

Ralph Esposito
Ralph Esposito

IN the SUPREME Court of the United States

Ralph F. Esposito,
Petitioner

V.

State of Arizona,
Respondent

Supreme Court of the United States

CASE
NUMBER

Arizona Supreme Court

NO. 1 CA-CR 20-0233 PR

Arizona Court of Appeals Division
ONE

NO. 1 CA-CR 15-0122 - Direct Appeal

NO. 1 CA-CR 20-0143 PRPC

Superior Court of Arizona - Maricopa County

CR2013-442655-001 PCR

CR2014-001312-001 PCR

(Writ of Certiorari)

(Appendix of Exhibits #1 - #26)

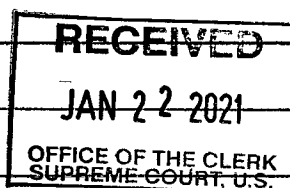
The Petitioner Ralph F. Esposito has submitted ^{ONE} ~~1~~ copy of Exhibits
Numbered #1 through #26 by U.S. Mail ~~in 120~~ to the Clerk of the
United States Supreme Court to be Filed and Distributed to All parties.

Date 1/11/21

by Petitioner

Ralph F. Esposito

Ralph Esposito





Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

JANET JOHNSON
Clerk of the Court

November 13, 2020

RE: STATE OF ARIZONA v RALPH FRANK ESPOSITO JR
Arizona Supreme Court No. CR-20-0233-PR
Court of Appeals, Division One No. 1 CA-CR 20-0143 PRPC
Maricopa County Superior Court No. CR2014-001312-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 12, 2020, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: Supplemental Cross-Petition for Review = DENIED.

A panel composed of Vice Chief Justice Timmer, Justice Bolick, Justice Gould and Justice Lopez participated in the determination of this matter.

Janet Johnson, Clerk

TO:

Michael O'Toole

Andrea L Kever

Ralph Frank Esposito Jr., ADOC 293561, Arizona State Prison,
Tucson - Winchester Unit

Amy M Wood

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Appendix #F

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,)	Arizona Supreme Court
)	No. CR-20-0233-PR
Respondent,)	
)	Court of Appeals
v.)	Division One
)	No. 1 CA-CR 20-0143 PRPC
RALPH FRANK ESPOSITO, JR.,)	
)	Maricopa County
Petitioner.)	Superior Court
)	No. CR2014-001312-001
)	

FILED: 11/24/2020

O R D E R

On November 12, 2020, the Court denied Petitioner's "Petition for Review" and "Supplemental Cross-Petition for Review." On November 20, 2020, Petitioner Esposito filed a "Petition for Rehearing" which this Court treated as a motion for reconsideration. In accordance with Arizona Rules of Criminal Procedures Rule 31.20(f), unless permitted by specific order of the appellate court, no party shall file a motion for reconsideration of an order denying a petition for review. Therefore,

IT IS ORDERED dismissing Petitioner's Motion for Reconsideration.

DATED this 24th day of November, 2020.

/S/

JAMES P. BEENE
Duty Justice

TO:

Michael O'Toole

Andrea L Kever

Ralph Frank Esposito Jr., ADOC 293561, Arizona State Prison, Tucson -
Winchester Unit

Amy M Wood

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Appendix (88)
F

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

RALPH FRANK ESPOSITO, JR., *Petitioner*.

No. 1 CA-CR 20-0143 PRPC

FILED 6-30-2020

Petition for Review from the Superior Court in Maricopa County

No. CR2014-001312-001

The Honorable Peter A. Thompson, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix

By Andrea L. Kever

Counsel for Respondent

Ralph F. Esposito Jr., Tucson

Petitioner

Appendix # F

STATE v. ESPOSITO Decision of the Court

MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie, Judge Jennifer B. Campbell, and Vice Chief Judge Kent E. Cattani delivered the following decision.

PER CURIAM:

¶1 Petitioner Ralph F. Esposito, Jr. seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is Esposito's fourth petition.

¶2 Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012). It is the petitioner's burden to show that the superior court abused its discretion by denying the petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011) (petitioner has burden of establishing abuse of discretion on review).

¶3 We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, and the petition for review. We find the petitioner has not established an abuse of discretion.

¶4 We grant review but deny relief.¹



AMY M. WOOD • Clerk of the Court
FILED: AA

¹ We also deny Esposito's motion, dated June 15, 2020, to compel production of materials created by a former attorney and to depose another former attorney.

Appendix # (C)

Appendix # (C)

Clerk of the Superior Court

*** Filed ***

02/10/2020 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-001312-001 DT

02/07/2020

HONORABLE PETER A. THOMPSON

CLERK OF THE COURT
C. Curley
Deputy

STATE OF ARIZONA

JEFFREY LEE SPARKS

v.

RALPH FRANK ESPOSITO JR. (001)

RALPH FRANK ESPOSITO JR.
#293561 ASPC TUCSON/WINCHESTER
UNIT
P O BOX 24401
TUCSON AZ 85734

COURT ADMIN-CRIMINAL-PCR
JUDGE FOX
JUDGE THOMPSON

RULE 32 PROCEEDINGS DISMISSED

Pending before the Court are:

- Defendant's Notice of Request for Post-Conviction Relief filed on December 16, 2020,
- "Motion for Extension of Time by Petitioner impropria (sic) persona" filed on January 23, 2020,
- "Show Cause Why Current Rule 32 Proceedings Shall Not Be Treated as the Original Rule 32 After Assignment Judge Errors in a Premature Ruling before Rule 32 Management Order for Discovery is Obtained Thereby Depriving Petitioner Esposito Due Process Rights on Appeal" filed on January 27, 2020, and

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-001312-001 DT

02/07/2020

- “Show Cause Why a Motion Notice for Change of Assignment Judge Karen L. O’Connor Due too (sic) Conflict of Interest Shall Not be Granted and/or Recusal by Assignment Judge Karen L. O’Connor by Petitioner Esposito (impropria (sic) persona)” filed on January 27, 2020.

This is Defendant’s fourth Rule 32 proceeding in CR2014-001312-001 and his second Rule 32 proceeding in CR2013-442655-001. As a preliminary matter, the Court finds that all charges in CR2013-442655-001 were dismissed on the prosecution’s motion. Furthermore, the recusal motion is unnecessary and moot due to Judge O’Connor’s retirement.

In CR2014-001312-001, a jury found Defendant guilty of one count of theft of means of transportation, a class 3 felony; and two counts of kidnapping, both class 2 felonies and one a dangerous crime against children. Defendant represented himself at trial. On August 8, 2014, the Court entered judgment and sentenced Defendant to mitigated prison terms, including concurrent 2.5- and 4-year terms and a consecutive 10-year term. He received 337 days of presentence incarceration credit for the concurrent terms. On direct appeal, Division One rejected Defendant’s arguments concerning: (1) the denial of a mistrial, (2) undiagnosed radiation poisoning of Defendant’s brain, (3) the 10-year kidnapping sentence in violation of his Eighth Amendment rights, (4) a discrepancy between the oral pronouncement of Defendant’s sentence and the hearing transcript, and (5) a witness’s competency to testify. The appellate court affirmed his convictions and sentences, issuing its order and mandate on June 3, 2016. *State v. Esposito*, 1 CA-CR 15-0122 (App. Nov. 19, 2015) (mem. filed). His previous Rule 32 proceedings were unsuccessful.

A. Rule 32.1(a) Claims

In his current submission, Defendant contends that his convictions and sentences were obtained in violation of his constitutional rights, thereby entitling him to Rule 32.1(a) relief. Specifically, Defendant is claiming that he received ineffective assistance of counsel. (Notice at 2) In addition, he contends that the sole eyewitness committed perjury. (*Id.* at 3) Because Defendant raised perjury and ineffective assistance issues in the previous Rule 32 proceedings, relief on those grounds is precluded. *See* Ariz. R. Crim. P. 32.2(a)(2). To the extent that he is raising new Rule 32.1(a) claims, relief is still precluded. *See* Ariz. R. Crim. P. 32.2(a)(3); *State v. Spreitz*, 202 Ariz. 1, 2, ¶ 4, 39 P.3d 525, 526 (2002) (“Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, *in a Rule 32 post-conviction relief proceeding*, subsequent claims of ineffective assistance will be deemed waived and precluded.”) (emphasis in original). Furthermore, Defendant has no cognizable claim of ineffective assistance against advisory counsel. *See State v. Russell*, 175 Ariz. 529, 534-35, 858 P.2d 674, 679-80 (App. 1993).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-001312-001 DT

02/07/2020

In addition, Defendant complains of an “unauthorized and premature ruling” regarding his first Rule 32 proceeding. (Notice at 3) He elaborates on this claim in the “Show Cause” filing concerning the allegedly premature ruling. This Court dismissed Defendant’s earlier Rule 32 proceedings in both cases in an order filed on October 1, 2018. The Arizona Court of Appeals then granted review and denied relief, issuing the order and mandate on Nov. 13, 2019. *State v. Esposito*, 1 CA-CR 18-0716 PRPC (App. Feb. 21, 2019) (mem. filed). That decision is final.

B. Rule 32.1(e) Claim

Equally unavailing is Defendant’s claim that newly discovered and material facts would have changed the convictions or sentences under Ariz. R. Crim. P. 32.1(e). (Notice at 2) Rule 32.1(e) claims “are not subject to preclusion under Rule 32.2(a)(3).” Ariz. R. Crim. P. 32.2(b). Nevertheless, the Court may summarily dismiss if Defendant fails to “provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner.” *Id.*

“The relevant inquiry for determining whether the petitioner is entitled to an evidentiary hearing is whether he has alleged facts which, if true, would *probably* have changed the verdict or sentence.” *State v. Amaral*, 239 Ariz. 217, 220, ¶ 11, 368 P.3d 925, 928 (2016) (emphasis in original). To put it another way, Defendant must show that the facts were discovered after trial although existed before trial; the facts could not have been discovered and produced at trial or on appeal through reasonable diligence; the facts are neither solely cumulative nor impeaching; the facts are material; and the facts probably would have changed the verdict or sentence. *State v. Saenz*, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000), *see also* Ariz. R. Crim. P. 32.1(e). “Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence.” *Saenz*, 197 Ariz. at 490, ¶ 13, 4 P.3d at 1033. Defendant’s Rule 32.1(e) claim concerns “newly discovered factual documents” and “evidence of perjury of sole eyewitness,” which Defendant received in 2019. (Notice at 3) According to Defendant, the evidence could result in his acquittal. (*Id.*)

The Court finds Defendant’s Rule 32.1(e) claim is not colorable. Conclusory statements do not support post-conviction relief. Defendant supplies no facts to enable the Court to evaluate whether the evidence existed at trial or whether Defendant pursued it with reasonable diligence. But the main problem is that Defendant fails to adequately explain why this information is so material and non-cumulative that it entitles him to post-conviction relief.

In sum, Defendant fails to state a claim for which relief can be granted in a successive Rule 32 proceeding. Defendant must assert substantive claims and adequately explain the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-001312-001 DT

02/07/2020

reasons for their untimely assertion. Ariz. R. Crim. P. 32.2(b). He has failed to meet this standard.

With regard to the motion for extension, the Court finds no basis for the filing. In any case, the assignment Minute Entry was rescinded in a Minute Entry filed in CR2013-442655-001 on January 21, 2020.

IT IS THEREFORE ORDERED dismissing Defendant's Notice of Request for Post-Conviction Relief pursuant to Ariz. R. Crim. P. 32.2(b) and 32.11(a) in CR2014-001312-001 and CR2013-442655-001.

IT IS FURTHER ORDERED denying the request for appointment of counsel.

IT IS FURTHER ORDERED denying the "Motion for Extension of Time by Petitioner *impropria (sic) persona*," "Show Cause Why a Motion Notice for Change of Assignment Judge Karen L. O'Connor Due too (sic) Conflict of Interest Shall Not be Granted and/or Recusal by Assignment Judge Karen L. O'Connor by Petitioner Esposito (*impropria (sic) persona*)," and "Show Cause Why Current Rule 32 Proceedings Shall Not Be treated as the Original Rule 32 After Assignment Judge Errors in a Premature Ruling before Rule 32 Management Order for Discovery is Obtained Thereby Depriving Petitioner Esposito Due Process Rights on Appeal."

IT IS FURTHER ORDERED denying all other requests for relief.

Dated: 02/07/2020

Honorable Peter A. Thompson
Judge of the Superior Court

Appendix # (C)

Clerk of the Superior Court

*** Filed ***

03/02/2020 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-001312-001 DT
CR2013-442655-001 SE

02/27/2020

HONORABLE PETER A. THOMPSON

CLERK OF THE COURT
C. Curley
Deputy

STATE OF ARIZONA

T P C. APPEALS COUNTY ATTORNEY

v.

RALPH FRANK ESPOSITO JR. (001)

RALPH FRANK ESPOSITO JR.
293561 ASPC TUCSON WINCHESTER
P O BOX 24401
TUCSON AZ 85734

COURT ADMIN-CRIMINAL-PCR
JUDGE THOMPSON

PCR Dismiss ON 2/7/20

RULE 32 PROCEEDINGS – Motion For Reconsideration

Pending before the Court is Defendant's Motion For Reconsideration filed February 21, 2020. The 27 page motion with 48 pages of attachments does not establish a basis to reverse or alter the Court's order dismissing Defendant's fourth Rule 32 proceeding in CR2014-001312-001 and his second Rule 32 proceeding in CR2013-442655-001. Therefore,

IT IS THEREFORE ORDERED denying Defendant's Motion For Reconsideration of the dismissal of Defendant's Notice of Request for Post-Conviction Relief pursuant to Ariz. R. Crim. P. 32.2(b) and 32.11(a) in CR2014-001312-001 and CR2013-442655-001.

IT IS FURTHER ORDERED denying reconsideration of the denial of Defendant's "Motion for Extension of Time by Petitioner impropria (sic) persona," "Show Cause Why a Motion Notice for Change of Assignment Judge Karen L. O'Connor Due too (sic) Conflict of Interest Shall Not be Granted and/or Recusal by Assignment Judge Karen L. O'Connor by Petitioner Esposito (impropria (sic) persona)," and "Show Cause Why Current Rule 32 Proceedings Shall Not Be treated as the Original Rule 32 After Assignment Judge Errors in a

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-001312-001 DT
CR2013-442655-001 SE

02/27/2020

Premature Ruling before Rule 32 Management Order for Discovery is Obtained Thereby
Depriving Petitioner Esposito Due Process Rights on Appeal.”

IT IS FURTHER ORDERED denying all other requests for relief.

Honorable Peter A. Thompson
Judge of the Superior Court

Appendix

A - Direct Appeal from
Superior Court of Arizona

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

RALPH F. ESPOSITO, *Appellant*.

No. 1 CA-CR 15-0122
FILED 11-19-2015

Appeal from the Superior Court in Maricopa County
No. CR 2014-001312-001
The Honorable Karen L. O'Connor, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Terry J. Adams
Counsel for Appellant

Ralph F. Esposito, Safford
Appellant

STATE v. ESPOSITO
Decision of the Court

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Donn Kessler joined.

THUMMA, Judge:

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297 (1969). Counsel for defendant Ralph F. Esposito has advised the court that, after searching the entire record, counsel has found no arguable question of law and asks this court to conduct an *Anders* review of the record. Esposito was given the opportunity to file a supplemental brief pro se, and has done so, including a first and second addendum. This court has reviewed the record and has found no reversible error. Accordingly, Esposito's convictions and resulting sentences are affirmed.

FACTS¹ AND PROCEDURAL HISTORY

¶2 One morning in September 2013, C.F.² left her 18-month old daughter, F.F., and mother-in-law, C.S., in her car while she went into a grocery store. While she was in the store, Esposito got into the driver's seat and drove away with both F.F. and C.S. still inside. He never said a word, despite C.S. hitting him and trying to get him to let them go. After about ten minutes, police stopped Esposito, surrounded the car with guns drawn, pulled Esposito from the car, arrested him and liberated F.F. and C.S.

¶3 The State charged Esposito with theft of means of transportation, a Class 3 felony, kidnapping, a Class 2 felony, and kidnapping, a Class 2 felony and a dangerous crime against children. The superior court ordered a competency evaluation and, after both doctors

¹ On appeal, this court views the evidence in the light most favorable to sustaining the conviction and resolves all reasonable inferences against the defendant. *State v. Karr*, 221 Ariz. 319, 320 ¶ 2 (App. 2008).

² Initials are used to protect the victims' privacy. *State v. Maldonado*, 206 Ariz. 339, 341 n.1 ¶ 2 (App. 2003).

STATE v. ESPOSITO
Decision of the Court

opined to his competency, the court found him competent.³ On March 13, 2014, one week before the scheduled trial and two weeks before the last day, the State indicted Esposito with the same charges and dismissed the original case. The court set trial in the new case for June 2014. Before trial, Esposito asked to represent himself. After an appropriate colloquy with Esposito, the court found his waiver of counsel was knowing, intelligent and voluntary and directed that Esposito could represent himself.

¶4 At trial, Esposito gave a four-sentence opening statement. He did not conduct cross-examination of any of the State's 10 witnesses (C.F., her husband, C.S. and seven police officers). Esposito elected not to testify after the court explained the ramifications of the decision, did not request any jury instructions besides a lesser-included offense to theft of means of transportation, did not make a motion for judgment of acquittal, chose not to give a closing argument after the court explained the ramifications and chose not to present argument at the aggravation phase.

¶5 During closing argument, the State remarked:

This has been a rather unusual case, as you may have figured out, ladies and gentlemen, in that the defendant didn't testify, didn't present any witnesses, and as the Judge told you from the outset, the defendant doesn't need to do that. . . . So there is nothing improper about the way the trial has proceeded, although it is a little bit unusual. . . . At the same time, while it can't be held against the defendant that he chose not to testify or not to present any witnesses on his behalf, the Judge also told you in the final instructions that you have, that were read to you this morning, that you are not to be influenced by sympathy or prejudice.

¶6 Immediately after the State's closing, at a sidebar, the superior court indicated these statements warranted a mistrial. After the court told Esposito that her inclination was to "declare a mistrial and start the trial over again," Esposito responded, "I really didn't have no concerns. I mean,

³ Documents from Esposito's original case number, CR 2013-036093, are not a part of the record on appeal. However, this court finds them helpful and therefore takes judicial notice of the pretrial minute entries. See *State v. Valenzuela*, 109 Ariz. 109, 110 (1973).

STATE v. ESPOSITO
Decision of the Court

I am not asking for a mistrial at all." Even after his advisory counsel advised him to ask for the mistrial, Esposito refused, saying, "I have my reasons, but basically I'm fine with everything. That's all I have to say." Given this, no mistrial was declared.

¶7 After the close of evidence, final instructions and argument, the jury deliberated and found Esposito guilty as charged. The jury also found the kidnapping was a dangerous crime against children and that F.F. was less than 12 years old and Esposito was at least 18 years old at the time of the offense.

¶8 At sentencing, Esposito admitted to a prior felony conviction and addressed the court, maintaining his innocence and asking for concurrent minimum terms. After considering the presentence report, the competency evaluations and both aggravating and mitigating factors, the court sentenced Esposito to mitigated prison terms for all three counts, each found to be non-dangerous and non-repetitive. Counts one and two are concurrent to one another, with presentence incarceration credit of 337 days,⁴ with the sentence on count three to be served consecutively to counts one and two.

¶9 Esposito timely appealed from his convictions and resulting sentences. This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031, and -4033 (2015).⁵

DISCUSSION

¶10 This court has reviewed and considered counsel's brief and appellant's pro se supplemental brief and addenda, and has searched the entire record for reversible error. *See State v. Clark*, 196 Ariz. 530, 537 ¶ 30 (App. 1999). Searching the record and briefs reveals no reversible error.

¶11 The State originally brought Esposito's case in 2013, but then brought the same charges to a grand jury in 2014 and indicted him. Then the State dismissed the 2013 case without prejudice, over Esposito's objection, and proceeded under the timeline of the 2014 indictment. Because Esposito's proper remedy for a potential violation of the speedy

⁴ Although the record suggests that the proper presentence incarceration credit may have been less than 337 days, there is no challenge on appeal that the credit he was given was excessive.

⁵ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

STATE v. ESPOSITO
Decision of the Court

trial rule was a special action or motion to reconsider in the 2013 case, *see Earl v. Garcia*, 234 Ariz. 577, 579 ¶ 9 (App. 2014) (citing cases), this court lacks jurisdiction to address any such issue in this appeal.

¶12 The record shows Esposito was either represented by counsel at all stages of the proceedings or that he knowingly, intelligently and voluntarily waived his right to counsel and elected to represent himself. The evidence admitted at trial constitutes substantial evidence supporting Esposito's convictions. From the record, all proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. The sentences imposed were within the statutory limits and permissible ranges.

¶13 Esposito raises several arguments in his pro se supplemental brief and addenda, which this court addresses as follows.

I. Esposito Has Not Shown Fundamental Error Resulting In Prejudice By The Superior Court Not Granting A Mistrial.

¶14 Esposito challenges the State's closing argument. He argues that he refused to ask for a mistrial, even at the superior court's prompting and against his advisory counsel's advice, because he was under duress from potential threats made by fellow inmates that assaulted him in the jail before trial.

¶15 "The prosecutor who comments on defendant's failure to testify violates both constitutional and statutory law." *State v. Hughes*, 193 Ariz. 72, 86 ¶ 63 (1998). The superior court suggested a mistrial based on the State's comments in closing about Esposito's failure to testify and offer any evidence. Because Esposito did not make a timely objection, this court reviews for fundamental error. *See id.* at 86 ¶ 62; *see also* Ariz. R. Crim. P. 21.3(c).⁶ "Accordingly, [Esposito] bears the burden to establish that (1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice." *State v. James*, 231 Ariz. 490, 493 ¶ 11 (App. 2013) (citations omitted).

¶16 Assuming the State's comments supported an unfavorable inference against Esposito and therefore resulted in fundamental error, *see State v. Ramos*, 235 Ariz. 230, 235 ¶ 13 (App. 2014); *see also* A.R.S. §13-117(B), Esposito has not shown resulting prejudice. The State offered sufficient evidence for each element of each charge, and Esposito did not offer any

(Appellate Court) Pro-se
ERROR
Esposito WAS NOT A side bar - Ex parte Communication
¶ Although given Esposito's statements at sidebar, the doctrine of invited error could preclude his argument on appeal, *see State v. Logan*, 200 Ariz. 564, 566 ¶ 11 (2001), on this record, the court analyzes the issue for fundamental error resulting in prejudice.

STATE v. ESPOSITO
Decision of the Court

alternative explanation, theory or defense, cross-examine any witness or make a closing argument. The court also gave him the opportunity to seek a mistrial, telling him, "I am going to leave it to you and respect your decision as to whether or not you want to mistry this case. If you do request a mistrial, I will grant it." Esposito refused multiple times. On this record, Esposito has not shown that the State's comments constituted fundamental error resulting in prejudice.

II. The Record Does Not Support Esposito's Radiation Poisoning Assertion.

¶17 Esposito makes several arguments stemming from what he considers to be electro-magnetic radiation poisoning of his brain. A thorough examination of the record, however, reveals no evidence of radiation poisoning. Therefore, he cannot support his claimed violations of the Fourth, Fifth or Eighth Amendments to the United States Constitution.

¶18 Relatedly, Esposito argues that his radiation condition went undiagnosed, so he was not competent to assist in his own defense. Again, however, the record reveals no evidence of radiation poisoning. Moreover, Esposito went through competency evaluation before trial and the court found he was competent and able to assist in his own defense, relying on the consistent opinions of two doctors. Additionally, when Esposito asked to represent himself, the court conducted a proper colloquy and determined Esposito's waiver of counsel was knowing, intelligent and voluntary, findings supported by the record. *See State v. Evans*, 125 Ariz. 401, 403-04 (1980) (holding defendant properly waived counsel, even after being diagnosed "as a paranoid schizophrenic" during competency proceedings). The superior court, therefore, did not err.

III. Esposito Has Not Shown His Sentence Was Illegal.

¶19 Esposito argues the 10-year mitigated sentence for kidnapping, a Class 3 felony, and dangerous crime against children was excessive and therefore illegal. The superior court correctly used A.R.S. § 13-705(D) to guide sentencing based on his conviction.

¶20 The Eighth Amendment to the United States Constitution "'does not require strict proportionality between crime and sentence' but instead forbids only extreme sentences that are 'grossly disproportionate to the crime.'" *State v. Berger*, 212 Ariz. 473, 476 ¶ 13 (2006) (quoting *Ewing v. California*, 538 U.S. 11, 23-24 (2003)). To determine whether a sentence is so lengthy that it is considered cruel and unusual under the Eighth Amendment, this court "first determines if there is a threshold showing of

STATE v. ESPOSITO
Decision of the Court

gross disproportionality by comparing the gravity of the offense and the harshness of the penalty." *Id.* at 476 ¶ 12 (citation omitted). "A prison sentence is not grossly disproportionate, and a court need not proceed beyond the threshold inquiry, if it arguably furthers the State's penological goals and thus reflects a rational legislative judgment, entitled to deference." *Id.* at 477 ¶ 17 (citation omitted).

¶21 The "dangerous crime against children" sentencing enhancement currently codified in A.R.S. § 13-705 "reflects a rational legislative judgment, entitled to deference." *See id.* at 477-78 ¶¶ 17, 22-23; *see also State v. Williams*, 175 Ariz. 98, 102-03 (1993) (noting Legislature "was attempting to respond effectively to those predators who pose a direct and continuing threat to the children of Arizona. The lengthy periods of incarceration are intended to punish and deter those persons, and simultaneously keep them off the streets and away from children for a long time."). Esposito's mitigated 10-year sentence was not excessive under the Eighth Amendment. Indeed, that sentence was the shortest possible sentence the court had the power to impose.

¶22 Esposito argues that at the sentencing hearing, the superior court orally sentenced him to three concurrent sentences, rather than only counts one and two being concurrent to each other, as stated in the resulting minute entry. Esposito is correct that, when the oral pronouncement of the sentence is inconsistent with the minute entry, the oral pronouncement controls. *See State v. Ovante*, 231 Ariz. 180, 188 ¶ 38 (2013). As applied, however, the oral pronouncement of Esposito's sentence, based on the transcript of the hearing, is consistent with the minute entry, meaning the discrepancy Esposito claims does not exist.

IV. Witness Competency.

¶23 Relying on A.R.S. § 12-2202, Esposito argues the superior court should not have allowed C.S. to testify because she has Alzheimer's disease, and therefore was of unsound mind at the time she was called to testify. Because A.R.S. § 12-2202 only applies to civil actions, it is inapplicable here. A witness is only incompetent to testify "if he or she is unable to understand the nature of an oath, or perceive the event in question and relate it to the court." *State v. Peeler*, 126 Ariz. 254, 256 (App. 1980); *see also* A.R.S. § 13-4061; Ariz. R. Evid. 601. "The credibility of witnesses is a matter for the jury." *State v. Canez*, 202 Ariz. 133, 149 ¶ 39 (2002). Therefore, any contradictions or inconsistent testimony go to the credibility, not competency, of a witness. *Peeler*, 126 Ariz. at 256.

STATE v. ESPOSITO
Decision of the Court

¶24 Esposito claims C.S. was incompetent to testify solely because she has Alzheimer's disease. Not so. The record shows C.S. was able to understand the oath, was able to understand and respond to questions asked of her, and asked for clarification when she needed it. C.F. testified that C.S. had Alzheimer's at the time of trial and at the time of the offense. Her disease, then, went to her credibility as a witness, rather than her competency to testify, and was a matter for the jury to consider. *See Canez*, 202 Ariz. at 149 ¶ 39; *Peeler*, 126 Ariz. at 256.

V. Ineffective Assistance Of Counsel.

¶25 Esposito argues that both his trial and current appellate counsel were ineffective. Although noting Esposito represented himself at trial, this court does not consider ineffective assistance of counsel claims on direct appeal; it is an issue only for a Rule 32 post-conviction proceeding. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415 ¶ 20 (2007). Therefore, this court will not consider Esposito's ineffective assistance of counsel arguments.

CONCLUSION

¶26 This court has read and considered counsel's brief and Esposito's pro se supplemental brief and addenda, and has searched the record provided for reversible error and has found none. *State v. Leon*, 104 Ariz. 297, 300 (1969); *State v. Clark*, 196 Ariz. 530, 537 ¶ 30 (App. 1999). Accordingly, Esposito's convictions and resulting sentences are affirmed.

¶27 Upon filing of this decision, defense counsel is directed to inform Esposito of the status of his appeal and of his future options. Defense counsel has no further obligations unless, upon review, counsel identifies an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Esposito shall have 30 days from the date of this decision to proceed, if he desires, with a pro se motion for reconsideration or petition for review.

STATE v. ESPOSITO
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Ruth A. Willingham - Clerk of the Court
FILED ama



SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

May 4, 2016

RE: STATE OF ARIZONA v RALPH F ESPOSITO
Arizona Supreme Court No. CR-15-0437-PR
Court of Appeals, Division One No. 1 CA-CR 15-0122
Maricopa County Superior Court No. CR2014-001312-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 4, 2016, in regard to the above-referenced cause:

ORDERED: Appellant's Motion for Mental Examinations or Incompetency Hearing into the Record in Propria Persona = DENIED.

FURTHER ORDERED: Appellant's Motion for for (sic) Documented Assault while Jailed in Maricopa County Towers Jail and Medical Records of Assault by Maricopa County Sherriff Office in Maricopa County Lower Buckeye Jail in Propria Persona = DENIED.

FURTHER ORDERED: Appellant's Motion to Petition for Review by the Arizona Supreme Court in Propria Persona = DENIED.

A panel composed of Chief Justice Bales, Vice Chief Justice Pelander and Justice Brutinel participated in the determination of this matter.

Janet Johnson, Clerk

**Additional material
from this filing is
available in the
Clerk's Office.**