IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06/20/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

STATE OF ARIZONA,	)	1 CA-CR 12-0508
	)	
	)	DEPARTMENT C
Appellee,	)	
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
RICHARD GARCIA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-135767-001

The Honorable Dawn M. Bergin, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Charles R. Krull, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 A jury convicted Appellant Richard Garcia of Count 1, disorderly conduct, pursuant to Arizona Revised Statutes

("A.R.S.") section 13-2904(A) (2010). This is a class 6 dangerous felony and a domestic violence offense, pursuant to A.R.S. §§ 13-2904(B), -105(13) (Supp. 2012), -3601(A) (Supp. 2012).[1] The jury also convicted Garcia of Count 2, misconduct involving weapons, A.R.S. § 13-3102(A)(4) (Supp. 2012), a class 4 felony, A.R.S. § 13-3102(L). Garcia was sentenced to concurrent presumptive terms of 2.25 and 10 years' incarceration, respectively. Counsel for Garcia filed a brief in accordance with *Anders v. California,* 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Garcia was given the opportunity to file a *pro per* supplemental brief, but did not do so. For the reasons that follow, we affirm Garcia's convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY

¶2 Garcia and the victim, RR, lived together, had been in a relationship for several years, and had two children together. In June 2011, the couple had an argument on the telephone about their shared car. RR demanded that Garcia bring the car to her so that she could use it, and warned Garcia that if he did not do so, she would report it as stolen. Garcia responded that he

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

was going to come over to "fuck up the house."

¶3 Garcia arrived home and they continued arguing. RR locked Garcia outside of the house. As the argument progressed, RR called 911 asking for help because Garcia was trying to force his way back inside. RR told the emergency operator that Garcia had a Mossberg 12-gauge shotgun. At trial, RR testified that it sounded like Garcia was trying to kick the door down from the outside. He also threw and broke a flower pot against the door. Garcia drove away while RR was on the 911 call, before law enforcement arrived.

¶4 Officer L responded. Upon arrival, he noted the broken flower pot and the scuff marks on the door. He did not see Garcia or the car. RR appeared upset when she answered the door with her son, D. RR told Officer L that she saw Garcia loading the shotgun into their car the night before. She also told the officer about the telephone argument precipitating Garcia's arrival at the house.

¶5 In July 2011, Officer C arrested Garcia and obtained a buccal DNA swab sample from him pursuant to a search warrant. Meanwhile, Officer L and the Glendale Police Department's fugitive squad executed search warrants for the couple's house and car.[2] They found a Mossburg 12-gauge shotgun in the master

[2] The car was registered in Garcia's name, at the couple's home address.

bedroom closet. Because records of long gun purchases are purged after 30 days, it was impossible to determine to whom the shotgun was registered, however, the gun had not been reported stolen. RR told Officer L that Garcia must have put the shotgun in the closet, because she asked him to remove it from the car whenever she was driving.

¶6 At trial, RR testified that she did not remember the details of what she told police. Contrary to her various statements to police, RR testified that she never saw Garcia with a gun and that she lied to police when she told them that she saw Garcia with a shotgun.

¶7 A DNA analyst tested the gun's DNA evidence against Garcia's DNA buccal swab. The analyst testified that Garcia's DNA was a "major contributor" to the sample collected from the shotgun, making it essentially a statistical impossibility that the gun DNA samples came from anyone other than Garcia. According to the analyst, Garcia's DNA most likely was on the gun because he handled it directly.

¶8 The jury convicted Garcia on both counts. The court held a trial on Garcia's prior felony convictions and found that he had two historical prior felony convictions. Garcia received concurrent and enhanced presumptive sentences of 2.25 years' and 10 years' incarceration, respectively. Garcia 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 -4033(A)(1) (2010).

DISCUSSION

¶9 In an *Anders* appeal, this Court must review the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial and the error prejudiced the defendant. *See State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *State v. Gendron,* 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). 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). "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)).

I. Count 1: Disorderly Conduct

¶10 Disorderly conduct involving a weapon requires proof that the defendant "[r]ecklessly handles, displays or discharges a deadly weapon or dangerous instrument," "with intent to

disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so." A.R.S. §§ 13-2904(A)(6), -105(15). If a defendant is charged with disturbing the peace of a particular victim, the State must prove that the victim's peace specifically was disturbed, or that the defendant intended to do so. *State v. Burdick*, 211 Ariz. 583, 585, ¶ 8, 125 P.3d 1039, 1041 (App. 2005); *see also In Re Julio L.*, 197 Ariz. 1, 3, ¶ 8, 3 P.3d 383, 385 (2000); *State v. Miranda*, 200 Ariz. 67, 69, ¶ 5, 22 P.3d 506, 508 (2001). Disorderly conduct is also a domestic violence offense if the State establishes a specific past or present domestic relationship between the victim and the defendant, or if the couple have children together. A.R.S. § 13-3601(A)(1), (2).

¶11 There is sufficient evidence to support Garcia's conviction for disorderly conduct with a weapon. Testimony from both police officers and RR, and the 911 recording, support a finding that Garcia intended to and did disturb RR's peace. Garcia told RR that he was going to come home and "fuck up the house." RR had to lock Garcia outside of their home and while Garcia was locked outside, he broke a flower pot against the door, and attempted to kick the door down. RR called 911 for assistance during the argument and demanded that police come to her aid immediately because she had small children in the house and Garcia was trying to break in with a gun. Thus, the jury

could reasonably conclude that Garcia either disturbed or intended to disturb RR's peace.

¶12 Although RR testified that she never at any point saw Garcia with a gun, her testimony was contradicted by police testimony and the 911 call recording. Police testimony established that RR saw Garcia with the shotgun the night before the argument and that Garcia's DNA was on the shotgun later found in the master bedroom closet. This evidence, coupled with the 911 recording wherein RR stated multiple times that Garcia had a gun, supports the jury's determination that Garcia was armed with the shotgun while disturbing or intending to disturb RR's peace notwithstanding RR's conflicting statements about the shotgun. *See State v. Pike*, 113 Ariz. 511, 514, 557 P.2d 1068, 1071 (1976) (stating that it is the jury's responsibility to decide what evidence is credible during a trial).

¶13 Finally, RR's testimony that the couple had previously resided together and that they have children together was sufficient for a jury to conclude that the offense was a domestic violence offense. *See* A.R.S. § 13-3601(A)(1), (2). Thus, there is sufficient evidence to support Garcia's conviction for Count 1.

II. Count 2: Misconduct Involving Weapons

¶14 Misconduct involving weapons based on a defendant's prohibited possessor status requires proof that the defendant

knowingly possessed a deadly or prohibited weapon. A.R.S. §§ 13-3102(A)(4); -105(15) (defining deadly weapon). As applicable to this case, a "prohibited possessor" is defined as one "[w]ho has been convicted within or without this state of a felony . . . and whose right to possess or carry a gun or firearm has not been restored." A.R.S. § 13-3101(A)(7)(b) (Supp. 2012). Garcia's classification as a "prohibited possessor" was established at trial. A letter from a superior court clerk, admissible pursuant to Arizona Rule of Evidence 902(1), showed that Garcia was previously convicted of a felony, and that his right to possess weapons or firearms had not been restored. As discussed above at ¶ 12 *supra*, during trial, the State presented evidence that supported the jury's finding that Garcia was in possession of the shotgun. Thus, there is sufficient evidence to support Garcia's conviction for Count 2.

CONCLUSION

¶15 After careful review of the record, we find no meritorious grounds for reversal of Garcia's convictions or modification of the sentences imposed. The evidence supports the verdicts, the sentences imposed were within the sentencing limits, and Garcia was represented by counsel at all stages of the proceedings. Accordingly, we affirm Garcia's convictions and sentences.

¶16 Upon the filing of this decision, counsel shall inform

Garcia 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). Garcia 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/
PETER B. SWANN, Presiding Judge

/s/
RANDALL M. HOWE, Judge