IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 02/23/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	1 CA-CR 09-0964
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
NATHANIEL BARTON SAMPLE,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-030276-002 SE

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Angela Corinne Kebric, Assistant Attorney General
Attorneys for Appellee

Theresa M. Armendarez, PLC — Manteo, NC
By Theresa M. Armendarez
Attorneys for Appellant

O R O Z C O, Judge

¶1 Nathaniel Barton Sample (Defendant) appeals his convictions and sentences for assault, aggravated assault and

assisting a criminal street gang. Defendant contends the trial court erred by denying his motion to dismiss on speedy trial grounds. Defendant also challenges the trial court's decision to not sever the charged offenses for trial and argues the court failed to enforce Arizona Rule of Criminal Procedure 15.8. Finally, Defendant contends the court unconstitutionally imposed an enhanced sentence on the charge of assisting a criminal street gang. For the reasons stated below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On March 28, 2008, Defendant, a Hells Angels "prospect," and two senior Hells Angels members physically attacked a man at a Scottsdale bar, causing serious physical injuries.[1] In connection with the altercation, the State filed -- and the court dismissed without prejudice -- two indictments against Defendant before indicting him in this case on February 4, 2009 and charging him with two counts of aggravated assault and one count of assisting a criminal street gang.[2] Defendant was arraigned in this matter on February 23, 2009.

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[1] We view the trial evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Defendant. *State v. Manzanedo,* 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

[2] The record on appeal does not contain any portions of the records from the previous cases. However, various items in the record refer to the previous cases.

¶3 On March 3, 2009, Defendant notified the court pursuant to Arizona Rule of Criminal Procedure (Rule) 8.1.d that his speedy trial "last day" was March 9, 2009. That same day, the court issued a minute entry noting Defendant's purported last day of March 9, 2009 related to the indictment that was previously dismissed. The court explained that the then-current last day of August 25, 2009 was correct because Defendant was indicted and arraigned in this case on February 23, 2009, and he was out of custody.[3] *See* Ariz. R. Crim. P. 8.2.a(2) (an indicted person on release shall be tried within 180 days of arraignment).

¶4 On August 5, 2009, Defendant moved to dismiss, arguing that the "speedy trial clock" began on April 8, 2008, the date he said he was arraigned under the first indictment. Defendant asserted the delay prejudiced him by draining his resources, interfering with his liberty, and causing him "much anxiety." Defendant also claimed the delay in trying the gang-assistance charge restricted "his freedom to associate in a lawful fashion with certain individuals." The court heard oral argument and denied the motion.

[3] The previous indictment was dismissed and a new indictment filed to correctly reflect a reduction in one of the charges. The record indicates that Defendant could have preserved the March 9, 2009 last day by agreeing to allow the existing indictiment to be amended, but Defendant declined to agree.

¶5 Defendant also moved before trial to sever the gang-assistance charge from the aggravated assault charges. Defendant argued that if the offenses were tried together, he would be unduly prejudiced "because the jury may impute their fears and assumptions regarding Hell's Angels to [Defendant]." The court denied the motion to sever.

¶6 A jury found Defendant not guilty of one aggravated assault charge but guilty of the lesser-included offense of assault, a class one misdemeanor. As for the remaining counts, the jury found Defendant guilty as charged, and, in addition to finding two aggravating circumstances, found Defendant intended to promote, further or assist a criminal street gang. The court sentenced Defendant to time served for the misdemeanor assault conviction and to concurrent enhanced presumptive terms of four years and eight-and-one-half years respectively for the class six felony aggravated assault and class three felony gang assistance convictions. Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 (2010) and -4033.A.1 (2010).[4]

[4] We cite the current version of the applicable statutes when no revisions material to this decision have since occurred.

DISCUSSION

Speedy Trial

¶7 Defendant argues the court should have granted his motion to dismiss based on a speedy trial violation because the motion was filed approximately sixteen months after the first indictment. We review for an abuse of discretion. *State v. Spreitz*, 190 Ariz. 129, 136, 945 P.2d 1260, 1267 (1997).

¶8 Criminal defendants have a constitutional right to a speedy trial. *See* U.S. Const. amend. VI; Ariz. Const. art. 2, § 11. Neither the United States nor the Arizona Constitution, however, imposes a specific time period within which a trial must be conducted. *Spreitz*, 190 Ariz. at 139-40, 945 P.2d at 1270-71. Rule 8, on the other hand, grants "stricter speedy trial rights than those provided by the United States Constitution" because, as applicable to this case, it imposes a 180-day requirement for trial to commence after arraignment. *Id*. at 136, 945 P.2d at 1267; Ariz. R. Crim. P. 8.2.a(2).

¶9 Here, Defendant does not argue that a Rule 8 violation occurred. Instead Defendant argues that the court's failure to dismiss amounted to a violation of his constitutional speedy trial rights.

¶10 "If a defendant is not under arrest and no indictment or charge is outstanding, the speedy trial provisions of the Sixth Amendment do not apply. Similarly, the Sixth Amendment is

not implicated if the government dismisses charges in good faith and later refiles them, as long as a defendant has not been subjected to actual restraints on his liberty after dismissal." *State v. Dunlap*, 187 Ariz. 441, 449-50, 930 P.2d 518, 526-27 (App. 1996) (citations omitted).

¶11 In this case, Defendant was not deprived of his constitutional rights to a speedy trial because each time that the indictment was dismissed, the time limits started anew. The trial court, therefore, did not abuse its discretion in denying Defendant's motion to dismiss.

Severance

¶12 Defendant contends he was unconstitutionally deprived of a fair trial because the trial court did not order the offenses severed. We do not address the merits of this argument because it has not been properly preserved for appellate review.

¶1 Rule 13.4.c provides, in relevant part, "A defendant's motion to sever offenses . . . must be made at least 20 days prior to trial . . . and, *if denied, renewed during trial at or before the close of the evidence*. . . . *Severance is waived if a proper motion is not timely made and renewed*." Ariz. R. Crim. P. 13.4.c (emphasis added). Here, although Defendant initially timely moved to sever, his motion was denied and he does not direct us to where in the record he renewed the motion. Therefore, Defendant has waived this issue on appeal absent

fundamental error. *See State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996), *cert. denied*, 519 U.S. 1032 (1996); *see also State v. Martinez*, 210 Ariz. 578, 580 n.2, ¶ 4, 115 P.3d 618, 620 n.2 (2005) ("[D]efendants who fail to object to an error below forfeit the right to obtain appellate relief unless they prove that fundamental error occurred."). On appeal, however, Defendant does not contend the trial court committed fundamental error by failing *sua sponte* to order separate trials at some point after trial commenced.

¶13 This court has previously declined to address the merits of a claim that the denial of a motion to sever constituted reversible error. *See State v. Flythe*, 219 Ariz. 117, 193 P.3d 811 (App. 2008). We did so because, as here, the defendant did not renew the motion during trial and did not request review for fundamental error on appeal. *Id.* at 120, ¶ 11, 193 P.3d at 814. We reasoned that the failure to renew a motion to sever, even if a defendant is entitled to severance, "represents a reasoned strategic choice." *Id.* at ¶ 8. Limiting appellate review is therefore appropriate, we noted, because the purpose of Rule 13.4.c is to prevent "a defendant from strategically refraining from renewing his motion, allowing a joint trial to proceed, then, if he is dissatisfied with the final outcome, arguing on appeal that severance was necessary." *Id.* at ¶ 9; *see also State v. Pierce*, 27 Ariz. App. 403, 406,

555 P.2d 662, 665 (1976) ("[Appellant's failure to renew the motion to sever] suggests that the prejudice now asserted to have resulted from the joinder may not have seemed so substantial to appellant in the context of [the] trial . . . .") (alterations in original) (quoting *Williamson v. United States*, 310 F.2d 192, 197 (9th Cir. 1962)). Based on the reasoning of *Flythe*, we conclude Defendant has waived this issue, and we do not address the merits of his claim. *See also State v. Moreno-Medrano*, 218 Ariz. 349, 354, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008) (declining to review for fundamental error when appellant failed to raise claim in trial court and failed on appeal to address whether alleged error was fundamental); *see also State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (explaining that the failure to argue a claim usually constitutes abandonment and waiver of such claim); *State v. Sanchez*, 200 Ariz. 163, 166, ¶ 8, 24 P.3d 610, 613 (App. 2001) (finding issue waived because defendant failed to develop argument in his brief).

Rule 15.8

¶14 Referencing an "initial plea offer in April 2008," Defendant asserts the trial court committed reversible error by "precluding the witnesses [sic] testimony pursuant to Rule 15.8" because the State "failed to disclose . . . material facts that

would have permitted [Defendant's] first attorney to competently advise [Defendant] about the plea offer."[5]

¶15 Rule 15.8 requires, at a defendant's request, preclusion of evidence that is not disclosed by the State at least thirty days before a plea offer's deadline if the court determines the evidence "materially impacted the defendant's decision" to accept or reject a plea offer. Ariz. R. Crim. P. 15.8.

¶16 It appears that Defendant is referring to a plea offer made and withdrawn in April 2008, some ten months before the State indicted him in this case in February 2009. Defendant does not point to any plea offer made in the current case. And he offers no authority for the proposition that a withdrawn plea offer in connection with a matter that is subsequently dismissed has any Rule 15.8 implications in a later-instituted criminal case.

¶17 However, any error in a now dismissed case is outside our jurisdiction in this matter. *See State v. Alvarez*, 210 Ariz. 24, 30, ¶ 23, 107 P.3d 350, 356 (App. 2005), *vacated in part on other grounds by* 213 Ariz. 467, 143 P.3d 668 (App. 2006) (explaining that this court has no jurisdiction to address alleged error in a previous case that was dismissed without

[5] We assume Defendant intended to argue that the trial court erred in *not* precluding the testimony.

prejudice). The correct avenue of review would have been a petition for special action in the prior case. *See State v. Paris-Sheldon*, 214 Ariz. 500, 508, ¶ 23, 154 P.3d 1046, 1054 (App. 2007) ("[T]he proper method to raise the issue [of the trial court's dismissal of charges without prejudice] was through a motion for reconsideration or petition for special action filed in [the dismissed case], not by a motion to dismiss filed in a different case.")

Sentence Enhancement

¶18 Defendant was convicted of violating A.R.S. § 13-2321.B (2010), which provides: "A person commits assisting a criminal street gang by committing any felony offense, whether completed or preparatory for the benefit of, at the direction of or in association with any criminal street gang."[6] For this conviction, the court imposed an enhanced presumptive sentence pursuant to A.R.S. § 13-709.02 (2011),[7] which subjects a

[6] Although the indictment refers to the class three felony of assisting a criminal street gang and tracks the language of § 13-2321.B, it incorrectly cites A.R.S. § 13-2308 (2010) as the statutory basis for the alleged offense. Section 13-2308.C prohibits the class two felony of assisting a *criminal syndicate*, stating: "A person commits assisting a criminal syndicate by committing any felony offense, whether completed or preparatory, with the intent to promote or further the criminal objectives of a criminal syndicate." A.R.S. § 13-2308.C. However, the language of § 13-2321.B was recited when the indictment was read in court.

[7] The statute was renumbered in 2008 and amended in 2011, but it remained substantively unchanged. 2008 Ariz. Sess. Laws, ch.

defendant to a mandatory term of confinement and an enhanced sentencing range when he or she is convicted of a felony with the intent to promote, further or assist the criminal conduct of a criminal street gang.

¶19 Defendant properly acknowledges that his enhanced sentence does not run afoul of Arizona's double punishment statute, A.R.S. § 13-116 (2010). *See State v. Ochoa*, 189 Ariz. 454, 461, 943 P.2d 814, 821 (App. 1997) ("The prohibition against double punishment in A.R.S. section 13–116 was not designed to cover sentence enhancement."). Instead, he argues his enhanced sentence is an unconstitutional double jeopardy violation because the elements of the criminal conduct for which he was convicted are the same as the elements of the statutory enhancement. This double jeopardy argument, however, was not raised at sentencing, and Defendant cites no authority to support it. Moreover, Defendant concedes that the United States and Arizona Supreme Courts have found sentence enhancement provisions generally do not amount to double jeopardy violations. Accordingly, Defendant's concession demonstrates that this argument is meritless.[8]

301, §§ 34, 119 (2d Reg. Sess.); 2011 Ariz. Sess. Laws, ch. 90, § 4 (1st Reg. Sess.). We therefore cite the current version.

[8] Defendant does not challenge the sufficiency of evidence supporting either his gang conviction or the resulting enhanced sentence.

CONCLUSION

¶20 Defendant's convictions and resulting sentences are affirmed.

/S/
_____
PATRICIA A. OROZCO Judge

CONCURRING:

/S/
_____
DIANE M. JOHNSEN, Presiding Judge

/S/
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PETER B. SWANN, Judge