DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. MARIO FRANCISCO MONTES, Appellant.	)	1 CA-CR 08-0635 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-138821-001 DT

The Honorable Robert L. Gottsfield, Judge

AFFIRMED AS CORRECTED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
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B A R K E R, Judge

¶1 A jury convicted defendant, Mario Francisco Montes, of one count of aggravated assault with a deadly weapon and one

count of misconduct involving weapons. Montes argues that his convictions must be reversed because: (1) the state presented insufficient evidence that he committed the aggravated assault, and (2) the trial court committed fundamental error when it permitted hearsay statements that the victim had been shot. He also contends that the trial court abused its discretion when it sentenced him to aggravated sentences. For reasons set forth more fully below, we affirm as corrected.

Facts[1] and Procedural History

¶2 On June 21, 2006, Montes and his girlfriend, Amy, went to the home of Vickie in Glendale, Arizona, to collect $50.00 that Vickie owed Amy. They walked into the bedroom and confronted Vickie; and, when Vickie informed them that she did not have the money Montes "blew up." Montes pulled a gun out of his pocket and said, "I want my f***ing money and I better get my f***ing money now." When Vickie insisted that she did not have the money, Montes then threatened to take her Mazda Miata that was parked in her driveway.

¶3 Vickie started to walk with Montes towards the front door of her house, thinking that, if she could get him outside, she could yell for assistance or attract the attention of

[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, ¶ 1, 119 P.3d 473, 474 n.2 (App. 2005).

someone who would aide her. The entire time they were walking toward the door, Montes still had the weapon in his hand.

¶4 As they approached the front door, Melissa, a woman who was also in the house at the time, started "saying some stuff," which sparked a reaction in Amy. Amy and Melissa then got into a physical fight, "actually going at it, slapping each other, fighting each other and actually made their way around the kitchen in the house knocking the phone off, [and] knocking some other stuff off."

¶5 Vickie yelled at Melissa to "shut up." She told her that she was trying to get Montes out the doorway and urged Melissa not to "piss him off" because he was already angry. Montes and Vickie were following the two women around as Vickie attempted to stop the fighting. Melissa eventually "started walking away," and Vickie attempted to get Montes and Amy out the door. However, as Melissa walked away she said "something smart ass that pissed [Montes] off," and Vickie next saw Montes "flying" past her after Melissa with "his gun up." Melissa went into the kitchen, and Montes went into the kitchen after her with the gun pointed. As Montes ran towards the kitchen with his gun, he stated: "[G]o ahead, bitch, I dare you to say one more thing."

¶6 Vickie heard Melissa laugh and then heard a gunshot. When Vickie entered the kitchen she saw Melissa lying on her

side on the ground with "blood on her head." As Vickie went towards Melissa to assist her, Vickie and Montes passed each other in the kitchen. As they passed each other, Montes still had the gun in his hand, pointed in Vickie's direction.

¶7 Vickie stated, "you motherf***er, you shot her." Montes replied either that he "didn't hit her" or that he "didn't shoot her," and he and Amy ran out the front door.

¶8 Melissa did not want to call 911 because she knew she had a warrant out for her arrest. Someone eventually called the police, and Melissa was subsequently treated at Arrowhead Hospital. The top of Melissa's left ear was "cut in half" and she also sustained a laceration behind the cut "to the back of her head." She required "six stitches to her left ear and four to the laceration to the . . . side of her head behind the ear."

¶9 Glendale Police Officer J.M. who responded to the scene of the crime, noticed a Dodge Neon matching the description of the suspect vehicle leaving the area at a high rate of speed and immediately pursued the vehicle. He saw the vehicle "slam on its brakes causing the white smoke to come from the tires" and turn right into the parking lot of an Albertson's grocery store. Officer J.M. confronted Montes and Amy as they started to walk away from their vehicle.

¶10 Melissa was transported to the parking lot and identified Montes as the person involved in the shooting. She

initially was not certain because Montes had removed a bandana and hat he wore during the shooting. However, when she got closer to Montes and "saw his eyes," that's when she "knew it was him."

¶11 Police discovered a .45 caliber handgun in an alley behind Albertson's near where Montes was detained. The gun itself appeared to have been hit or "smashed" against a nearby wall that also had divots or chips in it; the scrapes in the gun matched the color of the clay of the wall. The gun had an empty shell jammed inside it that rendered the weapon inoperable. Police also located a .45 caliber magazine containing six unfired .45 caliber cartridges in the center console of the Dodge Neon.[2] A Department of Public Safety criminalist testified at trial that the magazine discovered in the Neon fit the .45 caliber handgun that was found at Albertson's and that a bullet recovered from the bathroom cabinet at Vickie's house had unique markings that established that it had been fired from the same .45 caliber handgun.

¶12 Police interviewed Montes after he was arrested. He admitted being at Vickie's home with his girlfriend Amy; he admitted that "a bunch of people got into a fight" while they were there and that he was involved "at least in the argument

[2] Police also found a bandana and baseball cap in the vehicle that fit the description of what Montes was wearing while at the house.

side of that fight"; and he also admitted that he and Amy had to "leave real quick." Nonetheless, defendant denied being involved in any shooting or possessing a weapon. Instead, he maintained that he had heard "a popping sound" as he and Amy were leaving the house and thought "somebody may have thrown something at [their] car."

¶13 A jury found defendant guilty of aggravated assault with a deadly weapon, a Class 3 dangerous felony, and misconduct involving a weapon, a Class 4 felony,[3] as charged by the State. On July 25, 2008, the trial court sentenced defendant to concurrent, aggravated terms of 13.25 and 12 years in prison. Defendant timely appealed. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, -4033(A)(1) (2001).

Discussion

1. Sufficiency of the Evidence

¶14 Montes maintains that the State presented insufficient evidence to support the conviction for aggravated assault. As evidence of this insufficiency, Montes argues that no one actually observed the gun being discharged, that there was no evidence that Melissa's injuries were the result of a gunshot,

[3] The parties stipulated that Montes was a prohibited possessor at the time of this incident.

and, therefore, that those injuries "could have been a result of the fight between her and Amy."

¶15 On appeal, we review a trial court's denial of a Rule 20 motion for a judgment of acquittal in the light most favorable to sustaining the jury's verdict and will reverse only if no substantial evidence supports the conviction. *State v. Garza*, 216 Ariz. 56, 61 n.1, ¶ 2, 163 P.3d 1006, 1011 n.1 (2007); *State v. Henry*, 205 Ariz. 229, 232, ¶ 11, 68 P.3d 455, 458 (App. 2003). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citations omitted). Furthermore, it is well established that "substantial evidence" may be comprised of both circumstantial and direct evidence, that the probative value ascribed to each is "essentially similar," and that "[a] conviction may be sustained on circumstantial evidence alone." *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

Contrary to Montes' assertions, the evidence at trial was more than sufficient to sustain the jury's guilty verdict.

¶16 The State was required to prove that Montes committed aggravated assault by intentionally, knowingly, or recklessly causing physical injury to Melissa while using a deadly weapon. A.R.S. §§ 13-1203(A), -1204(A)(2) (2001). Vickie testified that Montes was the only person in the house who had a gun and that he had the gun out as she was walking him towards the front door when Melissa made the remark that angered him. She also testified that he then went into the kitchen after Melissa with his gun "up like this" stating, "one more thing, I'll fire, I'll shoot you." Immediately after that Vickie heard Melissa laugh and a gunshot fire. When Vickie "stuck [her] head around the corner" Melissa was lying on the floor in the kitchen. As she ran into the kitchen to assist Melissa, Vickie crossed paths with Montes, who still had the gun in his hand. When Vickie got to Melissa she observed blood on her. This evidence alone is sufficient evidence from which reasonable jurors could conclude that defendant had shot Melissa and caused the injury Vickie observed. *Mathers*, 165 Ariz. at 67, 796 P.2d at 869.

¶17 However, the State presented additional corroborating evidence at trial, such as the fact that a ballistics analysis established that a bullet that had travelled through the kitchen wall and lodged in a bathroom cabinet was fired from the gun

found in the Albertson's parking lot near where Montes was arrested. Furthermore, a magazine that fit the weapon was found inside the vehicle in which Montes and his girlfriend had fled from the scene.[4]

¶18 Montes denied any involvement in the shooting and denied possessing the weapon when questioned by police. His statements were directly contradicted by Vickie's testimony. It was for the jury to determine the credibility of her testimony and resolve any conflicts in it, and we defer to their assessments on appeal. *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995); *see also State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989) (appellate court does not reweigh evidence). Clearly the jury in this case did not give credence to Montes' assertions to police that he did not shoot the victim or to defense counsel's argument that the victim's injuries were merely the result of her earlier fight with Amy.

¶19 The record establishes sufficient evidence to support the jury's guilty verdict. Therefore, we find no abuse of discretion in the trial court's denial of the Rule 20 motion.

[4] Although the weapon was inoperable when it was located, the State also presented evidence that supported the inference that the weapon had been rendered inoperable when it was hurled against a wall in the parking lot.

2. Admission of Hearsay Evidence

¶20 Sharon, a nurse and Vickie's next-door neighbor, testified at trial that on the day of the crime a person knocked on her door. When Sharon opened the door she saw "a young lady" with "blood on her head." When Sharon asked the woman if she was okay, the woman "turned and walked away." Sharon then heard "some other people that were outside say that she had been shot." Montes did not object to this testimony or ask that it be stricken.[5]

¶21 When questioning Vickie on cross-examination, defense counsel suggested that, because Montes and Melissa had been out of her sight, Vickie could not know exactly what had happened in the kitchen "other than a gunshot went off and she was hit by the side of her head." Vickie responded: "I assumed that is correct and what Melissa told me." Counsel did not move to have this statement stricken.

¶22 On appeal, Montes concedes that he did not object to the admission of these hearsay statements at trial, but contends that their admission constituted fundamental error that requires reversal on appeal. He maintains that the statements were the only testimony relevant to causation at trial and that their

[5] Defense counsel even asked Sharon on cross-examination if by chance she had heard any of those "other people" mention "anything about possibly not calling the police because of any warrants."

admission violated his Sixth Amendment rights to confrontation as well as the tenets of *Crawford v. Washington*, 541 U.S. 36 (2004).

¶23 The State counters by arguing that Sharon's statement -- that "others" had said "she had been shot" -- was an "excited utterance" thus admissible as an exception to the hearsay rule. The State also contends that, in any event, even if wrongly admitted, their admission was harmless, at best, and Montes cannot establish prejudice.

¶24 To obtain reversal on a fundamental error review, the burden rests squarely with a defendant to establish both that fundamental error occurred and that the error in his case caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005). To establish fundamental error, the defendant must show that the error "goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id*. at 568, ¶ 24, 115 P.3d at 608.

¶25 We need not address whether error occurred because either way Montes has not proven fundamental error. The testimony was not necessary to the verdict in this case given the other evidence. Vickie testified that only Montes had a gun in the house and he had the gun out when Melissa angered him with her remark. She also testified that he went into the

kitchen with the gun and threatened to shoot. Vickie heard a gunshot and saw Melissa on the kitchen floor. She further testified that when she went into the kitchen she saw Montes with the gun in his hand. The State also presented evidence that a magazine fitting the weapon was found inside Montes' vehicle. Therefore, Montes cannot prove that fundamental error occurred because he cannot show that the testimony was an error of such magnitude that it deprived him of a fair trial. *Id*. at 567, ¶ 19, 115 P.3d at 607.

¶26 Most importantly, however, Montes has not met his burden of showing that its admission actually prejudiced him. *Id*. at 568, ¶ 22, 115 P.3d at 608. Error is prejudicial and reversible only if a defendant can show that a reasonable jury would have reached a different decision absent the error. *Id*. at 569, ¶ 27, 115 P.3d at 609.

¶27 For reasons discussed previously, there was more than sufficient evidence to support the jury's guilty verdict in the aggravated assault. Vickie's testimony regarding Melissa's statement was a brief and isolated statement in the course of a trial in which the accuracy of her perceptions as well as her credibility were thoroughly argued to the jury. Additionally, the fact that the incident involved a shooting was referred to at trial by several officers, who testified that they responded

to a 911 call about a "shot fired and possibly someone had been shot" or a radio call about a "901 George which is a shooting."

¶28 By simply speculating that he was prejudiced by the introduction of this statement, Montes fails to carry his burden of establishing that the jury's outcome would have been different absent the error. *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006); *see also Henderson*, 210 Ariz. at 569, ¶ 27, 115 P.3d at 609. Our review of all of the evidence in this case shows us that Montes did not meet his burden to show that absent the testimony in question the jury would have reached a different verdict.

3. Improper Aggravated Sentences

¶29 Montes contends that we should remand his case for resentencing because the trial court used several "invalid factors" to aggravate his sentence, among them his prior convictions and three aggravating factors found by the jury: (1) threatened infliction of serious physical injury, (2) emotional or financial harm to the victim, and (3) the fact that he was a member of the prison/street gang, the New Mexican Mafia.

¶30 As a general rule, the imposition of a sentence within statutory limits will not be modified absent an abuse of the trial court's discretion, and this court will not modify an otherwise lawful sentence unless it constitutes an abuse of discretion. *State v. Stotts*, 144 Ariz. 72, 87, 695 P.2d 1110,

1125 (1985). A trial court does not abuse its discretion unless its decision is characterized by arbitrariness, capriciousness, or failure to conduct an adequate investigation into the facts relevant to sentencing. *Id*.

¶31 Here, because Montes raised none of his objections before the trial court, we review only for fundamental error; and it is Montes' burden to establish that fundamental error occurred and that it caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶¶ 19-20, 115 P.3d at 607. Based on our review of the trial court's sentencing procedures, we find no error and no need to remand for resentencing.

¶32 First, the trial court specifically found that the State proved by clear and convincing evidence that Montes had four prior felony convictions: (1) unlawful use of a means of transportation, a Class 6 felony committed on July 2, 1981; (2) burglary in the third degree, a Class 5 felony, committed on November 25, 1982; (3) trafficking in stolen property in the second degree, a Class 3 felony; and (4) trafficking in stolen property in the second degree, a Class 3 felony. The trial court also found that Montes was convicted on the latter two trafficking crimes on June 8, 1993, and that he was sentenced to concurrent fifteen year prison sentences in each. The trial court properly concluded that those two offenses thereby constituted "forever priors." A.R.S. §§ 13-703(C), (J), 13-

105(22)(b), (d) (Supp. 2009).[6] Contrary to Montes' arguments, the record shows that the trial judge in this case scrupulously considered the timeliness and validity of all of his prior convictions before using them to aggravate his sentences. Therefore, Montes has not shown that the trial court committed any error, let alone fundamental error, in considering Montes' prior convictions in aggravating his sentence.

¶33 Once a single aggravating factor has been properly established, a sentencing court may find and consider additional aggravating factors in its determination of the appropriate sentence to be imposed. *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26, 115 P.3d 618, 625 (2005). With the State's concurrence, the trial court stated that it was going to sentence Montes as a non-dangerous, repetitive offender with two prior historical felonies. That range for a Class 3 aggravated assault (Count 1) is 7.5 to 25 years; for a Class 4 felony misconduct involving a weapon (Count 2) it is 6 to 15 years. A.R.S. §§ 13-703(C), (G), (J).

¶34 The trial court sentenced Montes to a slightly aggravated term of 13.25 years in prison on Count 1 and a slightly aggravated term of 12 years in prison on Count 2, both

[6] We cite to the most current version of the applicable sentencing statutes. Although Montes was sentenced before these statutes became effective, no substantive changes were made to the 2009 version.

sentences to be served concurrently. In imposing the sentence on Count 1, the trial court stated that it was considering the four prior convictions as well as the three aggravating factors found by the jury; on Count 2 it considered the prior convictions as well as the jury's aggravator that Montes was a member of the New Mexican Mafia.

¶35 Montes claims for the first time on appeal that the trial court improperly relied on the three factors found by the jury when imposing the aggravated sentences. He maintains that no reasonable jury could have found either the seriousness of the injury or the threat to inflict such an injury. Based on the facts at trial, we disagree.

¶36 As a result of Montes' actions the victim sustained a bullet wound that cut her ear in two and grazed her head; clearly these circumstances support the inference that he threatened to inflict serious physical injury on Melissa. Nor was the "serious physical injury" argued as an element of aggravated assault here; the State's argument at trial was that Montes committed aggravated assault based on his use of a deadly weapon. The victim did not testify, but the State presented argument to the jury concerning the "serious physical injury" as well as the "emotional harm" the victim must have suffered from such a life-threatening event as being shot in the head. The jury was the same one that rendered the guilty verdicts and

therefore was familiar with the underlying facts of the case. Those facts provided sufficient evidence for both the aggravators.

¶37 As far as the "New Mexican Mafia" aggravator is concerned, the State presented substantial evidence to the jury in the form of expert testimony as well as the physical evidence of Montes' tattoo that supports its finding that he was a member of the gang. The record shows that the State argued that it was applicable *specifically* to the misconduct involving a weapon charge and Montes' status as a prohibited possessor, but that the court might also consider it as an aggravator for the assault charge. Although it appears that the trial court considered "all three" jury aggravators, including this one, it is clear that it particularly viewed it as relevant to Montes' conduct as a prohibited possessor. We find it was relevant to that charge and to the possibility of the likelihood of Montes' future offenses and do not find any abuse by the trial court in considering it in aggravating the sentence for that offense. Nor do we necessarily find it an abuse of the trial court's discretion to have considered it in aggravating the sentence on the aggravated assault, as it was also relevant to the potential for Montes' involvement in future unlawful or violent acts. *See, e.g., State v. Wilson*, 179 Ariz. 17, 21-22, 875 P.2d 1322, 1326-27 (App. 1993) (membership in Aryan Brotherhood not offered

because morally reprehensible, but relevant to sentencing judge's assessment of potential for violence, unlawful activity, or rehabilitation).

¶38 Montes has failed to show that the trial court committed any error, fundamental or other, in sentencing him to aggravated sentences in this case. *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991). The sentence imposed is well within the applicable statutory limits, and we find no need to remand for resentencing.

4. Correction of Minute Entry

¶39 The court sentenced Montes within the range of a non-dangerous, repeat offender, but the minute entry mistakenly notes the sentence on Count 1 as dangerous and repetitive. This is a clerical error. *State v. Rockerfeller*, 9 Ariz. App. 265, 267, 451 P.2d 623, 625 (1969) (reviewing court should interpret the record in its entirety, giving effect to it as a whole and resolving deficiencies using the complete record). The record is clear that the trial court sentenced Montes as a non-dangerous, repetitive offender and the sentence was within the range mandated for a non-dangerous, repetitive offender with two historical prior felony convictions. We modify the minute entry by this Memorandum Decision pursuant to Arizona Rule of Criminal Procedure 31.17. *See also* A.R.S. § 13-4036 (2001); *State v.*

Stevens, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992). We note the State does not dispute this correction.

Conclusion

¶40 For the foregoing reasons, we affirm Montes' convictions and sentences as corrected.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
PETER B. SWANN, Judge