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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: 01/05/2012  
RUTH A. WILLINGHAM,  
CLERK  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 10-0826  
)  
) DEPARTMENT E  
Appellee, )  
) **MEMORANDUM DECISION**  
v. )  
) (Not for Publication -  
ANDREW DENNIS FICKLIN, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR 2004-023628-001 DT

The Honorable Warren J. Granville, Judge

**CONVICTIONS AND SENTENCES AFFIRMED**

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Thomas C. Horne, 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

Andrew Dennis Ficklin Florence  
Appellant

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**J O H N S E N**, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following Andrew Dennis Ficklin's conviction of first-degree murder, a Class 1 felony; sexual assault, a Class 2 felony; burglary, a Class 2 felony; aggravated assault, a Class 3 felony; and attempted first-degree murder, a Class 2 felony, all dangerous offenses. Ficklin's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel now asks this court to search the record for fundamental error, and Ficklin has filed a supplemental brief. After reviewing the entire record, we affirm Ficklin's convictions and sentences.

#### FACTS AND PROCEDURAL HISTORY

¶2 Two elderly women were found beaten in a Phoenix rooming house early one morning in May 1987; they had been brutally attacked, apparently by someone wielding an aluminum cane or telescoping crutch.<sup>1</sup> B.P. suffered severe injuries. Her roommate, M.W., who was beaten and raped, died of her injuries. The women's attacker was undiscovered for many years. Finally,

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<sup>1</sup> Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Ficklin. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

in 2004, law enforcement authorities discovered that fingerprints found at the scene and DNA evidence taken from M.W. matched that of Ficklin.

¶13 During the proceedings that followed after Ficklin's arrest, the court twice addressed Ficklin's competency. It granted Ficklin's motion for a competency examination pursuant to Arizona Rule of Criminal Procedure 11 on December 6, 2005. Upon finding Ficklin not competent, the court stayed proceedings for several months until, based on expert testimony, it found that he had been restored to competency.

¶14 On April 9, 2009, as trial drew near, Ficklin moved to dismiss the charges on the ground that he was not competent and not restorable. The superior court ordered a full evaluation pursuant to Rule 11. At an evidentiary hearing conducted over two days, the court heard Thomas Thompson, Ph.D., testify Ficklin was not competent. The defense also called Mary Jane Trunzo, a speech language pathologist, who concluded Ficklin suffers from "significant language and cognitive-communication deficits including difficulty with expressive and receptive language, reading/decoding, pragmatic communication, cognitive skills, and executive functioning skills." The court also considered reports of two expert witnesses it appointed, Bruce Kushner, Ph.D., and Gwen Levitt, D.O., both of whom concluded

Ficklin was competent. Based on the evidence, the court found Ficklin "competent to understand the proceedings and assist his counsel." The court explained it was basing its ruling in part on its own observation of Ficklin "[t]hrough many court appearances." The court noted that both during the prior appearances and during the competency hearing, "Defendant appeared both engaged and aware of the proceedings and disengaged and focused only on the area directly in front of him."

¶15 The jury convicted Ficklin of the crimes listed above. After hearing evidence relating to alleged aggravating and mitigating factors relevant to the first-degree murder charge, the jury determined to impose a sentence of life imprisonment. The court then sentenced Ficklin to 10.5 years' incarceration on each of the other four charges. It ordered Ficklin first to serve the sentence on the sexual assault charge and applied 2,083 days of presentence incarceration credit against that sentence. The court ordered that upon the completion of the sentence on the sexual assault charge, Ficklin would serve two concurrent terms of 10.5 years on the aggravated assault and attempted first-degree murder charges. It then ordered that consecutive to those terms, Ficklin serve concurrent terms of

10.5 years' incarceration and life imprisonment on the burglary and first-degree murder charges, respectively.

¶16 Ficklin timely appealed. 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), 13-4031 and -4033 (2011).

#### **DISCUSSION**

¶17 The record reflects Ficklin received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages, except for a handful of occasions during trial, in which he voluntarily waived his appearance. The court held appropriate pretrial hearings, including hearings under Rule 11. The court's findings that Ficklin was competent were supported by the evidence.

¶18 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly composed of 12 members. The court properly instructed the jury on the elements of the charges and the State's burden of proof. Although the court did not directly instruct the jury on the necessity of unanimous verdicts, the verdicts were confirmed by juror polling, which demonstrated unanimity.

Ficklin waived preparation of a presentence report. The sentences the superior court imposed were within legal ranges.<sup>2</sup>

#### CONCLUSION

¶19 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. The only issue that Ficklin raises in his supplemental brief is an argument that his counsel was not effective, but we do not address a claim of ineffective assistance of counsel in a direct appeal such as this. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007); *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (ineffective

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<sup>2</sup> The court's sentencing order states it intended to impose presumptive terms of incarceration on the four charges other than first-degree murder. The 10.5-year sentences the court imposed on the three Class 2 felonies indeed were the presumptive terms under the statutes in effect in 1987, when Ficklin committed his crimes. See A.R.S. §§ 13-701(B)(1), -604(G) (1987) (range of seven to 21 years; presumptive is three-fourths of the median). The presumptive sentence for Ficklin's Class 3 felony (aggravated assault), however, was 7.5 years. See A.R.S. §§ 13-701(B)(2), -604(G) (range of five to 15 years; presumptive is three-fourths of the median). The jury's finding that the aggravated assault was a dangerous offense, however, was a sufficient basis for the superior court to impose an aggravated sentence for that conviction. See A.R.S. § 13-702(D)(1)-(2) (1987); *State v. Bly*, 127 Ariz. 370, 371, 621 P.2d 279, 280 (1980) (same factor may be used both to enhance and aggravate a sentence). Moreover, the issue is of no consequence, given the court's order that Ficklin serve his sentence on the aggravated assault conviction concurrently with the 10.5-year sentence imposed on the charge of attempted first-degree murder.

assistance of counsel claim to be raised in Arizona Rule of Criminal Procedure 32 proceeding).

¶10 After the filing of this decision, defense counsel's obligations pertaining to Ficklin's representation in this appeal have ended. Defense counsel need do no more than inform Ficklin of the outcome of this appeal and his future options, 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). On the court's own motion, Ficklin has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Ficklin has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/  
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/  
PATRICIA A. OROZCO, Judge

/s/  
LAWRENCE F. WINTHROP, Judge