

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

See [C Ariz.R.Sup.Ct. 111\(c\)](#); [C ARCAP 28\(c\)](#); [C Ariz.R.Crim.P. 31.24](#)



DIVISION ONE  
FILED: 10/18/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0554
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	<b>MEMORANDUM DECISION</b>
	)	(Not for Publication -
ERIC JORDAN,	)	<a href="#">C Rule 111</a> , Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-007284-001

The Honorable Paul J. McMurdie, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General	Phoenix
By Kent E. Cattani, Chief Counsel	
Criminal Appeals/Capital Litigation Division	
Attorneys for Appellee	

Bruce F. Peterson, Maricopa County Legal Advocate	Phoenix
By Frances J. Gray, Deputy Legal Advocate	
Attorneys for Appellant	

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O R O Z C O, Judge

¶1 Eric Jordan (Defendant) appeals his convictions and sentences imposed on multiple counts of armed robbery, a class two dangerous felony; attempt to commit armed robbery, a class three dangerous felony; and misconduct involving weapons, a class four felony.

¶2 Defendant's counsel filed a brief in accordance with ¶ [Anders v. California, 386 U.S. 738 \(1967\)](#) and ¶ [State v. Leon, 104 Ariz. 297, 451 P.2d 878 \(1969\)](#), advising this court that after a search of the entire appellate record, she found no arguable question of law that was not frivolous. Defendant filed a supplemental brief in propria persona and raised several issues for consideration.

¶3 Our obligation in this appeal is to review the entire record for reversible error. ¶ [State v. Clark, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 \(App. 1999\)](#). We have jurisdiction pursuant to ¶ [Article 6, Section 9, of the Arizona Constitution](#) and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 (2010), and -4033.A.1 (2010). Finding no reversible error, we affirm.

## FACTS AND PROCEDURAL HISTORY<sup>1</sup>

¶4 At approximately midnight in June 2010, Defendant and William Jackson (Jackson) entered a party and told the host that they were his neighbors. The host invited them to join the party.

¶5 Just prior to 1:40 a.m., Defendant and Jackson told guests who were outside to get inside the residence because police had arrived to break up the party. When the guests followed the two men inside the residence, Defendant and Jackson produced a firearm and fired one round into the floor. Defendant and Jackson ordered everyone to lie on the floor and locked the back and front doors of the residence. Defendant and Jackson both handled the weapon and demanded everyone surrender their possessions. Defendant and Jackson told the victims that they would be shot if they did not comply. Defendant threatened to shoot one victim's infant if the child continued to cry.

¶6 Once Defendant and Jackson collected the victims' possessions, they left through the back door. Jackson was apprehended at the scene, but Defendant made his way to Jackson's girlfriend's car in the parking lot of an adjoining

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<sup>1</sup> When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." [▶ \*State v. Torres-Soto\*, 187 Ariz. 144, 145, 927 P.2d 804, 805 \(App. 1996\).](#)

complex. Defendant instructed Jackson's girlfriend to drive to the back of the parking lot and park in a vacant spot.

¶17 A police helicopter spotted the vehicle, a white Mercury Marquis, and informed patrol cars in the area. When an officer approached the vehicle, Defendant removed a gun from his pants and placed it behind Jackson's girlfriend's seat. Because officers had been advised to look for two male suspects in a white Cadillac, Defendant and Jackson's girlfriend were released.

¶18 Defendant instructed Jackson's girlfriend to drive around the corner to a group of bushes. Defendant exited the vehicle, collected a number of items from behind the bushes, and returned to the car. After briefly driving around the area looking for Jackson, Defendant and Jackson's girlfriend drove back to Defendant's apartment. Once there, Jackson's girlfriend witnessed Defendant sort through property later identified as belonging to the victims. Additionally, she witnessed Defendant dispose of driver's licenses and pictures from various wallets and purses.

¶19 The next morning, Jackson's girlfriend called police and discovered that Jackson was in jail on armed robbery charges. She subsequently informed police that she had information about the robbery and directed the police to Defendant's apartment. Police apprehended Defendant and

executed a search warrant on the apartment, where they discovered a firearm and many pieces of stolen property. Several victims later identified Defendant in photo lineups.

¶10 Defendant was charged with sixteen counts of armed robbery, two counts of kidnapping, and one count of misconduct involving weapons. Following a jury trial, Defendant was found guilty of nine counts of armed robbery, five counts of attempted armed robbery, and one count of misconduct involving weapons. The jury found that the armed robbery and attempted armed robbery offenses were dangerous offenses as defined by A.R.S. § 13-105.13 (Supp. 2011).<sup>2</sup> Defendant received enhanced sentences pursuant to A.R.S. § 13-704.A (2010) of 10.5 years' imprisonment for each count of armed robbery, to be served concurrently; 7.5 years' imprisonment for each count of attempted armed robbery, to be served concurrently to one another and consecutive to the armed robbery sentences; and 2.5 years' imprisonment for misconduct involving weapons, to be served consecutive to both the armed robbery and attempted armed robbery sentences. Defendant was given 398 days of presentence incarceration credit for his armed robbery sentence.

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<sup>2</sup> We cite the current version of the applicable statutes when no revisions material to this decision have occurred.

## DISCUSSION

¶11 In his supplemental brief, Defendant raises the following issues: (1) the State improperly informed the jury of Defendant's prior criminal record, resulting in prejudice; (2) the trial court granted Defendant a severance motion from Jackson, but the State improperly presented evidence connecting Defendant and Jackson; (3) Defendant's oral motion for full disclosure was denied, impeding his ability to prepare for trial; (4) witnesses were not properly instructed to not communicate with one another concerning their testimony prior to the trial; and (5) Defendant should have received concurrent sentences rather than consecutive sentences because all counts arose out of the same action or event. We address each argument in turn.

### **A. Prior Convictions**

¶12 Defendant alleges that the trial court improperly allowed the State to introduce evidence of Defendant's prior felony convictions. As a result, Defendant chose not to testify because of the prejudicial effect he believed such evidence would have.

¶13 When a defendant does not testify, he waives his right to appeal the admissibility of evidence that could be used to impeach him. [C \*State v. Conner\*, 163 Ariz. 97, 102-03, 786 P.2d 948, 953-54 \(1990\)](#). "Without [D]efendant's testimony, a

reviewing court cannot properly weigh the probative value of the testimony against the prejudicial impact of the impeachment.” *Id.* at 102, 786 P.2d at 953. Because Defendant failed to testify, he waived his right to appeal on this issue.

### **B. Severance Motion**

¶14 Defendant argues that because his trial was severed from Jackson’s, the trial court erred in allowing the State to present evidence connecting Defendant and Jackson at trial. However, Defendant did not object to the evidence at trial. When no objection to an alleged error is made at trial, we review only for fundamental error. ▶ [State v. Henderson, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 \(2005\)](#). To establish fundamental error, Defendant must demonstrate “that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial.” ▶ *Id.* at 568, ¶ 24, 115 P.3d at 608.

¶15 Severance motions are granted if it is necessary to promote a fair determination of the guilt or innocence of any of two or more defendants in a joined trial. See [Ariz. R. Crim. P. 13.4](#). The severance of trials, however, has no bearing on the admissibility of evidence in Defendant’s own trial. Defendant suggests that the trial court improperly admitted evidence relating to Jackson but fails to identify any specific

pieces of evidence that were overly prejudicial and should have been excluded. Absent a showing of prejudice, we cannot conclude that the admission of evidence relating to Jackson rises to the level of fundamental error.

**C. Motion for Full Disclosure**

¶16 Defendant asserts that the trial court erred in denying his oral motion for full disclosure during a pretrial hearing. Defendant contends that despite his counsel having access to all necessary documents and adequate time to prepare his defense, his lack of personal access rendered him incapable of defending himself in court.

¶17 The record reflects that Defendant had previously requested and been granted a change of counsel at the time of his motion. Furthermore, Defendant prefaced his motion with another request for change of counsel, suggesting that his court-appointed counsel failed to strategize with him about the trial and did not share information with him. Thus, this claim is actually a complaint about the effectiveness of Defendant's court-appointed counsel. This court will not consider such claims of ineffective assistance of counsel on direct appeal regardless of merit. [H ▶ State v. Spreitz, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 \(2002\)](#). Such claims must first be presented to the trial court in a petition for post-conviction relief. ▶ [Id.](#)



#### ***D. Witness Instruction***

¶18 Defendant next argues that the trial court erred in failing to instruct the State's witnesses not to communicate with one another outside of court. He contends this allowed for improprieties between the victims concerning their testimony.

¶19 Rule 9.3 of the Arizona Rules of Criminal Procedure states that the trial court will instruct witnesses "not to communicate with each other until all have testified." "If defendant *shows* that a witness violated this rule, then admission of that witness's testimony is within the trial court's discretion. Reversal on appeal is proper only where defendant shows an abuse of discretion by the trial court and resulting prejudice to defendant." [▶\*State v. Gulbrandson\*, 184 Ariz. 46, 63, 906 P.2d 579, 596 \(1995\)](#) (emphasis added).

¶20 To have a valid claim under this rule, Defendant must have shown during trial that one or more of the witnesses in fact violated [●\*Rule 9.3\*](#). He failed to do so. Moreover, even if Defendant had demonstrated that a witness violated [●\*Rule 9.3\*](#), admission of that witness's testimony would still have been at the discretion of the trial court. Because no valid claim was put forth, we cannot say the trial court erred in allowing or not striking the witnesses' testimony.

### ***E. Consecutive Versus Concurrent Sentences***

¶21 Defendant contends all of the charges and convictions in this matter arose from the same action or event, and thus the sentences imposed should run concurrently rather than consecutively.

¶22 "Separate sentences of imprisonment imposed on a defendant for 2 or more offenses, whether they are charged in the same indictment or information, shall run consecutively unless the judge expressly directs otherwise." [Ariz. R. Crim. P. 26.13](#). The only exception to this rule comes from [A.R.S. § 13-116 \(2010\)](#), which dictates that when a single act is punishable in different ways under different sections of the law, the trial court cannot impose consecutive sentences.

¶23 In the instant case, Defendant not only committed multiple violations of the same law, but also committed violations of different laws. Although the violations occurred on the same occasion, each count of armed robbery or attempted armed robbery represented an independent act against a different victim. Therefore, the exception in [§ 13-116](#) does not apply because Defendant is not being punished for a single act under multiple laws; rather, he is being punished under the same laws for multiple acts.

¶24 Additionally, though use of a deadly weapon is an element of armed robbery and attempted armed robbery, misconduct

involving weapons is an entirely separate crime involving Defendant's restricted right to carry a weapon and is not related to Defendant's use of the weapon in committing the other crimes. See A.R.S. §§ 13-1904 (2010), -3102.A. (Supp. 2011). It was within the trial court's discretion to assign Defendant consecutive and concurrent sentences as it deemed appropriate. See [Ariz. R. Crim. P. 26.13](#).

#### CONCLUSION

¶25 We have read and considered counsel's brief and Defendant's supplemental brief. We have carefully searched the entire appellate record appeal for reversible error and have found none. See *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the jury's finding of guilt. Defendant was present and represented by counsel at all critical stages of the proceedings. At sentencing, Defendant and his counsel were given an opportunity to speak and the court imposed a legal sentence, giving Defendant proper presentence incarceration credit.

¶26 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and his future options, unless counsel's review reveals an issue

appropriate for submission to the Arizona Supreme Court by petition for review. See [▶State v. Shattuck, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 \(1984\)](#). The Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an in propria persona motion for reconsideration or petition for review.

¶27 For the foregoing reasons, Defendant's convictions and sentences are affirmed.

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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

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JON W. THOMPSON, Judge

/S/

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SAMUEL A. THUMMA, Judge