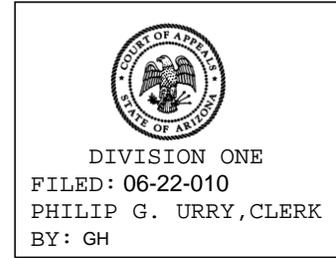


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 09-0278
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
TODD WILLIAM COVEY,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200800068

The Honorable Andrew W. Gould, Judge

**CONVICTIONS AFFIRMED;
SENTENCES AFFIRMED IN PART AS CORRECTED;
REMANDED IN PART FOR RESENTENCING**

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

Sharmila Roy Laveen
Attorney for Appellant

N O R R I S, Judge

¶1 Todd William Covey timely appeals his convictions and sentences.

¶12 A grand jury indicted Covey on one count each of attempted second degree murder, a class two felony; aggravated assault with a deadly weapon or dangerous instrument, a class three felony; and hindering prosecution in the first degree, a class five felony, alleging these offenses (the "three offenses") occurred on or about May 25, 2007. The State later amended the indictment to allege four prior felony convictions.¹ A jury convicted Covey of the three offenses.²

¶13 After a trial on the priors, the superior court found the State had proven Covey's four alleged prior felony convictions beyond a reasonable doubt. The superior court sentenced Covey as a repetitive offender to aggravated terms on each count. See Ariz. Rev. Stat. ("A.R.S.") §§ 13-604(C), (D) (Supp. 2006) (this section is now A.R.S. § 13-703(C), (J) (2010)) and -702(B), (C) (Supp. 2006) (this section is now A.R.S. § 13-701(C), (D) (2010)).

¶14 Covey first contends the superior court improperly imposed an aggravated sentence because it did not "consider" Covey's prior convictions as an aggravator and considered

¹Covey was convicted of these felonies on December 28, 2004; June 21, 2001; October 30, 2000; and October 23, 2000. These crimes were committed on November 20, 2004; October 23, 2000; "During the Month" of August, 2000; and August 19, 2000, respectively.

²We view the facts in the light most favorable to sustaining Covey's convictions and sentences. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008).

instead the presence of an accomplice and physical and emotional harm to the victim (the "additional factors") as aggravators. Covey then argues the additional factors should have been found explicitly or implicitly by a jury beyond a reasonable doubt, and we should remand for resentencing. See *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). We disagree.

¶15 Because Covey failed to object to his sentences in the superior court, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error goes "to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). Once a defendant shows fundamental error occurred, he must demonstrate the error caused him prejudice. *Id.* at 568, ¶ 26, 115 P.3d at 608.

¶16 The superior court sentenced Covey as a repetitive offender with two prior felony convictions under the enhanced sentencing provisions of A.R.S. § 13-604(C) and (D) for his three offenses; it then imposed aggravated sentences for these offenses, citing the additional factors. See A.R.S. § 13-702(B), (C)(4), (C)(9). The superior court, however, did not

specify which of the felonies it used to enhance Covey's sentences. Covey's two most recent felonies, *see supra* note 1, would have qualified to enhance his sentence pursuant to either A.R.S. § 13-604(W)(2)(c) (class four, five, or six felony committed within five years of date of present offense, excluding time incarcerated) or subsection (d) (any felony conviction that is defendant's third or more prior felony conviction). Thus, two felonies remained to aggravate Covey's sentence beyond the presumptive term pursuant to A.R.S. § 13-702(C)(11) (defendant previously convicted of felony within ten years of date of current offense).³

¶7 Although Covey correctly notes the superior court did not explicitly state it used the remaining felonies to aggravate his sentences above the presumptive term, the court explicitly found these priors beyond a reasonable doubt. This finding by itself exposed Covey to a penalty above the presumptive term under A.R.S. § 13-702(B) and (C)(11). This finding also permitted the superior court to find additional factors relevant to the exercise of its "discretion in determining the specific sentence to impose on a defendant *within* a given statutory

³We also note Covey's 2004 and 2001 convictions could be used for both sentence enhancement and aggravation purposes. *See State v. Ritacca*, 169 Ariz. 401, 403, 819 P.2d 987, 989 (App. 1991) (double jeopardy or double punishment principles do not preclude court from using prior convictions to impose enhanced sentence under A.R.S. § 13-604 and to find aggravating circumstances under § 13-702).

sentencing range" by a preponderance of the evidence. *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26, 115 P.3d 618, 625 (2005) (emphasis in original). Accordingly, we reject Covey's argument the jury was required to find the additional factors.⁴

¶18 Covey next argues the superior court improperly imposed an aggravated sentence on his hindering prosecution conviction because the additional factors -- use of an accomplice and harm to the victim -- did not apply to this crime. The State correctly concedes error. Covey has demonstrated prejudice by the imposition of an illegal sentence. Thus, we vacate Covey's sentence on this conviction and remand for resentencing. See *State v. Thues*, 203 Ariz. 339, 340, ¶ 4, 54 P.3d 368, 369 (App. 2002) (imposition of illegal sentence is fundamental error appellate court must vacate).⁵

⁴Covey also argues the superior court did not articulate the standard of proof it used to find the additional factors. We need not reach this argument because, as discussed above, the superior court was only required to find the additional factors by a preponderance of the evidence.

⁵We decline the State's request we reduce Covey's sentence to the presumptive term rather than remand for resentencing. "When a trial court relies on an improper factor, and we cannot be certain that it would have imposed the same sentence absent that factor, we must remand for resentencing. . . . The exercise of sentencing discretion is the trial court's, not ours." *State v. Muninger*, 213 Ariz. 393, 396, ¶ 9, 142 P.3d 701, 704 (App. 2006) (internal quotations omitted).

¶9 Covey also argues we should vacate his sentences and remand because the superior court improperly considered aggravators the State failed to allege before trial, thus depriving him of advance notice of "the full extent of potential punishment," in violation of Arizona Rule of Criminal Procedure 13.5(a), and of his right to a fundamentally fair trial. We disagree.

¶10 Assuming the State should have provided notice of the additional factors,⁶ Covey must demonstrate he was prejudiced. See *supra* ¶ 5. As discussed above, see *supra* ¶¶ 6-7, the State alleged Covey's four prior felony convictions, qualifying him for the enhanced sentencing range pursuant to A.R.S. § 13-604, and an aggravated sentence, above the presumptive, under § 13-702(B) and (C)(11). Once the superior court found Covey's four priors, it was entitled to find the additional factors under *Blakely*. See *State v. Lamar*, 210 Ariz. 571, 577, ¶ 26, 115 P.3d 611, 617 (2005) (once prior felony conviction found, court is then "free to consider additional aggravating factors in determining the actual sentence to impose, up to the maximum sentence prescribed by the sentencing statute"). Because the

⁶"Pretrial notice enables a defendant to know the full range of potential punishment he faces upon conviction; fundamental fairness and due process require that allegations that would enhance a sentence be made before trial so that the defendant can evaluate his options." *State v. Benak*, 199 Ariz. 333, 336-37, 18 P.3d 127, 130-31 (App. 2001).

additional factors were not required to be found by a jury, under a literal reading of Rule 13.5(a), the State did not need to allege them. See Ariz. R. Crim. P. 13.5(a) ("prosecutor may amend an indictment, information or complaint to add an allegation of . . . other non-capital sentencing allegations that *must* be found by a jury" (emphasis added)). Thus, Covey has failed to demonstrate the State's failure to allege the additional factors prejudiced him.

¶11 Finally, we note the signed sentencing order as amended and the minute entry for the sentencing hearing recited Covey's attempted second degree murder and aggravated assault convictions as dangerous offenses pursuant to A.R.S. § 13-604. The jury found these offenses to be dangerous although neither the grand jury nor the State made this allegation prior to trial. Citing *State v. Laughter*, 128 Ariz. 264, 268-69, 625 P.2d 327, 331-32 (1980), the superior court did not sentence Covey as a dangerous offender, see A.R.S. § 13-604(I), but as a repetitive offender because Covey's prior convictions were not dangerous. See A.R.S. § 13-604(D). Thus, we correct the sentencing order and minute entry to reflect Covey was sentenced for attempted second degree murder and aggravated assault as a repetitive offender. *State v. Sands*, 145 Ariz. 269, 278, 700 P.2d 1369, 1378 (App. 1985) (error in sentencing minute entry requires modification).

CONCLUSION

¶12 For the foregoing reasons, we affirm Covey's convictions;⁷ affirm Covey's sentences for attempted second degree murder and aggravated assault; vacate Covey's sentence for hindering prosecution in the first degree and remand for resentencing; and correct the superior court's sentencing order and minute entry to reflect Covey was sentenced for attempted second degree murder and aggravated assault as a repetitive offender.

/s/

PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

MAURICE PORTLEY, Judge

⁷Although Covey's notice of appeal also challenged his convictions, he presented no argument on appeal contesting them.