

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



DIVISION ONE
FILED: 07/14/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,) 1 CA-CR 10-0927
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
MARIO SAUL SALCIDO,) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-102954-001DT

The Honorable Karen L. O'Connor, 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 Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 This is an appeal under *Anders v. California*, 386 U.S.

738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878

(1969). Counsel for Defendant Mario Saul Salcido has advised us that, after searching the entire record, he has been unable to discover any arguable questions of law, and has filed a brief requesting us to conduct an *Anders* review of the record. Defendant, however, filed a supplemental brief.

FACTS¹

¶2 Leslie Chavez was shot outside of Pantera's, a gentlemen's show club, by security guards in January 2010. The mother of his children, Crystal Salcido, took him to Maryvale Hospital in the back of his pickup truck. After Ms. Salcido had been handcuffed pending further investigation, Officer Lindsey Smith escorted her to the bathroom. As they were going back to the patrol car, Defendant followed them and threw water from his water bottle that hit Officer Smith.

¶3 Because Defendant seemed to be out of control, Officer Smith told Defendant to turn around and told him he was under arrest. As she was trying to search him for weapons, he turned around and pushed her. She grabbed him and put him on the ground. Defendant, however, refused to obey the commands of the officers and was eventually "tased" by Officer Miller. Defendant was subsequently placed in a patrol car.

¹ We review the facts in the light most favorable to sustaining the verdict. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶4 Defendant was charged by information with aggravated assault and resisting arrest. The case proceeded to trial after a motion for full mental health evaluation pursuant to Arizona Rule of Criminal Procedure 11, as well as two settlement conferences. The jury, after considering all of the testimony, including Defendant's, and the instructions, acquitted Defendant of the aggravated assault but convicted him of resisting arrest. After the trial court found beyond a reasonable doubt that he had three prior felonies, Defendant was sentenced to a three-year mitigated prison term, with credit for forty days of presentence incarceration.

¶5 We have jurisdiction over this appeal 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).

DISCUSSION

¶6 We have read and considered counsel's brief, Defendant's brief, and have searched the entire record for reversible error. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶7 Defendant, however, raises a number of issues in his supplemental brief. We address each for fundamental error. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.2d 89, 96 (App. 1999); see also *State v. Henderson*, 210 Ariz. 561, 115 P.3d 601 (2005).

¶8 First, he argues that the trial court abused its discretion by not giving a disorderly conduct instruction. We have long held that disorderly conduct is not a lesser included offense of resisting arrest. See *State v. Diaz*, 135 Ariz. 496, 497, 662 P.2d 461, 462 (App. 1983) (disorderly conduct is not a lesser included offense of resisting arrest). Consequently, we find no error because the court could not legally give the disorderly conduct instruction as a lesser included of resisting arrest.

¶9 Defendant next argues that the trial court abused its discretion by allowing Officer Miller to testify in rebuttal based on "facts not in evidence based or attributed on hearsay." We review the decision to allow rebuttal evidence for abuse of discretion. *State v. Talmadge*, 196 Ariz. 436, 440, ¶ 17, 999 P.2d 192, 196 (2000).

¶10 Officer Miller was permitted to testify in rebuttal because Defendant testified earlier that "no one said that he was under arrest." Officer Miller then recounted to the jury what Defendant told him after being provided *Miranda*² warnings. Officer Miller's testimony was designed to impeach and undermine Defendant's testimony that he did not know the police were

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

trying to arrest him.³ Because Defendant, like any witness who testifies, is subject to having his testimony impeached pursuant to Arizona Rule of Evidence 607, the trial court did not abuse its discretion in allowing Officer Miller to testify in rebuttal.

¶11 Defendant also argues that there was no evidence of his consciousness of guilt to demonstrate that he was guilty of resisting arrest. He argues that the jury did not hear about his diminished capacity or mental disability. The defense was free, however, to present the evidence and Defendant could have testified about his mental disability. The record reveals that he did not discuss any mental disability.

¶12 The record also reveals that the jury heard all the testimony presented, including the fact that uniformed officers tried to arrest Defendant, that he was intoxicated, that he fought and struggled, and that he only calmed down after he was "tased" a second time. The jury was then properly instructed. Consequently, the fact that he struggled with the police to prevent his arrest supports the verdict.

³ We will not address the argument that Officer Miller should not have been allowed to testify about any outstanding warrant for Defendant because the warrant was briefly raised by the defense. If there was any error when it was discussed, it was invited error. *State v. Lucero*, 223 Ariz. 129, 136, ¶¶ 19-21, 220 P.3d 249, 256 (App. 2009)

¶13 Finally, Defendant argues that the trial court erred by not ordering a revised presentence report because there was no discussion about his diminished mental capacity or emotional retardation in the report. Because there was no request for an additional report and no objection to the report, we only review for fundamental error.

¶14 We find no error. The trial court was aware of the findings and results of the Rule 11 evaluation, as well as all the trial testimony. Moreover, because the jury was not involved in the sentencing process it did not need to see the presentence report. Based on the mitigated prison sentence imposed despite Defendant's prior felonies, it is clear that the judge considered all of the information available to her. Consequently, the court committed no error by not ordering a presentence report with additional information.

¶15 Having addressed Defendant's supplemental arguments, and having searched the entire record for reversible error, we find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. The record, as presented, reveals that Defendant was represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits.

CONCLUSION

¶16 After this decision has been filed, counsel's obligation to represent Defendant in this appeal has ended. Counsel need do no more than inform Defendant of the status of the appeal and Defendant's future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 585, 684 P.2d 154, 157 (1984). Defendant can, if desired, file a motion for reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure.

¶17 Accordingly, we affirm Defendant's conviction and sentence.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Judge

/s/

PATRICK IRVINE, Judge