**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**

DIVISION ONE
FILED: 11/08/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

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

| | |
|---|---|
| STATE OF ARIZONA, | No. 1 CA-CR 11-0124 |
| Appellee, | DEPARTMENT E |
| v. | **MEMORANDUM DECISION** |
| CHRISTOPHER LEE SCOTT, JR., | (Not for Publication – Rule 111, Rules of the Arizona Supreme Court) |
| Appellant. | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-104734-001 DT

The Honorable Pamela D. Svoboda, Judge *Pro Tempore*

**AFFIRMED**

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 Peg Green, Deputy Public Defender
Attorneys for Appellant

**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 Christopher Lee Scott, Jr.'s

conviction of aggravated driving under the influence (impaired) and aggravated driving under the influence (alcohol level), both Class 4 felonies. Scott's counsel has searched the record on appeal and has 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). Scott 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. She also advises that Scott has asked her to raise several issues for our review, which we address below. After reviewing the entire record, we affirm Scott's convictions and sentences.

**FACTS AND PROCEDURAL HISTORY**

**¶2** Phoenix Police Officer Cary Bryant saw a car driving at a very high rate of speed.[1] Bryant followed the car and saw it pull into a parking lot. The parking lot was small, and the driver had "nowhere to go." Scott exited the driver's side door of the car and ran to hide behind a bush, but eventually emerged peacefully. Scott had a moderate odor of alcohol, had bloodshot, watery eyes and was swaying. Scott said he had not been driving and that the driver had fled by jumping over a 12-

---

[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Scott. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

foot wall. Bryant testified, however, that he never lost sight of the car between when he saw it stop and when he saw Scott get out of the car. The officer said he did not see anyone else exit the vehicle.

**¶3** Scott was transported to a DUI processing van, where an officer drew his blood. The blood was tested by a forensic scientist, who determined Scott had an alcohol concentration of 0.111 grams per 1,000 milliliters, or at least 0.105 within two hours of driving.

**¶4** At trial, a Motor Vehicle Division investigator and records custodian testified that at the time of the incident, Scott's license was both suspended and revoked and that Scott had been notified of the suspension and revocation.

**¶5** A jury found Scott guilty of aggravated driving under the influence (impaired) and aggravated driving under the influence (alcohol level) pursuant to Arizona Revised Statutes ("A.R.S.") sections 28-1383 (2008), -1381(A)(1) and -1381(A)(2) (2009). The superior court then found Scott had two historical prior convictions and was on probation at the time of the offenses. The court sentenced Scott to concurrent 10-year sentences and awarded him 167 days' presentence incarceration credit.

¶6 Scott timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033 (2011).[2]

**DISCUSSION**

**A. Fundamental Error Review.**

¶7 The record reflects Scott 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.

¶8 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly composed of eight members with one alternate. 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 received and considered a probation violation report, addressed its contents during the sentencing hearing and imposed legal (presumptive) sentences for the crimes of which Scott was convicted.

**B. Issues Raised by Scott.**

¶9 Scott first argues that the jury was improperly composed of all females. The Equal Protection Clause prohibits

---

[2] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

a party from exercising peremptory strikes on the basis of gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-46 (1994) (applying *Batson v. Kentucky*, 476 U.S. 79, 85-89 (1986), to gender). A party challenging a peremptory strike first must make a prima facie showing of discrimination. *Purkett v. Elem*, 514 U.S. 765, 767 (1995). The party attempting to exercise the strike then must give a non-discriminatory explanation for the strike. *Id.* at 768-69. We have no record of the manner in which the parties in this case exercised their peremptory strikes, and the record does not reflect either party making a *Batson* challenge. Scott therefore cannot meet even the first part of the test, as he cannot make a prima facie showing of discrimination. "Unless there are objective indications of jurors' prejudice, we will not presume its existence." *State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981).

**¶10** Scott next argues there was insufficient evidence that he was driving or in actual physical control of the car. In support of this contention, he points out that the car keys were not found on his person or in the car. Sufficient evidence supports the conviction if "there exists substantial evidence from the entire record from which a rational trier of fact could have found guilt beyond a reasonable doubt." *Id.* at 553, 633 P.2d at 362. "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of

probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quotation omitted). We conclude that the evidence recounted above is sufficient evidence from which a rational jury could have found that Scott was driving or was in actual physical control of the vehicle. *See* A.R.S. § 28-1381(A)(1), (A)(2).

**¶11** Scott next argues that there were problems with the chain of custody of the blood sample taken by the police. The officer who took the sample followed all standard procedures to ensure the security of the blood. He placed safety labels over the vials to prevent tampering, placed the vials in a cradle in a bag and resealed them in Scott's presence. The safety labels on the vials, the plastic bag containing them and the outside of the kit all were labeled with Scott's name. The officer then took the blood sample to the property management bureau, where a crime lab technician picked it up. When the forensic scientist received the sample, it was properly sealed and marked with Scott's name. The forensic scientist's report contains the chain of custody information for the blood sample from the time it arrived at the property management bureau. Nothing in the record indicates the chain of custody was compromised.

**¶12** Finally, Scott argues his counsel was ineffective. A claim of ineffective assistance of counsel may not be reviewed on direct appeal. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411,

415, ¶ 20, 153 P.3d 1040, 1044 (2007); *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (ineffective assistance of counsel claim must be raised in Arizona Rule of Criminal Procedure 32 proceeding). We therefore do not reach the merits of Scott's argument that his counsel was ineffective.

**CONCLUSION**

**¶13** We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881.

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

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
LAWRENCE F. WINTHROP, Judge