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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/26/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0005
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
KEVIN DAWON LEWIS,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-120335-001 SE

The Honorable Joseph C. Welty, Judge

AFFIRMED

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

Maricopa County Public Defender's Office Phoenix
By Thomas Baird, Deputy Public Defender
Attorneys for Appellant

Kevin Dawon Lewis
Appellant

G E M M I L L, Judge

¶1 Kevin Dawon Lewis appeals from his convictions of

aggravated assault, a class six felony, assault, a misdemeanor and domestic violence offense, and the resulting sentences. Lewis's counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. See *Smith v. Robbins*, 528 U.S. 259 (2000). At Lewis's request, his counsel raised insufficiency of the evidence to challenge the aggravated assault conviction. Lewis also filed a supplemental brief *in propria persona* claiming ineffective assistance of counsel and prosecutorial misconduct. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶3 Lewis lived in a one-bedroom apartment with his girlfriend, C.B., and her mother, D.B.¹ The living arrangements resulted in periodic flare-ups that would send C.B. and her mother to stay in a hotel for the night. On March 20, 2009,

¹ Lewis's name was on the lease, but C.B. and her mother contributed to the rent.

Lewis was intoxicated and had become belligerent.² He wanted C.B.'s mother to leave the apartment and he took physical and verbal action to remove her. In response, C.B. began gathering her things to leave with her mother, but Lewis wanted C.B. to stay. The three began arguing. C.B. and D.B. would need to call a cab in order to go to a hotel, so C.B. told her mom to get the phone and call a cab to leave. D.B. grabbed the phone out of Lewis's back pocket and the two began to struggle over it; the phone's cord was very long and it tangled them both up. While they were fighting over the phone, both pulling it toward themselves, Lewis let go of the phone and it hit D.B. in the mouth.

¶14 During this struggle, two calls were made to 9-1-1. It is not clear who dialed -- both Lewis and D.B. were threatening to call the cops -- but the recorded argument contains C.B. yelling in the background that Lewis had hit her mother. After the struggle over the phone, Lewis kicked both C.B. and her mother out of the apartment and locked the door. C.B. called 9-1-1 from her cell phone because she wanted to get back into the apartment so she and her mother could get their purses, while Lewis called 9-1-1 from inside the apartment asserting that he wanted to press charges.

² No sobriety tests were performed, but Lewis appeared to be intoxicated and smelled of alcohol.

¶15 Officers arrived and, after some investigation, Lewis was arrested. As the officers walked Lewis toward the patrol car, Lewis began to yell and dropped all of his weight to the ground, refusing to move. Because the officers could not carry Lewis's dead weight to the car, they pulled the patrol car alongside him, and stood him up to pat him down. Lewis again dropped to the ground, scooted himself under the patrol car, and wrapped his legs around the back tire telling the officers they would have to run him over because he would not move. Unable to coax Lewis out from under the car, the officers called for assistance and four other officers arrived. One of the officers, the supervisor, was able to get Lewis into the back of the patrol car; however, Lewis refused to put his feet in the car so the door could be closed. An officer had to pull Lewis from the other side of the car to get his feet in the car.

¶16 Lewis continued to be uncooperative at the jail. While being searched as part of processing, Lewis stripped off all of his clothes. Because of his behavior, and to keep him from agitating other inmates, the officers placed Lewis in a padded cell. Once in the cell, Lewis incessantly yelled and screamed through an opening in the door. He could be heard throughout the facility. In order to distance Lewis from the door and muffle the sound, Officer O. entered the padded cell with a number of other officers to handcuff Lewis to the wall.

Lewis resisted with both his arms and his legs at one point requiring the presence of five officers to subdue him. Once he was cuffed, and the officers began to back out of the cell, Lewis pulled his leg back and kicked Officer O. in the shin.

¶17 Lewis was charged by grand jury indictment with one count of aggravated assault on Officer O., one count of assault, a domestic violence offense, and one count of preventing use of a telephone in emergency, a domestic violence offense. He waived his right to a jury and proceeded with a bench trial. At trial, Lewis was identified by C.B., D.B., Officer O., and the arresting officers. After a 2-day trial, the court found Lewis guilty of aggravated assault, a class six felony, and of the lesser included offense of reckless simple assault, a class two misdemeanor and domestic violence offense. Lewis was sentenced to pay a \$200.00 fine for the reckless simple assault and to serve one year of incarceration for the aggravated assault. The judge acquitted Lewis of count three.

¶18 Lewis sought, and was given, permission to file a delayed notice of appeal. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).

DISCUSSION

¶19 Lewis argues that he was not effectively represented

at trial because trial counsel failed to challenge the grand jury indictment, failed to seek appropriate amendment to the indictment, and failed to seek and interview other officers at the jail as witnesses to the aggravated assault. We will not consider these claims of ineffective assistance of counsel because such claims cannot be raised on direct appeal; rather, our supreme court has directed that such claims must be raised in a Rule 32 post-conviction relief proceeding. See *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

¶10 Lewis next argues that prosecutorial misconduct resulted in his wrongful conviction. A conviction will be reversed due to prosecutorial misconduct if (1) misconduct occurred and (2) it is reasonably likely the misconduct affected the jury's verdict. *State v. Anderson*, 210 Ariz. 327, 340, ¶ 45, 111 P.3d 369, 382 (2005). During trial, Lewis did not object to any misconduct; therefore, we review only for fundamental error. See *id.* at 341, ¶ 45, 111 P.3d at 383.

¶11 Lewis contends the prosecutor failed to disclose material information that would have warranted a lower charge and would have tended to contradict evidence of the aggravated assault. This argument tracks *Brady v. Maryland*, 373 U.S. 83 (1963), which held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to

punishment." *Id.* at 87. However, in Lewis's case, there was no such violation or resulting prejudice.

¶12 The State's disclosure statement contains the names of seven Mesa Police Department officers to be called in the case in chief or as rebuttal witnesses. Six of these same officers are listed in the joint pretrial statement. These witnesses were available for the defense to subpoena, and the defense did not do so. There is no indication of any knowledge on the State's part -- or any corresponding ignorance on the part of the defense -- that these other officers' testimony would contradict that of Officer O.; thus, there was no obligation on the State to produce their testimony. *See State v. Jones*, 120 Ariz. 556, 560, 587 P.2d 742, 746 (1978) (prosecution must give defendant "full information regarding any exculpatory evidence it possesses" about which the defendant does not have actual knowledge).

¶13 Finally, Lewis argues that the evidence was not sufficient to support his conviction of aggravated assault. We review the sufficiency of the evidence to determine whether there is substantial evidence to support the verdict. *State v. Stroud*, 209 Ariz. 410, 411, ¶ 1, 103 P.3d 912, 913 (2005). Substantial evidence requires more than a "mere scintilla"; there must be evidence that a reasonable person would find supports a verdict of guilty beyond a reasonable doubt. *State*

v. Hughes, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). And, as already noted, “[w]e view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions.” *Powers*, 200 Ariz. at 124, ¶ 2, 23 P.3d at 669.

¶14 Officer O. testified that Lewis intentionally kicked him while he was handcuffing Lewis to the wall of the padded cell. The State introduced Exhibit 15, video footage of the incident in the padded cell, which shows all of the officers reacting at the time Officer O. testified Lewis kicked him. The actual kick is not visible because the number of officers obscured a clear view via the camera of Lewis’s legs. While the actual kick is not shown on the video, the conclusion that Lewis did kick the officer is reasonably supported by Officer O.’s testimony and the apparent reaction on the video recording of the other detention officers. Lewis was charged with assaulting a person he knew or had reason to know was a peace officer engaged in the execution of official duties. See A.R.S. § 13-1204(A)(8)(a). Lewis was in a detention facility, Officer O. was in uniform, and testimony shows Lewis intentionally kicked Officer O. in the shin. We conclude there was sufficient evidence to support the verdict, and we affirm Lewis’s aggravated assault conviction.

¶15 Having considered defense counsel’s brief and examined

the record for reversible error, see *Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. The sentence imposed falls within the range permitted by law. As far as the record reveals, Lewis was represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶16 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Lewis of the disposition of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. Lewis has thirty days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

CONCLUSION

¶17 The convictions and sentences are affirmed.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Judge

_____/s/_____
MAURICE PORTLEY, Judge