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

STATE OF ARIZONA, Appellee, v. MONROE ANDERSON, JR., Appellant.	)	1 CA-CR 09-0342 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-128709-001 DT

The Honorable Robert L. Gottsfield, Judge

SENTENCES VACATED; REMANDED FOR RESENTENCING

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B R O W N, Judge

¶1 Monroe Anderson, Jr., appeals his sentences resulting from convictions for multiple counts of armed robbery, aggravated assault, kidnapping, and misconduct involving weapons, on the ground the trial court fundamentally erred in (1) sentencing him as a repetitive offender based on prior convictions from Oklahoma; and (2) in imposing probation surcharges for each of his convictions. For the following reasons, we vacate his sentences and remand for resentencing.

BACKGROUND

¶2 The facts underlying the convictions are not relevant to the issues on appeal. A jury convicted Anderson of the charged crimes, found all but the convictions for misconduct involving weapons were dangerous offenses, and found the existence of three aggravating factors. The trial court subsequently found that Anderson had three prior Oklahoma felony convictions, all of which were equivalent to Arizona felonies, and two of which qualified as historical priors under Arizona law as follows: (1) a 1991 Oklahoma conviction in CRF-91-405 for assault with a dangerous weapon which the judge concluded was equivalent to a conviction for aggravated assault under Arizona Revised Statutes ("A.R.S.") section 13-1204(A)(2), a class three felony, and was eligible as an historical prior

felony notwithstanding its age because it involved use of a deadly weapon or dangerous instrument; (2) a 1990 conviction in CRF-90-686 for unlawful possession of a narcotic with intent to distribute, which the judge found was equivalent to a conviction for possession of narcotics for sale under A.R.S. § 13-3408(A)(2), a class two felony; and (3) a 1993 conviction in CRF-93-706 for robbery by force and fear, which the judge found was equivalent to robbery under A.R.S. § 13-1902, a class four felony, and because it was the third felony, constituted an historical prior conviction notwithstanding its age. The court sentenced Anderson as a repetitive offender to a combination of concurrent and consecutive aggravated sentences totaling forty-eight years, with each of the terms enhanced by the finding of the two historical felony convictions. The court also imposed a probation surcharge of ten dollars for each conviction. Anderson timely appealed.

DISCUSSION

I. Historical prior felony convictions

¶3 Anderson argues that the trial court fundamentally erred in failing to conduct a side-by-side comparison of the Arizona and Oklahoma statutes in determining whether Anderson had prior felony convictions.

¶4 As an initial matter, we reject Anderson's argument that reversal is required on the grounds that "[t]he trial judge

merely accepted the prosecutor's avowal that the elements of the Oklahoma crimes were the same as an Arizona crime, and did not conduct any analysis of the statute's [sic] himself." The trial court is required to make the determination "by comparing the statutory elements of the foreign crime with those in the relevant Arizona statute." *State v. Crawford*, 214 Ariz. 129, 131, ¶ 7, 149 P.3d 753, 755 (2007). We presume that the trial court knew and followed the law. *State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996). Moreover, in this case, the court acknowledged at the start of the hearing on Anderson's prior convictions that it had a duty to find, not only that Anderson had been convicted of the Oklahoma offenses, but also that Arizona had an equivalent to the Oklahoma statute under which he was convicted. The prosecutor referred to the elements of the offense outlined in the Information in each case, and argued, albeit in summary fashion, that the elements of the Oklahoma offenses were comparable to those of the specific Arizona statutory offenses. The court subsequently concluded that the offenses were equivalent for purposes of finding the Oklahoma convictions were historical prior felony convictions.

¶5 On this record, we cannot agree with Anderson that the trial court completely abdicated its responsibility to compare the statutory elements of the Oklahoma convictions with those in the relevant Arizona statute, requiring us to vacate his

sentences on this basis alone. *Cf. Crawford,* 214 Ariz. at 132, ¶ 12, 149 P.3d at 756 (vacating sentence on the ground that the trial court erred in relying on factual basis described in the indictment to determine that the prior federal conviction qualified as a prior historical felony conviction, over defendant's objection that the federal statute could be violated by conduct that would not constitute a felony under Arizona law).

¶6 No other arguments relating to the prior felony convictions were raised by Anderson in his opening brief. In his reply brief, however, Anderson argued that the Oklahoma convictions have no Arizona statutory counterpart and therefore should not have been used to enhance his sentences. This argument has been waived because it was raised for the first time in the reply brief. *See State v. Lopez*, 217 Ariz. 433, 438 n.4, ¶ 17, 175 P.3d 682, 687 n.4 (App. 2008) (recognizing that issues raised for the first time in a reply brief are generally waived).

¶7 Notwithstanding waiver of the issue, we nonetheless find it necessary to consider whether Anderson should be resentenced based on a partial concession of error filed by the State. Prior to oral argument before this court, the State filed a notice of partial concession of error and citation to supplemental authority, stating that its prior reliance on

A.R.S. § 13-1802(A)(l), (E) (2006) (Arizona's theft statute) and A.R.S. § 13-105(12) (2010) (defining a dangerous weapon under Arizona law) was in error. The State conceded that given the strict requirements of *Crawford*, a remand for resentencing would be appropriate. Though we are not bound by the State's concession, *State v. Sanchez*, 174 Ariz. 44, 45, 846 P.2d 857, 858 (App. 1993), under these unique circumstances, and because we perceive there may be merit to the conceded error, we conclude that the case must be remanded for resentencing. On remand, if the State desires to renew its attempt to prove that the Oklahoma felonies match the Arizona felonies, then the State must establish that the Oklahoma felonies include "every element that would be required to prove an enumerated Arizona offense." *Crawford*, 214 Ariz. at 131, ¶ 7, 149 P.3d at 755.

II. Probation Surcharge

¶8 Anderson also argues that the court erred in imposing a separate ten dollar probation surcharge under A.R.S. § 12-114.01(A) (Supp. 2007) on each sentence of imprisonment, asserting the statute requires a levy of a surcharge only on monetary assessments, and none was imposed in this case. The State effectively concedes that the trial court did not impose any other monetary assessment in sentencing Anderson, but argues that the statute contemplates imposition of the surcharge on each conviction, including a sentence of imprisonment. We

review purely legal issues such as this one de novo. *Mejak v. Granville*, 212 Ariz. 555, 556, ¶ 7, 136 P.3d 874, 875 (2006). Because Anderson failed to object at sentencing, we are limited to review for fundamental error only. *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Anderson 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.

¶9 In interpreting statutes, "we make every effort to give effect to the intent of the legislature." *Mejak*, 212 Ariz. at 557, ¶ 8, 136 P.3d at 876. We consider the statutory language the best indicator of that intent, and we go no further to ascertain the intent if the language of the statute is clear and unambiguous. *Id.*

¶10 At the time of Anderson's offense and sentence, the statute requiring a probation surcharge provided in pertinent part:

> A. Except as provided in § 12-269, in addition to any other penalty assessment provided by law, a probation surcharge of ten dollars shall be levied on every fine, penalty and forfeiture imposed and collected by the superior, justice and municipal courts for criminal offenses[.]

A.R.S. § 12-114.01(A) (Supp. 2007). Arizona Revised Statutes § 12-269(C)(Supp. 2007) provides:

> C. In lieu of the surcharge prescribed in

> § 12-114.01 and in addition to any other penalty assessment provided by law, a county with a population of two million or more persons shall levy a probation surcharge in an amount determined by the county on every fine, penalty and forfeiture imposed and collected by the superior, justice and municipal courts for criminal offenses[.]

The trial court did not identify the statute under which it imposed the probation surcharge. The statutes, however, are worded identically with respect to the issue raised, and accordingly, our analysis applies whether the probation surcharge was imposed under either statute.

¶11 The statutory provision contemplates a surcharge only on a monetary "fine, penalty and forfeiture." In identifying the assessment as a "surcharge," the statute implicitly requires that the charge be imposed only as an addition to another monetary assessment. This is because a "surcharge" is by definition a charge over, above, or in addition to, another charge. *See* Webster's Ninth Collegiate Dictionary 1187 (1984) (defining the prefix "sur" as over or above, and "surcharge" as "an additional tax, cost, or impost"). Moreover, the statute requires imposition of the probation surcharge only on those fines, penalties or forfeitures that are "imposed and collected" by the courts.

¶12 In context, the use of the terms "surcharge" and "imposed and collected" cannot be construed as anything other

than the legislature's limitation of imposition of the surcharge to only those fines, penalties and forfeitures that are monetary. Had the legislature intended to impose a probation surcharge on each conviction, it could have said so. It did not. We therefore interpret A.R.S. §§ 12-114.01(A) and 12-269(C) as authorizing the levy of a probation surcharge only on those fines, penalties or forfeitures imposed in criminal offenses that are monetary in nature.

CONCLUSION

¶13 For the foregoing reasons, we vacate Anderson's sentence, including the probation surcharges, and remand for resentencing in accordance with this decision.

/s/

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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

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DANIEL A. BARKER, Judge

/s/

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PHILIP HALL, Judge