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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ZACKARIAH THOMAS WAGGONER, Appellant.	2 CA-CR 2008-0275 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20080502

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

David Alan Darby
Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 Zackariah Waggoner was found guilty by a twelve-member jury and convicted of one count each of theft of means of transportation; third-degree, nonresidential burglary; criminal damage; aggravated assault with a deadly weapon or dangerous instrument;

attempted armed robbery; and attempted aggravated robbery. The jury also found the aggravated assault, attempted armed robbery, and attempted aggravated robbery to be dangerous-nature offenses, and the trial court sentenced Waggoner to concurrent, mitigated terms of imprisonment, some enhanced, for a total of five years' incarceration.

¶2 Appellate counsel has filed a brief invoking *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel has complied with *Clark* by "setting forth a detailed factual and procedural history of the case with citations to the record, [so] this court can satisfy itself that counsel has in fact thoroughly reviewed the record." *Id.* ¶ 32. We infer from his reference to *Anders* and *Clark* that counsel has apparently found "no arguable issues for appeal," *id.* ¶ 30, and he asks this court to search the record for error. Waggoner has not filed a supplemental brief.

¶3 Pursuant to our obligation under *Anders*, 387 U.S. at 744, we have reviewed the record in its entirety, viewing the evidence in the light most favorable to upholding the verdicts. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). We are satisfied the record supports counsel's recitation of the facts.

¶4 In summary, the evidence and reasonable inferences therefrom established that Waggoner and Chad H., his codefendant, entered a vehicle that did not belong to them, drove it away, recklessly caused physical damage to its exterior and interior, and stole component parts from it. The evidence also established that, the next day, Waggoner had offered Douglas Z., an acquaintance of eight years, a ride home in the stolen vehicle. After he accepted, Chad

had instead driven Douglas and Waggoner to a secluded area where Waggoner and Chad demanded money from Douglas. Douglas testified Waggoner had also threatened his life and stabbed him with a screwdriver during this encounter.

¶5 Without developing any argument, counsel has suggested, as "colorable issues" for our consideration, whether "[t]he trial court *sua sponte* should have severed Waggoner from [his] co-defendant for trial purposes" and "*sua sponte* should have suppressed the [vehicle owner's] out of court identification . . . of Waggoner as unduly suggestive." Neither question presents an arguable issue for appeal. *See* Ariz. R. Crim. P. 13.4(a) cmt. ("The two standards—'the court may on its own initiative, and shall on motion of a party' [order severance when necessary]—are intended to indicate the court's power to act on its own authority to sever, but to remove any implication that it has a duty to search out all severance issues on its own, for fear of creating fundamental error."); *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983) (appellate court will not reverse conviction for failure to grant motion for severance absent "compelling prejudice against which the trial court was unable to protect"); *State v. Longoria*, 123 Ariz. 7, 10, 596 P.2d 1179, 1182 (App. 1979) (court has no duty to sever codefendants for trial sua sponte; claim for severance waived by failure to file motion).

¶6 To the extent either claim would be subject to review, it would be for prejudicial, fundamental error only, *see State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005), and we cannot discern any prejudice from these suggestions of error. In

other words, in light of all of the evidence supporting Waggoner's conviction, we conclude neither severance of the codefendants' cases for trial nor suppression of the vehicle owner's identification of Waggoner as a person she had seen just before her vehicle was stolen, could have changed the jury's verdict. *See id.* ¶ 27 (fundamental error only prejudicial if reasonable jury could have reached different result but for error).

¶7 Substantial evidence supported findings of all elements necessary for Waggoner's convictions, and the sentences imposed were within the range authorized by statute. *See* A.R.S. §§ 13-701, 13-702, 13-704(A), 13-1001, 13-1203, 13-1204, 13-1506, 13-1602, 13-1814, 13-1902, 13-1903, and 13-1904. In our examination of the record pursuant to *Anders*, we have found no error requiring reversal and no arguable issue requiring further appellate review. *See Anders*, 386 U.S. at 744. We therefore affirm Waggoner's convictions and sentences.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge