DIVISION ONE
FILED: 02/14/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0480
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
MICHAEL REED, JR.,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Coconino County

Cause No. S0300CR201000787

The Honorable Dan R. Slayton, Judge

AFFIRMED

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

H. Allen Gerhardt, Coconino Public Defender — Flagstaff
Attorney for Appellant

H A L L, Judge

¶1 Michael Reed, Jr., appeals his twelve-year sentences on two counts of aggravated driving under the influence of

alcohol, on the ground that the trial court violated his due process rights and the sentencing statutes by relying on an aggravating factor not alleged prior to trial. For the reasons that follow, we find no error and affirm.

¶2 Before trial, the State filed a notice alleging four aggravating factors for purposes of sentencing: danger to the community, failure to obtain a driver's license, history of similar criminal offenses, and a conviction for sexual abuse committed in 2007. The State also filed notice that it intended to use two prior felony convictions for aggravated DUI, one committed in 2001, and the second in 2002, for purposes of sentence enhancement. After an evidentiary hearing following Reed's conviction on the two counts of aggravated DUI in the instant case, the trial court found the State had proved beyond a reasonable doubt the existence of all three prior felony convictions.

¶3 A day before sentencing, the State filed a sentencing memorandum in which it alleged a fifth aggravating factor: that Reed "is not amenable to rehabilitation." In support of this allegation, the State cited Reed's "repetitive behavior of drinking and driving," and the presentence report writer's statements that Reed conceded he has a "problem" with alcohol, but that "[he] does not appear to consider treatment as being important," and he does not intend to seek treatment offered

through the Department of Corrections because "[i]t wouldn't do me any good to do it while in prison; it won't count for anything on the outside." The State argued that Reed's "actions and statements show that he is not amenable to treatment, doesn't really see that he has a problem, does not take responsibility for his actions, and would only do treatment if it counted for something on the outside." Reed argued at sentencing that the trial court should not use this factor to aggravate his sentence because of the absence of prior notice of the allegation, and of any direct evidence to support it.

¶4 The court noted that because it found the existence of a prior felony conviction, the law allowed it to "consider a whole range of other aggravating factors." The court found as aggravating factors the prior felony conviction for sexual abuse, and that "Mr. Reed is not amenable to rehabilitation as exhibited by the numerous alcohol related offenses and convictions in this case," not counting the two prior aggravated DUI offenses. He found as mitigating factors strong family and community support, volunteer work, and impaired capacity, although he gave little weight to the last factor. He imposed an aggravated sentence of twelve years on each conviction, to be served concurrently. Reed filed a timely notice of appeal.

¶5 Reed argues that the Arizona sentencing statutes and procedural rules, his due process right to notice, and his

rights under *Blakely v. Washington*, 542 U.S. 296 (2004), prohibited the court from relying on an aggravating factor that the State had failed to allege before trial. He argues that the legislature's use of the words "alleged" or "alleges" in Arizona Revised Statutes (A.R.S.) section 13-701(C) and (D)(24) (Supp. 2011) evidences a legislative intent to require allegations of aggravating factors, and Rule 13.5(d) of the Arizona Rules of Criminal Procedure, which requires that challenges to the legal sufficiency of such allegations be made before trial, contemplates that all aggravators must be alleged before trial.

¶6 We review de novo issues involving the interpretation of rules and statutes, constitutional law, and whether a trial court has properly employed a given factor to aggravate a sentence. *State ex rel. Thomas v. Klein*, 214 Ariz. 205, 207, ¶ 5, 150 P.3d 778, 780 (App. 2007); *State v. Campoy,* 220 Ariz. 539, 544, ¶ 11, 207 P.3d 792, 797 (App. 2009); *State v. Alvarez*, 205 Ariz. 110, 113, ¶ 6, 67 P.3d 706, 709 (App. 2003). In interpreting statutes and rules, we make every effort to give effect to the intent of the legislature or the rule-maker. *Mejak v. Granville,* 212 Ariz. 555, 557, ¶ 8, 136 P.3d 874, 876 (2006); *Chronis v. Steinle*, 220 Ariz. 559, 560, ¶ 6, 208 P.3d 210, 211 (2009). We consider the statutory language to be the best indicator of that intent, and we go no further to ascertain

the intent if the language is clear and unambiguous. *Mejak,* 212 Ariz. at 557, ¶ 8, 136 P.3d at 876.

¶7 We find no error, constitutional or otherwise, in the court's reliance on an aggravating factor that the State first alleged the day before sentencing. First, the plain language of A.R.S. § 13-701 does not require the State to file notice of allegations of aggravating circumstances before trial. Section 13-701(C) provides in pertinent part simply that the "maximum term imposed . . . may be imposed only if one or more of the circumstances alleged to be in aggravation of the crime are found to be true by the trier of fact beyond a reasonable doubt." A.R.S. § 13—701(C). The statute further provides that the court shall determine the truth of an allegation of a prior historical felony conviction as an aggravating circumstance. A.R.S. § 13-701(C) and (D)(11). Section 13-701(D)(24) provides that the trier of fact may consider, beyond those aggravating circumstances specifically identified in the subsection, "[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." Finally, the statute provides that once the trier of fact has found the existence of at least one aggravating circumstance, the trial court "may find by a preponderance of the evidence additional aggravating circumstances." *See* A.R.S. § 13-701(F). In short, no provision

in the statute explicitly sets forth a time limit within which the State must file allegations of aggravating circumstances.

¶8 The legislature has included language requiring pretrial notice of sentencing allegations in other statutes. *See, e.g.,* A.R.S. § 13-704(L) (2010) (providing that the penalties prescribed shall be substituted for the penalties otherwise authorized "if an allegation of prior conviction is charged in the indictment or information and admitted or found by the court"); A.R.S. § 13-708(D) (2010) ("The court shall allow the allegation that the person committed a felony while released on bond . . . at any time before the case is actually tried"); A.R.S. § 13-752(B) (2010) ("Before trial, the prosecution shall notice one or more . . . aggravating circumstances" in capital sentencing cases). The absence of any similar language in A.R.S. § 13-701 indicates that the legislature did not intend to require pretrial notice of aggravating circumstances in a non-capital case. *See Aileen H. Char Life Interest 629 v. Maricopa County,* 208 Ariz. 286, 299, ¶ 44, 93 P.3d 486, 499 (2004) ("We think that, if the legislature had intended to limit the statute as the County urges, it would have used language making that limitation clear.").

¶9 We further find no merit in Reed's argument that the legislature's use of the word "alleged" in A.R.S. § 13-701(C)

and (D)(24) indicates that the legislature intended to require the prosecutor to make allegations of aggravating circumstances before trial. We have previously rejected a similar argument with respect to a predecessor statute, and see no reason to revisit our opinion. *See State v. Marquez*, 127 Ariz. 3, 6, 617 P.2d 787, 790 (App. 1980) (rejecting argument that use of the word "alleged" in reference to aggravating factors in former sentencing statute indicated that trial court lacked jurisdiction to aggravate sentence relying on factors not formally alleged by prosecutor).

¶10 Reed's reliance on Arizona Rule of Criminal Procedure 13.5(d) is also misplaced. Rule 13.5(a) provides that "[t]he prosecutor may amend an indictment . . . to add an allegation of one or more prior convictions or other non-capital sentencing allegations that must be found by a jury within the time limits of Rule 16.1(b)," or no later than twenty days before trial. *See* Ariz. R. Crim. P. 13.5(a), 16.1(b). Rule 13.5(d) in turn provides that "[a] defendant may challenge the legal sufficiency of an alleged prior conviction or non-capital sentencing allegation that must be found by a jury by motion filed pursuant to Rule 16," or no later than twenty days before trial.

¶11 In his reliance on Rule 13.5, Reed ignores the impact on the sentencing proceedings of the court's finding of the existence of a prior historical felony conviction as an

aggravator. The plain terms of Rule 13.5 apply only to prior convictions and "other non-capital sentencing allegations that must be found by a jury." Ariz. R. Crim. P. 13.5(a) and (d). Under *Blakely*, any fact other than the existance of a prior conviction that increases a penalty for a crime beyond the presumptive sentence must be based solely on facts found beyond a reasonable doubt by a jury, implicit in the verdict, or admitted by the defendant. *See Blakely,* 542 U.S. at 313; *State v. Martinez,* 210 Ariz. 578, 585, ¶ 27, 115 P.3d 618, 625 (2005) (holding that aggravator implicit in verdict was *Blakely* compliant); *State v. Brown,* 209 Ariz. 200, 203, ¶ 12, 99 P.3d 15, 18 (2004) (holding that presumptive sentence is statutory maximum for purposes of *Blakely*). Our supreme court has held, however, that under *Blakely* and the Arizona sentencing scheme, once one aggravating factor is established, defendant is exposed to the maximum punishment, and the trial court is free to consider additional aggravating factors in imposing sentence. *Martinez*, 210 Ariz. at 585, ¶ 27, 115 P.3d at 625. Because the trial court in this case found the existence of a prior historical felony conviction alleged as an aggravator, it was free to rely on additional aggravators not presented to or found by the jury. *See id.* The sentencing aggravator that Reed challenges in this case accordingly did not require

determination by a jury. *See id.* The aggravator at issue thus was not subject to the provisions of Rules 13.5(a) and (d).[1]

¶12 Finally, our supreme court has held that due process does not require pretrial notice of the aggravating factors upon which the State will rely. *See State v. Canez,* 202 Ariz. 133, 156, ¶ 78, 42 P.3d 564, 587 (2002) (citations omitted). In the capital sentencing context, due process requires only that the prosecutor disclose aggravating circumstances "sufficiently in advance of the hearing that the defendant will have a reasonable opportunity to prepare rebuttal." *State v. Ortiz,* 131 Ariz. 195, 207, 639 P.2d 1020, 1032 (1981), *disapproved on other grounds by State v. Gretzler,* 135 Ariz. 42, 57 n. 2, 659 P.2d 1, 16 n. 2 (1983). Even assuming that a non-capital defendant is entitled to notice of specific aggravating factors that may be relied on by the State, notice of aggravating factors in the State's

[1] Contrary to Reed's argument, the supreme court's holding in *Chronis*, 220 Ariz. 559, 208 P.3d 210 (2009) that Rule 13.5(c) allows a defendant to request a determination of probable cause on capital sentencing allegations does not compel a different result. As outlined *supra*, Rule 13.5 simply was not applicable to the non-capital aggravator at issue because it was not subject to determination by a jury. Moreover, the amendment of Rule 13.5(c) was driven by considerations not present in the amendment of the rule governing non-capital cases, rendering the decision of limited value in non-capital cases. *See Chronis,* 220 Ariz. at 561-62, ¶¶ 11-17, 208 P.3d at 212-13; Maricopa County Attorney's Motion to Amend Rules, pp. 3-9 (filed August 26, 2002); Ariz. R. Crim. P. 15.1(i) (requiring the prosecutor to disclose "no later than 60 days after the arraignment in superior court" a list of aggravating circumstances on which it intends to rely in cases where it is seeking the death penalty).

presentencing memorandum satisfies due process. *State v. Jenkins,* 193 Ariz. 115, 121, ¶ 21, 970 P.2d 947, 953 (App. 1998).

¶13 Because Reed received notice of the additional aggravating factor the day before sentencing in the State's presentencing memorandum, we conclude that any due process requirement of advance notice was satisfied. Moreover, Reed did not ask for a continuance and only mentioned the lack of prior notice briefly. Rather, he mounted a vigorous defense to use of this aggravating factor that he was not amenable to rehabilitation, a factor that relied in part on a previously alleged similar criminal history, and in part on his statements to the presentence report writer rejecting treatment. Reed simply was unable to persuade the court that this aggravating factor was unsupported, and that the court should not rely on it in sentencing Reed. On this record, we find that Reed had adequate time to prepare a rebuttal, and the lack of earlier notice of this aggravating factor did not violate his due process rights.

¶14 For the foregoing reasons, we find no error, and affirm Reed's sentence.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
PATRICIA A. OROZCO, Presiding Judge

_/s/_____
JOHN C. GEMMILL, Judge