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

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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THE STATE OF ARIZONA, Appellee, v. JOSHUA ASTON, Appellant.	2 CA-CR 2010-0282 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092529001

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Robert J. Hirsh, Pima County Public Defender
By Rebecca A. McLean — Tucson
Attorneys for Appellant

B R A M M E R, Presiding Judge.

¶1 After a jury trial, appellant Joshua Aston was convicted of second-degree escape, a class five felony. Aston admitted to a prior conviction, and the trial court sentenced him to a presumptive 2.25-year prison term, to be served consecutively to the sentence he was already serving in another matter. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297,

451 P.2d 878 (1969), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting she has reviewed the record but found no arguable issues to raise on appeal. She asks this court to search the record for fundamental error. Aston has filed a supplemental brief. For the reasons set forth below, we affirm.

¶2 The trial court granted Aston's request to represent himself at trial and appointed an attorney to act as advisory counsel. With Aston's agreement, the jury was told he was in custody at the time of trial. An Arizona Department of Corrections (ADOC) officer testified that, while conducting a routine check, he had discovered "Inmate Aston" was missing from his cell and reported him missing. A Tucson Police Department helicopter officer observed "two people wearing orange jumpsuits laying in . . . a small culvert ravine area inside the main perimeter fence but outside the [prison] fence." One of the individuals, whose orange jumpsuit said "DOC" on the back, was identified as Aston. Another ADOC officer testified that, to get to the area where the inmates were found, known as "no man's land," it would be necessary either to go through the main prison sally port, or to traverse fences that have razor wire at the bottom and top and Aston was wearing gloves made out of prison blankets and had blood on his hands. The officer identified a photograph of an individual who had been caught on the night in question as "Inmate . . . Aston." Aston's face clearly was visible in the photograph, which depicted him lying on the ground in orange prison garb while being restrained. Aston moved for a judgment of acquittal at the close of the state's case, asserting the state had failed to prove he had "knowingly attempted or intended to escape and that [he] was assigned to [ADOC]." *See* Ariz. R. Crim. P. 20. The trial court denied

his motion. Advisory counsel gave a closing statement at Aston's request, and the jury rendered its guilty verdict.

¶3 Section 13-2503(A)(1), A.R.S., the statute under which Aston was convicted, provides "[a] person commits escape in the second degree by knowingly . . . [e]scaping or attempting to escape from . . . an adult correctional facility." On appeal, Aston argues the trial court incorrectly denied his motion for judgment of acquittal, asserting "the Court and the Jury were forced to assume he was lawfully ordered to prison thus he was presum[]ed to have 'known' he could not leave." In denying Aston's motion, the court found it was up to the jury to determine whether he knowingly had intended to escape, that there was "substantial evidence to warrant a conviction, [and] that a rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt."

¶4 A motion for a judgment of acquittal should be granted only if "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20; *see also State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996) (judgment of acquittal appropriate only if complete absence of substantial evidence supporting conviction). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). We will not disturb a trial court's denial of a motion for a judgment of acquittal except for an abuse of discretion. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App.

2007). Based on the record before us, there was ample evidence to permit the jury to find that Aston, who was detained as an inmate in an adult correctional facility, was the same individual who knowingly had attempted to escape from that facility and knew he was not allowed to leave. Evidence that he was not in his cell as required, had fashioned gloves out of prison blankets, and had traversed multiple fences equipped with razor wire, only to find himself in "no man's land," an area with an insurmountable fence, more than sufficiently supports the jury's finding of guilt. Therefore, the trial court properly denied Aston's motion for judgment of acquittal.

¶5 Aston also argues the trial court's ordering him shackled[1] at trial, over his objection, prevented him from "engag[ing] the jury and fairly present[ing] his examination of witnesses and evidence," ultimately "taint[ing]" the verdict. He contends the court alternatively could have ordered him to wear a stun belt, an option that would have made him appear less threatening to the jury. The court did not tell the jury why Aston, who was not dressed in prison garb, had been incarcerated, but explained that, for security reasons, he would not be permitted to move around the courtroom. However, at the beginning of his opening statement, Aston himself told the jury, "I'm going to stay seated . . . I've got chains on."

¶6 Because Aston was charged with escape, we infer the court viewed him as an escape risk and determined he needed to remain shackled during trial for security reasons. *See State v. Watson*, 114 Ariz. 1, 11, 559 P.2d 121, 131 (1976) (trial court has

[1]Although Aston states he was ordered to wear shackles, the record reflects he wore a leg brace instead. For purposes of his argument, this is a distinction without a difference.

discretion to order restraints on a prisoner when "necessary to prevent escape or to maintain order in the courtroom"). Moreover, if Aston had not told the jury he was shackled, the record is not clear the jury would have been aware of this fact. *See State v. Gomez*, 211 Ariz. 494, ¶¶ 43-46, 123 P.3d 1131, 1140 (2005), *quoting Deck v. Missouri*, 544 U.S. 622, 635 (2005) (convicted defendant should not be visibly shackled in front of jury absent justification of "indisputably good reasons" for doing so). Accordingly, we reject Aston's argument that he was denied a fair trial because he was shackled at trial.

¶7 Finally, Aston argues he was prejudiced by the trial court's denial of his request for a continuance to avoid negative "fallout" related to media coverage of prisoners who had just escaped from a Kingman prison, and he thus was denied "any semblance of a fair trial." In rejecting Aston's request, the court stated it could assure a fair trial by asking appropriate questions of the jury on voir dire, and noted, "It is not as if the State is able to prove that . . . you did anything other than escape, not like you hurt anybody or that kind of thing, it is really not similar to what is going on in this manhunt throughout the country." As promised, during voir dire, the court advised the jury:

> There's been, as I'm sure you're aware over the last couple weeks, a lot of press coverage of some men that escaped from a prison in Arizona, and I need to ensure [sic] that whatever you've heard or read about is not going to in any way affect your opinion of Mr. Aston's case. In other words, Mr. Aston's case is separate and distinct from anything that's happened anywhere else, and Mr. Aston is accused of attempting to escape, not actually escaping.
>
> But I want to make sure that whatever you've read or heard about what's been going on over the last couple of weeks is not in any way going to interfere with your ability to

> be fair and impartial in Mr. Aston's case since Mr. Aston is accused of attempting to escape from a correctional facility.

When asked, none of the jurors indicated that the unrelated incident would affect their ability to be fair and impartial in Aston's case. We thus reject this argument. In addition, to the extent Aston argues the jury was "willing to overlook elements of the crime" because of the publicity from the Kingman escape, the record simply does not support his contention.

¶8 We have reviewed the entire record and have searched it for error pursuant to our obligation under *Anders*. Having found none, we affirm Aston's conviction and sentence.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge