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: 01/19/2010
PHILIP G. URRY,CLERK
BY: RWillingham

STATE OF ARIZONA, Appellee,	1 CA-CR 09-0068
v.	DEPARTMENT C
DANIEL S. PINA, Appellant.	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-170470-001 SE

The Honorable Connie Contes, Judge

AFFIRMED

Terry Goddard, 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 Joel M. Glynn, Deputy Public Defender
Attorneys for Appellant

Daniel S. Pina — Florence
Appellant

W I N T H R O P, Judge

¶1 Daniel S. Pina ("Appellant") appeals his convictions and sentences for criminal trespass, aggravated assault, and

burglary in the third degree. 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 he has searched the record on appeal and found no arguable question of law. 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). This court afforded Appellant the opportunity to file a supplemental brief *in propia persona*, and he has done so.

¶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 (2001), and 13-4033(A) (Supp. 2009).[1] Finding no reversible error, we affirm Appellant's convictions and sentences.

FACTS AND PROCEDURAL HISTORY[2]

¶3 Appellant met J.A. in 2001. The two of them had a "fling" that resulted in the birth of a daughter. After the child was born, J.A. married another man and Appellant saw J.A.

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[1] We cite the current version of statutes in which no revisions material to this decision have since occurred.

[2] 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).

only “[n]ow and again,” when he gave her money for their daughter.

¶4 On October 30, 2007, J.A. lived in a Chandler home with her four children – her daughter with Appellant and three children from her now-dissolved marriage. According to J.A., Appellant did not have keys to her home. Between the evening of October 30 and the morning of October 31, J.A. and a new boyfriend, A.G., encountered Appellant three times, resulting in the charges in this case.

¶5 Between 7:00 and 8:00 p.m., Appellant arrived at J.A.’s house and entered uninvited. J.A. stopped him from entering her bedroom and called police, at which point Appellant left. Later that night, however, between 10:00 p.m. and midnight, Appellant returned to J.A.’s home with a friend. He entered her bedroom while she and A.G. were sleeping and shouted, “I caught you, I caught you, you cheated.” Appellant had a jack pole in his hands, which he swung around and used to threaten J.A. and A.G. J.A. managed to call the police, and Appellant and his friend left.

¶6 After Appellant left, J.A. noticed that, although A.G.’s car was still in the driveway, his car keys were missing. A Mazda that had been parked next to A.G.’s car in the driveway was also missing. A.G.’s glove compartment was open and his trumpet and backpack were gone.

¶7 Appellant returned to J.A.'s house between 2:00 and 3:00 a.m., apologized to A.G., and returned his car keys. Officer McClain, who had responded to the earlier call and spoken with Appellant by phone, responded to another telephone call from the house. When he arrived at the house, Appellant was sitting in his employer's tow truck, shaking hands with A.G. Officer McClain initiated a stop. When he searched the car, Officer McClain found a "pole for a jack," at which point he arrested Appellant. Police found the missing Mazda in Tempe and A.G. recovered his missing personal items.

¶8 At trial, Appellant claimed that he and J.A. were engaged to be married, but that he suspected she was cheating on him. He went to her home on October 30, hoping to "catch her in the act." While leaving her home, he accidentally took A.G.'s keys, which he was returning when police stopped him. He testified that he never entered A.G.'s car or took anything from it and did not use a jack pole to threaten either J.A. or A.G.

¶9 Appellant was indicted and charged with two counts of burglary in the second degree (Counts 1 and 2), class 3 felonies and domestic violence offenses; one count of aggravated assault (Count 3), also a class 3 felony and domestic violence offense; aggravated assault (Count 4), a class 3 dangerous felony; unlawful use of means of transportation (Count 5), a class 5 felony; and burglary in the third degree (Count 6), a class 4

felony. *See* A.R.S. §§ 13-1203 (2001), -1204 (Supp. 2009), -1506 (Supp. 2009), -1507 (2001), & -1803 (2001). The State alleged aggravating factors and prior felony convictions. On Count 2, the twelve-member jury found Appellant guilty of the lesser-included offense of criminal trespass. *See* A.R.S. § 13-1504 (Supp. 2009). The jury also convicted Appellant of both counts of aggravated assault (Counts 3 and 4), and of burglary in the third degree (Count 6). The court found that Appellant had two prior felony offenses and sentenced Appellant to the presumptive term on all four counts - concurrent sentences of 3.75 years for criminal trespass, 11.25 for each aggravated assault conviction, and 10 years for burglary in the third degree, with 435 days of presentence incarceration credit. Appellant filed a timely notice of appeal.

ANALYSIS

¶10 Appellant filed a supplemental brief raising several issues, which we address in turn. We review questions of law *de novo*, *Arizona Water Co. v. Arizona Corp. Comm'n*, 217 Ariz. 652, 656, ¶ 10, 177 P.3d 1224, 1228 (App. 2008), and we review evidentiary issues for an abuse of discretion. *State v. Blakley*, 204 Ariz. 429, 437, ¶ 34, 65 P.3d 77, 85 (2003).

A. Incomplete Police Report

¶11 Appellant argues that the "State's failure to provide the defense with a complete police report and mandatory

discovery in timely disclosure . . . deprived the Appellant . . . [of] effective assistance of counsel and due process." Regardless of merit, ineffective assistance of trial counsel claims cannot be raised on direct appeal; such claims may only be raised in a Rule 32 proceeding. *See State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Therefore, we decline to address Appellant's ineffective assistance of counsel argument.

¶12 Appellant further argues that the State's failure to provide the defense with a complete police report deprived him of his due process rights under the federal and state constitutions. During an interview with the county attorney and defense attorney, Officer McClain noticed that a supplement to his police report was missing. Due to computer system glitches at the Chandler Police Department, the supplement was lost. He was able to recover the supplement from his computer system, but the result was delayed disclosure. The court held a hearing on the matter after defense counsel filed a Motion for Sanctions Pursuant to Rule 15.7, but denied the motion when defense counsel acknowledged that "this late disclosure was not something intentionally done by the prosecution" or the officer. The trial court was willing to grant the defense additional time, if needed, but Appellant was "not interested in waiving time towards the last day in which to resolve this matter[.]"

¶13 We find no reversible error or deprivation of Appellant's due process rights in the trial court's handling of the State's inadvertent late disclosure.

B. *Miranda* Violation

¶14 Appellant next argues that the trial court erred in admitting statements he made to police prior to receiving his *Miranda* warnings. Although the trial court did not hold a formal voluntariness hearing, the statements Appellant made to Officer McClain before his arrest were not made in the course of a "custodial interrogation," as required by *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Prior to his arrest, both of Appellant's conversations with Officer McClain took place by telephone. Appellant initiated one of the phone calls by calling the non-emergency number for the City of Chandler, which patched him through to Officer McClain. Since Appellant was not in the custody of the police officer when he spoke with him by phone and, in fact, voluntarily initiated one of the telephone calls, we do not find reversible error in the trial court's admission of Appellant's pre-*Miranda* statements to police.

C. Jury Instructions and Lesser-Included Offenses

¶15 Finally, Appellant seems to argue that the jury's finding of guilty on the aggravated assault charges (Counts 3 and 4) are inconsistent with its finding of not guilty of a dangerous offense. Further, he seems to argue that the jury

should have been instructed to consider simple assault as a lesser-included offense of aggravated assault.

¶16 At trial, during the finalization of the jury instructions and verdict forms, the court offered defense counsel the opportunity to request lesser-included offenses. Defense counsel's failure to request a lesser-included offense instruction or object to the jury instructions related to the aggravated assault charges constitutes a waiver of the argument. *See Andrade v. Superior Court*, 183 Ariz. 113, 116 n.4, 901 P.2d 461, 464 n.4 (App. 1995).

¶17 As for the separate "dangerous offense" finding, a finding of guilt as to the aggravated assault charge alone does not include a finding that the offense involved the use of a dangerous instrument or a deadly weapon. Section 13-604(P) (2001) provides for additional penalties if the "dangerous nature of the felony is . . . found by the trier of fact." Therefore, "[t]he fact that the proof showed the use of a weapon does not satisfy the statutory requirement that the element of the dangerous nature of the felony be charged and be found to exist by the trier of fact." *State v. Parker*, 128 Ariz. 97, 99, 624 P.2d 294, 296 (1981). As trier of fact, the statutory scheme requires the jury to make a separate finding of dangerousness with respect to the aggravated assault charges. We therefore find no reversible error or inconsistency in the

instructions to the jury requiring a separate dangerousness finding on the aggravated assault charges.

D. Remaining Analysis

¶18 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 verdicts, and the sentences were 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.

¶19 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.

CONCLUSION

¶20 Appellant's convictions and sentences are affirmed.

/S/
LAWRENCE F. WINTHROP, Judge

CONCURRING:

/S/
PETER B. SWANN, Presiding Judge

/S/
MICHAEL J. BROWN, Judge