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Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 07-29-2010  
PHILIP G. URRY, CLERK  
BY: DN

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, )  
 ) 1 CA-CR 09-0123  
 )  
 Appellee, ) DEPARTMENT C  
 )  
 v. )  
 )  
 CRESENCIANO DE LA ROSA-TORRES, ) **MEMORANDUM DECISION**  
 ) (Not for Publication -  
 ) Rule 111, Rules of the  
 Appellant. ) Arizona Supreme Court)  
 )  
 )

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-008770-001 DT

The Honorable Joseph C. Welty, Judge

**AFFIRMED**

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

Kenneth S. Countryman, PC Phoenix  
By Kenneth S. Countryman  
Attorney for Appellant

Cresenciano De La Rosa-Torres Watonga, OK  
Appellant

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**K E S S L E R**, Judge

¶1 This appeal was filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz.

297, 451 P.2d 878 (1969), following Cresenciano De La Rosa-Torres' ("De La Rosa-Torres") conviction of four counts of kidnapping, class 2 dangerous felonies, under Arizona Revised Statutes ("A.R.S.") section 13-1304 (2001), and one count of human smuggling, a class 4 felony under A.R.S. § 13-2319 (Supp. 2010). Finding no arguable issues to raise, counsel requested that this Court search the record for fundamental error. De La Rosa-Torres filed a supplemental brief in *propria persona*, asking this Court to review three issues: (1) insufficient evidence; (2) denying motions for mistrial; and (3) prosecutorial misconduct.

¶2 After reviewing the entire record, we conclude the evidence is sufficient to support the verdict and there is no reversible error. Therefore, we affirm De La Rosa-Torres' conviction and sentences.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶3 We view the facts in the light most favorable to sustaining the conviction. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶4 De La Rosa-Torres and co-defendant, Jorge Morales-Loza ("Jorge" or "co-defendant"), were arrested at a house on Coolidge Street in Phoenix, Arizona (the "Coolidge house") by human smuggling detectives after receiving information that the house was being used to harbor illegal immigrants.

¶5 The State's four witnesses<sup>1</sup> testified that they entered the United States through various parts of Mexico and were eventually transported to the Coolidge house. Upon arriving at the house, they were forced to relinquish their clothes, wallets, and shoes. Two of the witnesses indicated that their names were written in a notebook by one of the house guards, and one of the witnesses said his picture, date of birth, and fingerprints were taken. The guards forced the witnesses, some at gunpoint, to call family members demanding between \$1,800 to \$6,000 dollars. The witnesses testified that they were forced to stay in closets or rooms with other individuals for one to three-and-a-half weeks. The witnesses saw De La Rosa-Torres bring other individuals into the house, recalled him being present during phone calls, and testified he carried a notebook around the house.

¶6 One of the witnesses recalled that when detectives arrived at the Coolidge house, De La Rosa-Torres entered the room that the witness was kept in. The witness testified that De La Rosa-Torres quickly changed into dirty clothes, left his money in the room, and told him that they were all equals. Another witness agreed to speak with a detective and to identify the house guards. Officer R. put the witness into a patrol car

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<sup>1</sup> The State's four witnesses were the victims in the four kidnapping counts.

and pulled the car in front of the garage where each person exited the house one at a time. Each individual was asked to directly face the patrol car and to turn to the side so the witness could see each person's face and profile clearly. The witness testified that he was able to identify all seven of the house guards, including De La Rosa-Torres and the co-defendant.

¶7 Officer R. testified that upon arriving at the house, detectives knocked on the front door, and kicked it down after they heard foot traffic and a scream from inside. Upon entering, detectives noticed there was no furniture or groceries in the cabinets, and that the house had a "foul smell." Officer R. also recalled seeing multiple phone chargers in the family room, binders and notebooks on the stairwell, and plywood placed on the windows. Officer R. testified these were characteristics of "drop houses."

¶8 Detectives found 54 people in the house. They also found a gun, piles of clothes, shoes, belts, and other personal items. Other evidence collected from the house included a Cricket cell phone, which Officer R. explained is very difficult to trace, notes containing a wire company telephone and PIN numbers, notes containing nicknames, phone numbers, dates, and amounts which Officer R. thought to be a list of payouts, a paper containing names of guides, Western Union receipts, I.D.s

and birth certificates, and a ledger containing information on drivers, guides, "pollos'" names and their contacts.

¶9 The jury convicted De La Rosa-Torres on all counts. The superior court sentenced De La Rosa-Torres to two 21-year and two 10-year sentences for the kidnapping counts and one three-year sentence for the human smuggling count.<sup>2</sup> The terms were imposed concurrently. The court also awarded De La Rosa-Torres 474 days of presentence incarceration credit

¶10 De La Rosa-Torres timely filed his notice of appeal. Ariz. R. Crim. P. 31.3. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), (3) (2003), 13-4031, -4033(A)(1) (2010).

## DISCUSSION

### I. Standard of Review

¶11 This Court has reviewed the entire record for fundamental error. *State v. Barraza*, 209 Ariz. 441, 447, ¶ 21,

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<sup>2</sup> The jury found beyond a reasonable doubt that the following aggravating factors were present: infliction or threatened infliction of serious physical injury, use or threatened use or possession of a deadly weapon or a dangerous instrument during the commission of a crime, the presence of an accomplice, and the commission of the offenses as consideration for receipt of anything of pecuniary value. The court found the following additional aggravating factors: the number of victims, that the victims were poor, uneducated, unsophisticated, unaware of how to contact authorities, were taken advantage of by De La Rosa-Torres, and did not speak English. See *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26, 115 P.3d 618, 625 (2005) (if the jury finds one statutorily enumerated aggravating factor, defendant is exposed to an aggravated sentence and the sentencing judge is permitted to find and consider additional aggravating factors).

104 P.3d 172, 178 (App. 2005). Fundamental error is “error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). In addition, we will not reverse unless the defendant shows prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. On review, we view the facts in the light most favorable to sustaining the jury’s verdict and resolve all inferences against the defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

## **II. Insufficient Evidence**

¶12 De La Rosa-Torres argues that the record lacks sufficient evidence to prove he was a “coyote” because there is no evidence that he possessed a gun or a cell phone, and such evidence is necessary to support the verdict. The sufficiency of evidence presented at trial is reviewed only to determine if substantial evidence exists to support the jury verdict. *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005). “Substantial evidence has been described as more than a ‘mere scintilla’ and is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.” *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 469

(1997) (citation omitted). In determining the sufficiency of evidence, we review the facts in the light most favorable to sustaining the verdict. *Stroud*, 209 Ariz. at 411, ¶ 6, 103 P.3d at 913 (citation omitted).

¶13 A defendant is criminally accountable for the conduct of another if the defendant is an accomplice of such other person in the commission of the offense. A.R.S. § 13-301(2) (2010). Thus, evidence need not show that De La Rosa-Torres carried a gun or a cell phone to sustain a guilty verdict. Instead, evidence must only show that De La Rosa-Torres had a meaningful role in the commission of the crimes. Nonetheless, two witnesses testified to observing De La Rosa-Torres carrying a gun, and other witnesses testified that he forced them to make phone calls to family members demanding money via a cell phone. This, combined with all other evidence described above, is sufficient to sustain a guilty verdict.

### **III. Denying Motions for Mistrial**

¶14 De La Rosa-Torres contends the superior court abused its discretion by denying co-defendant's motion for mistrial. Co-defendant's counsel moved for a mistrial on several occasions arguing that the State acted in bad faith by soliciting testimony that it believed to be untrue. The court denied the motions for mistrial, finding that the State did not act in bad faith because it did not attempt to get witnesses to say things

that the State believed were untrue. The court concluded that if the witnesses made inconsistent statements, they would be subject to cross-examination and their credibility would be determined by the jury. At no time did De La Rosa-Torres' counsel move for a mistrial. Accordingly, we find no error, much less fundamental error.

#### **IV. Prosecutorial Misconduct**

¶15 De La Rosa-Torres asserts that the State's alleged failure to disclose victim testimony to defense counsel prior to trial constituted prosecutorial misconduct. He also claims that the State called witnesses whom it had reason to believe conspired to lie under oath.

¶16 To prove prosecutorial misconduct, an "[a]ppellant must show: (1) the state's actions were improper; and (2) 'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Montano*, 204 Ariz. 413, 427, ¶ 70, 65 P.3d 61, 75 (2003) (citation omitted). We will reverse on prosecutorial misconduct if it is "so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Rosas-Hernandez*, 202 Ariz. 212, 218-19, ¶ 23, 42 P.3d 1177, 1183-84 (App. 2002) (citation omitted).

¶17 Although co-defendant's counsel made this objection at trial, De La Rosa-Torres' counsel did not make this objection



below. Thus, we review for fundamental error. *Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608. To prevail under this standard, a defendant must demonstrate that fundamental error occurred and it caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608.

¶18 At trial two witnesses made statements inconsistent with those that were made to the State before trial. Prior to trial, these witnesses identified the co-defendant as one who cooked and served food to the victims. At trial, however, these witnesses testified that the co-defendant carried a gun, guarded the rooms, and assaulted a victim on one occasion.

¶19 Because of this inconsistency, the co-defendant's counsel moved for a mistrial alleging that the State's attorney acted in bad faith. The superior court denied the motion finding that the State did not attempt to get witnesses to say things that the State did not believe were true. The court concluded that witnesses giving inconsistent statements would be subject to vigorous cross-examination and their credibility would be determined by the jury.

¶20 Here, we find no error, much less fundamental error, because the trial court determined the State did not attempt to have witnesses testify untruthfully. Moreover, there is no prejudice because the inconsistent statements merely pertained to co-defendant's conduct and not De La Rosa-Torres' conduct.

**V. Presentence Incarceration Credit**

¶21 Finally, the superior court awarded 474 days of presentence incarceration credit to De La Rosa-Torres. Our review of the record and calculation indicates that the court awarded De La Rosa-Torres the correct credit.

**CONCLUSION**

¶22 After careful review of the record, we find no meritorious grounds for reversal of De La Rosa-Torres' conviction or sentences. The record reflects De La Rosa-Torres had a fair trial, was present, provided an interpreter, and was represented by counsel at all critical stages prior to and during trial, as well as for the verdict and at sentencing. The jury was properly comprised of twelve members pursuant to A.R.S. § 21-102(A) (2002). Additionally, the court imposed the proper sentences for De La Rosa Torres' offense.

¶23 We affirm De La Rosa-Torres' conviction and sentences. Upon the filing of this decision, De La Rosa-Torres' counsel shall inform him of the appeal's status and his future options. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, De La Rosa-Torres shall have thirty days from the date of this decision to file a motion for

reconsideration in *propria pesrona* or petition the Arizona Supreme Court for review. See *id.*

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DONN KESSLER, Judge

CONCURRING:

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PATRICK IRVINE, Presiding Judge

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MICHAEL J. BROWN, Judge