DIVISION ONE
FILED: 06/07/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0098
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
DIEGO ARMANDO GUEVARA GARCIA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-163164-007DT

The Honorable Colleen L. French, Judge Pro Tempore

AFFIRMED

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

Law Offices of Richard D. Gierloff PC — Phoenix
By Richard D. Gierloff
Attorney for Appellant

S W A N N, Judge

¶1 Diego Armando Guevara Garcia ("Defendant") appeals his convictions and sentences for kidnapping, conspiracy to commit kidnapping, and theft by extortion. This case comes to us as an

appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Defendant's appellate counsel has searched the record on appeal and found no arguable question of law that is not frivolous, and asks us to review the record for fundamental error. *See Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Defendant was given the opportunity to file a supplemental brief *in propria persona*, but did not do so.

¶2 We have searched the record for fundamental error and find none. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3 In October 2009, Defendant was indicted for: (1) kidnapping, a class 2 felony pursuant to A.R.S. § 13-1304; (2) conspiracy to commit kidnapping, a class 2 felony pursuant to A.R.S. §§ 13-1003 and 13-1304; (3) theft by extortion, a class 2 felony pursuant to A.R.S. § 13-1804; (4) two counts of aggravated assault, one a class 3 felony and one a class 6 felony pursuant to A.R.S. §§ 13-1203 and 13-1204; and (5) misconduct involving weapons, a class 4 felony pursuant to A.R.S. §§ 13-3101 and 13-3102. The indictment specified that each of the offenses was a dangerous offense pursuant to A.R.S. §§ 13-105 and 13-704, and cited accomplice liability statutes A.R.S. §§ 13-301 to -303 for each count.

¶4 Defendant was arraigned and entered a not guilty plea, and the matter proceeded to a jury trial at which Defendant was tried with two co-defendants, Ramiro Ulises Soto-Valdez and Juan Dedios Mendivil-Corral.

¶5 At trial, the state presented evidence of the following facts. On September 28, 2009, the victim and his wife were getting into their car in the parking lot of a Phoenix business when a man brandishing a gun exited a nearby white truck and pushed the victim into the backseat of a green car. The three or four occupants of the green car placed the victim's head against the floorboard, put a gun to his head, and told him not to move. The abductors then drove both the green car and the white truck from the parking lot, stopping once to transfer the victim at gunpoint from the car to the truck. The victim obeyed orders not to look up during the transfer to the truck, and his head was again placed on the floorboard once he was in the truck. The abductors drove the victim to a house, covered his eyes with a shirt, and transferred him to a room inside the house. At that point, the victim had seen the face of only one of his abductors, the man who approached him in the parking lot.

¶6 Inside the house, the victim was bound and a bag was taped over his head. He was then beaten multiple times by three or four men who punched him, kicked him, hit him with guns, placed unloaded guns to his face and pulled the trigger, and put

a rope around his neck and pulled it tight. The men told the victim that his wife's friend had stolen drugs from them, and demanded that the victim tell them the friend's whereabouts and give them $40,000 and his truck or else be killed. They asked the victim to provide a phone number for someone who would pay his ransom, and told the victim that they had also kidnapped his wife, children, and nieces.

¶7 The victim gave his captors phone numbers for his father and sister in Mexico, and his brother-in-law in Phoenix. He heard them call his father, and was allowed to speak during that call to explain the situation. He did not hear them call his brother-in-law, but his brother-in-law testified that he received several calls from someone who told him that the victim had been kidnapped and the ransom was $40,000 plus the victim's truck. The caller told the victim's brother-in-law that the victim would be killed if the ransom was not paid.

¶8 The victim's brother-in-law worked with the police to arrange a ransom drop with the caller. By that point the police were already well involved in the case, having located the green car while en route to the scene of the abduction and arrested its occupants, including co-defendant Soto-Valdez. Soto-Valdez had told the police of the victim's transfer from the green car to the white truck, but stated that he did not know where the victim was taken.

¶9 Police accompanied the victim's brother-in-law to the ransom drop location with the victim's truck and arrested co-defendant Mendivil-Corral when Mendivil-Corral dropped another man off at the victim's truck. Mendivil-Corral told police that the person he worked for had told him to drop off the other man at the victim's truck to pick up the ransom money. Mendivil-Corral told police that he knew where the victim was being held, and showed them the house.

¶10 The police obtained a search warrant for the house. Shortly before the police entered the house, the victim was able to loosen his blindfold by rubbing his head against the wall. When the victim heard the police enter the house, he was able to move the blindfold up enough to see Defendant run into the room and hide in a closet. The police arrested Defendant and found ammunition in his pants pocket. A search of the house revealed zip ties, rope, a hood with duct tape on it, a loaded handgun and a variety of types of ammunition.

¶11 Defendant told police that he was not involved in the victim's abduction, was at the house because someone had dropped him off there, and did not leave the house because he was in the country illegally and did not know his way around Phoenix. Defendant also stated, however, that he knew the victim was bound and being held against his will for ransom money inside the house, and admitted that he guarded the victim in the house.

Defendant further stated that everyone at the house had touched the gun found there, and explained that ammunition was found in his pants pocket because he had changed pants at the house.

¶12 At the conclusion of the state's case in chief, the court granted the state's motion to dismiss the misconduct involving weapons count against Defendant. The court denied Defendant's motion for a judgment of acquittal on the remaining counts, and the defense rested. After hearing closing arguments and considering the evidence, the jury found Defendant guilty of kidnapping, conspiracy to commit kidnapping, and theft by extortion, and found that all of these offenses were dangerous offenses. The jury found Defendant not guilty on both counts of aggravated assault.

¶13 In the aggravation phase of the trial, the jury found that the following aggravating factors had been proven for each of the offenses for which Defendant was convicted: (1) the presence of an accomplice; (2) physical, emotional, or financial harm to the victim; (3) commission of the offense as consideration for the receipt or in the expectation of receipt of something of pecuniary value; and (4) Defendant's illegal presence in the country.

¶14 The court entered judgment on the jury's verdicts and imposed an aggravated sentence of 20 years of imprisonment for the kidnapping conviction, a presumptive sentence of 10.5 years

of imprisonment for the conspiracy to commit kidnapping conviction, and a presumptive sentence of 10.5 years of imprisonment for the theft by extortion conviction. The court ordered that all sentences would run concurrently, and credited Defendant with 478 days of presentence incarceration.

¶15 Defendant timely appeals his convictions and sentences. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

DISCUSSION

¶16 The record reveals no fundamental error. Defendant gave consent to have the trial judge preside over his settlement conference pursuant to Ariz. R. Crim. P. 17.4(a), and he was present and represented by counsel at all critical stages.

¶17 Defendant was also aided by a court-appointed interpreter at all stages, and the court did not err in overruling his objection to sharing the interpreter with his co-defendants at trial. The court was required to provide an interpreter to Defendant so that he could participate in his own defense, *State v. Natividad*, 111 Ariz. 191, 194, 526 P.2d 730, 733 (1974), but no Arizona law requires that each defendant in a multi-defendant trial be provided his own court-appointed interpreter. The court specifically stated that defense counsel could ask for breaks if attorney-client discussions were needed

during trial, and there is no evidence in the record that Defendant was ever precluded from speaking privately with his attorney through the interpreter.

¶18 The record of voir dire does not demonstrate the empanelment of any biased jurors, and the jury was properly comprised of twelve jurors and one alternate. *See* Ariz. R. Crim. P. 18.1(a); A.R.S. § 21-102(A).

¶19 There were two motions for mistrial related to the jury -- one made by Defendant in connection with a gun used as trial evidence that was in the jury's view during jury selection, and one made by Soto-Valdez and Mendivil-Corral in connection with an out-of-court altercation between the trial judge and her bailiff that some jurors witnessed during the trial. The court did not err in denying either motion. Mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (citation omitted). A mistrial would have been appropriate only if Defendant were actually prejudiced by jurors' observation of the gun or the altercation. *Cf. State v. Apelt*, 176 Ariz. 349, 361, 861 P.2d 634, 646 (1993) (brief inadvertent exposure of defendant's restraints to jurors outside of the courtroom does not entitle defendant to new trial absent showing of actual

prejudice). The record shows no evidence of prejudice. The court allowed defense counsel to question the potential jurors during voir dire about whether they had strong feelings about guns that would affect their ability to be fair and impartial, and none of the potential jurors stated any bias. And after the judge learned that some of the jurors had witnessed her altercation with the bailiff and written letters in support of the bailiff to the bailiff's supervisor, the judge allowed defense counsel to question the bailiff and she herself questioned each of the jurors individually. Each of the jurors stated that the altercation would have no effect on his or her ability to be fair and impartial and follow the judge's instructions.

¶20 The evidence that the state presented at trial was properly admissible and was sufficient to allow the jury to find Defendant guilty of the offenses for which he was convicted as a principal or accomplice. The jury was properly instructed regarding the offenses.

¶21 After the jury returned its verdict, the court received and considered a presentence report. At the sentencing hearing, Defendant was given the opportunity to speak and the court stated on the record the evidence and materials it considered and the factors it found in imposing sentence. The

court imposed legal sentences and correctly calculated Defendant's presentence incarceration credit.

CONCLUSION

¶22 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm Defendant's convictions and sentences.

¶23 Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Defendant of the status of this appeal and his future options. *Id.* Defendant has thirty days from the date of this decision to file a petition for review *in propria persona*. *See* Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has thirty days from the date of this decision in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:
/s/
_____
MICHAEL J. BROWN, Judge

/s/
_____
JON W. THOMPSON, Judge