

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0777
)
Appellee,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
SHELBY JARON HILL,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-106595-001

The Honorable Lisa Ann Vandenberg, Judge *Pro Tempore*

AFFIRMED; PRESENTENCE INCARCERATION CREDIT MODIFIED

Thomas C. Horne, 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 Jeffrey L. Force, Deputy Public Defender
Attorney for Appellant

Shelby Jaron Hill Phoenix
Appellant

J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following Shelby Jaron Hill's conviction of two counts of aggravated driving while under the influence with a suspended license, both Class 4 felonies. Hill's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel now asks this court to search the record for fundamental error. Hill filed a supplemental brief raising six issues, which we address below. After reviewing the entire record, we affirm Hill's convictions, but modify his sentence to correct his presentence incarceration credit.

FACTS AND PROCEDURAL HISTORY

¶2 A police officer stopped Hill in traffic one night because she suspected him of speeding.¹ Another officer approached the car and saw a bottle of champagne about one-third full and a silver flask on the passenger seat. This officer also observed in Hill all six cues of the Horizontal Gaze Nystagmus test, and he had bloodshot, watery eyes and smelled of

¹ Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Hill. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

alcohol. A blood test conducted two hours and 14 minutes after the stop revealed a 0.198 blood alcohol content concentration ("BAC").

¶3 Hill was charged with two counts of aggravated driving while under the influence with a suspended license, Class 4 felonies, and one count of possession of marijuana, a Class 6 felony. The State alleged Hill had one historical prior felony conviction for aggravated driving while under the influence, for which he was on probation at the time of the instant offenses.

¶4 At the close of the State's case-in-chief, the court granted a motion to dismiss the marijuana offense. Hill then testified and admitted he was intoxicated that night and that his license was suspended. Hill said, however, that he was only a passenger in the vehicle and repeatedly told officers at the scene that he had not been driving.

¶5 The jury found Hill guilty of both remaining charges. The court found one historical prior felony conviction and sentenced Hill to two concurrent presumptive terms of four and a half years, with 226 days' presentence incarceration credit.

¶6 Hill timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and

Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033 (West 2012).²

DISCUSSION

A. Issues Identified in the Supplemental Brief.

1. Standard of review.

¶7 Because Hill did not raise these issues at trial, we review them for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is error that "goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* at 568, ¶ 24, 115 P.3d at 608. To succeed on appeal, Hill must show both that fundamental error occurred and that such error prejudiced him. *Id.* at 567, ¶ 20, 115 P.3d at 607.

2. Sentencing.

¶8 Hill argues he should have been given "a lesser sentence" because the plea offer he rejected was for fewer years and included a conviction on the marijuana charge, which was dismissed at trial.

¶9 Our review of the record, however, shows that Hill's sentences were within the permissible range. The court found Hill had one historical prior felony conviction, and because he

² Absent material revisions after the date of an alleged offense, we cite a statute's current version.

was on probation for that prior felony, the minimum legal sentence was the presumptive term. See A.R.S. § 13-708(C) (West 2012). With one historical prior felony conviction, the presumptive term for each of the Class 4 felonies of which Hill was convicted was four and a half years. A.R.S. § 13-703(I) (West 2012). The court sentenced Hill to four and a half years on each count, to run concurrently. Thus, Hill's sentences were within the legal range.

3. The jury.

¶10 Hill also argues the jury was not "paying close attention," "had a guilty verdict for [him] from the start," and was not made up of his peers. There is no evidence in the record that the jury was so inattentive that he was denied his right to a fair trial. The court properly instructed the jury on the presumption of innocence, and the record of voir dire does not demonstrate the empanelment of any biased jurors or that Hill otherwise was denied his right to a jury.

4. Minimization of evidence favorable to Hill's case.

¶11 Hill argues the prosecutor "downplay[ed]" evidence favorable to his defense, specifically a forensic scientist's testimony describing erratic driving patterns expected from a person with a 0.198 BAC that did not correspond to the manner in which the car was being driven on the night in question.

¶12 A claim of prosecutorial misconduct warrants reversal only if "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Moody*, 208 Ariz. 424, 459, ¶ 145, 94 P.3d 1119, 1154 (2004).

¶13 A prosecutor does not act improperly by rephrasing questions or minimizing parts of a witness's testimony that are unfavorable to the State's position. Hill's attorney cross-examined the officer to emphasize the discrepancy between the usual effects of a 0.198 BAC and the manner in which the car was being driven on the night in question. The weight of the evidence and credibility of witnesses are to be evaluated by the jury. *State v. Williams*, 209 Ariz. 228, 231, ¶ 6, 99 P.3d 43, 46 (App. 2004).

5. Credibility of witnesses.

¶14 Next, Hill argues the police officers who testified at trial were not credible, "their memory was selective," and they "lied to the court." Evaluations of credibility are a matter for the jury, and here, the jury apparently believed the officers' testimony. See *State v. Hall*, 204 Ariz. 442, 455, ¶ 55, 65 P.3d 90, 103 (2003). The jury also was instructed properly regarding credibility of witnesses and that testimony of a law enforcement officer is not entitled to greater weight.

6. Sufficiency of the evidence.

¶15 Hill argues that he “continually denied driving,” the State “stretched the facts in the case to . . . convict [him] of something [he] never did,” and the jury should have known “that the case was a sham.” This court does not re-weigh the evidence, but rather resolves all conflicts in favor of sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). As recounted above, there was sufficient evidence from which the jurors reasonably could find that Hill was the driver of the car, was under the influence and had a suspended license. It was for the jury to weigh the evidence. See *Williams*, 209 Ariz. at 231, ¶ 6, 99 P.3d at 46.

7. Alleged ineffective assistance of counsel.

¶16 Lastly, Hill argues his attorney should have spoken to the prosecutor “about a deal that didn’t involve drugs” and contends he received “inadequate representation” throughout the process.

¶17 A claim of ineffective assistance of counsel, however, may not be reviewed on direct appeal. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007); *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (claim of ineffective assistance of counsel must be raised under Arizona Rule of Criminal Procedure 32). We therefore do not address Hill’s argument that his attorneys were ineffective.

B. Fundamental Error Review.

¶18 The record reflects Hill received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court held appropriate pretrial hearings. Pursuant to Arizona Rule of Evidence 609, the court held a hearing on Hill's prior conviction and ruled that he could be impeached with the fact of the conviction. The court did not conduct a voluntariness hearing; however, the record did not suggest a question about the voluntariness of Hill's statements to police. See *State v. Smith*, 114 Ariz. 415, 419, 561 P.2d 739, 743 (1977); *State v. Finn*, 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974).

¶19 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of eight members with two alternates. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned unanimous verdicts, which were confirmed by juror polling. The court received and considered a presentence report, addressed its contents during the sentencing hearing and imposed legal sentences for the crimes of which Hill was convicted. A.R.S. § 13-703(I).

C. Presentence Incarceration Credit.

¶20 Hill's first day in custody was February 6, 2011. His sentencing originally was set for September 19, 2011, but was continued to October 11, 2011. The court awarded Hill 226 days of presentence incarceration credit, as advised by the presentence report, which anticipated sentencing on September 19. Not including the day of sentencing, there were 247 days between February 6 and October 11, the day Hill was actually sentenced. Hill therefore should have been credited with 247 days of presentence incarceration.

CONCLUSION

¶21 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We modify the judgment to reflect that Hill is to be credited with 247 days of presentence incarceration.

¶22 After the filing of this decision, defense counsel's obligations pertaining to Hill's representation in this appeal have ended. Defense counsel need do no more than inform Hill of the outcome of this appeal and his future options, 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). On the court's own motion, Hill has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion

for reconsideration. Hill has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
PHILIP HALL, Judge