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Ariz. R. Crim. P. 31.24



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

STATE OF ARIZONA,) 1 CA-CR 08-0700
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
)
ROBERT LEE FISHER,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
)
)
)

Appeal from the Superior Court in Mohave County

Cause No. CR 2006-0076

The Honorable Steven F. Conn, Judge

CONVICTIONS AFFIRMED; REMANDED IN PART FOR RESENTENCING

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Susanne Bartlett Blomo, Assistant Attorney General
Attorneys for Appellee

David Goldberg, Esq. Fort Collins, CO
Attorney for Appellant

B R O W N, Judge

¶1 Robert Lee Fisher appeals his convictions and

sentences for second-degree murder and aggravated assault. For the reasons that follow, we affirm both convictions and his sentence for second-degree murder, but vacate the sentence for aggravated assault and remand for resentencing.

BACKGROUND

¶12 A grand jury indicted Fisher on charges of first-degree murder, arson of an occupied structure, and aggravated assault arising from the stabbing death of his mother in her home in Kingman in January 2006. Neighbors discovered the body when they saw smoke coming from the mobile home, and ran to put out the fire. The autopsy showed that the victim suffered thirty-four stab wounds to the upper back, neck, and head, one of which severed a carotid artery, and six defensive wounds to her arms and hands.

¶13 Witnesses observed Fisher behaving strangely shortly before the murder. Fisher was arrested soon thereafter; he had a cut on his hand and blood on his shoes, clothes, arms, and legs. Police investigators found Fisher's blood at the scene; they also found both his blood and his mother's blood on his shoes and sweatshirt. Fisher did not testify at trial, but called witnesses in support of his insanity defense.

¶14 The jury convicted Fisher of the lesser included crime of second-degree murder and of aggravated assault, but acquitted

him of arson. He was sentenced to an aggravated¹ term of twenty-one years for the second-degree murder conviction, with 942 days of presentence incarceration credit, and a presumptive term of 3.75 years on the aggravated assault conviction; the terms to be served consecutively. Fisher timely appealed. We have 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 (2010) and 13-4033(A)(1) (2010).²

DISCUSSION

I. Competency

¶15 Fisher argues that the trial court: (1) abused its discretion in finding him competent to stand trial; (2) failed to hold the required hearing upon notification of Fisher's restored competency; (3) misstated the burden of proving incompetency; and (4) abused its discretion in failing to order further evaluations and competency proceedings based on his counsel's personal observations and "red flags" in the final competency evaluation before trial. We find no reversible error on any of these grounds.

¶16 The court appointed Dr. Daniel Malatesta and Dr.

¹ The aggravating factors included Appellant's entire criminal record, the use of a dangerous instrument, and the "especially cruel manner in which this crime was committed."

² We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

Vasilios Kaperonis to examine Fisher regarding his competency to stand trial and his mental condition at the time of the alleged offense. Dr. Kaperonis opined that Fisher suffered from chronic paranoid schizophrenia, was not competent to stand trial, and was incapable of distinguishing right from wrong at the time of the offense. Dr. Malatesta disagreed and opined that Fisher was competent to stand trial, but, based on the records before him, he could not offer an opinion on Fisher's mental state at the time of the offense and could not rule out malingering. After the parties stipulated to the reports, the court found Fisher incompetent to stand trial and ordered him remanded to the custody of the Arizona State Hospital ("ASH") for competency restoration proceedings.

¶17 Seven months later, ASH psychiatrist Dr. Edward Jasinski reported that Fisher had been restored to competency, although he suffered from "a primary mental illness, most likely a Psychotic Disorder, Not Otherwise Specified." The doctor explained that Fisher's behavior suggested that he was exaggerating his symptoms and/or malingering. A competency hearing was set for March 2008, but was vacated upon motion of defense counsel who, after lengthy conferral with his client, concluded that Fisher was "presently competent to stand trial, and [was] competent to assist his attorney in his defense."

¶18 Two months later, defense counsel filed a motion for

reexamination and redetermination of Fisher's competency based on counsel's observations that his client was "delusional, [] subject to both auditory and visual hallucinations, and appears to continually process, observe, perceive and react to internal stimuli that have no basis in objective reality." Dr. Mark Harvancik was appointed to examine Fisher and evaluate his competency to stand trial.

¶19 Dr. Harvancik's evaluation concluded that Fisher was competent to stand trial and aid in his defense despite a likelihood that he had a primary mental illness. Based on Dr. Harvancik's evaluation, the trial court found no basis to question Fisher's competency and deemed him competent to stand trial.

A. Finding of Competency

¶10 Fisher argues first that the trial court abused its discretion in finding him competent to stand trial based on Dr. Harvancik's report. We will not upset a trial court's finding of competency absent an abuse of discretion. *State v. Moody*, 208 Ariz. 424, 444, ¶ 55, 94 P.3d 1119, 1139 (2004). In conducting our review, we determine only "whether reasonable evidence supports the trial court's finding that the defendant was competent, considering the facts in the light most favorable to sustaining the trial court's finding." *State v. Glassel*, 211 Ariz. 33, 44, ¶ 27, 116 P.3d 1193, 1204 (2005), *cert. denied*,

547 U.S. 1024 (2006).

¶11 The test for competency is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). The mere presence of a mental illness "is not grounds for finding a defendant incompetent to stand trial." Ariz. R. Crim. P. 11.1; see *Moody*, 208 Ariz. at 444, ¶ 56, 94 P.3d at 1139. Rather, the test for competency is whether the mental illness renders a criminal defendant "unable to understand the proceedings against him or her or to assist in his or her own defense." Ariz. R. Crim. P. 11.1; see *Moody*, 208 Ariz. at 444, ¶ 56, 94 P.3d at 1139; *Glassel*, 211 Ariz. at 44, ¶ 30, 116 P.3d at 1204. The competency inquiry thus focuses "on an extremely narrow issue: whether whatever is afflicting the defendant has so affected his present capacity that he is unable to appreciate the nature of the proceedings or to assist his counsel in conducting his defense." *State v. Amaya-Ruiz*, 166 Ariz. 152, 162, 800 P.2d 1260, 1270 (1990) (citation omitted).

¶12 Fisher argues that he was incompetent to stand trial and unable to "reasonably understand the proceedings against him or assist his counsel." He contends that Dr. Harvancik's report confirmed that he was actively delusional and hallucinating

during his final pretrial assessment; therefore, Dr. Harvancik's conclusion that Fisher was competent was faulty because a person who suffers auditory and visual hallucinations cannot be considered competent. The evidence suggests otherwise.

¶13 Three of the four doctors who examined Fisher found him competent to stand trial and suggested he could be malingering. Dr. Malatesta found no evidence of delusional thinking as it related to Fisher's awareness of court proceedings, a fair understanding of the charges against him, and the nature of his relationship with his attorney. Likewise, after seven months of restoration treatment, Dr. Jasinski found "to a reasonable degree of psychological certainty . . . [Fisher] understands the nature and object of the proceedings against him . . . [and] has the ability to assist an attorney in the preparation of his defense." Finally, one week before trial, Dr. Harvancik found that Fisher appeared to be exaggerating his symptoms, his symptoms were controlled by medication and did not interfere with the evaluation process, and he was competent to stand trial and aid in his defense.

¶14 Fisher further contends that Dr. Harvancik's report did not provide the court with sufficient information to address Fisher's competency. We disagree.

¶15 Two months after the initially scheduled Rule 11 hearing was vacated, defense counsel requested reexamination and

redetermination regarding Fisher's competency. That request was granted and Dr. Harvancik was appointed to evaluate Fisher. Dr. Harvancik submitted his written evaluation to the court and a hearing was held in which Fisher's competency was considered. Although Fisher was aware that this hearing was for the purpose of considering his competency,³ he offered no evidence to support his inability to understand the nature of the proceedings beyond the personal opinion of his defense counsel. Further, Fisher chose not to call any witnesses during the hearing, even though he could have had he so chosen, and did not object to the nature of the proceedings or request additional proceedings in which competency would be determined; he thereby acquiesced to a determination of competency based on the only evidence before the court at that time—Dr. Harvancik's written evaluation. See *State v. Cobb*, 110 Ariz. 578, 579, 521 P.2d 1124, 1125 (1974) (finding that a formal oral hearing is waived when psychiatric report is filed with the court, counsel is present at the hearing, some form of procedure took place, and no objection to that procedure was made). The court considered the evidence provided regarding Fisher's competency and, based on the expert opinion provided by Dr. Harvancik, determined Fisher competent

³ The minute entry dated May 19, 2008 granted Appellant's motion for redetermination and reexamination, ordered Dr. Harvancik to evaluate Appellant and submit a written report to the court, and set a status hearing.

to stand trial. Prior to making such a determination, Fisher had been reported returned to competency by Dr. Jasinski from ASH, he had been re-evaluated at defense counsel's request, and again found competent by Dr. Harvancik. We find no abuse of the trial court's discretion in making a competency determination based on these facts.

¶16 In addition, the court received numerous letters from Fisher prior to trial; some of which reflected "a guy who understands the legal system" and who can "file subjective motions that make sense" and others that "reflect someone who is operating with a different mind-set that does not really have an attachment with reality." The court is entitled to rely on experts to assist its assessment of a defendant's competency and may also rely on the court's observations in making such determinations. See *Bishop v. Superior Court*, 150 Ariz. 404, 409, 724 P.2d 23, 28 (1986) (recognizing that a "judge may appoint mental health experts to assist him in his determination, [but] he is not bound by their opinions; the determination of fact and law is his"). In considering the letters from Fisher, the input of defense counsel, and the opinion of Dr. Harvancik, the court commented that Fisher's mental state was "puzzling" and thus it felt "compelled to attach more weight to the expert opinion of Dr. Harvancik" in making a competency determination. On this record, reasonable

evidence supported the trial court's finding.

¶17 We also reject Fisher's claim that Dr. Harvancik's opinion revealed that Fisher was actively delusional and hallucinating, and "thereby unable to reasonably understand the proceedings against him or assist his counsel." Although Dr. Harvancik initially noted that "there appeared to be evidence of some ongoing hallucinations," he ultimately concluded that Fisher's "symptoms appeared to be controlled with medication treatment, his seeming responses to internal stimuli did not appear to be credible, and in combination with SIRS results, suggested that he was exaggerating his symptoms." At trial, Dr. Harvancik testified to the same effect, explaining that when he initially met with Fisher, he thought he "might have been responding to internal stimuli," but after completing his evaluation, he "did not believe that he was responding to internal stimuli, responding to hallucinations." Moreover, he testified that persons can be experiencing hallucinations and still be competent to stand trial. On this record, we find that reasonable evidence supported the trial court's conclusion that Fisher was competent to stand trial.

B. Restoration Hearing and Burden of Proof

¶18 Fisher next argues that the trial court violated Arizona Rule of Criminal Procedure 11.6(a)(1) and A.R.S. § 13-4514(C)(2) (2010) in failing to hold the required hearing upon

receiving Dr. Jasinski's report that Fisher had been restored to competency. Our review of the record does not support this contention.

¶19 As outlined above, three days before the first scheduled hearing, defense counsel moved to vacate the Rule 11 hearing because he believed his client was presently competent to stand trial and to assist in his defense. On this record, Fisher invited the error, and is precluded from complaining about it on appeal. *See State v. Logan*, 200 Ariz. 564, 566-67, ¶ 15, 30 P.3d 631, 633-34 (2001) (holding that invited error doctrine barred a defendant from claiming as error on appeal a jury instruction that he had requested).

¶20 Fisher also argues that the trial court misstated the burden of proof when it indicated to the parties that it would "start with the presumption that [Fisher] is competent[.]" We disagree that the court misstated the law. The court's comment was made during a status hearing held on February 8, 2000. The court first noted that Fisher had been returned from ASH based on a final report indicating that Fisher had been restored to competency. The court's subsequent statement that it would presume Fisher to be competent, considered in proper context, was not intended to shift the burden of proof to Fisher to establish that he was "still incompetent." Instead, in our view the court's purpose was to simply inform the parties that the

court had received the report from ASH and if a decision was made based solely on that report, Fisher would be found competent.

¶21 A prior adjudication of incompetency gives rise to a rebuttable presumption of continued incompetency. *State v. Blazak*, 100 Ariz. 202, 204, 516 P.2d 575, 577 (1973). Trial judges are presumed to know the law and to apply it in making their decisions, and we thus presume that the court knew that its prior finding of incompetency gave rise to a rebuttable presumption of continued incompetency. *See State v. Johnson*, 212 Ariz. 425, 432, ¶ 21, 133 P.3d 735, 742, *cert. denied*, 549 U.S. 1022 (2006). Before Fisher was found competent to stand trial, the court had two reports, one from Dr. Jasinski concluding that Fisher had been restored to competency, and a second from Dr. Harvancik opining that Fisher was presently competent to stand trial. On this record the presumption of incompetency was adequately rebutted. We decline to find reversible error on this basis.

¶22 We also reject Fisher's argument that the court violated his due process rights by employing inadequate procedures to address his competency to stand trial in its "rush to bring this case to trial." Due process requires that the State "observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent." *Drope v.*

Missouri, 420 U.S. 162, 172 (1975) (citation omitted). Fisher had previously been found incompetent based on conflicting reports by two doctors and was ordered to participate in restoration treatment at ASH. Dr. Jasinski from ASH thereafter concluded that Fisher had been restored to competency. After Fisher's release from ASH, the trial court ordered a reevaluation of Fisher's competency. The court also conducted another competency hearing just one week before trial, after which it concluded, based on Dr. Harvancik's opinion, that Fisher was competent to stand trial. We find sufficient procedures were employed to protect Fisher against being tried while incompetent.

C. Failure to Order Further Evaluations

¶23 Fisher finally argues that the trial court abused its discretion in failing to order further evaluations and competency proceedings based on defense counsel's observations and "red flags" in the final competency evaluation by Dr. Harvancik two weeks prior to trial. We disagree. A defendant has a right to a mental examination and hearing on his competency to stand trial when "reasonable grounds for an examination exist." See Ariz. R. Crim. P. 11.3. In order for the trial court to grant another competency hearing, "there must be some reasonable ground to justify another hearing on facts not previously presented to the trial court." *State v.*

Contreras, 112 Ariz. 358, 360-61, 542 P.2d 17, 19-20 (1975); see also *Moody*, 208 Ariz. at 443, ¶ 48, 94 P.2d at 1138. "In determining whether reasonable grounds exist, a judge may rely, among other factors, on his own observations of the defendant's demeanor and ability to answer questions." *Id.* (citation omitted). We will not reverse a trial court's determination of whether reasonable grounds exist to order further proceedings absent an abuse of discretion. *Amaya-Ruiz*, 166 Ariz. at 162, 800 P.2d at 1270.

¶24 The court had sufficient grounds to conclude that no basis existed to further question Fisher's competency. Dr. Harvancik's evaluation of Fisher deemed him to be competent. The court's personal observations at the competency hearing and conclusions drawn from the numerous letters it had received from Fisher also indicated Fisher understood the nature of the proceedings. Finally, Fisher offered no new evidence at the competency hearing to support his incompetence; instead, his counsel merely attacked Dr. Harvancik's report as faulty and inadequate based solely on defense counsel's personal belief that it was internally inconsistent. It was within the court's discretion to accord more weight to the expert opinion of Dr. Harvancik than to that of defense counsel. On this record, the court had no evidence on which to justify another hearing and thus did not abuse its discretion in failing to order additional

competency evaluations.

II. Preliminary Jury Instruction on Reasonable Doubt

¶125 Fisher argues that the trial court fundamentally erred by failing to instruct the jury at the start of trial that a defendant is presumed innocent, and to give the complete *Portillo*⁴ instruction on proof beyond a reasonable doubt in the preliminary instructions. Specifically, Fisher asserts that the preliminary instruction did not fully explain to the jury that "it had to start with the presumption that [Fisher] was 'innocent,' what proof beyond a reasonable doubt actually entails, and that it must acquit [Fisher] absent such proof or a 'real possibility' that [Fisher] was not guilty."

¶126 The trial court gave the following preliminary instruction at the start of trial:

The charges against the Defendant are not evidence against him. You should not think that the Defendant is guilty just because he has been charged with a crime.

The Defendant has pled not guilty. The Defendant's plea of not guilty means that the State must prove every part of the charges beyond a reasonable doubt.

The law does not require a defendant to prove his innocence. He is presumed by law to be innocent. This means that the State must prove all of its case against the Defendant. The State must prove the Defendant guilty beyond a reasonable doubt which means you have to be firmly convinced

⁴ *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995).

of the Defendant's guilt before you can return a guilty verdict in this case.

No guilty verdict may be based on mere suspicion, probability or supposition.

Since the burden is on the State to prove the Defendant guilty beyond a reasonable doubt, the Defendant has the right to rely upon a failure, if any, of the State to establish such proof.

¶27 Because Fisher failed to object at trial to this preliminary jury instruction, we review for fundamental error only. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fisher accordingly bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608. We review the adequacy of jury instructions in their entirety to determine if they accurately reflect the law. *State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000). The lawyers' arguments to the jury may be taken into consideration in evaluating the adequacy of instructions. *State v. Valverde*, 220 Ariz. 582, 586, ¶ 16, 208 P.3d 233, 237, *cert. denied*, 130 S. Ct. 640 (2009). We will not reverse "unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors." *State v. Sucharew*, 205 Ariz. 16, 26, ¶ 33, 66 P.3d 59, 69 (App. 2003) (citation omitted).

¶28 We find no fundamental error on this record. First, contrary to Fisher's claim, the preliminary instruction clearly

stated that Fisher "is presumed by law to be innocent." It further noted that the charges against Fisher were not evidence of his guilt, and that because the State has the burden of proof, Fisher could rely on the failure of the State to provide such proof. Moreover, during *voir dire*, the court also advised the *venire persons* that Fisher was presumed by law to be innocent: "The defendant in any criminal case is presumed by law to be innocent. This means he is not required to prove his innocence. In fact, he is not required to produce any evidence at all in his own behalf." Thus, Fisher's claim that the jury "was not aware until final instructions that it had to start with the presumption that [Fisher] was 'innocent'" is without merit.

¶129 The preliminary instruction also informed the jury that in order to convict based on proof beyond a reasonable doubt, it must be "firmly convinced" of Fisher's guilt, although the court did not further define the concept before trial. Fisher concedes that the trial court gave a complete instruction on the presumption of innocence and the entire *Portillo* instruction in its closing instructions.⁵ Moreover, both counsel

⁵ The *Portillo* instruction further explains the concept of preponderance of the evidence used in civil cases, and notes that the burden of proof in criminal cases is the more powerful "beyond a reasonable doubt," which means that the proof leaves one "firmly convinced of the defendant's guilt," a concept it explains is not that of absolute certainty, but one that if the

reiterated in closing arguments the principles of presumption of innocence, burden of proof, and beyond a reasonable doubt. Although it is advisable for the trial court to give the more complete *Portillo* definition in its preliminary instruction to the jury as well as in its final instruction, we find its failure to do so in this case was not fundamental error. Read as a whole, the jury instructions, together with the closing arguments of the parties, adequately informed the jury of the legal framework governing its decision.

¶30 Moreover, Fisher has failed to establish the required prejudice for reversal on this basis, as he relies only on speculation that the jury might have been misled because the concept of "beyond a reasonable doubt" was not fully explained before the start of trial. No evidence supports such speculation, which is insufficient to establish prejudice. See *State v. Bass*, 198 Ariz. 571, 576-77, ¶ 17, 12 P.3d 796, 801-02 (2000) (citation omitted).

III. Rebuttal Testimony by Psychologist

¶31 Fisher argues that the trial court abused its discretion in allowing the State to offer rebuttal testimony from Dr. Harvancik "limited to his opinions regarding Fisher's

juror thinks there is a real possibility that the defendant is not guilty, the juror must give him the benefit of the doubt and find him not guilty. See *Portillo*, 182 Ariz. at 596, 898 P.2d at 974.

competency to stand trial," because his opinion that Fisher was malingering two weeks before trial unfairly tainted the jury's consideration of his sanity at the time of the offense. We review a trial court's ruling on the admissibility of evidence for abuse of discretion. *State v. Wood*, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994).

¶132 At trial, Dr. Kaperonis testified that Fisher suffered from chronic paranoid schizophrenia and could not distinguish right from wrong at the time of the offense. He also testified that he had not personally interviewed anyone who had observed Fisher around the time of the offense, but instead relied on police reports and Fisher's personal assertions about his symptoms and psycho-social history regarding auditory and visual hallucinations. He testified that he did not perform any tests to detect malingering, but rather relied on his own clinical judgment.

¶133 In rebuttal, the State called Dr. Harvancik to testify that he observed indicators of malingering and that a sanity evaluation could not be completed for the time of the offense without extensive interviews and evaluations targeted for that time period which were not performed here. The State argued that such testimony was relevant to determine the credibility of Dr. Kaperonis' opinions.

¶134 Fisher moved to preclude Dr. Harvancik's rebuttal

testimony on the ground that Dr. Harvancik had evaluated Fisher only for his competency to stand trial; therefore, any opinion on his sanity at the time of the crime was not relevant and was unfairly prejudicial. The court, however, found Dr. Harvancik's rebuttal testimony relevant because Dr. Kaperonis had already testified as to Fisher's psychological history and had testified that if Fisher provided him inaccurate information, that would affect the accuracy of his assessment. The court also found that Dr. Harvancik's testimony was a "legitimate thing for the jury to hear, for them to weigh in assessing this." He further commented that he had "given counsel a great deal of latitude into things that would be relevant to [Fisher's] mental health" and therefore did not "believe that there [was any] basis to preclude [Dr. Harvancik's testimony]."

¶135 Dr. Harvancik testified that in order to evaluate Fisher's sanity at the time of the offense, it was important to review extensive documents outlining Fisher's family, school, medical, psychological, criminal, and personal history, and to conduct extensive interviews with persons who knew him well, as well as any third parties who might be involved. He testified he would also rely on psychological testing, including the SIRS test for malingering. He testified that he had administered the SIRS test to Fisher when he evaluated him in May 2008, and Fisher appeared to be exaggerating the extent of his symptoms.

He also testified that without interviewing individuals who knew Fisher, and having access to more documents, he could not offer an opinion on Fisher's mental state at the time of the offense.

¶36 Contrary to Fisher's claims, Dr. Harvancik's testimony was not introduced to show that Fisher was competent either at the time of the murder or to stand trial. Rather, Dr. Harvancik's testimony was used to show that Dr. Kaperonis' evaluation of Fisher was inadequate under generally accepted procedures in the profession to determine his sanity at the time of the offense, and to determine malingering. The results of Dr. Harvancik's tests for malingering were relevant to shed light on the credibility of the information Fisher had provided to Dr. Kaperonis a year earlier, and on which Dr. Kaperonis relied for his opinion.

¶37 Nor are we persuaded that the trial court failed to weigh the probative value of this evidence against the danger of unfair prejudice. A trial court conducting a Rule 403 analysis should explain its weighing process on the record for the benefit of the appellate court. See Ariz. R. Evid. 403; see also *Shotwell v. Donahoe*, 207 Ariz. 287, 295-96, ¶ 33, 85 P.3d 1045, 1053-54 (2004). However, we need not reverse a judgment merely because a trial court fails to explain on the record its reasons for making a Rule 403 determination. *Higgins v. Assmann, Elec., Inc.* 217 Ariz. 289, 299, ¶ 37, 173 P.3d 453, 463

(App. 2007) (citing *Shotwell*, 207 Ariz. at 295-96, ¶ 33, 85 P.3d at 1053-54). We decline to find reversible error on this basis.

IV. Reference to Criminal History

¶38 Fisher also argues that the trial court fundamentally erred in failing to preclude Dr. Harvancik's repeated references to his prior arrests, incarceration, and criminal history. The record to which Fisher cites contains three discrete references by Dr. Harvancik to Fisher's criminal history: (1) he testified that he believed, based on information in other reports, that "[Fisher] appeared to minimize his use of substances[,] as well as his criminal history"; (2) he diagnosed Fisher with antisocial personality disorder based on his "deceptiveness . . . [in] reporting of the substance use history, the criminal record, as well as the SIRS"; and (3) he considered indicative of antisocial personality disorder "failure to conform to social norms, lawful behavior. His multiple arrests . . . would certainly support that."

¶39 Because Fisher failed to object at trial to any of this testimony, or ask for a limiting instruction, we review for fundamental error only. See *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Fisher accordingly bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608.

¶140 We find no reversible error. Even if the court arguably erred in failing to preclude testimony about Fisher's criminal history, Fisher has failed to show that the error deprived him of a fair trial or that he was prejudiced thereby. Dr. Harvancik's brief references to Fisher's criminal history were simply cumulative of those already made by Dr. Kaperonis on his examination by defense counsel the day before. On direct examination, Dr. Kaperonis noted that defendant was prescribed an anti-psychotic drug "[w]hen he was in Florence," other anti-psychotic medications "[w]hile incarcerated," and that he saw a psychiatrist for paranoia "in some correction facility in California" in 1994 and 1995. Dr. Kaperonis also testified that it was possible that Fisher had antisocial personality disorder "given the pattern of repeated legal infractions, [and] a seeming persistent lack of guilt and remorse."⁶ On this record, Dr. Harvancik's brief references to Fisher's criminal history were cumulative of earlier, similar references by Fisher's expert witness, Dr. Kaperonis, and thus, the trial court's failure to preclude them was neither fundamental error, nor

⁶ The trial court commented in passing at the end of the trial day, in discussion of whether defendant might testify and thus require a ruling on his impeachment by his prior convictions, that Dr. Kaperonis had made at least two separate references in his testimony to defendant's criminal record, noting, however, that he was not certain that the jury had caught them.

error that prejudiced defendant. See *Moody*, 208 Ariz. at 455, ¶ 121, 94 P.3d at 1150.

V. Sentencing Errors

¶41 Fisher next argues that the trial court abused its discretion by finding that he was on parole at the time of this offense, and in finding the existence of two prior historical convictions for purposes of imposing an enhanced sentence for the aggravated assault conviction. He further argues that it was improper to aggravate his murder conviction by the use of a dangerous weapon, because use of a dangerous weapon is an essential element of second-degree murder.

A. Finding that Defendant Was On Parole

¶42 Fisher first challenges the court's finding that he was on parole at the time he committed the instant offense and the court's use of this finding in declining to impose less than the presumptive sentence for each conviction pursuant to A.R.S. § 13-604.02(B) (2001).⁷

¶43 Over Fisher's objection, the court found that he was on parole from a conviction in Mohave County at the time he committed the instant offense, but it was unclear from the record whether the parole arose from the conviction for the 1999 burglary, or from a 2003 criminal damage/aggravated assault

⁷ This statute has since been renumbered as A.R.S. § 13-708 (2010), and the subsection at issue is now subsection C.

conviction that the parties erroneously believed had been reversed on appeal. Regardless, the court found that because each offense was committed while Fisher was on parole, it was prevented from imposing a mitigated sentence.

¶144 We need not address whether the court's finding was in error, because "the record clearly shows the trial court would have reached the same result even without consideration of the improper factor[]." *State v. Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989). In this case, the court expressly stated that it would have imposed the same sentence on the aggravated assault conviction and the second-degree murder conviction, even absent its finding that Fisher committed the offenses while on parole. On this record, any error in the court's finding that Fisher was on parole at the time of the offense was harmless.

B. Finding of California historical felony conviction

¶145 Fisher also challenges the court's finding that a California conviction for possession of unidentified controlled substances was a prior historical felony for purposes of imposing an enhanced sentence for the aggravated assault conviction. The State argued that during sentencing for a 1999 burglary conviction, Fisher admitted his California conviction was a prior historical felony conviction. Based on this judicial admission, the court found the California conviction

was a felony in Arizona. Accordingly, the court sentenced Fisher on the aggravated assault conviction based on the existence of this prior historical felony conviction, as well as one for the 1999 burglary in Mohave County.

¶146 We review a trial court's determination of whether a prior conviction constitutes an historical prior felony conviction de novo. *State v. Rasul*, 216 Ariz. 491, 496, ¶ 20, 167 P.3d 1286, 1291 (App. 2007). We also review the determination that a foreign conviction constitutes a felony in Arizona for purposes of sentence enhancement as an issue of law, de novo. See *State v. Health*, 198 Ariz. 83, 84, ¶ 4, 7 P.3d 92, 93 (2000).

¶147 The State concedes, and we agree, that the court had insufficient information to support its finding that this California conviction qualified as an Arizona felony conviction. The minute entry from that case states only the following:

IF REPETITIVE PER A.R.S. § 13-604, the Court finds that the defendant was previously convicted of the following felonies:

1. Possession of a Controlled Substance on March 24, 1997 in Riverside County, California

. . .

And the reasons therefore are stated by the Court on the record.

Although the trial court might take judicial notice from this

minute entry that another court had determined that the California conviction was an historical prior felony conviction, nothing in the minute entry establishes whether this issue was challenged and litigated, admitted by Fisher, or simply found without objection. Under these circumstances, we find that the court erred in adopting this determination over Fisher's objection.

¶48 Nor can we determine on the basis of the record submitted on appeal whether the conviction for possession of an unidentified controlled substance would have been a felony in Arizona. See *Health*, 198 Ariz. at 84, ¶ 3, 7 P.3d at 93. The court acknowledged as much at sentencing, noting that the California judgment submitted by the State at sentencing failed to supply sufficient information to conduct the required inquiry, as it was possible that "possession of a controlled substance in California may include possession of items that would not be a felony if possessed in Arizona." The copy of the judgment in evidence at the hearing did not identify the controlled substance that defendant was convicted of possessing, but simply referred to the governing statute[.]"⁸ Under these

⁸ In 1997, the statute at issue, Section 11377(a) of the California Health and Safety Code, prohibited possession of numerous controlled substances listed in different statutes and outlined various exceptions to the prohibition. See Cal. Health & Safety Code § 11377(a) (1991).

circumstances, we vacate and remand for resentencing. At the resentencing, the State may produce additional evidence to establish the existence of historical prior felony convictions. See *State v. Sowards*, 147 Ariz. 156, 158-59, 709 P.2d 513, 515-16 (1985) (holding that double jeopardy does not prevent the state from offering additional evidence to support enhancement at resentencing after finding insufficient evidence was offered at original sentencing).

C. Use of Dangerous Instrument as Aggravator in Murder

¶149 Finally, Fisher argues that the trial court abused its discretion by imposing an aggravated sentence for the second-degree murder conviction based on the use of a dangerous instrument. Fisher argues that because "an essential element of [Fisher's] conviction for first degree murder [sic] was the use of either a deadly weapon or a dangerous instrument," the court violated the statutory prohibition against employing "use of a dangerous instrument" to aggravate an offense for which "use of a dangerous instrument" is an "essential element." See A.R.S. § 13-702(C)(2) (2001).⁹

¶150 Fisher's argument is based on the faulty premise that "use of a deadly weapon or dangerous instrument" is an "essential element" of second-degree murder. Second-degree

⁹ This section was transferred in 2008 to A.R.S. § 13-701(D)(2) (2010).

murder requires only that defendant: (1) intentionally caused the death of another person; (2) caused the death of another person, knowing that his conduct would cause death or serious physical injury; (3) under circumstances manifesting extreme indifference to human life, recklessly engaged in conduct that created a grave risk of death thereby causing the death of another person. See A.R.S. § 13-1104(A)(1), (2), and (3) (2010). Although Fisher used a knife to commit this offense, there are any number of ways to murder a person without the use of a dangerous instrument, including by strangulation and suffocation. In short, use of a dangerous instrument is not an "essential element" of the crime of second-degree murder. The court accordingly did not err in employing this factor to aggravate Fisher's sentence for second-degree murder.

CONCLUSION

¶51 For the foregoing reasons, we affirm Fisher's convictions and his sentence for second-degree murder, but we vacate his sentence for aggravated assault and remand for resentencing.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PATRICK IRVINE, Presiding Judge

/s/

DONN KESSLER, Judge