

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: 09/28/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0719
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
RUBEN ADRIAN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-174076-001 DT

The Honorable Michael W. Kemp, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender Phoenix
By Thomas K. Baird, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Ruben Adrian (Defendant) was convicted of two counts of armed robbery, a class two dangerous felony and one count of aggravated assault, a class three dangerous felony all of which

were committed in November 2008. Because Defendant committed the offenses while on release from community supervision and had prior non-dangerous felony convictions, Defendant was sentenced as a repetitive, non-dangerous offender.

¶12 Prior to trial, the State filed enhancement allegations, which alleged Defendant committed the felonies while on release from confinement pursuant to Arizona Revised Statutes (A.R.S.) section 13-604.02.B (2008)¹ and Defendant had six non-dangerous historical felony convictions. See A.R.S. § 13-604.D (2007).² The court sentenced Defendant to a slightly aggravated twenty year term of imprisonment for armed robbery, a slightly aggravated twenty year term for robbery and a slightly aggravated fourteen year term for aggravated assault. All sentences were to be served concurrently.

¶13 Defendant timely appealed. We have jurisdiction pursuant to Arizona Constitution Article VI, Section 9, and A.R.S. §§ 12-120.21.A.1 (2003), 13-4031 (2010), and -4033.A (2010).

¹ A.R.S. § 13-604.02 has been renumbered as A.R.S. § 13-708 (2010) and amended. See 1999 Ariz. Sess. Laws, ch. 261, § 7 (1st Reg. Sess.).

² A.R.S. § 13-604.D was amended and repealed, taking effect January 1, 2009. See 2008 Ariz. Sess. Laws, ch. 24, § 1 (2nd Reg. Sess.); 2008 Ariz. Sess. Laws, ch. 301, § 15 (repealed).

DISCUSSION

¶4 Defendant raises one issue on appeal, whether the trial court committed fundamental error by sentencing him under the non-dangerous as opposed to the dangerous felon sentencing scheme.

¶5 When a sentencing error is raised for the first time on appeal, the alleged error is reviewed for fundamental error. *State v. Molina*, 211 Ariz. 130, 134, ¶ 15, 118 P.3d 1094, 1098 (App. 2005). Fundamental error is "error going 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." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* at ¶ 20.

¶6 Defendant was sentenced according to A.R.S. §§ 13-604.02.B³ and -604.D.⁴ Defendant argues the trial court was

³ A.R.S. § 13-604.02.B stated, "a person convicted of any felony offense . . . while the person is on community supervision or any other release . . . shall be sentenced to a term of not less than the presumptive sentence authorized for the offense."

⁴ A.R.S. § 13-604.D stated, "a person who . . . stands convicted of a class 2 or 3 felony, and has two or more historical prior felony convictions, shall be sentenced to imprisonment as prescribed in this subsection." For a class two

required by the mandatory language of A.R.S. § 13-704 to sentence him as a dangerous offender.⁵ However, A.R.S. § 13-704 was not enacted until January 1, 2009 and thus was not applicable in the sentencing of Defendant as he committed the crimes that resulted in his convictions in November 2008. See 2003 Ariz. Sess. Laws, ch. 255, § 8.

¶7 Defendant acknowledged this Court has previously considered this issue and upheld the trial court's decision to sentence the defendant as a repetitive and non-dangerous offender instead of a dangerous offender. We have held a defendant's first "dangerous" felony enables the court to sentence him as a repetitive offender even though his prior felonies were non-dangerous. *State v. Knorr*, 186 Ariz. 300, 306, 921 P.2d 703, 709 (App. 1996). Similarly, in *Laughter* we stated:

[defendant] argues that because he used a gun, he must be punished as a first offender of a dangerous offense

felony, the presumptive sentence was fifteen years and nine months, minimum is fourteen years, and the maximum is twenty-eight years. *Id.* A class three felony provided a presumptive sentence of eleven years and three months, minimum of ten years, and a maximum of twenty years. *Id.*

⁵ Defendant argues he should have been sentenced under A.R.S. § 13-704.A (2010), which states a person convicted of a felony, being their first dangerous offense, is sentenced for a class two felony, to a presumptive of ten years and six months, minimum of seven years, or a maximum of twenty-one years. For a class three felony, the statute provides a presumptive sentence of seven years and six months, a minimum of five years, and a maximum of fifteen years. *Id.*

under A.R.S. § 13-604(G) and thus be subject to a sentence of no less than seven no more than twenty-one years. In essence, his argument is that by using a deadly weapon he assured a lesser sentence than had he not used a deadly weapon.

State v. Laughter, 128 Ariz. 264, 269, 625 P.2d 327, 332 (App. 1980).

¶18 To sentence Defendant as a dangerous felon instead of a repetitive non-dangerous felon, would reduce Defendant's sentence. As this Court has previously held, "[w]e will not presume that the legislature intended this absurd result." *Id.*

CONCLUSION

¶19 For the above stated reasons, we affirm Defendant's convictions and sentences.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

MAURICE PORTLEY, Presiding Judge

/S/

MARGARET H. DOWNIE, Judge