

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

FILED BY CLERK

JUN 20 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0235
)	DEPARTMENT B
)	
Appellee,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
v.)	Rule 111, Rules of
)	the Supreme Court
RICKY GRAY,)	
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20093253 and CR20094054

Honorable Christopher C. Browning, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson

Tucson
Attorneys for Appellee

West, Christoffel & Zickerman, PLLC
By Anne Elsberry

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K E L L Y, Judge.

¶1 After a jury trial, appellant Ricky Gray was convicted of one count each of influencing a witness, aggravated domestic violence, and tampering with a witness. The trial court found Gray had two historical prior felony convictions and sentenced him to enhanced, presumptive, concurrent terms of imprisonment, the longest of which is five years. Counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing she had conscientiously searched the record and found no arguable issues to raise on appeal. Gray filed a supplemental, pro se brief in which he appeared to allege (1) his trial counsel had been ineffective under the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); (2) the prosecutor had engaged in misconduct during the charging function; and (3) the trial court had abused its discretion in consolidating his cases for trial. We now address those claims with respect to Gray's convictions for influencing a witness and aggravated domestic violence.¹

¹In our review of the record pursuant to *Anders*, we identified an issue that had not been raised by Gray or his counsel but that arguably implicated fundamental error in his conviction for tampering with a witness. We directed counsel to file supplemental briefs addressing whether, to support Gray's conviction for tampering with a witness under A.R.S. § 13-2804, the state was required to prove that a witness had actually unlawfully withheld testimony, testified falsely, or failed to obey a summons as a result of Gray's conduct and, if so, whether the state had sustained its burden of proof. After consideration of those briefs and oral argument, we modified Gray's conviction for tampering with a witness to attempted tampering with a witness and remanded the case for sentencing on that charge. *See State v. Gray*, No. 2 CA-CR 2010-0235 (opinion filed simultaneously with this memorandum decision). The facts relevant to the claims in Gray's pro se brief may be found in that opinion, and need not be repeated here.

¶2 First, Gray’s claim of ineffective assistance of counsel is not properly before us. *See State ex rel. Thomas v. Rayes*, 214 Ariz. 411, ¶ 20, 153 P.3d 1040, 1044 (2007) (ineffective assistance of counsel may only be raised in post-conviction proceeding pursuant to Rule 32, Ariz. R. Crim. P.); *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (same; ineffective assistance claim may not be raised on direct appeal). Accordingly, we do not address it.

¶3 Although his next claim is not entirely clear, Gray appears to argue the prosecutor engaged in misconduct because he or she “sought and secured” an indictment on the “elevated charge [of] A.R.S. [§§] 13-2802 and . . . 13-2804” that was not supported by the evidence. This claim has been waived. A motion filed pursuant to Rule 12.9, Ariz. R. Crim. P., is a “defendant’s sole procedural vehicle for challenging grand jury proceedings” and “the appropriate method to challenge prosecutorial misconduct before the grand jury.” *State v. Young*, 149 Ariz. 580, 585-86, 720 P.2d 965, 970-71 (App. 1986). Gray did not file such a pre-trial motion. Moreover, because Gray’s claim is based on the sufficiency of the evidence to support the grand jury’s determination of probable cause, his claim is not cognizable on appeal of his conviction. *See State v. Moody*, 208 Ariz. 424, n.3, 94 P.3d 1119, 1135 n.3 (2004) (“[A] conviction precludes review of the finding of probable cause made by a grand jury.”); *see also State v. Snelling*, 225 Ariz. 182, ¶ 11, 236 P.3d 409, 412 (2010) (“A defendant alleging prosecutorial misconduct in a grand jury proceeding generally must seek relief from an

adverse trial court ruling through special action rather than waiting to raise such issues on appeal.”).²

¶4 Finally, Gray appears to argue the trial court abused its discretion in consolidating his cases for trial. *See State v. Prince*, 204 Ariz. 156, ¶ 13, 61 P.3d 450, 453 (“trial court has broad discretion” in matters involving joinder and severance). “When a defendant challenges a denial of severance on appeal, he must demonstrate compelling prejudice against which the trial court was unable to protect.” *Id.*, quoting *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995).

¶5 Here, the offenses charged arose out of a series of connected acts, the proof of which depended on the testimony of the same two witnesses, Denise J. and Tucson Police Department detective Michael Kishbaugh. Moreover, the jury was properly instructed “to consider each offense separately and [was] advised that each must be proven beyond a reasonable doubt.” *Id.* ¶ 17. We find no abuse of discretion in the trial court’s decision to consolidate the cases against Gray, and he has failed to establish that he was prejudiced by that decision. *See id.*

²The “one exception to the rule” precluding appellate review of denial of a Rule 12.9 motion “occurs ‘when a defendant has had to stand trial on an indictment which the government knew was based partially on perjured, material testimony.’” *Moody*, 208 Ariz. 424, ¶ 31, 94 P.3d at 1135, quoting *State v. Gortarez*, 141 Ariz. 254, 258, 686 P.2d 1224, 1228 (1984). Gray makes no such allegation here. He does not deny writing the letter upon which these convictions are based. Moreover, the letter was admitted as evidence at trial and was sufficient to support the jury’s verdicts.

¶6 With respect to Gray’s convictions and sentences for influencing a witness and aggravated domestic violence, we have found no fundamental or reversible error and no arguable issue warranting further appellate review. *See Anders*, 386 U.S. at 744. Accordingly, we affirm those convictions and sentences.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge