NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

SHAWN WILLIAM MALMIN, *Appellant*.

No. 1 CA-CR 16-0337
FILED 6-22-2017

Appeal from the Superior Court in Apache County
No. S0100CR201500223
The Honorable Michael D. Latham, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

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By Michael T. O'Toole
Counsel for Appellee

Law Office of Elizabeth M. Hale, Show Low
By Elizabeth M. Hale
Counsel for Appellant

MEMORANDUM DECISION

Judge Patricia A. Orozco delivered the decision of the Court, in which Acting Presiding Judge Peter B. Swann and Judge John C. Gemmill[1] joined.

O R O Z C O, Judge:

¶1 Shawn William Malmin appeals his convictions and sentences for theft of means of transportation, a class 3 felony, and a license plate violation, a class 2 misdemeanor. For the following reasons, we affirm Malmin's convictions, but vacate his sentence on the felony count and the restitution order and remand to the trial court for resentencing.

BACKGROUND

¶2 On the night of May 18, 2016, Malmin spent the night at a men's shelter in Phoenix. Julio Ramos also spent the night at the shelter, where he worked as a volunteer. When Ramos woke up on the morning of May 19, he discovered his vehicle had been stolen and called police to report the theft. John Antoine, a security guard who was working at the shelter that day, testified that earlier that morning two individuals got into an altercation near Ramos' bunk and knocked his keys onto the floor from where they had been hanging. Antoine stated he recognized Malmin and noticed him grab the keys and leave.

¶3 Two days later, Norman Brown noticed a vehicle parked on his property in St. Johns and called police. Officer Crosby responded to the call, approached the vehicle, and found Malmin covered up and sitting in the driver's seat. When Officer Crosby asked Malmin what he was doing, Malmin responded "I'm going to jail," and explained that he had a warrant for failing to report to his probation officer. Officer Crosby then discovered the vehicle identification number plate had been removed from the dash and that the license plate on the vehicle was registered to a different vehicle.

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[1] The Honorable Patricia A. Orozco and the Honorable John C. Gemmill, Retired Judges of the Court of Appeals, Division One, have been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

Police subsequently identified the vehicle as Ramos' and discovered it had been reported stolen.

¶4 A jury found Malmin guilty on both counts and that the State proved four aggravating circumstances. The court sentenced Malmin to an aggravated term of 11 years in prison on the felony count and 120 days on the misdemeanor count, to be served concurrently. Malmin was also ordered to pay restitution to the victim. Malmin timely appealed.

DISCUSSION

I. Prosecutorial Misconduct

¶5 Malmin first argues that the prosecutor committed misconduct by commenting on Malmin's post-arrest silence during closing statements. In his closing statement, the prosecutor stated:

> We heard Mr. Malmin get up earlier today for the first time anywhere, the first time ever recorded, Mr. Malmin has a story about how this all went down.
>
> . . .
>
> Mr. Malmin has had opportunity on multiple occasions to tell the police, to tell his attorney, to tell other people what happened. We never heard anything until today.

¶6 As the State points out, Malmin did not object to the prosecutor's comment in the trial court. However, even absent an objection by the defense, "prosecutorial comments on a defendant's post-arrest silence [are] held to be fundamental error." *State v. Vild*, 155 Ariz. 374, 378 (App. 1987); *see also State v. Shing*, 109 Ariz. 361, 365 (1973) (holding "it was fundamental error which was not waived by the failure of the defendant to object when the prosecutor commented upon defendant's silence after arrest"). Nevertheless, fundamental error may still be harmless error when the evidence against the defendant is sufficiently strong to render the error harmless beyond a reasonable doubt. *Vild*, 155 Ariz. at 378-79; *see also State v. Henderson*, 210 Ariz. 561, 568, ¶ 26 (2005) (defendant must show fundamental error caused him prejudice).

¶7 After a review of the record, we find the prosecutor's error was harmless because of the strength of the evidence presented at trial. First, the victim testified he saw Malmin at the shelter the night before his car was stolen, and the security guard working at the shelter stated he saw

Malmin "reach over and grab [the] keys" to the vehicle, after they had fallen onto the floor, and leave out the door. Further, the owner of the property on which Malmin was found, and the police officer who approached him in the vehicle, testified Malmin was alone and sitting in the driver's seat. Accordingly, we find the prosecutor's misconduct in mentioning Malmin's post-arrest silence in his closing statement was harmless beyond a reasonable doubt and affirm Malmin's convictions. *See State v. Valverde*, 220 Ariz. 582, 585, ¶ 11 (2009) (we will find harmless error "if the state, 'in light of all of the evidence,' can establish beyond a reasonable doubt that the error did not contribute to or affect the verdict").

II. Aggravators[2]

¶8 Malmin next argues the court erred in instructing the jury on three of the alleged aggravating factors and in considering them when determining Malmin's sentence. The three aggravating circumstances Malmin challenges are the value of the property taken, that the offense was committed for pecuniary gain, and that there was harm to the victim. Malmin did not object either to the instructions or the court's consideration of these factors in the trial court. Therefore we review only for fundamental error. *See Henderson*, 210 Ariz. at 567, ¶ 19; *see also* Ariz. R. Crim. P. 21.3(c) ("No party may assign as error on appeal the court's giving or failing to give any instruction or portion thereof . . . unless the party objects thereto before the jury retires to consider its verdict."). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. at 567, ¶ 20.

¶9 We find no error in the court's consideration of the value of the property taken. In instructing the jury regarding the aggravating factors, the court stated: "[The first] aggravating circumstance is the value of the property taken or damaged." The statute provides that, "[i]f the offense involves the taking of or damage to property," the court shall

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[2] Malmin suggests, without citation to authority, that the prosecutor was required to submit new evidence during the aggravation hearing. The sentencing statute provides that an aggravated sentence may be imposed if "the circumstances alleged to be in aggravation of the crime are found to be true by the trier of fact beyond a reasonable doubt . . . on any evidence or information introduced or submitted to the . . . the trier of fact before sentencing or *any evidence presented at trial*." Ariz. Rev. Stat. ("A.R.S.") § 13-701.C (emphasis added). Therefore, we find no error.

consider "the value of the property taken or damaged." Ariz. Rev. Stat. ("A.R.S.") § 13-701.D.3. In his argument to the jury, the prosecutor explained that "it doesn't matter what the value of the property was that was taken. What matters is there was a value to that property." Although the instruction does not quote the statute, we do not find the court fundamentally erred in its instruction or in allowing the prosecutor's explanation. Further, the jury's finding was supported by the victim's testimony that the vehicle had an approximate value of $1,000. *See State v. Rushing*, 156 Ariz. 1, 4 (1988) ("Ordinarily, the owner of property is competent to give an opinion of its value.").

¶10 The court next instructed the jury to decide whether "the crime was committed for pecuniary gain." Section 13-701.D.6 provides this aggravating circumstance is proven by evidence showing "[t]he defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything *of pecuniary value*." (Emphasis added.) Again, although the instruction was cursory, we do not find the court fundamentally erred in its instruction. Further, because the victim testified to the vehicle's value and the testimony of the security guard at the shelter showed Malmin intended to steal the vehicle, the jury's finding of this aggravator is supported by the evidence.

¶11 However, we find no evidence in the record to support the jury's finding that there was harm to the victim. Nor do we find that the court's instruction adequately informed the jury of the law, which requires evidence of "physical, emotional or financial harm." *See* A.R.S. § 13-701.D.9. The court simply instructed the jury to find whether there was "harm to the victim." The prosecutor then argued to the jury that the harm requirement was satisfied by the "inconvenience" the victim suffered by not having his vehicle for three days and having to travel to St. Johns to retrieve it. The court also cited this "harm" of inconvenience during sentencing. However, no evidence was presented to the jury of any actual physical, emotional or financial harm to the victim, as required by the statute. Indeed, the victim did not even testify as to the purported inconvenience cited by the prosecutor and judge. Any harm found by the jury was therefore assumed and not based on evidence. Accordingly, we find the court fundamentally erred in its instruction on and consideration of this factor. *See State v. Hunter*, 142 Ariz. 88, 90 (1984) (finding fundamental error where "the instructions did not carefully instruct the jury such that it would not misunderstand" an important aspect of the law affecting the defendant's rights).

¶12 Although the State argues Malmin was not prejudiced because his sentence was within the statutory range which would have been allowed even if these aggravators had not been found, we cannot know for certain how the court weighed the various aggravating factors and how consideration of this factor affected Malmin's sentence. *See State v. Gordon*, 125 Ariz. 425, 428 (1980) (noting the trial court "has broad discretion in sentencing"). It does appear, however, that the court weighed the finding of harm to the victim heavily, as the court noted during sentencing that "harm to the victim is probably the biggest issue." Therefore, we vacate Malmin's sentence and remand to the trial court for resentencing proceedings consistent with this decision.

¶13 Additionally, our review of the record indicates that at sentencing, the State requested restitution in the amount of $208, yet the court ordered restitution in the amount of $280. We therefore vacate the restitution order and remand to the trial court for correction at the resentencing proceedings. *See In re J.U.*, 241 Ariz. 156, ___, ¶ 18 (App. 2016) ("[A]n improper restitution order is fundamental error").

CONCLUSION

¶14 For the foregoing reasons, we affirm Malmin's convictions and the sentence on the misdemeanor count. We vacate the sentence on the felony count, as well as the restitution order and remand for resentencing consistent with this decision.

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