

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 08/28/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
) No. 1 CA-CR 11-0445
)
 Appellee,) DEPARTMENT E
)
 v.) MEMORANDUM DECISION
)
 DESMON FARRINGTON,) (Not for Publication -
) Rule 111, Rules of the
 Appellant.) Arizona Supreme Court)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-005426-015

The Honorable Robert L. Gottsfield, Judge

AFFIRMED

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

Tyrone Mitchell Phoenix
Attorney for Appellant

H A L L, Judge

¶1 Desmon Farrington (defendant) appeals from his convictions and the sentences imposed. For the reasons set forth below, we affirm.

¶2 Defendant's appellate counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising that, after a diligent search of the record, he was unable to find any arguable grounds for reversal. This court granted defendant an opportunity to file a supplemental brief, which he has done, raising one issue. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

¶3 We review for fundamental error, error that goes to the foundation of a case or takes from the defendant a right essential to his defense. See *State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988). We view the evidence presented at trial in a light most favorable to sustaining the verdict. *State v. Cropper*, 205 Ariz. 181, 182, ¶ 2, 68 P.3d 407, 408 (2003).

¶4 On January 25, 2010, defendant was charged by indictment with one count conspiracy (to commit 14 separate felony offenses) (Count 1), a class two felony; one count assisting in a criminal street gang (Count 2), a class three felony; one count money laundering (Count 3), a class three felony; and one count possession of dangerous drugs for sale

(Count 58), a class two felony.¹ On the first day of trial, the trial court granted the State's motion to dismiss Counts 1 (conspiracy) and 3 (money laundering). The court then renumbered the counts as follows: Count One - assisting a criminal street gang and Count 2 - possession of dangerous drugs for sale.

¶15 The following evidence was presented at trial. During the early afternoon of September 28, 2009, while conducting routine patrol, Officers Francisco Banuelos and Timothy Thiebaut of the Phoenix Police Department observed three individuals walking near the middle of the street. The individuals failed to move out of the street to allow the marked police unit to pass. The officers then attempted to make contact with the individuals. One of the individuals, who subsequently was identified as defendant, began to run. Officer Banuelos testified that he observed defendant "extend his right arm, and it appeared that he was throwing something." The officers placed defendant under arrest and, while searching his person incident to the arrest, the officers found \$510 and a pack of cigarettes.

¶16 Officers Banuelos and Thiebaut also directed other officers who had arrived at the scene to search the area that

¹ The indictment contained numerous other counts against other individuals that are not relevant to the issues on appeal.

defendant was observed "throwing" something. The officers searching the area found three glass vials, with two of those vials containing a "brown or yellowish transparent fluid." The officers also seized a glass pipe that was located in the same area.

¶7 At trial, a forensic scientist for the City of Phoenix Police Department testified that he tested the substance contained in the vials and determined that it was Phencyclidine (PCP). He also testified that it was a usable amount. Officer Thiebaut explained that PCP is typically smoked using "long brown cigarettes" like those found on defendant's person. Finally, the State presented evidence through the testimony of eight police officers that defendant has repeatedly been identified by the police as a gang member through several of the statutory criteria, including gang-related clothing, a tattoo identifying his gang allegiance ("WSC" - signifying West Side Crips), and a self-identified gang name (Dogman 1).

¶8 After a six-day trial, the jury found defendant guilty as charged. The jury further found two aggravating factors: defendant is a gang member and the offenses were committed with the intent to promote, further or assist criminal conduct by a street gang. At sentencing, defendant admitted that he had four prior felony convictions. The trial court sentenced defendant

to a term of 12.5 years imprisonment on Count 1 and a term of 15.5 years imprisonment on Count 2, to be served concurrently.

¶19 On appeal, defendant argues there was insufficient evidence to prove that he was assisting a criminal street gang. He likewise contends there was insufficient evidence to prove he possessed the PCP for sale, rather than personal use.

¶10 We review the sufficiency of the evidence by determining whether substantial evidence supports the jury's finding and we view the facts in the light most favorable to upholding the verdicts. *State v. Kuhs*, 223 Ariz. 376, 382, ¶ 24, 224 P.3d 192, 198 (2010). Substantial evidence is adequate proof that defendant was guilty beyond a reasonable doubt. *Id.* We will set aside a jury verdict for insufficiency of the evidence only when it is clear "that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶11 Defendant was convicted of assisting in a criminal street gang. A person commits the offense of assisting a criminal street gang by committing any offense "at the direction of or in association with any criminal street gang." Ariz. Rev. Stat. § 13-2321(A)(1) (2010). "Use of a common name or common identifying sign or symbol" is admissible to prove "membership in a criminal street gang." A.R.S. § 13-2321(E). Here, the

State presented evidence from which the jury could reasonably have concluded that defendant was a gang member and was assisting in a criminal street gang. First, several officers testified that defendant had repeatedly been identified during previous encounters with the police as a gang member through his gang-related clothing, tattoo, and self-identified gang name. Second, at the time of his arrest, defendant was in the company of two other gang members and was in possession of drugs.

¶12 Defendant was also convicted of possession of dangerous drugs for sale. To prove this charge, the State was required to show that defendant possessed a narcotic drug for sale. A.R.S. § 13-3408(A)(2) (2010). There was sufficient evidence presented at trial to support the jury's conviction: (1) officers testified that they observed defendant "throwing" objects; (2) the subsequently retrieved objects were vials of PCP; (3) officers testified that the PCP, in combination with the \$510 and the cigarettes, demonstrated that defendant possessed the drug for sale. We therefore conclude there was sufficient evidence to convict defendant of both counts.

¶13 We have read and considered counsel's brief and have searched the entire 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. Defendant was given an opportunity to

speak before sentencing, and the sentences imposed were within statutory limits. Furthermore, based on our review of the record, there was sufficient evidence for the jury to find that defendant committed the offenses for which he was convicted.

¶14 After the filing of this decision, counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do no more than inform defendant of the status of the appeal and his future options, unless counsel's review reveals 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). Defendant 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. Accordingly, defendant's convictions and sentences are affirmed.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
MAURICE PORTLEY, Presiding Judge

_/s/_____
DIANE M. JOHNSEN, Judge