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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

BRANDON KARL McCABE, *Appellant*.

No. 1 CA-CR 15-0582
FILED 4-4-2017

Appeal from the Superior Court in Maricopa County
No. CR2013-101575-001
The Honorable Karen A. Mullins, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Linley Wilson
Counsel for Appellee

Brown & Little, P.L.C., Tempe
By Matthew O. Brown
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Jon W. Thompson joined.

H O W E, Judge:

¶1 Brandon Karl McCabe appeals his sentences for attempted first-degree murder and aggravated assault. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Late one evening in January 2013, McCabe rode his bicycle down a dimly lit street. A Phoenix Police officer patrolling the area saw McCabe and noticed that the bicycle did not have a light. Because Arizona law requires bicycles to have a light on when ridden at night, the officer turned on his patrol car's overhead lights and approached McCabe to stop him. McCabe did not stop, however, so the officer pulled up next to him, rolled his window down, identified himself as a police officer, and asked McCabe to stop.

¶3 When McCabe stopped, the officer told him that he needed to have a light on his bicycle. McCabe quickly spun around, reached into his pocket, and pulled out a small flashlight. The officer then asked McCabe for his name. McCabe did not respond, but instead began looking around in all directions and repeated that he did not do anything wrong. He then threw down his bicycle and began running away from the police officer.

¶4 Soon after he took off, McCabe lost his footing and fell in the middle of the street. The police officer caught up to him and, attempting to control and arrest McCabe, used his foot to push McCabe's shoulder against the ground. But even with the police officer's foot on his back, McCabe tried to push up off the ground. The officer then laid on McCabe, using his body weight to control him. As the officer tried to grab McCabe's arm and bring it behind his back, McCabe reached into his waistband. Not knowing what McCabe was reaching for, the officer tried to push off of McCabe to stand up, but before he could, McCabe pulled out a gun and shot the officer in the face. The bullet's impact caused the officer to fall to his back, where he laid disoriented from his injury. Approximately seven seconds after the officer

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fell to the ground, McCabe fired an additional four shots toward him from about ten feet away, striking him in the chest and back. The officer sat up and fired back at McCabe, who then began running down the street away from the officer.

¶5 Additional police officers arrived to the scene almost immediately and with the help of a K-9 officer found McCabe hiding in a backyard shed. Despite McCabe's continuing resistance, the officers arrested him. As a result of the gunshots, the officer suffered serious injury to his jaw, including fractures and permanent nerve damage, and scarring from a bullet that entered through his hip and had to be surgically removed. The State charged McCabe with attempted first-degree murder, aggravated assault, misconduct involving weapons, resisting arrest, and first-degree criminal trespass.

¶6 McCabe pled not guilty and was tried by a jury. After both the State and McCabe presented evidence, the parties and the court convened to finalize the final jury instructions. The court noticed that its proposed instructions excluded the definition of "assault," a necessary element of the aggravated assault charge. The court then stated that it would include the definition in the final jury instructions. But when the court read the instructions to the jury, it omitted the assault definition. McCabe did not object to the court's omission before the court dismissed the jury to deliberate.

¶7 While the jury deliberated, the court received a question from the foreperson asking: "What is the clear, legal definition of [assault]?" The trial court conferred with the State and McCabe about the question, admitting that it had mistakenly failed to put the definition in its instructions. The parties agreed that they, too, missed the court's omission, but agreed that the court should provide the jury with the definition pursuant to A.R.S. § 13-1203(A) and that of "physical injury" pursuant to A.R.S. § 13-105(33). At the end of its deliberation, the jury convicted McCabe of all charged offenses.

¶8 In its pre-sentencing memorandum and at the subsequent sentencing hearing, the State asked that the trial court impose consecutive sentences for the aggravated assault and attempted first-degree murder convictions. But McCabe opposed the request, arguing instead for concurrent sentences because sentencing him to consecutive terms for an incident that occurred "in approximately 30 seconds" would not be fair. The trial court agreed with the State that the sentences should run consecutively, finding that the two charges stemmed from separate and

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distinct acts. Accordingly, the trial court sentenced McCabe to consecutive terms of 31 years' imprisonment, respectively, for attempted first-degree murder and aggravated assault, and concurrent terms of 10 years' imprisonment for misconduct involving weapons, 3.75 years' imprisonment for resisting arrest, and 3.75 years' imprisonment for criminal trespass.

¶9 McCabe did not file a timely notice of appeal, but requested that the trial court allow him to file a delayed notice. The trial court granted McCabe's request.

DISCUSSION

1. Jury Instructions

¶10 McCabe argues that the trial court improperly instructed the jury on the aggravated assault charge by omitting an essential element of the offense. But because the jury received the definition of assault before returning its verdict convicting McCabe, no error occurred. Despite discussing the omission of the definition with counsel and agreeing to add it to the final instructions, the court failed to do so. During its deliberation, however, the jury asked the court for the "clear, legal definition of assault" on their own. When conferring about the question, the parties and the court all admitted that they had missed the court's omission when it read the instructions to the jury, and agreed to provide the statutory definition pursuant to A.R.S. § 13-1203(A)(1). The court did so. The trial court also provided the definition of "physical injury." The jury therefore had these definitions while considering its verdict. On this record, no error occurred.

2. Sentencing

¶11 McCabe next argues that the trial court improperly imposed consecutive sentences for his attempted first-degree murder and aggravated assault convictions because they constituted a single act. We review *de novo* whether the trial court's order imposing consecutive sentences. *State v. Cotten*, 228 Ariz. 105, 108 ¶ 8, 263 P.3d 654, 657 (App. 2011). Because McCabe's convictions arose from multiple acts, the trial court did not err by imposing consecutive sentences.

¶12 In Arizona, "an act . . . which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." A.R.S. § 13-116. In determining whether a defendant has committed a single act pursuant to this statute, the courts consider three factors. *State v. Carlson*, 237 Ariz. 381,

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400 ¶ 80, 351 P.3d 1079, 1098 (2015). First, the court must decide which of the two crimes is the “ultimate charge – the one that is at the essence of the factual nexus and that will often be the most serious of the charges.” *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). The court must then consider the facts of each crime separately and “subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge.” *Id.* If the remaining evidence satisfies the secondary crime’s elements, the offenses may constitute multiple acts. *Id.* In such cases, consecutive sentences are permissible.

¶13 Second, the court then considers whether “it was factually impossible to commit the ultimate crime without also committing the secondary crime” given the entire transaction. *Id.* If not, the offenses may constitute multiple acts. But if so, the court considers a third factor: whether the defendant’s conduct in committing the secondary crime “caused the victim to suffer an additional risk of harm beyond that inherent ultimate crime.” *Id.* If the conduct caused an additional harm, then the court should find that the defendant committed multiple acts.

¶14 Although only two factors are necessary to properly impose consecutive sentences, *State v. Urquidez*, 213 Ariz. 50, 53 ¶ 10, 139 P.3d 1177, 1180 (App. 2006), all three factors show that McCabe committed multiple acts for which consecutive sentences were appropriate. The ultimate charge is attempted first-degree murder. After subtracting the factual evidence necessary to convict on that charge, sufficient evidence remains to convict McCabe of aggravated assault. To commit attempted first-degree murder, a person must intentionally commit an act that is any step in a course of conduct planned to culminate the offense of first-degree murder. *See* A.R.S. § 13-1001(A)(2). A person commits first-degree murder if, “intending or knowing that the person’s conduct will cause death, the person causes the death of another person . . . with premeditation.” A.R.S. § 13-1105(A)(1). The facts necessary to support the attempted first-degree murder charge are that McCabe attempted to cause the police officer’s death by purposefully stopping his flight from the encounter and shooting at the officer from approximately 10 feet away as the officer lay disoriented on the ground. At least two bullets struck the officer in the chest and back. McCabe began this round of shots – each of which was a step in a course of conduct planned to culminate into the officer’s death – several seconds after the officer had fallen back from the impact of the first gunshot wound.

¶15 The evidence supporting McCabe’s conviction of attempted first-degree murder is separate and distinct from the evidence supporting his conviction for aggravated assault. A person commits aggravated assault

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by intentionally, knowingly, or recklessly causing injury to another person or placing another person in reasonable apprehension of imminent physical injury by using a deadly weapon. A.R.S. § 13-1203(A)(1), (2), -1204(A)(2). Subtracting the evidence necessary to convict for attempted first-degree murder, sufficient evidence remains to also convict McCabe of aggravated assault. The evidence showed that while the officer was laying on McCabe's back, attempting to gain control of him by grabbing his wrists, McCabe pushed up onto his hands and knees, reached into his waistband, and pulled out a gun. Before the officer had time to react, McCabe fired the gun, shooting the officer in the face. The impact caused the officer to fall onto his back, and caused serious injuries and permanent nerve damage to his jaw. This evidence was not necessary to prove the attempted first-degree murder charge. Thus, because sufficient evidence exists to separately convict McCabe of both the ultimate and secondary charges, the first factor is met.

¶16 In addition, given the entire transaction, it was not factually impossible to commit attempted first-degree murder without also committing aggravated assault. McCabe could have stopped after shooting the officer in the face (the aggravated assault) and did not need to shoot at him five more times, hitting him in the chest and the back (the attempted first-degree murder). Moreover, McCabe had time to consider his actions because seven seconds elapsed from the shot to the officer's face to the shots to his chest and back. *See State v. Forde*, 233 Ariz. 543, 574 ¶ 139, 315 P.3d 1200, 1231 (2014) (concluding that consecutive sentences were appropriate because the defendant's attempted murder and aggravated assault offenses occurred at different times during the incident). Thus, because committing one act did not require McCabe to commit the other, the second factor also suggests that he committed multiple acts punishable by consecutive sentences.

¶17 Finally, although we conclude that the trial court properly imposed consecutive sentences based on the satisfaction of the first two factors, the third factor also supports the court's imposition of consecutive sentences. McCabe's conduct in committing aggravated assault caused the officer a risk of harm additional to harm caused by the attempted murder. McCabe created one risk of harm—and actual harm—to the officer by pulling out a gun from his waistband and firing it toward the officer while they wrestled on the ground. Because the officer did not have much time to react to McCabe's motions, he was within arm's reach of McCabe when the gunshot struck him. This harm was separate from and in addition to the risk of death that McCabe created by firing the additional five shots at the officer. Accordingly, because all three factors weigh in favor of viewing the

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two offenses as separate and discrete acts, the trial court did not err by imposing consecutive sentences under A.R.S. § 13-116.

CONCLUSION

¶18 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA