IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee,*

v.

MARCOS MEDINA, JR. *Appellant.*

No. 1 CA-CR 14-0745
FILED 03-24-2016

Appeal from the Superior Court in Maricopa County
No. CR2014-103193-002 DT
The Honorable Michael W. Kemp, Judge

AFFIRMED

APPEARANCES

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Office of the Legal Advocate, Phoenix
By Consuela M. Hanesian
Counsel for Appellant

Marcos Medina, Florence
Appellant

MEMORANDUM DECISION

Chief Judge Michael J. Brown delivered the decision of the Court, in which Presiding Judge Maurice Portley and Judge John C. Gemmill joined.

B R O W N, Chief Judge:

¶1 Marcos Medina, Jr. ("Defendant") appeals his convictions and sentences for aggravated assault and misconduct involving weapons. Counsel for Defendant filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), advising that after searching the record on appeal, she was unable to find any arguable grounds for reversal. Defendant was granted the opportunity to file a supplemental brief *in propria persona*, and he has done so.

¶2 Our obligation is to review the entire record for reversible error. *State v. Clark*, 196 Ariz. 530, 537, ¶ 30 (App. 1999). We view the facts in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Defendant. *State v. Guerra*, 161 Ariz. 289, 293 (1989). Finding no reversible error, we affirm.

¶3 The State charged Defendant with three counts of aggravated assault (Count 1 – victim D.K., using a knife; Count 3 – victim D.K., using a gun or a knife; and Count 4 – victim A.H., using a knife), in violation of Arizona Revised Statutes ("A.R.S.") section 13-1204(A)(2); one count of kidnapping (Count 2 – victim D.K.), in violation of A.R.S. § 13-1304(A)(3); and two counts of misconduct involving weapons (Count 5 – a knife; Count 6 – a gun), in violation of A.R.S. § 13-3102(A)(4). The following evidence was presented at trial.

¶4 In January, 2014, victim D.K. went to Defendant's house to collect money from multiple people "staying there." One person paid D.K. the money he was owed, but the other people D.K. was looking for were not home. Later, as D.K. and A.H. drove by Defendant's house, Defendant and his brother Frank directed them to stop. All four men went to the backyard of the house, where Frank and D.K. engaged in a heated verbal exchange.

¶5 During the argument, D.K.'s attention was diverted and Frank hit D.K., which immediately led to a fight. D.K. testified he felt

Defendant repeatedly hit him in the back, but eventually realized that Defendant was actually stabbing him, rather than punching him, and he gave up fighting. Frank then pointed a rifle at D.K., and D.K. and A.H. retreated to their vehicle.

¶6 The State also introduced evidence that Defendant had previously been convicted of a felony, together with the testimony of Defendant's probation officer, who testified that Defendant was on probation in January, 2014, and his civil rights to possess a weapon had not been restored.[1]

¶7 Following the State's presentation of evidence, the court granted Defendant's motion for judgment of acquittal in part, dismissing Counts 3 and 6. The jury found Defendant guilty of Counts 1 and 5 and not guilty of Counts 2 and 4. Following the aggravation phase of trial, the jury also found that the State had proven four aggravating factors: (1) the offense involved the infliction or threatened infliction of serious physical injury (as to Count 1); (2) the offense involved the use, threatened use or possession of a deadly weapon or dangerous instrument, specifically, a knife (as to Count 1); (3) the offense caused physical, emotional, or financial harm to the victim (as to Count 1); and (4) the offense involved the use, threatened use or possession of a deadly weapon or dangerous instrument, specifically, a knife (as to Count 5).

¶8 At sentencing, the court vacated the jury's finding of dangerousness as to Count 5. The court sentenced Defendant to an aggravated 8-year term of imprisonment on Count 1 and a presumptive 2.5-year term of imprisonment on Count 5, to be served concurrently to each other,[2] and to a 3.5-year term of imprisonment in CR2013-107605 (aggravated assault) and a 1-year term of imprisonment in CR2012-101177

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[1] Pursuant to A.R.S. § 13-3102(A)(4), a person commits misconduct involving weapons by knowingly possessing a deadly weapon or a prohibited weapon if such person is a prohibited possessor. A person who has been convicted of a felony and whose civil right to possess or carry a firearm has not been restored is a prohibited possessor, A.R.S. § 13-3101(A)(7)(b), and a "deadly weapon" means "anything that is designed for lethal use." A.R.S. § 13-3101(A)(1); *see also State v. Clevidence*, 153 Ariz. 295, 301 (App. 1987) (explaining that a "knife clearly qualifies as a 'deadly weapon' under A.R.S. § 13-3101").

[2] Defendant was awarded 264 days of presentence incarceration credit, applied to both counts.

(possession of drug paraphernalia), two unrelated probation violation cases. This timely appeal followed.

¶9 In his supplemental brief, Defendant argues that D.K. gave inconsistent testimony at trial regarding the rifle. Specifically, he contends D.K. was asked several times whether Defendant had a rifle several times and gave "different answers" for "the same question." On direct examination, D.K. unambiguously stated he never saw who handed Frank the rifle and he never saw Defendant point a gun at him. On cross-examination, D.K. testified he did not see Defendant touch the gun "in any way." As defense counsel further questioned D.K., the prosecutor objected to defense counsel referring to both Frank and Defendant as "Medina" when asking who handled the firearm. Following the State's objection, D.K. again unequivocally testified he "never saw" Defendant "with the rifle." Therefore, although defense counsel's form of questioning may have caused some initial confusion, the record reflects that D.K. consistently testified he never observed Defendant with a firearm. Moreover, even assuming there was some lingering confusion as to whether Defendant handled the gun, the presence of conflicting or inconsistent testimony, alone, is not a basis for reversal. *See State v. Lee*, 217 Ariz. 514, 516, ¶ 10 (App. 2008) ("[I]t is the trier of fact's role, and not this court's, to resolve conflicting testimony and to weigh the credibility of witnesses.") (quotation omitted). Furthermore, we note the trial court dismissed Counts 3 and 6, which alleged that Defendant committed offenses involving a firearm.[3]

¶10 We have searched the entire record for reversible error and have found none. All of the proceedings were conducted in accordance with Arizona Rules of Criminal Procedure. Except for a court hearing regarding several procedural matters held immediately before trial commenced, at which counsel waived Defendant's presence, the record shows that Defendant was present at all pertinent proceedings, and was represented by counsel. Defendant had an opportunity to speak before sentencing, and the sentences imposed were within the statutory limits. Accordingly, we affirm Defendant's convictions and sentences.

¶11 Upon the filing of this decision, counsel shall inform Defendant of the status of the appeal and his options. Defense counsel has no further obligations unless, upon review, counsel finds an issue

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[3] Defendant also raises additional issues, each of which relate to allegations implicating ineffective assistance of counsel. Such issues must be raised in the first instance by filing a petition for post-conviction relief. *See State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9 (2002).

appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Defendant 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.