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



DIVISION ONE
FILED: 08/16/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0333
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
MARTIN DELGADO,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-135506-001 DT

The Honorable Steven P. Lynch, Judge

**CONVICTIONS AFFIRMED; SENTENCES AFFIRMED IN PART,
CORRECTED IN PART, AND REMANDED IN PART**

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By Kent E. Cattani, Chief Counsel,
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Attorneys for Appellee

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By Louise Stark, Deputy Public Defender
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G E M M I L L, Judge

¶1 Martin Delgado appeals from his convictions and

sentences for criminal trespass, two counts of aggravated assault, and one count of disorderly conduct. Delgado'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 she has searched the record and found no arguable question of law, and requesting that this court examine the record for reversible error. Delgado was afforded the opportunity to file a supplemental brief *in propria persona* and he has raised several issues that we have considered. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We affirm Delgado's convictions and sentences on counts one, two, and four; correct the minute entry on the sentence for count four; and affirm the conviction on count five but remand for resentencing on that count.

FACTS AND PROCEDURAL HISTORY

¶12 "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). The following evidence was presented at Delgado's trial.

¶13 Around 11 a.m., on May 27, 2009, Martin Delgado went to an apartment complex, carrying two kitchen knives in his pockets. At that time, handicapped resident Robert, Robert's caregiver, and a van driver named Phillip, were returning from

Robert's physical therapy appointment. After the caretaker and Phillip unloaded Robert from the van in a wheelchair, the caretaker wheeled Robert into his apartment where his wife, Debra, was sleeping. After wheeling Robert to his living room, the caretaker turned around to close the door. Delgado had come into the apartment and was standing inside the doorway with his hands in his pockets.

¶4 The caretaker asked if Delgado was there to see Robert, but Delgado did not say anything. Delgado, expressionless and unresponsive, continued to stand inside the apartment even though the caretaker, Robert, and Debra repeatedly told him to leave. Through the still-open doorway, Phillip, who had been back at the van re-loading a wheelchair, noticed Delgado inside the living room.

¶5 Phillip went back to the apartment and approached Delgado who was still inside. Phillip told Delgado he ought to leave and that the police would be called soon because Delgado did not belong in the apartment. A silent Delgado finally left the apartment and followed Phillip outside. Debra slammed the door, locked it, and called 911.

¶6 Outside, Phillip warned Delgado the police were probably on their way and that he ought to leave. Phillip went back to the van and Delgado followed him, asking for a ride. Phillip told Delgado that a ride would be "against company

policy," and opened the van's door. Next, Phillip remembers Delgado "started slashing" at him, cutting his left hand severely enough to cause "gushing blood" to "right away blind" him. Phillip kicked at Delgado to defend himself, but Delgado persisted in slashing at Phillip with the two kitchen knives from his pockets. Phillip was able to call out for help.

¶17 Delgado was distracted when a neighbor, Cameron, who displayed a machete, appeared and shouted for Delgado to leave Phillip alone, giving Phillip an opportunity to try to ready a pocket knife he carried in his pants. Phillip couldn't use the knife, though, because he had "no coordination" in both his hands, "especially the left one." As Delgado chased Cameron away, Phillip got to his feet, leaving the pocket knife behind. He banged on Robert's door, and then made his way back to the safety of the van where, once inside, he tried to call 911 on his cell phone. As with the pocket knife, Phillip tried to use the cell phone, but "couldn't with all the blood."

¶18 Meanwhile, another neighbor, Cedric, heard the commotion, and came from his upstairs apartment telling Delgado to leave Phillip and Cameron alone. Delgado then chased Cedric back upstairs, banging on his door and sticking his knife into the metal screen door "trying to open it." Delgado then walked downstairs to the parking lot, finding Robert's neighbor, Calvin, and asked him for his car. Calvin refused, and watched

as the police confronted, tased, and arrested Delgado. Delgado, who had braced himself for the tasing, fell nonetheless and hit his head on the ground.

¶9 An ambulance transported Delgado to the hospital where he was treated for injuries resulting from his fall. During the ride to the hospital, Delgado was "tensing up his arms and legs," requiring EMTs to "strap[]" him to the stretcher. Delgado continued to "flex[] and resist[]" at the hospital. The nature of the charges against Delgado, his appearing to be "under the influence of meth," his having to be physically restrained, and his non-compliance with any officers, EMTs, or hospital staff, compelled the police to assign an officer to stay with him at the hospital. Later at the hospital, Delgado charged at an officer (Officer S.) and punched him in the face.

¶10 In June 2009, Delgado was indicted on the following five counts: count one, criminal trespass in the first degree, a class six felony, as against Debra and Robert, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1504 (2010); counts two, three, and four, aggravated assault, a class three dangerous felony, as against Phillip, Cedric, and Cameron, in violation of A.R.S. § 13-1204 (2010); and, count five, aggravated assault, a class six dangerous felony, as against Officer S., in violation of A.R.S. § 13-1204.

¶11 A seven-day jury trial began on February 8, 2010. The

jury found Delgado guilty of criminal trespass in the first degree; the aggravated assault of Phillip, a dangerous offense; the lesser-included offense of disorderly conduct against Cedric, a dangerous offense; and the aggravated assault of Officer S. The jury found Delgado not guilty of the aggravated assault of Cameron, nor of the lesser-included offense of disorderly conduct against Cameron. The trial court imposed slightly aggravated sentences for the convictions of criminal trespass, disorderly conduct against Cedric, and aggravated assault of Officer S. The court ordered those sentences to run concurrently with an aggravated sentence for the aggravated assault of Phillip, making Delgado's sentences 15 years overall, less 316 days of presentence incarceration credit.

¶2 Delgado timely appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21 (2003), 13-4031 (2010), and 13-4033 (2010).

DISCUSSION

¶3 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. In his supplemental brief, Delgado requests we find fundamental error based on errors at trial relating to (1) prosecutorial misconduct, (2) jury instructions, (3) his right to a complete defense, and (4) ineffective

assistance of counsel. After a review of the record for these issues, we find no fundamental error.

Prosecutorial Misconduct

Closing and Rebuttal Arguments

¶4 Delgado alleges the State committed prosecutorial misconduct in its closing argument when it said "[h]e's guilty," and in its rebuttal argument when it said Delgado "lives in a fantasy world." He asserts "[h]e's guilty" is an improper injection of the State's personal opinion of his guilt and that suggestions to a fantasy world are intended to "appeal to the jury's fears and passions."

¶5 In *State v. Sullivan*, 130 Ariz. 213, 218, 635 P.2d 501, 506 (1981), the Arizona Supreme Court expressed the test for the impropriety of closing remarks as a two-part inquiry requiring the remarks to draw attention to "matters which [jurors] could not be justified in considering" and those remarks must also appear to have "probably influenced the jury's verdict." "Prosecutors have 'wide latitude' in presenting their closing arguments to the jury." *State v. Jones*, 197 Ariz. 290, 305 ¶ 37, 4 P.3d 345, 360 (2000). Prosecutors are precluded, however, from expressing "personal belief in the defendant's guilt or innocence." *State v. Filipov*, 118 Ariz. 319, 323, 576 P.2d 507, 511 (App. 1977). Additionally, counsel is also barred from making "arguments that appeal to the passions and fears of

the jury." *State v. Henry*, 176 Ariz. 569, 581, 863 P.2d 861, 873 (1993).

¶6 In *State v. Filipov*, we found, "by virtue of [the] sheer repetition" in the phrase "[h]e's guilty, guilty, guilty," that the prosecutor's words became a personal opinion as to guilt. 118 Ariz. at 324, 576 P.2d at 512. Here, we find the State's isolated comment was not rendered a personal opinion because "[h]e's guilty" came as a conclusion to a permissible review of evidence presented. In *State v. Henry*, the Arizona Supreme Court found that although a comment referring to the defendant as a "psychopath" was an appeal to the passions and fears of the jury, it was a lone comment made in the course of a nine-day trial and did not influence the verdict. 176 Ariz. at 581, 863 P.2d at 873. A prosecutor is entitled to argue that the evidence shows the defendant is guilty.

¶7 In this case, the comment that Delgado lives in a "fantasy world" was said numerous times in the State's rebuttal argument. Understood in context, we conclude that these references constitute the prosecutor's opinion of the reasonableness – or lack thereof – based on the evidence, of Delgado's position and denial of guilt. In other words, we perceive these comments to have been a permissible argument based on the evidence. For these reasons we do not find prosecutorial misconduct based on the State's closing and

rebuttal arguments, and thus no error.

The State's Alleged Late Disclosure

¶18 On the morning of jury selection, Phillip revealed to the State that he was the owner of the pocket knife left at the scene. The State informed Delgado "right before" jury selection of this new information. Delgado asked for a dismissal arguing "a Grand Jury should have been able to consider [the information] . . . [because that] evidence is somewhat exculpatory and impedes Mr. Delgado's right to a fair trial on due process grounds to adequately prepare his defense on evidence." Delgado now alleges the late disclosure is an ethical violation amounting to misconduct.

¶19 The trial court dealt with the late disclosure issue by finding the State gave notice "as soon as it became aware," and found dismissal was inappropriate because the State had not "committed any wrongdoing." Likewise, we find the State did not unlawfully obstruct Delgado's access to evidence in violation of ethical rules. See Ethical Rule 3.4(a), Ariz. R. Prof'l Conduct, Ariz. R. Sup.Crt. 42 ("unlawfully obstruct[ing] another party's access to evidence or . . . conceal[ing] . . . material having potential evidentiary value."). Additionally, we find no abuse of discretion for the trial court's decision to not grant a dismissal. Thus, we find no reversible error.

Jury Instructions

Alleged Shifting of Burden of Proof

¶10 Delgado claims the State's closing and rebuttal arguments "shift[ed] the burden of proof to [his] version of events." We find no instances of actual or attempted burden shifting in those arguments or during the trial. Additionally, the court issued standard preliminary and final jury instructions dealing with, in pertinent part, the presumption of innocence, the State's burden of proving all elements beyond a reasonable doubt, that opening and closing arguments are not evidence, and that "[t]he defendant is not required to produce evidence of any kind." Because our supreme court has noted that we must presume that jurors follow the court's instructions in the absence of evidence to the contrary, see *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006), we conclude that the instructions given were an adequate guard against any potential burden shifting and find no error.

Lack of a Jury Instruction Regarding Intent to Enter

¶11 Delgado next claims the trial court should have read a jury instruction regarding his "lack of intent to plan an entry" in the criminal trespass charge. The record shows no request for such an instruction at trial, and instead shows the trial court issued final jury instructions defining, *inter alia*, "intentionally," and "knowingly," and describing that "knowingly" is necessarily included in "intentionally."

Additionally, Delgado's own testimony demonstrates he intended to enter, thinking it was the home of a girl he had spoken to earlier,¹ and the State put on evidence that his entry and delay in leaving was not authorized by Debra or Robert.² On this record, we find no reversible error in these jury instructions.

Right to Complete Defense

¶12 Delgado alleges his "right to present a complete defense was . . . violated." We find no evidence in the record or in his brief supporting such a claim. Court-appointed counsel represented Delgado during the trial's entirety, and Delgado was able to put forth the justification of self-defense, and the court provided an applicable final jury instruction. Consequently, we find no error based on this claim.

Ineffective Assistance of Counsel

¶13 "[I]neffective assistance of counsel claims are to be brought in Rule 32 proceedings." *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). "Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit." *Id.* We therefore do not address this claim.

¹ Delgado testified at trial: "I noticed that one of the doors was open . . . and the girl that I had talked to . . . told me she would be out waiting . . . in that area, . . . and I took a step into the door."

² The caretaker, Robert, and Debra repeatedly told Delgado to leave.

Minute Entry Correction

¶14 Where there are discrepancies between the sentencing minute entry and the oral pronouncement, we will often amend the minute entry to reflect the oral pronouncement. *State v. Johnson*, 108 Ariz. 116, 118, 493 P.2d 498, 500 (1972). The sentencing minute entry incorrectly states Delgado was convicted of count four, aggravated assault against Cedric, a class three dangerous felony. We correct the minute entry to reflect the jury's verdict finding Delgado guilty of the lesser-included offense of disorderly conduct against Cedric, a class six dangerous felony.

Sentencing Inconsistency

¶15 The sentencing minute entry states Delgado was convicted of count five, aggravated assault against Officer S., a class three dangerous felony. In contrast, the indictment lists count five as a class six dangerous felony, and, at sentencing, the transcript states that the judge described count five as a class six dangerous felony. Additionally, the jury verdict form for count five does not list a finding regarding dangerousness. Due to these inconsistencies, we remand for clarification or resentencing by the trial court on count five.

¶16 The sentences imposed for counts one, two, and four, fall within the range permitted by law for the convictions involved, and the evidence presented supports those convictions

on all counts. As far as the record reveals, Delgado 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.

¶17 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 Delgado 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. Delgado 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

¶18 Delgado's convictions are affirmed. Delgado's sentences are affirmed as corrected on all convictions except for count five, and we remand for clarification or resentencing on count five.

JOHN C. GEMMILL, Judge

CONCURRING:

PATRICIA K. NORRIS, Presiding Judge

PATRICIA A. OROZCO, Judge