DIVISION ONE
FILED: 05/10/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0959
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
ROBERT JESSE JOHNSON,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-171141-001SE

The Honorable Carolyn K. Passamonte, Judge *Pro Tem*

AFFIRMED

Thomas C. Horne, 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 Terry J. Reid, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Chief Judge

¶1 Robert Jesse Johnson ("Appellant") appeals his convictions and sentences for two counts of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs ("DUI") and one count of unlawful

flight from a law enforcement vehicle. Appellant's counsel has filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *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 on appeal and found no arguable question of law that is not frivolous. Appellant's counsel therefore requests that we review the record for fundamental error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). Although this court granted Appellant the opportunity to file a supplemental brief *in propria persona*, he has not done so.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012),[1] 13-4031, and 13-4033(A). Finding no reversible error, we affirm.

I. FACTS AND PROCEDURAL HISTORY[2]

¶3 On February 18, 2010, a grand jury issued an indictment, charging Appellant with Counts I and III, aggravated

[1] We cite the current Westlaw version of the applicable statutes because no revisions material to this decision have since occurred.

[2] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

DUI, each a class four felony, in violation of A.R.S. §§ 28-1381(A)(1)-(2) and 28-1383(A)(1), and Count II, unlawful flight from a pursuing law enforcement vehicle, a class five felony, in violation of A.R.S. § 28-622.01. The State alleged in Count I that Appellant had driven while under the influence of intoxicating liquor and while his Arizona driver's license was suspended. The State alleged in Count III that Appellant had driven while he had an alcohol concentration of 0.08 or higher in his body within two hours of the time of driving and while his Arizona driver's license was suspended. The State later alleged that Appellant had four historical prior felony convictions and a pending misdemeanor charge for DUI.

¶4 At trial, the State presented the following evidence: At approximately 8:13 p.m. on November 9, 2009, Deputy Thompson of the Maricopa County Sheriff's Office ("MCSO") was driving in a fully marked patrol vehicle in Mesa when she observed a vehicle being driven with only one working headlight. The deputy conducted a traffic stop of the vehicle, which pulled into a gas station and parked. The deputy exited her patrol vehicle, approached the other vehicle, and asked the driver (Appellant) for his license, registration, and proof of insurance. Appellant provided his registration and proof of insurance, but he did not have his Arizona driver's license with him. In the meantime, MCSO Deputy Follett, who was also driving

a fully marked sheriff's vehicle, arrived at the gas station to act as backup.

¶5 While speaking with Appellant, Deputy Thompson detected the odor of alcohol and noticed that Appellant's eyes were bloodshot. Appellant admitted he had been drinking that night. Deputy Thompson also noticed that Appellant had a bottle between his legs, and after Appellant admitted it was a bottle of beer, she advised him that "it was illegal to have an open container of alcohol in the car with him." When Deputy Thompson returned to her vehicle to conduct a background check, Appellant started his vehicle and drove away, even though he had not been informed that he was free to leave.

¶6 Deputy Follett activated his vehicle's lights and siren and followed Appellant as he left the gas station. Deputy Thompson activated her vehicle's lights and siren and followed Deputy Follett. During the pursuit, Appellant's vehicle's speed reached approximately seventy miles per hour, which occurred in a residential twenty-five mile-per-hour speed zone. Deputy Thompson estimated that the pursuit lasted approximately three minutes and covered roughly one and one-half miles, and in her opinion, Appellant could have safely pulled his vehicle to the side of the road along the route. Instead, Appellant drove his vehicle through a cinder block wall.

¶7 After the deputies stopped their vehicles, Deputy Follett ran toward the driver's side of Appellant's vehicle, and Deputy Thompson approached the passenger's side. Appellant, who did not appear to be injured, had begun drinking a beer when the deputies arrived. The deputies arrested Appellant, handcuffed him, and put him in Deputy Thompson's patrol car. Deputy Thompson transported him to a nearby sheriff's substation. Appellant drank no alcohol after approximately 8:20 p.m.

¶8 At the substation, Deputy Thompson advised Appellant of his rights pursuant to *Miranda*,[3] and Appellant agreed to speak to her. After the deputy read the admin per se, however, Appellant refused to voluntarily submit to a blood test, stating "you and I both know I'm already drunk." Appellant further stated that he had not eaten for approximately three days and had begun drinking that day at approximately 6:00 a.m. He also admitted drinking two forty-ounce beers in the hour before the traffic stop and declared he had consumed "more [alcohol] than the law allows."

¶9 Deputy Thompson obtained a search warrant in order to have Appellant's blood drawn, and she was present when a trained phlebotomist from the Arizona Department of Public Safety ("DPS") drew Appellant's blood at 12:37 a.m. and sealed the

[3] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

vials. The vials were placed in sealed boxes, which were stored in a refrigerator in a locked evidence room.

¶10 Subsequent testing indicated that Appellant's blood alcohol content ("BAC") was approximately 0.211. A DPS criminalist testified that, based on a retrograde analysis, Appellant's BAC within two hours of the traffic stop would have been between 0.233 and 0.279.

¶11 A custodian of records for the Arizona Motor Vehicle Department ("MVD") testified that MVD's records showed that, at the time of the charged offenses, Appellant's Arizona driving privileges were suspended. Notice of the suspension had been mailed to Appellant's current address by first-class mail on November 4, 2008.

¶12 Appellant chose not to testify. The jury found Appellant guilty of all three counts as charged. After determining that the State had proven the existence of at least two historical prior felony convictions, the trial court sentenced Appellant to concurrent, partially mitigated (minimum) terms of eight years' imprisonment in the Arizona Department of Corrections for Count I, four years' imprisonment for Count II, and eight years' imprisonment for Count III. The court also credited Appellant for 311 days of presentence incarceration.

¶13 In a minute entry filed November 10, 2010, the trial court granted Appellant's petition for post-conviction relief

requesting that he be allowed to file a delayed notice of appeal, and Appellant filed a timely delayed notice of appeal on November 30, 2010. *See* Ariz. R. Crim. P. 31.3(b), 32.1(f).

II. ANALYSIS

¶14 At the beginning of trial (after the jury was selected but before presentation of the evidence), the court granted Appellant's oral motion to amend the reading of the indictment to eliminate the phrase "in violation of Arizona law" when reading the charges to the jury. When reading each of the charged counts to the jury, however, the clerk included the language that the court had agreed to eliminate. Appellant did not object, but he advises this court on appeal that the incident occurred.

¶15 We find no reversible error as a result of the reading of the indictment. As read, the indictment simply informed the jury of the allegations made by the State, and the jury was also instructed that it "must decide the facts only from the evidence presented in court," that the charges made in the indictment "are not evidence against the defendant," and that it "must not think the defendant is guilty just because of the charge." We presume the jury followed the court's instructions. *See State v. Prince*, 204 Ariz. 156, 158, ¶ 9, 61 P.3d 450, 452 (2003). Further, Appellant makes no argument that the incident prejudiced him. Although the clerk's reading of the indictment

did not conform to the reading agreed to by the court when it granted Appellant's motion, we find no error, much less fundamental, prejudicial error in the reading of the indictment.

¶16 Appellant also notes that, near the end of the second day of trial, juror number three informed the court that earlier that day, during the lunch break, he overheard two of the State's witnesses (Deputy Thompson and Deputy Follett) discussing the case.[4] When questioned by the court outside the presence of the other jurors and with both counsel present, the juror stated that he overheard Deputy Thompson "telling [Deputy Follett] before he came in about the questions that they were asking about, if he knew how much extensive training have you had for DUI's and things like that." The juror further stated that he had then walked in a different direction and heard no more of the conversation. Both defense counsel and the prosecutor declined the opportunity to further question the juror, and the court admonished the juror not to discuss the incident with any other jurors.

[4] Defense counsel had previously invoked the rule of exclusion of witnesses, and the prosecutor had designated Deputy Thompson as the State's case agent. *See* Ariz. R. Evid. 615 (stating that, if requested by a party, the court must order witnesses excluded so they cannot hear the testimony of other witnesses). Deputy Thompson was the State's first witness, and the lunch break occurred during the State's direct examination of her.

¶17 The court stated that it found the incident "very troubling"; however, defense counsel indicated that he wanted the trial to proceed. Counsel noted that although he had invoked the rule of exclusion, he would not take issue with the conversation due to the circumstances, and he explained as follows:

> Your Honor, Defense doesn't take issue to what has supposedly occurred. Defense is the one that invoked the rule. Defense does not have a problem with what took place, and the juror's explanation prior to the lunch break the State was still in there [sic] direct examination of the officer. I'm sure the State has talked to both officers about the questions that were going to be elicited and the answers that the officers would give.
>
> Defense has not yet begun cross-examination. I think this would be more egregious if the officers were talking about, well, here's what the Defense counsel asked. Here's how you should answer that. Or here's what to expect. We didn't get to that point yet, and if Defense doesn't have an objection to just proceeding with trial with that juror still on the panel, I don't see why the State would have an issue.

¶18 The prosecutor stated that, given the lack of a motion by defense counsel, he would decline to "take a position at this time," and the court proceeded with the trial. On the last day of trial, the court asked juror number three if anything he overheard would make it difficult for him to be fair and impartial, and he replied that it would not. Later that day, juror number three was picked by lot to be the alternate and did not take part in deliberations.

¶19 Appellant makes no argument that this incident prejudiced him in any way, and given the timing of the incident, we agree with the analysis provided by defense counsel. Although the court and both counsel should have taken a more active role to ensure that future discussions between witnesses did not take place, the record provides no indication that any such discussions occurred, and we find no error, much less fundamental, reversible error, in the court's handling of the issue.

¶20 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdicts, and the sentences were within the statutory limits. Appellant was represented by counsel at all stages of the proceedings and was given the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶21 After filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for

petition for review to the Arizona Supreme Court. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

III. CONCLUSION

¶22 Appellant's convictions and sentences are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
PATRICIA K. NORRIS, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge