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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 01/03/2012
RUTH A. WILLINGHAM,
CLERK
BY: GH

STATE OF ARIZONA,) No. 1 CA-CR 10-0771
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
RODNEY RAY HOYT,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-153655-001 SE

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

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

Maricopa County Public Defender Phoenix
By Joel M. Glynn, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Rodney Ray Hoyt (defendant) appeals from his sentence for second-degree-murder, a class one felony in violation of Arizona Revised Statutes (A.R.S.) section 13-1104. Defendant argues the trial court erred by relying on three aggravating factors found by the jury. As set forth below, we find no reversible error and therefore affirm the sentence imposed by the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In August 2009, the State charged defendant with second degree murder for shooting his next door neighbor (victim).¹ The indictment alleged that defendant "without premeditation, intentionally caused the death of [victim], and/or knowing that his conduct would cause death or serious physical injury, caused the death of [victim], and/or under circumstances manifesting extreme indifference to human life, recklessly engaged in conduct which created a grave risk of death and thereby caused the death of [victim]." The indictment further alleged that the offense was dangerous because it "involved the discharge, use, or threatening exhibition of a GUN, a deadly weapon or dangerous instrument and\or the intentional or knowing infliction of serious physical injury

¹ Because defendant challenges only the trial judge's reliance on aggravating factors in the imposition of his sentence, we confine our discussion to the facts and proceedings relevant to that issue.

upon [victim]." The State alleged the following aggravating circumstances: (1) "the infliction or threatened infliction of serious physical injury"; (2) "the use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime, specifically a gun"; and (3) the offense "caused physical, emotional or financial harm to the victim or, if the victim died as a result of the conduct of the defendant, caused emotional or financial harm to the victim's immediate family."

¶13 After a six day trial, a jury found defendant guilty of second degree murder and further found that the offense was dangerous. Victim's first-cousin, L.H., was the State's sole witness at the aggravation phase of defendant's trial. L.H. testified that victim's death had impacted him financially and that he had lost an "older-brother-type figure." He also stated that victim's girlfriend of ten years had been emotionally and financially impacted and that "she's lost a lot. Also her son Dillon." The jury found the State had proven all of the aggravating factors beyond a reasonable doubt.

¶14 At sentencing, victim's daughter, as well as several other extended family members, addressed the trial judge. The court then sentenced defendant to an aggravated term of twenty years in prison, stating: "I've considered the aggravators found by the jury, the obvious emotional harm to the victim's family

and I've considered the mitigation urged by the defense, including defendant's mental health history, his age and physical ailments."

¶15 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-120.21 (2003).

DISCUSSION

¶16 On appeal, defendant argues that the sentencing judge improperly relied on all the aggravating factors found by the jury because they were either not supported by the evidence or were improperly double-counted. Thus, defendant contends that he is entitled to the presumptive sentence. See *State v. Martinez*, 210 Ariz. 578, 583, ¶ 17, 115 P.3d 618, 623 (2005) (the statutory maximum sentence "in a case in which no aggravating factors have been proved to a jury beyond a reasonable doubt is the presumptive sentence established" by statute).

¶17 We review the court's use of the three aggravating factors found by the jury only for fundamental error because defendant did not raise these issues at the aggravation phase of trial or at sentencing. See *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. “We will not disturb a sentence that is within the statutory range absent an abuse of the trial court’s discretion.” *State v. Joyner*, 215 Ariz. 134, 137, ¶ 5, 158 P.3d 263, 266 (App. 2007).

1. Deadly Weapon

¶8 We first address defendant’s argument that the use of a deadly weapon, specifically a gun, could not be used as an aggravating factor because it was a component of the jury’s finding that the offense was a dangerous felony. Defendant asserts that this resulted in improper double-counting. We conclude otherwise.

¶9 A trial court can consider the use of a deadly weapon as an aggravating factor “except if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under § 13-704.” A.R.S. § 13-701(D)(2). The “use, threatened use or possession of a deadly weapon” is not an essential element of the crime of second degree murder. A.R.S. § 13-1104(A); *See State v. King*, 226 Ariz. 253, 259-60, ¶¶ 21-28, 245 P.3d 938, 944-45 (App. 2011) (possible to commit homicide without using deadly weapons or dangerous instruments). Furthermore, the sentencing statutes do not allow for enhancement of the range of punishment. Second degree murder is punished according to A.R.S. § 13-710, which does not include a provision for enhancing the sentencing range

based on a finding of dangerousness. As a class 1 felony, second degree murder cannot be sentenced as a dangerous offense pursuant to A.R.S. § 13-704. Consequently, the jury's dangerous finding did not enhance the sentence. See *State v. Sammons*, 156 Ariz. 51, 55, 749 P.2d 1372, 1376 (1988) (holding finding of dangerousness superfluous because it had no impact on defendant's sentence). Therefore, the trial court properly considered the use of a deadly weapon as an aggravating factor.

¶10 In Arizona, a single *Blakely*²-compliant aggravating factor establishes the facts "legally essential" to punishment. Thus, because we find the use of a deadly weapon to be an appropriate statutory aggravating circumstance, the trial court had discretion to sentence defendant to an aggravated sentence with a maximum term of twenty-two years in prison. See A.R.S. § 13-710(A) (the maximum aggravated term for second degree murder is twenty-two years); *State v. Brown*, 212 Ariz. 225, 231, ¶ 28, 129 P.3d 947, 953 (2006) (if jury finds one statutorily enumerated aggravating factor, defendant exposed to maximum punishment); *State v. Martinez*, 209 Ariz. 280, 284, ¶ 16, 100 P.3d 30, 34 (App. 2004) ("Because the jury found at least one aggravating factor, defendant was eligible to receive an aggravated sentence, and the trial court's weighing of additional aggravating and mitigating circumstances to determine

² *Blakely v. Washington*, 542 U.S. 296 (2004).

the appropriate sentence within the aggravated range was permissible.").

2. Immediate Family

¶11 Defendant next alleges that the aggravating circumstance of harm to the victim's immediate family was unsupported by the evidence. He argues that L.H. and victim's girlfriend are not members of victim's "immediate family," consequently, the State failed to admit evidence in support of this aggravating factor. Black's Law Dictionary defines "immediate family" as a "person's parents, spouse, children, and siblings."³ Black's Law Dictionary 679 (9th ed. 2009). None of the definitions for "immediate family" included extended relationships such as a first-cousin or non-binding relationships with a significant other. Therefore, we conclude that the financial and emotional harm to victim's cousin and live-in girlfriend are not specifically enumerated aggravating factors in § 13-701(D).

¶12 However, although distinct from the enumerated aggravating circumstance of A.R.S. § 13-701(D)(9), this evidence would fall within the "catch-all" of § 13-701(D)(24). That provision permits a trial court to consider as an aggravating

³ Both defendant and the State rely on definitions from A.R.S. § 13-4401 to support their arguments. However, the plain language of the statute states that these definitions apply to chapter forty; we therefore do not rely on these definitions in our analysis.

circumstance “[a]ny other factor that the state alleges is relevant to the defendant’s character or background or to the nature or circumstances of the crime.” A.R.S. § 13-701(D)(24). We recognize that the trial court would have been prohibited from sentencing defendant to an aggravated term based solely on this catch-all factor. See *State v. Schmidt*, 220 Ariz. 563, 566, ¶ 10, 208 P.3d 214, 217 (2009). Nevertheless, where sufficient evidence supported the finding of use of a deadly weapon, a “clearly enumerated aggravator,” the court did not err in considering other aggravating factors or in imposing an aggravated sentence. See A.R.S. § 13-701(F) (“If the trier of fact finds at least one aggravating circumstance, the trial court may find by a preponderance of the evidence additional aggravating circumstances.”); *Schmidt*, 220 Ariz. at 566, ¶ 11, 208 P.3d at 217 (trial court must find one statutorily enumerated factor to impose aggravated sentence; thereafter, court may consider additional catch-all aggravators); see also *State v. Bonfiglio*, 623 Ariz. Adv. Rep. 7, ¶ 20 (App. Dec. 6, 2011). The court in *Schmidt* clarified that the “[s]ubsequent reliance on other factors embraced by a catch-all provision to justify a sentence up to the statutory maximum comports with the traditional discretionary role afforded judges in sentencing.” *Schmidt*, 220 Ariz. at 566, ¶ 11, 208 P.3d at 217.

¶13 The trial court thus was entitled to find and rely on its determination of emotional harm to victim's cousin and girlfriend. *State v. Poling*, 125 Ariz. 9, 11-12, 606 P.2d 827, 829-30 (App. 1979) (court may consider any factor it deems appropriate to the ends of justice); *Van Norman v. Schriro*, 616 F. Supp. 2d 939, 954 (D. Ariz. 2007) (trial court's additional finding of danger to the public is a proper aggravating factor).

¶14 In addition, victim's daughter also addressed the trial judge at sentencing. She spoke of the emotional harm she suffered by losing the opportunity to ever meet her father. As a member of victim's immediate family, her statements provided support for the trial court's consideration of the harm caused to victim's family under the enumerated aggravating circumstance of § 13-701(D)(9).⁴

3. Serious Physical Injury

¶15 Defendant also contends that the infliction of serious physical injury could not be used as an aggravating factor because it is an element of the offense. Death is an element of second degree murder. A.R.S. § 13-1104(A). The State concedes that serious physical injury is a necessarily included element of death. The trial court can consider the infliction of serious physical injury as an aggravator "except if the

⁴ The defense attorney even articulated at sentencing that there was "[a]bsolutely" "harm to the victim's family."

circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under § 13-704." A.R.S. § 13-701(D)(1). We therefore accept the State's concession that the trial court could not, in this case, aggravate this sentence based on "serious physical injury."

¶16 However, we find no reversible error. In *State v. Munniger*, 213 Ariz. 393, 397, ¶¶ 12-13, 142 P.3d 701, 705 (App. 2006), we found that the court's reliance on an improperly double-counted aggravator did not require reversal where, based on other proper aggravators, the same aggravated sentence would have been imposed. Here, valid aggravating factors other than serious physical injury were present, and there is no indication the court gave weight to the improper factor. Additionally, it is clear from the record that the court's decision to impose an aggravated sentence was not a close call.

¶17 Defendant has failed to meet his burden to prove the error caused him prejudice. *Id.* at ¶ 14. (defendant cannot demonstrate prejudice merely by speculating that he would have received a lesser sentence if the improper factor had not been considered); *Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608 (defendant has burden to demonstrate prejudice). In the case at hand, nothing in the record indicates the trial court would have imposed a lesser sentence had the jury not found a superfluous

aggravator. Defendant's twenty-year sentence was within the aggravated range prescribed for second degree murder, and defendant cannot prevail under fundamental error review. Thus, we decline to remand for resentencing.

CONCLUSION

¶18 For the foregoing reasons, defendant's sentence is affirmed.

/s/

JON W. THOMPSON,
Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

ANN A. SCOTT TIMMER, Judge