IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

KEVIN ANDERSON, *Appellant*.

No. 1 CA-CR 16-0194
FILED 1-30-2018

Appeal from the Superior Court in Maricopa County
No. CR2011-113209-001
The Honorable Michael W. Kemp, Judge

AFFIRMED

COUNSEL

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

Mays Law Office, PLLC, Phoenix
By Wendy L. Mays
Counsel for Appellant

Kevin Anderson, Florence
Appellant

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the Court, in which Judge Kent E. Cattani and Chief Judge Samuel A. Thumma joined.

S W A N N, Judge:

¶1 Kevin Anderson appeals his convictions and sentences on one count of first degree murder; two counts of attempted first degree murder; and three counts of aggravated assault.

¶2 This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969). We have reviewed the record for fundamental error. *See Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30 (App. 1999). Anderson has filed a supplemental brief *in propria persona* in which he raises several issues.

¶3 We have searched the record and considered the issues raised by Anderson. Our review reveals no fundamental error. For the following reasons, we affirm his convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶4 In March 2011, Anderson's mother, D.M., and his stepfather, H.M., hosted a barbecue at their apartment. L.W. and N.H. attended. Anderson was also home and, as D.M. testified, she recalled him being "in character"[1] that day because of his schizophrenia. The group, without Anderson, spent the evening playing cards and barbecuing. Around 10:00 p.m., the four decided to stop playing and go for a walk. Before anyone left the apartment, H.M. went to get his cap and keys from his bedroom dresser. While getting his items, H.M. noticed his gun was missing.

¶5 Suspecting Anderson had the gun, H.M. went into his room and told him to put the gun back. Anderson did not verbally respond, but gestured that he had the gun in his waistband. Anderson then removed the gun from his waistband, pointed it at H.M., and shot him.

---

[1] D.M. refers to Anderson as "in character" when he "makes a voice like he's either Jamaican or Cuban."

¶6 Still conscious and mobile, H.M. backed out of the room to alert everyone to get out of the apartment and that Anderson had a gun. Anderson then walked into the living room and shot at L.W. and N.H. While L.W. did not survive the gunshot, both N.H. and D.M. managed to escape from the apartment. N.H. suffered a superficial wound to his left upper bicep from the gunshot. H.M. also escaped from the apartment and was followed by Anderson.

¶7 Once H.M. was out of the apartment, he struggled with Anderson in an attempt to get the gun and was shot in the side. Still alert, he managed to take the gun out of Anderson's hands and throw it in the neighbor's hedges. While H.M. was down, Anderson reached into his pockets, removed the car keys, and "took off." Anderson returned to the apartment complex the same evening and was placed in police custody.

¶8 Sergeant Siekmann of the Phoenix Police Department responded to the shooting. When Sergeant Siekmann arrived at the scene, officers notified him that Anderson was in custody in a patrol vehicle. Sergeant Siekmann told Anderson his *Miranda*[2] rights before initiating a conversation. Officer Adair then transported Anderson to an interview room in the downtown Phoenix precinct.

¶9 The state charged Anderson with one count of first degree murder, a class one dangerous felony; two counts of attempted first degree murder, each a class two dangerous felony and domestic violence offense; one count of attempted first degree murder, a class two dangerous felony; two counts of aggravated assault, each a class three dangerous felony and domestic violence offense; and one count of aggravated assault, a class three dangerous felony. The state further alleged three aggravating factors:

> (1) the infliction or threatened infliction of serious physical injury; (2) the use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime, specifically: gun; (3) the offense caused physical, emotional, or financial harm to the victim, or if the victim died as a result of the conduct of the defendant, caused emotional or financial harm to the victim's immediate family.

Anderson pled not guilty, and in March 2014, he filed a motion to suppress his confession. The court conducted an evidentiary hearing and addressed Anderson's motion. The court found that Anderson's statements were

---

2 *Miranda v. Arizona*, 348 U.S. 436 (1966).

"voluntarily, knowingly, and intelligently made as shown by the state by a preponderance of the evidence."

¶10 During pretrial motions, Anderson filed a motion to change the place of trial. Anderson argued that he was "[in] the newspaper" and felt that "[he] would not get a fair trial" because of "how people feel about [him]." The court denied the motion, holding that there was no adverse pretrial publicity of an overwhelming nature and there was an insufficient legal basis for Anderson's request.

¶11 Additionally, Anderson requested an evaluation under Ariz. R. Crim. P. ("Rule") 11, which was approved by the court. Based on the evaluation, the court found Anderson to be competent. Anderson also submitted mitigation information from various doctors concerning his mental health. While there is no indication in the record as to the effect Anderson's mental health had as a mitigating factor, the court did comment about the issue at sentencing, stating, "I do think that you have some mental health issues and I think that those things need to be addressed. And I think your mental health issues explain some of the reasons why we're here."

¶12 Trial began on November 4, 2015. In the interim, the court granted approximately 15 trial continuances. The record shows that each continuance was granted because either Anderson or his counsel filed a motion for a continuance, there were extraordinary circumstances that caused a delay indispensable to the interest of justice, or both. In several orders, the court excluded time.

¶13 Anderson was found guilty of the first degree murder of L.W., the attempted first degree murders of both N.H. and H.M., and the aggravated assault of N.H., H.M., and D.M. After trial, the court entered judgment on the jury's verdicts. Balancing the aggravating factors against mitigating factors, the court sentenced Anderson to prison terms of life with the possibility of parole after 25 years for the first degree premeditated murder of L.W. (Count 1), 10.5 years for the attempted first degree murder of H.M. (Count 3), 7 years for the attempted first degree murder of N.H. (Count 4), 7.5 years for the aggravated assault of H.M. (Count 5), 7.5 years for the aggravated assault of D.M. (Count 6), and 7 years for the aggravated assault of N.H (Count 7). Counts 3, 5, and 6 are to be served consecutive to Count 1. Counts 4 and 7 are to be served consecutive to Counts 3, 5, and 6. Count 3 is concurrent with Counts 5 and 6 and Count 4 is concurrent with Count 7. Anderson received a presentence incarceration credit of 1,823 days for Counts 1, 5, 6, and 7. Anderson timely appeals.

DISCUSSION

I. ANDERSON'S ARGUMENTS DO NOT IDENTIFY FUNDAMENTAL ERROR.

¶14 In his supplemental brief, Anderson argues the court acted improperly in several respects. We conclude that none of Anderson's arguments identify fundamental error.

A. Anderson's Motion to Suppress the Confession Was Properly Denied.

¶15 Anderson first contends that the motion to suppress his confession was improperly denied and he was not given an evidentiary hearing on the matter. We disagree — the record shows otherwise. If questions of voluntariness as to a confession are raised, the court must hold a hearing. *State v. Goodyear*, 100 Ariz. 244, 248 (1966). After the hearing, the judge must make "a definite determination" as to the voluntariness of the confession. *Id.* at 249. The record shows that an evidentiary hearing was held on February 5, 2014. The court then issued a ruling finding that Anderson's statements were made voluntarily, knowingly, and intelligently. The state met its burden by a preponderance of the evidence.

B. The Record Reveals No Prosecutorial Misconduct.

¶16 Anderson next argues that the prosecutor engaged in misconduct when she referred to his mental health and character before he or his counsel had the opportunity to do so during trial. We find no evidence in the record to support Anderson's contention. To the contrary, Anderson's mental health was first introduced by the defense on direct examination of D.M., during which she stated that her son had schizophrenia.

C. The Jury Instructions Were Proper.

¶17 Anderson argues that the jury instructions were improper because they failed to include instructions on manslaughter, negligent homicide, defense of a third person, and second degree murder. The court's final jury instructions included instructions on manslaughter, defense of a third person, and second degree murder. For that reason, we only consider the absence of a negligent homicide instruction on appeal. We find no error in the jury instructions. The superior court has the discretion to refuse a jury instruction on a grade of homicide when it is not reasonably supported by the evidence. *State v. Ruelas*, 165 Ariz. 326, 328 (App. 1990); *see also State*

v. Moody, 208 Ariz. 424, 469, ¶ 206 (2004). For a defendant to be entitled to a lesser-included-offense instruction, there must be "evidence from which the jury could convict on the lesser offense and find that the state had failed to prove an element of the greater offense." *Ruelas*, 165 Ariz. at 328. Negligent homicide is a proper instruction when the defendant is not aware of the substantial and unjustifiable risk that his conduct has of causing the death of another person. *Id.* In the present case, there was no evidence to support a conviction on the lesser offense.

D. Anderson's Motion to Change the Place of Trial was Properly Denied.

¶18 Anderson further contends that the court wrongly denied his motion for a change of venue. We disagree. At the pretrial hearing, Anderson argued that he was concerned about how people's sentiments about him would affect his right to a fair trial. As the superior court correctly found, a presumption of prejudice against Anderson does not exist, unless pretrial publicity "is so pervasive and extensive that it creates a 'carnival atmosphere.'" *State v. Smith*, 160 Ariz. 507, 512 (1989). When no such presumption exists, the party requesting the change of venue has the burden of proving that publicity about the trial may result in the deprivation of a fair trial. *Id.* Anderson made no such showing and the superior court properly denied his motion.

E. The Court Did Not Err in Denying Anderson's Request to Dismiss for Lack of Speedy Trial.

¶19 Anderson next argues that the charges against him should have been dismissed because he was denied a speedy trial. We perceive no error. Under Rule 8, a defendant must be afforded a speedy trial. *State v. Spreitz*, 190 Ariz. 129, 136 (1997); *see also* U.S. Const. amend. VI; Ariz. Const. art. 2, § 24. A defendant in a case not designated as complex shall be tried within "150 days from arraignment if the person is held in custody." Rule 8.2(a)(1). A defendant may waive the right to a speedy trial if he does not object to the denial in a timely manner. *Spreitz*, 190 Ariz. at 138. The record shows that Anderson waived his right to a speedy trial when either he or his counsel requested continuances throughout the duration of the case. In some instances, there were extraordinary circumstances delaying the trial and even then, Anderson did not object. There was no error, fundamental or otherwise.

F. The Court's Reference to Anderson's Mental Health During Sentencing was Not Prejudicial or Biased.

¶20 Anderson asserts that the court discussed his mental health at sentencing.[3] We discern no error. Judges are presumed to be free from prejudice and bias at all stages of the process and a defendant must prove otherwise to rebut the presumption. *State v. Ramsey*, 211 Ariz. 529, 541, ¶ 38 (App. 2005). Anderson fails to describe how or why the court's comments prejudiced him or reflected bias. Anderson's mental health was an issue throughout the case and at some points, admitted by him through his request for Rule 11 evaluations. Moreover, Anderson mentioned his mental health in the mitigation report submitted to the judge.

G. The Misspelling of Victims' Names in the Police Report is Irrelevant.

¶21 Finally, Anderson contends that the victims' names were misspelled in the police report. There is no evidence that the misspelling of names had any bearing upon the outcome of the case. The victims were still able to attend the trial and testify.

II. OUR INDEPENDENT REVIEW OF THE RECORD REVEALS NO FUNDAMENTAL ERROR.

¶22 Our review of the record reveals no fundamental error. Anderson was present and represented at all critical stages. The record shows no evidence of jury misconduct, and the jury was properly comprised of 12 jurors. *See* A.R.S. § 21-102(A); Rule 18.1(a).

¶23 The evidence that the state presented at trial was properly admissible and was sufficient to support Anderson's convictions. Anderson was charged under A.R.S. § 13-1105(A)(1) for first degree murder and attempted first degree murder for Counts 1, 3, and 4. Under A.R.S. § 13-1105(A)(1), a person commits first degree murder if, with premeditation, he or she knowingly or intentionally acts to cause the death of another person. "Premeditation" means that the defendant intended to kill or knew that he would kill another human being and that after forming the intent or knowledge reflected on the decision before killing. A.R.S. § 13-1101(1); *State v. Thompson*, 204 Ariz. 471, 480, ¶ 32 (2003). Generally, to sustain a conviction of "attempted" murder, evidence of some overt act or

[3] In his supplemental brief, Anderson does not identify why the court's comments about his mental health were an issue. We infer that Anderson is concerned about prejudice or bias on behalf of the court.

steps taken toward the commission of murder and an intent to commit the crime is necessary. A.R.S. § 13-1001. The state produced evidence that Anderson went to get the gun from his stepfather's bedroom, he placed the gun in his waistband, and, before shooting L.W., N.H., and H.M., he was able to reflect upon whether he should do so. After some delay, Anderson intentionally fired the weapon, killing L.W. and wounding N.H. and H.M.

¶24 On Count 5, Anderson was charged under A.R.S. §§ 13-1203(A)(1) and -1204(A)(1)-(2) for aggravated assault. Under A.R.S. §§ 13-1203(A)(1) and -1204(A)(1)-(2), a person commits aggravated assault if he intentionally, knowingly, or recklessly causes physical injury to another and the injury is serious or the person used a deadly weapon or dangerous instrument. Here, the state presented evidence that Anderson intentionally fired a gun at H.M. while in the apartment, seriously wounding him.

¶25 On Count 6, Anderson was charged under A.R.S. §§ 13-1203(A)(2) and -1204(A)(2) for aggravated assault. Under A.R.S. §§ 13-1203(A)(2) and -1204(A)(2), a person commits aggravated assault if, when using a deadly weapon or dangerous instrument, he intentionally places another person in reasonable apprehension of imminent physical injury. Here, the state presented evidence that Anderson used a firearm to shoot at L.W. and N.H. in D.M.'s presence and that he followed D.M. out of the apartment, thereby placing her in reasonable apprehension of physical injury.

¶26 On Count 7, Anderson was charged under A.R.S. §§ 13-1203(A)(1) and -1204(A)(2) for aggravated assault. Under A.R.S. §§ 13-1203(A)(1) and -1204(A)(2), a person commits aggravated assault if, when using a deadly weapon or dangerous instrument, he intentionally, knowingly, or recklessly causes a physical injury. Here, the state presented evidence that Anderson used a firearm to shoot at N.H. and injured his bicep.

¶27 Counts 5 and 6 were found to be domestic violence offenses. An offense is designated as "domestic violence" if the relationship between the defendant and the victim is that of a parent-child or stepparent-child. A.R.S. § 13-3601. In the present case, Counts 5 and 6 involve acts of violence against Anderson's mother D.M. and stepfather H.M. At sentencing, Anderson was given an opportunity to speak, and the court stated on the record the evidence and materials it considered and the factors it found in imposing sentence. The court imposed legal sentences for the offenses, *see* A.R.S. §§ 13-704(A), -1001(C)(1), -1105(D), -1203(A), -1204(A), and correctly

calculated Anderson's presentence incarceration credit under A.R.S. § 13-712(B).[4]

CONCLUSION

¶28 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300. Accordingly, we affirm Anderson's convictions and sentences.

¶29 Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584–85 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Anderson of the status of this appeal and his future options. *Id.* Anderson has 30 days from the date of this decision to file a petition for review *in propria persona*. *See* Rule 31.19(a). Upon the court's own motion, Anderson has 30 days from the date of this decision in which to file a motion for reconsideration.

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

[4] Anderson received presentence incarceration credit on counts that run consecutively. "When consecutive sentences are imposed, a defendant is not entitled to presentence incarceration credit on more than one of those sentences . . . ." *State v. McClure*, 189 Ariz. 55, 57 (App. 1997). Imposition of an illegal sentence is fundamental error. *State v. Joyner*, 215 Ariz. 134, 137, ¶ 5 (App. 2007). However, the state did not appeal the presentence incarceration credit and Anderson was not prejudiced by the grant of the credit. *See State v. Dawson*, 164 Ariz. 278, 279 (1990) (holding that "the state's failure to timely appeal or cross-appeal acts as a jurisdictional bar to its raising the error in defendant's appeal").