

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

PABLO ORTIZ, JR., *Appellant*.

No. 1 CA-CR 17-0574
FILED 5-15-2018

Appeal from the Superior Court in Maricopa County
No. CR2016-002099-001
The Honorable Joan M. Sinclair, Judge

AFFIRMED

COUNSEL

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

Maricopa Public Defender's Office, Phoenix
By Paul J. Prato
Counsel for Appellant

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MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge James B. Morse Jr. joined.

J O N E S, Judge:

¶1 Pablo Ortiz, Jr. appeals his conviction and sentence for one count of aggravated assault. After searching the entire record, Ortiz’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. Ortiz was granted an opportunity to file a supplemental brief *in propria persona* and did not do so. After reviewing the entire record, we find no error. Accordingly, Ortiz’s conviction and sentence are affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 On March 26, 2016, Ortiz was arrested and transported to a detention facility in Glendale.¹ Ortiz initially cooperated, but during the pat-down search he spun around, grabbed onto the uniformed detention supervisor’s sleeve, and fell to the ground. Ortiz maintained his hold on the supervisor’s shirt and kicked him repeatedly in the thighs while yelling “rape.” Ortiz continued to kick the supervisor despite receiving a drive stun with a TASER, knee strike, elbow strike, and a closed-fist strike to the face from the supervisor and assisting officer. The supervisor eventually subdued Ortiz, consistent with his training on the use of physical force, with a second elbow strike, and then moved Ortiz to a locked cell.

¶3 The State charged Ortiz with one count of aggravated assault. At trial, Ortiz’s counsel argued he acted in self-defense.

¶4 Although the case agent timely requested video surveillance of the incident, the video was not preserved or copied. By the time the case

¹ “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, ¶ 2 (App. 2015) (quoting *State v. Valencia*, 186 Ariz. 493, 495 (App. 1996)).

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agent realized the mistake, the relevant footage had been recorded over and was not available to the defense. Accordingly, the jury was instructed that if it found the explanation for the failure to preserve the evidence to be inadequate, it could infer the evidence would have been unfavorable to the State. *See State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62 (1999); *State v. Willits*, 96 Ariz. 184, 191 (1964).

¶5 Ortiz's counsel moved unsuccessfully for a judgment of acquittal, and the jury convicted Ortiz as charged. After a separate aggravation hearing, at which Ortiz's probation officer testified, the jury found Ortiz committed the offense while on probation for a felony offense. Ortiz then admitted he had two prior felony convictions.

¶6 The trial court sentenced Ortiz to the presumptive term of five years' imprisonment and credited him with 409 days' presentence incarceration. Ortiz timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1),² 13-4031, and -4033(A)(1).

DISCUSSION

¶7 Our review reveals no fundamental error. *See Leon*, 104 Ariz. at 300 ("An exhaustive search of the record has failed to produce any prejudicial error."). A person is guilty of aggravated assault if: (1) the person "knowingly touch[es] another person with the intent to injure, insult or provoke such person," (2) the person is imprisoned or in the custody of a city or county detention facility, and (3) the person "know[s] or ha[s] reason to know that the victim is acting in an official capacity as an employee of [the detention facility]." A.R.S. §§ 13-1203(A)(3), -1204(A)(10). The record contains sufficient evidence upon which the jury could determine beyond a reasonable doubt that Ortiz attacked a person he knew was a detention officer while detained at a detention facility.

¶8 All the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Ortiz was represented by counsel at all stages of the proceedings and was present at all critical stages including the entire trial and the verdict. *See State v. Conner*, 163 Ariz. 97, 104 (1990) (right to counsel at critical stages) (citations omitted); *State v. Bohn*, 116 Ariz. 500, 503 (1977) (right to be present at critical stages). The jury was properly comprised of eight jurors, and the record

² Absent material changes from the relevant date, we cite a statute's current version.

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shows no evidence of jury misconduct. *See* A.R.S. § 21-102; Ariz. R. Crim. P. 18.1(a). The trial court properly instructed the jury on the elements of the charged offenses, the State's burden of proof, and Ortiz's presumption of innocence. At sentencing, Ortiz 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 the sentences. *See* Ariz. R. Crim. P. 26.9, 26.10. Additionally, the sentences imposed were within the statutory limits. *See* A.R.S. §§ 13-703(C), (J), -708(A).

CONCLUSION

¶9 Ortiz's conviction and sentence are affirmed.

¶10 Defense counsel's obligations pertaining to Ortiz's representation in this appeal have ended. Defense counsel need do no more than inform Ortiz of the outcome of this appeal and his future options, unless, upon review, counsel finds an issue appropriate for submission to our supreme court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85 (1984).

¶11 Ortiz has thirty days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. *See* Ariz. R. Crim. P. 31.21. Upon the Court's own motion, we also grant Ortiz thirty days from the date of this decision to file an *in propria persona* motion for reconsideration.



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