced with a record that shows the State did not ask for aggravated sentences and the court did not specify any aggravators. It therefore appears the "aggravated" sentences imposed on these counts are illegal, and



we correct Xochicale's sentences on counts 20 and 22 to reflect the presumptive terms under A.R.S. § 13-703(J) -- ten years on each count.

¶12 We underscore to the superior court that specification of the applicable sentencing statutes and subsections and the identification of any aggravators and mitigators are necessary for effective and efficient appellate review. Further, such specificity will assist the superior court in properly applying the sentencing statutes.

¶13 The superior court also gave Xochicale credit for 392 days of presentence incarceration. The time between the day he was arrested (July 28, 2009) and the day the court imposed its sentences (August 25, 2010), however, is 393 days. Thus, we also correct his sentences to give him credit for 393 days of presentence incarceration towards his sentences for counts 1, 2, 4-7, 9, 11-14, 16-18, and 21.

### *III. Anders Review*

¶14 We have reviewed the entire record and find no other reversible error. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Xochicale received a fair trial.<sup>5</sup> He was represented by counsel

---

<sup>5</sup>We note that in response to a question asked to the jury pool during voir dire, the transcript quotes Juror 30, who was later selected, as saying "I don't think I would be [impartial]. We've had several home invasions around our neighborhood since that experience." Based on our review of the record, it is clear to us Juror 30 did not actually make this

at all stages of the proceedings and was present at all critical stages.

¶15 The evidence presented at trial was substantial and supports the verdicts. The jury was properly comprised of 12 members and the court properly instructed the jury on the elements of the charges, Xochicale'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, Xochicale was given an opportunity to speak at sentencing, and, with the exceptions above, see *supra* ¶¶ 7-12, his sentences were within the range of acceptable sentences for his offenses.

#### CONCLUSION

¶16 We decline to order briefing and affirm Xochicale's convictions and sentences as corrected.

¶17 After the filing of this decision, defense counsel's obligations pertaining to Xochicale's representation in this appeal have ended. Defense counsel need do no more than inform Xochicale 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.

---

remark. Another juror, who had already spoken, and was not selected, did.

*State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

¶18 Xochicale 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 Xochicale 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
MARGARET H. DOWNIE, Judge

\_\_\_\_\_/s/\_\_\_\_\_  
LAWRENCE F. WINTHOP, Judge