

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

DANIEL SCOTT DOMINGUEZ, *Appellant*.

No. 1 CA-CR 18-0140; 1 CA-CR 18-0676; 1 CA-CR 18-0680;
1 CA-CR 18-0681 (Consolidated)
FILED 7-30-2019

Appeal from the Superior Court in Maricopa County
No. CR2017-135475-001; CR2009-177203-001;
CR2006-165511-001; CR2006-145668-002
The Honorable Ronda R. Fisk, Judge

AFFIRMED

COUNSEL

Maricopa County Public Defender's Office, Phoenix
By Mikel Steinfeld
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Eric Knobloch
Counsel for Appellee

Daniel Scott Dominguez, Buckeye
Appellant

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MEMORANDUM DECISION

Presiding Judge James B. Morse Jr. delivered the decision of the Court, in which Judge Jon W. Thompson¹ and Chief Judge Peter B. Swann joined.

M O R S E, Judge:

¶1 Dominguez appeals his convictions and resulting probation revocations and sentences. After searching the entire record, Dominguez'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. Dominguez filed a supplemental brief in propria persona, which this Court considered. Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Dominguez lived with K.E. and her 4-year-old son ("Child"). Dominguez's 13-year-old niece ("Babysitter") often babysat Child. Dominguez frequently picked up Child from Babysitter.

¶3 After being in a relationship for around nine months, Dominguez suspected that K.E. had been unfaithful to him. The next day, K.E. dropped off Child with Babysitter and went to work. Dominguez called K.E. at work and demanded that she come home. Once K.E. was home, Dominguez used a "prop" or "stage" gun (*i.e.*, one that appeared to be a normal gun, but with a plugged barrel) to force her into her car. Then he drove her to an unknown location in Phoenix. When he stopped to relieve himself on the side of the road, K.E. took control of the gun and escaped by flagging down a good Samaritan. The good Samaritan drove K.E. to the home where Babysitter was with Child. K.E. tried to leave with Child, but before she could, Dominguez arrived. K.E. hid in a bedroom with Child and called 911. Dominguez entered the home, banged on the bedroom door until it opened, grabbed Child from the bedroom, and left. K.E. tried to stop him and begged for him to leave Child with her, but he did not stop. In fact, he grabbed K.E. by the hair and dragged her with him.

¹ The Honorable Jon W. Thompson passed away on July 22, 2019. Judge Thompson signed this decision before his death.

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He then got in the car with Child and slowly drove the car while still holding K.E. by the hair. After a few feet, he let go of K.E. and continued driving without her. Babysitter's adult brother called 911.

¶4 Police arrived shortly after Dominguez left, and began asking K.E. about the incident. Police also recovered the gun and discovered that it was not functional. After a few hours, Dominguez was involved in a collision and the police found him and Child near the damaged vehicle. Child had a sore shoulder from the collision.

¶5 Dominguez was convicted of unlawful imprisonment, aggravated assault, criminal damage, kidnapping, child abuse, and burglary. At his sentencing hearing, the judge revoked probation in three other cases. Dominguez appealed his convictions and sentences. He also appealed the revocation of his probation in the other cases. 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 -4033(A)(1)

DISCUSSION

¶6 In his supplemental brief, Dominguez argues that the superior court erred when it admitted video of K.E. discussing the events of that day with the police officer. K.E. did not testify at trial and was not available for cross-examination. Therefore, Dominguez argues that his Sixth Amendment right of confrontation was violated. We review de novo a superior court's decision to admit evidence over a Confrontation Clause objection. *State v. Damper*, 223 Ariz. 572, 575, ¶ 7 (App. 2010).

¶7 The testimonial statement of a witness who does not testify at trial is only admissible under the Sixth Amendment if the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53-59 (2004). "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822 (2006). To determine the primary purpose of an interrogation, courts look to the circumstances in which the statement was made, as well as the statements and actions of both the interrogators and the declarant. *Michigan v. Bryant*, 562 U.S. 344, 367 (2011).

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¶8 Officer Martinson questioned K.E. a few minutes after Dominguez left with Child. The kidnapping was an ongoing emergency that continued until Child was found. The questions Martinson asked directly related to understanding and resolving that ongoing emergency. He asked about Dominguez's identity, the vehicle Dominguez was driving, Dominguez's relationship with the child and K.E., and whether Dominguez was armed. He also asked about the events that led to the kidnapping. Everything he asked directly related to the ongoing emergency.

¶9 K.E. expressed an unwillingness to implicate Dominguez, once saying, "I'm talking too much," and another time bemoaning that if he knew she talked with police, he would kill her. Nevertheless, she continued talking, saying, "I just want my son." The ongoing emergency, Officer Martinson's questions, and K.E.'s statements objectively show that the primary purpose of the interrogation and statements was not to prosecute Dominguez, but to find Child. Therefore, the statements were nontestimonial and the court did not err in admitting them. *See State v. Boggs*, 218 Ariz. 325, 337-38, ¶¶ 57-58 (2008) (finding statements are not testimonial when "circumstances in which [declarant] made the statements indicate that she was seeking aid for herself and the others . . . to meet an ongoing emergency"); *see also Bryant*, 562 U.S. at 375 (holding that a dying victim's response to police's question "[w]hat happened," was nontestimonial when shooter's location was not known).

¶10 Dominguez also argues that there was insufficient evidence to support a conviction for burglary because Babysitter's father allowed Dominguez in the house and Dominguez had frequently come in the house to pick up Child. We will not reverse a conviction if a reasonable jury could have found the elements of the offense proven beyond a reasonable doubt. *State v. Tillmon*, 222 Ariz. 452, 456, ¶ 18 (App. 2009). To prove burglary, the State was required to show that Dominguez entered or remained unlawfully in the home with the intent to commit theft or any felony therein. A.R.S. § 13-1507. "[A]lthough a person enters another's premises lawfully and with consent, his presence can become unauthorized, unlicensed, or unprivileged if he remains there with the intent to commit a felony." *State v. Altamirano*, 166 Ariz. 432, 435 (App. 1990). The evidence was sufficient to show that Dominguez remained in the home after forming the intent to commit a felony—kidnapping. In addition, Babysitter's brother testified that when Dominguez began banging on the bedroom door, their father asked Dominguez to leave, but Dominguez stayed until he grabbed Child. Thus, a reasonable jury could find that Dominguez remained unlawfully with the intent to kidnap Child, regardless of whether Dominguez's initial entry was authorized.

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¶11 In addition to evaluating the arguments raised in Dominguez's supplemental brief, we have conducted an independent review of the record. This review revealed 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 Dominguez 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* A.R.S. § 21-102(A); 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, the necessity of a unanimous verdict, and the presumption of innocence. At sentencing, Dominguez 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 appropriate sentences within the statutory limits.

CONCLUSION

¶12 Dominguez's convictions, revocations of probation, and sentences are affirmed. Defense counsel shall inform Dominguez 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).

¶13 Dominguez 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