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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 10/23/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,) 1 CA-CR 11-0416
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
CHRISTOPHER ANGEL BENITEZ,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-006838-001 DT

The Honorable Glenn M. Davis, Judge

AFFIRMED

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

Maricopa County Public Defender Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

H O W E, Judge

¶1 This appeal is filed in accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Benitez asks this Court

to search the record for fundamental error. Benitez was given an opportunity to file a supplemental brief in propria persona, but has not done so. After reviewing the record, we affirm Benitez's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the trial court's judgment and resolve all reasonable inferences against Benitez. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998). The State charged Benitez with first degree murder, or in the alternative, second degree murder, as well as arson of an occupied structure and arson of a structure of property. At the close of the evidence, the trial court properly instructed the jury on the elements of the offense.

¶3 At trial, the following facts were presented:¹ On March 14, 2001, Phoenix Firefighter Cyrus J. and the victim, another firefighter, responded to a call at Southwest Supermarket. When Cyrus J. arrived at the scene, he described the fire as a "working fire." Cyrus J. and six other firefighters, including the victim, entered the supermarket with a hose line to fight the fire.

¹ The first trial resulted in a mistrial when, after five days of deliberation, the jury returned a hung verdict.

¶4 When Cyrus J. entered the supermarket he observed smoke near the ceiling, but maintained visibility at eye level. The team proceeded to the rear of the store, located the fire, and began "water operations." The firefighters were equipped with breathable air, stored in tanks called SCBA's, or self-contained breathing apparatus. Approximately twenty-five minutes later, Cyrus J.'s captain informed the team that their air supply was low, and that it was time to exit the building. At the time the captain made the call, the smoke from the fire had decreased visibility. Cyrus J. could view the person in front of him, but nothing past that point.

¶5 As he turned to exit, Cyrus J. tripped. He and the victim were together, but neither knew where the hose line or others firefighters were located. Firefighters use the hose line to find the way out of a building when they are disoriented or have low visibility.

¶6 Cyrus J. and the victim found their way to the main floor of the grocery store. Both men's SCBA alarms had sounded, signifying no remaining air in their tanks. The victim sounded a mayday call over the communication system. After he made the call, Cyrus J. lost the victim and did not see him again. Cyrus J. walked toward the store's entrance and exited the building.

¶7 Firefighter John T. was on the same crew as Cyrus J. and the victim and entered the supermarket with them. As he and

the team fought the fire, the smoke level increased. When John T. became low on air, he began leaving the store to refill his air supply. As he was leaving, he heard the victim make the mayday call, and believed he was in close proximity to him. He found the victim and they began crawling out of the store, with the victim holding on to John T.'s pant leg to maintain contact. At some point, the victim stopped following John T., and John T. continued on in search of help. When a crew found John T., he directed the crew to the victim before losing consciousness. A rescue crew eventually found the victim unconscious, and took him out of the building. The victim was taken to a nearby hospital and pronounced dead. An autopsy revealed that he died from thermal burns and smoke inhalation.

¶8 Paul H. was assigned to the Southwest Supermarket fire as fire investigator. He determined that the fire started in a trash pile at the back of the Southwest Supermarket. He eliminated all potential accidental causes and believed that the fire was intentionally started by a person applying a handheld open flame device to the trash.

¶9 On March 22, 2001, Scott G., Division Chief of the Fire Prevention Bureau, received two different tips implicating individuals who may have started the fire. After speaking with the individuals implicated in the tip, Chief Scott G. determined

that the tips were not valid due to a lack of motive, opportunity, or admission.

¶10 Witnesses heard Ceferino Z. in the Southwest Supermarket parking lot after the fire was discovered, making statements that he started the fire. Chief Scott G. testified that sometimes individuals claim responsibility for a fire that they did not commit. When this occurs, investigators follow up with physical evidence and witness statements to verify their truth.

¶11 Chief Scott G. interviewed Ceferino Z. and his girlfriend. Ceferino Z. admitted to boasting about starting the fire, but stated that he had been joking, and provided Chief Scott G. with an alibi that placed him away from the fire. Chief Scott G. also interviewed Southwest Supermarket employees, but did not receive any information that led to further investigation. In 2001 the investigation went "cold," meaning investigators had pursued all leads and did not have any viable suspects.

¶12 The Southwest Supermarket fire case went from cold to active six years later on August 6, 2007, when Jack B., Director of Investigations for the Phoenix Fire Department, received a silent witness tip. The tip stated that Benitez started the fire because he was caught shoplifting from the store. Phoenix

Fire Department Captain N. verified by checking police records that Benitez was arrested for shoplifting from the supermarket.

¶13 The prior store manager of Southwest Supermarket testified that he caught a juvenile in March 2001 attempting to steal beer from the store. Officer S. responded and determined that the juvenile had committed a crime and arrested him. The juvenile was later identified as Benitez.

¶14 Captain N. then posted flyers in Benitez's neighborhood, asking for information regarding the fire. A second tip stated that a cousin of Gabriel O. started the fire. Captain N. interviewed Gabriel O., Benitez's cousin. Gabriel O. stated that Benitez called him on the day of the fire and admitted that he had started the fire. Gabriel O. stated that he believed Michael T. was with Benitez at the time the fire was started.

¶15 Gabriel O.'s interview led Captain N. to another cousin of Benitez, Michael T. Michael T.'s interview was inconsistent. Michel T. was not forthcoming, and the information he provided to Captain N. did not corroborate with other evidence.

¶16 Benitez's friend Jill B., testified that Benitez told her a few days after the fire that he had started the fire in the back of the building near the garbage can. Benitez's cousin Angel B., also told Jill B. that Benitez had started the fire.

She admitted that she called the silent witness program to report Benitez.

¶17 At the close of the evidence and after instruction, the jury began deliberation. Three days later, the jury informed the court that it was unable to unanimously decide on a verdict. The court read an impasse instruction to the jury, informing it that the court was not attempting to force a verdict and offering suggestions to aid in deliberation. The jury continued its deliberation, and four days later, the jury found Benitez guilty of the following: count 2, negligent homicide, a class 4 felony; count 3, arson of an occupied structure, a class 2 felony; and count 4, arson of a structure of property, a class 4 felony.

¶18 Defense counsel moved for a new trial, arguing that instructing the jury on the lesser included offense of negligent homicide prejudiced Benitez. Defense counsel argued that because arson requires the mens rea of "knowingly," the jury could not have found Benitez guilty of negligent homicide, which merely requires criminal negligence. After oral argument, the court ruled denying the motion for new trial.

¶19 The court found that sufficient evidence could have supported the conviction on negligent homicide and arson. The court stated that based on the evidence, the jury could have concluded that Benitez knowingly started the fire but failed to

recognize the risk of causing death to another in doing so. Further, the court found that the jury may have been lenient, and inconsistent verdicts based on leniency do not require reversal of a guilty verdict, citing *State v. Zakhar*, 105 Ariz. 31, 459 P.2d 83 (App. 1969).

¶20 The trial court conducted the sentencing hearing in compliance with Benitez's constitutional rights and Rule 26 of the Arizona Rules of Criminal Procedure. The trial court sentenced Benitez to four years' imprisonment on counts 2 and 4, and seven years' imprisonment on count 3, ordering all counts to be served concurrently with credit for 699 days presentence incarceration.

DISCUSSION

¶21 We review Benitez's convictions and sentences for fundamental error. See *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991).

¶22 Counsel for Benitez has advised this Court that after a diligent search of the entire record, he has found no arguable question of law. We have read and considered counsel's brief and fully reviewed the record for reversible error. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, counsel represented Benitez at all stages of the proceedings and the

sentence imposed was within the statutory limits. We decline to order briefing and we affirm Benitez's convictions and sentences.

¶23 Upon the filing of this decision, defense counsel shall inform Benitez of the status of his appeal and of his future 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). Benitez shall have thirty days from the date of this decision to proceed, if he desires, with a pro per motion for reconsideration or petition for review. On the Court's own motion, we extend the time for Benitez to file a pro per motion for reconsideration to thirty days from the date of this decision.

CONCLUSION

¶24 We affirm.

/s/

RANDALL M. HOWE, Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Presiding Judge

/s/

MARGARET H. DOWNIE, Judge