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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LINDA LEE CARPENTER, Appellant.	2 CA-CR 2010-0411 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200400755

Honorable James L. Conlogue, Judge

AFFIRMED IN PART; VACATED IN PART; AND REMANDED

Thomas C. Horne, Arizona Attorney General
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Attorneys for Appellee

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Attorney for Appellant

E S P I N O S A, Judge.

¶1 Following a jury trial *in absentia*, Linda Carpenter was convicted of conspiracy to commit armed robbery, aggravated assault with a deadly weapon, burglary

of a nonresidential structure while armed, and armed robbery. More than five years later[1] the trial court sentenced her to concurrent presumptive terms, the longest of which is 10.5 years. On appeal, Carpenter contends the court erred in enhancing her sentences for aggravated assault with a deadly weapon and armed robbery, pursuant to former A.R.S. § 13-604(I), (P).[2] 2003 Ariz. Sess. Laws, ch. 11, § 1. The state concedes the court erred and Carpenter should be resentenced. We agree and vacate Carpenter's sentences for aggravated assault with a deadly weapon (Count IV), burglary of a nonresidential structure while armed (Count V), and armed robbery (Count VI) and remand for resentencing. We otherwise affirm Carpenter's convictions and her remaining sentence as to Count III.

Factual Background and Procedural History

¶2 In October 2004, Carpenter and her sister Lisa Gray planned to rob Farmers' Insurance with Gray's husband's gun. Carpenter drove Gray to Farmers' Insurance and Gray robbed an employee at gunpoint. Both Carpenter and Gray were

[1]The jury rendered its verdict April 20, 2005, and Carpenter was sentenced by the trial court December 13, 2010.

[2]Former § 13-604(I) has subsequently been renumbered A.R.S. § 13-704(A), which modifies the sentencing ranges but retains a substantively similar definition of "dangerous offense" as set forth in A.R.S. § 13-105(13), "an offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person." Unless otherwise noted, the statutory references herein refer to those in effect in 2004 on the date of the offense.

arrested and indicted. Gray pled guilty and Carpenter's case proceeded to trial *in absentia*.

¶3 The state and defense stipulated the state would withdraw its dangerous nature allegation under former § 13-604(P), in exchange for Carpenter's agreement not to ask codefendant Gray on cross-examination about the range of sentence she faced under her plea agreement. The trial court accepted the stipulation and in accordance with its terms, Gray was not questioned about the range of sentence she faced, the jury was not given a dangerous nature instruction, and no special interrogatory on whether the offenses were of a dangerous nature was included in the verdict forms. The jury found Carpenter guilty as charged. Over five years later, at sentencing before a new judge, prosecutor, and defense counsel, Carpenter's sentences for aggravated assault with a deadly weapon and armed robbery were enhanced as a result of the dangerous nature of the offenses pursuant to former § 13-604(P). Carpenter appealed the enhanced sentences. This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(4).

Discussion

¶4 A trial court's imposition of sentence is reviewed for an abuse of discretion. *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). When a defendant fails to object to a sentencing error before the trial court, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d 601, 608 (2005); *State v. Cleere*, 213 Ariz. 54, ¶ 8, 138 P.3d 1181, 1184 (App. 2006). Fundamental error is that which

goes "to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Although the defendant must show "both that fundamental error exists and that the error in his case caused him prejudice," *Id.* ¶ 20, an illegal sentence constitutes fundamental error. *State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007).

¶5 Carpenter first argues the sentencing court abused its discretion by imposing enhanced sentences without either a jury finding or her admission that the offenses were dangerous nature offenses, in violation of former § 13-604(P). The state failed to respond to this argument in its answering brief, which we may construe as a confession of error. *See State ex rel. McDougall v. Superior Court*, 174 Ariz. 450, 452, 850 P.2d 688, 690 (App. 1993); *see also State v. Rhodes*, 219 Ariz. 476, n.2, 200 P.3d 973, 975 n.2 (App. 2008).

¶6 A dangerous felony is one "involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another." 2003 Ariz. Sess. Laws, ch. 11, § 1. Former § 13-604(I) imposed enhanced, presumptive penalties of 7.5 years for a dangerous class three felony, and 10.5 years for a dangerous class two felony and rendered a defendant ineligible for probation if the dangerous nature of the felony is "charged in the indictment . . . and admitted or found by the trier of fact." § 13-604(P).

Here, the jury did not make a specific finding on the dangerous nature of the offense, and Carpenter neither testified nor entered any admissions.

¶7 However, the jury need not make a separate finding of dangerousness if that fact is reflected in its verdict. *State v. Smith*, 146 Ariz. 491, 499, 707 P.2d 289, 297 (1985); *State v. Gatliff*, 209 Ariz. 362, ¶ 12, 102 Ariz. 981, 983 (App. 2004); *see also State v. Greene*, 182 Ariz. 576, 580, 898 P.2d 954, 958 (1995) (dangerousness found when necessary element of offense for which defendant convicted). A conviction for armed robbery includes a finding of dangerousness. *Smith*, 146 Ariz. at 498-99, 707 P.2d at 296-97. The jury verdict on the armed-robbery conviction established that Carpenter was "armed with a deadly weapon, to wit: a firearm," *see* A.R.S. § 13-1904(A)(1), and she committed burglary of a nonresidential structure "while armed with: a deadly weapon," *see* A.R.S. § 13-1508.[3] Therefore, the verdicts rendered in this case reflected the jury finding that Carpenter's felonies "involv[ed] the . . . use . . . of a deadly weapon" so a separate jury finding of dangerousness is not required. *See* 2003 Ariz. Sess. Laws, ch. 11, § 1. Accordingly, absent the parties' stipulation, discussed below, Carpenter could properly have been sentenced to the greater term of imprisonment under the dangerous offense statute.

¶8 Carpenter further contends, however, that the sentence enhancement under § 13-604(P) was improper because, pursuant to the trial stipulation, the state withdrew

[3]That Gray's gun was unloaded does not alter its classification as a deadly weapon. *See State v. Spratt*, 126 Ariz. 184, 186, 613 P.2d 848, 850 (App. 1980) (firearm is deadly weapon unless permanently inoperable).

the dangerous nature allegation in exchange for trial counsel refraining from questioning Gray about the range of sentence she faced pursuant to her plea. Carpenter asserts the stipulation is an enforceable contract, and the trial court had the responsibility to effectuate the intent of the parties and the stipulation's purpose following its acceptance by the court, citing *Lynch v. Lynch*, 682 N.Y.S.2d 823 (Sup. 1998). The state agrees, and concedes Carpenter should be resentenced without the dangerous offense enhancements for aggravated assault and armed robbery, citing *Rutledge v. Arizona Board of Regents*, 147 Ariz. 534, 549, 711 P.2d 1207, 1222 (App. 1985) and *Wolf Corp. v. Louis*, 11 Ariz. App. 352, 355, 464 P.2d 672, 675 (1970).

¶9 Parties are bound by their stipulations, unless relieved therefrom by the trial court. *Rutledge*, 147 Ariz. at 549, 711 P.2d at 1222. When Carpenter ultimately was sentenced, the stipulation was not mentioned, the presentence report recommended sentencing under the dangerous nature statutes, and, in fact, Carpenter's new counsel requested that she be sentenced under the ranges for dangerous nature offenses. The complete silence of the record as to the stipulation suggests the sentencing court, both counsel, and Carpenter were unaware of the stipulation. However, a court cannot ignore a valid stipulation. *See State v. Allen*, 223 Ariz. 125, ¶ 11, 220 P.3d 245, 247 (2009) (stipulation binding on parties); *Pulliam v. Pulliam*, 139 Ariz. 343, 345-46, 678 P.2d 528, 530-31 (App. 1984) (new attorney bound to valid stipulation made by previous counsel); *Higgins v. Guerin*, 74 Ariz. 187, 191, 245 P.2d 956, 958 (1952) (court erred in disregarding valid stipulation binding on court and parties).

¶10 The silent record conceivably also could suggest the court was aware of the stipulation but exercised its discretion to set it aside. However, although the trial court in its discretion may set aside a stipulation, *Rutledge*, 147 Ariz. at 549-50, 711 P.2d at 1222-23, it is clear from this record that neither party asked to be relieved of the stipulation and the court did not rule or say anything to that effect, *see Pulliam*, 139 Ariz. at 346, 678 P.2d at 531. Thus, resentencing is warranted on this basis as well. *Cf. State v. Thurlow*, 148 Ariz. 16, 20, 712 P.2d 929, 933 (1986) (matter remanded for resentencing where record unclear whether sentencing court exercised discretion in considering mitigators or whether it erroneously believed it lacked discretion). Accordingly, Carpenter's sentences must be vacated and the matter remanded for resentencing on the aggravated assault and armed-robbery counts. *See State v. Garza*, 192 Ariz. 171, ¶ 17, 962 P.2d 898, 903 (1998) (even when sentence imposed within trial court's authority, if record unclear whether court knew it had discretion to impose more lenient sentence, case should be remanded for resentencing).[4]

¶11 Finally, the state raises an additional sentencing error, pointing out that Carpenter's conviction for first-degree burglary of a nonresidential structure should have been sentenced under the class three felony sentencing scheme, § 13-701(C), but was

[4]Because we have resolved this appeal on non-constitutional grounds, we do not address Carpenter's argument that the enhanced sentences for aggravated assault and armed robbery violated her Sixth and Fourteenth Amendment rights, for which she cites *Blakely v. Washington*, 542 U.S. 296, 305 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *See Fragoso v. Fell*, 210 Ariz. 427, ¶ 6, 111 P.3d 1027, 1030 (App. 2005).

instead sentenced for a class two felony. *See* 1993 Ariz. Sess. Laws, ch. 255, § 10. The record confirms that although the sentencing court acknowledged first-degree burglary is a class three felony, it then sentenced Carpenter under the greater class two range. There being plain error in the application of the sentencing statute, we also vacate Carpenter's sentence for burglary and remand that conviction for resentencing.

Disposition

¶12 For the foregoing reasons, the trial court's imposition of sentence is vacated and the case is remanded for sentencing on the following counts: aggravated assault with a deadly weapon (Count IV), burglary of a nonresidential structure while armed (Count V), and armed robbery (Count VI). Carpenter's convictions and remaining sentence for conspiracy to commit armed robbery are otherwise affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge