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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/22/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0324
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MANUEL MENDOZA ELIAS,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-149297-004 DT

The Honorable Sherry K. Stephens, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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B R O W N, Judge

¶1 Manuel Mendoza Elias appeals his convictions and sentences for burglary, kidnapping, robbery, and unlawful flight from a law enforcement vehicle. Counsel for Elias filed a brief

in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising that after searching the record on appeal, he was unable to find any arguable grounds for reversal. Elias was granted the opportunity to file a supplemental brief *in propria persona*, but he has not done so.

¶12 Our obligation is to review the entire record for reversible error. *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We view the facts in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Elias. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). For the reasons that follow, we affirm as modified in part, reverse in part, and remand for further proceedings.

BACKGROUND

¶13 In September 2010, Elias was indicted on Count 1, burglary in the first degree, a class 2 dangerous felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1508 (2010);¹ Counts 2 and 3, kidnapping, class 2 dangerous felonies, in violation of A.R.S. § 13-1304 (2010); Counts 4 and 5, armed robbery, class 2 dangerous felonies, in violation of A.R.S. § 13-1904 (2010); Counts 6 and 7, aggravated assault, class 3

¹ Absent material revision after the date of the offense, we cite the statute's current version.

dangerous felonies, in violation of A.R.S. § 13-1204 (Supp. 2011); Count 8, misconduct involving weapons, a class 4 dangerous felony in violation of A.R.S. § 13-3102 (Supp. 2011); and Count 9, unlawful flight from a law enforcement vehicle, a class 5 felony, in violation of A.R.S. § 28-622.01 (2004). The following evidence was presented at trial.

¶14 In the early morning hours of September 12, 2010, three men kicked in the door of a home in the Ahwatukee Foothills area of Phoenix. They told the two victims to lie on the kitchen floor. The intruder used the butt of a shotgun or rifle to assault victim A.P.M. while he was bound. A guest, who was upstairs, heard the commotion downstairs and realized what was happening. He broke a bathroom window, and he and his girlfriend climbed out onto an overhang to call 9-1-1.

¶15 As police neared the house, they saw a vehicle matching the description given in the 9-1-1 call and followed it. The vehicle eventually stopped at an industrial business in Tempe, and the occupants fled on foot. All three men were quickly apprehended, but no weapons were found. Police found property belonging to the victims in the vehicle.

¶16 After being read his *Miranda*² rights, Elias confessed to his participation in the crimes, including driving the vehicle. At trial, Elias testified he met two men at a party

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

who wanted him to help a friend move that evening. He later realized that they were not really helping someone move, but were going to commit a burglary. He panicked when he discovered there were people inside the home, including an infant.

¶17 A jury found Elias guilty of kidnapping (Counts 2 and 3) and unlawful flight from a law enforcement vehicle (Count 9), as well as of the lesser-included offenses of burglary in the second degree (Count 2), misdemeanor assault (Counts 6 and 7), and robbery (Counts 4 and 5). The jury found Elias not guilty of misconduct involving weapons and determined that Counts 1 through 5 were non-dangerous.

¶18 At sentencing, Elias admitted that he had two prior felony convictions and that he was on probation at the time of the offense. The court determined that Elias had violated his probation and sentenced him to one year of imprisonment with 247 days of presentence incarceration credit. After weighing the aggravating and mitigating factors in the instant case, the court sentenced Elias to concurrent sentences totaling seventeen years, with 228 days of presentence incarceration credit. This timely appeal followed.

DISCUSSION

¶19 Our review of the record reveals the following sentencing errors. First, the conviction for assault on Count 7

was incorrectly designated as a class 1 misdemeanor. The assault statute provides in pertinent part:

- A. A person commits assault by:
 - 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
 - 2. Intentionally placing another person in reasonable apprehension of imminent physical injury.

A.R.S. § 13-1203(A). The statute further provides that assault committed under subsection (A)(1) is a class 1 misdemeanor, while assault committed under subsection (A)(2) is a class 2 misdemeanor. A.R.S. § 13-1203(B). Because the jury verdict forms did not distinguish between the two types of assault, the verdict form did not indicate whether the jury found Elias guilty pursuant to (A)(1) or (A)(2) as to L.R.P., the victim of Count 7. However, the State presented no evidence at trial that L.R.P. was physically injured. See A.R.S. § 13-1203(A)(1). The evidence was therefore legally insufficient to establish Elias' guilt under § 13-1203(A)(1). See *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005) ("We review the sufficiency of evidence presented at trial only to determine if substantial evidence exists to support the jury verdict.").

¶10 There is, however, substantial evidence to establish Elias' guilt under the lesser-included offense of § 13-1203(A)(2). Accordingly, we modify the judgment to reflect a

conviction for a class 2 misdemeanor on Count 7 and remand to the trial court for resentencing. See Ariz. R. Crim. P. 31.17(d); see also *State v. George*, 206 Ariz. 436, 442-43, ¶ 14, 79 P.3d 1050, 1056-57 (App. 2003) (“[B]ecause the evidence was more than adequate to support a conviction for the necessarily included offense . . . we modify the judgment to reflect [the defendant’s] conviction for the lesser offense and remand the case to the trial court to resentence [the defendant] accordingly.”).

¶11 Second, the trial court sentenced Elias to “time served,” which totaled 228 days, on Counts 6 and 7. The sentences exceed the statutory maximum range for class 1 and 2 misdemeanors. See A.R.S. § 13-707(A)(1), (2) (2010) (establishing maximum terms of imprisonment of six months and four months, respectively, for class 1 and class 2 misdemeanors). As noted above, Elias must be resentenced on Count 7. As to Count 6, because the sentence was not legally imposed, we remand for resentencing. See *State v. Thues*, 203 Ariz. 339, 340, ¶ 4, 54 P.3d 368, 369 (App. 2002) (“Imposition of an illegal sentence constitutes fundamental error.”).

¶12 Finally, although the trial court applied 228 days of presentence incarceration credit to the instant offenses and 247 days of credit to his probation violation, Elias should have been granted 247 days of presentence incarceration credit on all

counts, except Counts 6 and 7. See *State v. Brooks*, 191 Ariz. 155, 156-57, 953 P.2d 547, 548-49 (App. 1997) (noting that if the sentence imposed after probation revocation is concurrent with the sentence imposed on the new criminal charge, defendant is entitled to presentence incarceration credit on both sentences for all time spent in custody).

¶13 We have reviewed the entire record for reversible error and, with the exception of the sentencing errors we have identified, find none. All of the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Elias was present and represented by counsel at all pertinent stages of the proceedings and was afforded the opportunity to speak before sentencing.

CONCLUSION

¶14 Based on the foregoing, we affirm Elias' convictions and sentences on Counts 1, 2, 3, 4, 5, and 9. We modify his conviction on Count 7 to a class 2 misdemeanor. We vacate the sentences imposed on Counts 6 and 7 and remand for resentencing and modification of the presentence incarceration credit as to all counts.

¶15 Upon the filing of this decision, counsel shall inform Elias of the status of the appeal and his options. Defense counsel has no further obligations unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme

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

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

JON W. THOMPSON, Judge