DIVISION ONE
FILED: 02/17/11
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0384
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
DOUGLAS D. GRANT,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-032986-001 DT

The Honorable Margaret R. Mahoney, Judge

AFFIRMED

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

Tyrone Mitchell, PC — Phoenix
by Tyrone Mitchell
Attorneys for Appellant

Douglas D. Grant — Douglas
Appellant

P O R T L E Y, Judge

¶1 This is appeal under *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969) and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel for Defendant Douglas Grant 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 us to conduct an *Anders* review of the record. Defendant filed a supplemental brief in which he specifically declares he is appealing from the sentence only.[1] Thus, although we have subject matter jurisdiction to review the conviction for fundamental error, we limit our review to the sentence imposed. *See State v. Smith*, 171 Ariz. 501, 502, 831 P.2d 877, 878 (App. 1992); *State v. Delgadillo*, 174 Ariz. 428, 430 n.1, 850 P.2d 141, 143 n.1 (App. 1993).[2] Finding no reversible error, we affirm.

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[1] On page 8 of his supplemental brief, Defendant states "Appellant Grant is not appealing his conviction. He is only appealing the aggravators." Three pages later, he states that "[h]e only concedes no error of trial conviction occurred." There are also other statements in his brief which clearly reflect his desire to only challenge his sentence. Thus, we only address the *Blakely v. Washington*, 542 U.S. 296 (2004) claim.

[2] The jury was "unable to agree" on the first and second degree murder verdicts. If asked, and if we addressed the merits of the conviction and reverse his manslaughter conviction, Defendant could be tried again for first degree murder. *See Lemke v. Rayes*, 213 Ariz. 232, 141 P.3d 407 (App. 2006). He, however, only challenges his sentence.

FACTS[3]

¶1 Defendant's wife, F.G., drowned in a bathtub on September 27, 2001, and Defendant was indicted and charged with first degree murder. After a lengthy jury trial, the jury found Defendant guilty of the lesser included offense of manslaughter in March 2009.

¶2 The jury then heard evidence of three aggravating factors: (1) Defendant committed the offense in an especially cruel manner; (2) he committed the offense for pecuniary gain; and (3) the offense caused emotional or financial harm to the victim's immediate family.[4] The state presented testimony from the victim's sister, brother, father, daughter, and mother. Defendant also testified. The jury found the State proved all three aggravators.

¶3 Prior to the mitigation hearing, the adult probation department submitted a presentence report which recommended a sentence greater than the presumptive. Attached to the report were numerous letters from the victim's relatives and other interested parties requesting the judge to impose a prison

[3] We review the facts in the light most favorable to sustaining the verdict. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

[4] Counsel suggests that because the jury did not convict Defendant of first degree murder, the pecuniary gain factor was improperly considered by the jury. Although there was no objection below, Arizona law permits inconsistent verdicts. *See Lemke*, 213 Ariz. at 241, ¶ 26, 141 P.3d at 416.

sentence and, in several of these letters, to the maximum term allowed. Defendant submitted a mitigation packet which included letters from some of the victim's relatives and other interested parties in support of Defendant and requesting the judge to place Defendant on probation.

¶4 At the start of the mitigation hearing, the trial court noted that it had read and considered all of the materials submitted. Defendant then presented supportive testimony from relatives and friends. At the conclusion of the hearing, the court found that Defendant's notable contributions to various people and to the community, and Defendant's lack of prior convictions were mitigating factors. The court, however, found that the "tremendous pain and loss" suffered by the victim's family was an aggravating factor. The court further stated that the mitigators and aggravators were balanced, and sentenced Defendant to five years' imprisonment, the presumptive term for a class two felony, with credit for sixty-six days of presentence incarceration.

¶5 We have jurisdiction over this appeal 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, and -4033(A)(1) (2010).

DISCUSSION

¶6 We have read and considered counsel's brief and Defendant's supplemental brief, and have reviewed the evidence presented at the aggravation trial, the mitigation hearing, and all the sentencing proceedings for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Defendant was given the opportunity to present mitigating evidence, both documentary and through the testimony of witnesses, and he was given an opportunity to be heard prior to the imposition of sentence. The presumptive sentence imposed is the presumptive sentence for this crime, a class two, non-dangerous, non-repetitive felony. *See* A.R.S. §§ 13-701, -702(D). The aggravating factors were found by the jury, A.R.S. §§ 13-701(D)(5), (6), and (9),[5] and the trial court weighed the aggravating circumstances against the mitigating circumstances as required. A.R.S. § 13-701(C).

¶7 Defendant raises one cognizable argument.[6] Relying on *Blakely,* he contends that the aggravating circumstances were not properly re-alleged by the State after his motion to remand was

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[5] The Arizona criminal sentencing code was renumbered. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. Because the renumbering included no substantive changes, we refer to the current section numbers.

[6] Defendant also raises a claim of ineffective assistance of appellate counsel, but claims of ineffective assistance of counsel cannot be raised on direct appeal. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007) (claims of ineffective assistance of counsel cannot be presented in a direct appeal); *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 19, 39 P.3d 525, 527 (2002) (same).

granted and the grand jury returned another indictment. Thus, he argues, the aggravating factors should not have been submitted to the jury. If the aggravating factors had not been considered and found by the jury, his argument continues, the court would have imposed a mitigated sentence. Defendant did not object at trial to the lack of a second allegation, the submission of the aggravating factors to the jury, or to the court's consideration of the aggravating factors at sentencing. Therefore, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.2d at 96.

¶8 At the outset, we note Defendant received the presumptive sentence, and thus *Blakely* is not applicable. *Blakely* established the right to a jury trial on any fact that increases the punishment beyond the presumptive. Because Defendant's sentence was not increased beyond the presumptive, no error occurred.

¶9 Even if we assume for argument that Defendant is correct, there is nothing in the record that supports his argument that the trial court would have sentenced him to the mitigated term. The trial judge was present throughout the trial, heard the testimony and was free to impose the presumptive term of imprisonment even with only the trial testimony, the presentence report and the mitigation hearing.

Defendant's counsel concedes such in his brief when he notes that the court relied on the emotional harm to the victim's family aggravating factor. *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26, 115 P.3d 618, 625 (2005). Consequently, the failure to re-allege the aggravating factors was not fundamental error. *See State v. Johnson*, 210 Ariz. 438, 441-42, ¶¶ 12-13, 111 P.3d 1038, 1041-42 (App. 2005) (judicial factfinding when selecting presumptive sentence does not implicate indictment or jury trial right). *See also State v. Miranda-Cabrera,* 209 Ariz. 220, 227-28, ¶ 34, 99 P.3d 35, 42-43 (App. 2004) (finding no Sixth Amendment violation when trial court weighs non-*Blakely* compliant aggravating circumstances against mitigating circumstances and resulting sentence is not above the presumptive).

¶10 Nevertheless, the State filed an allegation of the aggravating circumstances, Defendant had notice prior to the aggravation phase of the trial, and testified before the jury determined the aggravators. Thus, the notice Defendant received satisfied due process. *See State v. Jenkins*, 193 Ariz. 115, 121, ¶ 21, 970 P.2d 947, 953 (App. 1998).

¶11 Having addressed Defendant's supplemental argument, and having searched the entire record of sentencing for reversible error, we find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal

Procedure. The record, as presented, reveals that Defendant was represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits.

CONCLUSION

¶12 After this decision has been filed, counsel's obligation to represent Defendant in this appeal has 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, 585, 684 P.2d 154, 157 (1984). Defendant can, if desired, file a motion for reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure.

¶13 Accordingly, we affirm Defendant's sentence.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Judge

/s/
_____
PATRICIA A. OROZCO, Judge