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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



DIVISION ONE  
FILED: 01/24/2012  
RUTH A. WILLINGHAM,  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 10-0958  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ROSARIO ALBERTO VERDUZCO-ROBLES ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2010-103348-001DT

The Honorable Cari A. Harrison, Judge

**AFFIRMED**

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

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

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G E M M I L L, Judge

¶1 Rosario Verduzco-Robles appeals his convictions and sentences for one count of aggravated assault, one count of leaving the scene of a serious injury accident, and four counts of endangerment. Verduzco-Robles asks this court to amend his

sentences to reflect 304 days of presentence incarceration credit, instead of 303 days. For the following reasons, we affirm Verduzco-Robles's convictions and sentences.

#### **FACTS AND PROCEDURAL HISTORY**

¶12 Verduzco-Robles was indicted and subsequently convicted by a jury of one count of aggravated assault (count one), one count of leaving the scene of a serious injury accident (count two), and four counts of endangerment (counts three through six). The trial court sentenced Verduzco-Robles to prison for nine years for count one, four years for count two, and two years for each of counts three through six. The prison terms for counts one, three, four, five, and six were ordered to be served concurrently with each other and the term imposed for count two was ordered to be served consecutively to the other terms. According to the transcript of the sentencing hearing, the trial court did not specify the prison terms to which the 303 days of presentence incarceration credit must be applied. However, the sentencing minute entry order and Order of Confinement/Sentence of Imprisonment form, both signed by the judge, specifically granted Verduzco-Robles 303 days of presentence incarceration credit on each of the six sentences.

¶13 Verduzco-Robles 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 -4033(A) (2010).<sup>1</sup>

#### ANALYSIS

¶4 Verduzco-Robles raises only one issue on appeal: whether the trial court committed fundamental error when it failed to grant him presentence incarceration credit of 304 days instead of 303 days.

¶5 Because Verduzco-Robles raised no objection to the trial court regarding the 303 days of presentence incarceration credit, we review Verduzco-Robles's sentences for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005) (failing to object at trial to error creates limited appellate review for fundamental error). A trial court's failure to give proper presentence credit is fundamental error. See *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989). Presentence incarceration credit errors do not always require remand; when the record is clear, we can correct the error by modifying the sentencing minute entry to reflect the proper credit. See *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992); A.R.S. 13-4037 (2010); Ariz. R. Crim. P. 31.17(b). "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

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<sup>1</sup> Absent material revisions to a statute after the date of an offense, we cite the current version.

term of imprisonment.” A.R.S. § 13-712 (2010). The trial court has a duty 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 Verduzco-Robles contends he is entitled to one more day of presentence incarceration credit. The State asserts that Verduzco-Robles has not proven his entitlement to the additional day. We need not determine, however, if Verduzco-Robles is entitled to one more day of presentence incarceration credit, because we conclude that Verduzco-Robles cannot demonstrate the necessary prejudice to establish fundamental error justifying relief. See *Henderson*, 210 Ariz. at 568, ¶ 26, 115 P.3d at 608 (explaining that having shown that fundamental error occurred, the defendant must also “demonstrate that the error caused him prejudice”).

¶17 Assuming Verduzco-Robles is correct that he should have been credited for 304 days instead of 303 days, we note that a separate error has resulted in Verduzco-Robles actually getting 606 days of presentence incarceration credit. Because he has received the functional equivalent of 606 days of presentence incarceration credit, he cannot establish that he has been prejudiced by not being awarded credit for one additional day.

¶18 As noted above, the trial court awarded Verduzco-

Robles 303 days of credit against the prison terms imposed on all six convictions. The State asserts in a footnote in its answering brief that the trial court erred in awarding presentence incarceration credit not only on the five prison terms being served initially and concurrently but also on the prison term that is to be served consecutively to the five terms. See *State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989) (defendant not entitled to double credit windfall on consecutive sentence imposed); *State v. Cuen*, 158 Ariz. 86, 88, 761 P.2d 160, 162 (App. 1988) (stating the legislature did not intend to compound or double presentence incarceration credit when consecutive sentence imposed); see also *State v. Caldera*, 141 Ariz. 634, 638, 688 P.2d 642, 646 (1984) ("In the case of concurrent sentences it is required to fully credit defendants with the total time spent awaiting trial in each separate count."). By awarding presentence incarceration credit to Verduzco-Robles on the consecutive prison term as well as the initial, concurrent terms, the trial court has effectively awarded a total, combined credit of 606 days.

¶19 Citing A.R.S. § 13-4037(A), the State asks us to modify the sentence so that the presentence incarceration credit will only apply to five counts being served concurrently. In response, Verduzco-Robles correctly points out that we lack subject matter jurisdiction to modify the presentence

incarceration credit to Verduzco-Robles's detriment because the State did not cross-appeal. See *State v. Dawson*, 164 Ariz. 278, 280-86, 792 P.2d 741, 743-49 (1990). Our supreme court summarized its analysis of this issue in *Dawson* as follows:

In the absence of a timely appeal or cross-appeal by the state seeking to correct an illegally lenient sentence, an appellate court has no subject matter jurisdiction to consider that issue. The state cannot preserve the issue for review by raising it in its answering brief in defendant's appeal, because this is not a cross-issue in support of the trial court's judgment. An appellate court cannot, within the scope of its own review of defendant's appeal, correct a sentencing error that inures to the detriment of a criminal defendant.

*Id.* at 286, 792 P.2d at 749. Accordingly, we cannot address the issue raised by the State.

#### CONCLUSION

¶10 Even assuming Verduzco-Robles could demonstrate that he was entitled to 304 days of presentence incarceration credit, he cannot demonstrate prejudice because he has effectively been awarded credit for 606 days. We therefore affirm Verduzco-Robles's convictions and sentences in all respects.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
JON W. THOMPSON, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
MAURICE PORTLEY, Judge