

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JUAN ALBERTO CRUZ,
Appellant.

No. 2 CA-CR 2016-0128
Filed May 3, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pinal County
No. S1100CR201400049
The Honorable Steven J. Fuller, Judge

AFFIRMED

COUNSEL

Flores & Clark, PC, Globe
By Daisy Flores
Counsel for Appellant

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Miller concurred.

ESPINOSA, Judge:

¶1 Following a jury trial, appellant Juan Cruz was convicted of aggravated assault and promoting prison contraband. After Cruz admitted three prior felony convictions, the trial court found two historical priors and sentenced him to concurrent, presumptive but enhanced prison terms of five and 15.75 years, to be served consecutively to the prison term he was serving for another conviction. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing she has found no arguable issue of law, and requests that this court review the record for fundamental error. Cruz has filed a supplemental brief.

¶2 Viewed in the light most favorable to sustaining the verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the evidence established that B.P., a correctional officer for the Arizona Department of Corrections (ADOC), was escorting Cruz, a prison inmate, from the shower to his cell, when Cruz, using a hand-made key, freed his hands from handcuffs that B.P. had placed on him, turned on B.P. and struck him, first in the face shield he was wearing and then in the jaw; the two wrestled until other officers arrived to assist B.P. The evidence also established that while B.P. was walking with him, Cruz had dropped an object and kicked it; an officer saw on the floor near Cruz's leg, and then picked up, an eight-inch prison-made "shank"—a pen tube with a sharpened metal point fashioned to serve as a weapon. The officer found additional items used to make the shank in Cruz's cell.

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¶3 Cruz raises a number of issues in his supplemental brief. They appear to fall within the following categories:

¶4 Ineffective assistance of counsel. In portions of his supplemental brief, Cruz seems to argue trial counsel was ineffective. Although not entirely clear, he also seems to imply appellate counsel who filed the *Anders* brief was ineffective as well. But claims of ineffective assistance of counsel cannot be raised on direct appeal; rather, they must be brought in proceedings pursuant to Rule 32, Ariz. R. Crim. P. See *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). We therefore do not address these claims further.

¶5 Sufficiency of the evidence. A large portion of Cruz's supplemental brief challenges the sufficiency of the evidence to support the convictions. He suggests repeatedly that the state's theory of the case was unbelievable. But Cruz is essentially asking this court to reweigh the evidence, which we will not do. *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004). Rather, it was for the jury, as the trier of fact, to weigh conflicting evidence and assess the credibility of the witnesses. See *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38, 312 P.3d 123, 133 (App. 2013). We review the sufficiency of the evidence de novo, *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011), and will affirm a conviction if the verdicts are supported by "substantial evidence," *State v. Ellison*, 213 Ariz. 116, ¶ 65, 140 P.3d 899, 916-17 (2006). Based on the evidence presented, reasonable jurors could find Cruz had committed aggravated assault by assaulting a person he knew or should have known was an officer of ADOC acting in his official capacity, in violation of A.R.S. § 13-1204(A)(10), see also A.R.S. § 13-1203(A)(2), and that he promoted prison contraband, in violation of A.R.S. § 13-2505(A)(3), based on the shank found near him. See *State v. Bearup*, 221 Ariz. 163, ¶ 16, 211 P.3d 684, 688 (2009) (substantial evidence is evidence reasonable jurors would find sufficient to prove elements of offense beyond reasonable doubt).

¶6 Challenge to jury based on *Batson v. Kentucky*, 476 U.S. 79 (1986). Cruz argues that he is Hispanic and "was tried by an all non-Hispanic fourteen (14) person jury derived from a community

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that supports the majority non-Hispanic ADOC employee prison system (but yet heavily populated Pinal County by Hispanic persons).” He concedes counsel did not object below. The claim is therefore waived. *State v. Garza*, 216 Ariz. 56, ¶ 31, 163 P.3d 1006, 1015 (2007). Moreover, nothing in the record before us establishes Hispanics were systematically excluded from the jury panel. Cf. *State v. Atwood*, 171 Ariz. 576, 622, 832 P.2d 593, 639 (1992) (court could not determine whether underrepresentation resulted from systematic exclusion because defendant did not provide information in that regard), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001).

¶7 Defects in the indictment and related issues. Cruz contends the indictment was not properly signed and alleges various purported defects related to his initial arrest. He also seems to claim he was not given proper notice of the charge of aggravated assault. But Cruz waived any defects in the indictment or grand jury proceeding by failing to raise an objection below. See Ariz. R. Crim. P. 12.9(b), 16.1(c); see also *State v. Anderson*, 210 Ariz. 327, ¶¶ 17-18, 111 P.3d 369, 378 (2005); *State v. Merolle*, 227 Ariz. 51, ¶ 10, 251 P.3d 430, 432 (App. 2011). Moreover, the indictment, which was signed as a true bill by the foreman, gave him proper notice of the offense with which he was charged, tried, and convicted: aggravated assault by assaulting a person he knew or should have known was an officer of ADOC acting in his official capacity, in violation of § 13-1204(A)(10) and § 13-1203(A)(2).

¶8 Cruz’s argument that the state was improperly permitted to amend the indictment as to count two at the start of trial is also without merit. The state moved to amend the count to reflect the correct date of the offense of promoting prison contraband: September 17, 2013, instead of November 29, 2013, consistent with the date of the offense in count one. After the prosecutor conferred with defense counsel as the trial court directed, the court granted the motion, ascertaining from defense counsel that he had no objection. We see no error with respect to this inconsequential amendment to conform to the anticipated evidence, correcting a mistake as to a technical defect, see Ariz. R. Crim. P. 13.5(b), affecting neither the charge nor Cruz’s notice of that charge,

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see State v. Self, 135 Ariz. 374, 380, 661 P.2d 224, 230 (App. 1983), and, in any event, the claim was waived.

¶9 Speedy-trial violations. Cruz asserts his speedy-trial rights were violated in several respects, primarily referring to his rights under Rule 8, Ariz. R. Crim. P., but at times implying his federal constitutional speedy-trial rights were violated as well. In particular, he claims he was not arraigned within the proper period or provided notice of the charges and counsel.

¶10 It appears from the record there were difficulties transporting Cruz from ADOC for his arraignment, special circumstances that extend the period for arraignment. *See* Ariz. R. Crim. P. 14.1(a), (b). Moreover, it does not appear Cruz objected to any delay between the filing of the indictment and the arraignment and thereby waived any speedy-trial claim. *See State v. Vasko*, 193 Ariz. 142, ¶ 25, 971 P.2d 189, 195 (App. 1998) (Rule 8 violations waived if not timely objected to); *see also State v. Adair*, 106 Ariz. 58, 60, 470 P.2d 671, 673 (1970) (“[T]he [constitutional] right to a speedy trial is waived unless it is promptly asserted.”). As to this waived claim, Cruz has not established the existence of fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005) (where issue not preserved in trial court, defendant forfeits relief on appeal absent showing of both fundamental error and prejudice). Nor does the record support his assertion that his speedy-trial rights under Rule 8.3, Ariz. R. Crim. P., were violated. Indeed, at times the requirements of the rule were expressly waived, and Cruz did not object when trial was set, confirmed, or continued.

¶11 Violations of the right to be present. We summarily reject Cruz’s conclusory assertion that he was denied his right to be present during portions of these proceedings. He does not specify precisely which hearings he was prevented from attending. The record shows that although his counsel appeared alone at some of the hearings, Cruz attended many of them, refused to be transported on at least one occasion, and attended all critical proceedings. *See State v. Forde*, 233 Ariz. 543, ¶ 52, 315 P.3d 1200, 1217 (2014) (defendant has right to attend proceedings critical to outcome of

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case and fairness of proceedings but counsel's waiver of defendant's presence is binding absent extraordinary circumstances). We see no error, fundamental or otherwise.

¶12 Miscellaneous claims. Cruz's suggestion that the state withheld, in bad faith, evidence that would have been helpful to his defense is unsupported and we reject it. We also reject his claim that the state was permitted to introduce improper evidence, particularly expert testimony by the investigating officer. Cruz concedes he did not object at trial, suggesting trial counsel was ineffective in this regard. Again, any claim of ineffective assistance of counsel must be raised in a Rule 32 proceeding. *Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d at 527. In any event, the waived objection did not result in the erroneous admission of evidence, much less error that could be characterized as fundamental and prejudicial. Other claims Cruz raises in his supplemental brief that we have not specifically addressed here are conclusory and lack merit, and we reject them as well.

¶13 Presentence incarceration credit. Because Cruz was in prison on another offense, he was not entitled to credit for presentence incarceration on these charges for the period between the issuance of the indictment and sentencing, as he asserts. *See* A.R.S. § 13-712(B); *see also State v. Bridgeforth*, 156 Ariz. 58, 59, 750 P.2d 1, 2 (App. 1986), *approved in pertinent part*, 156 Ariz. 60, 750 P.2d 3 (1988).

¶14 We have reviewed the record for fundamental error, as counsel has requested pursuant to *Anders*. We have found none with respect to the convictions. Additionally, the prison terms were within the statutory parameters and were imposed in a lawful manner. *See* A.R.S. § 13-703(J). Cruz's convictions and sentences are therefore affirmed.