

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

NEDEL VENTURA FLORES-HIGUERA, *Appellant*.

No. 1 CA-CR 16-0421
FILED 12-7-2017

Appeal from the Superior Court in Maricopa County
No. CR 2015-103198-001
The Honorable Mark H. Brain, Judge

AFFIRMED AS MODIFIED

COUNSEL

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

The Hopkins Law Office, P.C., Tucson
By Cedric Martin Hopkins
Counsel for Appellant

MEMORANDUM DECISION

Judge Maria Elena Cruz delivered the decision of the Court, in which
Presiding Judge Randall M. Howe and Judge Peter B. Swann joined.

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C R U Z, Judge:

¶1 This appeal was filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969). Counsel for Nedel Ventura Flores-Higuera has advised this Court that counsel found no arguable questions of law and asks us to search the record for fundamental error. Flores-Higuera was convicted of aggravated assault and drive by shooting. Flores-Higuera was given an opportunity to file a supplemental brief *in propria persona*; he has not done so. After reviewing the record, we affirm Flores-Higuera's convictions and sentences as modified.

FACTUAL AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the judgment and resolve all reasonable inferences against Flores-Higuera. See *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2 (App. 1998).

¶3 On January 17, 2015, A.M. went to the Dubai Club with some friends to watch a popular band. While at the club, A.M. encountered Flores-Higuera. A.M. knew Flores-Higuera: Flores-Higuera shared a child with A.M.'s girlfriend. At the club, Flores-Higuera and A.M. got into a verbal altercation in the restroom. As A.M. left the club on the early morning of January 18, an individual pulled up in a silver Acura and shot A.M. several times. The shooter was in the passenger seat, while another individual drove. At the scene and at the hospital, A.M. identified Flores-Higuera as the shooter. A.M.'s relatives, Felix Pacheco and Alan Valencia-Ramos, witnessed the shooting and identified Flores-Higuera as the shooter. Several other witnesses also identified the shooter as Flores-Higuera. After shooting A.M., the car pulled away.

¶4 Later that same morning, officers located a silver Acura with blood on its passenger side. The blood was tested and identified as A.M.'s blood. The car was registered to a different individual, but several documents belonging to Flores-Higuera were found inside. Detectives began searching for Flores-Higuera. Two days later, detectives located Flores-Higuera and placed him under arrest.

¶5 On January 30, 2015, Flores-Higuera was indicted for one count of aggravated assault, a Class 3 felony; one count of drive by shooting, a Class 2 felony; and one count of possession or use of narcotic drugs, a Class 4 felony.

¶6 At trial, the State presented the testimony of A.M., as well as several witnesses, who identified Flores-Higuera as the shooter. It also

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presented the testimony of officers who responded to the scene and interviewed the witnesses. Finally, it presented evidence of A.M.'s blood, which was found on the passenger side of the silver Acura involved in the shooting, and evidence linking Flores-Higuera to the car.

¶7 During trial, Flores-Higuera moved for a mistrial, which was denied. The jury found Flores-Higuera guilty on the first two counts.¹ After an aggravation phase, the jury found as to both counts that: the offense was a dangerous offense; the offense involved the infliction or threatened infliction of serious physical injury; the offense involved the presence of an accomplice; Flores-Higuera committed the offense in an especially heinous, cruel, or depraved manner; and the offense caused A.M. physical, emotional, or financial harm. After trial, Flores-Higuera filed a motion for new trial pursuant to Arizona Rule of Criminal Procedure 24.1, which was denied.

¶8 On June 10, 2016, the superior court conducted the sentencing hearing in compliance with Flores-Higuera's constitutional rights and Arizona Rule of Criminal Procedure 26. Flores-Higuera was sentenced to twenty years' imprisonment for count one and twenty-eight years' imprisonment for count two, to run concurrently, and was given 506 days of pre-incarceration credit. The court based the sentence on the fact that, although Flores-Higuera was a young man and had a substance abuse problem, the jury found aggravating factors. The court found Flores-Higuera had been convicted of prior felony offenses and had committed the crimes while on probation for a prior offense. It revoked his probation and sentenced him to three-and-a-half years for his prior offense, and it set his twenty-year and twenty-eight-year sentences to run consecutively after the three-and-a-half-year sentence. Flores-Higuera received 45 days' credit for pre-sentence incarceration related to his prior offense.

¶9 Flores-Higuera timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and 13-4033(A)(1)-(2).

¹ Detectives discovered a small bag of cocaine on Flores-Higuera during his arrest. The possession or use of narcotic drugs count was separated before trial, and subsequently dismissed during sentencing.

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DISCUSSION

¶10 We review Flores-Higuera’s convictions and sentences for fundamental error. *See State v. Flores*, 227 Ariz. 509, 512, ¶ 12 (App. 2011). Counsel for Flores-Higuera has advised this Court that after a diligent search of the entire record, counsel has found no arguable question of law. We have read and considered counsel’s brief and fully reviewed the record for reversible error, *see Leon*, 104 Ariz. at 300, and find none.

¶11 The record reflects Flores-Higuera received a fair trial. He was represented by counsel at all stages of the proceedings, and he was present at all critical stages. The superior court held appropriate pretrial hearings.

¶12 During trial, Flores-Higuera raised several motions for mistrial, all of which were denied, and after review we hold no fundamental error occurred. The State presented both direct and circumstantial evidence sufficient to allow the jury to convict as to both counts. The jury was properly comprised of twelve members. The superior court properly instructed the jury on the elements of the charged crimes, the State’s burden of proof, and the necessity of a unanimous verdict. The jury returned a unanimous verdict, confirmed by juror polling. The jury returned a finding of aggravating factors and the court separately found Flores-Higuera’s prior felony convictions and probationer status. The court received and considered a presentence report. All proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and the sentences imposed were within the statutory guidelines, although we modify Flores-Higuera’s sentences as to counts one and two to reflect 507 days of pre-incarceration credit instead of 506.² *See* A.R.S. § 13-4037; *State v. Stevens*, 173 Ariz. 494, 496 (App. 1992) (modifying defendant’s sentence to grant defendant the correct credit for presentence incarceration).

² A defendant is entitled to be credited for “[a]ll time actually spent in custody” against the imprisonment term imposed. A.R.S. § 13-712(B). Flores-Higuera was arrested on January 20, 2015, and sentenced on June 10, 2016. The superior court credited Flores-Higuera with 506 days, when it should have been 507.

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CONCLUSION

¶13 We have reviewed the entire record for reversible error and find none; therefore, we affirm the convictions and resulting sentences as modified.

¶14 Upon the filing of this decision, defense counsel shall inform Flores-Higuera of the status of the appeal and of his future options. 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 (1984). Flores-Higuera shall have 30 days from the date of this decision to proceed, if he desires, with a pro per motion for reconsideration or petition for review.



AMY M. WOOD • Clerk of the Court
FILED: AA