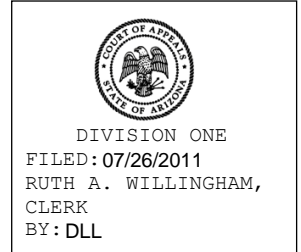


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 10-0836
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
OSCAR JIMENEZ VERA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-007096-001 DT

The Honorable Julie P. Newell, Commissioner

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 Christopher Johns, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Oscar Jimenez Vera (Defendant) appeals his convictions and sentences. 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 afforded the opportunity to file a supplemental brief in propria persona, but he did not do so.

¶12 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

¶1 We view the facts in this case in the light most favorable to sustaining the conviction. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). A grand jury indicted Defendant on four counts: count one, discharge of a firearm at a structure, a class two dangerous felony; count two, aggravated assault, a class three dangerous felony and a domestic violence offense; count three, endangerment, a class

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

six dangerous felony; and count four, unlawful discharge of a firearm, a class six felony.

¶12 In February 2006, Defendant's wife (Wife) was living in a Phoenix apartment complex with her three children, two of whom were fathered by Defendant. At the time, Wife did not have a telephone in her apartment. For some tenants who did not have telephones in their apartments, the on-site apartment complex manager (Manager) allowed tenants to use her phone in case of an emergency. At approximately 8:00 p.m. on February 1, 2006, Manager received a call on her cell phone. The caller identified himself as Defendant and asked to speak with Wife. Defendant is Wife's estranged husband. Wife testified that she had not given Manager's cell phone number to Defendant; however, Wife had called Defendant from Manager's cell phone because they were "fighting about child support." Manager went outside of her apartment and knocked on Wife's door. Wife answered the door and Manager told her "[Defendant] wanted to talk to her," and gave Wife the phone. Wife started to talk to Defendant while standing in her doorway. Wife testified she recognized the voice on the phone as Defendant's. The caller said "can you hear this," and then she heard two shots followed by the caller saying "well, guess what, this is me." Furthermore, Wife testified after she heard the shots she saw Defendant walking by

himself over to her apartment with a weapon in his right hand. Wife threw the phone back to Manager and told her "to call nine-one-one," and Wife shut her apartment door. After shutting the door Wife heard approximately five more shots. Manager called nine-one-one, continued to hear shots and saw one gunman that she later identified as Defendant approximately fifteen feet away. Manager further testified she "could hear the bullet flying right next to [her] ear."

¶13 Meanwhile, inside her apartment Wife's oldest daughter heard gunshots and Manager scream. Wife's daughter then took her younger brothers into the bathroom to protect them. Manager testified she then saw Defendant flee on foot from the apartment complex.

¶14 Police arrived at the scene after Manager's nine-one-one call and found eight casings. A police crime laboratory forensic scientist testified the casings found at the scene were fired from the same weapon.

¶15 Manager testified she received another call from Defendant about fifteen to twenty minutes after the police left the apartment complex, wherein Defendant instructed Manager "to tell [Wife] that he was going to kill her."

¶16 A jury found Defendant guilty of count two, aggravated assault, a class three dangerous felony and a domestic violence

offense; count three, endangerment, a class one misdemeanor; and count four, unlawful discharge of a firearm, a class six felony.² Defendant's Rule 20 motion was denied as well as his Rule 24 motion for a new trial. See Ariz. R. Crim. P. 20, 24.1.

¶17 After review of the presentence report and consideration of all possible aggravating and mitigating circumstances, the court sentenced Defendant to the following: count two, imprisonment for the presumptive term of seven and one-half years with credit for 173 days of presentence incarceration; count three, terminal disposition; count four, a term of probation for two years upon Defendant's discharge from the Arizona Department of Corrections as to his sentence for count two.

¶18 Defendant appealed, however, on May 26, 2009, Defendant's appeal was dismissed for lack of jurisdiction pursuant to Arizona Rule of Criminal Procedure 31.3, which provides that a notice of appeal shall be filed within twenty days after the entry of judgment and sentence. Defendant did not file a notice of appeal until May 18, 2009, more than twenty days after the entry of judgment and sentence. Pursuant to Defendant's request for post-conviction relief, leave to file a delayed notice of appeal was granted on September 30, 2010

² A jury found Defendant not guilty of count one, discharge of a firearm at a structure.

pursuant to Rule 32.1.f. Defendant filed a timely delayed notice of appeal on October 21, 2010.

DISCUSSION

¶9 This Court has reviewed the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, and is an error of such magnitude that the defendant could not possibly have had a fair trial. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prevail, a defendant must also establish that the error caused prejudice. *Id.* at ¶ 20, 115 P.3d at 607. The record reflects Defendant received a fair trial. Defendant was represented by counsel at all stages of the proceedings and was present or waived his presence at all critical stages. The jury was properly comprised of twelve members and two alternates. The trial court properly instructed the jury.

¶10 The State presented sufficient evidence upon which the jury could have based its decision. To convict a person of aggravated assault under A.R.S. § 13-1204 (2006) the jury must first find that the person committed an assault as defined by A.R.S. § 13-1203 (2006). Assault under A.R.S. § 13-1203.A.2 requires “[i]ntentionally placing another person in reasonable apprehension of imminent physical injury.” Furthermore, under

A.R.S. § 13-1204.A.2 “[a] person commits aggravated assault if the person commits assault as defined in § 13-1203 [and] . . . the person uses a deadly weapon or dangerous instrument.” Additionally, under A.R.S. § 13-604.P (2006) a dangerous felony “means a felony involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.” Wife testified she recognized the voice on the phone as Defendant. Wife further testified the caller said “can you hear this,” and then she heard two shots followed by the caller saying “well, guess what, this is me.” Wife also stated after she heard the shots she saw Defendant walking by himself over to her apartment with a weapon in his right hand. Wife’s testimony indicates she was placed in reasonable apprehension of imminent physical injury and Defendant used a deadly weapon. Thus, there was sufficient evidence to support Defendant’s conviction by a jury for aggravated assault and the jury’s finding that the aggravated assault charge was a dangerous felony.

¶11 Sufficient evidence was also provided that Defendant’s aggravated assault charge was a domestic violence offense under A.R.S. § 13-3601.A (2006). Pursuant to § 13-3601.A, a domestic violence offense means “an offense defined in § 13-1201 through 13-1204” if the “relationship between the victim and the defendant is one of marriage” or “the victim and the defendant

have a child in common." Wife testified in court Defendant was her husband and she has two children with Defendant. Thus, the evidence indicates the aggravated assault charge is a domestic violence offense.

¶12 The State presented sufficient evidence to allow the jury to convict Defendant on count four, endangerment. Under A.R.S. § 13-1201.A (2006), "[a] person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury." Manager testified in court that Wife talked to Defendant briefly before Manager heard two shots. Wife threw Manager the phone, said "call the police" and Wife slammed the door. Manager turned around when she heard the shots and saw Defendant shooting towards Wife. Manager called nine-one-one and continued to hear shots and saw Defendant, approximately fifteen feet away. Manager testified she could hear the bullet flying right next to her right ear. Thus, there was evidence of a substantial risk of death or physical injury.

¶13 Sufficient evidence was also presented at trial that Defendant discharged a firearm within the limits of the City of Phoenix, a municipality, in violation of A.R.S. §§ 13-3101, and -3107 (2006). A.R.S. § 13-3107.A, is violated when "[a] person who with criminal negligence discharges a firearm within or into the limits of any municipality." The evidence previously

recited supports the jury's finding that Defendant discharged a firearm within the limits of the City of Phoenix, a municipality.

¶14 The jury returned unanimous verdicts, which defense counsel confirmed by polling jurors. The court received and considered a presentence report, and imposed legal sentences. Both Defendant and his counsel were present at sentencing and both were given an opportunity to address the court prior to the imposition of sentences.

CONCLUSION

¶15 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.

¶16 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 this 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

date of this decision to proceed, if he so desires, with an in propria persona motion for reconsideration or petition for review.³

¶17 For the foregoing reasons, Defendant's convictions and sentences are affirmed.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

DONN KESSLER, Judge

/S/

MICHAEL J. BROWN, Judge

³ Pursuant to Rule 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.