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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

BENJAMIN MICHAEL LASATER, *Appellant*.

No. 1 CA-CR 19-0043
FILED 4-21-2020

Appeal from the Superior Court in Yavapai County
No. P1300CR201700191
The Honorable Tina R. Ainley, Judge

AFFIRMED IN PART; VACATED IN PART; REMANDED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael O'Toole
Counsel for Appellee

Law Office of Stephen L. Duncan, P.L.C., Scottsdale
By Stephen L. Duncan
Counsel for Appellant

Benjamin Michael Lasater, Eloy
Appellant

MEMORANDUM DECISION

Presiding Judge Kenton D. Jones delivered the decision of the Court, in which Judge James B. Morse Jr. and Judge Maria Elena Cruz joined.

J O N E S, Judge:

¶1 Benjamin Lasater appeals his convictions and sentences for four counts of child abuse (counts 1 through 4), two counts of discharge of a firearm at a structure (counts 5 and 6), two counts of possession or use of dangerous drugs (counts 8 and 9), two counts of possession of methamphetamine-related drug paraphernalia (counts 10 and 11), and one count each of discharge of a firearm within a municipality (count 7), misconduct involving weapons (count 12), disorderly conduct with a deadly weapon (count 13), conspiracy to commit fraudulent schemes and artifices (count 14), and conspiracy to commit perjury (count 15).

¶2 After searching the entire record, Lasater’s defense counsel has 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. Lasater was granted an opportunity to file a supplemental brief *in propria persona* and did so. After reviewing the record, we reject the arguments raised in Lasater’s supplemental brief and, for the reasons stated, affirm Lasater’s convictions.¹ We affirm the sentences imposed on counts 1 through 14 but vacate the sentence imposed on count 15 and remand for resentencing.

FACTS AND PROCEDURAL HISTORY

¶3 On February 7, 2017, Lasater was home with his wife, Kathleen, and their four children when, while high on methamphetamine,

¹ Lasater argues we should reverse his convictions and sentences because the State did not file a responsive brief. Because this Court is tasked with reviewing the entire record for fundamental error, briefing from the State is unnecessary, and we deny Lasater’s request.

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he began seeing robots in his backyard.² Lasater tried to scare the robots by firing a pistol from his bedroom two times. Sometime later, Kathleen, believing Lasater to be asleep, put their three-year-old child (Child) to bed in the same room. After Kathleen left the room, she heard another gunshot and Child crying.

¶4 Kathleen retrieved Child from the bedroom and called the police. Meanwhile, Lasater fled the home. Sometime later, police located Lasater in the family car, conducted a “high-risk traffic stop,” and arrested him. During a search incident to arrest, police found a small can containing methamphetamine in Lasater’s pocket. Police later found a pistol missing three bullets and an envelope containing methamphetamine in the car, and bullet fragments and one shell casing in the home. At some point, Child gave two other shell casings to the police. Police also observed bullet holes in the bedroom, at least one in a bedroom wall and another in some bedding, as well as a “piece of shrapnel” near Child’s bed.

¶5 In recorded jailhouse phone calls, Lasater and Kathleen discussed how they could explain away Kathleen’s prior report by claiming the gun accidentally discharged while she was cleaning it, that no children were present, and that Kathleen was experiencing hallucinations as a medication side effect. At trial, however, Kathleen testified Lasater told her that he had fired the gun at robots.

¶6 The jury found Lasater guilty on all counts. The jury also determined beyond a reasonable doubt that count 1 was a dangerous crime against children, counts 1 through 4 and 13 were domestic violence offenses, and counts 5 through 7 and 13 were dangerous offenses. After considering the aggravating and mitigating circumstances, the trial court sentenced Lasater as a dangerous, non-repetitive offender to the minimum term of ten years’ imprisonment on count 1. The court sentenced Lasater to terms of imprisonment on the remaining counts, to be served concurrent to each other but consecutive to the sentence imposed on count 1, the longest of which was seven years. The court also credited Lasater with 782 days of presentence incarceration against the concurrent sentences imposed on counts 2 through 15. Lasater timely appealed, and we have jurisdiction

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

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pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

I. Perjured Testimony

¶7 In his supplemental brief, Lasater argues he was deprived of due process because the State allowed a detective to provide “perjured testimony” at trial, as evidenced by his inconsistent statements.³ Perjury is the “making [of] . . . a false sworn statement in regard to a material issue, believing it to be false.” A.R.S. § 13-2702(A). Although knowing use of perjured testimony is a denial of due process, inconsistencies alone do not constitute perjury or disqualify a witness from testifying to the best of his ability. *See State v. Ferrari*, 112 Ariz. 324, 334 (1975). Instead, inconsistencies should be considered as part of the witness’s credibility. *Id.*

¶8 Witness credibility is resolved by the jury. *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996) (citing *State v. Scott*, 113 Ariz. 423, 424-25 (1976)). The jury here ultimately satisfied itself, beyond a reasonable doubt, that Lasater was guilty of the charged crimes. Lasater has shown no error.

II. Sentencing Error

¶9 The record reflects that the trial court sentenced Lasater to five years’ imprisonment on count 15. Conspiracy to commit perjury is a class four felony, A.R.S. §§ 13-1003(D) (stating “conspiracy is an offense of the same class as the most serious offense which is the object of or result of the conspiracy”), -2702(B) (classifying perjury as a class 4 felony), which, when sentenced as a non-dangerous, non-repetitive offense, carries a sentencing range of 1 to 3.75 years, *see* A.R.S. § 13-702(D). Thus, the court committed fundamental error when it sentenced Lasater outside of this range. *State v. Carbajal*, 184 Ariz. 117, 118 (App. 1995) (“The failure to impose a sentence in conformity with mandatory sentencing statutes makes the resulting sentence illegal.”) (citing *State v. Dawson*, 164 Ariz. 278, 283-84 (1990)); *State v. Thues*, 203 Ariz. 339, 340, ¶ 4 (App. 2002) (“Imposition of an

³ Lasater also argues his trial counsel was “ineffective for failing to object or diminish the effect of the [alleged] perjurious testimony.” However, “ineffective assistance of counsel claims are to be brought in Rule 32 proceedings. Any 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).

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illegal sentence constitutes fundamental error.”) (citing *State v. Cox*, 201 Ariz. 464, 468, ¶ 13 (App. 2002)).

¶10 The parties conceded fundamental error in supplemental briefs ordered by this Court in accordance with *Penson v. Ohio*, 488 U.S. 75, 75-89 (1988), but disagree on the proper remedy. We believe that the most appropriate remedy when an illegal sentence is discovered on appeal is to remand for resentencing, *see, e.g., State v. Norris*, 221 Ariz. 158, 161-62, ¶¶ 10-11 (App. 2009); *State v. Cruz*, 27 Ariz. App. 44, 46-47 (1976), so the error can be resolved in the same manner as if it were discovered in the trial court, *see State v. Anderson*, 171 Ariz. 34, 36 (1992) (“[T]he proper method of correcting an illegal sentence is not by minute entry, but in open court with the defendant present.”). Doing so ensures a public disposition of criminal matters, with notice to both defendants and crime victims alike, and it avoids the need for an appellate court to divine a trial court’s intentions. The sentence imposed for count 15 is thus vacated and remanded for resentencing.

¶11 Our review confirms, however, that Lasater was given an opportunity to speak at sentencing, and the trial 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 remaining sentences imposed were within the statutory limits. *See* A.R.S. §§ 13-702(A), (D), -704(A), -705(D).

III. Fundamental Error Review

¶12 The remainder of the record reveals no fundamental error. *See Leon*, 104 Ariz. at 300 (“An exhaustive search of the record has failed to produce any prejudicial error.”).

¶13 As relevant here, a person is guilty of child abuse if, “[u]nder circumstances likely to produce death or serious injury,” the person intentionally or knowingly “causes or permits a child . . . to be placed in a situation where . . . the child . . . is endangered.” A.R.S. § 13-3623(A)(1). This crime is identified as a dangerous crime against children in A.R.S. § 13-705(Q)(1)(h).

¶14 A person is guilty of discharge of a firearm at a structure if the person “knowingly discharges a firearm at a residential structure.” A.R.S. § 13-1211(A). A person is guilty of discharging a firearm within a municipality – defined as “any city or town and includes any property that is fully enclosed within the city or town” – if the person, “with criminal negligence[,] discharges a firearm within or into the limits of any

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municipality.” A.R.S. § 13-3107(A), (D)(1). And, a “dangerous offense” is defined as one “involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.” A.R.S. § 13-105(d)(13).

¶15 A person is guilty of possession of a dangerous drug if the person knowingly “possess[es] or use[s] a dangerous drug.” A.R.S. § 13-3407(A)(1). A person is guilty of possession of drug paraphernalia when the person uses or possess with intent to use “drug paraphernalia to . . . pack, repack, store, contain, [or] conceal” an illegal drug. A.R.S. § 13-3415(A).

¶16 A person is guilty of misconduct involving weapons if the person knowingly “possess[es] a deadly weapon during the commission of any felony [drug] offense.” A.R.S. § 13-3102(A)(8). A person is guilty of disorderly conduct if, “with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so,” such person “[r]ecklessly handles, displays or discharges a deadly weapon or dangerous instrument.” A.R.S. § 13-2904(A)(6). These offenses are “dangerous offenses” if they “involv[e] the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.” A.R.S. § 13-105(d)(13).

¶17 A person is guilty of a conspiracy to commit fraudulent schemes and artifices if the person conspires with one or more persons to “knowingly obtain[] any benefit by means of false or fraudulent pretenses, representations, promises or material omissions.” A.R.S. §§ 13-1003, -2310(A). A person is guilty of conspiracy to commit perjury if the person conspires with one or more persons to make “[a] false sworn statement in regard to a material issue, believing it to be false.” A.R.S. §§ 13-1003, -2701, -2702.

¶18 The record contains sufficient evidence upon which a reasonable factfinder could determine beyond a reasonable doubt that Lasater was guilty of these aforementioned offenses.

¶19 The proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Lasater was present for and represented by counsel at all critical stages of the proceedings, 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 twelve jurors, and the record shows no evidence of jury misconduct. *See* Ariz. Const. art. 2, § 23; A.R.S.

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§ 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, and Lasater's presumed innocence.

CONCLUSION

¶20 Lasater's convictions are affirmed. Lasater's sentences for counts 1 through 14 are affirmed, but his sentence for count 15 is vacated. The matter is remanded for resentencing on count 15.

¶21 Defense counsel's obligations pertaining to Lasater's representation in this appeal have ended. Defense counsel need do no more than inform Lasater 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); Ariz. R. Crim. P. 31.19 cmt.

¶22 Lasater 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 Lasater thirty days from the date of this decision to file an *in propria persona* motion for reconsideration. *See* Ariz. R. Crim. P. 31.20.



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