

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

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 10/22/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

STATE OF ARIZONA, ) No. 1 CA-CR 12-0652  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
JOHN R. REYNA, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Apache County

Cause No. S0100CR201100280

The Honorable Michala M. Ruechel, Judge Pro Tempore

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
by Joseph T. Maziarz, Chief Counsel  
Criminal Appeals Section  
and William Scott Simon, Assistant Attorney General  
Attorneys for Appellee

Emily L. Danies, Attorney at Law Tucson  
Attorney for Appellant

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**K E S S L E R**, Judge

¶1 John Rene Reyna appeals his conviction and sentence for sexual assault, a class 2 felony. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 13-4031

(2010), and -4033(A)(1) (2010).<sup>1</sup>

## DISCUSSION

### I. Repetitive Offender Sentencing

¶2 Reyna argues that the superior court improperly sentenced him as a repetitive offender in light of the State's failure to provide the required pretrial notice of its intent to use his prior convictions to enhance his sentence. The superior court found that Reyna had notice that the State intended to use his prior convictions to aggravate his sentence, and "[t]he fact that they are using them as historical priors is not a surprise." The court subsequently sentenced Reyna to 25 years' incarceration pursuant to A.R.S. § 13-1406 (2010), a sentence enhanced by two prior historical felonies.

¶3 Section 13-703(N) (Supp. 2012), provides enhanced penalties for repetitive offenders "if an allegation of prior conviction is charged in the indictment or information," or "at any time [twenty days or more] before the date the case is actually tried." The statutory requirement and constitutional guarantees of due process require the pretrial notice to ensure that defendants have notice of the punishments they face should they choose to proceed to trial. *State v. Benak*, 199 Ariz. 333, 336-37, ¶¶ 13-14, 18 P.3d 127, 130-31 (App. 2001). Defendants

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<sup>1</sup> We cite the current version of applicable statutes because no revisions material to this decision have since occurred.

are denied adequate notice if they are "misled, surprised or deceived in any way by the allegations of prior convictions." *Id.* at 337, ¶ 16, 18 P.3d at 131 (internal quotation marks and citation omitted). "[A] defendant is not prejudiced by noncompliance with [former] A.R.S. § 13-604(K) [now A.R.S. § 13-703(N)] provided he is on notice before trial that the prosecution intends to seek the enhanced punishment provisions of the statute." *State v. Williams*, 144 Ariz. 433, 442, 698 P.2d 678, 687 (1985); see *State v. Bernal*, 137 Ariz. 421, 424, 671 P.2d 399, 402 (1983) (holding that state provided adequate notice of intent to use prior conviction by noting intent in discovery materials produced two months prior to trial). We will affirm the superior court's ruling if legally correct for any reason. *State v. Boteo-Flores*, 230 Ariz. 551, 553, ¶ 7, 288 P.3d 111, 113 (App. 2012).

¶4 The information in this case did not contain the necessary allegation. However, the State's "Allegation of Aggravating Circumstances" filed six months before trial listing Reyna's four prior convictions, advised that "Defendant is subject to sentencing under the provisions of A.R.S. § 13-703(I) [(Supp. 2012)]."

¶5 Section 13-703(I) provides enhanced sentences for category 2 repetitive offenders, those who have one historical prior felony. See A.R.S. § 13-703(B)(2). The State's notice

that Reyna was subject to sentencing pursuant to section 13-703(I) provided sufficient notice that the State intended to seek an enhanced sentence based on the existence of one prior historical felony conviction. Thus, Reyna was on notice from this pleading that, if convicted, he could face a sentence of 23.1 years' incarceration. See A.R.S. § 13-703(I).<sup>2</sup>

¶16 The selection of a twelve-person jury to try his case, however, indicates that Reyna was on notice that the State sought to enhance his sentence with two prior historical felonies, for a potential sentence of 35 years' incarceration. See A.R.S. § 13-703(J), (C). Article 2, Section 23, of the Arizona Constitution requires that "[j]uries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons." See also A.R.S. § 21-102(A) (2013). In all other criminal cases, the jury "shall consist of eight persons." A.R.S. § 21-102(B). A defendant has a right to a twelve-person jury only if he faces death or imprisonment for 30 years or more, which in this case was possible only if the court used two prior convictions to enhance his sentence. See A.R.S. § 13-703(J), (C).

¶17 Moreover, four months before trial in this case, the superior court noted in a minute entry that the parties

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<sup>2</sup> In 2012, A.R.S. § 13-703(I) was amended to change the aggravated term for a class 2 felony from 23.1 to 23 years' incarceration.

discussed the "range of sentencing." The precise range is not specified by the court in this minute entry. We presume a transcript of the hearing, which was not provided to this Court on appeal, supported the action of the superior court. See *State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982). Under these circumstances, the court did not err in finding that Reyna had adequate notice before trial that the State sought to enhance his sentence with his historical prior felony convictions. See *Williams*, 144 Ariz. at 442, 698 P.2d at 687; *Benak*, 199 Ariz. at 337, ¶¶ 16-18, 18 P.3d at 131.

## **II. Motion for Mistrial**

¶8 Reyna next argues that the superior court abused its discretion by denying his motion for mistrial after a detective testified that, when she interrogated Reyna, he was "in custody for something separate than what I was . . . talking to him about." The court immediately struck the remark, but denied Reyna's motion for mistrial, concluding that because "it was a passing statement that was stopped quickly," without bringing "undue attention to it," there was no probability that the remark would have influenced the jury. The court also instructed the jury, as Reyna requested, to "disregard the statement when reaching the verdict in your case."

¶9 A declaration of mistrial "is the most dramatic remedy for trial error and should be granted only when it appears that

justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (internal quotation marks and citation omitted). In determining whether to grant a mistrial, a court should consider: (1) whether the testimony called the jurors' attention to "matters that they would not be justified in considering" in reaching a verdict; and (2) the probability under the circumstances that the testimony influenced the jurors. *State v. Bailey*, 160 Ariz. 277, 279, 772 P.2d 1130, 1132 (1989). We review the superior court's denial of a motion for mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000).

¶10 Having heard the unsolicited remark and the immediate objection, the superior court was in the best position to determine whether the jury here was actually influenced by the remark. *See id.* We cannot say that the court abused its discretion in finding the remark did not influence the jury. Moreover, the court struck the improper remark immediately and later instructed the jury to ignore it. Absent any indication in the record that the jury failed to heed this instruction, we presume the jury followed it. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). On this record, reversal is not required.

**CONCLUSION**

¶11 For the foregoing reasons, we affirm Reyna's conviction and sentence.

/S/  
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DONN KESSLER, Judge

CONCURRING:

/S/  
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ANDREW W. GOULD, Presiding Judge

/S/  
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MICHAEL J. BROWN, Judge