NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

DIVISION ONE
FILED: 12/21/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	1 CA-CR 09-0824
v.	DEPARTMENT D
DEREK JOSEPH MARTINEZ, Appellant.	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-110610-001 DT

The Honorable Glenn M. Davis, Judge

AFFIRMED AS CORRECTED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

I R V I N E, Judge

¶1 This appeal is filed in accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Derek Joseph Martinez

("Martinez") asks this Court to search the record for fundamental error. Martinez was given an opportunity to file a supplemental brief in propria persona, but he has not done so. After reviewing the record, we affirm Martinez's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the trial court's judgment and resolve all reasonable inferences against Martinez. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998). On February 7, 2009, Martinez was at a friend's house hanging out in the garage. The victim, T., stopped by with one of the residents of the house. When Martinez learned of T.'s arrival, he went outside to confront T. As Martinez was coming out of the garage, T. noticed Martinez was carrying a knife. Because of at least two prior altercations between Martinez and T., Martinez questioned why T. was at the house. Although T. told Martinez he did not want to cause any problems, Martinez accosted T. and the two began to fight. Martinez stabbed T. in the side. Martinez was taken into custody a few days later.

¶3 The State charged Martinez with aggravated assault, a class three dangerous felony. Martinez was convicted as charged. The trial court conducted the sentencing hearing in compliance with Martinez's constitutional rights and Rule 26 of the Arizona

Rules of Criminal Procedure and sentenced Martinez to five years' imprisonment with credit for eight-four days of presentence incarceration. The trial court also imposed restitution in the amount of $700. Martinez timely appealed. The court imposed an additional restitution order for $9,134.18 against Martinez, which has not been appealed.

DISCUSSION

¶4 We review Martinez's conviction and sentence for fundamental error. *See State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). Martinez, through counsel, raises various issues. We discuss each in turn.

Preclusion of defenses and witnesses

¶5 Martinez argues that the trial court improperly precluded witnesses and defenses. Martinez filed his pre-trial disclosure nearly three months after it was due. The State filed a motion to preclude some of Martinez's defenses, witnesses and evidence because of the late filing. After hearing argument, the trial court granted the State's motion.

¶6 Whether to impose a sanction for late disclosure, including preclusion of evidence, witnesses or defenses, is left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *See State v. Moody*, 208 Ariz. 424, 454, ¶ 114, 94 P.3d 1119, 1149 (2004). Martinez's disclosure was nearly three months late and was filed

approximately three weeks prior to the start of trial. The State also pointed out that some of the evidence was available to Martinez long before he disclosed it. On this record, we cannot say the trial court erred in granting the State's motion to preclude.

¶7 In response to the State's motion to preclude, Martinez's trial counsel stated on the record that he was "ineffective for filing a late notice" and needed to withdraw as counsel of record. An ineffective assistance of counsel argument is not properly raised on appeal but instead must be raised in a petition for post-conviction relief. *State v. Torres*, 208 Ariz. 340, 345, ¶ 17, 93 P.3d 1056, 1061 (2004). We note that no such petition has yet been filed.

Admission of prior bad acts

¶8 Martinez argues that he was prejudiced because of the admission of two prior bad acts. Evidence of a defendant's prior bad acts are not admissible to prove his propensity to commit the crime, but are admissible when used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz.R.Evid. 404(b); *State v. Van Adams*, 194 Ariz. 408, 415, ¶ 20, 984 P.2d 16, 23 (1999).

¶9 In this case, the trial court admitted two prior altercations between T. and Martinez that took place approximately one month prior to the February 7, 2009 incident.

One altercation involved Martinez threatening T. at school. The other incident was an argument that took place at a friend's birthday party. The trial court reasoned that although the two prior incidents between T. and Martinez may be prejudicial, "there's substantial probative value that outweighs any undue prejudicial effect." We agree. The incidents could reasonably be viewed as evidence of motive or intent for the February 7, 2009 incident.

Jury instructions

¶10 Martinez also takes issue with the final jury instructions, specifically the instruction regarding voluntary intoxication and the lack of a limiting instruction for prior bad acts. We note that a copy of the final jury instructions is not in the record on appeal. The jury instructions, however, were read into the record and are therefore in a transcript.

¶11 Although Martinez's counsel expressed concern about the preliminary voluntary intoxication instruction, our review of the record indicates he did not object to its inclusion in the final jury instructions. Additionally, Martinez's counsel suggested a limiting instruction for the prior bad acts admitted, but did not object to the final jury instructions, which did not contain a limiting instruction.

¶12 Because Martinez failed to object to the jury instructions, our review is limited to fundamental error. *State*

v. Henderson, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); *see also* Ariz.R.Crim.P. 21.3 (precluding claim of error on appeal regarding jury instructions absent objection). To warrant reversal, Martinez first must show the trial court's instructions constituted error that went to the foundation of his case, taking from him an essential right and denying him a fair trial. *See Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Martinez then needs to show the error was prejudicial so that a fair trial using the final jury instructions was impossible. *Id.* at 568, ¶ 20, 115 P.3d at 608.

¶13 When Martinez failed to request a limiting instruction on his prior bad acts and failed to object to the final jury instructions, "the trial court's failure to sua sponte give a limiting instruction is not fundamental error." *State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996). Martinez takes issue with "including mention of intoxication not being available to rebut or defend against mental state elements." We construe Martinez's argument to mean that the inclusion of the mention of intoxication may have influenced the jury to conclude that if Martinez was drunk, he may have been more likely to stab T. There is no evidence in the record to support this assumption.

¶14 Furthermore, Martinez has not argued on appeal that the final jury instructions, the alleged error, was fundamental,

or that it prejudiced him. Therefore, he has not sustained his burden of persuasion in fundamental error review. *State v. Moreno-Medrano*, 218 Ariz. 349, 354, ¶ 17, 185 P.3d 135, 140 (App. 2008). We find no error.

Amount of time jury spent deliberating

¶15 Martinez argues that the jury only spent a short time deliberating before reaching its verdict. A jury is not required to spend any particular amount of time deliberating before reaching a verdict. Therefore, we find no error.

Denial of A.R.S. § 13-603(L) motion

¶16 Martinez argues that the trial court erred in denying his Arizona Revised Statutes ("A.R.S.") section 13-603(L) (2010) motion.[1] Section 13-603(L) provides, in part, that when conducting sentencing, if the court finds the sentence that the law requires is excessive, "the court *may* enter a special order allowing the person sentenced to petition the board of executive clemency for a commutation of sentence." (Emphasis added.) Thus, pursuant to the express language of the statute, the trial judge has absolute discretion to determine whether a defendant's sentence warrants a special order. Because the determination as to whether to enter a special order is based on the trial

[1] Unless otherwise specified, we cite the current versions of the applicable statutes when no revisions material to this decision have since occurred.

judge's opinion, the court's decision not to enter a special order allowing the defendant to petition the board of executive clemency is essentially unreviewable on appeal. *Cf. McDonald v. Thomas*, 198 Ariz. 590, 596, ¶ 26, 12 P.3d 1194, 1200 (App. 2000), *overruled on other grounds by* 202 Ariz. 35, 40 P.3d 819 (2002) ("The governor's discretion to act on the [clemency] Board's recommendations remains unfettered, subjective, and a matter of grace.").

¶17 When sentencing Martinez, the trial judge commented that he felt that five years' imprisonment was "excessive."[2] The judge commented that one year imprisonment would have been an adequate deterrent. After sentencing, Martinez filed a motion pursuant to A.R.S. § 13-603(L) requesting a special order to petition the Arizona Board of Clemency for a sentence commutation. The same judge who sentenced Martinez denied his request for a special order. Because the decision to enter a special order is within the discretion of the trial court, and because the record does not reveal any discriminatory reasons for why the motion was denied, we find no error.[3]

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[2] Pursuant to A.R.S. § 13-704(A) (2010), five years' imprisonment is the minimum sentence for a class 3 dangerous felony.

[3] A petition to the trial court is not Martinez's only avenue for redress. Pursuant to A.R.S. § 31-402(C)(4) (Supp. 2010), a defendant may directly petition the executive clemency board for relief.

Sentencing order correction

¶18 Our review of the record indicates that at sentencing, the judge stated that Martinez had been found guilty "by a jury verdict" and that the jury found the offense to be dangerous. The sentencing order, however, incorrectly states that Martinez waived his right to a trial by jury, was found guilty after a trial by the court and that his aggravated assault conviction was non-dangerous.

¶19 Where there is an inconsistency between the oral pronouncement of sentence and the sentencing order, the oral pronouncement controls; if the inconsistency can be resolved by reference to the record, we can correct the minute entry without a remand for resentencing. *State v. Bowles*, 173 Ariz. 214, 215-16, 841 P.2d 209, 210-11 (App. 1992); *State v. Hanson*, 138 Ariz. 296, 304, 674 P.2d 850, 858 (App. 1983). Therefore, we correct the sentencing order dated October 23, 2009, to reflect that Martinez's conviction for aggravated assault, a class three felony, was tried to a jury and is a dangerous offense.

¶20 The Court has read and considered counsel's brief and fully reviewed the 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, Martinez was represented by counsel at all stages of the proceedings. The

court held the appropriate pretrial hearings. The State presented evidence sufficient to allow the jury to convict Martinez as charged. The jury was properly comprised of eight jurors and two alternates. The court properly instructed the jury on the elements of the offense, the State's burden of proof beyond a reasonable doubt and the necessity of a unanimous verdict. The jury returned a unanimous verdict, which was confirmed by jury polling. The court received and considered a presentence report and addressed its contents during the sentencing hearing. At sentencing, Martinez and his counsel were given an opportunity to speak and the court imposed a legal sentence. We decline to order briefing, and we affirm Martinez's conviction and sentence.

¶21 Upon the filing of this decision, defense counsel shall inform Martinez of the status of his appeal and of his future options. Defense counsel has no further obligations unless, upon review, counsel finds 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). Martinez shall have thirty days from the date of this decision to proceed, if he desires, with a pro per motion for reconsideration or petition for review. On the Court's own motion, we extend the time for Martinez to file a pro per motion

for reconsideration to thirty days from the date of this decision.

CONCLUSION

¶22 For the foregoing reasons, we affirm Martinez's conviction and sentence and correct the sentencing minute entry to reflect that his conviction for aggravated assault was tried to a jury and is a dangerous offense.

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Presiding Judge

/s/
PATRICIA K. NORRIS, Judge