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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: 12/27/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, )  
 ) No. 1 CA-CR 12-0179  
 )  
 Appellee, ) DEPARTMENT C  
 )  
 v. ) MEMORANDUM DECISION  
 )  
 ERWIN BARROW, ) (Not for Publication -  
 ) Rule 111, Rules of the  
 Appellant. ) Arizona Supreme Court)  
 )  
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Appeal from the Superior Court in Maricopa County

Cause No. CR2011-119355-001

The Honorable Patricia A. Starr, Commissioner

**AFFIRMED**

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

Bruce F. Peterson, Office of the Legal Advocate Phoenix  
by Frances J. Gray  
Attorneys for Appellant

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**H A L L**, Judge

¶1 Erwin Barrow (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, counsel was unable to find any arguable grounds for reversal. This court granted defendant an opportunity to file a supplemental brief, which he has done. 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 April 26, 2011, defendant was charged by indictment with: Count 1, possession or use of dangerous drugs, a class four felony; Count 2, possession or use of marijuana, having a weight of less than two pounds, a class six felony; and Count 3, aggravated assault, a class four felony.

¶15 The following evidence was presented at trial. On the morning of April 17, 2011, the victim testified that she woke up to find that her live-in boyfriend, defendant, had taken her vehicle without her permission. Defendant returned later that same day, and the victim confronted defendant about taking her vehicle. They both subsequently got into the victim's vehicle, and, while the victim was driving, defendant struck her in the abdomen area from his position in the backseat. Defendant also struck the victim in the face multiple times, and hit her a total of approximately twenty times. The victim testified that defendant said, "[s]hut up bitch and drive." Defendant then grabbed the victim by the neck with both of his hands and "appli[ed] pressure." The victim thought, "Oh, my God. I'm going to die." She saw "blackness" and was "disoriented," but did not completely lose consciousness. The victim further stated that she had urinated on herself while defendant was applying pressure to her neck. Defendant hit the victim several more times after strangling her. The victim testified that she then approached a stop light, put her car in park, and exited the vehicle. When defendant also exited the vehicle, the victim quickly re-entered the vehicle, called 9-1-1, and drove to a nearby police station.

¶16 Officer Katrina Morales and Officer Randy Johnson responded to the victim's 9-1-1 domestic "fight call." Officer

Morales testified that when she first saw the victim, the victim was "hysterical," "visibly shaking," "hyperventilat[ing,]" and "very, very upset." Officer Morales observed redness on the victim's chest, bruising, swelling, and abrasions on the right side of her face, scratches on her neck, and bruising on her lower neck area. Officer Morales also testified that she noticed "finger marks" on the victim's throat.

¶17 Officer Michael Kero of the Phoenix Police Department also responded to the 9-1-1 call. He was advised through dispatch that a subject involved in a fight, later identified as defendant, was walking northbound on 59th Avenue. Officer Kero approached defendant and subsequently placed defendant under arrest. After a thorough search of defendant's person, Officer Kero found two bags of what he believed to be marijuana and one bag of crystal methamphetamine in his left front pants pocket.

¶18 Anthony Gennuso of the Phoenix Crime Lab testified that defendant had 410 milligrams of marijuana and 3.4 grams of methamphetamine.

¶19 Defendant testified that his relationship with the victim was "rough" at the time the domestic-violence incident occurred. Defendant stated that on April 17, 2011, he had been sitting in the backseat of the victim's vehicle and the victim began hitting him and threw a rearview mirror at him, while she was driving, because she was angry defendant had impregnated

her. Defendant said that the victim showed him drugs and threatened to ingest the drugs in order to kill the fetus. Defendant elaborated that he attempted to take the drugs from the victim and the two "wrestled." Defendant then exited the vehicle with the drugs. Defendant denied hitting, punching, or strangling the victim. He did, however, later admit to "putting [his] hands on her." He acknowledged that he failed to tell the police his story about the unborn baby prior to testifying.

¶10 After a five-day trial, the jury found defendant guilty as charged on Counts 1 and 2, and guilty on the lesser included class 1 misdemeanor offense of assault on Count 3. Defendant admitted, and the court found, that defendant had five prior felony convictions. The trial court sentenced defendant to a minimum sentence of eight years for Count 1, with 210 days of presentence-incarceration credit; a minimum term of three years for Count 2, with 210 days of presentence-incarceration credit; and 180 days for the assault conviction, with credit for 180 days presentence incarceration.

#### **DISCUSSION**

¶11 Defendant argues in his supplemental brief that the prosecutor committed prosecutorial misconduct by allowing the victim to testify, despite having a history of being untruthful. A prosecutor is permitted to call witnesses that have made prior inconsistent statements. See *State v. Ferrari*, 112 Ariz. 324,

334, 541 P.2d 921, 931 (1975). "Contradictions and changes in a witness's testimony alone do not constitute perjury and do not create an inference, let alone prove, that the prosecution knowingly presented perjured testimony." *Tapia v. Tansy*, 926 F.2d 1554, 1563 (10th Cir. 1991). Absent a showing that the prosecutor was aware of the witness giving false testimony, the credibility of witnesses is for the jury to determine. See *State v. Rivera*, 210 Ariz. 188, 194, ¶ 28, 109 P.3d 83, 89 (2005). Defendant's argument that the prosecutor committed misconduct by permitting the victim to testify is without merit and not supported by the record. We therefore discern no error, let alone fundamental error.

¶12 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 sentence imposed was within statutory limits. Furthermore, based on our review of the record, there was sufficient evidence for the jury to find that defendant committed the offense for which he was convicted.

¶13 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.

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\_/s/\_\_\_\_\_  
PHILIP HALL, Presiding Judge

CONCURRING:

\_\_\_\_\_  
\_/s/\_\_\_\_\_  
PETER B. SWANN, Judge

\_\_\_\_\_  
\_/s/\_\_\_\_\_  
SAMUEL A. THUMMA, Judge