DIVISION ONE
FILED: 07-22-2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0085
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JORGE CARLOS RODRIGUEZ,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-176100-001 DT

The Honorable Robert L. Gottsfield, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Louise Stark, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Jorge Carlos Rodriguez ("Defendant") challenges his convictions and sentences. He maintains the trial court erred

when it failed to hold a hearing to determine whether he needed to continue to wear a knee brace and stun belt for security purposes. He also claims that statements he made to the police should have been ruled involuntary. Finally, Defendant contends that all of his sentences did not have to be consecutive to each other. For reasons that follow, we affirm the convictions, but remand for a hearing on the stun belt requirement and for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Defendant was charged with five counts of child molestation and two counts of sexual conduct with a minor, all class two felonies and dangerous crimes against children; one count of public sexual indecency to a minor, a class five felony; and one count of furnishing obscene or harmful items to a minor, a class four felony; all which occurred between July 2005 and May 2007. The counts were also charged as offenses of domestic violence. All offenses involved his daughter, a child under twelve.

¶3 The jury found Defendant guilty of all nine counts. We have jurisdiction over his appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A) (2010).

DISCUSSION

Use of Restraint Devices

¶4 On the fourth day of trial, Defendant handed his pro per motion to preclude the use of restraint devices on him to his lawyer, who delivered it to the trial judge. He complained that the leg brace made it difficult to "walk or sit normally," and he feared the leg brace would lock, and the jury would see that he was restrained. He also asserted that he was afraid of being accidentally shocked by the stun belt. Because he did not believe there was a reason for the restraints, he claimed that his right to a fair trial was jeopardized.

¶5 Although his lawyer told the court that he thought the security issue could not be addressed, the court asked Defendant why he wanted the devices removed. Defendant stated, "I feel uncomfortable walking. It locks up, and I have to unlock it." The court then informed Defendant that "[w]hen you testify, we'll put you up on the stand outside the presence of the jury so they don't know that you have that." Defendant responded, "[o]kay." The court did not address the stun belt. Instead, the deputy told the court that the restraint devices needed to stay on. After indicating for the record that the motion had been filed, the court denied the motion.

¶6 The use of visible restraint devices on a defendant at trial is constitutionally forbidden unless justified by, for

example, the need for courtroom security involving a specific defendant on trial. *See Deck v. Missouri*, 544 U.S. 622, 623 (2005). Although restraints that are hidden from view pose a lesser problem, they are still problematic. Not only is there the possibility that the jury might see the restraints, some, such as a stun belt, can "create anxiety by forcing the defendant to worry more about the [stun] belt and preventing it from being activated than to fully participate in his defense at trial." *State v. Bassett*, 215 Ariz. 600, 603, ¶ 17, 161 P.3d 1264, 1267 (App. 2007); *see also United States v. Durham*, 287 F.3d 1297, 1306 n.7 (11th Cir. 2002) (noting that "[m]andatory use of a stun belt implicates [the right to be present at trial], because despite the defendant's physical presence in the courtroom, fear of discharge may eviscerate the defendant's ability to take an active role in his own defense").

¶7 Before restraints are used, the trial court should inquire about the need for the security devices, and, if necessary, hold an evidentiary hearing. *See State v. Henry*, 189 Ariz. 542, 550, 944 P.2d 57, 65 (1997). The trial court "must have grounds for ordering restraints and should not simply defer to the prosecutor's request, a sheriff's department's policy, or security personnel's preference for the use of restraints. Rather, the judge should schedule a hearing at the defendant's request regarding the need for the restraints." *State v. Cruz*,

218 Ariz. 149, 168, ¶ 119, 181 P.3d 196, 215 (2008); *see also Gonzalez v. Pliler*, 341 F.3d 897, 904 (9th Cir. 2003) (holding that a remand was necessary to determine whether the defendant's stun belt was necessary and whether defendant was prejudiced).

¶8 Here, the trial court did not hold an evidentiary hearing or make an independent determination for the need for the restraints. The court did talk to Defendant about the leg brace and found a method to ensure the jury did not see Defendant walking to the witness stand. The court did not, however, address the need for the leg brace or the stun belt. As a result, we cannot determine whether either restraint was necessary. Consequently, we remand the issue for the trial court to hold a hearing to evaluate the need for the restraints and whether they interfered with Defendant's right to a fair trial.

Admissibility of Statements

¶9 Defendant next contends that his rights were violated because the detective did not honor his request to speak with an attorney. We disagree.

¶10 During the interview, Defendant told the detective, "I do need to talk to an attorney because I don't know what I am up against." The detective honored the request and informed Defendant that their conversation was over. When Defendant asked why, the detective explained that he could not speak with

him further unless he had an attorney. Defendant continued to ask the detective several questions. He then told the detective, "I want to talk to you without an attorney present."

¶11 Under the circumstances, there was no violation of Defendant's right to counsel. Although Defendant asked for counsel, he ultimately chose to talk with the detective in lieu of waiting for a lawyer. Consequently, the trial court did not err by admitting Defendant's statements. *See State v. Finch*, 202 Ariz. 410, 414, ¶ 14, 46 P.3d 421, 425 (2002) (holding that when a suspect reinitiates contact with the police after request for counsel, questioning may continue if he waives his right).

¶12 Defendant next contends that the trial court should have *sua sponte* conducted a voluntariness hearing to determine whether his post-arrest statements were admissible even though he did not request a voluntariness hearing and did not object to the admission of his statements at trial.

¶13 A defendant has the burden of raising any issue of voluntariness. *See State v. Alvarado*, 121 Ariz. 485, 488, 591 P.2d 973, 976 (1979). A court need not hold a *sua sponte* voluntariness hearing unless the evidence is such as to alert the court that the voluntariness of statements is at issue. *State v. Fassler*, 103 Ariz. 511, 513, 446 P.2d 454, 456 (1968).

¶14 To find a defendant's statements involuntary, there must be a showing of coercive police behavior and a causal

relationship between the coercive behavior and the defendant's overborne will. *State v. Boggs*, 218 Ariz. 325, 336, ¶ 44, 185 P.3d 111, 122 (2008). Although statements made during custodial interrogation are presumed involuntary, the State satisfies its burden of proving the statements were freely and voluntarily made when the officer testifies that they were "obtained without threat, coercion or promises of immunity or a lesser penalty." *Id.* at 335, ¶ 44, 185 P.3d at 121 (quoting *State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979)).

¶15 Here, the record fails to show that the interrogation of Defendant was coercive, a necessary predicate to finding the statements involuntary. *State v. Smith*, 193 Ariz. 452, 457, ¶ 14, 974 P.2d 431, 436 (1999). The interviewing detective testified that he did not make any promises or threats to convince Defendant to speak with him. He further testified that although Defendant was handcuffed during the interview, Defendant never complained about any discomfort, fatigue, or needs. The detective also stated that before beginning the questioning, he informed Defendant of his *Miranda* rights. The jury then heard an audio tape of the interview and received a transcript of the interview; both corroborated the detective's testimony.

¶16 Additionally, Defendant testified that the detective told him that he had the right to remain silent and that he had

the right to an attorney. The jury was then subsequently instructed not to consider any statements Defendant made to the detective unless they had determined beyond a reasonable doubt that Defendant made the statements voluntarily. We presume jurors followed the court's final instruction. *State v. Velazquez*, 216 Ariz. 300, 312, ¶ 50, 166 P.3d 91, 103 (2007). Consequently, we find no error with the court's decision not to hold a *sua sponte* voluntariness hearing before admitting Defendant's statements.

¶17 Citing *Doyle v. Ohio*, 426 U.S. 610 (1976), Defendant next argues that the failure to redact his request for counsel and decision to continue to speak with the detective from the audio tape and its transcript was improper impeachment of his credibility.

¶18 In *Doyle*, the United States Supreme Court held that a defendant's due process right to remain silent was violated when the State used the defendant's silence to impeach him. *Id.* at 618. The rule rests on "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986) (quoting *South Dakota v. Neville*, 459 U.S. 553, 565 (1983)).

¶19 Contrary to Defendant's argument, there is no reason to believe that the jury would view his request for counsel as a negative in judging his credibility. *See Wainwright*, 474 U.S. at 297 (Rehnquist, J., concurring) ("No sensible person would draw an inference of guilt from a defendant's request for a lawyer after he had been told he had a right to consult one; it is simply not true that only a guilty person would want to have a lawyer present when being questioned by the police.").

¶20 Moreover, by not redacting his request for counsel and his subsequent request to continue speaking with the detective, the jury was able to determine the voluntariness of his statements. Thus, because there was never a showing of prejudice, there is no basis to find that the failure to redact this portion of the interview rises to the level of fundamental error. Accordingly, we find no error.

Sentencing

¶21 The trial court sentenced Defendant to two consecutive life terms with the possibility of release after thirty-five years on the two convictions for sexual conduct with a minor, in accordance with A.R.S. § 13-604.01(A) (2007).[1] Although the trial court initially proposed concurrent prison terms on the

[1] The sentencing provisions in Arizona's criminal code were renumbered as of January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 17-29. Section 13-604.01(A) has since been renumbered as § 13-705(A) (2010).

seven other counts, consecutive to the life terms, the State informed the court that the sentences for public sexual indecency and furnishing obscene or harmful materials to a minor — counts three and nine — were required to be served consecutive to the other counts. The trial court, as a result, ordered the sentences on counts three and nine be served concurrent to each other but consecutive to the sentences imposed on the other convictions.

¶22 Defendant contends the trial court erred in imposing the consecutive sentences on counts three and nine because the court had discretion to order that these sentences be served concurrently with the other sentences. The State concedes the error, and we agree.

¶23 Section 13-604.01(L)[2] provides:

> The sentence that is imposed on a person by the court for a dangerous crime against children . . . that involves child molestation or sexual abuse . . . may be served concurrently with other sentences if the offense involved only one victim. The sentence imposed on a person for any other dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time, including child molestation and sexual abuse of the same victim.

Accordingly, "[i]f a defendant is convicted of child molestation or sexual abuse along with another offense that is *not* a

[2] This subsection has since been renumbered as § 13-705(M) (2010).

dangerous crime against children, the trial court has discretion to order that the sentences be served concurrently if only one victim is involved." *State v. Tsinnijinnie*, 206 Ariz. 477, 479, ¶ 14, 80 P.3d 284, 286 (App. 2003) (emphasis in original). Thus, because all the offenses involved the same victim, the trial court had discretion to order the sentences for counts three and nine to be served concurrently with the sentences imposed on the other convictions for child molestation and attempted child molestation.

¶24 "Even when the sentence imposed is within the trial judge's authority, if the record is unclear whether the trial court knew he had discretion to act otherwise, the case should be remanded for resentencing." *State v. Garza*, 192 Ariz. 171, 176, ¶ 17, 962 P.2d 898, 903 (1998). Here, the trial court imposed the sentence under the mistaken belief that the sentences on counts three and nine were required to run consecutive to sentences on the molestation counts. Consequently, the sentences on counts three and nine must be vacated and this matter remanded for resentencing on these two counts.

¶25 Defendant also argues that the State incorrectly informed the trial court that the life sentences had to be served prior to the fixed-term sentences, causing the trial court to alter the order of the sentences. Our review of the

record finds no support for Defendant's claim. In addressing the trial court's initial sentencing proposal, the prosecutor stated, "[c]ount one, the 17 years on the child molest and all of the other child molests could run concurrently with that and then when he finished that sentence, then he would start serving his sentences on the life sentences. Or you could reverse it and have him serve the life sentences first and it would probably make more sense." This statement clearly indicated that the trial court had the option of ordering the fixed-term sentences to be served first but that the State believed that having the life sentences served first was more sensible.

¶26 Furthermore, as Defendant acknowledges, there is no specific prejudice resulting from the claimed error. Regardless of the order of the multiple sentences, Defendant is mandated to serve a minimum of eighty-seven years. Defendant's suggestion that having the ability to complete some or all of the fixed-term sentences prior to serving the life sentences may impact the possibility of future commutation is pure speculation at best.

CONCLUSION

¶27 We remand to the trial court to hold a hearing to evaluate the need for the leg brace restraint or stun belt and whether they interfered with Defendant's right to a fair trial.

We also remand for resentencing on counts three and nine. The convictions and sentences are otherwise affirmed.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Presiding Judge

/s/
_____
PATRICIA K. NORRIS, Judge