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 11-0412
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ELIAS MICHAEL NICKOLAS HOLGUIN,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-149297-002DT

The Honorable Sherry K. Stephens, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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

Michael J. Dew — Phoenix
Attorney for Appellant

S W A N N, Judge

¶1 Elias Michael Nickolas Holguin ("Defendant") timely appeals from his convictions for burglary, kidnapping, and assault. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), defense

counsel advises us that a thorough search of the record has revealed no arguable question of law and requests that we review the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona* on or before January 17, 2012. He has not done so.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining Defendant's convictions. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶3 Around 1:00 a.m. on September 12, 2011, Defendant and two other intruders broke into a house. The intruders told the two people who were downstairs, L.P. and A.M., to lie down on the kitchen floor. The intruders wrapped A.M.'s hands in duct tape and beat his head. L.P. testified that the intruders were armed and that she was scared for her physical safety.

¶4 In a bedroom upstairs, L.P.'s brother and his girlfriend heard the commotion. When L.P.'s brother realized what was happening, he broke a window in the bathroom, and he and his girlfriend escaped onto a patio overhang. From there, L.P.'s brother could look into the bedroom and was able to observe two of the intruders ransacking it. He was also able to call 911 on his cell phone.

¶5 When the intruders saw the broken bathroom window, they knew that someone had gotten out of the house, and they decided to flee. The intruders threw several items into the back of a white pickup truck and drove away. The police, having been informed that a white truck was involved in the burglary, saw the intruders' truck driving away from the scene and pursued it.

¶6 The truck fled from police for seventeen miles. It eventually stopped in the parking structure of an industrial-business complex. Defendant and the other intruders ran from the truck and scattered; with the help of helicopters and a K-9 unit, the police caught them. Property stolen from the victims' house was found in the truck. Defendant and the other two men who fled from the truck were placed under arrest.

¶7 On September 20, 2010, a grand jury indicted Defendant on nine counts: one count of burglary in the first degree, a class 2 dangerous felony; two counts of kidnapping, a class 2 dangerous felony; two counts of armed robbery, a class 2 dangerous felony; two counts of aggravated assault, a class 3 dangerous felony; one count of misconduct involving weapons, a class 4 dangerous felony; and one count of unlawful flight from a law enforcement vehicle, a class 5 felony.[1] The state alleged

[1] At trial, the state did not seek a conviction on the unlawful flight charge against Defendant.

that the offenses had aggravating circumstances; that Defendant had historical prior convictions; and that Defendant had committed the offenses while under community supervision.

¶8 In March 2011, all three intruders were tried in a single jury trial. On March 22, the jury found Defendant not guilty on the charge of misconduct involving weapons. It also found him not guilty on the charges of aggravated assault, armed robbery, and first-degree burglary; it did find him guilty, however, of the lesser included offenses: assault, robbery, and second-degree burglary. On the two kidnapping charges, the jury found that Defendant was guilty, but that the offenses were non-dangerous. The jury found aggravating circumstances for the second-degree burglary count, the two counts of kidnapping, and the two robbery counts.

¶9 On June 3, 2011, the court held a sentencing hearing for Defendant. The court found that Defendant had a historical prior conviction for burglary and that he committed the charged offenses while on community supervision. For the burglary count (now classified as a class 3 felony) the court imposed an aggravated sentence of 13 years in prison; for the two counts of kidnapping (still class 2 felonies) aggravated sentences of 18.5 years; and for the two counts of robbery (now class 4 felonies) the court imposed aggravated sentences of 6 years. The court ordered all of those sentences to be served concurrently and

awarded Defendant 263 days of presentence incarceration credit. As to the assault charges, the court classified both as class 1 misdemeanors and, accordingly, sentenced Defendant to be incarcerated in the county jail for 263 days, with credit for 263 days already served.

DISCUSSION

¶10 We find two errors in regard to Defendant's sentences for misdemeanor assault. Errors at sentencing are reversible upon review. *See State v. Thues*, 203 Ariz. 339, 340, ¶ 4, 54 P.3d 368, 369 (App. 2002) ("Imposition of an illegal sentence constitutes fundamental error.").

I. DEFENDANT'S ASSAULT AGAINST VICTIM L.P. WAS IMPROPERLY CLASSIFIED AS A CLASS 1 MISDEMEANOR.

¶11 Defendant was sentenced for assault as a class 1 misdemeanor. Under A.R.S. § 13-1203(B), assault is a class 1 misdemeanor only when it is committed "intentionally or knowingly pursuant to subsection A, paragraph 1." Section 13-1203(A)(1) states that a person commits assault by "[i]ntentionally, knowingly or recklessly causing any physical injury to another person."

¶12 Here, Defendant's two assault convictions were divided by victim -- L.P. and A.M. -- and the indictment specified that the assault with respect to A.M. "caused a physical injury" but the assault with respect to L.P. merely "placed [her] in

reasonable apprehension of imminent physical injury." Testimony and evidence established that A.M. was beaten (photos taken after the break-in showed A.M.'s head bloodied and bandaged). But the state presented no evidence that L.P. received "any physical injury." In respect to the charge referencing L.P., we find no evidence to support Defendant's guilt under A.R.S. § 13-1203(A)(1). *State v. Stroud*, 209 Ariz. 410, 411, 103 P.3d 912, 913 (2005) (the appellate court reviews evidence "to determine if substantial evidence exists to support the jury verdict").

¶13 There is substantial evidence, however, to support Defendant's guilt under § 13-1203(A)(2) as charged in the indictment and explained by the jury instructions. Under A.R.S. § 13-1203(A)(2), the state can prove assault by showing that a defendant "intentionally plac[ed] another person in reasonable apprehension of imminent physical injury." At trial, L.P. testified that during the break-in she was "scared" for her own safety. The jury's assault verdict rested on substantial evidence, but the verdict form did not allow the jurors to distinguish between the "physical injury" assault in § 13-1203(A)(1) and the "reasonable apprehension" assault in § 13-1203(A)(2). That distinction matters, because assault under § 13-1203(A)(2) is a class 2 -- not a class 1 -- misdemeanor. A.R.S. § 13-1203(B).

¶14 The jury properly convicted Defendant for "reasonable apprehension" assault against L.P., but in entering the judgment and imposing sentence the court mistakenly identified the offense as a class 1 misdemeanor instead of a class 2 misdemeanor. We therefore modify the judgment on Defendant's conviction for assault against L.P. to reflect that it comes under § 13-1203(A)(2) as a class 2 misdemeanor, and vacate the sentence imposed for that conviction and remand the case to the trial court for resentencing. *Cf.* Ariz. R. Crim. P. 31.17(d). The resentencing on the misdemeanor conviction must remain within the maximum limitations allowed under § 13-707, discussed in the next section.

II. DEFENDANT'S SENTENCE FOR THE ASSAULT AGAINST VICTIM A.M. EXCEEDED THE STATUTORY LIMIT OF SIX MONTHS.

¶15 Under A.R.S. § 13-707, the trial court must impose a sentence of imprisonment for a misdemeanor within certain "maximum limitations." For a class 1 misdemeanor, that maximum limitation is six months; for a class 2 misdemeanor, it is four months. A.R.S. § 13-707(1), (2). In this case, Defendant received a sentence of 263 days on his assault conviction against A.M., which was a class 1 misdemeanor. Defendant's 263 day sentence exceeds the maximum limitation of six months. We therefore vacate the sentence and remand the case to the trial

court for resentencing on that assault count. *See Thues*, 203 Ariz. at 340, ¶ 4, 54 P.3d at 369.

CONCLUSION

¶16 We have reviewed the entire record for fundamental error; we find none besides the sentencing errors identified above. For the foregoing reasons, we affirm Defendant's convictions and sentences and remand for resentencing as set forth above.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Judge

/s/
_____
JON W. THOMPSON, Judge