IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ANTHONY LEWIS,
Appellant.

No. 2 CA-CR 2013-0323
Filed December 10, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20090879001
The Honorable Deborah Bernini, Judge

AFFIRMED AS MODIFIED

COUNSEL

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MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Kelly and Judge Vásquez concurred.

H O W A R D, Judge:

¶1 After a jury trial, appellant Anthony Lewis was convicted of one count of first-degree murder, two counts of aggravated assault, and one count of second-degree burglary. On appeal, Lewis argues the trial court illegally imposed consecutive sentences for his two aggravated assault convictions and illegally imposed a maximum sentence for his second-degree burglary conviction.[1] For the following reasons, we affirm the convictions and sentences, except the sentence on the aggravated assault conviction in count two, which we modify.

Factual and Procedural Background

¶2 We view the record in the light most favorable to upholding the jury's verdicts. *State v. Robles,* 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). The facts are fully set forth in our contemporaneously filed opinion, but we summarize them as follows. Lewis burglarized the victim's home twice, the second time setting her on fire. She died from severe burns. The trial court sentenced Lewis to an aggravated prison term of seven years for his

[1] In a separate, contemporaneously filed, published opinion, we address other issues that meet the requirements for publication. *See* Ariz. R. Sup. Ct. 111(b), (h); *see also* Ariz. R. Crim. P. 31.26 (providing for partial publication of decision).

second-degree burglary conviction, two aggravated terms of fifteen years for the assault convictions, both of which were to be served consecutively to the burglary sentence and to each other, and to natural life in prison on the first-degree murder charge, to be served concurrently with the sentences for aggravated assault.[2] We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Consecutive Sentences for Aggravated Assault Convictions

¶3 Lewis argues the trial court illegally imposed consecutive sentences for his two aggravated assault convictions, in violation of A.R.S. § 13-116 and *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989). The state concedes that the court should have imposed concurrent sentences on the aggravated assault counts "[b]ecause there was no evidence that the two aggravated assault convictions were based on two separate acts." The state believes that it may have been "theoretically possible . . . [the] convictions were based on two separate acts." But the state asserts "there is no direct evidence" to support this possibility, and "it [is] far more likely that the jury based both convictions on the fact that [Lewis] lit A.H. on fire."

¶4 We accept the state's concession and conclude that the two aggravated assault convictions are predicated on the "same act" for the purposes of § 13-116. *See State v. Forde*, 233 Ariz. 543, ¶ 140, 315 P.3d 1200, 1232 (2014) (agreeing with state's concession robbery and aggravated robbery conviction predicated on same act). We therefore modify the sentence for aggravated assault in count two so that it is to be served concurrently with the term imposed for aggravated assault in count three. *See* Ariz. R. Crim. P. 31.17(b); *see also Forde*, 233 Ariz. 543, ¶ 140, 315 P.3d at 1232.

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[2]The sentencing minute entry states Lewis waived his right to a jury trial and pled guilty. But the record is clear that Lewis was tried by a jury, and during the oral pronouncement of sentence, the court correctly stated Lewis had been found guilty of the charges by a jury.

Maximum Sentence for Second-Degree Burglary Charge

¶5 Lewis further argues the trial court illegally imposed a maximum prison term for his second-degree burglary conviction. He argues that the court's imposition of an aggravated term violated *Blakely v. Washington*, 542 U.S. 296 (2004), because it relied upon aggravating factors found by the jury that pertained only to the crimes committed on September 22, when Lewis lit A.H. on fire.

¶6 Lewis contends, based on *State v. Vermuele*, 226 Ariz. 399, ¶ 14, 249 P.3d 1099, 1103 (App. 2011), that he was not required to object below to preserve this issue for review. But Lewis was sentenced more than a month after the jury returned its verdicts on aggravating factors. At sentencing, the trial court asked the parties for their recommendations, and the state asked that all but one of the aggravating factors the jury had found, including emotional harm to the victim, apply to the burglary conviction and that Lewis receive an aggravated sentence. Thus, during his presentation that followed, Lewis had the opportunity to raise any alleged *Blakely* error but failed to do so. Furthermore, at the end of sentencing, the court asked, "Anything else, counsel?" to which defense counsel replied, "No, Your Honor." Consequently, we do not agree with Lewis that the rule articulated in *Vermuele* applies here. *See id.* (noting litigants have duty to "raise any other legal challenge to the propriety of the sentencing process that becomes apparent up to the moment the trial court pronounces sentence").

¶7 We review for fundamental error a claim of *Blakely* error raised for the first time on review. *State v. Kasic*, 228 Ariz. 228, ¶ 15, 265 P.3d 410, 413 (App. 2011). Lewis did not argue fundamental error on appeal, however, and ordinarily we find an appellant's failure to argue fundamental error waives the argument. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). But, because the state did not claim Lewis had waived this issue by not arguing fundamental error, we will review it on that basis.

¶8 We review constitutional issues related to sentencing de novo. *State v. Lizardi,* 234 Ariz. 501, ¶ 12, 323 P.3d 1152, 1155 (App. 2014). To show that a *Blakely* error is prejudicial, we must consider "whether a reasonable jury, applying the correct standard of proof,

could have failed to find the existence of each aggravator." *See State v. Henderson*, 210 Ariz. 561, ¶ 28, 115 P.3d 601, 609 (2005). The defendant has the burden of persuasion in fundamental error review. *Id.* ¶ 19.

¶9 Lewis was convicted of second-degree burglary for the break-in discovered on September 21, when he broke into A.H.'s home and left her a taunting voicemail message about his break-in. For this conviction, the trial court imposed a maximum prison term of seven years, to be served consecutively to the sentences imposed for all other counts. *See* A.R.S. § 13-702(D). The court orally charged the jury with deciding five aggravating factors:

> First, that the defendant committed the offense in an especially cruel manner; second, that the defendant committed the offense in an especially heinous or depraved manner; three, the offense was committed while the defendant was on authorized release from jail; four, the victim suffered physically prior to her death; five, the victim suffered emotionally prior to her death.

The written instructions on aggravators substantially mirrored the oral instructions. Neither the oral nor the written instructions directed the jury to specify to which counts each aggravator would apply. The verdict forms also did not distinguish between counts.

¶10 The jury found every aggravating factor proven beyond a reasonable doubt, with the exception of the especially heinous or depraved factor. At the sentencing hearing, the state asked the trial court to sentence Lewis to an aggravated prison term for second-degree burglary, noting the taunting voicemail and A.H.'s efforts to keep Lewis out of her life. In response, Lewis argued against the imposition of an aggravated term but did not dispute that the jury had found aggravating factors existed as to this count. The court sentenced Lewis "for an aggravated term of seven years," noting "the emotional harm suffered by the victim, the multiple [9-1-1] calls

that were placed even on that date, [and] . . . violation of the court order to not have contact with [the victim]."[3]

¶11 "The Sixth Amendment requires that a jury find beyond a reasonable doubt, or a defendant admit, any fact (other than a prior conviction) necessary to establish the range within which a judge may sentence the defendant." *State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005); *see also Blakely*, 542 U.S. at 301. Thus, a jury must find aggravating factors, like the elements of a crime, beyond a reasonable doubt. *State v. Dann*, 220 Ariz. 351, ¶ 65, 207 P.3d 604, 618 (2009). And "[i]t follows that when a defendant has been convicted of multiple [counts], . . . aggravator[s] must be proven as to each conviction." *State v. Miller*, 234 Ariz. 31, ¶ 46, 316 P.3d 1219, 1232 (2013).

¶12 In *Miller*,[4] the Arizona Supreme Court concluded that the trial court had erred in failing to ask the jury to find aggravators for each of the defendant's five murder counts. 234 Ariz. 31, ¶¶ 46-48, 316 P.3d at 1231-32. The court asked the jury to find proven or not proven a multiple-murder aggravator, but the verdict form did not ask the jury to find the aggravator for each count. *Id*. ¶ 47. "This format provided no record that the jury unanimously found multiple murders as to each count." *Id.* The supreme court

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[3]The sentencing minute entry lists the aggravating factors as "cruel physical and emotional harm suffered by [A.H.], defendant was on release at the time of the offense, and multiple [9-1-1] calls." Because the inclusion of "cruel physical harm" and "on release" are at odds with both the record in this case and the oral pronouncement by the court, we consider only those aggravating factors listed by the court at its oral pronouncement. *See State v. Ovante*, 231 Ariz. 180, ¶ 38, 291 P.3d 974, 982 (2013), *cert. denied,* 134 S. Ct. 86 (2013).

[4]*Miller* was issued after sentencing in this case, and the trial court did not have the benefit of that decision in formulating verdict forms. But *Blakely* principles apply to cases on direct review when the principle is announced. *See State v. Ruggiero,* 211 Ariz. 262, n.3, 120 P.3d 690, 695 n.3 (App. 2005).

affirmed, however, because the jury instructions required the jury to find the multiple-murder aggravator only if "the murders were temporally, spatially, and motivationally related," and, by finding this aggravator proven, the jury necessarily found the interrelatedness of the murders. *Id.* ¶ 48. As a result, "no reasonable juror could have failed to find the [multiple-murder] aggravator proven as to each of the five murders," and the defendant failed to demonstrate fundamental error. *Id.*

¶13 The verdict forms in this case are similar to the verdict form in *Miller*; none required the jury to find whether each aggravator applied to one, some, or all of the counts for which Lewis had been convicted. *See id.* ¶ 47. Further, the trial court never instructed the jury that it was required to find whether each aggravator was proven or not proven for each conviction. And the state never argued in its closing or at the *Blakely* hearing that the jury should find any of the aggravators proven as to the second-degree burglary conviction. Thus, the court erred under *Miller*.

¶14 Nevertheless, Lewis has failed to persuade us this error was prejudicial. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (to prevail under fundamental error review, defendant must show prejudice). A.H.'s 9-1-1 calls on September 21, viewed in the context of Lewis's taunting voicemail and the injunction against harassment, are overwhelming evidence that A.H. suffered emotional harm as a result of the burglary.

¶15 Lewis argues that "A.H.'s emotional disturbance was caused less by [Lewis] than by the police not arriving at A.H.'s house in a timely manner." But Lewis set the chain of events in motion. And the 9-1-1 calls reflect that A.H. was distressed because, as she awaited the police, Lewis returned to her home and remained in her backyard using a cellular telephone he had stolen from her. He effectively trapped her in the home he had broken into and ransacked. The four 9-1-1 calls that day show that Lewis was at all times the source of A.H.'s "emotional disturbance," not the police.

¶16 Accordingly, we find that no rational jury could have failed to find emotional harm beyond a reasonable doubt resulting from the burglary. *See State v. Moore*, 222 Ariz. 1, ¶ 87, 213 P.3d 150,

166 (2009) (concluding defendant could not show prejudice because uncontroverted evidence established aggravator). Lewis has failed to show any error was prejudicial, and we affirm the sentence on second-degree burglary in count five.

Disposition

¶17 For the foregoing reasons, as well as those set out in our separate opinion, we affirm Lewis's convictions and sentences, except that we modify Lewis's sentence for aggravated assault in count two to be served concurrently with the sentence for aggravated assault in count three.