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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: 10/04/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,) 1 CA-CR 10-0554
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MAX RAMIRO GARCIA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-145409-001 DT

The Honorable Pamela D. Svoboda, Judge *Pro Tem*

AFFIRMED AS MODIFIED

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 Peg Green, Deputy Public Defender
Attorneys for Appellant

Max Ramiro Garcia Douglas
Appellant

W I N T H R O P, Judge

¶1 Max Ramiro Garcia ("Appellant") appeals his convictions and sentences for negligent homicide, endangerment, and leaving the scene of a fatal injury accident. Appellant's counsel has filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that she has searched the record on appeal and found no arguable question of law that is not frivolous. Appellant's counsel therefore requests that we review the record for fundamental error. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). In addition, Appellant has raised issues through counsel and filed a supplemental brief *in propria persona*.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010). Finding no reversible error, we affirm, but we modify the trial court's June 17, 2010 sentencing minute entry to reflect both that Count III, leaving the scene of a fatal injury accident, is a class three felony, and that Appellant was sentenced to the presumptive term of 3.5 years' imprisonment for this count.

I. FACTS AND PROCEDURAL HISTORY¹

¶3 On July 17, 2009, a grand jury issued an indictment, charging Appellant with Count I, manslaughter, a class two dangerous felony; Count II, endangerment, a class six dangerous felony; and Count III, leaving the scene of a fatal injury accident, a class two felony, in violation of A.R.S. §§ 13-1103 (2010), 13-1201 (2010), and 28-661 (Supp. 2010).²

¶4 At trial, the following facts were elicited: On July 10, 2009, Appellant spent the evening at a bar in downtown Phoenix, where he met V.M. Appellant and V.M. left the bar together in the early morning hours of July 11 and went to Appellant's SUV. Appellant began driving and V.M. fell asleep in the front passenger seat. V.M. did not awaken until after a collision occurred.

¶5 A.C. testified that on July 11, he and his friend, R.F., rode their bicycles down 16th Street to go to work at their 4:00 a.m. shift. A.C.'s bike had a light on the front and back, and R.F. wore a reflective vest. A.C. and R.F. were

¹ We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. See *State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

² We cite the current version of the applicable statutes because no revisions material to our decision have since occurred.

biking together, about three inches apart, with R.F. slightly behind and nearest to traffic when R.F. was hit by Appellant's SUV. A.C. had looked behind to tell R.F. to get on the sidewalk, when he heard a loud boom. A.C. did not see or feel the SUV pass by, or notice lights coming from behind. When A.C. looked forward, he saw R.F. fifty to sixty feet in the air in front of him. A.C. yelled for the vehicle to stop, but it accelerated and sped away. A.C. called 911 and tended to R.F., who had obvious injuries and was not breathing.

¶16 Officer Castillo of the Phoenix Police Department was on patrol duty that morning and heard radio traffic about a hit-and-run collision involving a bicycle and a vehicle. He saw Appellant's SUV, which matched the description given over the radio and had a large indentation on the windshield and damage to the hood. Because Officer Castillo believed that the SUV might be the vehicle involved in the collision, he initiated a traffic stop of the SUV. When Officer Castillo approached the SUV, he saw Appellant sitting in the driver's seat and V.M. in the passenger seat, shaking and crying. Officer Castillo detained Appellant until other officers could arrive. In response to questioning by Officer Castillo, Appellant stated that he had "a few drinks a couple of hours earlier."

¶17 Detective Jacobs arrived and spoke with Appellant. The detective noticed that Appellant had watery, bloodshot eyes,

slurred speech, and a moderate odor of an intoxicating beverage. Appellant told Detective Jacobs that he was "a little buzzed." Blood drawn from Appellant at 6:19 a.m. indicated he had a blood alcohol level of .114. The collision had occurred at approximately 3:36 a.m.

¶18 Detective Orstad examined R.F.'s blue bicycle and noticed a transfer of white paint onto the frame. He found R.F.'s bike reflectors, shoes, and reflective vest in the roadway. There was a pool of blood on the ground where R.F. had landed. Detective Orstad also examined Appellant's vehicle. The detective noted damage to the lower right portion of the bumper, headlight, grill, and hood, as well as damage to the windshield consistent with an individual hitting his head on the windshield. The detective also noted a transfer of blue paint on the top portion of the vehicle's bumper, and concluded that the damage to Appellant's vehicle was consistent with that of a vehicle involved in a bicycle collision.

¶19 At the scene of the accident, Detective Tuttle found fresh tire marks from a bicycle consistent with a vehicle contacting the back tire of the bike and pushing it approximately nineteen feet down the street. Using R.F.'s point of rest and point of impact, the force of gravity and street drag factors, Detective Tuttle calculated that the SUV was traveling approximately forty to forty-nine miles per hour upon

impact. After examining all the evidence, he concluded that Appellant's vehicle rear-ended R.F.'s bicycle.

¶10 As to Count I, the jury found Appellant guilty of the lesser-included offense of negligent homicide, a class four dangerous felony. The jury also found Appellant guilty of Count II as charged. As to Count III, the jury found Appellant guilty of leaving the scene of a fatal injury accident, but the jury found the State had failed to prove that Appellant caused the accident, making the count a class three felony.³ For Count I, the court sentenced Appellant to the presumptive term of six years' imprisonment in the Arizona Department of Corrections ("ADOC") and credited him with sixty-nine days of presentence incarceration. The court sentenced Appellant to presumptive terms of 2.25 years' imprisonment in ADOC for Count II and 3.5 years' imprisonment in ADOC for Count III, ordered that Counts II and III be served concurrently as to one another but consecutively to Count I, and credited Appellant for no

³ The trial court's June 17, 2010 sentencing minute entry indicates that Count III is a class two felony. Because the jury found the State had not proven that Appellant caused the accident, the minute entry should reflect that Count III is a class three felony. See A.R.S. § 28-661(B). Accordingly, we modify the trial court's June 17, 2010 sentencing minute entry to reflect that Count III is a class three felony. See A.R.S. § 13-4036 (2010); *State v. Ochoa*, 189 Ariz. 454, 462, 943 P.2d 814, 822 (App. 1997).

presentence incarceration for Counts II and III.⁴ Appellant filed a timely notice of appeal.

II. ANALYSIS

¶11 Appellant argues through counsel that he was denied a jury of his peers, but he provides no further explanation as to the basis for his argument. We have reviewed the prospective jury list and the transcript of the jury selection proceedings and find no indication that Appellant was denied a jury of his peers. Further, all jurors who were selected stated that they could be fair and impartial, and prospective jurors who indicated they could not be fair were struck from the venire panel. On the record, it appears that the jury selection process was appropriate.

¶12 We note that, during jury voir dire, Appellant's counsel argued that the entire jury panel should be struck because one juror, who was not selected, commented, "I don't think policemen make that many mistakes" After that statement, the court asked, "[I]s there anyone who cannot judge the testimony of each witness by the same standards? And what I mean by this is, is there anyone who is likely to give more or less weight to the testimony of a law enforcement officer over the testimony of another witness simply because that person is

⁴ We also modify the sentencing minute entry to note that the court sentenced Appellant to the presumptive term for Count III.

employed as a law enforcement officer?" There were no hands raised. Appellant's counsel nonetheless argued that the prospective juror's comments had improperly influenced the jury. The court denied the motion to strike the jury panel. On this record, we find no error, especially given the court's further questioning of the venire panel, and the fact that the court instructed the jurors as part of the final instructions that the testimony of a law enforcement officer is not entitled to any greater or lesser importance or believability simply because that person is a law enforcement officer. We presume that jurors follow the court's instructions. See *State v. Nordstrom*, 200 Ariz. 229, 254, ¶ 84, 25 P.3d 717, 742 (2001).

¶13 We further note that, during a recess while outside the courtroom before his testimony, A.C. asked why they were going to trial and stated he thought Appellant was guilty. To ascertain whether any juror heard that statement, each juror was questioned whether he or she had heard any person discussing the case, and specifically whether they had heard anything pertaining to the case while outside the courtroom. All fourteen jurors were questioned individually, and each responded negatively. The next day, after A.C. testified, all jurors were questioned again regarding this incident and each juror denied having heard any comments from a witness outside the courtroom.

Based on the record before us, we find no error stemming from this incident.

¶14 Appellant next argues through counsel that his presentence incarceration credit of sixty-nine days is incorrect. Our records show that Appellant was in custody from July 11, 2009, the date of the collision, until August 13, 2009, when he was released on bail, a total of thirty-four days. Appellant was also in custody from May 13, 2010, the day of the jury's guilty verdict, until June 17, 2010, the day of sentencing. Because the day of sentencing does not count toward credit, this second set of days totaled thirty-five days of incarceration. See *State v. Hamilton*, 153 Ariz. 244, 246, 735 P.2d 854, 856 (App. 1987) (holding that where the date the sentence is imposed also serves as the first day of sentence, it does not also count for presentence credit). The combined total days of presentence incarceration is therefore sixty-nine, and the trial court did not err in crediting Appellant for that number of days.⁵

⁵ Appellant may believe that his presentence incarceration credit is incorrect because he was under house arrest for a period of time. However, defendants only receive presentence incarceration credit for time spent in custody. See A.R.S. § 13-712(B) (2010). "In custody" means actual incarceration in a prison or jail, and not merely a substantial restraint of freedom. *State v. Reynolds*, 170 Ariz. 233, 234-35, 823 P.2d 681, 682-83 (1992).

¶15 Appellant argues in his supplemental brief that he was arrested and held beyond the forty-eight hour time limit without a complaint prepared and filed as prescribed under Rule 4.1(b) of the Arizona Rules of Criminal Procedure. Our review of the record shows that the complaint was timely filed. Appellant was arrested Saturday, July 11, 2009, at 3:52 a.m. His initial appearance was also held that day. The direct complaint was filed on July 14, 2009, at 4:52 p.m. Rule 4.1(b)'s time requirements exclude Saturdays, Sundays, and legal holidays. See Ariz. R. Crim. P. 1.3. July 11 and 12 fell on a Saturday and Sunday, respectively; therefore, the complaint had to be filed by no later than July 14, 2009. Because it was filed on that date, the complaint was timely.

¶16 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdict, and the sentence was within the statutory limits. Appellant was represented by counsel at all stages of the proceedings and was given the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶17 After filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this

appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant 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.

III. CONCLUSION

¶18 Appellant's convictions and sentences are affirmed. We modify the trial court's June 17, 2010 sentencing minute entry to reflect that Count III, leaving the scene of a fatal injury accident, is a class three felony, and that Appellant was sentenced to the presumptive term of 3.5 years' imprisonment for this count.

_____/s/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/s/_____
MAURICE PORTLEY, Presiding Judge

_____/s/_____
PATRICK IRVINE, Judge