IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ERNIE RAY GARCIA, *Appellant*.

No. 1 CA-CR 21-0362
FILED 9-29-2022

Appeal from the Superior Court in Maricopa County
No. CR2018-107694-001
The Honorable Dewain D. Fox, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Linley Wilson
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Jesse Finn Turner
Counsel for Appellant

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Cynthia J. Bailey and Judge D. Steven Williams joined.

S W A N N, Judge:

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), from Ernie Ray Garcia's convictions and sentences for kidnapping and five counts of aggravated assault. We have reviewed the record for fundamental error, and we have considered the issues identified in Garcia's supplemental brief filed *in propria persona*. *See Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30 (App. 1999). We detect no reversible error.

FACTS AND PROCEDURAL HISTORY

¶2 Garcia was indicted for one count of kidnapping, a class two felony and dangerous offense; one count of aggravated assault with a dangerous instrument, a class three felony and dangerous offense; and four counts of aggravated assault, class four felonies. He pled not guilty, and the matter proceeded to a jury trial. The jury convicted Garcia as charged, and the court imposed concurrent prison terms.

DISCUSSION

I. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT GARCIA'S CONVICTIONS.

¶3 Garcia contends that the state presented insufficient evidence to support his convictions.

¶4 "A person commits kidnapping by knowingly restraining another person with the intent to: . . . [i]nflict death [or] physical injury . . . on the victim." A.R.S. § 13-1304(A)(3). Kidnapping is a dangerous offense if it involves "the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person." A.R.S. § 13-105(13). The state presented evidence that Garcia and A.W. were camping at Sycamore Creek when Garcia took A.W. to Mesquite Wash

against her will because he wanted to hurt her. At Mesquite Wash, Garcia dragged A.W. through a cactus while she was pulling on him and telling him to stop. Garcia then tied A.W. to a tree with rachet straps and tightened the straps when A.W. asked to be released. While A.W. was tied to the tree, Garcia repeatedly struck her in the head and hit her in the ribs with a shovel. Eventually, Garcia untied A.W. from the tree, but when she tried to escape, he caught her and brought her back to his truck. The next morning, Garcia told A.W. she could leave, and she ran through the forest to the highway to get help. This evidence was sufficient to support Garcia's kidnapping conviction.

¶5 A person commits aggravated assault when he intentionally, knowingly, or recklessly causes physical injury to another using a dangerous instrument or any means of force that results in "temporary but substantial disfigurement . . . or a fracture of any body part." A.R.S. § 13-1203(A)(1), -1204(A)(2)–(3). He also commits aggravated assault when, in addition to either of the foregoing, he "intentionally or knowingly impedes the normal breathing or circulation of another person by applying pressure to the throat or neck or by obstructing the nose and mouth either manually or through the use of an instrument." A.R.S. §§ 13-1203(A)(1), -1204(A)(2)–(4), (B). The state presented evidence that Garcia committed aggravated assault with a dangerous instrument (a dangerous offense) when he told A.W. that she "owed him two fingers," then partially severed her finger with a shovel. *See* A.R.S. §§ 13-105(12)–(13), -1203(A)(1), -1204(A)(2). The state presented evidence that Garcia committed aggravated assault by causing a fracture of a body part when he (1) hit A.W. in the ribs with a shovel, fracturing her ribs, and (2) slapped A.W. so hard that he caused an orbital fracture. *See* A.R.S. §§ 13-1203(A)(1), -1204(A)(3). The state presented evidence that Garcia committed aggravated assault by causing (at the least) a temporary substantial disfigurement when he partially severed A.W.'s finger with the shovel, ultimately resulting in a partial amputation of the finger. *See* A.R.S. §§ 13-1203(A)(1), -1204(A)(3). Finally, the state presented evidence that Garcia committed aggravated assault when, in addition to the foregoing, he impeded A.W.'s normal breathing or blood circulation by placing something around A.W.'s neck, causing bruising. *See* A.R.S. §§ 13-1203(A)(1), -1204(B).

¶6 This evidence was more than sufficient to support Garcia's five aggravated assault convictions. Contrary to Garcia's contentions, the state was not required to submit every piece of evidence found at the scene for DNA testing. The state tested one of the knives and the shovel found at the scene for the presence of blood, and both yielded positive results. The state then conducted a DNA analysis on the knife and shovel, and A.W.'s

DNA was present on both. The state's strategic decision to test certain items from the scene does not negate the evidence supporting Garcia's convictions.

¶7 We discern no fundamental error in Garcia's convictions. Garcia was present and represented by counsel at all critical stages, the jury was properly comprised and instructed, and there is no evidence of juror misconduct or bias.

II. THE COURT DID NOT ERRONEOUSLY RULE ON OBJECTIONS, BUT EVEN IF IT DID, ANY ERROR WAS HARMLESS.

¶8 Garcia challenges the court's rulings on several objections made at trial. We review objections preserved at trial for harmless error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18 (2005). An error is harmless if we can say beyond a reasonable doubt that the guilty verdict was unattributable to the error. *State v. Teran*, 253 Ariz. 165, 172, ¶ 24 (App. 2022).

¶9 Garcia contends that the court erred by sustaining the state's hearsay objection to a detective's testimony that Garcia admitted during interrogation that A.W.'s finger was cut off with a shovel. He contends that the statement was not offered for the truth of the matter asserted, but to provide foundation that the detective told A.W. that Garcia said he cut off her finger with a shovel. But despite the court's exclusion of the testimony, Garcia solicited the same without objection from the state. If any error occurred, it was harmless.

¶10 Garcia next asserts that the court erred in overruling his foundation objection to the state's introduction of photos of A.W.'s injuries. Garcia contends that A.W. admitted to having very little memory of her time in the hospital. The court overruled the objection, finding that it went to weight of the evidence rather than admissibility.

¶11 Foundation is sufficient when supported by "[t]estimony that an item is what it claims to be." Ariz. R. Evid. 901(a), (b)(1). Once the evidence is admitted, the opponent may still contest its authenticity, but the weight the evidence is given becomes a question for the trier of fact. *State v. Irving*, 165 Ariz. 219, 223 (App. 1990). At trial, A.W. identified photos of her injuries taken at the hospital and acknowledged that they reflected her injuries at the time. She admitted that she did not see some of her injuries until after she left the hospital but that the photos still reflected her injuries when she saw them. This was sufficient foundation for the photos to be

admitted. Garcia was free to contest the authenticity of the photos on cross-examination.

¶12 Garcia also challenges whether his attorney requested to interview A.W. At trial, Garcia asked A.W. whether she had been willing to submit to an interview. The state raised a relevance objection, and the court sustained the objection. A victim is not required to be interviewed unless she consents. A.R.S. § 13-4433(A). Garcia's line of questioning that she refused to be interviewed was not relevant, and the court properly sustained the objection. *See* Ariz. R. Evid. 402.

III. THE COURT'S ADMISSION OF HEARSAY WAS NOT FUNDAMENTAL ERROR.

¶13 Garcia next contends that the court erroneously admitted hearsay evidence. On cross-examination, Garcia solicited testimony that the detective told A.W. that Garcia said her finger was severed with a shovel rather than a knife. Garcia argues that the detective's statements were hearsay.

¶14 Hearsay is an out-of-court statement used to prove the truth of the matter asserted. Ariz. R. Evid. 801(c). Hearsay is inadmissible unless an exception applies. *See* Ariz. R. Evid. 802. But generally, if hearsay evidence is admitted without objection, it becomes competent evidence admissible for all purposes. *State v. Tafoya*, 104 Ariz. 424, 427 (1969). That said, if "hearsay evidence is the sole proof of an essential element of the state's case," it may amount to fundamental error. *State v. McGann*, 132 Ariz. 296, 299 (1982).

¶15 The detective's statements were made out of court and were offered to prove the truth of the matter asserted. No hearsay exception applied. But the state did not object to the testimony, and it was not the sole proof of an essential element of the case. Garcia himself solicited the testimony to cast doubt on A.W.'s credibility. The testimony was admissible for all purposes, and we discern no error.

IV. THE COURT DID NOT ERR BY REDACTING GARCIA'S LETTERS TO A.W.

¶16 Garcia wrote letters to A.W. while awaiting trial. Garcia asked the court to redact the inflammatory and unnecessary portions of the letters before they were admitted into evidence. The court agreed to redact the letters, but not to the extent requested by Garcia. On appeal, Garcia argues that the letters should have been admitted in whole, not in part,

under Ariz. R. Evid. 106, which provides that "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part . . . that in fairness ought to be considered at the same time."

¶17 To the extent that any error occurred, Garcia invited it. Garcia sought to redact the letters below. He cannot prevail on appeal by arguing that the court erred by implementing redactions. *See State v. Musgrove*, 223 Ariz. 164, 167, ¶ 8 (App. 2009) ("We will not reverse, even for an allegedly fundamental error, if the defendant invited the error."). To the extent that Garcia seeks to describe an ineffective assistance of counsel claim, we will not consider such a claim on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9 (2002).

V. GARCIA'S SENTENCES WERE NOT EXCESSIVE.

¶18 Finally, Garcia contends that the court imposed excessive sentences. The jury found all aggravating circumstances alleged by the state. Garcia was permitted to speak at the sentencing hearing and the court stated on the record the materials it considered and the factors it found in imposing his sentences. The court imposed lawful concurrent sentences of 18 years for the dangerous-offense kidnapping conviction, 10 years for the dangerous-offense aggravated assault with a dangerous instrument conviction, and 3 years for each of the remaining aggravated assault convictions. *See* A.R.S. §§ 13-702(D), -704(A), -1204(E), -1304(B). We perceive no fundamental error in Garcia's sentences.

CONCLUSION

¶19 We affirm. Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584–85 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Garcia of the status of this appeal and his future options. *Id.* Garcia has 30 days from the date of this decision to file a petition for review *in propria persona*. *See* Ariz. R. Crim. P. 31.21(b)(2)(A). Upon the court's own motion, Garcia has 30 days from the date of this decision in which to file a motion for reconsideration. *See* Ariz. R. Crim. P. 31.20(c). A timely motion for reconsideration will extend the deadline to file a petition for review. *See* Ariz. R. Crim. P. 31.21(b)(2)(A).

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