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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

DAVID RUBEN CONTRERAS, *Appellant*.

No. 1 CA-CR 18-0325
FILED 8-6-2019

Appeal from the Superior Court in Maricopa County
No. CR2014-002658-002
The Honorable Jose S. Padilla, Judge

AFFIRMED

COUNSEL

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

Michael J. Dew Attorney at Law, Phoenix
By Michael J. Dew
Counsel for Appellant

David Ruben Contreras, Florence
Appellant

STATE v. CONTRERAS
Decision of the Court

MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge David D. Weinzweig joined.

P E R K I N S, Judge:

¶1 David Ruben Contreras appeals his convictions and sentences for first degree felony murder, attempted armed robbery, and aggravated assault. After searching the entire record, Contreras’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. Contreras was granted an opportunity to file a supplemental brief in *propria persona* and has done so. After reviewing the entire record, we reject the arguments raised in Contreras’s supplemental brief and find no error. Accordingly, we affirm Contreras’s convictions and sentences.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 “We view the facts in the light most favorable to sustaining the convictions with all reasonable inferences resolved against the defendant.” *State v. Valencia*, 186 Ariz. 493, 495 (App. 1996). In the early morning hours of September 13, 2014, Contreras and his cousin Brian Streeter went to an apartment shared by the victims, E.F. and J.M. With Contreras acting as “back-up,” Streeter pointed a gun at the victims, demanded money, and took E.F.’s cellular phone. Contreras yelled that one of the victims moved and Streeter opened fire, shooting E.F. in the head and J.M. in the arm. E.F. died in the hospital from a gunshot wound to the head.

¶3 Contreras and Streeter fled the apartment complex. Hearing the gunshots, a resident of the complex saw multiple men run to a vehicle and copied the license plate for police. The vehicle was registered to a close relative of both Contreras and Streeter. When police searched the vehicle, they found a memory card from E.F.’s cellular phone. E.F.’s wallet was also missing from the crime scene.

¶4 When questioned by police, both Contreras and Streeter denied involvement. Contreras, however, made spontaneous statements

STATE v. CONTRERAS
Decision of the Court

that he should have fled Phoenix and could receive life imprisonment. Contreras's then-girlfriend eventually told police that Contreras confessed to her and asked her to tell police he was with her that night, thereby providing a false alibi.

¶5 Through forensic testing, analysts linked Streeter's gun to the bullet that killed E.F. and located his DNA profile on a bullet casing found at the crime scene. The police subpoenaed various cellular service providers and used cell-site information to further link Contreras and Streeter to the offenses.

¶6 The State charged Contreras and Streeter with first degree felony murder, a class 1 felony (count one), attempted armed robbery, a class 3 felony (count two), and aggravated assault, a class 3 felony (count three). Before trial, Contreras moved to sever his case from Streeter's case and renewed this motion multiple times throughout the proceedings. The trial court heard argument and refused to sever the cases. Contreras proceeded to trial.

¶7 During jury selection, the State disclosed cell-site information and a cellular phone extraction report from E.F.'s memory card. The State argued the items were referenced in previously disclosed police reports and Contreras could have sought out the information through his own investigator. The trial court ultimately found that reasonable efforts by Contreras would have yielded the newly disclosed information and denied Contreras's motion to preclude.

¶8 At trial, Contreras testified that neither he nor Streeter were directly involved, but admitted he was sitting in the vehicle when other individuals committed the offenses and he was armed with a gun at the time. He further admitted to having three prior felony convictions. Streeter did not testify.

¶9 Contreras's counsel moved unsuccessfully for judgment of acquittal based on insufficient evidence, and the jury returned guilty verdicts on all counts. The jury also found one aggravating factor applied to counts one and three, and two aggravating factors applied to count two. Based on Contreras's admissions during trial, the trial court found the State proved he had three historical prior felony convictions.

¶10 The court sentenced Contreras to concurrent prison terms, the longest of which is life imprisonment with the possibility of release after 25 years, with 1,327 days of presentence incarceration credit. Contreras now appeals.

STATE v. CONTRERAS
Decision of the Court

DISCUSSION

I. Issues Raised in Contreras's Supplemental Brief.

a. Sufficiency of the Evidence.

¶11 Contreras argues insufficient evidence supports his convictions. He argues the only evidence against him was testimony from witnesses who lacked credibility.

¶12 When reviewing the sufficiency of the evidence, “[t]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Cox*, 217 Ariz. 353, 357, ¶ 22 (2007) (internal quotations omitted). Sufficient evidence exists even where conflicting evidence is presented, *State v. Flowers*, 110 Ariz. 566, 567 (1974), and may be direct or circumstantial, *State v. Henry*, 205 Ariz. 229, 232, ¶ 11 (App. 2003). We do not reweigh the evidence and will defer to the jury’s resolution of any inconsistencies therein. *See State v. Parker*, 113 Ariz. 560, 561 (1976). Moreover, we do not reweigh the credibility of witnesses because credibility determinations are for the jury, not this Court, to decide. *See State v. Bustamante*, 229 Ariz. 256, 258, ¶ 5 (App. 2012).

¶13 The record shows that, while armed with a deadly weapon and acting as Streeter’s accomplice, Contreras attempted to use or threaten force against the victims with the intent to take their property. *See Ariz. Rev. Stat. §§ 13-301(2), -1001(A)(3), 13-1902(A), -1904(A)(1)*. In the course of that offense, Streeter caused E.F.’s death and recklessly caused J.M. physical injury using a deadly weapon. *See A.R.S. §§ 13-301(2), -1105(A)(2), -1203(A)(1), -1204(A)(2)*.

¶14 Contreras willingly aided in the commission of the offenses and the law does not require proof that Contreras fired the shots. *See A.R.S. §§ 13-301(2), -1105(A)(2); State v. Noriega*, 187 Ariz. 282, 284–87 (App. 1996) (citation omitted). The lack of biological evidence against Contreras does not, on its own, constitute insufficient evidence. *See State v. Montano*, 121 Ariz. 147, 149 (App. 1978) (“[O]ne witness, if relevant and credible, is sufficient to support a conviction.”). Thus, sufficient evidence supports Contreras’s convictions.

STATE v. CONTRERAS
Decision of the Court

b. Severance.

¶15 Contreras argues the trial court erred in refusing to sever his case from Streeter’s case. He argues the weight of evidence against Streeter was more substantial than the evidence against him and resulted in a prejudicial “rub-off” effect. We review the denial of a motion to sever for an abuse of discretion and require the defendant to show “compelling prejudice” that the trial court failed to protect against. *State v. Prince*, 204 Ariz. 156, 159, ¶ 13 (2003).

¶16 Generally, multiple defendants charged with the same criminal offense may be joined. Ariz. R. Crim. P. 13.3(b). Because joinder is preferred, a defendant seeking severance must show joinder would prevent the “fair determination of guilt or innocence” or cause him prejudice. *See* Ariz. R. Crim. P. 13.4(a); *State v. Murray*, 184 Ariz. 9, 25 (1995) (citations omitted). Such prejudice occurs when: (1) evidence admitted against one defendant is facially incriminating to the other; (2) evidence admitted against one defendant has a “harmful rub-off effect” on the other; (3) there is significant disparity in the evidence introduced against the defendants; or (4) codefendants present antagonistic defenses. *Murray*, 184 Ariz. at 25.

¶17 Here, Contreras and Streeter presented harmonious defense theories. The evidence presented at trial was overlapping and incriminating to both Contreras and Streeter. “[T]he mere introduction of evidence concerning one defendant’s conduct that does not involve the other defendant generally does not constitute grounds for severance.” *State v. Van Winkle*, 186 Ariz. 336, 339 (1996). Moreover, the trial court instructed the jury to consider the charges against Contreras and Streeter separately and each count as a separate and distinct offense, and we presume jurors follow the court’s instructions. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68 (2006). The court did not abuse its discretion in denying Contreras’s motion to sever.

c. Ineffective Assistance of Counsel.

¶18 Contreras argues he received ineffective assistance of trial counsel. Ineffective assistance of counsel claims may only be brought in post-conviction relief proceedings under Arizona Rule of Criminal Procedure 32, and our supreme court has directed that “such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit.” *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9 (2002). Accordingly, we do not address this argument.

STATE v. CONTRERAS
Decision of the Court

II. Fundamental Error Review.

a. Cell-Site Information.

¶19 Next, we determine whether the cell-site information should have been suppressed because it was obtained without a search warrant, in violation of the Fourth Amendment. *See Carpenter v. United States*, 138 S. Ct. 2206 (2018). Because Contreras did not move to suppress the cell-site information or raise the issue on appeal, we review for fundamental error. *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018).

¶20 In *Carpenter*, 138 S. Ct. at 2218-21, the United States Supreme Court held that the acquisition of a defendant's cell-site information from a cellular service provider constitutes a search, and police must generally secure a search warrant to acquire such records. Before the decision in *Carpenter* was issued in 2018, however, federal courts had largely declined to recognize a warrant requirement for cell-site information. *See United States v. Graham*, 824 F.3d 421, 428 (4th Cir. 2016) (en banc) (collecting cases). The good-faith exception to the exclusionary rule applies to searches conducted in reasonable reliance on appellate precedent. *See State v. Jean*, 243 Ariz. 331, 342-43, ¶¶ 40, 47 (2018) (applying good-faith exception to warrantless search using global positioning system tracking device); *see also Elkins v. United States*, 364 U.S. 206, 217 (1960) (noting the exclusionary rule was "calculated to prevent, not to repair").

¶21 Because the warrant requirement established in *Carpenter* had not been recognized at the time of Contreras's arrest, the police acted under the reasonable belief their conduct was lawful and the good-faith exception applies. We find no fundamental error.

b. Remaining Issues.

¶22 Further review reveals no fundamental error. *See Leon*, 104 Ariz. at 300 ("An exhaustive search of the record has failed to produce any prejudicial error.").

¶23 All the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Contreras 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). Though the State untimely disclosed various cellular phone-related items, the record does not show the disclosure violation caused Contreras

STATE v. CONTRERAS
Decision of the Court

prejudice, impacted the jury's determination of innocence or guilt, or warranted preclusion. *See* Ariz. R. Crim. P. 15.1(b)(8); *State v. Jessen*, 130 Ariz. 1, 4 (1981) (the trial court's ruling on whether a disclosure violation warrants sanction will not be reversed absent showing of prejudice).

¶24 The jury was properly comprised of twelve jurors, and the record shows no evidence of juror misconduct. *See* A.R.S. § 21-102(B); Ariz. R. Crim. P. 18.1(a). The trial court properly instructed the jury regarding the elements of the charged offenses, the State's burden of proof, and the presumption of Contreras's innocence. Though the court failed to provide a complete oral instruction on each element of count three, aggravated assault, the elements of the offense were correctly listed in the final written instructions provided to the jury, remediating any error. *See State v. Bass*, 198 Ariz. 571, 576-77, ¶¶ 15-18 (2000) (absent evidence of confusion, an improper oral instruction is remedied by a correct written instruction).

¶25 At sentencing, Contreras was given an opportunity to speak, and the court stated on the record both the evidence and materials it considered and the factors it found in imposing the sentences. *See* Ariz. R. Crim. P. 26.9, 26.10. Contreras's sentence was within the statutory range. *See* A.R.S. § 13-703(J).

¶26 The trial court imposed two extra days of presentence incarceration credit, however, the State did not cross-appeal the over-counted credit and we therefore lack jurisdiction to modify Contreras's presentence incarceration credit. *See State v. Dawson*, 164 Ariz. 278, 286 (1990).

CONCLUSION

¶27 We affirm Contreras's convictions and sentences.

¶28 Defense counsel's obligations pertaining to Contreras's representation in this appeal have ended. Defense counsel need do no more than inform Contreras 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).

¶29 Contreras 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 Contreras thirty days from the date of this decision to file an in *propria persona* motion

STATE v. CONTRERAS
Decision of the Court

for reconsideration. *See* Ariz. R. Crim. P. 31.20.



AMY M. WOOD • Clerk of the Court
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