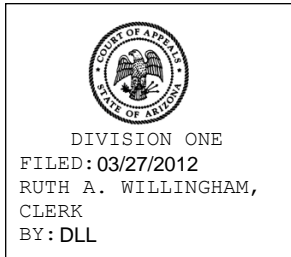


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 10-0841
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MARTIN MANRIQUEZ REYES,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-006934-001 DT

The Honorable John R. Hannah, Judge

AFFIRMED AS CORRECTED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
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By Thomas Baird, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Martin Reyes appeals his convictions and sentences. He raises one issue on appeal: whether the trial court committed fundamental error when it awarded presentence incarceration credit to him totaling 592 days. Reyes asks this court to amend his sentences to reflect 595 days of presentence incarceration credit. For the following reasons, we affirm Reyes's convictions and amend the sentencing minute entry to reflect 595 days of presentence incarceration credit on the prison terms for the convictions on counts one, two, four, and nineteen.

FACTS AND PROCEDURAL HISTORY

¶2 Reyes was initially arrested for molesting victim CZ¹ on February 26, 2009, and charged on March 3, 2009. The State moved to dismiss the initial complaint and Reyes was later indicted on June 10, 2009 for multiple offenses against multiple victims including CZ. A jury convicted Reyes on nineteen counts including: four counts of sexual conduct, eight counts of child molestation, five counts of sexual abuse, one count of aggravated assault, and one count of public sexual indecency -- all with minor children. Reyes was sentenced to numerous prison terms, some to be served concurrently and several to be served consecutively. Reyes was credited with 592 days of presentence

¹ We use initials to protect the victim's identity because of the sensitive nature of the offenses.

incarceration credit for counts one, two, and four.²

¶13 Reyes timely appeals and 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 13-4033(A) (2010).³

ANALYSIS

¶14 Reyes contends he was entitled to 595 days of credit as opposed to the trial court's finding of 592 days. Reyes failed to object to the amount of presentence incarceration credit at trial. Therefore, our review of the record is limited to fundamental error. See *State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005) (stating that defendant's failure to object at trial limits review only for fundamental error on appeal). To establish fundamental error, Reyes must prove that an error occurred, the error was fundamental (goes to the heart of defendant's case and deprives him of a fair trial), and that he suffered prejudice as a result of the error. See *id.* at 568, ¶¶ 23-24, 26, 115 P.3d at 608. A trial court's failure to give proper presentence credit is fundamental error.

² The sentencing minute entry states that 592 days of presentence incarceration credit was awarded only on the sentence for the conviction on count one. But the orders of confinement signed by the court regarding the prison terms imposed on the convictions for counts two and four also indicate credit for 592 days of presentence incarceration.

³ Absent material revisions to a statute after the date of an offense, we cite the current version.

See State v. Ritch, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989).

¶15 Remand is not necessarily required for presentence incarceration credit errors. We may correct the error by modifying the sentencing minute entry to reflect the proper amount of presentence incarceration credit due the defendant. *See State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992); A.R.S. § 13-4037 (2010). The statute directing that credit be given for presentence incarcerations states:

All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment.

A.R.S. § 13-712(B) (2010). The trial court is duty bound to calculate the correct presentence incarceration credit entitled to the defendant. *See State v. Nieto*, 170 Ariz. 18, 19, 821 P.2d 285, 286 (App. 1991).

¶16 Reyes and the State dispute the date that Reyes was arrested for the crimes enumerated in this appeal. Reyes contends that he was arrested on February 26, 2009, while the State places the actual date of arrest as June 12, 2009, after the indictment. Reyes argues that the State is mistaken in its calculation because he was initially charged with one count of molestation of victim CZ on March 3, 2009, under cause number CR2009-114670, with the conduct allegedly occurring on February

22, 2009.

¶17 The State argues that Reyes was credited for extra days and should have been awarded only 489 days of credit because Reyes was already in custody at the time he was arrested for the current offenses.⁴ The State contends that while a defendant is in custody for another offense, presentence incarceration credit does not accrue until the defendant is actually arrested for the new offense. *See State v. Rivers*, 190 Ariz. 56, 61, 945 P.2d 367, 372 (App. 1997). If the State was correct that Reyes received more presentence credit than he was entitled to, Reyes would be incapable of demonstrating any prejudice from the asserted loss of three days of presentence credit, and we would affirm his sentences. *See Henderson*, 210 Ariz. at 568, ¶ 26, 115 P.3d at 608 (stating that defendant must prove how he was prejudiced by trial court's error).

¶18 We disagree with the State's conclusion, however. On July 30, 2009, the State asked the trial court to dismiss the original complaint filed on March 3, 2009, in order to transition into a new case with a complex designation under cause number CR2009-006934. The trial court dismissed the

⁴ The State acknowledges that it did not cross-appeal to assert that Reyes was credited with more days than he was entitled to receive. *See State v. Dawson*, 164 Ariz. 278, 280-86, 792 P.2d 741, 743-49 (1990) (holding State's failure to cross-appeal deprives court of appeals of subject matter jurisdiction to correct illegally lenient sentence).

complaint. The State's new case, according to the trial court, was based in part on the same set of operative facts as cause number CR2009-114670 and included allegations of offenses against victim CZ.

¶9 The release questionnaire supports Reyes's contention: Reyes was booked with booking number P516651 under cause number CR2009-114670 on February 26, 2009; the arresting officer was Kathy V.; and the probable cause statement identified the victim as CZ. The June 10, 2009 indictment in count eight alleges the same conduct for which Reyes was arrested and booked into jail on February 26, 2009 -- that is, of the alleged molesting of CZ on February 22, 2009.

¶10 We conclude that Reyes is entitled to presentence incarceration credit beginning on February 26, 2009. He was accused and arrested for molesting CZ in February and formally charged in March. In July 2009, the State indicted Reyes on numerous charges including the original charge based on CZ's allegations. Although the initial criminal prosecution against Reyes was dismissed, it appears from the record that he remained incarcerated as a new proceeding was begun, which encompassed the greatly expanded charges from the indictment. In accordance with A.R.S. § 13-712(B), Reyes had been incarcerated since February 26, 2009 on a charge for which he was convicted and sentenced to prison.

¶11 After doing the math and using the arrest date of February 26, 2009, and the sentencing date of October 14, 2010, we further conclude that Reyes was entitled to 595 days of presentence incarceration credit instead of the 592 days credited by the trial court or the 489 days argued by the State.

¶12 Finally, the State suggests that Reyes is also entitled to the same presentence incarceration credit for all the prison sentences that have been ordered to run concurrently with count one. We agree. The trial court determined that the prison terms for counts one, two, four, and nineteen were to be served concurrently. Reyes is entitled to presentence credit of 595 days for counts one, two, four, and nineteen. See *State v. Cruz-Mata*, 138 Ariz. 370, 375, 674 P.2d 1368, 1373 (1983) (holding that the trial court should credit time spent against each concurrent sentence). Therefore, we modify the sentences to reflect this result, in accordance with *Stevens*, 173 Ariz. at 496, 844 P.2d at 663, and A.R.S. § 13-4037.

CONCLUSION

¶13 We affirm Reyes's convictions and sentences with the exception that we hereby amend the sentences to reflect 595 days of presentence incarceration credit and we apply this to his

sentences on counts one, two, four, and nineteen.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Judge

_____/s/_____
PHILIP HALL, Judge