

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



DIVISION ONE
FILED: 11-09-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0533
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
RICHARD LEE KNETZER,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Mohave County

Cause No. CR 2008-0951

The Honorable Rick A. Williams, Judge

AFFIRMED AS MODIFIED

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

Jill L. Evans, Mohave County Appellate Defender Kingman
By Jill L. Evans, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Richard Lee Knetzer appeals his convictions and sentences for negligent homicide and aggravated assault. On appeal, Knetzer argues the indictment was duplicitous; the trial

court incorrectly instructed the jury on the duty to render aid; there was insufficient evidence to support the conviction for negligent homicide; the trial court erred when it found two aggravating factors for sentencing purposes; and the trial court erred when it imposed consecutive sentences. For the reasons that follow, we affirm Knetzer's convictions and sentences as modified.

FACTUAL AND PROCEDURAL HISTORY

¶12 The victim, Knetzer's roommate, was found dead in Knetzer's residence with Knetzer present. The victim bled to death after he was shot through the right hand. The victim also had three newly-fractured ribs and multiple bruises, abrasions and lacerations on his body, head and face. Additional details are discussed in the context of the issues addressed below.

¶13 Knetzer was charged with second-degree murder and aggravated assault. After a five-day jury trial, Knetzer was found guilty of aggravated assault but acquitted of second degree murder. He was, however, found guilty of the lesser-included offense of negligent homicide. Knetzer was sentenced to a presumptive term of 7.5 years imprisonment for aggravated assault and a consecutive, presumptive term of 2.5 years imprisonment for negligent homicide. We have jurisdiction pursuant to Arizona Constitution, Article 6, Section 9, and

Arizona Revised Statutes (A.R.S.) sections 12-120.21(A) (2003), 13-4031 and -4033 (2010).

DISCUSSION

I. Duplicity of the Indictment

¶4 Knetzer titles the first issue on appeal as, "Appellant's dangerous Aggravated Assault conviction was based upon a duplicitous indictment which deprived him of his right to a unanimous verdict." "An indictment is duplicitous if it charges separate crimes in the same count. Duplicitous indictments are prohibited because they fail to give adequate notice of the charge, present a hazard of a non-unanimous jury verdict, and make a precise pleading of double jeopardy impossible in the event of a later prosecution. *State v. Hamilton*, 177 Ariz. 403, 410, 868 P.2d 986, 993 (App. 1993) (internal citations omitted).

¶5 Duplicity of the indictment, however, is not the issue Knetzer actually argues in his opening brief. Knetzer never explains how the actual language of the indictment was allegedly duplicitous or otherwise legally deficient and does not even quote the language of the indictment.¹ Despite Knetzer's title

¹ The charge for aggravated assault read, "On or about the 22nd day of August, 2008, in the vicinity of 13088 Cove Parkway, Golden Shores, Mohave County Arizona, said Defendant, RICHARD LEE KNETZER, committed aggravated assault upon [the victim], all in violation of A.R.S. §§ 13-1204, 13-1203, 13-604,

of this issue and despite the fact that a great deal of the law cited by Knetzer deals with duplicitous indictments, the only issue actually argued in the context of the facts presented in this case concerns the jury instruction regarding aggravated assault. The instruction read:

The crime of aggravated assault requires proof of the following:

1. The defendant committed an assault, *and*
2. The assault was aggravated by at least one of the following factors:
 - The defendant caused serious physical injury to another person; *or*
 - The defendant used a deadly weapon or dangerous instrument; *or*
 - The assault is committed by any means of force that causes temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part, or a fracture of any body part.

(Emphasis in original.) See A.R.S. § 13-1204(A)(1)-(3) (2008) (aggravated assault). The jury was also instructed regarding assault and was given definitions of "dangerous instrument," "deadly weapon" and "serious physical injury."

¶16 Knetzer argues he was denied the right to a unanimous verdict on aggravated assault because the jury instruction alleged three different theories of how the offense was

13-701 and 13-801, a Class 3 Felony." The indictment was not duplicitous.

committed and the verdict form did not require the jury to identify which theory it relied upon for their verdict.² Therefore, we address only whether the jury instructions regarding aggravated assault deprived Knetzer of a unanimous verdict.

¶7 Knetzer did not object to the jury instruction below. "The failure to object to an instruction either before or at the time it is given waives any error, absent fundamental error." *State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986). "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 once fundamental error has been established, however, a defendant must still demonstrate the error was prejudicial. *Id.* at 568, ¶ 26, 115 P.3d at 608.

¶8 In addition to the above instructions, the jury was also instructed the State had offered evidence of more than one act to support a conviction for aggravated assault. The jury was further instructed Knetzer may be found guilty of aggravated assault only "if the proof shows beyond a reasonable doubt that

² Knetzer concedes on appeal there was sufficient evidence to support all three theories.

he committed any one or more of the acts. However, in order to return a verdict of guilty [], *all jurors must agree that he committed the same acts.* It is not necessary that the particular acts agreed upon be stated in your verdict." (Emphasis added.) When more than one theory of conviction for a particular count is submitted to a jury, there is no risk of a non-unanimous verdict and, therefore, no error, if the jury is also instructed it must agree unanimously on the specific facts upon which its verdict is based. *State v. Kelly*, 149 Ariz. 115, 117, 716 P.2d 1052, 1054 (App. 1986); *State v. Petrak*, 198 Ariz. 260, 268, ¶ 28, 8 P.3d 1174, 1182 (App. 2000); *State v. Paredes-Solano*, 223 Ariz. 284, 290, ¶ 17, 222 P.3d 900, 906 (App. 2009). "Juries are presumed to follow their instructions." *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996). Knetzer's claim that the jury may have disregarded its instructions and may have failed to agree upon the theory of conviction as instructed is pure speculation.

¶19 Within his argument on this issue, Knetzer further asserts that because the jury was not required to identify which of the three theories its verdict was based upon, it is impossible to determine whether the jury convicted him of a class 3 felony (aggravated assault based on causing a serious physical injury or use of a deadly weapon) or a class 4 felony (aggravated assault based on causing disfigurement, impairment

or fracture). See A.R.S. § 13-1204(A)(1)-(3). Even assuming the trial court erred by including the theory predicated on a class 4 with the theories predicated on a class 3, under the facts of this case, there was no prejudice because the jury's additional determination that the offense was dangerous limited the applicable theory of conviction to a class 3 offense. The jury was instructed that an offense is dangerous "if it involved the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, or the intentional or knowing infliction of a serious physical injury." See A.R.S. § 13-105(13) (2008) ("dangerous offense" defined). Therefore, in order to find the offense was dangerous, the jury was required to find the offense was committed in one of the two manners that constitute a class 3 felony. Because the jury found the offense was dangerous, the jury necessarily convicted Knetzer of a class 3 felony.

¶10 Finally, Knetzer argues the jury's determination that the offense was dangerous may not have been unanimous because the instructions did not require the jury to identify which theory supported its determination of dangerousness and "there could have been disagreement" among the jurors over whether the offense was dangerous because it involved the use of a deadly weapon or because it involved the infliction of serious physical injury. Again, Knetzer did not object.

¶11 Regardless, we find no error, fundamental or otherwise. As noted above, because the jury found the offense was dangerous, the jury convicted Knetzer of aggravated assault based on either the use of a deadly weapon or causing serious physical injury. The jury was instructed it had to agree on which one of these two acts constituted the offense. Further, the jury was also instructed its determination of whether the offense was dangerous must also be unanimous. Therefore, the instructions sufficiently informed the jury it must unanimously determine whether the offense was dangerous based on the use of a deadly weapon or the infliction of serious physical injury. We will not speculate that the jury failed to follow the instructions that expressly required unanimity in its determination.

II. The Duty to Render Aid

¶12 As his second issue on appeal, Knetzer argues the jury was improperly instructed regarding his duty, if any, to render aid to the victim. Knetzer presents this issue only in the context of negligent homicide. The instruction read:

Before the defendant can be found guilty of any of the offenses charged, there must exist a legal duty owed by the defendant to [the victim]. The defendant's failure to obtain or provide aid, by itself, does not establish a legal duty and does not establish criminal liability.

A legal duty exists only if you find (1) the defendant's voluntary acts caused the injury that

placed [the victim's] health in peril, or (2) the defendant intentionally acted to prevent [the victim] from seeking aid or another person from taking action which the defendant knew to be necessary for the aid or protection of [the victim].

Knetzer argues the instruction misstated the law; relied on civil rather than criminal concepts of duty; misled the jury, and constituted an improper comment on the evidence.³ Knetzer did not raise any of these objections below. Therefore, we review for fundamental error. See *Schrock*, 149 Ariz. at 440, 719 P.2d at 1056.

¶13 The purpose of jury instructions is to inform the jury of the applicable law. *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996). A set of instructions need not be faultless. The instructions, however, must not mislead the jury and must give the jury an understanding of the issues. See *id.* It is only when the instructions, taken as a whole, are such that it is reasonable to suppose the jury would be misled that a case should be reversed for error in the instructions. *Schrock*, 149 Ariz. at 440, 719 P.2d at 1056.

¶14 We find no error, fundamental or otherwise. "The minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform a duty imposed by law" A.R.S. § 13-

³ Knetzer does not actually explain in his opening brief how the instruction commented on any evidence.

201 (2008). "Conduct" is "an act or omission and its accompanying mental state." A.R.S. § 13-105(5). In Arizona, a person has a legal duty to aid another person when they know or have reason to know their conduct harmed the other person and that person is in danger of further harm. *La Raia v. Superior Court*, 150 Ariz. 118, 122, 722 P.2d 286, 290 (1986) (citing Restatement (Second) of Torts, § 322 (1965)). The duty exists regardless of whether the person's conduct in causing or even contributing to the harm was "tortuous or innocent." *Id.* In such a situation, the person who caused or contributed to the harm is under a duty to exercise reasonable care to minimize the resulting harm and prevent further harm to the injured person. *Id.* Even though this duty is based on civil law, criminal liability based upon the failure to perform a duty imposed by law may be based upon the failure to perform a common law, statutory or other duty. *State v. Far West Water & Sewer, Inc.*, 224 Ariz. 173, 185-86, ¶¶ 27-28, 228 P.3d 909, 921-22 (App. 2010); *State v. Brown*, 129 Ariz. 347, 349, 631 P.2d 129, 131 (App. 1981).

¶15 Therefore, Knetzer could be held criminally liable based on the failure to exercise reasonable care to minimize any harm to the victim and/or prevent further harm. The instruction at issue sufficiently informed the jury regarding the duty to render aid under Arizona law. The instruction was not

misleading, did not comment on the evidence and did not otherwise permit a conviction for negligent homicide even in the absence of criminal negligence and/or based solely on civil negligence.

III. Sufficiency of the Evidence of Negligent Homicide

¶16 Knetzer next asserts there was insufficient evidence to support his conviction for negligent homicide. As charged in this case, "[a] person commits negligent homicide if with criminal negligence the person causes the death of another person[.]" A.R.S. § 13-1102(A) (2008).

"Criminal negligence" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

A.R.S. § 13-105(10)(d). Knetzer argues no act or omission on his part proximately caused the victim's death; that the victim's death from the gunshot wound was not foreseeable; and that the proximate cause of the death was the victim's own failure to get help for himself. Knetzer goes so far as to argue, "[t]he shooting did not cause death."

¶17 "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*,

187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). "To set aside a jury verdict for insufficient evidence, it must clearly appear that under 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) (citation omitted). In our review of the evidence, "[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998) (citation omitted). We do not weigh the evidence, however, that is the function of the jury. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶18 Knetzer and the victim lived together in a house owned by Knetzer. Knetzer, who had lost a leg in an accident, used a wheelchair and/or an electric scooter to get around. Knetzer had been angry with the victim because the victim failed to pay their utility bills with the money Knetzer had given him. Neighbors heard Knetzer yelling and swearing at the victim the morning of the date of the incident. At approximately 1:00 p.m., a neighbor heard what sounded like a gunshot. That night, Knetzer rode his electric scooter to a neighbor's house and asked him to call 911. Knetzer was unable to use his own phone because the service had been disconnected.

¶119 Emergency personnel arrived at Knetzer's home at approximately 8:00 p.m. The victim was found dead on the floor of the living room with Knetzer sitting on the couch nearby. The victim had been dead long enough that no life-saving measures were attempted. The victim had suffered a contact or very near contact gunshot wound to his right hand. The bullet went through the victim's hand and caused multiple fractures, disrupted veins and arteries and nearly severed the victim's ring finger. The victim eventually bled to death as a result. It was apparent the victim had not died immediately because his blood was spread throughout Knetzer's home.

¶120 The victim also had three newly-fractured ribs and multiple bruises, abrasions and lacerations on his body, including his head and face. One witness described the victim as being bruised "from head to toe." The medical examiner determined most of these injuries were not consistent with a person fainting, falling or having seizures. A sheriff's deputy who spoke to the victim the morning of the day he died noted the victim had no injuries to his face, forehead, legs or arms at that time. The medical examiner, who described the gunshot wound as a "major injury," determined the cause of death was a gunshot wound to the hand that caused the victim to bleed to death.

¶121 Blood and other cellular material from the victim were found on the barrel of one of Knetzer's handguns that was found locked in Knetzer's safe. A bullet removed from the soffit outside a rear entrance to the residence had been fired from that handgun. The victim's blood was found on the soffit near the bullet hole. Gunshot residue was found on Knetzer.

¶122 Knetzer spoke about the incident several times. Knetzer initially claimed the victim cut his hand on the rear door of the residence. There was, however, no blood on the rear door consistent with this story. Regardless, Knetzer, who had been trained as an emergency medical technician and had once worked in a hospital, acknowledged the victim was in a great deal of pain and that the injury was "really bad." Knetzer further acknowledged the victim's finger looked like it was "off" and that the victim was bleeding so badly he was "getting blood all over the damn house" and passed out several times.⁴ Knetzer acknowledged the bleeding never stopped even though he kept giving the victim rags to try to stop the bleeding.

¶123 A paramedic testified that anyone trained as an emergency medical technician would know how to recognize and treat profuse bleeding. Further, they would know that immediate emergency medical treatment was necessary and that the failure

⁴ The medical examiner testified that once a person faints from loss of blood, they do not regain consciousness.

to get such treatment could result in death. Despite all this, Knetzer claimed he eventually laid down on the couch to take a nap. He awoke that night to find the victim dead on the floor. After waiting approximately one more hour, Knetzer went to the neighbor's to seek help.

¶24 Knetzer's version of events evolved with time. Knetzer later claimed the victim shot himself in the hand accidentally when he dropped one of Knetzer's handguns. Even when he told this version of events, Knetzer still acknowledged the victim was in a great deal of pain, was bleeding profusely and that blood was going "everywhere." Knetzer claimed the victim told him not to call for help because he had once worked in a gun shop and was too embarrassed to let people know he accidentally shot himself.

¶25 Knetzer later changed his story again. Knetzer's latest version of events was, however, inconsistent. Knetzer first told deputies he and the victim "were screwing around, wrestling for the gun at the back door" and that while doing so, the gun "went off and it hit his finger." Knetzer initially claimed this occurred during an argument in which Knetzer took the gun from the victim. Knetzer claimed the gun went off when the victim then tried to take the gun back from Knetzer. Even this version of events, however, evolved within moments of its telling. Knetzer then claimed he and the victim had an argument

because the victim initially refused to do an errand for Knetzer. Knetzer claimed the victim, who was carrying one of Knetzer's guns, finally acquiesced and tried to give Knetzer the gun because he did not want to walk "down there with this." In response, Knetzer allegedly told the victim he did not want the gun. The two began to wrestle over the gun that Knetzer now claimed neither he nor the victim wanted, during which the gun went off. As in previous versions of events, Knetzer again acknowledged he knew the victim was losing a lot of blood and the bleeding was so severe the victim fainted several times.

¶126 Knetzer claimed he tried to get help for the victim while he was still alive. The day after the incident, Knetzer's next-door neighbors found two notes in their yard. Knetzer claimed he wrote those notes and put them on the neighbors' property at approximately 3:00 p.m. the date of the incident. The first note was found in the neighbors' back yard. The note had been written on a piece of poster board approximately twenty by twenty-two inches in size and read, "[C] or [B], please help me. My doors are open. I need your [sic] ASAP! Ric from next door. Thank you." The second note was found written on a piece of paper attached to the neighbors' fence. The second note read, "[C] or [B], please come over. My door's open. I need your [sic]! Ric." The note found on the fence does not appear in a photograph of that area taken by investigators the day of

the incident, and one of the neighbors who saw the fence that night said the note was not there the date of the incident.

¶127 The evidence admitted at trial was sufficient to support Knetzer's conviction for negligent homicide. While some of the evidence may have been circumstantial, "The probative value of evidence is not reduced because it is circumstantial." *State v. Murray*, 184 Ariz. 9, 31, 906 P.2d 542, 564 (1995). Reasonable jurors could find that Knetzer caused the death of the victim through criminal negligence. We cannot, and need not, determine exactly what the jury believed happened. The evidence supports several theories of how Knetzer could have negligently caused the death of the victim regardless of any failure to aid the victim. Knetzer admitted, however, that he and the victim struggled over a gun and the gun discharged during that struggle. The jury could reasonably find Knetzer caused an injury to the victim; that as a result he had a legal duty to take reasonable steps to aid the victim; and that the failure to do so constituted criminal negligence. Finally, and despite Knetzer's assertion to the contrary, the medical examiner testified the cause of death was the gunshot wound and the profuse bleeding which resulted. That a person could bleed

to death from a gunshot wound that caused profuse bleeding is not unforeseeable, abnormal or extraordinary.⁵

IV. Aggravating Factors

¶28 As the fourth issue on appeal, Knetzer argues the trial court improperly considered certain aggravating factors for sentencing purposes.⁶ For aggravated assault, the trial court found the "significant injury suffered by the victim" and the emotional trauma suffered by the victim's family to be aggravating factors. For negligent homicide, the court found as aggravating factors the offense was committed in a "cruel and callus [sic] fashion" because Knetzer failed to do anything to help the victim for a "significant length of time[,]" as well as the emotional trauma suffered by the victim's family. As mitigating factors for both offenses, the court found the support of Knetzer's family and his lack of a prior criminal record. The court found the aggravating and mitigating factors

⁵ The jury was instructed regarding superseding/intervening cause and that the State must prove beyond a reasonable doubt that a superseding/intervening cause did not cause the injury or death.

⁶ Even though the trial court rather than the jury determined the existence of aggravating factors for sentencing purposes, Knetzer does not present a claim pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004). The court and counsel agreed that because the State had not alleged any aggravating factors, the maximum sentence that could be imposed for each count was the presumptive sentence.

balanced each other and imposed presumptive sentences as indicated above.

¶129 On appeal, Knetzer argues the trial court could not consider the significant physical injury to the victim as an aggravating factor for aggravated assault, nor find that the negligent homicide was, in Knetzer's words, "cruel, heinous or depraved." Because Knetzer did not object to the court's consideration of any aggravating factors, we review for fundamental error. Even when fundamental error exists, however, a defendant who fails to object to a trial court's consideration of an improper aggravating factor for sentencing purposes carries the burden of proving prejudice resulted from the use of the improper factor. *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006).⁷

¶130 Knetzer first argues the significant injury suffered by the victim could not be considered as an aggravating factor for aggravated assault because it was an element of the offense and/or used to enhance his sentence. Infliction of serious physical injury may not be considered as an aggravating factor if it "is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under

⁷ In support of his argument on this issue, Knetzer cites *State v. Barraza*, 217 Ariz. 44, 170 P.3d 293 (App. 2007). *Barraza* was depublished by order of the supreme court in September 2008. *Id.*

section 13-604." A.R.S. § 13-702(C)(1) (2008). Knetzer has failed to prove he was prejudiced and we otherwise find no error. First, serious physical injury was not an "essential element" of aggravated assault as charged in this case because, as addressed above, infliction of serious physical injury was not the only theory of aggravated assault submitted to the jury. Further, as also addressed above, infliction of serious physical injury was not the only basis upon which the jury could find the offense was a dangerous offense for enhancement purposes. We do not know which theory was utilized by the jury to make its determination of guilt or dangerousness and we will not speculate. Therefore, Knetzer has failed to establish he was prejudiced by the court's consideration of any allegedly improper factor when it imposed the sentence for aggravated assault.

¶131 Knetzer also argues the trial court could not find the negligent homicide was committed in an "especially heinous, cruel or depraved" manner pursuant to A.R.S. § 13-702(C)(5) because there was insufficient evidence the offense was heinous, cruel or depraved. We find no error. The trial court did not find the offense was committed in an "especially heinous, cruel or depraved" manner pursuant to § 13-702(C)(5). The trial court found Knetzer's failure to do anything to help the victim for a "significant length of time was extremely cruel and callus

[sic]. And so I find as an aggravating factor that the negligent homicide was committed in a cruel and callus fashion." The court's focus was on the failure to help the victim. The failure to aid a helpless victim may be considered as an aggravating factor for sentencing purposes. *State v. Meador*, 132 Ariz. 343, 347, 645 P.2d 1257, 1261 (App. 1982). The record indicates the trial court meant "cruel" and "callous" in their colloquial sense and did not equate those terms with a formal finding that the offense was committed in an especially heinous, cruel or depraved manner as found in § 13-702(C)(5). Those terms as used in § 13-702(C)(5) are terms of art that have been defined and require specific findings before they may be considered as aggravating factors. *State v. Murdaugh*, 209 Ariz. 19, 31-33, ¶¶ 57-67, 97 P.3d 844, 856-58 (2004).⁸

¶32 We find no error in the trial court's consideration of any aggravating factors for sentencing purposes.

V. The Imposition of Consecutive Sentences

¶33 As the final issue on appeal, Knetzer argues the trial court erred when it imposed consecutive rather than concurrent sentences. Knetzer argues that once the facts necessary to

⁸ We also note that when, as here, a trial court imposes a presumptive sentence, the court is not required to make any findings whatsoever regarding any aggravating or mitigation factors the court may have considered in its determination of the appropriate sentence. *State v. Wideman*, 165 Ariz. 364, 370, 798 P.2d 1373, 1379 (App. 1990).

convict him of aggravated assault are removed, the remaining facts are not sufficient to convict him of negligent homicide and, therefore, he could not be given consecutive sentences. The trial court found consecutive sentences were permissible because the aggravated assault could have been committed without the resultant death if Knezter had simply sought aid for the victim. The court found the failure to seek aid despite the duty to do so was a separate criminal act that permitted consecutive sentences. Knetzer did not raise this issue below. An illegal sentence, however, may be reversed on appeal even in the absence of an objection below. *State v. Canion*, 199 Ariz. 227, 230, ¶ 10, 16 P.3d 788, 791 (App. 2000).

¶34 In order to determine whether two offenses constitute a single act, thereby prohibiting the imposition of consecutive sentences, we apply the following test:

The first step in the analysis is to determine which crime arising out of the incident is the "ultimate crime." The "ultimate crime" is the crime which has the factual nexus to all the other crimes. The ultimate crime will usually be the primary object of the episode, and it will usually be the most serious crime committed on the given occasion. Once the ultimate crime is determined, the test to be applied is as follows. If, considering all of the facts of the incident and subtracting the facts necessary to convict of the ultimate crime, the remaining facts satisfy the elements of the remaining crime(s), then multiple punishments *may* be permissible. Assuming that this first step is satisfied, multiple punishments are ordinarily permissible only if (1) given the entire criminal episode, the defendant could have committed the ultimate crime without committing

the other crime(s) or (2) in committing the other crime(s), the defendant caused the victim to suffer additional risk or harm beyond that inherent in the ultimate crime.

State v. Eagle, 196 Ariz. 27, 33, ¶ 27, 992 P.2d 1122, 1128 (App. 1998) (internal quotation omitted).

¶35 The parties agree aggravated assault was the "ultimate crime" for which Knetzer was convicted. It was the greater felony, carried the higher range of possible punishment and was the "factual nexus" to the two crimes. If we consider all of the facts of the incident and subtract the facts necessary to convict Knetzer of aggravated assault, the remaining facts do not satisfy the elements of negligent homicide. To convict Knetzer of aggravated assault, the jury first had to find he committed simple assault. The sole theory of simple assault submitted to the jury was that Knetzer intentionally, knowingly or recklessly caused physical injury to the victim. See A.R.S. § 13-1203(A)(1) (2008). As explained more fully above, the jury then had to find Knetzer committed an assault that caused serious physical injury to the victim or that he committed an assault by using a deadly weapon or dangerous instrument. See A.R.S. § 13-1204(A)(1) and (2). If we subtract the evidence that Knetzer caused physical injury to the victim, there is no remaining evidence that Knetzer caused the death of the victim through criminal negligence. This is so regardless of the mens

rea, regardless of whether a deadly weapon was used and regardless of whether any injury was serious. Further, while the trial court focused on the duty to obtain aid, if we subtract the evidence that any conduct of Knetzer caused injury to the victim, Knetzer had no legal duty to exercise reasonable care to minimize any resulting harm or prevent further harm to the victim. *La Raia*, 150 Ariz. at 122, 722 P.2d at 290. Absent such a duty, Knetzer could not be convicted of negligent homicide based on the failure to render aid. Therefore, because the remaining facts do not satisfy the elements of negligent homicide, multiple punishments are not permissible. *Eagle*, 196 Ariz. at 33, ¶ 27, 992 P.2d at 1128.

¶36 For the above reasons, we vacate that portion of the sentencing minute entry that ordered the sentences to be served consecutively and modify the sentencing minute entry to order the sentences be served concurrently.

CONCLUSION

¶137 For the reasons stated above, we affirm Knetzer's convictions. We further affirm the imposition of 7.5 and 2.5 years' imprisonment for aggravated assault and negligent homicide, respectively. We modify the sentencing minute entry to order that the sentences be served concurrently.

PHILIP HALL, Presiding Judge

CONCURRING:

SHELDON H. WEISBERG, Judge

PETER B. SWANN, Judge