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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 04/03/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)	No. 1 CA-CR 10-0287
)	1 CA-CR 10-0308
Appellee,)	(Consolidated)
)	
v.)	DEPARTMENT D
)	
THOMAS GERARDO CRUZ,)	MEMORANDUM DECISION
)	(Not for Publication -
Appellant.)	Rule 111, Rules of the
)	Arizona Supreme Court)
)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-149036-001DT and CR2009-153052-001 DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General	Phoenix
By Kent E. Cattani, Chief Counsel	
Criminal Appeals/Capital Litigation Section	
Linley Wilson, Assistant Attorney General	
Attorneys for Appellee	

James J. Haas, Maricopa County Public Defender	Phoenix
By Karen M.V. Noble, Deputy Public Defender	
Attorney for Appellant	

T H O M P S O N, Presiding Judge

¶1 Thomas Gerardo Cruz (defendant) was convicted by a jury in Maricopa County Superior Court Cause No. CR2009-153052 of attempted first degree murder, a class 2 felony and dangerous offense; aggravated assault, a class 3 felony and dangerous offense; misconduct involving weapons (prohibited possessor), a class 4 felony and dangerous offense; assisting a criminal street gang, a class 3 felony and dangerous offense; and false reporting to a law enforcement agency, a class 1 misdemeanor. The charges stemmed from an incident in which defendant, a member of the Vario Hispanic Homeboys (VHHB) street gang, attempted to shoot the victim after encountering him in the gang's neighborhood. When his gun failed to fire, defendant struck the victim several times in the head with it. Based on these convictions, the trial court revoked defendant's probation in Maricopa County Superior Court Cause No. CR2008-149036 on an earlier conviction for possession of marijuana.

¶2 The trial court sentenced defendant as a repetitive offender in Cause No. CR2009-153052 to concurrent terms of imprisonment, the longest being 20.75 years on the conviction for attempted murder. Based on defendant's conviction for assisting a criminal street gang, the sentences imposed on each of the felony convictions were further enhanced pursuant to Arizona Revised Statutes (A.R.S.) section 13-709.02(C) (2010). In addition, the trial court sentenced defendant to a

consecutive one-year term of imprisonment on the conviction for possession of marijuana in Cause No CR2008-149036.

¶3 Defendant filed timely appeals from his convictions and sentences in Cause No. CR2009-153052 and the revocation of his probation and sentence in Cause No CR2008-149036. We consolidated the two appeals. For reasons that follow, we affirm.

DISCUSSION

A. There was sufficient evidence to support the conviction for assisting a criminal street gang and the criminal street gang enhancement allegation.

¶4 Defendant argues that the evidence was insufficient to support his conviction on the charge of assisting a criminal street gang and the criminal street gang sentence enhancement allegation pursuant to A.R.S. § 13-709.02. The State's theory was that defendant attempted to kill the victim because the victim had "crossed him out" by painting over VHBB graffiti. Defendant contends the evidence did not permit the jury to find that this was the motive for his offenses. We review claims of insufficient evidence *de novo*. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶5 Arizona Rule of Criminal Procedure 20 requires that a trial court enter a judgment of acquittal on a charge "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(A). "Substantial evidence is proof that reasonable

persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). In reviewing claims of insufficient evidence, we construe the evidence in the light most favorable to sustaining the verdicts, and resolve all reasonable inferences against defendant. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). "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) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶16 The indictment charged defendant with assisting a criminal street gang by committing an aggravated assault on the victim. A person commits the offense of assisting a criminal street gang if the person commits a felony offense "for the benefit of, at the direction of or in association with any criminal street gang." A.R.S. § 13-2321(B) (2010). Similarly, A.R.S. § 13-709.02(C) provides for the enhancement of a sentence on a conviction for a felony offense committed "with the intent to promote, further or assist any criminal conduct by a criminal street gang."

¶17 Defendant concedes there was uncontested evidence that he was a member of the VHHB criminal street gang, but argues the

evidence was insufficient to establish any nexus between his gang membership and the offenses because of the long period of time between the victim's conduct in painting over the gang's graffiti and the attempted murder. Instead, defendant suggests his assault of the victim was the result of the victim "messing" with a sixteen or seventeen-year-old girl. No evidence was presented, however, to support defendant's proposed explanation for the assault.

¶18 To the contrary, the victim denied that defendant's attack on him had anything to do with the girl and specifically testified that defendant tried to kill him because "I supposedly had crossed him out." The victim explained that "cross out" means painting over gang tags in the neighborhood and that it is considered an act of disrespect to "cross out" gang tags. Moreover, the victim testified that on an earlier occasion defendant had alluded to the fact that he was upset about the victim painting over his gang graffiti, and that during the assault, defendant "kept telling [the victim] that [the victim] had crossed him out."

¶19 There was also testimony from a member of the police gang enforcement unit that the purpose of gang graffiti is to mark gang territory. The officer additionally testified that one of the things criminal street gangs do is instill fear in the people in the neighborhood, letting them know that they

control the neighborhood and that if anyone disrespects them, they will be beaten or killed. The officer further stated that this kind of criminal conduct helps strengthen the gang's control of the neighborhood. The testimony by the victim and this police officer was more than sufficient to permit the jury to find beyond a reasonable doubt that attack on the victim by defendant was committed for "the benefit of" and "with the intent to promote, further or assist any criminal conduct by a criminal street gang."

B. The trial court did not err in enhancing the sentence imposed on the conviction for assisting a criminal street gang based on the criminal street gang sentence enhancement allegation.

¶10 Defendant next argues that the trial court violated A.R.S. § 13-116 (2010), Arizona's double punishment statute, by using the criminal street gang enhancement allegation that he was promoting, furthering, or assisting criminal conduct by a criminal street gang to enhance his sentence on his conviction for assisting a criminal street gang. Section 13-116 reads: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." According to defendant, because promoting, furthering, or assisting in criminal conduct by a criminal street gang is an element of the offense of assisting a criminal street gang in violation of

A.R.S. § 13-2321, Arizona's bar against double punishment for the same act prohibits using this same element to enhance his sentence under A.R.S. § 13-709.02(C). Because defendant failed to object to this sentence enhancement in the trial court, our review is limited to fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶11 Defendant's conviction for assisting a criminal street gang required proof that defendant committed the offense "for the benefit of, at the direction of or in association with" a criminal street gang. A.R.S. § 13-2321(B). The trial court added an additional five years to the sentence for this offense pursuant to A.R.S. § 13-709.02(C), which provides sentencing enhancements for "[a] person who is convicted of committing any felony offense with the intent to promote, further or assist any criminal conduct by a criminal street gang." Defendant argues that the additional five years imposed on his sentence pursuant to this enhancement statute is prohibited by A.R.S. § 13-116 because the enhancement punishes him twice for the same act¹

¹ The parties and the trial court agreed that the verdict on the offense of assisting a criminal street gang would also constitute a finding on the criminal street gang enhancement allegation, negating need for a separate finding by the jury. No issue is raised on appeal regarding this stipulation. Accordingly, we do not address whether proving the elements of A.R.S. § 13-2321(B) means that the factual finding required under A.R.S. § 13-709.02(C) has been met. We assume they are the same elements only because that is the premise of defendant's argument.

under different statutes with consecutive rather than concurrent sentences.

¶12 The case law on this subject, however, is directly to the contrary. In *State v. Green*, 182 Ariz. 576, 580, 898 P.2d 954, 958 (1995), our supreme court permitted use of a dangerous finding based on the same event or occurrence to enhance more than one offense, reasoning in part that “§ 13-116 was not designed to cover sentence enhancement.” This court reached the same conclusion regarding the non-application of § 13-116 to sentence enhancements in *State v. Rodriguez*, 126 Ariz. 104, 107, 612 P.2d 1067, 1070 (App. 1980). In *Rodriguez*, we reasoned that the double punishment statute did not apply to sentencing enhancements increasing the punishment for aggravated assault when a gun was used because aggravated assault could be committed without use of a gun. *Id.* Though this decision could be read as limiting non-applicability of the double punishment statute only to sentencing enhancements that contain additional elements than the foundational crime, the later language from our supreme court in *Green* is not limited in this fashion. 182 Ariz. at 580, 898 P.2d at 958; see also *State v. Garcia*, 176 Ariz. 231, 234, 860 P.2d 498, 501 (App. 1993) (rejecting claim that use of element of underlying offense to enhance punishment violates guarantees against double jeopardy and A.R.S. § 13-116 without limitation).

¶13 Furthermore, even if our double punishment statute did apply to sentencing enhancements, A.R.S. § 13-709.02(C) plainly evinces the legislature's intent that the special sentencing enhancements it imposes are to be cumulative. "[W]here a special statute deals with the same subject as a general statute, the special statute will control." *State v. Weiner*, 126 Ariz. 454, 456, 616 P.2d 914, 916 (App. 1980). Here, the specific provision enhancing the sentence for assisting a criminal street gang increases the presumptive, minimum, and maximum sentence of any crime by five years if the crime is a class 2 or 3 felony. A.R.S. § 13-709.02(C). The statute then specifically states: "The *additional sentence* imposed pursuant to this subsection *is in addition* to any enhanced sentence that may be applicable." *Id.* (emphasis added). This language makes plain that the legislature was aware that an enhanced sentence would be applicable when a defendant was assisting a criminal street gang and chose to enhance those sentences further by imposing punishment "in addition to any enhanced sentence that may be applicable." *Id.* This specific provision overrides the more general double-punishment provision. See *Weiner*, 126 Ariz. at 456, 616 P.2d at 916. Thus, there was no error by the trial court in enhancing defendant's sentence on his conviction for assisting a criminal street gang pursuant to A.R.S. § 13-709.02(C).

C. There was no reversible error by the trial court in sentencing defendant as a repetitive offender with two prior historical felony convictions.

¶14 Finally, defendant argues that the trial court erred in sentencing him as a repetitive offender with two prior historical felony convictions. Again, because defendant did not object to his sentencing in the trial court, our review of this claim is limited to fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶15 Prior to trial, the State alleged that defendant was subject to sentencing as a repetitive offender in Cause No. CR2009-153052 based on prior historical felony convictions for robbery and possession of marijuana. At sentencing, defense counsel advised the trial court that defendant would not be contesting the existence of the two prior convictions. The trial court engaged in a colloquy with defendant, informing him of his right to have the State prove the prior convictions and the effect of the prior convictions on his sentences. Defendant thereafter admitted to the prior convictions and the trial court found the admissions to have been made knowingly and intelligently. As a consequence, the trial court sentenced defendant on his felony convictions in Cause No. CR2009-153052 as a repetitive offender with two prior historical felony convictions.

¶16 Before a sentence may be enhanced based on a prior conviction, the existence of the conviction must be admitted by the defendant or proven by the State. A.R.S. § 13-703(N) (Supp. 2010). Defendant contends the trial court erred in sentencing him as a repetitive offender with two prior felony convictions due to failure to fully comply with the procedures required by Arizona Rule of Criminal Procedure 17.6 for accepting an admission to a prior felony conviction. This rule provides: "[w]henver a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the procedures of this rule, unless admitted by the defendant while testifying on the stand." Ariz. R. Crim. P. 17.6. The procedures set forth in Rule 17 include that the trial court engage in a plea-type colloquy to inform the defendant of: 1) the nature of the charge; 2) the potential effect of the admission on sentencing; 3) the rights waived by the admission. Ariz. R. Crim. P. 17.2. Defendant maintains the trial court's colloquy was insufficient because the trial court did not advise him of the specific constitutional trial rights he was waiving by admitting to the prior convictions.

¶17 Even if we assume that the trial court's colloquy was insufficient, defendant is not entitled to appellate relief. If a defendant shows that he would not have admitted the prior conviction but for a Rule 17.6 error, the usual result will be a

sentencing hearing at which the State will be put to its burden of proving the prior conviction. *State v. Morales*, 215 Ariz. 59, 62, ¶ 13, 157 P.3d 479, 482 (2007). In the present case, the State had certified copies of records of the defendant's prior convictions admitted into evidence without objection at the sentencing hearing. Defendant does not challenge the authenticity of these records. Thus, evidence conclusively proving defendant's two prior convictions is already in the record. *Id.* "In these circumstances, there would be no point in remanding for a hearing merely to again admit the conviction records." *Id.*

CONCLUSION

¶18 Defendant's convictions and sentences in Cause No. CR2009-153052 and the revocation of his probation and sentence in Cause No. CR2008-149036 are affirmed.

/s/

JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/

MAURICE PORTLEY, Judge

/s/

JOHN C. GEMMILL, Judge