FILED BY CLERK
AUG 28 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MATTHEW J. SMOCK, Appellant.	)	2 CA-CR 2012-0514 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20111215001

Honorable Michael Cruikshank, Judge

VACATED IN PART; AFFIRMED IN PART

Angela C. Poliquin — Hamilton, MT
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 Matthew Smock appeals from his convictions and sentences for disorderly conduct, two counts of endangerment involving a substantial risk of imminent death—both dangerous offenses, and two counts of endangerment involving a substantial risk of physical injury. Counsel has filed a brief citing *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asserting she has searched the record on appeal and discovered two "arguable issues," specifically whether there

was sufficient evidence to support Smock's endangerment convictions and whether the trial court abused its discretion by permitting the state to present an additional witness after the parties had rested. Counsel additionally requests that we search the record for fundamental error.[1] Smock has not filed a supplemental brief.

¶2 We note that counsel has failed to strictly comply with *Leon*. Counsel identifies what she describes as "arguable issues" in an apparent attempt to comply with *Leon*'s statement that counsel must identify "'anything in the record that might arguably support the appeal'" if counsel finds the case to be "'wholly frivolous.'" 104 Ariz. at 299, 451 P.2d at 880, *quoting Anders*, 386 U.S. at 744. But counsel did not expressly advise this court the case is, in her view, wholly frivolous. And, should counsel identify arguable issues that are not wholly frivolous, counsel is required to file a brief fully addressing the merits of those issues, not an *Anders* brief. *See State v. Clark*, 196 Ariz. 530, ¶ 30, 2 P.3d 89, 96 (App. 1999). Because the issues identified by counsel are frivolous, however, we do not direct counsel to brief them further. *See id.*

¶3 Based on our review of the record, and viewing the evidence in the light most favorable to upholding the jury's verdicts, *see State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111-12 (1998), we conclude ample evidence supported Smock's convictions. *See* A.R.S. §§ 13-105(13), 13-1201(A), 13-2904(A)(6). He fired a pistol six times through his garage door, causing at least two bullets to strike and penetrate the residence across the street from his, which was occupied by two adults and two children;

[1]In support of that request, counsel cites A.R.S. § 13-4035, a statute that was repealed in 1995. 1995 Ariz. Sess. Laws, ch. 198, § 1.

a bullet broke a window and struck a dresser in an unoccupied room, and another bullet struck the interior garage wall that bordered a bedroom occupied by the two children. Although counsel suggests there was insufficient evidence "the gun used had the power to send bullets all the way into the rooms where the victims were," a police officer testified that a bullet of the type Smock fired could "travel through a wall and into another wall" approximately forty feet away, and at least two bullets in fact entered the victims' house. And, particularly in light of evidence that Smock is a former police officer, the jury could conclude he was aware that firing a pistol blindly through his garage door could cause a risk of death or injury. *See* §§ 13-105(10)(c), 13-1201(A).

¶4 Counsel also suggests the trial court erred in permitting the state to present an additional witness after both parties had rested. We have reviewed the record and conclude the court correctly found that Smock suffered no prejudice. *See State v. Favor*, 92 Ariz. 147, 149, 375 P.2d 260, 261 (1962) (trial court has discretion to reopen case for additional presentation of evidence).

¶5 The trial court sentenced Smock to concurrent prison terms, the longest of which were 1.5 years, for disorderly conduct and the two counts of endangerment involving a risk of death, and to time served for the two counts of endangerment involving a risk of physical harm. Those sentences are within the prescribed statutory range and were imposed lawfully. *See* A.R.S. §§ 13-702(A), 13-704(A), 13-1201(B), 13-2904(B).

¶6 The sentencing minute entry, however, provides that "all fines, fees, [and] assessments" the trial court had imposed were "reduced to a Criminal Restitution Order

[CRO]." But this court has determined that in these circumstances, based on A.R.S. § 13-805(C),[2] "the imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 909 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). Therefore, this portion of the sentencing minute entry is not authorized by statute.

¶7 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and found none except the improper CRO. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (*Anders* requires court to search record for fundamental error). The CRO is vacated; Smock's convictions and sentences are otherwise affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[2]Section 13-805, A.R.S., has been amended three times since the date of the crime. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. The changes are not material here.