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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
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,) No. 1 CA-CR 09-0268
)
) DEPARTMENT D
Appellee,)
) **MEMORANDUM DECISION**
v.)
) (Not for Publication -
MARTIN SALDANA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-163929-001 DT

The Honorable Raymond P. Lee, Judge

CONVICTION AND SENTENCE AFFIRMED

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

James J. Haas, Maricopa County Public Defender Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 This 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), following Martin Saldana's conviction on February 2, 2009 of one count of second degree murder. Saldana's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Saldana was given the opportunity to file a supplemental brief but did not do so. Counsel now asks this court to search the record for fundamental error. After reviewing the entire record, we affirm Saldana's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶2 In the late afternoon on September 29, 2007, the victim, who was Saldana's girlfriend, went to the home of a friend and former neighbor, M.M.¹ While the victim was inside M.M.'s home, S.M., another friend and former neighbor, saw Saldana walk up to the house. After Saldana knocked, M.M. opened the door. When he realized it was Saldana, M.M. tried to slam the door shut, but Saldana blocked it with his foot. M.M. managed to shut the door, and Saldana began yelling for the victim to come outside. The victim went outside; M.M. shut the door behind her and looked out through the peephole. Almost

¹ Upon review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Saldana. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

immediately, M.M. heard the victim yell, "no Martin," and saw Saldana remove a knife from under his shirt and stab the victim several times in the chest. She collapsed, but Saldana continued to stab her. The victim died from her injuries before the first police officers arrived at the scene.

¶13 Approximately ten to 20 minutes after a neighbor's 9-1-1 call, Phoenix police officers found Saldana walking down the street several blocks away and arrested him. At the scene of the arrest, Saldana told police officers, "I didn't mean to hurt her," and that "he was tired of [the victim] going to that house and hanging out with . . . 'those guys.'" Searching the area, police officers found a shirt in a trash can that S.M. identified as the shirt Saldana was wearing when he went to M.M.'s house. Later, DNA testing showed the presence of the victim's blood on the shirt and on Saldana's hands when he was arrested.

¶14 The State charged Saldana with one count of first degree murder. After an eight-day jury trial, the jury found Saldana guilty of the lesser-included offense of second degree murder. The jury also found as aggravating factors that Saldana used a dangerous instrument and that the offense caused the victim's immediate family physical, emotional or financial harm. The superior court sentenced Saldana to a presumptive term of 16

years' imprisonment, with 537 days' credit for presentence incarceration.

¶15 Saldana timely appealed. We have jurisdiction 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 (2010) and -4033 (2010).

DISCUSSION

¶16 At Saldana's request, his counsel asks us to consider three issues: sufficiency of the evidence, whether the superior court properly instructed the jury on flight or concealment and ineffective assistance of counsel.

A. Sufficiency of the Evidence.

¶17 "When reviewing the sufficiency of the evidence, an appellate court does not reweigh the evidence to decide if it would reach the same conclusions as the trier of fact." *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We will affirm if "substantial evidence" supports the guilty verdict. *Id.* Substantial evidence is "[m]ore than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached." *Id.* (quoting *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981)).

¶18 We conclude that substantial evidence, recounted above, supports the jury's verdict against Saldana.

B. Flight or Concealment Instruction.

¶9 The superior court should instruct the jury "on any theory reasonably supported by evidence." *State v. Doerr*, 193 Ariz. 56, 64, ¶ 35, 969 P.2d 1168, 1176 (1998) (quoting *State v. LaGrand*, 152 Ariz. 483, 487, 733 P.2d 1066, 1070 (1987)). "If the evidence shows a defendant's manner of leaving the scene of a crime reveals a consciousness of guilt, even in the absence of pursuit, an instruction on flight is permissible." *State v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992).

¶10 Here, the court instructed the jury:

Flight or Concealment. In determining whether the State has proved the Defendant guilty beyond a reasonable doubt, you may consider any evidence of the Defendant's running away, hiding or concealing evidence, together with all the other evidence in the case. You may also consider the Defendant's reasons for running away, hiding or concealing evidence. Running away, hiding or concealing evidence after a crime has been committed does not by itself prove guilt.

¶11 We conclude the manner in which Saldana left the scene reveals consciousness of guilt that reasonably supported the flight or concealment instruction. Witnesses testified that although he did not run, Saldana immediately walked away from the murder scene after stabbing the victim, ignoring neighbors who yelled to him. Most significantly, Saldana removed and discarded his blood-stained shirt in a trash can a few blocks

away. This evidence supported the court's instruction to the jury on flight or concealment. See *Salazar*, 173 Ariz. at 409, 844 P.2d at 576 (defendant ran away from crime scene and discarded shoes).

C. Ineffective Assistance of Counsel.

¶12 Ineffective assistance of counsel is not properly raised on appeal, but instead must be raised in a petition for post-conviction relief. *State v. Torres*, 208 Ariz. 340, 345, ¶ 17, 93 P.3d 1056, 1061 (2004). Accordingly we do not address this issue.

D. Review of the Record.

¶13 The record reflects Saldana received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court held a pretrial hearing on Saldana's motion to preclude a prior bad act and the voluntariness of his statements to the police. At the hearing, the court precluded evidence of the prior bad act pursuant to Arizona Rule of Evidence 404(b) and concluded Saldana's statements to police at the time of his arrest were voluntary.

¶14 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of 12 members with two alternates. The court

properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned a unanimous verdict, which was confirmed by juror polling. The court received and considered a presentence report and addressed its contents during the sentencing hearing and imposed a legal sentence for the crime of which Saldana was convicted.

CONCLUSION

¶15 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶16 After the filing of this decision, defense counsel's obligations pertaining to Saldana's representation in this appeal have ended. Defense counsel need do no more than inform Saldana of the outcome of this appeal and his future options, unless, upon review, counsel finds "an issue appropriate for submission" to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Saldana has 30 days from the date of this decision to proceed, if he wishes, with a *pro*

per petition for reconsideration. Saldana has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Presiding Judge

/s/
JON W. THOMPSON, Judge