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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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STATE OF ARIZONA, *Appellee*,

*v.*

ANTHONY ANGEL GONZALES, *Appellant*.

No. 1 CA-CR 15-0054

FILED 2-2-2016

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Appeal from the Superior Court in Maricopa County

No. CR2014-105171-001 DT

The Honorable Pamela D. Svoboda, Judge

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix

By Joseph T. Maziarz

*Counsel for Appellee*

DeBrigida Law Offices, P.L.L.C., Glendale

By Ronald M. DeBrigida, Jr.

*Counsel for Appellant*

Anthony Angel Gonzales, San Luis

*Appellant*

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**MEMORANDUM DECISION**

Judge Lawrence F. Winthrop delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Jon W. Thompson joined.

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**WINTHROP**, Judge:

¶1 Anthony Angel Gonzales (“Appellant”) appeals his conviction and sentence for armed robbery. Appellant’s counsel has filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has “reviewed the file for possible grounds of error,” but “has not identified any arguable issues of merit.” Appellant’s counsel therefore requests that we review the record for fundamental error. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). This court granted counsel’s motion to allow Appellant to file a supplemental brief *in propria persona*, and Appellant has done so, raising an issue that we address.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (“A.R.S.”) sections 12-120.21(A)(1), 13-4031, and 13-4033(A).<sup>1</sup> Finding no reversible error, we affirm.

**FACTS AND PROCEDURAL HISTORY<sup>2</sup>**

¶3 On April 2, 2014, a grand jury issued an indictment, charging Appellant with Count I, armed robbery, a class two felony, in violation of A.R.S. § 13-1904, and Count II, theft, a class one misdemeanor, in violation of A.R.S. § 13-1802, for an incident at a Phoenix convenience store on October 20, 2013. The State later filed an allegation of historical priors,

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<sup>1</sup> We cite the current version of the applicable statutes because no revisions material to this decision have occurred since the date of the offense.

<sup>2</sup> We view the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. See *State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

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alleging Appellant had eight prior felony convictions for enhancement purposes, as well as pending charges for other felonies allegedly committed on November 28, 2013—after the charged crimes.<sup>3</sup> The State also filed a notice of aggravating circumstances other than prior convictions pursuant to A.R.S. § 13-701, and an allegation of multiple offenses not committed on the same occasion pursuant to A.R.S. § 13-703.

¶4 At trial, the State presented the following testimony: On the night of October 19-20, 2013, the victim was working alone as a clerk at a Phoenix convenience store. Shortly after midnight, two men, including a man later identified as Appellant, entered the store. Appellant initially walked toward the beer cooler, then approached the counter, called the victim over, lifted his shirt with his right hand to show the victim what appeared to be a handgun in his waistband, and stated he was taking beer. The victim was “scared,” and Appellant walked over to the beer cooler, took a case of beer, and walked out. After watching Appellant get in a truck and leave, the victim called 911.

¶5 At approximately 12:31 a.m., the dispatch operator sent Phoenix Police Officer Daley to the convenience store, where he arrived approximately three minutes later. The victim appeared as if he had seen “a ghost.” The officer spoke with the victim and viewed the store’s surveillance video in an effort to put out a description of the subject and subject vehicle to other patrol officers. Efforts to apprehend Appellant that evening were unsuccessful.

¶6 Phoenix Police Detective Armenta was assigned to the case and retrieved a copy of the store’s surveillance video.<sup>4</sup> In December 2013, he showed the victim a six-person photographic lineup that included

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<sup>3</sup> Appellant later entered a plea agreement in Maricopa County Superior Court Case No. CR2014-112724-002, pleading guilty to burglary in the third degree, a class four felony with one prior felony conviction, and possession of drug paraphernalia, a class six felony. For the burglary, the trial court sentenced him to a term of 4.5 years’ incarceration in the Arizona Department of Corrections (“ADOC”), to be served consecutively to the sentence in this case, and placed Appellant on a consecutive term of two years’ supervised probation for the possession of drug paraphernalia, to be served upon his release from prison.

<sup>4</sup> At trial, the surveillance video was admitted in evidence and played to the jury.

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Appellant's photo. The victim identified Appellant through the photographic lineup as the person who took the beer on October 20, 2013.

¶7 In January 2014, Detective Armenta contacted Appellant, who agreed to speak with the detective after being advised of his rights pursuant to *Miranda*.<sup>5</sup> Appellant eventually admitted taking beer from the store, but denied knowing the person who arrived at the store with him or possessing a gun that evening. He claimed to have traded for the beer by handing the store clerk a bag of marijuana outside the store by the pay phones, in an area outside the view of the surveillance cameras. Appellant's statement was not supported by the available surveillance video, however.

¶8 In his defense at trial, Appellant presented testimony from his brother-in-law, Juan Chavez, who testified that on the night of October 19-20, 2013, he and Appellant were "hanging out" together, when they decided to take Chavez's truck to the convenience store. Chavez entered the store first, and did not see Appellant come in after him. Chavez initially testified that, as he waited at the counter to pay for his beer and snacks, Appellant approached and spoke to the clerk, but Chavez did not hear what was said.<sup>6</sup> Chavez did not see Appellant leave the store, but when Chavez went back to his truck after completing his purchase, Appellant was in the bed of the truck with a case of beer. Because he knew Appellant had not paid for the beer, he asked "what was going on," and Appellant stated he "knew the [clerk]." Chavez never saw Appellant possess any type of weapon while they were together.

¶9 Appellant testified that, shortly after midnight on October 20, 2013, he rode with Chavez to the convenience store in Phoenix. As he was walking toward the cooler, the clerk asked him if he had any marijuana, and he ultimately approached the counter and had a conversation with the clerk. The clerk allegedly told him he could get anything he wanted, and

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<sup>5</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>6</sup> On cross-examination, however, Chavez agreed after reviewing the surveillance video that there was a period of time when Appellant was at the counter and he was not, and that he did not know what happened while Appellant was at the counter. Chavez also conceded he never saw Appellant outside the store talking with the clerk.

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when he asked if he could get some beer, the clerk agreed.<sup>7</sup> Appellant then grabbed some beer from the cooler, walked out of the store, put the beer in the bed of Chavez's truck, and entered the passenger side of the truck while Chavez paid for the two beers he had selected. As Appellant and Chavez left, Chavez expressed concern that Appellant had not paid for the beer. Appellant responded that he and the clerk "were both wrong," and assured Chavez he would go back some other time and reimburse the clerk. He told Chavez he knew the clerk, when in fact he did not, because Chavez was concerned about getting involved. Appellant further testified that when he was taken into custody on January 30, 2014, and shown the store's surveillance footage by Detective Armenta, he lied about whether he knew Chavez because he was concerned about getting Chavez in trouble. He denied having a firearm or threatening the clerk on October 20, 2013, but admitted taking the beer.<sup>8</sup>

¶10 The jury found Appellant guilty as charged of armed robbery.<sup>9</sup> The jury further found the State proved as aggravating circumstances that the offense caused physical, emotional, or financial harm to the victim, and that Appellant had committed the offense for the purpose of pecuniary gain, but found the State had not proved the offense involved the use, threatened use, or possession of a deadly weapon or dangerous instrument during the commission of the crime.

¶11 The trial court found Appellant had at least two historical prior felony convictions for enhancement purposes, sentenced Appellant to the presumptive term of 15.75 years' imprisonment in ADOC, and credited

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<sup>7</sup> At trial, the victim denied having had any conversation with Appellant about trading marijuana for beer or going outside to receive marijuana for the beer.

<sup>8</sup> On cross-examination, Appellant admitted having at least five prior felony convictions from three different incidents. He again admitted lying to Detective Armenta when he denied knowing Chavez, and by telling the detective he had walked to the store and traded marijuana for the beer. He acknowledged lying to the detective in numerous other instances, but explained he had done so because he "was confused," and he continued to maintain "a verbal agreement" existed between him and the clerk.

<sup>9</sup> On the third day of trial, before Appellant testified, the court had granted the State's oral motion to dismiss theft as a separate charge.

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him for 357 days of presentence incarceration. Appellant filed a timely notice of appeal.

**ANALYSIS**

*I. Alleged Inconsistent Verdicts*

¶12 Appellant argues his conviction must be reversed because the guilty verdict as to armed robbery is inconsistent with the jury's finding that the State did not prove the offense involved the use, threatened use, or possession of a deadly weapon or dangerous instrument during the commission of the crime. We disagree.

¶13 As a general rule, a defendant may be convicted of armed robbery for using a simulated weapon without that weapon being dangerous. *See State v. Larin*, 233 Ariz. 202, 213, ¶ 41, 310 P.3d 990, 1001 (App. 2013).

¶14 In this case, as part of its final instructions, the trial court instructed the jury, consistent with A.R.S. § 13-1904, that the crime of armed robbery requires proof beyond a reasonable doubt of the following elements:

No.1, the defendant took property of another person.

And 2 the taking was from the other person's person or immediate presence.

And 3, the taking was against the other person's will.

And 4, the defendant threatened to use force against another person with the intent to force surrender of the property [o]r to prevent the resistance to taking or keeping the property. And

5, the defendant or an accomplice, in the course of committing the robbery was armed with a deadly weapon, simulated deadly weapon, [or] firearm or used or threatened to use a deadly weapon, or simulated deadly weapon.

¶15 In the aggravated circumstances phase of the trial, the court instructed the jury that the State was required to prove each alleged aggravating circumstance beyond a reasonable doubt and further instructed the jury as to the first aggravating factor that the State had alleged as follows:

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No. 1, the offense involved the use, threatened use, or possession of a deadly weapon or dangerous instrument during the commission of the crime, specifically a handgun.

¶16 After the trial court instructed the jury as to the aggravation portion of the trial, the prosecutor briefly highlighted the key difference in the two instructions, arguing with respect to the first alleged aggravating factor:

The first one, with regard to the use of a deadly weapon or dangerous instrument, that really sort of hinges -- that is simple as well, but it really hinges on your decision [to find Appellant guilty]. If your decision was based on the belief that [the victim] saw an actual handgun, then there is no question that aggravating factor is present. If your decision is predicated on the fact that there was a simulated deadly weapon, a simulated handgun, then it's similarly easy, and you will not find that aggravating factor. But either way, the evidence is there for you to find the aggravating factor based on [the victim's] testimony.

¶17 After the prosecutor concluded, defense counsel echoed the argument of the prosecutor with regard to the first alleged aggravating factor:

Just to kind of continue with what [the prosecutor] said, obviously coming to the decision that you did, you found, with regard to the armed robbery, that in your opinion, beyond a reasonable doubt, there was either a handgun or a simulated handgun.

So looking back at your instructions, you have to, again, be firmly convinced that it was one or the other in order to find the first aggravating factor. So if you don't know whether or not it was an actual handgun or if it was a pellet gun or a BB gun or just a plastic replica gun, if you don't know one way or the other, then according to your instructions, you're not firmly convinced. You cannot find that aggravating factor.

The jury then deliberated and found the State failed to prove the offense involved the use, threatened use, or possession of a deadly weapon or

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dangerous instrument – specifically a handgun – during the commission of the crime.

¶18 The trial court’s instructions and the arguments of counsel highlighting the differences in those instructions make clear the jury’s verdicts were not inconsistent. To find Appellant guilty of armed robbery while at the same time finding the State had not proved the offense involved the use, threatened use, or possession of a deadly weapon or dangerous instrument during the commission of the crime, the jury could have concluded, consistent with the evidence, that the “weapon” possessed by Appellant was at least a “simulated deadly weapon,” but the State had not proved beyond a reasonable doubt that Appellant possessed an actual deadly weapon or dangerous instrument. *See Larin*, 233 Ariz. at 213, ¶ 41, 310 P.3d at 1001.

¶19 Moreover, even if Appellant’s armed robbery conviction was inherently dangerous, the jury nonetheless could have found the deadly weapon or dangerous instrument allegation not proven. *See id.* at ¶ 42 (citing *State v. Parsons*, 171 Ariz. 15, 15–16, 827 P.2d 476, 476–77 (App. 1991) (finding no error when a jury rendered inconsistent verdicts by finding the defendant guilty of aggravated assault using a deadly weapon or dangerous instrument, while finding the State failed to prove dangerousness based on the use of a deadly weapon or dangerous instrument)); *see also State v. Estrada*, 27 Ariz. App. 38, 40, 550 P.2d 1080, 1082 (1976) (upholding a conviction for conspiracy to violate state narcotics laws, even though the only evidence of an overt act was the substantive offense of heroin possession, of which the defendant was acquitted).

II. *Other Issues*

¶20 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdict, and the sentence imposed was within the statutory limits. Appellant was represented by counsel at all stages of the proceedings and allowed to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶21 After filing of this decision, defense counsel’s obligations pertaining to Appellant’s representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel’s review reveals an issue



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appropriate for petition for review to the Arizona Supreme Court. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

**CONCLUSION**

¶22 Appellant's conviction and sentence are affirmed.



Ruth A. Willingham · Clerk of the Court  
FILED : ama