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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

DOUGLAS EDWARD FUQUA, *Appellant*.

No. 1 CA-CR 16-0289
No. 1 CA-CR 16-0292 PRPC
Consolidated
FILED 8-22-2017

Appeal from the Superior Court in Coconino County
No. S0300CR201100315
The Honorable Dan R. Slayton, Judge

AFFIRMED; REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

David Goldberg Attorney at Law, Fort Collins, Colorado
By David Goldberg
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 Douglas Edward Fuqua appeals the trial court's sentence and petitions this Court for review of the partial summary dismissal of his petition for post-conviction relief. For the following reasons, we affirm the sentence, and grant review but deny relief on the petition for review.

FACTS AND PROCEDURAL HISTORY

¶2 This consolidated appeal arises from Fuqua's third sentencing proceeding and from the trial court's partial summary dismissal of claims he made in his petition for post-conviction relief.

¶3 Following a trial in 2011, a jury convicted Fuqua of two counts of misdemeanor assault (Counts 1 and 4), and four felonies: two counts of aggravated assault (Counts 2 and 5), one count of kidnapping (Count 3), and one count of criminal damage of property valued at between $2,000 and $10,000 (Count 6). Fuqua committed each of these offenses against his then-wife. The jury found that Counts 1 through 4 were domestic violence offenses, and Counts 2 and 5 were dangerous offenses.

¶4 This Court summarized the facts in a memorandum decision. *See State v. Fuqua* ("*Fuqua I*"), 1 CA-CR 12-0088, 2013 WL 1174094 (Ariz. App. Mar. 21, 2013). One night in 2011, Fuqua became angry when dinner was late, and even angrier when his wife informed him that her son would be coming into town for her birthday. *Id.* at * 1 ¶ 2. While they were in bed that same night, Fuqua began to beat his wife. *Id.* at ¶ 3. The next morning, Fuqua's wife, while talking to her daughter on the phone, fled in her car down a Forest Service road. *Id.* at ¶¶ 6–7. Fuqua jumped on his all-terrain vehicle ("ATV") and chased her, hitting the back of her car until she lost control of it and hit a tree. *Id.* at ¶ 7. He then forced her on the back of his ATV, pulling her hair and beating her on the way back to the house. *Id.* at ¶ 7. Once inside the house, he continued beating her, telling her that he would kill her. *Id.* at ¶ 8. He retrieved his rifle, loaded it, pointed it at her forehead and stated that he was going to "blow [her] brains out" because

he was "not going back to prison for you or anybody else." *Id.* at ¶ 8. Alerted by the wife's daughter, sheriff's officers arrived, separated the two, and arrested Fuqua. *Id.* at ¶ 8.

1. First Sentencing

¶5 At the first sentencing in January 2012, the trial court sentenced Fuqua to a total of 36.5 years' imprisonment "flat-time," by imposing consecutive terms of imprisonment on each of his convictions. The court awarded Fuqua 277 days of pre-sentence incarceration credit without specifying to which count or counts it would apply. In the sentencing minute entry, however, the court awarded Fuqua 277 days' pre-sentence incarceration credit on each of the six sentences, terminally disposing of the two misdemeanor convictions for which the court had imposed 180-day jail terms. The State did not seek to correct this error in the trial court or in a direct appeal or cross appeal. *See Fuqua I*, 2013 WL 1174094 at * 8 ¶ 37. This court affirmed Fuqua's convictions and sentences on direct appeal. *Id.* at * 1 ¶ 1.

¶6 The Arizona Supreme Court, however, granted relief on Fuqua's petition for review, in which he argued that this Court had improperly rejected his claim that the trial court erred by imposing "flat-time" prison sentences for Counts 2, 3, 5, and 6. The supreme court reversed and remanded for resentencing on Counts 2, 3, 5, and 6.

2. Second Sentencing

¶7 At his second sentencing in February 2014, the trial court found that the supreme court had "directed [it] to impose the 85% sentencing range, rather than conduct a full re-sentencing hearing," and ordered that Fuqua serve no less than 85% of the term imposed in Counts 2, 3, 5, and 6. Fuqua requested that the court grant him 1,018 days' pre-sentence incarceration credit on each of the four sentences and vacate the imposition of consecutive sentences. After the State objected, however, Fuqua stated that he had no objection to the pre-sentence incarceration credit being applied to the sentence for Count 2, which he was presently serving. The trial court accordingly ordered that Fuqua be credited an additional 741 days' pre-sentence incarceration on Count 2, leaving in place, however, the 277 days of pre-sentence incarceration originally credited to all four sentences.

¶8 Fuqua again appealed, arguing that the supreme court's mandate for resentencing on each of the sentences ordered to be served day for day, or "flat-time" required a "full resentencing," and that the trial court

erred when it "simply corrected that portion of the previous sentence found to be illegal" by imposing "85 percent time" sentences. *State v. Fuqua* ("*Fuqua II*"), 1 CA-CR 14-0201, 2015 WL 392802, at * 1 ¶ 1 (Ariz. App. Jan. 27, 2015). This Court concluded that the trial court had properly followed the mandate and consequently affirmed the sentences. *See id.*

¶9 Fuqua then petitioned for post-conviction relief in September 2015, raising numerous arguments. The trial court summarily denied relief on several of the claims, but after hearing argument, granted relief on Fuqua's claim that the original sentencing court had improperly found the existence of two historical felony convictions, and accordingly had illegally sentenced him as a category three repetitive offender on Counts 2 and 3. The court requested further argument on whether it was bound by the presumptive, consecutive sentences imposed in the first sentencing.

3. Third Sentencing

¶10 At his third sentencing in April 2016, the trial court sentenced Fuqua to non-repetitive, consecutive terms of imprisonment on Counts 2, 3, 5, and 6, totaling 21 years to be served at 85% time. In its oral pronouncement, the trial court awarded Fuqua 1,796 days of pre-sentence incarceration credit only on Count 2, and ordered that "[a]ll counts will run consecutive to each other." On defense counsel's inquiry, the court confirmed that it was awarding "zero days" of pre-sentence incarceration credit on Counts 3, 5, and 6. In its sentencing minute entry and signed orders of commitment, however, the trial court credited Fuqua with 1,796 days of pre-sentence incarceration credit on each of the four sentences.

¶11 Fuqua appealed in April 2016. Three months later, after learning that the Arizona Department of Corrections was crediting Fuqua with 1,796 days of pre-sentence incarceration credit on all four sentences pursuant to the sentencing minute entry, the State moved to amend the sentencing order, arguing that it conflicted with the trial court's oral pronouncement. At Fuqua's request, this Court stayed the appeal pending disposition of the motion to correct the sentence pursuant to Arizona Rule of Criminal Procedure ("Rule") 24.4.

¶12 The trial court granted the State's request to correct the minute entry to remove pre-sentence incarceration credits from Counts 3, 5, and 6, to conform with its oral pronouncement awarding credit for Count 2 only. The trial court explained that "[t]he sentencing minute entry is clearly erroneous and conflicts with the clearly stated sentence credit given to the defendant by this Court."

¶13 Fuqua timely appealed from his sentences and petitioned for review from the trial court's partial denial of his petition for post-conviction review.

DISCUSSION

1. Direct Appeal

1a. Pre-sentence Incarceration Credit

¶14 Fuqua argues on direct appeal that the State waived its right to seek to correct pre-sentence incarceration credit by failing to timely appeal or cross-appeal the issue, and that the trial court lacked jurisdiction to entertain the State's motion to correct the credit. Alternatively, he argues that he is entitled to 277 days of pre-sentence incarceration credit on each of the four sentences, the amount awarded at the first sentencing. We review his claims de novo. *See State v. Burns*, 237 Ariz. 1, 28 ¶ 124 (2015); *State v. Flores*, 218 Ariz. 407, 410 ¶ 6 (App. 2008).

¶15 The State did not waive its right here to seek correction of the sentencing minute entry by failing to file a timely appeal or cross-appeal. The sentence was "complete and valid" upon oral pronouncement under Rule 26.16(a). Because the oral pronouncement imposed consecutive sentences and appropriately allocated pre-sentence incarceration credit only to Count 2, the State had nothing to appeal. Only after the State discovered that the sentencing minute entry had incorrectly allocated pre-sentence incarceration credit to all four counts, contrary to the court's announced intention, did the State have reason to challenge the sentencing minute entry. The State properly and timely made its challenge under Rule 24.4, which provides that "[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court *at any time* after such notice, if any, as the court orders." (Emphasis added.) This error clearly was the type of "clerical error" that could be corrected "at any time." *See* Ariz. R. Crim. P. 24.4; *State v. Hanson*, 138 Ariz. 296, 304 (App. 1983) ("A clerical mistake involves a failure to record accurately a statement made or action taken by the court or one of the parties.").

¶16 The trial court found that in its oral pronouncement of sentencing it had "clearly indicated that it was giving the defendant credit for presentence incarceration as to Count Two only" because it had ordered that all sentences be served consecutively. The trial court accordingly corrected the "clearly erroneous" sentencing minute entry to conform to this oral pronouncement at sentencing. In so doing, the court relied upon

the well-settled legal principle that the oral pronouncement of a sentence controls when a discrepancy between it and the written judgment exists. *See Hanson*, 138 Ariz. at 304–05.

¶17 This was not an attempt to modify an illegal sentence under Rule 24.3, and thus, the cases on which Fuqua relies for his argument that the court's amendment to the sentencing order was impermissible, and that the appropriate challenge was by appeal or cross-appeal, are inapposite. *See State v. Dawson*, 164 Ariz. 278, 286 (1990); *State v. Falkner*, 112 Ariz. 372, 373–74 (1975); *State v. Superior Court*, 124 Ariz. 288, 289 (1979); *State v. Guthrie*, 110 Ariz. 257, 258 (1974); *State v. House*, 169 Ariz. 572, 574 (App. 1991); *State v. Wood*, 115 Ariz. 182, 183 (App. 1977); *cf. In re Michelle G.*, 217 Ariz. 340, 344 ¶ 14 (App. 2008) (holding that the juvenile court lacked authority to reopen the final disposition order to enter restitution order).

¶18 Nor did the trial court lack jurisdiction to entertain the motion to amend. This Court stayed the appeal, on Fuqua's motion, to allow the trial court to resolve the pending motion to correct the sentencing minute entry pursuant to Rule 24.4. Moreover, this Court has previously rejected a similar claim that the that court lacked jurisdiction to correct a clerical error under Rule 24.4 once the notice of appeal was filed. *See Hanson*, 138 Ariz. at 304.

¶19 Finally, the third sentencing was a new sentencing prompted by Fuqua's petition for post-conviction relief, and accordingly the court was not bound by the award of 277 days in pre-sentence incarceration credit on all four counts at the first sentencing. *See State v. Thomas*, 142 Ariz. 201, 204 (App. 1984) (holding that because the trial court was not modifying previously imposed sentences, but rather was sentencing anew, it was free to impose any sentences which were legally allowable). The trial court re-sentenced Fuqua in April 2016 on all counts after partially granting his petition for review, in which he had challenged not only the repetitive sentences imposed on Counts 2 and 3, but the consecutive sentences imposed on Counts 2, 3, 5, and 6, and the presumptive sentences imposed on Counts 2, 3, and 5. At oral argument on the petition's sentencing claims, the court granted relief on the claim that Fuqua had been improperly sentenced as a repetitive offender on Counts 2 and 3, and invited additional argument on whether the court was bound by the presumptive, consecutive sentences imposed in the first sentencing.

¶20 In his subsequent sentencing memorandum, Fuqua urged the trial court to re-sentence him on all counts, arguing that the court abused its discretion by imposing consecutive sentences at the first sentencing

hearing, and—absent the improper use of the prior felonies—might have imposed mitigated sentences on Counts 2, 3, and 5. The court re-sentenced him on all counts, but again imposed presumptive sentences on Counts 2, 3, and 5, and again ordered that the sentences be served consecutively. This time, however, the trial court expressly and appropriately credited only Count 2 with the 1,796 days' pre-sentence incarceration. This was permissible because the court was not modifying the previous sentences, but had vacated those sentences and was re-sentencing Fuqua on all counts. *See McClure*, 189 Ariz. at 57; *Thomas*, 142 Ariz. at 204; Ariz. R. Crim. P. 26.14 (providing that when re-sentencing, the court may not impose a more severe sentence in pertinent part "unless . . . the original sentence was unlawful and on remand it is corrected and a lawful sentence imposed").

1b. Consecutive Sentences

¶21 Fuqua also argues that the trial court abused its discretion by imposing consecutive sentences for all convictions because the offenses in this case constituted "in large part a single episode." He asks this Court to remand with directions that the sentences for Counts 2 and 6 be imposed concurrently, and Counts 3 and 5 be imposed concurrently. We review de novo a trial court's decision to impose consecutive sentences. *State v. Urquidez*, 213 Ariz. 50, 52 ¶ 6 (App. 2006).

¶22 Arizona Revised Statutes Section 13–116 provides that "[a]n 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." In determining whether a crime is one act permitting only concurrent sentences, or multiple acts permitting consecutive sentences, the court must consider certain factors. *State v. Gordon*, 161 Ariz. 308 (1989). The court first must consider "the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge . . . . If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible." *Id.* at 315. Second, the court must consider "whether, given the entire 'transaction,' it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under A.R.S. § 13–116." *Id.* Third, we consider "whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime." *Id.* If any two of these three factors weigh in favor of viewing the crimes as multiple acts, the imposition of consecutive sentences is proper. *See Urquidez*, 213 Ariz. at 53 ¶ 10.

i. Counts 2 and 6

¶23 The trial court did not err by concluding that Counts 2 and 6 reflected multiple acts punishable by consecutive sentences. The aggravated assault conviction on Count 2, a class 3 dangerous felony, was based on Fuqua's conduct of using an ATV as a dangerous instrument to intentionally place his wife in fear of imminent physical injury. *See* A.R.S. §§ 13–1203(A)(2), –1204(A)(2). The criminal damage conviction on Count 6, a class 5 felony, was based on Fuqua's conduct of using the ATV to recklessly damage his wife's car as she was fleeing, in an amount between $2,000 and $10,000. *See* A.R.S. § 13–1602(A)(1), (B)(3).

¶24 Here, aggravated assault is the "ultimate charge" because it is the more serious of the charges. The evidence at trial established that Fuqua committed aggravated assault by chasing his wife down the dirt Forest Service road as she attempted to flee. Fuqua's wife testified that when she fled, she saw Fuqua trying to get his ATV started, and yelled to her daughter on the phone, "I need help, he is going to kill me." Her daughter testified that she sounded "terrified." Fuqua's wife stated that before she got on the road, she looked back and saw he was behind her, "trying to catch up." As he chased her down the Forest Service road on his ATV, her son-in-law heard her scream, "I am running, he is chasing me. He is going to f-ing kill me. . . . Tell my daughter I love her." He testified that she sounded "like someone who was terrified and thought they were going to die," then afterward heard a loud crash. Setting aside this evidence necessary to support the aggravated assault conviction, sufficient evidence remains to support the criminal damage conviction. The evidence supporting the criminal damage conviction was based on Fuqua's conduct in using his ATV to repeatedly ram his wife's car, causing her to lose control and hit a tree, resulting in damage to the car in an amount between $2,000 and $10,000. The first factor accordingly supports the imposition of consecutive sentences.

¶25 The second factor also supports imposition of consecutive sentences on Counts 2 and 6. Here, the facts are such that Fuqua could have committed the aggravated assault by chasing the victim without also damaging her car. Finally, although we can conclude that the trial court properly imposed consecutive sentences because the first two factors sufficiently suggest that Fuqua committed multiple acts, the third factor also supports this conclusion because the criminal damage offense caused the victim to suffer an additional risk of harm beyond that inherent in the aggravated assault charge. Thus, the trial court did not err by finding that Counts 2 and 6 reflected multiple acts punishable by consecutive sentences.

ii. Counts 3 and 5

¶26 Nor did the court err by concluding that Counts 3 and 5 reflected multiple acts punishable by consecutive sentences. The kidnapping conviction on Count 3, a class 2 non-dangerous felony, was based on Fuqua's knowingly restraining his wife with the intent to inflict death, physical injury, or to otherwise aid in the commission of a felony. *See* A.R.S. § 13–1304(A)(3). The aggravated assault conviction on Count 5, a class 3 dangerous felony, was based on his holding a rifle to her head after they had returned to his home, causing her reasonable apprehension of imminent physical injury. *See* A.R.S. §§ 13–1203(A)(2), –1204(A)(2).

¶27 Kidnapping, as the more serious felony, is the "ultimate charge" here. *See* A.R.S. § 13–1304(A)(3). The evidence at trial established that Fuqua committed the crime of kidnapping when he forced his wife onto his ATV after she hit the tree, and drove her back to the house where he continued to beat her. Setting aside the evidence necessary to support the kidnapping conviction, sufficient evidence remains to support the aggravated assault conviction in Count 5. Fuqua committed aggravated assault by pressing the muzzle of his rifle to his wife's head and threatening to kill her. The first factor accordingly supports the imposition of consecutive sentences.

¶28 The second factor also supports imposition of consecutive sentences on Counts 3 and 5. Here, the facts are such that Fuqua could have committed the kidnapping without also committing aggravated assault by pressing the muzzle of the rifle to her head. Finally, although the first two factors sufficiently support the trial court's imposition of consecutive sentences, the third factor also supports it. Here, the aggravated assault with the rifle caused the victim to suffer an additional risk of harm beyond that inherent in the kidnapping charge.

1c. Failure to Read the Trial Transcripts Before Sentencing

¶29 Fuqua also argues that the sentencing court abused its discretion because it failed to read the trial transcripts before it found consecutive sentences appropriate, "with no actual knowledge of the evidence at trial." Because Fuqua did not raise this claim at sentencing, we review for only fundamental error. *State v. Henderson*, 210 Ariz. 561, 568 ¶ 22 (2005). Fuqua cites to no authority, and we know of none, for his position that any time a resentencing occurs before a different judge than the trial judge, the sentencing judge is required to read all trial transcripts

before imposing sentence. Rather, a court does not abuse its discretion if it "fully considers the factors relevant to imposing [its] sentence." *State v. Cazares*, 205 Ariz. 425, 427 ¶ 6 (App. 2003). The court here reviewed, among other items, the original pre-sentence report, which summarized the evidence supporting the convictions, and the sentencing memoranda Fuqua submitted, which addressed application of the *Gordon* analysis. The court also heard argument from both counsel regarding the availability of consecutive sentences. The court ultimately found that "these are separate offenses." Our de novo review of the entire record similarly shows that these were separate offenses and accordingly, consecutive sentences were permissible. Under these circumstances, the court did not err, much less fundamentally err, by imposing consecutive sentences.

2. Petition for Review of Petition for Post-Conviction Relief

¶30 Fuqua also petitions this court for review of the summary dismissal of several claims in his petition for post-conviction relief. We review an order summarily dismissing a petition for post-conviction relief for abuse of discretion. *State v. Bennett*, 213 Ariz. 562, 566 ¶ 17 (2006). "A trial court may summarily dismiss a Rule 32 petition only if it finds no 'material issue of fact or law exists which would entitle the defendant to relief.'" *State v. Bowers*, 192 Ariz. 419, 422 ¶ 10 (App. 1998); Ariz. R. Crim. P. 32.6(c). We have considered the petition for review and for the following reasons, grant review but deny relief.

2a. Significant Change in the Law

¶31 Fuqua argues first that he is entitled to a new trial pursuant to Rule 32.1(g) because the Arizona Supreme Court's opinion in *State v. Ketchner*, 236 Ariz. 262 (2014), which limited expert testimony in domestic violence cases, constituted "a significant change in the law" that would probably overturn his convictions.

¶32 In *Ketchner*, the Court held that under that case's facts, the testimony of a domestic violence expert on separation violence, lethality factors, and characteristics common to domestic abusers was improper profile evidence. 236 Ariz. at 265 ¶ 19. The Court reasoned that "[t]his evidence did not explain behavior by [the victim] that might be misunderstood by a jury; indeed, the nature of her abusive relationship with Ketchner was uncontested." *Id.* Rather, the testimony "predicted an abuser's reaction to loss of control in a relationship. There was no reason to elicit this testimony except to invite the jury to find that Ketchner's character matched that of a domestic abuser who intended to kill or

otherwise harm his partner in reaction to a loss of control over the relationship." *Id.*

¶33 In Arizona, a defendant is entitled to post-conviction relief if "[t]here has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence." Ariz. R. Crim. P. 32.1(g). "A 'significant change in the law' is a 'clear break from the past.'" *State v. Shrum*, 220 Ariz. 115, 118 ¶ 15 (2009). Such change occurs, for example, "when an appellate court overrules previously binding case law" or when a "statutory or constitutional amendment representing a definite break from prior law" has occurred. *Id.* at ¶¶ 16–17. An appellate decision that is "merely the first case to address" an issue is not a "significant change in the law" for purposes of Rule 32.1(g). *See State v. Werderman*, 237 Ariz. 342, 344 ¶ 11 (App. 2015); *Shrum*, 220 Ariz. at 120 ¶ 21 ("An appellate decision is not a significant change in the law simply because it is the first to interpret a statute.").

¶34 *Ketchner* is not a significant change in the law warranting post-conviction relief under Rule 32.1(g). The supreme court's holding in *Ketchner* is consistent with prior case law because it extended the holding of *State v. Lee*, 191 Ariz. 542, 546 ¶ 18 (1998)—that profile evidence may not be used as substantive proof of guilt—to domestic violence expert testimony. *Ketchner*, 236 Ariz. at 264–65 ¶¶ 15–17 (citing *Lee* in discussing profile evidence, and noting "the admissibility of profile evidence in the context of domestic violence is an issue of first impression in Arizona"). Because it did not overrule any prior binding precedent, *Ketchner* did not constitute "a significant change in the law" under Rule 32.1(g). *See Werderman*, 237 Ariz. at 344 ¶ 11 (reasoning that "Werderman has not identified any binding precedent overruled by our supreme court in *Harris, and* we have found none," and holding that "*Harris* is not a significant change in the law."); *Shrum*, 220 Ariz. at 119, 120 ¶¶ 20, 23 (reasoning that "*Gonzalez* does not purport to overrule any prior opinion; at most, it is merely the first appellate opinion interpreting § 13–604.01 on the issue before us," and accordingly "*Gonzalez* was not a Rule 32.1(g) 'significant change in the law.'"). Thus, Fuqua is not entitled to relief, and it is not necessary to evaluate whether *Ketchner* should apply retroactively. *See Werderman*, 237 Ariz. at 343 ¶ 6. Accordingly, the trial court correctly dismissed this claim.

2b. Ineffective Assistance of Trial Counsel

¶35 Fuqua also argues that the trial court abused its discretion by summarily denying his claim that his trial counsel was ineffective for failing

to object to forms of verdict and jury instructions permitting the jury to determine dangerousness during the guilt phase of trial on Count 2 in violation of Rule 19.1. To state a colorable claim of ineffective assistance of counsel, a defendant must show not only that counsel's performance fell below objectively reasonable standards, but that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must show that a reasonable probability exists that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

¶36 Fuqua has failed to show that his counsel's performance fell below objectively reasonable standards or that he suffered prejudice. Rule 19.1(b) provides for a bifurcated procedure "[i]n all prosecutions in which a prior conviction or a non-capital sentencing allegation required to be found by a jury is alleged, *unless such conviction or allegation is an element of the crime charged* . . . ." Ariz. R. Crim. P. 19.1(b) (emphasis added). The indictment charged Fuqua with reasonable apprehension aggravated assault in Count 2 using the ATV as a dangerous instrument. For purposes of sentence enhancement, the State also alleged that Count 2 was a dangerous offense. A dangerous offense is in pertinent part "an offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." A.R.S. § 13–105(13). The use of a dangerous instrument—which also makes the offense a dangerous offense—accordingly was an element of the charged crime, so Rule 19.1(b) did not require a bifurcated proceeding. Fuqua thus could not establish that his trial counsel was ineffective for failing to object to the jury instructions and verdict form. Nor has Fuqua demonstrated that the jury could have reached a different conclusion had his counsel objected to the verdict forms, as necessary to show prejudice. The trial court accordingly did not abuse its discretion by dismissing this claim.

2c. Ineffective Assistance of Appellate Counsel

¶37 Fuqua also argues that the trial court abused its discretion by summarily dismissing his claims that his appellate counsel was ineffective for (1) failing to litigate the admissibility of testimony of the domestic violence expert; (2) failing to argue that the finding of dangerousness as to two counts was void; and (3) failing to challenge his consecutive prison sentences.

¶38 Again, to state a colorable claim of ineffective assistance of counsel, a defendant must show not only that counsel's performance fell below objectively reasonable standards, but that the deficient performance

prejudiced the defendant. *Strickland*, 466 U.S. at 687. A strong presumption exists that appellate counsel provided effective assistance. *State v. Febles*, 210 Ariz. 589, 596 ¶ 20 (App. 2005). Appellate counsel is responsible for reviewing the record and selecting the most promising issues to raise on appeal. *Id.* at ¶ 19. As a general rule, appellate counsel is not ineffective for selecting some issues and rejecting others. *State v. Bennett*, 213 Ariz. 562, 567 ¶ 22 (2006). We view the matter from counsel's perspective at the time, and recognize that "a strategic decision to winnow out weaker arguments on appeal and focus on those more likely to prevail is an acceptable exercise of professional judgment." *Febles*, 210 Ariz. at 596 ¶ 20.

¶39 Under this standard, appellate counsel was not ineffective for failing to challenge the admissibility of the expert's testimony on appeal. After reviewing briefing and hearing argument, the trial court confirmed with the prosecutor that his purpose in calling this witness is "to explain to the jury why the heck a woman would stay in this relationship," and accordingly limited the prosecutor to four questions seeking the expert's opinion, only one of which addressed the behaviors that abusers use to control the victim. This evidentiary ruling was subject to reversal only for an abuse of discretion. Appellate counsel was thus not ineffective for winnowing it out as a "weaker argument on appeal." *See Febles*, 210 Ariz. at 596 ¶ 20. The court accordingly did not abuse its discretion by dismissing this claim.

¶40 Nor was appellate counsel ineffective for failing to argue that the finding of dangerousness regarding the two aggravated assault counts during the guilt phase was "void." But because the verdict forms asking the jury to find whether the offenses were dangerous during the guilt phase were permissible and appropriate under Rule 19.1(b), Fuqua could not show prejudice. The trial court accordingly did not abuse its discretion by dismissing this claim. Finally, appellate counsel was not ineffective for failing to challenge the imposition of consecutive sentences because the imposition of consecutive sentences was permissible here. *See supra* ¶¶ 21–29. Fuqua therefore could not show prejudice. The court accordingly did not abuse its discretion by dismissing this claim.

CONCLUSION

¶41 For the foregoing reasons, we affirm Fuqua's sentences, and accept review but deny relief on his petition for review on his petition for post-conviction relief.

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