DIVISION ONE
FILED: 07/26/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

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

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| STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>ERNEST WALTER GRIFFIN,<br><br>Appellant. | ) | 1 CA-CR 10-0720<br><br>DEPARTMENT E<br><br>**MEMORANDUM DECISION**<br>(Not for Publication – Rule 111, Rules of the Arizona Supreme Court) |

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-103217-002 DT

The Honorable Daniel G. Martin, Judge

**AFFIRMED**

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Thomas C. Horne, 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 Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

Ernest Walter Griffin — Tucson
Appellant

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**P O R T L E Y**, Judge

**¶1** This is 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 Defendant Ernest Walter Griffin has advised us that, after searching the entire record, she 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 took the opportunity and filed a supplemental brief.

**FACTS**[1]

**¶2** Although Defendant was charged with two counts of burglary in the third degree, the jury only found him guilty of one; namely, entering a Circle K convenience store on January 16, 2010, with the intent to commit a theft or other felony. Specifically, the jury heard that he entered the Circle K at approximately 3:00 a.m. on January 16, 2010, went behind the counter to the cigarette area and grabbed some cigarettes. He then walked out and drove away.

**¶3** A short time later, the police found the car that matched the description given by the store clerk. During the pat down of Defendant, three or four cigarette packs fell out, and more fell from his sweater. The police recovered thirty-seven packs of cigarettes at the scene. The store clerk subsequently identified Defendant as the person who had taken the cigarettes without permission.

[1] 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** Prior to being sentenced, Defendant stipulated to two historical prior felony convictions. He was subsequently sentenced to a mitigated term of eight years in prison with 227 days of presentence incarceration credit.

**¶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 the opening brief and the supplemental brief, and have searched the entire record for reversible error.

**¶7** The opening brief also raises issues Defendant wanted to raise on appeal. First, he contends that he believes that "he was the subject of malicious prosecution or malicious use of process" because he claims he should have only been charged with trespassing or theft.[2] He also claims that the judge should have sua sponte given the lesser included offense of theft and/or trespassing. Third, he contends that the trial court should not have dismissed one of the jurors and that the jury contained no minorities. Fourth, he argues that he should have been given a super-mitigated sentence if the court properly balanced his five

[2] In his supplemental brief, Defendant argues that that he should have never been charged with burglary but only larceny, theft and/or trespassing.

mitigating circumstances. Finally, he argues that his trial lawyer was ineffective and believes that with an effective lawyer the matter would have not proceeded to trial.[3]

**¶8** We have reviewed the issues Defendant wanted raised, and we find no fundamental error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Moreover, even if we presume error, Defendant has not demonstrated any prejudice. *State v. Henderson*, 210 Ariz. 561, 115 P.3d 601 (2005).

**¶9** Specifically, the decision about how to charge a crime rests solely with the county attorney. *See State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992). Defendant has not argued facts that suggest that the county attorney abused his responsibilities in charging. The fact that the jury found Defendant guilty of one of the two charged burglaries demonstrates that the jury listened to the testimony, reviewed the evidence, and decided that the State had only proven one burglary beyond a reasonable doubt. Accordingly, there is no evidence of malicious or vindictive charging.

**¶10** The trial court did not commit fundamental error by failing to give the criminal trespass instruction. Although criminal trespass can be a lesser included offense of burglary,

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[3] We do not review whether a lawyer was ineffective at trial on direct appeal. If Defendant wishes to pursue the ineffectiveness claim, he will have to file a petition pursuant to Arizona Rule of Criminal Procedure 32. *See State v. Spreitz*, 202 Ariz. 1, 2, ¶ 6, 39 P.3d 525, 526 (2002).

it is not necessarily a lesser included offense.[4] *State v. Mitchell*, 138 Ariz. 478, 481, 675 P.2d 738, 741 (App. 1983). The problem here is the fact that the jury found that Defendant entered the Circle K with the intent to commit a theft or other felony, and he committed the theft. Accordingly, the facts of the case did not support a lesser included offense and the court did not err by not giving it.

**¶11** We find no fundamental error in the composition of the jury. At the end of the pretrial hearing on June 25, 2010, the trial court noted that one of the jurors was surprised that he was selected. The court was concerned that the juror might not return for the trial. The court proposed that he be excused, which would leave a panel of eight, plus one alternate. The defense agreed. Accordingly, the court did not err by excusing the one juror and notifying the other jurors on the first day of trial.

**¶12** Similarly, there was no fundamental error in the composition of the jury venire. First, the defense did not complain about the composition of the venire. *See State v. Harris*, 175 Ariz. 64, 66, 852 P.2d 1248, 1250 (App. 1993). Second, there is nothing in the record which identifies the race of any member of the venire. Consequently, because there is no

[4] The trial court gave the theft instruction as part of the instructions for burglary in the second degree.

evidence to support the claim, there is no fundamental error in the selection of the jury venire.

**¶13** Moreover, the trial court did not commit fundamental error by determining that Defendant was only entitled to a minimum prison term and not a "super-mitigated" prison term. The court outlined the information or documents that it had received or reviewed to make its sentencing determination. The court then found that there were no aggravating factors, but found mitigating factors. The court then sentenced Defendant to a mitigated prison term.

**¶14** Defendant was not entitled to a "super-mitigated" prison term.[5] The trial court exercised its discretion after reviewing the sentencing information and found the minimum term to be appropriate. We see no error based on Defendant's long criminal history and the facts of this case. *See State v. Olmstead*, 213 Ariz. 534, 535, ¶ 6, 15 P.3d 631, 632 (App. 2006) (stating that "the trial court had broad discretion to decide if the mitigating facts were sufficient to justify a mitigated sentence"). Consequently, there was no error.

**¶15** 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

[5] Any sentence that had been called "super mitigated" is just a "mitigated" term less than the minimum term of imprisonment.

all stages of the proceedings, and the sentence imposed was within the statutory limits.

**CONCLUSION**

**¶16** 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.

**¶17** Accordingly, we affirm Defendant's conviction and sentence.

/s/
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MAURICE PORTLEY, Judge

CONCURRING:

/s/
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PETER B. SWANN, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge