

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

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 09/22/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

STATE OF ARIZONA, ) No. 1 CA-CR 10-0955  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
HUGO RIOS-GARATE, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-112087-002 DT

The Honorable Maria del Mar Verdin, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona 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 Spencer D. Heffell, Deputy Public Defender  
Attorneys for Appellant

Hugo Rios-Garate Douglas  
Appellant

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**B R O W N**, Judge

¶1 Hugo Rios-Garate ("Defendant") appeals his convictions and sentences for theft by extortion and unlawful use of means of transportation. Counsel for Defendant filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising that after searching the record on appeal, he was unable to find any arguable grounds for reversal. Defendant was granted the opportunity to file a supplemental brief *in propria persona*, and he has 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 view 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). Finding no reversible error, we affirm.

¶3 In February 2009, Defendant was charged with six felony counts: Count 1, kidnapping, a class 2 dangerous felony in violation of Arizona Revised Statutes ("A.R.S.") section 13-1304 (2010);<sup>1</sup> Count 2, armed robbery, a class 2 dangerous felony in violation of A.R.S. § 13-1904 (2010); Count 3, theft by extortion, a class 2 dangerous felony, in violation of A.R.S.

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<sup>1</sup> Absent material revision after the date of the alleged offense, we cite the statute's current version.

§ 13-1804 (Supp. 2010); Count 4, aggravated assault, a class 3 dangerous felony, in violation of A.R.S. § 13-1204 (Supp. 2010); Count 5, misconduct involving weapons, a class 4 felony, in violation of A.R.S. § 13-3102 (Supp. 2010); and Count 9, unlawful use of means of transportation, a class 5 felony, in violation of A.R.S. § 13-1803 (2010). The following evidence was presented at trial.

¶4 The victim and his family were leaving a shopping center when a group of men, including Defendant, accosted him at gun-point and forced him into an awaiting vehicle. He was brought to a trailer in Eloy where he was held hostage for two days.

¶5 Immediately after her husband was kidnapped, the victim's wife began receiving ransom calls. The police monitored her phone and were able to ascertain the phone number the ransom calls were from, but could not obtain any information about the person making the calls. The victim's family was able to collect \$40,000 to give to the police, together with the victim's Cadillac Escalade, as the ransom.

¶6 Police officers placed the \$40,000 in the Cadillac Escalade and drove the vehicle to a parking lot in the vicinity of 51st Avenue and Baseline Road. Defendant and an accomplice arrived at the location in another car, entered the Cadillac, and exited the parking lot. Undercover officers followed the

Cadillac and the other vehicle, but they lost sight of the first vehicle. Eventually the officers were able to stop the Cadillac, finding Defendant and his accomplice along with two handguns.

¶17 After a six-day trial, the jury found Defendant not guilty of kidnapping and aggravated assault, but found him guilty of theft by extortion and unlawful use of means of transportation.<sup>2</sup> During the aggravation phase, the jury found the State had proven four of the five aggravating factors it presented. Defendant was sentenced to concurrent prison terms of 10.5 years for theft by extortion and .75 years for unlawful use of means of transportation. He also received credit for 651 days of presentence incarceration credit. This timely appeal followed.

¶18 In his supplemental brief, Defendant asserts that the trial court lacked jurisdiction over this case because the complaint was not filed within forty-eight hours from the time of his initial appearance, in violation of Arizona Rule of Criminal Procedure 4.1(b). Because Defendant did not raise this issue in the trial court, we review for fundamental error only. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (applying fundamental error review when a defendant

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<sup>2</sup> In a separate proceeding, Defendant pled guilty to misconduct involving weapons.

failed to object to alleged trial error). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* To prevail on fundamental error review, Defendant must establish both that fundamental error exists and that the error caused him prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607.

¶19 Defendant contends the trial court lacked jurisdiction to hear this case because the complaint was untimely filed. The record shows that Defendant had his initial appearance on February 17, 2009. Defendant alleges that this hearing took place prior to 9:55 a.m., but nothing in the record exists to support that assertion. The complaint was filed on February 19, 2009 at 4:45 p.m. Rule 4.1(b) requires the State to promptly file a complaint after a person is arrested without a warrant and that "[i]f a complaint is not filed within 48 hours from the time of [a defendant's] initial appearance before [a] magistrate, the defendant shall be released from jail." Assuming that a complaint was not filed within forty-eight hours after Defendant's initial appearance, a violation of the release provision in Rule 4.1(b) does not deprive the superior court of jurisdiction. See *State v. Rodriguez*, 205 Ariz. 392, 395 n.1, 71 P.3d 919, 922 n.1 (App. 2003) (noting that the superior court

generally has subject matter jurisdiction "over any criminal case in which the defendant is charged by indictment or information with a felony").

¶10 Defendant also asserts that his "private affairs" were disturbed in violation of the Article 2, Section 8, of the Arizona Constitution.<sup>3</sup> To the extent Defendant was kept in jail for several hours in violation of Rule 4.1(b), it was an error in the proceedings, which should not be taken lightly. However, Defendant has failed to demonstrate that the error went to the foundation of his case, took away a right essential to his defense, or was so serious that he could not have received a fair trial. See *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607; *State v. Gilbert*, 105 Ariz. 475, 477, 467 P.2d 63, 65 (1970) (recognizing that a defendant held "for an unreasonable length of time" has other avenues to enforce the right of release afforded by the rules of criminal procedure); *State v. Lee*, 27 Ariz. App. 294, 295, 554 P.2d 890, 891 (1976) ("Violations must be viewed from a due process standpoint, and a revocation reversed only if prejudice is demonstrated."). Thus, no fundamental error occurred regarding the violation of Rule 4.1(b).

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<sup>3</sup> "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

¶11 We have searched the entire record for fundamental error and find none. All of the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The record shows that Defendant was present and represented by counsel at all pertinent stages of the proceedings, was afforded the opportunity to speak before sentencing, and the sentence imposed was within statutory limits. Accordingly, we affirm Defendant's convictions and sentences.

¶12 Upon the filing of this decision, counsel shall inform Defendant of the status of the appeal and his options. Defense 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 shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review. /s/

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MICHAEL J. BROWN, Judge

CONCURRING:

/s/

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PATRICIA A. OROZCO, Presiding Judge

/s/

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DONN KESSLER, Judge