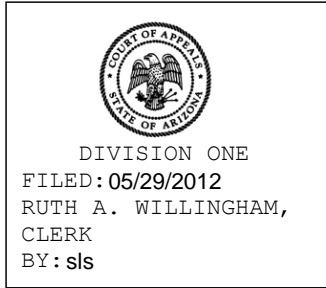


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 11-0261  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
DANTE HERNANDEZ, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)  
)  
)  
)

Appeal from the Superior Court in Maricopa County  
Cause No. CR2010-120673-001-DT

The Honorable Sherry K. Stephens, Judge

**AFFIRMED AS AMENDED**

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Thomas C. Horne, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
Attorneys for Appellee

Michael J. Dew Phoenix  
Attorney for Appellant

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O R O Z C O, Judge

¶1 Dante Hernandez (Defendant) appeals his convictions for five counts of kidnapping, class two dangerous felonies; five counts of armed robbery, class two dangerous felonies; one count of first degree burglary, a class two dangerous felony; one count of misconduct involving weapons, a class four felony; and one count of unlawful use of a means of transportation, a class six felony.

¶2 In accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), Defendant's counsel filed a brief advising this court that after a search of the entire record on appeal he found no arguable grounds for reversal or question of law that was not frivolous. This court granted Defendant an opportunity to file a supplemental brief in propria persona, but he did not do so.

¶3 Pursuant to *Anders* and *Leon*, our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). After reviewing the entire record, we find no meritorious grounds for reversal of defendant's convictions. However, we find error regarding the sentence imposed for count twelve, misconduct involving weapons, and we modify that sentence accordingly. We otherwise affirm all convictions and sentences.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

¶4 On April 18, 2010, Defendant and five or six accomplices (collectively, the Invaders) forcibly entered the residence of F.C. with the use of firearms. Present in the house were F.C. and four of F.C.'s friends (collectively, the Victims). Defendant was not wearing a mask when he entered the house, and several Victims recognized Defendant because Defendant was at F.C.'s house the previous day to perform tattoo work. During the invasion, Defendant repeatedly asked about his tattoo gun, which he believed had been stolen while he was at F.C.'s residence.

¶5 Once inside, the Invaders bound the Victims, took the Victims' phones, ID cards, and credit cards and began ransacking the house. The Invaders pointed firearms at the Victims and used baseball bats to intimidate them by hitting the ground next to where they lied. The Invaders also threatened to kill the Victims, as well as their family members and friends, if they reported the incident to the police. After taking everything of value from F.C.'s house, the Invaders left in a truck owned by one of the Victims.

¶6 Defendant was charged with five counts of kidnapping, five counts of armed robbery, one count of first degree burglary

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<sup>1</sup> On appeal, we view the facts in a light most favorable to sustaining the verdicts. *State v. Rutledge*, 205 Ariz. 7, 9 n.1, ¶ 2, 66 P.3d 50, 52 n.1 (2003).

one count of misconduct involving weapons and one count of unlawful use of a means of transportation. The State alleged aggravating circumstances and that Defendant had prior felony convictions. Defendant stipulated that he was a prohibited possessor at the time of the invasion.

¶17 A jury trial was held in October 2010. At trial, the Victims identified Defendant as one of the Invaders and as the person who forcibly entered the residence with the use of a firearm. Defendant was also identified by the distinctive "horn" tattoos on his forehead and by his nickname "Papas," to which he was referred by the other Invaders during the incident. The State also showed a store surveillance video showing Defendant attempting to use the credit card of one of the Victims. During police questioning, Defendant later claimed the credit card had been given to him as payment for the stolen tattoo gun.

¶18 Defendant did not object to the jury instructions. The jury unanimously returned verdicts of guilty on all counts and found aggravators for every count except the count of misconduct involving weapons. The jury also found the five counts of kidnapping, five counts of armed robbery and one count of burglary in the first degree to be dangerous offenses pursuant to Arizona Revised Statutes (A.R.S.) section 13-105.13

(Supp. 2011).<sup>2</sup> The court sentenced defendant to consecutive slightly aggravated terms for the five counts of kidnapping; concurrent slightly aggravated terms for the five counts of armed robbery, to also be served concurrent to Count Five of kidnapping; a slightly aggravated term for the count of first degree burglary, to be served concurrent to Count Five of kidnapping; and the presumptive terms for the counts of misconduct involving weapons and theft of a means of transportation, both to be served concurrent to Count Five of kidnapping. The court awarded Defendant 353 days of presentence incarceration credit on all counts.<sup>3</sup>

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<sup>2</sup> We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

<sup>3</sup> Defendant was improperly awarded presentence incarceration credit on all consecutive sentences. See *State v. McClure*, 189 Ariz. 55, 57, 938 P.2d 104, 106 (App. 1997) ("When consecutive sentences are imposed, a defendant is not entitled to presentence incarceration credit on more than one of those sentences . . . ." (citations omitted)). Because the State did not appeal Defendant's sentences, however, we do not address this issue.

Defendant was also denied one day of credit. Because Defendant was arrested on April 19, 2010 and sentenced on April 8, 2011, he should have been awarded 354 days of credit. See A.R.S. § 13-712.B (2010) (a defendant is entitled to presentence incarceration credit for all time spent in custody pursuant to an offense prior to sentencing). The failure to award the correct amount of presentence incarceration credit constitutes fundamental error. *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989). Nevertheless, because the court improperly awarded Defendant with credit on all consecutive counts, thus crediting Defendant with 1411 days to which he was not entitled, we find that Defendant was not prejudiced by this error.

¶9 Defendant timely appealed. 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 (2010).

#### DISCUSSION

¶10 We have read counsel's brief and carefully reviewed and considered the entire record for reversible error and have found none. Defendant was present at all critical stages of the proceedings and was represented by counsel. All proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure and substantial evidence supported the jury's finding of guilt. Accordingly, we affirm Defendant's convictions.

¶11 At sentencing, Defendant and his counsel were given an opportunity to speak and present witnesses. The court considered Defendant's evidence in support of his arguments regarding mitigating circumstances and, with the exception of Count Twelve, the court imposed legal sentences. As for Count Twelve, misconduct involving weapons, the court sentenced Defendant to the presumptive term and classified the offense as a non-dangerous and non-repetitive class four felony, thus triggering sentencing under A.R.S. § 13-702 (2010). Pursuant to § 13-702.D, the presumptive term for a class four felony is 2.5 years. The court, however, sentenced Defendant to 4.5 years, which is the presumptive term for a class four felony for a

category two repetitive offender.<sup>4</sup> See A.R.S. § 13-703.I (Supp. 2011). We therefore correct Defendant's sentence on Count Twelve, misconduct involving weapons, and order the sentence be reduced to 2.5 years, the presumptive term for a non-repetitive class four felony pursuant to § 13-702.D.<sup>5</sup> See Ariz. R. Crim. P. 31.17.b. We otherwise affirm Defendant's remaining sentences.

#### CONCLUSION

¶12 For the foregoing reasons, Defendant's convictions are affirmed. In accordance with this decision, we modify Defendant's sentence on Count Twelve, misconduct involving

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<sup>4</sup> Although the State alleged three prior felony convictions, one of which was a historical prior, we find no evidence in the record that the State proved Defendant's prior convictions. At the beginning of trial, upon the State's motion for a Rule 609 Hearing, the court did find Defendant was convicted of two prior felonies for the purpose of impeachment but did not address the State's allegation regarding Defendant's historical prior. Defendant did not testify and did not admit or stipulate to any prior felony convictions.

Based on the State's presentence recommendation report, it appears the State chose to pursue sentencing for Count Twelve, misconduct involving weapons, as a non-repetitive offense under § 13-702 and did not prove Defendant's historical prior for sentencing purposes. Without a finding or admission that Defendant has at least one historical prior, Defendant could not be classified as a category two repetitive offender. See A.R.S. § 13-703.B.2; *State v. Avila*, 217 Ariz. 97, 99, ¶ 7, 170 P.3d 706, 708 (App. 2007) ("The State bears the burden of proving a prior conviction." (citation omitted)).

<sup>5</sup> Because we can correct the clerical error based on the record on appeal and the trial court's sentencing minute entry, we do not find reversible error and need not remand the case. See *State v. Stevens*, 173 Ariz. 494, 495-96, 844 P.2d 661, 662-63 (App. 1992).

weapons, to 2.5 years' imprisonment and affirm Defendant's remaining sentences.

¶13 After filing 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 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 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.<sup>6</sup>

/S/

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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

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PHILIP HALL, Judge

/S/

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JOHN C. GEMMILL, Judge

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<sup>6</sup> Pursuant to Rule 31.18.b, Defendant or his counsel have fifteen days to file a motion for reconsideration. On the court's own motion, we extend the time to file such a motion to thirty days from the date of this decision.