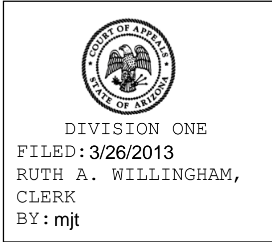
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 3/26/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

STATE OF ARIZONA,
Appellee,
v.
IGNACIO MARTINEZ ROBLES,
Appellant.

1 CA-CR 12-0189

DEPARTMENT D

MEMORANDUM DECISION
(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-118470-001

The Honorable Connie Contes, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Acting Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Defendant-Appellant Ignacio Martinez Robles ("Robles") was tried and convicted of aggravated assault, a class 6 felony,

and sentenced to 3.75 years' incarceration. Counsel for Robles 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). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Robles has submitted a supplemental brief *in propia persona*, raising the following issues: (1) denial of his motions in limine, (2) denial of his motion for a directed verdict, (3) prosecutorial misconduct that unlawfully shifted the burden of proof, (4) denial of his motion for a mistrial, (5) incorrect jury instructions, (6) the needless presentation of cumulative evidence, (7) lack of a colloquy when obtaining Robles's stipulation to his release status, (8) an incorrect assertion by the prosecution that Robles was on parole or release, (9) the use of a presentence report on the issue of guilt, and (10) improper evidence of flight. Robles also asserts vague due process concerns, which we address as part of the other issues raised. For the reasons that follow, we affirm Robles's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 Robles was charged with one count of aggravated assault against A.G. and one count of assault against M.G. The two victims are sisters, and at the time of the incident A.G. was fourteen years old. Robles had been dating Ramona G. ("Ramona"), the mother of A.G. and M.G., for approximately fourteen years.

¶3 The prosecution presented evidence that Robles was at home with A.G. and M.G. Robles began arguing with A.G. When the argument escalated, Robles punched A.G. just below her left eye. As a result of the punch, A.G. fell to the floor, unconscious. When M.G. entered the room to see what was going on, Robles grabbed her neck and pinned her against the wall. After M.G. used a blunt object to push Robles off of her, Robles took M.G.'s cell phone. Robles fled the house, and entered into Ramona's unoccupied car, which was parked outside the house. Before he could drive off, M.G. managed to grab a knife from the house and slash one of the car's tires. Despite the flat tire, Robles was able to drive away. M.G. called 911 from a neighbor's house. Police and firefighters arrived at the scene

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[1] In reviewing the sufficiency of evidence at trial, "[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

shortly after, and transported A.G. to the hospital, where she was treated for her injury. M.G. recapped the incident to the police officer who arrived on the scene. The State also introduced into evidence the 911 call made by M.G. from later that night, when Robles returned to the house. In the call M.G. stated that Robles punched A.G., and that A.G. was in the hospital. Robles was apprehended by police later that day.

¶4 Robles presented evidence that he and M.G. were arguing in the living room. A.G. heard M.G. calling her name, entered the room, and stood behind Robles. Robles, unaware of A.G.'s presence, backed away from M.G. with his arms raised. As Robles began to turn and leave the room, his elbow inadvertently struck A.G. in the face, and knocked her to the ground, unconscious.

¶5 At trial, A.G. testified that Robles did not punch her, but rather accidently struck her with his elbow. M.G. claimed to have significant memory loss from the day of the incident due to taking a double dose of her Vicodin prescription. The State called several witnesses at trial to impeach both M.G.'s and A.G.'s testimony. Over the objection of defense counsel, the State also introduced several photographs of A.G. that showed her injury.

¶6 The jury found Robles guilty of aggravated assault against A.G., and further found it to be a domestic violence

offense. The jury also found an aggravating circumstance under Arizona Revised Statutes ("A.R.S.") section 13-701(D)(9) (Supp. 2012),[2] that the offense caused physical, emotional or financial harm to the victim. The jury was unable to reach a verdict on Count 2, assault against M.G., and the judge declared a mistrial as to that count. The State moved to dismiss Count 2 without prejudice, and the court granted the State's motion. At sentencing, the State withdrew its allegation that Robles was on parole, community supervision or probation at the time of the offense, and Robles admitted to twelve prior felony convictions after a colloquy with the court. The court used Robles's two most recent convictions as historical prior felonies under A.R.S. §§ 13-105(22)(d) (Supp. 2012) and 13-703(C) (Supp. 2012) to enhance the sentence. Robles received 3.75 years' imprisonment with credit for 67 days of time served.

STANDARD OF REVIEW

¶7 In an *Anders* appeal, this Court must review the entire record for fundamental error. *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have

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[2] We cite the current versions of the applicable statutes when no revisions material to this decision have since occurred.

received a fair trial.” *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 68 P.2d 980, 982 (1984)). To obtain a reversal, the defendant must also demonstrate that the error caused prejudice. *Id.* at ¶ 20.

ANALYSIS

¶8 After careful review of the record, we find no grounds for reversal of Robles’s conviction. The record reflects Robles had a fair trial and all proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Robles was present and represented at all critical stages of trial, was given the opportunity to speak at sentencing, and the sentence imposed was within the range for Robles’s offense.

I. SUFFICIENCY OF THE EVIDENCE

¶9 We review the evidence in the light most favorable to sustaining the verdict, resolving reasonable inferences against an appellant. *Greene*, 192 Ariz. at 436, ¶ 12, 967 P.2d at 111. “Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.” *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

A. AGGRAVATED ASSAULT

¶10 There is sufficient evidence in the record to support the jury's conviction of Robles for aggravated assault. Robles was charged with aggravated assault under A.R.S. §§ 13-1203(A)(2) (2010) and -1204(A)(6) (Supp. 2012). A person commits assault by "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury . . . ." A.R.S. § 13-1203(A)(2). A person commits aggravated assault if he commits an assault under certain circumstances, including "[i]f the person is eighteen years of age or older and commits the assault on a minor under fifteen years of age." A.R.S. § 13-1204(A)(6).

¶11 M.G.'s initial conversation with the first officer on the scene provided evidence that Robles punched A.G. in the face. Officer K. arrived on the scene shortly after M.G. placed a 911 call. M.G. indicated to him that Robles had punched A.G. in the face, and that A.G. was knocked unconscious. Captain M. of the Phoenix Fire Department was also called to the scene, and testified that A.G. had swelling on her cheek bone that was consistent with a punch to the front of the head. When Captain M. asked A.G. how she sustained her injury, A.G. replied that Robles had punched her in the face with his fist. Additionally, the State introduced into evidence a recording of the 911 call made by M.G. In the course of the conversation between M.G. and

the 911 operator, M.G. stated several times that Robles punched A.G. in the face. While M.G. testified differently at trial, the jury was free to reject her testimony and accept her prior story. *See State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974).

¶12 Intent can be inferred from the surrounding circumstances. *State v. White*, 102 Ariz. 97, 98, 425 P.2d 424, 425 (1967) ("Generally, the intent with which a crime or act is committed may be implied from the facts that establish the doing of the act . . . ."). The jury was free to infer from the evidence that Robles acted intentionally.

¶13 The evidence in the record also supports Robles was eighteen years of age or older on the date of the incident, and that the victim was under fifteen years of age on the date of the incident. Officer K. testified that A.G.'s date of birth was October 21, 1996. Ramona testified to the same, and also stated that Robles's birthday was February 12, 1968.

B. AGGRAVATING CIRCUMSTANCE

¶14 The jury found an aggravating circumstance, that "[t]he offense caused physical, emotional or financial harm to the victim." Given the photographs of A.G.'s injury, and the testimony of the police officers and firefighter who treated A.G., there is sufficient evidence for a jury to find that A.G. suffered physical or emotional harm.

II. APPELLANT'S SUPPLEMENTAL CLAIMS

A. DENIAL OF MOTIONS IN LIMINE

¶15 Robles asks this Court to review the denial of his motions in limine. However, all of Robles's pre-trial motions in limine were granted, so this Court will not review them. We address separately Robles's objection during trial to the admission of several photographs into evidence. *See infra* ¶¶ 25-26.

B. DENIAL OF DIRECTED VERDICT

¶16 At the close of the State's case, Robles moved for a directed verdict under Arizona Rule of Criminal Procedure 20, which the court denied. "A judgment of acquittal under Rule 20 is appropriate only where there is no substantial evidence to warrant a conviction." *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citation and internal quotation marks omitted). The court did not err in denying the motion; as discussed, *supra*, ¶¶ 9-13, there is sufficient evidence in the record to warrant Robles's conviction and thus deny the motion for acquittal.

C. PROSECUTORIAL MISCONDUCT

¶17 Robles contends that the State "mischaracterize[d] evidence" during its closing argument by inappropriately asking the jurors to put themselves in Robles's situation. During closing arguments, the prosecutor stated "[n]ow, I know the word

accident has been thrown out a lot, but I want you to think about your own actions. How often does that happen in your lives where --." Defense counsel promptly objected to the statement, and the court sustained the objection. Defense counsel did not request a mistrial or a new trial based on the prosecutor's statement. The prosecutor rephrased the statement using the reasonable person standard and continued with the closing argument.

¶18 Even if Robles had moved for a mistrial, the denial of such a motion would not be reversible error. "Misconduct alone will not mandate that the defendant be awarded a new trial; such an award is only required when the defendant has been denied a fair trial as a result of the actions of [the prosecutor]." *State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988). To determine whether misconduct requires a new trial, the court should consider two factors: "(1) whether the remarks call to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks." *Id.* at 296-97, 751 P.2d at 956-57. An argument that improperly calls the jury's attention to an issue it should not consider, but does not actually influence the verdict does not constitute reversible error. *See id. See also Taylor v. DiRico*, 124 Ariz.

513, 518, 606 P.2d 3 (1980) (characterizing argument to jury to apply "golden rule" as appeal to passion or prejudice, but holding that argument did erroneously affect the verdict). "Because the trial court is in the best position to determine the effect of a prosecutor's comments on a jury, we will not disturb a trial court's denial of a mistrial for prosecutorial misconduct in the absence of a clear abuse of discretion." *State v. Newell*, 212 Ariz. 389, 402, ¶ 61, 132 P.3d 833, 846 (2006).

¶19 Prosecutors may not make an argument which inflames the passions or fears of the jury. *State v. Morris*, 215 Ariz. 324, 337, ¶ 58, 160 P.3d 203, 216 (2007). The prosecutor here asked jurors to put themselves in Robles's situation, violating the first factor. The second factor considers the effect of the improper statements on the fairness of the trial as a whole. In *Newell*, the prosecutor repeatedly vouched for the reliability of the state's DNA evidence. 212 Ariz. at 403, ¶ 64, 132 P.3d at 847. The court found that prosecutor's remarks were improper, but did not deprive the defendant of a fair trial because the jurors were given an instruction that anything said in closing arguments is not evidence. *Id.* at ¶¶ 67-69. The court also found that in the context of the entire trial, the statements were not so significant as to require a mistrial. *Id.* at ¶ 70.

¶20 If even repeated inappropriate statements from the

prosecutor do not deprive the defendant of a fair trial, as in *Newell*, then a single statement that was immediately rephrased also does not deprive the defendant of a fair trial. There is no reasonable probability that the jury convicted Robles on the basis of this statement. At the close of trial, the court gave the jury an instruction that the prosecutor's opening and closing remarks were not part of evidence. *See infra* ¶ 22. Robles has not shown any error, much less fundamental error, that deprived him of a fair trial.

D. DENIAL OF MOTION FOR MISTRIAL

¶21 While one of the State's witnesses was testifying, Robles made a motion for a mistrial on the basis of the witness's statement. The witness, a police officer, stated that:

> I have to remain open to everything, not simply ascribe. You know, we're also making our observations and our determinations, and, once again, it's what the evidence is going to show. It's what the witness testimony and victim testimony and even suspect testimony is going to be.

Robles contends that the statement gave the impression to the jury that he had to testify. Given the context of the witness's statement, it is clear that the witness was not implying that Robles had to testify, but rather was speaking in general terms about examining the evidence presented. At most, his statement meant that should the defendant testify, that testimony must be

considered along with all other evidence presented. Additionally, comments on a defendant's failure to testify may constitute harmless error. *State v. Hughes*, 193 Ariz. 72, 86, ¶ 63, 969 P.2d 1184, 1198 (1998). To rise to the level of reversible error, the defendant must show that the statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Newell*, 212 Ariz. at 402, ¶ 60, 132 P.3d at 846 (citation omitted). Even if the witness's statement included some implication that Robles needed to testify, the statement was harmless error, and did not infect the whole trial. There were no further statements from the witness or the prosecutor implying that Robles had to testify. The court also gave the jury an instruction stating that the State has the burden of proof, and that the defendant does not have to testify. *See infra* ¶ 22. The court did not err in denying Robles's motion.

E. INCORRECT JURY INSTRUCTIONS

¶22 Robles asserts a "lack of correct [jury] instructions." The court gave the standard jury instructions: duty of a jury, lawyers' comments are not evidence, stipulations, evidence to be considered, presumption of innocence, burden of proof, not to consider penalty, flight or concealment evidence, defendant need not testify, evidence of any kind, voluntary act, credibility of witnesses, indictment is

not evidence, direct and circumstantial evidence, expert witnesses, mere presence, testimony of law enforcement officers, and separate counts. The court also gave the jury the definitions of assault, intentionally, the intent-inference, physical injury, and domestic violence offense. The instructions were consistent with the offenses charged in the indictment and none of them were erroneous.

¶23 During deliberations, the jury submitted a question to the court: "What course of action should the jury take if we are dead locked on one count of the charges?" In response, the court gave the jury the standard impasse instruction in the comment to Arizona Rule of Criminal Procedure 22.4. After additional deliberations, the jury indicated to the court that it still could not reach a verdict as to Count 2, and that no assistance would bring about a verdict. Subsequently, the jury delivered its verdict as to Count 1, and stated that it could not reach a verdict as to Count 2.

¶24 Rule 22.4 allows the court to give an impasse instruction after the jury advises the court that it has reached an impasse. The jurors here affirmatively indicated that they were deadlocked on Count 2. Accordingly, the court did not err by giving the impasse instruction.

F. CUMULATIVE EVIDENCE AND PHOTOGRAPHS

¶25 Robles contends that the trial court erred in

admitting into evidence seven photographs of the victim. The photographs depict the victim, A.G., on a stretcher, and are captured from various angles. Several of the photographs are zoomed in to a bruise on A.G.'s face. At trial, Robles objected to the introduction of the photographs as cumulative, but the court overruled his objection.

¶26 Arizona Rule of Evidence 403 allows the court to "exclude relevant evidence if its probative value is substantially outweighed by . . . unfair prejudice . . . or needlessly presenting cumulative evidence." The trial court has broad discretion to admit or reject evidence on the basis of cumulativeness. *State v. Verive*, 128 Ariz. 570, 576, 627 P.2d 721, 727 (App. 1981). When cumulative photographs that are not inflammatory are admitted into evidence, the error is harmless. *State v. McCall*, 139 Ariz. 147, 158, 677 P.2d 920, 931 (1983). The photographs admitted here do not depict any blood or other inflammatory images. They are relevant, as they support the prosecution's theory that the injury was a result of Robles's intentional punch, and discredit the defense's theory that the injury was the result of an accident. Admission of the photographs was not error, much less fundamental error.

G. LACK OF A COLLOQUY WHEN OBTAINING STIPULATION TO RELEASE STATUS

¶27 Robles argues that the court "did not obtain a 'plea

type' colloquy from [Robles] when it accepted the State's stipulation that he was on parole or release status" at the time of the incident. As discussed below, the State did not stipulate to the existence of parole or release status. To the contrary, the State dismissed such allegations. *See infra* ¶ 29.

¶28 However, when a defendant stipulates to prior convictions the court must engage in a plea-type colloquy with the defendant to ensure that the defendant voluntarily and intelligently waived his constitutional rights. *State v. Morales*, 215 Ariz. 59, 61, ¶¶ 7-8, 157 P.3d 479, 481 (2007). In the present case, the court conducted such a colloquy with Robles when he admitted his prior convictions, and the court explained what rights he was giving up by admitting to these prior convictions. Robles's stipulation to his prior felony convictions does not present any fundamental error.

H. ASSERTION THAT THE DEFENDANT WAS ON PAROLE OR RELEASE

¶29 Robles argues that the State incorrectly asserted that he was on parole or release at the time of the incident. While the State did allege that Robles committed the offense while on release, the court granted Robles's motion in limine to preclude any such evidence of his release status from being used at trial, and the State never made any such assertions to the jury. At sentencing, the State withdrew its allegations that Robles

was on release at the time of the offense. Thus, Robles's release status was not considered for purposes of either guilt or sentencing, and does not present any fundamental error.

I. PRESENTENCE REPORT

¶30 Robles asserts that a presentence report is not admissible on the issue of guilt. However, the Presentence Investigation was not filed with the court until December 8, 2011, more than a month after the jury found Robles guilty. As the jury did not see or possess the report, they could not have used it in determining Robles's guilt.

J. FLIGHT EVIDENCE

¶31 Robles argues that the State improperly made use of evidence of flight by arguing that the jury could infer a "consciousness of guilt" from such evidence. Evidence of flight is permissible to show that a defendant has a consciousness of guilt, from which a jury can infer actual guilt. *State v. Cutright*, 196 Ariz. 567, 570, ¶¶ 9-10, 2 P.3d 657, 660 (App. 1999), *overruled on other grounds by State v. Miranda*, 200 Ariz. 67, 69, ¶ 5, 22 P.3d 506, 508 (2001). Merely leaving the scene of a crime is insufficient to warrant a flight instruction. *Id.* at ¶ 13. Rather, the test is fact-driven based on "whether the defendant engaged in some type of eluding behavior designed to camouflage his participation in a crime, thus manifesting a consciousness of guilt." *Id.* at ¶ 12. If a defendant flees a

crime scene in order to avoid detection, even without police officers in pursuit, a flight instruction is appropriate. *State v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992).

¶32 Robles ran from the house after knocking A.G. unconscious. Robles had knowledge that M.G. was in the house, had witnessed the incident, and had tried to prevent him fleeing by slashing a tire on the car he was using. This was sufficient for the State to argue that the jury could infer guilt from the flight and for the jury instruction on flight. *See supra* ¶ 22. Although Robles contended that A.G.'s injury was the result of an accident, a defendant's alternative explanation for his actions does not preclude a flight instruction. *State v. Hunter*, 136 Ariz. 45, 49, 664 P.2d 195, 199 (1983). The use of flight evidence, along with the jury instruction, does not present any fundamental error.

CONCLUSION

¶33 After careful review of the record, we find no meritorious grounds for reversal of Robles's conviction or modification of the sentence imposed. The evidence supports the verdict, the sentence imposed was within the sentencing limits, and Robles was represented at all stages of the proceedings below. Accordingly, we affirm Robles's conviction and sentence.

¶34 Upon the filing of this decision, counsel shall inform Robles of the status of the appeal and his options. Defense

counsel has no further obligations, 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). Robles shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
MICHAEL J. BROWN, Presiding Judge

/S/
ANDREW W. GOULD, Judge