NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.S
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 01/6/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ELIZABETH ROSADO, Appellant.	1 CA-CR 09-0358 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-171111-002 DT

The Honorable Joseph C. Welty, Judge

AFFIRMED

Terry Goddard, Arizona 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 Peg Green, Deputy Public Defender
Attorneys for Appellant

Elizabeth Rosado, ADOC #241656 — Goodyear
In Propria Persona

K E S S L E R, Judge

¶1 Elizabeth Rosado ("Rosado") filed this appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following her conviction of aggravated assault, a class 3 dangerous felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1204(B) (Supp. 2006). Finding no arguable issues to raise, Rosado's counsel requested that this Court search the record for fundamental error.

¶2 Rosado filed an untimely supplemental brief *in propria persona*. Rosado sent the brief to her counsel's office with ample time for filing, but counsel failed to timely file it. Because Rosado's untimely filing is the fault of her counsel and not her own, we will consider Rosado's claims that she raised in her supplemental brief. Rosado asked the Court to review four issues: 1) the right to testify at trial, 2) actual innocence and insufficiency of the evidence, 3) police misconduct, and 4) ineffective assistance of counsel. After reviewing the entire record, we conclude that the evidence is sufficient to support the verdict and there is no reversible error. Therefore, we affirm Rosado's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶3 At about two a.m. on November 18, 2006, Rosado left a bar and drove to the house of her ex-husband, W. ("W."). At the

time she arrived, Rosado was upset for an unspecified reason. Soon thereafter, she left W.'s residence, leaving her cell phone behind. She later returned to retrieve her cell phone, after which she entered W.'s house and accompanied W. to his bedroom. W. then left the bedroom to move Rosado's vehicle onto the correct side of the street because Rosado had parked in the wrong direction. Afterwards, W. returned to the bedroom. At some point thereafter, Rosado shot W. in the stomach.

¶4 The grand jury indicted Rosado on one count of aggravated assault, a dangerous felony offense. The State alleged four aggravating circumstances other than prior convictions. Rosado's first trial began in October 2008. The jury deadlocked and the court declared a mistrial.

¶5 Rosado's second trial began in February 2009. The State offered the testimony of W., a criminalist, and responding or investigating officers A., B., S., P., C., E., and Detective M. Rosado did not testify, but the jury viewed a redacted version of Rosado's interrogation by M.

¶6 The jury found Rosado guilty of aggravated assault and found that it was a dangerous offense. The jury then found that the State had proved the alleged aggravating circumstance, which was that the offense involved the infliction of serious physical injury.

¶7 The trial court found that mitigating circumstances outweighed the one aggravator found by the jury, and it sentenced Rosado to a mitigated term of six years in the Arizona Department of Corrections.

¶8 Rosado timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, as well as A.R.S. §§ 12-120.21(A)(1), (3) (2003), 13-4031, and -4033(A)(1) (2010).[1]

STANDARD OF REVIEW

¶9 This Court has reviewed the entire record for fundamental error. *State v. Barraza*, 209 Ariz. 441, 447, ¶ 19, 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)). The defendant must show that she suffered prejudice from any error. *Id.* 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

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[1] We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

inferences against the defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

DISCUSSION

I. Rosado waived her right to testify.

¶10 Rosado claims she did not testify at trial because she was scared of W., who she claims threatened her at gunpoint on the night of the incident "not to say a word of what had happened." She claims she "did not get on the stand because [she] was afraid that [W.] would gun [her] down after court if [she] would have testified."

¶11 A defendant has a fundamental right to testify. *State v. Gulbrandson*, 184 Ariz. 46, 64, 906 P.2d 579, 597 (1995) (citing *Rock v. Arkansas*, 483 U.S. 44, 53 n.10 (1987)). However, the defendant must make it known to the trial court that she wishes to testify; she "cannot allege this desire as an afterthought." *Id*. at 65, 906 P.2d at 598. When a defendant failed to assert to the court her decision to testify, she has waived that right unless she had insisted with her attorney that she wanted to testify. *State v. Thornton*, 26 Ariz. App. 472, 476, 549 P.2d 252, 256 (1976).

¶12 Rosado did not tell the trial court that she wanted to testify but feared W. At the beginning of the last day of trial, the court asked Rosado's counsel outside of the jury whether Rosado intended to testify. Rosado's counsel said that

she would not testify, and Rosado was present during this exchange. She did not tell the court she wished to testify but had concerns for her safety. Later, when the State had rested its case, the court asked if Rosado had any evidence to present, and in response, her counsel rested. Rosado did not ask to testify.

¶13 Therefore, Rosado waived her right to testify because she had at least two chances to notify the court of her desire to testify, but she failed to do so. *See Thornton*, 26 Ariz. App. at 476, 549 P.2d at 256.

¶14 If Rosado believes her attorney failed to meet his obligation of adequate representation regarding this issue, the proper recourse is to ask for post-conviction relief for ineffective assistance of counsel pursuant to Rule 32 of the Arizona Rules of Criminal Procedure.

II. Substantial evidence in the record supports the jury's verdict.

¶15 Rosado argues that she "did not pull the trigger that night, [W.] did when he tried to get the gun away from [her]." She asserts that "[W.] made [her] promise him that [she] would not say a word because he said he did not want to [lose] his job." She argues that she "was found guilty only based on [W.'s] word because there [was] no evidence against [her] that proved that [she] pulled the trigger."

¶16 We construe Rosado's claim of actual innocence as a challenge to the sufficiency of the evidence because we are limited to reviewing the record on appeal. However, if Rosado believes she has additional evidence not in the record to support her claim, she may assert the claim on post-conviction review. *See* Ariz. R. Crim. P. 32.1(h).

¶17 In reviewing a claim of insufficient evidence, "[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). We review the evidence presented at trial 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, 468 (1997) (internal quotation marks omitted). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶18 For the jury to find Rosado guilty of aggravated assault, it had to find Rosado intentionally, knowingly, or recklessly caused physical injury to W. and used a deadly weapon or dangerous instrument in doing so. A.R.S. §§ 13-1203(A)(1) (Supp. 2006), -1204(A)(2). The State presented substantial evidence to support the jury's verdict.

A. A jury could have reasonably found that W. suffered physical injury from a deadly weapon.

¶19 It was undisputed that Rosado shot W. The surgeon who treated W. testified that W.'s injury would have been fatal without surgery. W. underwent two surgeries: one in which the surgeon removed his spleen, removed about two feet of bowels, and implanted a colostomy bag, and the other to remove the bag four months later. This evidence is enough to support that W. suffered physical injury inflicted by a deadly weapon.

B. The jury could have reasonably found that Rosado acted intentionally when she shot W.

¶20 While the State argued that Rosado acted recklessly in shooting W. to rebut the defense theory that the gun discharged accidently during a struggle, its primary argument was that Rosado intentionally shot W. The jury could have reasonably found that Rosado intentionally shot W.

¶21 W. testified that the gun 1) was in a holster; 2) never had a round in the chamber; 3) Rosado enabled the gun to fire by "racking" the slide, which "chambered" a bullet and

allowed the gun to fire;[2] 4) Rosado intentionally shot him; and 5) there was no struggle before Rosado shot him.[3]

¶22 Also, the State called a criminalist to testify. The criminalist testified that the gun was fired within a foot of W. He said the gun had only a trigger safety, which prevented the gun from firing unless someone pulled the trigger, and the gun functioned normally and safely when he tested it.

¶23 From the evidence, the jury could reasonably believe W.'s testimony over some of Rosado's statements during the investigation and interrogation and find that Rosado intentionally shot W. *See State v. Cannon*, 148 Ariz. 72, 75, 713 P.2d 273, 276 (1985) (holding that it is within the trial court's province to resolve conflicting testimony and weigh the credibility of witnesses).

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[2] Det. M. testified that W.'s rendition of the events varied from W. claiming Rosado must have "racked" the slide on his gun in order to chamber a bullet, to W. claiming that while he did not hear it, he was sure he heard Rosado "rack" the slide.

[3] There was conflicting testimony on whether a struggle had occurred before the gun discharged. Regarding statements Rosado made to the police, only S. testified that Rosado told her at the scene that there was a struggle before the gun went off. On the other hand, M. testified that Rosado said she and W. were not arguing and there was no struggle. Also, Rosado did not say during the interrogation that a struggle had occurred. Regarding statements W. made, one of the officers testified that W. had attempted to grab the gun before it fired. Another officer testified that W. said he argued with Rosado, they struggled, and the gun went off. However, the detective and another officer testified that W. said Rosado shot him and they struggled for the gun afterwards, but not before.

C. The jury could have reasonably found that Rosado acted recklessly when she shot W.

¶24 The State argued that Rosado acted recklessly in shooting W., presumably to rebut the defense theory that the gun discharged accidently during a struggle. Had the jury not believed the State's primary theory that Rosado intentionally shot W., the jury could have reasonably found that Rosado acted recklessly.

¶25 The jury heard the interrogation of Rosado that occurred on the night of the incident, in which Rosado admitted that 1) she shot W., 2) she could not remember pulling the trigger, 3) she thought the gun was unloaded, 4) the gun was in a holster, and 5) she was not arguing with W. before the gun discharged. She said she did not check the weapon to see if it was unloaded because earlier W. had told her it was unloaded, and she trusted him. Rosado had weapons training on similar guns through her job at the Department of Corrections, and she knew how to check to see if the gun was loaded.

¶26 The jury also heard testimony from the other police officers about statements Rosado made to them at the scene or during transportation from the scene. B. testified that Rosado said she and W. were talking, the gun went off, and she heard a loud bang. P. testified that Rosado claimed that she did not mean to shoot W. and that the gun just went off. She thought it

was unloaded, and she did not intentionally shoot W. Finally, C. testified that Rosado apologized for shooting W.[4]

¶27 It was undisputed at trial that Rosado shot W. From Rosado's statements that she did not know the gun was loaded, the jury could infer that Rosado pointed the gun at W. and pulled the trigger, allegedly believing that the gun was unloaded and no harm would come to him. Rosado admitted she had been trained in gun safety and she knew how to check to see whether the gun was loaded. From this evidence, the jury could reasonably believe that Rosado acted at least recklessly when she shot W.

¶28 Therefore, there was substantial evidence to support Rosado's conviction of aggravated assault.

III. Rosado failed to show the police withheld material exculpatory evidence and acted in bad faith.

¶29 Rosado argues that the investigators did not preserve evidence and that they failed to do so because she is Hispanic. To obtain relief because of a police failure to preserve evidence, the defendant must show that evidence is "material exculpatory evidence," as opposed to "potentially useful evidence," and the police acted in bad faith by failing to

[4] Rosado did not claim at trial or on appeal that her statements were involuntary or that she was subject to a custodial interrogation without *Miranda* warnings having been given. All of the officers testified that Rosado was not under arrest, she was not being interrogated, and that the statements she made were spontaneous.

preserve it. *State v. Speer*, 221 Ariz. 449, 457, ¶ 37, 212 P.3d 787, 795 (2009) (internal quotation marks omitted).

¶30 Rosado asserts that the police did not 1) tell the detectives that there was a struggle over the gun before it discharged, 2) conduct a forensic test to determine whether there was a struggle, 3) check the gun for fingerprints, and 4) check her for gunpowder residue.

¶31 There was no dispute in the record about whether Rosado shot W.; rather, the dispute was whether she recklessly, knowingly, or intentionally shot W. Regarding the struggle, Rosado told the detective that she and W. were not arguing when she shot W., and Rosado did not say that there was a struggle. However, the criminalist testified that the gun had side vents to release gases when the gun fired, which would cause a noticeable injury or leave residue on someone's hands if that person had her hand on the vent when the gun discharged. There was no testimony about whether Rosado or W. had an injury to their hands.

¶32 Rosado asserts that the failure to preserve the fingerprints and gunshot residue was in bad faith because the police did not investigate because she is Hispanic. However, the lead detective did not arrange for gun residue testing on W. because 1) W. went into surgery, reasoning that the surgeons probably cleaned W.'s hands, 2) the police knew both Rosado and

W. were in the room when the gun discharged, and 3) there were only a few labs in the nation, none of which were in Arizona, that do gunshot residue testing. Therefore, the evidence was not preserved not because Rosado was Hispanic, but because it was not necessary to conduct expensive and time-consuming procedures to confirm what other evidence already showed.

¶33 Therefore, the record does not reveal that the failure of the police to collect and preserve the evidence resulted in the destruction of material exculpatory evidence or resulted from bad faith.

IV. Rosado must raise her ineffective assistance of counsel claim in a Rule 32 petition.

¶34 Rosado argues that she was denied her right to effective assistance of counsel because her attorney did not "raise those issues," presumably referring to her arguments that there was no evidence presented to prove she pulled the trigger, that she was found guilty "only based on [W.]'s word," and that the police did not conduct forensic tests for gunshot residue and fingerprints.

¶35 We do not consider claims of ineffective assistance of counsel on direct appeal regardless of possible merit. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Such claims must be raised in a petition for post-conviction relief. *Id.;* Ariz. R. Crim. P. 32.2.

V. The Court presumes the trial court followed the law and consulted with counsel during its consideration of two juror deliberation questions.

¶36 The record reflects that during jury deliberations, the trial court may have answered questions without consulting with Rosado, her counsel, and the State. However, without a transcript of the proceeding, the Court presumes that the trial court followed the law and consulted with counsel before answering the jury's questions.

¶37 An appellant is responsible for ensuring that the record on appeal contains all transcripts necessary for the reviewing court. *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995). "When matters are not included in the record on appeal, the missing portion of the record is presumed to support the decision of the trial court." *Id.*

¶38 When a trial court receives a question from the jury during deliberations, it must notify the parties and give them the opportunity to be present when the court considers the jury's question. *E.g.*, *State v. Pawley*, 123 Ariz. 387, 389, 599 P.2d 840, 842 (App. 1979). However, a defendant "has no right to be personally present during" in-chambers conferences that discuss questions from the jury during deliberations. *State v. Christensen*, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981); *see also Pawley*, 123 Ariz. at 390, 599 P.2d at 843 ("The rule requiring that a defendant be given an opportunity to be present

should not be mechanically applied to situations where the rationale for his presence does not exist."). In cases where there is a "personal interaction between [the] judge and [the] jury" which could influence the jury, or where there is no court reporter to make the record, the defendant must be present. *Id.* (holding that there was no personal interaction between the judge and jury where the judge provided a written answer to a juror's written question).

¶39 The jury submitted two written questions during deliberations within about thirty minutes of each other. First, a juror asked whether the jurors could "cut the zip tie on the weapon to see what 5-5.5 lbs of pressure on the trigger feels like." The court provided a written response: "You may do that." The minute entry does not indicate that a court reporter was present or that the court conferred with counsel when it considered the question: "A juror question is submitted; and a written response is given to the jury."

¶40 Jurors may scrutinize tangible exhibits "as long as the inquiry does not differ in character from that made when the evidence was offered." *State v. Ferreira*, 152 Ariz. 289, 294, 731 P.2d 1233, 1238 (App. 1986). An inquiry of this type "does not subject [the] defendant to any risks of inculpation against which he has not already had [the] opportunity to protect himself." *Id.* "Examination is of a different character when it

introduces extra-record facts and inferences not reasonably inferable from properly admitted testimony and evidence." *Id.* (internal quotation marks and citation omitted) (holding that the jury's examination of a scarf under different types of lighting to see if grey looked like green was permissible). Matters such as the admission of evidence are within the discretion of the trial court, and we review a court's decision for an abuse of discretion. *State v. Brierly*, 109 Ariz. 310, 322, 509 P.2d 203, 215 (1973). Here, Rosado's theory was that the gun discharged accidently during a struggle. The criminalist spoke at length about the working mechanics of a gun, the weight of the trigger-pull, and the type of safety mechanism the gun had. The gun was admitted into evidence, secured by a zip-tie. The trial court's decision to allow the gun to be examined is supported by the evidence and is not an abuse of discretion. Therefore, if the trial court erred in not consulting with counsel before allowing the jury to examine the gun's trigger pull, the error was harmless.

¶41 The jury submitted a second written question: "What do the placards in exhibit 11 represent?". The minute entry indicates that the court conferred with counsel telephonically: "A juror question is submitted; same is discussed in chambers telephonically with respective counsel, and a written response is given. Court reporter, Amy Stewart, is present." The court

provided a written answer: "You are to make your determination in this case based upon the evidence that was presented in court and should rely upon your individual and collective memories of the evidence."

¶42 The court reporter could not submit to this Court transcripts of the in-chambers proceeding, in which the trial court addressed the second question. The reporter certified to this Court that while the minute entry indicates she was present during consideration of the second question, she was not present for an in-chambers discussion. The reporter provided the cases in which she was the court reporter that morning, which did not include Rosado's case. The reporter was in court for Rosado's case only for the return of the verdict later that day. Therefore, the Court has been unable to obtain a transcript, if one exists, of the trial court's consideration of the jury's questions.

¶43 It is Rosado's responsibility to ensure that the record on appeal contained the transcript, if any, of the proceedings where the trial court considered the jury's questions. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Alternatively, it is Rosado's responsibility to track down whether a court reporter was present, and if so, who it was.

¶**44** We presume that the trial court did consult with counsel and that the missing portion of the record supports the court's answers to the jury questions. *See Mendoza*, 181 Ariz. at 474, 891 P.2d at 941.

VI. Rosado received more days of pre-sentence incarceration credit than she deserved, but the State did not cross-appeal.

¶**45** Rosado received 134 days of pre-sentence incarceration credit. The record indicates Rosado was in custody 129 days, not including the date she was sentenced. The State did not cross-appeal to challenge the additional days credited to Rosado. Therefore, the Court will not modify the credit. *See State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990) (holding that the state must file a cross-appeal to challenge an illegal sentence).

CONCLUSION

¶**46** After careful review of the record, we find no meritorious grounds for reversal of Rosado's conviction. The record reflects Rosado had a fair trial, and she was present and represented by counsel at all critical stages prior to and during trial, with the possible exception of her and counsel's presence during consideration of the jury deliberation questions. Rosado was present when the jury read the verdict and when she was sentenced, and she was given the opportunity to speak at sentencing. Additionally, the jury was properly

comprised of eight members pursuant to A.R.S. § 21-102(B) (2002). The evidence is sufficient to sustain the verdict and the trial court imposed the proper sentence for Rosado's offenses.

¶47 For the foregoing reasons, we affirm Rosado's conviction and sentence. Upon the filing of this decision, counsel shall inform Rosado of the status of her appeal and counsel's opinions about her future appellate options. Defense counsel has no further obligations, unless it 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). Upon the Court's own motion, Rosado shall have thirty days from the date of this decision to file a pro per motion for reconsideration in this Court or petition for review in the Arizona Supreme Court.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
PATRICK IRVINE, Presiding Judge

/s/
MICHAEL J. BROWN, Judge