

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



DIVISION ONE
FILED: 12/22/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
) No. 1 CA-CR 10-0515
)
 Appellee,) DEPARTMENT D
)
 v.) **MEMORANDUM DECISION**
)
 FRANK JOHN ARNOLD,) (Not for Publication -
) Rule 111, Rules of the
 Appellant.) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-133258-001 DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

Thomas C. Horne, Arizona 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 Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Frank John Arnold (defendant) appeals from his conviction and the sentence imposed. For the reasons set forth below, we affirm.

¶2 Defendant's appellate 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 that, after a diligent search of the record, he was unable to find any arguable grounds for reversal, but setting forth numerous issues raised by defendant. This court also granted defendant an opportunity to file a supplemental brief, which he has done.¹ See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

¶3 We review for fundamental error, error that goes to the foundation of a case or takes from the defendant a right essential to his defense. See *State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988). We view the evidence presented at trial in a light most favorable to sustaining the verdict. *State v. Cropper*, 205 Ariz. 181, 182, ¶ 2, 68 P.3d 407, 408 (2003).

¹ After defendant filed a supplemental brief, he also filed a document entitled "Appellant's Opening Brief" raising ten issues that are identical to the issues listed by defendant's appellate counsel in the *Anders* brief. In resolving defendant's appeal, we have considered the issues raised by defendant in the latter filing.

¶14 Defendant was charged by indictment with one count of conspiracy to commit murder, a class one felony, in violation of Arizona Revised Statutes (A.R.S.) sections 13-1003(A) and -1105(A)(1) (2010).

¶15 The following evidence was presented at trial. In late 2007, Angelica Rodriguez met defendant while working as a translator for Foreclosure Consulting Solutions. After completing two transactions together, defendant and Rodriguez developed a personal relationship.

¶16 As their relationship progressed, defendant frequently complained to Rodriguez about his wife. He was separated from his wife and "in the middle of a divorce." When defendant told Rodriguez that his wife was "sexually abusing [their] children," she responded that "somebody should kill the bitch." From that point forward, defendant became focused on killing his wife and all of his conversations with Rodriguez centered on finding a way to murder her "without [defendant] getting caught."

¶17 Rodriguez quickly determined defendant's interest in killing his wife provided her with a financial opportunity. She agreed to help him with the intent "to play him along and take money from him." Defendant gave Rodriguez approximately \$1000 and told her he would give her an additional \$3000 if she killed his wife. Rodriguez initially agreed to kill defendant's wife, because she "plann[ed] to string him along and take as much

money from him as [she] could," but she later became "scared" and told defendant that she would find someone else to do it for him. Rodriguez's primary motivation for "helping" defendant with his plans to murder his wife was to obtain money to support her drug addiction.

¶18 Although Rodriguez became scared and feared defendant might harm her, she chose not to go to the police because she is not lawfully in the country and feared she might be deported. In May 2008, however, Rodriguez was detained by police when she was found in an abandoned house after getting "high." Initially, Rodriguez offered to become a confidential informant and provide the police information about drug dealers. Soon thereafter, Rodriguez informed the detective she was primarily working with that defendant planned to have his wife killed. Rodriguez then met with other police officers and they arranged to have Rodriguez call defendant to set up a meeting between defendant and a "hit man" with the nickname of "Phat Tony" who was, in actuality, Detective Salvadore Sanfillipo.

¶19 In the recorded telephone call, defendant expressed his dismay that Rodriguez was taking so long to arrange the murder and he asked whether the hit man she had found would be willing to kill his mother-in-law as well. Defendant also asked for reassurance that Rodriguez was not going to talk to the police. Later that day, defendant stopped by Rodriguez's home

and told her he wanted to meet the hit man. He also asked Rodriguez to celebrate with him that they had finally found someone to kill his wife.

¶10 At approximately 5:00 p.m. on May 28, 2008, defendant met Detective Sanfillipo at a restaurant parking lot. During their recorded meeting, Detective Sanfillipo provided defendant numerous "outs" to allow him to walk away from the situation. Nonetheless, defendant explicitly stated that he wanted his wife killed. Defendant agreed to pay the detective \$1500 upfront and an additional \$3000 after his wife was killed. When Detective Sanfillipo asked how defendant wanted his wife killed, defendant suggested that she could "die in a car accident, . . . overdose, or . . . shoot herself in the head." Defendant also stated that Detective Sanfillipo "ought to" kill his wife's mother as well. The following evening, defendant met with Detective Sanfillipo again and provided him with his wife's address and photograph and \$1500. As soon as defendant handed Detective Sanfillipo the envelope of money, other police officers placed him under arrest.

¶11 Defendant was charged by indictment with one count of conspiracy to commit murder. At defendant's first trial, Rodriguez testified, contrary to a court order, that defendant was a sex offender and had prior felony convictions. The trial court declared a mistrial because of Rodriguez's testimony.

Defendant's second trial was also aborted due a shortage of jury panelists.

¶12 Defendant's third trial commenced on March 15, 2010. After a four-day trial, the jury found defendant guilty. The trial court sentenced defendant to life with the possibility of parole after 25 calendar years.

¶13 As his first issue on appeal, defendant challenges Rodriguez's testimony at his first trial. As previously mentioned, the trial court declared a mistrial after Rodriguez testified outside the parameters of the court's order and defendant received a new trial. To the extent defendant claims the State intentionally elicited Rodriguez's statements, see *Pool v. Superior Court*, 139 Ariz. 98, 104-05, 677 P.2d 261, 267-68 (1984) (recognizing that the double jeopardy doctrine may prevent the State from pursuing a second trial after the court declares a mistrial based on prosecutorial misconduct), the record reflects that the prosecutor averred, and the trial court expressly found, that the State did not intentionally elicit the statements. Rather, the prosecutor met with Rodriguez before she took the stand, outlined the trial court's order, and admonished her not to mention anything barred by the court. Therefore, we need not address this issue further.

¶14 Defendant next contends that Detective Sanfillipo testified falsely to the grand jury. "A defendant alleging

prosecutorial misconduct in a grand jury proceeding generally must seek relief from an adverse trial court ruling through special action rather than waiting to raise such issues on appeal." *State v. Snelling*, 225 Ariz. 182, 185, 236 P.3d 409, 412 (2010). "The one exception to this rule is when a defendant has had to stand trial on an indictment that the government knew was based partially on perjured, material testimony." *Id.* at 185-86, 236 P.3d at 412-13 (quotation omitted). Defendant alleges that Detective Sanfillipo lied to the jury regarding the nature of their conversations. The transcripts of the grand jury proceedings are not included in the appellate record. Nonetheless, even accepting defendant's recitation of Detective Sanfillipo's grand jury testimony, we find no reversible error. Defendant cites several instances in which Detective Sanfillipo summarized portions of their conversations without using the precise wording of the parties. We find the error in these summations, if any, to be immaterial. For example, as reflected in the recordings of their conversations played at trial, defendant told Detective Sanfillipo that he wanted him to "kill" his wife and he provided several suggestions as to how Detective Sanfillipo could achieve that result. Even accepting defendant's recollection of the grand jury testimony, that Detective Sanfillipo may have made some slight errors in relaying the chronology of their conversations or the precise

words defendant used is irrelevant because the substance of his testimony, namely that defendant asked him to kill his wife, was accurate.

¶15 Defendant also argues that Rodriguez testified falsely to the trial jury. At trial, the prosecutor repeatedly acknowledged that Rodriguez lied to the police and that she had been dishonest during portions of her testimony. In response to questions by defense counsel, Rodriguez also acknowledged that she had lied to the police and during her testimony. Indeed, Rodriguez stated that she lies, but "not always." Therefore, Rodriguez's lack of veracity was placed before the jury and it was for the jurors to determine what portion of her testimony, if any, they found credible. See *State v. Jeffers*, 135 Ariz. 404, 420, 661 P.2d 1105, 1121 (1983) (explaining witness credibility is a matter solely for the fact-finder to resolve).

¶16 Defendant next asserts that the State failed to disclose all pertinent records and documents regarding Rodriguez's prior convictions. At trial, both the prosecutor and defense counsel pointed out that Rodriguez has multiple prior felony convictions. Therefore, even assuming that the State failed to disclose some records pertaining to Rodriguez's prior convictions, the fact that she had previously been convicted of multiple felonies and was currently serving a prison sentence was presented to the jury.

¶17 Defendant contends that the recordings of his conversations with Detective Sanfillipo were altered and should not have been admitted into evidence. Absent an abuse of discretion, we will not disturb a trial court's decision to admit evidence. *State v. Lopez*, 174 Ariz. 131, 139, 847 P.2d 1078, 1086 (1992). The trial court held a hearing on the admissibility of the recordings and the undisputed evidence reflects that the State did not cut or splice the recordings. Instead, the only alteration to the recordings was an enhancement to reduce the noise in the background so that Detective Sanfillipo and defendant's voices would be clearer. Thus, there was no alteration to the material content of the recordings and the trial court did not abuse its discretion by admitting them into evidence.

¶18 Defendant argues that, during closing argument, the prosecutor suggested to the jurors that they need not find a conspiracy between defendant and Detective Sanfillipo, as charged in the indictment, but instead could find a conspiracy between defendant and Rodriguez. The record reflects that the prosecutor reviewed the evidence with the jurors and argued extensively that defendant had conspired with Detective Sanfillipo to kill his wife. To the extent the prosecutor argued defendant conspired with Rodriguez, he was attempting to refute defendant's claim of entrapment by demonstrating that the

idea of defendant killing his wife did not originate with the police, but instead arose between defendant and Rodriguez.

¶19 Defendant also challenges the accuracy of the testimony presented by Detective Ott and Officer Brillhardt. We note that he has not cited any evidence of inaccurate or misleading statements. Again, the credibility of a witness's testimony is a matter for the jury to resolve. *See Jeffers*, 135 Ariz. at 420, 661 P.2d at 1121.

¶20 Finally, defendant argues ineffective assistance of counsel. We will not consider claims of ineffective assistance of counsel on direct appeal regardless of merit. *See State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). We therefore decline to address this argument. If defendant wishes to pursue a claim for ineffective assistance of counsel, he may file a claim for post-conviction relief pursuant to Arizona Rule of Criminal Procedure 32.

¶21 We have read and considered counsel's brief and have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Defendant was given an opportunity to speak before sentencing, and the sentences imposed were within statutory limits. Furthermore, based on our review of the record, there was sufficient evidence for the jury to find that

defendant committed the offense of conspiracy to commit first-degree murder.

¶22 After the filing of this decision, counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do no 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. See *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 desires, with a pro per motion for reconsideration or petition for review. Accordingly, defendant's conviction and sentence is affirmed.

_/s/ PHILIP HALL, Judge

CONCURRING:

_/s/ PATRICK IRVINE, Presiding Judge

_/s/ JOHN C. GEMMILL, Judge