DIVISION ONE
FILED: 05/24/2011
RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. EPHRAIM MAHONRI MORIANCUMER MILES, Appellant.	)	1 CA-CR 10-0535 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-169296-001SE

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

Thomas C. Horne, 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 Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Ephraim Mahonri Moriancumer Miles (Defendant) timely appeals his convictions and sentences for first degree burglary

and aggravated assault, respectively class two and class three dangerous felonies. Defendant's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this Court that after a search of the entire appellate record, he found no arguable question of law that was not frivolous. Defendant was also afforded the opportunity to file a supplemental brief in propria persona, but he did not do so.

¶2 Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). 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, and -4033.A.1. (2010).[1] Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3 When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996). Defendant was indicted by a grand jury on one count of burglary in the first degree, a class two dangerous felony, and one count

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

of aggravated assault, a class three dangerous felony. Defendant pled not guilty.

¶4 Prior to trial, Defendant filed a motion to suppress evidence. Defendant argued that his wallet and its contents should be suppressed as fruits of an illegal search. Specifically, Defendant argued that two pieces of paper found within the wallet should be suppressed: one containing the address to a residence in Mesa, and the other containing a hand-written "to do" list.

¶5 The trial court held an evidentiary hearing regarding this matter. Detective R. testified that he monitored an interview of Defendant after the arrest. During the interview process, but prior to booking, Detective R. performed what he called an "inventory search" of Defendant's cell phone and wallet, looking for weapons or contraband. Detective R. testified that it was department policy to conduct this type of search to prevent contraband from entering a secured facility. Inside Defendant's wallet Detective R. found a folded piece of paper with writing on it. Detective R. testified that based on his training and experience, it was not uncommon to find illegal drugs or razorblades concealed in folded up pieces of paper. Detective R. set the paper aside for further investigation, having noticed that the first line written on the paper read, "Establish an alibi."

¶6 Detective T. testified that with the consent of Defendant's mother, he entered her house, located Defendant in a bedroom, and placed him under arrest. Defendant's mother confirmed this in her testimony. During the arrest, another detective asked Defendant if he wanted to take his wallet or phone to the police station. Defendant responded that he did want to take his cell phone and wallet with him to the police station. Detective D. testified that he retrieved the wallet from the bed where Defendant was found. Detective T. testified that it is common for a person to want to take identification and a phone to jail, to call for a ride home when the person is released from jail. Defendant's mother testified that she was present in the home at the time of Defendant's arrest, but not privy to any conversation regarding his wallet. The trial court found that Defendant's wallet was lawfully searched and seized and accordingly denied Defendant's motion to suppress.

¶7 Defendant also filed motions in limine to preclude references at trial to his alleged drug abuse and to his alleged on-line access of the victim's cell phone account. The trial court precluded reference to Defendant's alleged prior illegal drug use or possession; however, it found the voice mail, left by Defendant for the victim, regarding Defendant's on-line access of the victim's cell phone account to be admissible. At the evidentiary hearing, the trial court also ruled on

Defendant's oral motion in limine by precluding reference to the fact that Defendant was terminated from his job.[2]

¶8 The facts were established at trial as follows. The victim's neighbor (Neighbor) testified that on the day of the attack, the victim called her to his apartment for help. Neighbor entered the victim's apartment to find him on the floor in a puddle of blood, which prompted her to call the police.

¶9 Neighbor also testified that Defendant had been having a romantic relationship with the victim's wife. Neighbor testified that the victim had previously found a box of photographs containing images of Defendant with the victim's wife.

¶10 The victim testified that he discovered the romantic relationship occurring between his wife and Defendant. The victim also testified that he found photographs of his wife with Defendant, and that Defendant's name was Ephraim. The victim subsequently exchanged several threatening text messages with Defendant; the victim also received voice messages from Defendant. The victim's wife (Wife) identified Defendant's voice in the voice messages.

¶11 The victim described the attack: he heard someone tapping at the door, he rolled his chair from the desk over to

[2] The trial court also precluded testimony regarding allegations regarding the victim's feelings of jealousy.

the door, he opened the door, and a person pushed his way into the apartment. The person pointed a gun at the victim, knocked him to the ground, and hit him repeatedly with a hammer. During the attack, the victim saw that it was Defendant who was his assailant, recognizing him from the photographs. Defendant told the victim, "stay away from your wife." The victim suffered cuts, bruises, and required five to six staples to repair a laceration in the back of his head.

¶12 Wife testified that on the day of the attack she got a call at work from the victim saying "that it was [Defendant] that broke into the house." Officer A. testified that when he arrived on the scene, the victim stated to him that Defendant "had hit him in the head." Later at the hospital, Officer A. showed the victim a photo line-up and the victim identified Defendant as his attacker. The victim's sister-in-law testified that she called Defendant the night of the attack and asked, "What did you do?" Defendant replied with a laugh and said, "Even if I did do it, I wouldn't be dumb enough to leave my fingerprints behind [and] maybe he deserved it." Officers arrested Defendant the next day.

¶13 Detective B. testified that she interviewed Defendant upon his arrest. In the interview, Defendant said that he was at a friend's house on the day of the attack. Defendant denied knowing anything about the attack.

¶14 A custodian of records at Scottsdale Healthcare testified for the defense that the victim's medical records contained a statement by the victim that he was attacked in his home where "several" people came in and assaulted him.

¶15 The jury found Defendant guilty on both counts. The jury also found aggravating circumstances: (1) that the offenses involved "infliction or threatened infliction of serious physical injury;" and (2) that the offenses "caused physical, emotional or financial harm to the victim."[3]

¶16 The trial court sentenced Defendant to the presumptive 10.5 years' incarceration for count one, first degree burglary, and the presumptive 7.5 years' incarceration for count two, aggravated assault.[4] The trial court specified that both sentences were to run concurrently as dangerous, non-repetitive

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[3] Defendant challenged the use of aggravating circumstances at sentencing; however, because presumptive sentences were imposed, we do not address the issue.

[4] The signed order incorrectly states 7.5 months' incarceration as the sentence for count two. We therefore correct the record to accurately state Defendant's sentence for count two as 7.5 years' incarceration, as reflected by the transcript of the sentencing hearing. *See State v. Contreras*, 180 Ariz. 450, 453 n.2, 885 P.2d 138, 141 n.2 (App. 1994) ("When we are able to ascertain the trial court's intention by reference to the record, remand for clarification is unnecessary."); *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992) ("Upon finding a discrepancy between the oral pronouncement of sentence and a minute entry, a reviewing court must try to ascertain the trial court's intent by reference to the record.").

offenses, and that Defendant was entitled to 230 days of presentence incarceration credit on both counts.

DISCUSSION

¶17 The trial court properly admitted Defendant's wallet and its contents as fruits of a lawful search. The trial court found this evidence was admissible because: (1) police entered the home of Defendant's mother with her consent; (2) Defendant consented to having the wallet seized and brought with him to the police station upon his arrest; and (3) officers searched the contents of the wallet while at the police station as part of a valid inventory search.

¶18 "When reviewing a trial court's denial of a motion to suppress, we consider only the evidence presented at the suppression hearing, and view it in the light most favorable to upholding the court's ruling." *State v. Blakley*, 226 Ariz. 25, __, ¶ 5, 243 P.3d 628, 630 (App. 2010) (internal citation omitted). If the matter involves a discretionary issue, we employ an abuse of discretion standard; we review constitutional and purely legal issues de novo. *Id*.

¶19 "A consent search is outside the ambit of traditional Fourth Amendment warrant requirements, but clear and positive evidence in unequivocal words or conduct expressing consent must be shown." *State v. Lynch*, 120 Ariz. 584, 586, 587 P.2d 770, 772 (App. 1978) (internal citation omitted). For an inventory

search to be valid, "[f]irst, the police must have lawful custody [of the item to be searched]; and, second, the police must have acted in good faith in conducting [the] inventory so as not to use it as a subterfuge for a warrantless search." *State v. Johnson*, 23 Ariz. App. 64, 65, 530 P.2d 910, 911 (1975). The inevitable discovery doctrine renders admissible illegally obtained evidence "[i]f the prosecution can establish by a preponderance of the evidence that the illegally seized items or information would have inevitably been seized by lawful means." *State v. Ault*, 150 Ariz. 459, 465, 724 P.2d 545, 551 (1986).

¶20 In this case, not only does the evidence indicate that Defendant's mother consented to the officers' entry into her home, but also that Defendant consented to having his wallet seized and brought with him to the police station upon his arrest. Moreover, the evidence also supports that the contents of the wallet were searched in good faith as part of a valid inventory search; or in the alternative, they inevitably would have been subject to a valid inventory search upon Defendant's booking into jail. As such, the wallet and its contents were properly admitted at trial.

¶21 Nevertheless, even without the wallet and its contents, there was sufficient evidence to support the jury's verdict of guilty on both counts. Evidence is sufficient when

it is "more than a [mere] scintilla and is such proof" as could convince reasonable persons of Defendant's guilt beyond a reasonable doubt. *State v. Tison,* 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) (citation omitted).

¶22 "[C]ircumstantial evidence when examined as a whole [may] provide the jury with sufficient evidence from which it could [find] appellant guilty beyond a reasonable doubt . . . ." *Tison*, 129 Ariz. at 554, 633 P.2d at 363; *see State v. Henry*, 205 Ariz. 229, 232, ¶ 11, 68 P.3d 455, 458 (App. 2003) ("Substantial evidence, which may be either circumstantial or direct, is evidence that a reasonable jury can accept as sufficient to infer guilt beyond a reasonable doubt."). "The lack of direct evidence of guilt does not preclude such a conclusion since a criminal conviction may rest solely upon proof of a circumstantial nature." *Tison*, 129 Ariz. at 554, 633 P.2d at 363 (citing *State v. Carriger*, 123 Ariz. 335, 599 P.2d 788 (1979)); *accord State v. Green*, 111 Ariz. 444, 446, 532 P.2d 506, 508 (1975) ("There is no distinction in the probative value of direct and circumstantial evidence.").

¶23 A person is guilty of burglary in the first degree if he enters a residential structure with intent to commit any felony and knowingly possesses a deadly weapon or dangerous instrument in the course of committing any felony. A.R.S. §§ 13-1507, -1508.A (2010). A person is guilty of aggravated assault if he intentionally, knowingly, or recklessly causes any physical injury to another person, and either (1) the injury is serious, (2) the injury is caused by the use of a deadly weapon or dangerous instrument, (3) the use of force causes temporary but substantial disfigurement or a fracture of any body part, or (4) the assault occurs after entering the home of another with intent to commit the assault. A.R.S. §§ 13-1203, -1204 (Supp. 2010).

¶24 In this case, the victim suffered significant physical injuries after the attacker entered his home and beat him with a hammer. The victim was able to identify his attacker as Defendant. Several witnesses corroborated that the victim identified Defendant immediately after the attack. The attacker made statements to the victim during the assault indicating that he had a relationship with the victim's wife. Defendant was previously having an affair with the victim's wife. Defendant previously threatened the victim with physical harm after the details of the affair were discovered. Thus, there is

substantial evidence to support the jury's verdict of guilty on both counts.

CONCLUSION

¶25 We have read and considered counsel's brief, carefully searched the entire record for reversible error, and we have found none. *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the jury's findings of guilt. Defendant was present and represented by counsel at all critical stages of the proceedings. At sentencing, Defendant and his counsel were given an opportunity to speak and the court imposed a legal sentence.[5]

¶26 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status 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. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant has thirty days from the

[5] We have determined that Defendant received a windfall of one day in the calculation of his presentence incarceration credit. Because the State failed to raise this issue on appeal, *see State v. Dawson*, 164 Ariz. 278, 792 P.2d 741 (1990), we will not disturb the sentence imposed by the trial court.

date of this decision to proceed, if he so desires, with an in propria persona motion for reconsideration or petition for review.[6]

¶27 For the foregoing reasons, Defendant's convictions and sentences are affirmed as corrected.

/S/
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PATRICIA A. OROZCO, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
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JOHN C. GEMMILL, Judge

[6] Pursuant to Arizona Rule of Criminal Procedure 31.18.b., Defendant or his counsel have fifteen days to file a motion for reconsideration. On the Court's own motion, we extend the time to file such a motion to thirty days from the date of this decision.