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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



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FILED: 02/11/2010  
PHILIP G. URRY, CLERK  
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STATE OF ARIZONA, ) 1 CA-CR 08-0840  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
)  
ALVIN STEVENSON, ) (Not for Publication - Rule  
) 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
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)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2007-107782-001 DT

The Honorable Janet E. Barton, Judge

**AFFIRMED**

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Terry Goddard, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
and Craig W. Soland, Assistant Attorney General  
Attorneys for Appellee

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**B R O W N**, Judge

¶1 Alvin Stevenson appeals his conviction for first degree murder, transportation of marijuana, armed robbery, and possession of marijuana. For the reasons that follow, we affirm.

#### **BACKGROUND**

¶2 Stevenson was charged with first degree murder, transportation of marijuana, armed robbery and possession of marijuana after he and three other persons stole marijuana from a seller who believed the group planned to purchase the marijuana for \$27,000. The group utilized various firearms during the robbery, including an AK-47 rifle used by Stevenson. During the incident, a person associated with the seller was shot and killed. Two people identified Stevenson as the shooter. Later that day, Stevenson indicated he thought he shot the victim. A jury found Stevenson guilty as charged. He was sentenced to life imprisonment with a possibility of parole after twenty-five years for first degree murder and given concurrent, aggravated sentences of ten years' imprisonment for transportation of marijuana, twenty-one years for armed robbery and 1.5 years for possession of marijuana. He timely appealed.

#### **DISCUSSION**

¶3 Stevenson raises four issues on appeal. He contends the trial court erred when it dismissed a juror during deliberations and when it denied Stevenson's motion for mistrial

following the dismissal of the juror; that there was "no substantial evidence" that the aggravating factors found by the jury for sentencing purposes "exceeded the elements of the crime charged," and that the court erred when it imposed aggravated sentences based on those aggravating factors.

#### **I. Dismissal of Juror 13**

¶14 Stevenson argues the trial court erred when it dismissed Juror 13 during deliberations and replaced her with an alternate. Ordinarily, we review the dismissal of a juror for cause for abuse of discretion. *State v. Hoskins*, 199 Ariz. 127, 139, ¶ 37, 14 P.3d 997, 1009 (2000). However, Stevenson did not object to the dismissal of Juror 13. Therefore, we review for fundamental error only. *See State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) (failure to raise an issue at trial waives all but fundamental error). "To establish fundamental error, [a defendant] must show that the error complained of 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." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Even after fundamental error has been established, a defendant must demonstrate the error was prejudicial. *Id.* at ¶ 26.

¶15 During deliberations, the jury sent a note which read, "Judge Barton: [t]here are two jurors that have stated they are

unable to apply the law. We ask for an answer [] to how we should proceed at this time." After discussing the note, the parties agreed to bring in the entire panel for questioning.

¶16 The trial court re-read to the jurors the instructions that required them to follow all the instructions and the law contained within whether they agreed with the law or not, and further instructed the jurors that the instructions are the rules they must use to decide the case. When the court asked if anyone on the jury was unable to follow these instructions, Jurors 13 and 6 raised their hands. The court asked Juror 13 if she was unable to follow these instructions and she responded, "Yes." The court then asked Juror 13 if she was unable to follow the law because she disagreed with the law, to which she responded, "Yes." The court then asked, "And so because you disagree with the law, you will not follow the law in this case?" Juror 13 responded, "Yes." The court then addressed the issue with Juror 6. At this time, there was no clarification as to what law Juror 13 refused to follow.

¶17 The trial court believed it had no choice but to strike Juror 13. Despite Juror 13's clear statements that she would not follow the law because she disagreed with the law, Stevenson asked the court to question Juror 13 individually to make sure her issue was not with the sufficiency of the evidence rather than a refusal to follow a law with which she disagreed.

Stevenson agreed that if Juror 13 indicated she would refuse to follow the law because she did not agree with the law, she should be dismissed.

¶8 Juror 13 and Juror 6 were then questioned individually. The court explained to Juror 13 it needed to make sure it fully understood what she stated earlier. By this time, it was apparent to the court and counsel the instructions and law at issue were those that dealt with felony murder. The court told Juror 13 there seemed to be two possible scenarios:

Scenario No. 1 could be that you simply do not agree with the first degree murder law in Arizona, you don't agree with the felony murder rule as it's written; and based upon your analysis of the evidence in the case, you are of the opinion that the facts would show one or more of these Defendants to be guilty under the felony murder rule beyond a reasonable doubt, but you simply cannot apply that rule because you disagree with it. That's Scenario 1.

Scenario 2 would be, I'm not a big fan of the felony murder rule. I disagree with it in principle, but it really makes no difference because, based upon the facts as I have found them in this case, I would not be able to find the Defendant guilty under the felony murder rule beyond a reasonable doubt.

Juror 13 indicated she understood and it was more of a situation like scenario 2. The court and counsel then discussed whether an impasse instruction should be given. However, the court decided it wanted further clarification regarding both jurors'

positions. As noted above, Juror 13 had clearly indicated she disagreed with the law and would refuse to follow it, then indicated she had a problem with the facts of the case. We note also that the court's second scenario did not preclude a continued refusal to follow the law. The court then brought both jurors back for additional questioning.<sup>1</sup>

¶19 When Juror 13 returned, the court again explained to her it wanted to make sure it fully understood what she had previously told the court. The following discussion took place between the court and Juror 13:

Court: Putting this case aside, if you were on a jury on another case and - and the case involved the felony murder rule, and after hearing all of the evidence in the case you were convinced beyond a reasonable doubt that based upon the facts in that case the defendant was guilty of felony murder, would you be able to find a defendant guilty of felony murder if you were convinced the facts supported it beyond a reasonable doubt, or would you still say, I simply cannot follow that law because I so strongly disagree with it?

Juror 13: I would still say.

Court: You would still say you could not follow that?

Juror 13: Yes.

Court: So even if you were convinced beyond a reasonable doubt that the facts supported a felony murder conviction, you would not be able to find the defendant guilty because you fundamentally disagree with that law.

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<sup>1</sup> The court requested the two jurors be brought back in moments after sending Juror 13 out.

Juror 13: Yes.

Court: Thank you.

Juror 13 was then dismissed without objection and an alternate was selected to take her place. Juror 6 remained on the jury.

¶10 Rule 18.4(b) of the Arizona Rules of Criminal Procedure ("Criminal Rules") provides "[w]hen there is reasonable ground to believe that a juror cannot render a fair and impartial verdict, the court, on its own initiative, or on motion of any party, shall excuse the juror from service in the case." Pursuant to Rule 18.4(b), jurors may be removed at any time so long as there are sufficient jurors to enable the trial to continue. *State v. Evans*, 125 Ariz. 140, 142, 608 P.2d 77, 79 (App. 1980); see also *State v. Cook*, 170 Ariz. 40, 54, 821 P.2d 731, 745 (1991) (trial court did not abuse its discretion when it dismissed juror for cause during trial).

¶11 Stevenson does not dispute that a juror who refuses to follow the law can and should be dismissed for cause even during deliberations. As noted above, Stevenson agreed at trial that if Juror 13 indicated she would refuse to follow the law because she disagreed with it, she should be dismissed. On appeal, however, Stevenson argues Juror 13 indicated she was unwilling or unable to deliberate because of her views on the sufficiency of the evidence and the merits of the case. Once she communicated this to the trial court, Stevenson argues, the

court could not dismiss her and should not have questioned her further.

¶12 Stevenson relies on *United States v. Symington*, 195 F.3d 1080, 1084 (9th Cir. 1999). In *Symington*, a federal district court dismissed a juror for cause during deliberations after the district court found the juror was unable or unwilling to participate in deliberations in accordance with the jury instructions. *Id.* The Ninth Circuit reversed. *Id.* at 1088. In doing so, the court noted the frustrations with the dismissed juror may have been more related to the dismissed juror's views on the case than with any inability or refusal to follow the jury instructions. *Id.* The Ninth Circuit ultimately held that if the record "discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *Id.* at 1087.

¶13 We find no error, fundamental or otherwise, because this case does not present a similar situation as that presented in *Symington*.<sup>2</sup> In *Symington*, the dismissed juror never indicated she would refuse to follow the trial court's instructions or the law. *Id.* at 1084. Here, when first questioned, Juror 13 made it clear she would not follow the instructions that required her

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<sup>2</sup> The trial court noted that *Symington* presented "completely different facts from what we have here."



to follow the law whether she agreed with it or not. She further made clear she would not follow the law because she disagreed with it. When questioned again, Juror 13 confused the issue and indicated her position was more like the second scenario posed by the trial court in which she still disagreed with the law but would not be able to find Stevenson guilty beyond a reasonable doubt of felony murder. Juror 13's inconsistent statements necessitated clarification. We will not find a trial court errs when it clarifies a juror's position on whether she will refuse to follow jury instructions or the law contained in those instructions when that juror has made inconsistent statements in that regard. This is especially true where, as here, the juror has previously indicated she will not follow the instructions or the law contained in those instructions. Even if the record itself were not so clear, the trial court is in the best position to observe a potential juror's demeanor and evaluate credibility. *State v. Purcell*, 199 Ariz. 319, 323, ¶ 9, 18 P.3d 113, 117 (App. 2001).

¶14 There is nothing in the record to show the impetus for Juror 13's dismissal was her views on the merits of the case. The trial court did not abuse its discretion when it dismissed Juror 13 after she repeatedly stated she would not follow the law regardless of what the evidence showed.

## II. The Denial of the Motion for Mistrial

¶15 Stevenson contends the trial court erred when it denied his motion for mistrial made the day after Juror 13 was dismissed. Stevenson did not move for mistrial based on the wrongful dismissal of Juror 13 and does not argue on appeal the dismissal of Juror 13 itself warranted a mistrial. Instead, he argued sending the jury back to deliberate with an alternate juror "would be improperly tampering with the deliberations" and would unduly influence Juror 6. On appeal, Stevenson does not argue further deliberations unduly influenced Juror 6. Stevenson argues, based on *Symington*, that the trial court's only choices were to return both Jurors 13 and 6 to the jury for further deliberations or declare a mistrial. See *Symington*, 195 F.3d at 1087 ("[I]f the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror. Under such circumstances, the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial."). Stevenson argues that having the jury resume deliberations with an alternate somehow "forced" the jury to return a unanimous verdict when there had been a possibility the jury would have deadlocked on the count of felony murder.

¶16 The trial court has broad discretion when ruling on motions for mistrial. We review the failure to grant a mistrial for abuse of discretion. *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995). To warrant reversal, the decision to deny a mistrial must be "palpably improper and clearly injurious." *Id.* (quoting *State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989), *aff'd* 497 U.S. 639 (1990)).

¶17 We find no error. As noted above, this case is not analogous to *Symington*. The Criminal Rules expressly provide for seating an alternate juror when a deliberating juror is excused. Ariz. R. Crim. P. 18.5(h). Seating an alternate juror and having the jury begin deliberations anew does not "force" any jurors previously in the minority to change their position. Finally, the jury was given an impasse instruction just before deliberations began anew. In that instruction the jurors were told not to sacrifice their individual judgment. The court further informed the jury the instruction was not intended to force a verdict and that a deadlock was a legitimate result that they could and should report to the court should they be truly deadlocked. Stevenson does not contest the sufficiency or effectiveness of the impasse instruction. Therefore, the trial court did not abuse its discretion when it denied Stevenson's motion for mistrial.

### III. Sentencing Issues

¶18 At the aggravation phase of trial, the jury found each of the four offenses<sup>3</sup> were aggravated by four factors:

1. The infliction or threatened infliction of serious physical injury;
2. The use, threatened use or possession of a deadly weapon or dangerous instrument;
3. The presence of an accomplice; and
4. The offense was committed as consideration for receipt, or in expectation of the receipt, of anything of pecuniary value.

At sentencing, the trial court acknowledged that while the jury found the same four aggravating factors for each offense, some of those factors were subsumed within the offenses themselves.<sup>4</sup> However, the court also found there were at least two valid aggravating factors for each offense. Further, when the court

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<sup>3</sup> The jury returned verdict forms finding aggravating factors on all four offenses that Stevenson was charged with, however, the corresponding minute entry only lists three of those offenses. The minute entry shall be corrected to reflect the jury's intent. See *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992) ("Upon finding a discrepancy . . . , a reviewing court must try to ascertain the trial court's intent by reference to the record.").

<sup>4</sup> While the trial court did not identify which factors were subsumed in which offenses, "Trial judges 'are presumed to know the law and apply it in making their decisions.'" *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (quoting *Walton v. Arizona*, 497 U.S. 639, 653 (1990)).

imposed sentence and identified the applicable aggravating factors for each offense, it imposed each sentence based on the presence of "any or all" of the aggravating factors.

¶19 The court then imposed a sentence for first degree murder without reference to any aggravating factors. A trial court can impose a sentence of up to natural life for first degree murder based solely on the facts reflected in the jury's verdict. *State v. Fell*, 210 Ariz. 554, 557-58, ¶ 11, 115 P.3d 594, 597-98 (2005). There is no requirement that a jury find any aggravating circumstances. *Id.* at 560, ¶ 19, 115 P.3d at 600. In imposing a ten-year sentence for transportation of marijuana, the court found the offense was aggravated by the infliction or threatened infliction of serious physical injury, the presence of an accomplice, and the use of a deadly weapon. In imposing a twenty-one year sentence for armed robbery, the court found the offense was aggravated by the infliction or threatened infliction of serious physical injury, the presence of an accomplice, the possession and use of a deadly weapon, and pecuniary gain. Finally, in imposing a 1.5 year sentence for possession of marijuana, the court found the offense was aggravated by the infliction or threatened infliction of serious physical injury, the presence of an accomplice, the possession or use of a deadly weapon, and pecuniary gain.

¶20 Stevenson presents two issues regarding sentencing. He first argues the jury erred when it found the existence of the aggravating factors because “[N]o substantial evidence existed that the factors alleged exceeded the elements of the crime charged.” Stevenson further argues the trial court erred when it in turn imposed aggravated sentences based on the existence of those aggravating factors. Because Stevenson did not object to the jury’s determination of the existence of aggravating factors or the trial court’s consideration of those factors, we review for fundamental error only. See *Gendron*, 168 Ariz. at 154, 812 P.2d at 627. Further, because Stevenson did not receive an aggravated sentence for first degree murder, we do not address the imposition of life imprisonment for that offense.

¶21 Regarding the sufficiency of the jury’s findings, we find no error, fundamental or otherwise. The only issue for the jury was to determine whether each alleged aggravating factor existed beyond a reasonable doubt. See *State v. Cox*, 201 Ariz. 464, 469, ¶ 18, 37 P.3d 437, 442 (App. 2002) (aggravating factors are not required to be found by the jury beyond a reasonable doubt). Stevenson does not contend there was insufficient evidence to support the jury’s determination that each of the aggravating factors existed beyond a reasonable doubt; i.e., that the offenses involved the infliction or

threatened infliction of serious physical injury; the use, threatened use or possession of a deadly weapon or dangerous instrument; the presence of an accomplice; or whether the offenses were committed for pecuniary gain. Therefore, we find no error in the jury's determination of the existence of those aggravating factors.

¶22 Stevenson's argument regarding the jury's findings addresses whether the factors alleged could be considered as aggravating factors or whether they were subsumed in the particular offense at issue. Whether an aggravating factor is an element of the offense and whether the trial court may consider that factor for purposes of sentencing is a matter of law, not a question for the jury. *State v. Tschilar*, 200 Ariz. 427, 435, ¶ 32, 27 P.3d 331, 339 (App. 2001). We review de novo whether an aggravating factor is an element of the offense and whether the trial court may consider that factor for purposes of sentence aggravation. *Id.* In *Tschilar*, we stated:

An element of an offense may be used as an aggravating factor if the legislature has specified that it may be so used. The legislature has articulated aggravating factors in non-capital cases in A.R.S. section 13-702(C) (Supp. 2000). Ordinarily, if an element is not specified in section 13-702(C), it may not be used to aggravate a sentence because to enhance punishment, in the absence of any legislative intent, by using the very elements of the crime as aggravating factors would undermine the carefully structured statutory scheme

providing for presumptive sentences. Number of victims is not a statutory aggravating factor set forth in section 13-702(C). Nonetheless, an element not included in that section may be used to aggravate a sentence if it involves conduct that rises to a level beyond that merely necessary to establish the underlying crime, in which case the court may consider the factor pursuant to section 13-702(C)(18).

*Id.* at ¶ 33 (citations and internal quotations omitted).

¶23 We find no error in the trial court's consideration of the aggravating factors found by the jury or the imposition of aggravated sentences based upon those factors. All of the aggravating factors identified by the jury are contained in A.R.S. § 13-702(C) (2001).<sup>5</sup> See A.R.S. § 13-702(C)(1) (infliction of serious physical injury); (C)(2) (use or possession of a deadly weapon); (C)(4) (presence of an accomplice) and (C)(6) (pecuniary gain). Regarding the sentence for transportation of marijuana, none of the factors found by the jury (serious physical injury, use of a deadly weapon, presence of an accomplice) were elements of the offense and could, therefore, be considered as aggravating factors. See A.R.S. § 13-3405(A)(4) (Supp. 2009). The same is true for the sentence for possession of marijuana. See A.R.S. § 13-3405(A)(1).

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<sup>5</sup> We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.



¶24 Regarding armed robbery, as noted above, the trial court found all four aggravating factors were applicable. However, A.R.S. § 13-702(C)(1) and (2) provide that infliction or threatened infliction of serious physical injury and use, threatened use, or possession of a deadly weapon or dangerous instrument may not be considered as aggravating factors if that factor is an essential element of the offense. Regardless, we need not address whether these factors are essential elements of armed robbery or involved conduct that rose to a level beyond that merely necessary to establish the offense.<sup>6</sup> See *Tschilar*, 220 Ariz. at 435, ¶ 33, 27 P.3d at 339. Even if we assume the trial court improperly considered those two aggravating factors in the context of armed robbery, we find no error. When a trial court considers both proper and improper factors in imposing an aggravated sentence, we may affirm where the record clearly shows the court would have imposed the same sentence even without consideration of the improper aggravating factors.

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<sup>6</sup> "A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property." A.R.S. § 13-1902(A) (2001). "A person commits armed robbery if, in the course of committing robbery as defined in § 13-1902, such person or an accomplice: 1. Is armed with a deadly weapon or a simulated deadly weapon; or 2. Uses or threatens to use a deadly weapon or dangerous instrument or a simulated deadly weapon." A.R.S. § 13-1904(A) (2001).

*State v. Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989). Here, the court acknowledged some of the factors were subsumed in the offenses. The court imposed each sentence based on the existence of "any or all" of the factors it identified for each offense, thereby indicating it found each individual factor to be a sufficient basis for the sentence imposed. The sentence for armed robbery could be aggravated based on the presence of an accomplice or pecuniary gain. Therefore, the record shows the trial court would have imposed the same sentence for armed robbery and the other offenses even without consideration of any improper aggravating factors.

¶25 We find no error in the jury's determination of the existence of aggravating factors or the trial court's consideration of those factors for sentencing purposes.

#### CONCLUSION

¶26 Based on the foregoing, we affirm Stevenson's convictions and sentences.

/s/

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MICHAEL J. BROWN, Judge

CONCURRING:

/s/

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PETER B. SWANN, Presiding Judge

/s/

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LAWRENCE F. WINTHROP, Judge