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: 06/14/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	1 CA-CR 11-0449
Appellee,	DEPARTMENT D
v.	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
ANDREW RODRIGUEZ,	
Appellant.	

Appeal from the Superior Court of Maricopa County

Cause No. CR2010-149297-003 DT

The Honorable Sherry K. Stephens, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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

Gaffney Law Offices — Scottsdale
By Robert Gaffney
Attorneys for Appellant

T H O M P S O N, Judge

¶1 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). Counsel for Andrew Rodriquez (defendant) has advised us that, after searching the entire record, he has been unable to discover any arguable questions of law and has filed a brief requesting that this court conduct an *Anders* review of the record. Defendant has been afforded an opportunity to file a supplemental brief *in propria persona*, and he has not done so.

¶2 Our obligation is to review the entire record for reversible error. *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We review the facts in the light most favorable to sustaining the conviction and resolve all reasonable inferences against defendant. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989)(citations omitted). For the reasons that follow, we affirm as modified in part, reverse in part, and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

¶3 In the morning hours of September 12, 2010, defendant and two accomplices unlawfully entered a home in the Ahwatukee area of Phoenix. The men forced two victims, A.M. and L.P., to lie face down on the kitchen floor and demanded to be told where their cash and safe were located. In an attempt to obtain the information, one of the men struck A.M. in the head with a blunt object, allegedly a gun, and threatened to blow off L.P.'s hand. One of the men then stayed with the victims in the kitchen area

while the other two searched the house. A guest, who was upstairs at the time the men entered the house, broke out an upstairs window, climbed onto a balcony, and placed a phone call to 911. The two intruders searching the house noticed the broken window and realized that someone had escaped. After completing their search of the house, the men exited with several items of the victims' personal property.

¶4 As police were en route to the house, they noticed a white vehicle that resembled the description given in the 911 call. The police followed the vehicle, which performed multiple driving maneuvers in an effort to elude police, until it eventually stopped in an industrial business complex in Tempe, Arizona. Once stopped, the three occupants of the vehicle fled on foot and were quickly found and detained. The victims' property was found in and around the vehicle that the men abandoned. A.M.'s wallet was found in defendant's pants pocket.

¶5 At trial, defendant testified that he was walking from his mother's house to his girlfriend's house at approximately 12:00 a.m. when he saw A.M.'s wallet dropped out of a vehicle near a Circle K store. Defendant claimed that he tried to waive the car down but was unsuccessful, so he placed the wallet in his pocket and continued walking towards his girlfriend's house with the intention of turning the wallet in to the police the next day. According to defendant, after he found the wallet, he

noticed police chasing him, the police released K-9 units, and he ran into the commercial compound in an effort to avoid being bitten.

¶6 Defendant was indicted on one count of burglary in the first degree, a class 2 dangerous felony, two counts of kidnapping, class 2 dangerous felonies, two counts of armed robbery, class 2 dangerous felonies, and two counts of aggravated assault, class 3 dangerous felonies.

¶7 A jury convicted defendant of both counts of kidnapping, class 2 felonies (Counts 2 and 3), and also found defendant guilty of the lesser-included offenses of burglary in the second degree, a class 3 felony (Count 1), two counts of robbery, class 4 felonies (Counts 4 and 5), and two counts of misdemeanor assault (Counts 6 and 7). The jury determined that Counts 1-5 were non-dangerous, but did find that aggravating factors were present. The trial court sentenced defendant to aggravated sentences of seven years for Count 1, nine years for each of Counts 2 and 3, three years for each of Counts 4 and 5, and time served for Counts 6 and 7, with all sentences to run concurrently. Defendant received 263 days of presentence incarceration credit. This timely appeal followed.

DISCUSSION

¶8 Our review of the record reveals the following sentencing errors. First, the conviction for assault on Count

7, relating to victim L.P., was incorrectly designated by the trial court as a class 1 misdemeanor. Assault is defined by statute in pertinent part:

> A. A person commits assault by:
>
> 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
>
> 2. Intentionally placing another person in reasonable apprehension of imminent physical injury.

A.R.S. § 13-1203(A)(1)-(2)(2010). Section 13-1203(B) provides that an assault committed under subsection (A)(1) is a class 1 misdemeanor, while an assault committed under subsection (A)(2) is a class 2 misdemeanor. A.R.S. § 13-1203(B). The jury instructions provided that "[t]he crime of assault requires proof that the defendant, one, intentionally, knowingly or recklessly caused physical injury to another person, or two, intentionally put another person in reasonable apprehension of immediate physical injury," but the verdict form did not provide a space where the jury could specify as to which type of assault it was finding defendant guilty of committing. While there was sufficient evidence for the jury to find defendant guilty of assault under the instructions given, the trial judge erroneously classified Count 7 as a class 1 misdemeanor as there was no evidence produced at trial that L.P., the victim of Count 7, was physically injured during the home invasion. *See* A.R.S.

§ 13-1203(A)(1). For that reason, the evidence was insufficient to classify the assault conviction for Count 7 under A.R.S. § 13-1203(A)(1). *See State v. Fristoe*, 135 Ariz. 25, 33, 658 P.2d 825, 834 (App. 1982)("The trial judge's judgment will not be overturned unless . . . the trial judge abused his discretion in determining the sentence.")(citation omitted).

¶9 While the evidence at trial cannot support the assault as to L.P. being classified as a class 1 misdemeanor, the evidence substantially supports that the assault be classified under A.R.S. 13-1203(A)(2) and (B) as a class 2 misdemeanor. Therefore, we modify the judgment to reflect a conviction for a class 2 misdemeanor on Count 7 and remand to the trial court for resentencing. *See* Ariz. R. Crim. P. 31.17(d); *State v. George*, 206 Ariz. 436, 443, ¶ 14, 79 P.3d 1050, 1057 (App. 2003)("[B]ecause the evidence was more than adequate to support a conviction for the necessarily included offense . . . we modify the judgment to reflect [the defendant's] conviction for the lesser offense and remand the case to the trial court [for resentencing].")(citations omitted).

¶10 Second, our review of the record revealed a sentencing error relating to Counts 6 and 7. The trial court sentenced defendant to time served on both counts, equaling 263 days. Section 13-707(A)(1)-(2)(2010) establishes a statutory maximum sentence of six months of imprisonment for a class 1 misdemeanor

and four months of imprisonment for a class 2 misdemeanor. As such, the sentences imposed by the trial court exceeded the statutory maximum. Therefore, as the sentence for Count 6 was not legally imposed, we remand for resentencing. *See State v. Thues*, 203 Ariz. 339, 340, ¶ 4, 54 P.3d 368, 369 (App. 2002) ("Imposition of an illegal sentence constitutes fundamental error.")(citation omitted). As previously stated, defendant must also be resentenced on Count 7.

¶11 We have read counsel's brief and have searched the entire record for reversible error and, with the exception of the sentencing errors previously identified, find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, defendant was adequately represented by counsel at all stages of the proceedings.

¶12 Upon the filing of this decision, counsel shall inform defendant of the status of the appeal and his options. Counsel's duty to further defendant's cause on direct appeal is satisfied and 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). Defendant has thirty days from the date of this decision in

which to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

CONCLUSION

¶13 We affirm defendant's convictions and sentences on Counts 1, 2, 3, 4, and 5. We modify defendant's conviction on Count 7 to a class 2 misdemeanor. We vacate the sentences imposed on Counts 6 and 7 and remand for resentencing on those counts.

/s/

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JON W. THOMPSON, Judge

CONCURRING:

/s/

____
PETER B. SWANN, Presiding Judge

/s/

____
MICHAEL J. BROWN, Judge