DIVISION ONE
FILED: 03/05/2013
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0178
	)	
Appellee,	)	DEPARTMENT S
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
DAVID ESTRADA MUNOZ,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-161387-001

The Honorable Robert E. Miles, 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 Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

David Estrada Munoz — Buckeye
Appellant

W I N T H R O P, Chief Judge

¶1 David Estrada Munoz ("Appellant") appeals his conviction and sentence for aggravated assault. 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 he 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). This court granted Appellant the opportunity to file a supplemental brief *in propria persona*, and on February 5, 2013, he filed a document entitled "Petition for Review," which we construe as his supplemental brief.

¶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 herein.

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

I. FACTS AND PROCEDURAL HISTORY[2]

¶3 On November 29, 2010, a grand jury issued an indictment, charging Appellant with one count of aggravated assault, a class three dangerous felony, in violation of A.R.S. §§ 13-1203 and 13-1204. Before trial, the State alleged Appellant had six historical prior felony convictions and other aggravating circumstances that could increase his potential sentence.

¶4 At trial, the State presented the following evidence: Officers from the Mesa Police Department testified that on November 11, 2010, they responded to an emergency call about someone being struck with what appeared to be a baseball bat at a public park in Mesa, Arizona. The officers found the victim and the victim's girlfriend sitting near a park bench. The victim appeared dazed and confused. After noticing blood on the back of the victim's head, an officer called an ambulance for the victim. The victim's girlfriend told the officers about the incident, and other witnesses stated the attacker had fled on foot into the nearby neighborhood. Officers conducted a search of the area but did not find the suspect. Later, officers located and arrested Appellant in connection with the incident.

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[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).

¶5 The victim testified at trial that Appellant and Appellant's girlfriend had lived with him at his residence for a few weeks before the attack. On the day of the incident, the victim drove his truck to the park with his girlfriend and Appellant's girlfriend in order to help Appellant's girlfriend retrieve her dog from Appellant. Appellant had made threatening statements to his girlfriend, and the victim and his girlfriend accompanied her to the park out of concern for her well-being.

¶6 After the trio arrived at the park, Appellant ran toward the victim and began hitting him with a metal object that looked like a "stick." After striking the victim several times on the arms and head, Appellant stopped hitting the victim and moved toward his girlfriend and the victim's girlfriend. Before Appellant reached the two women, however, the victim restrained Appellant in a "chokehold" and pried the weapon from Appellant's hands. The victim's girlfriend retrieved the weapon and threw it into the bed of the victim's truck. The victim released the chokehold, and Appellant grabbed his girlfriend and the dog and fled the scene.

¶7 When the police arrived, officers retrieved the weapon from the truck and determined it was a metal pipe. Police conducted a search of the surrounding area; however, Appellant had fled the scene and hid in the backyard of a home until nightfall. At the hospital, the victim and his girlfriend

separately identified Appellant out of a photo line-up as the person who had hit the victim with the pipe. Police eventually located Appellant and placed him under arrest.

¶8 Appellant testified at trial he acted in self defense and that the victim threatened him verbally and had made physical gestures indicating the victim wanted to fight him. Appellant further testified he only picked up the metal pipe because he feared the victim, and he hit the victim in order to stop the victim from advancing toward him. Furthermore, Appellant testified he struck the victim on the head because he believed the victim would retrieve a gun from the truck. Appellant also admitted having at least three prior felony convictions. Appellant's girlfriend testified she believed Appellant acted in self defense.

¶9 The jury found Appellant guilty as charged, including finding that the offense was a dangerous offense. Before sentencing, Appellant admitted five historical prior felony convictions for sentence enhancement purposes.[3] The court

[3] Before trial, the State alleged that Appellant had six historical prior felony convictions. After trial, at a presentence hearing held on October 3, 2011, Appellant admitted five of the alleged historical prior felony convictions, and the trial court found the existence of all five prior convictions admitted by Appellant. During the sentencing hearing on March 2, 2012, however, the prosecutor mistakenly indicated that the State had proved all six alleged historical prior felony convictions, Appellant did not object, and the trial court accepted the prosecutor's representation and found all six

sentenced Appellant to a maximum sentence of twenty years' imprisonment in the Arizona Department of Corrections, with credit for 468 days of presentence incarceration.[4] Appellant filed a timely notice of appeal.

II. ANALYSIS

¶10 In his supplemental brief, Appellant raises several issues with regard to his trial counsel, including that he "was never told of any plea offer by [his] attorney," his "lawyer came to see [him] only twice during [his] whole time in jail," he "tried to fire [his] lawyer but [the lawyer] said that

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priors proven. However, nothing in the record reflects that the oldest alleged prior offense was admitted by Appellant or proven up by the State. Accordingly, the court should not have found this offense proven in the sentencing minute entry. We therefore amend the court's March 2, 2012 sentencing minute entry by deleting the court's finding that Appellant has been convicted of the following prior felony offense: "DUI, a class 5 felony committed on 9/21/1991 and convicted on 3/23/1992 in Pinal County Superior Court CR 16879." The sentencing minute entry should reflect that the court found five prior felony offenses. We do not need to remand for further proceedings, however, because Appellant has not alleged, and the record does not indicate, any prejudice caused by this error. *See State v. Henderson*, 210 Ariz. 561, 568, ¶¶ 21-26, 115 P.3d 601, 608 (2005).

[4] The record reflects that Appellant was arrested and taken into custody on November 19, 2010. He remained in custody until he was sentenced on March 2, 2012. He was thus incarcerated for a total of 469 days before sentencing and should be credited for one additional day of presentence incarceration. When we find a miscalculation in credit, we may correct the error by modifying the sentence without remanding to the trial court. *See State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992). Accordingly, we modify Appellant's sentence to reflect one additional day of presentence incarceration credit.

[Appellant] could not do that," and that his attorney did not request a hearing pursuant to Rule 11, Ariz. R. Crim. P. These arguments all constitute ineffective assistance of counsel claims, and that is a claim we do not address on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

¶11 Appellant also claims the prosecutor engaged in misconduct by claiming Appellant admitted being the aggressor during the trial. Prosecutors are given wide latitude in presenting closing arguments to the jury. *See State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000). To require reversal, prosecutorial misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997). In this case, the prosecutor's statements were a fair characterization of the evidence presented. Appellant admitted he attacked the victim, but claimed that he did so out of self defense because he was afraid the victim would attack him first. Accordingly, no prosecutorial misconduct occurred.

¶12 Appellant next claims the trial court erred by not ordering a Rule 11 hearing. The trial court has broad discretion in determining whether reasonable grounds exist to order a competency hearing, and its decision will not be reversed absent a manifest abuse of discretion. *See State v.*

Salazar, 128 Ariz. 461, 462, 626 P.2d 1093, 1094 (1981). To the extent Appellant believes the trial court should have ordered a hearing *sua sponte*, we find no abuse of discretion. Appellant provides no explanation for why such a hearing was necessary. Further, after reviewing the entire record, including Appellant's extensive testimony, we conclude that nothing in the record indicates a genuine question over Appellant's competency existed.

¶13 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 verdict, and the sentencing proceedings followed the statutory requirements. 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.

¶14 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

¶15 Appellant's conviction and sentence are affirmed. The sentencing minute entry is modified to reflect one additional day of presentence incarceration credit and to reflect the trial court's finding of five, rather than six, prior felony convictions.

/S/
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

/S/
JON W. THOMPSON, Judge

/S/
SAMUEL A. THUMMA, Judge