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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ANTONIO C. OCHOA, Appellant.	)	2 CA-CR 2011-0128 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200900793

Honorable Craig A. Raymond, Judge Pro Tempore

AFFIRMED

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B R A M M E R, Judge.

¶1 Antonio C. Ochoa appeals from his conviction and sentence for aggravated assault with a deadly weapon or dangerous instrument.[1] Ochoa contends the trial court erred by proceeding to trial after he had entered into a plea agreement. He also argues the court erred by allowing a juror question to be posed to a witness and there was insufficient evidence to support the conviction. Finally, he contends the court erred by failing to consider mitigating evidence of his mental illness at sentencing. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Ochoa's conviction and sentence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On November 15, 2008, Ochoa and the victim, R., argued at a barbecue hosted by A. Ochoa pulled a knife out of his pocket and cut R. behind the ear. R., A., and R.'s daughter, M., went to the hospital where R. received stitches for the cut. Casa Grande police officer Eric O'Dell was dispatched to the hospital where he took statements from R., A., and M.

¶3 Ochoa was charged with aggravated assault. He entered into a plea agreement, from which he later withdrew. Following a two-day jury trial, Ochoa was

[1]We note Ochoa's notice of appeal identifies the trial court's April 1, 2011 order. Although that is not the correct date of the final judgment of conviction, the notice of appeal also states Ochoa "inten[ds] to appeal the Trial Court's Judgment" and thus we will construe it as sufficient. *See* Ariz. R. Crim. P. 31.2(d) (notice of appeal must identify "the order, judgment and sentence appealed from"); *see also State v. Rasch*, 188 Ariz. 309, 311, 935 P.2d 887, 889 (App. 1996) (mere technical error does not render notice ineffective absent showing of prejudice).

convicted of aggravated assault, a class three dangerous felony, and sentenced to an aggravated term of thirteen years' imprisonment. This appeal followed.

Discussion

Plea Agreement

¶4 Ochoa argues the trial court "improperly proceeded to trial" after he and the state had entered into a plea agreement. He bases this assertion on "the record [being] devoid of any indication that, after pleading guilty in March, 2010, [he] wished to withdraw from his plea agreement." However, at the hearing set for acceptance of his guilty plea and entry of judgment, Ochoa asked to withdraw from the plea agreement. After the court questioned Ochoa, it allowed him to withdraw from the plea agreement and the case was set for trial. At a subsequent hearing resetting his trial date, Ochoa again advised the court that he "d[id] not want to go through with the plea agreement." Therefore, the record completely contradicts the basis for Ochoa's argument and we will not address it further.

Sufficiency of the Evidence

¶5 Ochoa argues the state did not present sufficient evidence to support his conviction. "We will not reverse a jury's verdict if it is supported by substantial evidence—evidence capable of convincing unprejudiced persons of the truth of a fact at issue." *State v. Garfield*, 208 Ariz. 275, ¶ 6, 92 P.3d 905, 907 (App. 2004). We will reverse a conviction for insufficient evidence "'only where there is a complete absence of probative facts to support the conviction.'" *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996), *quoting State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-

19 (1976). And, evidence is sufficient to sustain a conviction even "if reasonable minds can differ on inferences to be drawn therefrom." *Garfield*, 208 Ariz. 275, ¶ 6, 92 P.3d at 907. Therefore, we review the record to determine whether a rational jury could have found the elements of aggravated assault with a deadly weapon or dangerous instrument. *Id.*

¶6 "A person commits assault by . . . [i]ntentionally, knowingly or recklessly causing any physical injury to another person; or . . . [i]ntentionally placing another person in reasonable apprehension of imminent physical injury; or . . . [k]nowingly touching another person with the intent to injure, insult or provoke such person." A.R.S. § 13-1203(A). "A person commits aggravated assault if the person commits assault . . . [and] the person uses a deadly weapon or dangerous instrument." A.R.S. § 13-1204(A)(2).

¶7 The state presented sufficient evidence to support the jury's guilty verdict on the aggravated assault charge. A. testified that she had hosted a barbecue on November 15, 2008, which R., M., and Ochoa had attended. R. identified photographs of himself in which his injury is obvious and testified that he recalled waking up the day after the barbecue with the injury and stitches. O'Dell testified that on November 15, 2008, he had responded to a call about the incident and had gone to the hospital where he met R., who had come in with an injury, accompanied by A. and M. O'Dell stated that R. was reluctant to tell him what had happened but that A. encouraged R. to do so. R. and A. told O'Dell they were having a barbecue at A.'s house before coming to the hospital.

At the barbecue, R. and Ochoa had argued and Ochoa had pulled a knife out of his pocket and cut R. behind the ear.

¶8 O'Dell also testified that M. had told him she was inside the house during the barbecue, looked out the window, and saw Ochoa pull a knife out of his pocket and cut R. behind the ear. That evidence was corroborated by photographs taken at the hospital showing the laceration behind R.'s ear. And although A., R., and M. denied any memory of having spoken with O'Dell, and denied remembering the incident, it was for the jury to evaluate their credibility and weigh the evidence before it. *See Garfield*, 208 Ariz. 275, ¶ 8, 92 P.3d at 907. Therefore, viewed in the light most favorable to sustaining Ochoa's conviction, we conclude there was sufficient evidence to support the jury's verdict. *See Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d at 34.

Jury Question

¶9 Ochoa contends the trial court erred by asking O'Dell, at the request of the jury, whether R. had "want[ed] to press charges" against Ochoa. We will not disturb a court's decision whether to admit evidence absent an abuse of discretion, *State v. Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d 456, 473 (2004), and we will uphold the court's ruling if correct for any reason, *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984). Ochoa argues that a victim's desire to prosecute a defendant is not relevant to whether the defendant committed the crime. Relevant evidence is that which tends to make a fact that is of consequence to the determination of the action "more or less probable than it would be without the evidence." Ariz. R. Evid. 401. Irrelevant evidence is not admissible. Ariz. R. Evid. 402.

¶10 O'Dell testified that R. had stated at the hospital that Ochoa "pulled a knife out of his pocket and cut [R.] by the ear" during an argument and then fled. When testifying at trial, however, R. repeatedly stated he did not remember going to the hospital or speaking with O'Dell. Under these circumstances, R.'s credibility became an issue at trial, and the trial court could have determined the challenged question was relevant to the jury's determination of R.'s credibility. *See State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983) ("Evidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible."). Even if the question raised an irrelevant issue incidentally, the court did not err in determining it was admissible nonetheless for a proper purpose. *See State v. Mosley*, 119 Ariz. 393, 401, 581 P.2d 238, 246 (1978) (not error to admit evidence that raises irrelevant issue if evidence admissible for any reason).

¶11 Ochoa also argues the question elicited hearsay testimony that violated his constitutional confrontation right. *See Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). Because Ochoa failed to object on this basis below, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). And, because Ochoa does not argue the alleged error was fundamental, his argument therefore is waived.[2] *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

[2]Additionally, R. testified at trial. When a witness testifies at trial and is subject to cross-examination, "'the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.'" *State v. Real*, 214 Ariz. 232, ¶ 5, 150 P.3d 805, 807 (App. 2007), *quoting Crawford*, 541 U.S. at 59 n.9.

Mitigating Evidence

¶12 Ochoa also challenges his sentence, arguing the trial court erred by failing to consider mitigating evidence of mental illness and sentencing him to an aggravated term. Ochoa notes the court granted his motion for an evaluation pursuant to Rule 11, Ariz. R. Crim. P. That evaluation indicated he suffers from alcohol dependence and has a history of "impulsive aggression." The court also granted Ochoa's request for an evaluation pursuant to Rule 26.5, Ariz. R. Crim. P., which resulted in an indication he may have "some mild neuropsychological dysfunction," is immature, and suffers from a personality disorder "with antisocial and schizoid features."

¶13 We will not disturb a sentence within the statutory range absent a clear abuse of discretion. *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). The trial court is required to consider certain mitigating factors, including whether the defendant's capacity was significantly impaired. A.R.S. § 13-701(E). Although the court is required to consider all relevant evidence before it, including mitigating evidence, it is for the court to decide, in the exercise of its discretion, the weight to be given any mitigating factor. *State v. Vermuele*, 226 Ariz. 399, ¶ 15, 249 P.3d 1099, 1103 (App. 2011). The court is only obligated to consider such evidence; it is not required to find that it constitutes a mitigating circumstance. *State v. Long*, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004).

¶14 Without further explanation, Ochoa simply argues "[t]he court clearly did not take [his] mental illness into consideration." At the sentencing hearing, however, the trial court noted it had reviewed the mental health reports prepared pursuant to Rule 26.5

and Rule 11, which "detail[ed] Mr. Ochoa's history, as well as his current mental health diagnosis." The court referred to details of the reports and Ochoa's diagnoses of an antisocial personality with schizoid features and alcohol dependence. Additionally, Ochoa's court-appointed guardian ad litem testified in detail about the reports and antipsychotic medication that had been prescribed Ochoa after the trial and the effect of the medication on him. The record belies Ochoa's assertion and shows, instead, that the court fully considered evidence of mental illness. Therefore, we find no abuse of discretion. *See Vermuele*, 226 Ariz. 399, ¶ 15, 249 P.3d at 1103.

Disposition

¶15 For the foregoing reasons, we affirm Ochoa's conviction and the sentence imposed.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge