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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

JOSEPH ALBERT TELLEZ, *Appellant*.

No. 1 CA-CR 17-0264
FILED 9-11-2018

Appeal from the Superior Court in Maricopa County
No. CR2016-101050-001
The Honorable Sherry K. Stephens, Judge

AFFIRMED

COUNSEL

The Law Office of Kyle T. Green, P.L.L.C., Tempe
By Kyle Green
Counsel for Appellant

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

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MEMORANDUM DECISION

Presiding Judge James B. Morse Jr. delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Lawrence F. Winthrop joined.

M O R S E, Judge:

¶1 Joseph Albert Tellez timely appeals his conviction and sentence for three counts of attempted aggravated assault, class four dangerous felonies. After searching the entire record, Tellez's defense counsel identified no arguable question of law that is not frivolous. Therefore, in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), defense counsel asks this court to search the record for fundamental error. Tellez filed a supplemental brief in propria persona, which this court considered. Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On March 2, 2013, R.R. was having a barbeque and drinking in his front yard with his wife and daughters. Throughout the evening, R.R. invited his neighbor A.C., his friend C.P., and C.P.'s girlfriend M.P. to join the barbeque. Later that evening, R.R.'s cousin arrived at R.R.'s home with Tellez. Other than the cousin, no one had met Tellez before that night. The cousin and Tellez had not been invited, but R.R. gave each of them a beer. While R.R. was talking with his cousin on the side of the house, Tellez and C.P. started to argue, and C.P. offered to fight Tellez in the street. R.R. and M.P. tried to defuse the situation, but the argument continued. While R.R. and M.P. were not looking, Tellez shot C.P. C.P. stumbled back, and R.R. helped him to the ground. Tellez retreated to his car while pointing his gun at R.R., M.P., and A.C. R.R. took the gun that C.P. had been carrying in a holster on his belt and fired several shots as Tellez and the cousin drove away. C.P. died from the gun shot. DNA testing performed on a beer can at the scene matched Tellez.

¶3 Tellez was charged via indictment with second degree murder, a class 1 dangerous felony; three counts of endangerment, class 6 dangerous felonies (one count each for R.R., A.C., and M.P.); three counts of attempted aggravated assault, class 4 dangerous felonies (one count each for R.R., A.C., and M.P.); disorderly conduct, a class 6 dangerous felony;

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and misconduct involving weapons, a class 4 dangerous felony. Tellez pled not guilty to the charges. Before trial, the State filed a motion to dismiss the endangerment and disorderly conduct charges, which the superior court granted. The parties stipulated that C.P.'s cause of death was a single gunshot wound to the chest and that buccal swabs were taken from the beer can at the scene and from Tellez. At trial, R.R., R.R.'s wife, and M.P. testified. The first officer to respond on the ground, a crime scene specialist who worked the scene, and the DNA analyst who processed the buccal swabs also testified. At the end of the State's case, Tellez moved for a directed verdict as to the attempted aggravated assault of A.C., which the court denied. The jury found Tellez guilty of the three attempted aggravated assault charges and acquitted him of second degree murder. The jury also found that each of the aggravated assault charges was a dangerous felony. The State dismissed the remaining charge for misconduct involving a weapon.

¶4 The superior court conducted the sentencing hearing in compliance with Tellez's constitutional rights and Arizona Rule of Criminal Procedure ("Rule") 26. Tellez admitted to two prior felony convictions. Family of C.P., Tellez, and Tellez's daughter spoke at the sentencing hearing. The court considered aggravating and mitigating factors and sentenced Tellez to an aggravated term of 7 years for each count—two counts concurrent, and one consecutive. Tellez was given credit for 463 days of presentence incarceration.

DISCUSSION

¶5 "We view the facts in the light most favorable to sustaining the convictions with all reasonable inferences resolved against the defendant." *State v. Harm*, 236 Ariz. 402, 404 n.2 (App. 2015).

¶6 Tellez raises several challenges to the proceedings in the superior court. First, he argues the court erred in denying his motion to remand the indictment to the grand jury for a new finding of probable cause because there was uncertainty as to whether 13 or 14 grand jury members were present. "An indictment requires the concurrence of at least 9 grand jurors, regardless of the number of grand jurors hearing a matter." Ariz. R. Crim. P. 12.6(a). "Absent an indictment that the state knew was partially based on perjured, material testimony, defendant may not challenge matters relevant only to the grand jury proceedings by appeal from conviction." *State v. Murray*, 184 Ariz. 9, 32 (1995). Because Tellez did not claim perjured testimony, we affirm the superior court's denial of his motion to remand.

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¶7 Tellez argues the January 19, 2016, grand jury indictment was not filed with the court until February 11, 2016, in violation of Rule 13.2, which requires the State file the indictment within 10 days of the probable cause finding. However, the indictment was filed with the superior court on the day it was issued, January 19, 2016, in compliance with Rule 13.2.

¶8 Tellez argues that the trial jury was tampered with because someone in the gallery took pictures of the jury. A defendant is entitled to a new trial for juror misconduct "if the defense shows actual prejudice or if prejudice may be fairly presumed from the facts." *State v. Miller*, 178 Ariz. 555, 558 (1994). After two jurors told the bailiff that they saw someone taking pictures with a cell phone, the court investigated the allegation. The court questioned members in the gallery, including the person meeting the jurors' description, and he admitted to taking a call earlier in the day but denied taking photographs, which was confirmed when his phone was voluntarily searched. The court questioned the two jurors individually and dismissed one of the jurors because that juror did not feel she could be fair and impartial. Because the court dismissed the only juror who was unable to continue, and no prejudice was shown or could be presumed, Tellez's jury tampering allegation is without merit.

¶9 Tellez argues that the jurors discussed the alleged jury tampering before the end of trial, violating Rule 19.3. The dismissed juror had advised the court that she discussed what she saw with the rest of the jury while in the jury room. However, the jury's discussion of the incident was unrelated to "any subject connected with the trial." *See* Ariz. R. Crim. P. 19.3(a). Further, the court advised the remaining jurors of the alleged incident and the investigation results. The remaining jurors admitted to not seeing the incident and agreed that they could be fair and impartial. Therefore, the admonition by the court was sufficient to correct any error.

¶10 Tellez argues there was judicial and prosecutorial misconduct for three reasons. We disagree. First, he argues that a witnesses provided false testimony. "The credibility of witnesses and the weight given to their testimony are issues for the jury, not the court." *State v. Bustamante*, 229 Ariz. 256, 258, ¶ 5 (App. 2012). Second, he argues that the State did not call one of the detectives who was listed in the pretrial statement. However, he does not cite any authority requiring the State to call every listed witness. Further, Rule 15.4 prohibits a party from commenting on the failure to call a witness that was listed unless the court finds the "inclusion of the witness's name . . . constituted an abuse of the applicable disclosure rule." Ariz. R. Crim. P. 15.4(c). Here, Tellez did not object to the failure to call the witness and the court did not make such a finding. Third, he argues that

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the jury was improperly denied access to exculpatory evidence that was used to refresh a witness's memory but not admitted into evidence. A witness may be shown a transcript to refresh her memory, even though the transcript is not admitted into evidence. *Ariz. R. Evid.* 612; *State v. Ortega*, 220 Ariz. 320, 330, ¶ 33 (App. 2008). The jury may not consider items that are not admitted into evidence. *State v. Turrentine*, 122 Ariz. 39, 41 (App. 1979). In short, on this record we find no inappropriate action by the prosecutor nor judicial error concerning these issues.

¶11 Tellez next argues that a detective coerced a witness into making an identification from a photographic lineup and that the witness had identified a different person during two previous photographic lineups. Because Tellez did not object to the introduction of the lineups during trial, we limit our review to fundamental error. *State v. Burton*, 144 Ariz. 248, 250 (1985). Tellez had an opportunity to cross-examine the witness and draw out the inconsistencies in her identification. *See State v. Moore*, 222 Ariz. 1, 9, ¶ 29 (2009) (stating that inconsistencies and issues regarding the reliability of an identification witness "affect the weight, rather than the admissibility, of [the] identification and [are] appropriately the subject of cross-examination"). Further, if the admission of the identification was an error, the error was harmless because two other witnesses identified Tellez and uncontroverted DNA evidence connected Tellez to the scene. *See State v. Richardson*, 18 Ariz. App. 329, 331 (1972) (finding harmless error based on considerable other evidence identifying the defendant, apart from the lineup). Because there was sufficient evidence identifying Tellez, we find that any error relating to the introduction of the lineup evidence was harmless.

¶12 Tellez also argues that he had not reviewed the presentence report prior to the sentencing. He further argues that the report was inaccurate because he did not refuse to provide a statement but had wanted his attorney present when he gave a statement. Because Tellez did not object to the admission of the presentence report, absent fundamental error, which we do not find, Tellez has waived this issue on appeal. *State v. Amaya-Ruiz*, 166 Ariz. 152, 179 (1990). After the jury returned a guilty verdict, the court ordered a presentence report, pursuant to Rule 26.4. At the sentencing hearing, the court acknowledged it received and considered the report. While Tellez did not provide a statement for the presentence report, he was given a full opportunity during the sentencing hearing to address the court. As such, we do not find fundamental error.

¶13 Tellez next argues that he was denied the opportunity to confront one of the victims. At the close of the State's case, Tellez moved

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for a directed verdict as to the attempted aggravated assault of A.C., who had not testified. The court denied his motion because there was substantial evidence to support the charge, even though the victim had not testified. The United States and Arizona constitutions guarantee Tellez the right to confront witnesses. U.S. Const. amend. VI; Ariz. Const. art. 2, § 24. In this context, "confrontation" means the right to cross-examine a witness who has provided adverse testimony. Because neither the State nor Tellez called the victim as a witness, Tellez was not denied this constitutional right.

¶14 Finally, Tellez argues that the members of C.P.'s family should not have been allowed to speak at the sentencing because he was acquitted of the charge against C.P. Tellez objected to the statements before they were made, and the court allowed the statements, even though it believed the objection was appropriate. At a presentencing hearing parties may present "any reliable, relevant evidence, including hearsay, to show aggravating or mitigating circumstances" Ariz. R. Crim. P. 26.7(b)(2). While some of the family members' testimony related to C.P., they also spoke to Tellez's actions before, during, and after the crimes for which he was convicted. In general, "we presume the trial judge will ignore irrelevant information." *State v. Mann*, 188 Ariz. 220, 228 (1997). In this case, the court, before issuing the sentences, reiterated that the jury found Tellez not guilty of the offense against C.P. and explicitly stated that the court was not sentencing Tellez for that offense. The court went on to list the aggravating and mitigating factors considered in sentencing, all of which were proper and relevant. Because the record supports the presumption that the superior court properly ignored any irrelevant testimony, there was no reversible error. See *State v. Powers*, 200 Ariz. 123, 128-29, ¶ 20 (App. 2001) (finding no reversible error when trial court heard testimony from family of deceased pedestrian, even though defendant was being sentenced for leaving scene of accident – not for causing death of pedestrian).

¶15 In addition to evaluating the arguments raised in Tellez's supplemental brief, we have conducted an independent review of the entire record. Our review also reveals no fundamental error. See *Leon*, 104 Ariz. at 300 ("An exhaustive search of the record has failed to produce any prejudicial error."). The proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. The record reveals that Tellez was represented by counsel and was present at all critical stages of the proceedings. See *State v. Conner*, 163 Ariz. 97, 104 (1990) (right to counsel at critical stages); *State v. Bohn*, 116 Ariz. 500, 503 (1977) (right to be present at critical stages). The jury was properly comprised of twelve jurors, and the record shows no evidence of juror misconduct. See Ariz. Rev. Stat.

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("A.R.S.") § 21-102(A); Ariz. R. Crim. P. 18.1. The trial court properly instructed the jury on the elements of the charged offenses, the State's burden of proof, the necessity of a unanimous verdict, and the presumption of innocence. At sentencing, Tellez was given an opportunity to speak, and the court explained the basis for imposing the sentence. *See* Ariz. R. Crim. P. 26.9, 26.10. Additionally, the court imposed an appropriate sentence within the statutory limits. *See* A.R.S. § 13-704.

CONCLUSION

¶16 Tellez's convictions and sentences are affirmed. Defense counsel shall inform Tellez 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).

¶17 Tellez has thirty days from the date of this decision to proceed, if he wishes, with an *in propria persona* motion for reconsideration or petition for review.



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