IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 09/18/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0881
	)	DEPARTMENT S
v.	)	**MEMORANDUM DECISION**
JORGE MIRANDA AVILA, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-158269-001 SE

The Honorable Michael D. Jones, Judge

AFFIRMED AS MODIFIED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Chief Judge

¶1 Jorge Miranda Avila ("Appellant") appeals his convictions and sentences for attempted second degree murder and burglary in the first degree. Appellant's counsel has filed a

brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that she has searched the record on appeal and found no arguable question of law that is not frivolous. Appellant's counsel therefore requests that we review the record for fundamental error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). Although this court granted Appellant the opportunity to file a supplemental brief *in propria persona*, he has not done so. He has, however, raised four issues through counsel that we address.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012),[1] 13-4031, and 13-4033(A). Finding no reversible error, we affirm as modified.

I. FACTS AND PROCEDURAL HISTORY[2]

¶3 On September 14, 2009, a grand jury issued an indictment, charging Appellant with Count I, attempted second

[1] We cite the current Westlaw version of the applicable statutes because no revisions material to this decision have since occurred.

[2] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

degree murder, a class two dangerous felony, in violation of A.R.S. §§ 13-1001 and 13-1104; and Count II, burglary in the first degree, a class three dangerous felony, in violation of A.R.S. § 13-1508. In pertinent part, the indictment alleged that Appellant had entered or remained unlawfully in or on a non-residential structure and attempted to cause the death of the victim using a knife. On both counts, the State alleged the conduct was dangerous because the offense involved the use or threatening exhibition of a knife, a deadly weapon or dangerous instrument, and/or the intentional or knowing infliction of serious physical injury upon the victim. The State later alleged the presence of several aggravating factors, including the infliction of serious physical injury and lying in wait.

¶4 At trial, the State presented the following evidence: At approximately 9:00 a.m. on August 31, 2010, the victim opened the money transfer store where she was employed, when she was attacked and stabbed several times by a man. The man started to stab the victim as she entered an area for employees only, and he continued the attack after pushing the victim fully into the employee area. The attack resulted in the victim sustaining thirty-seven stab wounds on her face, neck, abdomen, and chest. Due to the extent of her injuries, the victim could not immediately provide the police with a description of her

attacker; however, she did nod affirmatively to detectives that she knew who attacked her.

¶5 At the scene of the crime, police collected a red hat. The State later presented expert testimony at trial that Appellant's DNA matched the DNA on the hat.

¶6 A store supervisor provided police access to the surveillance video room. On the day of the incident, however, the system had failed to record. The supervisor also gave police a file of a customer who had bothered the victim in the past. That customer was not Appellant.

¶7 By the next day, the victim had recovered enough to talk to police, and she identified Appellant as her attacker. The victim later acknowledged that she had previously been in a relationship with Appellant, which ended in a terminated pregnancy. The victim and Appellant had eventually ended their relationship, and Appellant had previously stated that if the victim, "wasn't going to date him, [she] couldn't date anybody else either."

¶8 Appellant's first trial ended in a mistrial due to a hung jury. In the second trial, the jury found Appellant guilty as charged. The jury also found each offense to be dangerous and found two aggravating factors proven beyond a reasonable doubt – that the victim had suffered physical, emotional, or

financial harm, and that Appellant had been lying in wait or ambushed the victim.

¶9 The trial court sentenced Appellant to concurrent maximum terms of twenty-one years' imprisonment for Count I and fifteen years' imprisonment for Count II. The court also credited Appellant for 409 days of pre-sentence incarceration.[3] Appellant filed a timely notice of appeal.

II. ANALYSIS

A. The Victim's Lack of Credibility

¶10 Appellant argues that the victim lacked credibility due to numerous inconsistencies in her statements to detectives including, "her admitted lies, failure to identify Appellant by name or as ex-boyfriend in the 911 call, and other discrepancies in the accounts of the offense."

¶11 "It is a basic maxim that judges determine admissibility of evidence and juries decide what weight to give it." *State v. Lehr*, 201 Ariz. 509, 517, ¶ 24, 38 P.3d 1172, 1180 (2002). The jury, as finders of fact, weighs the evidence and determines the credibility of witnesses. *State v. Fimbres*,

[3] We note that the trial court's October 18, 2010 sentencing minute entry states that Appellant received presentence incarceration credit of 409 years for Count II. The record reflects, however, that the correct amount of pre-sentence incarceration credit is 409 days. Pursuant to A.R.S. § 13-4036, we modify the trial court's October 18, 2010 minute entry to reflect that Appellant received credit for 409 days of presentence incarceration for Count II. *See State v. Ochoa*, 189 Ariz. 454, 462, 943 P.2d 814, 822 (App. 1997).

222 Ariz. 293, 297, ¶ 4, 213 P.3d 1020, 1024 (App. 2009). In general, we defer to the jury's assessment of a witness's credibility and the weight to be given evidence. *See id*. at 300, ¶ 21, 213 P.3d at 1027.

¶12 We have reviewed the entire record and find no error, much less fundamental error, in the jury's likely reliance on the witness's testimony. Appellant clearly identified the discrepancies in the victim's accounts to the police, and it was within the jury's province to determine her credibility and the weight to be given her testimony.

B. A Detective's Statement that the Victim was Truthful

¶13 Appellant also argues that a detective told jurors the victim was truthful. Appellant does not identify where in the record he believes this occurred, and after reviewing the record, we find nothing improper, much less rising to the level of fundamental error, about any statements by the detectives who testified.

C. The State's Failure to Obtain the Video

¶14 Appellant next contends that the State failed to produce video evidence from the store. If the State has lost, destroyed or failed to preserve evidence important to a case, the trial court may instruct the jury that it may infer the evidence would have supported the defendant. *See State v. Willits*, 96 Ariz. 184, 187, 191, 393 P.2d 274, 276, 279 (1964).

¶15 In this case, however, the omission of the video evidence was not due to any error or misconduct by the State but to a faulty recording system. Thus, the trial court did not err in not providing a *Willits* instruction. Further, nothing prevented Appellant from arguing the negative inference, and even without the evidence, the State met its evidentiary burden.

D. Failure to Investigate Other Suspects

¶16 Appellant's last contention is that the police failed to fully investigate the customer who had previously harassed the victim. "Where there is evidence of third-party culpability that raises a reasonable doubt as to a defendant's guilt, it should be admitted." *State v. Oliver*, 169 Ariz. 589, 590, 821 P.2d 250, 251 (App. 1991) (citation omitted). In this case, nothing prevented Appellant from attempting to show that some other person committed the crime. *See id.* In fact, evidence of the third party was admitted into trial, and the jury weighed that evidence against all of the other evidence. Thus, Appellant was not denied the opportunity to offer potentially exculpatory evidence.

¶17 Furthermore, the police have limited resources and cannot follow every potential lead in an investigation. "Whether the [police] enforcement decision is based on lack of resources, making other tasks higher priorities, or concerns about the legality or wisdom of enforcing the [law], the [police

have] the discretion to make that decision." *Sensing v. Harris*, 217 Ariz. 261, 265, ¶ 12, 172 P.3d 856, 860 (App. 2007). The reason for declining to further investigate the lead provided by the store supervisor was not an issue for the jury. *See Oliver*, 169 Ariz. at 590, 821 P.2d at 251. We find no error, much less fundamental error, in the alleged failure of the police to further investigate other subjects.

E. Other Issues

¶18 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdicts, and the sentences were within the statutory limits. Appellant was represented by counsel at all stages of the proceedings and was given the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶19 After filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. *See State v.*

Shattuck, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

III. CONCLUSION

¶20 Appellant's convictions and sentences are affirmed. The trial court's October 18, 2010 sentencing minute entry is modified to reflect that Appellant received presentence incarceration credit of 409 days for Count II.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
ANDREW W. GOULD, Judge

_____/S/_____
PHILIP HALL, Judge