

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: 09/01/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,) No. 1 CA-CR 10-0767
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
HAIDAR MUHSIN AL BAZONY,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-150653-001DT

The Honorable Lisa M. Roberts, Judge Pro Tempore

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 Thomas K. Baird, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Haidar Muhsin Al Bazony ("Appellant") appeals from his conviction for aggravated assault, a class 3 dangerous felony. Appellant appeals pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969).

Appellant's counsel has searched the record on appeal and finds no arguable non-frivolous question of law. See *Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel asks this court to independently review the record for fundamental error. Appellant was given the opportunity to file a supplemental brief but has not done so. We have reviewed the record and find no fundamental error. Accordingly, we affirm.

FACTS¹ AND PROCEDURAL HISTORY

¶2 At 5 p.m. on July 29, 2009, Phoenix police detective John Hobbs was one of a team of officers watching a townhouse located near 4625 West Thomas Road. He wore plain clothes and sat alone in an unmarked pickup truck parked close to the rear window of Appellant's townhouse. The truck had very dark tinted windows, the engine was off and the windows were cracked about an "eighth of an inch." Hobbs was in the truck for two hours before the incident occurred.

¶3 Appellant testified that his wife called him twice at work about the truck, and that she sounded scared.² In response, he left work early and borrowed a gun from a friend. He parked

¹ On appeal, we view the facts in the light most favorable to sustaining the convictions. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008).

² Appellant's wife did not testify at trial.

his car at a distance from his townhouse because he was afraid someone might be waiting for him.

¶14 Officer Joseph Newbern was part of the police surveillance team. He watched Appellant walk around the complex and approach the townhouse the team was watching.³ Somebody behind a screen door seemed to motion Appellant away, and he continued to walk around the complex. He stood in a grassy area for approximately 15 minutes until a gray Nissan car parked nearby. Appellant approached the Nissan and the driver, "Jose," got out to meet him.⁴ Appellant had told Jose he needed help because two men were waiting to jump him. Appellant had a conversation with Jose and showed him his gun. Newbern observed the conversation but did not see the gun. Together Appellant and Jose walked toward Hobbs' position and Newbern radioed Hobbs to alert him to their approach.

¶15 After Hobbs was alerted, he saw two men on the other side of a wooden fence walking toward his truck. To keep himself hidden, Hobbs leaned over in his seat to get beneath the level of the darkly tinted windows.⁵

³ The police were not watching Appellant's home.

⁴ Jose did not testify at trial.

⁵ Hobbs denied taking out his sidearm at this time. Another member of the surveillance team reported that Hobbs admitted to taking his sidearm out when he lay down, but this statement was not introduced into evidence.

¶16 The two men arrived at the truck and Jose pressed his hands and face against the driver-side window and looked inside. Jose stated that there was somebody inside, jumped backward and started to run away. Hobbs sat up quickly in response and saw Appellant pointing a handgun -- which Hobbs thought was a Helwan model because of the distinctive design, but which turned out to be a similar-looking Beretta 92 instead -- at Hobbs' head.⁶ Hobbs testified that he then drew his weapon, pointed it at Appellant and placed enough pressure on the trigger to activate the flashlight mounted on his gun. When the flashlight came on, Appellant's "eyes went wide," and he lowered his gun and fled. Hobbs and other officers then pursued Appellant and Jose. During the pursuit, Appellant threw his gun up on the roof of one of the townhouses. After appellant realized his pursuers were police officers, he lay down on the ground and was arrested.

¶17 After Appellant was Mirandized, he told police he had not had a gun, instead stating that he simulated a weapon using his hand. Appellant never disputed that this statement was voluntary and uncoerced. The Beretta was later found on the roof with the hammer cocked and a round in the chamber -- ready to fire if light pressure were applied on the trigger. A

⁶ However, Appellant testified that he only pointed his gun at Hobbs after he saw Hobbs pointing a gun at him.

technician was able to secure a fingerprint from the handgun. A forensic scientist matched the fingerprint to Appellant. At trial, Appellant admitted having the gun and tossing it on the roof.

¶18 Appellant received a seven-day trial before eight jurors and two alternates. After the state rested, Appellant moved that the case be dismissed, arguing that the state had not produced enough evidence to demonstrate that Appellant's use of the Beretta was not justified by Hobbs' "hiding in a truck . . . in a parking space, that's normally associated with only [Appellant's] unit." The trial court denied the motion, finding that "viewed in the light most favorable to the non moving party there is substantial evidence of guilt."

¶19 Jury instructions included the state's burden of proof, including its burden to overcome a claim of justification, the elements of the offense and of dangerousness, justification for self-defense, justification for defense of a third person, justification for prevention of the commission of a crime, and the necessity of unanimous verdict. The jury found Appellant guilty of aggravated assault and found that the offense was dangerous.

¶10 The court stated that because the offense was designated dangerous, it was required to impose a prison sentence on Appellant, but that it would not have done so

otherwise. Finding several mitigating factors and no aggravating factors, the court sentenced Appellant to the minimum sentence of five years, with 62 days credit for presentence incarceration. Appellant timely appeals. We have jurisdiction under A.R.S. § 12-120.21.

DISCUSSION

¶11 The jury was properly instructed that to find Appellant had committed aggravated assault they must find that Appellant "intentionally put another person in reasonable apprehension of immediate physical injury," A.R.S. § 13-1203(A)(2), and that he did so using a deadly weapon, A.R.S. § 13-1204(A)(2). Appellant admitted at trial that he had a handgun and that he pointed it at Hobbs. Hobbs testified that when he saw the gun pointed at him "my first thought was I'm going to die." On this evidence, the jury could have concluded that Appellant was guilty of aggravated assault unless Appellant pointing the gun at Hobbs was justified. See A.R.S. § 13-403. The jury was properly instructed on justification for self-defense, A.R.S. § 13-404, defense of a third person, A.R.S. § 13-406, and crime prevention, A.R.S. § 13-411. The instructions included specific instructions concerning the use of deadly force and the state's burden to prove a lack of justification beyond a reasonable doubt. A common element of these justifications is that the perceived need to use or threaten the

use of force must be immediate. A.R.S. §§ 13-403(A), -406(A)(2), -411(A).

¶12 Hobbs admitted that he also had a handgun and that he pointed it at Appellant. One factual determination for the jury was who acted first: both Appellant and Hobbs testified that the other was the first to threaten with a gun. On the evidence presented, a rational jury could have found beyond a reasonable doubt that Appellant pointed his weapon first, and that at that time and under those circumstances a reasonable person would not believe that physical force was immediately necessary for self-defense, defense of a third person, or crime prevention. Where there is competent evidence to support a jury's conclusion regarding justification, we will not disturb it. *State v. Jacobs*, 110 Ariz. 151, 152, 515 P.2d 1171, 1172 (1973).

¶13 In sentencing Appellant, the court correctly held that A.R.S. § 13-704(G) forbade the imposition of a term of probation for Appellant's conviction. The court's sentence fell within the lawful range for a class 3 dangerous felony for an adult with no historical prior felony convictions pursuant to A.R.S. § 13-704(A). The court imposed the minimum sentence allowed, and because the state has not cross-appealed we do not review that decision. See *State v. Walters*, 155 Ariz. 548, 550 n.1, 748 P.2d 777, 779 n.1 (App. 1987). Appellant was properly credited for 62 days presentence incarceration: 14 days between his

arrest and release on bond, and 48 days between his conviction and sentencing.

¶14 The record reflects Appellant received a fair trial. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Appellant was represented at all stages of the proceedings. The court properly instructed the jury on the elements of the charged offense and of possible justifications. Further, the court properly instructed the jury on the state's burden of proof. There was sufficient evidence to support the jury's verdict. The court received and considered a presentence report and imposed a legal sentence.

CONCLUSION

¶15 We have reviewed the record for fundamental error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm Appellant's conviction and sentence. Defense counsel's obligations pertaining to this appeal have come to an end. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Appellant of the status of this appeal and his future options. *Id.* Appellant has 30 days from the date of this decision to file a petition for review *in propria persona*. See Ariz. R. Crim. P. 31.19(a).

Upon the court's own motion, Appellant has 30 days from the date of this decision in which to file a motion for reconsideration.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PATRICIA K. NORRIS, Judge