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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 07-20-2010  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, )  
 ) No. 1 CA-CR 09-0206  
 )  
 ) DEPARTMENT D  
 Appellee, )  
 )  
 ) MEMORANDUM DECISION  
 v. )  
 ) (Not for Publication -  
 ) Rule 111, Rules of the  
 WALTER DAVID PATE, )  
 ) Arizona Supreme Court)  
 )  
 Appellant. )  
 )  
 )  
 )

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-109868-001 DT

The Honorable James T. Blomo, Judge *Pro Tempore*

**CONVICTIONS AND SENTENCES AFFIRMED**

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Terry Goddard, 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 Cory Engle, Deputy Public Defender  
Attorneys for 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 Walter David Pate's conviction of burglary in the first degree, a Class 2 dangerous felony; kidnapping, a Class 2 dangerous felony; armed robbery, a Class 2 dangerous felony; and possession of marijuana for sale, a Class 4 felony. Pate's counsel has searched the record 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). Pate was given the opportunity to file a supplemental brief but did not do so. Counsel now asks this court to search the record for fundamental error. After reviewing the entire record, we affirm Pate's convictions and sentences.

#### FACTS AND PROCEDURAL HISTORY

¶2 Pate and O.B., the victim, were friends.<sup>1</sup> Pate came to O.B.'s apartment with a gun in the middle of the night and knocked on the door. After O.B. opened the door, Pate entered, followed by a masked person carrying a shotgun. The person with the shotgun threatened to kill O.B. if he went to the police.

¶3 Pate hit O.B. on the forehead with the back of the gun, then threw O.B. to the ground, and the masked person held the shotgun to his neck. Pate used duct tape to tie O.B.'s feet and

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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 Pate. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

hands, and he also covered O.B.'s mouth and eyes. Pate and the other assailant also placed O.B.'s couch and coffee table on top of O.B.

¶14 While he was tied up on the ground, O.B. heard the two intruders go into his bedroom, open cabinets and open and close the front door several times. He later discovered that they had taken two video game consoles, a digital camera and electronic equipment, along with a gun and other items. After the intruders left, O.B. waited several hours to call police because he was afraid of what might happen to him or his family.

¶15 O.B. identified Pate as the perpetrator from a photo lineup of six people. Pate's DNA was found on the duct tape that was used to restrain O.B. When police arrived to arrest Pate, they saw him throw aside a semiautomatic handgun.

¶16 A jury convicted Pate of first-degree burglary, kidnapping and armed robbery. After the trial, Pate pled guilty to possession of marijuana for sale. The court sentenced Pate to aggravated terms of 12 years' imprisonment on the burglary, kidnapping and robbery charges and a presumptive term of 2.5 years' imprisonment on the marijuana charge. All sentences were ordered to run concurrently, and Pate was awarded 233 days' presentence incarceration credit.

¶17 Pate 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) (2003), 13-4031 (2010) and -4033(A)(1) (2010).

#### **DISCUSSION**

¶18 The record reflects Pate received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court held appropriate pretrial hearings. The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of 12 members with two alternates. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned a unanimous verdict, which was confirmed by juror polling. The court held an aggravation trial in which the jury unanimously found five aggravating factors. The court received and considered a presentence report and addressed its contents during the sentencing hearing and imposed legal sentences.

#### **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.

¶10 After the filing of this decision, defense counsel's obligations pertaining to Pate's representation in this appeal have ended. Defense counsel need do no more than inform Pate 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, Pate has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Pate 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, Judge

CONCURRING:

/s/  
PATRICIA A. OROZCO, Presiding Judge

/s/  
JON W. THOMPSON, Judge