DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ROBERT THOMPSON, Appellant.	1 CA-CR 11-0010 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-005979-001 DT

The Honorable Sherry K. Stephens, Judge

AFFIRMED

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

Maricopa County Public Defender — Phoenix
By Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

Robert Thompson — Florence
Appellant

I R V I N E, Judge

¶1 This appeal is filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Robert Thompson asks this Court to search the record for fundamental error. Thompson has filed a supplemental brief in propria persona asking this Court to review the jury selection process, insufficiency of the evidence, and the admission of allegedly tainted evidence. After reviewing the record, we affirm Thompson's convictions and sentences for Burglary, Kidnapping, four Sexual Assaults, Attempted Sexual Assault, Sexual Abuse, and Aggravated Assault with a dangerous instrument.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the trial court's judgment and resolve all reasonable inferences against Thompson. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998). In September 2009, Thompson entered the victim's bedroom wearing dark clothing, latex gloves, and a black stocking over his face. He pushed the victim and sexually touched her numerous times without her consent. Thompson pointed a gun at the victim's stomach when she resisted. She told him that she would rather die than be raped. He asked why she did not value her life, and they moved to the living room where they talked and she gained his trust. At some point, they returned to the bedroom, where he started to touch

her again. The victim convinced Thompson, however, to come back later for a date because she had to get ready for school. She called police when Thompson left. Thompson was arrested when he returned.

¶3 The State charged Thompson with Burglary in the First Degree (Count 6), Kidnapping (Count 7) and four counts of Sexual Assault (Counts 8, 9, 11 and 12), all class 2 felonies; Sexual Abuse, a class 5 felony (Count 10); Aggravated Assault, a class 3 Dangerous Felony (Count 13); and Attempted Sexual Assault, a class 3 felony (Count 14). DNA from the scene linked Thompson to the rape of another victim in June 2007 ("2007 victim"). Accordingly, the State charged Thompson with several additional offenses that were ultimately severed before trial (Counts 1 to 5).

¶4 A trial was held on Counts 6 to 14. At the close of the evidence, the trial court properly instructed the jury on the elements of each offense. Thompson was convicted as charged.

¶5 The trial court conducted the sentencing hearing in compliance with Thompson's constitutional rights and Rule 26 of the Arizona Rules of Criminal Procedure. The trial court imposed the following mitigated prison sentences: 4.5 years each for Burglary and Kidnapping (Counts 6 and 7);.75 years for Sexual Abuse (Count 10); three years for Attempted Sexual Assault (Count 14) and six years for Aggravated Assault (Count 13). It

made these sentences concurrent with a slightly mitigated six-year-prison sentence for Sexual Assault (Count 8). Thompson received additional six-year-prison terms for each Sexual Assault conviction (Counts 9, 11 and 12), all to be served consecutively to each other and Count 8. Thompson was given 472 days presentence incarceration credit for each count.

DISCUSSION

¶6 We review Thompson's convictions and sentences for fundamental error. *See State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). Counsel for Thompson has advised this Court that after a diligent search of the entire record, he has found no arguable question of law. We have read and considered counsel's brief and fully reviewed the record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none.

¶7 Thompson argues that two African-American venire members ("Juror 9" and "Juror 48.") were improperly dismissed, in violation of his right to a fair jury pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). We disagree. In *Batson*, the United States Supreme Court held that a racially based peremptory strike of a potential juror is unconstitutional. *Id.* at 89; *see also Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) (expanding *Batson* to invalidate peremptory strikes based substantially in part on discriminatory intent).

¶8 In this case, no peremptory challenge was made against either Juror 9 or Juror 48. Juror 9 voiced concern that the lengthy trial would conflict with her work schedule. Because she was unable to contact her employer to confirm this, the trial court noted her situation was "iffy" and suggested that she be excused for cause. Thompson's counsel did not object.

¶9 Juror 48 was not selected for numerical reasons. The panel that passed included Jurors numbers 4, 10, 15, 18, 22, 27, 29, 30, 31, 33, 38 45, 46 and 47. Juror 45 was later excused after becoming very upset about jury duty. Because the State was concerned about not having two alternate jurors, the trial court offered to contact Juror 48 about being an alternate. The State asked for time to consider the issue, stating that it may simply assume the risk of proceeding with just one alternate.

¶10 The trial court was unable, however, to contact Juror 48. At the next hearing, Thompson's counsel read a statement from Thompson on the record, stating Thompson's objection that the jury would be unfair unless there was an "African[-]American close to his age," or someone he identifies as a peer, "such as musicians, bartenders, chefs [and] barbers." On appeal, Thompson appears to raise the same argument.

¶11 The Sixth Amendment requires a jury to consist of a "fair cross-section" of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). Thompson is not entitled, however, to a

particular jury or even a single juror of a particular race. *Batson*, 476 U.S. at 85. The trial court correctly noted that the jury was selected in accordance with all procedural requirements. Because Thompson does not present any argument or evidence that the jury was otherwise impartial, we find no error.

¶12 Next, Thompson argues there was insufficient evidence to support his sexual-assault convictions. The State presented evidence from the victim, police detectives, a DNA expert and the forensic nurse, showing that Thompson committed each offense. Because substantial evidence supports the convictions, we will not reweigh conflicting evidence on appeal. *State v. Guerra,* 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶13 Finally, Thompson contends that the trial court erred by admitting evidence that the prosecutor had tampered with. Although Thompson does not specify what evidence, the record suggests that Thompson is referring to an incident involving the prosecutor's inspection of two stocking caps, admitted as trial exhibit 49. Thompson objected because the inspection was performed in the evidence closet, allegedly behind a closed door.

¶14 The prosecutor explained that she went to the evidence closet to discuss trial strategy regarding whether the State should request the defendant to put the stocking over his face.

She explained that she kept the door open during the inspection, even though the law clerk tried to close the door at one point. The prosecutor stated she wore gloves and avowed that she left the stocking in "exactly the same condition." The law clerk in charge of the evidence closet confirmed that the door was open during the inspection. Although the law clerk denied shutting the door, the clerk heard someone say at one point that the door had to remain open. The trial court examined the video surveillance of the closet with both counsel.

¶15 Thompson's counsel then clarified that his objection was based on his belief that the prosecutor unknotted one stocking by stretching it, but he said that he may be wrong about that. Accordingly, the trial court permitted the State to re-call the detective who testified earlier about the stockings. The detective testified that one stocking was indeed unknotted and that they were in the same condition as when she testified before. The parties stipulated to instruct the jury that the stockings "may not be in the same condition now as when they were taken by the police on September 4th, 2009." In light of this instruction, we find no error or prejudice.

¶16 All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Thompson was represented by counsel at all stages of the proceedings and the sentence imposed was within

the statutory limits. We decline to order briefing and we affirm Thompson's convictions and sentences.

¶17 We note, however, that the prosecutor argued in closing that the defense of consent made no sense. In making that argument, the prosecutor said, "Trust me, if there was a reason that existed for [the victim] to [make up the allegations she was raped], it would have been brought up." Although this statement may have been improper, we review for fundamental error because Thompson did not object.

¶18 Our supreme court has held that a prosecutor's vouching does not rise to the level of fundamental error if it does not result in prejudice, and the jury was properly instructed that attorney comments are not evidence. *State v. King*, 110 Ariz. 36, 43, 514 P.2d 1032, 1039 (1973). Here, the jury was instructed only to consider exhibits and witness testimony as evidence. More specifically, it was instructed that the attorneys' opening and closing statements were not evidence. Because the State presented physical evidence as well as testimony from the police detectives and forensic nurse that there was no consent, we find no prejudice.

¶19 Upon the filing of this decision, defense counsel shall inform Thompson of the status of his appeal and of his future options. Defense counsel has no further obligations unless, upon review, counsel finds 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). On the Court's own motion, Thompson shall have thirty days from the date of this decision to proceed, if he desires, with a pro per motion for reconsideration or petition for review.

CONCLUSION

¶20 We affirm.

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Presiding Judge

/s/
DANIEL A. BARKER, Judge