DIVISION ONE
FILED: 07/03/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0770
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
LAVELL ABDOL LOCKETT,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Coconino County

Cause No. S0300CR2010000963

The Honorable Mark R. Moran, Judge

AFFIRMED AS AMENDED

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

Wendy F. White — Flagstaff
Attorney for Appellant

O R O Z C O, Judge

¶1 Lavell Abdol Lockett (Defendant) appeals his conviction for one count of possession of drug paraphernalia, a class 6 felony.

¶2 In accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), Defendant's counsel filed a brief advising this court that after a search of the entire record on appeal, she found no arguable ground for reversal or question of law that was not frivolous. Counsel identified two issues, however, that she asks us to review for fundamental error. This court granted Defendant an opportunity to file a supplemental brief in propria persona, but he did not do so.

¶3 Pursuant to *Anders* and *Leon*, our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). After reviewing the entire record, we find no meritorious grounds for reversal and therefore affirm Defendant's conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶4 Defendant was in Page, Arizona when he was contacted by Page Police Officer Clark while Officer Clark was

[1] On appeal, we view the facts in a light most favorable to sustaining the verdicts. *State v. Rutledge*, 205 Ariz. 7, 9 n.1, ¶ 2, 66 P.3d 50, 52 n.1 (2003).

investigating a separate crime. Officer Clark noticed that Defendant appeared nervous and asked Defendant if he would consent to a search of his person for weapons. When Defendant "began backing up" and "putting his hands in his pockets," Officer Clark began to "fear for [his] safety" and conducted a *Terry*[2] search of Defendant. During the search, Officer Clark "identified what [he] knew from [his] training and experience to be a meth pipe." The pipe was seized, placed in evidence and tested positive for methamphetamine residue.

¶5 Defendant was indicted on one count of possession of drug paraphernalia, in violation of Arizona Revised Statutes (A.R.S.) section 13-3415.A (2010). The State alleged three previous felony convictions of a non-dangerous nature, one of which was an allegeable historical prior pursuant to A.R.S. § 13-105.22(d) (Supp. 2011).[3] The State gave notice of its intent to seek an enhanced sentence based on Defendant's historical prior and to impeach his testimony based on all previous convictions.

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[2] *See Terry v. Ohio*, 392 U.S. 1, 30 (1968) (If an officer reasonably concludes a suspect is armed or a threat to officer safety, the officer may "conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.").

[3] Absent material revision after the date of an alleged offense, we cite a statute's current version.

¶6 Defendant entered a plea of not guilty and was tried before a jury. At trial, Officer Clark identified Defendant and testified about the search and his discovery of the methamphetamine pipe. Following the close of the State's case-in-chief, Defendant motioned for judgment of acquittal pursuant to Rule 20 of the Arizona Rules of Criminal Procedure. The trial court denied Defendant's motion, and thereafter, Defendant testified.

¶7 The jury unanimously returned a verdict of guilty. Following an evidentiary hearing on Defendant's prior felony convictions, the trial court found the State proved beyond a reasonable doubt that Defendant had three prior convictions for purposes of sentencing enhancement and Defendant's third prior conviction therefore constituted a historical prior pursuant to A.R.S. § 13-105.22(d). The court made no findings as to mitigating or aggravating circumstances and sentenced Defendant as a category two repetitive offender to the presumptive term of 1.75 years. The court awarded Defendant sixty-seven days of presentence incarceration credit.

¶8 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21.A.1 (2003), 13-4031 (2010) and 13-4033.A.1 (2010).

DISCUSSION

¶9 We have read counsel's brief and carefully reviewed and considered the entire record. We find no reversible error.

Rulings on the Admissibility of Evidence

¶10 Defense counsel raises two issues that she submits might constitute error: (1) whether the trial court erred by denying Defendant's motion to admit self-serving statements he allegedly made to police prior to his arrest; and (2) whether the court erred by admitting a certified copy of Defendant's Arizona Department of Corrections (ADOC) "pen pack" over his objection. Upon review, we find no err.

¶11 We review the trial court's rulings on the admissibility of evidence for an abuse of discretion. *State v. King*, 213 Ariz. 632, 635, ¶ 7, 146 P.3d 1274, 1277 (App. 2006); *see also State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990) ("The trial court has considerable discretion in determining the relevance and admissibility of evidence, and we will not disturb its ruling absent a clear abuse of that discretion.").

Self-Serving Statements

¶12 Before trial, Defendant motioned in limine to admit statements he purportedly made to police two weeks prior to his arrest in which he claimed unknown individuals were leaving drug

paraphernalia at his residence. Defendant asserted these statements supported his claim that the methamphetamine pipe was in his possession when he was arrested because he was in the process of turning it over to police.

¶13 Defendant argued the statements either were not hearsay or fell within several exceptions to the rule against hearsay.[4] Specifically, he claimed the statements: (1) "establish[ed] his then-existing state of mind prior to the time of the alleged offense," pursuant to Rule 803(3) of the Arizona Rules of Evidence; (2) were made "under circumstances that provide guarantees of trustworthiness," pursuant to Rule 807; (3) established his state of mind and were therefore not "hearsay" as defined in Rule 801(c) because they were not offered to prove the truth of the matter asserted; and (4) the probative value of the statements was not substantially outweighed by their potential for prejudice and should be admitted under Rule 403.

¶14 A defendant's out-of-court denial is self-serving hearsay and not admissible if introduced by the defendant. *State v. Wooten*, 193 Ariz. 357, 366, ¶ 47, 972 P.2d 993, 1002 (App. 1998). Here, Defendant's statements were the equivalent of self-serving out-of-court denials. Moreover, Defendant

[4] Ariz. R. Evid. 802.

offered the statements to prove the truth of the matter asserted therein and the statements thus fall within the definition of hearsay pursuant to Rule 801(c). The trial court therefore did not abuse its discretion by finding Defendant's purported statements to be self-serving and inadmissible hearsay. *See id*; Ariz. R. Evid. 802. Because the court properly excluded the statements based on the rule against hearsay, we do not address Defendant's argument regarding whether the court could have also excluded the statement pursuant to Rule 403.

¶15 We further find the statements do not fall within any exception to the hearsay rule. Contrary to Defendant's assertion, the statements are not evidence of his then-existing state of mind and are also not indicative of any future motive, intent or plan. *See* Ariz. R. Evid. 803(3); *State v. Lehman*, 126 Ariz. 388, 390, 616 P.2d 63, 65 (App. 1980). In addition, a defendant's self-serving statement generally lacks the guarantees of trustworthiness to be admissible under Rule 807. *See State v. Smith*, 138 Ariz. 79, 84, 673 P.2d 17, 22 (1983); *State v. Duffy*, 124 Ariz. 267, 275, 603 P.2d 538, 546 (App. 1979).

¶16 Therefore, the court did not abuse its discretion in denying Defendant's motion or otherwise err by excluding his statements.

Evidence of Defendant's Prior Felony Convictions

¶17 Defendant claimed the admission of the ADOC "pen pack" violated his right to confront witnesses against him pursuant to the Confrontation Clause of the Sixth Amendment to the United States Constitution and *Crawford v. Washington*, 541 U.S. 36 (2004). Defendant also claimed the "pen pack" was inadmissible hearsay and did not fall within the public records exception to the rule against hearsay because records of matters observed by law enforcement personnel are not admissible pursuant to Rule 803(8).

¶18 In *Crawford*, the Supreme Court held that the Confrontation Clause prohibits a testimonial out-of-court statement from being admitted against a defendant unless the defendant has had the opportunity to cross-examine the declarant. 541 U.S. at 59. However, the Confrontation Clause applies only to statements that are "testimonial" in nature, meaning declarations or affirmations made for the purpose of establishing or proving some fact at trial. *State v. Damper*, 223 Ariz. 572, 575, ¶ 10, 225 P.3d 1148, 1151 (App. 2010). Here, the ADOC "pen pack" was not created to establish or prove facts for a trial or court proceeding, and thus, no Sixth Amendment consideration was implicated by its admission into evidence. *See State v. Bennett*, 216 Ariz. 15, 17-18, ¶ 7, 162

P.3d 654, 656-57 (App. 2007) *(*finding certified ADOC documents were non-testimonial for purposes of the Confrontation Clause because they were "signed and completed in the ordinary course of business"); *State v. King*, 213 Ariz. 632, 638, ¶ 24, 146 P.3d 1274, 1280 (App. 2006) (records of prior convictions are non-testimonial because they are "created and maintained regardless of possible future criminal activity by the defendants" and are "not recorded exclusively in anticipation of future litigation for the purpose of establishing facts").

¶19 Furthermore, ADOC prison records are statutorily required to be maintained and do not document "a matter observed by law-enforcement personnel." *See* A.R.S. § 31-221 (2002) (ADOC "shall maintain a master record file on each person who is committed to the department"); Ariz. R. Evid. 803(8)(A)(ii). The records therefore come within the public records exception to the rule against hearsay. *See* Ariz. R. Evid. 803(8)(A)(ii) (records of a public office that are required by law to be maintained are public records and are admissible as exceptions to the hearsay rule); *State v. Dixon*, 127 Ariz. 554, 558, 622 P.2d 501, 506 (App. 1980) (holding that an ADOC "pen pack" was properly admitted as a public record pursuant to Rule 803(8)); *see also State v. Gillies,* 142 Ariz. 564, 572, 691 P.2d 655, 663 (1984) (prison documents are public records for admissibility

purposes); *King*, 213 Ariz. at 638, ¶ 24, 146 P.3d at 1280 (records of prior convictions are public records).

¶20 We find the trial court properly admitted Defendant's "pen pack" because the record was non-testimonial in nature and fell within the public records exception to the rule against hearsay.

Defendant's Trial and Conviction

¶21 Defendant was represented by counsel and present at all critical stages of the proceedings. The jury instructions were a proper interpretation and explanation of Arizona law, and Defendant did not object to the instructions. Defendant was present during the trial, testified on his own behalf and cross-examined the State's witnesses. All proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure and substantial evidence supported the jury's finding of guilt. Accordingly, we affirm Defendant's conviction.

Defendant's Sentence

¶22 At sentencing, Defendant and his counsel were given an opportunity to speak and present witnesses. Defendant was given the opportunity to present arguments in support of mitigating circumstances. The trial court imposed a legal enhanced sentence based on its finding that Defendant had one allegeable historical prior, subjecting him to sentencing as a category two

repetitive offender pursuant to A.R.S. § 13-703.B.2 and 13-703.I (Supp. 2011). The court also properly awarded Defendant sixty-seven days of presentence incarceration credit.

CONCLUSION

¶23 For the foregoing reasons, Defendant's conviction and sentence are affirmed. 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 Defendant's 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 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.

/S/
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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
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PHILIP HALL, Judge

/S/
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JOHN C. GEMMILL, Judge