DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 09-0339
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
BRIAN WAYNE CARNAHAN, Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-149416-001 DT

The Honorable Maria del Mar Verdin, Judge

AFFIRMED AND REMANDED

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

S W A N N, Judge

¶1 Brian Carnahan ("Defendant") appeals from his convictions and sentences for two counts of armed robbery, class 2 dangerous felonies pursuant to A.R.S. § 13-1904, and two counts of misconduct involving weapons, class 4 felonies pursuant to A.R.S. § 13-3102(A)(4).

¶2 This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Defendant's appellate counsel has searched the record on appeal and finds no arguable question of law that is not frivolous. *See Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Defendant was given the opportunity to file a supplemental brief *in propria persona*, but did not do so. Counsel now asks this court to independently review the record for fundamental error. We have done so, and find no fundamental error. Accordingly, we affirm. For reasons set forth below, we remand for clarification of Defendant's sentences.

FACTS AND PROCEDURAL HISTORY

¶3 In August 2008, Defendant was indicted for armed robbery and misconduct involving weapons occurring on July 24, 2008, and July 30, 2008. A trial commenced in January 2009, but mistrial was declared when the jury deadlocked. A second trial took place several months later.

¶4 At trial, the State presented evidence that in July 2008, Defendant was living with friends in Glendale, Arizona. The friends allowed Defendant to use their car -- a beige, four-door Honda Accord sedan with graduation tassels and beads on the rearview mirror -- on a daily basis, including on July 24.

¶5 On the afternoon of July 24, a man driving a vehicle matching the description of Defendant's friends' vehicle parked in front of the main entrance of a Glendale restaurant. He left the vehicle running, went inside the restaurant, told a server that she was being robbed, and showed her that he was carrying a gun inside of a black zip-up portfolio. Frightened, the server handed the man all of the money in the cash register. The man told the server not to scream or call the police for twenty seconds, and left.

¶6 The server told a police officer who responded to the scene that she recognized the man as a regular customer named either Billy or Robert (neither of which are Defendant's name). Later, she told a detective that the man's name was Brian (Defendant's name) and selected Defendant's picture in a photo lineup. She also made an in-court identification of Defendant at trial and testified that a gun seized from Defendant's friends' vehicle and a portfolio seized from Defendant's bedroom looked like the items used in the robbery.

¶7 On the evening of July 30, almost a week after the restaurant robbery, a man approached a cashier at a Glendale hardware store and asked if she could make change for a $5 bill. When the cashier opened the cash register, the man showed her that he was carrying a gun inside of a black zip-up portfolio. He directed her to put the money from the register into the portfolio, and she complied. The man instructed her to wait ten seconds before telling anyone what had happened, and left.

¶8 The manager of the hardware store did not witness the robbery, but was able to identify Defendant in a photo lineup as a person he saw in the store ten to fifteen minutes before the incident. The cashier identified a different person in the photo lineup. At trial, however, she made an in-court identification of Defendant and testified that the gun and portfolio that police had seized looked like what was used in the robbery. The parties stipulated that Defendant was a prohibited possessor at the times of both robberies.

¶9 Defendant's defenses were alibi for the July 24 restaurant robbery and mistaken identity for the July 30 hardware store robbery. After hearing closing arguments and considering the evidence, the jury found Defendant guilty of armed robbery and misconduct involving weapons on both July 24 and July 30, and found that the armed robberies were dangerous offenses.

¶10 At sentencing, the State presented evidence and the court found that the State had met its burden to prove that Defendant had at least two prior serious felony convictions. For each armed robbery count, the court sentenced Defendant to life in prison (25-year minimum). For each misconduct involving weapons count, the court sentenced Defendant to presumptive terms of 10 years in prison.

¶11 Defendant timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1).

DISCUSSION

¶12 The record reveals no fundamental error. Defendant was present and represented by counsel at all critical stages. The record of voir dire does not demonstrate the empanelment of any biased jurors, and the jury was properly comprised of twelve jurors and two alternates. *See* A.R.S. § 21-102(A) (2002).

¶13 The evidence that the State presented at trial was properly admissible and sufficient to support the jury's verdicts. The prosecutor's closing and rebuttal arguments were proper, and the jury was properly instructed.

¶14 Before Defendant was sentenced, the court received and considered a presentence report, and the State presented evidence sufficient to support the court's finding that

Defendant had two prior serious felony convictions. The terms of imprisonment that the court imposed for each count were within the statutory limits, and the court properly credited Defendant with 274 days of presentence incarceration credit.

¶15 But though it was within the court's discretion to impose consecutive sentences for the armed robberies because the offenses were committed on different occasions against different victims, *State v. Riley*, 196 Ariz. 40, ¶ 21, 992 P.2d 1135, 1142 (App. 1999), it is not clear whether the court did so. In its oral pronouncement of sentence, the court stated that the sentences for Count 1 (the July 24 armed robbery) and Count 3 (the July 30 armed robbery) were to be served consecutively. Both the minute entry that followed the sentencing hearing and the orders of confinement, however, indicate that the sentences are both consecutive and concurrent -- the description of the sentence for Count 3 states that it is to be served consecutive to the sentence for Count 1, but the description of the sentence for Count 1 states that it is to be served concurrent with the sentence for Count 3.

¶16 By virtue of their internal inconsistency, the minute entry and the orders of confinement are not consistent with the oral pronouncement of sentence.[1] When we encounter such a

[1] We note also that there is a discrepancy between the minute entry (and the orders of confinement) and the transcript

discrepancy, we must remand unless we can discern the court's actual intent by reference to the record. *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992). Here, the record reveals no indicia of the court's intent. Accordingly, we remand to the superior court for the purpose of determining what sentence was actually imposed.

CONCLUSION

¶17 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We affirm Defendant's convictions but remand to the superior court for clarification of his sentences.

/s/
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PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge

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concerning the description of which sentences run concurrent to which other sentences. The minute entry and orders of confinement indicate that the 10-year prison terms are concurrent with each other and both life terms. In the transcript, the 10-year terms are concurrent only with the life term for Count 1.