IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 05/26/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0686
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ALEX OSUNA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200901226

The Honorable Andrew W. Gould, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Michael A. Breeze, Yuma County Public Defender — Yuma
By Edward F. McGee, Deputy Public Defender
Attorneys for Appellant

Alex Osuna — San Luis
Appellant

S W A N N, Judge

¶1 Alex Osuna ("Defendant") timely appeals his conviction for aggravated assault in violation of A.R.S. §§ 13-1203,

-1204(A)(2). Pursuant to *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has advised us that a thorough search of the record has revealed no arguable question of law, and requests that we review the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona* and did so.

FACTS AND PROCEDURAL HISTORY[1]

¶2 In 2009, J.H. worked at a fast-food restaurant and occasionally would give Defendant free or discounted food. About 4:30 a.m. on March 3, 2009, J.H. was working the drive-through window when a truck with three passengers drove up. J.H. saw Defendant sitting in the front passenger seat. When J.H. told Defendant the price of the order, Defendant said he had forgotten his wallet and asked J.H. to "hook him up with some food." J.H. shook his head no, closed the window, and walked away. When J.H. later came back to the window he was irritated to see Defendant still sitting there with customers lined up behind him. He told Defendant, "If you ain't got the money, get the fuck out of the line so I can help my other

[1] "We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against appellant." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

customers." Defendant looked "mad" and asked J.H. to repeat his statement. When J.H. did, Defendant threw a steel spark-plug socket at him. J.H. ducked, but the socket hit his head, causing a laceration, bleeding and a "big bump." Defendant told him, "That's what [you] get for talking shit" and left. J.H. went outside to retrieve the socket and saw it had also dented the drive-through window. J.H. called the police.

¶3 Yuma Police Officer Leo Williams was dispatched for an assault call. He interviewed J.H. and seized the socket for evidence. An officer took photographs of J.H.'s injuries. Even though officers advised J.H. to go to the hospital, he kept working. Later that day, J.H. described Defendant to a co-worker. The co-worker "pointed [Defendant's] house out" to Williams.

¶4 During the evening of March 4, Williams went to that house and saw Defendant and another man inside the garage. Three officers approached the residence and spoke to Defendant's sister when she answered the door. While they were talking, Williams heard "running through the house" and saw Defendant and the other man run out the back door and jump over the back fence. Officers set up a neighborhood perimeter but were unable to locate Defendant.

¶5 Defendant was later indicted by a grand jury for aggravated assault, a class 3 felony. A three-day trial was

held. At the conclusion of the state's case, Defendant moved for a judgment of acquittal pursuant to Ariz. R. Crim. P. 20. The motion was denied. After deliberations, the jury found Defendant guilty of aggravated assault and found the offense dangerous.

¶6 Defendant was sentenced to a mitigated term of five years in prison, with 126 days of presentence incarceration credit.[2]

DISCUSSION

¶7 Defendant and counsel raise several issues in their opening briefs, which we discuss below. We have reviewed the entire record and find no fundamental error. *Leon,* 104 Ariz. at 300, 451 P.2d at 881. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Defendant was present at all critical phases of the proceedings and represented by counsel. The jury was properly impaneled and instructed. The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process.

[2] Prior to sentencing, Defendant filed a motion for new trial that was later withdrawn.

I. RULE 20 MOTION

¶8 A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20. Substantial evidence is such proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "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).

¶9 A person commits aggravated assault if the person uses a dangerous instrument to intentionally, knowingly or recklessly cause physical injury to another. A.R.S. §§ 13-1203(A)(1), -1204(A)(2). "Physical injury" means "the impairment of physical condition." A.R.S. § 13-105(32). A dangerous instrument is "anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury." A.R.S. § 13-105(12).

¶10 The state presented substantial evidence of guilt.

¶11 J.H. testified that he felt something hit his head and saw where the socket "bounced to." J.H. testified that the impact caused bleeding, a cut and swelling. Williams testified

that J.H. sustained a "half inch, maybe a little larger" bump and a "half an inch" laceration. On this evidence, a reasonable jury could determine that J.H. sustained physical injury.[3]

¶12 J.H. testified that the socket was "heavy" and made of stainless steel. Williams testified that the socket weighed "between three and six ounces" and could "knock out teeth," "put out an eye or break a nose" if it hit someone in the face.[4] The socket was admitted at trial. On this evidence, a reasonable jury could have found that the socket was a dangerous instrument capable of causing serious physical injury.

¶13 Defendant asserts that the state did not establish his identity as the person who actually threw the socket because there were other passengers in the truck, J.H. was looking down when the socket was thrown, and the state did not admit video tape or the testimony of the other employee who worked that night. J.H. testified that he saw Defendant "pull back and start to throw something," so he put his head down to "take whatever he was going to throw at me," felt something hit his head, and saw the socket bounce on the ground. On this

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[3] Contrary to Defendant's assertion otherwise, even a "minor" injury is sufficient to support aggravated assault as Defendant was charged because A.R.S. §§ 13-1203(A)(1) and -1204(A)(2), require only "physical injury."

[4] Contrary to Defendant's assertion on appeal, the state never alleged that a "deadly weapon" was used, offered any evidence of that fact, or instructed the jury on that definition.

evidence, a reasonable juror could have determined that Defendant was the one who threw the socket.

II. JURY INSTRUCTION ON DANGEROUS INSTRUMENT

¶14 Defendant contends that the jury may have been confused by its instructions and convicted him pursuant to A.R.S. § 13-1204(A)(1) rather than § 13-1204(A)(2) as charged.

¶15 Aggravated assault can occur in different ways, including when an assault is committed using a dangerous instrument pursuant to A.R.S. § 13-1204(A)(2), or when a person commits "serious physical injury to another" pursuant to § 13-1204(A)(1).

¶16 Here, Defendant was charged for using a dangerous instrument, not for inflicting serious physical injury. As Defendant accurately points out, the state alleged "serious physical injury" as an aggravating factor to enhance sentencing, but later withdrew that request. The state also told the court it was not pursuing "a serious physical injury theory." The state nonetheless *did* instruct the jury about "serious physical injury" because it was necessary to define "dangerous instrument." *See* A.R.S. § 13-105(12) ("'Dangerous instrument' means anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing . . . *serious physical injury*.") (emphasis added).

¶17 As Defendant notes, the instruction regarding serious physical injury was submitted separately from the jury's other instructions.[5] But the court instructed the jury that the definition "should be tied in with the definition of dangerous instrument." The court provided the jury with corrected instructions before they deliberated. We presume the jury followed its instructions. *State v. Jeffrey,* 203 Ariz. 111, 115, ¶ 18, 50 P.3d 861, 865 (App. 2002).

III. WILLITS INSTRUCTION

¶18 Defendant contends the court erred by refusing to give a requested *Willits*[6] instruction regarding the restaurant's video tape from the night of the incident and photographs of J.H.'s injuries, neither of which were admitted during trial.

¶19 "A *Willits* instruction permits the jury to draw an inference against the state if the state permits evidence within its control to be destroyed." *State v. Broughton,* 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988). The instruction is not appropriate, however, "if the defendant fails to demonstrate that the absent evidence would have exonerated him." *Id.*

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[5] The transcript suggests that it was inadvertently omitted from the court's earlier recitation of the instructions. The state referenced "serious physical injury" when it defined "dangerous instrument" during its closing statement. When the state concluded its statement, the court called both counsel to the bench. The court then instructed the jury.

[6] *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

¶20 Here, the officers never obtained the video, so it was never in the state's possession. The photographs were "never provided" to defense counsel with the police report. Instead, the state offered the testimony of Williams and J.H., who both described the injuries. Defendant now asserts that the photographs "could have shown a minor bump" on J.H.'s head -- not that they would have exonerated him. Under these circumstances, a *Willits* instruction was not appropriate.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

¶21 Defendant asserts he received ineffective assistance of counsel. Ineffective assistance of counsel claims must be brought in proceedings pursuant to Ariz. R. Crim. P. 32. "Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of their merit." *State v. Spreitz,* 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

V. SERIOUS PHYSICAL INJURY

¶22 Defendant next claims error because the court refused to allow witnesses E.M. and X.P. to testify.

¶23 Defendant did not disclose these persons as testifying witnesses. On the last day of trial, Defendant told the court that defense counsel refused to subpoena his mother, grandmother, and E.M., who Defendant considered "very important witnesses." Defendant never told the court he wanted X.P. to testify.

¶24 Over the state's objection, the court delayed trial to allow mother and grandmother to testify but sustained the objection to E.M. because his testimony would be cumulative.[7] *See* Ariz. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *State v. Verive,* 128 Ariz. 570, 576, 627 P.2d 721, 727 (App. 1981) ("To reject relevant evidence on the basis of unfair prejudice and cumulativeness is within the discretion of the trial court.").

¶25 Here, Defendant told the court E.M. would testify that he was present the night the officers went to Defendant's residence and saw Defendant in the garage. E.M. was expected to tell the jury that Defendant was not present that night -- testimony Defendant's mother was also expected to give. Defense counsel was "concern[ed]" about putting E.M. on the stand because he was "a person of interest" in another criminal matter

[7] When Defendant's mother was unable to appear due to work constraints, the court allowed her to testify telephonically. In a civil case, "appearance by telephone is an appropriate alternative to personal appearance." *Ariz. Dep't of Econ. Sec. v. Valentine,* 190 Ariz. 107, 110, 945 P.2d 828, 831 (App. 1997). *See also* Ariz. R. Civ. P. 43(f) ("In all trials the testimony of witnesses shall be taken orally in open court . . . ."); *T.W.M. Custom Framing v. Indus. Comm'n of Ariz.,* 198 Ariz. 41, 48, ¶ 22, 6 P.3d 745, 752 (App. 2000) ("[T]he telephonic medium preserves paralinguistic features such as pitch, intonation, and pauses that may assist [the fact-finder] in making determinations of credibility.").

involving Defendant. The state also "strenuously" objected to E.M.'s testimony because the state had not been provided sufficient identifying information to determine whether E.M. had a criminal history and the defense had never disclosed him as a witness.

¶26 On this record we find no error, especially fundamental error, in the court's decision to preclude E.M.'s testimony.

VI. "CONTAMINATED" EVIDENCE

¶27 Defendant next asserts the court erred by allowing the socket to be admitted even though it was "contaminated" when J.H. picked it up. He contends that "more physical proof" could have been obtained "if proper procedures were taken."

¶28 Defendant's conclusion that the socket was "contaminated" goes to the weight of the evidence, which is a question for the jury. *See State v. Gonzales,* 181 Ariz. 502, 511, 892 P.2d 838, 847 (1995) (finding defendant's argument that evidence gathered seven days later was "contaminated" goes to its weight, not its admissibility); *R & M Oxford Constr., Inc. v. Smith*, 172 Ariz. 241, 247, 836 P.2d 454, 460 (App. 1992) ("Conflicts of evidence are within the sole province of the trier of fact, as is the weight of the evidence and the reasonable inferences to be drawn therefrom.").

¶29 Here, the state disclosed that it would use the socket at trial, so that Defendant could have tested it himself. *See* Ariz. R. Crim. P. 15.1(e) (requiring the prosecutor to make available to the defendant for examination and testing "[a]ny specific items" listed in its disclosure statement). J.H. testified that he saw where the socket "bounced to" after it was thrown, and that he "went outside and picked [the socket] up and placed it on the counter" for the police. He later gave it to Williams, who testified that he placed the socket in an evidence envelope and "followed normal procedures and chain of custody." The state offered the socket at trial and Williams testified that it was "what [he] seized." It was admitted without objection. Williams was cross-examined.

VII. INABILITY TO CROSS-EXAMINE WITNESS

¶30 Defendant asserts his Sixth Amendment right to cross-examine his accusers was infringed because the state did not present the co-worker who gave Williams his address.[8]

¶31 The Sixth Amendment gives an accused a constitutional right to confront a witness who "makes a testimonial statement against the accused." *State v. Parks,* 211 Ariz. 19, 25, ¶ 30, 116 P.3d 631, 637 (App. 2005). "It applies to 'witnesses'

[8] He also asserts that the court erred in admitting the co-worker's "hearsay" statements, but the record demonstrates that no statement attributed to the co-worker was admitted.

against the accused -- in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 25, ¶ 27, 116 P.3d at 637.

¶32 Here, the co-worker did not accuse Defendant of anything, she only provided the address of a person who fit the description J.H. gave her. J.H. and Williams testified how they identified Defendant as the person who threw the socket, and they were both cross-examined.

CONCLUSION

¶33 We affirm Defendant's conviction and sentence. 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). On the court's own motion, Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
PATRICK IRVINE, Judge

/s/
_____
MAURICE PORTLEY, Judge