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Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0121
)
Appellee,) Department B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
JORGE MORALES-LOZA,) Arizona Supreme Court)
)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-008770-006 DT

The Honorable Joseph C. Welty, Judge

AFFIRMED

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By Kent E. Cattani, Chief Counsel
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Jorge Morales-Loza Kingman
Appellant

S W A N N, Judge

¶1 Jorge Morales-Loza appeals from the superior court's judgment of guilt and imposition of sentence for four counts of kidnapping, violations of A.R.S. § 13-1304 and class 2 felonies; and one count of human smuggling, a violation of A.R.S. § 13-2319 and a class 4 felony.

¶2 This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Morales-Loza's appellate counsel has advised us that she has searched the record on appeal and finds no arguable question of law to raise on appeal. See *Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Morales-Loza, however, has requested that counsel identify certain issues for review, and has filed a supplemental brief *in propria persona*. Morales-Loza contends: (1) the evidence presented at trial was insufficient to support his convictions; (2) the superior court erred by denying his motions for mistrial because the prosecutor engaged in misconduct that deprived him of a fair trial; (3) the court impermissibly shifted the burden of proof; and (4) the court imposed excessive sentences.

¶3 Our independent review of the record reveals no fundamental error, and we affirm.

FACTS AND PROCEDURAL HISTORY

¶14 Morales-Loza was indicted for six counts of kidnapping and one count of human smuggling. For each count, the State cited the accomplice liability statutes. The State alleged that the kidnappings were dangerous offenses, and alleged multiple aggravating factors. Morales-Loza was arraigned and entered a plea of not guilty, and the matter proceeded to a jury trial in which Morales-Loza and Cresenciano Torres-De La Rosa were co-defendants. Before the jury was empanelled, the State dismissed two of the kidnapping counts.

¶15 At trial, the State presented evidence that on October 19, 2007, members of the Maricopa County Sheriff's Office searched a Phoenix residence that they suspected was being used as a "drop house" by human smugglers. Upon entering the first floor of the residence, the officers observed many circumstances typical of drop houses: a strong foul odor; many bags of trash; notebooks; multiple cell phone chargers; a power drill and extension cord; and an absence of furniture, laundry machines, and groceries. In response to the officers' commands, a total of 54 people exited the second floor of the residence. On the second floor, the officers observed several bedrooms and a bedroom closet that were fitted with locking mechanisms operable from the outside only. Plywood was secured over the bedroom

windows, and the closet contained a gallon jug of urine. In the unsecured areas of the house, the officers found piles of shoes and clothing, many Mexican identification cards and birth certificates, and many prepaid cell phones and phone chargers. The officers also found notebooks organized as payment ledgers and paperwork associated with wire transfers of money.

¶16 Among the 54 people removed from the house were J.G.D., G.L.F., R.C.S., and R.U.O. All four men identified Morales-Loza as one of the smugglers, or "coyotes," and identified themselves as "pollos" -- undocumented immigrants under the coyotes' control.

¶17 J.G.D. testified that he was taken from Mexico and illegally transported to the Phoenix house, which was run by approximately eight coyotes, against his will. At the house, Morales-Loza, acting at Torres-De La Rosa's direction, took J.G.D.'s shoes, clothes, and wallet. Torres-De La Rosa, wielding a firearm, forced J.G.D. to call a relative. Torres-De La Rosa spoke to the relative and threatened to kill J.G.D. unless money was paid. After the phone call, J.G.D. was locked in a closet with a dozen other pollos for eight to ten days, and was required to participate in daily phone calls to his relative. The pollos were forced to urinate in a water jug in the closet, and were not allowed to bathe. Several times, Morales-Loza, who was clean and wore sandals, brought food and

water to the pollos. When he did so, he would make fun of the pollos and would tell them that if they did not pay the money, they "would be next." J.G.D. saw that several of the coyotes had firearms, and feared that he was going to be killed. He was relieved when the sheriff's department officers removed him from the house.

¶18 G.L.F. testified that he had agreed to pay coyotes to illegally transport him from Mexico to the United States. The coyotes took him to the Phoenix house, where they confiscated his shoes, belt, and wallet, and locked him in a closet for one night. G.L.F. saw that several of the coyotes had firearms. The next day, Torres-De La Rosa made G.L.F. call a friend and ask for money -- more money than the coyotes had originally asked him to pay for their services. After the phone call, G.L.F. was locked in a room with 15 to 18 pollos for approximately eight days. During the period of confinement, G.L.F. was required to make additional phone calls to his friend. He ate food served by Morales-Loza, who would "make fun" of the pollos by laughing in a mocking manner. G.L.F. observed that Morales-Loza was clean and wore sandals.

¶19 R.C.S. testified that he had agreed to pay coyotes to illegally transport him from Mexico to the United States. While walking in the desert during the trip, R.C.S. and a friend became separated from their guides and group. They later

encountered a different group associated with the same coyote organization, and were transported to the Phoenix house. At the house, the coyotes took R.C.S.'s shoes, shirt, and wallet, and locked him first in a closet, then in another room. The next day, several coyotes brought R.C.S. back to the closet, pushed him down, and hit him. Morales-Loza participated in the attack, and held a gun to R.C.S.'s head. After the attack, R.C.S. was required to make a phone call to a relative, and the coyotes asked the relative for money -- more money than R.C.S. had originally agreed to pay for his transport. R.C.S. was then locked in a room with other pollos for over three weeks. During this time, he was required to participate in more phone calls to his relatives. Morales-Loza was involved in one of the calls. Morales-Loza also brought food to the pollos and would guard the room at night.

¶10 Like G.L.F. and R.C.S., R.U.O. testified that he had agreed to pay coyotes to illegally transport him from Mexico to the United States. When he arrived at the Phoenix house, the coyotes took his shoes, belt, and wallet. He was then locked in a closet with other pollos for two days. When R.U.O. was removed from the closet, the coyotes made him place a call to a relative, and told R.U.O. that he had to pay a sum of money. After the phone call, R.U.O. was returned to a room and locked up with other pollos. He was required to participate in daily

calls to his relatives, and the coyotes told him that he would be killed unless the money was paid. Morales-Loza brought food to the pollos, conversed with the other coyotes about securing the doors to prevent people from escaping, and served as a night guard. R.U.O. saw that Morales-Loza wore huarache-style sandals, and one time saw a gun "in his waist." R.U.O. felt afraid in the house. When he tried to escape, a group of coyotes (of which Morales-Loza was not a member) put a plastic bag over his head and put a gun at his head. When the officers removed R.U.O. from the house, he assisted them by making on-scene identifications of the coyotes, including Morales-Loza.

¶11 After hearing closing arguments and considering the evidence, the jury found Morales-Loza guilty of human smuggling, and guilty of kidnapping J.G.D., G.L.F., R.C.S., and R.U.O. The jury further found that the kidnappings of J.G.D., R.C.S., and R.U.O. were dangerous offenses. In the aggravation phase of the trial, the jury found that aggravating factors existed in connection with all four kidnapping offenses.

¶12 The court entered judgment on the jury's verdicts and sentenced Morales-Loza to concurrent presumptive terms of 10.5 years of imprisonment for each dangerous kidnapping offense, 5 years of imprisonment for the non-dangerous kidnapping offense, and 2.5 years of imprisonment for the human smuggling offense. Morales-Loza timely appeals. We have jurisdiction pursuant to

A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1).

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE

¶13 “Our review of the sufficiency of evidence is limited to whether substantial evidence supports the verdict. Substantial evidence is such proof that ‘reasonable persons could accept as adequate and sufficient to support a conclusion of defendant’s guilt beyond a reasonable doubt.’” *State v. Sharma*, 216 Ariz. 292, 294, ¶ 7, 165 P.3d 693, 695 (App. 2007) (internal citations omitted) (quoting *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990)). “Substantial evidence” may be comprised of both circumstantial and direct evidence, as both types of evidence are of equal probative value. *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981). Here, we have no difficulty concluding that substantial, properly admissible evidence supported the jury’s conclusions that Morales-Loza was guilty of the charged offenses.

A. Kidnapping

¶14 As a preliminary matter, we note that pursuant to A.R.S. § 13-303(A)(3) (2010),¹ “[a] person is criminally accountable for the conduct of another if . . . [t]he person is

¹ We cite to the current version of statutes when no revisions material to our decision have since occurred.

an accomplice of such other person in the commission of an offense" A person is an accomplice if he, with the intent to promote or facilitate the commission of the crime, aids the other person. A.R.S. § 13-301(2).

¶15 The crime of kidnapping is defined as "knowingly restraining another person with the intent to . . . [h]old the victim for ransom . . . or . . . [p]lace the victim or a third person in reasonable apprehension of imminent physical injury to the victim" A.R.S. § 13-1304(A)(1), (4). Here, all four victims testified that a group of coyotes held them in the Phoenix house against their will for ransom. Additionally, two of the victims testified that they feared that the coyotes, who had firearms, were going to kill them. The victims' testimony was sufficient to show that Morales-Loza was a coyote. Unlike the victims, Morales-Loza was clean and wore footwear. He was not confined with the victims, and he worked as a food-server and a guard. There was, therefore, substantial evidence that Morales-Loza was, at the very least, an accomplice to the kidnappings of J.G.D., G.L.F., R.C.S., and R.U.O.

¶16 Further, there was substantial evidence to support the jury's finding of dangerousness in connection with the kidnappings of J.G.D., R.C.S., and R.U.O. Pursuant to A.R.S. § 13-105(13), an offense is dangerous when it "involv[es] the discharge, use or threatening exhibition of a deadly weapon." A

firearm qualifies as a deadly weapon. A.R.S. § 13-105(15). J.G.D. testified that Torres-De La Rosa had a firearm when he ordered J.G.D. to call a relative, R.C.S. testified that Morales-Loza held a firearm to his head, and R.U.O. testified that different coyotes put a firearm to his head.

B. Human Smuggling

¶17 A person commits the crime of human smuggling when he "intentionally engage[s] in the smuggling of human beings for profit or commercial purpose." A.R.S. § 13-2319(A). "'Smuggling of human beings' means the transportation [or] procurement of transportation . . . by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state" A.R.S. § 13-2319(E)(3). Here, the State presented substantial evidence that Morales-Loza was, at the least, an accomplice to the crime of human smuggling. There was substantial evidence that he worked at the drop house as part of a coyote organization that charged a fee to transport undocumented immigrants from Mexico to the United States.

II. *MOTIONS FOR MISTRIAL*

¶18 At trial, counsel for Morales-Loza moved for mistrial several times, arguing that R.C.S. and R.U.O. testified to new and different facts concerning Morales-Loza's actions at the

drop house. Counsel contended that the prosecutor had told counsel about his pretrial interviews with the victims, and in those interviews (in contrast with their testimony at trial) R.C.S. and R.U.O. did not state that Morales-Loza did anything more than serve food. The court denied the motions for mistrial and found that the prosecutor did not in bad faith attempt to present false testimony.

¶19 We find no error in the court's denial of the motions for mistrial. Mistrial is warranted when a prosecutor engages in improper and prejudicial conduct that is "not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal." *Pool v. Superior Court (State)*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). Here, the record supports the court's determination that the prosecutor did not intentionally present false evidence. There is no indication that the prosecutor solicited or failed to correct testimony that he knew was false. R.U.O. testified to facts that he had not previously commented on, but his testimony was not inconsistent with his earlier statements. And to the extent that R.C.S.'s testimony was inconsistent with his earlier statements concerning the

identity of the coyote who held a gun to his head, the prosecutor presented evidence of the inconsistency. The prosecutor called Detective Carlos Rangel, who had attended the prosecutor-witness interviews, and Detective Rangel testified on direct examination that R.C.S. had previously identified the gun-wielding individual as Torres-De La Rosa, not Morales-Loza.

¶20 Morales-Loza had ample opportunity to address the inconsistencies and differences between the witnesses' previous statements and their trial testimony. He cross-examined the witnesses and Detective Rangel.² He also presented the testimony of the detective who had interviewed R.U.O. immediately after the October 2007 search of the house.

¶21 We conclude that the court did not err by denying Morales-Loza's motions for mistrial. The record supports the court's finding that the prosecutor did not engage in misconduct, and the inconsistencies in the witnesses' statements merely presented a credibility issue that the defendant had a full and fair opportunity to address.

III. BURDEN OF PROOF

¶22 Morales-Loza contends that because the State did not present fingerprint or DNA evidence in connection with the cell

² In the State's case in chief, Detective Rangel testified after R.C.S. but before R.U.O. However, Morales-Loza had the opportunity to cross-examine Detective Rangel after the conclusion of R.U.O.'s testimony because the detective was later called to testify by Torres-De La Rosa.

phones and handgun found at the drop house, the burden of proof was shifted to him to prove that he was not a coyote. We disagree. As discussed above, the State presented sufficient circumstantial evidence to meet its burden of proof regarding Morales-Loza's identity as a coyote, and fingerprint and DNA evidence was not necessary.

IV. SENTENCING

¶23 The court imposed the appropriate presumptive sentence for each conviction, and properly credited the defendant with 474 days of presentence incarceration credit. Morales-Loza's contention that his punishment was excessive has no merit.

V. REMAINING ISSUES

¶24 The record reflects that Defendant received a fair trial. Defendant was present and represented by counsel at all critical stages. The record of voir dire does not demonstrate the empanelment of any biased jurors, and the jury was properly comprised of twelve jurors. See A.R.S. § 21-102(A) (2002). The State's closing and rebuttal arguments were proper, and the jury was properly instructed.

¶25 Before imposing sentence, the court ordered and considered a presentence report. At the sentencing hearing, the defendant was given the opportunity to speak, and the court stated on the record the evidence and materials it considered and the factors it found in imposing sentence.

CONCLUSION

¶126 We have reviewed the record for fundamental error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm Morales-Loza's convictions and sentences. His counsel's obligations pertaining to this appeal have come to an end. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform her client of the status of this appeal and his future options. *Id.* Morales-Loza 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, he has thirty days from the date of this decision in which to file a motion for reconsideration.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

DANIEL A. BARKER, Judge