DIVISION ONE
FILED: 03/09/2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 08-1106
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
GAVINO ROMERO,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-006370-001 DT

The Honorable Colleen L. French, Commissioner

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Janelle A. McEachern Attorney at Law — Chandler
By Janelle A. McEachern
Attorneys for Appellant

S W A N N, Judge

¶1 Gavino Romero ("Appellant") appeals his conviction of one count of Aggravated Assault, a class three felony and a violation of A.R.S. § 13-1204(A)(1). His appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969).

¶2 Counsel for Appellant has searched the record and can find no arguable question of law that is not frivolous. Appellant was given an opportunity to file a supplemental brief *in propria persona* and has not done so. Counsel requests that we search the record for fundamental error. After reviewing the record, we affirm Appellant's conviction and sentence.

FACTS AND PROCEDURAL HISTORY[1]

¶3 On October 19, 2003, Appellant and several acquaintances, Albert, Maria, Virginia and Angelo, were gathered in Maria's front yard drinking. Although she was a stranger to the group, T.M. approached them as they socialized in the yard. Eventually, the group decided to drive to the residence of a friend of Albert's to continue drinking there.[2] And although T.M. was not drinking, she left with the group.

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[1] "We view the evidence in the light most favorable to sustaining the verdict[] and resolve all inferences against appellant." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997) (citation omitted).

[2] Angelo left the group and went home.

¶4 Early in the morning of October 20, 2003, after drinking at Albert's friend's house, T.M. and the group left to go home. But because Albert had to urinate, he decided to drive to a nearby park. Leaving the others in the car, Albert went to a tree to relieve himself. While Albert was gone, T.M. hit Maria and ran from the car toward an apartment complex. Virginia and Maria ran after T.M. and a physical altercation ensued between Maria, T.M. and Virginia. Maria hit T.M. several times in the face, causing T.M. to fall to the ground. But when T.M. told Maria that she had a son, Maria stopped fighting with her. Virginia, however, continued fighting with T.M.

¶5 When Appellant arrived on the scene, Virginia and T.M. were still fighting. He hit T.M. in the head with a plastic flashlight several times. After he finished hitting her with the flashlight, Appellant repeatedly stomped on T.M.'s head - jumping with both feet in the air and landing on her head. Maria, who heard T.M. moaning during the beating, noticed that at some point the moaning stopped.

¶6 Maria and Virginia ran back to the car, where they told Albert that he needed to get Appellant because he was "stomping on [T.M.'s] head." When Albert arrived on the scene, he found T.M. lying on the ground, silent and motionless. Albert told Appellant several times, "Let's go[;] let's go," in

an attempt to get him to leave, but Appellant was "completely oblivious to what he was saying." Eventually, Albert convinced Appellant to leave and they joined Maria and Virginia, who were waiting in the car. After they pulled away from the park, Appellant asked Albert to go back because he wanted to retrieve a piece of the flashlight that had broken off during the beating; he was worried that his fingerprints might be on it. Albert refused.

¶7 Later that morning, the police arrived at the scene and found T.M. lying on the ground, unresponsive. T.M. was transported to the hospital, where she remained in a coma for more than two months.[3] She was hospitalized from October until January, at which time she was moved to a nursing home facility, where she stayed from January until May.

¶8 With no leads, the police released a media news alert with a picture of T.M and a request for information. Upon seeing the press release, Maria, who was seventeen and in high school, went to her principal and said she knew what happened to T.M. The principal put her in contact with the police, and she gave them the first names of those who were involved in the

[3] T.M. suffered two strokes during the attack. As a result, she suffers from traumatic brain injury and experiences cognitive impairment. She is also permanently physically disabled, with partial paralysis of her right leg and hand, and her speech is impeded.

assault. The police interviewed Albert and Appellant in February 2004. But the investigation stalled until 2007 because the police could not identify Virginia.

¶9 On June 6, 2007, Appellant was charged by indictment with one count of Aggravated Assault.[4] The State alleged that Appellant had one prior conviction and the following aggravators: (1) the infliction of serious physical injury; (2) the presence of an accomplice; (3) the offenses were inflicted in a heinous, cruel, or depraved manner; and (4) physical, emotional or financial harm to the victim.

¶10 After a four day trial, a jury found Appellant guilty of Aggravated Assault.[5] After trial, the court conducted a separate hearing on aggravators, and the jury found the following aggravating circumstances: (1) the presence of accomplices and (2) emotional or financial harm to the victim.

¶11 At sentencing, the court considered the following aggravators: (1) the victim was permanently disabled due to a traumatic brain injury, now functions at the level of a six-year-old to nine-year-old child and is unable to work for the rest of her life; (2) the victim will never be able to parent

[4] Despite a delay of more than three and a half years, the prosecution for the assault was timely. *See* A.R.S. § 13-107(B)(1) (Supp. 2009).

[5] Appellant's first trial on this matter resulted in a mistrial because the jury could not unanimously agree on a verdict.

her five-year-old son; (3) the senselessness and savagery of the beating; (4) the fact that Appellant left T.M. to die after nearly beating her to death; (5) the presence of accomplices; and (6) Appellant's attempts to influence witnesses before trial.[6] The court did not find any mitigating circumstances. Appellant was sentenced to an aggravated term of 16.25 years of imprisonment, with 543 days of presentence incarceration credit.

¶12 Appellant timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A)(1) (Supp. 2009).

DISCUSSION

¶13 The record reveals no fundamental error. Appellant was represented at all stages of the proceedings against him and was present at all critical stages. The record of voir dire does not demonstrate the empanelment of any biased jurors. The jury was properly comprised of eight jurors and two alternates. *See* A.R.S. § 21-102(B) (2002).

[6] During his first trial, the State intercepted telephone conversations between Appellant and Angelo while Appellant was in jail. Appellant told Angelo to tell Albert to testify that Appellant was in the car during the assault, but cautioned that Albert needed to be prepared to address his prior statements to the police because the prosecution would use those to impeach him. In response, Angelo told Appellant that Albert intended to testify that he was drunk when he made his statement to the police.

¶14 At trial, the State presented evidence sufficient to allow the jury to find Appellant guilty of the charged offense. This evidence was properly admissible. Following trial, there was sufficient evidence to support the jury's finding of the two aggravating circumstances: (1) the presence of accomplices and (2) financial or emotional harm to the victim. The State's closing and rebuttal arguments were also proper, and the court properly instructed the jury on the elements of the charged offense and the State's burden of proof.

¶15 After the jury returned its verdict, the court received a presentence report. At sentencing, Defendant was given the opportunity to speak and the court stated on the record the basis for its findings. The court then imposed a legal sentence on the charge on which Defendant was convicted.

CONCLUSION

¶16 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Counsel must inform Appellant of the status of his appeal and his future options. Unless, upon review, he finds an issue appropriate for submission to our supreme court by petition for review, counsel has no further obligations. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant has thirty days from the date of this decision to file

a petition for review *in propria persona*. Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Appellant has thirty days in which to file a motion for reconsideration.

/S/

PETER B. SWANN, Presiding Judge

CONCURRING:

/S/

LAWRENCE F. WINTHROP, Judge

/S/

MICHAEL J. BROWN, Judge