

NOTE: 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. 31.34



DIVISION ONE
FILED: 07/10/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0262
)
Appellee,)
) DEPARTMENT A
v.)
) **MEMORANDUM DECISION**
BENITO ANORVE-CANDELA,)
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-178640-001 DT

The Honorable Michael D. Jones, Judge (Retired)

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Division
Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

Law Office of Nicole Farnum Phoenix
By Nicole T. Farnum
Attorneys for Appellant

T I M M E R, Judge

¶1 Benito Anorve-Candela appeals from his conviction and resulting sentence after a jury found him guilty of second-degree murder. He argues the trial court erred by (1) allowing the jury to find as an aggravator that he was in the United States illegally at the time of the offense, (2) using the multiple-victims factor both as an aggravator and as a justification for consecutive sentences, and (3) imposing a more severe sentence after a new trial than the court imposed after his first trial. For the following reasons, we affirm.

BACKGROUND¹

¶2 This appeal follows our reversal of Anorve-Candela's conviction of first-degree murder after we found that the trial court erred by not instructing the jury on the lesser-included offense of second-degree murder on the charge of first-degree murder (count 1). *State v. Anorve-Candela*, 1 CA-CR 08-1087, 2010 WL 1872867, at *4, ¶ 14 (Ariz. App. May 11, 2010). We affirmed his other convictions and sentences for attempted first-degree murder (counts 2 and 3), and misconduct involving weapons (counts 4 and 5) and remanded for a new trial on count 1. *Id.* at *7, ¶ 20.

¹ The events comprising the offenses charged against Anorve-Candela are set forth in this court's prior decision and are not repeated in this decision. *State v. Anorve-Candela*, 1 CA-CR 08-1087, 2010 WL 1872867 (Ariz. App. May 11, 2010).

¶13 At the new trial, the court instructed the jury on first-degree murder, second-degree murder, and manslaughter. The jury found Anorve-Candela guilty of second-degree murder. The jury also found two aggravators: he was in the country illegally at the time of the offense, a statutory aggravator pursuant to Arizona Revised Statutes ("A.R.S.") § 13-701(D)(21) (West 2012),² and the offense involved multiple victims in a single incident. At sentencing, the court found as additional aggravators that the victim's family had been harmed and that Anorve-Candela had lied during his testimony. The court found as mitigating circumstances that he was intoxicated at the time of the offense, and he had no criminal history. The court found the aggravating circumstances outweighed the mitigating circumstances and sentenced Anorve-Candela to an aggravated term of 22 years' imprisonment to be served consecutively to his sentences previously imposed for counts 2 through 5. This timely appeal followed.

DISCUSSION

I. Section 13-701(D)(21) aggravator

¶14 Anorve-Candela first argues the trial court erred by failing to dismiss the § 13-701(D)(21) aggravator because

² At sentencing the trial court stated the aggravator was listed under A.R.S. § 13-701(D)(21). At the time of the crime's commission, however, the language was listed under A.R.S. § 13-702(C)(21) (West 2007). The mistaken citation is inconsequential.

insufficient evidence supported the jury's finding he was in the United States illegally when he committed the offense. We review for an abuse of discretion. See *State v. Carlos*, 199 Ariz. 273, 276, ¶ 7, 17 P.3d 118, 121 (App. 2001).

¶15 In considering a sufficiency-of-the-evidence claim, we review the record to determine whether substantial evidence supports the jury's findings, viewing the facts in the light most favorable to sustaining the jury's decision. *State v. Gunches*, 225 Ariz. 22, 25, ¶ 14, 234 P.3d 590, 593 (App. 2010). Evidence is sufficient when it is more than a mere scintilla and is such proof as could convince reasonable persons of the defendant's guilt beyond a reasonable doubt. *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981).

¶16 Immediately after his arrest, Anorve-Candela told a police detective in a recorded statement that he was in this country illegally. The State presented this evidence at the aggravation phase, no contrary evidence was presented, and the jury found the aggravator. Anorve-Candela argues the corpus delicti doctrine prohibits convictions based solely on a defendant's statement alone. "The doctrine provides that before an uncorroborated confession is admissible as evidence of a crime, the state must establish . . . that a certain result has been produced and that someone is criminally responsible for that result." *State v. Scott*, 177 Ariz. 131, 142-43, 865 P.2d

792, 803-04 (1993) (internal citation and quotation marks omitted). But our supreme court has expressly held that the doctrine is inapplicable at the sentencing phase, *id.* at 143, 865 P.2d at 804, so we reject Anorve-Candela's argument on this basis alone. Because Anorve-Candela's statement was more than a mere scintilla of evidence and could convince reasonable persons of his status at the time of the offense, substantial evidence exists to support the jury's findings. See *id.* holding defendant's admission that he committed murder in expectation of pecuniary gain was sufficient by itself to prove the aggravating factor of pecuniary gain). The trial court did not commit error by failing to dismiss the § 13-701(D)(21) aggravator.

II. Consecutive sentences

¶7 At sentencing, the court explained it imposed a consecutive sentence in light of "the number of victims that were involved and additionally not only the seriousness of the injuries to these victims but the possibility that the injuries could have been much more serious by [Anorve-Candela's] reckless aiming and obvious intention to injure the people." Anorve-Candela briefly argues the trial court erred by using the multiple-victim factor as both an aggravator and as part of its decision to impose consecutive sentences. Because Anorve-Candela failed to raise this objection to the trial court, he has waived it, and we review only for fundamental error. *State*

v. Gendron, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). To gain relief under this standard of review, Anorve-Candela must prove error occurred, the error was fundamental, and he was prejudiced by the error. *State v. Henderson*, 210 Ariz. 561, 568, ¶¶ 23-24, 26, 115 P.3d 601, 608 (2005). Error is fundamental if it reaches the foundation of the defendant's case or removes an essential right to the defense. *State v. McGann*, 132 Ariz. 296, 298, 645 P.2d 811, 813 (1982).

¶18 Anorve-Candela cites *State v. Alvarez*, 205 Ariz. 110, 67 P.3d 706 (App. 2003) as support for his argument but fails to explain its application to this case. In *Alvarez*, this court concluded that in some circumstances a court cannot use the same factor as both a sentence aggravator and a sentence *enhancer*. *Id.* at 115-16, ¶¶ 17-18, 67 P.3d at 711-12. But sentence enhancers are unrelated to a court's decision whether a particular sentence should be served consecutively or concurrently. *Id.* at 112, ¶ 4 n.1, 67 P.3d at 708 n.1 ("Sentence enhancement elevates the entire range of permissible punishment"). We are not aware of any authority holding that the trial court cannot consider the same factor as both an aggravator and as a reason to refrain from ordering concurrent sentences. See A.R.S. § 13-711 (West 2012)³ ("[I]f multiple

³ Absent material revision after the date of an alleged offense, we cite a statute's current version.

sentences of imprisonment are imposed on a person at the same time, the sentence or sentences imposed by the court shall run consecutively unless the court expressly directs otherwise, in which case the court shall set forth on the record the reason for its sentence.”). Regardless, the court’s decision to refrain from imposing concurrent sentences also rested on the seriousness of the victims’ injuries and the possibility of even more dire consequences; Anorve-Candela does not challenges these bases. We do not discern any error, much less fundamental error.

III. Severity of new sentence

¶9 Anorve-Candela finally contends his sentence is illegal because it violates Arizona Rule of Criminal Procedure (“Rule”) 26.14. Because Anorve-Candela failed to object or otherwise raise the issue with the trial court, we review only for fundamental error. *Gendron*, 168 Ariz. at 154, 812 P.2d at 627.

¶10 Rule 26.14 provides that when a sentence has been set aside on appeal, the trial court cannot impose a more severe sentence for the same offense unless one of several exceptions is met. When evaluating whether a new sentence is more severe than the original sentence, we consider the aggregate sentences imposed against a defendant for all convictions. See *State v. Smith*, 162 Ariz. 123, 125-26, 781 P.2d 601, 603-04 (App. 1989)

(analyzing relative sentence severity by considering total sentences).

¶11 We need not determine whether one of the exceptions to Rule 26.14 applies because Anorve-Candela's new sentence is not more severe than the original sentence. The court originally sentenced Anorve-Candela to life imprisonment with no possibility of parole for 25 years for count 1, 12 years' imprisonment each for counts 2 and 3, and 2.5 years' imprisonment each for counts 4 and 5. The court ordered the sentences for counts 1, 3, 4, and 5 be served concurrently with one another and the sentence for count 2 be served consecutive to count 1. But for the reversal of the conviction and sentence on count 1, Anorve-Candela would have initially served his life sentence concurrently with his lesser sentences for counts 3, 4, and 5, and then served the sentence for count 2. Thus, his original aggregate sentence was life plus 12.

¶12 After retrial, the court sentenced Anorve-Candela to 22 years' imprisonment for count 1 to be served consecutively to counts 2, 3, 4, and 5. Under his new sentence, Anorve-Candela must initially serve 12 years for count 2, then serve 12 years total for counts 3, 4, and 5, and then serve 22 years for count 1. Adding these terms together, the new aggregate sentence is 46 years. Because 46 years is shorter in duration than a life

sentence plus 12 years, Anorve-Candela's new sentence is not more severe than his original sentence.

¶13 Anorve-Candela nevertheless argues his new sentence is more severe because he was eligible for parole after serving 25 years. Thus, assuming he would have been paroled at the 25-year mark, Anorve-Candela's aggregate sentence would have been 37 years' imprisonment. Although this scenario is possible, it does not alter the fact that his sentence was a life term with no guarantee of release after 25 years. We must compare the actual sentences imposed to determine if the court imposed a more severe sentence after the new trial and cannot speculate whether Anorve-Candela would have procured an earlier release under the original life sentence or will do so in serving his current sentences. After comparing the sentences, we conclude the court did not impose a more severe sentence after the second trial and therefore did not violate Rule 26.14.

¶14 Anorve-Candela also argues his sentence deprives him of due process. Because he fails to develop this argument, he has waived it. *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (holding that failure to develop legal argument waives argument on appeal); see also Ariz. R. Crim. P. 31.13(c)(1)(vi) (requiring appellant's brief to include a concise argument containing the party's contentions and references to supporting authorities). Nevertheless, our review

of the record does not reveal a deprivation of due process because, as previously explained, the court did not impose a more severe sentence on Anorve-Candela. See generally *Alabama v. Smith*, 490 U.S. 794. 798-99 (1989) (discussing due process violation of vindictive sentencing only in the context of revised sentences that are more severe than the original sentences).

CONCLUSION

¶15 For the foregoing reasons, we affirm Anorve-Candela's conviction and sentence on count 1.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Philip Hall, Presiding Judge

/s/
Donn Kessler, Judge