FILED BY CLERK
SEP 30 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JORGE JESUS CORTEZ, Appellant.	)	2 CA-CR 2009-0318 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20084834

Honorable Terry L. Chandler, Judge

AFFIRMED

Harriette P. Levitt — Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Jorge Jesus Cortez was convicted of aggravated assault with a deadly weapon, a class three felony, and drive by shooting, a class two felony. The trial court sentenced him to concurrent, mitigated prison terms, the longer of which is seven years. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and *State v.*

Clark, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting she has reviewed the record thoroughly but found no arguable issue for appeal. She asks this court to search the record for error. Cortez has filed a supplemental brief, challenging the trial court's denial of his motion for a new trial. For the reasons set forth below, we affirm.

¶2 The convictions arose from an incident that took place in December 2008, when Eddie, the former brother-in-law of the victim, P., repeatedly drove by the home of P.'s mother, where P. had gathered with various family members and P.'s girlfriend. P. went outside to investigate the sound of a gunshot and found Eddie and Cortez in Eddie's truck. When P. confronted them, Cortez, seated in the passenger's seat, pulled out a gun and pointed it in P.'s face, telling P. he was going to shoot him. As Eddie drove away, Cortez again told P. he was going to shoot him; P. then heard a gunshot and discovered he had been shot in the arm. P.'s mother, girlfriend, and another family member were outside at the time of the shooting. The mother and girlfriend later identified Cortez as the shooter, and the mother so testified at trial.

¶3 Following the trial, Cortez filed a motion for a new trial pursuant to Rule 24.1(c)(5), Ariz. R. Crim. P., asserting, inter alia, that he did not receive a fair and impartial trial because Detective Brian Moore had testified falsely that P.'s cousins had seen Cortez with Eddie at a convenience store just before the shooting. Cortez contends the trial court committed fundamental error by failing to instruct the jury to disregard Moore's misstatement, which Moore himself corrected at trial. "Whether to grant or deny a new trial is, however, within the sound discretion of the trial court and will not be

disturbed on appeal absent an abuse of that discretion." *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). Additionally, because Cortez did not request that the jury be instructed to disregard Moore's misstatement at trial and because he raises this issue for the first time on appeal, we review this issue for fundamental error only. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 81, 25 P.3d 717, 741 (2001). It is fundamental error for the trial court to fail to instruct on vital matters "'even if not requested by the defense.'" *State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App. 2003), *quoting State v. Avila*, 147 Ariz. 330, 337, 710 P.2d 440, 447 (1985). But, "[i]t is a rare case where the omission of an instruction without objection constitutes fundamental error." *State v. Marchesano*, 162 Ariz. 308, 316, 783 P.2d 247, 255 (App. 1989) (lack of sua sponte instruction on duress not fundamental error), *overruled on other grounds by State v. Phillips*, 202 Ariz. 427, n.4, 46 P.3d 1048, 1058 n.4 (2002).

¶4 Here, after defense counsel objected to Moore's testimony that a witness had seen Eddie and Cortez at the "Circle K" shortly before the shooting, the court asked the parties to review the transcripts from the investigation to avoid leaving the jury "with a misrepresentation." The parties did so, and upon redirect examination by the state, Moore clarified that the witness had stated he had seen only Eddie at the convenience store. One of the jurors then asked: "Could you clarify, did any person you interviewed mention that Jorge Cortez was at the Circle K?" Moore responded, "Oh, I'm sorry. It was Eddie, no." Defense counsel then asked Moore the following question on further examination: "And the information that you just testified about was that Eddie Lopez

was at the Circle K?" Moore responded, "Correct." In closing argument, the state revisited this issue:

> [Defense counsel] pointed out that Detective Moore did make a misstatement on the stand and [Moore] told us that he hadn't really reviewed all the transcripts in the case. He was brought in basically for the limited purpose of explaining what was done with the shell casing and why. Then when he was asked about his interview with [P.], he did make a misstatement about somebody having seen Jorge and Eddie at the Circle K. That was not true . . . .

¶5 Not only did Moore correct his own error, but he was subject to cross-examination by defense counsel. In addition, the prosecutor referred to and clarified the error in closing argument. At sentencing, the parties addressed the motion for new trial, and the court concluded as follows:

> Well, if we were uncorrected, I think that we would have a real problem, but [Moore's misstatement] was corrected. [Defense counsel] did an effective job of cross-examining Detective Moore, and [the prosecutor] brought it up as well. So it was corrected. I don't like the jury to hear misleading or incorrect information, particularly on such a significant point, because the whole issue was who was with Eddie Lopez and took a shot at [P.].

¶6 The trial court then correctly concluded that the jury had assessed the witnesses' credibility, particularly P.'s testimony that Cortez had shot him, before rendering its verdicts. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995) (fact-finder weighs evidence and determines credibility of witnesses). Cortez nonetheless argues the jury either did not believe Moore's correction to his misstatement or the jury instructions, as given, did not permit it to ignore the misstatement. The record

simply does not support a finding that the court erred by denying the motion for a new trial, or that the court's failure sua sponte to instruct the jury to disregard Moore's testimony constituted fundamental error. Moreover, there was sufficient evidence to support the convictions.

¶7 We have reviewed the entire record and have searched it for error pursuant to our obligation under *Anders*. Having found none, we affirm Cortez's convictions and sentences.

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

CONCURRING:

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

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge