

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



DIVISION ONE  
FILED: 12/15/09  
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IN THE  
COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, )  
 )  
 Appellee, ) 1 CA-CR 09-0193  
 )  
 v. ) DEPARTMENT B  
 )  
 ) **MEMORANDUM DECISION**  
 DOMINIC EMILIO AVINA, ) (Not for Publication -  
 ) Rule 111, Rules of the  
 ) Arizona Supreme Court)  
 Appellant. )  
 )  
 \_\_\_\_\_ )

Appeal from the Superior Court of Maricopa County

Cause No. CR 2008-030536-001 SE

The Honorable Silvia R. Arellano, Judge (Retired)

**AFFIRMED**

Terry Goddard, Attorney General  
by Kent E. Cattani, Chief Counsel  
Criminal Appeals Section  
Attorneys for Appellee Phoenix

James Haas, Maricopa County Public Defender  
by Eleanor S. Terpstra, Deputy Public Defender  
Attorneys for Appellant Phoenix

**W E I S B E R G**, Judge

¶1 Dominic Emilio Avina ("Defendant") appeals from his convictions and sentences imposed after a jury trial. Defendant's counsel has filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 744 (1967), and *State v. Leon*, 104 Ariz. 297, 299,

451 P.2d 878, 880 (1969), advising this court that after a search of the entire record on appeal, she finds no arguable ground for reversal. This court granted Defendant an opportunity to file a supplemental brief, but none was filed. Counsel now requests that we search the record for fundamental error. *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

¶12 We have jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033 (A) (2001). Finding no reversible error, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶13 We review the facts in the light most favorable to sustaining the verdict. See *State v. Stroud*, 209 Ariz. 410, 412, ¶ 6, 103 P.3d 912, 914 (2005). On December 12, 2007, C.O. was working as a cashier and taking orders at a fast food restaurant. She saw a man, later identified as Defendant, standing behind other customers. Defendant approached her, placed an order, and paid for it. As C.O. was giving Defendant change, he reached over the counter and pushed and shoved C.O. in an effort to get into the cash register drawer. C.O. attempted to close the drawer, but Defendant forcibly kept it open. Defendant took money out of the register and fled. Other restaurant employees as well as some customers witnessed the robbery.

¶14 C.O. did not see Defendant with a weapon. Other witnesses, however, thought they saw Defendant with something that could have been a weapon. The night manager reported that before he fled, Defendant lifted up his sweater and displayed a gun. Some witnesses reported that as Defendant was leaving the restaurant, he yelled, "do you want to follow me outside, I got a gun." The night manager determined that \$76.67 was missing. A surveillance tape in the restaurant recorded the incident.

¶15 The detective investigating the case prepared a photographic lineup for C.O. after viewing a copy of the surveillance tape. C.O. positively identified Defendant as the person who committed the robbery. Defendant's probation officer indicated that because Defendant was on probation at the time the offenses were committed, he was a prohibited possessor.

¶16 Defendant was indicted for robbery, a class 4 felony, misconduct involving weapons, a class 4 felony and aggravated assault, a class 3 dangerous felony. The State filed allegations (1) of historical prior felony convictions for armed robbery, theft of means of transportation, and burglary; (2) of aggravating circumstances other than prior felony convictions; (3) that the offenses were committed while on release from confinement; and (4) of multiple offenses not committed on the same occasion pursuant to A.R.S. § 13-702.02. Defendant rejected the State's plea offer and the matter proceeded to trial. The jury found Defendant guilty of robbery and of the lesser-included offense of assault, a class 2

misdemeanor. It found him not guilty of misconduct involving weapons. The jury also found the State proved five aggravating factors, namely, that the offenses were committed as consideration for the receipt of pecuniary gain, the offenses caused physical, emotional or financial harm to the victims or witnesses, that Defendant was on felony probation at the time of the offenses, had multiple prior felony offenses and had a prior felony for a similar offense.

¶17 At sentencing, the court founded four mitigating factors but determined the aggravating factors outweighed the mitigating factors. The court sentenced Defendant to an aggravated term of imprisonment of thirteen years for robbery, pursuant to A.R.S. § 13-702.02, (non-dangerous, non-repetitive) with 420 days of presentence incarceration and to time served for misdemeanor assault.<sup>1</sup> Defendant timely appealed.

#### CONCLUSION

¶18 We have read and considered counsel's brief and have searched the entire record for reversible error. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Defendant was represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits and that there was

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<sup>1</sup>At sentencing, the court imposed sentences in four other cases that are not the subject of this appeal.

sufficient evidence for the jury to find that Defendant had committed the offenses.

¶9 After the filing of this decision, counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do no more than inform Defendant of the status of the appeal and of Defendant's 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). Defendant has thirty days from the date of this decision to proceed, if he desires, with a motion for reconsideration or petition for review *in propria persona*.

¶10 Accordingly, we affirm Defendant's conviction and sentence.

/S/  
SHELDON H. WEISBERG, Judge

CONCURRING:

/S/  
PATRICIA K. NORRIS, Presiding Judge

/S/  
MARGARET H. DOWNIE, Judge