IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

J W CARLSON, *Appellant*.

No. 1 CA-CR 19-0411
FILED 9-29-2020

Appeal from the Superior Court in Maricopa County
No. CR2017-155360-001
The Honorable Warren J. Granville, Judge (Retired)

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jana Zinman
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Kevin D. Heade
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Cynthia J. Bailey joined.

H O W E, Judge:

¶1 J W Carlson appeals his kidnapping, aggravated assault, and sexual assault sentences. For the following reasons we affirm Carlson's sentences as modified.

FACTS AND PROCEDURAL HISTORY

¶2 Carlson was charged with multiple crimes and was ultimately convicted after a bench trial of sixteen counts of kidnapping, aggravated assault, and sexual assault, based on acts he committed against his ex-wife over the course of approximately two weeks.

¶3 After the trial court read the verdicts, defense counsel moved for an evaluation of Carlson under Arizona Rule of Criminal Procedure ("Rule") 26.5. The trial court granted the motion, scheduled a status conference to be held one month later, and ordered the evaluating doctor to submit the report to the court at least two days before that conference. The court's order further directed defense counsel to "review and excise" the doctor's report before the conference.

¶4 At the status conference, both Carlson and his attorney indicated that the Rule 26.5 evaluation had occurred but did not present any report of the evaluation to the trial court. Referring to the report, the court told Carlson, "the way the law works [is] you get to see it first, so you can decide what, if anything, you want to do with it." The court further informed Carlson that he could "talk first with [defense counsel] to see if [he] want[ed] to present" the report to the court because if he decided to do so, the prosecutor would have "a chance to look at it, and then they [might] decide to do another evaluation." Neither Carlson nor his attorney presented the report to the court.

¶5 Carlson formally moved to change counsel and for a mistrial before the sentencing hearing. He argued that because of his PTSD and brain lesions from multiple sclerosis, he did not trust his attorney and was unable to properly defend himself. While the motion referred to evaluators

and evaluations, no report accompanied the motion. Nor did Carlson or his counsel present a report to the court by the time of the sentencing hearing, which was held approximately five weeks after the status conference and when the report was due. At sentencing, Carlson referred to mental health issues he had discussed with an evaluator and asked for a continuance to "wait for" the report. Carlson's counsel, however, said nothing. The trial court stated that if Carlson was seeking a competency determination under Arizona Rule of Criminal Procedure 11—referring to the motion to change counsel and mistrial—the court saw nothing to warrant an examination and denied Carlson's request to continue the sentencing and his motion to change counsel and for a mistrial.

¶6 After finding that the mitigating circumstances, including Carlson's mental health issues, offset the aggravating circumstances, the court sentenced Carlson to concurrent and consecutive presumptive prison terms totaling 81.25 years' imprisonment. Carlson timely appealed.

DISCUSSION

¶7 Carlson argues that he should be resentenced because the trial court did not fulfill its obligation to consider the Rule 26.5 report before sentencing him.[1] This Court will review a defendant's sentence for an abuse of discretion. *State v. Russell*, 175 Ariz. 529, 534 (App. 1993). An error of law committed in reaching a discretionary decision may be an abuse of discretion. *State v. Johnson*, 247 Ariz. 166, 186 ¶ 45 (2019). Interpreting a rule of procedure is a question of law reviewed de novo. *State v. Martinez*, 226 Ariz. 464, 466 ¶ 6 (App. 2011).

¶8 The trial court has discretion to "order the defendant to undergo a mental health examination or diagnostic evaluation" before the court pronounces sentence. Ariz. R. Crim. P. 26.5. The report may assist the court's discretionary sentencing decisions and reveal issues bearing on a defendant's competency. *See State v. Williams*, 183 Ariz. 368, 381 (1995) ("the trial court should exercise its discretion in favor of an examination when it finds that it needs more information to determine whether a mitigating factor might exist."). Any report is due at the same time as the presentence report. Ariz. R. Crim. P. 26.5.

¶9 Rule 26.5 does not, however, require the trial court to consider the report if the defendant chooses not to submit it. After the Rule 26.5

[1] Carlson concedes on appeal that the Rule 26.5 report was never made part of the record on appeal and cannot now be located.

evaluation had occurred, the trial court reminded Carlson and his counsel at the status conference that they could decide whether to present the report. Neither Carlson nor his counsel ever submitted the report. When Carlson moved for a change of counsel and a new trial, he referred to his evaluation but did not attach any Rule 26.5 report to his motion. At sentencing, Carlson referred to mental health issues he had discussed with his evaluator but still did not submit the report. The trial court cannot be faulted for failing to consider a report that Carlson did not submit.

¶10 A Rule 26.5 report is not a presentence report that *must* be ordered and *must* be delivered to the sentencing court and all counsel before sentencing, as Arizona Rules of Criminal Procedure 26.4(a) and (c) require for presentence reports. Rule 26.5 does not have the same mandatory language as Rule 26.4 does, and that language should not be applied to Rule 26.5. *See Spirlong v. Browne*, 236 Ariz. 146, 149 (App. 2014) ("[W]hen drafters of a statute include particular language in one part of a statute, but not in another part of the statute, courts should not read 'that language into the portion of the statute or rule from which the particular language has been omitted.'") (quoting *Alejandro v. Harrison*, 223 Ariz. 21, 24 ¶ 8 (App. 2009). For this reason, Carlson's reliance on *State v. Clabourne* is unavailing. *See* 142 Ariz. 335, 346–48 (1984) (trial court required to consider Rule 26.4 presentence report, but ordering mental health examination under Rule 26.5 is discretionary).

¶11 Carlson further argues that Arizona Rule of Criminal Procedure 26.6(a) requires the trial court to make a presentence report or mental health report available to all parties. That rule, however, presupposes that a report was submitted to the trial court for consideration. *See* Ariz. R. Crim. P. 26.6(c) (report must be made available to the parties no later than two days "after it is delivered to the court"). Here, the trial court ordered an evaluation and left it to Carlson and his counsel to review and submit it if they chose to, and they chose not to submit it. Without a submitted report, the dissemination requirements of Rule 26.6 do not apply. The trial court did not err in failing to consider the Rule 26.5 report.[2]

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[2] We note an inconsistency between the trial court's oral pronouncement of sentence and its sentencing minute entry. The trial court ordered that the sentence of imprisonment for Count 17 be served concurrently with the sentence of imprisonment for Count 15, but the sentencing minute entry fails to note that. Because the oral pronouncement of sentence controls over the minute entry, *State v. Solis*, 236 Ariz. 285, 288

CONCLUSION

¶12 For the foregoing reasons, we affirm Carlson's sentences as modified to reflect that the sentence for count 17 will be served concurrently with the sentence for count 15.

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

¶ 15 (App. 2014), we order the minute entry corrected to conform to the oral pronouncement of sentence, *id.*